

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

In the Matter of the Tariff Filings of Sprint)	
Missouri, Inc. d/b/a Sprint to modify Rates in)	Case No. IT-2004-0134 et al.
Accordance with Sprint's Price Cap)	Tariff No. JI-2004-0272 and
Regulation, Pursuant to Section 392.245,)	JI-2004-0273
RSMo 2000)	

**SPRINT'S RESPONSE TO
OFFICE OF PUBLIC COUNSEL'S MOTION FOR REHEARING**

COMES NOW Sprint Missouri, Inc. ("Sprint"), and hereby files its response to the Office of Public Counsel's ("OPC's") Motion for Rehearing ("OPC's Motion"). In response, Sprint states as follows:

GENERAL RESPONSE

1. This case involves the fourth and final revenue neutral rate rebalancing authorized for Price Cap Companies under Section 392.245 RSMo. The rebalances allow cost recovery to move from exchange access service to basic local service in a manner that is revenue neutral to the company. Further, Section 392.245, RSMo requires that companies receiving reduced exchange access rates as a result of the rebalancing reduce rates for intrastate toll services. The first of the four rate rebalances (the 2000 rate rebalance) was allowed without review of cost,¹ whereas the remaining three rebalances could only occur if the Commission made a determination that an ILEC's access rates were above costs and its basic local service rates were below costs. Prior to the second rebalancing, Sprint filed verified total service long run incremental cost studies that

¹ The first rate rebalance did not require a demonstration that access rates were above costs and basic local service rates were below costs; however, statute did require a mathematical comparison between interstate and intrastate access rates, including carrier common line, as well as a 10% reduction in Sprint's instate toll rates.

demonstrated that it complied with the statutory requirements under which it would be allowed to conduct the remaining three rate rebalances. Staff extensively reviewed the cost studies and other information and filed verified recommendations to approve Sprint second rate rebalancing. The Commission approved Sprint's second revenue neutral rate rebalancing in Case No TR-2001-0251. This case was appealed to the Circuit Court of Cole County where it was affirmed. This case was further appealed to the Court of Appeals, Western District where, in a non-final decision, the Court remanded the case for more detailed findings reflecting the basis of the Commission's decision (the "Appeal Case").² During the appeals, the Commission's order approving the tariff was not stayed. While the appeal of the second rebalancing was pending, the Commission approved Sprint's third revenue neutral rate rebalancing in Case No. IT-2003-0166. This case is currently on appeal in the Circuit Court of Cole County. The decision in IT-2003-0166 was not stayed during the appeal. The Commission's earlier approval of the fourth revenue neutral rebalances in this case represents the last cost recovery shift authorized for Sprint in the interdependent and implemented statutory scheme provided by the legislators in Section 392.245, RSMo.

2. OPC's Motion fails to provide sufficient grounds to rehear the Commission's decision in this case approving tariffs implementing Sprint's fourth and final revenue neutral rate rebalancing. While Sprint acknowledges the Appeal Case in which the Court remanded Case TR-2001-0251 for further proceeding to provide sufficient detailed findings to permit the court to conduct a meaningful review, such a remand is not final and does not establish that Sprint's tariffs should not have been approved in this case.

² Case No. WD62016.

2. First, the majority of OPC's arguments are the same arguments that were made and rejected by the Commission in this case, as well as in previous cases, and by the Court of Appeals. The Appeal Case soundly rejected OPC's argument that it is entitled to a hearing and all the rights attended to the contested case. On this point, the Court of Appeals ruled:

As stated above, there is no statutory requirement in Section 392.245.9 RSMo, that the Commission conduct a hearing with regard to a proposed rate rebalancing. Nor are we persuaded, especially in light of the Missouri Supreme Court's opinion in *State ex rel. Jackson County v. Public Service Commission*, 523 S.W. 2d 20 (Mo banc 1975), that there is a property interest at stake that requires procedural due process protections. ... Given the nature of the Commission's determinations, we do not find that it abused its discretion in denying Public Counsel's hearing request.

The Court of Appeals ruling was based on two Missouri Supreme Court cases: *State ex rel. Jackson County v. Public Service Comm'n*, 523 S.W. 2d 20, 31 (Mo banc 1975) (holding that there is no protected property interest in a certain rate) and *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W. 2d 41, 49 (Mo. Banc 1975) (holding that the decision to hold a hearing in the absence of statutory direction is a matter for the sound discretion of the Commission). Therefore, the denial of OPC's claim to a hearing was based on well established law.

