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November 9, 2001

FILED³

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**Missouri Public
Service Commission**

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 650
P. O. Box 360
Jefferson City, Missouri 65102

Re: In the Matter of the Investigation of the State of Competition in the
Exchanges of Southwestern
Case No. TO-2001-467

Dear Judge Roberts:

Please accept for filing, an original and eight (8) copies of Sprint's Post-Hearing Brief in the above matter.

If you have any questions or comments, please do not hesitate to call me at 913-345-7918.

Very truly yours,

Lisa Creighton Hendricks
Lisa Creighton Hendricks *by Davis Bergmeyer*

/vw

Enclosures

cc: General Counsel
Office of the Public Counsel
All Parties of Record

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

In The Matter of the Investigation of the State)
Of Competition in the Exchanges of Southwestern)
Bell Telephone Company)

Case No. TO-2001-467

SPRINT'S POST-HEARING BRIEF

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Service Commission**

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SPRINT'S POST-HEARING BRIEF

Comes now Sprint Communications Company, L.P. ("Sprint") and hereby files its post-hearing brief in the above captioned matter as follows:

I. INTRODUCTION

The case before the Missouri Public Service Commission ("Commission") is one of first impression. In this case, the Commission has been asked to determine if Southwestern Bell Telephone Company's ("SWBT's") services in each of its exchanges are subject to effective competition. This determination is made pursuant to statutes that provide the Commission broad guidelines without specific criteria. In light of this, the Commission has asked the parties to address some preliminary issues surrounding the specific criteria. Sprint will address these questions in Section II of this brief.

However, the purpose of Sprint's participation in this case is to prevent SWBT's Switched Access Service from receiving a competitive designation. While Switched Access Service is just one of 18 services for which SWBT has sought competitive classification, it is the service to which this brief is dedicated. In this brief, Sprint will establish that the evidence on Switched Access Service yields only one conclusion -- there is no effective competition in any exchange for SWBT's Switched Access Service. The customers of Switched Access Service, the Interexchange Carriers (IXCs), have uniformly put into evidence that effective competition does not exist for the service. Furthermore, SWBT has admitted that it has failed to demonstrate otherwise. Given the overwhelming weight of the evidence, it is clear that SWBT's Switched Access Service should not be classified as competitive.

II. PRELIMINARY ISSUES

There are several preliminary issues that Judge Dippell requested all parties to address in their briefs. The issues are: (A) Who has the burden under Section 392.245.5 RSMo 2000 to demonstrate the presence or absence of effective competition; (B) What services are relevant to an analysis of effective competition pursuant to Section 392.245.5 RSMo 2000; and, (C) Do the rate rebalancing provisions of Section 392.245 RSMo 2000 have any relevance to the Commission's determinations in this case. Sprint addresses these questions as they apply to the Commission's determination on Switched Access Service.

A. Who has the burden under Section 392.245.5 RSMo 2000 to demonstrate the presence or absence of effective competition?

Section 392.245.5 RSMo 2000 reads in relevant part as follows:

"5. Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, *unless the commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service. The commission shall, from time to time, on its own motion or motion by an incumbent local exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunication company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunication company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company...*"
(392.245.5 RSMo. 2000 (emphasis added))

The statute contemplates that effective competition would be presumed to exist for the services of an incumbent local exchange carrier in any exchange in which an alternative service provider has been providing basic local exchange services for at least five years. After the five-year period, the Commission must find that effective competition does not exist if it is to refuse to

classify services as competitive. In order to make this finding there must be evidence to support it. *See, Deaconess Manor Ass'n v. Public Service Com'n of State of Mo.*, 944 S.W. 2d 602 (App. W.D. 1999) (Commission findings must be supported by evidence); *State ex rel. Oliver v. Public Service Commission*, 542 S.W. 595 (Mo. App 1976). Thus, after the five-year period, the burden is on any party that challenges the competitive designation to come forth with evidence upon which the Commission can make a finding that effective competition *does not exist*.

The second sentence of the statute contemplates that a competitive designation may be sought prior to the five-year period. If the designation is sought prior to the five-year period, the Commission must make an affirmative determination that effective competition *exists*. Thus, prior to the five-year period, the burden is on the party seeking a specific finding to put forth evidence to support that finding.

In this case, SWBT is seeking a competitive designation for all its services prior to the five-year period.¹ Thus, it is SWBT's burden to demonstrate that effective competition exists for its Switched Access Service. If its evidence does not support such a finding, then the Commission cannot grant a competitive designation.

