

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

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**Volume 7 MPSC 3d**  
**December 1, 1997 Through November 30, 1998**

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**Kevin Kelly**  
*Reporter of Opinions*

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**JEFFERSON CITY, MISSOURI**  
**(2001)**

## PREFACE

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This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning December 1, 1997 through November 30, 1998. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 1978, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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# ORGANIZATION OF THE PUBLIC SERVICE COMMISSION

**SHEILALUMPE**

**CONNIEMURRAY**

**KELVINSIMMONS**  
Appointed June 1, 2000

**STEVENGAW**  
Appointed April 2, 2001

**M.DIANNEDRAINER**  
Resigned May 3, 2001

**ROBERTSCHEMENAUER**  
Appointed March 6, 1998  
Resigned March 31, 2001

**HAROLDCRUMPTON**  
Resigned June 1, 2000

Dale Hardy Roberts, Secretary/Chief Regulatory Law Judge

Cecil I. Wright, Executive Director  
Resigned August 31, 1998

Gordon Persinger, Interim Executive Director  
Appointed August 17, 1998

Brian Kinkade, Executive Director  
Appointed February 14, 2000  
Resigned May 18, 2001

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KEVIN THOMPSON Deputy Chief R.L.J.	NANCY DIPPELL Senior R.L.J.
BILL HOPKINS Senior R.L.J.	MORRIS WOODRUFF Senior R.L.J.
VICKY RUTH	SHELLY REGISTER

ORGANIZATION

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BOB SCHALLENBERG  
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**ADMINISTRATIVE DIVISION**

DONNA KOLILIS  
DIRECTOR

**RESEARCH AND PUBLIC AFFAIRS DIVISION**

GORDON PERSINGER  
DIRECTOR

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TA-98-173	Efficy Group, Inc. (Certificate of service authority, IXC, granted) .	1/21/98
EO-96-56	Empire District Electric Company (Integrated resource plan, joint agreement approved) .....	1/7/98
TA-98-233	Empire District Electric Company (Certificate of service authority, IXC and local exchange telecommunications services, granted) .....	1/22/98
EF-98-120	Empire District Electric Company (Order approving financing, approved) .....	3/17/98
TA-99-139	ExOp of Missouri, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	11/19/98
TA-98-184	EZ Talk Communications, L.L.C. (Certificate of service authority, basic local telecommunications service, granted) .....	3/11/98
— F —		
TA-98-323	FaciliCom International, L.L.C. (Certificate of service authority, IXC, granted) .....	4/23/98
TO-98-501	Family Telecommunications Incorporated d/b/a FTI Communications(Name change from FTI to I-Link Communications, Inc., recognized) .....	6/11/98
TA-99-36	Farthing Enterprises Incorporated (Certificate of service authority, pay phone, granted) .....	8/31/98
TA-98-160	Fawcett, John (Certificate of service authority, pay phones, granted) .....	12/2/97
TA-98-332	Feist Long Distance Service, Inc. (Certificate of service authority, IXC and local exchange telecommunications service, granted) .....	3/23/98
TA-99-90	Fennelly, James B. (Certificate of service authority, pay phone, granted) .....	10/1/98
TA-99-103	FiberPath Technologies, L.L.C. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	10/28/98
TD-99-18	F&L Communications (Certificate of service authority, pay phone, canceled) .....	7/23/98
TA-98-569	Flying J Inc. (Certificate of service authority, pay phone, granted)	7/31/98

UNREPORTED UTILITY CASES

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TA-98-526	Fort, Gaines H. (Certificate of service authority, pay phone, granted) .....	6/19/98
SR-98-564	Four Seasons Water & Sewer Company (Rate increase granted) .....	7/30/98
SA-98-248	Four Seasons Water & Sewer Company (Certificate of public convenience and necessity to construct and maintain sewer system in Camden County, granted) .....	9/29/98
TA-98-551	Francis, Scott D. (Certificate of service authority, pay phones, granted) .....	7/20/98
TA-98-490	Friendship Village of West County (Certificate of service authority, IXC, granted) .....	6/10/98
WR-98-320	Frimel Water Systems, Inc. (Rate increase, approved) .....	3/26/98
TM-98-426	Frontier Corporation, Allnet Communication Services d/b/a Frontier Communications Services (FCS) and Frontier Communications of the West (FCW)(Reorganization and transfer of assets from FCW to FCS, granted) .....	6/11/98
TA-98-318	Frontier Local Services, Inc. (Certificate of service authority, basic local, exchange access and local telecommunications services, granted) .....	7/15/98
TA-98-161	Frontier Telemanagement, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	2/24/98
— G —		
TA-98-447	Gauvain, Steve d/b/a Cardinal Communications (Certificate of service authority, pay phones, granted) .....	2/27/98
TA-96-230	Goldenberg, Jerome B. (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-97-20	Goode, Carmen (Certificate of service authority, pay phone, canceled) .....	7/16/98
GR-97-74	Greeley Gas Company (1996-97 Actual Cost Adjustment case) .....	8/18/98
TA-98-380	Green Hills Area Cellular Telephone Company Inc. d/b/a Green Hills Telecommunications Services (Certificate of service authority, basic local telecommunications service, granted) ....	7/7/98
TA-97-88	Grice, David J. d/b/a KD Phones (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-97-437	Groner, Joe (Certificate of service authority, pay phones, canceled) .....	7/13/98
TM-98-65	Group Long distance, Inc. (Transfer of control of Eastern Telecommunications Incorporated to Group Long Distance, Inc., granted) .....	1/14/98
TA-98-112	Group Long distance, Inc. (Certificate of service authority, basic local telecommunications service, granted) .....	5/7/98

## UNREPORTED UTILITY CASES

TO-98-327	GTE Card Services Incorporated (Acknowledge name change to GTE Communications Corporation) .....	2/27/98
TO-98-378	GTE Card Services, Incorporated (Name change to GTE Long Distance, acknowledged) .....	4/2/98
TO-98-41	GTE Midwest Incorporated and GTE Arkansas Incorporated and Dial Call, Inc., (Interconnection agreement, approved) .....	12/16/97
TO-98-163	GTE Midwest Incorporated, GTE Arkansas Incorporated and Ameritech Mobile Communications, Inc. (Interconnection agreement, approved) .....	1/8/98
TO-98-193	GTE Midwest Incorporated, GTE Arkansas Incorporated and USA eXchange, LLC d/b/a Omniplex Communications Group (Resale agreement, approved) .....	1/27/98
TO-98-209	GTE Midwest Incorporated and Atlas Mobilfone, Inc. (Interconnection agreement, approved) .....	2/11/98
TO-98-230	GTE Midwest Incorporated, GTE Arkansas Incorporated and U S Cellular (Interconnection agreement, approved) .....	2/25/98
TO-98-388	GTE Midwest Incorporated, GTE Arkansas Incorporated and Digital Teleport, Inc. (Interconnection, resale and unbundling agreement, granted) .....	6/4/98
TO-98-410	GTE Midwest Incorporated, GTE Arkansas Incorporated and Mark Twain Communications Company (Interconnection and unbundling agreement, granted) .....	6/16/98
TO-98-410	GTE Midwest Incorporated, GTE Arkansas Incorporated and Mark Twain Communications Company (Interconnection agreement, approved) .....	9/3/98
TO-98-582	GTE Midwest Incorporated, GTE Arkansas Incorporated and Green Hills Communications (Interconnection agreement, approved) .....	9/22/98
TO-98-581	GTE Midwest Incorporated, GTE Arkansas Incorporated and Max-Tel Communications, Inc. (Resale agreement, approved) .....	9/22/98
TO-99-55	GTE Midwest Incorporated and GTE Arkansas Incorporated and Buy-Tel Communications, Inc. (Resale agreement, granted) ..	9/29/98
TO-99-13	GTE Midwest Incorporated and GTE Arkansas Incorporated and Local Line America, Inc. (Interconnection agreement, granted) .....	10/1/98
TO-99-23	GTE Midwest Incorporated and GTE Arkansas Incorporated and Pre-Paid Local Access Phone Service Company (Interconnection agreement, granted) .....	10/7/98
TO-99-56	GTE Midwest Incorporated and GTE Arkansas Incorporated and DMJ Communications, Inc. (Resale agreement granted) .....	11/17/98

## UNREPORTED UTILITY CASES

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TD-99-17 Guard, James S., d/b/a American Payphone Systems (Certificate of service authority, pay phone, canceled) ..... 7/23/98

## — H —

TA-96-103 Haman, Michael (Certificate of service authority, pay phone, canceled) ..... 2/26/98

TA-95-391 Hambelton, Garrold (Certificate of service authority, pay phone, canceled) ..... 2/26/98

TD-98-267 Harvey Hotel Management Corporation d/b/a Hospitality Telecom Solutions, certificate of service authority, IXC, canceled) ..... 1/28/98

TA-98-381 Hardt, Russell E. (Certificate of service authority, pay phones, granted) ..... 4/9/98

TA-96-50 Hayes, John (Certificate of service authority, pay phones, canceled) 7/13/98

TA-98-198 Hebron Communications Corporation (Certificate of service authority, IXC, granted) ..... 12/30/97

TA-98-588 HJN Telecom, Inc. (Certificate of service authority, IXC, granted) 8/13/98

TO-98-169 HLC-Internet, Incorporated (Name change to Epoch Networks, Inc., acknowledged) ..... 12/3/97

TA-98-395 Holthaus, Thomas G. (Certificate of service authority, pay phones, granted) ..... 5/7/98

TA-98-448 Hutchinson, Steve J. (Certificate of service authority, pay phones, granted) ..... 5/20/98

## — I —

TA-98-577 ICG Telecom Group, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) ..... 8/12/98

TA-98-589 ICG Telecom Group, Inc. (Certificate of service authority, facilities-based and resold local telecommunications services, granted) . 9/23/98

TA-99-97 IDT America, Corp. (Certificate of service authority, IXC, granted) ..... 11/23/98

WA-96-449 Incline Village Water and Sewer Company (Sale of system to Warren County Water and Sewer, granted) ..... 6/18/98

WF-97-271 Incline Water & Sewer Company (Financing, granted) ..... 10/20/98

TA-99-4 Infinitel, Inc. (Certificate of service authority, pay phone, granted) 8/3/98

TD-99-194 Insurance Information Exchange, L.L.C. (Certificate of service authority, IXC, canceled) ..... 11/20/98

TO-98-563 Intelnet Services of North America (Name change to Intelnet International Corp., recognized) ..... 7/17/98

## UNREPORTED UTILITY CASES

TM-98-244	Intermedia Communications Inc., Shared Technologies Fairchild Inc. and Access Network Services, Inc. (Acquisition and merger, transfer of control of Access from the shareholders of Shared Technologies to Intermedia, granted) .....	2/24/98
TO-98-415	International Charity Network, Inc. (Name change to Charities Network International, Inc., acknowledged) .....	4/30/98
TD-98-359	International Telecommunications Exchange Corporation (Certificate of service authority, IXC, canceled) .....	4/7/98
TM-98-479	IntraTel Group, Ltd. (Merger of North American Telephone Network, L.L.C. into IntraTel, granted) .....	5/28/98
TM-98-384	IXC Long Distance, Inc. and Network Long Distance, Inc. (Transfer of control of Network to IXC, granted) .....	6/2/98
TO-99-61	IXC Long Distance, Inc. (Name change to IXC Communications Services, Inc., acknowledged) .....	9/11/98

## — K —

TA-97-172	Kanefield, Wendy, d/b/a WK Communications (Certificate of service authority, pay phone, canceled) .....	7/14/98
TA-98-428	Kansas City Cable Partners d/b/a American Cablevision (Certificate of service authority, IXC, granted) .....	5/27/98
EF-98-578	Kansas City Power & Light Company (Order approving financing) .	8/5/98
TA-98-370	K.C. Telecom Services, L.L.C. (Certificate of service authority, pay phone, granted) .....	3/30/98
TA-99-82	Kean, Roger A. (Certificate of service authority, pay phone, granted) .....	9/29/98
TA-98-522	Kelly's Westport Inn, Inc. (Certificate of service authority, pay phone, granted) .....	6/19/98
TA-95-433	Klopfenstein, Michael d/b/a Mega-Com Communications (Certificate of service authority, pay phones, canceled) .....	7/13/98
TF-98-260	KLM Telephone Company (Order approving financing) .....	4/16/98
TA-98-408	KR&R Investment Corp. d/b/a UPLINK (Certificate of service authority, IXC, granted) .....	7/2/98
TA-98-407	KR&R Investment Corp. d/b/a Uplink (Certificate of service authority, shared tenant services, granted) .....	8/4/98
TD-99-20	K&S Enterprises, Inc. (Certificate of service authority, pay phone, canceled) .....	7/23/98

## — L —

WM-98-130	Lake Carmel Development Co., Inc. (Sale of water and sewer system to Capital Utilities, Inc., approved) .....	2/3/98
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## UNREPORTED UTILITY CASES

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TM-98-280	LATA 520/521 Microwave Corporation/ Cybertel RSA Cellular, L.P. (Sale of assets from LATA 520/521 to Cybertel, granted) .....	4/30/98
TA-99-65	Laughlin, Dean (Certificate of service authority, pay phone, approved) .....	9/22/98
TA-98-580	Lawson, Sonja Marie d/b/a Sonja Marie Communications (Certificate of service authority, pay phones, granted) .....	8/3/98
TM-98-402	LCI International Telecom Corp. (Merger of LCI International Management Services, Inc. with LCI International Management Services, Inc., approved) .....	5/13/98
TM-98-520	LCI International Telecom Corp. and USLD Communications, Inc. (Transfer of certain assets from USLD to LCIT, approved) .....	11/12/98
TA-98-338	LDD, Inc. (Certificate of service authority, basic local exchange and local exchange intrastate telecommunications services, granted) .....	9/29/98
TA-98-199	LDM Systems, Inc. (Certificate of service authority, basic local telecommunications service, approved) .....	9/15/98
TM-98-247	LDM Systems, Inc. and RSL Com U.S.A., Inc. (Transfer of control of LDM to RSL through the sale of 100 percent of stock of LDM, pursuant to stock purchase agreement, granted) .....	9/29/98
TA-98-565	LD Network Services, Inc. (Certificate of service authority, IXC, granted) .....	8/26/98
TA-98-256	LeMax, Inc. (Certificate of service authority, pay phone service, granted) .....	5/7/98
TA-98-178	Lone Star Transport, Inc. (Certificate of service authority, pay phone, granted) .....	12/9/97
WR-98-321	L.T.A. Water Company, Inc. (Rate increase, approved) .....	3/26/98
— M —		
TA-99-28	Main Street Telephone Company (Certificate of service authority, IXC, granted) .....	9/9/98
TA-98-305	Mark Twain Communications Company (Certificate of service authority, basic local telecommunications service, granted) ...	5/19/98
TA-98-547	Matex Corporation (Certificate of service authority, pay phone, granted) .....	7/6/98
TA-98-339	MAXCOM, Inc. (Certificate of service authority, basic local telecommunications service, granted) .....	7/15/98
TA-98-265	Maximum Communications, Inc. d/b/a CommWorld of St. Louis (Certificate of service authority, pay phone, granted) .....	2/25/98
TA-97-342	Max-Tel Communications, Inc. (Certificate of service authority, basic local telecommunications service, granted) .....	12/2/97

## UNREPORTED UTILITY CASES

TA-97-226	McCoy, John D. (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-95-242	McCraney, Terri L. (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-99-104	McGee, Marguerite L. (Certificate of service authority, pay phone, granted) .....	11/3/98
TA-98-575	MCImetro Access Transmission Services, LLC (Certificate of service authority, basic local exchange, local exchange, exchange access and IXC telecommunications services, granted) .....	10/27/98
TM-98-576	MCI Telecommunications Corporation, MCImetro, Inc., MCImetro Access Transmission Services, Inc., and MCImetro Access Transmission Services, LLC (Merger of MCImetro, Inc. into MCI Telecommunications Corporation and the merger of MCImetro Access Transmission Services, LLC into MCImetro Access Transmission Services, LLC, granted) .....	10/28/98
TA-98-288	McLeodUSA Telecommunications Services, Inc. (Certificate of service authority, basic local telecommunications service, granted) .....	5/19/98
TM-98-300	McLeodUSA Telecommunications Services, Inc./ Consolidated Communications Telecom Services Inc. (Merger of CCTS with and into McLeodUSA Telecom, with McLeodUSA Telecom the surviving entity, granted) .....	6/25/98
GO-98-562	MCN Corporation d/b/a MCN Energy Group, Inc. (Request for certification pursuant to Section 33 (a) (2) of the Public Utility Holding Company Act of 1935, order approving agreement) .....	11/12/98
TA-98-525	Megsinet-CLEC, Inc. (Certificate of service authority, IXC, granted) .....	7/2/98
TA-98-524	Megsinet-CLEC, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	10/6/98
TA-98-210	Merritt, Kenneth A. d/b/a Heartland Payphone Services (Certificate of service authority, pay phone, granted) .....	1/7/98
TA-98-585	Messerli, Howard and Barbara d/b/a Jenkins Kwik Shop (Certificate of service authority, pay phones, granted) .....	8/3/98
TA-98-543	Metracom Corporation (Certificate of service authority, IXC, granted) .....	8/27/98
TA-97-556	Metro Connection, Inc. d/b/a TransAmerican Telephone (Certificate of service authority, basic local telecommunications service, granted) .....	1/13/98



## UNREPORTED UTILITY CASES

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TA-98-535	Metrophone Telecommunications, Inc. (Certificate of service authority, pay phone, granted) .....	7/6/98
TA-97-57	Metzing, William (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-98-93	MiComm Services, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	12/23/97
TA-98-218	Midwest Communication Solutions, Inc. (Certificate of service authority, pay phone, granted) .....	1/7/98
TA-97-469	Midwestern Services L.C. d/b/a Midwestern Tel (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	12/2/97
TA-98-369	Midwestern Services, L.C. d/b/a Midwestern Tel (Certificate of service authority, IXC, granted) .....	4/8/98
WF-99-69	Missouri-American Water Company (Order approving financing, granted) .....	11/12/98
GO-96-243	Missouri Gas Energy (Gas cost incentive mechanism, order denying rehearing and granting reconsideration in part) .....	1/20/98
TA-98-190	MO-KAN Telecom, Inc. (Certificate of service authority, pay phone, granted) .....	12/16/97
TA-98-480	MVX Communications, LLC (Certificate of service authority, IXC, granted) .....	6/10/98
— N —		
TA-98-427	National Collegiate, Inc. (Certificate of service authority, IXC, granted) .....	5/13/98
TA-98-377	National Telecom, Inc. (Certificate of service authority, IXC, granted) .....	4/14/98
TM-98-290	National Teleservice, Inc. (Merger into Network Long Distance, Inc., approved) .....	9/9/98
TA-98-383	Navigator Telecommunications, LLC (Certificate of service authority, basic local telecommunications service, granted) ...	6/25/98
TA-98-470	Net2000 Group, Inc. (Certificate of service authority, IXC, granted) .....	8/12/98
TA-98-394	NET-tel Corporation (Certificate of service authority, IXC, granted) .....	5/7/98
TA-98-491	Nettronix, Inc. (Certificate of service authority, IXC, granted) .....	7/16/98
TA-99-117	Network International, L.C. (Certificate of service authority, IXC, granted) .....	10/30/98

## UNREPORTED UTILITY CASES

TM-98-384	Network Long Distance, Inc. (Merger of Pisces Acquisition Corporation, a wholly owned subsidiary of IXC Long Distance, Inc. with and into Network Long Distance, Inc.; name change of Network Long Distance, Inc. to Eclipse Telecommunications, Inc., approved) .....	11/19/98
TA-98-215	New Concept Communications, LLC (Certificate of service authority, IXC, granted) .....	12/30/97
TA-98-208	New Media Telecommunications, Inc. (Certificate of service authority, IXC, granted) .....	12/30/97
TA-98-533	NorthPoint Communications, Inc. (Certificate of service authority, IXC and non-switched local exchange services, granted) .....	6/30/98
TA-98-393	Nova Telecom, Inc. (Certificate of service authority, IXC, granted) .....	4/30/98
TA-98-502	NOW Communications, Inc. (Certificate of service authority, IXC, granted) .....	6/16/98
TA-98-390	NOW Communications, Inc. (Certificate of service authority, basic local telecommunications services, granted) .....	8/5/98
TA-98-560	NXLD Company d/b/a Nextel Long Distance (Certificate of service authority, IXC, granted) .....	7/30/98
TO-98-271	NYNEX Long Distance Company (Plans to do business in Missouri under name of Bell Atlantic Long Distance, acknowledge change of name) .....	1/27/98
— O —		
TA-99-24	OmniCall, Inc. (Certificate of service authority, IXC, granted) .....	8/25/98
TA-99-30	One Stop Telecommunications, Inc. (Certificate of service authority, IXC, granted) .....	10/8/98
TM-98-125	OpTex, Inc. and Claremont Technology Group, Inc. (Merger of Claremont with and into OpTex, approved) .....	1/20/98
TF-98-243	Oregon Farmers Telephone Company (Order approving financing) .	9/9/98
WA-97-110	Osage Water Company (Certificate of convenience and necessity, water and sewer service, Camden County, Cimmarron Bay and Chelsea Rose, granted) .....	3/5/98
WA-98-36	Osage Water Company (Certificate of convenience and necessity, water and sewer service, Camden County, Cedar Glen Condominiums, granted) .....	3/12/98
TD-99-21	Otzenberger, Joseph C. (Certificate of service authority, pay phone, canceled) .....	7/23/98

## — P —

TA-98-309	Pace, Tony M. (Certificate of service authority, pay phone, granted) .....	2/25/98
TA-98-489	Park 'N View, Inc. (Certificate of service authority, IXC, granted) .	6/10/98
TA-98-228	Parr, Thomas (Certificate of service authority, pay phone, granted)	1/14/98
TM-96-222	Payphones of America (Approval of sale of stock of Payphones of America to PhoneTel and the transfer of assets from Payphones of America to PhoneTel, granted) .....	6/25/98
TA-98-459	Phillips Maduros Enterprises, Inc. (Certificate of service authority, pay phones, granted) .....	5/27/98
TO-98-400	PhoneTime, Inc. (Name change to PT-1 Communications, Inc., acknowledged) .....	4/30/98
TA-97-347	Preferred Carrier Services, Inc. d/b/a Phones For All, d/b/a Telefonos Para Todos (Registration of fictitious name, recognized) .....	9/30/98
TA-98-301	Pride America, Inc. (Certificate of service authority, IXC, granted) .....	2/26/98
TA-99-86	Primecall, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) .....	10/13/98
TM-98-417	PSP Marketing Group, Inc. d/b/a I.T. GROUP Communications Company/ DeltaCom, Inc. d/b/a DeltaCom Long Distance Services (Sales of assets from PSP to DeltaCom, granted) .....	4/29/98
TA-98-295	Public Pay Telephone, Inc. (Certificate of service authority, pay phone, granted) .....	2/25/98

## — Q —

TA-97-380	QCC, Inc. (Certificate of service authority, basic local telecommunications service, granted) .....	12/23/97
TA-98-111	Quintelco, Inc. (Certificate of service authority, IXC, granted) .....	4/14/98
TA-98-325	Quintelco, Inc. (Certificate of service authority, basic local telecommunications service, granted) .....	9/17/98
TM-98-328	Qwest Communications Corporation and Phoenix Network, Inc. (Merger of Phoenix to Qwest, granted) .....	3/31/98
TM-98-406	Qwest Communications International Inc. (Transfer control of LCI International Telecom Corp. and USLD Communications, Inc. from the shareholders of LCI International, Inc. to Qwest, granted) .....	5/27/98

## UNREPORTED UTILITY CASES

## — R —

EO-98-142	Ralls County Electric Cooperative/ City of Vandalia (Territorial agreement, Audrain, Pike and Ralls Counties, approved) .....	1/8/98
TA-98-324	REN-TEL Communications, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	11/17/98
TA-98-225	Roberts, Shane Otis (Certificate of service authority, pay phone, granted) .....	1/7/98
TD-98-495	Robinson, Ronald L. (Certificate of service authority, pay phone, canceled) .....	6/1/98
TM-98-539	RSL COM U.S.A., Inc. (Transfer of assets of CBS Corporation d/b/a Westinghouse Communications to RSL, granted) .....	7/10/98
TA-99-60	RSL COM PrimeCall, Inc. (Certificate of service authority, IXC, granted) .....	9/25/98
TA-95-394	Russo, Frank M. (Certificate of service authority, pay phone, canceled) .....	2/26/98

## — S —

TA-98-366	Satellink Paging, LLC (Certificate of service authority, IXC, granted) .....	4/8/98
SA-98-294	Savannah Heights Industrial Treatment, Inc. (Certificate of public convenience and necessity to provide service in an area of Taney County known as Savannah Place Ltd. Subdivision, granted) .....	9/16/98
TA-99-133	Sellaro, Frank L. (Certificate of service authority, pay phone, granted) .....	10/29/98
TA-98-527	Scott, Stephen R. (Certificate of service authority, pay phone, granted) .....	6/19/98
TA-98-186	Shared Communications Services, Inc. (Certificate of service authority, IXC, granted) .....	12/18/97
TA-97-456	Sheng Yu, Jian, d/b/a Brother's (Certificate of service authority, pay phone, canceled) .....	7/16/98
WA-98-129	Silverleaf Resorts, Inc. (Certificate of convenience and necessity, water and sewer service in Jefferson County, granted) .....	3/12/98
SM-98-147	Silverleaf Resorts, Inc. (Sale of Holiday Hills Resort sewer system to Taney County Regional Sewer District, granted) ....	5/27/98
TA-98-306	Simply Long Distance, Inc. (Certificate of service authority, IXC, granted) .....	3/17/98
TM-98-409	SmarTalk TeleServices, Inc. and American Express Telecom, Inc. (Acquisition by stock purchase agreement of AETI by SmarTalk, granted) .....	6/10/98

## UNREPORTED UTILITY CASES

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TO-99-73	SmarTalk Teleservices, Inc. (Adoption notice of use of "PRONTO", approved) .....	9/15/98
TA-98-403	SmartStop, Inc. (Certificate of service authority, pay phones, granted) .....	5//7/98
TA-98-371	SmartStop, Inc. (Certificate of service authority, IXC, granted) .....	5/20/98
TA-98-317	Smith Enterprises, L.L.C. (Certificate of service authority, pay phone, granted) .....	3/30/98
TD-99-10	Smith, Steven Ray (Certificate of service authority, pay phone, canceled) .....	7/14/98
TD-98-505	SNET American, Inc. (Certificate of service authority, IXC, canceled) .....	9/1/98
GO-98-172	Southern Missouri Gas Company, L.P. (Order extending variance extend its conversion plan for natural gas hook-ups for three years, granted) .....	4/21/98
GF-97-194	Southern Union Company (Approval of acquisition of shares of Atmos Energy Company by Southern Union, granted) .....	1/6/98
TA-98-478	Southwest Communications, Inc. (Certificate of service authority, IXC, granted) .....	6/16/98
TO-98-156	Southwestern Bell Telephone Company/AllTel Mobile Communications, Inc. (Interconnection agreement, approved) .....	1/6/98
TO-98-235	Southwestern Bell Telephone Company and Dobson Cellular Systems, Inc. (Interconnection agreement, approved) .....	2/25/98
TO-98-240	Southwestern Bell Telephone Company and Quintelco, Inc. (Order approving resale agreement, granted) .....	3/5/98
TO-98-249	Southwestern Bell Telephone Company and WinStar Wireless of Missouri, Inc. (Interconnection and resale agreement, approved) .....	3/18/98
TO-98-298	Southwestern Bell/Frontier Telemanagement, Inc. (Resale agreement, approved) .....	4/15/98
TO-98-322	Southwestern Bell/Aerial Communications, Inc. (Agreement for interconnection and reciprocal compensation, granted) .....	4/29/98
TO-98-375	Southwestern Bell Telephone/Navigator Telecommunications, LLC (Interconnection agreement, granted) .....	5/27/98
TO-98-387	Southwestern Bell Telephone Company and NOW Communications, Inc. (Resale agreement, approved) .....	6/3/98
TM-97-528	Southwestern Bell Telephone Company and Rock Port Telephone Company (Sale of South Hamburg exchange from SWBT to Rock Port, approved) .....	6/3/98
TO-98-492	Southwestern Bell Telephone Company and LDD, Inc. (Resale agreement, approved) .....	7/21/98

## UNREPORTED UTILITY CASES

TO-98-517	Southwestern Bell Telephone Company and EZ Talk Communications, L.L.C. (Resale agreement, granted) .....	8/6/98
TO-98-516	Southwestern Bell Telephone Company and Tin Can Communications, L.L.C., d/b/a The Cube (Resale agreement, granted) .....	8/6/98
TO-98-515	Southwestern Bell Telephone Company and DMJ Communications, Inc. (Resale agreement, granted) .....	8/6/98
TO-98-541	Southwestern Bell Telephone Company and Frontier Local Services, Inc. (Interconnection agreement, granted) .....	8/27/98
TT-99-78	Southwestern Bell Telephone Company (Tariffs to introduce new billing option, SmartPayment Plan, approved) .....	9/3/98
TO-99-3	Southwestern Bell Telephone Company and Buy-Tel Communications, Inc. (Resale agreement, approved) .....	9/23/98
TO-99-93	Southwestern Bell Wireless, Inc. and GTE Midwest Incorporated and GTE Arkansas Incorporated (Interconnection agreement, granted) .....	11/25/98
TA-98-550	Southwest Fiber Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	7/31/98
TA-97-18	Sowers, Shayne (Certificate of service authority, pay phones, canceled) .....	7/13/98
TO-99-1	Sprint Communications Company L.P. (Interconnection and resale agreement with Southwestern Bell, approved) .....	9/15/98
TO-97-124	Sprint Communications Company L.P. and GTE Midwest Incorporated (Interconnection and resale agreement, approved) .....	11/25/98
TO-98-405	Sprint Missouri, Inc. and U.S. Telco, Incorporated (Resale agreement, granted) .....	6/10/98
TO-98-382	Sprint Missouri, Inc. and ExOp of Missouri, Inc. (Interconnection agreement, approved) .....	6/3/98
TO-98-476	Sprint Missouri, Inc. and Sterling International Funding, Inc. (Resale agreement, granted) .....	7/14/98
TO-98-482	Sprint Missouri, Inc. and Max-Tel Communications, Inc. (Resale agreement, granted) .....	7/16/98
TO-98-528	Sprint Missouri, Inc. and Tin Can Communications (Resale agreement, granted) .....	7/21/98
TO-98-583	Sprint Missouri, Inc. and Comm South (Resale agreement, approved) .....	9/16/98
TO-98-586	Sprint Missouri, Inc. d/b/a Sprint and Buy-Tel Communications, Inc. (Resale agreement, approved) .....	9/23/98

## UNREPORTED UTILITY CASES

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TO-99-75	Sprint Missouri, Inc. d/b/a Sprint and Green Hills Telecommunications Services (Interconnection and resale agreement, approved) .....	11/17/98
TA-98-246	Sprint Payphone Services, Inc. (Certificate of service authority, pay phone, granted) .....	2/3/98
TD-99-2	Sprint Spectrum L.P. (Certificate of service authority, IXC, canceled) .....	7/23/98
TA-99-136	Starpower Communications, LLC. (Certificate of service authority, IXC, granted) .....	11/23/98
TA-98-242	Startec Global Communications Corporation (Certificate of service authority, IXC, granted) .....	2/4/98
TM-98-574	Star Telecommunications, Inc. (Merger with and into PT-1 Communications, Inc., approved) .....	9/15/98
TA-98-121	St. John's Regional Medical Center (Certificate of service authority, shared tenant services (STS), granted) .....	9/1/98
GR-98-175	St. Joseph Light & Power (ACA filing May 1997-August 1997 filing period, order closing case) .....	5/5/98
GR-97-206	St. Joseph Light & Power (ACA, 1996-97 annual ACA filing, order closing case) .....	5/19/98
TD-99-6	Stone, John E. (Certificate of service authority, pay phones, canceled) .....	7/13/98
TM-98-117	Strategic Alliances, Inc. (Approval of sale of stock and transfer of ownership to London Telecom Network, Corp., granted) .....	1/21/98
TA-98-283	Strum, Rosemary d/b/a RS Communications (Certificate of service authority, pay phone, granted) .....	2/17/98
TO-98-548	Suretel, Inc. (Resale agreement with Southwestern Bell Telephone Company, granted) .....	8/13/98
TA-98-568	Suretel, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	10/6/98
TM-99-16	Switched Services Communications, L.L.C. (Merger with IXC Communications Services, Inc., approved) .....	9/23/98
— T —		
TM-98-171	Talton Holdings, Inc., Talton Invision, Inc., and InVision Telecom, Inc. (Talton Holdings to acquire assets of InVision, granted) .....	2/11/98
TA-98-367	Talton Invision, Inc. (Certificate of service authority, pay phone, granted) .....	9/29/98
TM-97-527	Talton STC (Acquisition of assets of Security Telecom Corporation, approved) .....	1/8/98
TA-98-368	Talton STC, Inc. (Certificate of service authority, pay phone, granted) .....	9/29/98

## UNREPORTED UTILITY CASES

TM-98-253	TCG Kansas City, Inc. (Certificate of service authority, basic local, non-switched local exchange and IXC services, transfer of assets, granted) .....	6/17/98
TO-99-71	TCG Kansas City/AT&T Corporation and Southwestern Bell Telephone Company (Interconnection agreement, approved) .....	11/12/98
TO-98-154	TCG St. Louis (Notice of adoption by TCG of interconnection agreement between Brooks Fiber and Southwestern Bell, approved) .....	12/2/97
TA-97-446	TCG St. Louis (Certificate of service authority, basic local telecommunications service, granted) .....	12/18/97
TA-96-345	TCG St. Louis (Certificate of service authority, basic local telecommunications service, granted) .....	2/3/98
TA-98-398	TDS engineering, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted) .....	5/26/98
TA-99-26	Telcorp, Ltd. (Certificate of service authority, IXC, granted) .....	8/25/98
TA-98-412	Telecom Resources, Inc. d/b/a TRINetwork, Inc. (Certificate of service authority, IXC, granted) .....	5/11/98
TA-98-558	Telecor Communications, Inc. (Certificate of service authority, pay phone, granted) .....	7/31/98
TA-98-287	Teleglobe USA Inc. (Certificate of service authority, IXC, granted) .....	2/24/98
TA-98-259	Teligent, Inc. (Certificate of service authority, IXC and nonswitched local exchange, granted) .....	4/30/98
TA-98-258	Teligent, Inc. (Certificate of service authority, basic local exchange telecommunications services and dedicated, non-switched local telecommunications services, granted) .....	9/9/98
TA-98-176	Tel-Link, L.L.C. (Certificate of service authority, basic local telecommunications service, granted) .....	8/27/98
TO-99-37	Tel-Link, L.L.C. and Southwestern Bell Telephone Company (Resale agreement, approved) .....	10/7/98
TD-98-360	TELNET Communications, Inc. (Certificate of service authority, IXC, canceled) .....	4/7/98
TA-98-302	Telephone Company of Central Florida, Inc. (Certificate of service authority, IXC, granted) .....	2/26/98
TO-98-494	Tel-Save, Inc. d/b/a Tel-Save, Incorporated of Pennsylvania (Name change to Tel-Save, Inc. d/b/a The Phone Company, recognized) .....	6/10/98
TA-99-68	Teutenberg, Jay d/b/a Advertisnet Internet Services (Certificate of service authority, pay phones, granted) .....	10/8/98



## UNREPORTED UTILITY CASES

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TA-97-87	That Place In Clarence (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-98-553	Thebeau, Robert A. (Certificate of service authority, pay phone, granted) .....	7/31/98
TA-98-195	The Millennium Group Telemanagement LLC (Certificate of service authority, IXC, granted) .....	1/8/98
TM-98-222	Tiger Telephone, L.L.C. (Acquire all the capital stock of the New Florence Telephone Company, granted) .....	6/30/98
TA-95-307	Timmons, Leon, d/b/a L.T.'s Payphones (Certificate of service authority, pay phone, canceled) .....	7/16/98
TA-98-231	Tin Can Communications Company, L.L.C. (Certificate of service authority, basic local telecommunications service, conditional certificate, granted) .....	6/3/98
TA-98-231	Tin Can Communications Company, L.L.C. (Acknowledge fictitious name "The Cube") .....	10/15/98
TA-98-269	T-NETIX, Inc. (Certificate of service authority, IXC, granted) .....	2/10/98
TA-99-63	TotalTel, Inc. (Certificate of service authority, IXC, granted) .....	9/22/98
TM-98-411	TresCom International, Inc. (Acquisition of stock of Least Cost Routing, Inc., approved) .....	11/24/98
TA-96-266	Tschudin, Paul G. (Certificate of service authority, pay phones, canceled) .....	7/13/98
TA-98-262	TSC Payphone Corp. (Certificate of service authority, pay phone, granted) .....	1/27/98
TD-98-282	TW Communications, Inc. d/b/a TWC (Certificate of service authority, IXC, canceled) .....	2/19/98
— U —		
TO-98-414	Unidial Incorporated (Name change from Unidial Incorporated to Unidial Communications, Inc., acknowledged) .....	4/23/98
EO-98-150	Union Electric Company (Certificate of public convenience and necessity, reroute transmission line in Cape Girardeau County, granted) .....	12/16/97
EO-98-144	Union Electric Company (Successor trustee for its tax qualified nuclear decommissioning trust fund issues, granted) .....	12/18/97
EM-98-341	Union Electric Company d/b/a AmerenUE/ Cuivre River Electric Cooperative, Inc. (Change of supplier and sale of certain electric distribution facilities in St. Charles County, granted) .	6/11/98
GR-96-430	Union Electric Company (1996-97 Actual Cost Adjustment case, order establishing ACA balance and closing case) .....	6/18/98
EF-99-5	Union Electric Company d/b/a AmerenUE (Order approving financing) .....	8/26/98

UNREPORTED UTILITY CASES

EO-98-416 Union Electric Company d/b/a AmerenUE, Farmers' Electric Cooperative and Willie Hibner (Sale of certain electric distribution facilities and change of electric service provider for Hibner Sawmill, granted) ..... 8/28/98

EO-98-511 Union Electric Company d/b/a AmerenUE and Farmers' Electric Cooperative (Territorial agreement, Chariton, Linn and Ray Counties, approved) ..... 9/3/98

EM-98-483 Union Electric Company d/b/a AmerenUE (Sale of certain electric facilities to City of Kahoka, approved) ..... 9/9/98

GR-96-197 United Cities Gas Company (1995-96 Actual Cost Adjustment case, order establishing ACA balance and closing case) ..... 6/18/98

TA-99-45 United States Telecommunications, Inc. d/b/a Tel Com Plus (Certificate of service authority, IXC and non-switched local exchange telecommunications services, granted) ..... 11/5/98

TO-98-365 United Telecom of America, Inc. (Acknowledge name change to USN Communications Long Distance, Inc.) ..... 2/26/98

TO-98-145 United Telephone Company of Missouri d/b/a Sprint and Dial Teleport, Inc. (Interconnection and resale agreement, approved) ..... 12/31/97

TO-98-232 United Telephone Company of Missouri d/b/a Sprint and Southwestern Bell Wireless, Inc. (Interconnection agreement, approved) ..... 2/26/98

WO-97-488 United Water Missouri, Inc. (Variance request allowing company to institute pilot program to study extending five-eighths inch (residential) water meter testing frequency from 10 to 15 years, approved) ..... 9/23/98

TM-98-299 United Wats, Inc. (Merger into Network Long Distance, Inc., approved) ..... 9/9/98

TA-97-506 USA eXchange LLC (Name change to Omniplex Communications Group, L.L.C., acknowledged, amended certificate of service authority, basic local service, granted) ..... 4/15/98

TO-98-189 U.S. Long Distance, Inc. (Operating under new corporate name, USLD Communications, Inc., order recognizing name change) ..... 2/6/98

TA-97-90 U.S. Long Distance, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, voluntary dismissal) ..... 8/24/98

TA-99-50 USN Communications Southwest, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) ..... 11/12/98

## UNREPORTED UTILITY CASES

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TA-98-587	U.S. Network Services, Inc. (Certificate of service authority, IXC, granted) .....	8/12/98
TO-98-182	U.S. Telco, Inc. and Southwestern Bell Telephone Company (Resale agreement, approved) .....	1/21/98
— V —		
TA-98-404	Van Keirsbilck, Dennis d/b/a Northland Pay Phones (Certificate of service authority, pay phones, granted) .....	5/7/98
TA-99-132	Vassil, LeRita D. (Certificate of service authority, pay phone, granted) .....	10/29/98
TA-98-196	Vista Group International, Inc. (Certificate of service authority, IXC, granted) .....	12/23/97
— W —		
TA-98-245	Wachsnicht, Gale d/b/a Wavelength Ltd. (Certificate of service authority, pay phone, granted) .....	2/3/98
TA-98-536	Webb Langworthy d/b/a Webb Communications (Certificate of service authority, pay phone, granted) .....	7/1/98
SR-98-270	West Elm Place Corporation (Sewer rate increase, granted) .....	1/29/98
SF-98-162	West Elm Place Corporation (Order approving financing) .....	5/7/98
TA-98-397	Western Tele-Communications, Inc./Retail Sales Group d/b/a Western Tele-Communications, Incorporated/Retail Sales Group (Certificate of service authority, IXC, granted) .....	5/28/98
TD-99-40	Western Union Communications, Inc. (Certificate of service authority, IXC, canceled) .....	8/26/98
TO-98-334	Westinghouse Electric Corporation d/b/a Westinghouse Communications (Name change to CBS Corporation d/b/a Westinghouse Communications, recognized) .....	3/10/98
TA-99-66	Williams Communications, Inc. d/b/a Vyvx, Inc. (Certificate of service authority, IXC, granted) .....	11/17/98
TA-96-219	Wilson, Scott R., d/b/a The Phone Guy's (Certificate of service authority, pay phone, canceled) .....	7/16/98
TM-98-385	WinStar Communications, Inc. (Transfer of assets of MIDCOM Communications, Inc. to WinStar Communications, Inc., granted) .....	8/4/98
TA-97-438	WinStar Wireless of Missouri, Inc. (Certificate of service authority, basic local telecommunications service, granted) .	12/18/97
TA-98-286	Winston, Travis d/b/a Phone-Tech Communications (Certificate of service authority, pay phone, granted) .....	2/17/98
TO-98-534	WorldCom Network Services, Inc. (Cancellation of fictitious name, WilTel Network Services, order recognizing cancellation) .....	6/25/98

## UNREPORTED UTILITY CASES

TA-98-201	WorldCom Technologies, Inc. (Certificate of service authority, basic local and local exchange telecommunications services, granted) .....	12/23/97
TA-98-166	Wright Businesses, Inc. d/b/a Long Distance Management (Certificate of service authority, IXC, granted) .....	12/16/97
— Y —		
TA-98-512	Yogi, Steven d/b/a World Access (Certificate of service authority, pay phone, granted) .....	6/22/98
— Z —		
TA-98-202	Zabawa, David W. (Certificate of service authority, pay phone, granted) .....	12/16/97
TA-99-15	Z-Tel Communications, Inc. (Certificate of service authority, IXC, granted) .....	11/9/98
TA-98-572	Z-Tel Communications, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted) .....	11/17/98

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

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**Jeff and Melissa McLard, Complainants, v. Stoddard County  
Sewer Company, Respondent.**

**Jeff and Amy McClain, Complainants, v. Stoddard County Sewer  
Company, Respondent.**

*Case Nos. SC-97-339 & SC-97-343  
Decided December 2, 1997*

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**Rates §§37, 48, 112.** The Commission ordered Respondent to refund Complainants the overpayment of the new service connection. The overpayment is computed by subtracting the appropriate CIAC charge and the charge for service line installation from the actual payment, along with interest in the amount of 6 percent per annum on the overpayment.

**ORDER REGARDING COMPLAINTS**

Jeff and Melissa McLard (Complainants) filed a complaint against Stoddard County Sewer Company (Respondent or Company) on February 20, 1997. The McLards alleged that Respondent overcharged them for their sewer hook up. According to the McLards, Respondent charged 12 percent interest on the \$835.00 construction cost since 1983, although the McLards did not purchase their property and begin to construct their home until December of 1996. The McLards also alleged they made a payment under protest to Respondent in the amount of \$2,338.00 for connection charges. The McLards requested that the Commission order Respondent to pay them \$1,303.00 plus twelve percent interest.

Jeff and Amy McClain filed a complaint against Respondent on February 24, 1997. The McClains alleged Respondent overcharged the McClains for their sewer hook up. According to the McClains, Respondent charged 12 percent interest on the \$835.00 construction cost since 1983, although the McClains did not purchase their property and start construction of their home until April of 1996. The McClains indicated that they made a payment under protest to Respondent in the amount of \$2,298.70 for connection charges. The McClains requested that the Commission order Respondent to pay them \$1,263.70 plus twelve percent interest.

The Commission issued a Notice of Complaint in each case. The Notice of Complaint was issued pursuant to 4 CSR 240-2.070 and advised the Company that it had 30 days in which to file an answer stating legal and factual defenses or to describe the measures taken to satisfy the complaints. The Respondent did not file an answer before 30 days passed in either case.

The Commission issued its Order Regarding Default in each case on May 2. The Commission found that pursuant to 4 CSR 240-2.070(9) the Respondent was in default and that the allegations set out in the complaints were deemed to be admitted absent a finding of good cause to the contrary. The Commission directed the Water and Sewer Department Staff (Staff), along with the Office of General Counsel of the Missouri Public Service Commission, to investigate the allegations set forth in the complaint cases and to file a report by May 30 setting out its findings in these cases.

The Commission extended the filing date of the report, and Staff filed its report of investigation on June 6. Staff reported that Case Nos. SC-97-339 and SC-97-343 pertain to the Contribution in Aid of Construction (CIAC) charge for new service connections. Staff stated that under the Company's current tariff, the McLards and McClains should have been charged \$835.00 for the CIAC charge plus \$200.00 for a service line installation. According to Staff, the current tariff sheet, P.S.C. MO. No. 1, 2nd Revised Sheet No. 7, provides for a 12 percent per annum increase in the CIAC charge only for homes constructed prior to February of 1981.

Staff's report indicates that Original Sheet No. 8 provided for a 12 percent per annum increase in the CIAC charge. Nevertheless, Staff shows that original Sheet No. 8 was replaced with the 1st Revised Sheet No. 8 on May 1, 1981. The 1st Revised Sheet No. 8 which is currently in effect provides for an optional payment plan for the CIAC charge, but it does not provide for a twelve percent per annum increase in the charge.

Staff recommended that a refund is appropriate in both cases for payments over \$1,035.00 because neither case involves a home constructed prior to February of 1981. Copies of the relevant tariff sheets are attached to Staff's report.

On September 24, 1997, the Commission issued an order setting show-cause hearing in which the Commission directed Respondent to appear and show cause for the Company's failure to respond. On October 14, Respondent appeared for the show-cause hearing and agreed to file answers to each complaint on or before October 28.

On October 23, Respondent filed answers to each complaint. Respondent stated that the appropriate CIAC charge consists of \$835.00 plus 12 percent per annum interest until the date of the service by the customer. Respondent submitted with his answer a copy of the current and original tariff sheets, copies of calculations performed by Staff, and a copy of the order issued by the Commission on April 30, 1981, which approved tariff sheets effective May 1, 1981. The position of Respondent is that the Sheet No. 8, effective May 1, 1981, was intended by both the Company and the Commission as an addendum to the Original Sheet No. 8 which was effective December 1, 1979, to allow financing of the appropriate CIAC charge.

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The Commission finds that the Respondent's tariff sheets which have been in effect since 1981 and 1983 do not allow a 12 percent per annum increase in the \$835.00 CIAC charge. The Commission finds that the 1st Revised Sheet No. 8 which is currently in effect clearly states in the upper right-hand corner that it is the "1st Revised Sheet No. 8" and does not state anywhere that it is an addendum. The Commission finds that regardless of the intent of the Company when it filed the revised tariff sheets, the plain language of the tariff sheets require that the Commission rule in favor of Complainants.

Therefore, the Commission will order Respondent to refund to Complainants Jeff and Melissa McLard the overpayment of \$1,303.00 for the new service connection. The overpayment is computed by subtracting the appropriate CIAC charge of \$835.00 and the \$200.00 charge for service line installation from the actual payment of \$2,338.00 ( $\$2,338.00 - \$835.00 - \$200.00 = \$1,303.00$ ).

The Commission will order Respondent to pay the McLards interest in the amount of 6 percent per annum on the overpayment. Pursuant to 4 CSR 240-60.030(6)(B) sewer utilities pay 6 percent per annum interest on customer deposits.

The Commission will order Respondent to refund to Complainants Jeff and Amy McClain the overpayment of \$1,263.70 for the new service connection. This overpayment is computed by subtracting the appropriate charge of \$835.00 and the \$200.00 charge for service line installation from the actual payment of \$2,298.70 ( $\$2,298.70 - \$835.00 - \$200.00 = \$1,263.70$ ). The Commission will order Respondent to pay the McClains interest in the amount of 6 percent per annum on the overpayment.

*IT IS THEREFORE ORDERED:*

1. That Stoddard County Sewer Company shall refund to Complainants Jeff and Melissa McLard the overpayment of \$1,303.00 for the new service connection along with interest in the amount of 6 percent per annum on the overpayment.
2. That Stoddard County Sewer Company shall refund to Complainants Jeff and Amy McClain the overpayment of \$1,263.70 for the new service connection along with interest in the amount of 6 percent per annum on the overpayment.
3. That this order shall become effective on December 12, 1997.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
G. George, Regulatory Law Judge

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**In the Matter of Associated Natural Gas Company's Tariff Revised  
Designed to Increase Rates for Gas Service to Customers in the  
Missouri Service Area of the Company.\***

*Case No. GR-97-272  
Decided December 3, 1997*

**Gas §18. Rates §108.** The Commission rejected the proposed tariff sheets filed by Associated Natural Gas Company and authorized the company to file tariff sheets designed to increase gross revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or other similar fees or taxes, by the amount of \$1,522,263 over its current revenues.

**APPEARANCES**

*Gary W. Duffy*, Attorney at Law, Brydon, Swearngen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102-0456, for Associated Natural Gas Company.

*Jeffrey L. Dangeau*, Attorney at Law, 1083 Sain Street, P.O. Box 1408, Fayetteville, Arkansas 72702-1408, for Associated Natural Gas Company.

*Robin E. Fulton*, Attorney at Law, 135 East Main, P.O. Box 151, Fredericktown, Missouri 62645, for Noranda Aluminum, Inc.

*Paul H. Gardner* and *Dallas M. Forrest*, Attorneys at Law, Goller, Gardner & Feather, P.C., 131 East High Street, Jefferson City, Missouri 65101, for Westar Gas Marketing.

*Douglas E. Micheel*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Cherlyn McGowan*, Assistant General Counsel, and *Thomas R. Schwarz, Jr.*, Deputy General Counsel, Post Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Gregory T. George.

**REPORT AND ORDER**

**Procedural History**

On January 14, 1997, Associated Natural Gas Company (ANG), a division of Arkansas Western Gas Company (Arkansas Western), filed tariff sheets with the Missouri Public Service Commission designed to produce an annual revenue increase for the Company in its Missouri service area in the amount of \$3,758,936 or 10.23 percent. The proposed tariff sheets bore an effective date of February 13, 1997.

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\*See page 114 for another order in this case. On January 30, 1998, this case was appealed to Cole County Circuit Court (CV198-136CC).



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On January 28 the Commission issued an order suspending the effective date of the proposed tariff sheets for a period of 120 days from February 13 plus an additional six months to December 13. The Commission's order directed that applications to intervene be filed on or before February 24 and that the parties file a recommended procedural schedule. Noranda Aluminum, Inc. (Noranda) and Westar Gas Marketing, Inc. (Westar) filed timely applications to intervene. ANG filed direct testimony and accounting schedules of five witnesses on February 28. Included in its filing, ANG requested to use a test year of the twelve months ending July 31, 1997, and noted that the Company would not object to the selection of a test year for the twelve months ending on December 31, 1996, if known and measurable changes through a period closer to the effective date of the tariffs were taken into consideration. On March 4 the Staff of the Commission (Staff) filed a proposed procedural schedule. On March 7 the Commission granted intervention to Noranda and Westar and adopted the procedural schedule recommended by Staff. On March 7 Staff and Public Counsel each filed recommendations that the Commission adopt the twelve-month period ending December 31, 1996, as the test year in this case. ANG filed its response to Staff's test year recommendation on March 17, 1997. By order issued on March 25, the Commission adopted the test year proposed by Staff and Public Counsel. A prehearing conference was held on July 16-18.

On August 1 Missouri Gas Energy (MGE) and United Cities Gas Company (United Cities) filed a joint motion for leave to intervene out of time and a joint motion to strike testimony regarding affiliated transactions standards. On August 11 Staff and Public Counsel each filed responses in opposition to the joint motion. On August 19 Laclede Gas Company (Laclede) and St. Louis County Water Company (SLCW) filed a joint motion to defer consideration of affiliated transactions standards and an alternative application to intervene out of time. By order issued on August 20, the Commission denied the motions to intervene of MGE, United Cities, Laclede and SLCW and denied the motions to strike testimony and to defer consideration of affiliated transactions standards.

On August 26 the parties filed the hearing memorandum and case reconciliation. On September 5 Staff filed its proposed order of issues and witnesses. The parties filed their Unanimous Stipulation and Agreement on September 5. On September 15 the parties filed their First Amendment to Unanimous Stipulation and Agreement. The Commission held an evidentiary hearing that convened on September 15 and adjourned on September 17. All the parties, except for Westar, filed initial briefs on October 21 and reply briefs on October 31. Westar did not file briefs and did not state a position on any issues in the hearing memorandum. Westar participated in the hearing only insofar as the affiliated transactions issue, and Westar did not state a position on that issue at the hearing.

On November 5 the Commission issued a request for the parties to complete a Revenue Requirement Scenario. On November 12 the parties submitted the com-

pleted Revenue Requirement Scenario. On November 26 the Commission issued an order to Staff to identify its proposed tariff language from Schedule 1 of Staff witness Hubb's surrebuttal testimony which applies to four issues. On December 1 Staff filed its response designated as late-filed Exhibit 97. On December 1 an objection to the admission of Exhibit 97 was filed by ANG. The completed Revenue Requirement Scenario will be received into the record as late-filed Exhibit 98. However, Exhibit 97 will not be admitted into the record.

#### Stipulation and Agreement

ANG, Staff, Public Counsel, Noranda, and Westar filed the Unanimous Stipulation and Agreement (Agreement) on September 5, 1997. The Agreement provides that ANG shall be authorized to file revised tariff sheets containing rate schedules for gas service designed to produce an increase in overall Missouri jurisdictional gross annual gas revenues, exclusive of applicable license, occupation, franchise, or gross receipts taxes, of one million five hundred thousand dollars (\$1,500,000) which resolves the following issues if approved by the Commission:

- III(A)(1) Allocation of Arkansas Western Gas Company  
General Office Building
- III(A)(2) FAS 106 Regulatory Asset
- III(A)(3) FAS 109 Regulatory Asset
- III(A)(4) Plant Acquisition Adjustment
- III(B)(1)(a) ANG Payroll
- III(B)(1)(b) AWG and Southwestern Energy Company (SWEN) Payroll  
Allocable to ANG through Intercompany Allocations
- III(B)(1)(c) Payroll Taxes
- III(B)(1)(d) Incentive Compensation (Bonuses)
- III(B)(1)(e) Administrative Expense Applicable to Appliance  
Program
- III(B)(1)(f) Elimination of Chairman/CEO's Salary
- III(B)(1)(g) Annualization of Employee Benefits-Medical, Life,  
and 401(K)
- III(B)(1)(h) Intercompany Allocations
- III(B)(1)(i) SWEN Depreciation and Return
- III(B)(1)(j) SWEN Property Tax
- III(B)(1)(k) ACA Legal Expense Elimination
- III(B)(1)(l) Amortization of Plant Acquisition Adjustment
- III(B)(1)(m) Airplane Expense
- III(B)(1)(o) FAS 106 External Funding
- III(B)(1)(p) AWG Building Depreciation Expense
- III(B)(1)(q) Amortization of FAS 106 Regulatory Asset
- III(B)(1)(r) Amortization of FAS 109 Regulatory Asset
- III(B)(1)(s) Jurisdictional Allocation of Budget Center 371 -  
Liquefied Natural Gas Plant

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III(B)(1)(t)	Jurisdictional Transmission Expense Allocation Factor
III(C)(1)	Return on Rate Base
III(C)(2)	Capital Structure

The Agreement set forth the resolution of the following additional issues: depreciation issue of expanding computerized salvage history prior to 1989 in this case, depreciation rates for five accounts, proration of bills implementing rate increase in this case, customer service tariff language, main extension policy, housing authority tariff language, residential air conditioner rider, miscellaneous tariff modifications, reconnection charges, special meter reading charge, insufficient check charge, and residential and small general service customer charge. The Agreement set forth positions regarding the revenue requirement for interest on customer deposits and for Arkansas Western Gas Division (AWG) Gathering and Transmission Costs for services provided in Arkansas.

ANG, Staff, Public Counsel, Noranda, and Westar filed the First Amendment to Unanimous Stipulation and Agreement (First Amendment) on September 15, 1997. The First Amendment provides that, if approved by the Commission, the \$1,500,000 increase will be allocated among the ANG districts as follows:

SEMO	\$1,231,706
Kirksville	\$212,933
Butler	\$55,361

The Commission has reviewed the Agreement and the First Amendment and finds both are a reasonable resolution of the issues and should be approved. The Commission will order the approval of the Agreement and First Amendment thereto.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

#### **I Interest on Customer Deposits (Hearing Memorandum Issue III.B.1.n.)**

Staff advocates an interest rate on customer deposits equal to 1 and 1/4 percentage points below the prime lending rate as reported in *The Wall Street Journal* on the last business day of the year as updated annually. The prime rate was reported at 8.25 percent effective December 31, 1996. Therefore, Staff's position suggests a seven percent interest rate on customer deposits for the remainder 1997 calendar year. ANG supports Staff's position on this issue. ANG currently pays nine percent interest on customer deposits.

Public Counsel maintains that the interest on customer deposits should be equal to the pre-tax effective rate of return in this case (12.73 percent) or, in the alternative, the prime lending rate of 8.5 percent as presented in the testimony of Public Counsel witness Kimberly Bolin (Tr. 145) plus one percent (9.5 percent). Public Counsel does

not believe that the interest rate should be revised each year because if this expense item is changed, then the revenue, rate base, and expense relationship will be violated. According to Public Counsel, allowing the interest rate to be revised each year outside a general rate proceeding is improper and unlawful single-issue ratemaking in violation of Section 393.270(4), RSMo 1994. Noranda took no position on this issue.

The Commission finds that 9.5 percent is the appropriate interest rate for customer deposits and that this rate should not be revised each year in this case. This interest rate for customer deposits results in an additional revenue impact of \$22,263 above the stipulated revenue impact of \$1.5 million. One percent above the prime lending rate is consistent with the Commission's decisions in other recent rate cases. See In re Missouri Public Service, Case No. ER-93-37 (Report and Order on Remand, April 4, 1997); and In re St. Louis Water Company, 3 Mo. P.S.C.3d 118, 121 (1994). The Commission does not determine that allowing interest rates to be revised each year will violate the prohibition against single-issue ratemaking because the service rates would not change with revised interest rates. Nevertheless, consistent with the Company's past practice and consistent with avoiding any violation of the revenue, rate base, and expense relationship, the Commission determines that the interest rate on customer deposits in this case will remain constant until the Commission orders a different interest rate in a future rate proceeding.

**II. Gathering and Transmission Costs (Hearing Memorandum Issue III.D.1)**

Currently ANG has tariffed rates to recover a portion of the costs for gathering and transmission (G & T) facilities of the Arkansas Western Gas Division of Arkansas Western Gas Company (Arkansas Western). These AWG facilities are located in Northwest Arkansas and are used for the delivery of gas to ANG's SEMo district. Staff recommends that ANG modify its transportation tariff and Purchase Gas Adjustment Clause (PGA) tariff to remove these rates. Staff believes ANG should be allowed to recover reasonable G & T costs which will be reviewed by the Commission under the Actual Cost Adjustment (ACA) process; however, Staff maintains that the Commission should not pre-approve these costs in ANG's tariffs. Staff argues that its proposal is consistent with the Federal Energy Regulatory Commission's (FERC's) Order 636 which restructured the natural gas industry and deregulated gathering costs so that the recovery of these costs is based on a competitive market.

ANG disagrees with Staff and requests that the Commission continue to establish the rate using cost of service principles applicable to G & T facilities and costs. ANG argues that the G & T facilities are no different from other Arkansas Western facilities located in Arkansas which the Commission routinely includes in ANG's base rates. ANG proposes to establish a crediting mechanism to return a portion of the revenue from transportation customers back to the system supply customers. ANG further

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proposes modification of language in the PGA to clarify that the G & T rate applies to volumes flowing through the NOARK Pipeline.

Public Counsel did not take a position on this issue. Noranda supports Staff's position.

The Commission will rule in favor of Staff and Noranda on this issue. The Commission will order ANG to modify its transportation tariff and PGA Clause tariff to remove references to the rates for recovery of G & T costs as recommended by Staff. The Commission finds that Staff's proposal will allow Missouri transportation customers to negotiate the best G & T rates available and will allow ANG to recover from sales customers all prudently incurred G & T costs which will be reviewed by the Commission under the ACA process.

**III. Class Cost of Service Issues (Hearing Memorandum Issues III.E.1-8.)**

**A. Modification of Service Classifications (Hearing Memorandum Issue III.E.1.)**

ANG currently divides customers into six classes: Residential, Commercial Firm, Commercial Interruptible, Industrial Firm, Industrial Small Interruptible, and Industrial Large Interruptible. Staff proposes to group ANG's customers into four classes: Residential, Small General Service (SGS), Large General Service (LGS) and Large Volume Service (LVS). Staff's basis for its proposal is that customer classes should be defined by volume and usage characteristics, not by standard industrial classification codes. Staff also contends that customer classes should not be based on the possibility of interruption of service by ANG. Staff points out that ANG's customers were interrupted from approximately 15 to 72 hours on one occasion in the last five years which represents an interruption from .03 percent to .16 percent for a five-year period (Exhibit 91). Staff states that any interruptions are caused by interstate pipeline restrictions and not by restraints on ANG's distribution system. ANG disagrees with Staff's inclusion into the LGS category the Industrial Firm, Commercial Interruptible, and Industrial Small Interruptible customers. ANG argues this grouping is not homogeneous because the Commercial Interruptible and Industrial Small Interruptible customers are interruptible by definition. According to ANG, the cost of service should recognize that interruptible customers receive a lesser quality of service because these customers may be interrupted by the Company to meet peak demands. ANG argues that it has always operated with interruption of those customers at peak conditions and that interruption occurred during the test period in this case. ANG argues that the computer simulation provided by in the rebuttal testimony of ANG witness Stevens (Exhibit 69, Schedule CVS-1, pp. 3-4) demonstrates that interruption is necessary for ANG to meet peak demands.

Public Counsel agrees with Staff's position on this issue. Public Counsel states that actual usage data does not support ANG's claim that LGS is not a homogeneous group. In response to the claim that interruptible customers differ in usage from firm industrial customers, Public Counsel notes that ANG's only curtailments in the last

five years were caused from cutting interstate pipeline pressure to ANG's system and were not from capacity constraints behind ANG's city gate to customer premise systems. Noranda takes no position on this issue.

The Commission will rule in favor of Staff and Public Counsel on this issue. The Commission determines that ANG's customers should be grouped into Residential, Small General Service (SGS), Large General Service (LGS) and Large Volume Service (LVS) classes. The Commission finds that these four classes represent homogeneous groupings and that the LGS class should not be further divided on the basis of interruptible versus firm service. The Commission finds that the classifications proposed by Staff and Public Counsel are based on actual volume and consumption patterns.

**B. Allocation of Transmission and Distribution Mains (Hearing Memorandum Issue III.E.2.); Allocation of Meters and Meter Installations (III.E.3.); Allocation of Regulators and Regulator Installations (III.E.4.); Allocation of Services (III.E.5.); Peak Day Demands (III.E.6.); Customer Billing Expense Allocation (III.E.7.); Customer Meter-Reading Expense Allocation (III.E.8.); Level of Revenue Shifts between Classes/ Interclass Revenue Shifts (III.F.2.); Cost of Service Rates (III.F.6.)**

Staff allocates ANG's transmission and distribution mains based on the capacity utilization method in order to recognize relative total use and relative peak use by Staff's four customer classes. ANG uses the "average and peak" method to allocate transmission mains and a two-part method to allocate distribution mains which recognizes a customer portion of mains based on current labor costs and the remaining portion based on each customer class' noncoincident demand. Public Counsel allocates distribution mains based on the modified Relative System Utilization Method (RSUM). Public Counsel's method allocates over 80 percent of the entire length of the Company's distribution mains (diameters of 2.5 inches or less) between the SGS and residential customers, two weather sensitive classes. Public Counsel allocates transmission mains strictly on the basis of its RSUM allocators for all the customer classes. Noranda supports in theory the method used by ANG; however, Noranda proposes cost allocations which reflect that no distribution costs should be allocated to Noranda's class because Noranda is served by an eight inch transmission line.

Staff allocates meters, meter installation, regulators, and regulator installation with regression techniques and customer demands based on trended costs for meters and regulators. For meters and meter installation, ANG initially used current meter cost data to assign costs between districts and rate schedules. For regulators and regulator installation, ANG initially used its allocator for meters. ANG modified its position on meters, meter installation, regulators and regulator installation, to adopt Public Counsel's method with corrections for capacity assignments related to meter models. Public Counsel allocates meters and meter installation using replacement cost for types of meters actually used by each class of customers plus the average installation cost for meters. For regulators and regulator installation, Public Counsel's

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allocation uses the Company's reported proportion of meters to regulators. Public Counsel opposes the corrections suggested by ANG because Public Counsel assigns capacity ratings to each meter model according to capacity ratings supplied by ANG in response to data requests and because Public Counsel does not use meter capacity for its allocation of regulators and regulator installation. Noranda proposes allocation factors which allocate to Noranda only the costs incurred by Noranda.

Staff allocates services by using replacement cost data with regression techniques and customer demands to allocate costs for each customer class in each district. ANG allocates services based on new services installed for the years 1995 and 1996. Public Counsel supports Staff's position on this issue. Noranda proposes allocation factors which allocate to Noranda only the costs incurred by Noranda.

Staff calculates peak demands for residential and small general service classes based on a regression analysis of peak day heating degree days (HDD) based on National Oceanic Atmospheric Administration (NOAA) normals. For the large general service class, Staff multiplies the average daily use by a factor of 1.5 which is equal to a load factor of 66 percent to reflect the effect of week day versus weekend consumption. Staff states that no reduction to peak load of interruptible customers are appropriate because any constraints on interruptible customers are caused by interstate pipeline restrictions and not by restraints on ANG's distribution system. Public Counsel supports Staff's allocations.

For peak day demands, ANG uses arithmetic analysis and peak day HDD based on the coldest day in recent history. The Company calculated class coincident peak demands based on the February 2-3, 1996, system peak day which included interruptions. ANG calculated noncoincident peak demands based on a review of average daily usage and monthly peak demands by class to find a load factor which was then applied to each class peak month demand to arrive at the class non-coincident peak. ANG argues that Staff's approach fails to recognize that interruptible customers are interrupted during peak conditions. Noranda supports ANG's position because it reflects demands during the coldest day of the recent past when interruptible customers, including Noranda, were curtailed.

As to the customer billing expense allocation, the monthly charge of \$25.00 per EGM meter is addressed below in paragraph VIII.D of this Report and Order in connection with Hearing Memorandum issue III.F.7.d.

ANG states it supports Staff's allocation of the following customer billing expense accounts by number of customers: Account 902 (meter reading expenses), Account 903 (customer records and collections), Account 904 (uncollectible expenses), and Account 905 (customer miscellaneous accounts). ANG allocates Account 901 (supervision) based on the allocation of Accounts 902 through 905.

Public Counsel uses the meters allocator it developed to allocate the customer billing expense. Public Counsel states this allocator reflects the additional per customer billing costs associated with large customers arising from work related to

coordinating gas procurement details with transportation customers. Noranda supports ANG's allocation because Noranda believes Public Counsel's allocation is based upon an incorrect peak day demand allocation.

The customer meter-reading expense allocation issue was resolved because ANG and Public Counsel agreed with Staff's allocation. Noranda stated no position on this issue.

Concerning interclass revenue shifts and cost of service rates, Staff recommends that the Commission move each customer class to its cost of service as calculated in Staff's cost of service study. Staff notes this will produce a revenue neutral (before accounting for the revenue increase proposed for ANG in this case) increase for residential customers, including gas costs, of 5.53 percent in the Kirksville District, 5.39 percent in the SEMO District, and 2.15 percent in the Butler District.

ANG proposes that the rates for each class should be set at each class' cost of service as determined in the Company's class cost of service study. ANG illustrates that large customers are paying more than they should by comparing the proposed shifts in the SEMO District before spreading any of the \$1,500,000 stipulated revenue increase: ANG proposes to shift \$1,492,302 from the SEMO commercial and industrial classes to the residential class; Staff would shift \$807,498 to the SEMO residential class, Noranda would shift \$1,649,646 and Public Counsel would shift \$600,133.

Public Counsel requests that the Commission be mindful of the impact of significant increases in residential rates. Public Counsel therefore uses a two-step process. First, proposed revenue neutral shifts are halfway to those indicated by Public Counsel's revenue neutral class cost of service study. Second, Public Counsel's shifts are limited to ensure that no customer class receives an overall decrease in rates (from the combined effect of interclass revenue shifts and an increase in the overall revenue requirement) while other classes experience rate increases.

Noranda requests that the Commission set rates for each class using Noranda's cost of service study. Noranda opposes one customer class from subsidizing another class.

Public Counsel and Staff agree that more of the revenue burden should be shifted to the residential and small general service classes. ANG and Noranda agree that more of the revenue should be shifted to the residential and commercial firm classes. The Commission agrees that the revenue burden should be shifted to the residential and small general service classes.

The Commission has carefully reviewed each party's cost of service study. In doing so, the Commission has remained mindful that the cost of service is but one consideration in determining the reasonableness of rates. Shepherd v. Wentzville, 645 S.W.2d 130 (Mo. App. 1982). It is not just the methodology or theory behind any proposed rates but the impact of the rate order which counts in determining whether



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rates are just, reasonable, lawful, and nondiscriminating. State ex rel. Associated Natural Gas Co. v. Public Service Commission, 706 S.W.2d 870, 879 (Mo. App. 1985). The quintessence of a just and reasonable rate is that it is just and reasonable to both the utility and its customers. State ex rel. Val Sewage Co. v. Public Service Commission, 515 S.W.2d 845 (Mo. App. 1974).

The Commission will rule in favor of Public Counsel in this issue. Public Counsel's proposed level of revenue shifts are as follows:

	Res.	SGS	LGS	LV	Total
Butler	\$ 34,129	\$ 21,195	\$0	N/A	\$ 55,324
Kirksville	\$134,774	\$ 78,159	\$0	N/A	\$ 212,933
SEMO	\$858,662	\$373,044	\$0	\$0	\$1,232,706

However, the Commission notes that Public Counsel's proposal is slightly above the \$1.5 million stipulated revenue impact. Furthermore, the Commission's decision on interest rates for customer deposits results in an additional revenue impact of \$22,263. The Commission therefore finds that the proposed revenue request should be allocated as proposed by Public Counsel to the residential and small general service classes in no more than the total amount of \$1,522,263.

In this case, the Commission finds that Public Counsel sets appropriate limits for the revenue shifts to the residential ratepayers and the small general service ratepayers. The Commission finds that the Public Counsel's proposal represents a balanced movement towards cost of service consistent with the public policy considerations of rate affordability and rate impact. The Commission finds it would be poor public policy to force residential ratepayers and small general service ratepayers to fund more of ANG's revenue requirement than the shifts recommended by Public Counsel. Therefore, the Commission need not adopt a preferred allocation method or formula.

#### **IV. Large Volume Customer Charge Level (III.F.1.)**

Staff proposes to continue the \$12,500 per month customer charge for Noranda Aluminum, the only customer in ANG's Large Volume class. This charge resulted from the settlement of ANG's 1990 rate case, and immediately prior to that case, Noranda's monthly customer charge was \$23,929.80. Staff recommends that the current charge provides ANG with a more reliable threshold of income stream in light of Noranda's ability to switch to an alternative fuel source and in light of ANG's large capital investment to serve its customers. Staff argues that by permitting a lower commodity charge, a high customer charge provides operating leeway for ANG with respect to alternative fuels and prevents the focus of competitive forces away from capital investment in facilities.

ANG agrees with Staff's proposal to retain the \$12,500 customer charge. ANG argues that because of Noranda's large size and ability to switch to an alternative fuel, ANG should have some level of protection to recover appropriate revenue from Noranda. ANG states that if the customer charge is decreased as proposed by

Noranda, then, in order to recover the same revenues from this rate class, the commodity charge would have to be significantly increased. Public Counsel takes no position on this issue.

Noranda requests that the Commission reduce the customer charge to \$506.00 per month to reflect the cost of service as shown in the cost of service study performed by Noranda witness Mallinckrodt. Noranda points out that the cost studies of the other parties show that Noranda's class is paying more than it should. ANG's cost of service indicated a customer charge for Noranda in the amount of \$1,788 per month, and Staff's study showed \$2,612. Witness Mallinckrodt also reviewed ANG's cost study and reduced the calculation for the cost of mains to arrive at a charge of \$1,440 per month. ANG argues that the incremental transportation rate can be used to ensure sufficient revenues are generated to meet the revenue requirement.

The Commission will rule in favor of Staff and ANG. The Commission finds that the current \$12,500 monthly customer charge is reasonable and should continue for the Large Volume customer class. The Commission finds that retaining the current customer charge will provide a means of protection for ANG to recover revenue from this class without significant increases in transportation rates. The Commission finds that retaining the current charge will provide long term stability for recovering costs of capital investments for the system by discouraging short term shifts to alternative fuel sources.

**V. Unauthorized Use Charge Level for Interruptible Sales and Transportation Services (III.F.3.)**

Staff requests that the Commission order ANG to incorporate into its tariff the unauthorized use charge as contained on Schedules 3-2 and 4-1 of Staff witness Hubbs' direct testimony (Exhibit 57) and on Schedules 1 and 3 of Hubbs' surrebuttal testimony (Exhibit 59). Staff's proposed unauthorized use charge will apply to interruptible transportation customers who take gas when they have been ordered to curtail usage and when they take gas in excess of what they had delivered to ANG's city gate receipt point. Staff argues that ANG has been charging its transportation customers a form of unauthorized use charge in violation of its tariff and in violation of Section 393.140, RSMo 1994. Staff's proposed unauthorized use charge is calculated as:

- (1) \$1.50 for each Ccf of unauthorized use, plus
- (2) 150 percent of the highest cost of gas purchased by the Company, for supplying the district in which the customer receives service, during the month of the unauthorized use charge period, plus
- (3) all intrastate and/or interstate pipeline penalties and other charges incurred by the Company which are attributable to a customer's unauthorized use.

Staff asserts these provisions, in conjunction with electronic gas metering (EGM), will assist in maintaining the reliability of ANG's distribution system. Staff intends to prevent affiliated and nonaffiliated transportation customers from paying

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a lower rate for interruptible gas, but taking in essence firm service without appreciable penalty.

ANG opposes Staff's unauthorized use charge because ANG believes the proposed amounts are too severe. ANG argues that when combined with the proposed elimination of back-up sales and balancing tolerances, the unauthorized use charge will practically guarantee that transportation customers will constantly incur substantial penalties. ANG contends that the following language in Tariff sheets 7E, 11D and 15D, under Special Conditions, paragraph 4, permit certain items such as the current balancing provision and penalties in its contract: "Specific details relating to delivery points, load balancing, optional transportation services and charges and other matters shall be set forth in the Gas Transportation Service Contract." (Stevens rebuttal, Ex. 69, pp. 17-18). Public Counsel takes no position on this issue.

Noranda opposes Staff's proposal. Noranda states that the balancing provisions currently written into transportation customers' contracts allow a six percent variance from their nomination penalty fee. Thus, a variance of six to ten percent results in a penalty, and a variance more than ten percent results in a much stiffer penalty. Noranda argues that Staff's proposal will require perfect nominations which are impossible to obtain and will fail to take into account meter inaccuracies.

The Commission will rule in favor of Staff on this issue and will order ANG to incorporate into its tariff the unauthorized use charge provisions as contained on Schedules 3-2 and 4-1 of Staff witness Hubbs' direct testimony (Exhibit 57) and on Schedules 1 and 3 of Hubbs' surrebuttal testimony (Exhibit 59). The Commission finds that Staff's unauthorized use charge provisions, in conjunction with electronic gas metering (EGM), will assist in maintaining the reliability of ANG's distribution system. The Commission finds that Staff's unauthorized use provisions will prevent transportation customers from paying a lower rate for interruptible gas, but receiving the benefits of firm service without appreciable penalty.

**VI. Imputing 100 Percent Load Factor Rate for Allocation of Pipeline Transportation Demand Cost between Firm and Interruptible Classes of Service (III.F.4.)**

Staff initially requested to impute a 100 percent load factor for interruptible rates to reflect the costs of the upstream pipeline capacity. Staff decided not to pursue this issue. This issue is resolved.

**VII. Removal from PGA and Transportation Tariff the Existing Language Regarding the Gathering and Transmission Rate Related to the AWG Facilities Allocated to ANG (III.F.5.)**

This issue is addressed above in paragraph II of this Report and Order. Currently ANG has tariffed rates to recover a portion of the costs for gathering and transmission (G & T) facilities of the Arkansas Western Gas Division of Arkansas Western Gas Company (Arkansas Western). These AWG facilities are located in Northwest Arkansas and are used for the delivery of gas to ANG's SEMO district. Staff recommends that ANG modify its transportation tariff and Purchase Gas Adjustment

Clause (PGA) tariff to remove these rates. Staff believes ANG should be allowed to recover reasonable G & T costs which will be reviewed by the Commission under the Actual Cost Adjustment (ACA) process; however, Staff maintains that the Commission should not pre-approve these costs in ANG's tariffs. Staff argues that its proposal is consistent with the Federal Energy Regulatory Commission's (FERC's) Order 636 which restructured the natural gas industry and deregulated gathering costs so that the recovery of these costs is based on a competitive market.

ANG disagrees with Staff and requests that the Commission continue to establish the rate using cost of service principles applicable to G & T facilities and costs. ANG argues that the G & T facilities are no different from other Arkansas Western facilities located in Arkansas which the Commission routinely includes in ANG's base rates. ANG proposes to establish a crediting mechanism to return a portion of the revenue from transportation customers back to the system supply customers. ANG further proposes modification of language in the PGA to clarify that the G & T rate applies to volumes flowing through the NOARK Pipeline.

Public Counsel did not take a position on this issue. Noranda supports Staff's position.

The Commission will rule in favor of Staff and Noranda on this issue. The Commission will order ANG to modify its transportation tariff and PGA Clause tariff to remove references to the rates for recovery of G & T costs as recommended by Staff. The Commission finds that Staff's proposal will allow Missouri transportation customers to negotiate the best G & T rates available and will allow ANG to recover from sales customers all prudently incurred G & T costs which will be reviewed by the Commission under the ACA process.

#### **VIII. Proposed Modifications to the Current Transportation Tariff**

ANG presents in its initial brief three objections to Staff's service-related proposals for changing ANG's tariff which were filed in Staff's prepared testimony in this case: (1) Lack of effective notice to transportation customers; (2) Staff usurps the tariff filing role of the utility; and (3) Staff's proposals are effectively complaints which do not follow the statutory procedure and which must satisfy the statutory burden of proof of convincing the Commission by "clear and satisfactory evidence."

The Commission will overrule ANG's three objections to the proposed tariff changes. ANG's objections are untimely and without merit. First, these objections were not raised until after the hearing in ANG's initial brief. Second, the transportation customers were provided notice of this proceeding pursuant to the Commission's Suspension Order and Notice which was issued on January 28, 1997, and directed that notice of this case be sent to each newspaper located in ANG's Missouri service areas. Third, Staff's proposals do not constitute the filing of tariffs, do not usurp any role of the utility for tariff filing, and do not effectively constitute complaint actions. A heightened burden of proof does not apply to this proceeding as requested by ANG.

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**A. Proposed Elimination of Interruptible Transportation Services, except for Large Industrial Interruptible Class (Hearing Memorandum Issue III.F.7.a.)**

Staff originally proposed that all transportation services offered by ANG be considered firm in nature. Staff decided not to pursue this modification, and Staff agreed that all transportation services be considered interruptible. Staff requests on page three of its initial brief that the Commission order ANG to modify its tariff as set out in Schedule 1 of Staff witness Hubbs' surrebuttal testimony (Exhibit 59). Schedule 1, page 5, states, "All transportation service is interruptible." The Commission will order ANG to modify its tariff as set out in Schedule 1, page 5, of Staff witness Hubbs' surrebuttal testimony (Exhibit 59).

**B. Proposed Elimination of ANG Providing Sales Service to Transportation Customers (Hearing Memorandum Issue III.F.7.b.)**

Staff proposes that the Commission should order ANG to eliminate sales service to its transportation customers. Although according to Staff the transportation customers should be responsible for the purchase and delivery of their natural gas requirements to ANG's city gate receipt point, ANG appears to act as marketer for its transportation customers. Staff argues that ANG provides these customers the functional equivalent of its standard sales service except that ANG can: (1) charge non-tariffed rates; (2) assign less capacity cost to these customers; and (3) avoid local taxes on the service. Staff argues this sales service operates to the detriment of nonaffiliated ratepayers and appears to involve affiliated bias on the part of ANG. Staff believes that more capacity release revenues might be obtained if ANG makes excess capacity on its upstream transportation contracts available to other marketers in a competitive environment. According to Staff, ANG could optimize its firm transportation contract on the NOARK pipeline system if NOARK would modify its tariff to allow capacity brokering and assignment. Staff requests that the Commission order ANG to modify its tariff by removing the provisions which allow ANG to provide marketing sales services to its transportation customer and adopt the language contained in Schedule 1 to Staff witness Hubbs' surrebuttal testimony (Exhibit 59).

ANG opposes Staff and argues that all customers, including transportation customers, benefit from allowing ANG to act as the agent of transportation customers in purchasing gas. According to ANG, the transportation customer first locates and arranges for a supply of gas. ANG then enters into a gas purchase contract with the supplier under the same terms and conditions that the customer has negotiated. ANG simultaneously enters into a contract with the customer to resell the same gas to the customer at the customer's plant. ANG charges the actual cost of gas plus the cost of transporting the gas to ANG's system plus ANG's own Commission-approved transportation rate. According to ANG, its only profit is from the return built into its transportation rate. ANG argues that it is barred from selling gas to its transportation customers as suggested by Staff, then ANG will not be able to optimize the utilization of its firm transportation contract on the NOARK pipeline system, and this action will

lead to increased costs for all customers. ANG states that no evidence shows ANG has ever refused to make excess capacity on upstream transportation contracts available to non-affiliates. Public Counsel did not take a position on this issue. Noranda opposes Staff on the grounds that allowing ANG to act as an agent in the purchase of gas will not harm remaining customers.

The Commission will rule in favor of Staff on this issue. The Commission determines that ANG should eliminate sales service to its transportation customers. The Commission finds that in order to avoid any affiliated bias and any resulting detriment to ANG's remaining ratepayers, transportation customers should be responsible for the purchase and delivery of their own natural gas requirements to ANG's city gate receipt point. The Commission will order ANG to modify its tariff by removing the provisions which allow ANG to provide marketing sales services to its transportation customer. The Commission will order ANG to adopt language in its tariff consistent with Schedule 1 to Staff witness Hubbs' surrebuttal testimony (Exhibit 59).

**C. Proposed Elimination of ANG Back-up Sales to Transportation Customers (Hearing Memorandum Issue III.F.7.c.)**

Staff proposes that ANG should not be allowed to provide back-up sales service to transportation customers. These customers, according to Staff, pay an inappropriately low rate for this service because the rates are not premised on continuous sales service over a one-year period and therefore do not recover adequate demand-related costs for providing this service. Staff maintains that through back-up sales the transportation customers access ANG's system supply gas at the PGA rates which can be much less expensive than replacement gas costs, resulting in detrimental impact for PGA sales customers. Therefore, Staff requests that the Commission approve language reflecting this limitation in Schedule 1 to Staff witness Hubb's surrebuttal testimony (Exhibit 59).

ANG opposes Staff's proposal on the grounds that elimination of back-up sales will substantially increase costs for transportation customers. ANG believes transportation customers will be unduly penalized under Staff's proposed unauthorized use charge in the event that back-up sales are eliminated. ANG contends in its initial brief at page 13 that any perceived risk of adverse effect on ANG's sales customers can be eliminated by billing back-up sales at either ANG's actual cost of gas purchased to supply back-up service or at the highest incremental cost of gas purchased by ANG in the month in which back-up service is provided. ANG proposes in its reply brief at page 12 that this issue was rendered moot by an October 15, 1997, amendment to ANG's PGA tariff which provides that ANG will bill back-up sales at the highest price ANG pays for gas taken during the billing month.

Public Counsel did not take a position on this issue. Noranda opposes Staff on the grounds that allowing ANG to act as an agent in the purchase of gas will not harm remaining customers.

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The Commission will rule in favor of Staff on this issue. The Commission determines that ANG should eliminate back-up sales service to its transportation customers in order to avoid detrimental impact on sales customers. The Commission approves the language reflecting this limitation in Schedule 1 to Staff witness Hubb's surrebuttal testimony (Exhibit 59), and the Commission will order that ANG include language consistent with Exhibit 59 in its tariff.

**D. Proposed Requirement that all Transportation Customers have Electronic Meters with Telecommunications Capability (EGM) (ILF.7.d.)**

Staff proposes that all of ANG's transportation customers should be required to have electronic meters with telecommunications capability (EGM) and that the Commission should approve language reflecting this requirement contained in Schedule 1 to Staff witness Hubb's surrebuttal testimony (Exhibit 59). Staff believes EGM is necessary to provide reliability and accountability to ANG's system, to allocate upstream penalties and costs to transportation customers, and to identify transportation customers taking gas during periods of curtailment. Staff asserts that without EGM, interruptible customers could take gas during periods of curtailment without fear of penalty. In addition, Staff proposes a \$25.00 per month charge for transportation customers for recovery of the incremental work associated with tracking and billing transportation customer usages and necessary upstream pipeline coordination.

ANG opposes Staff on this issue. ANG argues that Staff failed to present satisfactory evidence of the need for installing EGM for all transportation customers and that Staff failed to provide details on what specific type of EGM equipment will be required. ANG further argued that Staff failed to present a cost study or other evidence to support the proposed charge of \$25.00 per month to cover operational costs and that Staff failed to provide notice to customers who may eventually be required to pay several thousand dollars for installation. ANG complains that if it is required to pay the installation cost, then ANG will not recover any of these costs until the conclusion of its next rate case.

Noranda currently has EGM meters and opposes paying the \$25.00 monthly charge. Public Counsel takes no position on requiring EGM. Nevertheless, Public Counsel states that the \$25.00 monthly charge is consistent with Public Counsel's view of cost causation in the billing expense area.

The Commission will order that all of ANG's transportation customers should be required to have EGM. The Commission will approve the language reflecting this requirement consistent with Schedule 1 to Staff witness Hubb's surrebuttal testimony. The Commission will approve the \$25.00 per month charge for EGM. The Commission finds that EGM is necessary for tracking appropriate penalties and for identifying interruptible customers taking service during periods of curtailment. The Commission finds that the \$25.00 per month charge is reasonable and necessary for the recovery of incremental work associated with tracking and billing transportation customer use and for necessary upstream pipeline coordination. ANG may seek to

recover the installation cost of the EGM from the appropriate customer class in its next rate proceeding.

**E. Proposed Change in Balancing (Hearing Memorandum Issue III.F.7.e.)**

Staff requests that the Commission order ANG to change its balancing provisions in its transportation tariff as proposed in Schedule 1 to the surrebuttal testimony of Staff witness Hubbs (Exhibit 59). Under this proposal, ANG would only accept at its city gate the level of actual deliveries for its transportation customers which includes volumes the customer metered into ANG's system plus the appropriate loss and unaccounted for gas amount. Amounts taken in excess of what the Company receives for the customer's account is unauthorized use. Staff proposes to end the current free balancing service afforded to ANG's affiliates. Staff argues that its proposal would not require transportation customers to make flawless nominations and subsequent takes, but would make such customers responsible for ensuring their gas needs are delivered to ANG's city gate.

ANG opposes Staff on this issue and contends that the current balancing tolerances have served ANG and its customers well for several years. ANG argues that if these tolerances are eliminated, transportation customers will have to either perfectly match their nominations to actual use or incur severe and constant penalties under Staff's proposed unauthorized usage charge, or shut down their businesses when their requirements exceed their nominations. ANG states that it does not provide free balancing service to its affiliates and that it is physically impossible to prevent transportation customers from over delivering gas at the city gate.

Noranda opposes Staff on the grounds that a zero tolerance is unworkable. Public Counsel takes no position on this issue.

The Commission will order ANG to change its balancing provisions in its transportation tariff consistent with Schedule 1 to the surrebuttal testimony of Staff witness Hubbs (Exhibit 59). The Commission finds that ANG's current balancing service should be terminated so that Staff's proposed unauthorized use charge can be established. The Commission finds that transportation customers should be responsible for ensuring that their gas needs are delivered to ANG's city gate and that this requirement is not a mandate for flawless nominations and takes.

**E. Proposed Unauthorized Use Charge for Transportation Customers (III.F.7.f.)**

This issue is addressed above in paragraph V of this Report and Order. Staff requests that the Commission order ANG to incorporate into its tariff the unauthorized use charge as contained on Schedules 3-2 and 4-1 of Staff witness Hubbs' direct testimony (Exhibit 57) and on Schedules 1 and 3 of Hubbs' surrebuttal testimony (Exhibit 59). Staff's proposed unauthorized use charge will apply to interruptible transportation customers who take gas when they have been ordered to curtail usage and when they take gas in excess of what they had delivered to ANG's city gate receipt point. Staff argues that ANG has been charging its transportation customers a form



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of unauthorized use charge in violation of its tariff and in violation of Section 393.140, RSMo 1994. Staff's proposed unauthorized use charge is calculated as:

(1) \$1.50 for each Ccf of unauthorized use, plus

(2) 150 percent of the highest cost of gas purchased by the Company, for supplying the district in which the customer receives service, during the month of the unauthorized use charge period, plus

(3) all intrastate and/or interstate pipeline penalties and other charges incurred by the Company which are attributable to a customer's unauthorized use.

Staff asserts these provisions, in conjunction with electronic gas metering (EGM), will assist in maintaining the reliability of ANG's distribution system. Staff intends to prevent affiliated and nonaffiliated transportation customers from paying a lower rate for interruptible gas, but taking in essence firm service without appreciable penalty.

ANG opposes Staff's unauthorized use charge because ANG believes the proposed amounts are too severe. ANG argues that when combined with the proposed elimination of back-up sales and balancing tolerances, the unauthorized use charge will practically guarantee that transportation customers will constantly incur substantial penalties. ANG contends that the following language in Tariff sheets 7E, 11D and 15D, under Special Conditions, paragraph 4, permit certain items such as the current balancing provision and penalties in its contract: "Specific details relating to delivery points, load balancing, optional transportation services and charges and other matters shall be set forth in the Gas Transportation Service Contract." (Stevens rebuttal, Ex. 69, pp. 17-18). Public Counsel takes no position on this issue.

Noranda opposes Staff's proposal. Noranda states that the balancing provisions currently written into transportation customers' contracts allow a six percent variance from their nomination penalty fee. Thus, a variance of six to ten percent results in a penalty, and a variance more than ten percent results in a much stiffer penalty. Noranda argues that Staff's proposal will require perfect nominations which are impossible to obtain and will fail to take into account meter inaccuracies.

The Commission will rule in favor of Staff on this issue and will order ANG to incorporate into its tariff the unauthorized use charge provisions as contained on Schedules 3-2 and 4-1 of Staff witness Hubbs' direct testimony (Exhibit 57) and on Schedules 1 and 3 of Hubbs' surrebuttal testimony (Exhibit 59). The Commission finds that Staff's unauthorized use charge provisions, in conjunction with electronic gas metering (EGM), will assist in maintaining the reliability of ANG's distribution system. The Commission finds that Staff's unauthorized use provisions will prevent transportation customers from paying a lower rate for interruptible gas, but receiving the benefits of firm service without appreciable penalty.

**G. Proposed Affiliated Transactions Rules in the Transportation Tariff (III.F.7.g.)**

Staff proposes that the Commission approve the gas marketing affiliated transaction language as set out in Staff witness Hubb's testimony to be incorporated into ANG's transportation tariff. Public Counsel agrees with Staff and supports the inclusion of additional language regarding an affiliate's use of the utility's brand recognition and the development of a cost allocation manual or similar documentation. ANG is opposed to the placement of affiliated transactions language in the tariff, and ANG is opposed to the additional language recommended by Public Counsel. ANG requests the Commission to defer action on affiliated transaction standards until its decision in the generic rulemaking case. Noranda is opposed to the positions of Staff and Public Counsel. Noranda states that industry-wide rules are the appropriate forum for this issue.

The Commission will rule in favor of ANG and Noranda on this issue. The Commission will not order ANG to include Staff's proposed language regarding affiliated transactions into its transportation tariff. The Commission will address the generally applicable standards for an affiliated transactions rule in Case No. OX-98-183.

**H Proposed Transportation Contract (Hearing Memorandum Issue III.F.7.h.)**

Staff proposes to add the form of the transportation contract to the tariff as provided in Schedule 2 to Staff Witness Hubbs' surrebuttal testimony (Exhibit 59). Staff argues that the form contract avoids encouraging affiliated bias because it does not include the balancing provisions and back-up sales provisions. ANG is opposed to placing the form contract in the transportation tariff because it fails to contain numerous provisions including liability and operational clauses and it does not allow flexibility for proposing contract terms consistent with the tariffs. Noranda is opposed to Staff on the grounds that the form contract is unnecessary. Public Counsel takes no position on this issue.

The Commission finds that ANG and its customers should be allowed flexibility for negotiating contract terms as long as the terms are consistent with ANG's tariffs. The Commission will rule in favor of ANG and Noranda and will not require ANG to include the proposed contract form in its tariff.

**I Proposal to Require Refunding of Monies Collected through Balancing Provisions (Hearing Memorandum Issue III.F.7.i.)**

Staff proposes that the Commission order ANG to credit all unauthorized use charges to ratepayers through the Actual Cost Adjustment provisions of its PGA Clause and thus not to retain these amounts as a windfall for the Company. Staff alleges that, through ANG's balancing provisions, the Company charges penalties which are not approved by the Commission in violation of Section 393.140(11), RSMo 1994. ANG opposes the refund of monies collected through the balancing provisions or through the proposed unauthorized use charge. ANG contends that the penalties are allowed under tariff sheets 7E, 11D and 15D, which specify under Special Conditions, paragraph 4, "Specific details relating to delivery points, load balancing,

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optional transportation services and charges and other matters shall be set forth in the Gas transportation Service Contract." (Stevens rebuttal, Ex. 69, pp. 17-18).

Noranda states it is opposed to unauthorized use charges; however, it takes no position on whether the company should refund current penalties to all customers. Public Counsel takes no position on this issue.

The Commission finds that ANG would receive a windfall if it retained all unauthorized use charges. Therefore, the Commission will order ANG to credit all unauthorized use charges to ratepayers through the Actual Cost Adjustment provisions of its PGA Clause.

**IX. Curtailment Policy (Hearing Memorandum Issue III.F.8.)**

Staff proposes that the Commission order ANG to modify its curtailment policy as set forth in Schedule 3 to the surrebuttal testimony of Staff witness Hubbs (Exhibit 59). The proposed changes include notice requirements, enforcement of curtailments by billing unauthorized use charges, and curtailment classes receiving gas on a pro rata basis when partial requirements are available.

ANG initially recommended that Staff's changes be modified to include wording to provide that limiting curtailments to the system are requirements, to provide for minimum use of gas for plant protection, and to allow category 2 customers to receive notice of curtailment via mass media. After Staff modified its proposal in the prefiled surrebuttal testimony of Mr. Hubbs in response to ANG's concerns, ANG suggested only that the following language should be added, "If in the Company's opinion supplies and capacity are available, the Company may allow limited gas service for plant protection." (Tr. 194). Staff's position is that transportation customers should not be allowed plant protection gas because these customers are interruptible and should be required to contract for their needs. Staff believes that if such customers have needs for firm service, then they should contract for those needs.

Public Counsel and Noranda stated no position on this issue.

The Commission will rule in Staff's favor on this issue. The Commission finds that if interruptible transportation customers need plant protection gas, these customers should contract for their needs or purchase firm sales service. The Commission determines that ANG may allow limited gas service for plant protection except for transportation customers. The Commission will order that ANG include in its tariff the curtailment language from Schedule 3 of the surrebuttal testimony of Staff witness Hubbs with the following additional language, "If in the Company's opinion supplies and capacity are available, the Company may allow limited gas service for plant protection, except for transportation customers."

**Conclusions of Law**

The Missouri Public Service Commission has arrived at the following Conclusions of Law.

Associated Natural Gas Company, a division of Arkansas Western Gas Company, is a gas corporation as defined under Section 386.020(18), RSMo Supp. 1996.

Associated Natural Gas Company, a division of Arkansas Western Gas Company, is an investor-owned public utility engaged in the provision of natural gas service in the State of Missouri and, therefore, subject to the jurisdiction of the Missouri Public Service Commission under Chapters 386 and 393, RSMo.

The Commission has the legal authority to accept a Stipulation and Agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo Supp. 1996.

The cost of service is but one consideration in determining the reasonableness of rates. Shepherd v. Wentzville, 645 S.W.2d 130 (Mo. App. 1982). It is not just the methodology or theory behind any proposed rates but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and nondiscriminating. State ex rel. Associated Natural Gas Co. v. Public Service Commission, 706 S.W.2d 870, 879 (Mo. App. 1985). The quintessence of a just and reasonable rate is that it is just and reasonable to both the utility and its customers. State ex rel. Val Sewage Co. v. Public Service Commission, 515 S.W.2d 845 (Mo. App. 1974).

*IT IS THEREFORE ORDERED:*

1. That pursuant to the findings of fact and conclusions of law in this Report and Order, the proposed tariff sheets filed on January 14, 1997, by Associated Natural Gas Company, a division of Arkansas Western Gas Company, are rejected.
2. That Associated Natural Gas Company, a division of Arkansas Western Gas Company, is authorized to file, in lieu of the rejected tariff sheets, for approval of the Commission, tariff sheets in compliance with this order designed to increase gross revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or other similar fees or taxes, by the amount of \$1,522,263 for natural gas service rendered in its Missouri service area on an annual basis over its current revenues.
3. That the Staff of the Missouri Public Service Commission shall file a memorandum in this docket no later than ten days after the tariff has been filed, indicating whether the tariff sheets filed pursuant to ordered paragraph 2 are in compliance with this order.
4. That the Unanimous Stipulation and Agreement filed by Associated Natural Gas Company, a division of Arkansas Western Gas Company, Noranda Aluminum, Inc., Westar Gas Marketing, Inc., the Office of the Public Counsel, and the Commission's Staff on September 5, 1997, and the First Amendment thereto filed on September 15, 1997, are hereby approved (See Attachments A and B, respectively).
5. That the depreciation rates are approved as set forth in Exhibit 1 to the Unanimous Stipulation and Agreement (Attachment A) which was filed by Associated Natural Gas Company, a division of Arkansas Western Gas Company, Noranda Aluminum, Inc., Westar Gas Marketing, Inc., the Office of the Public Counsel, and the Commission's Staff on September 5, 1997.

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6. That the completed Revenue Requirement Scenario filed on November 12, 1997, is received into the record as Exhibit 98 (Attachment C).
7. That those motions and objections not specifically ruled on in this order are hereby denied or overruled.
8. That this Report and Order shall become effective on December 13, 1997.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.

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EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, it is available in the official case files of the Public Service Commission.

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**In the Matter of the Application of the Mid-Missouri Group and the Small Telephone Company Group of Incumbent Local Exchange Companies for Designation as Telecommunications Company Carriers Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996.\***

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*Case No. TO-98-49*  
*Decided December 4, 1997*

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**Telecommunications §23.** The Commission approved a stipulation and agreement and designated each applicant an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§ 214(e) and 254(e). The Commission found that each applicant's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. § 54.207(b).

**ORDER APPROVING STIPULATION AND DESIGNATION OF  
ELIGIBLE TELECOMMUNICATIONS CARRIERS**

The Mid-Missouri Group<sup>1</sup> (Mid-Mo) and the Small Telephone Company

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\*The Commission, in an order issued on December 31, 1997, denied a motion for correction.

<sup>1</sup>Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company, Inc.

Group<sup>2</sup> (STCG), collectively referred to as "Applicants," jointly filed on August 1, 1997, an Application for Designation as Eligible Carriers Pursuant to Section 254 of the Telecommunications Act of 1996. The Applicants asked the Commission to designate each of the members of Mid-Mo and STCG, all of whom are incumbent local exchange carriers (ILECs), as telecommunications carriers eligible to receive federal universal service support under 47 C.F.R. § 54.201(d).

Beginning on January 1, 1998, any carrier that is eligible for universal service support must provide the services that are supported by federal universal support mechanisms as described in 47 C.F.R. § 101 using its own facilities at least in part. The carrier must also advertise the availability of those services and the charges for them using media of general distribution. 47 C.F.R. § 54.201(d). Where a telecommunications carrier is otherwise eligible for universal service support it may request additional time to complete the network upgrades necessary to provide single-party service, access to enhanced 911 service, or toll limitation. 47 C.F.R. § 54.101(c). The Commission may grant a request for additional time only on a showing of exceptional circumstances and for the period of time the Commission deems necessary to complete the upgrades. *Id.* Because funding will become available under these conditions in January of 1998, the Applicants have asked the Commission to make a determination of their eligibility no later than December 31, 1997.

The Commission issued its order directing interested parties to file applications to intervene by September 8. The Commission granted intervention to United Telephone Company of Missouri d/b/a Sprint, MCI Telecommunications Corporation, MCI metro Access Transmission Services, Inc., and Southwestern Bell Telephone Company, and set a date for a prehearing conference.

The parties met in prehearing conference on October 1, and filed a Stipulation and Agreement (Stipulation) on October 23. The Stipulation provided for the applicants to be designated eligible telecommunications carriers for purposes of federal universal service support, and to be granted additional time to provide single-party service in all exchanges and toll limitation. No party requested a hearing.

<sup>2</sup>ALLTEL Missouri, Inc., BPS Telephone Company, Bourbeuse Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

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The parties agreed that each of the ILECs comprising Mid-Mo and STCG, with the exception of Cass County, KLM and Ozark, provide the following service:

- (1) Voice grade access to the public switched network;
- (2) Local usage;
- (3) Dual tone multifrequency signaling or its functional equivalent;
- (4) Single-party service or its functional equivalent;
- (5) Access to emergency services;
- (6) Access to operator services;
- (7) Access to interexchange services; and
- (8) Access to directory assistance.

Cass County, KLM and Ozark provide all of these services except for single-party service.

The parties stipulated that none of the Mid-Mo and STCG members are capable at the present time of providing toll limitation for qualifying low-income customers, as that service is defined by the Federal Communications Commission (FCC) because they do not have the technical ability to provide toll control. Providing toll control will require extensive revisions to telephone company billing systems and the establishment of totally new information exchanges among carriers. The parties agreed that exceptional circumstances prevent the ILECs from presently providing this service and that the Commission should grant them additional time to provide this service pursuant to 47 C.F.R. § 54.101(c). The parties agreed that the Applicants will either provide toll limitation, including toll control, on or before December 31, 1999. In the event that they will not be able to meet that deadline, the Applicants will file a request with the Commission for additional time by November 1, 1999, and a report setting out the current status of the technology. The Applicants agreed to serve a copy of these documents on each of the parties to this case. The Applicants will also provide reports regarding the status of the technology for toll control and the progress being made toward its implementation on or before December 31, 1998, to the Commission and the parties to this case.

The parties stipulated that exceptional circumstances prevent KLM from providing single-party service to approximately 260 of its customers. KLM and Staff have agreed to a modernization plan whereby the company will use its own employees to complete the upgrades in order to avoid having to incur an additional financial burden which might increase rates for local service. The agreement was filed in KLM's modernization case, TO-97-555, on September 26; Staff filed Suggestions in Support of the Stipulation on November 3. The parties to this case are agreed that KLM should be granted additional time up to December 31, 1998, to provide single-party service to all of its customers pursuant to 47 C.F.R. § 54.101(c).

The parties stipulated that exceptional circumstances prevent Ozark from providing single-party service to approximately 204 customers. Ozark has been granted an extension of time to complete its modernization plan by the Commission up to

December 31, 1998, based on its inability to obtain needed financing. See Case No. TM-95-134, Order Granting Extension of Time to Complete Modernization Plan issued September 25, 1997. The parties are agreed that Ozark should be granted additional time up to December 31, 1998, to provide single-party service to all of its customers pursuant to 47 C.F.R. § 54.101(c).

The parties stipulated that exceptional circumstances prevent Cass County from providing single-party service to approximately 747 customers. Cass County has filed a request with the Commission for an extension of time to complete its modernization based on the fact that it has not received the universal service funding it was relying on to complete these upgrades. Staff filed a response in support of Cass County's request on October 17. See Case No. TM-95-163. Cass County filed an application with the FCC for a waiver of 47 C.F.R. §§ 36.612(a) and 36.631(d) in connection with this delay in modernization and this Commission submitted comments in support of the application on May 19. See AAD97-59. The parties are agreed that Cass County should be granted additional time up to December 31, 1998, to provide single-party service to all of its customers pursuant to 47 C.F.R. § 54.101(c).

The parties agreed that all of the Applicants qualify for designation as "eligible telecommunications carriers" under the provisions of 47 C.F.R. § 54.201(d) because, throughout their respective exchanges or service areas, each of them, with the exceptions noted above, offer the services to be supported by federal universal service support using their own facilities. In addition, the Applicants advertise the availability of these services using directories, public record tariffs, newsletters and bill stuffers. The Applicants have agreed to comply with any additional advertising in media of general distribution that the Commission deems appropriate to meet the requirements of 47 C.F.R. § 54.201(d)(2). The parties recommend that the Commission establish a docket in early 1998 to determine if there should be a rulemaking to establish the requirements of 47 C.F.R. § 54.201(d)(2) for telecommunications companies in which all issues involving these requirements may be addressed. In the interim, the parties agree that the ILECs' current advertising is adequate until such time as the issues are explored more fully in the docket to be established in early 1998.

Each of the Applicants agreed that, if it does not have a tariff providing Lifeline services as defined in 47 C.F.R. § 54.401 and Link Up services to qualifying low-income customers, it will file a tariff with the Commission to be effective before the end of 1997 so that such service will be available to qualifying low-income consumers by January 1, 1998. The parties recommended that the Commission address the issue of authorizing a state reduction of \$1.75 in the local rate in accordance with 47 C.F.R. § 54.503(a) in conjunction with the LifeLine tariff filings.

The parties recommended that the Commission issue an order to be effective prior to December 31, 1997, designating each of the ILECs of the Mid-Mo and STCG as telecommunications carriers eligible to receive federal universal service support,



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granting the requested additional time to provide single-party service and toll limitation, and designating the service area of each applicant to be equivalent to its "study area" unless and until determined otherwise pursuant to 47 C.F.R. § 54.207(b).

The Commission has reviewed the pleadings in the case and the Stipulation and Agreement of the parties and finds that the Stipulation should be approved in resolution of all issues and the Applicants shall be designated as eligible telecommunications carriers for purposes of federal universal service support. The Commission finds that exceptional circumstances exist which prevent the Applicants from providing ubiquitous single-party service and toll limitation and that the requested extensions of time shall be granted. The Commission finds that a case should be established to determine whether a rule should be promulgated specifying the standards for advertising that the Commission will find adequate to meet the requirements of 47 C.F.R. § 54.201(d)2).

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the parties on October 23, 1997, is approved in resolution of the issues.
2. That each of the Applicants is designated an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§ 214(e) and 254(e). Each applicant's certificated Missouri service area shall be its service area for purposes of federal universal service support. Each applicant's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. § 54.207(b).
3. That extensions of time until December 31, 1998, to provide single-party service to all customers are granted to KLM Telephone Company, Ozark Telephone Company, and Cass County Telephone Company.
4. That extensions of time until December 31, 1999, to provide toll limitation as defined by 47 C.F.R. § 54.400 are granted to the Applicants. The Applicants will file a report with the Commission no later than December 31, 1998, regarding the status of the technology and progress being made toward implementing toll limitation. If exceptional circumstances continue to prevent compliance by the extended deadline, the Applicants will file a request for additional time no later than November 1, 1999, accompanied by a report on the status of the technology as of that date.
5. That the Commission will establish a docket by separate order to determine whether a rule should be promulgated specifying standards for advertising adequate to meet the requirements of 47 C.F.R. § 54.201(d)2).
6. That each applicant that does not have a Lifeline tariff in effect shall submit a tariff providing Lifeline services to the Commission for approval no later than December 31, 1997.
7. That this order shall become effective on December 16, 1997.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Wickliffe, Deputy Chief Regulatory Law Judge

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**In the matter of St. Louis County Water Company's Tariff Designed to Increase Rates for Water Service to Customers in the Company's Service Area**

*Case No. WR-97-382*  
*Decided December 4, 1997*

**Water §16.** The Commission approved a stipulation and agreement resulting in an increase in annual water revenues of \$3,800,000 exclusive of any applicable license, occupation, franchise, gross receipts or other similar fees and taxes.

APPEARANCES

*Richard T. Ciotton* and *David Abernathy*, Attorneys at Law, 535 North New Ballas Road, St. Louis, Missouri 63141, for St. Louis County Water Company.

*Diana M. Schmidt*, Attorney at Law, Peper, Martin, Jensen, Maichel & Hetlage, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, for Barnes-Jewish Hospital, Emerson Electric Company, McDonnell Douglas Corporation and Monsanto Company.

*John B. Coffman*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*William K. Haas*, Senior Counsel, and *Marc Poston*, Assistant General Counsel, Post Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Thomas H. Luckenbill, Deputy Chief

REPORT AND ORDER

Procedural History

On March 14, 1997, St. Louis County Water Company (Company) filed proposed tariff sheets with the Missouri Public Service Commission bearing an effective date of April 14. The proposed tariff sheets were designed to produce an increase in annual revenues of approximately \$8,250,000, or 8.25 percent, excluding applicable taxes.

On April 4 the Commission suspended the proposed tariff sheets until February 12, 1998, and directed that notice of the application be provided. On May 1 the Company filed the direct testimony and schedules of five witnesses and requested that the Commission provide for a true-up of certain issues.

On May 22 the Commission established a procedural schedule and granted intervention to Barnes-Jewish Hospital, Emerson Electric Company, McDonnell Douglas Corporation and Monsanto Company (Intervenors).

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On September 2 the Staff of the Missouri Public Service Commission (Staff) filed direct testimony and schedules of nine witnesses and requested that the Commission provide for a true-up of certain items. The Office of the Public Counsel (Public Counsel) filed the direct testimony and schedules of three witnesses. On September 17 the Commission directed a true-up audit and scheduled a true-up hearing for January 9, 1998.

The Company, Staff and Public Counsel appeared and participated in a prehearing conference on September 9. The Intervenors' attorney appeared and was excused from the prehearing conference by Deputy Chief Regulatory Law Judge Luckenbill. On October 6 the parties filed a unanimous stipulation and agreement. On October 7 the Staff filed Staff's Explanatory Memorandum. On November 3 the Commission convened an on-the-record presentation of the stipulation and agreement.

#### Findings of Fact

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to reflect a piece of evidence, position or argument of any party in no way indicates that the Commission has failed to consider relevant evidence, but indicates only that the omitted matter was not considered dispositive of the decision or outcome.

St. Louis County Water Company is a public utility regulated by the Commission, organized and existing under the laws of the State of Missouri, and engaged in the business of providing water service to the general public in various certificated areas in the State of Missouri. On March 14 of 1997 the Company filed tariff sheets designed to increase revenues. On October 6 the parties to the case filed a unanimous stipulation and agreement which, if approved by the Commission, will resolve the rate case.

The parties have agreed that the Company may file revised tariff sheets containing rate schedules for water service designed to produce an increase in overall Missouri gross annual water revenues of \$3,800,000, exclusive of any applicable license, occupation, franchise, gross receipts or other similar fees and taxes. The parties agree that a true-up audit and hearing are not necessary. Further, the parties strongly recommend that the revised rates become effective January 1, 1998.

The parties have agreed that the Company may file tariff changes to reduce the rates charged to the Metropolitan St. Louis Sewer District for customer billing information to \$1.31 per residential customer per year and \$0.655 per meter reading for non-residential and residential multi-family customers.

The Company has requested that it be allowed to accrue infrastructure replacement costs in an accounting authority order, as initially authorized in Case No. WR-

95-145, after the order in this proceeding becomes effective.<sup>1</sup> However, the Staff and Public Counsel have concerns with such use of an accounting authority order. Thus, the Stipulation requests that the Commission establish a sin-off docket to address the Company's request.

The Commission will establish Case No. WO-98-223 as requested by the parties to consider an accounting authority order designed to accrue infrastructure replacement costs for St. Louis County Water Company.

The Commission finds that the proposed Unanimous Stipulation and Agreement is in the public interest and should be approved. The proposed Unanimous Stipulation and Agreement is consistent with the Commission's obligation to ensure just and reasonable rates under Section 393.130.<sup>2</sup>

#### Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over water corporations under Section 386.250 RSMo. St. Louis County Water Company is a water corporation under Section 386.020 (58), RSMo Supp. 1996, and is subject to the jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393 RSMo.

The Commission finds that the proposed Unanimous Stipulation and Agreement is in the public interest and should be approved. The proposed Unanimous Stipulation and Agreement is consistent with the Commission's obligation to ensure just and reasonable rates under Section 393.130 RSMo. The Commission may accept a unanimous stipulation and agreement as disposition of a case under Section 536.060, RSMo Supp. 1996.

#### *IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed by St. Louis County Water Company, the Staff of the Missouri Public Service Commission, the Office of the Public Counsel, and the Intervenors is approved (Attachment 1).

2. That the proposed tariff sheets filed by St. Louis County Water Company on March 14, 1997 are rejected.

3. That St. Louis County Water Company may file revised tariff sheets containing rate schedules for water service designed to produce an increase in overall Missouri jurisdictional annual water revenues of \$3,800,000, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, said tariff sheets to be in compliance with this Report and Order.

<sup>1</sup>This request is contained in the prefiled direct testimony of Company witness Mr. Jenkins.

<sup>2</sup>All statutory references are to Revised Statutes of Missouri 1994, unless otherwise indicated.

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4. That Case No. WO-98-223 is established and the Commission's Records Department shall place a certified copy of this report and order in the official case papers of that case.

5. That late-filed Exhibit 20 is received into the record.

6. That this order shall become effective on December 16, 1997 .

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.

EDITOR'S NOTE: The Stipulation and Agreement in this case (Attachment 1) has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of an Investigation of Payphone Issues Pursuant to  
the Telecommunications Act of 1996.**

*Case No. TW-98-207*

*Decided December 9, 1997*

**Telecommunications §23.** The Commission established a docket to investigate Federal Telecommunications Act of 1996 compliance regarding whether the Commission's rules and regulations contain barriers to free entry and exit from the competitive payphone market; and to address the issue of provision and funding of "public interest" payphones.

**ORDER ESTABLISHING CASE**

On November 14, 1997, the Staff of the Missouri Public Service Commission filed a Motion to Open Docket (Motion) regarding certain payphone issues pursuant to the federal Communications Act of 1934 as Amended by the Telecommunications Act of 1996 (the Act).<sup>1</sup> The Motion notes that the Federal Communications Commission (FCC) has issued several orders interpreting the Act's requirements and mandating state action for the restructuring of the pay telephone market. In compliance with the FCC mandate, the Motion proposes that the Commission establish a case to investigate: (1) whether the Commission's rules and regulations contain barriers to free entry and exit from the competitive payphone market; and (2) to address the issue of provision and funding of "public interest" payphones.

As indicated in Staff's Motion, the FCC issued its Report and Order re: In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, FCC 96-388, CC Docket

See page 533 for another order in this case.

<sup>1</sup>47 U.S.C. 151 et seq.

No. 96-128, on September 20, 1996.<sup>2</sup> The Report and Order stated that the competitive market, rather than regulation, should dictate the behavior of the various parties in the payphone industry. To this end, the FCC directed each state to examine and modify its regulations applicable to payphones and payphone service providers (PSPs) to ensure the regulations are competitively neutral. The FCC indicated states should pay particular attention to those regulations which impose market entry or exit requirements, and remove those which restrict payphone competition.

Additionally, the FCC concluded that there is a need to ensure the maintenance of payphones that serve public policy interests. A payphone is a "public interest payphone" (PIP) if it: (1) fulfills a public policy objective in health, safety, or public welfare; (2) is not provided for a location provider with an existing contract for the provision of a payphone; and (3) would not otherwise exist as a result of the competitive marketplace. The FCC left the primary responsibility for administering and funding PIP programs to the states. However, the funding mechanism chosen by the state must fairly and equitably distribute the costs of such a program, and may not involve the use of subsidies prohibited by the Act.

The Report and Order directed each state to review whether it has adequately provided for public interest payphones in a manner consistent with the requirements of the Act. This review is required to be completed within two years of the issuance of the Report and Order and may be conducted in conjunction with the state's study of the payphone marketplace.

The Commission finds that it is in the public interest to grant Staff's Motion to Open Docket and the Commission will open this investigation as Case No. TW-98-207. Any entity interested in participating in this case shall file a "Notice of Participation." Representation by a licensed attorney is not a prerequisite to participation in a case of this type. At the conclusion of the period for registration of interested participants, the Commission will publish a list of all active participants for the purpose of providing service of documents on all participants.

Thereafter, the Commission shall convene a prehearing conference for the purpose of developing proposals which may be addressed in this case. This is not a procedure which by law requires a hearing, but the Commission anticipates that one may be convened for the final presentation of the positions of the participants. This hearing would also provide an opportunity for the Commissioners to question the appropriate participants and their witnesses.

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<sup>2</sup>On November 8, 1996, the FCC released its Order on Reconsideration, FCC 96-439, in CC Docket No. 96-128. A Second Report and Order, FCC 97-371, followed in this same docket on October 9, 1997. Neither the Order on Reconsideration, nor the Second Report and Order modified the requirements for state action to remove market entry and exit barriers and ensure the existence of public interest payphones set forth in the original Report and Order.

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The participants in this case shall be expected to comply with the Commission's pleading and practice requirements as set out in 4 CSR 240-2.010 *et seq.* All filings and documents in this case shall be served upon every other participant simultaneous with their filing with the Commission. To ensure extensive dissemination of this order, the Commission will direct the Records Department to send a copy of this order to every certificated local exchange company, every certificated interexchange carrier, and every certificated payphone service provider in the State of Missouri. In addition, the Commission will direct its Information Office to send a copy of this order to all Members of the General Assembly and to all newspapers in the State of Missouri as listed in the Newspaper Directory of the *Official Manual of the State of Missouri*.

*IT IS THEREFORE ORDERED:*

1. That Case No. TW-98-207 is established for the purpose of investigating payphone issues pursuant to the Telecommunications Act of 1996.

2. That notice of this order shall be issued by the Information Office and the Records Department as set out herein.

3. That any interested participant shall file its "Notice of Participation" not later than January 9, 1998. Every such notice shall list the participant's name, address, telephone number, fax number, and the interest which this participant has in this case.

4. That all participants shall appear for a prehearing conference at the Commission's offices on the 5th floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri, at 10:00 a.m. on January 27, 1998.

5. That any persons with special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one of the following numbers: Consumer Services' Hotline —1-800-392-4211 or TDD Hotline —1-800-829-7541.

6. That the participants shall file a proposed procedural schedule no later than 3:00 p.m. on February 3, 1997.

7. That this order shall become effective on December 9, 1997.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Hennessey, Regulatory Law Judge

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**In the Matter of Union Electric Company's Tariff Designed to Increase Rates for Gas Service in the Company's Missouri Service Area.**

*Case No. GR-97-393*

*Decided December 10, 1997*

**Gas §18.** The Commission approved the unanimous stipulation and agreement regarding a natural gas rate increase for the Company.

**ORDER APPROVING STIPULATION AND AGREEMENTS**

On March 21, 1997, Union Electric Company (UE or Company) filed proposed tariff sheets with the Missouri Public Service Commission bearing an effective date of April 20. The proposed tariff sheets were designed to produce an increase in annual revenues of approximately \$14,300,000, or 19.5 percent, excluding gross receipts taxes.

On April 15 the Commission suspended the proposed tariff sheets until February 18, 1998, and directed that notice of the application be provided. On May 30 the Commission established a procedural schedule and granted intervention to Midwest Gas Users Association (Midwest).

On May 12 the company filed direct testimony and accompanying schedules. On September 4 the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel) filed direct testimony and accompanying schedules regarding the Company's revenue requirement. On September 11 the Staff, Public Counsel, and Midwest filed direct testimony regarding rate design. During October the Staff and Public Counsel filed supplemental direct testimony regarding rate design. On October 20 the Company, Midwest, Staff, and Public Counsel filed rebuttal testimony. On November 3 the Company, Midwest, Staff, and Public Counsel filed surrebuttal testimony.

On November 12 the Company, Midwest, Staff, and Public Counsel filed a unanimous stipulation and agreement regarding the appropriate revenue requirement for the Company. On November 13 the Staff filed an explanatory memorandum regarding that stipulation and agreement. On November 20 the Staff filed Attachment 4 to the November 12 stipulation and agreement. Attachment 4 had erroneously been omitted from that Stipulation and Agreement. Attachment 4 and the other attachments to the November 12 Stipulation and Agreement are incorporated by reference for purposes of this Report and Order.

On November 18 the Company, Midwest, Staff, and Public Counsel filed a unanimous stipulation and agreement as to class cost of service and rate design issues. On November 26 the Staff filed suggestions in support of the unanimous stipulation and agreement regarding rate design and class cost of service issues.



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The Commission has reviewed the unanimous stipulation and agreement regarding the appropriate revenue requirement for the Company and determines that it is in the public interest and should be approved. The proposed unanimous stipulation and agreement regarding the appropriate revenue requirement for the Company is consistent with the Commission's obligation to ensure just and reasonable rates under Section 393.130.<sup>1</sup> The Commission may accept a unanimous stipulation and agreement as disposition of a case under Section 536.060 RSMo Supp. 1996. The Commission has reviewed the unanimous stipulation and agreement regarding the appropriate rate design and class cost of service for the Company and determines that it is in the public interest and should be approved. The proposed unanimous stipulation and agreement regarding the appropriate rate design and class cost of service for the Company is consistent with the Commission's obligation to ensure just and reasonable rates under Section 393.130. The Commission may accept a unanimous stipulation and agreement as disposition of a case under Section 536.060 RSMo Supp. 1996.

*IT IS THEREFORE ORDERED:*

1. That the Unanimous Stipulation and Agreement filed on November 12, 1997 by Union Electric Company, Midwest Gas Users Association, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel is approved (Attachment 1).

2. That the Unanimous Stipulation and Agreement filed on November 18, 1997 by Union Electric Company, Midwest Gas Users Association, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel is approved (Attachment 2).

3. That the proposed tariff sheets filed by Union Electric Company on March 21, 1997 are rejected.

4. That Union Electric Company may file revised tariff sheets containing rate schedules for natural gas service designed to produce an increase in overall Missouri jurisdictional gross annual gas revenues of eleven million five hundred thousand (\$11,500,000) exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, said tariff sheets to be in compliance with this Report and Order. The tariff sheets to be filed in compliance with this Report and Order shall be in substantially the same form as the sample tariff sheets provided with the Stipulation and Agreements.

5. That this order shall become effective on December 23, 1997.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
Luckenbill, Deputy Chief Regulatory Law Judge

EDITOR'S NOTE: The Stipulation and Agreement (Attachment A) in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

<sup>1</sup> All statutory references are to Revised Statutes of Missouri 1994, unless otherwise indicated.

**In the Matter of Southwestern Bell Telephone Company's Tariff  
Filing to Revise Its Wireless Carrier Interconnection Service  
Tariff, P.S.C. Mo.-No. 40.**

*Case No. TT-97-524*  
*Decided December 23, 1997*

**Telecommunications §§23, 36.** The Commission ordered SWBT to file a new tariff consistent with the finding that federal law does not prohibit the company from realigning its relationship with wireless carriers to provide only a transport function, and that such a realignment should be permitted. The Commission has also found that SWBT should be required to make available a Cellular Usage Summary Report that contains information sufficient to allow third-party LECs to bill wireless carriers for wireless-originating traffic which terminates in the exchanges of the third-party LECs. The Commission has further found that SWBT's interpretation of its indemnity language is unreasonable, and that some of the other language in its current tariff is unenforceable.

**APPEARANCES**

*Leo J. Bub*, Attorney-Missouri, Southwestern Bell Telephone Company, 100 North Tucker Boulevard, Room 630, St. Louis, Missouri 63101-1976, for Southwestern Bell Telephone Company.

*W.R. England, III*, and *Sondra B. Morgan*, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for: BPS Telephone Company, Bourbeuse Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (the Small Telephone Company Group).

*Craig S. Johnson*, Andereck, Evans, Milne, Peace & Baumhoer, 305 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102, for: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company (the Mid-Missouri Group of Local Exchange Companies).

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*Michael F. Dandino*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Cherlyn D. McGowan*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Elaine E. Bensavage.

## REPORT AND ORDER

### Procedural History

On June 5, 1997, Southwestern Bell Telephone Company (SWBT) filed proposed tariff revisions to its P.S.C. Mo.-No. 40, Wireless Carrier Interconnection Service Tariff. The tariff revision bears an effective date of July 7, which was originally extended by SWBT to July 21, and then was subsequently extended again to July 24. The Mid-Missouri Group of Local Exchange Companies (Mid-MO Group)<sup>1</sup> and the Small Telephone Company Group (STCG)<sup>2</sup> filed applications to intervene on June 27 and July 1 respectively, and requested suspension of the proposed tariff revisions.

SWBT explained in its cover letter that its filing included tariff changes associated with wireless carrier-originated calls which transit SWBT's network

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<sup>1</sup> For purposes of this proceeding, the Mid-MO Group is comprised of the following companies: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company.

<sup>2</sup> For purposes of this proceeding, the STCG is comprised of the following companies: BPS Telephone Company, Bourbeuse Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (the Small Telephone Company Group).

and terminate in the network of an "Other Telecommunications Carrier."<sup>3</sup> SWBT also maintained that the tariff filing was intended to conform with the Missouri Public Service Commission's (Commission's) decision in Case No. TC-96-112, which involved a complaint filed against SWBT by United Telephone Company of Missouri d/b/a Sprint (United).

In its application to intervene, the Mid-MO Group contended that the Commission had determined in Case No. TC-96-112 that the appropriate compensation mechanism between SWBT and third-party LECs was the existing LEC access rate, and claimed that SWBT's tariff filing was therefore inconsistent with the Commission's Report and Order. The Mid-MO Group also complained that SWBT's tariff would require third-party LECs to negotiate separate agreements with a myriad of cellular carriers, which would be administratively inefficient. In addition, the Mid-MO Group noted that third-party LECs have no ability to block the termination of cellular traffic in their exchanges, and pointed out that there is little or no incentive for cellular carriers or SWBT to block this traffic.

The focus of the STCG was slightly different. In its application to intervene, the STCG expressed concern that if the proposed tariff revision was honored by wireless carrier customers, the areas where wireless calls could be terminated would be severely restricted, since agreements with third-party LECs could not be completed in the time available. The STCG also stressed that the ability of third-party LECs to measure and bill wireless traffic terminating in their exchanges needed to be addressed before the third-party LECs could enter into interconnection agreements with wireless carriers.

On July 7, the Staff of the Commission (Staff) and SWBT filed responses to the requests to suspend the tariff. Staff stated that it was not prepared as of the time of its response to either support or oppose the requests to suspend. SWBT responded to several of the contentions contained in the applications to intervene, and specifically stated that it had no intention or desire to disrupt the present flow of wireless calls. As a result of discussions with the Staff, on July 9 SWBT filed two substitute sheets intended to replace the sheets originally filed on June 5.

On July 11, the Mid-MO Group filed a reply to SWBT's opposition to the applications to intervene. The Mid-MO Group asserted that SWBT should not be allowed to accomplish a complete change in customer relationships through minor tariff language revisions when the service SWBT is offering to cellular carriers — LATA-wide termination — remains unchanged. The Mid-MO Group stressed that SWBT is not refusing to terminate wireless traffic until wireless carriers have contracts with third-party LECs. The Mid-MO Group further stated that SWBT

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<sup>3</sup>For consistency, the Commission will refer to these other telecommunications carriers as third-party local exchange companies (LECs). While this phrase is narrower than other telecommunications carriers, it does adequately refer to the member companies of the Mid-MO Group and STCG.

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has not provided its member companies with the names and addresses of cellular carriers using SWBT's services, and reiterated that third-party LECs have no way to identify or block wireless traffic.

On July 15, Staff filed a memorandum containing its recommendation. Staff responded to the concerns raised in the applications to intervene, and ultimately recommended approval of the tariff as amended by the substitute sheets. Specifically, Staff maintained that third-party LECs have a duty to negotiate reciprocal compensation agreements with wireless carriers, pursuant to the Federal Communications Commission's (FCC's) Interconnection Order in CC Docket No. 96-325. Staff also stated that it believed the blocking of wireless traffic is against the public interest and should not be contemplated. In addition, Staff noted the concern that agreements could not be completed before the tariff would go into effect. Recognizing this, Staff requested that SWBT revise its tariff language, and SWBT provided that substitute sheet on July 9. The new language provided that wireless carriers must establish agreements with third-party LECs, but did not require that the agreements be in place before wireless carriers could send calls to SWBT which would terminate in the exchanges of third-party LECs. Further, Staff alluded to the inability of third-party carriers to bill and track wireless traffic terminating in their exchanges, and indicated that SWBT was planning to make available to all third-party LECs a monthly report containing the information necessary to bill the wireless carriers. Staff stated that according to SWBT, the report would contain at a minimum the identity of the originating wireless carrier, the terminating office, and the minutes-of-use (MOUs).

Staff also stated that it found part of SWBT's original tariff language unacceptable, and requested that the company revise the proposed tariff sheets. Staff was first concerned that SWBT would not carry wireless traffic destined for third-party LECs with whom the wireless carriers had not reached agreement, with the result that on the effective date of the tariff filing, wireless calls which transit SWBT's network would only be allowed to terminate in SWBT exchanges. After assurances from SWBT that it did not intend to block wireless traffic, Staff became concerned that if wireless carriers sent traffic over SWBT's network to third-party LECs without first having agreements in place, the wireless carriers would be in violation of the tariff the moment it became effective. Staff maintained that it would be against the public interest for the Commission to approve tariff sheets which would automatically render several parties in violation thereof. Staff ultimately recommended that the Commission approve SWBT's proposed tariff sheets as amended, stressing that without approval of this filing, there would be little incentive for the wireless carriers to enter into reciprocal compensation agreements. With approval of the proposed tariff filing, Staff claimed that wireless carriers will have an incentive to negotiate agreements with third-party LECs, since in the absence of an agreement, they will have to indemnify SWBT for charges the third-party LECs impose on SWBT.

On July 17, the STCG filed a response to Staff's recommendation, contending that the amended language contained in the substitute sheets would not resolve the problem of wireless carriers being in violation of the tariff on its effective date. The STCG also urged the Commission to suspend the tariff in order to allow sufficient time for the wireless carriers and third-party LECs to negotiate compensation agreements. Finally, the STCG noted that Staff apparently contemplated that SWBT would continue to compensate third-party LECs for wireless traffic terminated on their networks, but would be indemnified by the wireless carriers for these charges. However, the STCG asserted that the proposed tariff revisions do not assure such an arrangement. Instead, a situation could arise where SWBT would refuse to pay the third-party LECs because the wireless traffic was terminated in violation of SWBT's tariff.

The Commission issued its Order Granting Requests for Intervention and Suspending Wireless Carrier Interconnection Tariff on July 18. The Commission expressed concern that wireless carriers would be in violation of SWBT's tariff ab initio. In addition, the Commission found that it was unclear whether SWBT contemplated that third-party LECs would bill SWBT or the wireless carriers for termination of wireless traffic, and whether SWBT could use this tariff language to avoid paying proper charges billed by third-party LECs. The Commission suspended the tariff sheets filed by SWBT for a period of 120 days, from July 24 to November 21, and established a procedural schedule and set a hearing date. A Protective Order was issued on August 12. An evidentiary hearing was commenced on October 10. Because the Commission was unable to conclude the hearing on October 10, it continued the hearing to the afternoon of October 15. As a result, the Commission further suspended the tariff for an additional period of 40 days from November 21 to December 31, and modified the procedural schedule. Simultaneous initial and reply briefs were thereafter filed by the various parties.

The Commission finds that it should further suspend the tariff to allow for additional time in which the Commission may consider its decision, and to allow an adequate amount of time from the issuance of its Report and Order to the effective date of that order. The Commission will thus further suspend the tariff, from its current effective date of December 31, to January 6, 1998.

#### Rulings on Late-filed Exhibits

Five late-filed exhibits were requested by the Commission during the course of the hearing. All late-filed exhibits were submitted on or before the filing deadline, with two exceptions. SWBT filed a request for an extension of time to file the following late-filed exhibits: (1) the percentage of traffic being sent to the Mid-MO Group and the STCG members from the wireless carriers SWBT has interconnection agreements with; and (2) a determination of the technical feasibility to provide an ASCII version of the cellular usage summary report, or to provide EMR records for the wireless calls at issue. The Commission granted SWBT a three-day extension, from November 10

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to November 13, and also extended the deadline for responses or objections to these late-filed exhibits, from November 17 to November 19.

The following late-filed exhibits were submitted to the Commission:

(1) Late-filed Exhibit Nos. 20 and 20HC<sup>4</sup> (both public and highly confidential versions), submitted by the Mid-MO Group, the STCG, and SWBT: Traffic sent to small LECs by AT&T or Ameritech;

(2) Late-filed Exhibit Nos. 21 and 21HC (both public and highly confidential versions), submitted by SWBT: Percentage of traffic being sent to small LECs by wireless carriers;

(3) Late-filed Exhibit No. 22, submitted by the Mid-MO Group and STCG: Communications received by small LECs from wireless carriers;

(4) Late-filed Exhibit No. 23, submitted by SWBT: Correspondence from the seven wireless carriers with whom SWBT has interconnection agreements, re compliance with requirement that they reach separate agreements with small LECs; and

(5) Late-filed Exhibit No. 24, submitted by SWBT: Feasibility and cost of providing Cellular Usage Summary Report (CUSR)<sup>5</sup> in EMR format or ASCII format; feasibility and cost of blocking wireless-originated traffic destined to terminate in the exchange of a small LEC; and feasibility of applying Section 6 of SWBT's Intrastate Access Services Tariff to small LECs for the blocking of traffic from wireless carriers.

No objections were filed to Late-filed Exhibit Nos. 20, 20HC, 21, 21HC, and 22. The Commission will therefore admit Late-filed Exhibit Nos. 20, 20HC, 21, 21HC, and 22 into evidence. However, on November 17 and November 19, the STCG filed an objection to Late-filed Exhibit No. 23.<sup>6</sup> The STCG claimed that it had reason to believe SWBT had not provided the Commission with a complete description of all contacts it made with the wireless carriers, and that SWBT had provided wireless carriers with a draft letter suggesting a bill-and-keep arrangement with third-party LECs. The STCG objected to SWBT's late-filed exhibit as being incomplete, and requested that the Commission order SWBT to provide a description of the contacts it had made with wireless carriers, including copies of any correspondence from SWBT to the wireless carriers, as well as copies of any language suggested to be used by wireless carriers in contacting third-party LECs.

<sup>4</sup>The Commission notes that the index to Late-filed Exhibit Nos. 20 and 20HC inadvertently indicates that the material provided by SWBT refers to AT&T rather than Ameritech, and indicates that the material provided by the Mid-MO Group refers to Ameritech rather than AT&T.

<sup>5</sup>The Commission notes that at various places in the testimony, this report has been referred to as the Cellular Usage Summary Report, the Cellular Summary Usage Report, and the Cellular Transiting Usage Summary Report.

<sup>6</sup>The pleading filed on November 19 appears to be identical to the one filed on November 17.

SWBT filed a reply to the STCG's objection to Late-filed Exhibit No. 23 on November 26. Initially SWBT stressed that the Commission had asked it to contact the seven wireless carriers with which it had interconnection agreements. SWBT also explained that some of the wireless carriers had asked it for a copy of what other wireless carriers had done to start negotiations. SWBT then sent a form letter based on the letters Sprint Spectrum PCS had previously sent to various small LECs. It also attached to its reply the affidavit of Kevin Chapman, along with copies of the fax transmittals sent to the wireless carriers who had requested such information. The Commission finds that while reasonable minds could differ regarding the appropriateness of SWBT's actions given the potential for the appearance of impropriety, SWBT has violated no statute or Commission rule or order. The Commission further finds that in providing the affidavit of Kevin Chapman, along with copies of the material which was sent to the wireless carriers, SWBT has responded to the STCG's objection and essentially provided the relief requested. The Commission will therefore overrule the STCG's objection to Late-filed Exhibit No. 23 as moot.

On November 24 the STCG also filed a pleading objecting to Late-filed Exhibit No. 24. The STCG objected on the basis that some of the information contained in this exhibit was prepared by someone who was not a witness in this proceeding, and that the material was not subjected to cross-examination and is thus not competent and substantial evidence. SWBT filed a reply on December 4, noting that the objection was filed five days out-of-time, and that no witness is ever subject to cross-examination concerning late-filed exhibits, since such exhibits are submitted after the conclusion of a hearing. SWBT also indicated that the material contained in the exhibit was provided through a company representative with personal knowledge of the information sought. The Commission finds that the STCG's objection is untimely, and therefore the Commission will not address the merits of the objection. The Commission notes that the STCG has given no reason for the untimeliness of its objection, nor has it sought leave to file its objection out-of-time. The Commission will therefore overrule the objection to Late-filed Exhibit No. 24 as untimely.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather than the omitted material was not dispositive of this decision.

The Commission has given a fairly lengthy exposition of the procedural history in this case to make clear what concerns were originally raised by the parties, the



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reasons for the Commission's decision to suspend the tariff, and to clarify that the tariff which is presently before the Commission is the tariff as amended by the substitute sheets filed on July 9. The Commission also wishes to emphasize that in the testimony and hearing, the parties have addressed concerns regarding both the tariff language at issue in this case, and the language contained in interconnection agreements SWBT has entered into with wireless carriers. In addition, a distinction has not always been made between agreements for interconnection and agreements for reciprocal compensation.

In reaching its ultimate findings of fact on the issues raised by the parties, the Commission finds as underlying facts the following:

(A) Wireless traffic is being sent to SWBT for termination in the exchanges of third-party LECs such as the member companies of the STCG and Mid-MO Group.

(B) The member companies of the STCG and the Mid-MO Group currently do not have the technical capability to track wireless traffic that terminates in their exchanges.

(C) The member companies of the STCG and the Mid-MO Group currently do not have the technical capability to block wireless traffic that is destined to terminate in their exchanges.

(D) SWBT is attempting to alter its wireless interconnection tariff to clarify that it is offering wireless carriers a transiting service rather than a termination service for wireless-originating calls that are destined to terminate in the exchanges of third-party LECs.

(E) The traffic in question is the traffic of the wireless carriers whose customers initiate the calls, and not SWBT.

(F) SWBT's facilities provide an indirect interconnection between the wireless carriers and third-party LECs.

**Issue 1: Are the changes which SWBT proposes to make to its wireless interconnection services tariff required by the Telecommunications Act of 1996, Federal Communications Commission (FCC) Rules and Regulations or the Commission's Rules?**

The Mid-MO Group and the STCG both in essence contend that since SWBT has the direct physical interconnection with the wireless carriers and with the third-party LECs, SWBT will remain "in the middle" as the third-party LECs' customer under the Commission's holding in Case No. TC-96-112. Both groups also essentially maintain that the Commission should not approve SWBT's tariff because it is inconsistent with federal law. They claim that since the FCC has held that wireless carriers are not LECs for purposes of Section 251 and 252 of the Telecommunications Act of 1996 (the Act), wireless carriers are not required to negotiate with third-party LECs if they choose not to, and neither SWBT through its proposed tariff nor the Commission through its approval of the tariff can force the wireless carriers to negotiate interconnection or reciprocal compensation agreements.

The Office of the Public Counsel (OPC) did not take a position on this issue.

The Commission finds that the tariff changes proposed by SWBT are neither required nor prohibited by the Act, by the FCC, or by the Commission. Initially the Commission notes that it is unaware of any Commission rule which would require the proposed tariff changes. These changes are not, as originally contended by SWBT, a compliance filing, since the Commission's decision in Case No. TC-96-112 did not mandate that SWBT file revised tariffs or change its tariff structure. Conversely, the Commission's Report And Order in Case No. TC-96-112 does not dictate the outcome of this case, as contended by the Mid-MO Group and the STCG. In that case the Commission found that SWBT had contracted with cellular carriers to provide end-to-end intraLATA termination, and that for purposes of the termination of cellular traffic under SWBT's Cellular Interconnection Tariff, P.S.C. Mo.-No. 40, SWBT was the customer of United. Nothing in the Report And Order suggested that SWBT could not alter its tariff or refuse to provide end-to-end service in the future.

The Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. § 251(a). All LECs have the additional duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. § 251(b)(5). Furthermore, incumbent LECs (ILECs) have additional duties, including the duty to negotiate in good faith. § 251(c). This duty is also placed upon the "requesting telecommunications carrier." § 251(c)(1). Exceptions to these obligations are found in Section 251(f).<sup>7</sup>

The FCC in its First Report And Order involving interconnection held that wireless carriers (referred to in the order as Commercial Mobile Radio Services (CMRS) providers) are telecommunications carriers under the Act and are obligated to comply with Section 251(a). In re the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report And Order (released August 8, 1996), at § 993.<sup>8</sup> However, the FCC also determined that wireless carriers are not LECs subject to the obligations of Sections 251(b) and (c). Interconnection Order at §§ 1005, 1006.

<sup>7</sup>Certain rural telephone companies may be exempted from the obligations imposed on ILECs under Section 251(c). Likewise, certain rural carriers with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate may petition for the suspension or modification of the requirements of Section 251(b) or (c). The parties have not addressed these sections of the Act, and they will not be further discussed.

<sup>8</sup> Hereafter the FCC's First Report And Order will be cited as "Interconnection Order at ¶ \_\_\_."

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Further, the FCC held that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) is local traffic, and is subject to transport and termination rates under Section 251(b)(5), rather than interstate or intrastate access charges. Interconnection Order at §§ 1035, 1036. In explaining the difference between access and reciprocal compensation, the FCC indicated that access charges are intended to address the collaboration of three carriers, usually the originating LEC, the interexchange carrier (IXC), and the terminating LEC, to complete a long-distance call, while reciprocal compensation for transport and termination is intended to address the collaboration of two carriers to complete a local call. *Id.* at § 1034. The FCC's order does not appear to consider a situation in which three carriers are needed to complete a local call, as may be the case where interconnection is indirect rather than direct.

The FCC summarizes the duties of LECs and wireless carriers as follows:

As discussed above, pursuant to section 251(b)(5) of the Act, all local exchange carriers, including small incumbent LECs and small entities offering competitive local exchange services, have a duty to establish reciprocal compensation arrangements for the transport and termination of local exchange service. CMRS providers, including small entities, and LECs, including small incumbent LECs and small entity competitive LECs, will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers. We believe that these arrangements should benefit all carriers, including small incumbent LECs and small entities, because it will facilitate competitive entry into new markets while ensuring reasonable compensation for the additional costs incurred in terminating traffic that originates on other carriers' networks. We also recognize that, to implement transport and termination pursuant to section 251(b)(5), carriers, including small incumbent LECs and small entities, may be required to measure the exchange of traffic, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements.

Interconnection Order at ¶ 1045.

The FCC explicitly contemplates that wireless carriers will pay reciprocal compensation to other carriers, including small incumbent LECs, for transport and termination of local calls. The Commission finds nothing in the Act or the FCC's order that plainly prohibits SWBT from requiring wireless carriers to make compensation agreements with third-party LECs. The Commission also finds that the FCC expressly

contemplates the use of reciprocal compensation arrangements for the transport and termination of local traffic between wireless carriers and LECs. Whether the FCC also intends for reciprocal compensation arrangements to apply in situations where there is an indirect interconnection between a wireless carrier and a third-party LEC, and consequently three carriers are needed to terminate the traffic, is an open question. The parties have not cited to any FCC order or rule which addresses the question, nor have the parties provided the Commission with legal support for the proposition that it has jurisdiction to initially decide the issue in the absence of an FCC directive on the matter.

While third-party LECs may be required to initiate contact with the wireless carriers in order to seek compensation arrangements, the Commission believes that the wireless carriers are implicitly required to cooperate in negotiating such arrangements. Again the Commission is not in a position to decide the issue, since the Commission does not have jurisdiction to declare federal law.

**Issue 2: Should SWBT's revision to its Wireless Carrier Interconnection Service Tariff be approved?**

Both the Mid-MO Group and the STCG state that approval of SWBT's proposed tariff will drastically alter the traditional business relationship SWBT has had with wireless carriers and third-party LECs, and will concomitantly create substantial practical and administrative problems for third-party LECs. Because third-party LECs cannot track or block wireless traffic, both groups are concerned about the ability of their members to identify wireless carriers that terminate traffic in their exchanges via SWBT's network, and the amount of wireless traffic that is being terminated. In addition, the third-party LECs state that they require access to information which can provide for timely and accurate billing, and the ability to validate that all wireless traffic being received is billed to some wireless carrier. Both groups also contend that the negotiation and administration of agreements with a large number of indirectly interconnecting wireless carriers will create economic and administrative burdens for third-party LECs. Finally, both groups are concerned with having the means to enforce compensation mechanisms if there is noncompliance with compensation terms.

OPC concurs that allowing SWBT to change its business relationships could create substantial problems for third-party LECs, and submits that the current system should not be ended without a reliable and workable system to replace it.

Prior to discussing the merits of SWBT's proposed tariff, the Commission will set forth the language contained in the two versions of the tariff. The pertinent portion of the original version of the language contained in Section 6.9 of 3rd Revised Sheet 16.02, filed on June 5, is as follows:

Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier

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for the termination of such traffic. The wireless carrier shall indemnify SWBT against charges billed to SWBT by the Other Telecommunications Carrier.

The revised version of the language contained in Section 6.9 of 3rd Revised Sheet 16.02, filed as a substitute sheet on July 9, is as follows:

Wireless carriers shall establish agreements with Other Telecommunications Carriers to directly compensate those carriers for the termination of such traffic. Wireless carriers shall indemnify, defend and hold SWBT harmless against charges from Other Telecommunications Carriers for the termination of such traffic. SWBT will not block calls that terminate in Other Telecommunication Carriers' networks without regulatory approval.

The Commission acknowledges at the outset that this case presents legitimate concerns by both SWBT and third-party LECs, the ultimate resolution of which will require cooperation between SWBT, third-party LECs, and wireless carriers. This requires that proper incentives be given to encourage that cooperation.

Initially the Commission notes that the FCC treats transport and termination as two separate functions with different costs, and acknowledges that various alternatives may exist for transport, but are unlikely to exist for termination. Interconnection Order at ¶¶ 1039, 1040. The Commission finds that SWBT's desire to provide solely a transport function is consistent with the FCC's determination. Thus, the Commission finds that SWBT should be permitted to realign its business relationship with wireless carriers by replacing its offer of end-to-end termination service with a transport service instead, if proper safeguards are in place to ensure that incentives flow in the right direction.

First and foremost, third-party LECs must have access to information which is sufficient for them to bill for wireless traffic that terminates in their exchanges. This is important not only for the obvious reason that third-party LECs cannot collect the revenues to which they are entitled without the ability to bill for their termination services, but also because measurement of the exchange of traffic will have an impact on the negotiation of reciprocal compensation agreements. See Interconnection Order at ¶¶ 1044, 1045.

SWBT has developed a CUSR report which contains the identity of the originating wireless carrier, the terminating office, and the MOUs. The report has two formats, one for wireless carriers and one for third-party LECs. The MOUs for termination of wireless traffic will equal the MOUs for transiting the wireless traffic. The CUSR report is a paper report that will be available on a monthly basis. The Commission has reviewed the examples of the CUSR reports admitted into evidence, and finds that the CUSR reports will provide third-party LECs with adequate information with which to bill wireless carriers.

The Commission will thus order SWBT to make available to wireless carriers and third-party LECs the CUSR reports in substantially the same format as found in Exhibit

Nos. 16HC, 17HC, 18HC, and 19HC, and containing at a minimum the same types of information. The Commission will not mandate that SWBT provide the CUSR reports free of charge, nor will the Commission mandate that SWBT provide this information in ASCII or EMR format, although the parties are free to reach agreement on the provision of the report in an electronic format. To the extent SWBT chooses to charge for the CUSR report, the rate must be just and reasonable. The arguments of the third-party LECs seem to suggest that SWBT is choosing to "remain in the middle." However, that is not the case. If the members of the Mid-MO Group and the STCG are hostages to SWBT because they cannot track and bill for wireless-originating calls that terminate in their exchanges, SWBT is equally a hostage because its facilities interconnect with third-party LECs in such a way that, in the absence of blocking by either SWBT or the wireless carriers, once a call is connected to SWBT's system by a wireless carrier, it will automatically terminate in the exchanges of the third-party LECs if that is the call's destination. SWBT is required under Section 251(a) to interconnect its facilities with those of the wireless carriers, just as the wireless carriers are obligated to interconnect directly or indirectly with third-party LECs, and vice-versa.

There was much discussion in this case regarding whether wireless carriers would have the proper incentive to negotiate and enter into agreements with third-party LECs. The problem of incentives is a two-sided question, and the Commission must also consider how its decision in this case will affect the third-party LECs' incentive to engage in the negotiation of agreements with the wireless carriers. If third-party LECs are allowed to bill SWBT access charges for the termination of wireless traffic in their exchanges, the third-party LECs will have little or no incentive to negotiate reciprocal compensation agreements with wireless carriers. Conversely, a properly structured indemnity provision, which requires wireless carriers to reimburse SWBT against losses, may provide such an incentive to the wireless carriers.

The Commission has considered SWBT's interpretation of its indemnity provision, and finds that it is unreasonable. Indemnity may be defined as follows: "Indemnity is a right which inures to one that discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other." 41 AM. JUR. 2D Indemnity § 1 (1995). In addition, a cause of action on a provision indemnifying against a loss does not arise until the indemnitee has actually incurred the loss, therefore the obligation to indemnify arises at the time of payment of the underlying claim, the payment of a judgment on the underlying claim, or payment in settlement of an underlying claim. *Id.* at § 43. SWBT has indicated that it will not pay third-party LECs, but will instead forward any bills to the wireless carriers.

The Commission finds that the following interpretation of the relationships of the parties may provide the maximum incentives on the part of all parties for the negotiation of reciprocal compensation agreements. The wireless carriers are

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primarily liable to the third-party LECs for reciprocal compensation for the termination of wireless-originating traffic in the exchanges of third-party LECs, and third-party LECs will be required to bill the wireless carriers and make good-faith efforts to collect. In the event a wireless carrier refuses to pay a third-party LEC for such termination and the wireless carrier does not have a reciprocal compensation agreement with the third-party LEC, SWBT will remain secondarily liable to the third-party LEC for the termination of this traffic, but will be entitled to indemnification from the wireless carrier upon payment of the loss.

If wireless carriers know they may be required to reimburse SWBT, they may have a greater incentive to negotiate with the third-party LECs. Since the third-party LECs cannot simply continue with the status quo and collect access fees from SWBT, they too may have more of an incentive to negotiate with the wireless carriers. Similarly, if SWBT knows it will be secondarily liable to the third-party LECs, it will have an incentive to enforce the provisions of its tariff and its interconnection agreements, which require wireless carriers to enter into agreements with third-party LECs.

Finally, the Commission will address the language of SWBT's proposed tariff. The language which is presently before the Commission states as follows: "Wireless carriers shall establish agreements with Other Telecommunications Carriers to directly compensate those carriers for the termination of such traffic." The Commission determines that this language is inadequate. As was noted by the STCG's witness Schoonmaker, although this language is sufficiently vague that wireless carriers would not be in violation of the tariff at its inception, because of that very vagueness the legal threat of wireless carriers being held in violation of the tariff is removed, and with it any incentive on the part of the wireless carriers to negotiate agreements with the third-party LECs. See Schoonmaker Surrebuttal, Exh. 7, p. 9.) This concern was also addressed at the hearing. In response to a question regarding when a wireless carrier could be considered in violation of this tariff language, SWBT witness Chapman stated that there was not a date certain by which a wireless carrier could be considered in violation of the tariff, but opined that he thought a wireless carrier could be considered in violation if it had not made a good faith effort after a reasonable amount of time. He further opined that a "reasonable amount of time" would be six to eight months.

The Commission finds that the above language, which was submitted by SWBT in a substitute sheet at the behest of Staff, is essentially unenforceable. However, the language contained in SWBT's original tariff filing of June 5 does not share that infirmity. That language states as follows: "Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic." The Commission does not share the concerns originally expressed by Staff with regard to this language. The Commission will not assume that the wireless carriers will

violate the tariff by sending wireless traffic in the absence of an agreement. The Commission also notes that the delay which has necessarily resulted from the Commission's suspension of this tariff has provided an adequate amount of time for wireless carriers and third-party LECs to negotiate appropriate agreements.

Because the Commission has found that one of the provisions in SWBT's proposed tariff is unenforceable, the Commission finds that it should reject the tariff submission. However, as previously stated, the Commission finds that SWBT may discontinue offering end-to-end termination to its wireless customers, and may offer transport service instead. The Commission will thus order SWBT to file a new tariff revision which contains language similar to the language originally proposed in its June 5 filing prior to replacing end-to-end termination with transport service. The Commission is aware that there may exist matters which remain unresolved, but the Commission determines that its decision in this case provides the fairest balance among the interests of the parties.

**Issue 3: Should SWBT be allowed to "block" wireless traffic transiting SWBT's facilities and terminating in third-party LEC exchanges where the originating wireless carrier has either: a) failed to enter into an interconnection agreement with the third-party LEC, or b) has failed to pay the third-party LEC the appropriate charges for terminating such traffic?**

The Mid-MO Group expressed a strong desire that blocking of wireless traffic destined to terminate in the exchanges of third-party LECs be available as an option to third-party LECs in order to provide an incentive for wireless carriers to negotiate compensation agreements. Although the STCG originally took the position that compliance with SWBT's proposed tariff would result in a severe restriction of the areas in which wireless calls could be terminated, in the hearing memorandum the STCG took the position that if SWBT had the option of blocking wireless traffic in the event wireless carriers fail to pay SWBT compensation or otherwise fail to comply with the terms and conditions of SWBT's tariff, third-party LECs should likewise be given that option. However, in its reply brief the STCG again states that it does not advocate blocking because of the potential for disruption of the telephone network.

OPC opposes blocking as against the public interest, but ultimately concedes that if agreements cannot be reached with the wireless carriers or billing disputes arise, blocking of wireless traffic to third-party LECs may be an appropriate legal remedy.

Although raised in the Hearing Memorandum as an issue, the question of whether and when the blocking of wireless traffic by SWBT might be appropriate was not a basis for the Commission's suspension of the tariff. The original tariff language did not address the issue, and the substituted tariff language only states that SWBT will not block wireless calls without regulatory approval. The Commission notes that SWBT currently has a tariff which offers network blocking with respect to traffic



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covered under its access tariff. If SWBT wished to have authority to block wireless traffic, it would in all likelihood be required to file a tariff which authorizes such blocking. While the Commission makes no determination regarding the appropriateness of blocking wireless traffic by SWBT, if SWBT were to submit a tariff filing authorizing such blocking, the Commission would take such request under advisement.<sup>9</sup> The Commission further notes that the appropriateness of blocking wireless traffic by the wireless carriers themselves is beyond the scope of this proceeding.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

SWBT, the members of the STCG, and the members of the Mid-MO Group are telecommunications companies and public utilities as defined in Sections 386.020(51) and 386.020(42), RSMo Supp. 1996, and as such are subject to the jurisdiction of the Commission pursuant to Chapters 386 and 392 of the Missouri Revised Statutes.

The Commission has the authority, after a hearing upon its own motion or upon complaint, to determine whether the rules, regulations, or practices of any telecommunications company are unjust or unreasonable, and to determine the just, reasonable, adequate, efficient, and proper regulations, practices, and service to be observed and used by a telecommunications company. § 392.240.2, RSMo 1994.

The Commission has found that federal law does not prohibit SWBT from realigning its relationship with wireless carriers to provide only a transport function, and that such a realignment should be permitted. The Commission has also found that SWBT should be required to make available a Cellular Usage Summary Report that contains information sufficient to allow third-party LECs to bill wireless carriers for wireless-originating traffic which terminates in the exchanges of the third-party LECs. The Commission has further found that SWBT's interpretation of its indemnity language is unreasonable, and that some of the other language in its current tariff is unenforceable. The Commission concludes, based on the above findings of fact, that SWBT's proposed revisions to its Wireless Carrier Interconnection Service Tariff, filed on June 5 and amended on July 9, should be rejected, but that SWBT should be ordered to file new tariff revisions consistent with this Report And Order prior to realigning its relationship with wireless carriers to provide only a transport function.

#### *IT IS THEREFORE ORDERED:*

1. That the tariff sheets filed by Southwestern Bell Telephone Company on June 5, 1997, as amended on July 9, 1997, are suspended for an additional period of 6 days from December 31, 1997 to January 6, 1998.

<sup>9</sup>The Commission recognizes that such blocking may not be feasible once Local Number Portability is implemented.

2. That the objection to Late-filed Exhibit No. 23 by the Small Telephone Company Group is overruled as moot.
3. That the objection to Late-filed Exhibit No. 24 by the Small Telephone Company Group is overruled as untimely.
4. That Late-filed Exhibit Nos. 20, 20HC, 21, 21HC, 22, 23, and 24 are received into evidence.
5. That the revisions filed by Southwestern Bell Telephone Company to its Wireless Carrier Interconnection Service Tariff on June 5, 1997, as amended on July 9, 1997, are rejected.
6. That Southwestern Bell Telephone Company is directed to file with the Commission tariff revisions consistent with this Report And Order.
7. That the tariff revisions required to be filed pursuant to ordered paragraph 5 above shall be filed no later than 60 days after the effective date of this order, and shall contain a 30-day effective date.
8. That Southwestern Bell Telephone Company is directed to make immediately available to the member companies of the Small Telephone Company Group and the Mid-Missouri Group of Local Exchange Companies, and to wireless carriers, its Cellular Usage Summary Report, consistent with this Report And Order.
9. That this Report And Order shall become effective on January 6, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**In the Matter of AT&T Communications of the Southwest, Inc.'s  
Petition for Second Compulsory Arbitration Pursuant to Section  
252(b) of the Telecommunications Act of 1996 to Establish an  
Interconnection Agreement with Southwestern Bell Telephone  
Company.\***

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*Case No. TO-98-115  
Decided December 23, 1997*

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**Telecommunications §§13, 14.** The Commission adopted the rates established in arbitration as interim rates only and that further proceedings shall be conducted to establish permanent rates. In order to implement permanent rates, the AAS in its capacity as advisor to the Commission is instructed to conduct an investigation focusing on identifying the critical inputs and analyzing the costing models.

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\*See page 252 for another order in this case.

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#### APPEARANCES

*Paul G. Lane*, General Attorney-Missouri, Southwestern Bell Telephone Company, 100 North Tucker Boulevard, Room 630, St. Louis, Missouri 63101-1976, for Southwestern Bell Telephone Company.

*Paul S. DeFord*, Lathrop & Gage L.C., 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Michael F. Dandino*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Penny G. Baker*, Deputy General Counsel, and *Stephen M. Gunn*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Amy E. Randles.

#### Procedural History

Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) have been negotiating since March 14, 1996, to develop the terms for AT&T's interconnection with SWBT's facilities. The parties' initial round of negotiations culminated in AT&T's first petition for arbitration, filed with the Commission on July 29, 1996, in Case No. TO-97-40<sup>1</sup>.

The Commission issued its Arbitration Order in Case No. TO-97-40 on December 11, 1996, in which it resolved the issues presented by the parties and established interim rates for the resale of SWBT's services and for the sale of SWBT's unbundled network elements (UNEs) to AT&T. This order was modified on January 22, 1997<sup>2</sup>. The Commission's July 31 Final Arbitration Order set permanent rates. This order was modified in several respects on October 2, when the Commission ordered SWBT and AT&T (the parties<sup>3</sup>) to file an interconnection

<sup>1</sup>The March 14, 1996, date was alleged by AT&T in its petition. Case No. TA-97-40 was consolidated with Case No. TA-97-67, a petition for arbitration of an interconnection agreement between MCI Telecommunications Corporation (MCI) and SWBT, on September 16, 1996.

<sup>2</sup>This and all subsequent references to dates in this order shall be to 1997, unless otherwise noted.

<sup>3</sup>"The parties" shall be used to refer collectively to SWBT and AT&T in this Report and Order. The Commission's Staff (Staff) assisted the Commission in its decision-making role and did not act as a party before the Commission in this case. The Office of Public Counsel (OPC) was also a party to this proceeding, but OPC shall not be subsumed in the phrase "the parties" in this Report and Order because OPC will not be party to the interconnection agreement to be filed by SWBT and AT&T.

agreement incorporating the findings made by the Commission. The parties filed an agreement and, on November 5, the Commission issued an order approving the proposed interconnection agreement.

Meanwhile, AT&T initiated negotiations with SWBT on a new set of issues, but the parties were again unable to resolve all of their differences. AT&T filed its petition for a second round of arbitration on September 10, initiating this case. AT&T alleged that it had made its second request for negotiations to SWBT on April 3. SWBT filed its response to the petition on October 3, concurring in the April 3 date.

On October 17, the Commission ordered the parties to meet with specific members of the Commission's Staff (Arbitration Advisory Staff). The parties were ordered to jointly submit a comprehensive well-defined list of the issues on which they were requesting a second round of arbitration by October 24, and to appear before the Commission on October 27 to address certain jurisdictional issues. The parties complied. The Joint Issues List filed by the parties on October 24 grouped the issues under headings numbered I through XI, according to topic.

Following the hearing on jurisdictional issues, by its order of October 30, the Commission issued a procedural schedule to govern the submission of evidence and argument on the disputed issues. Pursuant to the Commission's order, the parties were required to maintain the same group and issue number designations used in the Joint Issues List throughout the proceedings in order to facilitate tracking of the issues. On November 7, SWBT and AT&T simultaneously filed testimony containing their proposed language on each of the remaining unresolved issues identified in the Joint Issues List.

SWBT and AT&T met during the period of November 10 through 20 with the Arbitration Advisory Staff (AAS) and with Dana K. Joyce, a Special Master appointed by the Commission, for the purpose of resolving as many of the unresolved issues as possible. The parties then filed their Joint Settlement Document on November 21 which identified each of the issues from the Joint Issues list which had either been withdrawn or resolved by agreement by SWBT and AT&T during mediation. In accordance with the Commission's October 30 order, the Joint Settlement Document set forth the specific language agreed to by the parties for implementing their accord.

Also on November 21, the parties and the Special Master filed their Commission ordered Joint Statement of Remaining Issues (Statement), which was amended by interlineation on November 24 and 25. This Statement was replaced by an Amended Joint Statement of Remaining Issues (Amended Statement) on November 26. The Amended Statement identified each of the unresolved issues from the Joint Issues List and, for each such issue, set forth 1) the language proposed by each party, 2) the Special Master's recommendations concerning which language to adopt, and 3) the Special Master's explanation of his recommendations. SWBT and AT&T each

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filed their responses to the Special Master's recommendations on November 26, and OPC filed its response to the Amended Statement on November 26. In its Response, SWBT requested a hearing with opportunities for cross-examination prior to issuance of this Report and Order.

**Discussion**

The arbitration proceedings in Case No. TO-97-40 and in this case were filed pursuant to the federal Telecommunications Act of 1996 (the Act). The Act establishes the following standards for State Commissions to follow in issuing arbitration orders mandating interconnection between incumbent and competitive local exchange carriers (ILECs and CLECs, respectively):

(c) **STANDARDS FOR ARBITRATION** - In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall:

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) **PRICING STANDARDS** -

(1) **INTERCONNECTION AND NETWORK ELEMENT CHARGES** - Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (e)(3) of such section:

(A) shall be:

- (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
- (ii) nondiscriminatory, and

(B) may include a reasonable profit.

\* \* \*

- (3) **WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES** - For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.
- (e) **APPROVAL BY STATE COMMISSION** -
- (1) **APPROVAL REQUIRED** - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.
- (2)  **GROUNDS FOR REJECTION** - The State commission may only reject
- (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that:
- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
- (B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

47 U.S.C. § 252. Section 251 of the Act prescribes the duties of ILECs and CLECs in implementing competition in the local exchange telecommunications services market. See 47 U.S.C. § 251. These include duties relating to interconnection, compatibility, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, unbundled access to network elements, and collocation. Id. Relevant language from Section 251 is set forth in the remainder of this Report and Order only as needed.

For the issues which SWBT and AT&T resolved by the time they filed their November 21 Joint Settlement Document, the Commission's review is limited to determining whether the nondiscrimination and public interest standards of 47 U.S.C.

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§ 252(e) have been met. The Commission will defer making a ruling on whether the negotiated terms are non-discriminatory or against the public interest, convenience and necessity until a complete interconnection agreement is filed in this case. The Commission will not require the parties to initiate a separate case for approval of their resolution on those issues.

#### Findings of Fact

The Commission notes at the outset that it is not required to support its decision by findings in this case, as was explained in the Commission's January 22 and October 2 orders in Case No. TO-97-40. Furthermore, the Commission is not restricted in its use of information as a basis for its decision as it would be in a contested case, because this is an arbitration proceeding. Nevertheless, the Commission bases its decision on the pleadings and testimony filed in this case and in Case No. TO-97-40.

Moreover, the Commission, having considered all of the competent and substantial evidence upon the whole record, voluntarily makes the following findings of fact in order to elucidate the reasons for its decision for the benefit of the parties. The positions and arguments of SWBT, AT&T, OPC and the Special Master have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive.

The following findings address all of the remaining issues in dispute as of November 21 (as they were presented in the November 26 Amended Statement). Some of the issues are discussed as a group. However, the Commission identifies all of the issues in this Report and Order by using the same heading and issue numbers as were used by the parties in their October 24 Joint Issues List and all subsequent filings.

