

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the matter of Southwestern Bell)	
Telephone, L.P. d/b/a AT&T Missouri's)	Case No. IT-2007-0187
Revision to its General Exchange Tariff,)	Tariff Tracking No. JI-2007-0260
PSC Mo.-No. 35 Regarding Provision of)	
811 Service)	

MISSOURI ONE CALL SYSTEM, INC.'S
POST HEARING BRIEF

Background

On October 19, 2006, Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T") filed its proposal to revise its General Exchange Tariff by adding Section 59 containing its intent to offer 811 Service (the "tariff") pursuant to the Federal Communications Commission's ("FCC") March 14, 2005 Sixth Report and Order in the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements, 20 FCC Rcd 5539 (2005) ("Order"). The tariff carried an effective date of November 18, 2006. Under the terms of the tariff, purported customers of 811 service would be charged a nonrecurring initial set up charge of \$235.12 per host or stand alone switch.

On November 13, 2006, Missouri One Call System, Inc. ("MOCS") filed a request to intervene and a motion to suspend the tariff. That motion was granted by the Commission on November 16, 2006. The Commission heard evidence on December 21, 2006.

Issue:

The solitary issue before the Commission in this case is "how are the costs associated with implementation of 811 to be recovered?" AT&T's tariff proposal places that burden on the "customers" subscribing to 811. As will be developed below, the only customer in the state of

Missouri that could subscribe to AT&T's 811 service is MOCS itself. MOCS contends that the costs of implementing 811 should be borne internally by AT&T.

Discussion

1. The Missouri One Call System.

MOCS qualifies as a notification center as defined in Section 319.022 RSMo 2000 and is the only notification center operating in the State of Missouri. (Tr.113). MOCS has a staff of approximately five employees (Tr. 111) and operates the one call center by subcontract with an outside vendor (Tr. 111) named One Call Concepts, Incorporated. (Tr.144) The mission of the center is

. . . to provide the centralized location in Missouri which excavators and the general public may call to secure adequate information regarding underground facilities located in the area where excavation is planned and to encourage all excavating or digging parties to utilize the central information office.

(Tr. 112-113)

MOCS is a not for profit corporation (Tr.160), and has been in existence since 1985. Its first notification of an intended excavation was processed in 1986. (Tr. 112)

The members of MOCS are owners of underground facilities that are located within "any public or private street, road or alley, right of way dedicated to the public use or utility easement of record, or prescriptive easement . . ." Section 319.015(10). All owners or operators of underground facilities are required to be participants, or members, in MOCS under the provisions of Sections 319.022 and 319.028.

Funding for MOCS comes from charges to members who receive "notifications of intention to excavate" from MOCS. (Tr. 113-114) The notice of an intention to excavate comes at the conclusion of the process by which locate requests from excavators are processed by the

one call center. (Tr. 113)¹ Members are charged \$1.20 per notification. (Exhibit 13) For the calendar year 2006, MOCS was on track to process approximately 635,000 location requests from excavators and issue approximately 3,500,000 notifications to underground facility owners. (Tr. 115)

Pursuant to Section 319.026, MOCS maintains at its own cost and expense a toll free number through which excavators may notify it of intended excavations on a 24 hours per day, seven days a week basis. That number is commonly known as 1-800-DIG-RITE (800-344-7483). That number is advertised by MOCS in a variety of ways and is promoted in its public education campaigns.

If the tariff is approved as proposed, the only conceivable subscriber to AT&T's 811 service would be MOCS. MOCS estimates its costs in subscribing to the service at approximately \$70,000.00. (Tr. 124) However, the board of directors of MOCS has decided that it has no intention to pay for any service that it has not requested including 811 service through the tariff. (Tr. 124)

2. The Pipeline Safety Act and the FCC's Sixth Report and Order

The present dispute is rooted in the Pipeline Safety Improvement Act of 2002 which was enacted on January 23, 2002. In Section 17 of the Act, Congress provided:

Sec. 17. NATIONWIDE TOLL-FREE NUMBER SYSTEM.

