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December 10, 2001

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
Jefferson City, Missouri 65101

FILED<sup>3</sup>

DEC 10 2001

Missouri Public  
Service Commission

Re: Case No. TO-2002-185

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and eight copies of Southwestern Bell Telephone Company's, Southwestern Bell Texas, Inc.'s, and Southwestern Bell Telephone, L.P.'s d/b/a Southwestern Bell Telephone Company's Response to Order Granting Intervention and Directing Filing.

Please stamp "Filed" on the extra copy and return it to Southwestern Bell Telephone Company.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Mimi B. MacDonald /m

Mimi B. MacDonald

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>  
DEC 10 2001

In the Matter of the Application of )  
Southwestern Bell Telephone Company )  
To Transfer Property and Ownership of )  
Stock Pursuant to Section 392.300, R.S.Mo. )

Case No. TO-2002-185

Missouri Public  
Service Commission

**SOUTHWESTERN BELL TELEPHONE COMPANY'S, SOUTHWESTERN BELL  
TEXAS, INC.'S, AND SOUTHWESTERN BELL TELEPHONE, L.P.'S, d/b/a  
SOUTHWESTERN BELL TELEPHONE COMPANY'S RESPONSE TO  
ORDER GRANTING INTERVENTION AND DIRECTING FILING**

Comes now Southwestern Bell Telephone Company ("SWBT"), Southwestern Bell Texas, Inc. ("SWBT Texas"), and Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company ("SWBT, L.P.") (collectively referred to as "Joint Applicants"), and for their Response to Order Granting Intervention and Directing Filing, state as follows:

**Executive Summary**

Joint Applicants respectfully request the Missouri Public Service Commission ("the Commission") to consider and grant their Joint Application for Order Permitting Corporate Restructuring Pursuant to Section 392.300, R.S.Mo.2000, 4 CSR 240-2.060(1) and 4 CSR 240-2.060(8) to convert SWBT from a Missouri corporation to a Texas limited partnership by December 20, 2001. Approval by that date will permit Joint Applicants to fully realize the anticipated tax savings from the restructuring. The proposed conversion will have no effect on the tax revenues of the State of Missouri or its political subdivisions in which SWBT's structures, facilities, or equipment are located nor will the restructuring affect the ultimate owner of SWBT, which will continue to be owned by SBC Communications Inc. ("SBC"). Moreover, this conversion is not detrimental to the public interest and will be transparent to SWBT's Missouri customers. The proposed conversion will lead to tax savings in Texas and was approved by the Texas Public Utility Commission on November 28, 2001.

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Joint Applicants have responded to all arguments of the parties in their Reply to: (1) Application to Intervene, Response and Request for Hearing of the Missouri Independent Telephone Company Group; (2) Office of Public Counsel's Response and Request for Hearing; (3) Application to Intervene, Response and Request for Hearing of the Small Telephone Company Group; and (4) Staff's Response to Application.

Further, Joint Applicants have responded to the Commission's three questions in its Order Granting Intervention and Directing Filing herein. In summary, if SWBT is allowed to reorganize as a telephone limited partnership, the Commission's oversight will not be any different than if it had remained a Missouri corporation. The Commission will have general supervision over SWBT, L.P., its telecommunications facilities, and its services under Section 386.250(2). Further, the Commission will have general supervision over SWBT, L.P.'s telephone lines under Section 386.320.1. The Commission will have the power to inspect SWBT, L.P.'s facilities under Section 386.320.2. Additionally, the Commission will have the power to examine SWBT, L.P.'s books, contracts, records, documents and papers under Section 386.320.3. Further, the Commission will have oversight over transfers under Section 392.300. The Commission will retain all of its power of oversight under Chapters 386 and 392, including the power to enforce all applicable quality of service rules.

