

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 15th day of March, 2007.

In the Matter of the Investigation of the State of )  
Competition in the Exchanges of Southwestern Bell ) **Case No. TO-2001-467**  
Telephone Company. )

## ORDER DENYING APPLICATION FOR REHEARING

Issue Date: March 15, 2007

Effective Date: March 15, 2007

On January 25, 2007, the Commission issued its Report and Order on Remand in which it found additional services of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to be classified as competitive. The Commission's order was given an effective date of February 4, 2007. On February 2, 2007, the Office of the Public Counsel filed a timely application for rehearing.

Public Counsel first argues that the Commission should not have relied on the record evidence in the “transitionally competitive” case, Case No. TO-93-116, or the evidence previously adduced in the current case. Public Counsel’s argument is wholly without merit as the Commission relied on the evidence as specifically directed by the Court of Appeals of Missouri, Western District. The Appeals Court stated:

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.<sup>1</sup>

<sup>1</sup> *State of Missouri ex rel., Acting Public Counsel John Coffman v. Public Service Commission*, 154 S.W.3d 316, 329 (Mo. App. W.D. 2004).

The Appeals Court reversed and remanded to the Circuit Court of Cole County, which entered its Order Remanding Case in which it mandated that the Commission make further findings in accordance with the Appeals Court's decision. Furthermore, as with a trial court, the Commission "on remand, with respect to the issues addressed by the appellate court on appeal, only has that authority granted to it by the appellate court in its mandate."<sup>2</sup>

Public Counsel also argues that it did not receive sufficient notice that the Commission would consider the evidence in TO-93-116. Since the Court of Appeals specifically directed the Commission to consider that evidence, the Commission fails to understand how Public Counsel was unaware that the Commission might now rely on its findings in that matter. In addition, Public Counsel was an active party in Case No. TO-93-116 when it was adjudicated and had a full opportunity to cross-examine the evidence in that case. Furthermore, the Commission relied on the findings in Case No. TO-93-116 in its original Report and Order in this case, of which the Public Counsel was fully aware. The Commission finds Public Counsel's argument to be without merit.

Public Counsel next argues that the Commission's decision was incorrect because the Commission failed to make an exchange-by-exchange analysis. The Commission relied on the previous determination that the services had been found competitive on a statewide basis. Thus, the Commission logically concluded that if the service is competitive statewide (i.e., in every exchange in the state) that service must necessarily be competitive on an exchange-by-exchange basis. The Commission rejects Public Counsel's argument.

---

<sup>2</sup> *Lombardo v. Lombardo*, 120 S.W. 3d 232, 243 (Mo. App. W.D. 2003) (further citations omitted).

Finally, Public Counsel makes numerous arguments that the Commission applied the incorrect law by applying Section 392.245 as it existed at the time of the original Report and Order and at the time of the Appeals Court decision. Public Counsel argues that the Commission should have applied Section 392.245.5, as amended by Senate Bill 237. As discussed in the Report and Order on Remand, the Commission concluded that Section 392.245.5, as amended by Senate Bill 237, contains no language requiring the statute to be applied retroactively. Furthermore, the Commission found that the changes to the statute were substantive changes, and thus that statute should operate prospectively.<sup>3</sup> Thus, the Commission determined that the old law should apply. Public Counsel's arguments that the Commission make findings in compliance with the new law must, therefore, also be rejected.

Public Counsel's final argument is that the Commission should roll back rates to the levels they were at the time of the remand of the case. Public Counsel suggests that because the Commission incorrectly determined that these services were competitive by operation of law, the tariffs later filed in compliance with the Commission's Report and Order were also unlawful. As the Commission explained in its Report and Order on Remand, the current rates were set through later tariff filings which were not contested as being unlawful. In addition, Section 386.520, RSMo, provides a procedure by which the courts may "stay or suspend the operation of the order" and no such stay or suspension was ordered in this case or with regard to any of the subsequent tariffs. For these reasons, along with the fact that the Commission found the services to be competitive in its Report

---

<sup>3</sup> See, *Callahan v. Cardinal Glennon Hospital*, 863 S.W. 2d 852, 872 (Mo. banc 1993); *Pierce v. State Dept. of Social Services*, 969 S.W.2d 814, 822-23 (Mo. App. W.D. 1998).

and Order on Remand, the Commission determined that rates should not be affected by its determination on remand.

Section 386.500.1, RSMo 2000, provides that the Commission shall grant an application for rehearing if “in its judgment sufficient reason therefor be made to appear.” In the judgment of the Commission, Public Counsel has failed to establish sufficient reason to grant its motion for rehearing. The motion for rehearing shall be denied.

**IT IS ORDERED THAT:**

1. The Office of the Public Counsel’s Motion for Rehearing is denied.
2. This order shall become effective on March 15, 2007.
3. This case may be closed on March 16, 2007.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

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

Dippell, Deputy Chief Regulatory Law Judge