Within 1 year after the date of the enactment of this Act, the Secretary of Transportation shall, in conjunction with the Federal Communications Commission, facility operators, excavators, and one-call notification system operators, provide for the establishment of a 3-digit nationwide toll-free telephone number system to be used by State one-call notification systems.

¹ Mr. Lansford, Executive Director of MOCS, explained in detail at hearing the manner in which locate requests called into the Center were processed and the means by which notices are delivered to members and subject to charge. (Tr. 114-115). That process will not be repeated here.

This is the only section of the Pipeline Safety Improvement Act that mentions the 3 digit dialing code. The Act provides no cost recovery mechanism, and as MOCS has explained in previous pleadings, the Act does not direct one call centers to pay for implementation of the 3 digit dialing code.

Pursuant to Congressional decree, the FCC entered the Order and a concise four point summary of the Order's elements is found in Paragraph 2:

Specifically we [the FCC]:

- ? require One Call Centers to notify carriers of the toll-free or local number the One Call Center uses in order to ensure that callers do not incur toll charges, as mandated by the statute;
- ? allow carriers to use either the Numbering Plan Area (NPA)-NXX or the originating switch to determine the appropriate One Call Center to which a call should be routed;
- ? require the use of 811 as the national abbreviated dialing code for providing advanced notice of excavation activities to underground facility operators within two years after publication of this Order in the Federal Register; and
- ? delegate authority to the states, pursuant to section 251(e), to address the technical and operational issues associated with the implementation of the 811 code.

3. Response to the Order

MOCS was not a party to the Order. It is not under the jurisdiction of the FCC and is not subject to the provisions of the Pipeline Safety Improvement Act of 2002. MOCS has not requested AT&T to provide it an 811 service. (Tr. 128) However, MOCS has not ignored its role as a coordinating one call center in the implementation of 811. On October 28, 2005, about a year before AT&T filed the tariff, the staff of the Commission sponsored a workshop for the telephone service providers in the state respecting implementation of 811 pursuant to the Order. Mr. Lansford, Executive Director of MOCS, attended that workshop. Representatives of all the

telecommunications carriers in Missouri attended including a representative of AT&T. (Tr.186) The workshop covered a variety of network topics but cost recovery was not settled; neither was there a proposal to MOCS regarding a form of acceptable tariff. (Tr. 186-187) Ms. Dietrich explained at hearing that as she left the matter with the Commission, unless a company was actually seeking cost recovery, there was not a need to file a tariff. (Tr.188)

As part of its response to the Order, MOCS advised the staff of the Commission by letter dated August 2, 2006 of the toll free number to which 811 calls could be routed. (Exhibit 15) In turn, Ms. Dietrich notified the official contacts for each telecommunications carrier, including AT&T, by electronic mail of the availability of that number.

MOCS has done everything that the FCC expected it to do in connection with the nationwide implementation of 811.

4. AT&T should bear the costs of implementing 811.

Although this matter can be characterized as one involving an issue of law rather than an issue of fact, the Commission did take testimony in this matter. Through its witness Jason Olson, AT&T explained its position, if not its arguments, that it had prepared the tariff consistently with what it thought the Pipeline Safety Improvement Act and the Order both required; that the tariff was in harmony with the North American Numbering Council's (NANC) report of October 29, 2003, in which it stated that 811 should not be an unfunded mandate;² (Exhibit 4, page 11); that its tariff was consistent with its tariffs on the provision of other abbreviated dialing code offerings in Missouri, specifically 211 and 311; that regulatory agencies in other jurisdictions had approved tariffs like AT&T's and one call centers in other jurisdictions had agreed to pay for 811 as customers of the service either by contract or by tariff.

² The FCC did not adopt the recommendation made by the NANC in this report. Instead, it left to state commissions to decide cost recovery approaches. See ¶¶ 38 and 39, Appendix B to the Order.

