

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 29th  
day of June, 1984.

CASE NO. TR-84-177

In the matter of the application of  
the Western Union Telegraph Company,  
Washington, D. C. to file a tariff  
to establish rates, rules and  
regulations for the provision of  
intrastate Metrofone service in the  
State of Missouri.

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ORDER DISMISSING CASE

On January 19, 1984, Western Union Telegraph Company (Western Union) submitted Tariff PSC Mo. No. 3. By letter dated February 3, 1984, counsel for Western Union amended its tariff to change the effective date to March 1, 1984. The Company submitted its Tariff PSC Mo. No. 3 1st Revised Title Page and 1st Revised Pages 1 through 18 to reflect the change of date.

On February 28, 1984, the Commission issued its order suspending Western Union's tariff. The Commission also directed the Company and its Staff to file a legal memorandum addressing the question of whether the Company is required to obtain a certificate of convenience and necessity in order to provide intrastate telephone service within the State of Missouri. On March 28, 1984, counsel for Western Union filed his Legal Memorandum. Deputy General Counsel filed his Legal Memorandum on May 25, 1984. By letter filed on May 30, 1984, Deputy General Counsel submitted certain corrections to his Memorandum and provided the information on Exhibit B which did not copy legibly.

One June 27, 1984, the Commission further suspended the proposed tariff until December 29, 1984.

The Commission finds that it must construe Section 392.260, RSMo 1978, which states:

No telegraph corporation or telephone corporation hereafter formed shall begin construction of its telegraph line or telephone line without first having obtained the permission and approval of the commission and its certificate of public convenience and necessity, after a hearing had upon such notice as the commission may prescribe.

This section, which contains a grandfather clause, was construed by the Public Service Commission in George G. Youngblood v. Christian County Farmers Rural Telephone Association, P.U.R. 1930A 257, 262 (1929). The Commission stated therein "it will be noted that the above section [392.260] referred to telephone companies hereinafter formed, and since the defendant was in existence and operating as a telephone company before the enactment of the Public Service Commission Law, it will not be required to file an application for a certificate of convenience and necessity."

A similar statute, Section 393.170, RSMo 1978, provides that no gas, electric, water or sewer corporation shall begin construction of a plant or system without first having obtained the permission and approval of the Commission. The Commission has interpreted this section as not requiring certificates of convenience and necessity for companies who are in operation prior to the effective date of the statute. Missouri Valley Realty Co. v. Cupples Station Light, Heat and Power Co., 2 Mo. P.S.C. 1 (1914), Re: Capital City Water Company, 12 Mo. P.S.C. (N.S.) 646, (1966), and Re: Jefferson County Sewer Company, Inc., 14 Mo. P.S.C. (N.S.) 297, (1969).

Both Western Union and the Staff cite Western Union Telegraph Company v. Ulrich, 120 Mo. App. 177, 97 S.W. 191 (1906), as evidence that Western Union was providing telephone service prior to 1913. In that case, the court found that Western Union owned a greater part, if not all, of a telephone line in the County of Putnam, Missouri, extending from the town of Omaha to Unionville.

The Commission takes official notice of Western Union's PSC Mo. No. 2 and PSC Mo. No. 3 tariffs and all revised pages and Commission Case No. TR-83-37. See 4 CSR 240-2.130(2). Both Western Union and Staff have discussed these tariffs in their briefs. Western Union provided telephone and voice transmission service according to its PSC Mo. No. 2 tariffs from November, 1943 to February, 1952. In May, 1962, voice transmission service was filed as part of PSC Mo. No. 2 tariff. Deregulation of Western Union's record services was the result of federal preemption of state jurisdiction by the Record Carrier Competition Act of 1981, 95 Stat. 1687-90 (1981). The Commission then, in Case No. TR-83-37, allowed Western Union to cancel its intrastate tariff PSC Mo. No. 2 on October 19, 1982. Western Union's PSC Mo. No. 3 tariffs were suspended in this case. Since Western Union's PSC Mo. No. 2 tariffs were cancelled and its PSC Mo. No. 3 tariffs suspended, the Commission finds that Western Union does not have any tariffs on file and in effect for the provision of telephone service at this time, and has not since October 19, 1982.

Western Union contends that since its telegraph company has operated continuously in Missouri since before 1913 and telephone and telegraph companies are considered to be one and the same for all intents and purposes, it does not need a certificate. The Commission agrees with Staff that the cases supporting Western Union's contention can be distinguished from the present case because of the purpose of the legislative enactments being construed and the facts of the cases.

