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 Southwestern Bell

FILED

AUG 31 1998

Missouri Public
Service Commission

August 28, 1998

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, MO 65101

Re: Case No. TM-99-76

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case are an original and fourteen (14) copies of Southwestern Bell Telephone Company's Response in Opposition to the Office of the Public Counsel's Motion to Open a Docket, to Establish a Procedural Schedule and to Hold a Hearing.

Also enclosed is an additional copy to be file stamped and returned to us in the enclosed self-addressed, stamped envelope.

Thank you for bringing this matter to the attention of the Commission.

Sincerely,

Anthony K. Conroy

Enclosures

cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
AUG 31 1998
Missouri Public
Service Commission

In the Matter of the Merger of SBC Communications
Inc. and Ameritech Corporation.

) Case No. TM-99-76
)

**RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY
IN OPPOSITION TO THE OFFICE OF THE PUBLIC COUNSEL'S
MOTION TO OPEN A DOCKET, TO ESTABLISH A PROCEDURAL
SCHEDULE, AND TO HOLD A HEARING**

COMES NOW Southwestern Bell Telephone Company (SWBT) and for its Response in Opposition to the Office of the Public Counsel's (OPC's) Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing (Motion to Open Docket), states as follows:

I. BACKGROUND

On May 10, 1998, SBC Communications Inc, (SBC), SBC Delaware, Inc. (SBC Delaware) and Ameritech Corporation (Ameritech) entered into an Agreement and Plan of Merger (Merger Agreement). (See affidavit of Jonathan P. Klug, Managing Director-Corporate Development for SBC Communications Inc., attached hereto as Exhibit A (Klug affidavit) at para. 2). SBC is a corporation created and existing under the laws of the State of Delaware. (Klug affidavit at para. 3). SBC is a holding company whose subsidiaries and affiliates operate predominately in the communications industry. One of SBC's subsidiaries is SWBT, a corporation created and existing under the laws of the State of Missouri, which is a telecommunications company authorized to provide a wide range of telecommunications services in the State of Missouri. (Klug affidavit at para. 4). SWBT is not a party to the Merger Agreement. (Klug affidavit at para. 4). SBC Delaware is another wholly-owned subsidiary of SBC, which was formed by SBC solely for the purpose of effecting the Merger Agreement between SBC and Ameritech. (Klug affidavit at para. 5).

Ameritech is a corporation created and existing under the laws of the State of Delaware. (Klug affidavit at para. 6). Like SBC, Ameritech is a holding company whose subsidiaries and affiliates operate predominately in the communications industry. Several of Ameritech's wholly-owned subsidiaries are telecommunications companies authorized to provide local telecommunications services in several states, including Ohio, Illinois, Wisconsin, Indiana and Michigan. (Klug affidavit at para. 6).

The Merger Agreement provides for a business combination of SBC and Ameritech. The proposed transaction is a merger of SBC Delaware (the newly-formed, wholly-owned subsidiary of SBC created specifically for the purpose of consummating the merger) and Ameritech. (Klug affidavit at para. 7). Pursuant to the Merger Agreement, SBC Delaware will merge with and into Ameritech and upon doing so the separate corporate existence of SBC Delaware will cease. (Klug affidavit at para. 7). Ameritech will be the surviving corporation of the SBC Delaware-Ameritech merger, and will become a wholly-owned, first-tier subsidiary of SBC. (Klug affidavit at para. 7). The surviving corporation will continue under the name of Ameritech, and its subsidiaries will continue to provide local telecommunications services in their respective states. (Klug affidavit at para. 7). Upon consummation of the merger, SBC will own 100% of Ameritech's outstanding common stock, and former holders of Ameritech common stock will become shareholders of SBC. (Klug affidavit at para. 7).

As stated above, SWBT (the entity which provides telecommunications services in Missouri subject to Commission regulation) is not a party to the Merger Agreement. The Merger Agreement between SBC, SBC Delaware and Ameritech has no effect or impact on SWBT's operations or utilization of telecommunications facilities in the State of Missouri, or on SWBT's provision of telecommunications services between one point and another within the State of