Despite having lost this argument in every forum where it has been raised, OPC continues to raise the argument throughout its motion. Almost all of the points raised by OPC under its 6th paragraph, as well as the points raised in paragraphs 7, 11, 12, 12, 14, 15, 17 and 18 are premised on OPC's right to a hearing and/or the Commission's abuse of discretion in not granting a hearing. Therefore, while Sprint will specifically address the

paragraphs of OPC's Motion, to the extent OPC's arguments rely on the need for a hearing as basis to grant its motion, the motion should be denied.

3. Second, the only substantive issue decided by the Court of Appeals in its non-final decision, was OPC's claim to be entitled to a hearing. The Court of Appeals was unable to render judgment on the other points raised by OPC because it was "impaired by the conclusory nature of the Commission's findings." Based on this, the Court remanded the case for further proceedings to develop adequate findings of facts and conclusions of law. Therefore, nothing in the Appeal Case in any way sanctioned any other argument made by OPC in front of the Commission earlier and repeated in OPC's Motion, nor did the Appeal Case in any way challenge the Commission's ability to rely on the verified cost studies and verified analysis submitted by Sprint and Staff in Case No TR-2001-0251. The Appeal Case merely instructed the Commission to issue sufficient findings of facts and conclusions of law. If TR-2001-0251 is ultimately remanded to the Commission pursuant to the Appeal Case, the in excess of five hundred page record contains verified facts that completely and strongly support the Commission's decision.

SPECIFIC RESPONSES

4. For specific response to each paragraph in OPC's Motion, Sprint states as follows:

Paragraph 1: In this paragraph, OPC argues that Section 386.130, RSMo requires that at last three members of the Commission approve any exercise of Commission authority. OPC is incorrect. First, the very language of Section 386.130 RSMo, explicitly states that a "majority of the commissioners shall

constitute a quorum for the...exercise of any power of the commission or the performance of any duty." That is exactly what occurred in this case. Three Commissioners convened and exercised the authority of the Commission. Further, the United States Supreme Court has ruled that "in the absence of a contrary statutory provision, a majority of the quorum constitutes a simple majority of a collective body [and] is empowered to act for the body." *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179, 183 (1967). Therefore, OPC's argument on this point does not provide a ground to grant rehearing.

Paragraph 2: In this paragraph, OPC argues that the order in this case is not supported by adequate findings of facts and conclusion of law. For the purposes of this case, OPC is incorrect. This case involves approval of the last of the four rebalances authorized under Section 392.245.9, RSMo. Under the statute, there is no requirement to review cost studies and make factual findings about those studies in connection with the approval of the last rate rebalancing. This rebalancing is authorized as a result of the Commission's determination made prior to Sprint's second rebalance that occurred in December of 2001 in Case No TR-2001-251.

The relevant portion of Section 392.245.9 provides:

If the commission determines that the company's monthly maximum allowable average statewide prices for basic local telecommunications service after adjustment pursuant to this subsection will be equal to or less than the long run incremental cost, as defined in section 386.020, RSMo, of providing basic local telecommunications service and that the company's intrastate access rates after adjustment pursuant to this subsection will exceed the long run incremental cost, as defined in section 386.020, RSMo, of providing intrastate access services, the commission shall allow the company to offset the revenue loss resulting from the remaining three-quarters of the total needed to bring

that company's intrastate access rates to one hundred fifty percent of the interstate level by increasing the company's monthly maximum allowable prices applicable to basic local telecommunications service by an amount not to exceed one dollar fifty cents on each of the next three anniversary dates thereafter.

In Case No. TR-2001-0251, the Commission determined that:

The cost studies filed by Sprint and Staff show that the Public Counsel is simply wrong in its assertion that the Commission has failed to determine that the proposed tariff sheets comply with the law. The Commission Staff reviewed ample cost material provided by Sprint and performed a lengthy analysis of the cost data...Staff's analysis shows that the proposed rebalancing is compliant with Section 392.245; that the mathematical test set by the statute is met. Staff recommends that the Commission approve the proposed tariff sheets. Sprint's cost study, while highly confidential, also show that the statutory test is met.

Therefore, in this case, the Commission correctly referenced its earlier determination in Case No TR-2001-0251 and allowed last rate rebalancing to be effective on the third anniversary date after approval in TR-2001-0251. While the Commission may have to issue more detailed findings supporting its determination in Case No. TR-2001-251 to comply with the Appeal Case if and when it becomes final, the record in that case fully supports the Commission's determinations.

