

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

In the Matter of a Request for Expansion of)	
the St. Louis Metropolitan Calling Area Plan to)	
Include the Exchanges of Washington, Union,)	Case No. TO-2005-0141
Wright City, St. Clair, Marthasville, Beaufort,)	
Foley, and Warrenton.)	

**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 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

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).

Apart from the substantive issues noted above, this proceeding also runs afoul of accepted procedural requirements. If the Commission intends this proceeding 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. The Office of Public Counsel (“OPC”) is proposing a radical change to the MCA Plan—the addition of eight exchanges to the Plan—despite the fact that the competitive marketplace is already addressing these eight communities’ calling needs. 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 Beaufort, St. Clair, Union, and Washington, all of which include a more expansive calling scope than OPC proposes in this case (nationwide calling vs. MCA calling) and all of which are less expensive than OPC proposes (either outright or if one considers the services included in the package). It is SBC Missouri’s understanding that AT&T and MCI similarly also 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, that obviate the need for the expansion of the MCA Plan. Further, optional MCA service as it is provisioned today, requires the use of dedicated area codes and prefixes. The competitive alternatives offered to customers do not require a customer to change his/her/its telephone number, as would be required under OPC’s proposal. OPC has not demonstrated that customers in these communities

are interested in MCA Service, especially in light of required number changes and especially when there are so many competitive alternatives available.

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 MCA Service in these exchanges at a compensatory price, but also that these customers are willing to change their telephone numbers having been advised of the 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 Metropolitan Calling Area ("MCA") Plan be modified to add a new Tier 6 that would include the exchanges of Washington, Union, Wright City, St. Clair, Marthasville, Beaufort, Foley, and Warrenton.³ Pursuant to OPC's proposal, this service would be optional. OPC further proposes that the price for optional MCA service in Tier 6 would be no higher than the applicable rate for the classes of service in MCA Tier 5.⁴ Finally, OPC indicates that inter-company compensation for optional MCA service in Tier 6 should be on a "bill and keep" basis to reflect the existing compensation arrangement for the existing MCA Plan.

For a number of years, various parties have requested changes to the 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 to modify or alter the existing MCA Plan for four reasons.

³ SBC Missouri is the incumbent local exchange carrier in Washington, Union, St. Clair and Beaufort.

⁴ MCA Tier 5 service is currently priced at \$32.50 for residential customers and \$70.70 for business customers.

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. 2000.⁵ 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

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).

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 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. Moreover, even if the Commission were to hold an evidentiary hearing that

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).

¹¹ Id.

¹² Id.

satisfied applicable due process requirements, OPC's proposed modification of the MCA Plan would still be unlawful.

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.

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.

¹³ Order Dismissing Complaint, The Wood Family v. Sprint and Southwestern Bell, TC-2002-399, July 30, 2002, p. 2.

¹⁴ Id.

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 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.

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

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 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 not be appropriate to adopt it in this proceeding. OPC is proposing a radical change to the MCA Plan—the addition of eight exchanges to the Plan—despite the fact that the competitive marketplace is already addressing these eight communities' calling needs. 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 Beaufort, St. Clair, Union, and Washington that

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).

OPC proposes to include in MCA Tier 6, all of which offer a greater calling scope (nationwide calling vs. MCA calling) and all of which are less expensive than the price OPC proposes for service in MCA Tier 6 (either outright or if one considers the services that are contained within the bundle).

For example, SBC Missouri and its affiliate, SBC Long Distance, offer their residential customers four different unlimited long distance calling plans in these four exchanges. 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 to SBC Missouri access line customers. This plan includes unlimited long-distance 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 Missouri and SBC Long Distance offer their business customers in Greenwood one unlimited long distance calling plan, Business All Distance, for \$58.99 per month. The 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 Missouri and its affiliate offer plans to both their residential and business customers in Greenwood, which include a larger calling scope than MCA service (nationwide calling as opposed to MCA calling)

for less money than the price OPC proposes for MCA Tier 6 service (either outright or if you take into account the additional services that are included in the plan).

Further, it is SBC Missouri's understanding that AT&T and MCI similarly also offer unlimited long distance calling plans to these communities. 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 Big River and Sage actively compete for residential customers in the eastern portion of Missouri.

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 Allegiance, Big River, Birch, MCI, McLeodUSA, and Sage, as well as other telecommunications companies, actively compete for business customers in the eastern portion of Missouri. These competitive alternatives are offered to customers without the need for the customer to change his/her/its telephone number. OPC has not demonstrated that customers are willing to do this; especially in light of the competitive alternatives that are available. Moreover, these communities 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 contrary to SBC Missouri's position, the Commission

determines that it has the legal authority to proceed, it should require OPC to put forth evidence not only that customers want MCA Service in these exchanges at a compensatory price but also that these customers would be willing to change their telephone numbers having been advised of the 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 MCA Service in these exchanges at a compensatory price but also that these customers would be willing to change their telephone numbers having been advised of the competitive alternatives that are available to them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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