

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

In the Matter of a Request for the)
Modification of the Kansas City)
Metropolitan Calling Area Plan to Make)
the Greenwood Exchange Part of the)
Mandatory MCA Tier 2.)

Case No. TO-2005-0144

**STAFF’S RESPONSE TO THE ARGUMENTS
REGARDING THE COMMISSION’S AUTHORITY**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and states:

1. On April 29, 2005, the Office of the Public Counsel (“OPC”) filed its final recommendation addressing modification of the Kansas City MCA to make the Greenwood exchange part of the mandatory MCA Tier 2. On May 10, 2005, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (“SBC”) filed a response to the OPC’s final recommendation, and CenturyTel of Missouri, L.L.C. and Spectra Communications Group, L.L.C. d/b/a CenturyTel (collectively “CenturyTel”) filed a joint response to the OPC’s final recommendation, concurring in SBC’s arguments. This response addresses SBC and CenturyTel’s arguments that it would be unlawful for the Commission to modify or alter the existing MCA Plan.

2. In the MCA/Calling Scopes Task Force’s Final Report, filed on September 29, 2004, the Task Force does not address the authority issue other than to acknowledge the existence of a question over the Commission’s authority to implement mandated calling plans, and to suggest that “legislative action may be necessary.” Case No. TW-2004-0471, *In the Matter of a Commission Inquiry into the Metropolitan Calling Area Plan and Calling Scopes in Missouri*.

3. In its response to the OPC's final recommendation, SBC and CenturyTel raise four (4) separate arguments to support SBC's position that it is unlawful for the Commission to modify or alter the existing MCA Plan. First, in its *Reply* SBC claims that "such action would violate SBC Missouri's due process rights, as guaranteed by Article 1, Section 10, of the Missouri Constitution" without "a full and fair hearing." SBC's due process concerns are premature and not ripe for consideration at this time. The Commission has made no indication that it intends to alter the MCA Plan, nor has the Commission suggested that it will make alterations to the MCA Plan without first affording the parties an opportunity for an evidentiary hearing. If the Commission wishes to consider potential changes to the MCA Plan, the Staff recommends that the Commission conduct an evidentiary hearing that affords all parties an opportunity to be heard and an opportunity to cross-examine witnesses. This procedure would alleviate SBC's concern that the Commission has violated SBC's due process rights.

4. Second, SBC and CenturyTel contend that modifications to the MCA Plan would violate Section 392.200.9 RSMo Supp. 2004. This section states:

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 the alteration of exchange boundaries.

SBC argues that a geographic expansion of the current MCA Plan would "effectively" alter exchange boundaries, which can only be accomplished by agreement of the incumbent local exchange companies ("ILECs") serving each exchange. The Staff disagrees. The OPC has not proposed an alteration of exchange boundaries. The OPC's plan proposes to modify the availability of a service in the Greenwood exchange. The exchange, and all surrounding exchanges, would remain intact without alteration under the OPC's proposal. If OPC's proposal

had recommended changes to the exchange boundaries, Section 392.200.9 RSMo Supp. 2004 does not prohibit a proposal that would actually alter exchange boundaries. It does, however, require approval from the ILEC serving those exchanges before the exchange boundaries can be altered.

5. Third, SBC and CenturyTel argue that an order modifying or altering the existing MCA Plan would violate Section 392.245.11 RSMo 2000 if the modification is applicable to price cap regulated carriers. This section states:

The maximum allowable prices for nonbasic telecommunications services of a small, incumbent local exchange telecommunications company regulated under this section shall not be changed until twelve months after the date the company is subject to regulation under this section or, on an exchange-by-exchange basis, until an alternative local exchange telecommunications company is certified and providing basic local telecommunications service in such exchange, whichever is earlier. The maximum allowable prices for nonbasic telecommunications services of a large, incumbent local exchange telecommunications company regulated under this section shall not be changed until January 1, 1999, or on an exchange- by-exchange basis, until an alternative local exchange telecommunications company is certified and providing basic local telecommunications service in such exchange, whichever is earlier. Thereafter, the maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices. This subsection shall not preclude an incumbent local exchange telecommunications company from proposing new telecommunications services and establishing prices for such new services. An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section. [emphasis added].

