

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day of
April, 2005.

In the Matter of the Proposed Acquisition of)	<u>Case No. TM-2005-0355</u>
AT&T Corporation by SBC Communications, Inc.)	

ORDER CLOSING CASE

Syllabus: The Commission finds that it has no jurisdiction over a merger between SBC Communications, Inc. and AT&T Corporation. In light of its lack of jurisdiction, the Commission rejects a request by the Office of the Public Counsel to conduct an investigation into the transaction.

On April 6, 2005, the Office of the Public Counsel filed a document entitled "Comments of the Office of the Public Counsel." Public Counsel asks the Commission to "conduct an investigation, including evidentiary hearings and public hearings, into the proposed merger of AT&T Corp. and SBC Communications Inc." Public Counsel does not allege that the Commission has authority to approve or disapprove the merger, but instead urges the Commission to investigate the merger and convey the results of that investigation to the Federal Communications Commission and the Department of Justice – entities that do have authority to approve or disapprove the merger.

On April 12, 2005, the Commission issued an order making AT&T Communications of the Southwest, Inc. and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri parties

to this case, and directing them and the Commission's Staff to respond to Public Counsel's comments.

On April 12, 2005, AT&T and SBC Missouri, along with TCG St. Louis and TCG Kansas City, jointly filed a response. AT&T, SBC and TCG argue that it would be inappropriate to conduct the investigation requested by Public Counsel because the Commission does not have the authority to approve the proposed merger under any Missouri statute. AT&T, SBC and TCG describe the subject transaction as follows:

Pursuant to the Parties' agreement, a wholly owned subsidiary of SBC Communications, Inc., Tau Merger Sub Corporation ("Tau"), will be created specifically for the purpose of consummating the transaction. Tau will merge with and into AT&T Corp., with AT&T Corp. being the surviving entity. At the time of the SBC/AT&T merger, shareholders of AT&T Corp. will exchange their stock for SBC stock. Following the merger, AT&T Corp. will become a wholly owned subsidiary of SBC. There is no change in the ownership structure of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, as a result of the transaction, nor is there a change in the ownership of SBC Long Distance or SBC Advanced Solutions, Inc., the other SBC-affiliated entities subject to the Commission's regulatory authority. Similarly, the transaction will not result in a change in ownership of those entities affiliated with AT&T Corp., which are subject to the Commission's authority. The AT&T affiliated entities operating in Missouri, which are comprised of AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City, will continue to be owned by the same entities after the transaction is completed as they are today.

AT&T, SBC and TCG argue that the statute (Section 392.300.2, RSMo 2000) that might otherwise give the Commission jurisdiction over telecommunications companies is not applicable to this merger for three reasons. First, the statute only applies to domestic telephone companies and none of the entities involved in the proposed merger are Missouri corporations. Second, the statute does not confer jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-

regulated telecommunications companies. Third, for AT&T and TCG, the Commission waived the applicability of Section 392.200.2 when it granted them certificates of service authority.

The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level, and it will adhere to that position here. Thus the only question is whether the Commission, despite its lack of direct authority over the transaction, should nonetheless conduct an investigation of its possible effects. Public Counsel has not alleged that those entities that do have jurisdiction over the transaction will be lax in their oversight, and the Commission has no reason to believe they will be. The Commission concludes that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise. The Commission will not conduct an investigation into the proposed transaction, and will close this case.

IT IS THEREFORE ORDERED:

1. That this case is closed.
2. That all motions not previously ruled upon are denied.
3. That this order shall become effective on April 19, 2005.

BY THE COMMISSION

(S E A L)

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Davis, Chm., and Appling, C., concur
Murray, C., concurs, concurring opinion attached
Gaw and Clayton, CC., dissent, dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

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

In the Matter of the Proposed Acquisition of) Case No. TM-2005-0355
AT&T Corporation by SBC Communications, Inc.)