Second, if Southwestern Bell is allowed to reorganize as a Texas limited partnership, the franchise and charter that the State granted to SWBT's predecessors will belong to SWBT, L.P. after the reorganization. This is because the legal significance of the franchise and charter that the State granted to SWBT's predecessors is that it created a valid, binding, and enforceable contract between the State of Missouri and SWBT. Moreover, these contract rights are assignable to SWBT Texas and, in turn, to SWBT, L.P.

Third and finally, there are no questions of fact that would require a hearing in this matter. Nevertheless, Joint Applicants stand ready to supplement any response if the Commission believes it necessary and appropriate. Further, Joint Applicants stand ready to appear before the Commission and answer any questions that the Commission may have regarding the proposed restructuring.

Joint Applicants again respectfully request the Commission to issue its decision on or before December 20 in order to permit Joint Applicants to realize the savings anticipated by the proposed restructure. As previously indicated, the only other state where approval was required, Texas, has already approved the restructure, and Joint Applicants stand ready to complete the process immediately upon approval by this Commission.

#### **Procedural History**

On October 12, 2001, Joint Applicants filed their Joint Application. That same day, Joint Applicants filed their Motion for Expedited Treatment regarding the Joint Application, requesting that the Commission grant their Joint Application on or before December 20, 2001.

On October 17, 2001, the Commission issued its Notice Setting Time for Response, ordering any party desiring to respond to the Joint Application to do so no later than October 29, 2001. On October 29, 2001: (1) the Missouri Independent Telephone Group ("MITG") filed its Application to Intervene, Response, and Request for Hearing ("MITG's Response"); (2) the Office of Public Counsel ("OPC") filed its Response and Request for Hearing ("OPC's Response"); (3) the Small Telephone Company Group ("STCG") filed its Application to Intervene, Response and Request for Hearing ("STCG's Response"); and (4) the Staff of the Missouri Public Service Commission ("Staff") filed its Response to Application ("Staff's Response"). In Staff's Response, Staff requested until November 15, 2001, to file its

recommendation regarding the Joint Application. On November 8, 2001, Joint Applicants filed their Reply to: (1) MITG's Response; (2) OPC's Response; (3) STCG's Response; and (4) Staff's Response ("Joint Applicants' Reply to Responses"). On November 15, 2001, Staff filed its Recommendation, recommending that the Commission approve the Joint Application. On November 19, 2001, MITG filed its Motion for Extension of Time. In its Motion, MITG requested until December 3, 2001, to file a Response to Joint Applicants' Reply to Responses.

On November 27, 2001, the Commission issued its Order Granting Intervention and Directing Filing ("Order Directing Filing"). In its Order Directing Filing, the Commission granted intervention to MITG and STCG. The Commission also ordered all parties to file briefs that address all the issues raised by the Joint Application and the responses (and any other issues relevant to the Commission's determination). The Commission specifically requested the parties to address three issues: (1) if Southwestern Bell is allowed to reorganize as a Texas limited partnership, will the Commission's oversight over it be any different than if it had remained a Missouri corporation (the Commission requested the parties to pay particular attention to the Commission's oversight over future transfers of property); (2) if Southwestern Bell is allowed to reorganize as a Texas limited partnership, what will become of the franchise and charter granted to the Missouri corporation; and (3) what questions of fact (distinct from legal questions) are likely to be in dispute and require a hearing for resolution.

On November 29, 2001, Joint Applicants filed their Reply to MITG's Motion for Extension of Time.

## Argument

I. If Southwestern Bell Is Allowed To Reorganize As A Telephone Limited Partnership, Will The Commission's Oversight Over It Be Any Different Than If It Had Remained A Missouri Corporation (The Parties Should Pay Particular Attention To The Commission's Oversight Over Future Transfers of Property)?

If Southwestern Bell is allowed to reorganize as a telephone limited partnership, the Commission's oversight over it will not be any different than if it had remained a Missouri corporation. This position is based on review of the relevant statutes.