SBC states that under Section 392.245.11, the Commission lacks the authority to propose new telecommunications services and, consequently, to make modifications to existing services. The Staff disagrees. SBC quotes a single sentence from Section 392.245.11, which states “[t]his subsection shall not preclude an incumbent local exchange company from proposing new

telecommunications services and establishing prices for such new services.” This sentence does not state or even suggest that the Commission lacks the authority to direct price cap regulated carriers to offer services in exchanges where such services were not previously offered. The quoted sentence merely clarifies that Section 392.245.11 RSMo 2000 should not be misinterpreted to prohibit price cap regulated carriers from “proposing” new services or from establishing prices for such new services. The General Assembly was concerned that the language in subsection 392.245.11 RSMo 2000, which limits price increases to a percentage of current prices, could be misinterpreted since new services have no current prices. This is not a grant of exclusive authority to price cap regulated carriers to establish and price new services. This subsection does not take away the Commission’s supervision and jurisdiction over telecommunications services as provided for in Section 386.250(2) RSMo 2000.

6. Lastly, SBC and CenturyTel argue that it would be unlawful for the Commission to modify the MCA Plan under existing case law. SBC contends that modifying the MCA Plan is akin to the Commission dictating the manner in which SBC conducts its business. Again, the Staff disagrees with SBC’s legal analysis. First, SBC fails to explain how the Commission had the legal authority in 1992 to implement the MCA Plan and what has occurred since 1992 to remove that legal authority. Only one of the four cases cited by SBC was decided after 1992, while the other three cases were existing case law at the time the Commission implemented the MCA Plan. Second, SBC misinterprets the relevance of the cited cases to the case at hand. In *State of Missouri, ex rel. MoKan Dial, Inc. v. P.S.C.*, 897 S.W.2d 54 (Mo. App. 1995), the Missouri Court of Appeals for the Western District dismissed this very argument in an appeal of the Commission’s order implementing the MCA Plan, and concluded that the “court fails to see how Appellants’ management functions have been damaged.”

7. The case cited above followed the Commission's 1992 implementation of the MCA Plan and is the only case to address the Commission's authority to mandate expanded calling scopes. Two small ILECs, MoKan Dial, Inc. and Choctaw Telephone Company appealed the Commission's Order.¹ The Court of Appeals identified five "separate points of attack on the Commission's order."

- The Commission's classification of the new service as a local service.
- The order usurps their management authority.
- The order causes them to provide service outside their existing area.
- The Commission didn't properly set the new rates.
- The end result would be a taking under due process because of the effect on Appellants' rate of return.

The Court concluded that none of these points had merit and that "[t]he statutes, the record, and the case law put at rest all arguments raised here."

The Court also concluded that Section 392.240.1 "invests the Commission with authority to revise and set reasonable rates for tolls and other services when customer needs are not being met." The Court did not expand on this authority and did not address whether other statutes in addition to Section 392.240.1 also invest the Commission with the authority to implement or modify the MCA Plan. The Staff believes support for the Commission's authority can be found in Sections 386.250(2) and 392.240.2 RSMo 2000 and Section 392.200.7 RSMo Supp. 2004. Unfortunately, the Court did not address these additional grants of authority.

¹ The Commission implemented the MCA Plan in Case No. TO-92-306, *In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges, Report and Order*, December 23, 1992.

8. The Commission's authority over the services offered by a telecommunications company originates from the Commission's jurisdiction statute, Section 386.250(2), which states that 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...

There is no question that this Commission was vested with the authority over telecommunications services, including expanded local calling services.

9. Through Section 392.200.7 RSMo 2000, the General Assembly gave the Commission the authority "to provide the limits within which telecommunications messages shall be delivered without extra charge." This section supports the Commission's authority to determine whether calls between certain exchanges should be delivered without extra charge, thus giving the Commission the authority to modify the MCA Plan.

10. Section 392.240.2 RSMo 2000 appears to give the Commission the authority to modify the MCA Plan:

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 telecommunications 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.

Under this section the Commission has the authority to “determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service” to be observed by telecommunications companies. If the Commission were to determine that the services provided by telecommunications companies in the petitioning exchanges are inadequate to meet the needs of the consumers in those exchanges, the Commission appears to have the authority under Section 392.240.2 RSMo 2000 to order the modification of the MCA Plan to petitioning exchanges.

WHEREFORE, the Staff respectfully offers this response to the arguments of SBC and CenturyTel regarding the Commission’s authority to modify the MCA Plan.

Respectfully submitted,

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I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 20th day of May 2005.

/s/ David A. Meyer