Missouri. (Klug affidavit at para. 8); see § 386.250(2) RSMo. (Cum. Supp. 1997). Both before and after the merger of SBC and Ameritech, SWBT will remain a first-tier subsidiary of SBC and will continue to operate telecommunications facilities and provide telecommunications services within the state of Missouri. (Klug affidavit at para.8). Likewise, the Merger Agreement between SBC, SBC Delaware and Ameritech will have no effect or impact on the Commission's authority or ability to supervise and examine SWBT's general condition, its capitalization, its franchises and the manner in which its lines and property, owned, leased, controlled or operated are managed, conducted or operated. (Klug affidavit at para. 8); see, §386.320 RSMo. (Cum. Supp. 1997). Finally, the Merger Agreement between SBC, SBC Delaware and Ameritech does not call for SWBT (or for that matter SBC) to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public." (Klug affidavit at para. 8); see, §392.300 RSMo. (1994). Nor does the Merger Agreement call for SWBT (or for that matter SBC) to merge or consolidate SWBT's "line or system, or franchises, or any part thereof, with any other corporation, person or public utility," by any means, whether direct or indirect. (Klug affidavit at para. 8); See, §392.300 RSMo. (1994). In fact, the Merger Agreement does not call for SWBT to operate any differently in Missouri after SBC's merger with Ameritech than SWBT operates in Missouri today. (Klug affidavit at para. 8).

The telecommunications industry is undergoing a period of rapid change, driven by global market pressures and the Telecommunications Act of 1996. The merger of SBC and Ameritech will enhance the competitive telecommunications landscape, both in Missouri and across the country. This merger will allow SBC, through its subsidiaries, to implement a "national-local" strategy, which will permit subsidiaries of SBC to offer broad-based local services across the

country, in markets not currently served by either Ameritech or SBC. SBC subsidiaries will challenge incumbent local telecommunications companies, competitive local exchange carriers. (CLECs), long distance companies and other competitors, both domestic and foreign, across the country. The competitive marketplace will force these companies to challenge and compete head-on with SBC's subsidiaries, including SWBT in Missouri. This combination of competitive forces will no doubt go a long way towards jump-starting intense competition in the global telecommunications marketplace, including the State of Missouri.

II. SWBT'S OPPOSITION TO OPC'S MOTION

A. The Commission Does Not Have Statutory Authority to Review the SBC-Ameritech Merger

In its Motion to Open Docket, OPC asserts that this Commission should "exercise its jurisdiction under Sections 386.250(2), 386.320, and 392.300, RSMo. by opening a docket and holding a hearing to review the proposed merger transaction prior to granting or withholding its consent." (OPC Motion to Open Docket at para. 5). As described in detail above, however, the Missouri statutes relied upon by OPC as a legal basis for its suggestion that the Commission open a proceeding to review the Merger Agreement between SWBT's parent corporation, SBC, and Ameritech do not grant the Commission authority or jurisdiction to review the specific proposed transaction between SBC and Ameritech. Likewise, the Missouri statutes relied upon by OPC convey no authority to the Commission to "grant or withhold its consent" to the SBC-Ameritech Merger.

The Commission is purely a creature of statute. State ex rel. Util. Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. Banc 1979). As a result, the Commission's powers are limited to those conferred to it by statute. *Id.* The statutes upon which

OPC relies as a legal basis for its suggestion that the Commission open a proceeding to review the Merger Agreement, however, are clear and unambiguous - they do not grant the Commission authority to review the type of transaction contemplated by the SBC-Ameritech Merger Agreement. In an attachment to its Motion to Open Docket, OPC lists several case captions in which OPC asserts the Commission exercised its authority to review "telecommunications mergers," "transfers of assets," "transfers of control," "purchases of the capital stock of one telecommunications company by another, and "acquisitions of telecommunications companies." On their face, however, these case captions reflect transactions over which Missouri statutes expressly grant the Commission authority to review¹. OPC attempts to lump the SBC-Ameritech merger into a statutory classification which is simply inapplicable to the facts.

Furthermore, even if, contrary to law, the Commission had asserted jurisdiction over a transaction identical to the SBC-Ameritech merger in the past, the mere fact that the Commission claimed jurisdiction over a transaction or subject matter which it had no statutory authority to review does not "trump" Missouri statutes limiting the Commission's jurisdiction to specific matters. If the Commission does not have statutory jurisdiction to review the proposed merger, (which it does not), it may not obtain such jurisdiction based on a previous unlawful assertion of jurisdiction over an unrelated transaction. Here, the plain language of the Missouri statutes cited

¹The merger between SBC and Pacific Telesis Group is conspicuous by its absence from OPC's list. That merger, announced in 1996 and completed in 1997, followed essentially the same form as the pending SBC-Ameritech merger. In both, a new subsidiary of SBC was created and merged with and into the acquired corporation, with the acquired parent corporation (i.e., Pacific Telesis and Ameritech) being the surviving entity and a first-tier subsidiary of SBC. And in both cases, neither SWBT's assets nor its stock was affected. The Commission was notified of the SBC-Pacific Telesis merger, but did not attempt to assert jurisdiction, nor did any entity claim the Commission had jurisdiction. The merger between SBC and Southern New England Telephone is also conspicuous by its absence. That merger, which followed a similar structure to the SBC-Pacific Telesis and SBC-Ameritech mergers, was announced on January 5, 1998.

by OPC makes clear that the Commission does not have jurisdiction to review the type of transaction between SBC and Ameritech, as reflected in the Merger Agreement described above.