Paragraph 3: In this paragraph, OPC argues Sprint was required in this case to file its supporting cost studies and/or result of the supporting cost studies in this case before the tariffs could be approved. OPC is wrong. Pursuant to the relevant statute, the determination made in Case TR-2001-0251 authorized the rebalancing sought in this case. As the Commission ruled in TR-2001-0251, the verified cost studies reflected that Sprint complied with the mathematical formula provided in the Statute. The cost studies demonstrated the Sprint's cost of basic

local residential and business service were more than sufficiently above the price of basic residential and business local service to allow for three more rate rebalancing of \$1.50 each to be placed on basic local services and maintain a price that is equal or less than the long run incremental cost of Sprint's basic local residential and business service. Further, the cost studies demonstrated that Sprint's cost of intrastate access are more than sufficiently below the price of intrastate access service to allow for three more rate rebalancing of \$1.50 each to be placed on basic local service and maintain a price for access that is equal or more than the long run incremental cost of Sprint's intrastate service. The Court's directive, if it becomes final, to issue more detailed findings of facts and conclusions of law does not undermine the substance of what supported the Commission's determinations in Case No. TR-2001-0251.

Paragraph 4: In this paragraph, OPC argues that because a generic investigation into the cost of access services in the CLEC Access Case (Case No TR-2001-065), an unrelated case that involved different cost studies that produced different results, this Commission must treat all issues relating to cost studies as a contested issue. First, as noted above, the Appeal Case rejected this argument. Second, the CLEC Access Case is clearly distinguishable from this case. In the CLEC Access Case, the major issue was what cost methodology was appropriate for identifying the cost of access. Many parties advocated different methodologies which resulted in different cost studies and results. In this case, the statute answers the question of which cost methodology must be used by the Commission. Section 392.245.9 *specifically requires* the Commission to use long

run incremental cost. Further, Section 386.020(32) clearly defines what long run incremental costs are. Therefore, there is no open issue regarding the applicable cost methodology in this case.

However, it is interesting to note OPC's position in the CLEC Access Case with respect to the cost methodology required in this case. In the CLEC Access case, OPC acknowledged that a proper long run incremental cost (LRIC) study, such as a Total Service LRIC ("TSLRIC") excludes loop cost unless it is a direct cost of providing the service. As stated by OPC: **TSLRIC measures the costs that a company incurs to provide access service based solely on the direct costs of providing the service without the cost of any shared, joint or common facilities and expenses.** (OPC's Initial Brief at p. 6). Given that OPC defined the loop as shared joint and common facilities in that case,³ it is clear that OPC cannot argue that portions of the loop should have been allocated to access service in the required LRIC studies. Further, as it is undeniable that the loop is a direct cost of providing basic local service, it is hard to understand how OPC could raise loop allocations issues for the studies capturing the LRIC cost of basic service given its stated understanding of TSLRIC cost.

Therefore, while OPC would like to draw a parallel between the issues raised in the CLEC Access Case and this case, the governing statute prevents such a parallel. Further, any review of the CLEC Access Case only demonstrates that OPC does not have issues with the manner in which Sprint's TSLRIC cost studies are done in Case No TR-2001-0251. Therefore, OPC's citation to the CLEC Access Case does not provide a basis for rehearing in this case.

³ Dunkel, Surrebuttal at pp. 11-12.

Paragraph 5: See response to Paragraph 3 above.

Paragraph 6: In this paragraph, OPC again argues that it is entitled to a hearing and all attendant rights that come with a hearing, including establishing burdens of proof, the right to cross exam witnesses and to measure the admissibility of evidence under the standards of a contested case. As noted above, the Court of Appeals has rejected OPC's argument and held that there was no statutory or due process right to a hearing in this case. As such it is a non-contested case.

As Sprint argued before, OPC's mere request to hold a contested case does not magically turn a case where the statute only requires the Commission to conduct an investigation into a contested case. Therefore, consistent with the Court of Appeals decision, the Commission's decision to not conduct a contested case does not render the decision unlawful. *See also State ex rel Renner v. Noel*, 140 S.W.2d 57, 59 (Mo. 1940).

OPC also attacks the affidavits filed by Staff and Sprint as non-compliant with Section 536.070.11 RSMo 2000. However, as mentioned above, Section 536.070.11 is applicable to contested cases as stated in the first sentence of the section. Further, Staff's affidavits were submitted by two members whose primary job responsibilities regularly included reviewing companies' cost studies and who participated in meetings with Sprint to discuss Sprint's cost studies. Finally, Sprint's cost studies were verified by Sprint's Director of Network Costing, someone who *participated in creating the cost studies*, had *personal knowledge* of the matters in each cost study, and swore that the cost studies were

true and accurate. This knowledge of Sprint's cost studies reflected in the filed affidavits **far exceeds** what was required under Section 536.070.11 RSMo 2000.

