

BEFORE THE PUBLIC SERVICE COMMISSION  
FOR THE STATE OF MISSOURI

In the Matter of a Further Investigation of     )  
the Metropolitan Calling Area Service After     )     Case. No. TO-2001-391  
the Passage and Implementation of the     )  
Telecommunications Act of 1996.     )

**SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC MISSOURI'S  
RESPONSE TO THE SUPPLEMENTAL BRIEF OF THE STAFF OF  
THE MISSOURI PUBLIC SERVICE COMMISSION**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Reply to the Supplemental Brief of the Staff of the Missouri Public Service Commission, states as follows:

**Executive Summary**

The Missouri Public Service Commission ("Commission") does not have the authority to alter the MCA Plan for the reasons set forth on pages 3 through 7 of SBC Missouri's Position Statement.<sup>1</sup> Although it is clear that the Commission does not have this authority, the Staff of the Missouri Public Service Commission ("Staff") continues to argue otherwise. Specifically, Staff argues that the Commission has the authority to alter the MCA Plan pursuant to Sections 392.240.1<sup>2</sup>, 392.250, 392.470, 386.250, and 392.240.2. Staff's arguments are spurious.

The Commission does not have the authority to alter the MCA Plan pursuant to Section 392.240.1 because price cap companies, like SBC Missouri, are exempt from the provisions of Section 392.240.1 pursuant to Section 392.245.7. Further, the Commission does not have the authority to alter the MCA Plan pursuant to Sections 392.250, 392.470, 386.250, and/or 392.240.2 because each of these provisions contains a general statement of the Commission's

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<sup>1</sup> See Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Position Statement in Response to the Missouri Public Service Commission's Order Directing Filing Dated April 7, 2003 ("SBC Missouri's Position Statement"), pp. 3-7.

<sup>2</sup> All statutory references are to the Missouri Revised Statutes, 2000, unless specifically noted otherwise.

authority that cannot override the specific provisions of 392.240.1 (or the price cap companies' exemption from this section pursuant to 392.245.7). Moreover, none of the provisions cited by Staff provide the authority claimed by Staff. Section 392.250 does not give the Commission authority to alter the MCA Plan; rather, it gives the Commission authority to require repairs or charges to telecommunications facilities. Section 392.470 does not give the Commission authority to alter the MCA Plan; rather, it concerns the imposition of conditions on companies providing service without Commission authority. Finally, Sections 392.250 and 392.240.2 do not give the Commission authority to alter the MCA Plan; rather, both are general jurisdictional statutes that cannot override Section 392.245.7, which specifically exempts price cap companies from Section 392.240.1.

Furthermore, although Staff contends that the Commission has the authority to make any optional Tier of the MCA mandatory, Staff's contention is without merit. Section 392.200.9 specifies that the Commission may not alter local exchange boundaries unless the ILEC doing business in the exchange for which the boundaries are changed approves of the change. Since SBC Missouri does not approve of any change to the MCA Plan at this time, the Commission does not have the authority to make any optional Tier of the MCA mandatory. Moreover, Staff's citation to Section 392.200.7 is not instructive. Again, since specific statutory provisions trump general statutory provisions, Section 392.200.9, not Section 392.200.7 controls.

For all of these reasons, the Commission does not have the authority to alter the MCA Plan at this time. If the Commission is interested in the possibility of implementing Staff's MCA-2 Plan, OPC's proposed geographic expansion of the MCA Plan, or any other proposal that might be offered by the parties in this case, the Commission should order the Industry Task Force to hold additional meetings to discuss pricing proposals for such services as the parties

have not fully explored this issue. The parties may then reach a consensus regarding these issues. Otherwise, the Commission should close this case.

### **Argument**

#### **I. The Commission Does Not Have The Authority To Modify the MCA Plan**

SBC Missouri agrees with Staff that in State ex rel. MoKan Dial, Inc. et al. v. Public Service Commission, 897 S.W.2d 54 (Mo. App. W.D. 1995) ("MoKan Dial"), the Missouri Court of Appeals for the Western District ("Court of Appeals") determined that the Missouri Public Service Commission ("the Commission") had the legal authority to set up the MCA Plan.<sup>3</sup> SBC Missouri further agrees with Staff that the Court of Appeals determined that the Commission's authority to mandate expanded local calling plans in lieu of toll charges was to be evaluated under Section 392.240.1.<sup>4</sup> However, although the Commission may once have had the authority to mandate expanded local calling plan under Section 392.240.1 (but even then MoKan Dial makes it clear that any such plan could not cause a company to incur capital expense or lose revenues),<sup>5</sup> such authority no longer exists--at least with respect to price cap companies. Specifically, after the Court of Appeals rendered its Order in MoKan Dial, the legislature passed and the Governor signed Senate Bill 507, thereby enacting Section 392.245, Missouri's price cap statute. Section 392.245.7 provides: "A company regulated under this section shall not be subject to regulation under subsection 1 of section 392.240."

