

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 11th day
of April, 2006.

In the Matter of a Request for the Modification of the)
Springfield Metropolitan Calling Area Plan to Make the)
Ozark Exchange a Mandatory MCA Tier 1 Exchange.) **Case No. TO-2005-0143**

**ORDER DENYING MOTIONS TO DISMISS
AND DIRECTING FILINGS**

Issue Date: April 11, 2006

Effective Date: April 11, 2006

Syllabus: This order rejects AT&T Missouri's and CenturyTel's arguments concerning the Commission's authority to alter Metropolitan Calling Area (MCA) Plans, and directs the carriers to submit statements of revenue and expense impacts, as well as revenue-neutrality requirements, related to the Office of the Public Counsel's proposal. This order also directs the parties to file a proposed procedural schedule.

Procedural History

On January 17, 2006, the Office of the Public Counsel filed its final recommendation, in which it recommended the following:

- a. The Ozark exchange be made a Tier 1 mandatory exchange.
- b. The price for MCA service in the Ozark exchange be the same as other Tier 1 exchanges (\$12.50 residential and \$36.95 business, including local service).
- c. The intercompany compensation be bill-and-keep, the same compensation as other Tier 1 exchanges.

Public Counsel requested that the Commission direct the carriers to submit statements of revenue and expense impacts, as well as revenue-neutrality requirements, related to the proposal.

Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri (formerly SBC Missouri), and CenturyTel of Missouri, LLC, separately filed responses on January 30, 2006. Both carriers oppose Public Counsel's final recommendation.

In its response, AT&T Missouri moved to have Public Counsel's request for expansion of the MCA Plan dismissed. In the alternative, AT&T Missouri asked that if the Commission determines that it has authority to proceed, the Commission should require Public Counsel to first put forth further evidence. AT&T Missouri argued that the Commission should not impose the expanded MCA service proposed by Public Counsel until a hearing has been conducted. AT&T Missouri also stated that it would not oppose a public hearing and would support an evidentiary hearing on the proposed MCA modification.

CenturyTel also filed a response opposing, on legal grounds, the Commission ordering modifications to the existing Springfield MCA Plan as proposed by Public Counsel. If the Commission determined it should proceed, CenturyTel supported Public Counsel's suggested procedure that carriers be directed to submit statements of revenue and expense impacts and revenue-neutrality requirements related to the proposal. CenturyTel also supported the scheduling of public and evidentiary hearings.

The Commission's Staff filed its response on February 7, 2006. Staff noted that the arguments raised by AT&T Missouri and CenturyTel are the same arguments raised by

these parties in Case No. TO-2005-0144.¹ Responding to motions to dismiss for lack of jurisdiction, the Commission issued an order rejecting these arguments.² Staff concurred with Public Counsel's suggestion in its final recommendation that the Commission's next step should be to direct the carriers to submit revenue, expense, and revenue-neutrality information.

No replies have been filed to Staff's response, and the time for doing so has now passed.

Discussion

AT&T Missouri and CenturyTel set forth several arguments against approving Public Counsel's proposal. AT&T Missouri contended that if the Commission finds it can lawfully expand MCA service, it should not do so until a hearing has been conducted in which the Commission considers whether customers want mandatory MCA service in the Ozark exchange and whether all customers are willing to pay a compensatory price for this service.

AT&T Missouri and CenturyTel's arguments against the Commission's authority to modify or alter the existing Springfield MCA Plan are essentially the same. The companies argue that such action: (1) would be an unlawful taking of property in violation of their due process rights as guaranteed by Article I, Section 10 of the Missouri Constitution; (2) would violate Section 392.200.9, RSMo Cum. Supp. 2005; (3) would violate Section 392.245.11, RSMo Cum. Supp. 2005; and (4) would be inconsistent with Missouri

¹ *In the Matter of a Request for Modification of the Kansas City Metropolitan Calling Area Plan to Make the Greenwood Exchange Part of the Mandatory MCA Tier 2.*

² *Order Denying Motion to Dismiss and Order Directing Filing*, Case No. TO-2005-0144, August 23, 2005.

case law, which holds that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.

