

PB
20
B✓

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 27th
day of June, 1997.

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

ORDER REGARDING MOTION TO STRIKE

This case involves a petition filed by Southwestern Bell Telephone Company (SWBT) for a determination that it is subject to price cap regulation. On June 12, 1997, SWBT filed a motion to strike the testimony filed on behalf of MCI Telecommunications Corporation (MCI) and MCImetro Access Transmission Services (MCImetro), and portions of the testimony filed on behalf of the Office of the Public Counsel (OPC). SWBT first quotes from the Commission's April 18th order, which stated that the hearing would be limited to the factual issues of whether an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service in any part of SWBT's service area, and whether that alternative local exchange telecommunications company is actually providing such service.

SWBT then specifically requests that the rebuttal testimony of Lane Kollen and Don Price, filed on behalf of MCI and MCImetro, be stricken completely from the record. SWBT maintains that the testimony of these rebuttal witnesses is irrelevant to any issue in this proceeding, and that the testimony seeks to litigate issues beyond the scope of this docket. In particular, SWBT notes that the testimony of Lane Kollen is focused almost exclusively on allegations of overearnings. Likewise, SWBT contends

that the testimony of Don Price repeats the allegations of overearnings and asserts that the price cap statute is unconstitutional. SWBT also claims that this testimony on the unconstitutionality of the statute is erroneous.

In addition, SWBT requests that the following portions of the rebuttal testimony of Barbara Meisenheimer, filed on behalf of OPC, be stricken: Page 6, line 18 through page 11, line 4; page 14, lines 8-14; page 15, lines 10-21; and page 17, line 1 through page 22, line 22. SWBT contends that these portions of the testimony of Barbara Meisenheimer contain the witness's analysis of the economic underpinnings which the witness believes should accompany the availability of price cap regulation, i.e. viable competition. SWBT points out that § 392.245.2, RSMo Supp. 1996 contains no requirement that competition be "viable" or "effective" as a precondition to price cap regulation.

On June 20, OPC filed its response to the Motion to Strike. OPC contends that any evidence which reasonably relates to a determination of whether to approve or deny SWBT's petition to be regulated under price cap regulation rather than traditional rate of return regulation, including but not limited to the powers and duties of the Commission, the consequences of a move to price cap regulation to telephone consumers, the effect on the future of local exchange competition, the purpose and intent of the General Assembly in enacting Senate Bill 507, as well as the public policy considerations which the Commission must weigh with every decision, are relevant to this proceeding. OPC states that the testimony in question -- testimony on the regulatory purpose of price cap regulation compared to existing rate of return regulation, on the consequences of imposing price caps, and on the attributes of a price cap system and its comparison to the facts in this case -- is pertinent to the issue of whether to approve or deny SWBT's petition. OPC asserts that to strike the testimony of its

witness would deprive OPC of the ability to present relevant evidence and create a fatal flaw in the Commission's administrative record.

On June 23, MCI and MCImetro filed their response to the Motion to Strike. MCI and MCImetro strongly disagree with the Commission's orders limiting the scope of this case, and argue that this limitation is in violation of Missouri Law as stated in State ex rel. Fischer v. Public Serv. Comm'n, 645 S.W.2d 39 (Mo. App. 1982). Because the Commission's orders are interlocutory, MCI and MCImetro contend that they cannot yet exercise their right to judicial review, and thus they have every right to obtain and offer all the evidence to support their position in this case. MCI and MCImetro reiterate their position that the price cap statute is unconstitutional, that SWBT is currently overearning, that SWBT does not face such competition as would make price cap regulation appropriate, and that SWBT's rates must be reduced before they are locked-in as price caps. MCI and MCImetro request that the Commission exercise its primary jurisdiction and consider evidence and arguments concerning the constitutionality of the price cap statute, citing State ex rel. Kansas City Transit, Inc. v. Public Serv. Comm'n, 406 S.W.2d 5, 7 (Mo. banc 1996).

The Commission has considered the entire case file in this proceeding, including SWBT's Motion to Strike and the responses thereto, as well as the testimony in question, and finds that SWBT's motion should be granted in part. The Commission will strike the rebuttal and revised rebuttal testimony of MCI and MCImetro witness Lane Kollen in its entirety. As the witness himself indicates, the purpose of his testimony is to review SWBT's earnings to determine "if [SWBT] is overearning on a traditional revenue requirement basis and to make recommendations with respect to Commission action on any such overearnings in the context of SWBT's

Petition in this case." (Kollen Rebuttal, p. 4). Just as the Commission found that the Office of the Attorney General of the State of Missouri (the AG) could not depose SWBT on the matter of any alleged overearnings because of its irrelevance to the factual determinations required by § 392.245.2, RSMo Supp. 1996, the Commission also finds that rebuttal testimony on the same matter is equally irrelevant.