SBC Missouri became subject to price cap regulation on September 16, 1997.<sup>6</sup> Under the express provisions of Section 392.245.7, SBC Missouri is not subject to regulation under Section

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<sup>3</sup> See State ex rel. MoKan Dial, Inc. et al. v. Public Service Commission, 897 S.W.2d 54, 56 (Mo. App. W.D. 1995).

<sup>4</sup> Id. at 55.

<sup>5</sup> Id. at 55-56.

<sup>6</sup> See Report and Order, Case No. TO-97-397, September 16, 1997, p. 29.

392.240.1. The Commission, therefore, has no authority to modify the MCA Plan pursuant to Section 392.240.1, at least with respect to SBC Missouri and other price cap companies.

Further, other statutory changes since MoKan Dial confirm the Commission's lack of authority to modify the MCA Plan. Specifically, Section 392.200.9 requires the incumbent local exchange carriers ("ILECs"), including SBC Missouri, to approve the alteration of any exchange boundaries. Specifically, Section 392.200.9, provides:

This act shall not be construed to prohibit the Commission, upon determining that it is in the public interest, from altering local exchange boundaries, provided that the incumbent local exchange telecommunications company or companies serving each exchange for which the boundaries are altered provide notice to the Commission that the companies approve of the alteration of exchange boundaries.

As SBC Missouri has repeatedly stated, it does not approve of the alteration of the MCA Plan at this time. The Commission, therefore, has no authority to modify the MCA Plan.

Staff's citation to Sections 392.250, 392.470, 386.250, and 392.240.2 proves nothing. Each of these sections is a general statement of Commission authority that cannot override the specific provisions of Section 392.240.1 (or price cap companies' exemption from Section 392.240.1 pursuant to Section 392.245.7). The rules of statutory construction are clear--in situations where the same subject matter is addressed in general terms in one statute and specific terms in another, and there is a "necessary repugnancy" between statutes, the more specific statute controls over the more general.<sup>7</sup>

Moreover, none of the provisions cited by Staff provide the authority claimed by Staff. Section 392.250 gives the Commission the authority to require repairs or changes to telecommunications facilities, not to impose a new service. Specifically, Section 392.250 provides:

Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that repairs or improvements to or changes in any

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<sup>7</sup> Robinson v. Health Midwest Development Group, 58 S.W.3d 519 (Mo. 2001).

telecommunications facilities ought reasonably be made thereto, or that any additions should reasonably be made thereto, in order to promote the convenience of the public or employees, or in order to secure adequate service or facilities for telecommunications service, the commission shall make and serve an order directing that such repairs, improvements, changes or additions be made within a reasonable time and in a manner to be specified therein, and every telecommunications company is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it. (Emphasis added).

Thus, section 392.250 does not give the Commission authority to alter the MCA Plan; rather, it gives the Commission authority to require repairs or changes to telecommunications facilities. Staff's citation to 392.250 is not instructive.

Section 392.470 concerns the imposition of conditions on companies providing service without Commission authorization. Specifically, Section 392.470 provides:

1. The commission may impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest and consistent with the provisions and purposes of this chapter, including, but not limited to, determining that such company should provide just and reasonable compensation to one or more other certificated telecommunications companies operating in areas in which the compensating company is providing intrastate telecommunications service without commission authorization. The foregoing authority to determine compensation may be exercised by the commission for any telecommunications service that the compensating company is not authorized to provide, whether or not the provision of the telecommunications service is intentional, unintentional or incidental to any telecommunications service that the compensating company is authorized to provide. The commission may view any certificate of public convenience and necessity issued prior to September 28, 1987, and modify such certificate to impose any reasonable and necessary conditions authorized by this section.

2. An order of the commission issued under subsection 1 of this section which determines that compensation should be provided shall be enforced and subject to continuing enforcement by the circuit courts of this state, unless stayed pending review pursuant to section 386.520, RSMo. The venue of such an action shall lie in any county in which the subject telecommunications company is providing unauthorized telecommunications service. (Emphasis added).