In State v. Central New Jersey Telephone Company, 53 N.J.L. 341, 21 A. 460 (1891), the court held that the telephone company was a legal corporation possessing all of the privileges including the right to exercise the power of eminent domain which was conferred by the Telegraph Act and its supplements based upon the similarity of the equipment and the purpose of the equipment. In Holmes Electric Protective Company v. Williams, 228 N.Y. 407, 127 N.E. 315 (1920), the court determined that the company having incorporated under the Telegraph Act, was exempt and did not need a franchise to maintain its wires and carry on its burglar alarm

system because it provided a public service and was recognized by the Legislature in its statutes. The facts in State Public Utilities Commission ex rel. Chicago Telephone Company v. Postal Telegraph - Cable Company, 285 Ill. 411, 120 N.E. 795 (1918), show that the company had amended its charter prior to 1914 to add telephone service. By 1912 it had completed the transposition of all of its telegraph wires so they were compatible with both telephone and telegraph instruments. In 1914 the Illinois Public Utilities Commission was established. In 1915 the company began to provide telephone service for the public. The Illinois Public Utilities Commission found that telephone and telegraph systems were different and issued an order requiring the company to cease and desist from the operation of public telephone business until a certificate of convenience and necessity was obtained. The Circuit Court of Sangamon County affirmed and the company appealed to the Supreme Court of Illinois which reversed the decision. The Supreme Court of Illinois found that the telegraph company was able to use its telegraph wires as a part of its telephone system by adding at the end of each telephone circuit a composite or simplex equipment consisting of coils with a large amount of iron wire in them and also condensers, as well as switchboards, telephone booths and instruments. The court concluded that these additives do not constitute construction of any new plant, however, only an extension of service it was already furnishing.

In State v. Central New Jersey Telephone Company, and in Holmes Electric Protective Company v. Williams, the courts were not interpreting a statute which established a Commission to regulate utility companies by determining if a public need for a service exists. In State Public Utilities Commission v. Postal Telegraph - Cable Company the court was interpreting such a statute; however, the facts were different in that, prior to the date that the Illinois Public Utilities Commission was established, the company had transposed its telegraph equipment so that it could provide telephone service. The court held that the company was only extending its service in that case since it transposed the wires it used in its

telegraph business. With the technological and regulatory changes of the past 66 years, this Commission cannot find that a case which interpreted facts unique to that time period should be considered a binding precedent today.

The Commission notes that Section 386.020, RSMo Supp. 1983, defines telegraph and telephone companies separately as well as telephone and telegraph lines:

The term "telegraph corporation", when used in this chapter includes any corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any telegraph line or part of telegraph line used in the conduct of the business of affording for hire communication by telegraph.

The term "telegraph line", when used in this chapter, includes conduits, ducts, poles, wires, cables, crossarms, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telegraph corporation to facilitate the business of affording communications by telegraph.

The term "telephone corporation", when used in this chapter, includes every corporation, company, association, joint stock company, or association, partnership, and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any telephone line or part of telephone line used in the conduct of the business of affording telephone communication for hire.

The term "telephone line", when used in this chapter, includes conduits, ducts, poles, wires, cables, crossarms, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telephone corporation to facilitate the business of affording telephonic communication.

Chapter 392 of the Revised Statutes of Missouri is entitled Telephone and Telegraph Companies. The Legislature in this chapter specifies telephone and telegraph companies or lines throughout the entire chapter.

There are cases which have found that a telegraph company and its services are different from that of a telephone company. In Bess v. Citizens Telephone Company, 315 Mo. 1056, 287 S.W. 466 (1926), the court found that:

The nature of the telephone service ordinarily rendered is thus admirably stated in Telephone Co. v. Telephone Co., 147 Mo. App. 216, 235; 126 S.W. 773, 778: 'The act of telephoning is the act of holding a conversation with another over the wires of a telephone company. The conversation, instead of being delivered to the agency of the telephone company, as are the goods to the agents of the railroad or the dispatch to the agent of the telegraph company for transmission, is transmitted by the patron of the telephone himself, by means of electrical undulations which reproduce at the farther end of the line the pulsations set in motion by the first speaker. The act of transmission is instantaneous and self-executing. Instead of placing the message in the possession of the carrier for transmission in his own way, while operating his own instrumentalities, the telephone instrument and line are placed in possession of the patron to be operated by him while the communication is being had.'