Likewise, the Commission will strike the following portions of the rebuttal testimony of MCI and MCImetro witness Don Price: Page 4, line 3 through page 5, line 2; page 7, line 11 through line 17; page 12, line 7 through page 13, line 8; page 13, line 16 (material after the word "No.") through page 19, line 2; and page 20, line 12 through p. 21, line 14. The stricken portion of witness Price's testimony is irrelevant to the factual issues previously designated by the Commission. In addition, notwithstanding the witness's disclaimer to the contrary, Mr. Price's testimony purports to construe and apply various statutory provisions, something this witness is not qualified to do. Mr. Price is not a lawyer and has not worked in a legal capacity. The portions of Mr. Price's testimony which remain provide general background on rate of return regulation and the history of prior Commission cases involving SWBT. However, where Mr. Price provided background information which is inextricably linked with his interpretation of the appropriate statutory construction, such as in his definition of price cap regulation, the testimony has been stricken.

The Commission will also strike most of the rebuttal testimony of Barbara Meisenheimer, filed on behalf of OPC, that SWBT has requested be stricken. The Commission will strike the following portions of Meisenheimer's rebuttal testimony: Page 7, line 1 through line 24; page 8, line 5 through page 11, line 4; page 14, line 8 through line 14; page 15,

line 10 through line 21; page 17, line 1 through page 21, line 14; and page 22, line 5 through line 22. The stricken portion of Ms. Meisenheimer's testimony, while hewing more closely to her expert economic opinion than to an unqualified legal opinion, is still irrelevant to the factual matters at issue. The portions of Ms. Meisenheimer's testimony which were not stricken as requested by SWBT provide general background information on price cap regulation and the history of a prior Commission case involving SWBT.

Furthermore, the Commission will strike the cross-surrebuttal testimony of Don Price in its entirety. This testimony is irrelevant and responds to testimony by OPC witness Barbara Meisenheimer which the Commission has stricken.

The Commission has also considered the cases cited by MCI and MCImetro, and finds the cases to be inapposite. The Commission has discussed its reasons for limiting the factual issues to be addressed at the hearing in its previous decisions in this case.

IT IS THEREFORE ORDERED:

1. That the Motion to Strike filed by Southwestern Bell Telephone Company on June 12, 1997 is granted in part and denied in part.
2. That the rebuttal and revised rebuttal testimony of Lane Kollen, filed on behalf of MCI Telecommunications Company and MCImetro Access Transmission Services, Inc., is stricken in its entirety, and will not be allowed into evidence.
3. That the following portions of the rebuttal testimony of Don Price, filed on behalf of MCI Telecommunications Company and MCImetro Access Transmission Services, Inc., are stricken, and will not be allowed into evidence: Page 4, line 3 through page 5, line 2; page 7, line 11

through line 17; page 12, line 7 through page 13, line 8; page 13, line 16 (material after the word "No.") through page 19, line 2; and page 20, line 12 through p. 21, line 12. Furthermore, the cross-surrebuttal testimony of Don Price will be stricken in its entirety.

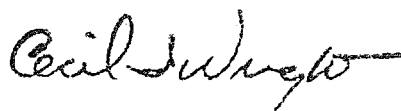
4. That the following portions of the rebuttal testimony of Barbara Meisenheimer, filed on behalf of the Office of the Public Counsel, are stricken, and will not be allowed into evidence: Page 7, line 1 through line 24; page 8, line 5 through page 11, line 4; page 14, line 8 through line 14; page 15, line 10 through line 21; page 17, line 1 through page 21, line 14; and page 22, line 5 through line 22.

5. That the rebuttal testimony which has been stricken shall nevertheless be preserved pursuant to § 536.070(7), RSMo 1994.

6. That a briefing schedule shall be determined at the conclusion of the hearing.

7. That this order shall become effective on the date hereof.

BY THE COMMISSION



Cecil I. Wright
Executive Secretary

(S E A L)

Crumpton, Murray, Lumpe and
Drainer, CC., Concur.
Zobrist, Chm., Absent

ALJ: Bensavage