

Memorandum on June 18, recommending that the Agreement be approved with certain conditions. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one requested a hearing in this case, the Commission may grant the relief requested based on the verified application and the Staff's Memorandum.

Discussion

The Commission, under the provisions of Section 252(e) of the Act, has authority to approve a resale agreement negotiated between an incumbent local exchange company (ILEC) and other telecommunications carriers. The Commission may reject a resale agreement only if the agreement is discriminatory to a nonparty or is inconsistent with the public interest, convenience, and necessity.

The Agreement between SWBT and Tin Can is to become effective ten days after Commission approval. The term of the Agreement is 90 days from the effective date of the Agreement; thereafter, the Agreement shall continue in effect until either party gives the other party 60 days' written notice of termination.

SWBT will provide to Tin Can for resale multiple residential and business services including "mandatory EAS" (extended area service) and optional metropolitan calling area (MCA) plans, and directory listings. These services will be provided at a discount of 13.2 percent, with some exceptions. The Agreement provides for a service order charge of \$25.00 to switch an existing SWBT customer to Tin Can when the service order is "noncomplex."

SWBT agrees to make available to Tin Can customers the same access to 911 and E911 (enhanced 911) that SWBT customers receive. SWBT further agrees to provide local dialing parity on the same basis as that provided to SWBT end users and intraLATA toll dialing parity in accordance with Section 251(b)(3) of the Act. SWBT and Tin Can agree that neither party shall treat the other party any less favorably than it treats other similarly situated parties with whom such party has an approved interconnection or resale agreement. The Agreement also provides for negotiation and binding arbitration of disputes that arise between the signatories.

The Staff stated in its recommendation that the Agreement meets the limited requirements of the Act in that it does not appear to be discriminatory toward nonparties, and does not appear to be against the public interest. Staff also described the general provisions of the Agreement, including disconnection procedures, and these are substantially similar to those contained in other interconnection agreements previously approved by the Commission. Staff recommended approval of the Agreement provided that all modifications to the Agreement be submitted to the Commission for approval. This condition has been applied in prior cases where the Commission has approved similar agreements.

In addition, Staff noted that the top right-hand margin of each page of the Agreement indicates that Tin Can will do business as "The Cube." Staff pointed out that this designation does not appear in the joint application for approval of the Agreement or in the Commission's June 3 order granting Tin Can a conditional certificate of service authority in Case No. TA-98-231. Staff therefore recommended that the

Commission order Tin Can to either remove or specify the purpose of "D/B/A The Cube" in the top right-margin of each page of the Agreement, and to submit any modifications or amendments to the Commission for approval.

On July 30, Tin Can filed a notice in which it stated that Tin Can has obtained a Registration of Fictitious Name certificate from the Missouri Secretary of State's office for the fictitious name "The Cube." The Commission takes official notice that, in Case No. TA-98-231, Tin Can filed a Notice and Application for Adoption of Fictitious Name (Application) on July 30. Tin Can attached a copy of its certificate of registration of fictitious name from the Secretary of State to its Application and requested that its certificate of service authority permit Tin Can to operate under the fictitious name "The Cube" when the certificate becomes effective. Tin Can also filed a tariff, and a certification of notice of its tariff filing, on July 30. Tin Can's tariff reflects that it intends to do business as "The Cube."

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has considered the application, the supporting documentation and Staff's recommendation. Based upon that review the Commission has reached the conclusion that the resale Agreement meets the requirements of the Act in that it does not unduly discriminate against a nonparty carrier, and that implementation of the Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that Tin Can has adequately addressed the Staff's

recommendation to clarify the purpose for including "D/B/A The Cube" in the top right-hand margin of each page of the Agreement. However, the Commission will condition its approval of the Agreement in its present form on approval of Tin Can's Application and tariff in Case No. TA-98-231. The Commission finds that approval of the Agreement should be conditioned upon the parties submitting any modifications or amendments to the Commission for approval pursuant to the procedure set out below.

Modification Procedure

This Commission's first duty is to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act. 47 U.S.C. § 252. In order for the Commission's role of review and approval to be effective, the Commission must also review and approve modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection. 47 U.S.C. § 252(h). This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission. 4 CSR 240-30.010.

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

The parties shall provide the Telecommunications Staff with a copy of the resale or interconnection agreement with the pages numbered

consecutively in the lower right-hand corner. Modifications to an agreement must be submitted to the Staff for review. When approved the modified pages will be substituted in the agreement which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the pages when they are inserted into the Agreement. The official record of the original agreement and all the modifications made will be maintained by the Telecommunications Staff in the Commission's tariff room.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the modification will be approved once Staff has verified that the provision is an approved provision, and prepared a recommendation advising approval. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission, under the provisions of Section 252(e)(1) of the federal Telecommunications Act of 1996, 47 U.S.C. 252(e)(1), is required to review negotiated resale agreements. It may only reject a negotiated

agreement upon a finding that its implementation would be discriminatory to a nonparty or inconsistent with the public interest, convenience and necessity under Section 252(e)(2)(A). Based upon its review of the resale Agreement between SWBT and Tin Can and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the resale agreement filed on May 18, 1998, between Southwestern Bell Telephone Company and Tin Can Communications Company, L.L.C. is conditionally approved.

2. That the approval granted in Ordered paragraph 1 is conditioned upon Commission approval of the Notice and Application for Adoption of Fictitious Name and the tariff sheets filed on July 30, 1998 by Tin Can Communications Company, L.L.C. d/b/a "The Cube" in Case No. TA-98-231.

3. That Southwestern Bell Telephone Company and Tin Can Communications Company, L.L.C. shall file a copy of the resale agreement with the Staff of the Missouri Public Service Commission with the pages numbered seriatim in the lower right-hand corner no later than August 21, 1998.

4. That any changes or modifications to this agreement shall be filed with the Commission for approval pursuant to the procedure outlined in this order.

5. That Tin Can Communications Company, L.L.C. shall not offer services in Missouri unless it obtains Commission approval of its proposed tariff sheets and its conditional certificate of service authority becomes effective.

6. That the Commission, by approving this agreement, makes no finding on the completion by Southwestern Bell Telephone Company of any of the requirements of the competitive checklist found in 47 U.S.C. § 271.

7. That this order shall become effective on August 18, 1998.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer
and Drainer, CC., concur.
Crumpton, C., absent.

Randles, Regulatory Law Judge

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION