

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

In the Matter of the Investigation of the)	
State of Competition in the Exchanges of)	Case No. TO-2001-467
Southwestern Bell Telephone Company.)	

**SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A AT&T MISSOURI'S
RESPONSE TO THE OFFICE OF PUBLIC COUNSEL'S
MOTION FOR REHEARING**

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T Missouri")¹ hereby submits its response to the Office of Public Counsel's ("OPC's") Motion for Rehearing ("Motion").

I. SUMMARY

1. The Commission's January 25 Report and Order on Remand is amply supported by an extensive record spanning almost twenty years. The Commission first classified each of the AT&T Missouri services at issue² as competitive well over a decade ago, both for interexchange carriers ("IXCs") in 1989 and for AT&T Missouri in 1992, and confirmed competitive classification for several of them in 2003. The Commission's January 25 Report and Order on Remand correctly concluded that each should be deemed competitive in all of AT&T Missouri's exchanges for purposes of Section 392.245.5 RSMo, and that effective competition existed for each of these services both when the Commission issued its 2001 Report and when the Court of Appeals issued its 2005 mandate. The Commission's Report and Order rests upon both competent and substantial evidence and a proper application of the governing law. For

¹ All references to AT&T Missouri shall include AT&T Missouri's predecessors, Southwestern Bell Telephone Company and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, unless otherwise indicated.

² The specific services at issue are AT&T Missouri's intraLATA private line/dedicated services, intraLATA toll/message telecommunications services, Wide Area Telecommunications Services ("WATS") and 800 services, and certain operator services (i.e., station-to-station, person-to-person, and calling card services).

these reasons, and because OPC's Motion presents no new or different arguments, OPC's Motion should be denied in its entirety.

II. ANALYSIS

2. OPC's shotgun criticisms of the Commission's Report and Order on Remand may be reduced to two claims: that the Report and Order on Remand is factually unsupportable and that it applied the incorrect legal standard. Both are without merit.

3. OPC first complains that the Commission erred in drawing upon the evidence adduced in TO-93-116 in reaching its conclusions. It objects because, "[i]n making its determination of 'effective competition,'" the Commission "look[ed] to the evidence provided in the transitionally competitive classification case, TO-93-116, and the current case, TO-2001-467."³ In a related vein, OPC complains that the Commission's reliance on the record in TO-93-116 was done "without notice to any party or an opportunity to object or to otherwise be heard or to adduce evidence to contest or respond to the facts presented in another proceedings [sic] record."⁴

4. The Commission's reliance on the record already compiled in both TO-93-116 and TO-2001-467 is precisely what the Court of Appeals directed on remand. The opinion of the Court expressly stated that the Commission should "re-examine the competitive status of these particular services by applying the 'effective competition' factors to the evidence the Commission has already accumulated with regard to these services both from the 1993 'transitionally competitive' hearing in Case No. TO-93-116 as well as from the hearing in this underlying case."⁵ The Court's March, 2005 mandate thus "reversed and remanded to the

³ OPC's Motion, p. 2; see, Report and Order on Remand, p. 5.

⁴ OPC's Motion, para. 2.

⁵ State of Missouri ex rel. Acting Public Counsel Coffman v. Public Service Commission, 154 S.W. 3d 316, 329 (Mo. App. W.D. 2004) (emphasis added); see also, id. ("[W]e remand for the Commission to analyze the evidence it already has available . . .").

Circuit Court of Cole County as to Point II [i.e., the decision concerning these particular services] for further proceedings all in accordance with the opinion of this court.” (emphasis added).⁶

5. It is well settled under Missouri law that “a trial court, on remand, with respect to the issues addressed by the appellate court on appeal, only has that authority granted to it by the appellate court in its mandate.”⁷ Accordingly, the Commission properly considered the evidence “already accumulated” in both TO-2001-467 and TO-93-116, as it had been directed to do. OPC’s claim that the Commission erred in doing so is specious at best.

6. Nor does OPC’s complaint that the Commission’s action was “without notice” to it have any merit. The mere issuance of the Court of Appeals’ opinion and subsequent mandate provided OPC sufficient notice. Moreover, OPC’s own May 2, 2005 Response Concerning Remand Procedure filed with the Commission expressly acknowledged that the Court of Appeals had remanded this case for the Commission to “apply the effective competition factors also to the evidence accumulated in TO-93-116.”⁸ OPC cannot now claim that it was somehow blindsided by the Commission’s having done so.

7. Finally, OPC waived any claim that the Court’s opinion and mandate denied it “an opportunity to object or to otherwise be heard or to adduce evidence to contest or respond to the facts presented in [TO-93-116].” OPC could and should have made its present argument in a

⁶ On March 18, 2005, the Circuit Court of Cole County entered its Order Remanding Case wherein the court remanded the case to the Commission for further proceedings in accordance with the Court of Appeals’ opinion.

⁷ Lombardo v. Lombardo, 120 S.W. 3d 232, 243 (Mo. App. W.D. 2003) (further citations omitted).

⁸ OPC’s Response Concerning Remand Procedure, p. 1.

motion for rehearing to the Court of Appeals which issued the opinion and mandate. In any case, in its Response Concerning Remand Procedure, OPC stated that “the evidentiary record should not be opened unless the PSC intends to limit the additional evidence to facts arising after the evidentiary hearing [in TO-2001-467].”⁹ In short, OPC’s claim is foreclosed by the Court’s opinion and mandate. Even were it otherwise, OPC failed to affirmatively request that the Commission reopen the record, choosing to rest instead on the established record. It cannot now be heard to complain of the result.