B. What services are relevant to an analysis of effective competition pursuant to Section 392.245.5 RSMO 2000?

As indicated above, Section 392.245.5 RSMo provides that the Commission must evaluate whether effective competition exists for a given service in a given exchange. The Missouri statutes provide a definition for "effective competition," to-wit:

"Effective competition" shall be determined by the commission based on:

- (a) The extent to which services are available for alternative providers in the relevant market;
- (b) The extent to which services of alternative providers are functional equivalent or substitutable at comparable rates, terms and conditions;

¹ Tr. (Vol. 3) at p. 439, l. 4-12 (Mr. Hughes).

(c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185 RSMo, are being advanced;

(d) Existing economic or regulatory barriers to entry; and

(e) Any other factors deemed relevant by the commission and necessary to implement the purpose and policies of chapter 392, RSMo."
386.020 (13) RSMo 2000.

As indicated in the statute, the Commission should consider "services" provided by alternative providers that provide a functional equivalent or substitutable alternative for the service for which competitive designation is sought. In this consideration, the Commission must determine what services are properly evaluated – services provided only by telecommunication companies or services provided by other providers such as wireless providers. The Missouri statutes define "services" as follows:

"Services include not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons."

RSMo 386.020(47)

Based on the statutory definition, Sprint believes that the Commission should consider services beyond those provided by certified telecommunication providers. Indeed, if the legislators had meant to limit the Commission's evaluation to services provided by certified telecommunications providers, the statute could have used the more limited defined term "telecommunications services" and accomplished that intent.²

² See Section 386.020(53) RSMo.

However, in evaluating Switched Access Service, the Commission must understand there is no functional equivalent or substitutable service regardless of how broadly or narrowly the Commission defines the source of alternative services. Switched Access Service allows an IXC to originate and terminate long distance calls to customers. In order to complete a call, the call must be originated or received by the local provider who offers the local dial tone or the called number. If the customer has selected SWBT as its local provider, the fact that the customer may have a wireless phone with another number is irrelevant as the IXC cannot choose to use it. As will be shown herein, the record is undisputed on the point that Switched Access Service represents a locational monopoly. A feature of a locational monopoly is that it serves a captive customer who has no choice in service providers. Therefore, it is not necessary for the Commission to determine the definition of "services" for it to evaluate Switched Access Services as no other service can represent a functional or equivalent service.

C. Do the rate rebalancing provisions of Section 392.245 RSMo 2000 have any relevance to the Commission's determinations in this docket?

Sprint does not believe that rate rebalancing is relevant to the issues before the Commission in this case.

III. SWBT'S SWITCHED ACCESS SERVICE SHOULD NOT BE CLASSIFIED AS COMPETITIVE PURSUANT TO SECTION 392.245.5 RSMO 2000

Pursuant to Section 392.245.5 RSMo, in order to grant a competitive designation, this Commission must find that SWBT's Switched Access Service is subject to effective competition. As the record in this case cannot support such a finding, the Commission must deny SWBT's request to designate its Switched Access Service competitive.

First, the record reflects that Switched Access Service enables IXC's to provide long distance services to end users by connecting to SWBT's network.³ Thus, the IXC is the customer of Switched Access Service. Further, Switched Access Service is provided through three major components: (1) common line, (2) the end office and (3) transport.⁴ While IXC's may find some competition for the transport component, Switched Access Service cannot be provided without all the components. Based on this fact, all parties agree that this Commission must evaluate all three components as one service and cannot separately evaluate each one. As testified by SWBT's witness Ms. Douglas:

"Q. (By Mrs. Creighton Hendricks) Does that mean that Southwestern Bell is withdrawing its request for a competitive designation for Switched Access Service?

A. (By Ms. Douglas) Well, with that -- what this does, in clarifying our position, **it came quite clear that what we needed to do was treat Switched Access Service as a whole, not individual rate elements**, which is what I initial tried to do in my direct testimony which tended to confuse things, and the recognition that this Commission cannot look at every rate element for every service * * *

Q. Okay, lets talk a little bit about the determinations that the Commission would have to make in this case. Now, in order to grant competitive designation, would the Commission have to find that switched access was subject to effective competition?

A. That goes back to one of the reasons for the clarification in my testimony, in my Surrebuttal testimony. **It appears that the Commission is going to have to treat switched access as a total service.**

Tr. (Vol. 2) at pp. 257 - 259 (emphasis added).

Thus, the Commission must find that SWBT has not met its burden to demonstrate that Switched Access Service as a whole is subject to effective competition. Based on the record in this case, the Commission cannot make such a finding as SWBT has not only failed to meet its burden,

³ Tr. Vol. 2 at p. 249, Exhibit 7, Direct Testimony of Ms. Sandra Douglas at p. 3, l. 18-19.

⁴ Tr. at Vol. 2, at p.249, Exhibit 7, Direct Testimony of Sandra Douglas, at Schedule 3.

but, alternatively, affirmatively provided evidence that its Switched Access Service is not subject to effective competition.

The record reflects that *all parties* agree that **Switched Access Service is not subject to effective competition.**

As testified by Sprint:

"Switched access is a bottleneck byproduct a LEC gains when it sells switched local service to the end user. Once a sale is made, any IXC who wishes to carry long-distance calls to or from the end user must deal with the end user's chosen LEC. Competition among LECs is focused on end users. Access revenues are a benefit of gaining the end user as a local customer. End users do not select local providers on the basis of their access charges and local providers do not use access charges as a marketing appeal to end users. Consequently, Sprint does not believe appropriate competition triggers exist for switched access. (Tr. Vol. 7, at p. 823; Exhibit 22 Rebuttal Testimony of Dawn Rippentrop at p. 12, line 15, p. 3, line 4).

Consistent with Sprint's testimony, Staff⁵, AT&T⁶ and OPC⁷ argue that Switched Access Service is a locational monopoly. SWBT not only failed to refute this testimony, it also admitted that its Switched Access Service is a locational monopoly. SWBT's testimony in Case No TO-99-596 that was repeated in relevant part in the record in this case, states:

"Originating and terminating access are not competitive services because the access customer (i.e., IXCs) does not have an opportunity to select the CLEC providing either originating or terminating access for toll calls carried by the IXC. For example, if a CLEC end-user places a toll call, the CLEC selected by that end-user to carry that call must pay the CLECs its originating access rates for this call. The IXC is a captive customer of this CLEC."⁸

Further, SWBT's own economic expert in this case, Dr. Aron, admitted that Switched Access Service is a locational monopoly when she testified:

"One thing about switched access and the issue of locational monopoly is that it really doesn't matter how many customers you have. It's a locational monopoly

⁵ See Tr. Vol. 5 at p. 623, Exhibit 18, Rebuttal Testimony of Mr. William L. Voight at p. ---

⁶ See Tr. Vol. 7 at 814, Exhibit 22, Rebuttal Testimony of R. Matthew Kohly, at pp. 22-27.

⁷ See Tr. Vol. 5 at p. 547, Exhibit 19, Rebuttal Testimony of Ms. Barbara Meisenheimer, at p. 21, l. 15-24.

⁸ See Tr. Vol. 7 at 814, Exhibit 22, Rebuttal Testimony of R. Matthew Kohly, at p 25, l.4-13. .

because if an IXC wants to -- let's say we're looking at the terminating end. If an IXC's customer is asking the IXC to terminate a call to a specific customer, the providers of that customer's local service gets the terminating access whether that provider has one customer or all of the customers."⁹

Finally, over and above SWBT's admission that Switched Access Service is a locational monopoly, SWBT admitted that it has not and could not show that effective competition exists for its Switched Access Service. As testified by SWBT's witness Ms. Douglas:

"Q. (By Mrs. Creighton Hendricks) Switched access, the service switched access, you would agree with me that switched access is not subject to effective competition in Missouri, is that correct, in Southwestern Bell's territories?

A. (By Ms. Douglas) Looking at switched access service as a whole, **we would be hard-pressed to prove anything differently** without looking at each rate element individually.

Q. So you would agree with me. It's not subject to effective competition?

A. **I would say it's a hard hurdle.**
(Tr. at Vol. 2, at p. 260) (emphasis added)

Thus, there is no party in this docket that maintains, or has provided evidence to support a finding, that switched access services are subject to effective competition. Given the record in this case, the Commission must deny SWBT's request.

Recognizing that it could not demonstrate effective competition as required by the applicable statute, SWBT belatedly asked the Commission to overlook the statutory requirement to find effective competition and evaluate its Switched Access Service under a standard applicable to competitive local exchange companies ("CLECs"). SWBT makes this argument despite the fact that it is an incumbent local exchange company that is unquestionably governed by Section 392.245.5 in its efforts to secure competitive classification.

⁹ See Tr. Vol.2 at p. 213, l. 20- p. 214, l. 2.

