



Missouri Public Service Commission

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December 10, 2001

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FILED

DEC 10 2001

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

RE: Case No. TO-2002-185

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **BRIEF OF STAFF**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

*Wm K Haas*

William K. Haas  
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WKH:sw  
Enclosure  
cc: Counsel of Record

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of                    )  
Southwestern Bell Telephone Company to        )  
Transfer Property and Ownership of Stock        )                    Case No. TO-2002-185  
Pursuant to Section 392.300 RSMo.            )

**BRIEF OF STAFF**

COMES NOW the Staff of the Missouri Public Service Commission and for its brief states:

1. In a Joint Application filed on October 12, 2001, Southwestern Bell Telephone Company (SWBT), a Missouri incorporated telecommunications company, seeks Commission approval to merge with Southwestern Bell Texas, Inc. (SWB Texas), a Texas corporation, which would survive the merger and which would then convert to Southwestern Bell Telephone, L.P. (SWBT, L.P.), a Texas limited partnership.
2. In Case No. TO-97-397, the Commission authorized SWBT to convert to price cap regulation.<sup>1</sup>
3. In an Order issued November 27, 2001, the Commission directed the parties to address questions raised by the application and responses to the application.
4. In its response filed on October 29, 2001, the Office of the Public Counsel raised the question of whether SWBT's price cap regulation would continue for SWBT, L.P.

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<sup>1</sup> In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996, 6 Mo. P.S.C. 3d 493 (1997).

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5. SWBT's price cap status would vest in SWBT Texas and then in SWBT, L.P., without further act.

Section 351.458 RSMo 2000 authorizes a Missouri corporation to merge into a foreign corporation with the foreign corporation surviving the merger. Subsection 2 of this statute provides:

The effect of the merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations; except, if the surviving or new corporation is to be governed by the laws of any other state than this state, to the extent that the laws of the other state shall otherwise provide.

Section 351.450 RSMo 2000 provides that when a merger or consolidation has been effected:

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, under the laws of this state vested in any such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

Article 5.01 of the Texas Business Corporation Act authorizes a Texas corporation to merge with a foreign corporation. Similar to § 351.450 RSMo, Article 5.06 of the Texas Business Corporation Act provides that when a merger takes effect:

(2) All rights, title and interests to all real estate and other property owned by each domestic or foreign corporation and by each other entity that is a party to the merger shall be allocated to and vested in one or more of the surviving or new domestic or foreign corporations and other entities as provided in the plan of merger without reversion or impairment, without further act or deed, and without any transfer or assignment having occurred, but subject to any existing liens or other encumbrances thereon.

Although Article 5.06 is less encompassing than Section 351.450, the effect is the same. Unless there is a provision to the contrary in either the statute or the agreement of merger, the resulting corporation succeeds as a general rule to the powers, privileges, and property of the constituents.<sup>2</sup> There is no provision in the Texas statute or in the plan of merger that is contrary to the survivor here succeeding to all the powers, privileges and property of the constituents.

Article 5.17 of the Texas Business Corporation Act authorizes a domestic corporation to convert to any other entity. Article 5.20 provides that when a conversion takes effect:

(2) All rights, title, and interests to all real estate and other property owned by the converting entity shall continue to be owned by the converting entity in its new organizational form without reversion or impairment, without further act or deed, and without any transfer or assignment having occurred, but subject to any existing liens or other encumbrances thereon.

SWBT's price cap status is the right, power or privilege to adjust its rates outside rate of return regulation. This status will vest by operation of law first in SWB Texas and then in SWBT, L.P.

6. The Commission's November 27, 2001 Order directed the parties to address the following questions:

If Southwestern Bell is allowed to reorganize as a Texas limited partnership, will the Commission's oversight over it be any different than if it had remained a Missouri corporation (the parties should pay particular attention to the Commission's oversight over future transfers of property)?

If Southwestern Bell is allowed to reorganize as a Texas limited partnership, what will become of the franchise and charter granted to the Missouri corporation?

What questions of fact (distinct from legal questions) are likely to be in dispute and require a hearing for resolution?

7. The Commission's oversight over SWBT, L.P., will not be different than its oversight over SWBT. Section 386.250(2) RSMo extends the jurisdiction, supervision, powers

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<sup>2</sup> 19 Am. Jur. 2d, Corporations § 2629.

and duties of the Public Service Commission to all telecommunications facilities, telecommunication services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide intra-state telecommunications service, except for certain rates charged by a telephone cooperative.

Section 392.300.1 RSMo 2000 provides that no "telecommunications company" shall sell its franchise, facilities or system, necessary or useful in the performance of its duties to the public without having first secured from the commission an order authorizing it to do so.

Section 386.020 RSMo 2000 defines "telecommunications company":

(51) "Telecommunications company" includes telephone corporations as that term is used in the statutes of this state and every corporation, company, association, joint stock company or association, *partnership* and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any facilities used to provide telecommunication service for hire, sale, or resale within this state. (Emphasis added.)

Accordingly, the Commission's jurisdiction over a telecommunications company is not dependent upon the company's form of organization. Therefore, SWBT's restructuring into SWBT, L.P., a partnership, will not change the Commission's oversight vis-à-vis its current oversight of SWBT. In particular, SWBT, L.P., may not sell property described in Section 392.300.1 without first securing Commission approval.<sup>3</sup>

8. The franchise and charter granted to SWBT, the Missouri corporation, would be transferred to the Texas limited partnership through the restructuring.

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<sup>3</sup> Section 392.300.2 RSMo, which requires Commission approval for a corporation to purchase more than ten percent of the total capital stock issued by a telecommunications company organized or existing under or by virtue of the laws of the state, would not be applicable to SWBT, L.P., a foreign partnership.

A franchise is the right conferred by the government to engage in a specific business or to exercise corporate powers.<sup>4</sup> The franchises of a company are divisible into two classes: (1) the mere right of being a body corporate; and (2) all other grants of power or privileges by the sovereign power. The first is not subject to barter and sale, but those rights and privileges falling within the second division are subject to barter and sale. *State ex rel. Wabash Railway Company v. Roach*, 184 S.W. 969, 971 (Mo. 1916). The charter of a corporation is its contract with the state. *Id.* at 973. Based upon the court's opinion in the *Wabash* case, it appears that because SWBT's predecessors were incorporated before the establishment of the Commission that it may assign its right to conduct a telecommunications business in Missouri without a requirement that its successor first obtain a certificate of service authority.

9. The question of fact likely to be in dispute and require a hearing for resolution is whether the transaction will be detrimental to the public interest. See, *State ex rel. City of St. Louis v. Public Service. Comm'n*, 73 S.W.2d 393 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer Company, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. 1980); 4 CSR 240-2.060(8)(d). It is the Staff's position that the transaction is not detrimental to the public interest because SWBT, L. P., as the successor in interest to SWBT, will be an "incumbent local exchange company"<sup>5</sup> and will be subject to the same regulation as SWBT and because the transaction will be transparent to SWBT's customers.

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<sup>4</sup> Black's Law Dictionary, 668 (7th Ed. 1999).

<sup>5</sup> "Incumbent local exchange telecommunications company" means a local exchange telecommunications company authorized to provide basic local telecommunications service in a specific geographic area as of December 31, 1995, or a *successor in interest* to such a company. (Emphasis added.) § 386.020(22) RSMo 2000.

Respectfully submitted,

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### Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 10<sup>th</sup> day of December, 2001.

*Wm K Haas*

**Service List for  
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Revised: December 10, 2001 (SW)**

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