

**BEFORE THE PUBLIC SERVICE COMMISSION**

**OF THE STATE OF MISSOURI**

In the matter of Southwestern Bell Telephone     )  
Company's tariff sheets designed to establish     )  
separate Residential and Business MaxiMizer     ) CASE NO. TR-95-322  
800 services and to set rate bands for each     )  
service.     )

---

---

**REPORT AND ORDER**

---

---

**Issue Date:** November 29, 1995

**Effective Date:** December 10, 1995

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

In the matter of Southwestern Bell Telephone Company's tariff sheets designed to establish separate Residential and Business MaxiMizer 800 services and to set rate bands for each service. )  
)  
) CASE NO. TR-95-322  
)  
)

APPEARANCES: **Katherine C. Swaller**, Attorney at Law, and  
**Diana J. Harter**, Attorney at Law, (oral entry),  
100 North Tucker Blvd., Room 630, St. Louis,  
Missouri 63101-1976,  
For: Southwestern Bell Telephone Company.

**Carl J. Lumley**, Attorney at Law, (oral entry),  
Curtis, Oetting, Heinz, Garrett & Soule, P.C.,  
130 South Bemiston, Suite 200, Clayton,  
Missouri 63105, and  
**Edward J. Cadieux**, Senior Attorney, 100 South Fourth  
Street, Suite 200, St. Louis, Missouri 63102,  
For: MCI Telecommunications Corporation.

**William M. Barvick**, Attorney at Law, 240 East High  
Street, Suite 202, Jefferson City, Missouri 65101,  
For: Midwest Independent Coin Payphone Association.

**Michael F. Dandino**, Senior Public Counsel, P. O.  
Box 7800, Jefferson City, Missouri 65102,  
For: Office of the Public Counsel and the Public.

**Cherlyn D. McGowan**, Assistant General Counsel,  
**Thomas Schwarz, Jr.**, Senior Counsel (oral entry),  
P. O. Box 360, Jefferson City, Missouri 65102,  
For: Staff of the Missouri Public Service Commission.

Administrative  
Law Judge: **Mark A. Grothoff**

**REPORT AND ORDER**

On April 13, 1995, Southwestern Bell Telephone Company (SWBT) filed tariff sheets designed to establish separate Residential and Business MaxiMizer 800 services and to establish rate bands for each separate service. On April 21, 1995, the Missouri Public Service Commission

(Commission) suspended the tariff sheets to September 10, 1995. Subsequently, the Commission further suspended the tariff sheets to December 10, 1995.

On May 23, 1995, the Commission granted intervention to the Midwest Independent Coin Payphone Association (MICPA) and MCI Telecommunications Corporation (MCI). On May 26, 1995, the Commission established a procedural schedule pursuant to which the parties filed prepared testimony. On July 18, 1995, a hearing was held as scheduled and briefs were subsequently filed by the parties.

#### 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:

This case continues a process begun with statutory changes enacted in 1987 allowing for pricing flexibility and reduced regulation for companies and services which are found to be subject to competition. In Case No. TO-89-56, SWBT sought classification of a wide range of services as transitionally competitive (TC). SWBT withdrew its application on April 20, 1990, but the Commission did not dismiss the case. On May 2, 1990, the Commission ordered the parties to address the costing issues prescribed in Sections 392.400.1, 2, 3, and 4, RSMo 1994. (All statutory references are to RSMo 1994 unless otherwise noted.)

On August 28, 1991, the Commission issued a Report and Order in Case No. TO-89-56 establishing requirements to comply with Section 392.400. In Case No. TO-93-116, the Commission classified several of SWBT's services as TC, including MaxiMizer 800.

In Case No. TR-94-364, SWBT filed rate bands to establish the maximum and minimum rates it can charge for each TC service. On March 28,

1995, the Commission issued a Report and Order in Case No. TR-94-364 approving rate bands for several services but rejecting the rate bands for SWBT's MaxiMizer 800 service. The Commission ruled there was insufficient evidence to support SWBT's pricing of its MaxiMizer 800 service below its Cost Accounting Procedure (CAP) cost level.

