

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

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

**SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI'S REPLY TO
THE OFFICE OF THE PUBLIC COUNSEL'S FINAL RECOMMENDATION**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Reply to the Office of the Public Counsel's Final Recommendation, states as follows:

Executive Summary

For a number of years, various parties have requested changes to the Metropolitan Calling Area ("MCA") Plan. SBC Missouri's position regarding such changes has been consistent throughout the years and is the same today. Based on the instant record, it would be unlawful for the Missouri Public Service Commission ("Commission") to modify or alter the existing MCA Plan for four reasons. First, such action would violate SBC Missouri's due process rights, as guaranteed by Article I, Section 10, of the Missouri Constitution. Second, such action would violate Section 392.200.9, RSMo. 2000.¹ Third, such action would violate Section 392.245.11. Finally, such action would be inconsistent with Missouri case law, which uniformly holds the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.²

SBC Missouri notes that the Commission is proceeding in this case on the basis of proposed rule 4 CSR 240-2.061, a rule that is not even in effect. Apart from the substantive issues noted above, this proceeding also runs afoul of accepted procedural requirements. If the

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

² 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 re. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

Commission intends to follow the requirements of the proposed rule, procedural due process dictates that the rule be adopted before proceeding here.

Even if the Commission had the legal authority to proceed, it should not do so. What this case essentially boils down to is one community's alleged desire to have MCA service for "free" or "almost free." If the Commission were to grant OPC's proposal, it is SBC Missouri's position that it would mark the beginning of the end of MCA Service since every other community that is contained within the current optional MCA footprint would similarly propose that it be offered the service for "free" or "almost free."

Constituents of Greenwood have been eligible participants in the MCA Plan since the inception of the plan. Today, if Greenwood's community members do not want to pay for MCA Service, they have competitive alternatives available to them. For example, SBC Missouri and its long distance affiliate, SBC Long Distance, offer a variety of unlimited long distance calling plans to both their residential and business customers in Greenwood, all of which include a more expansive calling scope than MCA Service (nationwide calling scope vs. MCA calling scope). It is SBC Missouri's understanding that AT&T and MCI similarly offer unlimited long distance calling plans to residential customers in these communities and that AT&T, MCI, and a variety of other telephone companies offer unlimited long distance calling plans to business customers in these communities. Moreover, these communities have other competitive alternatives available to them, most notably wireless service, which obviate the need for the expansion of the MCA Plan.

For all of these reasons, the Commission should dismiss OPC's request for expansion of the MCA Plan. If the Commission finds that it can lawfully impose the expanded MCA service sought by OPC, it should not do so until OPC has put forth evidence not only that customers want mandatory MCA service in Greenwood, but also that all customers that do not currently

subscribe to MCA service are willing to pay a compensatory price for this service, having been advised of competitive alternatives that are available to them.

Argument

On April 29, 2005, OPC filed its Final Recommendation in the above-referenced case. In its Final Recommendation, OPC proposes that the constituents of Greenwood, who have been optional Tier 3 MCA participants since the inception of the MCA Plan, be made mandatory Tier 2 MCA participants under the same terms and conditions as apply to all other Tier 2 exchanges. OPC states that: “while it believes that all Tier 2 customers should be treated equally, it does recognize that there is some merit to considering the practical effects of reclassifying an exchange in an optional tier to an exchange in a mandatory tier where the MCA charge is not an additive, but is included in the price of local basic service.”³ OPC, therefore, indicates it would consider an adjustment to the MCA pricing plan to compensate for the special situation posed by the Greenwood exchange reclassification. Specifically, OPC indicates that it would: “consider an additive **not to exceed** \$2.00 month residential, \$3.00 month business as a possible price adjustment under this unique ‘annexation’ circumstances.”⁴ Under OPC’s proposal, all customers in Greenwood would be mandatory, rather than optional, participants in the MCA Plan. Finally, inter-company compensation would be bill and keep.

For a number of years, various parties have requested changes to the MCA Plan. SBC’s Missouri position regarding such changes has been consistent throughout the years and is the same today. Based on the instant record, it would be unlawful for the Commission to modify or alter the existing MCA Plan for four reasons. First, such action would violate SBC Missouri’s due process rights, as guaranteed by Article I, Section 10, of the Missouri Constitution. Second,

³ See OPC’s Final Recommendation, page 2.

⁴ Id.

such action would violate Section 392.200.9, RSMo. 2000.⁵ Third, such action would violate Section 392.245.11. Finally, such action would be inconsistent with Missouri case law, which uniformly holds the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.⁶ SBC Missouri will address each of these arguments, briefly below.

First, if the Commission were to modify or alter the existing MCA Plan at this time, it would violate SBC Missouri's due process rights under Article I, Section 10, of the Missouri Constitution. Specifically, Article I, Section 10, provides: "[t]hat no person shall be deprived of life, liberty or property without due process of the law." At the outset, SBC Missouri notes that no pre-filed testimony has been filed in this case, there has been no hearing, and there has been no opportunity for SBC Missouri to cross-examine any witnesses.

