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August 6, 1997

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Mr. Cecil I. Wright
Executive Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Southwestern Bell Telephone Co. - Case No. TO-97-397

Dear Mr. Wright:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION**.

This filing has been mailed or hand-delivered this date to all parties of record.

Thank you for your attention to this matter.

Sincerely yours,

Penny G. Baker
Deputy General Counsel
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PCB/sm
Enclosures
cc: Counsel of Record

Exhibit No. 14
Case No(s) 10-2003-0012
Date 2/7/03 Rptr SURM

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

Petition of Southwestern Bell Telephone)
Company for a Determination that it is)
Subject to Price Cap Regulation Under)
Section 392.245 RSMo (1996).)

Case No. TO-97-397

**INITIAL BRIEF OF THE STAFF OF THE
MISSOURI PUBLIC SERVICE COMMISSION**

Comes now the Staff of the Missouri Public Service Commission ("Staff") and presents the Staff position in this case.

I. Introduction

This case began with a Petition, filed by Southwestern Bell Telephone Company ("SWBT"), requesting that the Commission make a determination that it be subject to price cap regulation. This Petition was filed on March 21, 1997. The Commission granted intervention requests to MCI Telecommunications Corporation ("MCI"), The State of Missouri, MCI Metro Access Transmission Services, Inc. ("MCImetro"), United Telephone Company of Missouri d/b/a Sprint ("United"), AT&T Communications of the Southwest, Inc. ("AT&T"), GTE Midwest Incorporated ("GTE"), Sprint Communications Company L.P. ("Sprint"), Birch Telecom of Missouri, Inc. ("Birch"), Kansas City Fiber Network, L.P. ("K.C. Fiber") and CompTel-Mo.

Pursuant to Commission Orders, a hearing was held in this case on June 30, 1997. Prior to the evidentiary hearing, oral argument was heard by the Commission relating to the Motion to Strike Testimony filed by SWBT on June 20, 1997 and the request that confidential information be returned to SWBT. The Commission requested that parties

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respond to this issue in briefs by its Order Regarding Motion to Strike, issued July 11,

1997. The Staff discussion of this issue appears at IV. herein.

II. PRICE CAP REGULATION

Section 392.245.2¹ specifically states:

A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the Commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area.

Before moving to the requirements of Section 392.245.2, it must first be established that the petitioning party is a "large incumbent local exchange telecommunications company."

Section 386.020(30) defines a large incumbent local exchange telecommunications company as one that has at least one hundred thousand access lines in Missouri.

Although SWBT did not plead this fact in its Petition, nor did SWBT establish this fact in testimony filed in this case, the Commission may utilize its prior knowledge to ascertain that SWBT does indeed have at least one hundred thousand access lines in Missouri and thus qualifies as a large incumbent local exchange telecommunications company.

A. Determination of Alternative Provider

The language of Section 392.245.2 is clear and unambiguous. The first condition that must be met is that an alternative local exchange company has been certified to provide basic local telecommunications service within SWBT's service area. This is a

¹ All statutory cites refer to Mo. Rev. Stat., 1996 Supp. unless otherwise noted.

purely factual question for the Commission. "What are the undisputed facts?" That Communications Cable Laying Company, Inc. d/b/a Dial US ("Dial US") applied to this Commission for a certificate to provide basic local telecommunications service in all of SWBT's Missouri exchanges. The Commission, by Order dated December 20, 1996 in Case No. TA-96-347, approved that request.²

MCI, in its opening statement, attempted to blur the Commission's focus on this issue by trying to create a distinction between a facilities-based provider and a reseller of local exchange telecommunications services. This argument must fail. MCI points the Commission to Section 392.450 which deals with certification of competitive local exchange telecommunications companies in order to make its point.³ Section 392.450.1 makes a distinction between the provision of basic local telecommunications service or for the resale of basic local telecommunications service. This distinction applies only to the certification process. Once the application is approved, there is no further distinction between the two methods of providing the service. No matter which method of providing the service is to be utilized, the order of the Commission approving the application results in a certificate.