In Sunset Telephone and Telegraph Company v. City of Pasadena

161 Cal. 265, 118 P. 796 (1911), the court determined that a telephone company cannot use public streets and highways under a statutory grant to telegraph companies since grants by the public are to be strictly construed by the grantor. Similarly, the United States Supreme Court in City of Richmond v. Southern Bell Telephone and Telegraph Company, 174 U.S. 761 (1899) determined that a telephone company was not entitled to claim the benefits of provisions of an act of Congress entitled, an Act to aid in the construction of telegraph lines and to secure the government to use of the same for postal, military and other purposes. In that case, the court stated that "...the question is, not what Congress might have done in 1866 nor what it may or ought now to do, but what was in its mind when enacting the statute in question." Id. at 775. Clearly, the Missouri legislature envisioned telephone companies being different and distinct from telegraph companies as evidenced by Section 386.020 and Chapter 392, RSMo 1978.

The courts have also discussed the purpose of the Commission law. In determining the question of whether there is a public necessity for another public utility telephone system in Nodaway County, the court in Peoples Telephone Exchange v. Public Service Commission, 239 Mo. App. 166, 186 S.W.2d 531 (1945),

stated that the Missouri Supreme Court in State ex rel. Sikeston v. P.S.C., 336 Mo. 985, 82 S.W.2d 105 (1935) announced certain general purposes of the Commission law which are applicable to the issues presented herein:

The Public Service Commission Law was intended to prevent overcrowding of the field in any city or area and thus 'restrain cut-throat competition upon the theory that it is destructive, and that the ultimate result is that the public must pay for that destruction', State ex rel. Union Electric Light & Power Company v. Public Service Commission, 333 Mo. 324, 62 S.W.2d, 32, 745. To accomplish this, the Commission was given the authority to pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the State, or for an established company to enter new territory. To secure to the public all advantages to be gained from competition in obtaining fair rates and good service and also to protect them from their disadvantages, the Commission was given authority to regulate rates, to investigate complaints about service, to compel companies to adequately serve all persons and industry in their territory in which they operate, to order improvement and safety equipment, and to authorize the abandonment or extension of lines and the financing of all improvements or purchases. The question of whether regulated monopoly or regulated competition will best serve the public convenience and necessity in a particular area at any time is for the Commission to decide, subject to the qualification that the Commission must not act arbitrarily or unreasonably, which matter is reserved to be passed upon by the courts. State ex rel. Electric Company v. Atkinson, 275 Mo. 325 204 S.W. 897.

Also see State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177, 182 (Mo. App. 1960).

Further, Section 386.610, RSMo 1978 provides that "[t]he provisions of this Chapter shall be liberally construed with a view to the public welfare, efficient facilities, and substantial justice between patrons and public utilities." Section 386.250, RSMo 1978, states:

The jurisdiction, supervision, power and duties of the Public Service Commission herein created and established shall extend under this jurisdiction...(6) To all telephone lines, as above defined, and all telegraph lines, as above defined, and to every telephone company, and to every telegraph company, so far as said telephone and telegraph lines are and be, are said telephone companies and said telephone lines conduct and operate such line or lines, respectively, within this state...

The Commission notes that a grandfather clause is a statutory exception to the operation of law and as such is construed narrowly and strictly against one who invokes it. 73 Am. Jur.2d Statute Section 313 (1974), Spokane & Inland Empire Railroad Co. v. U. S., 241 U. S. 344, 350 (1915). The rule favoring strict construction is particularly applicable where the statute promotes the public welfare, or where, in general, the law is entitled to liberal construction. See Piedmont and N. R. Company v. Interstate Commerce Commission, 286 U.S. 299, 311 (1932). In Spokane & Inland Empire Railroad Co. v. U. S., 241 U. S. 344, 350 (1916), the court was interpreting a statute and held that:

The obvious purpose of Congress enacting the law and its amendment was to secure the safety of railroad employees, and that the amendment sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.

Therefore, the Commission finds that the grandfather clause in Section 392.260, RSMo 1978, should be construed narrowly and strictly against Western Union.

The Commission, having distinguished the cases which allowed telephone companies rights under statutory provisions for telegraph companies from this case, having examined the provisions for telephone and telegraph service in Chapter 386 and 392, RSMo, having concluded that the legislature envisioned telephone companies being different and distinct from telegraph companies, having reviewed the cases holding that telephone companies are different and distinct from telegraph companies and the purpose of the Public Service Commission Act and having determined that the grandfather clause in Section 392.260, RSMo 1978, should be construed narrowly and strictly against Western Union, finds that a telephone company is different and distinct from a telegraph company. The Commission further finds that a telegraph



company is not a telephone company for purposes of interpreting Section 392.260, RSMo 1978.