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order today, the Commission, by a simple majority, voted to close the case before them finding that it did not have jurisdiction to oversee the merger of the parent companies, SBC Communications, Inc., and AT&T Corporation that are not subject to Commission oversight. The Commission also found that an investigation was duplicative and unnecessary in light of the fact that the Commission did not find, and the Public Counsel failed to allege that the entities which do have jurisdiction over the transaction will be lax in their oversight.¹

While I voted in favor of the order closing the case, I believe the Commission should have addressed the Office of Public Counsel's allegation that the Commission had jurisdiction under section 386.330.1, RSMo 2000, to conduct a formal investigation into the merger of the parent companies and its effect on Missouri consumers. By failing to address this claim in a direct manner, the Commission has left open the question of its authority under this section. The inference now is that the Commission can open investigations under section 386.330.1, RSMo without concern for the threshold requirements established by law, whenever it questions the vigilance of the Federal Communications Commission ("FCC").

¹ The federal agencies with jurisdiction to review the merger between the parent companies are the Federal Communications Commission and the Department of Justice.

In paragraph 7 of its pleading, the Public Counsel stated, "the Commission under its general authority to conduct investigations in Section 386.330.1, RSMo should open a case to conduct an investigation into the impact the merger has on the telecommunications market, the ratepayers, and the public interest." The Public Counsel later makes several allegations that an investigation is needed to study the impact of the merger of the parent companies on the competitive markets of the Missouri-certified subsidiary companies.²

Section 386.330.1, RSMo provides as follows:

"The commission may, of its own motion, investigate or make inquiry, in a manner determined by it, as to any act or thing done or omitted to be done by any telecommunications company *subject to its jurisdiction*, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation *in violation of any provision of law or in violation of any order or decision of the commission.*"

(emphasis added).

The Public Counsel did not assert that SBC Communications Inc. or AT&T Corporation, the parent companies involved in the merger, are "subject to [the commission's] jurisdiction" under section 386.330.1, RSMo. Indeed, such an assertion would fail as there is nothing in the Commission's authorizing statutes that confers jurisdiction to investigate two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.³ Nor does the public counsel allege that the Missouri-regulated subsidiaries of these companies have done or omitted doing an act that is "in violation of any provision of law or in violation of any order or decision of the commission". Without such allegations or independent Commission

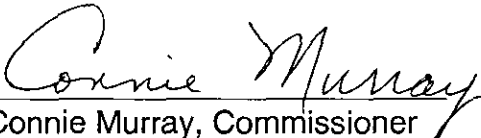
² See Comments of the Office of the Public Counsel, pp. 2-5.

³ See, e.g., *In the Matter of the Merger of SBC Communications Inc. and Ameritech Corporation*, 7 Mo. P.S.C.3d 528 (1998), for an analogous finding regarding the Commission's authority to oversee mergers of parent companies not regulated in Missouri.

findings that the Missouri-regulated subsidiaries have violated the law or a Commission order, I believe the Commission has no choice but to dismiss the Public Counsel's request for a hearing pursuant to section 386.330.1, RSMo for lack of jurisdiction.⁴

Despite having reached this conclusion regarding the Public Counsel's request for a formal investigation, I see no reason why the Commission's staff could not review the available information and discuss the impact of the merger on the Missouri-regulated subsidiaries. The staff could then provide a recommendation to the Commission regarding any necessary comments to be forwarded to the FCC and the Department of Justice. Our staff routinely handles matters before the FCC in this way without the expense and time-consuming prospect of opening a formal investigation. It is my opinion that we should continue to handle issues within the FCC's jurisdiction in this same manner.

Respectfully submitted,


Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 19th day of April, 2005.

⁴ I would note that even if we had jurisdiction to open an investigation under section 386.330.1, RSMo, the timing of the Public Counsel's request would make this a near impossibility. A Public Interest Statement in this merger was filed at the FCC on February 22, 2005. The FCC issued a Public Notice on March 11, 2005, requesting comments from interested parties regarding the merger and setting April 25, 2005 as the deadline for such filings. (See Public Notice in WC Docket No. 05-65). The Public Counsel waited until April 6, 2005 to file its pleading before the Commission requesting an investigation – leaving the Commission less than three weeks to open a formal investigation into an extremely complex corporate merger in order to file comments with the FCC.