A. Revising Exchange Boundaries

AT&T Missouri and CenturyTel argue that the Commission may not alter the existing MCA plan because to do so would violate Subsection 392.200.9. This portion of the statute states that the Commission may only revise an exchange boundary with the consent of the affected incumbent telephone company. This argument fails because if the Commission adopted Public Counsel's proposal, the Commission would not be changing an exchange boundary. The expansion would be accomplished by including the entire Ozark exchange. Thus, no exchange boundary would be altered.

B. Expanding the Calling Scope of a Price Cap Company

AT&T Missouri argues that the rule violates Subsection 392.245.11, for price cap companies, because pricing and new service offering decisions must be left to the discretion of the price-cap-regulated company. AT&T Missouri relies on that portion of the price cap statute that, after discussing how maximum allowable prices are to be set, says, "[t]his subsection shall not preclude an incumbent local exchange telecommunications company from proposing new telecommunications services and establishing prices for such new services." AT&T Missouri argues that this section precludes the Commission from setting price cap companies' prices because those prices may only be set in accordance with the statute. CenturyTel also objected to Public Counsel's proposal, citing to Section 392.245.11.

The Commission is granted authority over all telecommunications companies to order expanded calling scopes. This authority is derived from several different parts of the

statutes. That is, the Commission has general supervisory authority over “all telecommunications facilities, telecommunications services and to all telecommunications companies . . . within this state”³ Additional support for the Commission’s authority can be found in the purposes section of Chapter 392, RSMo.⁴ Specifically, one of the purposes of Chapter 392 is to “ensure that customers pay only reasonable charges for telecommunications service.”⁵ Another purpose is to allow “full and fair competition to function as a substitute for regulation *when consistent with* the protection of ratepayers and otherwise consistent with the public interest.”⁶

Further authority for the Commission’s ability to grant expanded calling plan applications is found in Subsection 392.240.2, RSMo. This provision gives the Commission authority over expanded calling plans by authorizing the Commission to “determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service” to be used by telecommunications companies. Thus the Commission could determine, if sufficient evidence is provided, that the current services of the companies are inadequate to meet the needs of the consumers in those exchanges. The Commission also has the authority to order “repairs or improvements to or changes in any telecommunications facilities . . . or . . . any additions . . . in order to promote the convenience of the public . . . or in order to secure adequate service”⁷

³ Subsection 386.250(2), RSMo.

⁴ Section 392.185, RSMo.

⁵ Subsection 392.185(4), RSMo.

⁶ Subsection 392.185(6), RSMo(emphasis added).

⁷ Section 392.250, RSMo.

Additional support for the Commission's authority is found in Section 392.470, RSMo. That section declares that the Commission can impose any conditions that it deems reasonable and necessary upon any company providing telecommunications service if those conditions are in the public interest and are consistent with the provisions and purposes of the chapter.

Under these provisions, the Commission has jurisdiction to order expanded local calling scopes, including altering the MCA, for all basic local telecommunications companies.

C. Violation of Case Law

AT&T Missouri argues that, under Missouri case law, an order from the Commission to alter the existing MCA would be unlawful because the Commission's authority to regulate does not include the right to dictate the manner in which a company shall conduct its business.⁸ AT&T Missouri argues that by modifying the MCA Plans, the Commission would be usurping the companies' management decisions. CenturyTel also states its objection on this ground.

The Court of Appeals rejected this argument in the appeal of the Commission's original order implementing the MCA Plan.⁹ The Court stated that it did not "see how Appellants' management functions have been damaged."¹⁰ The Court also stated that Subsection 392.240.1, RSMo, "invests the Commission with authority to revise and set

⁸ Citing, *State v. Public Service Commission*, 406 S.W.2d 5, 11 (Mo. 1966); *State v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995); *State ex rel. Laclede Gas Company v. Public Service Commission*, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

⁹ *State of Missouri, ex rel. MoKan Dial, Inc. v. P.S.C.*, 897 S.W.2d 54 (Mo. App. 1995) (affirming the Commission's order in Commission Case No. TO-92-306).