The Commission may be aware that proceedings are underway in Illinois and Ohio to review the SBC-Ameritech merger. It is certainly not surprising that statutes in those states, as in Missouri, specifically authorize the respective Commissions to review a merger which involves a change in control of the companies specified in those statutes. But that situation simply does not exist in Missouri, as no assets of SWBT are affected and no change of control of SWBT will result from the SBC-Ameritech merger. For similar reasons, no other state in which SWBT operates claims jurisdiction to approve the merger.

B. Even if the Commission Had Jurisdiction to Review the Proposed SBC-Ameritech Merger Agreement, the Commission May Not Grant the Relief Requested by OPC

In its Motion to Open Docket, OPC asks the Commission to open a docket and hold a hearing "to review the proposed merger transaction prior to granting or withholding its consent." (OPC Motion to Open Docket at para. 5). OPC asserts that "[T]his proposed proceeding would enable the Commission to require and attach conditions to the proposed merger to adequately safeguard consumers and to ensure that the claimed cost efficiencies of the merger are guaranteed through rate reductions to consumers." (OPC Motion to Open Docket at para. 9).

As the Commission is aware, in Case No. TO-97-397, on September 16, 1997, the Commission made a determination that SWBT is subject to "price cap regulation" as provided for in §392.245 RSMo. (Cum. Supp. 1997). The Commission's determination in Case No. TO-97-397 was affirmed by the Circuit Court of Cole County, Missouri on May 22, 1998, in Case Nos. CV-197-1795CC and CV-197-1817CC. No party has appealed the decision of the Cole County Circuit Court. That decision is now final.

Under §392.245.3 RSMo., SWBT is permitted to charge the rates which were "in effect on December 31 of the year preceding the year in which the company is first subject to" price cap regulation under §392.245 RSMo. In SWBT's case, therefore, SWBT is permitted to charge any rate not in excess of the maximum allowable prices established by the December 31, 1996 rate levels. §392.245.5 RSMo. The statute authorizing price cap regulation in Missouri contains no exception or provision which would permit the Commission to lower SWBT's rates or reduce the maximum allowable prices to reflect the cost efficiencies of the merger between SBC and Ameritech as requested by OPC. Therefore, even if the Commission had jurisdiction to review the proposed merger (which it does not), the Commission does not have authority to grant the relief requested by OPC, i.e., rate reductions. Even if it had jurisdiction to do so, the Commission may not do indirectly (in the context of a review of a merger) what it cannot do directly (under the provisions of §392.245 RSMo.).

C. It Would Be a Waste of the Commission's Scarce Resources to Review the SBC-Ameritech Merger

Finally, even if the Commission had statutory authority to review the proposed SBC-Ameritech merger, and further, could grant the relief requested by OPC, review by the Commission would not be an efficient use of the Commission's scarce resources. The proposed Merger Agreement between SBC and Ameritech will be thoroughly reviewed by several regulatory agencies with jurisdiction, including the United States Department of Justice and the Federal Communications Commission². These regulatory agencies are authorized to determine if the Merger Agreement between SBC and Ameritech is in the public interest and is otherwise lawful. Based on the heightened competition that the proposed merger will fuel, SBC believes

²In fact, OPC is participating in the FCC proceeding.

that the FCC and the U.S. Department of Justice will approve the Merger Agreement between SBC and Ameritech. It would be a waste of significant (and scarce) Commission resources to embark on yet another review of the SBC-Ameritech merger.

SWBT is, however, willing to meet with the Commission to explain the rationale behind the proposed merger in detail and to answer any questions the Commission may have concerning the SBC-Ameritech merger. If the Commission is interested in this approach, it could also invite the Office of Public Counsel to attend an agenda meeting scheduled for this purpose. But as described above, it would be unlawful and inappropriate for the Commission to assert jurisdiction over the proposed merger or to open a docket for such a purpose.

III. CONCLUSION

For the reasons stated herein, SWBT respectfully requests that the Commission deny OPC's Motion to Open Docket.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Anthony Klousoy.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the attached Service List by first-class postage prepaid, U.S. Mail on August 28, 1998.

