

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

In the Matter of the Investigation of the)
State of Competition in the Exchanges of)
Southwestern Bell Telephone Company)

Case No. TO-2001-467

STAFF'S BRIEF ON REMAND

Comes Now the Staff of the Missouri Public Service Commission and for its brief states:

Introduction

This case began in 2001 when the Commission opened an investigation into whether any services of Southwestern Bell Telephone Company (SWB or SWBT or AT&T Missouri or AT&T) in any of its exchanges could be classified as competitive under Section 392.245.5 RSMo based on a finding of “effective competition” from alternative companies. The Commission’s Report and Order held, *inter alia*, that certain SWB services previously classified as “transitionally competitive” had converted to “competitive” status in 1999 by operation of law under Section 392.370 RSMo. Those services consist of intraLATA private line/dedicated services, intraLATA toll services, Wide Area Telecommunications Services (“WATS”) and 800 services, special access services, and certain operator services. The Office of the Public Counsel sought judicial review of the Report and Order.

The Court of Appeals, in an Opinion issued September 28, 2004, reversed this holding. The Court stated, “When SWB became subject to price-cap regulation in 1997, all its services became subject to price-cap regulation at that time, and the Commission erred in finding competitive status under the old statutes.” The Court directed:

In remanding, we ask the Commission to re-examine the competitive status of these particular services by applying the “effective competition” factors to the evidence the Commission has already accumulated with regard to these services both from the 1993 “transitionally competitive” hearing in Case No. TO-93-116 as well as from the hearing in this underlying case. Consistent with the

requirements of section 392.245.5, it will be necessary for the Commission to determine whether these services are effectively competitive on an exchange-by-exchange basis. Since the original finding of transitionally competitive applied to the entire service area, we assume sufficient evidence for such a finding is available. *State of Missouri ex rel. Acting Public Counsel Coffman v. Public Service Commission*, 154 S.W. 3d 316, 329 (Mo. App. W.D. 2004)

Senate Bill 237, which became effective on August 28, 2005, replaced the “effective competition” standard in Section 392.245 for determining the competitive classification of the services of a price cap regulated incumbent local exchange telecommunications company with an expedited two-track procedure more focused on the number and type of other entities providing local voice service in an exchange.

The Commission has directed the parties to brief the issues of which law the Commission must apply, whether any rates of AT&T should be adjusted, and the appropriate process for making that adjustment.

Argument

A. Effective Competition Standard

The Commission should apply the “effective competition” standard of Section 392.245.5 as it existed before amendment by Senate Bill 237.

Article I, Section 13 of the Missouri Constitution provides that “no ex post facto law, nor law . . . retrospective in its operation can be enacted.” In accord with this constitutional provision, there is a presumption that statutes are to operate prospectively. Although this is the general rule, there are two exceptions: (1) when the legislature expressly or by unavoidable implication provides that the statute shall have retroactive effect, and (2) when the statute is procedural or remedial only and the substantive rights of the parties are not affected. For

purposes of retroactivity analysis, substantive law relates to the rights and duties giving rise to the cause of action. Substantive statutes take away or impair vested rights acquired under existing law, or create or impose a new duty. On the other hand, a statute is procedural or remedial in nature if it prescribes a method of enforcing rights or obtaining redress for their invasion. Generally, procedural or remedial statutes are applicable to all pending cases, that is, those cases not yet reduced to a final, unappealable judgment. *See, Pierce v. State Dept. of Social Services*, 969 S.W. 2d 814, 822-23 (Mo. App. W.D. 1998).

The first exception to the rule prohibiting retrospective application does not apply in the instant case because there is no express language or unavoidable implication that the legislature intended for the amended version of Section 392.245 to operate retroactively. The second exception to the rule does not apply in the instant case because the amended statute is substantive. Amended Section 392.245 takes away a price-cap regulated telecommunications company's right to a competitive classification of its services in those exchanges where the services faces effective competition.

Accordingly, the Commission should apply the prior version of Section 392.245 to its determination in this case.

B. Rate Adjustments

As demonstrated in the Staff's Findings of Fact, the record supports a finding that SWB faces effective competition for the five categories of telecommunications services at issue on remand. Therefore, no rate review is required. Assuming for purposes of argument that the Commission finds on remand that one or more of these five categories of telecommunications services does not face effective competition, and further assuming that AT&T has raised its rates

for such services based upon the Commission's prior finding of effective competition, then AT&T Missouri should be directed to submit revised rate sheets.

Section 386.270 RSMo provides, in part: All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful . . . until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.” Based on the Commission's finding that the five categories of telecommunications services at issue faced effective competition and were classified as competitive under Section 392.245.5, AT&T Missouri was allowed to adjust its rates for such services as it determined appropriate. On the appeal of this case, the Court reversed the Commission's finding that these services had converted from transitionally competitive to competitive status by operation of law under Section 392.270 RSMo. The Court did not reach the issue of whether the record would support a finding of effective competition for these services. In remanding, the Court asked the Commission to re-examine the competitive status of these particular services by applying the effective competition factors. *Coffman, supra*, 154 S.W. 3d 329.

Section 392.200.1 RSMo Supp. 2005 provides, in part: “All charges made and demanded by any telecommunications company shall be just and reasonable and not more than allowed by law or order or decision of the commission.” If the Commission were to decide on this remand that one or more of these categories of services does not face effective competition, then at that point, any prior rate increases that were based upon the earlier competitive classification become more than allowed by law or order or decision of the Commission. And, in that event, the Commission should direct AT&T Missouri to submit revised tariff sheets to reduce any rates increased under the Commission's earlier finding that such services faced effective competition.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed this 11th day of December 2006.

/s/ William K. Haas

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