The Commission notes that with divestiture and the technological development of the last five years, telephone service and the regulation of telephone service is changing tremendously. While the Commission has never considered whether Western Union needed a certificate to provide telephone service prior to this case, these changes in the regulation of the telephone industry make this an issue today.

The Commission is of the opinion that a strict and narrow construction of the grandfather clause in Section 392.260, RSMo 1978, is necessary so that the remedial processes intended to be accomplished by the Public Service Commission Act not be destroyed. Therefore, the Commission finds that a telephone company which was formed and operating prior to 1913 and continues to provide service to an area does not need a certificate of convenience and necessity to operate in that area. See Missouri Valley Realty Co. v. Cupples Station Light, Heat and Power Co., Re: Jefferson County Sewer Co. Inc. and Limousine Rental Service, Inc. v. Benjamin F. Feinberg, 9 A.D. 986, 194 N.Y.S.2d 1014 (1959).

However, a company which has grandfathered rights to serve an area cannot expand its rights by extending a line into an area it had not previously rendered service. Re Doniphan Telephone Company, 27 P.U.R. (N.S.) 189 (1939). The Commission based its decision in that case on Public Service Commission v. Kansas City Power and Light Company, 325 Mo. 1217, 31 S.W. 67 (1930). In the latter case the Missouri Supreme Court held that a certificated electric company could not extend its line into an area to which it had not previously rendered service under its present certificate.

In Southwestern Bell Telephone Company v. P.S.C., 416 S.W.2d 109, 115-116 (Mo. en banc 1967), the court did not reach the issue of what service area was grandfathered, however, the court did state that "the mere fact, if it be a fact,

that Bell's charter authorized it to serve anywhere in Missouri did not thereby impose a duty to furnish services everywhere in the state, nor constitute a profession of service for every part of the state. The fact that subsequently, when the Public Service Commission Act was enacted, the legislature exempted existing telephone companies under what is now Section 392.260 does not alter the situation. The grandfather rights represented a concession by the state, not the imposition of an obligation." In that case, the court held that the issue is whether the company in fact has professed to provide telephone service to the area in question and determined that the evidence did not so establish. Also see State ex rel. Ozark Power and Water Co. v. P.S.C., 287 Mo. 522, 229 S.W. 782 (1921).

The Commission finds that the grandfather rights of a company should not extend beyond the area that it has professed to serve and has continuously served. In addition, the Commission notes that Section 392.200, RSMo 1978, states that every telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. A company which is providing service under either a certificate or grandfathered rights has an obligation to provide adequate service to that area.

In 1913, the section referred to under RSMo, 1978, as 392.220 was enacted by the legislature. This section provides that every telephone corporation shall print and file with the commission schedules showing the rates, rentals and charges for service of each and every kind by or over its line between points in this state and between each point upon its line and all points upon every line leased or operated by it and between each point upon its line or upon any line leased or operated by it and all points upon the line of any other telegraph or telephone corporation whenever a through service or joint rate shall have been established between any two points.

Western Union was formed and owned telephone lines prior to 1913 but does not have a tariff on file and in effect with the Missouri Public Service Commission


for the provision of telephone service. The Commission finds that failure to keep tariffs for the provision of telephone service in the State of Missouri on file and in effect with the Commission is an act that shows the intent to abandon any right it may have had to provide intrastate telephone service. Therefore, the Commission finds that since Western Union has not continuously had tariffs on file and in effect for provision of telephone service in Missouri, it has abandoned any rights it may have had to serve Missouri customers without a certificate of convenience and necessity. The Commission does not find it necessary to determine whether Western Union provided telephone service from 1908 to 1913 in Missouri. Western Union must obtain a certificate prior to filing tariffs. Filing of a tariff by a corporation that is not a regulated utility pursuant to Section 392.260, RSMo 1978, has no force and effect. The Commission finds that the tariffs filed by Western Union have no force and effect and therefore Case No. TR-84-177 should be dismissed.

It is, therefore,

ORDERED: 1. That Case No. TR-84-177, Re: Application of Western Union Telegraph Company to file a tariff to establish rates, rules and regulations for the provision of intrastate Metrofone service in the State of Missouri, be, and hereby is, dismissed.

ORDERED: 2. That this order shall become effective on the 31st day of July, 1984.

BY THE COMMISSION



Harvey G. Hubbs  
Secretary

(S E A L)

Steimeier, Chm., Musgrave, Mueller,  
Hendren and Fischer, CC., Concur.