In Section 386.250(2), the Missouri legislature granted the Commission jurisdiction over telecommunications facilities, telecommunications services, and telecommunications companies.<sup>1</sup> Specifically, the Commission's jurisdiction, supervision, powers and duties extend:

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; . . .

Further, in Section 386.320, the Missouri legislature granted the Commission general supervision over all telephone corporations and telephone lines, as well as the manner in which their lines and property are owned, leased, controlled or operated. Specifically, Section 386.320 provides:

1. The Commission shall have the general supervision of all telegraph corporations or telephone corporations, and telegraph and telephone lines, as herein defined, and shall have power to and shall examine the same and keep

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<sup>1</sup> Telecommunications company is defined as: "telephone corporations as that term is used in the statutes of this state and 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 facilities used to provide telecommunications service for hire, sale or resale within this state." Section 386.020(51).

informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements.

2. The commission shall have the power, either through its members or responsible engineers or inspectors or employees duly authorized by it, to enter in and upon and to inspect the property, equipment, buildings, plants, factories, powerhouses, offices, apparatus, machines, devices and lines of any such corporation or persons.

3. The commission and each commissioner shall have the power to examine all books, contracts, records, documents and papers of any person or corporation subject to its supervision, and by subpoena duces tecum to compel production thereof. In lieu of requiring production of originals by subpoena duces tecum, the commission or any commissioner may require sworn copies of any such books, records, documents, contracts and papers or parts thereof to be filed with it.

Section 382.320, RSMo. 2000.

In addition to these grants of general supervision, the Missouri legislature also granted the Commission specific oversight over telecommunications companies' transfers of property.

Specifically, Section 392.300 provides:

1. No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. Any person seeking any order under this subsection authorizing the sale, assignment, lease,

transfer, merger, consolidation, or other disposition, direct or indirect, of any telecommunications company shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the companies involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. Nothing in this subsection contained shall be construed to prevent the sale, lease, or other disposition by any telecommunications company of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such company shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

2. Except where stock shall be transferred or held for the purpose of collateral security, no stock corporation, domestic or foreign, shall, without the consent of the commission, purchase or acquire, take or hold more than ten percent of the total capital stock issued by any telecommunications company organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any telecommunications company may, without the consent of the commission, acquire and hold the remainder of the capital stock of such telecommunications company, or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of such stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such telecommunications company, or shall be recognized as effective for any purpose.

Section 392.300, RSMo. 2000.

If Southwestern Bell is allowed to reorganize as a telephone limited partnership, the Commission's oversight over SWBT, L.P. under Section 386.250(2), 386.320, and 392.300 will not be any different than if SWBT had remained a Missouri corporation. In other words, the



Commission will have jurisdiction over SWBT, L.P., its telecommunications facilities, and its services under Section 386.250(2) in the same manner it has over SWBT today. Further, the Commission will have general supervision over SWBT, L.P.'s telephone lines under Section 386.320.1. The commission will have the power to inspect SWBT, L.P.'s facilities under Section 386.320.2. Additionally, the Commission will have the power to examine SWBT, L.P.'s books, contracts, records, documents and papers under Section 386.320.3. The Commission will retain all of its powers under Chapters 386 and 392, including the power to ensure compliance with its quality of service rules.

It is not entirely clear whether, as a technical matter, the Commission's authority under Section 392.300.2 would be different, but as a practical matter the Commission's authority would be the same. SWBT today has but one share of stock, and it is held by SBC. If SBC sought to transfer its interest in SWBT under the current structure, that transfer would almost certainly be through a sale of SWBT's assets or a merger or other disposition that would require approval under Section 392.300.1. The same will be true after the proposed restructure is complete—any transfer of the interest in SWBT, L.P. would almost certainly be through a sale of assets or other disposition that would come within the purview of Section 392.300.1. And in any event, the Commission would retain all of its authority over the services and facilities of the telecommunications company it regulates.

