

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

January 16, 2004

Mr. Dale Hardy Roberts, Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Case No. TO-2001-391

Dear Mr. Roberts:

Enclosed for filing, please find the original and eight copies of the Supplemental Brief of Cass County Telephone Company, Lathrop Telephone Company and Orchard Farm Telephone Company.

Please bring this filing to the attention of the appropriate Commission personnel. A copy of this filing will be provided to parties of record. If there are any questions, please direct them to me at the above number. I thank you in advance for your cooperation in this matter.

Sincerely,


Brian T. McCartney

BTM/da
Enclosure
cc: Parties of Record

FILED³

JAN 16 2004

**Missouri Public
Service Commission**

FILED³

JAN 16 2004

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

In the Matter of a Further Investigation of)
the Metropolitan Calling Area Service)
after the Passage and Implementation of)
the Telecommunications Act of 1996.)

**Missouri Public
Service Commission**

Case No. TO-2001-391

**SUPPLEMENTAL BRIEF OF
CASS COUNTY TELEPHONE COMPANY,
LATHROP TELEPHONE COMPANY, AND
ORCHARD FARM TELEPHONE COMPANY**

COME NOW Cass County Telephone Company, Lathrop Telephone Company, and Orchard Farm Telephone Company (hereinafter collectively referred to as "Cass County et al."), pursuant to the Commission's *Notice* of December 31, 2003 and for their Supplemental Brief, state to the Commission as follows:

INTRODUCTION

During the November 24, 2003 prehearing conference in this case, questions were raised about the Commission's authority to mandate expanded local calling scopes. Regulatory Law Judge Ruth recommended that parties cite authority on the subject, and a Notice was issued providing the opportunity to file supplemental briefs. Accordingly, Cass County et al. submit the following supplemental brief with citation to authority regarding the Commission's ability to mandate expanded local calling scopes. Cass County et al. stand by their Statement of Position filed on May 19, 2003, and this brief is intended solely to supplement that pleading.

SUMMARY

The Commission's authority to establish or modify expanded calling plans is strictly limited by Missouri case law and statutory provisions. The Commission cannot order a Missouri telephone company to expand its service area or exchange boundaries without the agreement of the affected company or companies. The Commission cannot direct a connection between two companies primarily for the purpose of providing local service. Whether the Commission can mandate a change from an existing toll connection to a new local connection and thus replace existing toll rates with local rates is not as clear. At the very least, any expanded calling plan mandated by the Commission must be supported by competent and substantial evidence that customer needs are not being met, and any Commission-mandated plan must be revenue neutral to any rate-of-return regulated companies that are affected by the change.

DISCUSSION

In *Southwestern Bell v. Missouri Public Service Comm'n*, 416 S.W.2d 109 (Mo. banc 1967) ("the *Bellflower*" case), the Commission ordered SWBT to extend its services to an area in Montgomery County. The Missouri Supreme Court reversed and remanded the Commission's decision, holding that the Commission is "without power to order a telephone company to provide services in an area which it has not offered, professed or undertaken to serve." *Id.* at 113. Thus, *Bellflower* prohibits the Commission from ordering a telephone company to provide service in an area where it

has not sought to serve.

The Commission may order a physical connection to be made between the lines of two or more telecommunications companies if, after hearing, the Commission finds that such a physical connection can be reasonably made and will serve the public convenience and necessity. §392.240.3. Thus, the Commission could order two companies to connect their respective networks in order to permit calling between their respective subscribers. However, such an order may not be made “primarily to secure the transmission of local telecommunications service.” *Id.* Therefore, this provision does not authorize the Commission to require two companies to connect their networks for the purpose of replacing existing interexchange toll with a local calling plan.

Recent changes to Missouri statutes provide that the Commission may alter local exchange boundaries if: (a) the Commission determines that it is in the public interest to do so; and (b) the ILEC(s) serving the affected exchanges approve(s) the boundary alteration. §392.200.9. Thus, the Commission may not alter exchange boundaries, which traditionally define the area in which local exchange service is provided, without approval from the affected ILEC(s).

Missouri telecommunications companies must provide adequate facilities and adequate service at “just and reasonable charges.” §392.200.1. However, the Commission and the Court of Appeals have held that this statute is not authority for mandating expanded calling plans. For example, in *State ex rel. City of Oak Grove v. Public Service Comm’n*, 769 S.W.2d 139 (Mo. App. 1989) a group of suburban telephone customers sought expanded calling into the Kansas City metropolitan area,

and the Commission denied the petition. The Court of Appeals affirmed the Commission and explained:

The sole basis for appellants' complaint was the cost of service, not adequacy of equipment. We are unaware of any case authority, and appellants cite none, indicating that [§ 392.200.1] dealing with adequacies of facilities and instrumentalities encompasses a claim for less expensive telephone service, that is, the elimination of inter-exchange tolls.

