

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 23rd day of August, 2005.

In the Matter of a Request for the Modification of the)
Kansas City Metropolitan Calling Area Plan to Make) **Case No. TO-2005-0144**
the Greenwood Exchange Part of the Mandatory MCA)
Tier 2.)

**ORDER DENYING MOTION TO DISMISS
AND ORDER DIRECTING FILING**

Issue Date: August 23, 2005

Effective Date: September 2, 2005

Syllabus: This order denies all pending motions to dismiss the application for lack of jurisdiction. The order also directs the parties to file a proposed procedural schedule.

Procedural History

On April 29, 2005, the Office of the Public Counsel filed its final recommendation indicating that no change in its original request for modification of the Kansas City Metropolitan Calling Area is necessary. Public Counsel requests that the Commission alter the Kansas City MCA so that the Greenwood exchange becomes part of the mandatory MCA Tier 2. Public Counsel requests that the price for the Greenwood exchange customers remain the same as the current Tier 2 price with no more than a \$2.00 additive for residential customers and a \$3.00 additive for business customers.

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, MoKan Dial, Inc., CenturyTel of Missouri, LLC, and Spectra Communications Group, LLC, d/b/a CenturyTel, filed responses to Public Counsel's final recommendation. MoKan Dial indicated that it did not object to Public Counsel's recommendation since the proposal would have very little financial impact for MoKan Dial. In its response to Public Counsel's recommendation, SBC Missouri objected to the proposal and moved to have the application dismissed. CenturyTel and Spectra concurred in the pleading of SBC Missouri. The Staff of the Missouri Public Service Commission argued that the Commission has authority to proceed. The Office of the Public Counsel concurred in the arguments of Staff.

On July 25, 2005, MoKan Dial filed illustrative tariffs in response to an order of the Commission. On July 28, 2005, SBC Missouri, Lathrop Telephone Company, and Cass County Telephone Company Limited Partnership filed illustrative tariffs. In its cover pleading, SBC Missouri reiterated its motion that the request of Public Counsel be dismissed.

Discussion

SBC Missouri made four arguments against approving Public Counsel's proposal. First, SBC Missouri argued that such action would violate its due process rights, as guaranteed by Article I, Section 10, of the Missouri Constitution. Second, it argued that such action would violate Subsection 392.200.9, RSMo 2000.¹ Third, it argued that Commission action would violate Subsection 392.245.11, RSMo. Finally, SBC Missouri argued that such action would be inconsistent with Missouri case law holding that the Commission's authority to regulate does not include the right to dictate the manner in which

¹ All statutory references are to RSMo. 2000 unless specifically noted otherwise.

the company shall conduct its business. In addition to these four arguments, SBC Missouri objected to the procedure followed by the Commission.

A. Necessity for a Hearing

SBC Missouri first argues that the Commission may not grant Public Counsel's requested relief because granting the application would violate SBC Missouri's due process rights. SBC Missouri argues that the Commission may not grant such relief without first giving SBC Missouri the opportunity to be heard and to cross-examine witnesses.

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 SBC Missouri its opportunity to be heard and to cross-examine witnesses. The Commission will direct the parties to file a proposed procedural schedule that includes an evidentiary hearing and local public comment hearings, if desired. The Commission encourages the parties to set out a proposal that moves this proceeding forward as expeditiously as possible.

B. Revising Exchange Boundaries

SBC Missouri's second argument is that the Commission may not alter the existing MCA plan because to do so would violate Subsection 392.200.9, RSMo. 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 Greenwood exchange. Thus, no exchange boundary would be altered.

C. Expanding the Calling Scope of a Price Cap Company

SBC Missouri’s third argument is that the rule violates Subsection 392.245.11, RSMo, for price cap companies, because pricing and new service offering decisions must be left to the discretion of the price-cap-regulated company. SBC 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.” SBC 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.

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 . . .”² Additional support for the Commission’s authority can be found in the purposes section of Chapter 392, RSMo.³ Specifically, one of the purposes of Chapter 392 is to “ensure that customers pay only reasonable charges for telecommunications service.”⁴ Another purpose is to allow “full and fair competition to function as a

² Subsection 386.250(2), RSMo.

³ Section 392.185, RSMo.

⁴ Subsection 392.185(4), RSMo.

substitute for regulation *when consistent with* the protection of ratepayers and otherwise consistent with the public interest.”⁵

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 . . .”⁶

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.

⁵ Subsection 392.185(6), RSMo(emphasis added).

⁶ Section 392.250, RSMo.

D. Violation of Case Law

SBC Missouri’s final argument against the Commission’s authority is 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.⁷ SBC Missouri argues that by modifying the MCA Plans, the Commission would be usurping the companies’ management decisions.

The Court of Appeals, however, rejected this argument in the appeal of the Commission’s original order implementing the MCA Plan.⁸ The Court stated that it did not “see how Appellants’ management functions have been damaged.”⁹ The Court also stated that Subsection 392.240.1, RSMo, “invests the Commission with authority to revise and set reasonable rates for tolls and other services when customer needs are not being met and service is inadequate.”¹⁰ Thus, the Commission has the authority to alter the MCA under the current Missouri case law.

E. Procedures

SBC Missouri also stated that the proceeding itself runs afoul of procedural due process requirements by generally following the procedures outlined in proposed rule 4 CSR 240-2.061, which has not yet been promulgated. The Commission notes, however,

⁷ 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).

⁸ *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).

⁹ *Id.*

¹⁰ *Id.* at 55.

no party objected to the procedures outlined in this case when given the opportunity to do so at the conference held on April 20, 2005.¹¹ In other words, the procedures in this case, thus far, have been set out with the consent of parties. Therefore, the Commission determines that no violation of SBC Missouri's due process rights has occurred as a result of the procedures used in this matter.

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 acquiesced in the procedures to be followed, and they are being granted the opportunity for a hearing before the Commission makes its decision about whether to grant Public Counsel's proposal.

¹¹ See, Conference Transcript, p. 6-7.

Also, the Commission is not altering an exchange boundary, so no violation of Subsection 392.200.9 will occur. And 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 will, therefore, deny all the pending motions to dismiss this application for lack of jurisdiction, and will direct the parties to file a proposed procedural schedule.

IT IS THEREFORE ORDERED:

1. That all pending motions to dismiss this application for lack of jurisdiction are denied.
2. That no later than September 7, 2005, the parties shall jointly or separately file a proposed procedural schedule that includes an evidentiary hearing and local public comment hearings, if desired.
3. That this order shall become effective on September 2, 2005.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., dissents.

Dippell, Senior Regulatory Law Judge