MOCS can certainly be the first to concede that AT&T prepared its tariff in accordance with what it thought was its obligation under the Act and the Order. Not surprisingly, AT&T's interpretation of the Act and the Order drives it to draft the tariff so that AT&T is paid in full for its costs in complying with the Order. Yet, AT&T's ideas about what the Act and Order provide and how other jurisdictions and one call centers in those jurisdictions may perceive as their rights and duties, simply beg the question in this Commission. MOCS submits that AT&T's position on 811 cost recovery should be rejected.

i. Intention Behind the FCC Order.

As the FCC has no jurisdiction over MOCS or for that matter, over any of the nation's other one call centers, the FCC is powerless to direct MOCS through its rules or Orders. Any effort by parties regulated by the FCC, or by parties or commentators in FCC orders, to create duties in unregulated entities, or nonparties to FCC cases, are mere entreaties and nonbinding. Whatever the parties in the FCC Order may have recommended about a one call center's 811 participation was strictly academic and non-substantive. Of importance is that AT&T agrees that MOCS is not obligated to take the service, and cannot be compelled to take the 811 service described in AT&T's tariff. (Tr. 80)

That being so, the intention of the FCC's Order must be determined as it applies to the parties over which it had authority. MOCS' earlier arguments³ on the intention of the Act and the Order have suffered no tarnish. Notwithstanding the decisions of other regulatory agencies, the argument is still valid that nowhere in the Pipeline Safety Act or the Order is there any provision allowing for a telecommunications provider to bill a one call center for that telecommunication provider's implementation or ongoing participation in its 811 obligation.

³ See MOCS' Motion to Suspend Tariffs and Application to Intervene.

That the FCC used terms implying 811 would be used by state one call centers ⁴ does not mean that the FCC meant for nonparties to the Order to pay for what it was ordering its telecommunication carriers to do. MOCS' position is that the Order does not ring with an intention to impose the financial burden of 811 implementation on call centers.

ii. Decisions by other jurisdictions and one call centers.

Decisions in other jurisdictions respecting 811 cost recovery are inapposite. This is a state by state matter and there is no way to compare side by side the circumstances that bear upon another state's decision on the issue. There is no evidence in the record that the rules, regulations, statutes or policies of neighboring jurisdictions that have decided the issue are identical or even substantially the same as those governing this Commission. Absent the same basis of comparison, reliance on the transactions or decisions of other regulatory commissions is inappropriate. Furthermore, MOCS cannot be bound by the decisions made by one call centers in other states to pay for 811 service. Again, the reasons why a neighboring one call center would set aside objections to a tariff like AT&T's are unknown to MOCS and to the Commission.

iii. 811 is not analogous to 211 or 311

AT&T offered its approved tariffs governing 211 (Exhibit 5) and 311 (Exhibit 6) along with Mr. Olson's explanation of each in support of its point of argument that the proposed 811 tariff is not unlike other abbreviated dialing code offerings in that it charges a subscriber to, or customer of, the service. For this argument to have validity the Commission must accept that that 811 is the same as 211 and 311. It may be true that each service involves an abbreviated dialing code but past that similarity, MOCS submits that the premise is fundamentally flawed.

⁴ ¶1 of the Order.

There are differences in origin and scope between 211, 311, and 811. First, the genesis of 211 and 311 cannot be traced directly to an act of Congress. 811 was ordered into existence by Congress. Neither 211 nor 311 is a mandatory statewide service. Under the framework by which it was ordained in Missouri, 211 can be an offering within a defined set of exchanges only without offending state or federal law. The same can be said for 311. Although 311 is available to any municipality, the service is strictly optional. There is no statute in place that requires all municipalities in the state to subscribe to 311 or that AT&T must implement 311 statewide.