Thus, Section 392.470 does not give the Commission authority to alter the MCA Plan; rather, it gives the Commission authority to impose conditions on companies that are providing service

without Commission authorization. Section 392.470 cannot be stretched into authority to require alteration of the MCA Plan in contravention of Section 392.245.7. This is clear because the statute specifically states that the Commission may not impose any condition(s) upon any company providing telecommunications service without Commission authorization, if such conditions are inconsistent with the provisions of Chapter 392. Altering the MCA Plan is not consistent with the provisions of Chapter 392 since price cap companies are exempt from the provisions of Section 392.240.1 pursuant to Section 392.245.7 and because Section 392.200.9 requires ILEC approval before the Commission may alter local exchange boundaries. Thus, Staff's citation to Section 392.470 is not instructive.

Similarly, Section 386.250 does not give the Commission authority to alter the MCA Plan. Section 386.250 provides in pertinent part:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

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(2) To all telecommunications facilities, telecommunications services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide telecommunications service between one point and another within this state or so far as such telecommunications services are offered or provided by a telecommunications company between one point and another within this state, except that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the rates charged by a telephone cooperative for providing telecommunications service within an exchange or within a local calling scope as determined by the commission, except for exchange access service; . . .

Section 386.250 does not give the Commission authority to alter the MCA plan; rather, it is a general jurisdictional statute. As previously discussed, the terms of a specific statute override the provisions of a general statute.<sup>8</sup> Thus, Section 386.250 cannot override the specific provisions of Section 392.245.7, exempting price cap companies from the provisions of 392.240.1.

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<sup>8</sup> Robinson v. Health Midwest Development Group, 58 S.W.3d 519 (Mo. App. 2001).

Finally, Staff argues that the Commission has the authority to alter the MCA Plan pursuant to Section 392.240.2. Section 392.240.2 provides:

Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment or service of any telecommunications company is inadequate, insufficient, improper or inefficient, the commission shall determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service thereafter to be installed, to be observed and used and to fix and prescribe the same by order to be served upon every telecommunications company to be bound thereby, and thereafter it shall be the duty of every telecommunications company to which such order is directed to obey each and every such order so served upon it and to do everything necessary or proper in order to secure compliance with and observance of every such order by all its officers, agents and employees according to its true intent and meaning. Nothing contained in this chapter shall be construed as giving to the commission power to make any order, direction or requirement requiring any telecommunication company to perform any act which is unjust or unreasonable or in violation of any law of this state or of the United States not inconsistent with the provisions of this chapter.

Section 392.240.2 does not give the Commission authority to alter the MCA plan; rather, it is a general jurisdictional statute. As previously discussed, the terms of a specific statute override the provisions of a general statute.<sup>9</sup> Thus, Section 392.240.2 cannot override the specific provisions of Section 392.245.7, exempting price cap companies from the provisions of 392.240.1. This is clear from the express terms of Section 392.240.2 which limits the Commission's authority to make an order, direction or requirement--it must be consistent with the provisions of Chapter 392. For all of these reasons, the Commission does not have the authority to alter the MCA Plan at this time.

II. The Commission Does Not Have The Authority To Make Any Optional MCA Tier Mandatory.

The Commission does not have the authority to make any optional MCA Tier mandatory for the reasons set forth on pages 3 through 7 of SBC Missouri's Position Statement. For the

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<sup>9</sup> Robinson v. Health Midwest Development Group, 58 S.W.3d 519 (Mo. App. 2001).

reason set forth above, Staff's citation to the Commission's Report and Order in Case No. TC-92-306 is not instructive because that Report and Order and the Court of Appeals' subsequent decision, preceded the price cap statute that exempts price cap companies, like SBC Missouri, from the provisions contained in Section 392.240.1. Further, although the Staff contends that the Commission has the authority to make any optional MCA Tier mandatory under Section 392.200.7, which gives the Commission authority to "provide the limits which telecommunications messages shall be delivered without extra charge", the rules of statutory construction are clear--that provision must be read in connection with Section 392.200.9. Since Section 392.200.9 specifies that the Commission may not change local exchange boundaries without ILEC approval, the Commission does not have the authority to make any optional Tier of the MCA mandatory at this time. Thus, Staff's contention is without merit.

### **Conclusion**

The Commission does not have the authority to alter the MCA Plan. If the Commission is interested in the possibility of implementing Staff's MCA-2 Plan, OPC's proposed geographic expansion of the MCA Plan, or any other proposal that might be offered by the parties in this case, the Commission should order the Industry Task Force to hold additional meetings to discuss pricing proposals for such services as the parties have not fully explored this issue. This may lead to a consensus among the parties. Otherwise, the Commission should close this case.



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### **CERTIFICATE OF SERVICE**

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