8. That result – based on an evidentiary record which spans almost twenty years and was compiled in three separate cases in which a host of parties participated¹⁰ – provides overwhelming support for the conclusions reached in the Commission’s Report and Order on Remand. It is telling in this regard that when, in October, 2006, the parties in the case were directed to “file proposed findings of fact and conclusions of law[,]”¹¹ AT&T Missouri and Staff did both while OPC did neither. OPC’s failure to identify any evidence refuting the evidence detailed in AT&T Missouri’s and Staff’s proposed findings demonstrates that the evidence supporting the Commission’s Report and Order on Remand was competent and substantial, if not overwhelming.

⁹ OPC’s Response Concerning Remand Procedure, p. 2. (emphasis added).

¹⁰ See, In the Matter of Southwestern Bell Telephone Company’s application for classification of certain services as transitionally competitive, Case No. 93-116, Report and Order, December 21, 1992, 1992 Mo. PSC LEXIS 23 (reflecting fifteen appearances in the case); In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company, Case No. TO-2001-467, Report and Order, December 27, 2001, 2001 Mo. PSC LEXIS 1770 (reflecting ten appearances in the case); In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint Missouri, Inc., Case No. IO-2003-0281, Report and Order, December 4, 2003, 2003 Mo. PSC LEXIS 1560 (reflecting eight appearances in the case). These cases followed the Commission’s September 15, 1989 Report and Order issued in Case No. TO-88-142 (In the matter of the investigation for the purpose of determining the classification of the services provided by interexchange telecommunications companies within the State of Missouri), in which the Commission found all services of the IXCs except for AT&T Communications of the Southwest, Inc. (“AT&T-C”) to be competitive, and further, found AT&T-C’s WATS, private line and custom network services to be competitive its MTS and ancillary/complimentary services to be transitionally competitive.

¹¹ Order Denying Motion to Dismiss and Directing Filing of Proposed Findings of Fact and Conclusions of Law, October 26, 2006, p. 3.

9. OPC also claims that the Commission's Report and Order on Remand applied the wrong law. According to OPC, the Commission should have applied Section 392.245.5 RSMo as amended (which was enacted in 2005 in Senate Bill 237) instead of the prior version of Section 392.245.5 (which was enacted in 1996 in Senate Bill 507).¹² This claim is likewise without merit, and OPC advances no arguments in support of its claim that are new or different than those it earlier advanced without success.¹³

10. Article I, Section 13 of the Missouri Constitution provides that “no ex post facto law, nor law . . . retrospective in its operation can be enacted.” Owing to this constitutional provision, the presumption is that a statute is deemed to operate prospectively unless the legislature manifests a clear intent that the statute should apply retroactively or the statute is solely procedural or remedial and the substantive rights of the parties are not affected.¹⁴ A statute is procedural or remedial in nature if it prescribes a method of enforcing rights or obtaining redress for their invasion; a statute is substantive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation or imposes a new duty.¹⁵

11. Section 392.245.5, as amended by Senate Bill 237, contains no language that either expressly or by unavoidable implication manifests a clear intent that the new law should be applied retroactively. Additionally, applying amended Section 392.245.5 was foreclosed because, among other things, the Commission properly found that “[a]mended Section 392.245 takes away a price cap regulated telecommunications company's right to a competitive classification of its services in those exchanges where the services face effective

¹² OPC's Motion, pp. 3-5.

¹³ OPC's Brief, December 12, 2006, pp. 2-5.

¹⁴ See, Callahan v. Cardinal Glennon Hospital, 863 S.W. 2d 852, 872 (Mo. banc 1993); Pierce v. State Dept. of Social Services, 969 S.W. 2d 814, 822-23 (Mo. App. W.D. 1998).

¹⁵ See, Hoskins v. Box, 54 S.W. 3d 736, 739 (Mo. App. W.D. 2001). (further citations omitted).

competition.”¹⁶ Thus, there can be no question that, as the Report and Order on Remand properly concluded, Section 392.245.5, as amended by Senate Bill 237, “is a substantive statute” and that the statute as amended should have only “prospective application.”¹⁷

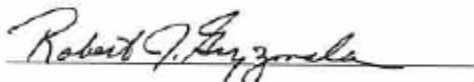
12. OPC’s Motion fails to mention, much less address any of the multiple Missouri cases supporting the Commission’s analysis and resulting determination to apply the prior version of Section 393.245.5 to this case. Moreover, OPC offers no contrary authorities. Consequently, OPC’s challenge to the legal standard employed by the Commission’s Report and Order on Remand has no merit and must be rejected.

III. CONCLUSION

For the foregoing reasons, AT&T Missouri respectfully submits that OPC’s Motion for Rehearing should be denied in its entirety.

Respectfully submitted,

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¹⁶ Report and Order on Remand, pp. 29-30.

¹⁷ Report and Order on Remand, p. 30.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on each party shown on the Commission's Data Center Service List, either by electronic mail or by first-class, postage prepaid, U.S. Mail, on February 9, 2007.


Robert J. Gryzmala