For each issue discussed below, the Commission has reviewed the relevant pleadings and testimony and applied the standards enunciated in §§ 251 and 252(c), (d) and (e) of the Act to the facts to arrive at its findings. Although the Special Master was required to recommend adoption of either the language proposed by SWBT or the language proposed by AT&T in toto, the Commission has considered, in the course of making its findings, whether language other than that proposed by either party should be adopted and whether any special conditions on the solutions proposed by the parties should be adopted.

#### **A. Group I Issues - INTRALATA TOLL/ACCESS**

##### **Issue 1 (Receipt of Toll Revenue) and Issue 2 (IntraLATA toll - OS/DA)**

These two issues involve the manner in which AT&T is entitled to participate in the intraLATA market before SWBT is authorized to provide in-region interLATA services.

AT&T takes the position that, when AT&T purchases local switching as an unbundled network element (UNE), AT&T should be recognized as the intraLATA

toll provider and therefore receive access and toll revenue, prior to implementation of a dual primary interexchange carrier (PIC) system. AT&T maintains that when it purchases unbundled local switching from SWBT, it purchases the ability to originate and terminate all types of calls, including intraLATA toll calls. For the same reason, AT&T argues that intraLATA toll traffic that SWBT routed to AT&T's Operator Services and Directory Assistance (OS/DA) platform should not be returned to SWBT for completion of the call.

SWBT takes an opposite position, citing § 271(e)(2)(b) of the Act. SWBT's position is that it cannot be required to provide intraLATA toll dialing parity under the Act until the earlier of either three years or the time it obtains authority to provide interLATA interexchange services. According to SWBT, when AT&T purchases unbundled local switching, a 1+ intraLATA toll call is automatically routed over SWBT's intraLATA toll network, and AT&T is effectively reselling SWBT's intraLATA toll and should be required to pay SWBT the retail rate for such usage less the resale discount rate established by the Commission. SWBT states that the Special Master has incorrectly understood the issue to be which company will be the intraLATA toll provider, and that the issue is actually over pricing. (See SWBT's November 26 response). SWBT states in its November 26 response that § 271(e)(2)(b) of the Act "effectively protects SWBT's intraLATA toll revenues for the duration of the applicable time period, but that protection would be eroded if AT&T were permitted to use SWBT's intraLATA toll network without paying intraLATA toll rates (less the 19.2 percent discount) merely because it purchased unbundled local switching."

On these two issues, the Special Master takes the position that AT&T's proposed language should be adopted because the FCC recognizes that § 251(c)(3) of the Act anticipates carriers requesting interconnection to purchase UNEs for the purpose of offering exchange access services (See the FCC's First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, et al., § 356 (Aug. 1, 1996)) (hereinafter referred to as the FCC's First Report and Order). The Special Master also points out that the unbundled local switching rates contained in this Commission's July 31 Final Arbitration Order in Case No. TO-97-40, et al., were intended to include the ability to originate and terminate all types of calls. The Special Master states that when AT&T purchases unbundled local switching at the rates ordered by the Commission, it is purchasing the full functionality of the switching element, and SWBT's position would deny AT&T the full functionality of this element by limiting AT&T's use of the element.

The Commission agrees with the Special Master that the Act provides no basis for SWBT to exclude intraLATA toll services from the category of services that a CLEC may provide using UNEs. The provision cited by SWBT does not "effectively protect" SWBT's intraLATA toll revenues. This provision addresses the point in time at which SWBT must offer intraLATA toll dialing parity, whereas the language



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which AT&T seeks to include in an interconnection agreement with SWBT deals only with AT&T's ability to handle intraLATA toll calls when it has purchased local switching as a UNE from SWBT. The Commission finds that when it established prices for AT&T to purchase unbundled local switching capabilities in Case No. TO-97-40, the prices covered the full functionality of the local switch, which includes the ability to originate and terminate all types of calls. The Commission finds that AT&T's proposed language on Issues 1 and 2 correctly implement the requirements of the Act and the Commission's prior orders and should be adopted.

**Issue 3 (Tandem Switching and Transport)**

This issue concerns whether AT&T or SWBT is entitled to bill access charges to interexchange carriers (IXCs) for calls which are originated by an AT&T customer served by unbundled local switching and for calls terminating to an AT&T customer served by unbundled local switching. SWBT opposes the language proposed by AT&T because in SWBT's view, AT&T's language would permit AT&T to usurp SWBT's intraLATA and interLATA access network and claim the revenues for common transport as its own. SWBT relies on § 251(d)(3) and (g) of the Act to support its argument that access arrangements to IXCs are intended to be unchanged by local interconnection.

The Special Master recommends the adoption of AT&T's language, emphasizing that IXCs currently have a choice of terminating over their own dedicated access facilities or over SWBT's network. The Special Master points out that AT&T's language will allow it to provide access transport for calls originated by an AT&T local customer or terminating to an AT&T local customer, and that when AT&T performs these services, it will pay the appropriate UNE rates established by the Commission to SWBT. The Special Master states that this is consistent with § 356 of the FCC's First Report and Order, which allows CLECs to purchase UNEs to provide exchange access service.

The Commission finds that the language proposed by AT&T should be adopted. The portions of the Act which SWBT cites do not provide that access arrangements to IXCs are intended to be unchanged by local interconnection. Rather, § 251(d)(3) simply limits the FCC's jurisdiction to interfere with access charges established by states. Section 251(g) is designed, *inter alia*, to prevent ILECs such as SWBT from cutting off exchange access services in the wake of competition in order to prevent CLECs from effectively participating in the local markets.

**B. Group III Issues - OPERATIONAL ISSUES**

**Issue 1 (UNE Ordering and Provisioning - Use of EASE)**

This issue presents the question of whether SWBT should be required to provide access to Easy Access Sales Environment (EASE) as an interim solution for UNE ordering. The Special Master recommends adoption of SWBT's language. According to the Special Master, AT&T desires a modified version of EASE as an interim

method for processing UNE transactions, but the time and expense necessary to implement another interim method is not a productive use of resources. There is already an interim method (LSR Exchange System (LEX)) in place by virtue of Case No. TO-97-40 and the permanent Electronic Data Interchange (EDI) solution will be ready in the near future. The Special Master states that the most appropriate solution is to continue the current interim method until EDI is fully developed.

AT&T emphasizes in its November 26 response that the capabilities of LEX have not been tested, whereas EASE has been used in the Texas market to provision resale customers with little or no manual work on the SWBT side of the interface. AT&T alleges that SWBT has stated that LEX will not provide flow-through capability for UNE orders. According to AT&T, LEX will at best be inferior at processing UNE loop with port orders to the EASE interface that SWBT uses to provision retail POTS (plain old telephone service), which also uses loops with ports. However, AT&T acknowledges that EASE is itself only a partial and interim UNE solution.

AT&T further points out that the language which SWBT proposes to add would limit the types of conversion orders that can be placed using LEX. AT&T states that elsewhere in the Amended Statement the Special Master recommends that SWBT be required to provide already intact UNE combinations to AT&T and that SWBT's language would deny AT&T any interim interface for placing the CLEC Simple Conversion Order authorized by the Commission's July 31 order in Case No. TO-97-40.

The Commission finds that the language proposed by SWBT should be adopted with some modifications because EDI, which is a permanent solution to UNE ordering and provisioning, will be available in the near future and the parties' resources should not be wasted on a new partial, interim solution when a LEX is already available as an interim solution and a permanent solution is imminent. The Commission agrees with AT&T that SWBT's language could be used by SWBT as authority not to provide LEX ordering for facilities-based conversion orders, whether conversions with changes or conversions as specified. The Commission will require processing of such orders as discussed below. Therefore, the Commission finds that SWBT's language should be adopted, but modified to replace the phrase "Conversion (resale only)" with the phrase "Conversion (resale or using unbundled network elements as specified)."

**Issue 2 (UNE Ordering and Provisioning - Data for Conversion as Specified Orders)**

This issue involves the data that AT&T must provide to SWBT on a conversion as specified order.

The Special Master recommends adoption of AT&T's language because when AT&T identifies and orders UNEs, and SWBT proposes to delete all customer database records associated with the requested UNEs (with the exception of Line

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Information Database (LIDB)) before providing the UNEs to AT&T. This would require the purchaser to reenter the data before being able to use UNE components. The Special Master opines that SWBT's position presents a barrier to access because it results in unnecessary and costly redundant work for both parties. In addition, the deletion and reentry of the data (including 911 information) would increase the potential for human error. SWBT maintains data on closed customer accounts and it clearly can continue to do so with AT&T bearing the responsibility of updating for accuracy. The Special Master states that SWBT should not be allowed to purge the database and thus require AT&T to reenter the same data.

SWBT argues in its November 26 response that it only seeks to require AT&T to update the customer information databases (excluding LIDB) utilizing the same processes and procedures that SWBT uses for provisioning service to its own end users. For example, SWBT prepares a disconnect order and then reenters the customer information into the customer information databases after a new connect is prepared, in order to refresh the information in the database. SWBT suggests that AT&T's language would permit AT&T, contrary to the practice used by SWBT, to assume all previous customer service information remains accurate without verifying the information with the customer. SWBT alleges that, without requiring AT&T to update the databases when AT&T converts customers to its service, the Commission would permit AT&T to destroy the accurate databases which SWBT has maintained. SWBT suggests that this could result in a tragedy in instances where AT&T fails to confirm and reenter a change of address and the 911 database is inaccurate.

The Commission finds that AT&T's proposed language should be adopted. AT&T's language does not pose the threats which SWBT alleges. SWBT ignores the fact that AT&T will have an incentive to maintain accurate telephone and address information so that it can bill its customers and contact them in the event of disconnection. AT&T's language merely prevents SWBT from purging information that SWBT already has in its databases and will require AT&T to provide a complete information update whenever AT&T wishes to change any information in SWBT's database. The Commission agrees with the Special Master's assessment of the issue.

### **Issue 3 (UNE Ordering and Provisioning - Industry Guidelines)**

This issue involves the standards to be followed for UNE ordering and provisioning in light of the fact that the Ordering and Billing Forum (OBF) has not finalized industry standards for UNE ordering and provisioning.

The Special Master points out that those standards are anticipated to be finalized shortly and that AT&T's proposed language allows for an interim method to transmit the necessary data so that service is not delayed. The Special Master recommends adoption of AT&T's proposed language.

In its November 26 response, SWBT argues that OBF has defined the ordering requirements for some UNEs, such as loop and port, and that it should not be required

to expend resources on interim solutions that are specific to AT&T that are not contained in the finalized industry standards set out by OBF.

The Commission finds that AT&T's proposed language would only require SWBT to use industry guidelines when they are available, and that AT&T's proposed language should be adopted.

**C. Group IV Issues - UNE PARITY**

**Issue 1 (Parity: Overview) and Issue 2 (Ordering, Provisioning, and Maintenance: Access to Information)**

These issues require the Commission to determine how the parity standards in the existing interconnection agreement and in the Act apply to UNEs. For both issues, the Special Master recommends that AT&T's proposed language be adopted. Under Issue 1, the parties dispute whether SWBT can charge separately for each UNE ordered by AT&T, even when such UNEs are to be used in combination, and whether SWBT is required to meet performance quality standards for combinations or platforms of elements. Under Issue 2, the parties dispute whether SWBT must provide AT&T information concerning dispatch and due date requirements when it provides other pre-service ordering information for unbundled elements ordered in combination.

According to the Special Master, the issues in dispute concern parity for UNEs when used in combination, and AT&T's proposed language is consistent with the Act. The Special Master asserts that without parity standards applied to UNEs used in combination, AT&T cannot be guaranteed nondiscriminatory access and comparable performance and quality. The Special Master points to relevant Federal Communications Commission (FCC) rules, the Act, and the recent decision of the United States Court of Appeals for the Eighth Circuit in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (hereinafter Iowa Utilities Bd.), as well as specific contract language in the approved interconnection agreement between SWBT and AT&T as support. With regard to Issue 2, the Special Master states that dispatch and due date functionality must be included with UNE ordering and provisioning terms or there will be no parity between SWBT's services and AT&T's.

SWBT's November 26 response to the Special Master objected to his recommendation on Issue 1 because the Iowa Utilities Bd. court has decided that UNEs must be combined by CLECs, not ILECs. SWBT argues further that, even if it were required to combine UNEs for AT&T, the service being provided for AT&T customers would not be "equivalent" because UNEs are not equivalent to any SWBT service. SWBT reaches this conclusion because "UNEs are provided on an unbundled basis and only to CLECs." SWBT opposes any performance parameters that differ from those specified in Attachment 17 of the existing agreement for individual UNEs. AT&T's response does not add to its prior filings. However, the Commission notes on its own that AT&T's proposed language explicitly limits performance standards to those already set forth in Attachment 17.

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With regard to dispatch and due date requirements, SWBT argues that standard intervals for AT&T to obtain access to this information are already set forth in Attachment 17. SWBT alleges that, while resold services are subject to dispatch and due date requirements, UNEs are not and so there is no reason to establish new dispatch and due date access processes when UNEs are ordered in combination. SWBT does not cite any legal authority for its position. AT&T has not responded to the Special Master's recommendation on Issue 2, but the Commission notes that AT&T's proposed language for resolving Issue 1 would preserve the standards set forth in Attachment 17. This should alleviate SWBT's concerns about new standards.

The Commission notes first that § 251(c)(3) of the Act states that ILECs have:

[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, non-discriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). Both the Iowa Utilities Bd. decision and § 251(c)(3) of the Act require the ILEC to provide UNEs in a nondiscriminatory manner that permits the CLEC to combine the elements as it sees fit. They do not go so far as to require the CLEC to purchase UNEs separately and then recombine them, at the time of the order, if the ILEC already uses the elements specified by the CLEC in the same combination that the CLEC requests. SWBT has not pointed to any provision requiring disassembly and then reassembly of identical service, and nothing in AT&T's language attempts to force SWBT to combine elements for AT&T.

Moreover, Section 2.1 of Attachment UNE (Attachment 6) of the approved SWBT/AT&T interconnection agreement states:

SWBT will permit AT&T to designate any point at which it wishes to connect AT&T's facilities or facilities provided by a third party on behalf of AT&T with SWBT's network of access to unbundled Network Elements for the provision by AT&T of a Telecommunications Service. If the point designated by AT&T is technically feasible, SWBT will make the requested connection.

Additionally Section 2.4 of Attachment UNE of the approved SWBT/AT&T interconnection agreement states:

SWBT will provide AT&T access to the unbundled Network Elements provided for in this Attachment, including combinations of Network Elements, without restriction.

Finally, Section 2.8 of Attachment UNE of the agreement states that:

Except upon request, SWBT will not separate requested network elements that SWBT currently combines.

The Commission finds that SWBT's proposed language is contrary to agreed-upon and approved language.

The Commission finds that AT&T's proposed language on Issue 1 implements the prior agreement of the parties and should be adopted. In addition, the Commission finds that it should adopt the language proposed by AT&T for resolution of Issue 2 in order to ensure UNE parity. If AT&T does not have dispatch and due date requirements available to it as with other pre-service ordering information, AT&T cannot provide service to its customers that is equivalent to SWBT's.

**Issue 3 (Interconnected and Functional Network Elements), Issue 4 (Service Disruption With IDLC), Issue 7 (Automated Testing), Issue 10 (Automated Testing Through EBI), Issue 14b (Input-Output Port) and Issue 16 (Combining Elements)**

For all six of these issues, the Commission must address the extent of SWBT's obligation to provide combined UNEs. Issue 3 involves SWBT's ability to disconnect elements that are ordered in combination by AT&T when those elements are already interconnected and functional at the time of the order. Issue 4 addresses whether SWBT may interrupt service to rearrange loop facilities on working service served by Integrated Digital Loop Carrier (IDLEC) technology when AT&T orders the loop and switch port in combination. Issue 7 addresses whether SWBT must provide automated loop testing through the local switch rather than install a loop test point when AT&T utilizes a SWBT unbundled local loop and SWBT unbundled switch port in combination. Under Issue 10, the dispute is over AT&T's right to initiate and receive test results through EBI, and under Issue 14b, the parties dispute AT&T's right to have access to Input/Output ports at locations other than in AT&T's collocation space. Issue 16 is whether the agreement should provide for SWBT to combine those elements that are not interconnected in the SWBT network at the time of AT&T's order.

For all of these issues, the Special Master recommends adoption of AT&T's proposed language because SWBT has already agreed not to separate requested network elements that SWBT currently combines, referring to Sections 2.1, 2.4 and 2.8 of Attachment UNE (Attachment 6). Moreover, the Special Master states that Issues 3 and 4 involve functions included within the full functionality of the switching element already purchased by AT&T. If there is to be parity, SWBT must provide the functions requested by AT&T in the manner that it provides such functions to itself. Parity is required for the reasons set forth under Issues 1 and 2, above.

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The Commission finds that SWBT is bound by this contractual language because the Eighth Circuit's recent ruling in Iowa Utilities Bd. has not made SWBT's and AT&T's contract provisions illegal. The decision simply vacated FCC rules which required that ILECs combine elements; it did not prevent ILECs from volunteering to combine such elements. Also, the Commission concurs with the Special Master's reasoning on Issues 3 and 4 related to parity. The Commission finds that AT&T's proposed language should be adopted for Issues 3, 4, 7, 10, 14b and 16.

**Issue 14c (Switch Capability)**

This issue involves the information SWBT should be required to provide to AT&T concerning the features, functions and capabilities of each end office. The difference between the parties is primarily over AT&T's access to information concerning the identity of the specific programs installed, rather than just information concerning the capabilities of the network.

The Special Master recommends adoption of SWBT's language because AT&T's proposed language may require SWBT to provide its competitors with proprietary business information. SWBT's proposed language would provide AT&T with adequate information to operate effectively. The Commission has reviewed the language proposed by both parties and their arguments in support and agrees that SWBT's proposed language should be adopted.

**Issue 14d (Expedited Special Request Process)**

This issue is limited to a determination of the amount of time that SWBT should have to respond to an expedited special request made by AT&T. AT&T would like for the price quote response time to be 20 days, while SWBT proposes 60 days.

The Special Master recommends adoption AT&T's language, stating that because the UNE is already operational, twenty days is sufficient time for a price quote. In the other four states where SWBT is the incumbent local provider, SWBT is required to provide the price within ten days.

The Commission sees no reason for SWBT to need more than 20 days to provide this information and therefore finds that AT&T's proposed language should be adopted.

**D. Group V Issues - PRICING**

In general, AT&T alleges that the rates proposed by SWBT are for features that are included in the full functionality of the unbundled elements for which the Commission established permanent rates in either its July 31 or October 2 orders in Case. No. TO-97-40. In its November 26 response, AT&T requests the Commission to avoid making a final determination at this point in time about whether rates should be imposed for any of the following UNEs. AT&T would like for the Commission to delegate its authority to the Special Master to set a procedural schedule for determining whether any rates should be imposed and, if so, what the rates should be. AT&T also urges the Commission to make clear to the AAS and Special Master that SWBT is required to provide a Total Element Long Run Incremental Cost

(TELRIC) study to support the rates it proposes, and to permit the Special Master to issue protective orders as needed so that AT&T can have access to the SWBT study.

The Commission finds that it is appropriate to adopt interim prices for some, but not all, of the UNEs in dispute, as set forth below. The establishment of interim rates shall not be construed as a final determination by the Commission that a rate is appropriate. Similarly, the failure to establish interim rates shall not be construed as a final determination by the Commission that no rate is appropriate.

The Commission does not find it appropriate to have the Special Master set a procedural schedule or issue protective orders. The Commission finds that the Commission should adopt a schedule for setting permanent prices that is similar, but not identical, to the process used in Case No. TO-97-40, for the elements identified below as not being covered by the prices already established in Case No. TO-97-40. Also, the Commission finds that it is unnecessary to order SWBT to provide the TELRIC studies to the AAS to the extent that such studies have already been provided. However, the Commission will order SWBT to provide the AAS with any and all cost studies that are directly or indirectly relevant to the rate issues to be reviewed by the AAS pursuant to this order. The details of the process are set forth below.

**Issue 1a (EAS Port Additive Charges)**

The issue presented is whether the Commission's October 2 order precludes SWBT from assessing an Extended Area Services (EAS) Port Additive Charge when AT&T requests a telephone number with an NXX<sup>4</sup> which has an expanded area calling scope. The Special Master recommends adoption of AT&T's proposal. Neither SWBT nor AT&T made any arguments specific to this issue in their November 26 responses. According to the Special Master, SWBT's proposed language would allow AT&T to have the option of purchasing this port additive, but that during the mediation sessions, AT&T indicated they did not want to purchase this port additive.

The Commission finds that AT&T's proposal to reject SWBT's language should be adopted, and AT&T's proposal to leave this issue unaddressed in the parties' final interconnection agreement should be approved. The Commission notes that its finding is based upon AT&T's lack of interest in the port additive at this time. The Commission's finding should not be construed as resolving the issue of whether a port additive charge would be appropriate if AT&T were to request this port additive in the future.

**Issue 1b (Multiplexing Charges), Issue 1c (Digital Cross Connect (DCS) Charges), Issue 1j (Dedicated Transport Cross-Connect Charges), Issue 4 (NXX Migration) and Issue 7 (Pricing for Additional Elements)**

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<sup>4</sup>The term "NXX" or "NXX code" refers to the first three digits dialed in a seven digit number.



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Issue 1b poses the question of whether the Commission's October 2 order precludes SWBT from assessing multiplexing charges in addition to the dedicated transport charges approved by the Commission. Issue 1c is whether the Commission's October 2 order precludes SWBT from assessing Digital Cross Connect Systems (DCS) charges when AT&T controls the DCS. To resolve Issue 1j, the Commission must decide whether SWBT may assess dedicated transport cross-connect charges other than the DS3 transport cross-connect charge established by the Commission in its July 31 Final Arbitration Order in Case No. TO-97-40. Issue 4 is whether NXX migration is a form of interim number portability and, if not, the appropriate rate to be charged for NXX migration. Under Issue 7, the parties have requested that the Commission determine which of the following elements need to be priced<sup>5</sup>: 7b) 4-wire PRI loop to multiplexer cross-connect, 7c) dedicated transport entrance facility when this element is actually utilized, 7d) SS7 links-cross connects, and 7e) call branding for Directory Assistance and Operator Services.

The Special Master urges the Commission to adopt SWBT's language for each of these issues, and neither SWBT nor AT&T has responded specifically to the Special Master's recommendations for resolution of these three issues in their November 26 responses.

For each of these issues, the Special Master asserts that both parties believe the AAS should review the applicable cost studies to determine the appropriate permanent rate, if any. AT&T believes there are no additional rate elements, while SWBT believes the rates should be those set forth in its proposed language. The AAS has examined the relevant cost studies and believes a rate is appropriate to address each issue, and so the Special Master concludes that SWBT's language should be adopted as it includes interim rates. In the event the permanent rates are different than the interim rates, SWBT's proposed language includes a true-up process.

The Commission finds that, because the AAS has made a preliminary determination that rates will be applicable and the language proposed by SWBT would provide AT&T with a true-up process in the event the Commission eventually determines that a rate is not appropriate or that a different rate should be applied, the Commission determines that interim rates are appropriate at the levels proposed by SWBT. The language proposed by SWBT for resolution of Issues 1b, 1c, 1j, 4 and 7(b, c, d and e) should be adopted.

**Issue 1d (LIDB Services Management System, Fraud Monitoring System and Service Order Charges)**

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<sup>5</sup>The Commission notes that, although the description of Issue 7a in the Amended Statement states that the Commission should decide whether Optical Transport (including multiplexing) needs to be priced, and the parties' Joint Settlement Document does not mention that Issue 7a has been settled, neither party's proposed language addresses this issue. Therefore, the Commission will treat Issue 7a as resolved.

The parties question whether the Commission's October 2 order precludes SWBT from assessing charges for the LIDB Services Management System and the Fraud Monitoring System, and a Service Order Charge when AT&T has a new switch or orders a new type of access to LIDB for query origination, in addition to LIDB and Calling Name (CNAM) query/query transport charges approved by the Commission. The Special Master recommends that the Commission adopt AT&T's language, and neither party addressed this recommendation specifically in its response.

As with Issues 1b, 1c, 1j, 4 and 7, SWBT's proposal includes proposed interim rates and a true-up provision in the event that the Commission establishes different permanent rates or finds that no rate should be imposed. However, the factual data submitted on this issue is not as complete as for Issues 1b, 1c, 1j, 4 and 7. The Special Master indicates that during the cost study review ordered pursuant to Case No. TO-97-40, SWBT failed to provide these cost studies along with the other signaling cost studies reviewed by AAS. SWBT presented the cost studies as a part of this arbitration, but the AAS has not formed a preliminary determination regarding whether a rate is appropriate. Therefore, the Special Master states that AT&T's language should be adopted as it does not include rates for these elements.

The Commission finds that interim rates should not be imposed without additional opportunity for the AAS to review SWBT's cost studies. Because AT&T's language does contain a process for arriving at permanent rates but does not impose interim rates, the Commission finds that AT&T's language should be adopted.

**Issue 1e (Non-recurring Charges for Conversion)**

The issue presented is whether the Commission's October 2 order precludes SWBT from assessing non-recurring charges (NRC), in addition to the CLEC Simple Conversion Charge approved by the Commission, when AT&T converts a SWBT customer to AT&T service using all the network elements required to provide the service.

The Special Master states that this issue was already resolved in the Final Arbitration Order in Case No. TO-97-40 issued July 31, and refers the Commission to Attachment C of the order, in which the AAS recommended "that there be no additional NRC for a CLEC Simple Conversion. The Staff Proposed Service Order Charge of \$5.00 would still apply."

SWBT's November 26 response asserted that the Special Master's recommendation is contrary to the Commission's November 5 order approving the interconnection agreement filed by SWBT and AT&T to implement the Commission's arbitration orders in Case No. TO-97-40. SWBT points to the following language from the Commission's November 5 order to support its argument:

The Agreement sets a \$5.00 customer change charge which SWBT will charge AT&T for switching an end user from SWBT to AT&T. If an end user adds features or services at the time the

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customer is switched from SWBT to AT&T, SWBT will also charge AT&T any applicable wholesale non-recurring charges for the features and services added.

See Southwestern Bell Telephone Company's Response to the Recommendations of the Special Master in the Joint Statement of Issues Remaining, p. 20 (emphasis added).

The Commission disagrees with the Special Master that the Commission foreclosed the possibility of SWBT assessing non-recurring charges for a CLEC Simple Conversion when it issued its July 31 order in TO-97-40. The Commission's November 5 order approving the interconnection agreement submitted in that case clearly left open the possibility that non-recurring charges could be established. However, SWBT's language is not acceptable because it would impose an interim rate without any assessment having been made by the AAS and the Special Master about the appropriateness of the rate. The Commission finds that AT&T's language provides for a process to establish any appropriate permanent rates and does not establish interim rates, and so AT&T's proposed language should be adopted as recommended by the Special Master. The AAS should review the cost studies that are pertinent to SWBT's proposed charges as a part of the permanent rate development process discussed below.

**Issue 1f (Mechanized Service Order Charges for UNEs)**

This issue involves whether SWBT should be permitted to charge additional non-mechanized service order charges for services where they do not currently have a mechanized process. The Special Master indicates that the AAS is not in a position to make a recommendation on the appropriate costs, if any, at this time. SWBT's proposed language allows for the AAS to review these cost studies and recommend an appropriate rate, and the Special Master recommends that SWBT's language be adopted on an interim basis until AAS has completed a review of the cost studies and recommended appropriate rates. The Special Master points out that AT&T's proposed language does not allow for a review of the cost studies and that SWBT's proposed language includes a true-up mechanism.

The Commission agrees with the Special Master's recommendation to adopt SWBT's proposed language but finds that SWBT's language should be modified, because the AAS has not yet had an opportunity to make a preliminary assessment of those charges based on SWBT's cost studies. The language proposed by each of the parties is faulty because the SWBT language imposes an interim rate not reviewed by the AAS and the AT&T language fails to include any process for establishing any appropriate permanent rates. While the Special Master was ordered to recommend adoption of one of the party's language in toto, the Commission is not so constrained.

Therefore, the Commission finds that the SWBT language should be adopted with the following modifications to the first and second paragraphs to resolve this issue:

SWBT shall not impose charges for nonmechanized service order types in those situations where SWBT does not have a mechanized process in place for its own customers unless and until such time as the arbitration advisory staff has reviewed the cost, made their recommendation to the Commission, and the Commission has ordered final cost based rates. If the Commission orders final cost based rates, AT&T will remit any amounts owed for the interim period to SWBT within a reasonable period. In accepting this procedure, the parties preserve all rights to appeal any Commission order, including the right to contest the process used in establishing the rates, terms and conditions between the parties.

SWBT offers the following order types.

The remaining paragraphs proposed by SWBT will remain intact, except that the rates listed in the chart entitled "Service Order Charges - Unbundled Element" should all be changed to "\$0.00" and all of SWBT's statements to the effect that charges will apply in the final two paragraphs should be deleted.

**Issue 1h (Rate Quotation Service Charges)**

The parties also seek resolution of the issue of whether SWBT may assess charges in addition to the Operator Services and Directory Assistance charges established by the Commission when SWBT provides rate quotation service to AT&T, either in a UNE or resale environment. The Special Master recommends that the Commission adopt AT&T's language because AT&T's proposed language allows for the AAS to review these cost studies and recommend appropriate rates and for a true-up following establishment of any applicable rates, while SWBT's proposed language does not allow for a review of the cost studies. The Special Master states that the AAS is not in a position to make a recommendation on the appropriate costs at this time, and that no interim rates should be adopted until AAS has completed a review of the cost studies and recommended appropriate rates. SWBT's and AT&T's November 26 responses did not specifically address this issue.

The Commission finds that, consistent with its findings on Issues 1d, 1e and 1f, no interim rate should be implemented where the AAS has not had a sufficient opportunity to make even a preliminary assessment concerning their appropriateness. Therefore, the Commission finds that AT&T's proposed language should be adopted.

**Issue 3a (Rates for White Pages-Resale, White Pages-Other and Directory Listings)**

The Special Master states that the Commission should adopt AT&T's proposed language as it allows for the AAS to review these cost studies and recommend appropriate rates and also allows for a true-up mechanism. SWBT's proposed language does not allow for a review of the cost studies. According to the Special

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Master, the AAS is not in a position to make a recommendation on the appropriate costs, if any, at this time. Neither SWBT nor AT&T included a specific response to the Special Master's recommendation on this issue.

This issue is similar to Issue 1f in that the only party proposing a process for establishing permanent rates and a true-up at the end of that process (SWBT) is also proposing establishment of interim rates, even though the Special Master has indicated that the AAS has not had sufficient time to review the appropriateness of the proposed interim rates. However, this issue is in a different posture from Issue 1f because both SWBT and AT&T are proposing adoption of the same rate of \$3,191.73 for a single sided informational white page per year in any book covering a geographic area. For this reason, the Commission finds that it should adopt the interim rate and implementing language proposed by AT&T, with one modification to correct an apparent typographical error. AT&T's second paragraph under "Appendix White Pages - Resale" should have the appropriate section number inserted following the word "Section."

**Issue 8 (Additional Pricing Issues)**

Finally, Issue 8 is whether the Commission's October 2 order covers pricing for the following items:

- a. Loop Cross Connect without testing to DCS
- b. Loop Cross Connect with testing to DCS
- c. Subloop Cross Connect
- d. Nonrecurring Charge for Unbundled Switch Port-Vertical Features
- e. Access to Directory Assistance database
- f. Dark Fiber cross connect
- g. Dark Fiber record research

The Special Master states that, consistent with SWBT's position on combining UNEs, the cross-connects in Issues 8a and 8b were withdrawn by SWBT, and AT&T did not object<sup>6</sup>.

For issues 8c, 8e, 8f, and 8g, the Special Master recommends that SWBT's rates be adopted on an interim basis because the AAS believes that a rate may be appropriate. The Special Master noted that SWBT's proposed language provides for the imposition of interim rates while AT&T's does not, but both parties recommend that a procedure be established to determine any applicable permanent rates for items 8c, 8e, 8f and 8g with a true-up process at the end. Neither SWBT nor AT&T responded to this recommendation.

However, for Issue 8d, the Special Master recommends that SWBT's proposed rates be rejected and no additional rates for the functionality of unbundled local switching be applied. The Special Master relies on the Commission's Final Arbitration Order in Case No. TO-97-40, in which the Commission found that

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<sup>6</sup> As with Issue 7a, the parties did not identify Issues 8a and 8b as settled in their Joint Settlement Document. Nevertheless, the Commission will treat these issues as resolved.

prices for the unbundled network elements include the full functionality of each element. In the Special Master's opinion, SWBT's proposed rates under Issue 8d are for activating the functionality of unbundled local switching. In its response, SWBT made the same arguments as it did for Issue 1e.

For the reasons stated above for Issues 1b, 1c, 1j, 4 and 7, the Commission finds that SWBT's proposed interim rates and language should be adopted to resolve Issues 8c, 8e, 8f and 8g.

As with Issue 1e, the Commission does not adopt the Special Master's conclusion that the Commission foreclosed the possibility of SWBT assessing the non-recurring charges identified in Issue 8d when it issued its July 31 order in TO-97-40. However, SWBT's language is not acceptable because it would impose an interim rate without any assessment having been made by the AAS and the Special Master about the appropriateness of the rate. The Commission finds that SWBT's language should be adopted except that the interim charges listed under the section entitled "d. Nonrecurring Charge for Unbundled Switch Port - Vertical Features" should all be changed to \$0.00. The AAS should review the cost studies that are pertinent to SWBT's proposed charges as a part of the permanent rate development process discussed below.

#### **E Group VII Issues - NETWORK EFFICIENCY**

##### **Issue 2 (Flexibility in Establishing Trunk Groups)**

Issue 2 is whether AT&T should be allowed to combine all traffic, including local and toll, on a single trunk group over its interconnection facility with SWBT. Under the Commission's December 11, 1996 Arbitration Order in Case No. TO-97-40, AT&T may combine intraLATA and local traffic onto the same trunk group. The issue has now been expanded to include interLATA traffic.

The Special Master recommended adoption of AT&T's proposal to allow it to combine interLATA, intraLATA and local traffic over a single trunk group, noting that allowing AT&T to combine interLATA traffic with intraLATA and local traffic provides the most efficient use of network resources and is therefore consistent with the intent of the Commission's December 11, 1996, order in Case No. TO-97-40.

SWBT is opposed to AT&T's proposal because it is concerned about its ability to record data and bill properly for various types of traffic in one trunk. SWBT argues that the Special Master's recommendation is not limited to intrastate interLATA traffic and therefore is beyond the PSC's jurisdiction. SWBT asserts that the Commission's December 11, 1996, order in Case No. TO-97-40 rejected such a proposal made by MCI in that proceeding. Finally, SWBT suggests that AT&T could use combined trunking facilities to avoid access charges owed to SWBT.

AT&T responded to the Special Master's recommendation by asserting that the efficiency to be achieved by its proposal goes to the heart of one of the key benefits to be gained by introducing competition. AT&T stated affirmatively in its November

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26 response that it does not intend to avoid paying access charges when it functions as an interexchange carrier only.

The Commission notes that AT&T's language specifies the use of percentage of jurisdictional use factors reports as an interim method to identify traffic types for billing purposes and that AT&T has stated that it will pay all applicable access charges in its proposed language. The interim billing method proposed by AT&T is consistent with Commission's order of December 11, 1996, in Case No. TO-97-40. Contrary to SWBT's assertion, the order was silent on the specific issue of combining interLATA traffic with intraLATA and local traffic.

The Commission finds that AT&T's proposed language should be adopted. The Commission's order should not be construed as affecting interstate interLATA traffic outside of its jurisdiction.

**E. Group IX Issues - POLES, CONDUITS, AND RIGHTS-OF-WAY**

**Issue 31 (Compensation for Use of Rights-of-Way)**

Under this issue, SWBT seeks to have AT&T compensate it for costs incurred in obtaining exclusive rights-of-way, and AT&T opposes the addition of this language to the parties' agreement. The Special Master notes that the language SWBT proposes should be adopted, as nothing in the existing section 5.03 allows for SWBT to be compensated for AT&T's access to exclusive rights-of-way. AT&T did not respond to the Special Master's recommendation.

The Commission finds that where SWBT has purchased exclusive rights-of-way, AT&T must share the cost when and to the extent that AT&T uses those rights-of-way. SWBT's language fairly allocates costs for such use and should be adopted.

**G. Group X Issues - CONTRACT TERMS AND CONDITIONS AND OTHER ISSUES**

**Issues 3a, 3b, 3c and 4 (Limitation of Liabilities and Indemnification), Issue 15 (Intellectual Property Rights Associated with UNEs) and Issue 8 (Responsibility for Environmental Contamination)**

These issues are related because they deal with the allocation of responsibilities toward end users and other third parties between SWBT and AT&T and correlated limitation of liability and indemnification arrangements. Issues 3a and 15 require a determination of whether SWBT or AT&T should be responsible for obtaining copyrights, licenses and any other required intellectual property rights before AT&T provides service using SWBT's facilities. Issue 3b relates to the length of time to be used in measuring the liability cap for damages to be paid by the parties to one another for negligent acts other than those specifically addressed elsewhere. Issue 3c and 4 involve the parties' responsibilities to indemnify one another for damages sought by their end users. Finally, Issue 8 addresses what the agreement should provide regarding responsibility for the presence or release of environmental hazardous at an affected work location that was introduced by a third party.

SWBT proposes to address Issue 3b by capping each party's damages for harm to one another to the amounts paid for the affected services as defined in the

Performance Criteria section of the agreement, which corresponds to the amount of time that service is interrupted. SWBT's language also proposes damages to recover the injured party's collocated equipment or property that was destroyed or damaged by the injuring party. AT&T's language would permit damages up to the total amount paid for the entire contract for a given contract year. The Special Master comments that AT&T's language permits damages that are too high because the annual contract amount might be greater than actual damages in many instances, and AT&T's language fails to permit recovery for the value of any damaged collocated equipment or property. While SWBT did not respond to the Special Master's recommendations, AT&T commented that SWBT's approach would treat AT&T as an end user with an outage rather than as a competitor with potentially large consequential damages.

The Commission finds that SWBT's language is most appropriate. AT&T has ignored the fact that, under SWBT's proposed language, SWBT and AT&T are to be treated equally. Therefore, if this provision treats AT&T as an end user with an outage whenever SWBT causes damage to AT&T, the reverse is also true. Each party will have an incentive to avoid causing the other to incur consequential damages because each party will be subject to the same limitation of liability amounts. The Commission does not agree with the Special Master's statement that AT&T's language would permit AT&T to recover damages beyond actual damages, but agrees that AT&T's proposed liability limit is too high because the limitations of liability imposed by most telecommunications carriers on their customers are similar to the limits proposed by SWBT. There is no reason that companies should be permitted to limit the damages their end users can obtain against them while preserving much higher claims for themselves. The Commission finds SWBT's proposed language preferable to AT&T's for this reason and for the reason that SWBT's language would permit the companies to recover their costs for any damaged collocation equipment or property as a cost of interconnection. The Commission finds that SWBT's language should be adopted.

The Special Master also recommends the Commission adopt SWBT's language for resolution of Issues 3a and 15. The Commission notes that SWBT's proposed language would place the responsibility for obtaining all licenses, copyrights and other intellectual property rights required by law on AT&T when SWBT provides UNEs to AT&T that are purchased from third parties and protected by intellectual property laws. SWBT does promise to assist AT&T in identifying the applicable licenses, but AT&T bears ultimate responsibility for compliance with intellectual property laws. By contrast, AT&T's language would require SWBT to indemnify AT&T for any infringements of intellectual property rights by AT&T. AT&T responded to the Special Master's recommendation by alleging that SWBT could use its proposed language to prevent AT&T's use of unbundled elements by claiming that AT&T has failed to purchase the necessary copyrights, and such actions by SWBT would violate the Act.



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The Commission disagrees with AT&T's assessment of the language proposed by SWBT. SWBT's proposed language would not make AT&T's purchase of the necessary copyrights a condition precedent to provisioning UNEs, but merely clarifies that SWBT cannot be held responsible to third parties for AT&T's copyright infringements. Also, AT&T's argument is undercut by SWBT's promise to assist AT&T in locating the applicable intellectual property rights. It is difficult to see how SWBT could successfully prevent AT&T's use of UNEs on the ground that AT&T failed to seek necessary licenses when SWBT would itself be under an obligation to disclose any known intellectual property rights to AT&T. The Commission finds that SWBT's proposed language merely exculpates SWBT and requires AT&T to defend, hold harmless and indemnify SWBT for AT&T's infringements. This does not violate the Act. The Commission finds that SWBT's language should be adopted to resolve Issues 3a and 15.

With respect to Issues 3c and 4, the Special Master recommends that AT&T's language be adopted, because AT&T's proposed language suggests that each party be responsible for the damage it causes toward its end users. By contrast, SWBT's proposed language seeks to protect itself from damages to AT&T's end users caused by SWBT, and to protect AT&T from damages that AT&T causes to SWBT's end users. The Special Master asserts that SWBT should not be permitted to abrogate its liability for its own actions. AT&T does not respond to this specific recommendation. However, SWBT argues that AT&T's proposed language would present a departure from the Commission's longstanding practice of permitting companies to limit their liability toward end users. SWBT suggests that, with AT&T in control of its tariff provisions and contracts with customers, AT&T can limit its own liability toward its customers, but SWBT does not have a direct contractual relationship with AT&T's customers and cannot do likewise. The reverse is also true. Therefore, SWBT advocates an agreement term requiring each party to indemnify the other for damages alleged by its own customers, so that each party will have an incentive to limit liability to customers for both itself and the other party.

The Commission finds that AT&T's proposed language for resolving Issues 3c and 4 is reasonable and should be adopted. SWBT has not explained how the language proposed by AT&T is more favorable toward AT&T than it is toward SWBT, as SWBT could likewise limit its damages toward its end users and encourage them to sue AT&T. The Commission acknowledges SWBT's concerns about its exposure to liability but finds that SWBT's proposed system would create much worse incentives. If each party could avoid responsibility for harm that it caused to the other party's customers there would be little incentive for either party to work together on providing customers with quality service.

Finally, the Special Master believes that the Commission should adopt AT&T's proposed language for resolution of Issue 8. AT&T believes that neither party should be responsible for hazards which it has not introduced to the affected work

location and attempts to introduce language that would protect it from responsibility for hazards introduced at a work site by any person, including SWBT. SWBT likewise believes that each party should only be responsible for hazards it has introduced, but SWBT would only limit each party's responsibility in the event of hazards introduced by the other; SWBT's proposed language would not address responsibility for hazards introduced by third parties. Neither SWBT nor AT&T responded to the Special Master's recommendation to adopt AT&T's language.

The Commission finds that SWBT's proposed language is not broad enough because it would allow SWBT to sue AT&T for damages due to hazards introduced at a work site by a third party rather than suing the responsible third party. While neither party can limit its liability to the federal or state government or prevent the government from suing all responsible parties for environmental harm and then allowing them to indemnify one another appropriately, AT&T's proposed language at least addresses the allocation of responsibility as between SWBT and AT&T. The Commission finds that AT&T's proposed language should be adopted.

**Issue 6 (Local Exchange Carrier Selection/"Slamming")**

SWBT proposes to add language concerning the procedures for investigating charges of slamming. This language would require each party to provide to the other party any customer authorization without charge when a request is made to investigate claims of unauthorized changes. The Special Master has recommended that the Commission adopt SWBT's proposed language, and AT&T has responded to this recommendation by pointing out that it is opposed to SWBT's proposal because it fears that SWBT could use this language to interfere with competition by requesting customer authorizations on its own initiative.

The Commission finds that AT&T's fears are unjustified. The existing language, when read together with SWBT's proposed new language, would clearly require an end user request for a slamming investigation before either party could demand customer authorizations, for free or for a charge, from one another. The Commission finds that SWBT's proposed language should be adopted.

**Issue 16 (Dispute Resolution Process)**

AT&T proposes to add language to the agreement that requires the parties to seek arbitration before the Commission of any disputes arising from either party's desire to add terms to their agreement. SWBT opposes this new language. The Special Master endorses AT&T's position, and neither party has responded to that recommendation. The Commission finds that AT&T's language restates the requirements of the Act. To the extent that the Act gives the Commission jurisdiction over any particular disputes, either party can force the other to arbitrate before the Commission pursuant to § 252(b) if the party acts within the time frames established under the Act. To the extent that the Commission lacks jurisdiction over any particular disputes, the proposed language will be unenforceable.

The Commission adopts the language proposed by AT&T and notes that its finding should not be construed as an attempt to confer upon the Commission any

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jurisdiction which it does not have. This finding is not contrary to the Commission's October 30 order in this case because the proposed language deals with the parties' obligations to submit their disputes for arbitration, and not with the Commission's authority or obligation to resolve such disputes. As the Special Master states, the Commission should determine its responsibility to address any such disputes on a case by case basis.

**Issue 18 (Custom Routing to Multiple SWBT End Offices)**

According to the Special Master, the Commission should adopt AT&T's language requiring SWBT to custom route AT&T local calls to multiple SWBT end offices. The Special Master states that SWBT currently employs various routing methodologies to route local calls to multiple destinations, and that it is technically feasible for SWBT to route certain local calls over its common transport to a tandem end office, or to route certain local calls over dedicated facilities to a specified end office. The Special Master concludes that AT&T's proposed routing arrangement utilizes network facilities more efficiently, and that SWBT should provide the same routing functionality to AT&T as SWBT provides itself.

AT&T's response to the Special Master's recommendation emphasizes in addition that SWBT's proposed language would be discriminatory because it would significantly restrict AT&T's access to basic functions of the local switch such as connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks. AT&T suggests that if SWBT only permits AT&T to route local calls to one location, this could result in line blocking during busy periods and in order to avoid this result AT&T would have to order inefficiently large trunks out of the local switch.

SWBT alleges that AT&T's proposed language would be inefficient and would use up an unjustified amount of SWBT's network facilities because a greater number of trunks is required to carry the same amount of traffic when the traffic is routed over multiple trunk groups rather than a single trunk group.

The Commission finds that AT&T's proposed language should be adopted because the Act requires the Commission to address AT&T's discrimination concerns, and because SWBT's efficiency concerns are countered by AT&T's efficiency and blocking concerns. AT&T's proposed language ensures that the full functionality of local switching capabilities will be available to AT&T on the same basis as they are available to SWBT, while SWBT's proposed language would implement a discriminatory regime and be likely to result in either the blocking of AT&T customers' calls or the purchase by AT&T of unnecessarily large numbers of trunks. Nondiscriminatory access is a primary duty under § 251 of the Act. SWBT may be correct that certain inefficiencies could result from routing local calls to multiple end offices, but the Commission finds that it is just as likely that inefficiencies will result if AT&T is forced to direct all calls over a single trunk group.

**Issue 20 (Separate NXX Codes for Each SWBT Exchange)**

This issue addresses the NXX codes to be used by AT&T for assignment of numbers to its end users and encompasses both billing and Numbering Plan Area (NPA) exhaustion concerns shared by the parties. Both parties propose language that would require AT&T to obtain a separate NXX code for each SWBT exchange or group of exchanges that share a common mandatory calling scope as defined in SWBT's tariffs in metropolitan exchange areas where AT&T intends to offer service. This would permit the parties to identify the jurisdictional nature of traffic for purposes of intercompany compensation for the foreseeable future.

However, the parties disagree about how to address any NPA number exhaustion that may develop in those areas. SWBT would use NXX codes for billing identification purposes until both of the parties have implemented billing and routing capabilities to determine traffic jurisdiction on a non-NXX code basis, and would resort to industry forums or the Commission for a solution if NPA exhaustion occurs before that time. By contrast, AT&T does not provide for termination of the NXX code based billing approach outside of an NPA exhaustion context. However, in the event of NPA exhaustion, AT&T would establish a substitute billing method involving use of certain fields in SWBT's "92-99" billing record if the parties could not agree to an alternative method by March 31, 1998. The Special Master recommends adoption of AT&T's language because it is proactive in that it establishes a deadline for voluntarily resolution of NPA exhaustion problems and a precise and feasible alternative billing method to be implemented by the parties without the need for Commission intervention.

AT&T did not respond to the Special Master's recommendation. However, SWBT did respond. SWBT alleges that AT&T's proposed solution involving SWBT's "92-99" billing record would allow AT&T to originate calls without accepting responsibility for processing all of the types of calls that AT&T is obligated by law to terminate for its end users under § 386.020(4) of the Revised Statutes of Missouri (Supp. 1996). According to SWBT, AT&T's proposal does not provide any billing solution for calls made by AT&T's customers to companies other than SWBT. SWBT insists that, at a minimum, AT&T should be required to explain this billing method completely and to assure the Commission that AT&T will provide full local service even if AT&T is allowed to use SWBT's NXX codes in assigning numbers.

The Commission finds that the level of service to be provided to AT&T's customers is an issue best resolved in connection with the tariffs filed by AT&T. The Commission also finds that AT&T's proposal provides a permanent solution, rather than a temporary solution, to a problem that both of the parties acknowledge could develop. AT&T's proposal, like SWBT's, requires the parties to work toward alternative solutions before resorting to the "92-99" billing record field approach, and so SWBT will have an opportunity to address any remaining feasibility concerns with AT&T even if SWBT's language is not adopted. The Commission finds that it should adopt AT&T's proposed language for the reasons stated above.

**Issue 22 (Timing of AT&T Service to Business and Residential Customers)**

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SWBT seeks to insert language into the agreement that would require AT&T to provide telephone exchange service to business and residential customers within a specified period after approval of the PSC, and AT&T opposes this requirement. The Special Master recommends adoption of AT&T's position that no language should be inserted. The Special Master notes that the Commission has found in prior cases that serving either business customers or residential customers is acceptable, and that AT&T has already filed tariffs to provide residential service. Neither party responded to the Special Master's recommendation.

The Special Master correctly describes the approach adopted by the Commission in prior cases with respect to providing service to both residential and business customers. SWBT has not provided the Commission with a good reason for changing its interpretation of the applicable law, and so the Commission finds that AT&T's proposal to reject SWBT's additional language is adopted.

#### **H. Group XI Issues - COLLOCATION**

##### **Issue 33e (Environmental, Health and Safety Questionnaires)**

The parties are in agreement that SWBT must comply with all federal and state laws regarding environmental, health and safety issues applicable to SWBT. Their disagreement is over additional language that AT&T would like to insert in the agreement to force SWBT to complete an "Environmental, Health & Safety Questionnaire" for each eligible structure in which AT&T applies for collocated space.

The Special Master recommends adoption of SWBT's language without the additional language suggested by AT&T, stating that SWBT should not be required to bear the burden of completing such questionnaires in order to satisfy AT&T's insurance requirements. In the Special Master's opinion, however, SWBT should be required to provide AT&T a copy of any such questionnaires that SWBT previously completed or is required to complete in the future for its own purposes. Neither SWBT nor AT&T responded to the Special Master's recommendation on this issue.

The Commission finds that the language proposed by SWBT should be adopted but the additional language proposed by AT&T should be rejected, for the reasons given by the Special Master. The Commission notes in addition that AT&T's proposed language might unfairly shift responsibility to SWBT for compliance with environmental laws, without AT&T assuming a concomitant responsibility for its equipment that is collocated in SWBT's space, and is therefore unreasonable.

The Commission notes that the Special Master has complied with the Commission's order to choose between the alternatives presented by the parties, but he has also suggested that it would be appropriate for SWBT to provide copies to AT&T of any questionnaires which it completes in the course of its regular business. The Commission finds that it should fully implement the Special Master's recommenda-

tion by adding the following language to that proposed by SWBT: “SWBT is required to provide AT&T a copy of any environmental, health and safety questionnaires that SWBT has previously completed or is required to complete in the future for its own purposes.”

**Issue 43 (Equipment Removal)**

The parties agree that if AT&T fails to remove any of the equipment, property or other items that it has brought into the collocated space, SWBT may perform removal at AT&T’s cost. The issue remains unresolved because SWBT wishes to add language that would require AT&T to indemnify and hold harmless SWBT for any claims, expenses, fees or other costs related to removal. The Special Master states that the Commission should adopt SWBT’s language, and neither party responded to this recommendation.

The Commission agrees with the Special Master that it would be unreasonable to require SWBT to bear risks for AT&T’s failure to meet its responsibility to remove items it brings into the collocated space or any part of the eligible structure, except when SWBT acts willfully or negligently in causing damage to SWBT. The Commission notes that the language agreed to by the parties gives AT&T 30 days to remove its equipment on its own and finds that, under these circumstances, it is fair to limit SWBT’s liability for taking care of AT&T’s equipment. In addition, SWBT’s responsibility for its willful or negligent acts should be maintained because of the language to be adopted for resolution of Issue 48 (see below). Therefore, the Commission adopts SWBT’s proposed language to resolve this issue.

**Issue 48 (Restoration, Repair or Replacement of AT&T’s Improvements, Equipment and Fixtures)**

This issue concerns SWBT’s responsibility to rebuild, restore, repair or replace AT&T’s improvements, equipment or fixtures that are damaged due to casualties or due to SWBT’s negligence or intentional misconduct. The parties agree that SWBT should not be responsible for casualty losses, but AT&T wishes to insert language to retain SWBT’s liability for negligent or intentional acts of SWBT, its agents and employees. The Special Master recommends adoption of AT&T’s additional language, reasoning that it is fair and reasonable to permit AT&T to seek recompense for any acts of intentional misconduct or acts of negligence or omission by SWBT’s employees or agents. Neither SWBT nor AT&T commented on the Special Master’s recommendation.

The Commission finds that AT&T’s additional language should be adopted so that SWBT has an incentive to act with care when handling AT&T’s equipment, fixtures and improvements in the collocated space. SWBT may have a duty to avoid negligence and intentional acts causing harm to AT&T’s property under the Act, but permitting AT&T to recover damages for such harm will provide incentive for compliance with the Act’s collocation requirements and is consistent with the Commission’s resolution of Issue 3b (Limitation of Liabilities and Indemnification) under Section G above.

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**Issue 52 (Liability for Acts and Omissions of “Others”)**

This issue relates to SWBT’s responsibility to AT&T for any damage caused to AT&T by the acts of third parties. SWBT proposes to add extremely broad language that would insulate SWBT from liability to AT&T for the acts and omissions of such third parties regardless of the degree of culpability of SWBT. SWBT’s proposed language would also require AT&T to save and hold SWBT harmless for any claims made against SWBT that are associated with the acts or omissions of third parties who act on behalf of AT&T. AT&T opposes the adoption of this new language, given that it has already acknowledged that its equipment and fixtures in collocated space may be subjected to harm by third parties under the parties’ collocation arrangements. AT&T would have the General Terms and Conditions portion of the agreement cover collocation, as well.

The Special Master recommends adoption of AT&T’s language and rejection of SWBT’s language, stating that he believes SWBT’s language is over broad. The parties did not respond to this recommendation.

The Commission finds that it should adopt the AT&T proposed language without the additional language proposed by SWBT. The Commission finds that the SWBT language is unreasonably broad because it seeks to insulate SWBT from the actions of others even where SWBT shares culpability with them. This would create an incentive for SWBT to act irresponsibly. Also, there is no reason that the allocation of liability under the General Terms and Conditions portion of the agreement should not apply to collocation issues, as well.

**Issue 54a (Damage to Vehicles of AT&T and its Employees, Contractors, Invitees, Licensees or Agents)**

On this issue, the parties agree that AT&T should be required to maintain automobile liability insurance for its own automobiles located on SWBT’s property and that AT&T should hold SWBT harmless for any damage that occurs to its employees’ vehicles. However, SWBT would like for AT&T to be responsible for also indemnifying SWBT for any damages that SWBT must pay to AT&T’s employees for harm to their automobiles, and SWBT would expand the hold harmless and indemnification clause to AT&T’s contractors, invitees, licensees or agents, as well. The Special Master recommends that the Commission adopt SWBT’s proposed language, and neither party responded to this recommendation.

The Commission finds that SWBT’s proposed language should be adopted because SWBT should not be responsible for the automobiles of any individuals or companies who are on SWBT’s property in order to serve AT&T’s business purposes.

**Issue 54d (Lost Profits and Revenues)**

SWBT seeks to include language in the Appendix on collocation that clarifies that SWBT should not be required to pay AT&T for lost profits and revenues due to service interruptions. AT&T opposes inclusion of this language. The Special Master recommends adoption of SWBT’s proposed language, noting that lost

profits and revenues are speculative and difficult to quantify, and that in many instances if AT&T's services are interrupted, SWBT's will probably be interrupted too. Neither party responded to this recommendation.

For the reasons enunciated by the Special Master, the Commission finds that it should adopt SWBT's proposed language to resolve this issue.

**2. Conclusions of Law**

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission concludes that the recommendations of the Special Master should be adopted, with the minor modifications specified above. The Commission has determined that the rates established in this arbitration shall be interim rates only and that further proceedings shall be conducted to establish permanent rates.

**3. Procedure for Establishment of Permanent Rates**

In order to implement permanent rates, the AAS in its capacity as advisor to the Commission is instructed to conduct an investigation beginning on January 5, 1998, with a special focus on identifying the critical inputs and analyzing the costing models. The AAS and SWBT personnel shall meet in SWBT offices in St. Louis where software, data and subject matter experts responsible for critical input values will be readily available. Because SWBT will perhaps be required to disclose confidential information, including trade secrets and other proprietary matter, AT&T will not participate in these meetings. Similarly, the AAS shall meet with AT&T during this investigation period at a mutually agreed upon location to analyze cost data provided by AT&T. SWBT will not participate in these meetings. Because of its status under Missouri law, OPC will be allowed to participate in these meetings. See § 386.710, RSMo 1994. If either of the parties desires access to specific information produced by the other party during the review process it may use data requests, and any disputes over the production of such data may be brought to the Commission's attention in the form of a motion for protective order.

This process will allow the parties the opportunity to work with the AAS to explain in a thorough, detailed and analytical fashion their costing models and final costing inputs. The parties are expected to provide full cooperation with the AAS in this effort, including providing necessary training of the AAS, documentation for all inputs and calculations, and access to each of its cost models. The parties shall allow the AAS to analyze the models using various inputs and assumptions and make available all necessary data including data it considers to be proprietary.

The AAS should then submit to the Commission, SWBT, AT&T and OPC its report containing proposed permanent rates based on the same permanent rate costing approach adopted in Case No. TO-97-40 and commenting on the costing approaches proposed by the parties during the review process. The parties will be given an opportunity to file comments on the rates and the costing model proposed



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by the AAS and to support their positions with affidavits and schedules. The parties may seek protective orders from the Commission prior to filing these.

The Commission will then hold a hearing for the sole purpose of providing the Commissioners with an opportunity to ask questions of the parties, the AAS and OPC. There will be no opportunity for cross-examination by the parties, but the Commission will permit the filing of briefs following the hearing.

The Commission anticipates that it will issue a final order establishing permanent rates no later than July 1, 1998. The specific dates for the parties and OPC to respond to the AAS report, for the hearing, and for briefing will be established in a subsequent order.

The Commission notes that, by permitting SWBT and AT&T to file comments and by holding a hearing in this case, the Commission is not making a finding that it is required to do so under the Act, contrary to the arguments made by SWBT in its November 26 response. The Act's provisions governing State Commission arbitration proceedings do not mention the word "hearing" and do not otherwise suggest that a hearing is required. See 47 U.S.C. § 252(b). Moreover, the Act permits the Commission to use information from any source to make its determinations. See 47 U.S.C. § 252(b)(4)(B). This order should not be construed as finding that the Commission is required to permit the parties to each present a case as in a contested case. SWBT's request for a contested case hearing with opportunity for cross-examination prior to issuance of this Report and Order and prior to the establishment of permanent rates should be denied.

*IT IS THEREFORE ORDERED:*

1. That the issues remaining in dispute as of the date of filing of the parties' Joint Statement of Remaining Issues on November 21, 1997, are resolved by the adoption of implementing language as set forth in this Report and Order.

2. That the language adopted by this Report and Order shall be incorporated by the Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. into the interconnection agreement that they are required to submit pursuant to Ordered Paragraph 3.

3. That Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. shall file an interconnection agreement implementing the language they have agreed to and the language adopted by the Commission in this Report and Order by February 1, 1998.

4. That the Commission will defer ruling on the language agreed to by the parties for the issues resolved following the filing of AT&T Communications of the Southwest, Inc.'s petition until it has reviewed the interconnection agreement required to be filed in accordance with Ordered paragraph 3.

5. That the scope of the evidentiary hearing to be scheduled in a subsequent Commission order shall be limited as described in this order and that Southwestern Bell Telephone Company's request for a hearing with opportunity for cross-examination is denied.

6. That the following procedural schedule is established for the purpose of determining permanent rates for the pricing issues described in this Report and Order:

Begin cost study review process—January 5, 1998

7. That any objections to the process established in this Report and Order for the setting of permanent rates shall be filed no later than December 29, 1997.

8. That Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. shall use the interim rates approved in this Report and Order pending the development of permanent rates for these elements.

9. That Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. shall comply with the Commission's finding on each and every issue and shall comply with the procedure for determining permanent rates set forth in this order.

10. That this Report and Order shall become effective on January 2, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur.  
Crumpton, C., dissents, with dissenting opinion to follow.

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**DISSENTING OPINION OF COMMISSIONER HAROLD CRUMPTON**

I am deeply concerned about the regulatory process that produced this agreement. My concerns fall into two categories. The first is the impact of the regulatory strategy of unbundling network elements. The second is the impact of our implementation of that strategy.

I am concerned that the regulatory scheme to unbundle the incumbent's network will have an adverse impact on the State of Missouri. To promote competition in the local exchange market, the Telecommunications Act of 1996 adopted a regulatory scheme that keeps competitors connected to and dependent on the incumbents' network. Sadly, this dependency has been structured in a way which may harm the competitors, the incumbents, and the public in that the Act mandates unbundling network elements. Unbundling a network means breaking it down to its functional components and Section 251 (c) (3) of the Act requires that network elements be offered only on an unbundled basis.

The unbundling of an incumbent's network elements may prove detrimental to us all. First, it may prove physically harmful to the network on an everyday basis as technicians are required to tinker and tweak it over and over again in order to recombine the unbundled elements. The network has some very sensitive components and the less that happens to those components, the better. The fewer tweaks and adjustments that are made to it, the fewer interruptions in service. In the end, unbundling represents a waste of effort and a threat to service, especially unbundling into sub-elements.

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Second, regulators such as ourselves, are then required to make the incumbent sell its network elements at inappropriate prices. The prices are inappropriate because they do not reflect the market value of the elements and they do not allow the incumbent to recover its embedded costs or give it an incentive to continue to invest in the network upon which we all depend.

It is blatantly unfair to require the incumbent to sell its network elements at unbundled prices (one of the effects of unbundling is that the elements will be sold to the new competitor below cost) when we know that, after the purchase competitors are going to reap the benefits of combining elements without paying a proper price.

A regulatory strategy that has grasped the importance of a fully operational and well-maintained network is a strategy that makes sure that the network is left alone as much as possible. Such a strategy will not divvy up the network into individual parts, but simply sell interconnection to it at deeply discounted prices on high margin elements only. Access or connection through discounts means the physical network can be protected while the competitors pool the capital necessary to build their own value-added networks. Since the effect of the present regulatory scheme seems to be to keep competitors dependent on this all-important incumbent asset, it only makes sense to take appropriate precautions to protect the asset for all to use. The best way to protect the network and promote true competition is to give competitors deep discounts so they can pool enough money to build their own networks while giving discounts only on high-margin elements so that the incumbent will have sufficient revenues to maintain the existing network.

We cannot change the regulatory scheme of unbundling network elements; however, I fear we have implemented it in a way that has done damage to the incumbent and in turn to the very backbone of competition: the network itself. I am concerned that the process by which we arrived at the interconnection charges may constitute a taking of the incumbent's network and that such a taking will affect and harm every Missourian.

My first concern is how we are implementing the Act's directive of unbundling the incumbent's network elements. In regards to this concern, I think we are unbundling the network elements to too great a degree. We have reduced these elements to too fine a level that will place the incumbent in danger's way. The incumbent's network may be injured because of the excessive tinkering that takes place when the elements have been broken down too far. The competitors may be injured as they struggle to recombine the too finely disaggregated parts. The level to which the Staff has taken unbundling is not necessary to foster competition in the local exchange market. Therefore the risks such atomistic unbundling sets loose outweighs any benefits.

Also, I believe that the majority is incorrect in its view that SWBT should be bound to contract provisions to which it "agreed" to combine network elements for AT&T.

On page 21 of the Report and Order, the majority states:

The Commission finds that SWBT is bound by this contractual language because the Eighth Circuit's recent ruling in Iowa Utilities Bd. has not made SWBT's and AT&T's contract provisions illegal. The decision simply vacated FCC rules which required that ILECs combine elements; it did not prevent ILECs from volunteering to combine such elements. Also, the Commission concurs with the Special Master's reasoning on Issues 3 and 4 related to parity. The Commission finds that AT&T's proposed language should be adopted for Issues 3, 4, 7, 10, 14b and 16.

My reading of Section 251 (c)(3), the Eighth Circuit decision and my understanding of the facts forces me to dissent from the findings within this paragraph.

I read Section 251(c)(3), to require that the network elements be sold only on an unbundled basis. First of all, the subsection is entitled "unbundled access" and is listed as one of the additional duties of the incumbent local exchange carrier. In the first sentence, the section states that it is a "duty" to provide nondiscriminatory access to network elements on a "unbundled basis." The first part of the next sentence states that the incumbent "shall [emphasis added] provide such unbundled network elements." That's what the incumbent has to provide: unbundled network elements. The second part, or end of the sentence tells, the incumbent how it is to provide unbundled network elements: "... in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service."

Therefore, my reading of Section 251(c)(3) leads me to believe that: 1) the incumbent has to provide unbundled network elements; 2) it has to do it in a way that lets the competitors combine them so they can provide telecommunications service; and 3) it is the competitors that will be doing the combining.

My reading of the Eighth Circuit decision leads me to a very different conclusion than that drawn by the majority. Earlier this year, the Eight Circuit in Iowa Utilities Board v. FCC, 120 F.3d 753 (July 18, 1997 and amended October 14, 1997) vacated FCC rule, 47 C.F.R. Section 51.315. As the majority stated, the Court ruling vacated the FCC rule which required that the incumbent local exchange carrier (ILEC) to combine network elements. However, what is not noted, is why the Court vacated the rule. The reason the Court vacated 47 C.F.R. Section 51.315 is the exact reason I must dissent from the majority's finding that the contract provisions are legal.

In vacating the FCC rule, the Court stated that the rule was contrary to the language of Section 251(c)(3). In explaining its perception of this section, the Court stated:

Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on a unbundled (as opposed) to a combined basis. Stated another way, Section 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combi-

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nation of two or more elements) in order to offer competitive telecommunications services. (Emphasis Added) 120 F.3d 753, 813 (as amended on October 14, 1997)

This view of Section 251(c)(3) is why the Court said that “[d]espite the Commission’s arguments, the plain meaning of the Act indicates the requesting carriers will combine the unbundled elements themselves. . .” Ibid; Emphasis Added.

The Court interpreted Section 251(c)(3) to require competitive local exchange carriers (CLECs) to do the combining themselves. The Court interpreted the section to only allow purchases of an incumbent’s network elements on an unbundled basis. It went so far as to state that:

To permit acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent’s telecommunications retail services for resale on the other. Ibid.

The Court then stated:

Accordingly, the Commission’s rule, 47 C.F.R. Section 51.315(b) is contrary to Section 251(c)(3) because the rule would permit the new entrant access to the incumbent ILEC’s network elements on a bundled rather than unbundled basis. Ibid; Emphasis Added.

Clearly, the Court did not believe that an ILEC could offer combined network elements. Therefore, it concluded and ruled that a ILEC could not be “forced” to do something that was impermissible for it to do in the first place. Stated another way, an ILEC cannot be forced to combine its network elements because a CLEC is supposed to do that itself. An ILEC cannot even agree to, or in this case be forced to, do the combining because network elements must be sold on an unbundled basis and a CLEC is supposed to do the combining itself.

Even if the Court is reversed and told it is mistaken that network elements must be sold on an unbundled basis and that CLECs must do the combining thereby making it impermissible for an ILEC to even agree to do the combining, my understanding of the facts is that there has been no such agreement.

In its response to the recommendations of the Special Master filed on November 26, 1997, SWBT outlined the facts that caused it to submit to the terms we gave them. We mandated certain provisions when we directed SWBT to submit an agreement that kept within the language of our Orders dated December 11, 1996, July 31, 1997 and October 2, 1997. Moreover, the “agreements” were made under the shadow of a FCC rule that has now been vacated. Any agreement that SWBT made to combine elements for AT&T was not a voluntary agreement but “voluntary” compliance to our directives and FCC rules. Therefore, I must disagree from the majority’s position that SWBT “agreed” to these provisions. Ultimately, whether SWBT agreed to do the combining or was forced to, those provisions should be voided and the majority should have rejected AT&T’s proposed language for Issues 3, 4, 7, 10, 14b and 16.

Our implementation of unbundling network elements also concerns me because of our pricing strategy. Our current process of pricing network elements is one in which we may leave the incumbent without significant revenues to properly maintain the network. Historically, bundling has allowed LECs to spread costs associated with network elements over all the elements, thereby allowing some elements to be overpriced and others to be underpriced. For example, even given the deep discounts on business circuits, our process did not take into consideration that the prices on such circuits were super-inflated over costs to begin with. They were super-inflated with regulatory approval. The wide regulatory margins that our process seemed so intent on removing were, in fact, the incumbent's source of revenue to maintain the network. These margins were permitted by regulators in pursuit of social policies. Without a sufficient level of revenue, the network suffers. The decline of the network does not just mean losses for the incumbent, but also for the competitors who depend on the local network to terminate their traffic.

A declining network means unreliable service which can create heavy losses to businesses, individuals and ultimately a lowering of the standard of living we hoped would belong to all Missourians. I believe that competitors would be given the help they really need if we, as regulators, simply give them deeper discounts on high margin elements while allowing smaller or no discounts on products that are priced below costs.

I am disconcerted that despite all of the information the incumbent provided on its costs, we arrived at rates that will likely not allow SWBT to maintain its network.

I recall the affidavit of SWBT employee, William Bailey, expressing the incumbent's concerns. Mr. Bailey stated as follows:

The proposed rates do not cover SWBT's embedded costs which reflect the actual cost of operating the network as it exists today. Nor do the rates cover SWBT's forward-looking TELRIC costs which themselves do not permit recovery of SWBT's actual or embedded costs. A company which cannot cover its costs of doing business, either actual or forward-looking, does not have the incentive to continue to maintain a modern and high quality network.

Like Mr. Bailey, I am concerned that the Commission's adopted rates will have a significant and negative effect on the incentive and ability of SWBT to continue to invest in its network in Missouri. I share his concern that a failure to use actual costs could force SWBT to not recover millions of dollars every year. SWBT's documentation showed these unrecovered costs could be as high as 335 million dollars a year. While I believe that his dollar figure is exaggerated and while I do not want my comments construed as an endorsement for this amount, the point that SWBT was trying to make when it offered this figure is quite valid.

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Such a shortfall is not a “Bell” issue. It is an issue of securing the communications network of this state and ensuring the continued welfare of its citizens who depend on that network. To put SWBT in a position to lose the millions of dollars that it needs to maintain its network is to “take” its network. Such a taking is not a promotion of the kind of competition envisioned by the Act but instead risks of the most ruinous kind of competition.

It could be ruinous to an incumbent who cannot provide reliable service to its customers.

It could be ruinous to competitors dependent on the incumbent’s network for the termination of their traffic. Interruptions in service could be devastating to new entrants whose customers will probably be the least tolerant of disruptions in service. It could be ruinous for businesses whose lifeblood is their ability to communicate with customers, vendors, banks, and creditors. The effect on these businesses should be considered because they are customers themselves and provide jobs and tax revenues that are used to serve all Missourians. It could be ruinous to this state’s efforts to attract investments, businesses and people who have the skills that will help our economy grow. In this increasingly technological age, few will come to a state with a communications network that is inadequately maintained and is undependable. Finally, it could be ruinous on a very personal and private level for those individuals trying to make a living and trying to keep in touch with loved ones if they are connected to a network that is poorly maintained and experiencing disinvestment.

My concerns should not be regarded as exaggerated to make a point. But they should be carefully considered as coming from someone, who like my esteemed colleagues, is looking to the future and from someone who strongly believes that the underpinning of that future is a properly maintained, modern and reliable network.

We as Commissioners would have been greatly aided in these very complicated matters if we had been able to give ourselves more time to think and had been willing to give the parties more time to speak. Staff and the Commissioners labored under reasonably short time frames. While I acknowledge such time limits were externally imposed by the FCC, I suspect that such time limitations often left us without time to engage in the level of review and reflection we thought was required. But we did not help ourselves as we could have. Unbundled network element pricing is extremely complex requiring extensive technical knowledge and economic insight. The Commission could have been aided in this area by allowing the parties to present their cases in the context of evidentiary hearings. The parties did request such an opportunity and rightfully expressed disappointment when their requests were denied. The benefit of evidentiary hearings would have been enjoyed by everyone. Certainly such hearings would have supplemented the Staff’s and the Commissioners’ knowledge about network elements and in turn increased our ability to make reasoned decisions based on technical insight and economic foresight. Again, I want to go on the record to urge my esteemed colleagues to review their interpretation of

the applicable arbitration statutes. Given the stakes, I believe it is in the public interest to provide the parties with opportunities to speak that are as full and extensive as possible.

I believe our worst mistake, in this very high stakes endeavor, was to engage in pricing and unbundling strategies that do not reflect preservation of the network as a priority. Without such a priority, it will become increasingly difficult to implement the letter and the spirit of the Telecommunications Act of 1996. In the long run, we may find that as regulators we have failed in our duty to protect the public interest because we have failed to protect the public network. It is this concern of mine that forces me to dissent from the majority. It is my hope that future proceedings will incorporate the concerns I have expressed herein so that we can truly fulfill our mission to provide competition in the telecommunications industry and provide Missourians the full benefits of such competition.

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**In the Matter of AT&T Communications of the Southwest, Inc.'s  
Petition for Second Compulsory Arbitration Pursuant to Section  
252(b) of the Telecommunications Act of 1996 to Establish an  
Interconnection Agreement with Southwestern Bell Telephone  
Company.**

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*Case No. TO-98-115  
Decided March 19, 1998*

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**Telecommunications §38.** The Commission approved the interconnection agreement filed by Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. because the agreement does not discriminate against telecommunications carriers not a party to the agreement and is not against the public interest.

**ORDER APPROVING AGREEMENT FILED IN COMPLIANCE WITH  
COMMISSION ORDER**

On December 23, 1997, the Commission entered its Report and Order, resolving the issues presented by the parties for arbitration. This case was established for the purpose of addressing the issues that were not previously arbitrated in Case No. TO-97-40. The Commission's December 23 Report and Order specified language to be used by Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest (AT&T) to resolve the interconnection issues remaining between them, ordered SWBT and AT&T to submit an interconnection agreement implementing this language and the language which they had previously agreed to by February 1, 1998, and set interim rates for certain services to be provided to AT&T by SWBT. The Report and Order also determined a procedure for the establishment of permanent rates.



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On December 29, 1997, SWBT filed its objections to the process for establishing permanent rates, and on December 31, SWBT filed an Application for Rehearing of the Commission's December 23 Report and Order. SWBT's objections and application for rehearing are under consideration and will be addressed by the Commission by separate order or orders.

AT&T filed a motion on January 27, requesting an extension of time for approximately one month to comply with Ordered Paragraph 3 of the Commission's December 23 Report and Order. According to AT&T, despite diligent efforts on the part of SWBT and AT&T, the parties had not been able to devote sufficient resources to comply with the Commission's February 1 filing deadline because their subject matter experts had obligations to meet in other state arbitration proceedings. No party opposed AT&T's motion.

On March 4, SWBT and AT&T filed an interconnection agreement that had been executed by the parties on February 27 (Agreement) to implement the Report and Order. Pursuant to Ordered Paragraph 3 of the Commission's December 23 Report and Order, the Agreement is supposed to include: 1) all language implementing the terms agreed to by the parties and not submitted for arbitration, and 2) all language that the Commission ordered the parties to include to resolve the issues submitted for arbitration. The Commission reserved its ruling on any terms that were not arbitrated until the complete agreement was filed so that it could review the agreement in its entirety for compliance with the Federal Telecommunications Act of 1996 (the Act), 47 U.S.C. §151 *et seq.* The Commission directed Staff to file a Memorandum recommending approval or rejection of the Agreement.

Staff filed a Memorandum on March 17, recommending approval of the Agreement. Staff stated that the agreement will take effect upon Commission approval and will expire after a three-year initial term. The agreement may be extended twice for one-year periods unless written notice is given. The Agreement covers terms for the resale of all services except operator services at a 19.2 percent discount from SWBT's retail prices. Operator services are to be discounted 13.9 percent from SWBT's wholesale prices. Some of the prices established for unbundled network elements (UNEs) are the rates that the Commission ordered in Case No. TO-97-40. The Agreement provides for the remaining prices, established on an interim basis in the Commission's December 23 Report and Order in this case, to be reviewed by the Arbitration Advisory Staff, with a true-up to follow the establishment of permanent rates by the Commission.

The Agreement also specifies terms for network interconnection architecture and compensation, collocation, rights-of-way, conduits, pole attachments, interim number portability, 911/E911, network security and law enforcement, failures to meet performance criteria, exchange of directory listing information, white pages, clearing-house, numbering, facilities-based directory assistance and facilities-based operator services.

The Commission finds that AT&T's motion for additional time to file a signed interconnection agreement should be granted. The Commission further finds that the Agreement filed with the Commission on March 4 should be approved. The standard for deciding arbitration cases was set forth in the Commission's December 23 Report and Order, and the Commission previously determined that the arbitrated portions of the agreement meet those standards. Staff stated in its Memorandum that there were instances where the parties did not implement the exact determination set forth in the Commission's prior arbitration orders in this case and in Case No. TO-97-40, but in each of those instances the parties had reached agreement and included language in the Agreement to implement their modifications.

When parties submit a voluntary agreement to a state commission for approval, the agreement may only be approved if it 1) does not discriminate against telecommunications carriers not a party to the agreement and 2) is not against the public interest. See § 252 (e)(2)(A) of the Act. The Commission has reviewed the Agreement between SWBT and AT&T, and the Staff's recommendation, and determined that the Agreement complies with the Act.

*IT IS THEREFORE ORDERED:*

1. That the interconnection agreement filed by Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. pursuant to the Commission's Report and Order of December 23, 1997, is approved.

2. That this order shall become effective on March 30, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur. Crumpton, C., dissents.  
Randles, Regulatory Law Judge

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**In the Matter of the Application of United Telephone Company of Missouri d/b/a Sprint for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. Section 214(E)(2) of the Telecommunications Act of 1996.**

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*Case No. TO-98-205*

*Decided December 23, 1997*

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**Telecommunications §§14, 23.** The Commission approved the Stipulation and Agreement and designated Sprint as an eligible telecommunications carrier for purposes of federal universal service support. The Commission found exceptional circumstances exist which prevent Sprint from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission found that Sprint should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.

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ORDER APPROVING STIPULATION AND DESIGNATION OF ELIGIBLE  
TELECOMMUNICATIONS CARRIER

Sprint Missouri, Inc. (Sprint)<sup>1</sup> filed on November 14, 1997, an Application for Designation as Eligible Telecommunications Carrier Pursuant to Section 254 of the Telecommunications Act of 1996. Sprint, an incumbent local exchange carrier, asked the Commission to designate it a telecommunications carrier eligible to receive federal universal service support under 47 C.F.R. § 54.201(d). Beginning on January 1, 1998, any carrier that is eligible for universal service support must provide the services that are supported by federal universal support mechanisms as described in 47 C.F.R. § 101 using its own facilities at least in part. The carrier must also advertise the availability of those services and the charges for them using media of general distribution. 47 C.F.R. § 54.201(d). Where a telecommunications carrier is otherwise eligible for universal service support it may request additional time to complete the network upgrades necessary to provide single-party service, access to enhanced 911 service, or toll limitation. 47 C.F.R. § 54.101(c). The Commission may grant a request for additional time only on a showing of exceptional circumstances and for the period of time the Commission deems necessary to complete the upgrades. *Id.* Because funding will become available under these conditions in January of 1998, Sprint has asked the Commission to make a determination of its eligibility no later than December 31, 1997.

The Commission issued its order directing interested parties to file applications to intervene by December 8. MCI Telecommunications Corporation (MCI) and MCImetro Access Transmission Services, Inc. (MCImetro) filed a joint application to intervene on December 8, which was granted on December 11. MCI and MCImetro stated that, if Sprint is not willing to make certain specified commitments that were included in the stipulation in Case No. TO-98-49, the Commission should conduct a hearing where Sprint should explain its position.

The Commission directed Sprint to file a pleading addressing the concerns raised in the application for intervention by December 17. Sprint filed a response on December 15 stating that all the commitments demanded by MCI and MCImetro are alleged and verified in its application. Sprint also stated that the Commission could rule on its application without a stipulation between the parties.

The parties filed a Stipulation and Agreement (Stipulation) on December 22 which is included with this order as Attachment 1. The Stipulation provides for Sprint to be designated an eligible telecommunications carrier for purposes of federal universal service support, and to be granted additional time to provide single-party service in all exchanges and toll limitation.

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<sup>1</sup> Formerly United Telephone Company of Missouri d/b/a Sprint.

The parties agreed that Sprint provides the following services:

- (1) Voice grade access to the public switched network;
- (2) Local usage;
- (3) Dual tone multifrequency signaling or its functional equivalent;
- (4) Access to emergency services;
- (5) Access to operator services;
- (6) Access to interexchange services; and
- (7) Access to directory assistance.

The parties stipulated that Sprint is not capable at the present time of providing toll limitation for qualifying low-income customers, as that service is defined by the Federal Communications Commission (FCC) because it does not have the technical ability to provide toll control. Providing toll control will require extensive revisions to Sprint's billing system and the establishment of totally new information exchanges among carriers. The parties agreed that exceptional circumstances prevent Sprint from presently providing this service and that the Commission should grant additional time to implement it pursuant to 47 C.F.R. § 54.101(c). The parties agreed that the Sprint will either provide toll limitation, including toll control, on or before December 31, 1999. In the event that Sprint will not be able to meet that deadline, it will file a request with the Commission for additional time by November 1, 1999, and a report setting out the current status of the technology. Sprint will also provide a report regarding the status of the technology for toll control and the progress being made toward its implementation on December 31, 1998, to the Commission and the parties to this case.

The parties stipulated that exceptional circumstances prevent Sprint from providing single-party service to some of its customers. Sprint is currently in the process of upgrading customers to single-party service pursuant to a modernization plan approved by the Commission. in Case No. TR-93-181. The plan calls for Sprint to provide single party service to all of its Missouri customers by December 31, 2000. Sprint requests an extension of time until that date to provide ubiquitous single party service.

The parties agreed that Sprint qualifies for designation as an "eligible telecommunications carrier" under the provisions of 47 C.F.R. § 54.201(d) because, throughout its service area, with the exceptions noted above, it offers the services to be supported by federal universal service support using its own facilities. In addition, Sprint advertises the availability of these services using directories, public record tariffs, and bill messages. Sprint has agreed to comply with any additional advertising in media of general distribution that the Commission deems appropriate to meet the requirements of 47 C.F.R. § 54.201(d)(2).

Sprint agreed that, if it does not already have tariff provisions regarding Lifeline and Link Up services as defined in 47 C.F.R. 54.501 it will file revisions to its existing tariffs before December 31 so the services will be available to customer by January 1, 1998, or as soon as approved.

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The parties recommended that the Commission issue an order to be effective prior to December 31, 1997, designating Sprint as a telecommunications carrier eligible to receive federal universal service support, granting the requested additional time to provide ubiquitous single-party service and toll limitation, and designating Sprint's service area to be equivalent to its "study area" unless and until determined otherwise pursuant to 47 C.F.R. § 54.207(b). The parties also recommended that the Commission specifically direct Sprint to file revised tariffs for Lifeline and Link Up service no later than December 31, 1997.

The Commission has reviewed the pleadings in the case and the Stipulation and Agreement of the parties and finds that the Stipulation should be approved in resolution of all issues and Sprint shall be designated an eligible telecommunications carrier for purposes of federal universal service support. The Commission finds that exceptional circumstances exist which prevent the Sprint from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission finds that Sprint should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the parties on December 22, 1997 is approved in resolution of the issues.
2. That Sprint Missouri, Inc. is designated an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§ 214(e) and 254(e). Sprint's Missouri service area shall be its service area for purposes of federal universal service support. Sprint's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. § 54.207(b).
3. That Sprint Missouri, Inc. is granted an extension of time until December 31, 1999, to provide toll limitation as defined by 47 C.F.R. § 54.400. Sprint will file a report with the Commission no later than December 31, 1998, regarding the status of the technology and progress being made toward implementing toll limitation. If exceptional circumstances continue to prevent compliance by the extended deadline, the Sprint will file a request for additional time no later than November 1, 1999, accompanied by a report on the status of the technology as of that date.
4. That Sprint Missouri, Inc. is granted an extension of time until December 31, 2000, to provide single party service to all of its Missouri customers.
5. That, to the extent necessary for implementation of the services, Sprint Missouri, Inc. shall file tariff revisions for Commission approval for the provision of Lifeline and Link Up services no later than December 31, 1997, with a 30-day effective date.
6. That this order shall become effective on December 31, 1997.
7. That this case will be closed on January 2, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Wickliffe, Deputy Chief Regulatory Law Judge

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EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, it is available in the official case files of the Public Service Commission.

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**In the Matter of the Application of Southwestern Bell Telephone Company for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. Sections 214(e) and 254.**

*Case No. TO-98-191  
Decided December 23, 1997*

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**Telecommunications §§14, 23.** The Commission approved the Stipulation and Agreement and designated SWBT as an eligible telecommunications carrier for purposes of federal universal service support. The Commission found exceptional circumstances exist which prevent SWBT from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission found that SWBT should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.

**ORDER APPROVING STIPULATION AND DESIGNATION OF ELIGIBLE  
TELECOMMUNICATIONS CARRIER**

Southwestern Bell Telephone Company (SWBT) filed on November 7, 1997, an Application for Designation as Eligible Telecommunications Carrier Pursuant to Section 254 of the Telecommunications Act of 1996. SWBT, an incumbent local exchange carrier, asked the Commission to designate it a telecommunications carrier eligible to receive federal universal service support under 47 C.F.R. § 54.201(d). Beginning on January 1, 1998, any carrier that is eligible for universal service support must provide the services that are supported by federal universal support mechanisms as described in 47 C.F.R. § 101 using its own facilities at least in part. The carrier must also advertise the availability of those services and the charges for them using media of general distribution. 47 C.F.R. § 54.201(d). Where a telecommunications carrier is otherwise eligible for universal service support it may request additional time to complete the network upgrades necessary to provide single-party service, access to enhanced 911 service, or toll limitation. 47 C.F.R. § 54.101(c). The Commission may grant a request for additional time only on a showing of exceptional circumstances and for the period of time the Commission deems necessary to complete the upgrades. Id. Because funding will become available under these conditions in January of 1998, SWBT has asked the Commission to make a determination of its eligibility no later than December 31, 1997.

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The Commission issued its order directing interested parties to file applications to intervene by November 26. MCI Telecommunications Corporation (MCI) and MCImetro Access Transmission Services, Inc. (MCImetro) filed a joint application to intervene on November 21, but failed to take a position in support of, or in opposition to, the application as required by 4 CSR 240-2.075(2). The Commission directed MCI and MCImetro to file a statement of position or a request for hearing. The companies' position statement was filed on December 8. MCI and MCImetro stated that, if SWBT is not willing to make certain specified commitments that were included in the stipulation in Case No. TO-98-49, the Commission should conduct a hearing where SWBT should explain its position.

The Commission granted intervention to MCI and MCImetro on December 11 and directed SWBT to file a pleading addressing the concerns raised in the application for intervention by December 17. SWBT filed its response on December 17 stating that it would be willing to address the issues raised by MCI and MCImetro in an appropriate stipulation.

The parties filed a Stipulation and Agreement (Stipulation) on December 22 which is included with this order as Attachment 1. The Stipulation provides for SWBT to be designated an eligible telecommunications carrier for purposes of federal universal service support, and to be granted additional time to provide toll limitation.

The parties agreed that SWBT provides the following services:

- (1) Voice grade access to the public switched network;
- (2) Local usage;
- (3) Dual tone multifrequency signaling or its functional equivalent;
- (4) Single-party service or its functional equivalent;
- (5) Access to emergency services;
- (6) Access to operator services;
- (7) Access to interexchange services; and
- (8) Access to directory assistance.

The parties stipulated that SWBT is not capable at the present time of providing toll limitation for qualifying low-income customers, as that service is defined by the Federal Communications Commission (FCC) because it does not have the technical ability to provide toll control. Providing toll control will require extensive revisions to SWBT's billing system and the establishment of totally new information exchanges among carriers. The parties agreed that exceptional circumstances prevent SWBT from presently providing this service and that the Commission should grant additional time to implement it pursuant to 47 C.F.R. § 54.101(c). The parties agreed that the SWBT will either provide toll limitation, including toll control, on or before December 31, 1999. In the event that SWBT will not be able to meet that deadline, it will file a request with the Commission for additional time by November 1, 1999, and a report setting out the current status of the technology. SWBT agreed to serve a

copy of these documents on each of the parties to this case. SWBT will also provide reports regarding the status of the technology for toll control and the progress being made toward its implementation on or before December 31, 1998, to the Commission and the parties to this case.

SWBT agreed that, if it does not already have tariff provisions regarding Lifeline and Link Up services as defined in 47 C.F.R. 54.501 it will file revisions to its existing tariffs before December 31 so the services will be available to customers by January 1, 1998, or as soon as approved.

The parties agreed that SWBT qualifies for designation as an "eligible telecommunications carrier" under the provisions of 47 C.F.R. § 54.201(d) because, throughout its service area, with the exception noted above, it offers the services to be supported by federal universal service support using its own facilities. In addition, SWBT advertises the availability of these services using directories, public record tariffs, and bill messages. SWBT has agreed to comply with any additional advertising in media of general distribution that the Commission deems appropriate to meet the requirements of 47 C.F.R. § 54.201(d)(2).

The parties recommended that the Commission issue an order to be effective prior to December 31, 1997, designating SWBT as a telecommunications carrier eligible to receive federal universal service support, granting the requested additional time to provide toll limitation, and designating SWBT's service area to be equivalent to its "study area" unless and until determined otherwise pursuant to 47 C.F.R. § 54.207(b). The parties also recommended that the Commission specifically direct SWBT to file revised tariffs for Lifeline and Link Up service no later than December 31, 1997.

The Commission has reviewed the pleadings in the case and the Stipulation and Agreement of the parties and finds that the Stipulation should be approved in resolution of all issues and SWBT shall be designated an eligible telecommunications carrier for purposes of federal universal service support. The Commission finds that exceptional circumstances exist which prevent the SWBT from providing toll limitation and that the requested extension of time shall be granted. The Commission finds that SWBT should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the parties on December 22, 1997, is approved in resolution of the issues.
2. That Southwestern Bell Telephone Company is designated an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§ 214(e) and 254(e). SWBT's certificated Missouri service area shall be its service area for purposes of federal universal service support. SWBT's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. § 54.207(b).
3. That Southwestern Bell Telephone Company is granted an extension of time until December 31, 1999, to provide toll limitation as defined by 47 C.F.R. § 54.400. SWBT will file a report with the Commission no later than December 31, 1998, regarding the status of



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the technology and progress being made toward implementing toll limitation. If exceptional circumstances continue to prevent compliance by the extended deadline, then SWBT will file a request for additional time no later than November 1, 1999, accompanied by a report on the status of the technology as of that date.

4. That, to the extent necessary for implementation of the services, Southwestern Bell Telephone Company shall file tariff revisions for Commission approval for the provision of Lifeline and Link Up services no later than December 31, 1997, with a 30-day effective date.
5. That this order shall become effective on December 31, 1997.
6. That this case will be closed on January 2, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Wickliffe, Deputy Chief Regulatory Law Judge

EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Development of a Forward-looking Economic  
Cost Study for Purposes of Determining Federal Universal  
Service Support in the State of Missouri.**

*Case No. TO-98-64*

*Decided December 23, 1997*

**Telecommunications §§6, 13.** The Commission approved an agreement not to develop a Missouri state-specific forward-looking economic cost study for purposes of determining federal universal service support; and instead, the Commission decided to adopt the forward-looking economic cost study which will be developed by the Federal Communications Commission (FCC).

**ORDER APPROVING STIPULATION AND AGREEMENT AND ADOPTING  
THE FCC'S FORWARD-LOOKING COST METHODOLOGY**

The Commission established this case by order on August 29, 1997, for the purpose of investigating the development of a forward-looking economic cost study for use in determining federal universal service support in Missouri. The Commission gave notice to all telecommunications companies and set the case for an early prehearing conference. The Commission granted intervention to the following entities:

MCITelecommunications Corporation and MCImetro  
Access Transmission Services, Inc.;  
Brooks Fiber Communications of Missouri, Inc.;  
GTE Midwest Incorporated;

TCG St. Louis;  
the Small Telephone Company Group<sup>1</sup>;  
Southwestern Bell Telephone Company;  
AT&T Communications of the Southwest, Inc.;  
COMPTEL-MO;  
Kansas City Fiber Network, L.P.;  
CMT Partners;  
Ameritech Communications International, Inc.;  
Missouri State Library; and

an Educators' Group comprised of Missouri National Education Association, Missouri Association of School Administrators, Missouri State Teachers Association, Missouri School Boards Association, Cooperating School District of Greater St. Louis, Cass County Reorganized School District R-IX of Harrisonville, Missouri, Reorganized School District R-VI of Greene County, Missouri, at Strafford, Blue Eye R-5 School District of Stone County, Missouri, at Blue Eye, and Missouri Federation of Teachers and School Related Personnel.

The parties met in a prehearing conference on September 10, and filed a Stipulation and Agreement and Alternative Procedural Schedule on September 26, recommending that the Commission not develop a Missouri state-specific forward-looking economic cost study for purposes of determining federal universal service support. Rather, the parties stated that the Commission should adopt the forward-looking economic cost study which will be developed by the Federal Communications Commission (FCC). Because not all of the parties were signatories to the Stipulation and Agreement, the Commission issued a notice permitting time for those nonsignatory parties to request a hearing. No party made such a request and, therefore, the Stipulation and Agreement filed in this case will be treated as a unanimous stipulation in accordance with 4 CSR 240-2.115(3).

The Commission conducted a stipulation hearing on November 17 for the purpose of allowing the parties to make presentations in favor of the Stipulation and to respond to Commission questions.

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<sup>1</sup> ALLTEL Missouri, Inc., BPS Telephone Company, Bourbeuse Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Rock Port Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

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Discussion:

In the text of the Stipulation, and at the November 17 hearing, the parties offered several reasons for the recommendation to adopt the FCC's cost methodology. First, the parties pointed out that state models must be approved and submitted to the FCC by February 6, 1998. It would take a significant amount of time to choose and refine a model and develop state-specific inputs. Therefore, the Commission would be working under serious time pressure and would not be able to develop the most accurate and appropriate cost model. This lack of time could have serious consequences, especially since the FCC has ordered that any study proposed by a state for use in determining federal universal service support must also be used by that state in determining intrastate universal service support levels pursuant to 47 U.S.C. § 254(e).<sup>2</sup>

The parties also pointed out that the states will have the opportunity to file comments on the forward-looking cost model being developed by the FCC. The FCC's model will not be completed until August 31, 1998.

Finally, the parties argued that the adoption of a state-specific cost model creates a risk that Missouri telecommunications companies will receive less support than they might using an FCC model, because the Missouri model could yield costs substantially less than those derived from the FCC model. On the other hand, if the Commission-approved model were to yield results significantly above those derived from the FCC model, it would be unlikely that the FCC would approve Missouri's model.

Findings and Conclusions:

The Commission has reviewed the Stipulation of the parties, the transcript of the hearing, and the applicable law and finds that the stipulation should be approved in resolution of the issues.

The FCC directed states wishing to submit proposed cost studies for purposes of federal universal service support to file them by February 6, 1998.<sup>3</sup> States electing not to submit proposals have the option of adopting the FCC's forward-looking cost methodology to be completed in 1998.<sup>4</sup> The Commission finds that the complexity and contentiousness of the costing model issue make it unlikely that this Commission could develop an acceptable model within any reasonable time frame, and certainly not by the February, 1998 deadline currently in effect. The Commission is also concerned that its options for Missouri universal service fund implementation not be foreclosed by approving a costing model for the federal fund.

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<sup>2</sup>In the Matter of Federal-State Joint Board on Universal Service, FCC 97-157 (released May 8, 1997), § 251.

<sup>3</sup> Id., at 248.

<sup>4</sup> Id., at 249.

Missouri law permits the Commission to adopt a stipulation entered into by the parties in resolution of a contested case. § 536.060 RSMo Supp. 1996. The Commission finds that the Stipulation filed in this case presents a reasonable resolution of the issues that is in the public interest and it shall be approved.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation of the parties filed on September 26, 1997, is adopted in resolution of the issues.
2. That the Staff of the Commission will prepare comments for the purpose of providing input to the development of the Federal Communications Commission's forward-looking cost methodology in accordance with FCC 97-57, paragraph 249.
3. That this order shall become effective on January 2, 1998.
4. That this case will be closed on January 6, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Wickliffe, Deputy Chief Regulatory Law Judge

EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of the Designation of GTE Midwest Incorporated as  
an Eligible Telecommunications Carrier (Etel) in the State of  
Missouri per FCC Universal Service Report and Order No. 96-  
45.**

*Case No. TO-98-188  
Decided December 23, 1997*

**Telecommunications §§6, 23.** The Commission approved a Stipulation and Agreement designating GTE Midwest Incorporated as an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§ 214(e) and 254(e). The Commission found that GTE's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. § 54.207(b).

**ORDER APPROVING STIPULATION AND DESIGNATION OF ELIGIBLE  
TELECOMMUNICATIONS CARRIER**

GTE Midwest Incorporated (GTE) filed on November 5, 1997, an Application for Designation as Eligible Telecommunications Carrier Pursuant to Section 254 of the Telecommunications Act of 1996. GTE, an incumbent local exchange carrier, asked the Commission to designate it a telecommunications carrier eligible to receive federal universal service support under 47 C.F.R. § 54.201(d). Beginning on January 1, 1998,

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any carrier that is eligible for universal service support must provide the services that are supported by federal universal support mechanisms as described in 47 C.F.R. § 101 using its own facilities at least in part. The carrier must also advertise the availability of those services and the charges for them using media of general distribution. 47 C.F.R. § 54.201(d). Where a telecommunications carrier is otherwise eligible for universal service support it may request additional time to complete the network upgrades necessary to provide single-party service, access to enhanced 911 service, or toll limitation. 47 C.F.R. § 54.101(c). The Commission may grant a request for additional time only on a showing of exceptional circumstances and for the period of time the Commission deems necessary to complete the upgrades. Id. Because funding will become available under these conditions in January of 1998, GTE has asked the Commission to make a determination of its eligibility no later than December 31, 1997.

The Commission issued its order directing interested parties to file applications to intervene by November 26. MCI Telecommunications Corporation (MCI) and MCImetro Access Transmission Services, Inc. (MCImetro) filed a joint application to intervene on November 21, but failed to take a position in support of, or in opposition to, the application as required by 4 CSR 240-2.075(2). The Commission directed MCI and MCImetro to file a statement of position or a request for hearing. The companies' position statement was filed on December 8. MCI and MCImetro stated that, if GTE is not willing to make certain specified commitments that were included in the stipulation in Case No. TO-98-49, the Commission should conduct a hearing where GTE should explain its position.

The Commission granted intervention to MCI and MCImetro on December 11 and directed GTE to file a pleading addressing the concerns raised in the application for intervention by December 17. GTE filed a response making the commitments requested by MCI and MCImetro.

The parties filed a Stipulation and Agreement (Stipulation) on December 22 which is included with this order as Attachment 1. The Stipulation provides for GTE to be designated an eligible telecommunications carrier for purposes of federal universal service support, and to be granted additional time to provide single-party service in all exchanges and toll limitation.

The parties agreed that GTE provides the following services:

- (1) Voice grade access to the public switched network;
- (2) Local usage;
- (3) Dual tone multifrequency signaling or its functional equivalent;
- (4) Access to emergency services;
- (5) Access to operator services;
- (6) Access to interexchange services; and
- (7) Access to directory assistance.

The parties stipulated that GTE is not capable at the present time of providing toll limitation for qualifying low-income customers, as that service is defined by the Federal Communications Commission (FCC) because it does not have the technical

ability to provide toll control. Providing toll control will require extensive revisions to GTE's billing system and the establishment of totally new information exchanges among carriers. The parties agreed that exceptional circumstances prevent GTE from presently providing this service and that the Commission should grant additional time to implement it pursuant to 47 C.F.R. § 54.101(c). The parties agreed that the GTE will either provide toll limitation, including toll control, on or before December 31, 1999. In the event that GTE will not be able to meet that deadline, it will file a request with the Commission for additional time by November 1, 1999, and a report setting out the current status of the technology. GTE agreed to serve a copy of these documents on each of the parties to this case. GTE will also provide reports regarding the status of the technology for toll control and the progress being made toward its implementation on or before December 31, 1998, to the Commission and the parties to this case.

The parties stipulated that exceptional circumstances prevent GTE from providing single-party service to approximately 4200 of its customers. GTE is subject to a modernization plan that was approved by the Commission in Case No. TC-96-270. The plan calls for GTE to provide single party service to all of its Missouri customers by December 31, 1998. GTE requests an extension of time until that date to provide ubiquitous single party service. The parties to this case are agreed that GTE should be granted additional time up to December 31, 1998, to provide single-party service to all of its customers pursuant to 47 C.F.R. § 54.101(c).

GTE filed tariff revisions regarding Lifeline and Link Up services to qualifying low-income customers on November 24.

The parties agreed that GTE qualifies for designation as an "eligible telecommunications carrier" under the provisions of 47 C.F.R. § 54.201(d) because, throughout its service area, with the exceptions noted above, it offers the services to be supported by federal universal service support using its own facilities. In addition, GTE advertises the availability of these services using directories, public record tariffs, and bill messages. GTE has agreed to comply with any additional advertising in media of general distribution that the Commission deems appropriate to meet the requirements of 47 C.F.R. § 54.201(d)(2).

The parties recommended that the Commission issue an order to be effective prior to December 31, 1997, designating GTE as a telecommunications carrier eligible to receive federal universal service support, granting the requested additional time to provide single-party service and toll limitation, and designating GTE's service area to be equivalent to its "study area" unless and until determined otherwise pursuant to 47 C.F.R. § 54.207(b).

The Commission has reviewed the pleadings in the case and the Stipulation and Agreement of the parties and finds that the Stipulation should be approved in resolution of all issues and GTE shall be designated an eligible telecommunications carrier for purposes of federal universal service support. The Commission finds that

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exceptional circumstances exist which prevent the GTE from providing ubiquitous single-party service and toll limitation and that the requested extensions of time shall be granted.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the parties on December 22, 1997, is approved in resolution of the issues.
2. That GTE Midwest Incorporated is designated an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§ 214(e) and 254(e). GTE's certificated Missouri service area shall be its service area for purposes of federal universal service support. GTE's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. § 54.207(b).
3. That GTE Midwest Incorporated is granted an extension of time until December 31, 1998, to provide single-party service to all its Missouri customers.
4. That GTE Midwest Incorporated is granted an extension of time until December 31, 1999, to provide toll limitation as defined by 47 C.F.R. § 54.400. GTE will file a report with the Commission no later than December 31, 1998, regarding the status of the technology and progress being made toward implementing toll limitation. If exceptional circumstances continue to prevent compliance by the extended deadline, the GTE will file a request for additional time no later than November 1, 1999, accompanied by a report on the status of the technology as of that date.
5. That this order shall become effective on December 31, 1997.
6. That this case will be closed on January 2, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Wickliffe, Deputy Chief Regulatory Law Judge

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EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**In the Matter of an Investigation to Implement a Statewide Telecommunications Equipment Distribution Program for Individuals Unable to Use Traditional Telephone Equipment Due to Disability. \***

*Case No. TO-97-16*  
*Decided December 31, 1997*

**Telecommunications §24.** The Commission modified certain terms and conditions relating to the Adoptive Telephone Equipment Program. The Commission denied a request to establish an intermediate level of review because it may add confusion to the applicant and does not add efficiency to the process. The commission also eliminated the ability to "trade up" by applying vouchers.

ORDER CLARIFYING AND REVISING THE MISSOURI ADAPTIVE  
 TELEPHONE EQUIPMENT PROGRAM

The Missouri Public Service Commission (Commission) issued its Order Implementing Equipment Distribution Program for the Disabled on June 20, 1997. In that order the Commission renamed the program the "Adaptive Telephone Equipment Program" (ATEP). On September 3, the Staff of the Commission (Staff) filed its Motion to Revise Definition. Subsequently Staff asked to withdraw its September 3 motion and substitute its Motion to Revise the Adaptive Telephone Equipment Program, filed on October 22, in its stead. On November 6 Staff filed an attachment to its October 22 motion, which had been inadvertently omitted from its original filing.

Staff requests that the Commission issue an order which does the following:

- (1) revises the definition of "reasonable access to telephone service";
- (2) revises the definition of "traditional telephone equipment";
- (3) eliminates the ability of an applicant to "trade up" by applying a voucher against the cost of an upgraded, more expensive piece of equipment;
- (4) establishes an intermediate level of review in which Staff first reviews and makes a decision regarding an applicant's rejected application, with the Commission only reviewing those applications in which Staff agrees with the decision of the ATEP Program Administrator, and rejects the application;
- (5) replaces Carolyn Little, a representative from GTE Midwest Incorporated (GTE), on the ATEP Advisory Committee (ATEPAC), with Dave Evans, also from GTE; and
- (6) approves the bylaws of the ATEPAC.

Staff first asks that the Commission revise the definition of the phrase "reasonable access to telephone service." In conjunction with the ATEPAC, Staff

\*See pages 96 and 367, Volume 6 MPSC 3d for other orders in this case.



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recommends that the definition be "cost-effective adaptive telephone equipment that provides an eligible subscriber with connection to a basic telephone access line." This is a modification of the definition originally adopted by the Commission in its February 28 order. That definition is "service that enables an eligible subscriber to reach and use a basic telephone access line."

Staff contends that the original definition has caused confusion regarding the parameters of the ATEP program. The original definition appears to define a "service" rather than "access" to a service. In addition, the phrase "reach and use" has been misunderstood as applying to such things as wheelchairs, hearing aids, or other augmentative devices. The Commission agrees with Staff that the definition should be revised, but finds that the key focus of the phrase to be defined is on "access," while Staff's proposed definition focuses on "equipment." The Commission determines that Staff's proposed definition can be adopted if modified, as follows: "Reasonable access to telephone service is access which connects eligible subscribers to a basic telephone access line via cost-effective adaptive telephone equipment."

Further, Staff requests that the Commission also revise the definition of "traditional telephone equipment." The definition adopted in the Commission's February 28 order is "equipment costing less than \$50.00, exclusive of taxes, which enables users to reach and use a basic telephone access line." Staff proposes that the language "reach and use" be eliminated from the definition, and the language "connect to" be substituted instead. This change would make the definition consistent with Staff's proposed definition of "reasonable access to telephone service." The Commission agrees that Staff's proposed change is reasonable and appropriate, but finds that the definition needs further clarification in order to adequately convey to certifying persons or entities what is to be considered "traditional telephone equipment" under the ATEP program. The Commission will thus substitute the following definition for the definition previously adopted in its February 28 order: "Traditional telephone equipment is customer premises equipment (CPE) which connects users to a basic telephone access line and permits the two-way exchange of voice messages via audio signal transmission and reception, and via employment of a handset for transmission and reception of those audio signals, along with an audio notification system for incoming calls."

The Commission finds that it is not necessary to include the cost of the equipment as part of the definition. The original purpose was to indicate that the ATEP program would only provide equipment that cost more than \$50.00, exclusive of taxes. The Commission finds that this goal can be more effectively accomplished by simply stating that the ATEP program will purchase for eligible subscribers only those types of adaptive telephone equipment which cost more than \$50.00, exclusive of taxes. The Commission finds that the establishment of a \$50.00 threshold for the purchase of adaptive telephone equipment as a parameter of the ATEP program is consistent with the Commission's authority to ensure that the program is cost-effective. In addition,

the Commission finds that retaining the reference in the definition of traditional telephone equipment may cause confusion, since the Commission now has a separate definition for adaptive telephone equipment.

Additionally, Staff urges the Commission to eliminate the ability of an applicant to "trade up" by applying a voucher against the cost of an upgraded, more expensive piece of equipment. Staff contends that it would be administratively difficult to track refunds and credits of individual participants in the ATEP program, and that such a system would be extremely susceptible to fraud and abuse. The Commission notes that the present vendor contracts contain a provision in Section 3.3.3 which states as follows: "If requested by the voucher program client, the vendor should make available equipment costing more than the voucher allows or that provides additional features not described in the voucher so long as the voucher program client has indicated his or her willingness to pay the difference. Such cost differences shall not be billed to the state or otherwise paid by the state."

The Commission finds that the authorization for applicants to obtain upgraded equipment is contained in the current vendor contracts, and that elimination of this ability to "trade up" may require the termination of existing vendor contracts and the issuance of IFBs (Invitation For Bids) for new contracts. The Commission finds that it would not be efficient to terminate and re-bid the vendor contracts at this time. In addition, the Commission would prefer to have more information on the potential for fraud and abuse prior to making a decision on this issue. The Commission will thus deny Staff's request at this time. However, the Commission will clarify that the amount which may be applied to an upgraded piece of equipment is the dollar value that would be paid to the vendor by the State under the vendor contract for the type of equipment for which a person with that type and level of disability would qualify. The applicant must make arrangements directly with the vendor to obtain upgraded equipment. However, the applicant should indicate on the application form sent to the ATEP Program Administrator that he or she intends to request upgraded equipment.

Staff also suggests that the Commission establish an intermediate level of review in which Staff first reviews and makes a decision concerning an applicant's rejected application, with the Commission reviewing only those applications in which Staff agrees with the ATEP Program Administrator, and rejects the application. Staff believes that such an intermediate level of review may assist in dealing with misunderstandings and simple procedural problems without the need for Commission involvement.

The Commission has considered Staff's request and finds that adding another layer to the review process will not measurably add to the efficiency of the process, and may cause confusion to the applicant seeking review. Instead, the Commission finds that Staff should process requests for administrative review of the ATEP Program Administrator's decision, and should prepare a recommendation for the

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Commission's decision. The Commission will then authorize a letter to be sent to the applicant, informing the applicant of the Commission's decision. The letter will be mailed to the applicant within 60 days after receipt of a completed application for review, including all necessary documentation. The Commission further notes that in the past the administrative review process was referred to as an appeals process instead, and finds that these references may cause confusion. All future references should be to an administrative review process, and the forms used to request review should be titled "Request for Administrative Review."

In addition, Staff notes that Carolyn Little from GTE was named to the ATEPAC by the Commission in its June 20 order. Because of changes in the job responsibilities of Ms. Little, Staff requests that she be replaced on the ATEPAC by Dave Evans, who is also from GTE. The Commission finds that as the result of changes in the job duties of Ms. Little, Dave Evans of GTE should be appointed to replace her. The Commission further finds that although the initial members of the ATEPAC were designated by the Commission in an order, future changes in the composition of the ATEPAC can be accomplished in the course of the Commission's regular public agenda meetings.

Finally, Staff submits the bylaws passed by the ATEPAC at its October 15 meeting for Commission approval. The Commission has reviewed the proposed bylaws, and determines that they can be approved with minor modifications. The Commission finds that:

(a) Subsection D of Section II, Article I should be modified to read as follows: "To provide, when requested, information to the Commission or its Staff which may assist the Commission in the administrative review of rejected applications where such review has been sought." This change will make the bylaws consistent with the Commission's determination that the "appeals process" should be referred to as an administrative review process instead;

(b) Subsection A of Section I, Article IV should be modified to read as follows: "The Committee shall convene no more than four (4) times per year.";

(c) Subsection B of Section I, Article IV should be modified to read as follows: "Committee meetings and records are open to the public, but may be closed to the same extent as allowed by the statutory provisions applicable to the Commission."; and

(d) Section VI of Article IV should be modified to read as follows: "Meetings of the Committee shall be held at any location within the State deemed convenient by the Committee." Although not requested by Staff, the Commission determines sua sponte that it should reaffirm some of the changes made to the ATEP program at a public agenda session on August 29. The Commission authorized development of a list of basic adaptive telephone equipment that would be available under the program. This list would determine what equipment a particular applicant would receive, depending on the type and level of that person's disability. The ATEP Program Administrator would order the appropriate equipment from the list directly

from the vendor, to be delivered to the address specified by the applicant in the application. The Program Administrator would then send the applicant a copy of the voucher submitted by the Administrator to the vendor on the applicant's behalf. The Commission finds that these changes will eliminate confusion about what the ATEP program provides, will allow applicants to receive their equipment more quickly, and will increase the cost-effectiveness and efficiency of the program. The latter in turn will ensure that adaptive telephone equipment can be provided to the greatest number of eligible subscribers. The Commission thus reaffirms these changes to the program.

The Commission will also reconsider sua sponte the definitions approved during that agenda session. The definition of adaptive telephone equipment proposed by Staff and approved by the Commission on August 29 is as follows: "Adaptive telephone equipment is customer premises equipment that attaches directly to a basic telephone access line, or equipment that is an extension of customer premises equipment attached directly to a basic telephone access line." Upon further reflection, the Commission determines that this definition is inadequate, since it does not convey an understanding of what distinguishes adaptive telephone equipment from regular telephone equipment. The phrase "customer premises equipment that attaches directly to a basic telephone access line" could be interpreted as referring to traditional telephone equipment. Similarly, "equipment that is an extension of customer premises equipment attached directly to a basic telephone access line" could be interpreted as referring to equipment such as a Caller ID unit.

The Commission will thus replace the current definition of adaptive telephone equipment with the following definition: "Adaptive telephone equipment is customer premises equipment (CPE) designed as a telecommunications device that has the sole function of connecting an eligible subscriber to a basic telephone access line by facilitating a comparable substitute for some attribute of traditional telephone equipment, such as the transmission of audio signals, the reception of audio signals, the audio notification of incoming calls, or the handset."

The Commission will also modify its definition of "qualified state agency." The definition proposed by Staff and approved by the Commission on August 29 is as follows: "A "qualified state agency" for purposes of certifying individuals is an agency that works with individuals with disabilities, or is familiar with an individual's needs, and has been involved with working with individuals with disabilities for no less than three years." However, the Commission finds that the "definition" should be revised to make it clear that the Commission is not adopting a definition of "qualified state agency" per se, but instead is adopting criteria to be used in certifying agencies as qualified state agencies. Thus the Commission will adopt the following criteria: "The Commission or the Commission's Staff, acting on behalf of the Commission, may designate a state agency as a "qualified state agency" for purposes of certifying individuals as eligible subscribers under the ATEP program if the state

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agency works with individuals with disabilities, or is familiar with disabled individuals' needs, and has been involved in working with individuals with disabilities for no less than three years."

This statement of criteria is consistent with the requirements recommended by the ATEPAC. The Commission further finds that it would be appropriate to delegate the designation of qualified state agencies to its Staff. Using these criteria, Staff can quickly designate that a particular state agency be recognized as a qualified state agency, thus the certification of state agencies as qualified state agencies can be accomplished in a timely manner. Staff shall report to the Commission on the designation of state agencies as qualified state agencies on a regular basis, no less frequently than once every six months.

*IT IS THEREFORE ORDERED:*

1. That the definition of "reasonable access to telephone service" shall be as follows: "Reasonable access to telephone service is access which connects eligible subscribers to a basic telephone access line via cost-effective adaptive telephone equipment."

2. That the definition of "traditional telephone equipment" shall be as follows: "Traditional telephone equipment is customer premises equipment (CPE) which connects users to a basic telephone access line and permits the two-way exchange of voice messages via audio signal transmission and reception, and via employment of a handset for transmission and reception of those audio signals, along with an audio notification system for incoming calls."

3. That the Adaptive Telephone Equipment Program will only provide eligible subscribers with those types of adaptive telephone equipment which cost more than \$50.00, exclusive of taxes.

4. That the portion of the motion filed by the Staff of the Commission on October 22, 1997, which requests that the Commission revise the Adaptive Telephone Equipment Program to eliminate the ability of an applicant to "trade up" by applying a voucher against the cost of an upgraded, more expensive piece of equipment, is denied.

5. That the portion of the motion filed by the Staff of the Commission on October 22, 1997, which requests that the Commission revise the Adaptive Telephone Equipment Program to establish an intermediate level of review in which Staff would first review an applicant's rejected application, and the Commission would only review those applications which Staff rejects, is denied.

6. That the process for the administrative review of applications which are rejected by the Adaptive Telephone Equipment Program Administrator shall be as described in the body of this order.

7. That Dave Evans of GTE Midwest Incorporated shall replace Carolyn Little of GTE Midwest Incorporated as a representative on the Adaptive Telephone Equipment Advisory Committee.

8. That the bylaws of the Adaptive Telephone Equipment Advisory Committee shall be approved as modified by this order.

9. That a list of basic adaptive telephone equipment shall be developed and the Adaptive Telephone Equipment Program shall be modified as described in this order.

10. That the definition of "adaptive telephone equipment" shall be as follows: "Adaptive telephone equipment is customer premises equipment (CPE) designed as a telecommunications device that has the sole function of connecting an eligible subscriber to a basic telephone access line by facilitating a comparable substitute for some attribute of traditional telephone equipment, such as the transmission of audio signals, the reception of audio signals, the audio notification of incoming calls, or the handset."

11. That the criteria for designating qualified state agencies shall be as follows: "The Commission or the Commission's Staff, acting on behalf of the Commission, may designate a state agency as a "qualified state agency" for purposes of certifying individuals as eligible subscribers under the ATEP program if the state agency works with individuals with disabilities, or is familiar with disabled individuals' needs, and has been involved in working with individuals with disabilities for no less than three years."

12. That the Staff of the Commission shall report to the Commission on the designation of state agencies as qualified state agencies on a regular basis, no less frequently than once every six months.

13. That this order shall become effective on January 10, 1997.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., Concur.  
Bensavage, Regulatory Law Judge

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**In the Matter of Associated Natural Gas Company's Tariff Revision Designed to Increase Rates for Gas Service to Customers in the Missouri Service Area of the Company.\***

*Case No. GR-97-272*  
*Decided December 31, 1997*

**Gas §§10, 21.** The Commission granted the motion for stay the implementation of the unauthorized use charges and tariffs regarding the elimination of sales and back-up sales service to transportation customers until August 1, 1998, when all current contracts containing balancing provisions and penalties will expire. The Commission also stayed the requirement for installation of EGM equipment to allow ANG sufficient time to order, install and test the equipment and to arrange for installation of telecommunications equipment for customers receiving transportation service.

ORDER DENYING APPLICATIONS FOR REHEARING AND RECONSIDERATION, GRANTING MOTION FOR STAY, AND GRANTING MOTION FOR EXPEDITED TREATMENT

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\*See page 4 for another order in this case. On January 30, 1998, this case was appealed to Cole County Circuit Court (CV198-136CC).

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On December 3, 1997, the Commission issued its Report and Order. On December 12 Associated Natural Gas Company, a division of Arkansas Western Gas Company (ANG), filed an Application for Rehearing and Motion for Stay. On December 12 Noranda Aluminum, Inc. (Noranda) filed a Motion for Rehearing and/or Reconsideration.

ANG requested that the Commission stay the implementation of the unauthorized use charges and tariffs regarding the elimination of sales and back-up sales service to transportation customers until August 1, 1998, when all current contracts containing balancing provisions and penalties will expire. ANG further requested that the Commission stay the requirement for installation of Electronic Gas Measurement (EGM) equipment until August 1, 1998, to allow ANG sufficient time to order, install and test the equipment and to arrange for installation of telecommunications equipment at approximately 15 sites.

On December 16, 1997, ANG filed compliance tariffs in this proceeding along with a Motion for Expedited Treatment. The tariff sheets bear an effective date of January 15, 1998. ANG stated in its motion that because of the magnitude of changes ordered by the Commission, the short period of time between the issuance of the order and the operation of law date, unavoidable scheduling conflicts by ANG and by personnel from the Staff of the Commission (Staff), and significant questions about compliance tariff language, it was not possible for ANG to file the tariff sheets by the effective date of the order. There was no requirement that ANG file the tariff sheets by the effective date of the order. ANG requested that the Commission and its Staff expedite the consideration of the tariff sheets. ANG stated that it stands ready, upon receipt of such an order, to submit a set of tariff sheets with a different effective date on them. The Commission has reviewed ANG's Application for Rehearing and finds that cause to grant rehearing does not appear. The Commission has also reviewed Noranda's Motion for Rehearing and/or Reconsideration and finds that cause to grant a rehearing or reconsideration does not appear. The Commission will deny ANG's Application for Rehearing, and the Commission will deny Noranda's Motion for Rehearing and/or Reconsideration.

The Commission has reviewed ANG's Motion for Stay and determines that the Motion for Stay is reasonable and should be granted. The Commission will stay the implementation of the unauthorized use charges and tariffs regarding the elimination of sales and back-up sales service to transportation customers until August 1, 1998, when all current contracts containing balancing provisions and penalties will expire. The Commission will also stay the requirement for installation of EGM equipment until August 1, 1998, to allow ANG sufficient time to order, install and test the equipment and to arrange for installation of telecommunications equipment for customers receiving transportation service.

The Commission has reviewed ANG's Motion for Expedited Treatment. The Commission finds that the Motion for Expedited Treatment is reasonable and should be granted. Therefore, the Commission will order its Staff to file a recommendation

regarding the compliance tariffs no later than January 5, 1997. The recommendation shall contain a proposal regarding the effective date of the compliance tariffs. The Commission will review the compliance tariffs and issue an order as expeditiously as its docket will allow.

*IT IS THEREFORE ORDERED:*

1. That the Application for Rehearing filed by Associated Natural Gas Company, a division of Arkansas Western Gas Company, on December 12, 1997, is denied.
2. That the Motion for Rehearing and/or Reconsideration filed by Noranda Aluminum, Inc. on December 12, 1997, is denied.
3. That the Motion for Stay filed by Associated Natural Gas Company, a division of Arkansas Western Gas Company, on December 12, 1997, is granted.
4. That the requirement for Associated Natural Gas Company, a division of Arkansas Western Gas Company, to implement the unauthorized use charges and tariffs regarding the elimination of sales and back-up sales service to transportation customers, as set forth in the Commission's Report and Order issued on December 3, 1997, is stayed until August 1, 1998.
5. That the requirement for Associated Natural Gas Company, a division of Arkansas Western Gas Company, to install Electronic Gas Measurement equipment, as set forth in the Commission's Report and Order issued on December 3, 1997, is stayed until August 1, 1998.
6. That the Motion for Expedited Treatment filed on December 16, 1997, by Associated Natural Gas Company, a division of Arkansas Western Gas Company, is granted.
7. That the Staff of the Commission shall file its recommendation in this case no later than January 5, 1998, regarding the tariff sheets filed on December 16, 1997, by Associated Natural Gas Company, a division of Arkansas Western Gas Company.
8. That this order shall become effective on December 31, 1997.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
G. George, Regulatory Law Judge

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**In the Matter of the Application and Request for Expedited Treatment of Union Electric Company for Approval of Decommissioning Cost Estimate and Funding Level of Nuclear Decommissioning Trust Fund, and Contingent Request for Waiver of Quarterly Funding Requirement.**

*Case No. EO-97-86*  
*Decided January 14, 1998*

**Electric §39.** The Commission approved the Stipulation and Agreement establishing the decommissioning costs of the Callaway Plant at the end of its 40-year operating license to be \$419,975,000. The Commission found that Union Electric Company's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$6,214,184.

**ORDER APPROVING COST ESTIMATES AND FUNDING LEVELS FOR  
NUCLEAR DECOMMISSIONING COSTS**

On September 3, 1996, Union Electric Company (UE) filed an application with the Missouri Public Service Commission (Commission) for approval of its nuclear decommissioning costs estimate, and the funding level of its nuclear decommissioning trust fund. UE included as Attachment 1 a document entitled "Callaway Plant Decommissioning Cost Estimate Update for September 1, 1996," and as Attachment 2 a document entitled "UE Nuclear Decommissioning Zone of Reasonableness, Missouri Jurisdiction." UE's application stated that the current contribution of \$6,214,184 is adequate to meet the cost of decommissioning, based on a number of reasonable assumptions, including a projected inflation rate of 4 3/4 percent to just over 6 1/4 percent. UE's cost estimate to decommission the Callaway plant is \$419,975,000 in 1996 dollars.

In addition, UE sought expedited treatment of its application, and requested a Commission decision by December 1, 1996, or in the alternative, a contingent waiver of 4 CSR 240-20.070(4)(D). UE explained that in order to obtain tax-deductible treatment for its contribution to the decommissioning trust fund, UE must request and obtain a schedule of ruling amounts from the Internal Revenue Service (IRS), a process which takes several months. UE indicated that it needed to obtain IRS approval by April 24, 1997, in order to make its first quarter contribution for 1997, which was scheduled for April 25. However, UE stressed that even if the Commission was able to issue an order by December 1, 1996, there was no guarantee that the IRS would be able to issue the requested ruling before the end of April. Consequently, UE requested that in the event the Commission was not able to issue an order by December 1, 1996, or in the event that the IRS was not able to grant its approval by April 24, 1997, the Commission grant a waiver of the requirement to make contribu-

tions to UE's decommissioning trust fund on a quarterly basis under 4 CSR 240-20.070(4)(D). UE maintained that good cause existed for its waiver request, and that no harm would result from a grant of the waiver, since UE would be able to make "catch up" contributions for 1997 at any time until March 15, 1998.

The Commission issued an Order and Notice on September 19, 1996, and set an intervention deadline of October 18, 1996. No applications for interventions were filed. The Commission issued an order on October 31, 1996, which set an early prehearing conference for November 18. In lieu of a proposed procedural schedule, Staff filed a letter on November 22, indicating that the parties did not believe a procedural schedule would be necessary, and proposed to report the status of the case on December 2. On December 2, Staff filed a letter indicating that the parties anticipated filing a stipulation and agreement by December 20. A stipulation was not filed by that date, but several other letters concerning the status of the case were subsequently filed.

A Unanimous Stipulation And Agreement (Stipulation) was filed on April 22, 1997. On September 24, 1997, the Commission issued its Order Directing the Filing of Suggestions in Support of Stipulation and Agreement, directing Staff to either file its suggestions no later than October 24, or file an explanation of why it was unable to comply with this directive. Staff filed a response on October 24, indicating that testimony in support of the Stipulation would be filed by October 31. Subsequently, several extensions of time were requested, and the testimony of witness David Broadwater in support of the Stipulation was ultimately filed on November 14, 1997.

#### Discussion

The Stipulation purports to be a settlement of all issues pertaining to this case, and is attached hereto and incorporated by reference as Attachment 1. The major provisions of the stipulation may be summarized as follows:

- In the immediately preceding decommissioning cost proceeding, Case No. EO-94-81, the cost to decommission the Callaway Plant was deemed to be \$371,511,680 in 1993 dollars.
- The annual decommissioning expense accrual and trust fund payment in Case No. EO-94-81 was maintained at \$6,214,184, the level first set in Case No. EO-91-300. No changes to the funding level were sought because UE concluded, based upon an analysis of the funding level, that it would be sufficient to cover the cost of decommissioning under a reasonable set of economic, financial, and investment assumptions.
- UE considers the funding level of \$6,214,184 to be sufficient to cover the current decommissioning cost estimate of \$419,975,000, based upon certain assumptions used in its analysis. Solely for purposes of the Stipulation, Staff and Public Counsel do not object to the economic, financial and investment assumptions utilized by UE, including UE's assumptions as to inflation and trust fund earnings.

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- Decommissioning costs in the amount of \$6,214,184 are, and should continue to be, included in UE's cost of service and reflected in its current rates for ratemaking purposes.

- UE shall continue its Missouri retail jurisdiction expense accruals and trust fund payment at current levels without a change in its Missouri retail jurisdictional rates.

- In the event the Commission approves the stipulation in this case, no further action regarding UE's application will be required by the Stipulation And Agreement approved by the Commission in Case No. ER-95-411.

- UE should be granted a waiver from 4 CSR 240-20.070(4)(D) pursuant to 4 CSR 240-20.070(17), and such waiver should relate back to any quarterly payments that would otherwise have been required for 1997, and should remain in effect until UE receives a ruling from the IRS authorizing it to make contributions for 1997 and subsequent years. Upon receipt of the IRS ruling, UE will immediately make a catch-up contribution consisting of amounts which UE would otherwise have contributed as required by the Commission's quarterly funding requirements.

- UE or its trustee shall comply with the quarterly and annual filing requirements of 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6).

In connection with the above agreements, the signatories to the Stipulation request that the Commission: (a) approve the Unanimous Stipulation And Agreement; (b) recognize that UE's current decommissioning costs are included in its current cost of service and reflected in its current rates for ratemaking purposes; (c) grant UE a limited waiver, pursuant to 4 CSR 240-20.070(17), of 4 CSR 240-20.070(4)(D), from the Commission's requirement that contributions to the decommissioning trust fund be made on a quarterly basis, in order to address the situation that UE will not receive an IRS ruling amount for 1997 by April 25, 1997, with the waiver to relate back to any quarterly payments otherwise required for 1997; and (d) direct that UE or its trustee comply with the quarterly and annual filing requirements of 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6).

In support of the Stipulation And Agreement, Staff filed the testimony of David Broadwater. Staff first explains what decommissioning is, and provides an historical background on UE's prior decommissioning cases, including Case No. EO-94-81. Staff explains that UE's analysis of the current cost to decommission the Callaway Plant is an update of the study performed by the company in 1993, which the Staff agreed to in Case No. EO-94-81. Staff maintains that it is reasonable to accept UE's analysis in the present case without having an outside consultant perform a study. Nevertheless, Staff submits that for the purposes of UE's 1999 filing, Staff should retain an outside consultant to perform or assist in an analysis of the cost to decommission the Callaway Plant and perform a reconciliation between the Callaway Plant and the Wolf Creek Nuclear Generating Station (Wolf Creek) concerning decommissioning quantities, dimensions, weights and levels of radioactivity. Staff

also explains the three alternative decommissioning options explored by UE—DECON, SAFSTOR and ENTOMB—and notes that all three alternatives are acceptable to the United States Nuclear Regulatory Commission (NRC). The cost to decommission the Callaway Plant under the DECON alternative<sup>1</sup> is \$419,975,000 in 1996 dollars.

In addition, Staff reviewed the status of UE's decommissioning trust fund. Staff explains that while the cost to decommission the Callaway Plant is estimated at approximately \$420 million in 1996 dollars, Missouri retail customers of UE will be responsible for 87.6 percent of the costs, or approximately \$368 million. As of June 30, 1997, UE's decommissioning trust fund for its Missouri jurisdictional portion of the Callaway Plant had a market value of approximately \$112.6 million, and has achieved an internal rate of return of 14.01 percent.<sup>2</sup> Staff performed an analysis of UE's decommissioning trust fund based upon certain reasonable assumptions, and notes that while the fund is currently outperforming Staff's assumptions, Staff does not believe that current conditions will exist for the remaining life of the fund. Because of concerns with the reliability of decommissioning cost estimates for any nuclear power plant, as a result of the general lack of historical information respecting the cost of decommissioning nuclear generating units, Staff maintains that it is appropriate to keep the funding level of UE's decommissioning trust fund at its current annual level of \$6,214,184, with payments made on a quarterly basis.

Moreover, Staff addresses UE's waiver request. Staff explains that UE's most recent revised schedule of ruling amounts from the IRS is a letter dated December 12, 1992, which contains ruling amounts for the Missouri retail jurisdiction for 1992 through 1996. The IRS issued this ruling for only these five years because it was concerned that the 1992 changes to the federal tax law, which removed

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<sup>1</sup> The DECON alternative assumes decontaminating and decommissioning immediately following the conclusion of power operations in 2024, when the 40-year operating license expires. Work is anticipated to be completed by 2032. DECON consists of removal of fuel assemblies, source material, radioactive fission and corrosion products, and other radioactive materials immediately after cessation of power operations.

<sup>2</sup> The internal rate of return is the annualized interest rate that equates the ending market value with the historical stream of quarterly fund payments.

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"Black Lung"<sup>3</sup> restrictions from decommissioning trust funds and reduced the tax rate applicable to income earned by these funds, might lead to an overfunding because the Commission's order issued on August 21, 1992, did not account for an after-tax rate of return on fund assets that reflected the legislative changes which were signed into law in October 1992. Apparently UE did not subsequently submit to the IRS the Commission's order issued on June 14, 1994 in Case No. EO-94-81. UE therefore has not made quarterly decommissioning trust fund payments during 1997, other than a January 1997 payment for the third quarter of 1996. If UE does not receive a ruling from the IRS before March 15, 1998, it will be permitted to make a contribution for 1997 as of that date, in an amount equal to the proposed 1997 ruling amount in UE's request letter that would then be pending before the IRS. Staff concludes that if UE does not receive a ruling from the IRS before March 15, 1998, it will still make its 1997 catch-up contribution at that time.

The decommissioning cost estimate update provided by UE states that the cost estimate is based upon current requirements and present-day technology. The update uses the same assumptions regarding decommissioning requirements, techniques, and cost estimate methodology, with the exception of certain work efficiency assumptions, as were made in the earlier 1993 study, but takes into account physical changes made to the plant since 1993, as well as inflation. The update also includes a risk assessment of the impact of input variability on total cost. Further, the study assumes that spent fuel will be stored on site for five years following the Callaway Plant's final shutdown in 2025, in accordance with the requirements of the U.S. Department of Energy (DOE), which mandates the five-year period to allow adequate cooling prior to DOE acceptance of the spent fuel. The cost for the disposal of spent fuel is not included in UE's cost estimate, as the cost for fuel disposal is funded by DOE's one mill per kilowatt surcharge.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

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<sup>3</sup>"Black Lung" investments are public debt securities of the United States; obligations of a state or local government that are not in default as to principal or interest; and time or demand deposits in banks or insured credit unions located in the United States. Taxable bonds and equity securities are not included among "Black Lung" investments. After federal law lifted the prohibition against investments in equity securities, UE's decommissioning trust fund was able to invest in these securities and take advantage of the higher likely yield, subject to the restriction in 4 CSR 240-20.070(4)(E)3 that the total book value of these investments not exceed 65 percent of the trust fund's book value.

The Commission has considered UE's application, the Callaway Plant Decommissioning Cost Estimate Update for September 1, 1996, the chart of UE's nuclear decommissioning zone of reasonableness for the Missouri jurisdiction, the Unanimous Stipulation And Agreement, and the testimony of Staff witness Broadwater in support of the Stipulation.

The Commission finds as follows:

- (A) No party has requested a hearing in this case.
- (B) UE is not requesting a change to its authorized rates and charges for its nuclear decommissioning trust fund.
- (C) The decommissioning cost study filed by UE should be received into evidence, along with the Unanimous Stipulation And Agreement.
- (D) The Unanimous Stipulation and Agreement is just and reasonable with respect to the continuation of Missouri retail jurisdiction expense accruals and nuclear decommissioning trust fund payments at current levels without a change in Missouri retail jurisdiction rates, as well as with respect to all other agreed-upon terms and conditions specified in the stipulation and previously set forth in this order.
- (E) That the cost in 1996 dollars to immediately decommission the Callaway Plant at the end of its 40-year operating license shall be deemed to be \$419,975,000.
- (F) That UE's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$6,214,184.
- (G) That the \$6,214,184 funding level is currently included in UE's current cost of service, and is reflected in its current rates for ratemaking purposes.
- (H) UE's attempt to obtain tax-deductible treatment from the IRS for the contribution to its decommissioning trust fund is reasonable and appropriate.
- (I) Pursuant to 4 CSR 240-20.070(17), UE should be granted a limited waiver of 4 CSR 240-20.070(4)(D) from the Commission's requirement that contributions to the decommissioning trust fund be made on a quarterly basis. The waiver shall relate back to any quarterly payments that otherwise would have been required for 1997, and shall remain in effect until UE receives a ruling from the IRS authorizing it to make contributions for 1997 and subsequent years.
- (J) That UE shall make a catch-up contribution consisting of amounts which it would otherwise have contributed to its decommissioning trust fund as required by the Commission's quarterly funding requirements.
- (K) That UE or its trustee shall comply with the quarterly and annual filing requirements of 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6) on an ongoing basis.

In restating portions of the Unanimous Stipulation And Agreement, the Commission is not changing the language or terms of the Stipulation, but adopts it in full as resolving all issues that were set out therein. The Commission in adopting the Stipulation is satisfied that the negotiated settlement represents a reasoned and fair resolution of the issues in this case, and that it would be in the interest of all parties for the Commission to adopt the Stipulation.

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#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

UE is a Missouri corporation, with its principle place of business located at 1901 Chouteau Avenue, St. Louis, Missouri, and is in the business of supplying electricity and gas in parts of Missouri and elsewhere. It is an electrical corporation and public utility as defined in Section 386.020, RSMo. Supp. 1996, and is subject to the jurisdiction of the Commission pursuant to Chapters 386 and 393 of the Missouri Revised Statutes. UE owns 100 percent of the Callaway Plant, and 87.6% of that ownership interest is allocated to the Missouri retail jurisdiction. Pursuant to 4 CSR 240-20.070(9), utilities with decommissioning trust funds are required to file every three years a cost study detailing the utility's latest cost estimate for decommissioning its nuclear generating unit, along with the funding levels necessary to defray these decommissioning costs. The purpose of UE's filing of September 3, 1996 is to comply with this requirement.

Ordinarily, a hearing would be required in the event a change in the level or annual accrual of decommissioning funding is proposed, pursuant to Section 393.292, RSMo 1994. No such change has been proposed. In addition, no party has requested a hearing. Likewise, no party has requested a hearing pursuant to 4 CSR 240-20.070(17) with regard to UE's waiver request. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989).

Pursuant to Section 536.060, RSMo. Supp. 1996, the Commission may approve a stipulation and agreement concluded among the parties as to any issues in a contested case. The standard for Commission approval of a stipulation and agreement is whether it is just and reasonable. The Commission, in accordance with its statutory power, has determined that the Unanimous Stipulation And Agreement which settles all issues raised in this case is just and reasonable and appropriate, and therefore should be approved in full.

#### *IT IS THEREFORE ORDERED:*

1. That the Missouri Public Service Commission approves and adopts the Unanimous Stipulation And Agreement filed on April 22, 1997, and agreed to and signed by Union Electric Company, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, which is incorporated herein by reference and attached hereto as Attachment 1.

2. That the Unanimous Stipulation And Agreement shall be received into evidence as Exhibit No. 1, and the decommissioning cost study filed by Union Electric Company shall be received into evidence as Exhibit No. 2.

3. That pursuant to the Unanimous Stipulation And Agreement, the cost in 1996 dollars to immediately decommission the Callaway Plant at the end of its 40-year operating license shall be deemed to be \$419,975,000.

4. That pursuant to the Unanimous Stipulation And Agreement, Union Electric Company's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$6,214,184.

5. That the current decommissioning costs for the Callaway Plant are included in Union Electric Company's current cost of service, and are reflected in its current rates for ratemaking purposes.

6. That pursuant to 4 CSR 240-20.070(17), Union Electric Company is granted a limited waiver of 4 CSR 240-20.070(4)(D) from the Commission's requirement that contributions to the decommissioning trust fund be made on a quarterly basis.

7. That the waiver granted in ordered paragraph 6 above shall relate back to any quarterly payments that otherwise would have been required for 1997, and shall remain in effect until Union Electric Company receives a ruling from the Internal Revenue Service authorizing it to make contributions for 1997 and subsequent years.

8. That Union Electric Company or its trustee is directed to file on a prospective basis in Case No. EO-97-86 the quarterly and annual reports required by 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6) respectively.

9. That this order shall become effective on January 24, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., Concur.  
Bensavage, Regulatory Law Judge

EDITOR'S NOTE: The Unanimous Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Application of Kansas City Power & Light  
Company for Approval of the Accrual and Funding of Wolf  
Creek Generating Station Decommissioning Costs at Current  
Levels.**

*Case No. EO-97-84*  
*Decided January 20, 1998*

**Electric §39.** The Commission approved the Stipulation and Agreement establishing the decommission costs of the Wolf Creek Plant at the end of its 40-year operating license to be \$408,887,000. The Commission found that Kansas City Power & Light Company's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$2,303,856.



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ORDER APPROVING COST ESTIMATES AND FUNDING LEVELS FOR  
NUCLEAR DECOMMISSIONING COSTS

On September 3, 1996, Kansas City Power & Light Company (KCPL) filed an application for approval of its proposed accrual and funding of Wolf Creek Generating Station (Wolf Creek Plant) nuclear decommissioning costs at current levels. Along with its application, KCPL also filed a document entitled "Wolf Creek Generating Station Decommissioning Cost Estimate Update For September 1, 1996," which contains a number of appendices, including a detailed cost analysis. The current decommissioning cost has increased from an estimate of \$370 million in 1993 dollars to an estimate of \$408,887,000 in 1996 dollars. KCPL believes it is reasonable to continue the annual accruals at the current level of \$2,303,856 for the Missouri jurisdictional amount, since the cost estimate in 1996 dollars based on the 1996 cost estimate update is reasonably close to the 1996 decommissioning cost projection in the accrual schedule of the 1993 study, which was approved in Case No. EO-94-80. KCPL therefore requests that the Commission issue an order: (a) finding that the 1996 cost study satisfies the requirements of 4 CSR 240-20.070(9), (b) approving the 1996 decommissioning cost estimate of \$408,887,000, (c) approving the continuation of annual accruals at the current level of \$2,303,856, and (d) finding that the decommissioning costs are included in KCPL's current cost of service and are reflected in its current rates for ratemaking purposes.

The Commission issued an Order and Notice on September 19, 1996, and set an intervention deadline of October 18, 1996. No applications for interventions were filed. The Commission issued an order on October 31, 1996, which set an early prehearing conference for November 18. The prehearing conference was subsequently changed to December 2 at the request of KCPL. In lieu of a proposed procedural schedule, Staff filed a letter on December 6, indicating that the parties did not believe a procedural schedule would be necessary, and that the parties anticipated filing a stipulation and agreement by December 20. A stipulation was not filed by that date, but several other letters concerning the status of the case were subsequently filed.

On September 24, 1997, the Commission issued its Order Directing the Filing of a Proposed Procedural Schedule directing Staff to either file a stipulation and agreement or a proposed procedural schedule. Staff filed a Unanimous Stipulation and Agreement (Stipulation) on October 24. Staff also filed a separate response on that date indicating that testimony in support of the Stipulation would be filed by October 31. Subsequently, several extensions of time were requested, and the testimony of witness David Broadwater in support of the Stipulation was ultimately filed on November 14, 1997.

## Discussion

The Stipulation purports to be a settlement of all issues pertaining to this case, and is attached hereto and incorporated by reference as Attachment 1. The major provisions of the stipulation may be summarized as follows:

- In the immediately preceding decommissioning cost proceeding, Case No. EO-94-80, the cost to decommission the Wolf Creek Plant was deemed to be \$369,789,856 in 1993 dollars.

- The annual decommissioning expense accrual and trust fund payment in Case No. EO-94-80 was maintained at \$2,303,856, the level first set in Case No. EO-91-84. No changes to the funding level were sought because KCPL concluded that it was reasonable to continue the annual accruals at the same level as a result of, among other things, changes in federal tax law and corresponding changes in state regulations that permitted decommissioning trust funds to achieve higher earnings.

- The 1993 Accrual Schedule in Case No. EO-94-80 projected that the then-current decommissioning cost would escalate to approximately \$422 million in 1996 for the DECON alternative. Because the inflation rate which KCPL projected in Case No. EO-94-80 was less than expected, the current decommissioning cost estimate in 1996 dollars, \$408,887,000, is less than the \$422 projected in 1993.

- KCPL considers the current decommissioning cost estimate of \$408,887,000 to be reasonably close to the cost projection contained in its 1993 Accrual Schedule, and therefore considers that it is reasonable to continue annual accruals at the current level of \$2,303,856. Solely for the purposes of the Stipulation, Staff and Public Counsel do not object to KCPL's assumptions as to inflation and trust fund earnings.

- If required, KCPL shall seek an Internal Revenue Service (IRS) ruling regarding the continuation of its current accrual and funding level, in order for KCPL to receive the maximum tax benefits associated with its decommissioning costs.

- KCPL shall continue its Missouri retail jurisdiction expense accruals and trust fund payment at current levels without a change in its Missouri retail jurisdictional rates.

- KCPL or its trustee shall comply with the quarterly and annual filing requirements of 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6).

In connection with the above agreements, the signatories to the Stipulation request that the Commission: (a) approve the Unanimous Stipulation And Agreement; (b) recognize that KCPL's current decommissioning costs are included in its current cost of service and reflected in its current rates for ratemaking purposes; and (c) direct that KCPL or its trustee comply with the quarterly and annual filing requirements of 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6).

In support of the Stipulation And Agreement, Staff filed the testimony of David Broadwater. Staff first explains what decommissioning is, and provides an historical

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background on KCPL's prior decommissioning cases, including Case No. EO-94-80. Staff explains that KCPL's analysis of the current cost to decommission the Wolf Creek Plant is an update of the study performed by the company in 1993, which the Staff agreed to in Case No. EO-94-80. Staff maintains that it is reasonable to accept KCPL's analysis in the present case without having an outside consultant perform a study. Nevertheless, Staff submits that for the purposes of KCPL's 1999 filing, Staff should retain an outside consultant to perform or assist in an analysis of the cost to decommission the Wolf Creek Plant and perform a reconciliation between the Wolf Creek Plant and the Callaway Plant concerning decommissioning quantities, dimensions, weights and levels of radioactivity. Staff also explains the three alternative decommissioning options explored by KCPL—DECON, SAFSTOR and ENTOMB—and notes that all three alternatives are acceptable to the United States Nuclear Regulatory Commission (NRC). The cost to decommission the Wolf Creek Plant under the DECON alternative<sup>1</sup> is \$408,887,000 in 1996 dollars.

In addition, Staff reviewed the status of KCPL's decommissioning trust fund. Staff explains that while the cost to decommission the Wolf Creek Plant is estimated at approximately \$409 million in 1996 dollars, Missouri retail customers of KCPL will be responsible for 58.11 percent of the costs, or approximately \$112 million. As of June 30, 1997, KCPL's decommissioning trust fund for its Missouri jurisdictional portion of the Wolf Creek Plant had a market value of approximately \$25.4 million, and has achieved an internal rate of return of 9.74 percent.<sup>2</sup> Staff performed an analysis of KCPL's decommissioning trust fund based upon certain reasonable assumptions, and notes that while the fund is currently outperforming Staff's assumptions, Staff does not believe that current conditions will exist for the remaining life of the fund. Because of concerns with the reliability of decommissioning cost estimates for any nuclear power plant, as a result of the general lack of historical information respecting the cost of decommissioning nuclear generating units, Staff maintains that it is appropriate to keep the funding level of KCPL's decommissioning trust fund at its current annual level of \$2,303,855.79 with payments made on a quarterly basis.

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<sup>1</sup> The DECON alternative assumes decontaminating and decommissioning immediately following the conclusion of power operations in 2024, when the 40-year operating license expires. Work is anticipated to be completed by 2032. DECON consists of removal of fuel assemblies, source material, radioactive fission and corrosion products, and other radioactive materials immediately after cessation of power operations.

<sup>2</sup> The internal rate of return is the annualized interest rate that equates the ending market value with the historical stream of quarterly fund payments.

Moreover, Staff also explains that unlike Union Electric Company (UE) in Case No. EO-97-86, KCPL does not require a waiver of 4 CSR 240-20.070(4)(D). Staff reviewed KCPL's most recent revised schedule of ruling amounts from the Internal Revenue Service (IRS),<sup>3</sup> a letter dated February 23, 1995, which contains ruling amounts for the life of the Wolf Creek Plant, with a mandatory review after ten years. KCPL was able to obtain this ruling because, unlike UE, it provided the IRS with a copy of the Commission's order issued on June 14, 1994 in Case No. EO-94-80. KCPL thus has a current IRS ruling in effect and is able to make contributions to its decommissioning trust fund.

The decommissioning cost estimate update provided by KCPL states that the cost estimate is based upon current requirements and present-day technology. The update uses the same assumptions regarding decommissioning requirements, techniques, and cost estimate methodology, with the exception of certain work efficiency assumptions, as were made in the earlier 1993 study, but takes into account physical changes made to the plant since 1993, as well as inflation. The update also includes a risk assessment of the impact of input variability on total cost. Further, the study assumes that spent fuel will be stored on site for five years following the Wolf Creek Plant's final shutdown in 2025, in accordance with the requirements of the U.S. Department of Energy (DOE), which mandates the five-year period to allow adequate cooling prior to DOE acceptance of the spent fuel. The cost for the disposal of spent fuel is not included in KCPL's cost estimate, as the cost for fuel disposal is funded by DOE's one mill per kilowatt surcharge.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has considered KCPL's application, the Wolf Creek Plant Decommissioning Cost Estimate Update for September 1, 1996, the Unanimous Stipulation And Agreement, and the testimony of Staff witness Broadwater in support of the Stipulation.

The Commission finds as follows:

- (A) No party has requested a hearing in this case.
- (B) KCPL is not requesting a change to its authorized rates and charges for its nuclear decommissioning trust fund.
- (C) The decommissioning cost study filed by KCPL should be received into evidence, along with the Unanimous Stipulation And Agreement.

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<sup>3</sup>The purpose of seeking "ruling amounts" from the IRS is to obtain tax-deductible treatment for KCPL's contribution to its decommissioning trust fund.

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(D) The Unanimous Stipulation And Agreement is just and reasonable with respect to the continuation of Missouri retail jurisdiction expense accruals and nuclear decommissioning trust fund payments at current levels without a change in Missouri retail jurisdiction rates, as well as with respect to all other agreed-upon terms and conditions specified in the Stipulation and previously set forth in this order.

(E) That the cost in 1996 dollars to immediately decommission the Wolf Creek Plant at the end of its 40-year operating license shall be deemed to be \$408,887,000.

(F) That KCPL's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$2,303,856.

(G) That the \$2,303,856 funding level is currently included in KCPL's current cost of service, and is reflected in its current rates for ratemaking purposes.

(H) That KCPL or its trustee shall comply with the quarterly and annual filing requirements of 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6) on an ongoing basis.

In restating portions of the Unanimous Stipulation And Agreement, the Commission is not changing the language or terms of the Stipulation, but adopts it in full as resolving all issues that were set out therein. The Commission in adopting the Stipulation is satisfied that the negotiated settlement represents a reasoned and fair resolution of the issues in this case, and that it would be in the interest of all parties for the Commission to adopt the Stipulation.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

KCPL is a Missouri corporation, with its principle place of business located at 1201 Walnut Street, Kansas City, Missouri, and is engaged in the generation, transmission, distribution and sale of electric energy and power in portions of western Missouri and eastern Kansas. It is an electrical corporation and public utility as defined in Section 386.020, RSMo. Supp. 1996, and is subject to the jurisdiction of the Commission pursuant to Chapters 386 and 393 of the Missouri Revised Statutes. KCPL owns 47 percent of the Wolf Creek Plant, and 58.11 percent of that ownership interest is allocated to the Missouri retail jurisdiction. Pursuant to 4 CSR 240-20.070(9), utilities with decommissioning trust funds are required to file every three years a cost study detailing the utility's latest cost estimate for decommissioning its nuclear generating unit, along with the funding levels necessary to defray these decommissioning costs. The purpose of KCPL's filing of September 3, 1996 is to comply with this requirement.

Ordinarily, a hearing would be required in the event a change in the level or annual accrual of decommissioning funding is proposed, pursuant to Section 393.292, RSMo 1994. No such change has been proposed. In addition, no party has requested a hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989).

Pursuant to Section 536.060, RSMo. Supp. 1996, the Commission may approve a stipulation and agreement concluded among the parties as to any issues in a contested case. The standard for Commission approval of a stipulation and agreement is whether it is just and reasonable. The Commission, in accordance with its statutory power, has determined that the Unanimous Stipulation And Agreement which settles all issues raised in this case is just and reasonable and appropriate, and therefore should be approved in full.

*IT IS THEREFORE ORDERED:*

1. That the Missouri Public Service Commission approves and adopts the Unanimous Stipulation And Agreement filed on October 24, 1997, and agreed to and signed by Kansas City Power & Light Company, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, which is incorporated herein by reference and attached hereto as Attachment 1.
2. That the Unanimous Stipulation And Agreement shall be received into evidence as Exhibit No. 1, and the decommissioning cost study filed by Kansas City Power & Light Company shall be received into evidence as Exhibit No. 2.
3. That pursuant to the Unanimous Stipulation And Agreement, the cost in 1996 dollars to immediately decommission the Wolf Creek Plant at the end of its 40-year operating license shall be deemed to be \$408,887,000.
4. That pursuant to the Unanimous Stipulation And Agreement, Kansas City Power & Light Company's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$2,303,856.
5. That the current decommissioning costs for the Wolf Creek Plant are included in Kansas City Power & Light Company's current cost of service, and are reflected in its current rates for ratemaking purposes.
6. That Kansas City Power & Light Company or its trustee is directed to file on a prospective basis in Case No. EO-97-84 the quarterly and annual reports required by 4 CSR 240-20.070(5) and 4 CSR 240-20.070(6) respectively.
7. That this order shall become effective on January 30, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., Concur.  
Bensavage, Regulatory Law Judge

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EDITOR'S NOTE: The Unanimous Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of Missouri Gas Energy, a Division of Southern Union Company Regarding an Incident at 8814B Smart Street, Independence, Missouri on Saturday, April 26, 1997.**

**The Staff of the Missouri Public Service Commission, Complainant, v. Missouri Gas Energy, Respondent.**

*Case Nos. GS-97-494 & GC-98-113*

*Decided January 22, 1998*

**Gas §16.** The Commission approved a Settlement Agreement and Satisfaction of Complaint which requires the company to revise procedures regarding service burial depth requirements.

**ORDER APPROVING SETTLEMENT AGREEMENT, SATISFACTION OF COMPLAINT AND ORDER CLOSING CASES**

On September 10, 1997, the Staff of the Missouri Public Service Commission (Staff) filed a gas incident report (the incident report) in Case No. GS-97-494. The incident report relates the relevant facts about an incident which occurred between 2:30 p.m. and 3:00 p.m. CDST on Saturday, April 26, 1997. The incident is a natural gas explosion and flash fire which occurred in one unit of a four-unit apartment building located at 8814B Smart Avenue in Independence, Missouri. That building was extensively damaged due to the explosion and flash fire, but no injuries were reported.

Also on September 10 the Staff filed a Complaint against MGE alleging violation of the Commission's rules regarding installation depth of unencased plastic service lines. Commission Rule 4 CSR 240-40.030(8)(G)1 provides that unencased plastic must be installed with at least 18 inches of cover in all locations. Staff alleged in the Complaint that its investigation of the service line at 8814B Smart Street following the incident revealed 27 feet of unencased plastic service line at an average depth of 12.7 inches with a depth of 10 inches at the point of damage. Staff alleged that damage occurred when the landowner placed an incendiary device used to kill moles in a hole near the unencased portion of the service line causing the service line to melt and rupture.

The incident report states that natural gas escaped from the damaged service line and migrated through a broken sewer lateral into unit 1 of 8814B Smart Avenue. According to the incident report, the probable cause of the incident was the ignition of natural gas that had accumulated in the apartment. Staff states it is probable that

the incident would not have occurred if the unencased portion of the service line had been installed at the required depth of cover. Staff reported its investigation showed that several other service lines in the area of the incident made by the same contractor at approximately the same time period were buried at the proper depth.

On November 5 MGE and Staff filed a Settlement Agreement and Satisfaction of Complaint (Agreement). In the Agreement, MGE, without conceding the legal merits of any of Staff's allegations of violation, provides the following response to the incident report. Subsidence in the immediate area of the damage to the service line makes it difficult to determine for certain the depth at which the service line was installed. The service line was installed in 1993 prior to MGE's acquisition of assets from Western Resources, Inc. The line was installed by a contractor, Northern Pipe Line (NPL) which has not installed service lines for MGE since 1996. From October to November of 1996, MGE met with the training departments of its service line contractors and reviewed service line installation depth standards. NPL conducted review sessions with its construction employees assigned to MGE contracts.

MGE states it has reviewed its procedures and standards for service line installation and believes that it has already communicated the importance of service line installation depth to its contractors with sufficient clarity and emphasis; however, MGE has taken or will take three additional measures: (1) MGE's current service line installation contractors, Gas Distribution Contractors (GDC) and K & B, which did not hold special review sessions on service line burial depth requirements in the fall of 1996, conducted such sessions with all of their employees by late October of 1997; (2) MGE sent a letter to all of its service line contractors (GDC and K&B) generally reminding them of their contractual obligation to observe the construction requirements imposed by Commission rule and Company standards and reiterating the importance of the burial depth of service lines (attached to the Agreement as Exhibits A-1 and A-2); and (3) MGE will also revise certain of its construction standards pertaining to the installation of service lines (nos. 2120, 2310, 2315 and 2320 attached to the Agreement as Exhibits B-1 through B-4) to eliminate any possible ambiguity regarding the required depth of service line burial. MGE reviewed its procedures and standards regarding the inspection and evaluation of service line installations and found them to be adequate. Therefore, MGE is not revising such procedures although MGE is conducting meetings with all Company personnel who inspect service line installation work to review and emphasize the importance of the procedures.

MGE and Staff request that the Commission issue an Order Approving Settlement Agreement and Satisfaction of Complaint and issue orders closing both cases. The Agreement states that the undertakings by MGE and their acceptance by Staff forms a reasonable basis for settlement of the cases and any claims within the jurisdiction of the Commission arising from the incident.

The Commission has reviewed the Settlement Agreement and Satisfaction of Complaint filed on November 5 and the entirety of the file for each case. The



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Commission finds that the undertakings of MGE and their acceptance by Staff forms a reasonable basis for the settlement of these cases. The Commission finds that the Settlement Agreement and Satisfaction of Complaint is a reasonable resolution of the issues and should be approved.

*IT IS THEREFORE ORDERED:*

1. That the Settlement Agreement and Satisfaction of Complaint filed on November 5, 1997, by Missouri Gas Energy and the Staff of the Commission, is approved.
2. That Case Nos. GS-97-494 and GC-98-113 may be closed after February 4, 1998.
3. That this order shall become effective on February 3, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
G. George, Regulatory Law Judge

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EDITOR'S NOTE: The Settlement Agreement and Satisfaction of Complaint in this case have not been published. If needed, these documents are available in the official case files of the Public Service Commission.

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**In the Matter of the Application of Ronald Albright for Change of Electric Supplier.**

**In the Matter of the Application of Jerry Lilley for Change of Electric Supplier.**

**In the Matter of the Application of William R. and Joan Van Sant for Change of Electric Supplier.**

**In the Matter of the Application of E. Lynn and Wanda Wilson for Change of Electric Supplier.**

**In the Matter of the Application of Gil Edmiston for Change of Electric Supplier.**

**In the Matter of the Application of Lazy Valley Resort for a Change of Electric Supplier.**

**In the Matter of the Application of Lilleys' Landing for a Change of Electric Supplier.**

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*Case Nos. EO-97-314, 315, 316, 317, 318, 378 & 428*  
*Decided January 29, 1998*

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**Electric §§24, 31.** The Commission closed or denied eight applicants' request for a change of suppliers. The Commission found that most outages were not within the supplier's control and that a change in supplier would require a duplication of facilities leaving the original supplier with a stranded investment.

#### APPEARANCES

*Bonnie E. Albright*, 10070 Northeast 50th Street, Weir, Kansas 66781, for Ronald and Bonnie Albright.

*Jerry D. Lilley*, 105 River Lane, Branson, Missouri 65616, pro se.

*William R. Van Sant*, 171 River Lane, Branson, Missouri 65616, for William R. and Joan Van Sant.

*Rodric A. Widger*, Andereck, Evans, Milne, Peace & Baumhoer, L.L.C., 1111 South Glenstone, Post Office Box 4929, Springfield, Missouri 65808-4929, for White River Valley Electric Cooperative, Inc.

*Dean L. Cooper*, Brydon, Swearngen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for The Empire District Electric Company.

*Lewis R. Mills, Jr.*, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

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*William K. Haas*, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Elaine E. Bensavage.

## REPORT AND ORDER

### Procedural History

Seven applications for change of electrical supplier were filed with the Missouri Public Service Commission (Commission) during the period from February 11, 1997 to March 31. All of the applicants' properties are located in the vicinity of Branson, Missouri, all of the applicants are presently being served by White River Valley Electric Coop., Inc. (White River), and all seek to change their electric supplier to The Empire District Electric Company (Empire). The Commission issued an Order and Notice in each case notifying both electric suppliers of the applications and ordering the suppliers to file their response. In conjunction with its Order and Notice, the Commission directed its Records Department to send a copy of Commission information about proper procedure for pro se applicants for change of supplier, as well as a copy of the Commission's rules on practice and procedure to those applicants not represented by an attorney.<sup>1</sup>

White River filed timely responses to all seven applications. With one exception, White River filed the same response to all the applications. White River admitted that it provided electric service to the applicants, denied that there were any service problems, including outages, beyond normal repairs, maintenance and upgrades, and interruptions due to events beyond White River's control, and denied that more reliable service is available from another supplier. With regard to the application of E. Lynn and Wanda Wilson, Case No. EO-97-317, White River stated that the jurisdiction of the Commission to hear applications for change of suppliers does not extend to "the service, rates, financing, accounting or management of any such cooperative," citing to Section 394.395 [sic], RSMo 1994. White River thus requested that the Commission issue an order dismissing this application for the reason that it sought relief not available from the Commission.

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<sup>1</sup>The Commission notes that the information for pro se applicants specifically states: "The applicant should also be aware that if any pleading or correspondence is to be filed with the Commission, a copy of that document must be sent to all the other parties." Nevertheless, several applicants submitted correspondence to various employees of the Commission, as well as to a Commissioner, without sending copies to the other parties. These letters constitute ex parte contacts.

Empire also filed timely responses to the seven applications. Empire stated that it did not solicit the applicants and took no position on the merits of the applications. Empire further stated that the necessity for and amount of any connection fee would depend on the total number of persons connecting to its system, and their location relative to Empire's facilities, since Empire's tariff permits a 1,000-foot extension at no direct cost to the customer. Sufficient rights-of-way for the location of buried electric cable would also have to be obtained in order to provide service.

The Commission subsequently issued an Order Establishing Procedural Schedule in each case, which scheduled a hearing for August 25. A hearing was held as scheduled. However, of the applicants, only Bonnie E. Albright, Jerry D. Lilley, and William R. Van Sant appeared before the Commission. At the hearing, testimony was presented on behalf of applicants Albright, Lilley, and Van Sant, and the Staff of the Commission (Staff) and White River. The parties presented oral arguments in lieu of briefs at the close of the hearing.

#### **Rulings**

At the hearing, several rulings were made on both pending motions and motions raised at the hearing. In order to keep the record clear, the Commission will reiterate those rulings here.

A motion for an extension of time to file interrogatory answers in Case No. EO-97-428 was denied as moot. This case was also dismissed at the request of White River since Lilleys' Landing Resort, Inc. (Lilleys' Landing) was not represented by an attorney at the hearing. Missouri law does not permit a corporation to represent itself in legal matters, but instead corporations must act solely through licensed attorneys. Reed v. Labor and Indus. Relations Comm'n, 789 S.W.2d 19, 21 (Mo. 1990).

White River requested the dismissal of Case Nos. EO-97-318 and EO-97-378 for failure of the applicants to appear at the hearing. The Commission dismissed Case Nos. EO-97-318 and EO-97-378 pursuant to rule 4 CSR 240-2.110(4)(B), which states that failure to appear at a hearing without previously having secured a continuance shall constitute grounds for dismissal of the party's complaint, application or other action unless good cause for the failure to appear is shown.

Finally, White River requested the dismissal of Case No. EO-97-317 because the complaint involved a dispute over a deposit requirement, a matter over which the Commission would have no jurisdiction, and because applicants did not appear at the hearing. The Commission dismissed Case No. EO-97-317 on both bases. The Commission notes that both statutory provisions which provide the Commission with jurisdiction in change-of-supplier cases involving rural electric cooperatives explicitly exclude Commission jurisdiction over the rates of an electric cooperative. See §§ 394.080.5 and 394.315.2, RSMo 1994. In addition, this case was properly dismissed pursuant to 4 CSR 240-2.110(4)(B) for the applicants' failure to appear at the hearing.

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### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The applicants in these seven change-of-supplier cases either have primary residences, vacation homes, or businesses located at River Lane in Branson, Missouri, and currently receive electrical service from White River. River Lane parallels the upper part of Lake Taneycomo, with applicants' property located on the lake side of the road.

White River is a rural electric cooperative with the general powers designated in Section 394.080, RSMo. 1994. Empire is an electrical corporation and public utility as defined in Section 386.020(15) and Section 386.020(42), RSMo Supp. 1997. Because four of the applications were dismissed, only Case Nos. EO-97-314, EO-97-315, and EO-97-316 remain for the Commission's decision. Applicants seek through this proceeding an order from the Commission authorizing them to change electric suppliers from White River to Empire.

### **Evidence Regarding Individual Applicants**

#### **RONALD ALBRIGHT, Case No. EO-97-314:**

Applicant Ronald Albright was represented at the hearing by his wife, Bonnie Albright. Applicant Albright indicated that he experiences frequent power outages resulting in the loss of water and heat in his vacation home, and that power surges and fluctuations cause computer and other equipment problems. Mrs. Albright testified that she and her husband are very concerned about the possibility of an outage occurring in the wintertime when the applicants are not at their vacation home. Because the home is all-electric, applicants fear that the pipes in their home may freeze. She also claims that a power surge destroyed a well pump ten years ago, and that a TV set was destroyed by a power surge less than a month before the hearing. Mrs. Albright testified that the clock in their vacation home usually needs to be reset when they visit, indicating that a momentary blink or outage has occurred. Finally, Mrs. Albright testified that the number of outages at their vacation home is greater than the number of outages they experience in their home in Weir, Kansas, which is located in rural southeast Kansas.

#### **JERRY D. LILLEY, Case No. EO-97-315:**

Applicant Lilley testified that he experiences frequent power fluctuations and outages at his home, and that the outages affect his access to water and sewer as well, since both require electric pumps. Mr. Lilley also complained of damage to

compressors and computers by fluctuations and interruption of service, and difficulty in contacting White River to report an outage. Mr. Lilley complained of blinking clocks and damaged equipment, although he conceded that he could not prove the lost equipment was caused by White River. Mr. Lilley entered into evidence a letter from Empire indicating that Empire had only had two outages in the past year. Further, Mr. Lilley testified that he had never experienced the number of outages that he has experienced with White River when he lived at other locations, including locations similar in terrain, such as a rural area in Parsons, Kansas, which is located in southeast Kansas. Mr. Lilley noted that there had been additional outages since the time Staff's testimony was filed, which would bring the total number of outages to 17.

**WILLIAM R. and JOAN VANSANT**, Case No. EO-97-316:

Applicants Van Sant claimed that they have experienced numerous power interruptions and outages, and that as retired senior citizens they require a more reliable electric supplier to ensure that they have a constant supply of heating, cooling, and air filtration. Mr. Van Sant testified that he has a heart condition, and his wife has arthritis and problems with her joints. Mr. Van Sant expressed concern about his or his wife's ability to open their garage door or use the phone to get help in a medical emergency. In addition, Mr. Van Sant relayed an incident in which a power outage occurred while he was exercising on a treadmill, and the treadmill stopped abruptly, which caused him to fall and wrench his back. Mr. Van Sant claims that he has had equipment damaged by power surges and voltage fluctuations. In particular, Mr. Van Sant claims that a power surge occurred on July 12, at a time when there was no electrical storm. Mr. Van Sant has had to replace components in his computerized heat and air conditioning control system twice in the last two years, which he attributes to voltage fluctuations. In addition, Mr. Van Sant indicated that when outages occur, he and his wife are required to reset their security system, air and heating control system, clocks, VCR, TVs, microwaves, and the timers on a water softener and kitchen stove, which is time-consuming and frustrating. The motion detector lights outside their home sometimes lock on, which can be a problem if they are not home to turn them off.

Mr. Van Sant also read from a letter which he was asked to sign by White River when he became a member of the Cooperative. The letter indicated that power outages could occur, and recommended that members obtain backup power system generators for critical or sensitive equipment, and protective devices such as surge protectors, lightning arresters, and lightning and line conditioners to guard against equipment damage. The letter also indicated that White River would assist its members in the selection of standby equipment and protective devices. Mr. Van Sant offered into evidence affidavits from the remaining property owners on River Lane, which indicated that these owners did not object to having their electric supplier switched from White River to Empire.

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Staff testified that the properties on River Lane are served by a single-phase overhead line, which extends approximately one-quarter mile to a three-phase White River feeder. River Lane line is directly connected to White River's three-phase line, which serves an additional 850 customers. Staff states that there have been 13 outages during a seven-month period. Staff noted that the line is in good shape with respect to tree trimming, and that White River expects to increase the number of lines for incoming calls from eight to 24 when it installs an automated answering system during the first part of 1998. Staff further notes that White River does not have a policy on squirrel guards, since its experience has been that squirrels will chew up squirrel protection devices.

Staff recommends that the applicants' request for a change of suppliers be denied. Staff maintains that while 13 outages in a seven-month period are enough to be concerned about, most of the outages were beyond the control of White River. Staff notes that there are over 850 customers served by this same line, and no other requests or complaints have been received from those customers. Staff notes that the present value of White River's facilities on River Lane is estimated to be approximately \$41,000. Since not all of the customers on River Lane have requested a change of supplier, Empire would have to duplicate the White River line. In order to eliminate the duplication, all of the customers on River Lane would have to be changed to Empire, and White River's facilities would have to be sold to Empire. Staff states that it does not believe the outages are sufficient for a change in suppliers to be in the public interest.

Staff recommends that since four of the outages, representing 70 percent of the outage time, were related to squirrels, White River should work with manufacturers or electrical suppliers to secure a squirrel guard which will protect the transformers and other electrical facilities against outages. With respect to Case No. EO-97-314, Staff also notes that Mr. Albright does not have a computer at his vacation home, but instead was referring in his application to the equipment of neighbors. With regard to Case No. EO-97-315, Staff also noted that the power fluctuations alluded to in the application were the result of breaker (switch) operations during the outages.

White River states that it receives electricity from its supplier, KAMO Power at the Table Rock Substation, and the electricity flows over White River's three-phase system for a distance of 4.75 miles, at which point the voltage is reduced and passes over less than eight-tenths of a mile of single-phase line to the applicants. White River reviewed its records regarding service continuity from January 1, 1997. White River reported approximately the same number of outages as was reported by Staff. White River indicated that it installed a voltage recorder in April to measure voltage fluctuations on the line serving the applicants. Since the graphs produced by the recording data showed consistent voltage in an acceptable range, White River concluded that the complaints were not about true voltage fluctuations but rather about unexpected power interruptions. White River also indicated that it intended

to install a software program which would more quickly isolate an outage location on its mapping system, so that trouble crews could focus their attention on the right places.

White River claims that as long as its system is exposed to lightning, weather, construction, trees and animals, there will be breaker operations. White River notes that squirrels are recognized as a problem across the nation, and that the Electric Power Research Institute (EPRI) is conducting research into animal control. Finally, White River states that the line serving these customers was rebuilt only four years ago, and that the installed cost, including wire transformers, material, and labor, is approximately \$40,000 to \$41,000. If applicants were allowed to change electric suppliers, White River would not be able to retire the line, since it would continue to be used to serve other customers over common facilities.

#### General Findings

The Commission is aware that the fact situation of the individual applicants differs, and has considered each application on an individual basis. In analyzing the evidence presented in a change-of-supplier case, no single finding is determinative of the outcome. Instead, many factors, the most common of which are detailed in the Commission's conclusions, infra, must be balanced.

Based upon all of the evidence presented, the Commission finds that the applicants as a group have not been consistently receiving an adequate supply of electric power with respect to the quality of the power. The Commission found the applicants and their testimony to be credible. The testimony of the applicants was consistent with regard to the types of problems they were experiencing. The Commission finds that there have been approximately 17 outages within a seven-month period of time. Many of those outages were only momentary blinks; however, at least five of the outages ranged from one to three hours in duration. Of the five lengthier outages, four of the five were attributed to squirrels on the line. While the Commission recognizes that outages can occur for a number of reasons, many of which are not within the control of the electric supplier, the Commission finds that the evidence demonstrates a particular problem with squirrels causing outages.

The ascertainment that a problem exists is but one step in the balancing process, and other factors must be considered in determining whether a change in suppliers is appropriate. For various reasons, the Commission finds that it is not. The obvious solution would be for applicants to receive better service. Certainly, both Mr. Lilley and Mr. Van Sant expressed a desire for better service during their closing arguments. In the event the Commission could not authorize a change in suppliers, Mr. Lilley asked whether the Commission could arrange for the situation to be monitored in the future regarding the quality of service, and Mr. Van Sant asked whether the Commission could obtain a commitment from White River that service would improve in the future. Were White River a regulated utility, the Commission would have had



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as an option the ability to order White River to improve its electric service, which under certain circumstances might be a more efficient remedy and more responsive to the public interest. However, because the Commission has only limited authority over rural electric cooperatives, the only remedy which is available for its consideration is the drastic remedy of ordering a change in electric suppliers. Problems with service quality cannot be viewed in isolation but must be considered in conjunction with a range of other factors to determine whether a change in suppliers is in the public interest.

Health issues were raised by Mr. Van Sant. However, the evidence does not indicate how Mr. Van Sant's heart condition or Mrs. Van Sant's arthritis would be affected by power outages. These applicants expressed a need for heating, cooling, and air filtration. The Commission notes that the longest outage was three hours, which is unlikely to have an undue impact on these needs. The biggest health-related concern involved the ability of the Van Sants to have access to telephone service. The Van Sants have cordless phones which are dependent upon an electrical supply. This problem could be resolved by the installation of a telephone which is not dependent upon an electrical supply.

The Commission also finds that it is likely that at least some of the applicants have had equipment damaged or destroyed, although the evidence was sparse and contained hearsay. Because the evidence is not sufficiently specific or compelling to find that a particular appliance or piece of equipment was damaged or destroyed, it is difficult to measure the possible economic burden on the applicants. The Commission will not consider the Albrights' experience with their well pump, since the incident occurred ten years ago and is too far removed in time to be relevant.

Several factors militate against granting a change of suppliers. Staff has recommended that the applicants' request for a change of suppliers be denied. Staff's investigation was based on a review of White River's system and service continuity records, and its general experience. Staff concluded that most of the outages were not within White River's control. Although Staff's investigation and recommendations are not dispositive, they do weigh against granting a change in suppliers.

The applicants note that they are surrounded by properties which are served by Empire, and that when the electricity goes out at night, they can see lights on in the properties served by Empire. The Commission notes that this "island" situation — where a group of properties served by one supplier is surrounded by another supplier — is not unique. Were the Commission to give undue weight to this fact, it could expect to see additional applications from other people in the same situation. See, for example, In re the application of Martin J. Sinclair, Case No. EO-95-165, Report and Order, issued September 5, 1995, at 6-7. In effect, the Commission would be substituting its judgment for the judgment of White River and Empire, who are free to enter into a territorial agreement to address such matters as irregular borders. See § 394.312, RSMo 1994. Empire has not indicated a desire to enter into a territorial

agreement or to purchase White River's facilities, which might be possible for it to do under the circumstances delineated in Section 394.080.1(4). Instead, if the change was authorized by the Commission, Empire proposes to install buried electric cable, which would require it to obtain sufficient rights-of-way. White River would be left with a stranded investment of approximately \$40,000 if all the properties on River Lane were converted to Empire.

The Commission finds that it would not be in the public interest to authorize the transfer of all eleven properties on River Lane, since several of the applications were dismissed, and other property owners did not request a change in suppliers. The Commission is aware that the other property owners signed affidavits stating that they had no objection to a change in their electric supplier to Empire. The Commission finds that the affidavits alone are insufficient, since these property owners may not be aware of the potential costs, financial or otherwise, which may be incurred in switching suppliers. For example, there was testimony that it might be necessary to dig up driveways in order to install new facilities. It would not be in public interest for the Commission to order the transfer of all the properties on River Lane to Empire.

Likewise, it would not be in the public interest to authorize a change for only three of the properties in the area. This would require a duplication of facilities, and White River would experience some stranded investment. The Commission notes that White River rebuilt this line only four years ago. Any stranded investment would likely have an adverse economic impact on the remaining members of the Cooperative. The existence of two electric suppliers along the same street could cause confusion, and make the negotiation of territorial agreements and the drawing of territorial maps more difficult. Finally, there was little evidence to show that applicants had considered alternatives to address the problem short of seeking a change in supplier.

After balancing all the pertinent factors, the Commission finds that the public interest would not be served by granting a change of electric suppliers to the applicants. However, the Commission notes that applicants may review White River's Articles of Incorporation or Bylaws to determine whether there exists a procedural avenue through which they may remedy their grievances. Applicants may participate in elections for the Board of Directors of White River, or may raise their complaints at White River's annual meeting, which it is required to hold pursuant to Section 394.120.2, RSMo 1994. They may also be able to seek redress in a court of competent jurisdiction.

#### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

The burden of proof in change-of-supplier cases is on the applicant. In re Cominco American, Inc., 29 Mo. P.S.C. (N.S.) 399, 407 (1988). The Commission utilizes

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a case-by-case analysis in determining whether an application for a change of electric suppliers should be granted. *Id.* at 405.

The Missouri Legislature enacted four statutes, commonly referred to as the "anti-flip-flop" laws, which assure electric suppliers the right to continue supplying retail electric energy to structures through permanent service facilities once service has commenced, except for certain limited circumstances under which the Commission may authorize a change of supplier. Two statutes deal with a situation where the customer seeking a change of supplier is currently receiving service from a rural electric cooperative. The two statutes state as follows:

Notwithstanding the provisions of subsection 2 of this section, after a public hearing upon a complaint, the public service commission may order that service be provided by another supplier if it finds that service from another supplier of electricity is in the public interest for a reason other than rate differential. Nothing in this section shall be construed as conferring upon the public service commission jurisdiction over the rates, financing, accounting or management of any electric cooperative.

§ 394.080.5, RSMo 1994.

The public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential, and the commission is hereby given jurisdiction over rural electric cooperatives to accomplish the purpose of this section. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction.

§ 394.315.2, RSMo 1994.

The Cominco case, cited above, In re the application of Thomas J. and Barbara A. Bakie, Case No. EO-93-170, Report and Order, issued August 6, 1993, and In re the application of Carol June Tyndall, et al., Case No. EO-93-295, Report and Order, issued May 27, 1994, are the leading cases on customer-initiated applications for change of electric suppliers, and provide a substantial amount of guidance regarding the standards to be applied in determining when a change of electric suppliers is appropriate. The factors addressed in the Cominco and Bakie decisions may be recapitulated as follows:

(A) Whether the customer's needs cannot adequately be met by the present supplier with respect to either the amount or quality of power;

(B) Whether there are health or safety issues involving the amount or quality of power;

(C) What alternatives a customer has considered, including alternatives with the present supplier;

(D) Whether the customer's equipment has been damaged or destroyed as a result of a problem with the electric supply;

(E) The effect the loss of the customer would have on the present supplier;

(F) Whether a change in supplier would result in a duplication of facilities, especially in comparison with alternatives available from the present supplier, a comparison of which could include:

(i) the distance involved and cost of any new extension, including the burden on others — for example, the need to procure private property easements, and

(ii) the burden on the customer relating to the cost or time involved, not including the cost of the electricity itself;

(G) The overall burden on the customer caused by the inadequate service including any economic burden not related to the cost of the electricity itself, and any burden not considered with respect to factor (F)(ii) above;

(H) What efforts have been made by the present supplier to solve or mitigate the problems;

(I) The impact the Commission's decision may have on economic development, on an individual or cumulative basis; and

(J) The effect the granting of authority for a change of suppliers might have on any territorial agreements between the two suppliers in question, or on the negotiation of territorial agreements between the suppliers.

The Commission has applied its factual findings to the factors listed above, and concludes that a change in electric suppliers is not in the public interest. The Commission is sympathetic to the applicants' plight, and they may have other remedies which they may be able to pursue, but an order authorizing a change in suppliers is not a remedy which is in the public interest in these cases.

*IT IS THEREFORE ORDERED:*

1. That Case Nos. EO-97-317, EO-97-318, EO-97-378, and EO-97-428 are closed.
2. That the application for change of electric supplier filed by Ronald Albright in Case No. EO-97-314 is denied.
3. That the application for change of electric supplier filed by Jerry D. Lilley in Case No. EO-97-315 is denied.
4. That the application for change of electric supplier filed by William R. and Joan Van Sant in Case No. EO-97-316 is denied.
5. That this Report And Order shall become effective on February 6, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**West Elm Place Corporation, Complainant, v. Imperial Utility Corporation, Respondent.\***

*Case No. SC-98-180*

*Decided January 28, 1998*

**Sewer §26.** The Commission found company in default on payment for wholesale sewer service and ordered an investigation into the allegations.

**ORDER REGARDING DEFAULT**

On October 29, 1997, West Elm Place Corporation (Complainant) filed a complaint against Imperial Utility Corporation (Respondent). Complainant states that pursuant to its tariff provision (Sewer Rate Schedule E: Wholesale Service; P.S.C. Mo. No. 2, Sheets 1A, 1B, 1C, 1D and 1E), Complainant provides wholesale sewer service to retail sewer service providers, including Respondent, in Jefferson County. Complainant alleges that Respondent has ceased paying for the service provided pursuant to Schedule E and owes quarterly payments of \$6,871.00 due on July 1, 1997, and \$7,178.09 due on October 1, 1997. These amounts, according to Complainant, represent service to approximately 160 units consisting of residences, mobile homes, apartments and commercial establishments.

Complainant alleges that Respondent is violating Section 393.130, RSMo 1996, by not providing safe and adequate service to its customers. Complainant argues that Respondent is not paying for wholesale sewer service as required by tariffs approved by the Commission and is thus exposing Respondent's customers to the prospect of disconnection of sewer service and the concomitant loss of treatment of the waste produced by the affected customers. Complainant further alleges that Respondent is violating Schedule E of the Complainant's approved tariff by intentionally not paying lawful bills for service when due. Complainant seeks the following relief from the Commission:

- (1) A finding by the Commission that Respondent has violated Section 393.130, RSMo, by failing to provide safe and adequate service, and the authorization for the Commission's General Counsel to seek penalties from Respondent in the amount of up to \$2,000.00 per day for each day on which Respondent has intentionally refused to pay amounts lawfully due under Complainant's tariffs;
- (2) An order of the Commission requiring Respondent to pay all outstanding amounts due Complainant for service under Schedule E;

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\*Notice of dismissal without prejudice on behalf of complainant was filed on September 10, 1998. Case was closed on September 15, 1998.

- (3) An order of the Commission requiring Respondent to pay all future bills rendered by Complainant pursuant to Schedule E when due;
- (4) An order of the Commission determining that the tariff sheets of Respondent which allow Respondent to provide retail sewer service in the areas authorized by the Commission, but which are actually provided sewer service through Schedule E of Complainant's tariff, should be modified to exclude those areas where Complainant is providing wholesale service;
- (5) An order of the Commission authorizing Complainant to file a tariff changing its boundaries so as to provide retail service in those particular areas now served by Respondent pursuant to Complainant's Rate Schedule E; and
- (6) For such other relief, not inconsistent with that prayed for, as the Commission shall consider appropriate.

On October 31 the Commission issued a Notice of Complaint. The Notice of Complaint was issued pursuant to 4 CSR 240-2.070 and advised Respondent that it had 30 days in which to file an answer stating legal and factual defenses or to describe the measures taken to satisfy the complaint. The Respondent did not file an answer to the complaint.

On December 22 Complainant filed a Motion for Entry of Default Judgment. Complainant states that in addition to not answering the complaint, the Respondent has failed to satisfy the complaint and continues to be delinquent in payments. According to Complainant, Respondent presented Complainant with a check for over \$7,000.00 in November which Respondent's bank has refused to cash. Therefore, Complainant requests the Commission enter a default judgment against Respondent and an order granting the relief requested in the complaint. In particular, Complainant requests an order of the Commission which would accomplish the transfer of the affected wholesale customers to Complainant so that Complainant may bill them directly for retail service and eliminate the need to seek payments from Respondent in the future.

Pursuant to 4 CSR 240-2.070(9), the Respondent is in default and the allegations set out in the complaint are deemed to be admitted. "If the respondent in a complaint case fails to file a timely answer, the complainant's averments shall be deemed admitted unless good cause is found by the commission to extend the filing date of the answer." 4 CSR 240-2.070(9).

The Commission finds this an appropriate case in which its Staff should be directed to investigate the facts surrounding the complaint. The Water and Sewer

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Department Staff, along with the General Counsel of the Missouri Public Service Commission, should be directed to investigate the allegations set forth in the complaint and to file a report setting out its findings in these cases. The Commission further notes for the record that pursuant to § 386.570, RSMo 1994, failure to comply with an order of the Commission, as well as failure to obey the utility statutes and regulations of the State of Missouri, subjects a public utility to a penalty of not less than \$100.00 and not more than \$2,000.00 per day for each violation. Respondent has failed to comply with the relevant laws herein and could be subject to cumulative penalties of up to \$2,000 per day from December 1, 1997, forward.

*IT IS THEREFORE ORDERED:*

1. That Imperial Utility Corporation is hereby found to be in default pursuant to 4 CSR 240-2.070(9).
2. That the allegations set out in the complaint filed and docketed under Case No. SC-98-180 are hereby deemed admitted by Imperial Utility Corporation.
3. That the Water and Sewer Department Staff, along with the assistance of the General Counsel of the Missouri Public Service Commission, shall investigate the allegations set out in the complaint filed herein and shall file a report of their findings in this case. Such report shall be filed no later than February 20, 1998.
4. That this order shall become effective on February 10, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
G. George, Regulatory Law Judge

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**In the Matter of the Petition of MCI Telecommunications Corporation And Its Affiliates, Including MCI metro Access Transmission Services, Inc., for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company and\***

**In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company**

**In the Matter of the Mediation and Arbitration of Remaining Interconnection Issues Between MCI Telecommunications Corporation and Its Affiliates and Southwestern Bell Telephone Company**

*Case Nos. TO-97-40 & TO-98-200  
Decided February 6, 1998*

**Telecommunications §§6, 23, 36.** The Commission concluded the requests to negotiate interconnection issues were in accordance with the Telecommunications Act of 1996. The Act does not establish a minimum level of formality for making such requests. The Commission concluded the Act does not require a party with a history of prior negotiations and arbitration to carefully state whether it seeks to negotiate new issues or issues that have been previously negotiated or arbitrated.

**ORDER SETTING PROCEDURAL SCHEDULE AND DIRECTING FILING OF  
PARTIAL INTERCONNECTION AGREEMENTS**

On November 20, 1997, the Commission entered its Order Establishing Case for Accelerated Mediation and Arbitration, which established a procedural schedule for MCI Telecommunications Corporation and its affiliates (MCI) and Southwestern Bell Telephone Company (SWBT) to mediate and arbitrate the issues which remained regarding interconnection between them. Case No. TO-98-200 was established for the purpose of bifurcating the issues not previously

\*See page 354 for another order in this case. See pages 522 and 562, Volume 6 MPSC 3d for other orders in this case.



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arbitrated from those which were arbitrated in consolidated Case No. TO-97-40<sup>1</sup>. On November 26, SWBT filed an application for rehearing of the November 20 Commission order, alleging that the Commission does not have jurisdiction to arbitrate the issues in Case No. TO-98-200. MCI replied on December 5, and SWBT responded to MCI's reply on December 8. The Commission granted SWBT's request for rehearing on December 11 and set a hearing for the parties to address the extent of the Commission's jurisdiction. SWBT and MCI attended and presented oral argument and evidence at the December 30 hearing on jurisdictional issues.

#### Discussion

In its application for rehearing, SWBT alleged that MCI had never made a formal request to negotiate the issues which are the subject of Case No. TO-98-200 pursuant to the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 151 et seq. SWBT further alleged that no formal petition requesting the Commission to address these issues was filed pursuant to Section 252(b) of the Act within the time window mandated by the Act. SWBT explained that negotiations were requested on January 16 to develop language to implement the Commission's December 11, 1996, Arbitration Order, but that even if this constituted a proper "request," then the Commission could not assume jurisdiction because more than nine months had passed since that time. MCI responded prior to the hearing by suggesting that it had made a request to negotiate on June 3, 1997, and that it had filed a petition within the corresponding deadline under the Act on November 3. MCI asserted in the alternative that if SWBT's argument that negotiations began on January 16 was correct, then the Commission should find that MCI's June 16 pleading in Case No. TO-97-40 constituted a petition. MCI asserted that the Commission could exercise jurisdiction even if more than nine months had passed following the date of the request. At the hearing, MCI further alleged that it had made another request to negotiate with SWBT on August 20, 1997, and that the time frame for filing a petition to arbitrate would begin on January 2, 1998, and last until the end of the day on January 27.

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<sup>1</sup>MCI's first petition for arbitration of interconnection issues was initially the subject of TO-97-67, but that case was subsequently consolidated with and into Case No. TO-97-40. The Commission issued its first Arbitration Order in Case No. TO-97-40 on December 11, 1996 to resolve the issues presented to it at that time. The Commission's Final Arbitration Order was issued on July 31, 1997. The November 20 order required the parties to file an executed agreement in Case No. TO-97-40 to implement the arbitration orders that had already been issued in Case No. TO-97-40. MCI and SWBT submitted an unsigned agreement containing disputed language on December 1 that did not comply with the Commission's November 20 order.

**A. Applicable Law**

The Act sets forth certain procedures for negotiation, arbitration, and approval of interconnection agreements:

**(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION:**

(1) **ARBITRATION:** During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

**(2) DUTY OF PETITIONER:**

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning:

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues;  
and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) **OPPORTUNITY TO RESPOND:** A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such information as it wishes within 25 days after the State commission receives the petition.

**(4) ACTION BY STATE COMMISSION:**

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed

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on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

47 U.S.C. § 252(b). The "request for negotiation under this section," as described in (b)(1) refers to a "request for interconnection, services, or network elements pursuant to section 251 . . . ." See 47 U.S.C. § 252(a). Subsection (a) of § 252 addresses voluntary negotiations between telecommunications carriers, and states that upon receipt of such a request, "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . ." Id. Both carriers are obligated under § 251(c)(1) of the Act to negotiate in good faith.

#### **B. Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. The failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

##### **1. Request to Negotiate**

MCI presented evidence showing that on January 8 and August 20, 1997, MCI requested to meet with SWBT for the purpose of negotiating interconnection issues and that, on or near both of these occasions, MCI provided a sample agreement covering the topics which MCI sought to address. MCI also argued that it requested negotiations on June 3, and introduced a letter of that date addressed to SWBT from MCI to support its position. SWBT argues that each of the requests to negotiate concerned issues which had been decided by the Commission in its arbitration orders in Case No. TO-97-40, to resolve MCI's first arbitration petition. SWBT admits that MCI added previously unarbitrated issues to its requests of January 8 and August 20, but SWBT introduced uncontroverted evidence that the requests to negotiate were presented to SWBT by MCI as requests to merely negotiate language to implement the Commission's prior arbitration orders rather than to negotiate new issues. SWBT argues that MCI's presentation of contracts with its requests shows that MCI did not request negotiation, but implementation, of the Commission's prior arbitration orders. With respect to the alleged June 3 request, SWBT argues that the letter does not even request meetings.

The Commission finds that MCI requested, on January 8 and August 20, to meet with SWBT to negotiate interconnection issues. The set of issues which MCI sought to address on each of these occasions included both issues subsumed in the Commission's prior arbitration orders, and issues not previously arbitrated. The fact that MCI gave proposed contracts to SWBT together with or near the time of MCI's January 8 and August 20 letters does not negate MCI's requests, because in each letter, MCI stated that it proposed to use the contracts as topic outlines for conducting negotiations. The Commission further finds that MCI did not request negotiations on June 3. The letter does not contain any language suggesting that MCI would like to discuss interconnection issues with SWBT. (Exhibit 1).

### **2. Petition to Arbitrate Filed Within Statutory Time Limits**

MCI presented evidence at the hearing concerning various pleadings that it filed with the Commission in Case No. TO-97-40, arguing that these pleadings constituted "petitions." MCI argues that it filed petitions within the meaning of the Act on June 16 and November 3. The Commission has reviewed the pleadings in Case No. TO-97-40 and concludes that, at the time of the hearing, MCI had never filed a pleading denominated as a "petition" with the Commission<sup>2</sup>. The documents specified in § 252(b)(2)(A) of the Act were not filed together with the November 3 pleading or incorporated by reference. In the June 16 pleading, MCI requested the Commission to adopt the language of the agreement that was attached (except for the bolded and underlined language proposed by SWBT) in order to "fully capture the Arbitration Order." (See p. 4 of MCI's June 16 Motion for Approval of Interconnection Agreement). MCI further stated in its June 16 pleading that "does not believe that an additional contested case is needed to decide these issues that may almost certainly be decided on the existing record." (See p. 5, *Ibid.*). The June 16 pleading did not request the Commission to initiate a second arbitration proceeding.

### C. Conclusions of Law

Based upon its findings of fact and the applicable law, the Commission has reached the following conclusions of law:

#### **1. Request to Negotiate**

The Commission concludes that MCI made two different requests to negotiate interconnection issues to SWBT in accordance with the Act: on January 8 and August 20. The Act does not establish a minimum level of formality for making such requests. SWBT's contention that the request must be "clear and unequivocal" is not based upon the language of the statute. Likewise, despite SWBT's argument to the contrary, the Act does not state that a party with a history of prior

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<sup>2</sup>MCI did file a pleading denominated as a "petition" on January 27, 1998, which is discussed infra.

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Negotiations and arbitration must carefully state whether it seeks to negotiate new issues or issues that have been previously negotiated or arbitrated.

SWBT takes the position that a party requesting negotiation for a second time must be clear about its intention to initiate negotiations on new issues so that SWBT is made aware of the fact that the Act's 135th-160th day time window is approaching and can take advantage of the opportunity to negotiate. SWBT argues that MCI is attempting to recreate history. The Commission rejects SWBT's argument because SWBT has an obligation to negotiate in good faith with a requesting party, regardless of when the time window for arbitration will run. SWBT does not need to concern itself with the petition filing time window or the requesting parties' intent to ultimately initiate a new arbitration proceeding unless and until negotiations are unsuccessful. The Act contemplates that if and when negotiations fail, then the parties will refer back to the date on which their negotiations were initiated for the purpose of calculating when a petition for arbitration can be filed — not earlier.

The Commission acknowledges that SWBT's ability to negotiate in good faith is affected by the nature of the request to negotiate, however. Because MCI presented two requests for negotiations as requests to meet and confer over language to implement the Commission's prior arbitration orders rather than as requests to address new issues, and yet MCI was proposing language on issues that had not yet been arbitrated, SWBT was justifiably confused about MCI's approach to negotiations. Nevertheless, SWBT was put on notice on January 8 and August 20 about the set of issues which MCI wanted to address, regardless of whether they were previously arbitrated, and SWBT has had ample time to negotiate prior to the filing of a petition.

The Act references the date on which a request for negotiation is made so that the state commissions can determine when they have jurisdiction. The date does not have any significance unless negotiations are unsuccessful, and it is not intended to trigger a response deadline or any other deadline that would prejudice a non-requesting party if missed. As discussed *infra*, the request for negotiation differs from a petition for arbitration, which does trigger a response time and must be clear.

## **2. Petition to Arbitrate Filed Within Statutory Time Limits**

The Act explicitly requires a party petitioning a state commission for arbitration to provide the state commission all relevant documentation concerning the unresolved issues, the position of each of the parties with respect to those issues, and any other issue discussed and resolved by the parties, "at the same time as it submits the petition." 47 U.S.C. § 252(b)(2)(A). Copies of the petition and documentation must be provided to the other party on or before the date the petition is filed. 47 U.S.C. § 252(b)(2)(B). MCI argues that this permits a petitioner to file a request to arbitrate, in any form, to the Commission, and that the accompanying documents need only be provided to the Commission at some time prior to the completion of the case. MCI

takes the position that the term "submits" in § 252(b)(2)(A) of the Act is used in the sense of "submission of a case" following receipt of all evidence and argument.

The Commission disagrees with MCI's interpretation because it is contrary to other provisions of the Act. For example, § 252(b)(3) states that a non-petitioning party may respond to the other party's petition and "provide such additional information as it wishes" within 25 days after the state receives the petition. This provision suggests that the petitioning party will have already presented its documentation to the Commission and the responding party's information will be "additional." Moreover, § 252(b)(4) provides that the Commission will limit its consideration of any petition to the issues "set forth in the petition and in the response, if any . . . ." The Act clearly contemplates that a petition and response will serve the same functions as a complaint and answer in other civil actions, and the term "submits" in § 252(b)(2)(A) is intended to mean "files." Unlike the request to negotiate, the petition triggers a deadline for the respondent to state its position, and the petition and the response together define the set of issues to be arbitrated by the Commission. Finally, the Commission concludes that a petition need not necessarily be titled as such<sup>3</sup>, but it must clearly request the Commission to arbitrate a set of issues.

Given that a petition must include a clear request to arbitrate and must include the documentation specified in § 252 (b)(2)(A)(i-iii) of the Act, the Commission concludes that MCI failed to file a petition on June 16 or November 3. The pleading which MCI identifies as its June 16 petition contained no request for the Commission to engage in a new arbitration, but rather urged the Commission to adopt specific language to implement its December 11, 1996 Arbitration Order. The November 3 pleading clearly requested a new arbitration proceeding, but did not include or incorporate by reference the required documentation. If MCI had verified its November 3 pleading and, in the body of that pleading, incorporated the required documentation by reference from other pleadings on file with the Commission, then the Commission could have entertained the November 3 pleading as a petition and notified SWBT of the date on which its response was due. The Commission's rules authorize parties to incorporate by reference pleadings and other documents that are already on file with the Commission as though received into evidence in the case at bar<sup>4</sup>. See 4 CSR 240-2.130(2).

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<sup>3</sup>The Commission nevertheless encourages parties wishing to initiate arbitration on new issues after they have already completed an earlier arbitration or arbitrations to denominate their requests as "petitions" in order to clarify the nature of the relief requested from the outset.

<sup>4</sup>A verified petition is a form of evidence to which the Commission's rule applies.

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Nevertheless, although the June 16 and November 3 filings did not constitute "petitions" for arbitration within the meaning of the Act, MCI's January 27, 1998, "petition" does meet those requirements. The petition is verified, contains a clear request for a second arbitration proceeding, attaches or incorporates by reference the specific documents required to be provided under § 252(b)(2)(A)(i-iii) of the Act, and was filed between the 135th and 160th day, inclusive, following MCI's August 20, 1997, request for negotiations.

### **Conclusion**

The Commission concludes at this time that it has jurisdiction over the petition filed by MCI on January 27, 1998, and that SWBT must file its response, if any by February 23. However, SWBT's response may allege that there are defects in the January 27 petition that will cause the Commission to reconsider its conclusion. In the interim, the Commission will establish an expedited procedural schedule so that a decision can be made by the Commission concerning the issues raised in MCI's petition within the nine month time window established by the Act. 47 U.S.C. § 252(b)(4)(C). The procedure is similar, but not identical, to the procedure followed in Case No. TO-98-115 and the arbitration between MCI and SWBT in Texas. In addition, the Commission finds that the following conditions shall be applied to the schedule.

A. MCI and SWBT shall sign and file, in Case No. TO-97-40, a partial interconnection agreement containing all language that has been agreed upon by MCI and SWBT during the course of their negotiations to date.

B. MCI and SWBT shall file, in Case No. TO-97-40, a signed, partial interconnection agreement containing all language that they have agreed would implement the Commission's previous arbitration orders in Case No. TO-97-40. The parties will reserve their rights to appeal the Commission's previous arbitration orders, but the language of the partial interconnection agreement will be binding absent a court order preventing its enforcement.

C. MCI and SWBT shall file, in Case No. TO-98-200, a Joint Statement of Issues for Mediation which identifies each of the issues remaining in dispute that have not been previously arbitrated or for which MCI and SWBT cannot agree on language to implement the Commission's previous arbitration orders.

D. The Commission's General Counsel, Dana K. Joyce, or his designee, and the Commission's Arbitration Advisory Staff (AAS) shall meet with MCI, SWBT and OPC for the purpose of assisting MCI and SWBT in resolving the disputed issues. MCI and SWBT shall use the meeting with the AAS and the General Counsel or his designee to eliminate issues through compromise and through clarification of misunderstandings, explanation of an issue's interrelationship with other issues, and correction of clerical or arithmetical errors. Prior to the beginning of mediation sessions, MCI and SWBT shall submit position papers to the Commission's General

Counsel or his designee for use by the parties, the General Counsel and the AAS during the mediation sessions. Each party's position paper shall include the issues, the party's proposed language for resolving the issues, and the reasons supporting the party's position. MCI and SWBT shall file a notice in Case No. TO-98-200 that the position papers have been submitted to the General Counsel or his designee in accordance with this order. At the conclusion of the mediation sessions, the AAS and the General Counsel or his designee shall jointly file, in Case No. TO-98-200, their preliminary recommendation concerning the manner in which the Commission should resolve each issue not resolved during the mediation stage. MCI and SWBT shall jointly file a Statement of Resolved Issues at the conclusion of their mediation sessions, containing the specific language that they will use to implement their agreement on all issues resolved during mediation. No issue shall be identified as settled if MCI and SWBT have not agreed to specific language. MCI, SWBT, the AAS and the General Counsel or his designee shall ensure that each of the issues identified in the Joint Statement of Issues for Mediation is addressed in either the Statement of Resolved Issues or the preliminary recommendation of the AAS and General Counsel or his designee. Following the deadline established in this order for MCI and SWBT to file their Settlement Document, MCI and SWBT shall not be permitted to withdraw issues from the Joint Statement of Issues for Mediation by settling them. Rather, all issues not settled as of the deadline for filing the Statement of Resolved Issues shall be resolved by the Commission as it deems appropriate. The Commission intends to rely on its own experts, including the AAS and General Counsel or his designee, in reaching a final arbitration decision.

E. The Commission will require MCI and SWBT to prefile testimony in Case No. TO-98-200 in preparation for the arbitration hearing. In this proceeding, the prefiled testimony shall set forth specific language proposed by the filing party for resolving the remaining issues in dispute and shall support the filing party's reason for proposing that language. The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays in the proceedings caused by allegations of unfair surprise at the hearing. The Commission expects the parties to comply with the requirements of 4 CSR 240-2.130, including the filing of testimony on line-numbered pages. MCI and SWBT will also be given an opportunity to file rebuttal testimony in the same fashion.

F. Testimony and schedules shall not be filed under seal and treated as proprietary or highly confidential unless a protective order has first been established by the Commission. The party that considers the information to be proprietary or highly confidential should request a protective order. Any testimony or schedule filed without a protective order first being established shall be considered information open to the public.

G. At the arbitration hearing, MCI, SWBT and OPC will be permitted to cross-examine witnesses. One member of the AAS will be permitted to ask questions from



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the bench, along with the Commission and Regulatory Law Judge. The AAS and the General Counsel or his designee will then file final recommendations on the issues presented during the arbitration hearing.

H. The Commission's general policy provides for the filing of the transcript within ten working days after the conclusion of the hearing. The Commission will expedite the transcript in this case.

I. Initial briefs shall be limited to 60 pages and reply briefs to 30 pages. All pleadings, briefs and amendments shall be filed in accordance with 4 CSR 240-2.080(7).

J. All pleadings shall be filed in accordance with 4 CSR 240-2.080. All pleadings and testimony, and the position papers to be submitted to the AAS and General Counsel or his designee, shall be filed (or submitted) both in paper form and on 3" x 5" diskettes in WordPerfect 6.1 format, and shall employ the same headings and numbers to identify the issues that will be employed in the Joint Statement of Issues for Mediation. The preliminary and final recommendations of the AAS and General Counsel or his designee shall contain the language proposed by MCI, the language proposed by SWBT, and the recommendation to adopt either the MCI language or the SWBT language. The final recommendation shall contain an explanation of the AAS's and General Counsel's, or his designee's, position.

The Commission notes that, although it will schedule a hearing and permit cross-examination in this case, the Commission is doing so because the Commission finds that cross-examination is in the public interest, and not because of any statutory or other legal requirement that it do so.

*IT IS THEREFORE ORDERED:*

1. That the procedural schedule established by the Commission in its November 20, 1997, order is rescinded.

2. That the MCI Telecommunications Corporations and its Affiliates and Southwestern Bell Telephone Company shall file a signed, partial interconnection agreement containing language for all agreed upon interconnection issues in Case No. TO-97-40 no later than February 25, 1998.

3. That MCI Telecommunications Corporation and its Affiliates and Southwestern Bell Telephone Company shall file a signed, partial interconnection agreement containing all language that they agree would implement the Commission's prior arbitration orders in Case No. TO-97-40 no later than February 25, 1998.

4. That the following procedural schedule be adopted for Case No. TO-98-200, subject to the conditions discussed above:

SWBT response to petition	- February 23, 1998
MCI/SWBT Joint Statement of Issues	- February 25, 1998
MCI/SWBT notices of submission of position papers	- March 2, 1998

Mediation sessions	- March 9-20, 1998
AAS/General Counsel preliminary recommendation	- March 25, 1998
MCI/SWBT direct testimony for arbitration	- March 27, 1998
MCI/SWBT Joint Statement of Resolved Issues	- March 27, 1998
MCI/SWBT rebuttal testimony for arbitration	- April 1, 1998
Arbitration hearing	- April 8-22, 1998
AAS/General Counsel final recommendation	- May 4, 1998
Simultaneous initial briefs of MCI, SWBT and OPC	- May 8, 1998
Simultaneous reply briefs of MCI, SWBT and OPC	- May 11, 1998

5. That a procedural conference will be held in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri, beginning at 10:00 a.m. on Friday, February 13, 1998.

6. That the arbitration hearing will be held in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri, beginning at 8:30 a.m. on the first day and at 9:00 a.m. on each succeeding day.

7. That anyone wishing to attend who has special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days before the procedural conference or arbitration hearing at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

8. That the parties shall comply with this order in all respects.

9. That this order shall become effective on February 6, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Randles, Regulatory Law Judge

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## **In the Matter of an Investigation into the Provision of Community Optional Calling Service in Missouri\***

*Case No. TW-97-333*

*Decided February 17, 1998*

**Telecommunications §34.** The Commission suspended the elimination of Community Optional Service and found that it shall be phased out on or after June, 1998, but no later than the federally mandated deadline of February 28, 1999. The suspension was due to the industry's unexpectedly slow response to the elimination and replacement of the COS program.

### **Order Regarding Extension of Deadline**

The Commission has decided to extend the deadline for the elimination of mandatory Community Optional Service (COS). Although the date should be extended, for the reasons set out below, it would not be prudent for the Commission to allow this barrier to competition to remain any longer than necessary.

On October 16, 1997, the Commission issued its Report and Order (the Order) in which COS was eliminated as a mandatory service. The Commission directed that any expanded area calling service to be offered must be cost-based and could not rely upon a hidden subsidy.<sup>1</sup> The Order directed that COS, as it is now offered, must end on March 31, 1998.

The Commission has maintained a watchful eye on the process of implementation of replacement services, the responsiveness of the telecommunications industry and the overall preparation for the transition to a more competitive environment. The Order gave the telecommunications companies five and one-half months in which to both eliminate and replace COS. However, the industry has been unexpectedly slow to respond and their customers are now facing an imminent deadline. Therefore, the Commission has, *sua sponte*, reviewed the status of this case including, but not limited to, the testimony filed herein.

The Staff of the Public Service Commission (Staff) was a party to this case and proffered testimony on the elimination of COS as well as the way in which that elimination might occur in phases. The Commission has specifically turned its attention to the testimony of the Staff witness. Within that testimony the Staff's first suggestion for elimination was that the Commission eliminate COS routes simultaneously. "A simultaneous transition will also eliminate customers 'looking over the fence' and seeing a neighboring exchange with COS in its present form while they were switched to one-way COS." (Staff direct, p. 13.) However, as an alternative, Staff considered a more gradual phase-out.

\*See page 522 for another order in this case. In addition, see pages 152 and 531, Volume 6 MPSC 3d for other orders in this case.

<sup>1</sup> State statute prohibits the subsidization of competitive services by non-competitive services. See Section 392.400. In addition, the federal Telecommunications Act of 1996 requires that subsidies be explicit and competitively neutral. For these reasons, although the consumers desire to retain this service, it is a service which may not lawfully remain.

I strongly believe one-way COS should be subsumed in a competitive environment which would result in the most appropriate and permanent solution. I am not suggesting that one-way COS would be subsumed overnight by competition but realize it would be retained in each route until competition enters into that area. (Staff direct, p. 15.)

The Commission concludes it is appropriate to extend the deadline for the elimination of COS and to phase it out instead of requiring a simultaneous elimination. Inasmuch as one of the major concerns regarding the elimination of this service was the ability of families and school children to communicate in rural communities without incurring long distance charges, the Commission finds it appropriate to move the date for beginning the elimination of COS from March 31, to June 1, 1998.

The Commission will require COS to be phased out as intraLATA presubscription<sup>2</sup> is implemented in either the target or petitioning exchange. This implementation will, of necessity, coincide with the capability for competition and the availability of multiple competitors. Inasmuch as the retention of COS presents an ongoing barrier to competition, the public would be better served if the phase-outs occur as soon as feasible. However, under no circumstance may the Commission allow COS to exist after the federal deadline of February 28, 1999.

In addition to delaying the deadline for the elimination of COS the Commission has created a separate case in which it shall examine public access to the Internet. See In re: an Investigation into the Provision of Internet Access in Missouri, Case No. TW-98-155. The Commission has also determined it appropriate to establish a case in which it may examine calling scopes in a competitive environment.

In order to ensure notice to the public of these matters the Commission shall follow its long-standing, time-honored, routine practice of directing its Information Office to send a copy of this order to every member of the General Assembly as well as notice of this order to every newspaper listed in the official newspaper section of the **Official Manual of the State of Missouri**. In addition, the Commission will direct its Records Department to send a copy of this order to every certificated telecommunications company in the state of Missouri.

*IT IS THEREFORE ORDERED:*

1. That the date for the complete elimination of Community Optional Calling Service, of March 31, 1998, is suspended.

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<sup>2</sup>IntraLATA presubscription, or equal access, is the condition where all long distance carriers must be accessible by dialing 1+ and not a string of long dialing codes. . . telephone subscribers are being asked to choose their primary carrier who they will reach by dialing 1 before their long distance number. Newton's Telecom Dictionary, 10th Edition, 1996.

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2. That Community Optional Calling Service shall be phased-out on or after June 1, 1998, and that each Community Optional Service route shall be eliminated upon the implementation of intraLATA pre-subscription into either the target or the petitioning exchange of that route.
3. That for any exchanges which have not phased-out Community Optional Calling Service pursuant to ordered paragraph 2, shall not retain Community Optional Calling Service past the federally mandated deadline of February 28, 1999.
4. That the Information Office and the Records Department shall issue notice as set out herein.
5. That this order shall become effective on February 27, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., Concur.  
 Roberts, Chief Regulatory Law Judge

**In the Matter of a Review of the Technical and Financial Provision-  
 ing of Calling Scopes, in a Competitive Environment**

*Case No. TW-98-356*  
*Decided February 18, 1998*

**Telecommunications §30.** That Commission established a docket to investigate calling scopes in a competitive environment in order to adequately address the needs of Missouri customers and receive essential public and industry input.

**ORDER ESTABLISHING CASE, SETTING INTERVENTION  
 DEADLINE, AND SETTING PREHEARING CONFERENCE**

Competition in the telecommunication industry may cause numerous changes in the services provided to Missouri customers. Therefore, the Missouri Public Service Commission (Commission) finds it appropriate to develop a thorough report on calling scope issues and services in order to adequately address the needs of the Missouri customers in a competitive environment. In order to receive essential public and industry input for the purpose of developing this report, the Commission is establishing this case.

The Commission will direct the Staff of the Commission (Staff) to file with the Commission a proposed schedule of five local public hearings to be held throughout the state beginning in mid-April. Staff shall file the proposed schedule for the local public hearings no later than March 23, 1998.

In accordance with the Commission's usual practice of providing notification to the public of the establishing of working cases, the Commission directs that the following notification procedure take place. The Commission's Information Officer should send notice of this order to the publisher of every newspaper located in the State of Missouri, as listed in the newspaper directory of the current Official Manual

of the State of Missouri. The Records Department of the Commission should send a copy of this order to all certificated Missouri telecommunications companies. Any interested persons or entities should be given an opportunity to participate in this proceeding. The Information Officer will send a copy of the Commission's press release to all members of the General Assembly, all county commissions and municipalities within the state.

Representation by a licensed attorney is not a prerequisite to participation in a case of this type. Applications to participate shall be filed with the Secretary of the Missouri Public Service Commission by March 23, 1998.

Additionally, the Commission will set an early prehearing conference in which all participants may meet to discuss a proposed procedural schedule. Staff shall be responsible for filing a proposed procedural schedule no later than April 7, 1998. The proposed procedural schedule shall include dates for technical workshops.

The Commission wishes to receive a final Technical Report based upon the technical workshops by October 27, 1998. The Staff shall be responsible for filing the report. The final Technical Report should contain information on all existing calling scope services in Missouri and anticipated expanded calling scope services, with deadlines for implementation and a thorough description of the technological, legal, and financial issues to be considered.

*IT IS THEREFORE ORDERED:*

1. That case number TW-98-356 is established to investigate calling scopes in a competitive environment.
2. That the Records Department of the Missouri Public Service Commission shall send notice as set forth in the body of this order.
3. That the Information Officer of the Missouri Public Service Commission shall send notice as set forth in the body of this order.
4. That any interested person or entity wishing to participate in this proceeding shall file an application to participate on or before March 23, 1998. Such application shall be mailed to:

Secretary of the Commission,  
P.O. Box 360,  
Jefferson City, Missouri 65102.

5. That the Staff of the Missouri Public Service Commission shall file a proposed schedule for local public hearings as set forth in the body of this order on or before March 23, 1998.
6. That a prehearing conference is scheduled for March 30, 1998 in hearing room 520B on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri.
7. Staff shall file a proposed procedural schedule with the Commission on or before April 7, 1998.

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8. That any person(s) with special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten days prior to the prehearing conference at one of the following numbers: Consumer Services Hotline — 1-800-392-4211, or TDD Hotline — 1-800-829-7541.

9. That this order shall become effective on February 18, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., Concur.  
Roberts, Chief Regulatory Law Judge

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**In the Matter of the Joint Application of Southwestern Bell Telephone Company and Southwestern Bell Wireless, Inc. for Approval of Interconnection Agreement Under the Telecommunications Act of 1996.**

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*Case No. TO-98-219*  
*Decided February 19, 1998*

**Telecommunications §36.** The Commission approved an interconnection and reciprocal compensation agreement allowing SWB Wireless to become a reseller provider, a facilities-based provider, and a mixed-mode provider combining resold and facilities-based elements.

ORDER APPROVING INTERCONNECTION AND RECIPROCAL  
COMPENSATION AGREEMENT

Southwestern Bell Telephone Company (SWBT) and Southwestern Bell Wireless, Inc. (SWB Wireless) filed a joint application on November 25, 1997 requesting that the Missouri Public Service Commission approve an interconnection and reciprocal compensation agreement (Agreement) between SWBT and SWB Wireless. The Agreement was filed pursuant to Section 252(e)(1) of the Federal Telecommunications Act of 1996 (the Act). See 47 U.S.C. § 251, et seq. SWB Wireless does not currently hold any certificates of service authority to provide interexchange, basic local exchange or nonswitched private line local exchange telecommunications services in Missouri. Wireless carriers are licensed by the Federal Communications Commission (FCC).

The Commission, by its Order and Notice issued December 10, established a deadline of December 30 for proper parties to request permission to participate without intervention or to request a hearing. No parties requested to participate without intervention or requested a hearing. The Commission's Order and Notice also directed parties wishing to file comments to do so by January 23, 1998 and directed the Commission Staff (Staff) to file a memorandum advising the Commission of its recommendation by February 3. No comments were filed. Staff filed a Memorandum

on February 5, recommending that the Agreement be approved. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has asked permission to participate or requested a hearing in this case, the Commission may grant the relief requested based on the verified application.

#### **Discussion**

The Commission, under the provisions of Section 252(e) of the Federal Telecommunications Act of 1996 has authority to approve an interconnection or resale agreement negotiated between an incumbent local exchange company (LEC) and a new provider of basic local exchange service. The Commission may reject an interconnection agreement only if the agreement is discriminatory or is inconsistent with the public interest, convenience and necessity:

#### §252(e) APPROVAL BY STATE COMMISSION

(1) APPROVAL REQUIRED.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION.—The State commission may only reject —

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that —

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; . . . .

Staff stated in its memorandum that the agreement appears to be similar to other approved agreements for wireless interconnection. The Agreement describes the interconnection facilities and methods with which the parties may interconnect their networks and contains provisions for the transmission and routing of telephone exchange service, exchange access service, and other types of traffic including 800/888 traffic, E911/911 traffic, Directory Assistance and Operator Services traffic.



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The Agreement between SWBT and SWB Wireless is to become effective thirty days after Commission approval. The term of the contract is two years from the effective date; thereafter the Agreement remains in effect until one of the parties gives 60-day notice of termination. Each party agreed to treat the other no less favorably than it treats other similarly situated local service providers with whom it has a Commission-approved interconnection agreement. The Agreement contemplates three ways for SWB Wireless to provide service: as a reseller, as a facilities-based provider, or as a mixed-mode provider combining resold and facilities-based elements.

The Agreement permits several methods of interconnection, including mid-span meet POI, physical and virtual collocation, and SONET-based interconnection for originating and terminating calls between the two parties. The Agreement provides for reciprocal compensation for termination of local traffic, interMTA traffic and Area Wide Calling Plan traffic. The parties agreed that compensation rates for origination and termination of traffic to or from interexchange carriers would be based on SWB Wireless's and SWBT's access service tariffs.

SWBT agreed to work with SWB Wireless to meet all requirements mandated by applicable law for the handling of E911/911 traffic. SWBT also agreed to make available intraLATA toll dialing parity in accordance with Section 251(b)(3) of the Act.

The Agreement also contains provisions which apply a transit traffic element rate to all minutes of use between either SWBT or SWB Wireless and third party networks that transit the other party's system, if the calls do not originate with or terminate to SWBT's or SWB Wireless's (the transit party's) end user. The originating party is responsible for negotiating appropriate rates with the terminating party. SWBT has agreed not to block SWB Wireless traffic that is destined for the network of a third party even if SWB Wireless and the third party do not have an agreement. SWB Wireless will indemnify SWBT for such traffic if the third party demands compensation from SWBT.

#### **Findings of Fact**

The Missouri Public Service Commission, having considered the joint application of the parties, including the agreement and its appendices, and the Staff's memorandum, makes the following findings of fact.

The Commission has considered the application, the supporting documentation, and Staff's recommendation. Based upon that review the Commission has reached the conclusion that the interconnection and resale Agreement meets the requirements of the Act in that it does not unduly discriminate against a nonparty carrier, and implementation of the Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that approval of the Agreement

should be conditioned upon the parties submitting any modifications or amendments to the Commission for approval pursuant to the procedure set out below.

The Commission further finds that the Agreement addresses SWBT's handling of traffic originating on a wireless carrier's network and terminating on the networks of third parties in situations where the wireless carrier does not have an agreement with the third parties, as did the tariff in Case No. TT-97-524. The Commission finds that approval of the Agreement should be conditioned upon its decision in Case No. TT-97-524, and that the Agreement must be interpreted in conformity with the Commission's findings and conclusions in that case.

#### **Modification Procedure**

This Commission's first duty is to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act. 47 U.S.C. § 252. In order for the Commission's role of review and approval to be effective, the Commission must also review and approve modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection. 47 U.S.C. § 252(h). This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission. 4 CSR 240-30.010.

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

The parties shall provide the Telecommunications Staff with a copy of the resale or interconnection agreement with the pages numbered consecutively in the lower right-hand corner. Modifications to an agreement must be submitted to the Staff for review. When approved the modified pages will be substituted in the agreement which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the pages when they are inserted into the agreement. The official record of the original agreement and all the modifications made will be maintained by the Telecommunications Staff in the Commission's tariff room.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the modification will be approved once Staff has verified that the provision is an approved provision, and prepared a recommendation advising approval. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the

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Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

**Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission, under the provisions of Section 252(e)(1) of the federal Telecommunications Act of 1996, 47 U.S.C. 252(e)(1), is required to review negotiated interconnection and resale agreements. It may only reject a negotiated agreement upon a finding that its implementation would be discriminatory to a nonparty or inconsistent with the public interest, convenience and necessity under Section 252(e)(2)(A). Based upon its review of the interconnection and resale Agreement between SWBT and SWB Wireless and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and should be approved.

The Commission also has the authority to determine whether the rules, regulations or practices of any telecommunications company are unjust or unreasonable, and to determine the just, reasonable, adequate, efficient, and proper regulations, practices, and service to be observed and used by a telecommunications company. § 392.240.2, RSMo 1994. The Commission has previously found in Case No. TT-97-524 that SWBT will be required to make available a Cellular Usage Summary Report that contains information sufficient to allow third-party providers to bill wireless carriers for wireless-originating traffic which terminates in the exchanges of those providers. This obligation applies equally to traffic originating on SWB Wireless's network, which transits SWBT's network and terminates on the networks of third-party providers.

***IT IS THEREFORE ORDERED:***

1. That the interconnection and reciprocal compensation agreement between Southwestern Bell Telephone Company and Southwestern Bell Wireless, Inc., filed on November 25, 1997, is approved.
2. That Southwestern Bell Telephone Company and Southwestern Bell Wireless, Inc. shall file a copy of this agreement with the Staff of the Missouri Public Service Commission, with the pages numbered seriatim in the lower right-hand corner.
3. That any changes or modifications to this agreement shall be filed with the Commission for approval pursuant to the procedures outlined in this order.
4. That Southwestern Bell Telephone Company is obligated to make available to any requesting third-party carrier its Cellular Usage Summary Report, consistent with the Commission's Report and Order in Case No. TT-97-524.

5. That the Commission, by approving this agreement, makes no finding as to whether Southwestern Bell Telephone Company has fulfilled the requirements of Section 271 of the Telecommunications Act of 1996, including the competitive checklist of any of the fourteen items listed in Section 271(c)92)(B).

6. That this order shall become effective on February 23, 1998.

7. That this case shall be closed on February 24, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Randles, Regulatory Law Judge

**In the Matter of Union Electric Company's Filing to Revise its  
Tariff Sheets Applicable to Underground Distribution System  
Extensions**

*Case No. ET-98-110*  
*Decided February 26, 1998*

**Electric §§34, 39. Expenses §65.** The Commission approved the proposed tariff revisions set forth in Schedule 4 to the direct testimony of Mr. Kovach. The Commission found the revisions will provide overall cost savings for the installation of underground distribution system extensions.

**ORDER APPROVING REVISION TO UNDERGROUND  
DISTRIBUTION SYSTEM EXTENSION STANDARDS**

**Procedural History:**

On July 22, 1997, Union Electric Company (UE or Company) filed proposed tariff sheets to revise UE's standards for underground distribution system extensions to residential subdivisions. On August 11 UE filed substitute tariff sheets and extended the effective date of the tariff sheets from August 21 to September 15. On September 8 Laclede Gas Company (Laclede) filed a motion to reject or, in the alternative, to suspend the tariff sheets and application to intervene. UE filed substitute tariff sheets on September 9 and extended the effective date of the tariff sheets from September 15 to September 19. On September 11 the Staff of the Commission (Staff) filed a Memorandum recommending approval of the proposed tariff sheets. On September 12 the International Brotherhood of Electrical Workers, AFL-CIO, Local No. 1439 (Local No. 1439) filed a motion to reject, or in the alternative, to suspend the tariff sheets and application to intervene.

On September 18 the Commission issued an Order Suspending Tariff Sheets and Granting Intervention. The Commission granted intervention to Laclede and Local No. 1439 and ordered the suspension of the tariff sheets until March 17, 1998. The

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Commission also directed the parties to file a proposed procedural schedule no later than October 20, 1997. The parties filed a proposed procedural schedule on October 20, and on October 28 the Commission issued an Order Establishing Procedural Schedule.

Pursuant to the procedural schedule, the parties filed direct testimony on December 1 and rebuttal testimony on December 22. The International Brotherhood of Electrical Workers, AFL-CIO, Local No. 2 (Local No. 2) filed an untimely application to intervene on December 10. On December 19 UE filed an objection to Local No. 2's application to intervene. On December 30 the Commission issued an order denying the application to intervene of Local No. 2.

On January 9 the parties filed a hearing memorandum. On January 14 the Commission issued a notice canceling the evidentiary hearing and establishing a briefing schedule pursuant to the agreement of the parties to waive cross examination and submit case on prefiled testimony and briefs. The parties filed initial briefs on January 30 and reply briefs on February 9.

The Commission determines that the prefiled testimony submitted by the parties shall be received into the record as follows:

Exhibit No. 1: Direct Testimony of Richard J. Kovach filed by UE

Exhibit No. 2: Direct Testimony of Thomas W. Fagan filed by Local No. 1439

Exhibit No. 3: Rebuttal Testimony of Thomas W. Fagan filed by Local No. 1439

Exhibit No. 4: Rebuttal Testimony of Jeffrey A. Vaughn filed by Laclede

Exhibit No. 5: Direct Testimony of William L. McDuffey filed by Staff

Exhibit No. 6: Rebuttal testimony of William L. McDuffey filed by Staff

Written Testimony of Mr. Kovach:

Mr. Kovach, the Manager of the Rate Engineering Department at UE, states in his prefiled direct testimony that UE's current distribution extension tariffs provide two options to developers of residential subdivisions and multiple occupancy residential buildings, collectively referred to as subdivisions. Under the first option, the developer may avoid all UE underground fees and charges by installing, in accordance with UE specifications, a complete underground conduit system which would accommodate all of the various electrical cables and other distribution facilities which will be subsequently installed by UE. Under the second option, the developer may pay all UE per lot or per dwelling unit extension fees in advance and may then elect to subject such fee payments to an annual revenue test for the development. This revenue test, according to Mr. Kovach, compares the estimated total UE distribution system cost of serving the subdivision, on a per lot or per unit basis, with the estimated annual revenue to be received from the subdivision, on the same per lot or per unit basis. Any excess revenue above costs may be refunded to the developer up to the amount of fees or charges actually paid to the Company. The

tariffs currently in effect are contained in Schedule 2 attached to the direct testimony of Mr. Kovach.

Contained in Schedule 1 attached to the testimony of Mr. Kovach are copies of the tariff sheets filed by UE on July 22 as substituted on August 11 and September 9. Schedule 3 is a copy of a letter from the Home Builder's Association of Greater St. Louis (HBA) in support of the Company's proposal. Schedule 4 contains a "marked up" or modified version of the Company's Schedule 1 tariffs. Mr. Kovach states that the modified version contained in Schedule 4 contains the recommended tariff sheets for which the Company seeks Commission approval in this case. Mr. Kovach states that while the Company continues to believe that its original filing contained in Schedule 1 resulted in distinct advantages for both UE and HBA and should be viewed as relatively non-controversial, it nevertheless resulted in two interventions in opposition to portions of the filing. Mr. Kovach asserts that consideration of such interventions and subsequent discussions with the HBA resulted in the revisions proposed in Schedule 4. Mr. Kovach states that UE filed the proposed tariffs contained in Schedule 1 because the Company has been aware, since 1996 or earlier, that its schedule of charges for underground service has been below its actual cost of supplying such service to subdivision developers. Therefore, in 1996 the Company began participating in discussions with the HBA to explore ways in which underground service can be supplied to subdivisions in a more cost effective manner. HBA also sought a greater degree of control over construction scheduling and development costs being incurred by its members. As a result of these discussions, UE elected to file the proposed tariff sheets in Schedule 1.

The tariff sheets contained in Schedules 1 and 4 attached to Mr. Kovach's testimony implement as standard the option the developer currently has of installing a complete underground conduit system with materials provided by the Company. The tariff sheets set forth in Schedule 1 provide for a one-time partial refund of the developer's installation cost of up to \$150.00 of the average net annual revenue per lot which exceeds the estimated extension cost per lot. A similar provision allows a refund for multiple occupancy dwelling units of up to \$50.00 of the average net revenue per dwelling unit which exceeds the estimated extension cost per dwelling unit. The modified version contained in Schedule 4 eliminates the \$150.00 per lot refund and retains the \$50.00 per unit refund for multiple occupancy buildings.

Written Testimony of Mr. Vaughn:

Mr. Vaughn, Manager of Residential Sales/Division Operations for Laclede, states that Laclede does not oppose the new tariff language set forth in Schedule 4 attached to the direct testimony of Mr. Kovach. Mr. Vaughn states this position of Laclede is based, in part, on Laclede's understanding that UE has no plans to make additional modifications to these tariffs in the foreseeable future that would incor-

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porate or expand the use of revenue testing and that implementation of the tariff proposal will not be relied upon as a precedent by UE for implementing revenue testing in the future. Mr. Vaughn adopted the statements made by Laclede in its pleadings on September 8 and September 17 as to why Laclede opposed UE's original tariff filing. In those pleadings, Laclede alleges that the refund of up to \$150.00 per lot based on the average electric revenue generated by each lot constituted a load building measure for inducing developers to install electric appliances and established a prohibited promotional practice under Commission rule 4 CSR 240-14.020(1).

Written Testimony of Mr. Fagan:

Mr. Fagan, Business Manager for Local No. 1439, testified that the tariff revisions requested by UE are in violation of the collective bargaining agreement (agreement) between UE and Local No. 1439 and in violation of the long standing past practice between UE and Local No. 1439. However, the Commission notes that any such collective agreement would not be relevant or binding in this case. Moreover, the Commission does not have the authority to overturn or uphold bargaining agreements.

Mr. Fagan contends that the Commission should not grant the proposed tariff revisions because they would adversely impact working conditions and other terms and conditions of employment for members of Local 1439. Mr. Fagan argues that approval of the tariff would violate Section 386.315.1, RSMo 1994,<sup>1</sup> which provides in part, "In establishing public utility rates, the commission shall not reduce or otherwise change any wage rate, benefit, working condition, or other term or condition of employment that is the subject of a collective bargaining agreement between the public utility and a labor organization." However, that statute is specifically directed to actions in which the Commission is "**establishing public utility rates**" (emphasis added), and that statute is not relevant in this case.

Written Testimony of Mr. McDuffey:

Mr. McDuffey is a Rate and Tariff Examiner in the Electric Department of the Staff's Operations Division. Mr. McDuffey testifies that Staff is not opposed to the tariff sheets filed by UE on July 22 as substituted because the filing will provide overall cost savings, efficient scheduling of construction and better coordination with other utilities. Mr. McDuffey states that Schedule 4 of Mr. Kovach's testimony removes the provision for a refund of up to \$150.00 for single family construction and retains the refund of up to \$50.00 per unit for multiple occupancy construction. This modification, according to Mr. McDuffey, does not change Staff's recommendation for approval. Mr. McDuffey disagrees with Mr. Fagan's request because Mr. McDuffey believes that UE's underground extension policy should be determined by

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<sup>1</sup>All statutory references are to the Revised Statutes of Missouri, 1994, unless otherwise indicated.

the Commission, not by an arbitrator. Mr. McDuffy testifies that the current per lot rates for underground line extensions are so far below current actual costs as to be unreasonable.

According to Mr. McDuffey, the alternative of requiring UE to continue to install underground distribution systems while increasing the developer's contribution to current costs would have various shortcomings. Specifying fixed per lot charges cannot account for cost difference between residential subdivisions caused by different surface and subsurface conditions, obstructions, stage of construction, or access to right-of-way. Furthermore, Mr. McDuffey states that the average subdivision lot size in square feet does not accurately reflect the linear feet of conduit installation. Mr. McDuffey recommends that the Commission approve the proposed tariff sheets as filed and revised to go into effect no later than March 1, 1997, in order to be available at the beginning of the home building season.

Legal Briefs:

Staff requests in its initial and reply briefs that the Commission approve UE's proposed general rules and regulations applicable to underground distribution extensions to residential subdivisions as set forth in Schedule 4 to the Direct Testimony of Mr. Kovach. Staff states that UE's proposal will benefit the developer with overall cost savings, efficient scheduling of construction and better coordination with other utilities. Staff adds that UE will benefit by more efficiently utilizing its skilled work force, lessening the construction period and eliminating the out-of-date contribution charges.

In response to the claims of Local No. 1439, Staff points out that the Commission has general supervision of electrical companies such as UE pursuant to Section 386.250, RSMo Supp. 1997, and Section 393.140. Therefore, Staff believes that the Commission, not an arbitrator, should determine UE's underground line extension policy. Staff argues that the approval of the tariff revisions does not violate Section 386.315.1 because the revisions do not cause a change to any "term or condition of employment."

Local No. 1439 continues in its brief the argument stated in Mr. Fagan's testimony that the proposed tariff revisions should be rejected because the proposal would change and negatively impact the working conditions and other terms or conditions of employment of bargaining unit employees in violation of Section 386.315.1. Again, this statute is not on point.

According to Local No. 1439, any action taken by the Commission in furtherance of UE's proposed changes prior to the arbitral award would result in substantial prejudice to the interests of Local No. 1439 and would effectively nullify the grievance and arbitration process. Local No. 1439 asks, assuming *arguendo* that the Commission finds the terms of Section 386.315.1 inapplicable to this case, that the Commission refrain from any action on the proposed tariff sheets until the arbitrator enters the award. Local No. 1439 asks that the Commission take into account the



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award when the Commission makes its decision. The Commission finds that this process should be reversed inasmuch as the Commission's decision should be binding.

Laclede states in its brief that it does not oppose the implementation of the revised tariffs set forth in Schedule 4 to the direct testimony of Mr. Kovach. Laclede states this position is based on its understanding that: (1) UE has no plans to make additional modifications to these tariffs in the foreseeable future that would incorporate or expand the use of revenue testing; and (2) implementation of the new tariff proposal will not be relied upon as a precedent by UE for implementing revenue testing in the future.

UE requests in its initial and reply briefs that the testimony and arguments of Local No. 1439 related to Section 386.315.1 should be stricken or disregarded because Local No. 1439 first raised this issue in rebuttal testimony. UE contends that nowhere did UE's witness testify that UE's rate structure is inextricably bound up with its proposed tariff revisions, so that the argument raised by Local No. 1439 was not responsive to UE's direct testimony. UE agrees with Staff that Section 386.315.1 has no application to this matter because the Commission is not being asked to establish public utility rates or to reduce or otherwise change any wage rate, benefit, working condition or other term or condition of employment that is the subject of a collective bargaining agreement. UE points out that Local No. 1439's interpretation of Section 386.315.1 is overly broad and unprecedented because under the same logic the Commission would be prohibited from adjusting the rate of return for any jurisdictional utility if doing so would reduce funds available to the utility and would result in the possibility of layoffs or reductions in hiring in a bargaining unit. UE argues that the Commission should not delegate its authority to an arbitrator and to the vagaries of the collective bargaining process because the subject matter of the tariff revisions is unequivocally within the Commission's jurisdiction pursuant to Section 386.250, RSMo Supp. 1997, and Section 393.140. UE states that Local No. 1439 failed to establish that the collective bargaining agreement has been breached or that Local No. 1439 is likely to prevail in any subsequent arbitration. According to UE, Local No. 1439 witness Mr. Fagan failed to identify any harm which would be caused by the Commission's approval of the tariffs because he merely speculated of the possibility of layoffs or reductions in hiring. UE adds that Local No. 1439 failed to present any competent evidence that the arbitrator would not have the ability to fashion a remedy if, in fact, Local No. 1439's complaints might be found to have any merit, which UE denies.

UE points out that the tariff included as Schedule 4 to Mr. Kovach's direct testimony implements as standard the current option the developer has of installing a complete underground conduit system. Therefore, UE states that Schedule 4 does not impose a radical change, but only implements as standard the options and practices that are currently permitted under UE's tariffs. The changes are sought by UE for two reasons: (1) since at least 1996, UE has been

aware that its schedule of charges for underground service has been below its actual cost for supplying such service to subdivision developers; and (2) the developers wanted to have the conduit installation responsibility in order to gain greater control over construction scheduling and development costs.

Determination:

The Commission has reviewed the prefiled testimony and briefs of the parties. The Commission concludes this is not a case in which the Commission will "reduce or otherwise change any wage rate, benefit, working condition, or other term" of employment as provided in Section 386.315.1. UE is requesting the Commission to exercise its statutory authority pursuant to Section 386.250, RSMo Supp. 1997, and Section 393.140 to approve UE's proposed changes to its standards for underground distribution system extensions. Section 386.250, RSMo Supp. 1997, and Section 393.140 provide for the Commission to have jurisdiction over the installation and maintenance of underground electrical lines and conduits. The Commission concludes that the approval of the proposed tariff revisions would not violate Section 386.315.1. This case does not involve establishing public utility rates as set forth in Section 386.315.1.

The Commission determines that the proposal set forth in Schedule 4 to the direct testimony of Mr. Kovach will provide overall cost savings for the installation of underground distribution system extensions. The Commission determines that the proposal set forth in Schedule 4 will allow more efficient scheduling of construction and better coordination with other utilities. The Commission finds that Local No. 1439 has not established that the Commission's approval of the proposal would result in layoffs or a reduction in hiring in the bargaining unit or that the arbitration process would be rendered a nullity. The Commission determines that it is not proper for the Commission to refrain from taking any action on the proposed tariffs until a final decision is rendered on alleged violations of the collective bargaining agreement.

The Commission will approve the proposed tariff revisions set forth in Schedule 4 to the direct testimony of Mr. Kovach and will order UE to file tariff sheets consistent with those sheets set forth in Schedule 4. The Commission will reject the tariff sheets filed by UE on July 22, 1997, as substituted on August 11 and September 9, which UE no longer supports.

*IT IS THEREFORE ORDERED:*

1. That the tariff sheets filed by Union Electric Company on July 22, 1997, as substituted on August 11, 1997, and on September 9, 1997, assigned tariff file No. 9800067 and subsequently docketed in Case No. ET-98-110, are rejected.

2. That the proposed tariff revisions set forth in Schedule 4 to the direct testimony of Mr. Kovach (Exhibit 1) are approved, and that Union Electric Company is authorized to file tariff sheets consistent with Schedule 4.

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3. That Exhibits 1 through 6 as identified in this order are received into the record by agreement of the parties.
4. That those motions and objections not specifically ruled on in this order are denied or overruled.
5. That this order shall become effective on March 10, 1998.

Lumpe, Ch., Murray, and Drainer, CC., concur. Crumpton, C., absent.  
G. George, Regulatory Law Judge

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**AT&T Communications of the Southwest, Inc., Complainant, v.  
Ozark Telephone Company, Respondent.**

*Case No. TC-97-335  
Decided February 26, 1998*

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**Telecommunications §26.** The Commission approved an agreement between Ozark Telephone Company and AT&T in which Ozark will provide periodic investigation and repair reports to AT&T. The parties further agreed that AT&T will not initiate contact unless Ozark fails to provide the reports and AT&T will pay Ozark's overtime repair expenses.

**ORDER APPROVING STIPULATION AND AGREEMENT**

AT&T Communications of the Southwest, Inc. (AT&T) initiated this case by filing a complaint against Ozark Telephone Company (Ozark) on February 19, 1997. AT&T alleged that Ozark had provided inadequate service to AT&T and other customers by failing to repair defective or damaged equipment on a timely basis, refusing to accept and respond to trouble reports on a timely basis, and failing to advise AT&T as an interconnecting carrier about the status of investigation and repair attempts. AT&T also alleged that one of the T1.5 access lines provided by Ozark to AT&T had failed on four occasions prior to the filing of the complaint and that Ozark had taken an inordinate amount of time to properly restore service, inconsistent with industry expectations.

The Commission issued a Notice of Complaint on February 25. On March 19, Ozark filed its answer, in which Ozark denied AT&T's allegations. Ozark explained that it has only two full-time employees, one of which serves as its sole repairman, to serve the 2,000 customers in its two exchanges. Also, Ozark explained that it has only been operating as a telecommunications company in Missouri since April 1, 1996, when it acquired the assets for its exchanges from GTE Midwest Incorporated pursuant to a Commission approved asset purchase agreement.<sup>1</sup>

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<sup>1</sup> The Commission approved the sale and issued a certificate of service authority to Ozark on July 11, 1995 in Case No. TM-95-134.

Ozark alleged that AT&T had harassed Ozark by calling every 30 minutes to check on the status of repairs and investigations following trouble reports. According to Ozark, the T1.5 access line at issue, which serves an AT&T customer in Noel, was struck by lightning in June of 1996 and it took Ozark 24-36 hours to repair the line after Ozark received notification of the damage. Ozark alleged that two to three days passed between the time of the lightning strike and the time of AT&T's notice to Ozark. Ozark stated that the only other service interruption took place in July of 1996 and that Ozark restored service approximately one hour after receiving notification; any other service interruptions were due to customer-owned equipment for which Ozark was not responsible.

The Commission convened a prehearing conference of the parties on May 12, 1997 for the purpose of identifying the issues and giving the parties a forum to negotiate.

On September 19, AT&T and Ozark filed a Stipulation and Agreement (Agreement) and requested Commission approval of its terms. The Agreement does not contain any stipulations of fact concerning the allegations made in the complaint or the answer. However, the Agreement identifies the actions that each party will take to resolve the dispute. Ozark will provide AT&T with four telephone numbers at which Ozark personnel can be reached 24 hours per day, seven days per week, to receive trouble reports. Ozark will provide AT&T with reasonable periodic reports as to the status of investigation and repair attempts, and AT&T will not initiate contact unless Ozark fails to provide such reports. If AT&T needs to contact Ozark, there will be only one individual from AT&T initiating contact. Ozark will install and maintain a "Smart Jack" on the premises of the Hudson Foods facility near Noel, and will purchase and store at the facility a spare "Smart Jack." If AT&T makes a trouble report that requires Ozark to dispatch personnel outside of normal business hours (8:00 a.m. to 5:00 p.m.), AT&T will pay Ozark's overtime expenses. AT&T will pay a minimum of two hours of overtime for any such incident.

The Agreement was signed by AT&T and Ozark only. Under 4 CSR 240-2.115, the Commission may treat a stipulation and agreement as a unanimous stipulation agreement unless a non-signatory party requests a hearing within five days after receiving notice of the stipulation and agreement. Neither the Staff of the Commission (Staff) nor the Office of the Public Counsel (OPC), who are the remaining parties to the case, requested a hearing concerning the Agreement.

Staff filed Suggestions in Support of the Agreement on January 20, 1998. The suggestions did not state that Staff had investigated the facts alleged in the complaint or answer. Staff supports the Agreement because it fairly and accurately represents the oral agreement that the parties had reached at the prehearing conference.

The standard for Commission approval of a stipulation and agreement is whether the agreement is just, reasonable and in the public interest. The Commission has

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reviewed the complaint, the answer, and the other case papers and finds that the terms of the Agreement reached by the parties is just and reasonable and will serve the public interest. The Commission does not have sufficient information to make findings concerning the allegations contained in the complaint and answer. Moreover, the Commission does not, in this case, address the necessity for or reasonableness of Ozark's purchase of two "SmartJacks." Nevertheless, the Commission finds that the terms upon which AT&T and Ozark seek to settle their dispute do not appear on their face to violate any statute, rule, or Commission order. Therefore, the Commission will approve the Agreement as set out in Attachment A to this order and will order the parties to comply with the Agreement.

*IT IS THEREFORE ORDERED:*

1. That the proposed Stipulation and Agreement, filed by AT&T Communications of the Southwest, Inc. and Ozark Telephone Company on September 19, 1997 is approved.
2. That the parties shall comply with the terms of the Stipulation and Agreement set forth in Attachment A to this order.
3. That this order shall become effective on March 10, 1998.
4. That this case shall be closed on March 11, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur.  
Crumpton, C., absent.  
Randles, Regulatory Law Judge

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EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**In the Matter of Missouri Public Service, a Division of UtiliCorp United Inc.'s Tariff Designed to Increase Rates for Electric Service to Customers in the Missouri Service Area of the Company. \***

**In the Matter of the Filing of Tariff Sheets by Missouri Public Service, a Division of UtiliCorp United Inc., Relating to Real-Time Pricing, Flexible Rates/Special Contracts, Line Extension Policy and Energy Audit Program.**

**The Staff of the Missouri Public Service Commission, Complainant, vs. UtiliCorp United Inc., d/b/a Missouri Public Service, Respondent.**

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*Case Nos. ER-97-394, ET-98-103 & EC-98-126*  
*Decided March 6, 1998*

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**Electric §20.** The Commission approved revised tariff sheets reducing the company's revenue requirement in the amount of \$16,898,098. The Commission found the reduced rates will be applied as an equal percentage across all rates and rate classes.

**APPEARANCES**

*James C. Swearingen, Dean L. Cooper and Christine J. Egbarts, Attorneys at Law, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102, for UtiliCorp United Inc. d/b/a Missouri Public Service.*

*Richard S. Brownlee, III, Attorney at Law, Hendren and Andrae, 221 Bolivar Street, Suite 300, P.O. Box 1069, Jefferson City, Missouri 65102, for Sedalia Industrial Energy Users Association.*

*Jeremiah D. Finnegan, Attorney at Law, Finnegan, Conrad & Peterson, L.C., 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, for Jackson County, Missouri.*

*Jeffrey A. Keevil, Attorney at Law, Stewart & Keevil, L.L.C., 1001 Cherry Street, Suite 301, Columbia, Missouri 65201, for International Brotherhood of Electrical Workers, Local 814.*

*Mark W. Comley, Attorney at Law, Newman, Comley & Ruth, P.C., 205 East Capitol Avenue, P.O. Box 537, Jefferson City, Missouri 65102-0537, for City of Kansas City, Missouri.*

*James M. Fischer, Attorney at Law, 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Kansas City Power & Light Company.*

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\*The Commission, in an order issued on April 16, 1998, denied applications for rehearing, granted in part and denied in part applications for reconsideration, granted a motion for clarification and approved tariffs.

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*William J. Niehoff*, Attorney at Law, 1901 Chouteau Avenue, P.O. Box 149, St. Louis, Missouri 63166-6149, for Union Electric Company.

*Robert J. Hack*, Senior Attorney, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy.

*Lewis R. Mills, Jr.*, Deputy Public Counsel, Office of the Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*David Woodsmall*, Senior Counsel, *Roger W. Steiner*, Assistant General Counsel, *Stephen Gunn*, Assistant General Counsel, *Thomas R. Schwarz, Jr.*, Deputy General Counsel, and *Steven Dottheim*, Deputy General Counsel, P.O. 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Joseph A. Derque III.

#### Procedural History

On March 21, 1997, UtiliCorp United Inc. (UtiliCorp) d/b/a Missouri Public Service (MPS) initiated ER-97-394 by filing with the Missouri Public Service Commission (Commission) tariffs designed to increase rates for electric service to its Missouri customers in the amount of approximately \$25 million, an increase of 9.3 percent. Included as a part of that filing were charges referred to as transition charges. The requested increase was exclusive of occupational and franchise taxes. On April 4, 1997, the Commission issued an order suspending the proposed tariffs until March 18, 1998.

On August 18, 1997, UtiliCorp filed tariffs relating to real-time pricing, flexible rates, special contracts, line extension policies and an energy audit program in Case No. ET-98-103, all bearing an effective date of September 18, 1997. On September 11, 1997, the Commission issued an order suspending those tariffs consistent with the suspension date of the rate filing and consolidating the two cases, Nos. ER-97-394 and ET-98-103.

On September 16, 1997, the Staff of the Commission (Staff) filed a separate complaint against UtiliCorp, alleging jurisdictional electric over-earnings by MPS of approximately \$28.5 million and seeking a reduction in rates. The Staff and Office of the Public Counsel (OPC) filed direct testimony concurrently with the complaint filing. On September 23, 1997, the Commission issued an order consolidating the Staff complaint, Case No. EC-98-126, with the rate case and tariff filings.

On October 9, 1997, the Commission issued an order establishing the historic test year in the consolidated cases as the twelve-month period ending December 31, 1996, updated through June 30, 1997. The Commission granted a true-up period through September 30, 1997.

Intervention was granted to the following parties in the consolidated cases: Union Electric Company (UE), the International Brotherhood of Electric Workers, Local No. 814 (IBEW), the City of Kansas City, Missouri (Kansas City), the Sedalia Industrial Energy Users Association (SIEUA), Jackson County, Missouri (Jackson County), Kansas City Power & Light Company (KCPL), St. Joseph Light & Power Company (SJLP) Missouri Gas Energy (MGE) and The Empire District Electric Company (EDE).

The evidentiary hearing was held from December 8, 1997 through December 12, 1997, and from December 15, 1997 through December 19, 1997 and, after briefing, this case was submitted to the Commission for decision on February 4, 1998.

#### **Findings of Fact**

The Missouri Public Service Commission, having considered all competent and substantial evidence, upon the whole record, makes the following findings of fact.

The Commission has reviewed and considered all of the evidence and argument presented by the various parties and intervenors in this case. Due to the volume of material presented to the Commission, some evidence and positions on certain issues may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or the position of a party indicates that, while the evidence or position was considered, it was not found to be necessary to the resolution of the issue.

For the purposes of organization and ease of understanding, the issues will be addressed in the order in which the issues and corresponding dollar amounts appear on the Revenue Summary, page 72, based on information provided in Second Revised Scenario I, entered into evidence as Exhibit No. 161, filed March 2, 1998 and appended to this order as Attachment A. These issues will be addressed beginning with the three issues involving calculation of the appropriate rate of return, denoted E-1 through E-3; then proceeding to the three revenue issues, C-1 through C-3; continuing on to the various expense items, B-1 and D-1 through D-10; and ending with the real-time pricing, flexible rates, special contracts, line extension tariffs, rate design and the UtiliCorp proposal for incentive regulation. Discussion will include consideration of the positions of the OPC pertaining to E-1, E-2 and D-8.

Some evidence was introduced by the parties which is proprietary or highly confidential in nature and is protected by order of the Commission. While all protected material was considered by the Commission in making its decision in this case, no highly confidential or proprietary information will appear in this order except by general reference.



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### **Settled Issues**

The true-up reconciliation, filed January 8, 1998, reflects several adjustments of \$0 (zero): the issues of the new headquarters building, B-1; property tax, D-7; relocation and recruiting costs, D-9H; and miscellaneous Enterprise Support Function (ESF) costs, D-9K. The zero adjustments indicate that the issues were settled by the parties and no further findings need be made.