For all these reasons, Joint Applicants do not believe that the Commission's oversight over SWBT, L.P. will be any different than if it had remained a Missouri corporation. The Commission retains its full power to ensure that SWBT, L.P. continues to comply with all requirements imposed pursuant to Chapters 386 and 392.

II. If Southwestern Bell Is Allowed To Reorganize As A Texas Limited Partnership, What Will Become Of The Franchise And Charter Granted To The Missouri Corporation?

If Southwestern Bell is allowed to reorganize as a Texas limited partnership, the franchise and charter that the State granted to SWBT's predecessors will belong to SWBT, L.P. after the reorganization. As Joint Applicants explained in their Reply to Responses, SWBT's predecessor corporations were chartered to provide service as a result of incorporation as telephone and telegraph companies pursuant to Article V, Chapter 21 of the Revised Statutes of Missouri of 1879. (See Joint Applicants' Reply to Responses, paragraphs 7-11). This franchise grant preceded the establishment of the Commission pursuant to legislation passed in 1913. The legal significance of this franchise is that it created a valid, binding, and enforceable contract between the State of Missouri and SWBT's predecessors. (See Joint Applicants' Reply to Responses, paragraphs 12-20). The terms of the contract were and are governed by Article V. (See Joint Applicants' Reply to Responses, paragraph 20).

Moreover, the rights granted under this state-wide franchise are perpetual. (See State on Inf. Of McKittrick ex. rel. City of Trenton v. Missouri Public Service Corp., 174 S.W.2d 871 (Mo. 1943); see also Joint Applicants' Reply to Responses, paragraph 21). In McKittrick, the Missouri Supreme Court specifically held that if there is no limitation in the general law of the state as to the duration of franchises for public utilities, it is perpetual.

SWBT's perpetual franchise rights are vested property rights and contract rights that cannot be impaired or taken and are constitutionally protected by Article I, Sections 13 and 26 of the Missouri Constitution and Article I, Section 10 and the Fourteenth Amendment of the United States Constitution. (See e.g. Sunset Tel. & Tel. Co. v. City of Pomona, 172 F. 829, 837 (9<sup>th</sup> Cir. 1909); see also Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 120 (Ca. 1911); see also Iowa Tel. Co. v. City of Keokuk, 226 F. 82, 90 (S.D. Iowa 1915); see also City of Lansing v.

Mich. Power Co., 150 N.W. 250, 253 (Mich. 1914); see also Mountain States Tel. and Tel. Co. v. Town of Belen, 244 P.2d 1112, 1121 (N.M. 1952); see also Joint Applicants' Reply to Responses, paragraph 22).

The Commission lacks the power to alter the contract rights granted by the State of Missouri in 1879 to its predecessor corporations because those contract rights are assignable. (See State ex rel. Wabash Ry. Co. v. Roach, 184 S.W. 969 (Mo. 1916); see also Lawrence v. Hennessy, 65 S.W. 717, 718 (Mo. 1901) (recognizing the valid assignment of a franchise from Southwestern Light & Fuel Company to Acme Gas Company—the former company conveyed not only its tangible property, but also, expressly, its franchise in its deed of trust which covered all of its property, “with all the rights, privileges, and appurtenances thereunto belonging”); see also MCI Metro Access Transmission Services, Inc. v. City of St. Louis, 941 S.W.2d 634, 642-643 (Mo. App. 1997) (in the absence of any applicable statutory or constitutional provision forbidding assignment, it is generally held that assignments are permissible); see also State ex. rel. City of St. Louis v. Laclede Gas-Light Co., 14 S.W. 974 (Mo. 1890) (holding that a contract that was entered into with the St. Louis Gas-Light Company contemplates that all franchise rights granted to the original company would be “granted to another company whose longer lease of corporate life would enable it to perform the contract and fulfill the various conditions”); see also Joint Applicants' Reply to Responses, paragraph 23).