² Voight Rebuttal, Ex. 6, p. 3. Hedges Direct, Ex. 1, p. 2. The Office of the Public Counsel admits this factual premise by referring to the tariffs and customers of Dial US. See Meisenheimer Rebuttal, Ex. 7, pp. 2 and 11.

³ Tr. p. 74.

Section 392.245.2 requires only that "an alternative local exchange telecommunications company" be certified. Section 386.020(1) provides the following definition:

"Alternative local exchange telecommunications company", a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service or switched exchange access service, or any combination of such services, in a specific geographic area subsequent to December 31, 1995.

There is no distinction in this definition between a facilities-based versus reseller provider, only that there be a certificate to provide "basic or non-basic local telecommunications service..." Thus, MCI's distinction is without merit.

The first step in the two-step determination is a simple determination as to whether or not an alternative local exchange telecommunications company has been certified by this Commission. The Commission has been presented with uncontradicted evidence that Dial US was granted a certificate by this Commission to provide basic local exchange telecommunication service pursuant to its Order dated December 20, 1996 in Case No. TA-96-347. Therefore, the first step has been successfully cleared by SWBT.

B. Determination That Certified Alternative Provider is Providing Service

The second requirement of Section 392.245.2 is a determination that the certified alternative local exchange telecommunications company "is providing such service in any part of the large incumbent company's service area." This, too, is a simple and straightforward determination. The statute does not require a percentage of market share for the

alternative provider, nor does it require that the alternative provider be creating real, substantial or effective competition.

The clear language of the statute requires a determination by the Commission that Dial US, as the certificated alternative local exchange telecommunications company in SWBT's service area, is providing service. Again, there is no dispute as to the facts necessary to this determination. All parties admit that Dial US has customers and is providing those customers with basic local telecommunications service pursuant to Commission approved tariffs. This should end the determination on this second step of the statutory requirements.

Once again, the other parties to this case have tried to obscure the Commission's focus. For example, MCI has presented a position that "the level of competition" is an important factual question while the Office of the Public Counsel ("OPC") argues that the Commission has discretion to determine how many customers are enough to make a determination that Dial US is providing service. These are simply ploys used by the parties to shift the spotlight away from the relevant statutory language. The statute refers to the provision of local exchange telecommunications service. Nowhere does it specify a requirement that the provision of service meet some arbitrary level before the criteria is met. Dial US is providing service in a SWBT service area. It has been providing such

service since at least January 22, 1997.⁴ This provides the Commission with the factual basis required to make the second-step determination pursuant to Section 392.245.2.

Once the Commission makes the two required findings, the determination required by the statute is clear. SWBT, as a large incumbent local exchange telecommunications company, is subject to price cap regulation under Section 392.245.1.

III. RELATIONSHIP TO CASE NO. TC-97-303

There is, however, another matter that the Commission must consider. On February 6, 1997, MCI and a number of other interexchange telecommunications companies filed a complaint against SWBT alleging that SWBT's intrastate switched access rates are excessive and should be reduced. On July 29, 1997, the Commission convened a motions hearing for the purpose of hearing argument on the issue of whether the complaint was properly filed pursuant to statute, as well as other issues relating to whether or not the complaint should go forward. The Staff believes that the issues, though inter-related, are distinctly different. In the case before the Commission here, the determination is merely one of whether or not SWBT *meets the criteria* specified in the statute in order to be subject to price cap regulation. The issue in Case No. TC-97-303 is a determination of the appropriate *rates* that become the maximum allowable prices for SWBT under price cap regulation.

⁴ The provision of basic local telecommunications services began on December 31, 1996 to Dial US employees. The provision of basic local telecommunications service to non-Dial US employees began on January 22, 1997 when Lieutenant Governor Roger Wilson placed the first competitive basic local exchange telecommunications call. See Hedges Direct, Ex. 1, p. 3.