Another difference between 811 and the other abbreviated dialing codes is that reconfiguration of AT&T's switches was not required in advance of orders for 211 or 311 service. Mr. Olson testified that apparently in obedience to the FCC directives in the Order, AT&T has configured its switches for 811 and would do so even though MOCS does not order the service. (Tr. 95) It was also Mr. Olson's testimony that in his opinion AT&T will have complied completely with the FCC's Order by having its switches ready to route and test the toll free number MOCS provides for 811 service. (Tr. 108) MOCS questions, and so should the Commission, whether the FCC intended a half measure as compliance with its directives. MOCS has provided the toll free number to the industry. That number is ready to accept routing of calls. The Order expects timely implementation of 811. Not routing the 811 calls arguably is disobedience to that Order.

Another important difference between 811 is that neither 211 nor 311 was created to advance the interest of public safety.

In the Order the FCC stated:

4. We believe that adopting a nationwide abbreviated dialing code for this purpose will enhance public safety, and strengthen homeland security by streamlining the advance notification of excavation activities. The measures

adopted in this *Order* will reduce disruptions to underground facilities during excavation.

* * *

Nationwide use of 811 will also serve the public interest by minimizing confusion over which number to call before engaging in excavation activities.

5. The 811 abbreviated dialing code shall be deployed ubiquitously by carriers throughout the United States for use by all telecommunications carriers, including wireline, wireless, and payphone service providers that provide access to state One Call Centers. [emphasis original]

¶¶ 4-5, Appendix B of the Order.

Since the FCC intends for 811 to be deployed ubiquitously by carriers so that its public safety features can be used on a large-scale basis, MOCS believes that AT&T's provision of 711 is more analogous to 811. The 3 digit dialing code 711 was reserved for Relay Missouri. It is designed to serve a discrete segment of the calling population: those who are hard of hearing, the deaf and the speech impaired. As testified by Mr. Olson, AT&T's witness, there are no tariffs for 711. Moreover, there are no charges for 711. (Tr.91-92) This service is available in all of AT&T exchanges and in all telephone exchanges throughout the state of Missouri. The relay allows persons who normally would be unable to effectively use the telephone to complete calls to businesses, family and friends. The purposes for 711 are obvious. It increases the availability of telephone service throughout the state for a community which otherwise would live in isolation and silence. Relay Missouri is offered without charge because the benefits of the service must outweigh the need for cost recovery.

The abbreviated dialing code 811 was reserved by the FCC pursuant to an Act of Congress that contemplated the nationwide deployment of the number for enhancement of pipeline safety. Use of 811 is basically reserved for another discrete segment of the calling population, specifically, excavators who intend to dig in areas of underground facilities.

Uninformed excavators pose a danger to underground facilities. Although the Congressional enactment giving rise to 811 referred to the one call centers as users of 811, it placed no duties on them to pay for the 811 supplement to the available means of dialing one call centers. The FCC Order that followed intends that 811 be on a statewide basis (Tr. 191); it contemplates no gaps in the provision of service. If there are gaps, there will be ensuing confusion by the excavating public and this is beyond the intention of the Act and the FCC's order. This is a safety orientated device that has benefits not only for the excavators and one call centers that may have direct interests in using it, but also the general public who are intended by the Act to have a diminished risk of injury or inconvenience caused by damages to utility underground facilities that are cut by uninformed excavators. As the public in general is benefited by 711 services it is likewise to be benefited by ubiquitous availability of 811 on the same terms and conditions.

CONCLUSION

Another expression of the overriding issue in this case is whether Congress and the FCC intended AT&T and all other telecommunications carriers in Missouri to have 811 available to excavators whether MOCS paid for the service or not. MOCS submits the answer to that question is "yes." Based upon the above and foregoing, MOCS respectfully requests the Commission to reject AT&T's proposed 811 tariffs.

Respectfully submitted,

/s/ Mark W. Comley

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 17th day of January, 2007, to General Counsel's Office at gencounsel@psc.mo.gov; Office of Public Counsel at opcservice@ded.mo.gov; and Robert J. Gryzmala, at robert.gryzmala@att.com, attorney for AT&T Missouri.

/s/ Mark W. Comley