In State ex rel. Wabash Ry. Co. v. Roach, 184 S.W. 969 (Mo. 1916), a railroad Company was incorporated in the 1860s under a Missouri statute which provided that railroads incorporated in Missouri were entitled to certain rights and privileges. Id. at 971. Pursuant to this incorporation and the railroad's subsequent construction and operation of a railroad within Missouri, the State of Missouri granted to the railroad, “its successors and assigns, the franchises,

rights, and privileges to locate, construct, own, maintain and operate a railroad as a common carrier for hire.” Id. The court held that this incorporation granted the railroad a franchise/charter to do business as a railroad within Missouri. Id. at 972-973. Following numerous mortgages, foreclosure sales, consolidations and sales, the franchise/charter of the Missouri railroad corporation was ultimately transferred to an Indiana corporation. Id. at 972. The court expressly held that the transfer of this charter (which had originated from the incorporation of the company under the Missouri incorporation statutes) to the Indiana company was proper, and effectively transferred the rights in the charter. Id. at 973. In reaching this holding, the court explained that the franchises of a corporation can be divided into two categories: (1) the right of being a body corporate; and (2) all other grants of power or privileges. Id. at 972. The court held that a corporation’s rights in the first class are not assignable, but its rights in the second class of franchises are freely transferable and assignable. Id. The court placed the railroad’s right to do business as a railway company in Missouri (which has originated from its incorporation) into the second category of freely assignable rights. Id. The Court explained: “[t]his franchise or right was subject to sale or mortgage along with the physical company.” Id. The court, therefore, held that the Indiana corporation was the “legal owner of [the] charter rights” originally granted to the Missouri corporation by the State of Missouri. Id. at 973.

Like the railroad in Wabash Railway, SWBT’s predecessors were incorporated under a Missouri incorporation statute that granted certain rights and privileges. These rights and privileges are franchise/charter rights that are vested property interests now belonging to SWBT. Like the railroad in Wabash Railway, SWBT’s franchise/charter is assignable to a non-Missouri corporate entity, SWBT Texas, even though the franchise/charter originated from incorporation

of a Missouri corporation. Since SWBT's contract rights are assignable, it can assign its state-wide perpetual franchise to SWBT Texas, which in turn can assign it to SWBT, L.P. SWBT, L.P. will, thereafter, hold the perpetual franchise/charter rights indefinitely.

III. What Questions Of Fact (Distinct From Legal Questions) Are Likely To Be In Dispute And Require A Hearing For Resolution?

There are no questions of fact, distinct from legal questions, which are in dispute and require a hearing for resolution. SWBT, L.P. customers will continue to receive telecommunications service in the same manner and with the same quality of service as before the restructuring. After the transaction, SWBT, L.P. will employ the same personnel, will use the same facilities, and will provide the same services at the same prices and with the same quality of service as SWBT does today. In addition, as explained above, the Commission retains the same rights and authority to ensure that SWBT, L.P. complies with applicable statutes and quality of service rules as it has with respect to SWBT.

There are simply no issues that require the Commission to conduct a hearing on this matter. The transaction at issue here is not detrimental to the public interest, and will be transparent to SWBT's customers, the State, and its political subdivisions. The Commission should, therefore, approve the Joint Application. SWBT reiterates, however, that it is willing to answer any questions the Commission may have so that this matter can be resolved expeditiously on or before December 20.

Conclusion

For all of these reasons the Commission should approve SWBT, SWBT Texas, and SWBT, L.P.'s Joint Application. SWBT, SWBT Texas, and SWBT, L.P. reiterate their request that the Commission approve the Joint Application on or before December 20, 2001. Approval

by that date will permit Joint Applicants to achieve the goal of this conversion, i.e. an overall tax savings on taxes paid in Texas.

Respectfully submitted,

BY Mimi B. MacDonald tm

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**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by United States Mail, postage prepaid, or via hand-delivery on December 10, 2001.

Mimi B. MacDonald tm

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