The hearings of administrative agencies must be conducted consistently with fundamental principles of due process.⁷ One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.⁸ Section 386.420 also guarantees all parties to a Commission proceeding, the right to be heard and to introduce evidence.⁹

Another component of the due process requirement is that parties be allowed to cross-examine witnesses.¹⁰ The purpose of cross-examination is to sift, modify, or explain what has

⁵ All statutory references are to RSMo. 2000 unless specifically noted otherwise.

⁶ 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 re. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

⁷ State ex. rel. James M. Fischer, Public Counsel for the State of Missouri, v. Public Service Commission of Missouri, et al., 645 S.W.2d 39, 43 (Mo. App. W.D. 1982); State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission of Missouri, et al., 562 S.W.2d 688, 693 (Mo. App. 1978).

⁸ State ex. rel. James M. Fischer, Public Counsel for the State of Missouri, v. Public Service Commission of Missouri, et al., 645 S.W.2d 39, 43 (Mo. App. W.D. 1982).

⁹ State ex. rel. James M. Fischer, Public Counsel for the State of Missouri, v. Public Service Commission of Missouri, et al., 645 S.W.2d 39, 42 (Mo. App. W.D. 1982).

¹⁰ State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission of Missouri, et al., 562 S.W.2d 688, 693 (Mo. App. 1978).

been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of the witness.¹¹ When the evidence is critical to the issues and necessary to sustain a proponent's burden or proof, cross-examination is essential to testing the reliability of evidence.¹²

The right to cross-examination is explicitly set forth in Section 536.070.2 which provides that in any contested case:

Each party shall have the right to call and cross-examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

Thus, if the Commission were to modify or alter the existing MCA Plan based on this instant record, it would be violating SBC Missouri's due process rights since SBC Missouri has not had a meaningful opportunity to be heard, including the right to confront and cross-examine opposing witnesses and to rebut their testimony with its own evidence.

Second, if the Commission were to modify or alter the existing MCA Plan, without the agreement of the affected telecommunications companies, it would violate Section 392.200.9, which provides:

This act shall not be construed to prohibit the Commission, upon determining that it is in the public interest, from altering local exchange boundaries, provided that the incumbent local exchange telecommunications company or companies serving each exchange for which the boundaries are altered provide notice to the Commission that the companies approve of the alteration of exchange boundaries.

¹¹ Id.
¹² Id.

The Commission has interpreted Section 392.200.9 to require two conditions for the borders of an exchange to be changed.¹³ First, the Commission may change local exchange boundaries only if the ILEC doing business in the exchange for which the boundaries are changed approves of the change; and, second, the Commission must then make a finding that changing the borders of the exchange is in the public interest.¹⁴

If the Commission implements OPC's proposed geographic expansion of the current MCA Plan, the Commission would effectively alter exchange boundaries. Since SBC Missouri has not provided notice to the Commission that it approves of the alteration, the first requirement in Section 392.200.9 would not be met. Moreover, the second requirement in Section 392.200.9 would not have been met because the Commission has not made any finding that changing the exchange is in the public interest. Thus, it would be unlawful under Section 392.200.9 for the Commission to modify or alter the existing MCA Plan.

Third, it would be unlawful for the Commission to modify or alter the existing MCA Plan under Section 392.245.11, which provides in pertinent part:

The maximum allowable prices for nonbasic telecommunications services of a large, incumbent local exchange telecommunications company regulated under this section shall not be changed until January 1, 1999, or on an exchange-by-exchange basis, until an alternative local exchange telecommunications company is certified and providing basic local service in such exchange, whichever is earlier. Thereafter, the maximum allowable prices for nonbasic telecommunications service of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices. This subsection shall not preclude an incumbent local exchange company from proposing new telecommunications services and establishing prices for such new services. An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty

¹³ Order Dismissing Complaint, The Wood Family v. Sprint and Southwestern Bell, TC-2002-399, July 30, 2002, p.

2.

¹⁴ Id.

days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section. (Emphasis added).

On September 16, 1997, SBC Missouri became subject to price cap regulation.¹⁵ The express terms of Section 392.245.11 provide that an ILEC, such as SBC Missouri, not OPC or the Commission, may propose new telecommunications services and establish prices for such services.

At the current time, SBC Missouri does not propose to expand the current MCA Plan, or to modify or alter the existing MCA Plan in any respect. Further, SBC Missouri has not established prices for OPC's geographic expansion of the current MCA Plan and OPC does not have the statutory right to establish a price for this service. Thus, it would be unlawful under Section 392.245.11 for the Commission to modify or alter the existing MCA Plan.

