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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 22nd
day of May, 1997.

Petition of Southwestern Bell)
Telephone Company for a)
Determination that it is Subject) CASE NO. TO-97-397
to Price Cap Regulation Under)
Section 392.245 RSMo (1996).)

ORDER DENYING MOTION TO STAY PROCEEDING, AND DENYING MOTION
FOR ACCESS TO SURVEILLANCE REPORTS

Southwestern Bell Telephone Company (SWBT) filed a petition for a determination that it is subject to price cap regulation on March 21, 1997. A number of pleadings have been filed in this case. The Commission has previously addressed the requests for interventions, SWBT's motion for a protective order, and the Office of the Public Counsel's (Public Counsel's) request for a modification of the procedural schedule in an order issued on May 20, 1997. The remaining motions will be addressed in this order.

On April 30, MCI Telecommunications Company (MCI) filed a motion to stay this proceeding, pending resolution of MCI's complaint of alleged excessive access charges brought against SWBT in Case No. TC-97-303. MCI contends that Chapter 392 of the Missouri Revised Statutes allows the Commission to hear and decide Case No. TC-97-303, which was filed first, before hearing this case. MCI also submits that the Commission would be well-served by a stay of this proceeding to consider Case No. TW-97-333, investigating the provision of Community Optional Service (COS) in Missouri, and Case No. TO-97-367, involving the implementation of a state Universal Service Fund (USF). Alternatively, MCI moves the Commission to

stay this proceeding until 1998 to allow full and fair discovery to be conducted and testimony prepared regarding such matters as the alleged unreasonableness of SWBT's earnings and prices, and the scope and cost of price cap regulation of incumbents like SWBT as compared to the scope and cost of regulation of potential basic local telecommunications service competitors. While these matters may not fit within the evidentiary restrictions announced by the Commission in its order of April 18, MCI alleges that they are relevant to the Commission's consideration of this proceeding, and asks the Commission to reconsider its restrictions. MCI cites *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39 (Mo. App. 1982) for the proposition that a limited hearing procedure violates due process of law.

SWBT filed a response to MCI's motion to stay on May 6. SWBT maintains that MCI's arguments are essentially the same arguments raised in its application to intervene filed on March 27, and MCI's reply to SWBT's opposition to intervention filed on April 11. SWBT asks that the Commission reject MCI's attempts to expand the scope of the proceeding and to stay the proceeding to conduct discovery into issues beyond those set by Section 392.245.2, RSMo Supp. 1996.

Also on May 6, the Office of the Public Counsel (Public Counsel) filed suggestions in support of MCI's motion to stay proceedings. Public Counsel suggests that the Commission's price cap determination be stayed pending a review of SWBT's earnings and revenues, and that sound public policy and the best interest of consumers require SWBT's existing rates to be reviewed prior to capping those rates until the year 2000. Public Counsel requests that the Commission stay these proceedings and order an investigation and audit into all the services of SWBT, or, in the

alternative, to modify the procedural schedule to allow additional time between the filing of direct testimony, the filing of rebuttal testimony, and the hearing.¹

On May 9, SWBT filed a response to Public Counsel's suggestions in support of MCI's motion to stay proceedings. SWBT notes that had the General Assembly chosen to call for an earnings investigation before price caps are implemented, it could have done so in clear and unambiguous language. Even if a rate case is completed during the year in which the price cap determination is made, any increase or decrease in rates is ignored, as Section 392.245.3 requires the rates in effect at the end of the preceding year to be the initial maximum allowable prices.

On May 14, the Attorney General on behalf of the State of Missouri (State) filed a motion to open the Commission's records, seeking access to all surveillance reports filed by SWBT from August 31, 1994 through the present. In support of its motion, the State claims that examination of the surveillance reports will help demonstrate that there is no effective competition in the market place offered by Dial U.S. The State maintains that the Commission has the authority to order access to the surveillance records, pursuant to Section 386.480, RSMo 1994. In addition, the State supports the motions to stay or continue this proceeding, and stresses that SWBT will not be harmed by a stay of this proceeding until Case No. TO-97-303 is concluded since SWBT will continue to operate under its current rates.

SWBT filed a response to the State's motion for access to SWBT's surveillance reports on May 16. SWBT repeats many of the same

¹ Public Counsel's alternative request for modification of the procedural schedule was granted by Commission order issued on May 20, 1997.

arguments made in previous pleadings, but also notes that it was required to file surveillance reports only through the year 1993. Thus no surveillance reports were prepared or filed for the time period requested by the State. SWBT adds that surveillance reports filed in 1993 are irrelevant to any issue concerning SWBT's current rates².

The Commission has thoroughly reviewed the pleadings, Senate Bill 507, and in particular Section 392.245, and finds that neither MCI, Public Counsel, nor the State have provided the Commission with persuasive legal argument demonstrating that the Commission should reconsider the evidentiary restrictions announced in its order of April 18, or stay this proceeding until Case No. TO-97-303 is concluded. The initial question is whether there is statutory authority which gives the Commission discretion to order an earnings investigation of SWBT prior to making the determination under Section 392.245.2 which would authorize SWBT to switch from rate base/rate of return regulation to price cap regulation. The Commission has reviewed Section 392.245.2, and finds the language to be clear and unambiguous. Where the language of the statutory provision is unambiguous, the rules of statutory construction do not apply. See *Brownstein v. Rhomberg-Haglin & Assoc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

In reviewing Section 392.245 in its entirety, along with the remainder of Senate Bill 507, the Commission finds nothing that would authorize an earnings investigation of SWBT in the context of making the determination called for by Section 392.245.2. If the legislature had intended conversion to price cap regulation to be contingent on the

²The State subsequently filed a pleading on May 20 clarifying that the "surveillance reports" it is seeking are SWBT's monthly financial reports, and any other similar records filed with the Commission, for the period from August 31, 1997 through the present.

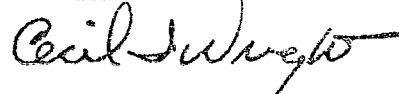
existence of "effective competition," it could have included in Section 392.245.2 language similar to that found in Section 392.245.5. Similarly, if the legislature had intended to allow the Commission discretion to conduct "one final rate case" in order to adjust rates prior to conversion to price cap regulation, it could have included such a provision as part of Section 392.245.2.

The Commission will thus deny MCI's motion, in which Public Counsel and the State concur, which asks the Commission to stay this proceeding pending the resolution of Case No. TO-97-303. Likewise, the Commission will deny the State's motion to examine SWBT's "surveillance reports," since the reports are irrelevant to the issues in this proceeding, which the Commission delineated in the order issued on April 18.

IT IS THEREFORE ORDERED:

1. That MCI Telecommunication Corporation's motion to stay proceeding filed on April 30, 1997, is hereby denied.
2. That the motion filed by the State of Missouri on May 14, 1997 for access to surveillance reports filed by Southwestern Bell Telephone Company with the Missouri Public Service Commission is hereby denied.
3. That this order shall become effective on the date hereof.

BY THE COMMISSION



Cecil I. Wright
Executive Secretary

(S E A L)

Zobrist, Chm., Murray,
and Drainer, CC., Concur.

ALJ: Bensavage