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

In the matter of the Proposed Acquisition of) Case No. TM-2005-0355
AT&T Corporation by SBC Communications, Inc.)

**DISSENTING OPINION OF COMMISSIONERS STEVE GAW
AND ROBERT M. CLAYTON III**

We respectfully dissent from the Order Closing Case issued by the majority in the above captioned proceeding. Through its Comments which initiated this docket, Public Counsel merely requests that the Commission undertake an investigation for the purpose of submitting “well-founded and informed recommendations” in the context of the reviews conducted by the Department of Justice and Federal Communications Commission.¹ As Public Counsel notes, “[t]he impact of the merger should be evaluated to gauge the extent to which it will reduce competitive pressures in SBC’s exchanges.”²

In its joint response to the OPC pleading, SBC & AT&T attempt to evade the purpose of OPC’s comments. As noted, OPC merely seeks an investigatory docket to analyze the effects of the proposed transaction on the Missouri local and interexchange telecommunications markets. In response, SBC / AT&T assert that it “would be inappropriate for the Commission to proceed with this case because the Commission does not have the authority to approve the proposed merger”.³ As such, SBC / AT&T request that the Commission “dismiss this case for lack of jurisdiction.”⁴

¹ *Comments of the Office of the Public Counsel*, Case No. TM-2005-0355, filed April 6, 2005, at page 5.

² *Id.* at 4.

³ *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City’s Response to the Comments of the Office of the Public Counsel*, Case No. TM-2005-0355, filed April 12, 2005, at page 1. In its “no action” letter to the Commission dated February 28, 2005, SBC & AT&T tout the advantages of the transaction. “The parties believe the merger will strengthen SBC’s ability to provide all of the advanced, innovative communications and entertainment services that our customers have come to expect.” Ultimately, SBC & AT&T conclude that “[t]he merger should result in benefits for Missouri and the country”. Given its claims of alleged benefits for Missouri, the Commission should take SBC / AT&T on its assertions and provide the analysis to our federal colleagues.

⁴ *Id.* at page 10.

In its Order Closing Case, the majority, like SBC & AT&T, misconstrue the intent of OPC's request. Despite its explicit recognition that "Public Counsel does not allege that the Commission has authority to approve or disapprove the merger", the majority nonetheless devotes the vast majority of its Order to a discussion regarding the Commission's lack of jurisdiction over a parent company transaction. In passing, the majority finds that Public Counsel has not alleged that the FCC and DOJ "will be lax in their oversight, and the Commission has no reason to believe they will be."⁵ As such, the majority concludes "that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise."⁶

The Commission's position that such an investigation "would be redundant and duplicative" and, therefore, "a fruitless exercise", stands in stark contrast to its actions following the announcement of the SBC / Ameritech merger. Recognizing the obvious effect that the SBC / Ameritech merger would have on Missouri ratepayers, the Commission initiated a docket and held an on-the-record conference so that parties could "address what they believe[d] should be contained in the Commission's comments to the FCC regarding [the] merger."⁷ The Commission conducted this on-the-record conference despite SBC / Ameritech's claims that the Commission lacked jurisdiction to approve the transaction.

In addition to the SBC / Ameritech merger review, the Commission has routinely opened dockets or conducted investigations for the purpose of presenting well-informed comments and information to other agencies or the Missouri General Assembly. For instance, in February of 2004, the Commission issued an Order Establishing Case in Case No. TW-2004-0324 based upon an indication that the Federal Communications Commission would "soon issue a Notice of

⁵ *Order Closing Case*, Case No. TM-2005-0355, issued April 19, 2005.