SWBT argues that this Commission should grant it (SWBT) a competitive designation, despite the lack of evidence, because competitive local exchange companies get a competitive designation for the same service. What SWBT overlooks is that the statute under which CLECs receive a competitive designation does not require that this Commission find that Switched Access Service is subject to "effective competition." The governing statutory provision for competitive local exchange carriers, Section 392.361.3 RSMo, states as follows:

"The Commission may classify a telecommunications company as a competitive telecommunications company only upon a finding that all telecommunication services offered by such company are competitive telecommunications services. Section 392.361.3 RSMo."

Nowhere in the statute is the Commission directed to make a finding that effective competition exists for all services before a company can be designated as competitive. Indeed, it would not make sense to require a CLEC to demonstrate effective competition before receiving a competitive classification. CLECs are new entrants, typically with no customers. Thus, the CLEC is the competition and is offering its service in competition with the incumbent SWBT. However, a finding of *effective* competition versus competition requires more than an issuance of a certificate of service to a CLEC.

Indeed all services offered by the new entrants are deemed competitive. Thus, following SWBT's logic, all its services, including local service, should be designated competitive based on the mere fact that CLECs receive competitive designation. Clearly, the Commission would never accept that the mere fact it designates CLECs' local service offerings as competitive, it should automatically do so for SWBT. Switched Access Service is no different and can only be designated competitive for the incumbent SWBT if the Commission determines that effective competition exists. Thus, SWBT's request to rely on a statute that does not apply to the relief sought in this case must be rejected.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. SWBT has requested a competitive designation for its Switched Access Service as a separate and distinct service for each service exchange in which SWBT operates. (Tr. Vol. 2 at p. 249, Exhibit 7, Rebuttal Testimony of Sandra Douglas at p. 2, lines 10-13; Position Statement of Southwestern Bell Telephone Company, filed September 18, 2001, at p. 14, Issue No. 13).
2. Switched Access Service enables IXC's to provide long distance service to end users by connecting to SWBT's network. (Tr. Vol. 2 at p. 249, Exhibit 7, Rebuttal Testimony of Ms. Sandra Douglas at p. 3. Lines 18-19)
3. There are three components to Switched Access Service: common line, local switching and transport. (Tr. Vol. 2 at 249, Exhibit 7, Rebuttal Testimony of Ms. Sandra Douglas at p. 3. lines 19-21).
4. Switched Access Service can only be evaluated as an end to end service. Tr. Vol. 2 at pp. 257-259. Thus, any analysis of any one of the component parts of Switched Access Service, taken separately, cannot support a finding of effective competition. (Id.).
5. The customers for Switched Access Service are Interexchange carriers (IXCs). (Tr. Vol. 2 at 249, Exhibit 7, Rebuttal Testimony of Sandra Douglas at p. 3, lines 18-19; Tr. Vol. 7, at p. 823, Exhibit 25, Rebuttal Testimony of Dawn Rippentrop at p. 5, line. 5, p. 7, lines 1.-8 at page 814, Exhibit 22, Rebuttal Testimony of R. Matthew Kohly, at p 25, lines 4-13).
6. All IXC's in this case have put in evidence that SWBT's Switched Access Service are not subject to effective competition and oppose a competitive designation. (Tr. Vol. 7 at 814, Exhibit 22, Rebuttal Testimony of R. Matthew Kohly, at pp. 22-27; Tr. Vol. 7, at 823 Exhibit 25, Rebuttal Testimony of Dawn Rippentrop at p. 1-19; Tr. Vol. 7 at p. 799, Exhibit 24, Rebuttal Testimony of Donald G. Price, at p. 1).
7. In earlier cases, SWBT has argued that Switched Access Service is not subject to effective competition as its is a locational monopoly. (Tr. Vol. 7 at 814, Exhibit 22, Rebuttal Testimony of R. Matthew Kohly, at p 25, 1.4-13).
8. In this case, SWBT admits that Switched Access Service is a locational monopoly. (Tr. Vol.2 at p. 213, l. 20- p. 214, l. 2).
9. In this case, SWBT further admits that Switched Access Service is not subject to effective competition. (Tr. Vol. 2 at p.260, lines 3-15).
10. Therefore, the record in this case does not support a finding that Switched Access Service is subject to effective competition and pursuant to 392.245.5 RSMo, SWBT's request must be denied.

V. CONCLUSION

In closing, there is no evidence upon which this Commission can find that Switched Access Service is subject to effective competition. In contrast, there is an abundance of evidence, including that provided by SWBT, upon which the Commission can find that Switched Access Service is not subject to effective competition.

Respectfully submitted,
SPRINT

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed postage prepaid, this 9th day of November, 2001, to the following:

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