Lastly, OPC alleges that among the concerns that it would have raised at a hearing was whether the Sprint cost studies were legally insufficient because Sprint allocated the entire intrastate jurisdictional local network loop cost to basic service in violation of 47 U.S.C. 254(k). This argument is without merit. The Federal Communications Commission ("FCC") discredited these arguments in the CALLs Order.⁴ In its CALLs Order, the FCC reduced, and in most instances, eliminated implicit subsidies for the local loop among end-users by permitting loop costs to be recovered through a flat rate charge assessed on the local basic service customer rather than through the traffic sensitive per minute charge assessed on the long distance customer.⁵ Further, opponents of this cost recovery structure argued that the CALLs proposal violated Section 254(k) for similar reasons as OPC and the FCC rejected those arguments.⁶ The FCC stated:

We find that section 254(k) is not implicated by our action today. Section 254(k) is directed at the allocation of costs between competitive and non-competitive services, both regulated and non-regulated, and prohibits subsidization of competitive services by non-competitive services. The SLC is a method of recovering loop costs; not an allocation of those costs between supported and unsupported services.

CALLs Order, ¶91.

⁴ *In the Matter of Access Charge Reform, etc.*, CC Docket No. 96-262, FCC 97-158, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket NO. 96-45, FCC 00-193 (Released May 31, 2000) ("CALLs Order").

⁵ CALLs Order, ¶29, ¶31.

⁶ CALLs Order, ¶¶90-99.

The exclusion of loop costs from the long run incremental costs of providing switched access is not prohibited because this case does not concern the allocation of costs between competitive and non-competitive services. Accordingly, Section 254(k) is not implicated in this matter. Therefore, nothing in Paragraph 6 provides a basis to rehear the Commission's decision in this case.

Paragraph 7: Again, in this paragraph, OPC argues that it was entitled to a hearing. As noted above, this argument was rejected by the Court of Appeals.

Paragraph 8: In this paragraph, OPC notes that it raised various legal challenges to the Commission's order in TR-2001-0251 and IT-2003-0166 and based on those legal challenges, this case should be reheard. OPC is wrong. Each one of the legal challenges raised by OPC in TR-2001-0251 and IT-2003-0166 has been rejected by the Commission in those cases, as well as this case. Furthermore, the Court of Appeals rejected the premise on which the majority of those arguments are based -- the right to a hearing. On the remaining arguments, the Court of Appeals has not judged the merits as it ruled it did not have sufficient findings of facts and conclusions of law in front of it. Therefore, this paragraph does not present any arguments upon which the Commission should rehear this case.

Paragraph 9: In this paragraph, OPC highlights a footnote from the Appeal Case in which the court noted ". . . This Court is particularly concerned by the lack of finding that the methodology employed by Sprint was appropriate." What OPC fails to mention is that the cost methodology employed by Sprint was to methodology *required by the applicable statutes*.

As mentioned earlier, Section 392.245.9, RSMo specifically requires that the Commission evaluate the long run incremental cost of basic local telecommunications and access services. Section 386.020(32) defines long run incremental cost as:

(32) **"Long run incremental cost,"** the change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology, *and excluding any costs that, in the long run, are not brought into existence as a direct result of the increment of output.* The relevant increment of output shall be the level of output necessary to satisfy total current demand levels for the service in question, or, for the new services, demand levels that can be demonstrably anticipated. (Emphasis added)

Section 386.020(32) specifically excludes from the Commission's consideration any cost not brought into existence as a direct result of the increment of output subject to the cost studies. Therefore, in considering the long run incremental cost of basic local telecommunications service, a service that the Missouri statutes define to require two switched voice service within a local calling scope, it is consistent with the statutory definition of long run incremental cost to include the cost of the basic loop. Further, in considering the long run incremental cost of access services, which is defined by statute to offer entry and departure for the local telecommunications network, it is consistent with the statutory definition of long run incremental cost to exclude the cost of the local loop. If Sprint did not offer access service, the cost of the loop would not go away. Again, in the CLEC Access Case, OPC agreed that no portion of the loop is allocated to access service when performing a TSLRIC cost study.

Based on the above, the concern noted by the Court of Appeals is addressed in the statute under which the Commission rendered its decision in this

case. Only one methodology can be used – a LRIC methodology. Both Sprint in performing its studies and Staff in reviewing the studies were aware of the statutory requirement. If the Commission is required to issue more detailed findings of facts and conclusions of law reflecting this, the concern raised by the Court of Appeals will be addressed. Therefore, Paragraph 9 does not provide the basis to rehear this case.


Paragraphs 10-19: Each one of these paragraphs state in a slightly different language that OPC was entitled to a hearing before the Commission approved the cost justification in Case No TR-2001-0251. As noted many times, this argument was rejected by the Appeals Case.

CONCLUSION

Based on the above stated reasons, Sprint respectfully urges the Commission to deny OPC's motion for rehearing and conclude that Sprint has satisfied all its statutory obligations in approving Sprint's requested tariff changes.

Respectfully submitted,

SPRINT



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on each of the following parties by first-class/electronic/facsimile mail, this 10th day of November, 2003.

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