The Commission can make its determination in this case that SWBT has met the criteria required by Section 392.245.2 and thus shall be subject to price cap regulation. However, the Commission should either stay or extend the effective date of such an Order until such time as it reaches a decision in Case No. TC-97-303. If the Commission concludes that an earnings investigation is warranted in order to meet its statutory obligation of ensuring that rates, charges, tolls and rentals for telecommunications service are just, reasonable and lawful,⁵ then the effective date of its determination in this docket should be stayed or extended until after that investigation is complete and just and reasonable rates have been ordered.

IV. CONFIDENTIAL INFORMATION

The issue of what does and does not constitute open versus closed public records or information is not a new one to the Commission. This is simply a new fact situation upon which to apply the standards. OPC provided MCI with highly confidential information that it had obtained from the Commission's records pursuant to its authority under Section 386.30 Mo. Rev. Stat., 1994. The information provided by OPC to MCI was provided in response to a Data Request propounded to OPC in this case.

A discussion of this issue must begin with Section 386.480 Mo. Rev. Stat., 1994.

This section states:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provision of this chapter, or chapter 610, RSMo, shall be open to public

⁵ Section 392.245.1.

inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor. (Emphasis Added).

It is clear that the information provided by SWBT to the Commission and obtained by OPC pursuant to this section falls within the meaning of the prohibition against divulgence. Additionally, the Protective Order issued in this case, at paragraph W. states that the "Staff and OPC are subject to the nondisclosure provisions of Section 386.480, R.S.Mo. 1986."⁶

Section 386.480 Mo. Rev. Stat., 1994 must then be reconciled with Section 386.380.1 Mo. Rev. Stat., 1994. Section 386.380.1 specifies, in part, that "[a]ll proceedings of the commission and all documents and records in its possession shall be public records." This section has been interpreted to mean that the public records of the Commission pursuant to this statute constitute all documents required by law or regulation to be filed with the Commission and all papers and written memorials expressly required to be kept by public officials of the Commission.⁷ Thus, while the document at issue in this case was held by the Commission as a public record, it is a closed public record pursuant to 386.480.1 Mo. Rev. Stat., 1994.

⁶ The citation should be updated in the standard Protective Order to refer to Mo. Rev. Stat., 1994.

⁷ See Section 386.190.2 Mo. Rev. Stat., 1994 and General Counsel of the Public Service Commission Opinion No. 78-3.

Section 610.021 lists exceptions to the general rule that all records and meetings must be open to the public. Specifically, Section 610.021(14) states: "Records which are protected from disclosure by law." Thus, records that are protected from disclosure by law are permitted to be kept as closed public records and cannot be divulged. Section 386.480 Mo. Rev. Stat., 1994 provides that "...[n]o information...except such matters as are specifically required to be open..." shall be open to the public. Thus, the specific prohibition against disclosure of Section 386.480 Mo. Rev. Stat., 1994 specifically excepts the public records containing this SWBT provided financial "surveillance" information from disclosure.

The fact that the information was provided pursuant to a data request does not change that conclusion. Pursuant to the language in the Protective Order, OPC was still subject to the nondisclosure provisions of Section 386.480, Mo. Rev. Stat., 1994. Staff is very guarded in its release of information provided to it under this provision. Counsel for regulated companies have stated that their clients would be less likely to provide Staff with the cooperation and free-flow of information currently enjoyed if the companies were concerned that the information provided would be disseminated to its competitors.

Additionally, it is generally viewed that all information obtained by the Commission and its Staff is subject to the provisions of Section 386.480 Mo. Rev. Stat., 1994, whether it is obtained via a data request response or through informal requests outside of a docketed case. Where the information has been obtained during a docketed case pursuant to data requests propounded under the Commission's rules, the party providing the information has the opportunity to designate a classification based upon the Protective

Order in effect in that case. In the situation before the Commission here, SWBT provided information to Staff on an informal basis. Staff utilized that information to prepare financial surveillance reports. Staff designated its work-product as confidential because it utilized information provided to it pursuant to Section 386.480 Mo. Rev. Stat., 1994 in the preparation of those financial surveillance reports.

