

B-
Ko
PB

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 18th
day of November, 1997.

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

ORDER DENYING APPLICATIONS FOR REHEARING

The Missouri Public Service Commission (Commission) issued a Report and Order in this case on September 16, 1997, in which the Commission found that Southwestern Bell Telephone Company (SWBT) had met the prerequisites of Section 392.245.2, RSMo Supp. 1996,¹ and could convert from rate base/rate of return regulation to price cap regulation. Applications for rehearing were subsequently filed on September 25 by the Office of the Public Counsel (OPC), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (MCI and MCImetro), and the State of Missouri by and through the Attorney General (the AG). The Commission will not detail all of the grounds raised in the rehearing motions, but will instead generally summarize the items raised, while referring to a specific item only as necessary.

The rehearing motions of OPC, MCI and MCImetro, and the AG essentially claim that the Commission erred both factually and legally in finding that SWBT should be subject to price cap regulation. OPC, MCI, MCImetro, and the AG further claim that the Commission erred in striking portions of the testimony offered by witnesses for OPC, MCI, and MCImetro.

¹ All further statutory citations are to the 1996 Supplement of the Missouri Revised Statutes, unless otherwise noted.

The AG also adds that the Commission improperly denied it access to the surveillance reports filed by SWBT. In addition, OPC, MCI, and MCImetro assert that the Commission erred in finding that OPC had violated Section 386.480, RSMo 1994, while the AG maintains that the Commission improperly interpreted the Sunshine Law.

The vast majority of the grounds raised in the rehearing motions constitute reargument of issues determined by the Commission's Report and Order. However, several points may benefit from comment or clarification. OPC contends that since Communications Cable-Laying Company, Inc. d/b/a Dial U.S. (Dial U.S.) is a reseller rather than a facilities-based provider, with only a "trivial" presence in SWBT's territory, "[t]he Commission's finding that this constitutes competition such as to justify and require subjecting Bell to price cap regulation is unreasonable and is not based upon substantial and competent evidence and is arbitrary and capricious." OPC also states that the Commission mischaracterized its position as advocating an "effective competition" standard. The Commission, however, made no finding that the presence of Dial U.S. in SWBT's territory constituted competition, effective or otherwise. Nor was the Commission required to make such a finding, since Section 392.245.2 contains no reference to "competition."

OPC also alleges that the Commission erred in finding it violated a statute and a protective order without an evidentiary hearing, sworn evidence, and an opportunity to cross-examine witnesses. The Commission notes that OPC filed a written response to SWBT's motion within the time period permitted by Commission rule. All parties, including OPC, were also given the opportunity to orally argue the merits of SWBT's motion prior to the commencement of the hearing, and to brief the issue after the conclusion of the hearing. At no time did OPC request a hearing on this

issue. Neither did OPC dispute the main underlying fact -- that it provided the information in question to MCI and MCImetro in response to a data request. Rather, OPC focused on the proper interpretation to be given to the applicable statutes. Moreover, the Commission's finding was made in the context of ruling on SWBT's motion, which sought limited relief (the return of the disputed information) for the claimed violation.

MCI and MCImetro state that the Commission misunderstood their argument regarding the information provided to them by OPC as a claim that all Commission records are open to the public. Even if true the Commission's analysis remains unaffected. MCI and MCImetro have not presented the Commission with a reasonable interpretation which would give meaning to Section 386.480, RSMo 1994, but has instead claimed that it is subsumed by the Sunshine Law.

MCI and MCImetro also assert that the Commission erroneously failed to determine whether incumbent and alternative local exchange companies are similarly situated. The Commission was never asked to make this decision. Implicit in the constitutional argument made by MCI and MCImetro is the assumption that incumbent and alternative local exchange companies are similarly situated. As the Commission pointed out, MCI and MCImetro have been classified as competitive companies, and as such are subject to a lesser degree of regulation. The Commission's comment in footnote eleven was only intended to draw attention to the underlying assumption in MCI and MCImetro's argument.

Further, MCI and MCImetro request that the Commission stay the effectiveness of its Report And Order pending rehearing and judicial review, citing to State ex rel. Director of Revenue v. Gabbert, 925 S.W.2d 838, 839-40 (Mo. banc 1996). Absent extraordinary circumstances, the Commission does not generally issue stay orders. The Gabbert case is

instructive but does not compel the result sought by MCI and MCImetro; rather, it supports a converse result. In Gabbert the Missouri Supreme Court made absolute a writ of prohibition to prevent the enforcement of a trial court's stay order. The Court held that a movant must justify a court's exercise of an extraordinary remedy such as a stay, and that the factors for granting a stay of an administrative order are substantially the same as those for issuing a preliminary injunction. Gabbert, at 839. The Commission has considered the Gabbert decision along with MCI and MCImetro's arguments, and determines that there is no compelling reason for the grant of a stay order.

The AG argues that the Commission should have ordered a limited investigation of SWBT as suggested in Staff's brief. However, Staff's proposal does not address the question of whether "one final rate case" was contemplated by the legislature in enacting Senate Bill 507. Staff suggested that SWBT be required to provide certain data for a 12-month period, and assumed that it would take SWBT 45 days to do so. Staff further assumed that it could review the data and provide a preliminary report to the Commission within 45 days, so that the Commission would have a preliminary report within 90 days. The Commission notes that the preliminary report could only provide Staff's assessment of whether or not SWBT was overearning. However, the Commission could not summarily act based upon the preliminary report. If Staff concluded in its report that SWBT was overearning, a full complaint case would still be necessary so that SWBT would have an opportunity to contest the allegations, file testimony in its support, and otherwise exercise its due process rights.

The Commission's observations in its Report And Order are more than the recitation of "practical difficulties" that the AG asserts. It is extremely unlikely that a complaint case of the magnitude required could

be completed until sometime in 1998, which in turn would require this case to be held in abeyance until 1999, in order to conform with Section 392.245.3. In construing Section 392.245.2, the Commission has reviewed Senate Bill 507 in its entirety. A lengthy stay would not allow Section 392.245.4, which provides for a partial rate moratorium after conversion to price cap regulation, to be given meaningful effect.

MCI and MCImetro subsequently filed an additional pleading on November 4, and SWBT filed a reply on November 10. Pursuant to Section 386.500, RSMo 1994, the Commission shall grant and hold a rehearing if in its judgment sufficient reason has been made to appear. The Commission finds that the rehearing motions filed by OPC, MCI and MCImetro, and the AG do not present sufficient grounds for rehearing. The Commission will therefore deny the motions.

IT IS THEREFORE ORDERED:

1. That the applications for rehearing filed on September 25, 1997 by the Office of the Public Counsel, MCI Telecommunications Corporation, MCImetro Access Transmission Services, Inc., and the State of Missouri by and through the Attorney General are denied.

2. That this order shall become effective November 18, 1997.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton,
Murray, and Drainer,
CC., Concur.

Bensavage, Regulatory Law Judge