On April 13, 1995, SWBT filed tariff sheets designed to establish separate Residential and Business MaxiMizer 800 services and to establish rate bands for each separate service. The proposed tariff sheets were subsequently suspended by the Commission to December 10, 1995. SWBT's proposed rate bands and their relationship to SWBT's competitors rates can be found in the Schedules to Exhibit 12 (Lecure Rebuttal).

SWBT's proposed tariff sheets have produced the following issues for Commission consideration: 1) Are the proposed rate bands consistent with Section 392.400; 2) Has SWBT satisfied the conditions of Case No. TR-94-364; and 3) Are the proposed rate bands consistent with full and fair competition?

SWBT argues its proposed rate bands should be approved because they are above incremental unit cost; they will provide a positive net present value as determined by a Discounted Cash Flow (DCF) analysis; they are consistent with full and fair competition; and they will recover imputed costs. The Staff of the Commission (Staff) takes the position that SWBT's proposed rate bands meet the requirements for below-CAP cost pricing for TC services established by the Commission in Case No. TR-94-364.

MICPA and MCI contend that SWBT's proposed tariff sheets are contrary to Section 392.400 and inconsistent with full and fair competition. The Office of the Public Counsel (Public Counsel) agrees with MICPA and MCI. Public Counsel's position is that SWBT's proposed rate

bands are inconsistent with both Section 392.400 and the promotion of full and fair competition.

The initial inquiry concerns the minimum rate within the proposed rate bands. The minimum rate must meet the requirements of Section 392.400. In Case No. TO-89-56, the Commission found that Sections 392.400.1, 2, 3, and 4 would be satisfied by utilizing a CAP cost study to calculate the costs of a TC service. Section 392.400.5 provides:

It shall be unjust, unreasonable, and unlawful for a noncompetitive or transitionally competitive telecommunications company to offer or provide a competitive or transitionally competitive service below the cost of such service as determined by the commission if the commission finds that such offering or provision of service constitutes conduct which is not consistent with full and fair competition.

SWBT's proposed minimum rate for its MaxiMizer 800 services falls below the CAP costs for those services, but this alone does not mean SWBT's proposed rate bands violate Section 392.400.5. In Case No. TR-94-364, the Commission found that below-CAP cost pricing was not prohibited by Section 392.400. Furthermore, any interpretation of Section 392.400 as a blanket prohibition on below-CAP cost pricing would be contrary to the language of the statute and the accepted rules of statutory construction.

The Missouri Supreme Court has held that statutory words should be interpreted "in their ordinary and usual sense." *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338,340 (Mo. banc 1991); *Indian Lake Property Owners Association, Inc. v. Director of Revenue*, 813 S.W.2d 305, 308 (Mo. banc 1991). The Court noted that "there is no room for construction where words are plain and admit to but one meaning." *Abrams*, 918 S.W.2d at 340.

Another rule of statutory construction is that "all words utilized by the legislature are presumed to have separate and individual meaning." *State of Missouri v. Carouthers*. 714 S.W.2d 867, 870 (Mo. App. 1986); see also: *Smith v. Atterbury*, 270 S.W.2d 399, 404 (Mo. banc 1954). The Missouri Supreme Court has noted that "in construing a statute, significance and effect should if possible, be attributed to every word, every phrase, sentence and part thereof, and words or phrases may be stricken out only in extreme cases." *Smith*, 270 S.W.2d at 404.

The Commission finds that the words used in Section 392.400.5 are subject to only one meaning: a noncompetitive (NC) or TC company may price a competitive (C) or TC service below cost unless the Commission determines that such below-cost pricing is not consistent with the promotion of full and fair competition. In addition, the Commission finds that any interpretation of Section 392.400.5 which results in a blanket prohibition on below-cost pricing would necessitate striking the words "which is not consistent with the promotion of full and fair competition" from Section 392.400.5 in violation of accepted rules of statutory construction.

Thus, the Commission finds that Section 392.400.5 does not contain a blanket prohibition on NC or TC companies pricing TC or C services below CAP cost. Rather, the only logical interpretation of Section 392.400.5 would only prohibit such below-CAP cost pricing if the Commission found it to be inconsistent with the promotion of full and fair competition.