¹⁰ *Id.*

reasonable rates for tolls and other services when customer needs are not being met and service is inadequate.”¹¹ Thus, the Commission has the authority to alter the MCA under the current Missouri case law.

D. Necessity for a Hearing

CenturyTel argues that the Commission may not grant Public Counsel’s requested relief because granting the application would be an unlawful taking of property in violation of CenturyTel’s due process rights, as guaranteed by Article I, Section 10, of the Missouri Constitution. AT&T Missouri argues that if the Commission finds it can lawfully impose the expanded MCA service sought by Public Counsel, it should not do so until a hearing has been conducted.

The Commission agrees that it has an obligation to provide adequate due process. The Commission has not made a decision on the current record and will not do so without giving AT&T Missouri and CenturyTel opportunity to be heard and to cross-examine witnesses.

E. Procedures

Public Counsel has requested that the companies be directed to submit statements of revenue and expense impacts as well as revenue-neutrality requirements related to the proposal. Public Counsel also requests that public comment hearings and an evidentiary hearing be scheduled.

The Commission finds that under its rule 4 CSR 240-2.061, such revenue statements and hearings are contemplated and shall be ordered. The Commission shall

¹¹ *Id.* at 55.

direct the parties to jointly or separately file a proposed procedural schedule, including evidentiary and public hearing dates and possible locations.

Conclusion

The Commission concludes that it has jurisdiction to hear cases related to expanded calling plans, including the MCA, for the following reasons. First, the Commission has general supervisory jurisdiction over all telecommunications companies. Second, Subsection 392.240.2, RSMo, gives the Commission the jurisdiction to “determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service” of telecommunications companies. Third, the competitive companies are not exempt from Section 392.470, RSMo, which gives the Commission authority to impose conditions on telecommunications companies that the Commission deems reasonable and necessary. Fourth, Section 392.250, RSMo, grants the Commission authority to order changes or additions to promote public convenience and adequate service. And furthermore, directing companies to expand local calling scopes would be consistent with the purposes of Chapter 392.

In addition, the Commission has not violated the due process rights of the companies by going forward with this proceeding. The parties are being granted the opportunity for a hearing before the Commission makes its decision about whether to grant Public Counsel’s proposal. Also, the Commission is not altering an exchange boundary, so no violation of Subsection 392.200.9 will occur. Finally, the Commission is not in violation of the case law, because it is not usurping the management decisions of the company by considering Public Counsel’s proposal.

The Commission, therefore, rejects AT&T Missouri and CenturyTel's arguments that it is without authority to proceed, and rejects AT&T Missouri's request to dismiss Public Counsel's request for expansion of the Springfield MCA Plan. The Commission shall direct the carriers to submit statements of revenue and expense impacts, as well as revenue-neutrality requirements, as requested by Public Counsel in its final recommendation. The Commission shall also direct the parties to file a proposed procedural schedule.

IT IS ORDERED THAT:

1. The motion of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to dismiss the Office of the Public Counsel's request for expansion of the Springfield MCA Plan is denied.
2. The opposition of CenturyTel of Missouri, LLC, to the extent it is a motion to dismiss the Office of the Public Counsel's request for expansion of the Springfield Metropolitan Calling Area Plan, is denied.
3. No later than June 9, 2006, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, and CenturyTel of Missouri, LLC, shall submit their statements of revenue and expense impacts, as well as revenue-neutrality requirements, related to the Office of the Public Counsel's final recommendation.
4. The parties shall jointly or separately file a proposed procedural schedule that includes an evidentiary hearing and local public comment hearings no later than May 11, 2006.

5. This order shall become effective on April 11, 2006.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton, and
Appling, CC., concur.
Murray, C., dissents, with separate
dissenting opinion to follow.

Dippell, Deputy Chief Regulatory Law Judge