

CIRCUIT JUDGE DIVISION

Division II

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FINDINGS OF FACT

The Court, having reviewed the record and the briefs presented and having considered the oral arguments of the parties, makes the following findings of fact:

1. Southwestern Bell Telephone Company ("SWBT") is a regulated telecommunications company pursuant to Section 386.020 RSMo Supp. 1997 and is therefore subject to the jurisdiction of the Missouri Public Service Commission ("PSC").
2. Respondent PSC is a governmental regulatory agency created and established by the State of Missouri under Chapter 386 and vested with jurisdiction of public utilities of Missouri, including telecommunications companies under Chapter 392.
3. The Office of the Public Counsel ("OPC") was created by the Missouri Legislature to represent the public in proceedings before the Commission.
4. On September 16, 1997, the PSC issued its Report and Order in the Petition of Southwestern Bell Telephone Company for a determination that it is subject to price cap regulation under Section 392.245, RSMo Supp. 1996, Case No. TO-97-397. In its Report and Order, the PSC made the determination required by Section 392.245.2 RSMo Supp. 1997.
5. Relators were parties to PSC Case No. TO-97-397. Each Relator filed an Application for Rehearing prior to the effective date of the PSC's Report and Order, September 26, 1997. The Applications for Rehearing were denied on November 18, 1997.
6. Each Relator filed its Petition for Writ of Review within 30 days of the PSC's Order Denying Applications for Rehearing. On January 20, 1998, the Court consolidated these cases and the PSC filed its consolidated return. Subsequently, briefs were submitted and oral arguments held. An initial judgment was rendered on May 22, 1998, and MCI

Telecommunications Corporation, et al filed a timely Motion for New Trial on June 22, 1998.

7. Section 392.245.2 RSMo Supp. 1997 states that: "A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the Commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area."

8. Section 392.245.3 requires that the maximum allowable prices established for a company under subsection 1 of Section 392.245 shall be those in effect on December 31 of the year proceeding the year in which the company is first subject to price cap regulation.

9. Section 392.254.4 provides that for basic local exchange service, and exchange access, the maximum allowable prices of a large incumbent local exchange telecommunications company shall not be increased prior to January 1, 2000.

10. SWBT is an incumbent local exchange telecommunications company as defined in Section 386.020(22).

11. SWBT has at least 100,000 access lines in the State of Missouri and, as such, is a large local exchange telecommunications company as defined in Section 386.020(30).

12. Communications Cable-Laying Company, Inc., d/b/a Dial US ("Dial US") received a certificate of service authority to provide basic local telecommunications service from the PSC on December 20, 1996, in Case No. TA-96-347. The certificate of service authority became effective simultaneously with the effective date of the company's approved tariff, for provision of service on or after January 31, 1997. Dial US has been providing basic local telecommunications service in SWBT's Springfield Metropolitan Exchange and other SWBT exchanges in

southwestern Missouri since February 1997.

13. The PSC made its determination pursuant to Section 392.245.2 that SWBT is subject to price cap regulation. The PSC made that determination with the understanding that it had no discretion to first consider the justness and reasonableness of SWBT's rates and other matters.

CONCLUSIONS OF LAW

1. The PSC has the authority, under Section 392.245.1 RSMo Supp. 1997, to ensure that the rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful.

2. Under Section 392.245.2 RSMo Supp. 1997, the application of price cap regulation is mandatory upon the PSC's determination that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service anywhere in a large incumbent telecommunications company's service area.

3. Once the PSC makes a determination that the criteria specified in Section 392.245.2 RSMo Supp. 1997 has been met, it loses its authority to examine the justness and reasonableness of SWBT's rates, charges, tolls and rentals for telecommunications service.

4. Section 392.245.2 RSMo Supp. 1997 does not explicitly establish any deadlines by which the PSC must make its determination as to whether the criteria specified therein have been met. The statute implicitly requires, however, that the determination be made in a reasonable time.

5. The statutory requirements applicable to small local exchange telecommunications

companies supports the view that the determination required under Section 392.245.2 must be made within a reasonable time. Under that section, a small incumbent local exchange telecommunications company may opt into price cap regulation upon simple written notice to the PSC, if the same criteria which makes price cap regulation mandatory for a large incumbent telecommunications company have been met. It would be unreasonable to interpret the statute to permit small incumbent telecommunications companies to opt into price cap regulation upon simple written notice to the PSC, but permitting the PSC to unreasonably delay the determination which would make price cap regulation mandatory for large incumbent telecommunications companies.

6. Section 392.245.3 RSMo Supp. 1997 provides that the initial maximum allowable rates under price cap regulation are those rates which were in effect on December 31st, prior to the price cap determination. The prior December 31st rates are deemed just and reasonable under Section 386.270 RSMo 1994 until changed by the PSC, with any such change operating only on a prospective basis. The price cap statute thus contemplates that even a recently completed rate proceeding would be disregarded for purposes of determining initial maximum allowable rates if the Commission determines that the price cap criteria have been met in the same year as any rate proceeding.

7. If the Commission had initiated a rate complaint proceeding before making the determination required under Section 392.245.2, the results of such a proceeding would not have impacted the initial maximum allowable prices under price cap regulation unless the Commission unreasonably delayed the required determination. Since a rate complaint proceeding would not have been completed until late 1997 or, more likely, in 1998, the Commission would have been

required to delay price cap determination until at least 1998, and more likely 1999, in order to make any new rates established in a rate complaint proceeding the initial maximum allowable rates under price cap regulation. Such a delay would be unreasonable and not consistent with the legislature's intent.

8. There is doubt that the competition envisioned by Section 392.245 will be met by the competition provided by a single reseller of telecommunications services, although Section 392.245.2 does not specify that any designated level of competition be obtained before price cap regulation is applied.

9. Although Section 392.245.2 does not specifically state that competition must be by a company providing service through its own facilities, it is a possible interpretation when read in association with Section 392.450 where a reseller is distinguished from a company that utilizes its own facilities to provide basic local exchange telecommunications service.

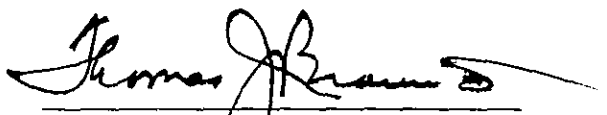
10. Because the Commission has made the determination required by Section 392.245.2, the Court agrees that SWBT has met all the prerequisites of Section 392.245.2 and is subject to price cap regulation.

11. Once the PSC made the determination, and SWBT became subject to price cap regulation, the PSC lost its authority to examine the justness and reasonableness of SWBT's rates on the basis of rate base/rate of return regulation. At that time, the Order Dismissing the Complaint filed by MCI and the appeal heard by this Court in Case Nos. CV197-1794cc and CV197-1809cc, became moot.

JUDGEMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the Court affirms the Missouri Public Service Commission's September 16, 1997 Report and Order in Case No. TO-97-397.

SO ORDERED this 6th day of August, 1998.



Circuit Judge