In Case No. TR-94-364, in addition to finding that below-CAP cost pricing was not prohibited by the statutes, the Commission rejected SWBT's proposed rate band for its MaxiMizer 800 service based upon SWBT's

failure to provide sufficient evidence that the proposed rate bands were consistent with full and fair competition. Within its Report and Order in Case No. TR-94-364, the Commission identified conditions for consideration of below-CAP cost pricing. These conditions require SWBT to produce: 1) evidence of a positive net present value from a DCF analysis, 2) evidence that the rates pass an imputation test, and 3) evidence addressing market share, number of competitors or other evidence related to competition.

The Commission finds that SWBT has satisfied the first requirement for consideration of below-CAP cost pricing. Within its Report and Order in Case No. TR-94-364, the Commission stated: "...evidence of DCF analysis and positive net value provides some support for the lower than CAP cost...". SWBT has presented evidence of a positive net present value from a DCF analysis. (See Schedule 2-1 of Exhibits 3 and 3 HC). SWBT's DCF analysis shows that the MaxiMizer 800 service currently provides a positive net present value to SWBT and will continue to provide a positive net present value to the year 2003.

SWBT has also satisfied the second requirement for consideration of below-CAP cost pricing by presenting evidence that its proposed rates pass an imputation test. (See Schedule 3 of Exhibits 10 and 10-HC). The imputation analysis provided by SWBT indicates that annual revenues generated from the proposed rate structure at the minimum rates will pass an imputation test. In addition, SWBT's evidence includes an explanation of how the imputation test was performed.

Within its Report and Order in Case No. TR-94-364, the Commission found SWBT's evidence was insufficient to show that the minimum rate passed an imputation test because there was no evidence of the results of the imputation analysis nor was it clear how the analysis was performed. SWBT's evidence on the imputation test is more extensive in this case and

includes the evidentiary items the Commission found lacking in Case No. TR-94-364. SWBT has presented sufficient evidence to show its proposed rates pass an imputation test.

The Commission further finds that SWBT has satisfied the third requirement for consideration of below-CAP cost pricing. Within its Report and Order in Case No. TR-94-364, the Commission noted "...there must be some evidence adduced which addresses market share, number of competitors, or other related evidence...". SWBT has presented evidence related to competition. (See Exhibits 6, 6-HC, 8, 8-HC, and 9). SWBT's evidence provides the number of competitors which offer services similar to SWBT's MaxiMizer 800 service (Schedule 2 of Exhibit 8-HC), compares the number of minutes of use of MaxiMizer 800 service through minutes of use of competitors services (Schedule 3 of Exhibit 8-HC), and compares proposed rates for MaxiMizer 800 service to the rates of SWBT's competitors (Schedules 4-1, 4-2, and 10 of Exhibit 6-HC). Further, in various portions of its evidence, SWBT compares its MaxiMizer 800 service as only an intraLATA service to its competitors' statewide service.

The Commission finds that SWBT has clearly satisfied the Commission's conditions for consideration of below-CAP cost pricing of its TC MaxiMizer 800 services. Accordingly, the Commission's inquiry now turns to reviewing the evidence submitted in compliance with those conditions and determining whether the rate bands as proposed are consistent with the promotion of full and fair competition.

Upon review of the evidence on the record in this case, the Commission finds that SWBT's proposed rate bands are not inconsistent with full and fair competition. Rather, the record reflects that they are likely to promote competition. The record indicates that SWBT's MaxiMizer 800 services face competition from approximately 100 interexchange carriers



offering business and residential services. The number of SWBT's competitors has tripled since its MaxiMizer 800 service was first classified in December, 1992. The record shows that SWBT's competitors control the vast majority of the 800 service market, 97.7 percent. Even though SWBT's MaxiMizer 800 service has never been priced above CAP cost, it holds only 2.3 percent of the 800 service market. It appears that even at its current below-CAP cost rates SWBT is unable to effectively compete in the 800 service market. Forcing SWBT to price its MaxiMizer 800 services above CAP cost could effectively drive SWBT out of the 800 service market.