Anthony K. Conroy.
Anthony K. Conroy

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Merger of SBC Communications)
Inc and Ameritech Corporation.) Case No. TM-99-76

AFFIDAVIT OF JONATHAN P. KLUG

STATE OF TEXAS)
) SS
COUNTY OF BEXAR)

1. My name is Jonathan P. Klug. I am a Managing Director – Corporate Development for SBC Communications Inc. I have personal knowledge of the facts stated herein relating to the proposed merger between SBC Communications Inc. (SBC) and Ameritech Corporation (Ameritech).

2. On May 10, 1998, SBC, SBC Delaware, Inc. (SBC Delaware), and Ameritech entered into an Agreement and Plan of Merger.

3. SBC is a corporation created and existing under the laws of the State of Delaware. SBC is a holding company whose subsidiaries and affiliates operate predominately in the communications industry.

4. One of SBC's subsidiaries is Southwestern Bell Telephone Company (SWBT), which is a corporation created and existing under the laws of the State of Missouri. SWBT is a telecommunications company which is authorized to provide and does provide a wide range of telecommunications services within the State of Missouri. SWBT is not, however, a party to the Merger Agreement between SBC and Ameritech.

5. SBC Delaware is another, wholly-owned subsidiary of SBC, which was formed by SBC solely for the purpose of effecting the Merger Agreement between SBC and Ameritech.

6. Ameritech is a corporation created and existing under the laws of the State of Delaware. Ameritech, like SBC, is a holding company whose subsidiaries and affiliates operate

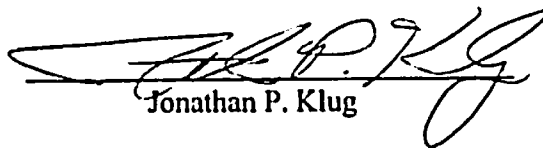
predominately in the communications industry. Several of Ameritech's wholly-owned subsidiaries are telecommunications companies authorized to provide and providing telecommunications services in several states, including Illinois, Indiana, Michigan, Ohio and Wisconsin.

7. The Merger Agreement provides for a business combination of SBC and Ameritech. The proposed transaction is a merger of SBC Delaware (the newly-formed, wholly-owned subsidiary of SBC created specifically for the purpose of consummating the merger) and Ameritech. Pursuant to the Merger Agreement, SBC Delaware will merge with and into Ameritech and upon doing so, the separate corporate existence of SBC Delaware will cease. Ameritech will be the surviving corporation, and will become a wholly-owned, first-tier subsidiary of SBC. The surviving corporation will continue under the name of Ameritech, and its subsidiaries will continue to provide telecommunications services in their respective states. Upon completion of the merger, SBC will own 100% of Ameritech's outstanding common stock, and former holders of Ameritech common stock will become shareholders of SBC.

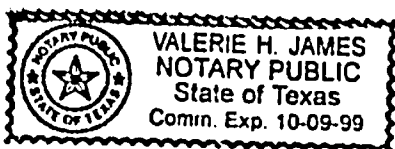
8. Consummation of the transaction contemplated by the Merger Agreement will have no effect or impact on SWBT's operations or utilization of telecommunications facilities in the State of Missouri, or SWBT's provision of telecommunications services between one point and another within the State of Missouri. The Merger Agreement does not contemplate any change in the ownership or transfer of control of SWBT's assets or outstanding stock. Both before and after the SBC-Ameritech merger, SWBT will operate telecommunications facilities and provide telecommunications services within the State of Missouri. Both before and after the SBC-Ameritech mergers, SWBT will be a first tier subsidiary of SBC. Consummation of the transaction contemplated by the Merger Agreement will have no effect or impact on the Missouri

Public Service Commission's authority or ability to supervise and examine SWBT's general condition, its capitalization, its franchises and the manner in which its lines and property, owned, leased, controlled or operated are managed, conducted or operated. The merger Agreement does not call for SWBT to sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public. The Merger Agreement does not call for SWBT to merge or consolidate SWBT's line or system, or franchises, or any part thereof, with any other corporation, person or public utility, by any means, whether direct or indirect. The Merger Agreement does not call for SWBT to operate any differently in Missouri after SBC's merger with Ameritech than SWBT operates in Missouri today.

FURTHER AFFIANT SAYETH NOT.


Jonathan P. Klug

Subscribed and sworn to before me this 27th day of August, 1998.




Notary Public

My Commission Expires: 10-9-99