Finally, it would be unlawful for the Commission to modify or alter the existing MCA Plan under existing case law. Missouri courts have consistently held that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.¹⁶ Specifically, the regulatory power of the Commission does not clothe the Commission with general powers of company management incidental to ownership.¹⁷ The utility retains the lawful right to manage its own affairs and conduct business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare.¹⁸ Thus, it is SBC Missouri's decision, not the Commission's, whether to offer any plan that is a modification of the MCA Plan. SBC Missouri, quite simply, has not made any decision

¹⁵ See Report and Order, Case No. TO-97-397, September 16, 1997, p. 29.

¹⁶ 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 re. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

¹⁷ State ex re. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980); State v. Public Service Commission of Missouri, 343 S.W.2d 177, 182 (Mo. App. 1960).

¹⁸ State v. Public Service Commission of Missouri, 343 S.W.2d 177, 182 (Mo. App. 1960).

at this time to offer any plan that is a modification of the MCA Plan. For all of these reasons, it would be unlawful for the Commission to modify or alter the existing MCA Plan.

Moreover, even if the Commission had the legal authority to adopt OPC's plan—which it clearly does not—it would be inappropriate to adopt it in this proceeding. What this case essentially boils down to is one community's alleged desire to have MCA service for “free” or “almost free.” If the Commission were to grant OPC's proposal, it is SBC Missouri's position that it would mark the beginning of the end of MCA Service since every other community that is contained within the current optional MCA footprint would similarly propose that it be offered the service for “free” or “almost free.”

Constituents of Greenwood have been eligible participants in the MCA Plan since the inception of the plan. Today, if Greenwood's community members do not want to pay for MCA Service, they have competitive alternatives available to them. For example, SBC Missouri and its affiliate, SBC Long Distance, offer their residential customers four different unlimited long distance calling plans in Greenwood. First, SBC Long Distance offers National ConnectionsSM for \$15.00 per month. In order to qualify for this price, the customer must order this service online and must also have local service from SBC Missouri, as well as Caller ID, or Caller ID with Name, and two additional features. Second, SBC Long Distance offers National ConnectionsSM II for \$30.00 per month for SBC access line customers. This plan includes unlimited nationwide calling. Third, SBC Long Distance offers All Distance® Select for \$39.99. In order to qualify for this price, the customer must order this service online. This plan includes Personal ChoiceSM, a bundle that includes residential flat rate service with SBC Missouri that includes unlimited local calling, Caller ID, a customer's choice of two selectable features, InLine®, and nationwide direct dialed long distance. Finally, SBC Long Distance offers All Distance® for \$48.95. This service includes residential flat rate service with SBC Missouri that

includes unlimited local calling, Caller ID, a customer's choice of two selectable features, InLine®, and nationwide direct dialed long distance.

Additionally, SBC Long Distance offers its business customers in Greenwood one unlimited long distance calling plan, Business All Distance, for \$58.99 per month. SBC Long Distance Business All Distance plan includes SBC Custom BizSaver and unlimited state-to-state and instate long distance calling (with a one year term commitment). Thus, SBC Long Distance offers plans to both its residential and business customers in Greenwood, which include a larger calling scope than MCA service (nationwide calling as opposed to MCA calling).

Further, it is SBC Missouri's understanding that AT&T and MCI similarly also offer unlimited long distance calling plans in Greenwood. Specifically, AT&T offers its residential customers its One Rate USA Plan and MCI offers its residential customers its MCI Neighborhood Complete. Additionally, companies such as Birch and Sage actively compete for residential customers in the Kansas City Metropolitan Area.

AT&T offers its business customers its AT&T All in One Advantage and AT&T CallVantage Small Office plans. MCI offers its business customers MCI Business Complete Unlimited. Additionally, it is SBC Missouri's understanding that Birch, McLeodUSA, NuVox, and Sage actively compete for business customers in the Kansas City Metropolitan Area. Moreover, constituents in Greenwood have other competitive alternatives available to them, most notably wireless telephones, which obviate the need for the expansion of the MCA Plan.

For all of these reasons, the Commission should dismiss OPC's request for expansion of the MCA Plan. If the Commission finds that it can lawfully impose the expanded MCA service sought by OPC, it should not do so until a hearing has been conducted in which the Commission considers, among other matters, not only whether customers want mandatory MCA service in Greenwood, but also that all customers that do not currently subscribe to MCA service are

willing to pay a compensatory price for this service, having been advised of competitive alternatives that are available to them.

Wherefore, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, prays that the Commission considers its Reply to OPC's Final Recommendation, that the Commission dismisses OPC's request for expansion of the MCA Plan. If contrary to SBC Missouri's position, the Commission determines that it has the authority to proceed, the Commission should require OPC to put forth evidence not only that customers want mandatory MCA service in Greenwood, but also that all customers that do not currently subscribe to MCA service are willing to pay a compensatory price for this service, having been advised of competitive alternatives that are available to them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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