### **Issues**

#### **Preface - UtiliCorp Organizational Structure and Change**

As reflected in the testimony of Staff witness James Dittmer and other witnesses, the Commission finds the following regarding the organizational structure of UtiliCorp.

UtiliCorp provides regulated gas and electric service, either as a combination or separately, in eight states, including Colorado, Kansas, Nebraska, Iowa, Minnesota, Michigan, West Virginia and Missouri. UtiliCorp also provides energy-related services. UtiliCorp owns gas pipelines, either itself or through its majority ownership of Aquila Gas Pipeline, and an electric company in British Columbia. UtiliCorp has a minority interest in overseas energy utility operations in the United Kingdom, Australia and New Zealand. UtiliCorp has also invested in several electric generation facilities providing service in the United States and in Jamaica.

UtiliCorp's energy-related businesses include natural gas marketing, natural gas pipeline transportation service, appliance service and repair, home security sales and service, and municipal, commercial and industrial consulting services.

MPS is one of seven different divisions comprising UtiliCorp's regulated domestic electric and gas business. UtiliCorp's stock is publicly traded on the New York Stock Exchange.

### **Rate of Return Issues**

#### **Capital Structure - E-1**

The capital structure of a company is generally expressed as a ratio of debt to equity. Included in the calculation of capital structure, in percentages, are common equity and preferred stock as balanced against long-term and short-term debt. MPS is an operating division of UtiliCorp, however, and issues neither its own stock nor its own debt. All of the MPS capital comes from its parent UtiliCorp; therefore, a capital structure must be imputed to MPS.

There is substantial difference in theory, and some resulting variance in numbers, in the capital structures proposed by UtiliCorp, the Staff and the OPC. UtiliCorp proposes a capital structure allocated to MPS by UtiliCorp. UtiliCorp refers to this as its "per books" capital structure and uses a capital structure as of December 31, 1996, the end of the test year. The resulting debt to equity ratio is 52.69 percent debt to 47.31 percent equity.

UtiliCorp argues that this is the accurate capital structure for MPS for the following reasons:

1) This is the actual capital structure of MPS at the end of the test year and represents the actual financing of the properties which make up the rate base in this proceeding.

2) The capital structure is similar to the capital structures of comparable electric utility companies. This is the primary standard for determining appropriateness and, in this case, the MPS per books capital structure meets that standard.

3) The capital structure is consistent with the historic and expected capital structure of MPS, and it represents the actual financing required by MPS as the properties and facilities were put in place through time.

4) The capital structure is the result of the application of a system of capital allocation which has been repeatedly audited and market tested and accepted.

5) It has the advantages of consistency, predictability, rationality and responsibility.

6) It insulates MPS from the other activities of UtiliCorp and the other divisions.

7) It has been tested and accepted by this Commission after consideration in the last MPS rate proceeding (ER-93-37).

The Staff maintains that a capital structure based on the actual overall cost of capital to the parent is more reasonable. The Staff proposes applying the UtiliCorp consolidated capital structure as of December 31, 1996, including consideration of short-term debt (adjusted to remove construction work in progress), resulting in a debt-to-equity ratio of 56.14 percent debt to 43.86 percent equity. This results in the proposed Staff adjustment in the amount of approximately \$4.1 million from revenue requirement, depending on the rate of return used.

The OPC also takes the position that the UtiliCorp consolidated capital structure should be used, but prefers the consolidated structure on June 30, 1997. This results in a debt-to-equity ratio of 57.63 percent debt to 42.37 percent equity. The OPC states that UtiliCorp retired all outstanding preferred stock as of March 31, 1997, and the June 30, 1997 adjustment period more accurately reflects the current capital structure of UtiliCorp and, therefore, MPS on an ongoing basis. The OPC position results in an additional proposed adjustment of approximately \$1.3 million, again based on the rate of return applied, making a total adjustment from the UtiliCorp position of approximately \$5.4 million from overall revenue.

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Based on substantial evidence of record, the Commission finds that the consolidated capital structure as proposed by the Staff accurately reflects the correct capital structure of UtiliCorp itself, and therefore MPS, during the actual test year.

The Commission adopts the Staff-proposed capital structure of 56.14 percent debt to 43.86 percent equity.

### **Return on Equity - E-2**

The rate of return on common equity, necessary in the calculation of the overall rate of return, must sufficiently reflect an investor's required return on investment to allow a company the ability to publicly trade its stock in the marketplace and raise equity capital. As has been stated, MPS does not sell stock in the marketplace; therefore, an assignment or allocation of a return on equity must be made. UtiliCorp, the Staff and OPC used various comparable companies as surrogates for MPS in applying the discounted cash flow (DCF) model. Jackson County supports the position of the OPC with regard to return on equity.

The DCF model maintains that value (price) of any security or commodity is the discounted present value of all future cash flows. It is based on two fundamental principles: (1) that investors value an asset on the basis of the future cash flows they expect to receive from owning the asset; and (2) that investors recognize the true value of money (i.e. a dollar received in the future is worth less than a dollar received today). This is rendered as an algebraic formula set out in the testimony. The formula is also adjusted to reflect the comparative risk involved in potential equity investment in the subject company.

The testimony reflects the fact that the DCF method is currently accepted as the most appropriate indicator of the cost of common equity and has been used consistently by this Commission for a long period of time.

UtiliCorp states that the most reliable application of the DCF method involves use of companies comparable to MPS rather than applying the DCF method to UtiliCorp itself with an adjustment for risk associated only with MPS.

UtiliCorp selected comparable companies for its analysis from the Value Line Investment Survey and developed an estimated cost of equity for the group. UtiliCorp selected 12 companies, referred to as the "pure play" group, defined as a reasonably homogenous group of publicly traded, well-known and reasonably sized electric utilities. After applying the DCF analysis and factoring in the relative risk of MPS as compared to the group of comparable utilities, UtiliCorp recommended an annual return on equity of 12.5 percent. UtiliCorp found the comparable group to have less risk than MPS and, therefore, an overall lower cost of common equity of 12 percent.

The Staff employed the same companies as UtiliCorp for its comparable group. In testimony, the Staff describes this group as being non-diversified, non-nuclear, located in the central U.S., and having considerably less financial risk than MPS (through UtiliCorp).

The Staff also employed three other methods for determining return on equity as checks of the DCF method. Upon final analysis, the Staff recommended a range of 10 percent to 11 percent. With an adjustment for use of the somewhat more risky consolidated capital of UtiliCorp, the Staff recommended the Commission adopt the midpoint of the upper half of that range, that being 10.75 percent. This produces an overall rate of return of approximately 9.1 percent. The resulting proposed Staff adjustment, assuming the application of the Staff proposed capital structure, is approximately \$5.9 million.

The OPC relied on an analysis of the consolidated capital structure of UtiliCorp, with adjustments for the comparative risk between UtiliCorp and MPS. The OPC used the DCF method to analyze a group of electric utilities comparable to MPS in an effort to assist in making adjustments and determining the reasonableness of the outcome of its analysis as applied to MPS. The OPC employed the DCF method but used a group of only seven publicly-traded utilities as being comparable to MPS. The OPC recommended a maximum rate of return for MPS of 10.70 percent, rendering an overall rate of return of 9.0 percent as of December 31, 1996, and an overall rate of return of 8.9 percent as of June 30, 1997. Application of the OPC proposed rate of return would add an additional \$182,500 to the proposed Staff adjustment.

Based on substantial evidence, the Commission finds the return on equity of 10.75 percent as proposed by the Staff to be the most reasonable and appropriate of the choices proposed by the parties. The Commission notes that the OPC's recommendation was within the range proposed by the Staff as was the UtiliCorp proposal, without final adjustments.

The Commission, therefore, adopts a return on equity for use in this case of 10.75 percent.

#### Cost of Long-Term Debt - E-3

The cost of long-term and short-term debt is an integral part of the calculations of the overall rate of return. The Staff believes the consolidated UtiliCorp capital structure furnishes the most reasonable values for both long-term and short-term debt for ratemaking purposes. The Staff recommends an appropriate embedded cost of long-term debt of 8.179 percent and embedded cost of short-term debt of 6.154 percent.

UtiliCorp alleges that the Staff's short-term debt calculations include international debt not relevant to the operation of MPS. UtiliCorp contends that the cost of debt assigned by it, as explained above, should be used without the inclusion of the cost of short-term or international debt. As of December 31, 1996, UtiliCorp states that the assigned cost of debt (all long-term) for MPS is 8.39 percent.

The OPC states that the embedded cost of long-term debt, as supplied by UtiliCorp in response to a data request, was 8.14 percent on December 31, 1996, and 7.88 percent on June 30, 1997. The OPC recommends the June 30, 1997 figure.

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The Commission finds the cost of long-term debt, including the cost of embedded short-term debt as proposed by the Staff, to be the most reasonable proposal and will adopt the Staff's position.

### **Revenue Issues**

#### **Weather Normalization - C-1**

This issue involves the normalization of the influences of historical weather on test year sales and therefore revenues for ratemaking purposes. This is necessary to assist in obtaining a sales revenue amount which reflects and normalizes the influence of variations in the weather patterns over a period of time. A normalized sales revenue amount reflects the anticipated amount of sales in a year in which the weather is as close to "average" as possible.

A weather normalization adjustment is made to modify test year revenues (sales) to reflect a level of sales that would occur under conditions of "normal" historical weather. The revenue requirement value of approximately \$1.2 million reflects the difference between UtiliCorp's and the Staff's estimates of the effects of abnormal weather during the test year on revenues. There are two primary factors that cause this difference: 1) the models used to predict sales; and 2) the weather data that is used as an input to these models.

UtiliCorp used a set of econometric models to forecast and weather normalize monthly electric sales. The models project the level of monthly electricity sales for the various rate classes as a function of heating and cooling degree days, economic driver variables (e.g. number of households for the residential classes, commercial employment for the commercial rate codes, and industrial output for the industrial rate codes), energy prices, price elasticities and end-use parameters (for the residential classes only). UtiliCorp states that the variation in monthly sales due to degree day variations shows substantial weather sensitivity for appropriate rate classes.

The Staff used the Electric Power Research Institute (EPRI) Hourly Load Electric Model (HELM) to calculate the weather normalization adjustment to the billing month sales. The Staff uses HELM because it has the advantage in that it bases its weather normalization estimation on daily usage data. The Staff states that there is a direct relationship between the amount of energy a weather sensitive customer uses and the weather experienced on any day. In addition, the response of the weather sensitive customers to daily fluctuations in weather can be dramatic and varied across a group of customers. The Staff argues that because UtiliCorp uses monthly data in its models, it is impossible to obtain detailed information about class usage.

Both UtiliCorp and the Staff selected the weather station at the Kansas City International Airport (KCI) as a source of daily temperature data and used the period from 1961 to 1990 to define normal weather. However, because daily weather data was not collected at KCI prior to 1973, both parties had to manufacture data for the period from 1961 to 1972.

UtiliCorp used statistical regression analysis to fit equations that relate that the temperature measured at the KCI weather station to the temperature measured at the older Kansas City Downtown Airport (KCDT) during a period when both weather stations were reporting. The resulting equations were used to backfill the missing temperature values in the daily series for the KCI weather station. UtiliCorp claims its temperature data is more appropriate for weather normalizing heating and cooling loads because it better matches the normal heating and cooling degree days published by the National Oceanic and Atmospheric Administration (NOAA).

The Staff compiled a data set for the KCI weather station based on two NOAA data sets, one containing adjusted monthly temperature data, and another containing daily temperature data from the selected weather stations. From these data sets, the Staff produced a series of daily minimum, maximum and mean temperatures for the thirty-year period ending December 31, 1990 adjusted so that the average monthly values are equal to the monthly NOAA values published for KCI. The Staff claims that when using the UtiliCorp data set, Staff was unable to closely match the monthly NOAA normal temperature values. In addition, UtiliCorp values tended to show seasonal biases in the spring and summer months.

No other party has taken a position on this issue.

The Commission finds the substantial evidence presented by the Staff to be the most reasonable and appropriate analysis of historical weather on test year sales and will, therefore, adopt the revenue requirement adjustment of the Staff, net of fuel expense.

#### **Economic Development Rider Revenue - C-2**

MPS has a current tariff, approved by stipulation and agreement in Case No. ET-92-171, which allows MPS to enter into contracts with certain qualifying customers for reduced electric service rates. This tariff is generally referred to as the economic development rider (EDR) and is offered to large commercial and industrial customers.

The Staff is proposing an adjustment to test year revenues of approximately \$821,000 to elevate the test year revenue to the level it would have been absent the EDR discounts. The Staff maintains that UtiliCorp has not demonstrated that the new load acquired as a result of the EDR discount has offset the "long run marginal" cost of serving the new load and that the EDR will be detrimental to the remainder of the existing ratepayers over the long run.

The Staff bases the above conclusion on the fact that various long-term purchase power contracts will expire in years 1999 and 2000, causing UtiliCorp to build additional generation facilities or negotiate new purchase power contracts. The Staff is of the opinion, based on the most recent MPS integrated resource plan filing, that the cost to replace the purchase power and therefore to serve the increased load will be relatively high compared to the cost under the present contracts. The Staff

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maintains that, over the long run, the EDR discount will be detrimental in that it would cause an increase in load resulting in the purchase or generation of more expensive power, all paid for by the remainder of the ratepayers.

The Staff admits, however, that because of the present favorable contracts, there probably exists some short-term benefit to the ratepayers in serving the EDR customers because the current cost to serve new load on the system is relatively low.

UtiliCorp states that the EDR tariff is a valuable tool in fostering economic development, both for MPS in particular and for the state in general, in terms of increased employment opportunities and increased customer load. UtiliCorp states that, directly or indirectly, everyone in the state benefits from gaining new business employers on the MPS system through incentives such as the EDR rider.

Of particular note is the rebuttal testimony of UtiliCorp witness Maurice Arnall, who points out on page 4, lines 15 through 21, the various terms used by the Staff consultant in performing a test to determine the long-term benefit of the EDR rider. Mr. Arnall points out that no reference is made to any particular cost as being definitive and each of the referenced costs appears to be different. Mr. Arnall states that it is impossible to evaluate the appropriateness of the test applied by the Staff. In addition, UtiliCorp notes that test year incremental revenues received from EDR customers provide a net gain when compared to test year incremental costs to serve such customers.

Finally, UtiliCorp points out that it would be absurd to speculate that the existence of the EDR rider would be the cause of higher replacement costs.

The OPC notes that UtiliCorp has not tendered a detailed analysis substantiating its claim to some present contribution to fixed costs as a result of the EDR rider. The OPC, therefore, supports the position of the Staff, as does Jackson County.

The Commission finds the position of UtiliCorp to be reasonable in that UtiliCorp has presented sufficient evidence that the use of the EDR rider is of benefit to the state of Missouri and the ratepayers. The Commission will adopt the position of UtiliCorp in this matter and decline to adopt the proposed adjustment of the Staff.

#### **Off-System Sales Revenue - C-3**

During the test year of 1996, MPS generated approximately \$2.6 million in additional revenue as a result of its sales of excess generation capacity to interconnected utilities and power marketers. UtiliCorp proposes to share this additional revenue by adding half (approximately \$1.3 million) to its test year revenues, thereby allowing the other half to devolve to its stockholders. The Staff proposes a \$1.3 million adjustment to revenue to reflect the total test year amount collected in off-system sales.

Ancillary to the central issue is the Staff position that the off-system sales amounts should be updated through the June 30, 1997 adjustment period. The Staff states that the test year total revenue is approximately \$1.8 million, while the updated total amount is the approximate \$2.6 million stated above.

UtiliCorp states that significant risk exists in the current UtiliCorp effort to enhance off-system sales and that there must be some incentive to UtiliCorp and its stockholders to aggressively pursue off-system sales. UtiliCorp explains that, until recently, off-system sales were made usually to neighboring utilities to cover downtime of generating units due to scheduled or forced outages. With the advent of open access transmission and regional transmission pricing, UtiliCorp determined that significant opportunities existed in the marketplace.

UtiliCorp takes the position that the current marketplace for power is similar in nature and operation to a commodities market. In testimony, the UtiliCorp witnesses point out the various expense and other risk factors which can be incurred by active participation in that commodities market. Some of those risk factors include increased risk in the form of infrastructure wear and tear, unplanned outages, additional staff requirements, price volatility, unpredictable weather and competition. UtiliCorp places this risk in two categories, marketplace risk and infrastructure risk.

To fairly compensate the UtiliCorp shareholders for assuming this risk, and as a future incentive, UtiliCorp is proposing to split the revenue derived from its test year sales on a 50/50 basis, including applying one-half of the total in revenue as an offset to rates while holding the other one-half out of revenue. UtiliCorp admits that no exact calculation exists showing that the 50/50 split accurately reflects the respective contributions made to off-system sales by the shareholders and ratepayers.

The Staff maintains that all of the off-system sales revenue should be reflected in the test year revenue for the purposes of setting rates. The Staff has two basic reasons for its position. The first is that UtiliCorp has no coincident proposal to share the costs of producing the off-system sales revenue 50/50 between the ratepayers and shareholders. The Staff alleges that all of the costs incumbent on producing the off-system sales revenue are currently included in rates.

The second reason the Staff objects to the UtiliCorp proposal is that, as a result of the operation of the concept of regulatory lag, MPS is benefiting and will benefit from the increase in annual revenue for the length of time between rate case proceedings.

Regulatory lag is defined as the lapse of time between a change in a utility's revenue requirement and a reflection of that change in the utility's rates. In relation to overall revenue requirement and rate of return, those changes can be either negative or positive. In this case, an increase in revenue without a concurrent increase in expense during the interregnum between rate cases raises the level of revenue passed on to the stockholders or retained by the company without an offsetting lowering of rates. The same phenomenon would occur if expenses were decreased without a decrease in revenue. In regard to the revenue generated from the off-system sales, the Staff maintains that both increased efficiency and increased



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revenue have occurred since the previous MPS rate case (in 1993) without concurrent lowering of rates.

The Commission finds the Staff provided competent and substantial evidence that all of the off-system sales revenue should be reflected in the test year revenue for the purposes of setting rates. The Staff is correct in stating that, since all of the costs of producing the off-system sales revenue were borne by the ratepayers, and since UtiliCorp has benefited from regulatory lag, the total amount of this revenue should be included in rates.

The Commission adopts the adjustment proposed by the Staff.

### **Expense Issues**

#### **Systems Maintenance - D-1**

This issue involves the estimation of the ongoing, normalized, annual expense of MPS for operating systems and computers. The evidence reveals that, in 1995, UtiliCorp initiated a program partly involving the retirement of its then current computer system, referred to in testimony as the “vintage” or “legacy” system, and installation of a new, centralized computer system. This caused the test year expense for systems maintenance to be abnormally low as maintenance on the vintage system was suspended, and some employees were transferred to the new system. Testimony shows that a number of employees were transferred from vintage system maintenance to functions involving the new system and that a portion of the payroll expense was capitalized. The expense for those employees therefore is not reflected in the systems maintenance expense category.

The Staff proposes a total systems maintenance expense credit which results in an adjustment of approximately \$628,000. UtiliCorp alleges that a normal level of expense should reflect the adjusted historical levels. It is UtiliCorp's intent to return the transferred employees back to their original functions and, in fact, hire additional employees because the new server/client computer system is more maintenance intensive than the vintage system.

The Staff states that it was unable to determine an accurate level of systems maintenance expense for the test year. The Staff witness states that the proper Federal Energy Regulatory Commission (FERC) account in which to record systems maintenance expense is account No. 935, “maintenance of general plant.” The witness states that the Staff was unable to ascertain an accurate level of maintenance expense because that expense had been recorded in various other accounts in addition to account 935 and, apparently, UtiliCorp was unable to produce sufficient accurate, historical data to track these costs.

The Staff continues that it was then impossible to identify total systems maintenance expense for the test year and compare it to levels incurred in previous years to obtain an accurate, normalized level. Nonetheless, the Staff based its recommendation on an analysis of account 935 for years 1992 through 1996. The Staff found that, for years 1992 through 1994, prior to the transfer of personnel, the annual average expense was approximately \$1.79 million. However, the Staff is recommend-

ing a total expense level of approximately \$1.26 million. The Staff states that the adjustment amount represents 50 percent of the difference between the \$1.79 million average and the test year level of \$769,000.

Both the OPC and Jackson County support the position of the Staff.

The Commission finds the Staff position, based on historical data, is a reasonable estimation of the ongoing expense in this category which should properly be charged to the ratepayer. The Commission agrees with the Staff that, as UtiliCorp was unable to produce sufficient evidence to support its position, the weight of the evidence supports the Staff position.

The Commission adopts the adjustment to revenue requirement proposed by the Staff.

### **Depreciation Expense Issues - D-2**

#### **Change in Service Lives**

Depreciation is a system of accounting that aims to distribute the cost or other basic value of tangible capital assets, less salvage, over the estimated useful life of the unit (which may be a group of assets). UtiliCorp states depreciation expense should, to the extent possible, match either the consumption of the facilities or the revenues generated by the facilities. The matching concept is also an essential element of the basic regulatory philosophy of intergenerational customer equity.

For the purpose of setting depreciation rates and determining the useful service lives of facilities, both UtiliCorp and the Staff have characterized MPS's production facilities as life span accounts, and its transmission, distribution and general plant facilities as mass asset accounts. The change in service lives proposed by these parties results in a Staff adjustment of approximately \$5.9 million.

The estimated retirement date for production plant units is one of the required parameters used in the calculation of depreciation rates for these assets. A summary of the UtiliCorp and Staff positions on these dates for MPS's generation facilities is given below:

<b>Generating Unit</b>	<b>MPS Retirement Date</b>	<b>Staff Retirement Date</b>
Sibley Units 1, 2 and 3	2010	2020
Jeffrey Units 1, 2 and 3	2013, 2015 and 2018	2020
*Nevada C.T.	1999	2020
KCI Units 1 and 2	2000	2020
*Greenwood Units 1-4	2004	2020
*Ralph Green C.T.	2014	2020

\*Leased Units

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The UtiliCorp witness states that the retirement dates for the MPS production units, which were supplied by MPS planning personnel, were, in his experience, consistent and reasonable and reflected the current best estimate of when the generating units would retire, giving due consideration to each unit's age, location, operating characteristics and expected future usage. In its calculation of retirement dates, UtiliCorp includes its estimation of time over which investor-related costs should be recovered. In particular, with respect to Nevada CT and Greenwood units which are leased, UtiliCorp states that the retirement dates used for the depreciation calculations correspond to the lease termination dates for those facilities. UtiliCorp maintains that the Staff proposal has ignored the relation between investment and retirement dates.

Also, UtiliCorp states that the retirement date of 2020 proposed by the Staff for all generating facilities is not appropriate for the determination rates. This date ignores the Company's plans, gives no recognition to the type of asset placement activity necessary to achieve the longer life, and results in inadequate levels of depreciation.

The Staff bases its use of the 2020 retirement date for generation facilities on the fact that it appears, from the Staff's information, that 2020 is an appropriate planning horizon. However, the Staff does not maintain that all units should be retired on that date.

The Staff supports its position by explaining that UtiliCorp documentation demonstrates that the useful lives of MPS's generation assets can reasonably be expected to extend beyond the dates assigned them by UtiliCorp. The evidence that the Staff uses includes the following: (1) MPS's 1995 Integrated Resource Plan which has a planning horizon to the year 2013; (2) current MPS coal contracts, which, for the Jeffrey units, expire in 2020; (3) MPS capital and construction budgets (two-year document); (4) MPS operation and maintenance budgets (five-year document); (5) MPS Replacement Power Plans as revealed in the depositions of MPS electric production employees; and (6) MPS reports contained within the most recent Southwest Power Pool Coordinated Regional Bulk Power Supply Program (ten-year document).

However, with the exception of the Jeffrey coal contracts, which expire in 2020, the Staff was unable to demonstrate from the documents listed above any estimated retirement dates beyond the year 2013. In addition, the Staff states that:

“ . . . It [retirement date] is something determined by its owner where they state at this point in time [it] is [no] longer in service  
 . . .  
 and

“ . . . Under a life span account, the average service life is of only nominal importance in the computation for depreciation, be-

cause you have this date certain out there that is really irrelevant to any actuarial analysis that you may have undertaken.

“Q. How do you arrive at that date certain”

“A. That is arrived at by the owner's statement.”

With respect to the transmission, distribution and general plant accounts (mass asset accounts), the Missouri Public Service Commission recommended changes to almost every average service life proposed by UtiliCorp, some as small as a fraction of a year. UtiliCorp feels that the changes are inappropriate for three reasons. First, Staff conducted no evaluation of the historical experience and its applicability to the future. Second, Staff modified average lives in tenths of a year implying a precision far beyond the bounds of achievability. Third, Staff provides no details regarding how the depreciation rates were calculated.

The OPC testimony generally supports the Staff's position with one additional argument. The OPC points out that in this “competitive” rate filing by UtiliCorp, it seems to be the intent of UtiliCorp to accelerate the rate of depreciation, and thus increase rates, in order to enter an apparent competitive environment with little or no sunk costs or stranded investment, while other utilities in the state are still maintaining standard depreciation rates. UtiliCorp alleges that this simply levels the potential competitive playing field level. The OPC regards this UtiliCorp proposal as providing a clear competitive advantage to UtiliCorp.

The Commission does not find competent and substantial evidence to adopt the position of the Staff. The Commission finds that the Staff has failed to prove that its proposed retirement dates are reliable.

The Commission finds that the service lives for the above-stated generation facilities are established as proposed by UtiliCorp.

#### **Terminal Net Salvage**

UtiliCorp has proposed the inclusion in current rates of the estimates of net costs of end-of-life dismantlement in the calculation of the above-stated production unit depreciation rates. Both the Staff and OPC disagree, and the Staff proposes an adjustment of approximately \$1.8 million.

UtiliCorp states that terminal net salvage refers to the net demolition cost of a plant or unit at final retirement. UtiliCorp maintains that these costs will be incurred and should be recognized in current rates. UtiliCorp points out the difference between interim net salvage (removal and salvage associated with interim retirements) and terminal net salvage (relating to ultimate retirement) and notes that the Staff has already recognized, to some extent, interim net salvage as being properly included in depreciation rates. UtiliCorp notes several other states in which similar approaches have been used.

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Both the Staff and OPC point out that this Commission has rejected the inclusion of terminal net salvage in rates in past cases based on the fact that terminal costs of removal are speculative and not known and measurable. The Commission has also found interim costs to be sufficient for purposes of recovery. The Staff adds that the timing of the ultimate decommissioning and removal of a generation unit would, in today's changing electric environment, be highly speculative.

The Commission finds that terminal net salvage costs are speculative and not known and measurable and therefore may not be included in current rates. The Commission adopts the proposed Staff adjustment.

#### **Elimination of Interim Additions**

UtiliCorp proposes the inclusion of the costs of interim future additions in the calculation of production unit depreciation rates. Both the Staff and OPC disagree, with the Staff proposing an adjustment of approximately \$1.5 million.

UtiliCorp defines interim additions as the replacement of retired plant components or the addition of new plant components between the date of original installation and the date of final retirement of the plant or unit. UtiliCorp employs a method to determine the ongoing amount to be included in annual depreciation. This amount seems to be based on a historic analysis of interim additions over the life of the plant or unit and extrapolation of that amount over the remaining life of the plant or unit.

The Staff and OPC state that the Commission has held in previous cases that inclusion in current rates of future additions violates Section 393.135, RSMo 1994, the statutory prohibition against inclusion in rates of costs for property which is not fully used and useful. The Staff and OPC cite the following cases: In re Union Electric Company, 27 Mo.P.S.C. (N.S.) 183, (1985); In re Kansas City Power & Light Company, 28 Mo.P.S.C. (N.S.) 228, (1986); and Case No. ER-90-101, In re Missouri Public Service, 30 Mo.P.S.C. (N.S.) 320, (1990).

The Commission agrees that inclusion in current rates of future additions violates the provisions of Section 393.135, RSMo 1994. The Commission adopts the proposed adjustment of the Staff.

#### **Change in Procedure**

This issue deals with the MPS proposal to change from the current method of depreciation, the average life group method (ALG) to the equal life group (ELG) method. The Staff has proposed an adjustment of approximately \$1.2 million as a result of UtiliCorp's adoption of the ELG method in its original filing.

UtiliCorp is proposing the equal life group (ELG) method in order to meet the competitive challenge faced by MPS, presumably in a deregulated electric utility industry of the future. UtiliCorp states that the equal life group method gives recognition to the fact that assets retire at different ages and thus the method

provides a better matching of depreciation expense with asset consumption. UtiliCorp adds that this method more closely emulates the method used by competitive industries. UtiliCorp notes that several state commissions have adopted this method for telecommunications companies.

Both the Staff and OPC are opposed to the adoption of the ELG method. The Staff notes several serious objections to the adoption of the ELG method. The Staff witness points out that the ELG method results in uneven depreciation over the course of several years, accelerating depreciation early in the time period. The ELG method does not result in straight line depreciation rates but in rates which decline over time. The Staff takes the position that this would necessitate an annual examination of depreciation rates.

Secondly, the Staff points out that application of the ELG method is extremely burdensome because of the detailed records needed to make reasonably accurate future estimates of mortality dispersion.

Finally, it is the Staff's position that the adoption of the ELG method is an attempt by UtiliCorp to "optimize accruals to the reserve at the expense of the current ratepayers" and to actually enhance UtiliCorp's competitive advantage in the marketplace. The Staff witness testified that, far from creating a level playing field, the adoption of such a method of accelerating depreciation could allow UtiliCorp the opportunity to actually undercut competition as "they would have the opportunity to write assets down when the others don't."

The Commission does not find sufficient evidence to alter its long-standing policy regarding the method used to calculate depreciation. Furthermore, the Commission finds the method proposed by UtiliCorp is unduly burdensome. The Commission will adopt the Staff-proposed adjustment.

#### **Change in Technique**

This issue is the result of a UtiliCorp proposal to alter Commission policy by allowing MPS to adopt the remaining life technique. The Staff proposes an adjustment of \$2.3 million, applying instead the traditional whole life technique.

The remaining life technique, according to UtiliCorp, allows a company to recover any reserve imbalance over the remaining life of the account. UtiliCorp states that this technique gives recognition to past accumulations of depreciation and limits the amount of depreciation to the total net investment. UtiliCorp claims the technique allows for automatic adjustment to the rate of depreciation for the inevitable differences between actual asset activity and estimated mortality patterns.

The Staff offers several criticisms of the remaining life technique. As all electric utilities in the state use the whole life technique, the Staff is opposed to adopting a different technique on an ad hoc basis. Rather than alter the regulated environment on a piecemeal basis, the Staff recommends such issues be addressed by the electric restructuring task force.

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Secondly, because the remaining life technique deals with the recovery of a theoretical reserve imbalance, the Staff submits that this technique is appropriate only if and when it is shown that an alleged reserve deficiency is material.

Lastly, the Staff suggests in its brief that the remaining life technique is inappropriate when an over-earnings situation exists.

The OPC supports the position of the Staff and adds that UtiliCorp has failed to demonstrate any shortcomings of the current method in Missouri, that is, the whole life technique. OPC maintains that, as UtiliCorp is the party wishing to alter the Commission's long-standing policy, it is incumbent on UtiliCorp to prove by substantial and convincing evidence that such a change is desirable and of benefit to the ratepayers. The OPC is of the opinion that UtiliCorp has not proffered sufficient evidence to warrant such a change in Commission policy.

The Commission agrees with the points made by the Staff and OPC. The Commission does not find sufficient evidence to warrant alteration of its long-standing use of the whole-life technique. Therefore, the Commission will adopt the Staff-recommended adjustment.

#### **General Plant Amortization**

UtiliCorp proposes to amortize seven general plant accounts over the associated tax lives of the accounts rather than depreciate these assets. The accounts involved are: (1) Account 391.0, Office Furniture and Equipment; (2) Account 391.1, Computer Equipment; (3) Account 393, Stores Equipment; (4) Account 394, Tools, Shop and Garage Equipment; (5) Account 395, Laboratory Equipment; (6) Account 397, Communication Equipment and (7) Account 398, Miscellaneous Equipment. This is an effort by UtiliCorp to streamline its method of accounting for various minor items. UtiliCorp maintains that tracking these minor items individually for depreciation purposes is not cost-justified and proposes to amortize these items over the tax life of the account. This would accelerate the return on the investment. There is an approximate \$3.7 million difference between the UtiliCorp filing and the Staff adjustment as a result.

The Staff and OPC support an adjustment of \$3.7 million and state that the tax life of an item generally does not reflect the item's useful life for depreciation purposes. The Staff notes in testimony that tax lives are shorter than, and unrelated to, useful lives and, thus, the amortization of the general plant account is an attempt by UtiliCorp to accelerate the recovery of its assets prior to the anticipated advent of competition.

Further, the Staff offers the argument that the amortization of these assets over the tax life, as opposed to the useful life, of the item, violates the concept of intergenerational equity. The principle of intergenerational equity states that the costs of providing the service should be borne by the generation of ratepayers that caused the costs to be incurred, not by an earlier or later generation. The Staff testimony reveals that the average useful life, or service life, of the accounts in

question is ten years or more. Use of tax life will therefore cause current ratepayers to pay for items which will remain useful far into the future.

The Staff notes that the UtiliCorp proposal does not meet the criteria of FERC Accounting Release AR-15. The Staff reasons that UtiliCorp will have to continue its current cumbersome tracking of these assets for purposes of the FERC anyway and that, therefore, the benefits of streamlining its accounts, claimed by UtiliCorp, will not be realized.

Lastly, the Staff has proposed that MPS capitalize its general plant accounts at \$1,000, rather than the current \$500, in an effort to accomplish the savings and administrative efficiencies desired by UtiliCorp without the attendant increase in rates. The Staff maintains that increasing capitalization to \$1,000 will allow MPS to avoid cumbersome bookkeeping on 87 percent of the assets in the general plant accounts.

The Commission finds the Staff arguments regarding the deficiencies of the tax life approach to be convincing. It would be ill-advised to adopt the tax life approach because it does not reflect the item's useful life and violates the concept of intergenerational equity. The Commission will adopt the Staff's proposed adjustment.

The Commission will also order MPS to capitalize its general plant accounts at \$1,000 in order to accomplish additional savings and administrative efficiencies.

#### **Computer Equipment Depreciation**

As a sub-issue of general plant amortization, UtiliCorp proposes to establish a depreciation rate for its computer equipment account based on that account's five-year tax life. The Staff alleges that this account is over-accrued in the amount of approximately 125 percent and that the depreciation rate for this account should be set at zero.

Alternatively, the Staff suggests an average service life of 13 years for this account and a net salvage value of 25 percent. With this in mind, the Staff proposes that the Commission adopt a depreciation rate of 5.77 percent as an alternative to its zero percent recommendation. The Staff points out that the account in question is not totally made up of personal computers but also contains main frame and other equipment which makes up approximately 43 percent of the account balance. The Staff states that the mix of equipment in the account dictates an average service life of 13 years and the Staff's 5.77 percent depreciation rate.

The Commission finds the evidence of over-accrual supports adoption of a depreciation rate of zero percent.

#### **Depreciation Summary**

The Staff, OPC and UtiliCorp are instructed to recalculate depreciation rates based on the Commission's decisions on the depreciation issues and to file recalculated depreciation rates along with the ordered tariff filing.



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### **Amortization of Regulatory Assets - D-3**

Regulatory assets are defined as those prudently incurred costs booked as assets by the utility based on action by the regulator to allow future recovery of the capitalized costs in rates. UtiliCorp testimony indicates that these costs are generally regarded as “above-market” costs in a competitive environment and therefore as costs which are likely to be “stranded.” In a competitive market in which prices for service are based on the market and not as the result of regulation, it is thought that above-market costs may not be recoverable.

The Staff has proposed an adjustment of approximately \$4.5 million in response to a UtiliCorp proposal to accelerate recovery through amortization of its currently booked regulatory assets over a period of four years. UtiliCorp refers to this proposal as an attempt to recover “transition” costs prior to restructuring in the electric industry. The Staff characterizes the UtiliCorp proposal as an attempt to recover stranded costs prematurely.

The UtiliCorp witness testifies that the electric utility industry is in the process of significant change revolving around the advent of competition. UtiliCorp believes there is now an opportunity, prior to the onset of deregulation, to prepare costs and balance sheets for a competitive market. UtiliCorp states that, when prices are set by the competitive market, it will be difficult if not impossible to recover prudently incurred regulatory costs. If allowed to remain on the books, UtiliCorp states that regulatory assets will not be recoverable with the onset of a competitive market. UtiliCorp wishes to recover these regulatory assets over a four-year period by application of a customer surcharge.

The Staff views the UtiliCorp proposal as an attempt to recover potential stranded costs prior to potential restructuring. The Staff is not in favor of the UtiliCorp proposal and hence the approximate \$4.5 million adjustment. The Staff gives several reasons for its opposition to the recovery of transition costs.

The Staff states that, in the event of competition, not all electric utilities will have “positive” stranded costs. If the utility's generating assets have an overall market value greater than current book value, stranded costs would be “negative.” The Staff continues that, if a utility's negative stranded costs are greater than its positive stranded costs, the utility may be able to actually raise its electric prices rather than be forced to lower them. No evidence has been presented that UtiliCorp will incur a “positive” stranded cost position in the event of deregulation.

The Staff also points out that the electric restructuring task force, with which the Staff is participating, is only now considering many of the issues surrounding electric restructuring, including treatment of stranded costs. The Staff has not taken a position on any electric restructuring issues beyond the current efforts of the Commission to study the matter. The Staff thinks it is premature for the Commission to make piecemeal decisions regarding the treatment of various matters which may result from potential deregulation.

The Staff states that no evidence is present to indicate that the regulatory assets involved in the UtiliCorp proposal are or will be truly stranded and unrecoverable. Whether assets will be stranded, and if and from whom the funds will be recovered, are issues not yet decided in Missouri.

The OPC and Jackson County generally agree with the position of the Staff on this issue. In addition, OPC emphasizes the point that UtiliCorp is asking the ratepayers to assume the entire burden of paying for the alleged stranded costs when, ultimately, this may not accurately reflect the eventual statewide policy.

The Commission finds that approval of transition costs is premature. Additionally, there is insufficient evidence as to what assets will be stranded, if any, and as to what costs may be recovered, and from whom.

The Commission adopts the proposed adjustment of the Staff.

#### **FAS 87 vs. ERISA Minimum Contribution - Pension Expense - D-4**

Pension expense represents a future obligation to the employee, which accrues to the employee's benefit over a term of service with the utility. In its original filing, UtiliCorp proposed to recover a level of pension expense based on its contribution to its employee pension plan required by the Employee Retirement Income Security Act of 1974 (ERISA). The amount for the test year is zero, based on ERISA mandated funding levels.

The Staff is recommending that the correct amount of pension expense should be based on application of Financial Accounting Standard No. 87 (FAS 87). The Staff bases its position on the fact that the Commission is currently required by state law to calculate post-retirement benefits other than pension in accordance with FAS 106 and to allow recovery of those benefits. As the FAS calculation of benefits for 87 and 106 are identical, the Staff is of the opinion that the method for recovery of benefits should be identical also.

There are two differences between the methods used by UtiliCorp and the Staff. First, UtiliCorp prefers to use a 15-year amortization period to reflect gains and losses, while the Staff recommends a five-year period. Secondly, UtiliCorp proposes to recognize gains and losses by using what is generally known as the "corridor" approach.

UtiliCorp maintains that its corridor approach causes less expense volatility because it tends to levelize market fluctuations and differences between actuarial assumptions and real life experience.

The Staff argues that amortization of gains and losses over a lengthy period of time can result in rates which are increasingly inaccurate and reflect intergenerational inequity. The Staff prefers a five-year amortization period for recognition of all losses or gains as a reasonable amount of time.

The Staff notes that the Commission has specifically rejected use of the corridor approach and approved the use of a five-year amortization period for FAS 87 in several previous cases.

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The OPC and Jackson County both support the position of the Staff.

The Commission concurs with the Staff in regard to adopting accrual accounting for pension benefits, per Financial Accounting Standard No. 87, and authorizes the use of the accrual method.

The Commission rejects the corridor approach and adopts the Staff's suggested five-year amortization period. The Commission finds it preferable to recognize gains or losses in pension expense in current rates as closely as possible. The Commission adopts the Staff-proposed adjustment.

#### **FAS 106, Other Post-Retirement Employee Benefits Expense - D-5**

Other post-retirement employee benefits (OPEBs) refers to certain benefits paid to retired employees that are non-pension related. OPEB expense is mainly considered to be expense from the provision of post-retirement medical benefits by the company to former employees.

Both parties agree that OPEB expense should be determined using the requirements of FAS 106. Those requirements include accrual accounting. Accrual accounting, as opposed to the pay-as-you-go method, attempts to approximate the post-retirement compensation cost of an employee over the life of that employee's service. The pay-as-you-go method merely reflects the actual annual cash outlay for benefits.

The Staff has proposed an approximate \$350,000 adjustment to the FAS 106 account based on the Staff's proposed five-year amortization of unrecognized gains and losses. UtiliCorp is proposing a corridor approach as set out in the FAS 87 issue above.

In addition, UtiliCorp seeks to recover the unfunded balance of OPEB benefits expense incurred in 1993 through 1996. MPS proposes to recover these funds through a surcharge mechanism over a four-year period. Testimony reflects that the amount of adjustment is \$239,721 per year. UtiliCorp explains that pay-as-you-go levels were maintained in the account after the 1993 MPS rate case (ER-93-37) because UtiliCorp interpreted the original decision as making a determination that the pay-as-you-go status would be maintained.

The Staff disagrees, stating that the remand order in Case No. ER-93-37, dated April 4, 1997, holds that MPS has recovered FAS 106 expense through its current rates, which went into effect in 1993.

Both Jackson County and the OPC support the position of the Staff.

The Commission agrees with the Staff in regard to recovery of the unfunded OPEB balances from 1993-96. The Commission finds that MPS has already recovered FAS 106 expense in its current rates.

The Commission finds substantial evidence that FAS 106 expense should be amortized over a five-year period, as the Commission has done for FAS 87 expense. The Commission rejects the corridor approach for FAS 106 for the same reasons as it rejected that approach for FAS 87.

The Commission adopts the Staff adjustment.

**Maintenance Expense Normalization - D-6**

The Staff proposes an adjustment of approximately \$1.1 million to the total non-payroll maintenance expense account. The Staff states that it found the test year maintenance expense to be abnormally high and therefore used a five-year normalized expense process to more accurately represent the ongoing level of maintenance expense.

The Staff gives two reasons for its use of the five-year normalization rather than the one-year normalized method supported by UtiliCorp. The Staff first points out that UtiliCorp has substantial discretion over the budgeting and prioritizing of maintenance projects, and this has resulted in an abnormally high test year amount as compared with previous years. Secondly, the Staff testifies that it had great difficulty obtaining information necessary to ascertain the normal amount of maintenance expense. Staff states that, to the best of its knowledge, UtiliCorp has no specific budget guidelines which specify a normal amount of maintenance expense and could provide no information as to what projects are undertaken on a recurring basis. Further, UtiliCorp did not furnish the Staff with its maintenance policies or changes for the 1994-96 time period.

The Staff, therefore, used the normalization method, which is a type of averaging, to obtain its normalized expense figure. The following table shows Staff's comparison of actual maintenance figures for the five-year period with the normalized amount applied to this rate proceeding.

## MISSOURI PUBLIC SERVICE

## CASE NO. ER-97-394

## Comparison of Normalized Maintenance with Actual

Source: Shaw Direct, Schedule 2

Maintenance Area	1992	1993	1994	1995	1996
Production	\$5,695,403	\$7,828,917	\$5,850,114	\$5,336,900	\$6,964,823
Norm. Ovhl	500,000	500,000	500,000	500,000	500,000
Transmission	728,809	680,561	798,063	776,051	904,434
Distribution	4,773,419	4,805,958	4,856,674	3,265,837	5,366,599
Total	\$11,697,631	\$13,815,436	\$12,004,851	\$9,878,788	\$13,735,856

Staff's "Total" Normalized Maintenance Expense

\$12,226,512

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UtiliCorp states that the most common approach to normalizing costs is to adjust the test year for any abnormalities, as in this case the 1996 ice storm, and to use the adjusted amount to project ongoing expense. UtiliCorp points out that this method has been used by the Staff and UtiliCorp for the majority of the adjustments in this case. The UtiliCorp witness points out that the Staff failed to adjust all five years in its calculation for abnormalities. The UtiliCorp witness, Gary L. Clemens, uses distribution maintenance expense as an example and gives the following figures in rebuttal.

Mr. Shaw's Normalized Level of Distribution		
Maintenance Expense		<u>\$4,613,697</u>
<u>Actual Distribution Maintenance Expense</u>		
1992	Higher than Mr. Shaw's Normalized Level	\$4,773,419
1993	Higher than Mr. Shaw's Normalized Level	\$4,805,958
1994	Higher than Mr. Shaw's Normalized Level	\$4,856,674
1995	Lower than Mr. Shaw's Normalized Level	\$3,265,837
1996	Higher than Mr. Shaw's Normalized Level	\$5,366,599

The average would be closer to the expected level of normalized expense. See the following table . . . :

1992	\$4,773,419
1993	\$4,805,958
1994	\$4,856,674
1995	\$4,900,000 (estimated increase)
1996	<u>\$5,017,607</u> (decreased for ice storm)
New 5-Year Average	\$4,870,732
Mr. Shaw's Average	\$4,613,697

The Commission finds the weight of evidence to favor UtiliCorp on this issue and will deny the proposed \$1.1 million adjustment. However, the Commission is disturbed by the apparent lack of policy, program and budget information from UtiliCorp regarding its ongoing maintenance program in its MPS service area. The Commission advises UtiliCorp to formulate specific plans and budget goals for its ongoing maintenance program for the MPS service territory. It is hoped that proper ongoing maintenance will mitigate or totally avoid a future situation as serious as that caused by the most recent ice storm.

#### **Economic Development Costs - D-8**

The Staff has proposed an approximate \$90,000 adjustment, representing 50 percent of the jurisdictional amount allocated for economic development costs. Evidence reveals that these costs were incurred by UtiliCorp employees engaged in maintaining relations with economic development councils from various municipali-

ties. This apparently includes meetings and other assistance to municipalities in obtaining federal and state funding for growth and expansion in conjunction with the promotion of "Energyone" sales activities. It is agreed that "Energyone" activities are a non-regulated function of UtiliCorp.

The Staff has characterized these economic development activities as being promotional and, as such, properly chargeable to the shareholders of UtiliCorp and not to the MPS ratepayers. The Staff's proposed adjustment covers salaries, personal and administrative expenses (including meals and golf), and promotional items such as "Energyone" advertising material; \$1,300 worth of golf balls; and \$12,000 paid to assist building development in Nevada, Missouri.

The Staff states that, while a greater disallowance could be justified, the 50 percent disallowance was selected as being conservative. The Staff also noted that while there may be some benefit to the ratepayers from economic development activities, UtiliCorp was unable to quantify this benefit. The Staff pointed out that some costs were clearly of no benefit to the ratepayers, such as the meals and golf expenses.

Both the OPC and Jackson County support the position of the Staff, although the OPC recommends a disallowance of 100 percent based on the promotional practices rules and the fact that it is OPC's opinion that the ratepayers receive no benefit whatsoever from the economic development activities.

UtiliCorp cites the value of creating jobs to the community, the benefit of economic growth, attracting private investment, and stimulating tax revenue, all as being of benefit to the individual communities, the state of Missouri and the ratepayers of MPS. No quantification of these benefits has been offered by MPS save documentation of the creation of jobs in the test year of 1996 through successful economic development programs.

The Commission finds the Staff-recommended adjustment to be reasonable and supported by the evidence of record. The Commission will adopt the Staff-proposed adjustment.

#### **Corporate Allocations - D-9 (Sub-issues A through G, I and J)**

In order to understand the allocation issues, it is necessary to review the UtiliCorp accounting procedures.

Prior to 1995, MPS operated largely as an independent company with dedicated accounting, risk management and human resources departments. Beginning in 1995, however, UtiliCorp significantly reorganized its operation and centralized a number of functions, including its accounting function. UtiliCorp states that the reorganization was an effort to streamline its diverse businesses, make its operations more efficient and cost effective, and prepare for the advent of a competitive electric industry.

As a result, MPS no longer operates as an autonomous unit but as a division of UtiliCorp, sharing common services, such as accounting, human resources, information technology and risk management with the remainder of the UtiliCorp domestic

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divisions. Each specific function, according to Witness Dittmer, was centralized beginning in 1995 and continuing through the test year. These are referred to as Enterprise Support Functions (ESFs). During 1996, UtiliCorp had approximately 20 ESFs. Dittmer further testifies that most of the 20 or so ESFs provided services to regulated and non-regulated divisions alike throughout 1996.

The effect of the 1995 reorganization was that fewer costs were incurred directly by and exclusively for the MPS division and that many more costs were incurred on a UtiliCorp corporate-wide basis.

In some instances the corporate-wide costs were allocated on the basis of a general allocator, commonly referred to as the Massachusetts formula. The Massachusetts formula is described as a formula used to allocate costs when no better cost causative factors can be identified. The components used in developing the formula include revenue margins, payroll expense, and investment in plant and non-utility property.

#### **A. Governmental Affairs**

UtiliCorp proposes to allocate, by use of the Massachusetts formula, a portion of the costs in its governmental affairs ESF, which includes charges for the UtiliCorp federal and state “governmental support” and “legislative” programs. The Staff has proposed a disallowance for all of the costs incurred for representation in Washington, D.C. by the firm of Wiley, Rein, and Fielding, and 50 percent of the remaining costs, before jurisdictional allocation. This results in a total proposed Staff disallowance of approximately \$400,000.

Based on its understanding that the Commission routinely treats lobbying activities as a below-the-line expense, the Staff concluded from work product evidence offered by UtiliCorp that the Washington, D.C. firm was engaged primarily in lobbying and legislative monitoring activities. The material is highly confidential. UtiliCorp has outsourced its federal legislative program to the Washington, D.C. firm. That firm provides UtiliCorp with periodic updates on pending legislation and various other federal legislative activities. The Staff alleges that no substantial proof of the firm's total activities was forthcoming from UtiliCorp.

The Staff maintains that all of the Washington, D.C. costs and 50 percent of the other pre-jurisdictional allocation costs were incurred solely to benefit UtiliCorp shareholders. The Staff is willing only to concede that the Missouri ratepayers might share the costs of “properly recoverable communication expenditures” at a local level.

UtiliCorp states, through testimony, that its governmental affairs ESF includes the following functions:

- (1) Monitoring introductions to federal and state legislatures;
- (2) Identifying issues that impact UtiliCorp operations;
- (3) Communicating information back to affected groups;

- (4) Determining appropriate actions, such as educating legislators about impact on the company, working with other companies, etc.; and
- (5) Informing affected parties on passed legislation to comply with new rules or requirements.

UtiliCorp argues that many of the legislative monitoring functions are a normal and legitimate business expense. In addition, UtiliCorp takes issue with the Staff's characterization of legislative expenses as being a "below-the-line" activity and therefore synonymous with being not includable in rates. The UtiliCorp witness is of the opinion that 95 percent of the expense charged as state legislative monitoring is a legitimate business expense and does not constitute lobbying activity.

The OPC and Jackson County support the position of the Staff.

The Commission finds the Staff position to be reasonable and supported by the evidence of record. As in the remainder of the cost allocation items where it is employed, the Commission finds the evidence indicates that the 50/50 split of costs is fair both to the ratepayer and the shareholders of UtiliCorp. This is due in part to the substantial lack of evidence and specific documentation provided by UtiliCorp and in part to the evidence provided by the Staff. In this particular instance, the Commission finds the Staff's evidence to be persuasive in that a substantial amount of the costs involved in this issue were used for lobbying purposes. The Commission's policy has been to charge lobbying costs to the shareholders, and the Commission finds nothing in the record to convince it to alter that policy.

The Commission adopts the adjustment proposed by the Staff.

#### **B. Public Affairs**

The Staff proposes a disallowance from the public affairs ESF in the amount of approximately \$250,000. In the test year, testimony reveals the public affairs ESF included the corporate responsibility program, corporate contributions, the UtiliCorp United Foundation Fund, corporate sponsored events, civic and community involvement, and industry associations. The Staff noted that while the charitable gifts and contributions themselves were recorded below-the-line, the administrative costs were not. The Staff maintains that this Commission routinely disallows all charitable contributions.

UtiliCorp's testimony and argument for the inclusion of the proposed disallowance in rates is basically the same as put forth for the inclusion of dues and donations. UtiliCorp restates its argument that causing an item to be recorded "below-the-line" does not preclude the Commission from including it in rates. Additionally, UtiliCorp states that benefit to all, including the ratepayers, is incurred as the result of the UtiliCorp corporate responsibility program and UtiliCorp's support for local non-profit organizations. At the least, UtiliCorp supports a reasonable sharing of the costs from the public affairs ESF, and the dues and donations ESF.

The OPC and Jackson County support the Staff's position.



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The Commission has routinely disallowed costs for charitable gifts and contributions. The Commission finds that, while the UtiliCorp corporate responsibility program is commendable, the ratepayers cannot be held liable for contributions to charities not of their own choosing. In addition, the Commission is not convinced by the evidence that it is just and reasonable to include these costs in rates.

The disallowance proposed by the Staff is adopted.

### **C. TransUCUESF (Corporate Travel)**

During the test year this ESF was responsible for arranging and providing for corporate travel. Part of the ESF costs incurred were related to the leasing, operation and maintenance of several corporate aircraft. The Staff proposes a disallowance related to leasing and operating costs of these aircraft. Some details regarding the use and accounting procedures used for these corporate aircraft remain highly confidential and will not appear in this report and order.

According to the Staff this issue arose as the result of approximately \$2.9 million in overall residual aircraft costs at the end of the test year which were unassigned to any business unit, division or ESF. UtiliCorp proposes to allocate these residual costs to its business units on the basis of the Massachusetts formula. The evidence on this issue relates largely to comparisons by both parties to the relative costs, advantages and disadvantages of these aircraft in relation to the use of commercial travel.

The Staff initially points out that, up to this time, UtiliCorp has not included its residual aircraft costs in rates. The Staff has also been unable to identify any other utility in the state which is operating a business aircraft and which has included such costs in the development of jurisdictional retail rates.

The Staff witness bases his analysis partly on information furnished by UtiliCorp in an attempt to justify the inclusion of the residual costs in rates. The Staff witness analyzed information furnished by UtiliCorp regarding variable corporate aircraft operating costs assigned to business units and ESFs. The witness made comparisons between the variable cost per flight and the cost of alternative commercial airlines on a cost-per-passenger basis. The Staff witness has broken down the cost per business unit figures to reflect cost-per-passenger being assigned to the given ESF or business unit in comparison to cost-per-passenger of alternative commercial transportation.

The Staff witness concludes that he has reviewed information furnished by UtiliCorp regarding the operation of one aircraft used to shuttle employees between Omaha and Kansas City. The Staff witness notes that no date for the information, referred to as the "PRC Aviation Study," could be found but states that the date of the most recent source of information cited in the study is October 1987. The witness continues that the study was prepared for the General Aviation Manufacturers Association and the National Business Aircraft Association and was apparently

designed to “convince stockholders and other parties” of the financial soundness of operating corporate aircraft. The Staff witness doubts that this constitutes an “independent” study. The witness concludes that the study does not provide key sources of information, calculations and the assumptions used in arriving at the results of the study and that the study was provided to the Staff at such a late date that complete analysis was impossible.

In the hearing of this case, the Staff testified to receiving an additional cost analysis provided by UtiliCorp. Mr. Dittmer testified that the shuttle analysis performed by UtiliCorp was flawed in many respects, including the apparent elevation of comparable costs and comparison of 5,500 commercial flights with 4,500 private shuttle flights.

UtiliCorp supports its operation of the shuttle, and the comparison analysis of its costs, by stating that the analysis demonstrates that the operation of the shuttle is “within three percent of the cost of commercial flights and related costs.” UtiliCorp maintains that the total costs of the shuttle are reasonable when compared with similar commercial travel, and therefore some \$679,537 should be recovered in rates.

UtiliCorp also maintains that the PRC study quantified the benefits of the use of the corporate jet aircraft, including enhanced productivity, reduced total travel time, personal security and safety and reduced stress for employees and families. UtiliCorp concludes that the costs of the company's jet (the non-shuttle aircraft) are also justified when all costs related to employee travel are considered.

The Commission finds the UtiliCorp evidence to be insufficient to support the inclusion of the questioned costs in rates. The Commission also finds the Staff evidence in support of its disallowance to be substantial and competent. The weight of the evidence therefore causes the Commission to find that the Staff proposed disallowance will be adopted.

#### **D. Severance Costs**

The Staff has proposed an approximate \$142,600 disallowance for test year severance costs. The Staff witness states that such costs are largely non-recurring and are quickly offset by savings in payroll expense. The typical severance pay is six months salary.

UtiliCorp disagrees with the Staff's position. UtiliCorp states that payroll savings are achieved, to the benefit of the ratepayers, by severing employees. UtiliCorp believes that the concurrent severance costs, therefore, should also be borne by the ratepayers.

UtiliCorp also points out that it regards severance pay as a management tool and therefore seeks inclusion of what it considers an ongoing amount of severance costs in rates. The test year severance expense was a result of the UtiliCorp reorganization program, referred to as “Building Tomorrow's UtiliCorp,” or BTU. The UtiliCorp witness explains that the BTU program is ongoing, along with a certain level of severance costs. UtiliCorp maintains that these costs should properly be reflected in rates.

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The Commission finds the weight of evidence in this issue indicates that the severance costs in question were a one-time occurrence and not an ongoing expense. In addition, while some benefit to the ratepayer may accrue, the evidence is insufficient on that point.

Therefore, the Commission will adopt the proposed adjustment of the Staff.

#### **E. Common Plant Allocation Factor**

This issue revolves around the allocation of costs for one of the “responsibility centers” (RC) in the Operations Support ESF, namely, the facilities support RC. This RC includes rent and other office-related costs for office buildings located company-wide which housed ESF personnel during the test year.

Initially, according to the Staff witness, both UtiliCorp and the Staff used the same allocation method to determine the portion of these consolidated costs which should be included in local rates. That method is described as the “head count” method. Subsequently, in August 1997, and after the filing of UtiliCorp direct testimony, UtiliCorp revealed a proposal to allocate facilities support costs on the basis of an overall common plant ESF allocation factor rather than the head count factor. This caused an increase in the common plant expense in the amount of approximately \$567,000, the proposed amount of the Staff adjustment. The common plant allocation rate is reported to be 24.98 percent. The head count factor used by the Staff is 18.35 percent.

The UtiliCorp witness states that the common plant allocation factor is more precise, follows previous regulatory treatment, and is reasonable. UtiliCorp adds that the head count factor fails to allow for the movement of employees during the year and is inconsistent with the allocation factor used in the remainder of the ESF.

The Staff bases its objection on the fact that UtiliCorp has failed to document the reasonableness of either allocation factor. Although the Staff objected to UtiliCorp's original head count allocator, the Staff offered no alternative. After the late change in allocation factor by UtiliCorp, Staff still maintains that adequate documentation is lacking and the UtiliCorp position is unsupported. The Staff urges the Commission to hold UtiliCorp to its original position.

The Commission finds the evidence presented by UtiliCorp to be reasonable and sufficient to support its position. The Commission will deny the proposed Staff adjustment.

#### **F. Mergers and Acquisitions (M&A), International and New Product Development**

The Staff proposes an adjustment of approximately \$726,000, alleging that UtiliCorp failed to adequately capture and assign costs to three major non-regulated activities. Those activities are mergers and acquisitions, international operations and new product development. The Staff states that, “based on Missouri policy and practice, merger company records and the extensive experience of its auditors,” the

above adjustment was the result of the Staff directly assigning 25 percent of the finance ESF costs and 50 percent of the executive, operations, CFO and external communications ESF costs to M&A, international and new product development.

The Staff characterizes the UtiliCorp policy as one of growth by acquisition. The Staff points to the acquisition or startup of a number of companies and the aggressive acquisition strategy of UtiliCorp, both domestically and internationally. The Staff also notes the UtiliCorp effort beginning in 1995 to launch a proprietary national brand for its energy services called "Energyone." Finally, the Staff lists the unsuccessful merger attempt with Kansas City Power & Light Company (KCPL) which took place during the test year, all as examples of the amount of time UtiliCorp's management and staff personnel have given to unregulated activities.

Specifically, in the executive ESF, the Staff testifies that, of a total cost incurred of \$1.5 million, only \$200,000 was charged to foreign operations. The Staff witness states that, of the eight senior management officers, several were either partly or wholly responsible for international operations, mergers and acquisitions or other non-regulated activities. The Staff witness states that, other than the \$200,000 charge for international operations, no charges were made to this ESF for any other unregulated activities such as mergers and acquisitions.

In the operations ESF, the Staff states that the individual responsible for operations, Mr. Robert Green, charged only 14 percent of the total ESF costs to international operations. There were, according to Staff, no M&A or corporate development charges to this ESF from Mr. Green.

In the financial ESF, the Staff recommends a 25 percent disallowance. The Staff notes the various functions contained in the description of the finance ESF, including external financing of both domestic and international ventures, daily cash management, lock box interface, cash collections, pension management, check signing, financial community relations and administration of the customer finance program. The Staff originally requested a 50 percent disallowance of the costs attributed to this ESF minus those costs incurred for bank service fees and collection agency fees. That adjustment was later changed to 25 percent. The Staff is of the opinion that the excluded fees were incurred for regulated activities.

For the Chief Financial Officer (CFO) ESF, the Staff first points out that there is a substantial lack of documentation of the CFO's time. It adds that given a description of the responsibilities and duties of that position by UtiliCorp, it was the position of the Staff that unregulated activities made up a large portion of those duties, including international operations and merger activity. Time charged to those activities was not reported at all, and later under-reported. The Staff is also critical of the "exception" timekeeping used by the CFO and described below. The Staff proposes a 50 percent disallowance of the costs charged to this ESF.

For the external communications ESF, the Staff maintains that this position exists chiefly to facilitate external financial requirements related to UtiliCorp's non-regu-

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lated and international activities. The Staff adjusted these costs to exclude costs associated with the UtiliCorp annual report and shareholders meeting and then proposed 50 percent, the remainder, be allocated to M&A activities, international and new product development.

The Staff bases this proposed disallowance on a comparison of the job accountability of the senior vice president-corporate communications, with the UtiliCorp proposed allocations themselves. It should be pointed out that, as in all of the five ESFs, the Staff substantiates its proposed disallowances partly on the poor timekeeping of various senior executives. The Staff explains that UtiliCorp executives, and all ESF personnel, use "exception" time sheet reporting to track the ultimate assignment of costs to an ESF. The employee's own ESF is charged with the costs unless the time sheet reflects an "exception." No time is reported or assigned to a task unless there is an exception. The Staff considers exception timekeeping to be a very inadequate method of tracking costs for purposes of accurately determining the amount of time and expense devoted to regulated, as opposed to non-regulated, activity in a diverse company such as UtiliCorp. The Commission agrees.

As a result of inadequate timekeeping and lack of other documentation, the Staff was forced to use its own estimation of time spent in various activities in conjunction with the various job descriptions furnished it, to allocate an appropriate level of funds which should reasonably be included in rates.

UtiliCorp states, generally, that its senior management is not heavily involved in foreign operations and that each of the international companies is managed relatively autonomously. In this regard, UtiliCorp points out that substantial time differences exist between its corporate headquarters in the Midwest and its companies in Australia and New Zealand which makes lengthy contact during reasonable working hours very difficult. UtiliCorp also states that it does not have controlling interest in its New Zealand and Australian operations.

UtiliCorp also argues that the Staff disallowances of 50 percent, and 25 percent of the finance ESF, were arbitrary, without basis in evidence, and unrealistically low. UtiliCorp adds that after some direct assignment of costs to non-regulated activities, the Massachusetts formula was used to assign costs. UtiliCorp argues that, as a result of the application of direct assignment and use of the Massachusetts formula, the assigned costs accurately reflect the time and expense dedicated to various business units and activities.

The Commission finds substantial evidence supports the position of the Staff. The Commission finds the proposed adjustment to be reasonable in light of the poor timekeeping and inadequate records offered by UtiliCorp. The Commission will adopt the Staff adjustment.

**G. Discretionary Bonus/Employee Recognition**

The Staff has proposed an adjustment of approximately \$148,000 for certain discretionary employee bonuses and merchandise distributed to employees, allegedly related to the “Energyone” activity.

The Staff witness states that the employee bonuses in question are not predicated on any achievement of goals or targets and seem to be an after-the-fact reward. The witness continues that in his experience such after-the-fact rewards are not common in the utility industry. Further, the Staff witness states that he finds it difficult to believe that ratepayers benefit from the employee bonuses.

The Staff continues that UtiliCorp awarded certain merchandise displaying the “Energyone” brand to its employees during the test year. The cost of the merchandise was included as an operating expense in certain ESFs. The Staff takes the position that all costs of promoting the Energyone brand name should be borne by the UtiliCorp shareholders.

UtiliCorp states that both the merchandise and bonus plans are part of a UtiliCorp program to retain its employees. UtiliCorp notes substantial turnover in its industry and a desire on the part of its employees to obtain recognition from the company for the contribution they are making. The bonuses are intended to recognize and reward exceptional performance. In addition, UtiliCorp maintains that the program is, in effect, “self-funding” because the expense to replace experienced employees is greater than the expenditure of salary and benefits combined.

The Commission finds the discretionary bonus plan to be as the Staff describes it, an after-the-fact reward plan not predicated on any achievements or goals. The Commission typically does not award costs to the ratepayers for programs of this nature without a substantial showing of direct ratepayer benefit. The Commission finds the Staff proposed adjustment to be just and reasonable.

The Commission will adopt the proposed Staff adjustment.

**I. ESF Time Reporting**

While this issue does not contain a monetary adjustment, the Staff particularly has requested the Commission issue, as a part of its report and order, a direction to UtiliCorp requiring positive time reporting. As has been noted above, UtiliCorp currently uses “exception” reporting. The Staff testifies repeatedly that this type of time reporting creates a major impediment to auditing the accuracy and fairness of the charges to regulated and non-regulated functions and particularly to the various ESFs. It is also the opinion of the Staff that UtiliCorp employees, under the exception system, are neglecting to report time spent in non-regulated functions and are therefore, by default, causing that time to be charged to the ratepayers of MPS.

UtiliCorp responds that “contemporary management theory holds that the traditional organizational chart does not provide the necessary flexibility” for the

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efficient operation of current and future utility businesses. UtiliCorp, as has been set out above, disputes the Staff assertion that, for one reason or another, UtiliCorp employees are not reporting their time accurately.

The Staff has also recommended that UtiliCorp be required to maintain current organizational charts and job descriptions which clearly delineate responsibility and reporting requirements. The Staff notes that the Commission has the statutory authority to specify the nature of the accounting records of regulated entities.

UtiliCorp states that its current cost assignment procedure, described as direct assignment based upon requirements, allocation based upon cost causative factors, and application of the Massachusetts formula, is a reasonable approach for assigning costs associated with time reporting.

As this issue bears no monetary amount, the Commission will make no ordered finding. The Commission will, however, strongly suggest to UtiliCorp that it adopt positive timekeeping, as recommended by the Staff, and accounting procedures which adequately separate and track costs associated with the operation of the MPS regulated service area.

#### **J. The Ernst and Young Synergy Study**

During the test year, UtiliCorp commissioned the firm of Ernst and Young to study and report on possible synergies which could be expected from the proposed merger of KCPL into UtiliCorp. The Staff has proposed an adjustment of approximately \$280,000, which reflects all costs of this study.

The Staff states that this item is a non-recurring expense and therefore should not properly be considered inside the test year for ratemaking purposes. The Staff also states that no evidence was offered by UtiliCorp that the ratepayers have received any "stand-alone" or "non-merger" benefit from the study.

UtiliCorp witness Robert Green stated that the Ernst and Young study was a detailed internal analysis which helped management identify many cost-saving programs as part of its ongoing re-engineering. Some examples are the centralization of operating functions, new computer software, new control systems, improved training and ways to handle environmental issues. UtiliCorp states that its ratepayers are, and will continue, to benefit from the knowledge gained from a third-party review of the UtiliCorp procedures and operating practices.

The Commission finds that the record does not adequately support a finding that the study in question produced any real benefit to the ratepayers. The Commission also finds the Staff case to be sufficient on the record to support its proposed adjustment.

The Commission will adopt the Staff-proposed adjustment.

#### **Dues and Donations - D-10**

The Staff has proposed an adjustment of approximately \$42,600 in the cost of dues and donations to various organizations on the basis that membership in these organizations is not necessary for the provision of safe and adequate service and that donations to charitable organizations, while perhaps worthwhile and well-inten-

tioned, should be rejected as not necessary for the provision of safe and adequate service. The Staff maintains that these costs should be regarded as a gift from the company and its stockholders, not as an involuntary gift from the ratepayers. Testimony reveals these organizations include various country clubs, rotary clubs and a host of charities.

UtiliCorp states that it has regularly obtained above-the-line treatment of its charitable donations and dues in other jurisdictions. These recoveries have been based on the premise that the cost of meeting civic responsibility benefits everyone, including the ratepayers. UtiliCorp demonstrates its corporate responsibility by supporting the various worthwhile organizations in the community and would recommend a reasonable approach to sharing this responsibility with the ratepayers.

The Commission has traditionally disallowed donations such as these. The Commission finds nothing in the record to indicate any discernible ratepayer benefit results from the payment of these donations. The Commission agrees with the Staff in that membership in the various organizations involved in this issue is not necessary for the provision of safe and adequate service to the MPS ratepayers.

The Commission will adopt the proposed adjustment of the Staff.

#### **Tariff Issues**

In Case No. ET-98-103, consolidated with the rate filing and Staff complaint, UtiliCorp filed three proposed tariffs. The three tariffs were suspended to the operation of law date of March 18, 1998, to coincide with the suspension of proposed tariffs in the rate filing. The three tariffs propose the initiation of real-time pricing, the modification of the line extension policy and the institution of flexible rates and special contract service. The Commission will deal with each tariff separately and with the alternative rate proposal later in this report and order.

#### **Real-Time Pricing Tariff**

UtiliCorp has proposed a real-time pricing tariff (RTP) to allow MPS to reconfigure its rates to better conform to the emerging competitive electricity environment. By way of summary of the proposed tariff, UtiliCorp describes the tariff as having a two-part structure. The first part comprises the customer baseline load, which is a calculation of the customer's usage absent an RTP program. This baseline load is calculated on the customer's historical usage. The second part of the RTP proposal covers the difference between actual and baseline usage in each hour. This usage is priced at the marginal cost-based real time price, allowing the customer the option of purchasing additional load above the baseline or selling back excess load at the real-time price.

A description of the proposed RTP tariff is contained in the direct testimony of SIEUA witness Donald E. Johnstone. Mr. Johnstone states:

“The Company's proposal calls for a Customer Base Bill to be established which reflects a pre-determined level of usage at a pre-determined price. The Base Bill seeks to be revenue neutral to the utility and customer, assuming the customer were to use exactly the Customer Baseline Load



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(CBL) amount of energy under the program. The CBL may or may not change over the term of the RTP agreement.

Hourly real time electricity prices ( $P_{\text{rtp}}$ ) will be established and communicated by the utility to the customer one day ahead. These prices will apply to usage above or below the CBL. Incremental usage is billed at  $P_{\text{rtp}}$ . Similarly, decreases in usage are credited at  $P_{\text{rtp}}$ .

In establishing the price  $P_{\text{rtp}}$ , MPS proposes to add a combination of fixed and variable adders to the estimate of marginal cost, as shown in the tariff and in the testimony of Company witness Chapman at Pages 14 and 15. This hybrid approach of fixed and variable adders appears to be unique among utilities. Further, it contains variables that are not spelled out in the tariff, but rather are set on an individual basis by the Company.

These adders have the effect of causing a greater markup at times when marginal cost is lower, and a lower markup at times when marginal cost is high. I would note that such a phenomenon is in direct contrast to what is usually observed in a competitive market, as margins are trimmed when market prices are low and expanded at times of high demand and high market price. I have prepared Schedule 5 which shows how the variable adder affects the markup under two different marginal cost situations. This schedule also shows the scale of percent markups that could be expected under the various scenarios.

There are additional noteworthy features in the tariff. These include "Price Quotes for Fixed Quantities" and "Bill Aggregation Service." The first allows customers to contract with MPS for short-term power contracts (one week to six months) for agreed increments of usage, under mutually agreeable terms. The second, Bill Aggregation Service, allows customers with multiple accounts, that are financially or legally related to one another, to aggregate bills for the purpose of the incremental energy charge.

Finally, the Company wishes to offer a "Premium RTP Service," which is similar to Basic RTP Service, except that a reduced markup on the marginal cost is accepted in return for an additional fixed payment, Base Bill Premium (B), by the customer. The reduced markup is accomplished by using a relatively higher alpha and/or a relatively lower gamma in the pricing equation."

UtiliCorp argues that the utility, the customer, and the remainder of the ratepayers will all benefit from this program. UtiliCorp states that the proposed tariff allows

customers to use energy in a more economically efficient manner because use can be planned and adjusted based on the current price. For the energy supplier, the proposed tariff allows incremental sales of excess capacity. For the service provider, UtiliCorp points out an opportunity to encourage customer growth in a manner that promotes system reliability and economic efficiency.

The Staff prefers and recommends an alternative RTP tariff, substantially the same as the tariff approved by the Commission in Case No. ET-97-113, In re Kansas City Power & Light Company. The staff witness points out the differences between the UtiliCorp proposal and the Staff-recommended KCPL tariff.

In regard to availability, the Staff states that self-generating customers are suited for real-time pricing and the proposed tariff should be available for services used by self-generators, including standby, back-up and supplemental. Further, curtailable customers should be allowed to take service under the RTP tariff. Finally, it is the Staff's opinion that customers without hourly recording devices should be required to pay the installation cost of such devices.

In regard to monthly rates, the Staff states that the proposed tariff rates have variable pricing components which are to be negotiated individually with each customer. The Staff takes the position that a negotiated rate is a special contract rate and should be entered into under the special contract tariff. The Staff states that the variables in the pricing component should be fixed within the RTP tariff. The Staff also states that no provision has been made for the adjustment of transmission charges. The Staff is of the opinion that embedded-cost transmission charges should be a component of the hourly real-time price so that the amount of use of the transmission system is the same for customers with the same use.

The Staff states that the customer baseline load, once established, should only be adjusted by mutual agreement, and then only under special circumstances. The Staff is in favor of the two-part structure of the proposed tariff and the KCPL tariff and does not appear to favor the alternative, one-part SIEUA proposal.

Finally, the Staff seeks to eliminate the section of the proposed tariff which provides for price quotes for fixed quantities, stating that offering individual customers separately negotiated prices, structures and quantities will likely result in undue discrimination.

The Staff supports approval of a real-time tariff similar to the tariff adopted in the Kansas City Power & Light case.

The SIEUA recommends a one-part real-time pricing approach. The SIEUA states that the one-part approach would better reflect costs and will not discriminate between new and existing loads. SIEUA adds that the one-part tariff would be a better model for the future competitive retail sector.

The SIEUA agrees with the Staff regarding the price quote section and availability to curtailable and self-generating customers. Finally, the SIEUA states that it has identified many terms in the proposed MPS tariff that it states are ill-defined and unauditible. The SIEUA recommends that no tariff should be approved until the rates, terms and conditions of service are clearly defined.

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The Commission has approved tariffs of this general type in previous cases, as pointed out by the parties. While the Commission is not opposed to tariffs of this nature, the Commission agrees with the preferences and recommendations of the Staff and, partly, with the SIEUA. The Commission finds that the Staff has provided sufficient evidence that the proposed tariff is not just and reasonable.

Therefore, the Commission will reject the proposed tariff.

#### **Flexible Pricing/Special Contract Tariff**

UtiliCorp has requested authority to implement a tariff that supports special contract service to large customers that has the following provisions regarding availability, rates and conditions.

With regard to availability, MPS, in instances where it faces competition from alternate energy suppliers, may enter into special rate contracts with Large Power Service customers. The rates agreed upon by MPS and customers will not exceed the rates available under the Large Power Service tariff or be less than rates that, in the aggregate, exceed MPS's incremental costs making a contribution to fixed costs. All contracts entered into under the tariff would be provided to the Commission Staff and the OPC and would be subject to the Commission's jurisdiction.

UtiliCorp states that this is an effort to retain large customers and to retain as much contribution to fixed cost recovery as possible. UtiliCorp has filed a proposed tariff detailing its proposal for a special contract tariff with a flexible rate feature.

The Staff recommends an alternative tariff with substantially the same provisions as the tariff approved by the Commission in Case No. ET-97-113. The Staff contrasts the UtiliCorp proposal with the KCPL tariff in three general categories.

In the first category, availability, the Staff recommends the Commission set a minimum monthly billing demand to qualify for the special contract rate. This monthly demand is specified in minimum kW's used per month. This would have the effect of limiting the special contract rates to those customers who would be large enough users to have an adverse impact on the remainder of the ratepayers on the system were they to leave.

In the second category, rates, the Staff suggests that a proper tariff should make it clear that the rates negotiated for each customer will exceed the incremental cost of serving that customer and that MPS will seek to maximize each customer's contribution to margin without undue discrimination. The Staff suggests the following language:

The rates agreed upon by Missouri Public Service and each customer shall reasonably exceed Missouri Public Service's incremental cost of serving that customer. Missouri Public Service will endeavor to maximize each customer's contribution to margin without the exercise of undue discrimination.

In the third category, conditions, the Staff recommends that MPS should be required to provide not only the special contracts themselves, but sufficient documentation to allow adequate review by the Staff. A contract documentation section was incorporated into the KCPL tariff and the Staff recommends its use.

The OPC does not support the UtiliCorp proposal and does not agree entirely with the Staff's alternative. The OPC notes the following deficiencies in the Staff proposal, and contained in the KCPL tariff:

KCPL was allowed to use its discretion in applying the tariff to customers with special needs and receiving a smaller contribution to margin from these customers when there is no rationale for lessening the margin. This discretion was allowed despite the fact that the utility is likely to have an incentive to offer smaller margins in situations where it helps its competitive position.

KCPL is allowed to enter into contracts that do not contain "market out" clauses which would allow customers to be free to choose the services of an alternative supplier once direct retail access becomes available.

KCPL was granted discretion to enter into special contracts of unlimited length even though the Commission's order in Case No. EO-95-181 stated that it was "concerned with the length of contracts."

The SIEUA points out two fundamental problems with the UtiliCorp-proposed tariff. First, the SIEUA witness notes that the downward flexibility removes the incentive for the company to have its product priced properly for all classes of customers. The second SIEUA criticism is that the proposed tariff provides different prices for different customers who would otherwise be similarly situated.

SIEUA recommends cost-of-service based rates in lieu of the downward flexibility portion of the proposed tariff. Also, the SIEUA proposes that all price reductions be posted so that all similarly-situated customers will be aware of prices offered to others.

In surrebuttal, after review of the Staff alternative proposal, the SIEUA witness states that the SIEUA has a concern in regard to the suggested Staff language regarding expanding the availability of the special contract rate to special needs customers. The SIEUA explains that there needs to be some qualification that it would only be appropriate to maximize margin in regard to special contracts that are in response to viable competitive alternatives. Special needs contracts should reflect rates that are cost-based, and those rates should not maximize the contribution to margin.

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Finally, the SIEUA suggests a modification to the incremental cost language proposed by the Staff:

In situations where contract rates under this rate schedule are in response to viable competitive alternatives, and represent reductions from the otherwise applicable rate, such contract rate shall be designed to produce revenues that exceed Missouri Public Service Company's incremental cost of serving the customer, and Missouri Public Service Company shall endeavor to maximize the contribution to its margin from such customers without the exercise of undue discrimination and up to the level of the otherwise applicable rate.

Again, the Commission is not opposed to special contract tariffs and has approved such tariffs for use by several electric utilities in this state. However, the Commission agrees with the comments of the Staff in regard to availability, rates and various conditions. The Commission suggests that UtiliCorp refile a tariff similar in nature to the special contract tariffs the Commission has already approved.

The Commission finds that the Staff has provided sufficient evidence that the tariff as proposed is not just and reasonable.

The Commission will reject the proposed tariff.

#### **Line Extension Policy**

UtiliCorp has proposed a tariff regarding its line extension policy, also referred to as facilities extension policy. UtiliCorp proposes to revise its current facilities extension policy to reflect that the recovery of costs for facilities extensions will take into consideration the potential revenue associated with each class of customer.

Briefly described, the UtiliCorp proposal provides for a construction allowance from MPS that is based upon an analysis of the revenue provided from the extension during the first five years of its use.

An additional purpose of the proposed tariff is to reflect the unbundling of generation, transmission and distribution costs. This proposal would restrict the MPS investment in facilities to an amount that can reasonably be recovered from the distribution portion of its network.

UtiliCorp is also proposing that applicants for service provide the conduit and other materials at their cost in areas requiring underground service.

The Staff states that residential extensions and proposed allowances fall into the following four categories and amounts:

I. Electric Cooling, Gas Space & Water Heating	\$1,371	
II. Electric Cooling & Water Heating, Gas Space	\$2,020	
III. Dual Fueled Heat Pump		\$2,820
IV. All Electric		\$2,220

The Staff's analysis of the proposal indicates that category I customers would suffer the most impact while category IV customers would suffer the least impact.

The Staff generally supports the proposed tariff revision as an effort to properly allocate costs to those customers who cause the costs. The Staff would recommend that the proposed tariffs be altered to incorporate the two-year transition period proposed by MPS but not reflected in the actual tariff. The Staff would also recommend that the proposed tariffs be modified to describe the characteristics of each of the four categories of residential customers. Finally, as the proposed tariff makes reference to the electric services standards handbook, the Staff suggests that the Commission instruct MPS to furnish the Staff with an updated handbook whenever substantive changes occur.

Intervenor Missouri Gas Energy (MGE) is opposed to the proposed MPS tariff revision because, as stated by the MGE witness, the proposed tariff unfairly burdens the customer who chooses gas space and water heating by deducting a higher allocated percentage. MGE argues that gas space and water heating customers get less credit for the revenues they produce than customers with electric water heating or space heating. MGE continues that the result is that gas water and space heating customers are required to pay an electric facility's extension charge while electric water and space heating customers are not required to do so. MGE offers the following chart as an example:

Type	Description	Allocated Piece to Infrastructure Percentage	Construction Cost	Annual Distribution Gross Margin	Customer Payment
I.	Gas Space & Water Heat, Electric Cool	33%	\$2,020	\$379	\$539
II.	Electric Water, Electric Cool, Gas Space Heat	20%	\$2,020	\$470	\$0
III.	Electric Heat Pump, Gas Back up Heating	20%	\$2,020	\$417	\$0
IV.	All Electric	20%	\$2,220	\$526	\$0

MGE maintains that a more equitable approach would be to use the same allocated percentage for all customers regardless of equipment in the structure. MGE also notes the lack of a category for natural gas-fired cooling. Finally, MGE states that the proposed tariff language is confusing.

Jackson County supports the Staff position on this issue while the OPC takes no position.

The Commission concurs with MGE that a proper line extension policy should employ the same allocated percentage to all residential customers regardless of the equipment installed in the structure.

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The Commission finds there is sufficient evidence that the proposed tariff is not just and reasonable.

The Commission will reject this tariff.

### **Incentive Regulation**

UtiliCorp is proposing an incentive regulation plan, called an Efficiency Earnings Model (EEM). An incentive regulation plan generally is described as a method for setting rates to allow the opportunity for the utility to obtain a higher return for assuming higher risk.