Id. at 145[5]. Thus, §392.200.1 does not give the Commission the authority to mandate expanded calling plans.

However, the Commission does have some authority to address expanded calling plans under §392.240. If the Commission determines, after hearing, that rates and tolls are unjust and unreasonable, then the Commission may determine and fix just and reasonable rates and tolls. §392.240.1. In the past, the Commission has used this authority to adopt industry proposals for expanded calling plans such as Community Optional Service (COS), Outstate Calling Area (OCA), and Metropolitan Calling Area (MCA). *In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges*, Case No. TO-92-306, *Report and Order*, issued Dec. 23, 1992.

The Commission's authority to adopt such plans was affirmed by the Court of Appeals in *MoKan Dial v. Public Service Comm'n*, 897 S.W.2d 54 (Mo. App. 1995). However, the *MoKan Dial* case stressed that the plans: (1) did not expand any

company's area of service (distinguishing *Bellflower*); (2) did not require any increased expenses (i.e. no takings); and (3) did not result in any revenue losses (i.e. revenue neutrality). *Id.* at 55-56.

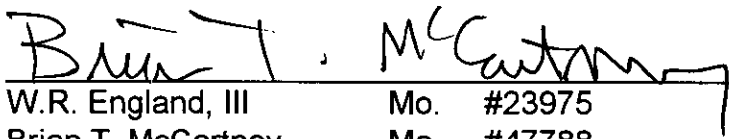
Revenue neutrality is required for rate of return regulated carriers. The doctrine of revenue neutrality ensures that Commission decisions concerning the provision of public utility service do not adversely affect a public utility company's regulated revenue stream. Thus, when a Commission decision affects a public utility company's existing revenue stream, the Commission must allow that company to maintain revenue neutrality. The Commission has regularly provided for revenue neutrality in telecommunications provisioning orders, and revenue neutrality has been consistently enforced by the Cole County Circuit Court. *See also Alma Tel. Co. v. Public Service Comm'n*, 40 S.W.3d 381 (Mo. App. 2001)(discussing revenue neutrality as it related to the Primary Toll Carrier Plan).

After the state and federal Telecommunications Acts were passed in 1996, the Commission's position towards expanded calling plans changed. One of the Missouri legislation's clear directives was to allow competition to substitute for regulation when consistent with the public interest. §392.185(6). Accordingly, when the Commission terminated the COS Plan in 1997, it stated, "Retaining a mandated service that is not a necessary function of basic local service is inconsistent with the goal of a more competitive telecommunications environment." *In the Matter of an Investigation into the Provision of Community Optional Calling Service in Missouri*, Case No. TW-97-333, *Report and Order*, issued Oct. 28, 1997. This decision indicates the Commission's unwillingness to mandate expanded local calling plans in a competitive environment.

CONCLUSION

In summary, it is clear that the Commission cannot order a Missouri telephone company to expand its service area or exchange boundaries without the agreement of the affected company or companies. Likewise, the Commission cannot mandate a connection between two companies primarily for the purpose of providing local service. Whether the Commission can mandate a change from an existing toll connection to a new local connection and thus replace existing toll rates with local rates is not as clear. At the very least, there must be a factual record supporting a finding that the existing toll service and rates are inadequate, and provision must be made for the affected companies to remain revenue neutral.

Respectfully submitted,



W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456
573/635-7166
573/634-7431 (Fax)
trip@brydonlaw.com
bmccartney@brydonlaw.com

Attorneys for Cass County, Lathrop, and
Orchard Farm

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via email, hand-delivered or sent by U.S. Postal Service to the following on this 16th day of January, 2004:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael F. Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Mimi MacDonald
SBC Missouri
One Bell Center, Room 3510
St. Louis, MO 63101

Carl J. Lumley
Curtis, Oetting, Heinz, Garrett & Soule
130 S. Bemiston, Suite 200
St. Louis, MO 63105

James M. Fischer
Fischer & Dority
101 Madison Street, Suite 400
Jefferson City, MO 65101

Mary Ann Young
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110

Larry W. Dority
Fischer & Dority
101 Madison Street, Suite 400
Jefferson City, MO 65101

Mark W. Comley
Newman, Comley & Ruth
601 Monroe Street, Suite 301
Jefferson City, MO 65102-0537

Craig S. Johnson
Andereck, Evans, Milne, Peace & Johnson
P.O. Box 1438
Jefferson City, MO 65102-1438

Lisa Creighton-Hendricks
Sprint
6450 Sprint Parkway
MS: KSOPHN0212-2A253
Overland Park, KS 66251

Burt McCarty