⁶ *Id.*

⁷ *Order Setting Oral Argument*, Case No. TM-99-76, issued September 8, 1998

Proposed Rulemaking concerning Voice over Internet Protocol (VoIP) technology.”⁸ Immediately prior to the Commission issuing its Order Establishing Case, the U.S. District Court for the District of Minnesota issued a decision which held that VoIP “is an information service and therefore not subject to state regulation”.⁹ Despite the apparent lack of Missouri Commission jurisdiction, the Commission nonetheless found that the FCC rulemaking “will have an impact on telecommunications service in Missouri” and that a docket should be established under the Commission’s general supervisory powers (Section 386.250) to “further [the Commission’s] knowledge of VoIP technology and to assist in its preparation of comments to the FCC.”¹⁰

Additionally, the Commission initiated a docket to study the issue of electric restructuring. In its Order Establishing Docket and Creating Task Force, the Commission notes:

Any decision to implement electric retail competition statewide in Missouri, not merely on an experimental basis, will require amendments to existing state law. While that policy decision must be made by the General Assembly and the Governor, the time has come for the Commission to establish a formal means to identify the risks and benefits that would face the State of Missouri in the event that retail competition occurs.¹¹

Despite its recognition that it lacked any authority to unilaterally implement any suggested changes, the Commission established the restructuring docket in order to “compile a comprehensive plan for implementation of retail electric competition in the State of Missouri in the event legislation is enacted which authorizes it.”¹²

Without conceding any issue regarding Commission jurisdiction to review the proposed transaction, it seems apparent that the Commission should follow past precedent and conduct an investigation in order to more fully enlighten itself regarding the state of competition in the SBC exchanges and the degree to which competition in those exchanges will be impacted by SBC’s

⁸ *Order Establishing Case*, Case No. TW-2004-0324, issued February 3, 2004.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Order Establishing Docket and Creating Task Force*, Case No. EW-97-245, issued March 28, 1997.

¹² *Id.*

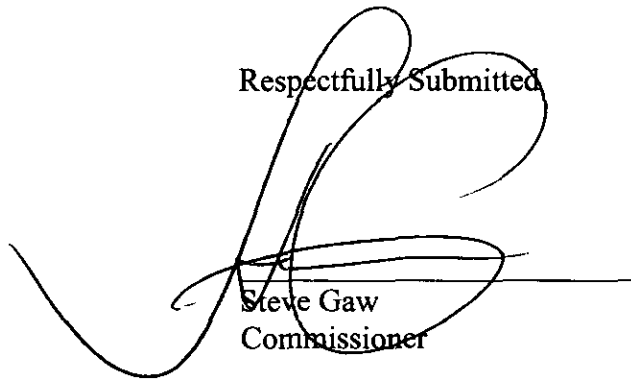
acquisition of AT&T. The mere establishment of such a docket would not contain an implicit finding that the FCC or DOJ would be "lax in their oversight", but instead would be a logical step in anticipation of filing comments as routinely requested by those agencies.

Because of its proximity to consumers in Missouri and its duties under the state and federal telecommunications statutes to examine the status of competition, this Commission has the ability to add valuable information and insight into the impact of this merger on Missouri consumers. Moreover, the Commission should be mindful of the apparent demise of interexchange service as a result of the pending acquisitions of both AT&T and MCI.¹³ Finally, the Missouri Commission has a responsibility to gather this information and to provide it, with critical analysis, to key elected policy makers. As the Missouri General Assembly prepares to modify state telecommunications laws and as Missouri's Congressional delegation contemplates re-writing the Telecommunications Act of 1996, this Commission owes them the Missouri-specific data retrieved and compiled by Commission staff to protect Missouri consumers.



Robert M. Clayton III
Commissioner

Respectfully Submitted



Steve Gaw
Commissioner

Dated at Jefferson City, Missouri,
on this 19th day of April, 2005.

¹³ See, Case No. TM-2005-0370 concerning the proposed acquisition of MCI by Verizon, Inc.