In traditional regulation, once the utility's rates are set in a general rate proceeding, the utility assumes the risk of any revenue requirement increases and, conversely, receives the benefit of any revenue requirement decreases, until such time as another general rate proceeding takes place and imbalances are adjusted. The UtiliCorp proposal is referred to by the Staff as a sliding scale sharing grid-type plan, called Performance Based Regulation (PBR). The utility would be allowed to retain a portion of its earnings above its authorized return on equity depending on a comparison of achieved earnings with a pre-established sharing grid. Depending on the comparison of the actual return of the company with the sharing scale in the grid, the utility might retain all or some of its earnings above its authorized rate of return.

The sliding scale mechanism is the only type of incentive plan that has been approved by this Commission. It is currently being used on an experimental basis by UE, as the result of Case No. ER-95-411, and was used by Southwestern Bell Telephone Company from 1990-1993 as the result of Case No. TC-89-14, et al. UtiliCorp also sets out the following purposes for such a plan:

1. Provide adequate incentives for the company to cut costs and increase efficiency and productivity.
2. Prevent any cost reduction action that might degrade performance measurements of safety, reliability and customer service quality.
3. Remove the over-emphasis on capital investments.
4. Reduce the high cost and time consumption of the traditional regulation model.
5. Continue to provide a reasonable regulatory review of the profit levels of a monopoly enterprise.
6. Remove the "profit envy" or "profits are bad" concept of current regulation.
7. Establish a regulatory model that looks at "price" instead of "cost."
8. Address the need for "price stability."

On an annual calendar basis, the MPS proposed sharing grid is as follows:

13.5% to 14.5%	25% to customer/75% to shareholder
14.5% to 15.5%	50% to customer/50% to shareholder
15.5% to 16.5%	75% to customer/25% to shareholder
16.5% and above	100% to customer/0% to shareholder

The mechanics of the UtiliCorp proposal are for the company to issue a report detailing its annual calendar year earnings by April 15 of the following year. The Staff, Office of Public Counsel and other involved parties would then review the report and bring their recommendations and any points of disagreement forward to the Commission. By July 1 of that year, the Commission would issue its order containing its findings as to the company's earnings for the previous year, and order rate credits to be issued, as appropriate, if MPS's earnings are within the sharing portion of the grid.

Initially, the Staff states that, under certain circumstances, it is not opposed to implementation of a well-designed experimental incentive regulation plan. The Staff notes that a well-designed and managed plan requires the following: up-front agreement on how earnings should be calculated for purposes of determining whether customer sharing is called for; and a high degree of cooperation on discovery so that the Staff and other parties can make their recommendations to the Commission within the truncated time period called for in the past sliding-scale plans now used in Missouri and in UtiliCorp's proposal.

Those matters being necessary to the proper administration of this type of plan, the Staff states that it does not favor allowing MPS to implement such a plan at this time for three reasons. The Staff has serious concerns regarding (1) the MPS cost allocation procedures; (2) an MPS propensity for earnings manipulation; and (3) the discovery problems regarding MPS encountered by the Staff in this and previous rate proceedings.

Finally, the Staff objects to the details of the MPS proposed sharing grid as being slanted in favor of the shareholders and against the ratepayers. The Staff notes that every aspect of the sliding scale is less favorable to the ratepayer than the plan currently in effect for UE.

The OPC also does not believe that MPS should be authorized to engage in an incentive plan for three general reasons. First, as did the Staff, the OPC cites UtiliCorp's recent, consistent, non-cooperation with the discovery process in this case. In that regard, the OPC witness states:

“Alternative Regulatory Plans require a greater degree of cooperation between a utility, the Commission, the Staff, the Public Counsel, and other intervening parties. An ARP does not mean a decrease in regulatory oversight, but a change in focus. This change in focus involves: the production of reports on a timely basis, access to company planning documents on a regular basis, interaction between the parties to address unanticipated changes in operations or other factors, customer service measures, and other possible goals such as increases in productivity or efficiencies. The difficulty Public Counsel and other parties in this case have had getting timely and actually responsive responses to discovery indicated that an ARP, with its required high degree of cooperation, would be a disaster.” (Exhibit 11, Trippensee Direct, pp. 15-16).



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The OPC cites UtiliCorp's consistent disregard of, and failure to fulfill, previous commitments to the Commission. The OPC notes particularly Case No. EO-95-187 in which it alleges MPS failed to submit required documents.

The OPC reiterates the Staff contention that UtiliCorp has a propensity, in fact a corporate policy, to "manage" corporate earnings.

The OPC also notes its objection to the propriety of the benchmarks on the sharing grid as favoring the shareholders and the company, and the UtiliCorp proposal to use year-end rate base and capital structure.

Jackson County supports the position of the Staff and also points out that the current State statute governing the setting of rates, Section 393.270, RSMo 1994, requires the Commission to consider all relevant factors when setting the rates of a public utility. As the proposed incentive plan does not, by design, allow consideration of all relevant factors, Jackson County maintains that the proposal is unlawful.

The Commission is aware that it has currently approved several experimental incentive regulation plans of one type or another. However, the Commission has weighed the evidence in this record carefully and finds several matters of concern.

First, the Commission finds that the sharing grid, as proposed by UtiliCorp, is not in the interest of the MPS ratepayers and is neither fair nor reasonable.

Second, the Commission notes the concerns of both the Staff and OPC in regard to the long-term problems encountered in this litigation in regard to discovery and cooperation between the parties. The Commission will not assign fault in this matter but states that a successful incentive regulation plan requires proper and accurate accounting and other record keeping, and substantial cooperation between the parties.

Third, the Commission agrees with Jackson County to the extent that the approved Incentive Plans to date have all been experimental and have had a fixed expiration date.

Therefore, for the above reasons, the Commission will reject the proposed incentive regulation plan.

#### **Stipulation and Agreement**

On February 27, 1998, the Staff, OPC and UtiliCorp filed a proposed stipulation and agreement, requesting Commission approval of the resolution of three issues. Those issues are a customer deposit interest proposal, an energy audit tariff, and a low-income weatherization program. The parties have failed to reach an agreement on a low-income weatherization program and have, therefore, requested the removal of an additional \$150,000 from the MPS revenue requirement. The proposed stipulation and agreement is appended to this report and order as Attachment B.

In regard to the customer deposit matter, the parties have agreed that MPS will calculate and pay interest on customer deposits at a rate of one percent over prime lending rate, or 9.5 percent. The parties state that this is consistent with the

Commission's Report and Order in Case No. GR-97-272, in re Associated Natural Gas Company.

The energy audit tariff was originally filed in Case No. ET-98-103, later consolidated into this proceeding. Generally, the proposed tariff provides for residential mail-in audits, large commercial and class A industrial audits, and small commercial and class B industrial audits.

The residential audits will focus on advising residential customers as to energy usage by appliance and end-use as well as furnishing a list and description of energy efficiency measures relevant to the customer's home.

The large commercial and class A industrial audits will consist of providing the customer with a detailed report designed to identify areas of greatest opportunity for improvement in energy efficiency. This will include a prioritized list of recommendations, relevant options, and an explanation of potential savings, costs, benefits, and overall value.

The small commercial and class B industrial audits will focus on customer energy consumption and operations, and will provide the customer with recommendations for improvement in energy efficiency. The customer will be provided with a report setting out the results of a walk-through audit and containing recommendations for improvement.

As the proposed stipulation and agreement is non-unanimous, rule 4 CSR 240-2.115 must be applied. Pursuant to this rule, the parties were notified by the General Counsel's office of their right to request a hearing. None of the non-signatory parties requested a hearing within the five-day time period specified in the rule. Furthermore, the Chief Deputy General Counsel indicated in his letter filed March 4, 1998, that no party has indicated that it will request a hearing. The Commission has complied with the provisions of 4 CSR 240-2.115 and, therefore, finds the proposed stipulation to be unanimous by operation of that rule.

The Commission has reviewed the terms of the proposed stipulation and agreement and finds that competent and substantial evidence exists on the record to support all three provisions of the proposed stipulation. The Commission finds the energy audit proposal to be reasonable and in the public interest and will approve that proposal. The Commission also finds the energy audit tariff to be reasonable and will order a tariff to be filed by UtiliCorp in compliance. The Commission finds the agreement between the parties regarding the proposed \$150,000 debit to the MPS revenue requirement to be reasonable and has reflected that debit in the revenue summary and revenue requirement in this report and order.

The Commission finds the proposed stipulation and agreement to be just, reasonable, and in the public interest and will approve the stipulation and agreement and order UtiliCorp to comply with its terms and conditions.

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**Revenue Summary**

C = Company

S = Staff

O = Office of the Public Counsel

		<u>Revenue Requirement</u>
Company's Revised Recommendation - January 8, 1998 Reconciliation		\$14,941,360
Changes to reflect final Cash Working		<u>450,757</u>
Capital, Interest on Customer Deposits and Staff Correction		
Final Company Recommendation		15,392,117
<b>Hearing</b>		
<b><u>Memo Ref</u></b>	<b><u>Issue</u></b>	<b><u>Decision</u></b>
E-1	Capital Structure	S 4,128,835
E-2	Return on Equity	S 5,968,700
E-3	Cost of Long-Term Debt	S 570,133
C-1	Weather Normalization - Net of Fuel Expense	S 1,244,372
C-2	Economic Development Rider Revenue	C
C-3	Off-System Sales Revenue - Netof Fuel Expense	S 1,325,968
D-1	Systems Maintenance	S 628,745
D-2	Depreciation Issues:	
	Change in Service Lives	S -0-
	Terminal Net Salvage	S 1,794,954
	Elimination of Interim Additions	S 1,538,532
	Change in Procedure	S 1,282,110
	Change in Technique	S 2,307,797
	General Plant Amortization	S 3,720,415
D-3	Amortization of Regulatory Assets - Transition Costs	S 4,565,995
D-4	FAS 87 vs ERIS Minimum Contribution - Pension Expense	S 262,628
D-5	FAS 106 - Post-Retirement Benefits Expense	S 357,023
D-6	Maintenance Normalization	C
D-8	Economic Development Costs	S 90,308
D-9	UCU Corporate Allocation Issues:	
	A. Governmental Affairs	S 399,794
	B. Public Affairs	S 249,444
	C. Trans UCU	S 515,922
	D. Severance Costs	S 142,662
	E. Common Plant Allocation Factor	C
	F. Mergers & Acquisitions, International & New Products	S 726,122
	G. Discretionary Bonus/Employee Recognition	S 147,787
	J. Ernest & Young Synergy Study	S 279,343
D-10	Dues & Donations	S <u>42,627</u>
Revenue Requirement		<u><u>(16,898,098)</u></u>

### **Rate Design**

This issue involves the method of applying any resultant increase or decrease in rates to the rate structure of MPS. The Staff supports the position of applying decreases or increases in equal percentages across all rates and rate classes. The Staff states that reducing all rates by the same percentage will preserve the current revenue distribution among customer classes, maintain the current rate continuity between general service tariffs and result in the same percentage impact to all customers. The Staff cites a current class-cost-of-service study performed for this case which indicates that preserving the current revenue distribution among customer classes is reasonable and appropriate and accurately reflects the fact that the revenues generated by the various classes are reasonably identical to the relative costs to serve those classes.

SIEUA proposes that the Commission authorize a sub-class of the large power service class, called "network system direct," and create a reduced rate for that class. These customers apparently take service at the primary voltage. It is the position of the SIEUA that the network direct customer group is less costly to serve than the remainder of the large power service class and should receive an additional five percent reduction in rates.

The Commission declines to adopt the suggestion of the SIEUA based on the Staff's evidence that no inequities exist among customer classes at this time.

The Commission finds substantial evidence to adopt the Staff position that any rate increase or decrease as a result of this case will be assigned in an equal percentage manner, across all rates and rate classes.

### **Pending Motions**

During the course of the briefing period in this case, several motions were filed which are still pending. The Commission will dispose of those pending motions at this time.

On January 23, 1998, the Staff filed a motion to extend the page limit of the initial briefs, set at 150 pages, as its brief was filed at 152 pages long, and to accept its brief for filing. Only UtiliCorp objected, by response of January 26, 1998, stating that, if properly formatted, the Staff's brief would have actually been some 227 pages in length. UtiliCorp stated as its requested remedy that it "may find it necessary to request an extension of the page limitation for its reply brief in order to fully respond." On February 4, 1998, MPS filed its reply brief consisting of 102 pages and appendices. The Commission accepts both the Staff initial brief and the MPS reply brief for filing.

On January 27, 1998, the Staff filed a motion to strike a portion of the initial brief of UtiliCorp. In its motion the Staff states that, beginning on page 48 and continuing to page 49 of the initial brief, UtiliCorp cites Exhibit No. 68 in support of its case. Exhibit No. 68 is generally referred to as the "ice storm memo." The Staff points out that, upon Staff objection, Exhibit No. 68 was ruled inadmissible in the evidentiary hearing of this case, by ruling of the presiding officer, (referred to as the "regulatory law judge").

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The Staff seeks an order of the Commission striking those portions of the UtiliCorp initial brief which refer to Exhibit 68.

On January 28, 1998, UtiliCorp filed its response to the Staff's motion and a motion to reconsider the evidentiary ruling referred to above. As its basis for reconsideration, UtiliCorp states that Section 536.070, RSMo 1994, does not prohibit reference to an excluded document in a brief. UtiliCorp adds that the Staff has not cited, nor is there a Commission rule, which allows a motion to strike as a remedy for reference to such a document in a brief. Further, UtiliCorp states that there is no authority under the Missouri Rules of Civil Procedure for the Staff's motion.

UtiliCorp also pleads that the ruling, made by the presiding officer, be reviewed by the Commission as the ruling was erroneous. UtiliCorp states that it has the "right" to bring such a ruling to the attention of the Commission for reconsideration. UtiliCorp prays the Commission deny the Staff's motion to strike, reverse the ruling of the presiding officer and maintain the overall level for maintenance expense.

Rule 4 CSR 240-2.130(3) states "the presiding officer shall rule on the admissibility of all evidence." The rule continues that evidence to which an objection is sustained shall be preserved for the record. No mention is made, nor authority given, for any party to request reconsideration of an evidentiary ruling by the Commission. For purposes of conduct of evidentiary hearings, the presiding officer has the exclusive authority to make evidentiary rulings (4 CSR 240-2.130(4)). The Commission finds, therefore, that the UtiliCorp request for reconsideration by the Commission of the evidentiary ruling of the presiding officer regarding the exclusion from evidence of Exhibit No. 68 must be denied.

In regard to the Staff's motion to strike, findings made by the Commission must be based on substantial and competent evidence, taken on the record as a whole. In making its findings, the Commission may not take into consideration any matter not on the record and may not base a finding of fact on any matter not in evidence. UtiliCorp, by making an inappropriate reference to the excluded document in its brief, is asking the Commission to make a finding of fact based on a document not in evidence. The Commission finds this to be improper. As the excluded document is not a part of the record that the Commission may consider in making its decision, the Commission finds that the Staff's motion to strike references to the document from the UtiliCorp brief is reasonable.

The Commission will grant the Staff motion to strike and exclude from the UtiliCorp initial brief the last paragraph on page 48, beginning with the word "finally" and continuing on to page 49 and ending with the word "added," and, on page 49, the first full paragraph beginning with the word "so" and ending with the word "issue."

Twice in its reply brief, on pages 25 and 88, UtiliCorp requests the Commission to take official notice of various documents pursuant to Section 536.070, RSMo. 1994, and 4 CSR 240-2.130. On February 13, 1998, the Staff filed a response in opposition

to the UtiliCorp requests and moving the Commission to strike reference by UtiliCorp to the documents in question. On February 18, 1998, UtiliCorp filed a response to the Staff's objection, restating its request for the Commission to take official notice of the various documents.

The Commission has considered the various arguments of the Staff and finds them compelling. However, the Commission has reached a threshold determination in this matter. The Commission finds that all parties had fair opportunity to exercise their due process rights prior to and during the evidentiary hearing, including offering testimony, proffering evidence for consideration and admission and cross-examination of adverse parties. At the conclusion of the on-the-record portion of the evidentiary hearing, the Commission considered the record closed. The Commission will not accept the offer of evidence subsequent to the conclusion of the evidentiary hearing unless by consent of the parties. To do so would be violative of the due process rights of the remainder of the parties and would be fundamentally unfair.

The requests of UtiliCorp for the Commission to take judicial notice of various documents, found on pages 25 and 88 of its reply brief, are denied for the reasons as set out above. In addition, the Staff motion to strike is granted. The Commission will exclude the following portions of the UtiliCorp reply brief: (1) page 25, the last paragraph beginning with the word "Moreover" and including footnote 13, through page 26, the first three lines through the word "positions"; and (2) page 88, the paragraph beginning with the word "After" through the rest of the page including footnote 20, through page 89, the entire first paragraph through the word "Commission."

#### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law:

UtiliCorp United Inc. d/b/a Missouri Public Service is a public utility engaged in the provision of electric service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

The Commission has authority under Chapter 393, RSMo 1994, to set just and reasonable rates for the provision of service by regulated electric utilities.

Inclusion of future additions in current rates is contrary to the provisions of Section 393.135, RSMo 1994.

The orders of the Commission must be based on substantial and competent evidence, taken on the record as a whole, and must be reasonable and not arbitrary, capricious, or contrary to law. In that regard, and in setting rates which are just and reasonable, the Commission has considered all relevant evidence and determines, as set out in the findings of fact, that Missouri Public Service's revenue requirement will be decreased in the amount of \$16,898,098 as set out in this report and order and as reflected in the Revenue Summary.

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The proposed stipulation and agreement is treated as unanimous by operation of rule 4 CSR 240-2.115, is in the public interest, and is approved.

*IT IS THEREFORE ORDERED:*

1. That the Commission's scenario I of February 19, 1998, and the response of the parties filed March 2, 1998, is made a part of the record and entered into evidence as Exhibit No. 161.
2. That the proposed tariff sheets submitted by UtiliCorp United Inc. d/b/a Missouri Public Service on April 18, 1997, are hereby rejected.
3. That UtiliCorp United Inc. d/b/a Missouri Public Service is hereby directed to file, not later than March 18, 1998, revised tariff sheets with a thirty day effective date in accordance with the findings in this report and order, to implement the rate decrease of \$16,898,098.
4. That the above-ordered decrease in rates will be applied as an equal percentage across all rates and rate classes.
5. That UtiliCorp United Inc. d/b/a Missouri Public Service, the Office of the Public Counsel, and the Staff of the Commission are ordered to recalculate and file depreciation rates in accordance with the findings in this report and order not later than March 18, 1998.
6. That the various motions, as set out in the body of this report and order, are hereby granted and denied as detailed herein and those portions of the initial and reply briefs of UtiliCorp are stricken from the record as detailed herein. Any objection not specifically addressed is overruled and any motion not specifically addressed is denied.
7. That UtiliCorp United Inc., d/b/a Missouri Public Service, is hereby ordered to comply with the terms and conditions of the stipulation and agreement, filed February 27, 1998, and to file an energy audit tariff for Commission approval in compliance therewith in conjunction with the remainder of the tariff filings ordered herein.
8. That the proposed real-time pricing tariff, the line extension policy tariff, and the flexible rate and special contract tariff, originally filed in Case No. ET-98-103, are hereby rejected for the reasons as set out in this report and order.
9. That this report and order shall become effective on March 18, 1998.

Crumpton, Murray, and Drainer, CC., concur and certify  
compliance with the provisions of Section 536.080, RSMo 1994  
Lumpe, Ch., absent.

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EDITOR'S NOTE: The Second Revised Revenue Requirement Scenario and the Stipulation and Agreement and Revised Response to Revenue Requirement Scenarios has not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

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**In the Matter of an Investigation Concerning the Continuation or Modification of the Primary Toll Carrier Plan When IntraLATA Presubscription is Implemented in Missouri.\***

**In the Matter of the Request for Suspension and Modification of Federal Communications Commission Rules Regarding IntraLATA Dialing Parity.**

*Case Nos. TO-97-217 & TO-97-220*  
*Decided March 12, 1998*

**Telecommunications §45.** The Commission found that the PTC Plan is no longer appropriate in the emerging competitive telecommunications environment and should be replaced with an alternative to be denominated an Originating Responsibility Plan. The Commission found that the PTC Plan must be phased out in a reasonable fashion and will direct the formation of a technical committee to make recommendations regarding the transition period and needed mechanisms.

**APPEARANCES:**

*W. R. England, III, and Paul A. Boudreau*, Brydon, Swearingen & England, P.C., 312 E. Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for: ALLTEL Missouri, Inc., BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (the Small Telephone Company Group).

*Craig S. Johnson*, Andereck, Evans, Milne, Peace & Baumhoer, 305 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102, for: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company (the Mid-Missouri Group of Local Exchange Companies).

\* See page 275 for another order in this case. In addition, see page 291, Volume 6 MPSC 3d, for another order in this case.



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*Leland B. Curtis* and *Carl J. Lumley*, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation.

*Paul G. Lane*, General Attorney-Missouri, and *Leo J. Bub*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3510, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Jeffrey M. Pfaff*, and *Paul S. DeFord*, Lathrop & Gage L.C., 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Linda K. Gardner*, Senior Attorney, Sprint Missouri, Inc., 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Missouri, Inc. (formerly United Telephone Company of Missouri d/b/a Sprint).

*James C. Stroo*, Associate General Counsel, GTE Telephone Operations, 1000 GTE Drive, Post Office Box 307, Wentzville, Missouri 63385, for GTE Midwest Incorporated.

*James M. Fischer*, Attorney at Law, 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Bourbeuse Telephone Company and Fidelity Telephone Company.

*Mark W. Comley*, Newman, Comley & Ruth P.C., 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537, for CompTel-Mo.

*Dallas M. Forrest*, Goller, Gardner and Feather Professional Corporation, 131 East High Street, Jefferson City, Missouri 65101, for TCG St. Louis.

*Michael F. Dandino*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Penny G. Baker*, Deputy General Counsel, and *Carol M. Keith*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: L. Anne Wickliffe, Deputy Chief.

#### REPORT AND ORDER

##### Procedural History

The Staff of the Commission (Staff) filed a motion on November 26, 1996, asking the Commission to establish a case for the purpose of investigating the continuation or modification of the Primary Toll Carrier (PTC) Plan when intraLATA presubscription is implemented in Missouri. The Commission did not take action on Staff's motion until June 27, 1997, when it established a case for the issues presented in Staff's motion and consolidated the new case with Case No. TO-97-220.<sup>1</sup> In its June 27 order the Commission established a procedural schedule for consideration of issues surrounding the PTC Plan. The Commission also established an intervention deadline of July 14 for parties wishing to intervene who were not already party to TO-97-220. TCG

St. Louis (TCG) and COMPTTEL-MO (COMPTTEL) filed timely applications to intervene which were granted on July 28.

The Mid-Missouri Group (MMG)<sup>2</sup> filed a Motion to Vacate April 1, 1998 Dialing Parity Implementation and Motion to Suspend Procedural Schedule and Continue Proceeding on September 16. Several parties filed responses to MMG's motion and the Commission denied the motion on October 9.

The Commission conducted an evidentiary hearing October 27 through October 31. The parties filed initial and reply briefs, and numerous late-filed exhibits which were requested by the Commission. Late-filed exhibits 54 through 92 were filed after the hearing; the Small Telephone Company Group (STCG)<sup>3</sup> filed an objection to certain late-filed exhibits to which Southwestern Bell Telephone Company (SWBT), GTE Midwest Incorporated (GTE), and Sprint Missouri, Inc. d/b/a Sprint f/k/a United Telephone Company of Missouri d/b/a Sprint (Sprint) filed replies. STCG filed a response.

MMG filed an Application for Extension on February 24, 1998, which will be addressed in the section entitled "Implementation of IntraLATA Presubscription by Secondary Carriers." STCG, SWBT, and MCI Telecommunications Corporation (MCI) filed responses to MMG's application.

<sup>1</sup>In the Matter of the Request for Suspension and Modification of Federal Communications Commission Rules Regarding IntraLATA Dialing Parity, Report and Order issued on May 22, 1997.

<sup>2</sup>Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company.

<sup>3</sup>ALLTEL Missouri, Inc., BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

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#### Findings of Fact

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all of the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

#### **I. Implementation of IntraLATA Presubscription by Secondary Carriers: Time for Implementation; Balloting and Customer Notification; Cost Recovery.**

##### **A. Schedule for Implementation:**

The Commission's Report and Order in Case No. TO-97-220<sup>4</sup> (issued on May 22, 1997) granted to the members of the STCG and MMG an extension of time in which to comply with the Federal Communication Commission's (FCC) rules and Order regarding implementation of intraLATA presubscription. The Commission ordered that the FCC's implementation rules would be suspended as to these companies until the sooner of April 1, 1998, or the resolution of the issues surrounding Community Optional Service (COS) service and the PTC Plan, and establishment of an implementation schedule.

MMG filed a motion in Case No. TO-97-217 in September of 1997 asking the Commission to vacate this implementation schedule and the procedural schedule in TO-97-217 because the United States Court of Appeals for the Eighth Circuit had vacated the FCC rules regarding implementation of intraLATA toll dialing parity<sup>5</sup>. That motion was denied. See Order Denying Motions to Vacate and to Suspend Schedule issued October 9, 1997. The Commission stated that the April 1 deadline was a Missouri-specific deadline not dependent upon the FCC's implementation schedule.

After the closing of the record and the filing of briefs in TO-97-217, MMG filed an Application for Extension. MMG's February 24, 1998, motion asks the Commission to find that the implementation schedule decided upon in TO-97-220 is no longer applicable or, in the alternative, grant an indefinite extension of time. MMG repeated the arguments made in its September motion and expressed a concern that the Missouri Commission is unaware that the FCC's attempt to impose a schedule upon intrastate implementation of intraLATA presubscription has been invalidated. MMG also argued that the Order Regarding Extension of Deadline in Case No. TW-97-333 which extends COS service until at least June 1, 1998,

<sup>4</sup>Case No. TO-97-220 was consolidated with this case by Commission order issued June 27, 1997.

<sup>5</sup>The People of the State of California, et al. v. The Federal Communications Commission, et al., No. 96-3519 (8th Cir. August 22, 1997).

makes implementation of intraLATA presubscription by April 1 impracticable. MMG stated that implementation should not be required until the Commission has resolved the issues surrounding the PTC Plan, expanded calling services, the Missouri Universal Service Fund, and rural protections. MMG made specific mention of pending cases TW-98-356 (established to consider calling scope issues) and TO-98-329 (established to consider issues involved in the implementation of the Missouri Universal Service Fund).

STCG, SWBT, and MCI filed responses to MMG's application for extension. STCG concurred in the request for extension asking that the deadline for implementation of intraLATA presubscription be extended until the issues surrounding COS and the PTC Plan have been resolved. STCG set out a list of issues that need to be resolved before intraLATA presubscription can be put in place. STCG proposed that, if the Commission needs further information before granting the request for extension, the parties could appear for oral argument on the motion.

SWBT stated that, since the Commission has control over the timing of intraLATA presubscription, it has the authority to extend the deadline on a sufficient showing. SWBT takes the position that MMG failed to make such a showing. SWBT opposed the indefinite extension of the current implementation deadline proposed by MMG, but stated that an extension until June 1, 1998, would be appropriate as it would coincide with the Commission's February 17, 1998 order.<sup>6</sup>

MCI opposes an indefinite extension of the implementation deadline but, like SWBT, would support an extension until June 1, 1998. MCI argued that Missouri customers deserve to have intraLATA presubscription, that MCI has been requesting it since 1987, and that it is time to move forward.

The Commission specifically questioned a number of the witnesses at the hearing in these consolidated cases about the practicality of the April 1 implementation deadline. Although SWBT's witness testified that the April date could be met, others, including Dr. Childers (Staff), Mr. Shannon (GTE), Mr. Harper (Sprint), and Mr. Schoonmaker (STCG), testified that the deadline is probably unrealistic given the delay in the elimination of COS and the implementation decisions that need to be made.

The Commission wishes to encourage the development of competition and customer choice in telecommunications in Missouri and finds that it is in the public interest for intraLATA presubscription to be implemented as soon as practicable. The Commission agrees that it is time to move forward. However, given the complications afforded by the continued existence of COS routes and the PTC Plan, and the possible lack of technical capacity on the part of some incumbent local

<sup>6</sup> See In the Matter of an Investigation Into the Provision of Community Optional Calling Service in Missouri, Case No. TW-97-333, Order Regarding Extension of Deadline issued February 17, 1998.

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exchange companies (ILECs), the April deadline should be modified. Accordingly, the Commission will set a new deadline for implementation that takes these factors into account and coordinates intraLATA presubscription with the phasing out of COS. IntraLATA presubscription must begin on June 1, 1998, and must be implemented in every exchange in the state, other than those whose basic local service is provided by SWBT, no later than December 1, 1998. Any company that cannot meet this deadline must request an exemption or extension of time from the Commission by application no later than June 15, 1998 and set out the reasons an exemption or extension of time is needed. Companies with exchanges participating in COS routes that will continue in existence after December 1, 1998, must request an extension of time by application no later than June 15 and set out the reasons an extension is needed and a date for implementation.

Each local exchange company (LEC), other than SWBT, that does not have an approved implementation plan for intraLATA presubscription shall submit such a plan to the Commission for approval no later than June 15, 1998. The plan will describe the company's proposed schedule for implementing presubscription, include an exemplar customer notice based on the notice approved by the Commission in Case No. TO-97-253, and a proposed method for recovering the costs of implementation.

**B. Balloting and Customer Notification:**

Dr. Childers testified on behalf of Staff that balloting might not be necessary if the Commission were to assign a carrier of last resort (COLR) for toll services and expressed some concern about the costs involved in balloting. Mr. Taylor (SWBT) also testified that balloting would not be necessary where there is a COLR in place. Mr. Ensrud (COMPTEL) and other witnesses expressed concern about the delay in implementing intraLATA presubscription that would result from the Commission's requiring balloting.

The Commission finds that balloting is not necessary in light of its decision to assign the carrier of last resort responsibility (see III. Replacement Mechanism below), and in light of the costs and delay that may be involved in using a balloting process. The Commission will require the use of a customer notice by separate mailing and will require each company to submit an exemplar customer notice for approval along with its implementation plan. The notice should focus the attention of customers on the change in service and should clearly explain the customer's options. An implementing company should either include a list of available and willing toll providers on the notice, or provide a toll-free number for customers to call to obtain a list of participating providers. Companies are referred for guidance to the following filings in Case No. TO-97-253: the Report and Order issued May 6, 1997; the customer notice submitted by Sprint for Commission approval; and the Order Approving Form of Notice issued May 19, 1997.

**C. Cost Recovery:**

The record includes some evidence on the costs associated with balloting which Mr. Taylor (SWBT) estimated to be approximately \$3.00 per customer. There is no

specific evidence regarding the costs of customer notification which the Commission orders in lieu of balloting or on the costs of software upgrades. The issue of cost recovery has previously been resolved in relation to the intraLATA presubscription implementation plans of GTE and Sprint using a company-specific approach to implementation issues.<sup>7</sup> In those cases, the Commission committed to handling cost recovery on a case-by-case basis. Therefore, the Commission finds that it need not make a generic ruling on the issue. The Commission will, however, permit the SCs to recover the appropriate costs associated with implementation of intraLATA presubscription by a method similar to that used in the GTE and Sprint cases, i.e., by a per-minute charge added to all intrastate minutes of use. Any party that objects to this method shall file a pleading setting out its objections no later than May 15. Each SC should present its projected costs and specific proposal for cost recovery in the implementation plan to be filed on June 15.

## **II. Phasing Out of the PTC Plan.**

Staff, Sprint, GTE, SWBT, AT&T Communications of the Southwest, Inc. (AT&T), and Fidelity Telephone Company (Fidelity) all maintain that the PTC Plan must be discontinued. MCI takes the position that the PTC Plan is not viable in its present form. STCG, MMG, COMPTEL, and the Office of the Public Counsel (OPC) argue that the PTC Plan should be retained with modifications.

Staff witness, Dr. Ben Childers, testified that intraLATA presubscription, by definition, allows customers to select their own carrier for 1+ intraLATA toll traffic. The PTC Plan, in contrast, requires the secondary carrier (SC) to route all 1+ intraLATA traffic to the PTC. Dr. Childers stated that this routing requirement is a critical part of the PTC Plan and that implementation of intraLATA presubscription would make the PTC Plan unnecessary. Dr. Childers believed that competition will replace this aspect of the PTC Plan, though it may not replace the carrier of last resort obligation. Dr. Childers stated that the original justification for the PTC Plan, and the benefits of the PTC Plan, will largely vanish with intraLATA presubscription.

Staff's proposal is set out in the Staff Report filed on February 5, 1997 (filed in Case No. TO-97-220). Staff recommends that the PTC Plan continue to exist in any given exchange until it is replaced by intraLATA presubscription. Staff would assign the carrier of last resort responsibility to the ILEC, as the ILEC currently has the responsibility of maintaining universal local service in its territory. Staff denominated its plan the Local Exchange Responsibility Plan (LERP).

<sup>7</sup> See In the Matter of GTE Midwest Incorporated's Tariff Revision Designed to Provide IntraLATA Equal Access Conversion to GTE End Offices, Case No. TT-96-398; and In the Matter of United Telephone Company of Missouri d/b/a Sprint's 1+ IntraLATA Toll Dialing Parity Implementation Plan, Case No. TO-97-253.

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Sprint's witness, Mr. Mark Harper<sup>8</sup>, testified that the time is right for the Commission to reconsider the PTC Plan since the FCC has ordered all LECs to provide intraLATA presubscription by February 8, 1999.<sup>9</sup> Mr. Harper pointed out that Sprint and GTE have already gained approval of intraLATA presubscription implementation plans for their service areas in Case Nos. TO-97-253 and TO-97-254, respectively. He testified that 33 Sprint exchanges already have intraLATA presubscription.

Mr. Harper stated that the Commission made a commitment to revisit the PTC Plan in light of intraLATA presubscription when it issued its initial Report and Order approving and implementing the Joint Recommendation/Conceptual Framework that established the PTC Plan.<sup>10</sup> Mr. Harper testified that Sprint loses approximately \$600,000 per year in provisioning toll to small company exchanges.

GTE's witness, Mr. Shannon, testified that GTE agrees in general with the six conclusions Staff made in its report in Case No. TO-97-220: 1) that the Primary Toll Carrier Plan is not viable in the new environment of intraLATA presubscription; 2) that the ILEC should be responsible for providing intraLATA toll in its own exchanges; 3) that ILECs who may have difficulty attracting carriers to provide intraLATA service should be permitted to reduce their access rates through rate rebalancing; 4) that all carriers of interexchange traffic should pay the cost directly related to implementation of intraLATA presubscription, but not the cost of modernizing exchanges; 5) that two-way Community Optional Service (COS) cannot continue in a presubscribed environment; and 6) that the Commission should grant the maximum delay in implementing intraLATA presubscription that is afforded by the FCC rules.

SWBT's witnesses, Mr. Taylor and Mr. Rudloff, testified that the PTC Plan is not a satisfactory arrangement in the current telecommunications environment and that its continuance would prolong inefficient rate design. Mr. Cooper prepared a study designed to demonstrate the negative financial impact that serving as PTC has on SWBT's revenues. SWBT's position is that SWBT's basic local customers are subsidizing the cost of providing this service and the cost of toll calling for SC customers. SWBT maintains that elimination of the PTC Plan would enable the company to reduce toll rates to its own customers. Mr. Taylor testified that SWBT would flow through any savings from elimination of the PTC Plan to its customers as rate reductions. Mr. Taylor admitted that SWBT's own access rate reductions have contributed to its PTC Plan losses.

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<sup>8</sup> Mr. Harper adopted the direct, rebuttal, and surrebuttal testimony of W. Robert Cowdrey, marked Exhibits 24, 25, and 26.

<sup>9</sup> The February 8, 1999 deadline was vacated by the Eighth Circuit order cited in footnote 4.

<sup>10</sup> See In the Matter of the Missouri InterLATA Access Charge and IntraLATA Toll Pool, 29 Mo.P.S.C. (N.S.) 249, 252 (October 23, 1987).

SWBT makes the argument that the PTC Plan imposes a competitive disadvantage on the PTCs by prohibiting them from bypassing SC exchange facilities, and by requiring the PTCs to purchase their billing and collection services from the SCs. According to the results of Mr. Cooper's study, billing and collection costs to SWBT are significant.<sup>11</sup>

The SCs did not dispute the fact that the PTCs are operating at a loss in certain SC exchanges but pointed out that, overall, the PTCs enjoy a profit from carrying toll traffic. The SCs, though, maintain that they don't have adequate facilities to provide intraLATA toll themselves, can't afford to provide toll in their high cost exchanges, and are unable to average costs across a large enough customer base to absorb the additional costs.

The Commission finds that the weight of the evidence supports the conclusion that the PTC Plan is incompatible with a competitive environment, inconsistent with the implementation of intraLATA presubscription, and discriminatory in that it creates an unfair disadvantage to companies carrying PTC responsibility. The clear mandate of the Telecommunications Act of 1996, and of Senate Bill 507, is to establish a competitive environment in the telecommunications industry. The continuation of the PTC Plan is at odds with that goal, and with the goal of maximizing customer choice, an important benefit of the move to competition. The Commission finds that the PTC Plan must be phased out in favor of a more competitively neutral Originating Responsibility Plan (ORP). The details of the transition, and of the ORP will be addressed by a technical committee. At a minimum, the obligation that SCs must direct all 1+ intraLATA traffic to its PTC, the PTC's obligation to purchase billing and collection services from the SC, and the prohibition against the PTCs making arrangements that bypass SC facilities, must be eliminated as soon as practicable. The PTC Plan shall be phased out as recommended by the technical committee on a schedule that coincides with the implementation of intraLATA presubscription. The PTC Plan shall be eliminated in all exchanges without COS routes no later than December 1, 1998, and in all exchanges no later than February 28, 1999, except for those exchanges for which the Commission has granted an extension of time.

### **III. Replacement Mechanism.**

#### **A. Originating Responsibility Plan and Carrier of Last Resort Obligation:**

Staff proposed an alternative to the PTC Plan in the Staff Report filed on February 5, 1997 in Case No. TO-97-220. Staff recommended that the PTC Plan continue to exist in any given exchange until it is replaced by intraLATA presubscription. Staff believed the carrier of last resort responsibility for intraLATA toll should be assigned to the ILEC, as the ILEC currently has the responsibility of maintaining universal local service in its territory. Staff stated that it is unlikely

<sup>11</sup>The actual figure is found in Schedule 2 to Exhibit 15HC, Mr. Cooper's direct testimony, classified as highly confidential.



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that there would be any exchange where some interexchange carriers would not be willing to provide toll service, thereby avoiding any burden of carrier of last resort responsibility to the SC. Staff's witness, Dr. Childers, testified that the proposed LERP is not significantly different from what is generally referred to as an ORP (Originating Responsibility Plan). The reason for choosing a different name was to avoid "assumption[s]" being made by parties using the ORP terminology.

SWBT's witness, Mr. Taylor, described an ORP as fairly simple, consisting of an arrangement whereby the SCs are responsible for their own origination and toll network, relieving the PTCs of that responsibility. In addition, PTCs would not be required to purchase billing and collection services from SCs, and SCs would not be required to pass all 1+ toll traffic directly to the PTC. Mr. Taylor stated that the SC should establish its own toll rates, bill for its own traffic, and keep the revenue earned. He pointed out that the Commission would need to resolve certain other issues such as revenue neutrality, appropriate toll rates, and adjustments to other SC rates.

The Commission asked several witnesses at the hearing about the need to assure access to toll services for all customers. Dr. Childers (Staff) testified that it would be in the public interest to designate a COLR in order to insure access to emergency services. Mr. Jackson, testifying for MMG, argued that designation of a COLR is necessary until there is no reasonable chance that a customer could be denied toll service at rates comparable to those in urban areas. He took the position that the only solution would be to leave the COLR responsibility with the existing PTC.

In contrast, Mr. Shannon (GTE) stated that, even without a COLR, customers will be able to make intraLATA toll calls by using the 10XXX code of an interexchange carrier. Dr. Childers (Staff), Mr. Taylor (SWBT), Mr. Bliss (Fidelity), and Mr. Schoonmaker (STCG) all testified that interexchange carriers would be willing to provide intraLATA toll in the absence of a designated COLR.

Witnesses representing the intervening interexchange carriers were generally unwilling to provide absolute assurance that their companies would enter the intraLATA toll market in SC exchanges. The witness for COMPTTEL, Mr. Ensrud, insisted that COMPTTEL member companies would not enter an area to provide services where the route would be unprofitable due to high access rates. However, he also testified that there are COMPTTEL members doing business in GTE and Sprint exchanges despite the high access rates in those areas. AT&T's witness, Mr. Pauls, was also unwilling to commit AT&T to providing service in every exchange and stated that it would be possible that in some exchanges there would be no carrier willing to provide toll service.

The SCs expressed an unwillingness to be designated COLR. Mr. Jones (MMG) testified that because the SCs are so much smaller than SWBT (the PTC for MMG members) they don't have the ability to absorb the losses from isolated exchanges that SWBT can absorb. He stated that the SCs don't have an adequate customer base over which to average their toll rates in order to balance out the unprofitable routes.

Mr. Schoonmaker (STCG) testified that designating the SCs as COLRs for their exchanges would result in a need for increased toll revenue of approximately 41 percent, or \$5.81 per access line, per month in local revenue.

Although certain of the witnesses, most notably Mr. Schoonmaker, made a diligent effort to calculate the likely financial impact of eliminating the PTC Plan, there are many uncertainties that could affect the validity of the calculations. The parties attempted to quantify the impact of COS elimination but were unable to predict with certainty how much of the toll traffic over former COS routes would become regular toll traffic and how much would represent a drop in toll demand. There is no way to predict the likely subscribership rates for services designed to replace COS that may be offered by ILECs. In short, the Commission is not persuaded that designating the SCs as COLR for their local exchange customers would impose an undue financial burden on these companies or lead to an excessive increase in local revenue requirements.

GTE's witness pointed out that the term "carrier of last resort", which is defined in Section 386.020(6), RSMo Supp. 1997, has been incorrectly used by the parties. The statute restricts the meaning of this term to telecommunications companies which are obligated to provide basic local telecommunications services to all customers who request it in a particular geographic area. The Commission agrees with GTE that the term, though it has been useful to these discussions, is not accurate. Accordingly, the Commission will coin the term "intraLATA toll carrier of last resort" (ITCOLR) to refer to a carrier obligated by Commission order to provide toll services to a defined group of customers.

The Commission finds that the most effective replacement for the PTC Plan for the transitionally competitive environment that exists in Missouri is an Originating Responsibility Plan. It is in the public interest to ensure that all customers have access to intraLATA toll services. The Commission finds that a carrier should be designated as the ITCOLR which will bear the responsibility for making intraLATA toll service available to its customers. The ITCOLR will be assigned on a customer-specific basis, rather than an exchange-specific basis. That is, each ITCOLR, whether an ILEC or a CLEC, will be responsible for assuring that the customers who subscribe to its basic local services have access to intraLATA toll services. For the purposes of this case, the SC is the most appropriate carrier to undertake this responsibility since the SC already has an established relationship with the end-user customer. Accordingly, each SC will become the ITCOLR for its own basic local customers. The Commission believes that there will be interexchange carriers willing to enter the intraLATA toll market and that the SC will not in fact be required to provide toll services in most exchanges, if in any.

**B. Methods for Secondary Carriers to Satisfy the COLR Responsibility.**

Dr. Childers (Staff), Mr. Shannon (GTE), and others testified that there are a number of options for SCs to satisfy their ITCOLR responsibilities without actually having to prepare tariffs and carry the toll traffic themselves. These witnesses opined

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that most, if not all, exchanges would attract interexchange carriers willing to carry the intraLATA toll traffic. As an alternative, an SC could provide toll by means of a certificated interexchange affiliate, or could contract with its current PTC or an interexchange carrier to provide the services.

The Commission finds that a flexible approach to satisfying the ITCOLR obligation is appropriate. LECs that are unwilling to tariff and provide toll services directly should be able to submit an alternative plan to the Commission for approval. The ultimate goals are to maintain access to intraLATA toll services for all customers, to make intraLATA presubscription with its expanded choices available to as many Missouri customers as possible, and to encourage the development of a more competitive market in all aspects of telecommunications in the state.

**C. Service Authority for Secondary Carriers to Provide IntraLATA Toll Services.**

According to the Hearing Memorandum GTE and SWBT take the position that the SCs have the authority they need to provide interLATA and intraLATA toll services. MMG, COMPTTEL, and OPC believe the SCs must obtain interLATA authority, and other parties expressed uncertainty. Dr. Childers testified for Staff that, in his opinion, the SCs now have the necessary service authority to provide intraLATA services but might need certification to provide interLATA services.

Grants of authority to provide both intraLATA and interLATA services are within the purview of the Commission. It may well be that the SCs already have all the authority they need to provide intraLATA toll services. However, the changing telecommunications environment has blurred the traditional lines of distinction between interexchange, interLATA, intraLATA, basic local, and local exchange services and created uncertainty. In order to satisfy all parties that each SC is properly authorized to act as ITCOLR in the face of any future challenge, the Commission will require each SC to submit an application for an interexchange certificate of service authority.

Interexchange certification is subject to 4 CSR 240-2.060(4). Subsection (E) of that rule states that an applicant that has submitted the applicable information in another application may incorporate that information by reference. The Commission would expect that most, if not all, of the SCs already have the applicable information on file to support a grant of interexchange authority. In order to clarify the status of each company's authority, the Commission will direct each SC to submit an appropriate application concurrently with the submission of its implementation plan. The SC may request competitive classification as to its interexchange services. All applications will be submitted under this case number and must be served upon all parties.

**IV. Issues to be Assigned to the Technical Committee for Resolution.**

**A. Establishment of Technical Committee.**

The Commission will direct the establishment of a technical committee to consider the issues assigned to it in this order. Each PTC and SC shall assign, and each

intervenor may assign, one or more representatives to the committee who will be responsible for participating in the meetings and preparation of joint pleadings. The company shall assign an individual fully authorized to commit the company to a position or settlement, and to execute any necessary documents in carrying out the work of the committee. The Commission Staff will carry the ultimate responsibility for the preparation and filing of joint pleadings, reports, recommendations, and requests for information or for decision from the Commission.

**B. Schedule of Implementation Activities.**

The Commission will adopt the implementation schedule set out in the ordered paragraph below. The Commission will also establish an informal referral process by which the technical committee may make inquiry, or request a decision, from the Commission in order to avoid delay in the implementation process. Should the committee need a speedy response from the Commission on any implementation issue the committee's Staff representative may make informal contact with the Regulatory Law Judge assigned to this case or the Chief Regulatory Law Judge to schedule an appearance before the Commission at a regular or specially scheduled agenda meeting. The Staff representative shall give 24 hours notice of the agenda appearance to all parties by fax transmission, followed by a paper copy.

**C. Feature Group C Versus Feature Group D Signaling.**

Some of the parties take the position that elimination of the PTC Plan will require a general change from the use of the Feature Group C (FGC) protocol to the Feature Group D (FGD) protocol. FGC is the protocol most commonly used by SCs in Missouri. FGC will transmit the calling number from the originating carrier to the terminating carrier, but will not transmit the carrier identification code (CIC). FGD technology has the advantage of passing along the carrier identification code which makes tracking and billing a simpler task. ALEC without FGD capabilities cannot track the origin of the traffic that terminates in its exchanges and must rely on traffic reports from originating carriers.

The testimony regarding the necessity of making a change to Feature Group D was contradictory. For example, Mr. Schoonmaker testified on behalf of STCG that elimination of the PTC Plan would require a general change from FGC to FGD. Mr. Jones testified on behalf of MMG that it would be a mistake to continue with FGC in a competitive environment.

On the other hand, Mr. Taylor (SWBT) testified that FGD is not necessarily a superior connection and that SWBT would continue to use FGC even after intraLATA presubscription is implemented. Mr. Taylor stated that FGC is adequate in a competitive, post-PTC Plan environment if used in conjunction with Signaling System 7 (SS7). Mr. Shannon (GTE) testified that a transition to FGD could be made after the PTC Plan is replaced or eliminated, and after intraLATA presubscription has been implemented. Mr. Shannon also stated that there are other options such as intraLATA toll/access compensation that may be more cost-effective.

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Mr. Taylor and Mr. Shannon testified that deployment of SS7 throughout the entire network is necessary in order for FGD to transmit the CIC. Mr. Harper, of Sprint, testified to the contrary.

Mr. Taylor testified that SWBT currently provides a PTC-to-PTC settlement function to facilitate the transfer of information among the PTCs without the necessity of FGD. He stated that SWBT would be willing to provide the same service to all LECs if the PTC Plan is eliminated. SWBT would perform this service at no cost to the LECs since the cost of this function is already being recovered in toll rates.

The Commission agrees with Mr. Schoonmaker and Mr. Shannon's recommendation that the testimony on the record is not adequate to support a decision regarding whether to move to FGD. Further, this is the type of issue best resolved by the technical and engineering experts who work with the companies' networks on a regular basis. Accordingly, the Commission will assign the task of determining whether a move to FGD is necessary to the technical committee. The committee will also consider other alternatives and recommend to the Commission how any proposed transition should take place. The committee shall include its recommendations on Feature Group protocols in the report to be filed on May 15, 1998.

**D. Elimination of Originating (T/O) Ratios in Favor of Billing Terminating Access Charges on the Basis of Actual Terminating Minutes.**

STCG's witness testified that moving from terminating to originating ratios toward recording usage on the basis of actual minutes of use (MOU) would provide an overall benefit. According to the Hearing Memorandum, GTE, SWBT, MCI, STCG, MMG, and COMPTTEL all support such a move. Staff's witness proposed that this issue be taken up by the technical committee.

The Commission finds that the use of actual MOU would improve the process and should be adopted as we move toward a more competitive environment. The technical committee should include in its report to the Commission its recommendation on how to achieve a transition to recording traffic on an MOU basis.

**E. Private Line Services and Compensation for Those Services.**

Mr. Jones (MMG) and Mr. Taylor (SWBT) testified that the 911 and private line provisions that are a part of the PTC Plan could operate as stand-alone contracts outside the PTC Plan without significant modification. Other parties take the position in the Hearing Memorandum that these issues should be worked out by the technical committee.

The Commission finds that there is insufficient evidence on the record to determine how these private line services contracts should be treated in the future. Therefore, this issue will be assigned to the technical committee. The committee should include in its report to the Commission its recommendation on which of the ancillary contracts or addenda associated with the PTC Plan can and should be retained, what modifications need to be made to those contracts, what process should be used to make the modifications, and what additional provisions for intercompany compensation are necessary.

**E. Other Issues to be Assigned to the Implementation Technical Committee for Resolution: Points of Interconnection Between Incumbent LEC Networks; IntraLATA V&H Data Base; Estimated Financial Impacts on the LECs; Revenue Neutrality.**

The issues of points of interconnection between ILEC networks and intraLATA V&H data base are among the types of issues best resolved by the technical and engineering experts who work with the companies' networks on a regular basis. Accordingly, the Commission will assign these issues to the technical committee to prepare its recommendations. The committee should also consider the issues of toll pricing flexibility, whether the Commission should establish a procedure to relieve an ITCOLR of its responsibilities, and what criteria should apply to a request to be relieved of those responsibilities. The committee should consider to what extent revenue neutrality is desirable and achievable, bearing in mind the necessity of eliminating the requirement that PTCs purchase billing and collection services from SCs. The committee shall include its recommendations on these issues in the report to be filed on May 15, 1998.

**V. Access Reform and Rate Rebalancing.**

There was extensive, varied, and conflicting testimony regarding the level of SC access rates, the level and sources of subsidization being provided by one customer group to another, and the need for and best method of rate rebalancing. Mr. Schoonmaker (STCG) testified that the Commission should undertake rate rebalancing before the PTC Plan is replaced. Dr. Childers (Staff) testified that the Commission should not attempt to resolve access reform and rate rebalancing in this case because of the varied issues involved. Mr. Shannon's (GTE) position was that, although the Commission should identify and take some initial steps to address access reform and rate rebalancing, he was not sure the Commission could come to any resolution in this case. Ms. Meisenheimer (OPC) questioned the subsidization concerns raised by other parties and brought out the issue of affordability. Mr. Taylor (SWBT) pointed out that rate rebalancing under Section 392.245, RSMo Supp. 1997 is available to SCs but admitted that all the SCs are currently subject to rate of return regulation so the procedure is not yet an option for them. Mr. Pauls's (AT&T) discussion during cross-examination of possible solutions to these issues highlights their complexity and the need for further development of the facts and issues.

The Commission finds that this case is not the appropriate vehicle by which to address access reform and rate rebalancing. The issue of access rate levels may find a resolution in the rate flexibility available to the SCs once they have received interexchange authority and are participants in a competitive market. To what extent the problem will be thus resolved is speculative and any Commission proceeding directly affecting access rates would be premature. The Commission finds that the existing rate of return regulation mechanism for LECs is adequate to address any

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problem of over or underrecovery that may arise in the wake of elimination of the PTC Plan. An SC that experiences revenue losses impacting its provision of basic local service has access to the Commission's procedures for relief. On the other hand, the market acts as a control mechanism in and of itself for the regulation of rates for competitive services. Once the Commission has taken steps to implement the level playing field required to create a competitive environment, the market will begin to exercise control over access rates as envisioned by the Missouri and federal legislatures.

#### **VI. Objection to Late-Filed Exhibits**

Sprint, SWBT, and GTE submitted late-filed exhibits demonstrating the financial impact of the elimination of COS on their operations in response to a Commission request. Those exhibits were numbered 63HC (Sprint), 65HC (SWBT), and 66 and 66HC (GTE). STCG filed an objection on December 9, 1997 on the grounds that the exhibits appear to have been prepared by someone not a witness and not subject to cross-examination, and that the material was not subjected to cross-examination and therefore does not constitute competent and substantial evidence. STCG also complained that the exhibits are not comparable to similar exhibits already admitted on behalf of STCG (Exhibits 51 and 52) because the underlying assumptions have been altered. STCG submitted an additional exhibit of its own (Attachment A to its December 9 pleading), and asked the Commission to accept it into evidence in the nature of rebuttal if the Commission should choose not to sustain the objection to Exhibits 63HC, 65HC, 66, and 66C.

GTE filed a reply to STCG's objection on December 12 arguing that the objection was out of time and that late-filed exhibits are of necessity not subjected to cross-examination. GTE stated that, if Exhibits 66 and 66HC are to be excluded from the record, all the late-filed exhibits should be excluded. GTE also stated that these exhibits were prepared under the direction of Mr. Gerald Shannon who submitted prefiled testimony and testified for GTE at the hearing. GTE stated that it never agreed with the assumptions employed by STCG and that these differing assumptions were a reason for the Commission's request for Exhibits 66 and 66HC. GTE objected to STCG's rebuttal exhibit on the grounds that it is untimely filed and its admission would be unfair.

SWBT filed a reply on December 19, also arguing that STCG's objection was untimely and repeating GTE's argument that all late-filed exhibits are immune to cross-examination. SWBT pointed out that STCG cited to no supporting authority for its objection. SWBT stated that all three of the companies submitting the objected-to exhibits provided the documents through a company representative with personal knowledge of the information requested by the Commission. SWBT also argued that the Commission, in requesting these exhibits, never indicated its acceptance of any assumptions employed by STCG. SWBT argued that the Commission is capable of taking into account the differences in assumptions when weighing the evidence presented.

STCG filed a reply arguing that their objection was not untimely and essentially repeating the arguments set out in its objection.

The Commission will consider STCG's objection without regard to the issue of timeliness because of the sheer volume of late-filed exhibits in this case, and because the Commission's rules are virtually silent on the issue of late-filed exhibits. The Commission will note that late-filed exhibits are served upon all parties at the time of submission and the exhibits in question here were submitted on November 21.

The late-filed exhibits to which STCG objects were provided at the request of the Commission. The Commission appreciates the limitations of the material presented in terms of its not having been subjected to cross-examination but, as discussed by GTE and SWBT, it is inherent in late-filed exhibits that they are not subject to cross-examination. The Commission wishes to retain its ability to request information after the close of hearing as permitted by its rules. See 4 CSR 240-2.130(14).

The Commission also appreciates the fact that these exhibits are not strictly comparable to STCG's Exhibits 51 and 52. The parties were not instructed to prepare these exhibits using STCG's assumptions. The Commission finds that Exhibits 63HC, 65HC, 66, and 66C should be admitted into evidence and STCG's objection will be overruled. The Commission has taken STCG's objection regarding their sufficiency into consideration in evaluating the weight that material should be given. The Commission also finds that Attachment A to STCG's motion shall be denominated Exhibit 93HC and admitted into evidence as a means of making it easier for the Commission to compare the parties' positions. GTE's objection to this rebuttal exhibit is overruled.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The parties to this case are all certificated telecommunications service providers within the state of Missouri, subject to the Commission's jurisdiction under Section 386.250(2), RSMo Supp. 1997. The Primary Toll Carrier Plan (PTC Plan) which is the subject matter of this case was approved by the Commission by Report and Order issued October 23, 1987, in Case No. TO-84-222. The Commission specifically rejected a five-year term provision and directed that the PTC Plan would remain in effect until the Commission ordered otherwise.

The Federal Telecommunications Act of 1996 and Sections 392.185 and 392.455, RSMo Supp. 1997, were designed to institute competition in the telecommunications market in order to benefit all telecommunications consumers. Section 392.185, RSMo Supp. 1996, states that "the provisions of this chapter shall be construed to: (1) Promote universally available and widely affordable telecommunications services; . . . (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri; . . . (6) Allow full and fair competition to function



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as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest . . ."

The Commission has conducted an evidentiary hearing and admitted evidence to the record that supports its findings of fact. In accordance with those findings, the Commission determines that the PTC Plan is no longer appropriate in the emerging competitive telecommunications environment and should be replaced with an alternative to be denominated an Originating Responsibility Plan. The Commission determines that the PTC Plan must be phased out in an and reasonable fashion and will direct the formation of a technical committee to make recommendations regarding the transition period and needed mechanisms.

*IT IS THEREFORE ORDERED:*

1. That late-filed Exhibits 54 through 93HC are admitted into evidence.
2. That implementation of intraLATA presubscription must begin for all Missouri local exchange carriers on June 1, 1998, and must be implemented in every exchange in the state, other than those whose basic local service is provided by Southwestern Bell Telephone Company, no later than December 1, 1998. Any company that cannot meet this deadline must request an exemption or extension of time from the Commission by application filed no later than June 15, 1998 and set out the reasons an exemption or extension of time is needed. Companies with exchanges participating in COS routes that will continue in existence after December 1, 1998, must request an extension of time by application no later than June 15 and set out the reasons an extension is needed and a date for implementation. In no event will an extension be granted beyond February 28, 1999.
3. That each local exchange company, other than Southwestern Bell Telephone Company, that does not have an approved implementation plan for intraLATA presubscription shall file such a plan for approval no later than June 15, 1998. The plan must describe the company's proposed schedule for implementing presubscription in its exchanges, include a customer notice as described in this order, a proposed method for cost recovery, and an application for a certificate of interexchange service authority.
4. That the Primary Toll Carrier Plan shall be discontinued as described in the body of this order and in accordance with the schedule set out in Ordered Paragraph 7.
5. That a Technical Committee is established to consider issues and make recommendations to the Commission regarding the implementation of intraLATA presubscription and an Originating Responsibility Plan in accordance with the schedule set out in Ordered Paragraph 7, and as described in the body of this order.
6. That each PTC and SC shall assign, and each intervenor may assign, one or more representatives to the Technical Committee who will be responsible for participating in the meetings and preparation of joint pleadings. Each company shall assign an individual no later than March 24, 1998, who is fully authorized to commit the company to a position or settlement, and to execute any necessary documents in carrying out the work of the committee.

7. That the Technical Committee shall meet, and implementation of this order shall take place on the following schedule:

Technical Committee members named	March 24, 1998
First Technical Committee Meeting	March 30-31, 1998
Initial Report to the Commission filed	May 15, 1998
Each company's plan for implementing intraLATA presubscription filed	June 15, 1998
All requests for exemptions or extensions of scheduled deadlines	June 15, 1998
Response from the Commission issued	June 15, 1998
Final Report to the Commission filed	July 15, 1998
Final Order issued	September 1, 1998
Final deadline for implementation of intraLATA presubscription and the ORP for companies with no COS routes	December 1, 1998
Final deadline for implementation of intraLATA presubscription and the ORP for all companies	February 28, 1999

8. That any party objecting to the recovery of the costs of implementing intraLATA presubscription by means of a per-minute charge on all intrastate minutes of use shall file a pleading setting out its objections no later than May 15, 1998.

9. That this Report and Order shall become effective on March 24, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.

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**In the Matter of the Missouri Public Service Commission, Complainant, v. The City of Granby, Missouri, Respondent.\***

*Case No. GC-96-452*

*Decided March 17, 1998*

**Gas §13.** The Commission approved a modification of the stipulation and agreement in which the City of Granby will replace its existing steel natural gas distribution system with polyethylene pipe, valves, and fittings. The Commission ordered the City to strictly comply with all terms and conditions, reporting requirements, timetables, and the completion date as set out in the modification.

**ORDER APPROVING MODIFICATION TO STIPULATION  
AND AGREEMENT**

On September 3, 1997, the Commission issued a report and order approving a stipulation and agreement between the Staff of the Commission (Staff), the Office of the Public Counsel (OPC), and the City of Granby, Missouri (City) in which the City agreed to the following conditions:

10. Based upon the findings from the investigations noted in numbered paragraph 9(a)(4), set out above, Granby agrees to excavate and expose a large sample of not less than fifteen (15) of the approximately seventy-five (75) remaining locations where sewer mains cross beneath natural gas mains to determine if additional damage to natural gas mains exist. These excavations will be completed within six (6) months of the date of any order approving this Unanimous Stipulation and Agreement. Within thirty (30) days of completion of these excavations, the City shall send the Staff: a) a summary that details the addresses of the locations excavated and examined; b) the date of the excavations; c) any damage noted, and d) any remedial action taken. Further, the City will provide the Staff with a minimum of forty-eight (48) hours' notice of each planned excavation to allow the Staff the opportunity to witness such excavations.

11. If the investigation of the additional locations set out in numbered paragraph 10 uncovers additional excavation related damage, the City agrees to investigate as many of the approximately sixty (60) remaining locations as the Staff

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\*See Volume 6 MPSC 3d page 471 for another order in this case. The Commission, in an order issued on August 5, 1999, denied a second motion to modify the stipulation and agreement and/or grant an extension of time for completion of the natural gas distribution system replacement project.

determines is necessary. The excavation and investigation of any additional locations will be undertaken at a rate that would complete approximately twenty (20) locations every six (6) months beginning the date the City receives notice from the Staff. If less than twenty (20) additional locations are selected for an investigation, the rate of completion will be approximately three (3) per month.

12. If the investigation of the additional locations set out in numbered paragraphs 10 and 11 uncovers additional damage that could impair the serviceability of the natural gas mains or service lines, appropriate repairs or replacements will be undertaken.

Granby was required to complete excavations by March 16, 1998. Subsequent to the issuance of the above report and order, Granby pursued and adopted a proposal for the complete replacement of its existing steel natural gas distribution system with polyethylene pipe, valves, and fittings. Granby anticipates that this replacement program will be completed no later than April 1, 1999.

As a result, on February 13, 1998, the parties filed a proposed modification to the stipulation and agreement in this case, reflecting agreement between the parties that the City will complete the replacement program in lieu of paragraphs 10, 11, and 12 set out above. The proposed modification to the stipulation and agreement is appended to this order as Attachment A and incorporated herein.

On March 3, 1998, the Staff filed a recommendation to approve the proposed modification. The Staff takes the position that the new course of action proposed in the modification is superior to that contained in the original stipulation. The Staff states that, on March 2, 1998, the City provided the Staff with documentation per the terms of the proposed modification which Staff believes adequately addresses that a) the funding necessary to replace its natural gas distribution system is in place; and b) the design and replacement of the system will occur on schedule as specified in paragraph number 4 of the proposed modification.

The Staff notes that, as part of the proposed modification, the City has agreed to provide the Staff with quarterly progress reports detailing all actions taken toward completion of the project. The Staff recommends the Commission approve the proposed modification.

The Commission has reviewed the proposed modification to the stipulation and agreement in this case, together with the Staff recommendation and accompanying documentation. The Commission finds the proposed replacement proposal to be reasonable and in the best interest of public safety and will approve the proposed modification. The Commission will order the City to strictly comply with the terms and conditions of the agreed-upon timetables, reporting, and completion date.

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*IT IS THEREFORE ORDERED:*

1. That the proposed modification of the stipulation and agreement, filed February 13, 1998, and appended to this order as Attachment A, is hereby approved.
2. That the City of Granby is hereby ordered to strictly comply with all terms and conditions, reporting requirements, timetables, and the completion date as set out in the modification.
3. That this order shall become effective on March 27, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
Derque, Regulatory Law Judge

EDITOR'S NOTE: Attachment A, the modification to the Stipulation and Agreement, has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of the Application of St. Louis County Water Company for Authority to Issue and Sell \$40,000,000 Aggregate Principal Amount of its First Mortgage Bonds, Series X, Due 2028 to the EI ERA, at an Interest Rate and Discount to be Negotiated.**

*Case No. WF-98-310*  
*Decided March 19, 1998*

**Water §28.** The Commission authorized St. Louis County Water Company to issue and deliver \$40,000,000 aggregate principal amount of its First Mortgage Bonds to the State Environmental Improvement and Energy Resources Authority. The Commission found that it will reserve ratemaking treatment of the approved financial transaction and may consider the prudence and treatment of the approved transaction in any subsequent rate proceeding.

ORDER APPROVING FINANCING

On January 26, 1998, St. Louis County Water Company (County Water) filed an application with the Commission seeking Commission authorization to sell up to and including \$40,000,000 in secured tax-exempt water facility revenue bonds. County Water states that the proceeds of the proposed sale will be used to retire its Series R EI ERA bonds and make additions, extensions, and improvements to its current water plant and distribution system.

On February 24, 1998, the Staff of the Commission (Staff) filed its recommendation. In that recommendation, the Staff states that in regard to County Water's

resulting capital structure, the percentage of long-term debt to total capital will increase from 54.39 percent to 55.90 percent and the percentage of common equity to total capital will decrease from 45.61 percent to 44.10 percent. The Staff states that these percentages are consistent with an investment grade water utility as defined by Standard & Poor's Corporation. The Staff further states that pre-tax interest coverage will increase from 3.00x to 3.26x.

Based upon its review, the Staff recommends that the Commission approve the proposed financing with the following requirements:

1. That County Water be required to file the final terms and conditions of the financing in the official case file;
2. That the interest rate on the proposed bonds not exceed 6.5 percent; and
3. That the Commission reserve the right to consider ratemaking treatment for the proposed financing in an appropriate rate proceeding.

No objection to the Staff recommendation was tendered by any party.

The Commission has reviewed the proposed financing application, attached documentation, and the Staff recommendation. The Commission finds the proposed financing to be reasonable and in the public interest. The Commission will approve the financing for the purposes stated in the application and this order.

***IT IS THEREFORE ORDERED:***

1. That St. Louis County Water Company is hereby authorized to issue and deliver in a privately negotiated transaction Forty Million Dollars (\$40,000,000) aggregate principal amount of its First Mortgage Bonds, Series X, due 2028, to the following purchaser or its related or affiliated nominees:

<u>Name of Purchaser</u>	<u>Amount of Bonds to be Purchased in Denominations to be Determined</u>
State Environmental Improvement and Energy Resources Authority (or its assignees)	\$40,000,000

said Bonds to be issued, delivered, received and held subject to the terms and conditions of the Indenture of Mortgage and Deed of Trust dated as of December 1, 1942, and Supplemental Indentures thereto dated as of June 1, 1946; June 1, 1950; December 1, 1952; January 1, 1954;

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June 1, 1955; December 1, 1957; December 1, 1961; December 1, 1964; June 1, 1967; June 1, 1971; December 1, 1977; January 15, 1983; December 1, 1984; October 1, 1985; January 1, 1988; November 1, 1988; November 1, 1989; December 1, 1989; February 1, 1991; February 1, 1992; February 1, 1993; May 1, 1995; November 1, 1996; and May 1, 1997, and a Series X Supplemental Indenture to be dated upon authentication and delivery of the Series X Bonds no later than May 31, 1998; said Bonds to be substantially in the form as provided in said Series X Supplemental Indenture; and said Bonds to be issued for the purpose of retiring Applicant's 6.9 percent Series R EIERA indebtedness of \$25,000,000, redeemable on or after February 1, 1998, and for the acquisition of property, the construction, extension, and improvement of its plant and distribution system, and other capital investment all of which shall be necessary and proper for the rendition of public water supply, and to reimburse its treasury for any such costs heretofore incurred subsequent to July 1, 1997; and further authorizing Applicant to execute and deliver the Supplemental Indenture to be dated as of authentication and delivery of said Series X Bonds in substantially the form as provided in said Supplemental Indenture to be late filed in this proceeding which said Series X Supplemental Indenture will substantially comply with the terms described herein.

2. That St. Louis County Water Company is hereby authorized to make payments for those expenses incurred in connection with the issuance and delivery of said First Mortgage Bonds, Series X.

3. That the interest rate incurred by St. Louis County Water Company for the said Series X Mortgage Bonds shall not exceed 6.5 percent.

4. That the final terms and conditions of the sale of the Series X Mortgage Bonds will be filed in this case.

5. That the Commission reserves ratemaking treatment of the approved financial transaction and may consider the prudence and treatment of the approved transaction in any subsequent rate proceeding.

6. That this order shall become effective on March 31, 1998.

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur.  
Derque, Regulatory Law Judge

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**In the Matter of AT&T Communications of the Southwest, Inc.'s  
Petition for Second Compulsory Arbitration Pursuant to Section  
252 (b) of the Telecommunications Act of 1996 to Establish an  
Interconnection Agreement with Southwestern Bell Telephone  
Company.\***

*Case No. TO-98-115  
Decided March 19, 1998*

**Evidence §8.** The Commission approved an interconnection agreement submitted by the parties in compliance with the Commission's Report and Order issued on December 23, 1997. The interconnection agreement includes provisions implementing the Commission's resolution of unresolved issues submitted for arbitration under the Telecommunications Act of 1996, Title 47, United States Code. The interconnection agreement will expire in three years, unless renewed for two 1-year periods. Southwestern Bell Telephone Company will resell all services, except operator services, to AT&T at a 19.2 percent discount from retail rates; operator services will be resold at a 13.9 percent discount from wholesale rates. Other provisions include prices for unbundled network elements (UNEs), interconnection architecture and compensation, collocation, rights-of-way, conduits, pole attachments, interim number portability, 911/E911, network security and law enforcement, and other items.

**ORDER APPROVING AGREEMENT FILED  
IN COMPLIANCE WITH COMMISSION ORDER**

On December 23, 1997, the Commission entered its Report and Order, resolving the issues presented by the parties for arbitration. This case was established for the purpose of addressing the issues that were not previously arbitrated in Case No. TO-97-40. The Commission's December 23 Report and Order specified language to be used by Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest (AT&T) to resolve the interconnection agreement issues remaining between them, ordered SWBT and AT&T to submit an interconnection agreement implementing this language and the language which they had previously agreed to by February 1, 1998, and set interim rates for certain services to be provided to AT&T by SWBT. The Report and Order also determined a procedure for the establishment of permanent rates.

On December 29, 1987, SWBT filed its objections to the process for establishing permanent rates, and on December 31, SWBT filed an Application for Rehearing of the Commission's December 23 Report and Order. SWBT's objections and application for rehearing are under consideration and will be addressed by the Commission by separate order or orders.

AT&T filed a motion on January 27, requesting an extension of time for approximately one month to comply with Ordered Paragraph 3 of the Commission's

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\*See page 54 for another order in this case.



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December 23 Report and Order. According to AT&T, despite diligent efforts on the part of SWBT and AT&T, the parties had not been able to devote sufficient resources to comply with the Commission's February 1 filing deadline because their subject matter experts had obligations to meet in other state arbitration proceedings. No party opposed AT&T's motion.

On March 4, SWBT and AT&T filed an interconnection agreement that had been executed by the parties on February 27 (Agreement) to implement the Report and Order. Pursuant to Ordered Paragraph 3 of the Commission's December 23 Report and Order, the Agreement is supposed to include: 1) all language implementing the terms agreed to by the parties and not submitted for arbitration, and 2) all language that the Commission ordered the parties to include to resolve the issues submitted for arbitration. The Commission reserved its ruling on any terms that were not arbitrated until the complete agreement was filed so that it could review the agreement in its entirety for compliance with the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 151 *et seq.* The Commission directed Staff to file a Memorandum recommending approval or rejection of the Agreement.

Staff filed a Memorandum on March 17, recommending approval of the Agreement. Staff stated that the agreement will take effect upon Commission approval and will expire after a three-year initial term. The agreement may be extended twice for one-year periods unless written notice is given. The Agreement covers terms for the resale of all services except operator services at a 19.2 percent discount from SWBT's retail prices. Operator services are to be discounted 13.9 percent from SWBT's wholesale prices. Some of the prices established for unbundled network elements (UNEs) are the rates that the Commission ordered in Case No. TO-97-40. The Agreement provides for the remaining prices, established on an interim basis in the Commission's December 23 Report and Order in this case, to be reviewed by the Arbitration Advisory Staff, with a true-up to follow the establishment of permanent rates by the Commission.

The Agreement also specifies terms for network interconnection architecture and compensation, collocation, rights-of-way, conduits, pole attachments, interim number portability, 911/E911, network security and law enforcement, failures to meet performance criteria, exchange of directory listing information, white pages, clearing-house, numbering, facilities-based directory assistance and facilities-based operator services.

The Commission finds that AT&T's motion for additional time to file a signed interconnection agreement should be granted. The Commission further finds that the Agreement filed with the Commission on March 4 should be approved. The standard for deciding arbitration cases was set forth in the Commission's December 23 Report and Order, and the Commission previously determined that the arbitrated portions of the agreement meet those standards. Staff stated in its Memorandum that there were instances where the parties did not implement the exact determination set forth in the Commission's prior arbitration orders in this case and in Case No. TO-

97-40, but in each of those instances the parties had reached agreement and included language in the Agreement to implement their modifications.

When parties submit a voluntary agreement to a state commission for approval, the agreement may only be approved if it 1) does not discriminate against telecommunications carriers not a party to the agreement and 2) is not against the public interest. See § 252(e)(2)(A) of the Act. The Commission has reviewed the Agreement between SWBT and AT&T, and the Staff's recommendation, and determined that the Agreement complies with the Act.

*IT IS THEREFORE ORDERED:*

1. That the interconnection agreement filed by Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. pursuant to the Commission's Report and Order of December 23, 1997, is approved.
2. That this order shall become effective on March 30, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur. Crumpton, C., dissents.

Randles, Regulatory Law Judge

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**The Staff of the Missouri Public Service Commission, Complainant,  
v. University Place Apartments, Respondent.**

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*Case No. TC-98-141  
Decided March 31, 1998*

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**Telecommunications §§3.2, 7.** The Commission approved a Stipulation and Agreement providing that University Place will apply for certificates of service authority to provide shared tenant services and interexchange services. The Commission found that University Place will permit current and future tenants to receive their telecommunications service from GTE if they prefer and will take no retaliatory action against any tenant who chooses to do so. The agreement requires University Place to credit the final phone bill of any tenant choosing to take service from GTE in an amount not to exceed \$20.60 (GTE's activation fee).

**ORDER APPROVING STIPULATION AND AGREEMENT**

The Staff of the Commission (Staff) filed a complaint against University Place Apartments (University Place) on October 3, 1997, stating that University Place was providing shared tenant and interexchange services under the name "Up-Link" without certificates of service authority from the Commission. Staff also alleged that University Place's management disconnected a tenant's GTE telephone service without the tenant's permission. Staff asked the Commission to find that University

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Place was in violation of Sections 392.410.1 and .2, RSMo Supp. 1997, and to authorize penalties. Staff also requested the Commission to require University Place to obtain a shared tenant services certificate and to reconnect any tenant to GTE on request.

University Place filed an answer on November 3 admitting that it was providing telecommunications services to tenants. University Place argued that it is exempt from Commission regulation by virtue of Sections 386.020(53)(d) and (e), RSMo Supp. 1997, and that the Commission lacks jurisdiction over the subject matter of the complaint.

The Commission set the case for a prehearing conference and established a deadline for the filing of a procedural schedule. The parties met in a prehearing conference and filed a motion on December 29 asking the Commission to set a deadline for the filing of a Stipulation and Agreement in lieu of a procedural schedule. The Commission granted that motion and directed the parties to file their Stipulation and Agreement no later than January 30, 1998. The parties requested and received an extension of time and filed a Stipulation and Agreement on February 11. Staff submitted Suggestions in Support on February 24 and appeared at the Commission's regular Agenda meeting on February 26 to provide an oral explanation of the Stipulation. Both the Suggestions in Support and Agenda appearance are specifically permitted by the Stipulation of the parties; University Place was given prior notice of the Agenda appearance.

The Stipulation and Agreement (Attachment A to this Order) provides that University Place will apply for certificates of service authority to provide shared tenant services and interexchange services. University Place agrees to provide notice to its tenants of the terms of the agreement. University Place will permit current and future tenants to receive their telecommunications service from GTE if they prefer and will take no retaliatory action against any tenant who chooses to do so. University Place agrees to credit the final phone bill of any tenant choosing to take service from GTE in an amount not to exceed \$20.60 (GTE's activation fee). Once University Place has completed the actions specified by the Stipulation, Staff will dismiss its complaint.

The Commission has considered the Stipulation and Agreement of the parties, the Suggestions in Support, and the information elicited at the Agenda meeting, and finds that the Stipulation should be approved. Once University Place has requested and received the certificates of service authority required by the Stipulation, its provision of shared tenant services will have been legitimized. The Commission is satisfied that tenants who wish to receive service from GTE will be treated appropriately and that the Notice (Attachment B to this Order) agreed upon by the parties is sufficient. The Commission will adopt the Stipulation and Agreement in resolution of the issues. In order to assure that the terms of the stipulation are carried out in such a fashion that interested parties can track the necessary documentation, the

Commission will establish two new cases for receipt of University Place's certificate applications and consolidate them with this complaint case.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement of the parties filed on February 11, 1998 is approved.
2. That University Place Apartments shall comply with each and every provision of the Stipulation and Agreement approved in Ordered Paragraph 1.
3. That the Commission establishes Case No. TA-98-407 and Case No. TA-98-408 for receipt of University Place's certificate applications. These two cases will be consolidated with lead case TC-98-141. Copies of this Order shall be filed in all three official case files.
4. That no later than 15 days after the date on which this Order is issued, University Place Apartments shall apply for a certificate of service authority to provide shared tenant services under Case No. TA-98-407.
5. That no later than 30 days after the date on which this Order is issued, University Place Apartments shall apply for a certificate of service authority to provide interexchange services under Case No. TA-98-408.
6. That no later than April 10, 1998, University Place Apartments shall provide the occupant of each of its apartments with the notice attached to this Order as Attachment B and file a pleading advising the Commission that notice has been given.
7. That this order shall become effective on April 10, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur. Crumpton, C., absent.  
Wickliffe, Deputy Chief Regulatory Law Judge

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EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**The Staff of the Missouri Public Service Commission, Complainant,  
v. Local Fone Service, Inc., Respondent.**

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*Case No. TC-98-119*  
*Decided March 31, 1998*

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**Telecommunications §§23, 8.** The Commission approved an agreement following allegations that company provided basic local service without approved tariff. The Commission found that the customer refunds, and the company's payment of charges necessary for reestablishment of service with SWBT, are adequate to compensate any customers for the inconvenience they may have experienced as a result of the company's conduct. The Commission found that the penalty of \$4,300 to be paid into the public school fund of the state of Missouri is an appropriate resolution of the issues of this case.

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#### ORDER APPROVING STIPULATION

The Staff of the Commission (Staff) filed a complaint against Local Fone Service, Inc. (Local Fone) on September 15, 1997 stating that local Fone had been providing basic local telecommunications services without an approved tariff. Staff asked the Commission to find that Local Fone had acted in violation of the Commission's Order in Case No. TA-97-411<sup>1</sup> and of Section 392.410.1, RSMo Supp. 1997, and to impose penalties.

Local Fone filed an answer on October 20 stating that it had not intentionally acted to violate the Commission's Order or the statute, that it had voluntarily discontinued service, and that penalties would be inappropriate. Local Fone also asserted defenses to the complaint.

The Commission determined that a hearing would be necessary and scheduled an early prehearing conference and a date for the filing of a procedural schedule.

Staff filed a Motion to Establish Procedural Schedule on January 5, 1998, proposing dates for the filing of testimony and a hearing. The Commission adopted Staff's schedule by Order issued January 12. The parties met in prehearing conference and, in lieu of a procedural schedule, submitted a Stipulation (Attachment A to this Order) on March 6 purporting to resolve the issues in the case. Staff, Local Fone, and the Office of the Public Counsel filed the Stipulation jointly and asked the Commission to approve it.

The terms of the Stipulation call for Local Fone to refund the payment of every customer who was erroneously switched to Local Fone for basic local service, including taxes and surcharges. If Local Fone is unable to locate the customer, it will forward the refund to the public school fund as specifically set out in the Stipulation. Local Fone agreed to give the Commission a full accounting of the names, addresses, and amount refunded to each customer, once the Commission issues a Protective Order. Local Fone also agreed to pay any customer's charges for reestablishment of service with Southwestern Bell Telephone Company (SWBT) if that customer had been switched from SWBT to Local Fone, and to pay \$100 per customer for 43 customers (\$4,300 total) into the public school fund of the state of Missouri pursuant to Section 386.570.1, RSMo 1994.

The parties also agreed that, should the Commission accept the terms of the Stipulation, they would waive their rights to present testimony, cross-examine witnesses, present argument or written briefs, to have the transcript read by the Commission, and their rights for rehearing and judicial review. Staff filed a Motion for Protective Order on March 6 which was granted on March 11. On the same date, Staff filed Suggestions in Support of the Stipulation explaining its rationale for reaching agreement with the other parties.

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<sup>1</sup> Case No. TA-97-411 granted Local Fone certificates of service authority to provide basic local and local exchange telecommunications services. However, the certificates do not become effective until Local Fone's tariff has been approved, a condition not yet satisfied.

The Commission has reviewed the Stipulation submitted by the parties, Staff's Suggestions in Support, and the official case file, and finds that the Stipulation should be approved. The Commission finds that the customer refunds, and Local Fone's payment of charges necessary for reestablishment of service with SWBT, are adequate to compensate any customers for the inconvenience they may have experienced as a result of Local Fone's conduct. The Commission finds that the penalty of \$4,300 to be paid into the public school fund of the state of Missouri is adequate under the circumstances and that the Stipulation in general is an appropriate resolution of the issues of this case.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation of the parties filed on March 6, 1998 and attached to this Order is approved in resolution of all issues.
2. That Local Fone Service, Inc. shall comply with the provisions of the Stipulation approved in Ordered Paragraph 1.
3. That Local Fone Service, Inc. shall file with the Commission a full accounting of the names, addresses, and amounts refunded to every customer under the protection of the Protective Order issued in this case on March 11, 1998. This accounting shall be filed with the Commission no later than 30 days after the effective date of this Order.
4. That the procedural schedule previously established is suspended.
5. That this Order shall become effective on April 10, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur. Crumpton, C., absent.  
Wickliffe, Deputy Chief Regulatory Law Judge

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EDITOR'S NOTE: Attachment A, the Stipulation and Agreement in this case, has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**In the Matter of a Rulemaking to Govern Interaffiliate Transactions Among Electric, Gas, Heating, Sewer and Water Companies.**

\_\_\_\_\_  
*Case No. OX-98-183*  
*Decided April 21, 1998*  
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**Electric §14, Expense §61, Gas §78, Sewer §78, Steam §14, Water §33.** The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.