In addition, the proposed minimum and maximum monthly charges and the proposed maximum per minute rates for the MaxiMizer 800 services do not appear to be inconsistent with the rates charged by SWBT's competitors. SWBT's proposed rates are not likely to impair full and fair competition in the 800 service market. Of SWBT's competitors, approximately 81 currently offer their services at rates below SWBT. While the proposed rates would place SWBT among the lowest priced providers in the market, some providers are already priced below the low end of SWBT's proposed bands, and the opportunity to offer low-end rates would enable SWBT to balance the effect of its intraLATA restrictions. The Commission finds that SWBT's market share is too small and its intraLATA restrictions too limiting for SWBT's proposed rates to appreciably impact the market.

Unlike the 800 services of its competitors, SWBT's MaxiMizer 800 services are currently limited to intraLATA calling while competitors' services provide a statewide calling scope. As such, SWBT's service may be perceived by customers as less valuable than competitors' 800 services. The Commission acknowledged the possibility of such a perception when it initially classified SWBT's MaxiMizer 800 service as TC in Case No.

TO-93-116. Furthermore, a study commissioned by SWBT indicates that SWBT has been losing MaxiMizer 800 customers because the calling area was too limited and the rates were too high. (See: Schedule 2 of Exhibit 4-HC and Transcript pp. 41-42, 88-91). Accordingly, it is reasonable and in furtherance of full and fair competition for SWBT to have the opportunity to price its MaxiMizer 800 services below its competitors and below-CAP cost.

The Commission has examined the relevant statutes, the Commission's Report and Order in Case No. TR-94-364, and the evidence on the record in this case, and finds that the below-CAP cost rate bands proposed by SWBT for its MaxiMizer 800 services are consistent with the promotion of full and fair competition. Thus, the Commission finds that SWBT's proposed tariff sheets should be approved.

#### Conclusions of Law

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

The Commission has jurisdiction over the issues presented in this proceeding pursuant to the provisions of Chapter 392 and, with regard to rate bands specifically, Section 392.510. Pursuant to Section 392.510, SWBT may file proposed rate bands for services classified as TC. The Commission has previously classified SWBT's MaxiMizer 800 services as TC and in this proceeding SWBT is proposing rate bands for these services.

Section 392.400 establishes the statutory requirements for pricing rates for TC services. Specifically, Section 392.400.5 requires pricing at costs established by the Commission unless the Commission finds the below-cost pricing is consistent with full and fair competition.

In Case No. TO-89-56, the Commission established the CAP method for determining costs for TC services. In this case, SWBT has filed proposed rate bands for its MaxiMizer 800 services whose minimum rates are below the CAP costs for those services. The Commission has found that SWBT's proposed below-CAP cost pricing for its MaxiMizer 800 services is consistent with full and fair competition. Thus, the Commission concludes that the tariff sheets filed by SWBT should be approved.

**IT IS THEREFORE ORDERED:**

1. That the following tariff sheets filed by Southwestern Bell Telephone Company are hereby approved for service on and after December 10, 1995:

P.S.C. MO. No. 27

18th Revised Sheet No. 3 Canceling 17th Revised Sheet No. 3;  
5th Revised Sheet No. 9.02 Canceling 4th Revised Sheet No. 9.02;  
4th Revised Sheet No. 9.03 Canceling 3rd Revised Sheet No. 9.03;  
3rd Revised Sheet No. 9.04 Canceling 2nd Revised Sheet No. 9.04;  
3rd Revised Sheet No. 14.01 Canceling 2nd Revised Sheet No. 14.01;  
Original Sheet No. 14.0101;  
First Revised Sheet No. 14.02 Canceling Original Sheet No. 14.02;  
Original Sheet No. 14.03;  
Original Sheet No. 14.0301;  
Original Sheet No. 14.04;  
Original Sheet No. 14.05.

2. That Southwestern Bell Telephone Company shall submit to the Commission rates to be charged within the rate bands approved in Ordered Paragraph 1, including the effective date of the new rate, prior to the date the new rate will become effective.

3. That this Report and Order shall become effective on  
December 10, 1995.

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch".

David L. Rauch  
Executive Secretary

(S E A L)

McClure, Kincheloe, Crumpton,  
and Drainer, CC., Concur.  
Mueller, Chm., Absent.

Dated at Jefferson City, Missouri,  
on this 29th day of November, 1995.