SWBT had no opportunity to review the financial surveillance reports prepared by Staff and designate a classification based upon the Protective Order in this docket prior to the release of the information document by OPC to MCI. If Staff had been presented with a data request that could arguably require the dissemination of information provided to it under Section 386.480 Mo. Rev. Stat., 1994, it would have, at the very least, contacted the company who provided the information and discuss with that company Staff's intent with regard to the provision of such information to an entity other than OPC.

Under the standard Protective Order which was adopted in this case, pursuant to paragraph F., OPC was required to contact SWBT prior to releasing the information to MCI.

Paragraph F. states:

If material or information to be disclosed in response to a data request contains material or information concerning another party which the other party has indicated is confidential, the furnishing party shall notify the other party of the intent to disclose the information. The other party may then choose to designate the material or information as HIGHLY CONFIDENTIAL or PROPRIETARY under the provisions of this Protective Order.

OPC failed to meet this requirement of the Protective Order. Further, there seems to be some misunderstanding as to the meaning of the paragraph. OPC stated its belief that

under the Protective Order, "[i]t doesn't say that I have to notify them in order to designate it."⁸

Upon a review of Opinions of the General Counsel to the Missouri Public Service Commission, two such opinions may be of some assistance to the Commission in its deliberations on this issue. Opinion No. 83-1 concluded that the Commission is not legally obligated to allow the press or the public to inspect information provided by a company pursuant to a staff audit, or the mental impressions and opinions of staff experts drawn from such information for the purpose of advocating a position before the Commission in a contested case proceeding. Opinion No. 87-1 concluded that the Commission is not legally obligated to provide the media with a copy of a memorandum submitted to the Commission by its General Counsel containing Staff calculations involving company provided data and the General Counsel's analysis on the defensibility of a Stipulation and Agreement. Opinion Nos. 83-1 and 87-1 are attached hereto as Attachments A and B.

The data request propounded to OPC requested that it "[p]roduce copies of any calculations performed by the Public Counsel regarding the rate of return and/or return on equity of Southern Bell Telephone Company and any documents relied upon in making those calculations, including documents received from the Public Service Commission."⁹ The information provided to MCI by OPC consisted of, in fact, OPC calculations which were based on Staff calculations from company provided information

⁸ Tr. p. 36.

⁹ Tr. p. 21.

as well as copies of the financial surveillance reports obtained from the Commission's closed records. A red flag should have gone up in the eyes of the OPC when it read the phrase "including documents received from the Public Service Commission," which was included in the MCI data request. OPC is obviously aware of its responsibility under Section 386.480 Mo. Rev. Stat., 1994, but it did not heed that responsibility in this instance.

This is very similar to the situation discussed in Opinion No. 87-1. The primary difference is that here the calculations and provision of the information are one step removed from the Staff, whereas the situation in Opinion No. 87-1 dealt with Staff's calculations based upon company information. The Circuit Court of Cole County, Missouri upheld the reasoning of Opinion No. 87-1 in its Order dated May 2, 1988.¹⁰ The Circuit Court's decision was not appealed. It seems clear that the information provided to MCI by OPC was provided in violation of the prohibition found in Section 386.480 Mo. Rev. Stat., 1994 and paragraph F. of the Protective Order.

V. Conclusion

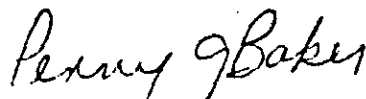
The Staff recommends that the Commission make a determination that SWBT has met the criteria required by Section 392.245.2 and is entitled to regulation by price caps. The Staff further recommends that the Commission delay the effective date of such an order until it has reached a conclusion in Case No. TC-97-303 as to whether or not an investigation into the earnings of SWBT is necessary in order for the Commission to meet

¹⁰ The Kansas City Star Company v. Public Serv. Comm'n. A copy of this Order is attached hereto as Attachment C.

its statutory obligation of ensuring that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful.

Further, the Staff recommends that the Commission find that OPC provided information to MCI in violation of Section 386.480 Mo. Rev. Stat., 1994 and Order all parties to return all copies of such information to SWBT and such further relief as it deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 6th day of August, 1997.