ORDER CLOSING CASE

The Commission established this case in order to determine whether a rule should be promulgated to govern affiliate transactions among regulated electric, gas, heating, sewer, and water companies. The parties participated in technical workshops after which Staff filed a proposed rule. The parties submitted comments and Staff filed its proposed affiliate transactions rule with the Commission on February 20. Staff's rule addresses information filings as well as proper costing and accounting procedures. Staff did not submit a rule to address a standard of conduct for affiliated transactions on the grounds that formulating a universal standard of conduct applicable to all electric, gas, heating, sewer, and water companies would be unworkable due to the differences in operations and structures of these utilities. Staff also pointed out the differences in the possibilities for development of competition from industry to industry. Staff proposed that rules regarding a standard of conduct for affiliates are needed but should be implemented on an industry-specific basis. Staff recommended that the Commission close this case and begin a rulemaking process in order to adopt its proposed rule for affiliate costing and accounting procedures and information filings. Staff recommended that a standard of conduct be developed in the context of utility-specific workshops.

A number of parties filed comments in this case; the Office of the Public Counsel and West Elm Place Corporation both filed alternative proposed rules. The gist of the comments filed by water companies is that affiliate transactions rules are not needed and not appropriate in the water and sewer industries. In addition, there was considerable opposition to certain aspects of the filing requirements included in Staff's proposed rule.

The Commission has reviewed all three proposed rules and the comments in this case, and concludes that it would be inappropriate to attempt to develop affiliate transactions rules that would apply to all regulated electric, gas, heating, sewer, and water companies. The lack of agreement among the parties leads the Commission to conclude that, even where costing and accounting procedures and filing require-

ments are concerned, these issues must be resolved on an industry-specific basis. Accordingly, the Commission finds that the rules proposed in this case are premature and that the impact of each of these rules on each of the affected industries has not been fully explored, and cannot be fully explored, in this multi-industry docket. The Commission wishes to commend the parties on their efforts and encourages them to make use of these efforts in a more appropriate industry-specific setting. The Commission has directed its Staff to begin an informal process to develop affiliate transaction rules that are industry-specific. This case shall be closed and, at this time, the Commission declines to initiate a rulemaking case for Staff's proposed affiliate transactions rule.

*IT IS THEREFORE ORDERED:*

1. That all of the proposed rules filed in this case are rejected as premature.
2. That this case is closed.
3. That this order shall become effective on May 1, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC.,  
concur.

Wickliffe, Deputy Chief Regulatory Law Judge

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**In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection With Southwestern Bell Telephone Company.**

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*Case No. TO-98-278*  
*Decided April 23, 1998*

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**Telecommunications §7.** 47 U.S.C. §151 et seq., establishes jurisdiction in the Commission to arbitrate disputes between interconnecting local exchange carriers.

**Telecommunications §§36, 39.** The Commission found that the record presented by the parties was not sufficiently persuasive to move the Commission to make a final decision on the issue of reciprocal compensation for calls from an end user to an Internet Service Provider within the local calling scope, pending the results of the Federal Communications Commission's proceeding on the same issue.

**Telecommunications §§ 36, 39.** The Commission directed that prior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to Internet Service Providers within a local calling scope, the parties were to compensate one another for such traffic in the same manner that local calls to non Internet Service Provider end users are compensated, subject to true-up following the Federal Communications Commission's determination of the issue.



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#### APPEARANCES

*Mark W. Comley*, Newman, Comley & Ruth, 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537, and

*Albert H. Kramer* and *Michael C. Casowitz*, Dickstein, Shapiro, Morin & Oshinsky LLP, 2101 L Street N.W., Washington, DC 20037-1526, for Birch Telecom of Missouri, Inc.

*Paul G. Lane*, General Attorney-Missouri, and *Anthony K. Conroy*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3510, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

REGULATORY LAW JUDGE: Kevin F. Hennessey.

#### ARBITRATION ORDER

##### Procedural History

On December 31, 1997, Birch Telecom of Missouri, Inc. (Birch) filed a petition with the Commission to arbitrate terms of interconnection between Birch and Southwestern Bell Telephone Company (SWBT) pursuant to Section 252(b) of the Telecommunications Act of 1996 (the Act). The Commission notified SWBT of the petition for arbitration on January 8, 1998. Birch supplemented its petition on January 15 with a pleading indicating that the only disputed issue concerned whether calls made within the same local calling scope to an Internet service provider (ISP) are local in nature and subject to the payment of reciprocal compensation.

The Commission established a procedural schedule and adopted a protective order on January 27. The Commission directed Birch to file appropriate documentation concerning those issues which had been discussed and resolved by the parties as required by 47 U.S.C. 252(b)(2). Birch filed its response on January 30 which included a copy of the proposed interconnection agreement and appendices agreed to by Birch and SWBT.

SWBT filed a response to Birch's petition for arbitration and a motion to dismiss on February 2. Birch responded with late-filed suggestions in opposition on February 17. The parties filed direct testimony on February 18 and rebuttal testimony on March 4. SWBT replied to Birch's suggestions in opposition on March 4 and also moved to strike the testimony of two Birch witnesses, Gary L. Chesser and Gregory C. Lawhon.

The parties met in a prehearing conference on March 9, at which time SWBT withdrew its motion to dismiss the petition for arbitration. On March 12, the parties reached agreement regarding SWBT's motion to strike. Birch agreed to withdraw the testimony of witnesses Chesser and Lawhon and file a revised version of Mr. Lawhon's

testimony on the day of the hearing. SWBT agreed to withdraw its motion to strike and not to oppose the filing of the revised version of Mr. Lawhon's testimony.

The Commission conducted an arbitration hearing on March 16 and 17. The parties filed briefs on April 3.

SWBT submitted late-filed Exhibits 11, 12 and 13 as requested by the Commission on March 24. Birch did not object to these exhibits. On April 14, SWBT submitted a supplement to late-filed Exhibit 11. Birch responded by letter on April 16 stating that the material which SWBT sought to add to Exhibit 11 does not constitute a procedurally proper late-filed exhibit and contains information which is neither new nor helpful to the Commission in resolving this dispute. Birch stated that the "supplemental" constituted a re-argument of SWBT's position.

Birch filed a motion on April 16 seeking the Commission's permission to file as a post-record authority a copy of the Federal Communications Commission's (FCC) Report to Congress on Universal Service Issues, which was released on April 10, 1998. The parties filed a Stipulation on April 21 agreeing that the FCC Report is relevant to the arbitration and is an appropriate subject for official notice.

#### Discussion

The parties to this case are not only in disagreement about the issues surrounding reciprocal compensation for ISP traffic, but also about the issues in this case. The parties filed a Hearing Memorandum on March 9, in which each party separately stated its understanding of Issues 1 and 2. The only agreement in the Hearing Memorandum was on the wording of Issue 3. This disagreement as to how the issues should be framed is core to the Commission's decision in this case.

Birch phrases Issue 1 as: "Should Internet Service Provider (>ISP) traffic be treated as local traffic for purposes of reciprocal compensation under the Interconnection Agreement?" In contrast, SWBT states Issue 1 as: "Is a local exchange carrier (LEC) required, under the provisions of the Act, to pay reciprocal local compensation when one of its subscribers places a call to the internet through an Internet Service Provider that receives local exchange service from another LEC?" Birch takes the position that ISP traffic, consisting of calls made within the same local calling scope to an ISP, is local traffic and should be treated as such by this Commission. SWBT takes the position that ISP traffic is jurisdictionally interstate in nature, is not local, and is not terminated on the network facilities of the LEC providing service to the ISP. SWBT believes that, under the Act, reciprocal local compensation is not applicable to such traffic.

Issue 2, as stated by Birch, asks whether, if the Commission determines that the traffic to ISPs should be treated as local traffic for purposes of reciprocal compensation, the rate should be different than for local traffic that is not terminated to ISPs. Birch also asks the Commission to decide whether additional language should be inserted into the Interconnection Agreement already negotiated between the parties to resolve the issue. SWBT states the issue as whether, if the Commission has

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jurisdiction over traffic to ISPs and reciprocal compensation applies, the parties should be required to negotiate a compensation rate for such traffic other than the rate established in the parties' Interconnection Agreement for local traffic that is not directed to ISPs. Birch argues that the rate for traffic to an ISP should be the same as for traffic terminating to other users. SWBT argues that if the Commission finds that it has jurisdiction and that reciprocal compensation applies, the Commission should not order the parties to pay one another the same rate for traffic to ISPs as SWBT pays to other local exchange carriers for local traffic.

The parties stipulated that it would be appropriate for the Commission to take official notice of the FCC's Report to Congress in the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, released April 10, 1998. In a footnote included in that Report the FCC stated that it was making no determination on the question of whether LECs that serve ISPs are entitled to reciprocal compensation for terminating Internet traffic. The FCC went on to state that the issue is currently before it and is the subject of public and industry comments. The reader was referred to the Pleading Cycle Established for Comments on Requests by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Public Notice, CCD/CPD 97-30 (released July 2, 1997).<sup>1</sup> The Public Notice referred to is included as Attachment A to this Order and states that the Association for Local Telecommunications has requested clarification that nothing in the FCC's Local Competition Order "requires information service traffic to be treated differently than other local traffic is handled under current reciprocal compensation agreements" in situations in which local calls to information service providers are exchanged between ILECs and CLECs. The FCC asked for comments on this request to be filed in July of 1997. To date, a decision has not been issued.

The parties' agreed-upon statement of Issue 3 reads: "If the Commission resolves issue 2 above in favor of SWBT, should the parties be directed to implement the interconnection agreement, subject to true up once the compensation rate for ISP traffic is determined?" The Commission has before it a proposed interconnection agreement between Birch and SWBT filed on January 30. The parties have agreed to each of the terms and conditions of the agreement, and concur that the agreement is substantially similar to agreements previously approved between SWBT and other CLECs. The only area of dispute concerns reciprocal compensation for traffic to ISPs. Birch's position is that language should be added to the agreement that would clarify that reciprocal compensation would be paid by either company to the other when calls to an ISP are terminated within the local calling scope. SWBT's position is that traffic to ISPs should be specifically excluded from reciprocal compensation provisions.

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<sup>1</sup> Report to Congress at Paragraph 106, Footnote 220.

#### Findings of Fact

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all of the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

The Commission finds that no objections were filed to late-filed exhibits 11, 12, and 13 and they should be admitted into evidence. The Commission finds that the material SWBT proffered on April 14 as a supplement to Exhibit 11 is, indeed, a restatement of SWBT's legal arguments to the Commission. However, the letter submitted by Birch on April 16 is not a formal objection in compliance with the Commission's pleading rules. Accordingly, both SWBT's April 14 offering and Birch's April 16 letter will be received into the record and be given the weight they are due.

The Commission finds that it has jurisdiction over the issue because the federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C. §151 *et seq.*, establishes jurisdiction in the Commission to arbitrate disputes between interconnecting local exchange carriers. *See* 47 U.S.C. §252(b)(4). The Commission acknowledges that in the recent past the FCC has treated a call from an end user to an ISP within the local calling scope as local traffic. However, the Commission has been advised by the parties and takes official notice that, as to the crucial issue in this case, i.e. reciprocal compensation under this type of scenario, the FCC has requested comments and taken the matter under advisement in Docket No. 97-30. The record presented by the parties is not sufficiently persuasive to move this Commission to make a final decision on the reciprocal compensation issue in light of the FCC's pending proceeding on the same issue.

Moreover, because the parties presented the issue of whether such traffic constitutes local traffic only "for purposes of reciprocal compensation under the Interconnection Agreement,"<sup>2</sup> the Commission finds that it would not be appropriate to determine whether the traffic to ISPs constitutes local traffic until the issue of compensation is resolved by the FCC. The Commission will direct the parties to file a notice with the Commission within ten days after the FCC makes its determination on the reciprocal compensation issue.

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<sup>2</sup>This was the manner in which Birch stated the issue. *See* Issue 1, Birch's Separate Statement of The Issue, Hearing Memorandum filed March 9, p. 2. SWBT did not raise the issue of whether such traffic constitutes local traffic in the abstract, except in order to challenge the Commission's jurisdiction to decide the appropriate rate. *See* Issue 1, SWBT's Separate Statement of the Issue, Hearing Memorandum filed March 9, p. 3.

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While the record is not sufficient for the Commission to make a final decision concerning the nature of the traffic and the appropriate compensation for it, the record does make clear that neither SWBT nor Birch can accurately distinguish calls to ISPs from calls to other end users at this time. For this reason, the Commission finds that calls to ISPs should be treated and compensated as if they are local calls by the parties pending the FCC's final determination of the issue.

Pending an FCC determination on the issue of reciprocal compensation, the Commission finds that an executed copy of the agreement should be filed for approval without any language that specifically addresses reciprocal compensation for traffic to ISPs. The language appearing on page 12 of the General Terms and Conditions of the agreement submitted on January 30, following Section 5.1.2, should not be included in the executed agreement.<sup>3</sup>

The evidence presented to the Commission was insufficient for the Commission to determine whether it will be possible for the parties to track the traffic at issue. Therefore, the Commission finds that Birch and SWBT should submit a proposed tracking plan and implementation schedule for such plan within 30 days after this Report and Order takes effect.

If a method for tracking traffic to ISPs can be developed and approved by the Commission, the Commission finds that a true-up procedure should be established following the FCC's determination of the issue to ensure that the parties compensate or refund one another, as appropriate, for the traffic exchanged during the period of time between the implementation of their Interconnection Agreement and the end of the true-up period.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The parties to this case are public utilities subject to the jurisdiction of the Missouri Public Service Commission under Chapters 386 and 392, Revised Statutes of Missouri 1994 and the 1997 Supplement.

The Commission has jurisdiction to resolve this case by means of arbitration under Section 252 of the federal Telecommunications Act of 1996. The Commission must conclude the resolution of the issues no later than nine months after the date on which the local exchange carrier received the request for interconnection, in this case no later than April 25, 1998. §252(b)(4)(C). The Commission must resolve the disputed issues and ensure that the arbitrated agreement meets the requirements of Section 251 of the Act.

Based upon its findings of fact, the Commission determines that the proposed interconnection agreement submitted by Birch and SWBT meets the requirements of Section 251 and an executed copy should be submitted with the change described above for approval.

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<sup>3</sup>This language provides: "The Parties disagree as to whether reciprocal compensation should apply to ISP traffic and what language, if any, should address that issue."

*IT IS THEREFORE ORDERED:*

1. That late-filed Exhibits 11, 12, and 13 are received into evidence.
2. That the supplement to Exhibit 11 offered by Southwestern Bell Telephone Company on April 14, 1998 and the letter submitted by Birch Telecom of Missouri, Inc. on April 16, 1998 will be received into the record and given the weight they are due. Birch Telecom's letter will be marked late-filed Exhibit 14.
3. That the Commission takes official notice of the Federal Communications Commission's Report to Congress, FCC 98-67, CC Docket No. 96-45 (released April 10, 1998).
4. That an executed copy of the interconnection agreement between Birch Telecom of Missouri, Inc. and Southwestern Bell Telephone Company submitted on January 30, 1998, modified as described in this order, shall be filed with the Commission for approval no later than May 25, 1998.
5. That the parties shall file a notice with the Commission within ten days after the Federal Communication Commission renders a decision in Docket No. 97-30.
6. That prior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to ISPs within a local calling scope, the parties shall compensate one another for such traffic in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue if it becomes possible to implement a Commission approved tracking plan in the interim.
7. That the parties shall file a proposed tracking plan and implementation schedule for such plan no later than May 25, 1998.
8. That this Report and Order shall become effective on April 24, 1998.

Lumpe, Ch., Drainer and Murray, CC., concur. Crumpton, C., dissents, with Dissenting Opinion to follow.

Schemenauer, C., not participating.

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**DISSENTING OPINION OF COMMISSIONER HAROLD CRUMPTON**

I respectfully disagree with the majority in Case No. TO-98-278. The majority should base its decision on the evidence in this case and not depend on the Federal Communications Commission (FCC) to decide the issue. If the FCC reaches a conclusion other than the fact that Internet Service Provider (ISP) traffic is a hybrid of voice, data and video telecommunications services, and contains elements of intra- and interexchange traffic, the FCC will be wrong.

The majority is correct in concluding that this record is insufficient, but not for the reason given. This record makes clear that some calls to the ISP are local, e.g., when the ISP's server providing the information requested by the caller is located in

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the local exchange of the caller. This record also makes clear that some calls to the ISP are long distance in nature.

It seems clear to me this record is insufficient in this matter because the witnesses provided insufficient information on the design and operation of the Internet which could lead to a reasonable solution. Apparently, the witnesses had difficulty describing the design and operation of the local switched voice network as well. Therefore, I agree with that part of the holding of the majority which states, "the Commission finds that it would not be appropriate to determine whether the traffic to ISPs constitutes local traffic." My reasons are indicated above and are not the reason stated by the majority.

The majority believes the inexperienced witnesses when it found that calls to ISPs should be treated and compensated as local because "neither SWBT nor Birch can accurately distinguish calls to ISPs from calls to other end users at this time." I find this testimony incredible. First, the public switched telephone network is intelligent enough to identify an ISP's telephone number when that number is stored in memory. In addition, carriers know whether or not their circuits are sold to an ISP. Secondly, the ISP's router has the address and a route for every request of an ISP customer and can therefore provide information as to whether or not a call is using a path outside the originating exchange. Routers by definition send streams of data along "routes." In order to identify the portion remaining local from the portion going interexchange, one would only need to study the records of the routers involved.

This is an issue that comes under the jurisdiction of the states. The record is clear that a request to a server in Missouri may be considered interexchange, while the same request made in Virginia might be local, depending on the location of the server.

In my opinion, the Commission should have approved the contract as agreed to with other CLECs, and ordered the parties to perform traffic studies at ISP routers in order to determine to what extent the traffic is local or long distance. Having completed such studies, the parties could then provide the Commission with the record necessary to decide this issue.

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**In the Matter of the Proposed Commission Rules 4 CSR 240-31.010, et seq. Missouri Universal Service Fund\***

*Case No. TX-98-56*  
*Decided May 4, 1998*

**Telecommunications § 46.** Motions for rehearing denied. The Commission's Universal Service Fund rulemaking establishes that disbursements from the fund shall be revenue neutral; that assessments for the fund will be based on each carrier's Missouri net jurisdictional revenues; and that a denominated end-user Universal Service Fund surcharge is unlawful.

**ORDER DENYING APPLICATIONS FOR  
REHEARING AND CLARIFICATION**

The Commission issued an Order of Rulemaking (OR) in this case on April 15, 1998, establishing the framework for a Missouri Universal Service Fund (MoUSF). MCI Telecommunications Corporation (MCI), COMPTEL-Mo (COMPTEL), and Southwestern Bell Telephone Company (SWBT) all filed applications for rehearing or clarification on April 14. MCI filed a response to the other parties' applications for rehearing on April 23; SWBT filed responses to COMPTEL's and MCI's applications on April 24; AT&T Communications of the Southwest, Inc. (AT&T) filed a response to SWBT's motion for clarification or rehearing on April 29; and SWBT filed a reply on May 11.

**1. MCI Telecommunications Corporation's Application for Rehearing or Additional Rulemaking**

In its OR the Commission provided that all disbursements from the MoUSF must be revenue neutral. 4 CSR 240-31.040(6)(B). The Commission stated that the details of achieving revenue neutrality would be determined in a separate proceeding. MCI argues in its application for rehearing that the Commission's OR leaves a potential ambiguity because Rule 31.040(6)(B), dealing with eligibility for MoUSF funding for high-cost areas, includes the provision that "the effect of disbursements from the MoUSF shall be revenue neutral, with offsetting reductions in rates for other services to be determined by the commission." New Rule 31.050, which deals with eligibility for MoUSF funding for providers of service to low-income customers and disabled customers, does not include a similar provision. MCI suggests that the language of 31.040(6)(B) be repeated in 31.050(4), stating that without such language incumbent local exchange companies may argue that they are not required to reduce other rates to offset MoUSF distributions for discounted service to low-income customers and disabled customers. MCI proposes that the Commission either issue an order of clarification on rehearing or initiate a separate rulemaking to achieve this result.

\*On July 2, 1998, this case was appealed to Cole County Circuit Court (CV198-907cc).



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SWBT filed a response arguing that the "potential ambiguity" suggested by MCI does not exist. SWBT points out that the Commission has established the principle of revenue neutrality for the MoUSF and has established a separate proceeding in which it will consider the proper method of maintaining revenue neutrality (Case No. TO-98-329). SWBT also states that, in the case of MoUSF support for eligible low-income customers or disabled customers, the amount of MoUSF support would be equal to the amount of the discount offered to the eligible customer. SWBT states that the MoUSF support received would be revenue-neutral on an access line basis because the company providing service to the eligible customer has already reduced its rate by the amount of the Commission-determined discount for that eligible customer. SWBT does not believe the Commission needs to make any modifications to 4 CSR 240-31.050.

The Commission has reviewed MCI's application and SWBT's response and finds that MCI's arguments do not present sufficient reason for rehearing. The Commission stated in its OR that the details of how revenue neutrality can best be achieved would be addressed in a separate proceeding. MCI is actively involved in the technical conferences that are currently under way and will have an opportunity to make all relevant arguments regarding revenue neutrality when the Commission specifically takes up those issues. Furthermore, the Commission accepted recommendations by the Small Telephone Company Group, the Commission Staff, and the Office of the Public Counsel to eliminate the connection originally made in the proposed rule between Sections 31.040(6) and 31.050 for the reason that support for high-cost areas is different in purpose from support for low-income customers and disabled customers. The issue of revenue neutrality as it relates to services covered by Section 31.050 cannot be clearly defined until the appropriate discount level for service to low-income customers and disabled customers has been determined, and until the cost of providing such services has been determined, as well as available levels of federal subsidization.

**2. Southwestern Bell Telephone Company's Motion for Clarification or, in the Alternative, Application for Rehearing**

SWBT filed a motion for clarification or, in the alternative, rehearing on April 14. SWBT's motion is concerned with the definition of "net jurisdictional revenues" for the purpose of determining assessments for MoUSF support. The rule the Commission adopted, 4 CSR 240-31.060(2), states that "[a]ssessments for the MoUSF will be based on the Missouri net jurisdictional revenues of each telecommunications company and other nondiscriminatory factors as determined by the commission." The term "net" has been substituted for the term "gross" in subsections (3) and (4)(B) of that rule also. SWBT's concern is that the parties do not interpret the phrase "Missouri net jurisdictional revenues" in the same way. SWBT states that the interpretation applied by AT&T would permit carriers that do not build their own facilities to deduct their costs of providing service (access charges and payments for unbundled network elements) from their revenues before being assessed for MoUSF funding. AT&T's proposal would result in facilities-based carriers being

unable to deduct any of the costs associated with providing service from their assessed revenues. SWBT's position is that, if the Commission intended to interpret "net jurisdictional revenues" as AT&T interprets it, the result would be discriminatory to certain carriers. SWBT asks the Commission to clarify that it did not intend to adopt AT&T's interpretation. In the alternative, SWBT asks that, if the Commission did intend to adopt AT&T's interpretation, it should grant rehearing and revise 4 CSR 240-31.060 to determine assessed revenues in a nondiscriminatory manner.

MCI filed a response to SWBT's pleading on April 23, stating that MCI continues to support the use of revenues net of payments to other carriers as the definition of "Missouri net jurisdictional revenues." MCI states that all carriers would be making such payments in a competitive market and that the approach is, therefore, nondiscriminatory and prevents the same dollar of revenue from being assessed multiple times. In the alternative, MCI supports the use of end-user revenues as net revenues.

AT&T filed a response to SWBT's pleading on April 29. AT&T requests that the Commission clarify 4 CSR 240-31.060 to state that Missouri net jurisdictional revenues equals gross revenues net of carrier payments. AT&T argues that using this method of assessment is not discriminatory and was recommended by the Federal-State Joint Board on Universal Service, quoting paragraph 807 of the Recommended Decision by the Federal-State Joint Board, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, adopted November 7, 1996. AT&T states that, although the Federal Communications Commission (FCC) decided to base assessments on end-user revenues, it did not find that the use of gross revenues less payments to other carriers would be discriminatory.

SWBT filed a reply to AT&T's response on May 11, stating that the FCC rejected AT&T's proposed "gross revenues net of payments to other carriers" basis of assessment. SWBT points out that the FCC stated that this method of assessment would be likely to cause economic distortions that could be avoided by basing assessments on the end-user telecommunications revenues approach, citing to paragraph 850 of the Report and Order issued on May 8, 1997 in CC Docket No. 96-45. SWBT states that the FCC also determined that calculating universal service assessments based upon end-user revenues would be administratively easier to implement and less burdensome, and that Arkansas, Kansas, and Oklahoma have all decided to use the end-user revenue approach to assessments.

The Commission has reviewed SWBT's motion for clarification or rehearing and the responses filed by MCI and AT&T and finds that SWBT's application does not present sufficient reason for clarification or rehearing. The issue of what costs should be considered in evaluating a company's net revenues for purposes of MoUSF assessment must be taken up in the context of appropriate costing methodology. The parties have already requested a procedural schedule that calls for an evidentiary

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hearing on this general subject. To the extent that the issue of what constitutes net jurisdictional revenues needs further definition, it must be taken up in that case.

**3. COMPTEL-Mo's Application for Rehearing**

COMPTEL argues that the Commission should grant its application for rehearing on two issues: the end-user surcharge issue and the issue of payment of assessments through current revenues. COMPTEL argues that 4 CSR 240-31.060 is unlawful because it denies interexchange carriers the ability to add as a billing line item the amount of the assessment made under the rule. COMPTEL argues that the rule is inequitable, discriminatory, and highly prejudicial to interexchange carriers, and inconsistent with the FCC's rules on universal service assessment and collection. COMPTEL quoted a portion of the Commission's OR stating that "a direct end-user surcharge is not an option under section 392.248.3, RSMo Supp. 1997, which states that universal service shall be funded through assessments on all telecommunications companies in the state."

COMPTEL submitted comments in this case to the effect that, in lieu of a system that assesses a carrier based upon the prior year's jurisdictional revenue, the Commission should adopt a mechanism that imposes a "quasi-sales tax" on the customer's current jurisdictional billing for all telecommunications services. COMPTEL states that this procedure would result in a perfect match between jurisdictional revenues generated and the amount of assessment collected. COMPTEL argues that the procedure is equitable and nondiscriminatory.

MCI, in its Response to Applications for Rehearing filed on April 23, states that it does not agree that the Commission's rule denies interexchange carriers the ability to add as a billing line item a surcharge to recover Universal Service Fund assessments. MCI points out that the rules are silent on this issue and that the Commission's comment indicates that Section 392.248, RSMo Supp. 1997 does not allow the Commission to directly fund universal service by the means of end-user surcharges.

SWBT filed a response to COMPTEL's application for rehearing on April 24, stating that it is not clear from the Commission's OR whether the Commission has already determined that telecommunications companies may not recover their MoUSF assessments through the use of an end-user surcharge, or whether the Commission has only rejected a direct assessment on end users. SWBT makes the assumption that the Commission has rejected the recovery of MoUSF assessments through an end-user surcharge, and argues that the Commission may not authorize a price-cap-regulated local exchange carrier to recover its assessment through an end-user surcharge. See §392.248.3, RSMo Supp. 1997. SWBT argues that it would be unlawful for the Commission to adopt a rule which would permit some companies (such as interexchange carriers) to recover their assessments through an end-user surcharge, while other companies (such as price-cap-regulated local exchange carriers) would not be allowed to recover their assessment in the same way.

The Commission has reviewed COMPTEL's application, and the responses filed by MCI and SWBT, and finds that COMPTEL's argument does not present sufficient

reason for rehearing or clarification. The Commission intentionally left certain provisions of Chapter 31 open-ended because, until the costs of providing basic local service have been identified, and the Commission has determined how revenue neutrality may be maintained, it would be unwise to make specific findings on how MoUSF assessments are to be calculated. In addition, the Commission's OR does not eliminate the possibility of some sort of pass-through of MoUSF assessments, but only determines that a direct end-user surcharge in order to obtain MoUSF funding is not permissible under Section 392.248.3, RSMo Supp. 1997. It would be premature for the Commission to make a determination as to how MoUSF assessments might be recovered by obligated carriers, since the cost of providing basic local telecommunications services has not yet been demonstrated, much less the level of assessments that will be necessary to reimburse companies servicing high-cost areas.

*IT IS THEREFORE ORDERED:*

1. That MCI Telecommunications Corporation's Application for Rehearing or Additional Rulemaking filed on April 14, 1998 is denied.
2. That Southwestern Bell Telephone Company's Motion for Clarification or in the Alternative, Application for Rehearing filed on April 14, 1998 is denied.
3. That COMPTEL-MO's Application for Rehearing filed on April 14, 1998 is denied.
4. That this order shall become effective on June 16, 1998.

Lumpe, Ch., Drainer, Murray and Schemenauer, CC., concur.  
Crumpton, C., absent.

Wickliffe, Deputy Chief Regulatory Law Judge

**In the Matter of GTE Midwest Incorporated Proposed Revision of Its PSC Mo - No. 3 Long Distance Message Telecommunications Tariff to Introduce Extended Exchange Calling Plan Service.\***

Case No. TT-98-311  
Decided May 6, 1998

**Evidence, Practice & Procedure §27.** Section 386.500, RSMo, does not authorize a second request for rehearing.

**Order Rejecting Second Request for Rehearing**

On February 5, 1998, the Mid-Missouri Group of local exchange companies<sup>1</sup> (Mid-Mo or Applicant) filed a Motion For Entry Of Written Order For Order Suspending Tariffs, Or For Rehearing (sic). In addition, in a separate action, Mid-

\*This case was appealed to Cole County Circuit Court (cv198640cc).

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Mo applied for, and received from the Circuit Court of Cole County, a writ of mandamus requiring the Commission to respond to Mid-Mo's motions which were pending before the Commission.<sup>2</sup> In response, the Commission issued its Order Regarding Motion To Suspend Tariff on March 19. That order addressed the motions filed by Mid-Mo and in doing so also attempted to clarify the difference between tariffs which are filed but are not docketed into a contested case<sup>3</sup> and tariffs which are filed but do necessitate the creation of a docketed, contested case. This discussion was explanatory and not dispositive of the issues. That discussion did not alter the Commission's prior determination regarding the underlying tariff sheets to which Mid-Mo objected. Inasmuch as the Order Regarding Motion To Suspend Tariff did not change the outcome of the case it should not give rise to any additional avenue of relief.

The Commission's March 19 order provided a response to the writ and Mid-Mo's pending motions and, in doing so, both satisfied the requirements of the writ and addressed Mid-Mo's Motion For A Written Order. The Commission's order denied Mid-Mo's request for suspension and it denied Mid-Mo's request for rehearing. That order stated:

3. That the Motion For Entry Of Written Order For Order Suspending Tariffs, Or For Rehearing is denied as to the request for suspension or rehearing.

The March 19 denial of rehearing concluded the pendency of this matter before the Commission and, pursuant to Sections 386.500 and 386.510, began the time within which review of the Commission's action might be pursued.

The Commission has traditionally issued orders denying rehearing with an effective date the same as the issue date. Although it was not required to do so, out of an abundance of caution, the Commission made its March 19 order effective ten days after issuance owing to a Declaratory Judgment in which the Cole County Circuit Court had ordered that orders which resolve contested issues be issued with a date other than the date of issuance.<sup>4</sup> Allowing additional time for the applicant does not allow additional applications for rehearing as that matter is controlled entirely by statute. It has subsequently become clear that orders denying rehearing may continue to become effective on the date of issuance as a 30 day time limit within which one must request review begins from that date, thus providing an ample period of time in which to seek a writ of review. See Section 386.510.

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<sup>1</sup> The Mid Missouri Group is comprised of Alma Telephone Company, Chariton Valley Telephone Corp., Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company.

<sup>2</sup> State ex rel Alma Telephone Company et al. v Public Service Commission, Case No. CV198-269cc. Preliminary Order In Mandamus issued March 3, 1998.

<sup>3</sup> These are often referred to as "submitted" as opposed to "filed" because no contested case is docketed, or created, into which these tariffs may be formally filed.

<sup>4</sup> State ex rel. County of Jackson v Mo. Public Service Commission, Case No. CV197-1833cc (March 11, 1998).

Although Section 386.500 provides an opportunity to request rehearing before the Commission it contains no such provision for a second request for rehearing. In fact, the courts have held that no such provision exists.

We are of the opinion, also, that the application to the circuit court for certiorari or review was made too late, under Section 5234, R. S. 1929 (Mo. St. Ann. §5234). Respondent's motion for rehearing before the commission was overruled on June 16. It did not apply for certiorari until August 12, much more than 30 days thereafter. It contends that the time should be considered as running from July 17, the day when its second motion for rehearing was overruled by the Commission. We do not agree with that contention. ... It seems to us that, when the commission, on June 16, denied respondent's application for rehearing, the proceeding before the Commission was concluded and the Commission's order became final, so far as respondent, applicant before the Commission, was concerned, and that its right to seek review by the circuit court thereupon accrued. State ex rel. Kansas City, Independence & Fairmont Stagelines Co. v. Pub. Serv. Comm'n, 63 S.W.2d 88, 93, 333 Mo. 544(1933).

The Commission follows the reasoning of the Supreme Court of Missouri on this issue. With the Commission's March 19 denial of Mid-Mo's application for rehearing "The proceeding before the Commission was concluded and the Commission's order became final, so far as respondent, applicant before the Commission, was concerned, and that its right to seek review by the circuit court thereupon accrued." *Id.* at 93.

The Commission has already denied Applicant's request for rehearing in the Commission's order of March 19. Applicant has no right, either by statute or by common law, to a second request. The applicant's second request for rehearing fails to state a claim upon which relief may be granted and the Commission will neither grant nor deny the request. Rather, the Commission determines that the second request for rehearing must be rejected.

***IT IS THEREFORE ORDERED:***

1. That the second request for rehearing filed on behalf of the Mid-Missouri Group of local exchange companies on March 25, 1998, is hereby rejected for failing to state a claim upon which relief may be granted.

2. That this order shall be effective on May 6, 1998

Murray, Schemenauer, and Drainer, CC., Concur. Lumpe, Ch., Crumpton, C., Absent.

Roberts, Chief Regulatory Law Judge

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**In the Matter of an Investigation Concerning the Continuation or Modification of the Primary Toll Carrier Plan When IntraLATA Presubscription is Implemented in Missouri.\***

*Case No. TO-97-217*

*Decided May 7, 1998*

**Evidence, Practice and Procedure § 3.** In addition to the evidence adduced on the record, the Commission must also consider legislative mandates and the public interest. The Commission determined that the public interest and the weight of the evidence, including recent legislative action, supported the replacement of the Primary Toll Carrier Plan with an Originating Responsibility Plan.

**ORDER DENYING APPLICATIONS FOR REHEARING AND STAY  
AND CLARIFYING REPORT AND ORDER**

The Commission issued an order on March 12, 1998, setting an implementation schedule for intraLATA presubscription and the replacement of the Primary Toll Carrier Plan with an Originating Responsibility Plan (ORP). The order also established a Technical Committee to consider specified technical issues and to bring to the Commission any other issues that need resolution in the course of implementation of presubscription and an ORP. The order included a procedural schedule for the Technical Committee meetings and reports and other filings related to implementation. On March 23, the Small Telephone Company Group (STCG), the Mid-Missouri Group (MMG), and the Office of the Public Counsel (OPC) filed motions for rehearing of the Commission's order. STCG and MMG also asked that the Commission stay the effectiveness and enforcement of the order. Southwestern Bell Telephone Company (SWBT) filed a response on April 2 and the Commission Staff (Staff) filed a response on April 16. Staff's response discussed implementation scheduling conflicts but addressed none of the substantive issues raised by the applications for rehearing.

Section 386.500, RSMo 1994, provides that the Commission may grant rehearing if it finds there is sufficient reason for rehearing. The Commission has reviewed the motions filed and responses, and finds that there is not sufficient reason for rehearing the case as a whole. However, the Commission finds that some clarification of its order is needed. In addition the Commission will address the following specific allegations raised by the parties.

**Discussion of Issues Raised by the Parties:**

**1. Abandonment of Service**

MMG argues that the Commission, by its order directing the phasing out of the Primary Toll Carrier Plan (PTC Plan), has allowed the Primary Toll Carriers (PTCs) to abandon service without complying with Section 392.460, RSMo 1994.<sup>1</sup>

See page 288 for another order in this case. In addition, see page 291, Volume 6 MPSC 3d, for another order in this case.

\*On May 14, 1998, this case was appealed to Cole County Circuit court (CV198-666cc)

<sup>1</sup> All further statutory citations will be to the Revised Statutes of Missouri 1994, unless otherwise stated.

That statute provides that no company can abandon service unless the Commission finds it would not deprive any customers of basic local or basic interexchange service or access thereto, and is not contrary to the public interest. Since the Commission has designated the Secondary Carriers (SCs) as the carriers of last resort for intraLATA toll, no customer will lose access to interexchange services as a result of the Commission's order. The ILECs remain under a duty to provide basic local service and, therefore, no customer will lose access to basic local service as a result of the Commission's order. Accordingly, there has been no violation of Section 392.460.

**2. Adequacy of the Evidence to Support the Commission's Findings**

STCG and MMG argue that a number of the Commission's findings are not supported by competent and substantial evidence. In particular, MMG argues that the Commission's findings that the financial burden of the PTC Plan on the PTC is substantial, and that eliminating the PTC Plan would not impose a substantial financial burden on SCs, are not supported by the evidence. SWBT states in response that the Commission appropriately found that the weight of the evidence supported phasing out the Plan. SWBT extensively discussed certain record evidence in its motion.

First, the Commission made no specific finding that the financial burden on the PTCs is substantial. Rather, the Commission found that the continued existence of the PTC Plan is incompatible with a competitive environment and is discriminatory to PTCs. The Commission did find that the effort to adduce evidence demonstrating financial impact in this case, although valiantly made, was ineffectual to show that SCs would suffer a serious financial loss were the PTC Plan replaced.

STCG argues that the evidence is undisputed that the PTC Plan would "work fine" as long as the requirement that 1+ traffic be passed to the PTC is eliminated. Although the PTC Plan might "work fine" for SCs and their customers with this simple limitation, the Commission does have competing policy considerations in mind. In particular, the Telecommunications Act of 1996 (the Act) and Senate Bill 507 have the purpose of creating a competitive environment and a level playing field. The Commission has also found that the PTC Plan is discriminatory to PTCs. See page 12 of this order, "Subsidization Issue." Retaining the Plan, while eliminating the requirement that SCs pass all their 1+ traffic to the PTCs, would destroy the *quid pro quo* on which the PTC Plan is premised.

STCG argues that the proponents of terminating the PTC Plan failed to meet their burden of proof and failed to show good cause for dismantling the Plan as required by Section 386.430. That statute requires a party seeking to set aside an order of the Commission to show by clear and satisfactory evidence that the order is unreasonable or unlawful.

The evidence at the hearing indicates that the PTC Plan was not meant to be a permanent solution to the provision of intraLATA toll. The parties originally proposed a five-year term which was rejected by the Commission. By Commission



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order the Plan was to remain in effect until the Commission replaced it with a better solution. (Tr. 607-608.) In addition to the evidence adduced on the record, the Commission must also consider legislative mandates and the public interest. The Commission in its role as trier of fact has determined that the public interest and the weight of the evidence, including recent legislative action, support the replacement of the PTC Plan with ORP. This decision is within the Commission's discretion and was within the contemplation of the parties and the Commission when the Plan was originally approved.

**3. Adequacy of the Commission's Findings of Fact**

STCG and MMG argue that the Commission's findings of fact are conclusory and so insufficient that a reviewing court could not discharge its duty. The Commission would be willing to review and clarify particular findings but STCG and MMG have not specified which of the Commission's findings is insufficient. This allegation is too general to constitute sufficient reason for rehearing.

**4. Balloting**

STCG and MMG complain that the Commission's findings that balloting would be more costly than customer notification, and that balloting will cause delay toward implementation, are unsupported by the record. The Commission did not make either of those findings but instead determined that balloting is not "necessary" because of the assignment of intraLATA carrier of last resort (ITCOLR) responsibility to the SCs, and in light of "the costs and delay that *may be* involved" [emphasis added] in using balloting. See Report and Order, p 9, & 3. Given the fact that the Commission has neither required nor prohibited balloting, these allegations, even if true, do not present sufficient reason for rehearing. The Commission wishes to make it clear that its order requires that, at a minimum, companies provide customer notice.

**5. Consideration of Related Issues**

OPC and MMG argue that the Commission's decision is factually and legally incorrect in ordering implementation of presubscription on the designated schedule because "COS, local calling scopes, and universal service should all be decided first." Neither party cites any authority for this proposal. Furthermore, Case No. TW-97-333 has already been decided, and since all these issues are intimately intertwined and heavily implicated in the implementation of telecommunications competition in Missouri, the same argument could be made in the COS, calling scopes, and universal service cases as well. Accordingly, no action at all could be taken to implement competition in the state or to comply with the Act if the Commission were to take seriously OPC and MMG's complaint. This allegation does not present sufficient reason for rehearing.

**6. Contacts Between the Commission and Advisory Staff**

STCG, MMG, and OPC all make various complaints about communications between the Commission and its Advisory Staff regarding this case. OPC confines its participation to joining the complaint that the parties did not have the opportunity

to cross-examine the Advisory Staff members. The Advisory Staff is under the direct supervision of the Commission. Parties have no more right to cross-examine the Commission's technical advisors than to cross-examine the Commission itself. The Commission's intention in establishing an Advisory Staff, set apart from other Staff members, was to make technical expertise available during the course of its deliberations.

MMG and STCG complain that the Commission engaged in conversation with Advisory Staff outside the presence of a court reporter and improperly allowed Advisory Staff opinions to substitute for the judgment of the Commission. They complain that the Commission's use of Advisory Staff constitutes an unauthorized delegation of its decision-making authority. The support these parties offer is the general statement that "the Commission adopted Staff's position on virtually each and every contested issue." (MMG's application, p. 19; STCG's application, p. 5.)

SWBT points out that Telecommunications Department Staff members filed testimony, took the stand, and were subject to cross-examination. SWBT argues that STCG and MMG failed to present any evidence to support their claims of improper *ex parte* contact.

Section 386.500, which governs rehearings before the Commission, states that an application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable." MMG and STCG have failed to set out its complaints with specificity: they have not identified particular Advisory Staff members they believe communicated with the Commission; they have not cited to particular alleged conversations by date or by substance; they have not pointed to any particular recommendation or opinion on which the Commission appears to have relied; they have not indicated what findings of the Commission have been improperly influenced; and they have not specified in what way the use of technical expertise from the Advisory Staff has prejudiced them. In short, the allegations are too general and conclusory to support a grant of rehearing.

The Commission did not, at any point, rely on information outside the record in making its decision, nor did the Commission ask any Advisory Staff member to make a decision on its behalf. Furthermore, the Commission is specifically authorized to delegate any of its functions to Commission employees, provided that any resulting order, rule, or regulation is "authorized or approved" by the Commission.<sup>2</sup> There was nothing improper in the Commission's contacts with its Advisory Staff members.

The Commission is convinced that all of the parties were aware of the involvement of the Advisory Staff at the time of hearing. It is unfortunate that, if these parties had objections to the Commission making use of technical expertise in its review of the case, such objections were not made at the time of hearing.

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<sup>2</sup> §386.240.

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**7. Definition of COLR**

MMG argues that the Commission has erroneously defined carrier of last resort responsibility for interexchange service as being set out in Section 386.020(6), RSMo Supp. 1997. There is no such definition in the Report and Order issued on March 12. The Commission's only reference to this statute is to agree with GTE Midwest Incorporated (GTE) that the term had been incorrectly used by some witnesses in this case. See Report and Order, p. 17, & 3.

**8. Effect of Section 392.185, RSMo Supp. 1997**

MMG argues that the Commission's decision violates the legislative directions set out in Section 392.185, RSMo Supp. 1997. Specifically, MMG cites to Sections 392.185(4), (6) and (7) which provide that Chapter 392 be construed to: ensure that customers pay only reasonable charges for telecommunications services; allow competition to function as a substitute for regulation only when it is consistent with the protection of ratepayers and otherwise consistent with the public interest; and promote parity of urban and rural telecommunications services. MMG and STCG argue that the Commission's decision to replace the PTC Plan is not in the public interest because it will not result in "lower toll bills to rural residents." OPC argues that eliminating the Plan will lead to pressure to increase local rates.

The Commission's order made note of the parties' efforts to calculate the likely financial impact of phasing out the PTC Plan. See Report and Order, p. 17, & 2. However, the Commission also pointed out that there are many uncertainties that could affect the validity of the calculations. The Commission stated that it was not persuaded that designating the SCs as ITCOLR for their own local exchange customers will impose any undue financial burden upon them, or necessarily lead to a need to increase local service rates. In short, the Commission found the evidence insufficient to lead to the conclusion that elimination of the PTC Plan would increase rural toll rates or basic local exchange rates.

Although Section 392.185(7) provides that the Commission should implement Chapter 392 in a way that would "promote parity of urban and rural telecommunications services," the parties point to no legislative directive that would require the lowering of rural toll rates as a condition of implementation of intraLATA presubscription. Parity of services does not necessarily imply parity of rates.

The Commission's decision does not mandate any changes in toll or basic local exchange rates. Evaluation of the credibility of evidence is within the province of the Commission; the Commission was persuaded that the parties could not accurately evaluate the financial impact at this time. The Commission also determined that its decision was in the public interest and in compliance with the Act. The allegations by MMG, STCG, and OPC do not present sufficient reason for rehearing.

**9. Exclusion of SWBT Exchanges from the Requirement to Implement IntraLATA Presubscription**

STCG and MMG allege that the Commission's order is discriminatory because it requires intraLATA presubscription in every exchange except for SWBT exchanges and cites to 47 U.S.C. 271(a)(2)(B), and to the federal and Missouri constitutions. In its responsive pleading SWBT points out that state commissions are prohibited by the Act from requiring a Bell Operating Company (BOC) to implement presubscription before February 8, 1999. SWBT also points out that none of the parties have asked the Commission to order presubscription for SWBT exchanges in this case.

The authority cited by STCG and MMG, i.e., 47 U.S.C. 271(a)(2)(B), proves SWBT's point that the state commissions are not permitted to require BOCs to implement presubscription before the earlier of February 8, 1999, or the BOCs' entry into the in-region interLATA toll market. Neither of those events has occurred and, in addition, SWBT is correct in pointing out that no party requested that intraLATA presubscription be ordered in SWBT exchanges in the context of this case. These allegations do not present sufficient reason for rehearing.

**10. Informal Referral Process**

STCG alleges that the informal referral process set up in the Commission's order "might be" unreasonable, unlawful, or unconstitutional depending on the issue resolved by this means. STCG also argues that the process allows an unauthorized procedure and violates the Commission's *ex parte* rule. MMG makes similar allegations. Both parties cite authority that is so general that it is unclear to the Commission what exactly the complaint is on these points. These allegations do not present sufficient reason for rehearing.

**11. Invitation to Rate Revision**

OPC complains that the Commission's order "invites" SCs to seek rate revisions. Taking OPC's allegation as absolutely true, the Commission fails to see what harm there would be in allowing companies to take advantage of existing procedures for rate adjustments. In fact the Commission discussed the extensive, but contradictory, evidence offered regarding the impact any change in the PTC Plan would have on the companies involved and concluded that the evidence did not support rate rebalancing in the context of the PTC case. The Commission did not order SCs to seek rate increases but pointed out that the existing regulatory processes are adequate to maintain the financial stability of SCs, and that the introduction of a competitive market also acts as a control mechanism to regulate competitive service rates. This allegation does not present sufficient reason for rehearing.

**12. Regulatory Taking Without Just Compensation**

STCG and MMG argue that the Commission's finding that SCs must assume intraLATA toll responsibilities and improper taking without just compensation. The position of these parties during the hearing was that eliminating the PTC Plan would result in unbearable financial burdens on SCs and they attempted to quantify that

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burden. However, it was made clear on cross-examination that many uncertainties could affect the outcome of these calculations. Accordingly, the Commission has properly found that there is not sufficient evidence to show what adverse impact, if any, there would be in the long run on any party as a result of the phasing out of the PTC Plan. In addition, the Commission has pointed out in its Report And Order that there are in place avenues of relief should an SC experience unbearable financial burden. See discussion above.

**13. Revenue Neutrality**

STCG, MMG, and OPC all argue that if the PTC Plan is not eliminated on a revenue-neutral basis, the Commission will have reduced rates without considering all relevant factors. The Commission has not issued an order directly affecting revenue neutrality but has asked the Technical Committee to investigate the possible approaches to achieving revenue neutrality. The complaint is, therefore, premature. The same reasoning applies to MMG's argument that the Commission's decision will eliminate revenues produced by tariffed and statutorily presumed lawful rates.

**14. Staff Report**

STCG argued that the Commission's reliance on the Staff report (the Report) filed in February of 1997 in Case No. TO-97-220 was improper because it was not marked as an exhibit or admitted into evidence. The Report STCG complains of was referred to in SWBT's opening statement and also during cross-examination. SWBT's witness, Mr. Taylor, responded to questions from the Regulatory Law Judge regarding the Staff Report. (Tr. 640-642.) After those questions, STCG conducted its recross-examination of Mr. Taylor. (Tr. 656-671.) At no time did STCG object to the use of, or reference to, the Report. In addition, STCG made no objection to Mr. Taylor's answers, nor did STCG's counsel attempt to address the issue of the Report on recross-examination.

The Report at issue was a part of Case No. TO-97-220. The Report was filed in response to a Commission directive and placed in the official case file. No objections to the Report were raised at its filing or at the time that the Commission issued its Report and Order resolving Case No. TO-97-220 on May 22, 1997. Furthermore, Case No. TO-97-220 was consolidated for procedural purposes with TO-97-217. Accordingly, the Staff Report is a part of the official case file and a proper subject of official notice. Finally, everything of substance that was discussed in the Report was also discussed at the hearing of this case, on the record, by Staff's witness Childers, and by SWBT's witness Taylor. The Commission is not convinced that any prejudice to STCG could have resulted from a failure to mark the Staff report as an exhibit or take official notice of it in the context of the evidentiary hearing, particularly in light of the fact that STCG's counsel had the opportunity to object or to cross-examine regarding the Report. To the extent that any clarification or reformation of the Commission's order should be necessary, the Commission hereby takes official notice of the Staff report filed in Case No. TO-97-220 on February 5, 1997.

**15. Subsidization Issue**

OPC argued, and STCG and MMG indirectly supported this argument, that the Commission improperly found that the PTCs are subsidizing the SCs and that the Commission used this finding as a basis for ending the Plan.

The Commission did not make any finding in this case regarding whether the PTCs are subsidizing the SCs. Rather, the Commission found that the Plan is discriminatory to PTCs and incompatible with a competitive environment. As clarification of this finding, the Commission hereby states that the evidence on this record demonstrates that the Plan is discriminatory to the PTCs by requiring them to provide services they are unwilling to provide, requiring them to provide services for which they do not receive brand recognition, requiring them to provide services to end users with whom they do not have a direct customer relationship, and requiring them to provide services on routes, some of which are unprofitable by admission of all parties. This allegation does not present sufficient reason for rehearing.

**16. Technical Committee**

MMG argues that the assignment of unresolved issues to a technical committee violates the requirement that the Commission decide all issues in a single report and order. MMG makes no citation to authority and the Commission is aware of none that would support this allegation. MMG argues that the assignment of issues to a technical committee is an unlawful delegation of the Commission's decision-making authority, again without citation to authority.

The technical committee has been directed to provide reports to the Commission on particular issues and the Commission retains its power to approve any reports and to adopt or reject any recommendations made. The Commission is not making a delegation of authority by requiring the parties to work together to propose solutions to problems that the parties themselves insist will be associated with implementing the ORP. Furthermore, STCG's witness testified at the hearing that the use of a technical committee would be appropriate to consider such issues as the controversy over Feature Group C versus Feature Group D, and "some of the issues regarding interconnection and calculation and transport and so forth, and to come back . . . to the Commission with a report as to how those issues should be dealt with." (Tr. 1386-1387).

STCG and MMG also allege that the Commission's direction to the companies to assign a technical committee representative exceeds its statutory authority and constitutes a taking over of management functions. Again, no authority is cited for this proposition. If the Commission had directed a company to assign a particular individual to this committee, this allegation might have merit. However, under the circumstances it has none.

**Clarification Issues****A. IXC Certification of SCs**

MMG, STCG, and OPC argue that the Commission's direction to SCs to apply for an IXC certificate invade SC management rights and exceed the Commission's

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authority. On reconsideration, the Commission agrees that it may have been overzealous in requiring SCs to apply for interexchange certificates. It is within the Commission's discretion to determine what authority is needed to act as ITCOLR and the Commission's opinion is that the SCs already have the authority they need to provide this service. The Commission would also like to point out that obtaining IXC certification would not have the result of forcing an SC to provide statewide interexchange services. If that were so, there would have been considerably less testimony in this case about the willingness of Missouri interexchange carriers to enter the toll market in SC exchanges.

The evidence in this case was that most SCs already provide service to the boundaries of their service area. (Taylor Rebuttal Testimony, page 6, Tr. 1407). There was testimony to the effect that certain SCs own all of the interexchange facilities between their own exchanges so that they are already providing interexchange service to this extent. (Tr. 1413-1415). Some SCs offer interexchange services through affiliates as well. (Tr. 91-92, 1425-1426.)

The Commission will amend its order by removing the requirement that SCs apply for IXC certification. In lieu thereof, and in order to clarify the Commission's thinking on this point, the Commission finds that secondary carriers already have the necessary authority to provide toll to the exchanges in which they provide service as incumbent local exchange carriers.

**B. June 1, 1998 Beginning Implementation Date**

STCG and MMG complain that the Commission's order is vague and unenforceable because it requires implementation of presubscription "to begin on June 1, 1998" and requires companies to submit implementation plans by June 15. Staff also brought up the problem of a June 1 start date for implementation and June 15 deadline for submission of a plan.

The Commission believes this issue deserves some attention. The intention of directing that implementation begin on June 1 was to coordinate this implementation schedule with the schedule of phasing out of COS routes ordered in TW-97-333. Companies with COS exchanges cannot implement presubscription before June 1. The order issued in TW-97-333 on February 17, 1998 provides that "Community Optional Calling Service shall be phased out on or after June 1, 1998 and that each Community Optional Service route shall be eliminated upon the implementation of intraLATA presubscription into either the target or the petitioning exchange of that route". Companies that are capable of implementing intraLATA presubscription in a particular exchange should do so after June 1. A company with a COS route in an exchange that is either a petitioning or target COS exchange must eliminate COS in that exchange upon the introduction of intraLATA presubscription. One purpose of using June 1 as a beginning date in this case was to avoid requiring a company with a COS route to provide intraLATA presubscription before it was required to eliminate its COS offering in compliance with Case No. TW-97-333.

Another purpose of using June 1 as a start date was to permit companies who already have an approved plan to proceed. Sprint Missouri, Inc. d/b/a Sprint's implementation plan was approved in May of 1997, Case No. TO-97-253; GTE's plan was approved on June 20, 1997 in Case No. TT-96-398. Obviously, none of the ILECs has been, or remains, under a prohibition against filing an implementation plan. There is nothing in any of the Commission's orders that would prevent a company from filing an implementation plan prior to 5:00 p.m. on June 15.

Staff's response included an extensive discussion of various scheduling matters but there was little in the response that had not already been considered by the Commission in its deliberations. In addition to the companies who already have approved implementation plans, there may be companies who are not technologically capable of conforming to the schedule because of incomplete modernization. The Commission specifically directed that any company not able to comply with the schedule must file a pleading explaining why it needs additional time. Previously approved plans and modernization schedules would fall within the category of reasons a company may present to the Commission as justification for an extension of time.

As for the concern that confusion may result from having intraLATA presubscription implemented in some exchanges and not others, the simple reply is that the telecommunications industry has always existed in a context in which services and access to services varied from company to company. COS is not available in every exchange, 1+ access for intraLATA interexchange service is available in some exchanges and not others, even single-party service is not ubiquitously available. The fact that the Commission's order in the PTC case does not instantly create the ideal situation of universal access to all services and a purely competitive environment does not mean there should be no attempt to make progress toward a more ideal situation. Furthermore, the type of issues raised in Staff's response are precisely the type of issues the Commission expected to be raised in the Technical Committee conferences.

Staff expressed an opinion that the Commission should open a new case in order to require SWBT to provide intraLATA presubscription on the same schedule as other parties. The expression of an opinion in this context does not clearly express a request for Commission action. If the Staff wishes to file a motion regarding SWBT's implementation of intraLATA presubscription it may do so.

### **C. Staff Report**

As discussed above, the Commission finds that it is appropriate to take official notice of the Staff Report filed on February 5, 1997, in Case No. TO-97-220.

### **Applications for Stay of the Commission's Order**

MMG and STCG requested that the Commission stay the effectiveness and enforcement of its order. STCG specified no grounds for its request; MMG stated that great or irreparable harm or damage would result to the MMG SCs and their customers unless a stay were granted. MMG did not set out any facts in support of its request. SWBT proposes that MMG and STCG have failed to meet the criteria for



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a stay of an administrative order, citing to State ex rel. Director of Revenue v. Gebbert, 925 S.W.2d 838 (Mo. banc 1996).

The Gebbert case cited by SWBT holds that the criteria for granting a stay of an administrative order are substantially similar to those for a circuit court's grant of an injunction, i.e., the applicant's probability of success on the merits, the threat of irreparable harm to the applicant unless a stay is granted, the balance between this harm and the injury that a stay would inflict on other interested parties, and the public interest.<sup>3</sup> MMG and STCG have failed to make the necessary allegations or demonstrate the facts that would warrant a stay.

*IT IS THEREFORE ORDERED:*

1. That the applications for rehearing and stay filed by the Office of the Public Counsel, the Small Telephone Company Group, and the Mid-Missouri Group are denied except as clarified in the body of this order and in the ordered paragraphs below.

2. That the Commission takes official notice of the Staff Report filed in Case No. TO-97-220 on February 5, 1997.

3. That the Commission's order is amended to eliminate the requirement that secondary carriers file an application for a certificate of service authority to provide interexchange telecommunications services. In lieu thereof the Commission has found that secondary carriers already possess all the necessary service authority to provide intraLATA toll service to the exchanges in which they provide services as incumbent local exchange carriers.

4. That the Commission's order is amended to indicate that no company is required to implement intraLATA presubscription in exchanges involved in COS routes before June 1, 1998, in compliance with the Commission's February 17, 1998 order in Case No. TW-97-333.

5. That this order shall become effective on [date issued].

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur.

Wickliffe, Deputy Chief Regulatory Law Judge

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<sup>3</sup> 925 S.W.2d 838, 839.

**In the Matter of the Application of Green Hills Communications, Inc., for a Certificate of Service Authority to Provide Local Exchange and Intrastate Interexchange Telecommunications Services Within the State of Missouri.**

*Case No. TA-98-157*  
*Decided May 21, 1998*

**Telecommunications §§ 3.2, 40.** The Commission will grant a certificate to provide interexchange telecommunication services to Green Hills Communications, Inc., classify it and its services as competitive, and waive requested statutes and rules despite concerns raised by Southwestern Bell Telephone Company with respect to the Primary Toll Carrier Plan because Green Hills Communications, Inc., does not presently have a tariff permitting it to provide interLATA toll services and the issues raised by Southwestern Bell Telephone Company with respect to the Primary Toll Carrier Plan are better addressed when and if Green Hills files such a tariff.

**APPEARANCES**

*Paul A. Boudreau*, Attorney at Law, Brydon, Swearngen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102, for Green Hills Communications, Inc.

*Leo J. Bub*, Attorney at Law, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Penny G. Baker*, Deputy General Counsel, and *Marc Poston*, Assistant General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

REGULATORY LAWJUDGE: Elaine E. Bensavage.

**REPORT AND ORDER**

**Procedural History**

On October 10, 1997, Green Hills Communications, Inc. (Green Hills) filed an application requesting a certificate of service authority to provide intrastate interexchange and local exchange telecommunications services in the State of Missouri under Sections 392.410-.450 RSMo 1994 and RSMo Supp. 1997<sup>1</sup>. Green Hills asked the Missouri Public Service Commission (Commission) to classify it as a competitive company and waive certain statutes and rules as authorized by Sections 392.361 and 392.420. Applicant is a Missouri corporation, with its principal office located at 7926 N.E. State Route M, Breckenridge,

<sup>1</sup> All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated.

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Missouri 64625. Green Hills is a wholly-owned subsidiary of Green Hills Telephone Corporation (Green Hills Corp). The Commission issued a Notice of Applications and Opportunity to Intervene on October 28, which set a deadline of November 12 for intervention requests.

Southwestern Bell Telephone Company (SWBT) filed a timely application to intervene. The Commission issued its Order Granting Intervention and Suspending Tariff on November 18, which granted intervention to SWBT and suspended the tariff filed by Green Hills for a period of 120 days from November 24 to March 24, 1998. The order also set an early prehearing conference for November 3, which was held as scheduled. The Commission adopted a procedural schedule on December 15, which was subsequently modified. A Protective Order was issued on January 28, 1998. An evidentiary hearing was commenced on February 13. Thereafter one set of simultaneous briefs was filed by the various parties. The tariff was further suspended from March 24 to May 30.

#### Background

SWBT raised a number of issues in its application for intervention, as follows: (1) Whether Green Hills' provision of the proposed services is governed by the Primary Toll Carrier (PTC) Plan; (2) whether a corporate affiliate of a local exchange company (LEC) operating as a secondary carrier (SC) under the PTC Plan should be permitted to offer services in competition with the PTC; (3) if so, what effect such competition will have on the PTCs offering toll services in those areas; (4) whether Green Hills should be reclassified as a PTC by virtue of its venture into the interexchange business; and (5) whether affiliate transaction procedures similar to those required of SWBT should apply to Green Hills and its affiliate, Green Hills Corp. SWBT also alleged that the PTC Plan could be adversely affected, since Green Hills could be expected to serve the most profitable routes, while leaving SWBT or other PTC Plan participants with noncompensatory routes.

In suspending Green Hills' tariff, the Commission noted at least two prior cases in which SWBT raised similar concerns. Both cases were resolved without recourse to a hearing.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Based upon the evidence presented by the parties, the ultimate question in this case is whether Green Hills should be granted both requested certificates, or whether

the intrastate interexchange certificate should be restricted or conditioned. SWBT has argued that Green Hill's authority should be restricted to prohibit the provision of switched intraLATA interexchange services, or that the authority to provide switched intraLATA interexchange services should be conditioned upon SWBT being relieved of its PTC obligations prior to Green Hills' exercise of this authority.

Green Hills claims that it has met the requirements for the issuance of certificates to provide intrastate interexchange and nonswitched local exchange services, and thus should be granted all the relief it requested in its application. It claims that since the Commission has previously granted similar certificates to affiliates of LECs which are SCs, it would be inequitable for the Commission not to do so in this instance. Green Hills further maintains that SWBT's concerns have been rendered moot by its commitment to provide a copy of its tariff filing to SWBT should it seek to provide switched intraLATA interexchange services in the future, and by the Commission's decision in the PTC docket, Case No. TO-97-217.

The Staff of the Commission (Staff) concurs that Green Hills has met the requirements for the issuance of certificates to provide intrastate interexchange and local exchange services, and recommends that the Commission grant to Green Hills all the relief requested. The Office of the Public Counsel (Public Counsel) supports Staff's position. SWBT requests that the Commission restrict the grant to Green Hills of a certificate for intraLATA interexchange services to nonswitched services, or in the alternative, that the Commission condition the grant of full interexchange authority on SWBT's being relieved of its PTC obligations prior to Green Hills exercising intraLATA toll service authority. SWBT claims that under the PTC Plan, it has historically paid out more in access payments than it has received in revenues from Green Hills Corp., which is an SC under the Plan. Thus it claims that its customers provide a subsidy to the customers of Green Hills Corp., which could be transferred to or made available for the support of Green Hills, a direct competitor of SWBT. This anomaly would be exacerbated by the fact that Green Hills would not have to serve all the customers in the territory of Green Hills Corp., but could pick and choose the more profitable customers, since Green Hills Corp. has the billing records which would enable it to identify those customers. Green Hills could cherry-pick the more profitable customers in SWBT's territory as well.

SWBT maintains that the Commission has never addressed the question of whether it is in the public interest to permit an SC or its affiliate to offer services in competition with a PTC. SWBT distinguishes a number of cases cited by Green Hills for the opposite proposition. While SWBT acknowledges that Green Hills does not currently have a provision in its tariff for intraLATA toll services, SWBT contends that this certification proceeding is the proper vehicle to address any future request by Green Hills to provide intraLATA service. In addition, SWBT also stresses that although the Commission has issued a decision in the PTC docket, Case No. TO-97-

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217, that decision is subject to rehearing or appeal, and the PTC Plan will be dismantled over time.

The Commission finds that the application of Green Hills meets the requirements for the issuance of certificates of service authority to provide intrastate interexchange and nonswitched local exchange telecommunications services. SWBT does not generally dispute Green Hills' qualifications, but instead focuses on its status as an affiliate of an SC. SWBT also correctly distinguishes the cases cited by Green Hills for the proposition that since the Commission has previously granted certificates to affiliates of LECs which are SCs, the Commission must do the same in this instance. In none of the cases cited did the Commission ever explicitly address the concerns raised by SWBT in this case.

The Commission also finds that the tariff submitted by Green Hills does not currently contain provisions for the offering of intraLATA toll. Ordinarily restrictions or conditions on the issuance of a certificate of service authority are addressed in the certification procedure rather than during a later tariff process. This generally protects both applicants and parties opposed to an applicant's certification. For example, an applicant is protected from an opposing party getting a "second bite of the apple" by contesting a later tariff filing, in the event the opposing party missed an intervention deadline in the certification procedure, or was denied intervention. Likewise, an opposing party is protected from being required to monitor all of the applicant's tariff filings into the indefinite future. However, in the present case the Commission finds, for the reasons set forth below, that SWBT's concerns should be addressed at the time Green Hills files a tariff to provide intraLATA toll services.

The witness for Green Hills testified at the hearing that a certificate which would encompass the provision of intraLATA interexchange service was necessary in order for it to provide the telemedicine and distance learning services it contemplated, and the Commission so finds. The Commission has in the past granted limited certificates, such as certificates to provide only interLATA interexchange service, which were granted to Chariton Valley Long Distance Corporation and ALLTEL Communications, Inc. in Case Nos. TA-96-314 and TA-97-41 respectively. However, in this instance a certificate which would grant Green Hills the authority requested and still address SWBT's concerns might be unnecessarily complicated in its wording: for example, "a certificate to provide full intrastate interLATA interexchange services and intrastate intraLATA interexchange services limited to dedicated, nonswitched interexchange private line services."

In addition, if the Commission were to issue such a certificate, Green Hills would be required to bear additional expense to file a later application for switched intraLATA interexchange authority. In contrast, because Green Hills does not have tariff provisions to offer intraLATA toll and could not legally do so, there is no current harm to SWBT's interests. Moreover, Green Hills offered at the hearing to mail a copy

of any tariff provisions for intraLATA toll services to SWBT if it files such provisions with the Commission in the future. Finally, the Commission's decision in the PTC case, Case No. TO-97-217, anticipates that SCs like Green Hills Corp. will in the future function as their own PTCs.

The Commission is aware, as has been pointed out by SWBT, that its decision in the PTC case is subject to appellate review, and that the Commission's decision contemplates that the PTC Plan will be phased out over time. The Commission is also aware of the need to have an alternative in place to provide intraLATA toll service to the customers of Green Hills Corp., who are currently served by SWBT as the PTC, so that there is no gap in the provision of intraLATA toll to those customers.

The Commission determines that the most efficacious method to consider the link between Green Hills' provision of intraLATA toll and SWBT's release as a PTC for Green Hills Corp. is to require Green Hills to provide SWBT with a copy of any tariff sheets it files with the Commission which would permit it to provide intraLATA toll services on the same day they are filed with the Commission. This will provide SWBT with adequate notice in which it may ask the Commission to condition approval of the tariff sheets upon SWBT being released from its PTC obligations, or otherwise seek suspension of the tariff. This may furnish a more appropriate route, since SWBT does not actually contest that Green Hills meets the requirements for intrastate interexchange certification, only that there are compelling policy reasons why Green Hills should not be allowed to provide a certain class of services, intraLATA toll, until such time as SWBT is relieved from the duty to provide those same services.

Under the facts presented here, the Commission determines that it would be more prudent to wait until Green Hills files tariff provisions to provide intraLATA toll before deciding whether or at what juncture SWBT should be relieved of its obligation to provide intraLATA toll to the customers of Green Hills Corp. under the PTC Plan. It is likely that the Commission will have more and better information upon which to base its decision, as some of the uncertainty regarding the Commission's decision in the PTC case will be resolved with time and some progress may be made toward a resolution of technical problems associated with the dismantling of the PTC Plan. Nothing in this Report And Order shall be construed as a finding or prejudgment by the Commission of whether any tariff sheets filed by Green Hills Communications, Inc. for the provision of intraLATA toll services should be approved, or whether conditions should be attached to any such approval. Likewise, nothing in this Report And Order shall be construed as limiting the Commission's authority to move forward with the dismantling of the PTC Plan in Case No. TO-97-217, as it pertains to Green Hills Corp.

The Commission finds that competition in the intrastate interexchange and nonswitched local exchange telecommunications markets is in the public interest and Green Hills should be granted certificates of service authority. The Commission finds

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that the services Green Hills proposes to offer are competitive and Green Hills should be classified as a competitive company. The Commission finds that waiving the statutes and Commission rules set out in the ordered paragraph below is reasonable and not detrimental to the public interest.

The Commission finds that Green Hills' proposed tariff details the services, equipment, and pricing it proposes to offer, and is similar to tariffs approved for other Missouri certificated interexchange and nonswitched local exchange carriers. The Commission finds that the proposed tariff filed on October 10, should be approved to become effective on May 30.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

SWBT and Green Hills Corp. are telecommunications companies and public utilities as defined in Sections 386.020(51) and 386.020(42), RSMo Supp. 1997, and as such are subject to the jurisdiction of the Commission pursuant to Chapters 386 and 392 of the Missouri Revised Statutes. Green Hills, if granted the certificates requested, will become a telecommunications company and public utility as defined in Sections 386.020(51) and 386.020(42), RSMo Supp. 1997, and as such will be subject to the jurisdiction of the Commission pursuant to Chapters 386 and 392 of the Missouri Revised Statutes.

Section 392.410.2, RSMo Supp. 1997 requires any telecommunications company seeking to provide interexchange telecommunications service to apply for and receive a certificate of interexchange service authority pursuant to Section 392.410.1, RSMo Supp. 1997 prior to offering such service. Similarly, Section 392.410.2, RSMo Supp. 1997 also requires any telecommunications company seeking to provide local exchange telecommunications service to apply for and receive a certificate of local exchange service authority pursuant to Section 392.420 prior to offering such service. Likewise, Section 392.440 requires any telecommunications company wishing to offer the resale of local exchange or interexchange telecommunications service to obtain a certificate of service authority first.

The Commission shall approve an application for a certificate of local exchange or interexchange service authority upon a showing by the applicant, and a finding by the Commission, that the grant of such authority is in the public interest. § 392.430. The Commission has found that the public interest would be served by allowing Green Hills to provide interexchange and nonswitched local exchange telecommunications services, therefore the Commission concludes that Green Hills should be granted certificates of service authority to provide interexchange and nonswitched local exchange service. The Commission further concludes that the balance of the equities favors deferring a decision on whether Green Hills should be allowed to provide intraLATA toll services, or whether conditions should be attached to any such allowance, until such time as Green Hills files tariff sheets to offer such services.

*IT IS THEREFORE ORDERED:*

1. That Green Hills Communications, Inc. is granted a certificate of service authority to provide intrastate interexchange telecommunications services in the State of Missouri, subject to all applicable statutes and Commission rules except as specified in this order.

2. That Green Hills Communications, Inc. is granted a certificate of service authority to provide local exchange telecommunications services in the State of Missouri limited to dedicated, nonswitched local exchange private line services, subject to all applicable statutes and Commission rules except as specified in this order.

3. That Green Hills Communications, Inc. shall provide Southwestern Bell Telephone Company with a copy of any tariff sheets it files with the Commission which would permit it to provide intraLATA toll services, on the same day that they are filed with the Commission.

4. That nothing in this Report And Order shall be construed as a finding or prejudgment by the Commission of whether any tariff sheets filed by Green Hills Communications, Inc. for the provision of intraLATA toll services should be approved, or whether conditions should be attached to any such approval.

5. That nothing in this Report And Order shall be construed as limiting the Commission's authority to move forward with the dismantling of the Primary Toll Carrier Plan in Case No. TO-97-217, as it pertains to Green Hills Telephone Corporation.

6. That Green Hills Communications, Inc. is classified as a competitive telecommunications company. Application of the following statutes and regulatory rules shall be waived:

## Statutes

392.240(1)	- ratemaking
392.270	- valuation of property (ratemaking)
392.280	- depreciation accounts
392.290	- issuance of securities
392.310	- stock and debt issuance
392.320	- stock dividend payment
392.340	- reorganization(s)
392.330, RSMo Supp. 1997	- issuance of securities, debts and notes

## Commission Rules

4 CSR 240-10.020	- depreciation fund income
4 CSR 240-30.010(2)(C)	- rate schedules
4 CSR 240-30.040	- Uniform System of Accounts
4 CSR 240-32.030(1)(B)	- exchange boundary maps
4 CSR 240-32.030(1)(C)	- record keeping



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| 4 CSR 240-32.030(2) | - in-state record keeping     |
| 4 CSR 240-32.050(3) | - local office record keeping |
| 4 CSR 240-32.050(4) | - telephone directories       |
| 4 CSR 240-32.050(5) | - call intercept              |
| 4 CSR 240-32.050(6) | - telephone number changes    |
| 4 CSR 240-32.070(4) | - public coin telephone       |
| 4 CSR 240-33.030    | - minimum charges rule        |
| 4 CSR 240-33.040(5) | - financing fees              |

7. That the tariff filed by Green Hills Communications, Inc. on October 10, 1997, is approved to become effective on May 30, 1998. The tariff approved is:

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8. That this order shall become effective on May 30, 1998.
9. That this case shall be closed on June 23, 1998.

Lumpe, Ch., Murray and Drainer, CC., concur. Crumpton, C., concurs with concurrence to follow. Schemenauer, C., not participating.

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**In the Matter of the Request of Southwestern Bell Telephone Company and Rock Port Telephone Company to Transfer South Hamburg Exchange to Rock Port Telephone Company.**

*Case No. TM-97-528*  
*Decided June 3, 1998*

**Telecommunications § 5.** The Commission found that the sale of the South Hamburg Exchange by Southwestern Bell Telephone Company to Rock Port Telephone Company was in the public interest, and approved it.

**ORDER AUTHORIZING SALE OF ASSETS**

Southwestern Bell Telephone Company (SWBT) and Rock Port Telephone Company (RPTC) filed a joint application on June 10, 1997 for Commission approval of a sale of the South Hamburg Exchange from SWBT to RPTC, pursuant to Section 392.300, RSMo 1994. SWBT is a Missouri corporation with its principal office at One Bell Center, St. Louis, Missouri 63101. RPTC is a Missouri corporation with its principal place of business at 107 Opp Street, Post Office Box 147, Rock Port, Missouri 64482. The South Hamburg Exchange lies wholly within Atchison County, Missouri, is the northwesternmost telephone exchange in the State of Missouri, and shares borders with the states of Nebraska and Iowa.

### Procedural History

The Commission issued an Order and Notice on June 13 that was sent to the publisher of each newspaper located in the County of Atchison, to members of the Missouri General Assembly representing the County of Atchison, to the presiding commissioner of Atchison County and to the mayors of all the municipalities within the South Hamburg Exchange. In its Order and Notice, the Commission established a deadline of July 14 for interested parties to intervene. No party requested intervention.

On October 31, SWBT and RPTC filed their First Amended Application. The Staff of the Commission (Staff) filed a response to the First Amended Application on November 14, in which it recommended approval of the application. On December 22, the Staff filed a Memorandum that recommended approval of the proposed sale of assets from SWBT to RPTC without further delay. The Office of the Public Counsel (OPC) filed Comments on December 23, suggesting that the Commission should not approve the proposed sale until it had either conducted a local public hearing or a survey of customers of the South Hamburg Exchange. The Commission conducted a local public hearing in Rock Port, Missouri on April 30, 1998.

### Discussion

According to the application, as amended, SWBT currently operates the South Hamburg Exchange through U.S. West's Hamburg, Iowa central office (Hamburg Exchange) under a 1942 contract between SWBT and the predecessor of U.S. West. RPTC is a cooperative that operates two exchanges adjacent and to the south of the South Hamburg Exchange: the Rock Port Exchange and the Watson Exchange.

SWBT and RPTC attached copies of their contract and RPTC's balance sheet to show what effects the proposed sale would have on RPTC. According to the terms of the contract, RPTC would purchase the South Hamburg Exchange, including all of its assets, for the sum of \$65,000 and the transaction would be consummated only upon Commission approval. RPTC would then expend approximately \$150,000 to connect the South Hamburg Exchange to RPTC's Watson Exchange with digital fiber optic cable. RPTC projects income losses for three years as a result of the purchase and ensuing construction costs, but expects to maintain a positive cash flow.

SWBT and RPTC asserted that the proposed sale is in the public interest because the customers located in the South Hamburg Exchange have a community of interest with Rock Port, Missouri (Rock Port) and because the South Hamburg Exchange would be more economically and efficiently served by RPTC. Applicants stated that RPTC would continue to provide South Hamburg Exchange customers with emergency telephone service comparable to the emergency telephone service currently being provided to them through the Hamburg Exchange. SWBT and RPTC stated that the tax impact on Atchison County would be an initial loss of property tax of

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approximately \$21,000 and that this loss would be small in comparison to the county's 1996 total tax revenues of over \$3 million.

The applicants stated that they had obtained approval from the United States District Court for the District of Columbia for a transfer of the South Hamburg Exchange from the Omaha, Nebraska LATA to the Kansas City, Missouri LATA to facilitate efficient delivery of interexchange services to customers in the South Hamburg Exchange. SWBT and RPTC attached a copy of the court's January 6, 1995 order approving the transfer.

Moreover, SWBT and RPTC stated that they had filed a petition with the Federal Communications Commission (FCC) for a waiver of the definition of "study area" contained in Part 36 (Appendix-Glossary) of the FCC's rules. By requesting a waiver of the definition, SWBT and RPTC sought permission to alter the boundaries of their respective Missouri study areas to eliminate the South Hamburg Exchange from SWBT's Missouri study area and add the South Hamburg Exchange to RPTC's existing study area upon transfer of the exchange from SWBT to RPTC. The applicants stated that the FCC had granted their waiver request on July 18, 1996 and attached a copy of the order approving the waiver<sup>1</sup>.

Finally, the applicants asserted that RPTC proposes to charge customers of the South Hamburg Exchange the same rates for local exchange telecommunications service that RPTC currently charges to its own subscribers. This would have the effect of reducing the local exchange rate paid by South Hamburg Exchange residential one-party customers from the current SWBT rate of \$11.45 per line per month to the rate of \$5.90 per line per month. Business one-party customers' rates would drop from \$23.70 to \$8.90 per line per month. South Hamburg Exchange customers would no longer be able to call the community of Hamburg, Iowa (Hamburg) on a toll free basis, as they currently can. However, these customers would gain toll free calling to RPTC's existing Watson Exchange and Rock Port Exchange, including the community of Rock Port. South Hamburg Exchange customers would be permitted to become full members of the cooperative, participate in its governance, and share in future capital credits that may be allocated to members. Applicants stated that notice of the proposed transfer, changes in rates and local calling scopes had been sent to all customers of the South Hamburg Exchange on September 23, 1997.

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<sup>1</sup> The FCC order also approved the applicants' request for a waiver of the FCC rule which would otherwise have required RPTC to switch from rate of return regulation to price cap regulation at the time of purchasing the exchange from SWBT, a price cap company. Thus, the proposed transaction would not affect the ratemaking treatment that the Commission gives to RPTC. The extent of the Commission's jurisdiction over RPTC's rates is discussed more fully below.

**Staff Recommendation**

In its November 14 response to the applicants' First Amended Petition and in its December 22 Memorandum, the Staff recommended approval of the proposed transaction. Staff noted that RPTC is currently undergoing an earnings review, but nevertheless recommended approval.

In addition to reiterating the details of the proposed transaction that are set out above, Staff pointed out that if the South Hamburg Exchange is transferred to RPTC, its customers will be able to call the county seat of Atchison County toll free. Toll calls into Iowa would be rated as interstate, interLATA, which are the lowest cost type of toll calls. Staff also noted that Sprint-United currently provides intraLATA toll service for RPTC, and RPTC plans to utilize Sprint-United to carry the South Hamburg Exchange's intraLATA toll calls if the sale is approved. According to Staff, RPTC intends to charge access rates for the South Hamburg Exchange as set forth in its access tariff.

With respect to RPTC's proposed construction plans, Staff stated that RPTC intends to construct a fiber optic feeder facility extending from its Watson Exchange to a point in the northern area of the South Hamburg Exchange, where the cable will terminate to a digital loop carrier and connect with existing distribution facilities. RPTC intends to use existing distribution loops and related facilities where possible. The amount of net plant to be booked by RPTC is estimated at \$171,998,<sup>2</sup> and RPTC intends to book these accounts in accordance with the Uniform System of Accounts. Staff stated that the Commission's Accounting and Financial Analysis Departments have reviewed the proposed transaction and have expressed no objection to Commission approval.

Staff also explained in its Memorandum that it had obtained data from U.S. West<sup>3</sup> and RPTC on their residence and business repair intervals. For the months of August, September and October, 1997 for the South Hamburg Exchange, U.S. West kept an average of 69.23 percent of its trouble report commitments. By contrast, for the months of July, August and September, 1997, RPTC kept 100 percent of its trouble report commitments.

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<sup>2</sup> Staff did not explain the discrepancy between its figure and the \$150,000 figure in the First Amended Application. However, this discrepancy is not material and none of the parties disputed or otherwise responded to the figure cited by Staff, so the Commission will assume that Staff's figure is the most recent estimate of net plant to be booked by RPTC.

<sup>3</sup> SWBT is the certificate holder and SWBT is ultimately responsible for the provision of adequate service, even though it has contracted with U.S. West to actually carry out its functions as local service provider. Therefore, U.S. West's record of service for the South Hamburg Exchange is SWBT's record of service, as well.

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Staff brought to the Commission's attention the fact that the notice sent by applicants to South Hamburg Exchange customers stated that 911 calls would be routed to the Atchison County Sheriff's Department. Currently, customers in the northern part of the South Hamburg Exchange, who reside closer to Hamburg than to Rock Port and desire Iowa dispatching of emergency services, must dial a "1-800" number rather than 911 for emergencies, unless they dial the appropriate emergency services agency directly. The call is routed to an answering point in Iowa, and then to the appropriate emergency service entity. Fire and ambulance service for this area is dispatched out of Hamburg, while calls requiring police attention are routed to the Sheriff's Department of Fremont County, Iowa, where they are appropriately handled. Under the proposal to transfer the South Hamburg Exchange, when the exchange's customers dial 911, RPTC would route their calls to the Atchison County Sheriff's Department, who would route the calls to the emergency entity that could most appropriately and expediently handle the emergency. Calls from customers in the northern part of the exchange would be routed so that dispatching of the appropriate emergency response entity would be out of Iowa. Staff stated that there would be no increase in emergency response times as a result of the proposed sale.

#### **Public Input**

Staff's Memorandum and OPC's Comments discussed the fact that customer notices were mailed by RPTC to all 65 of the customers of the South Hamburg Exchange and that 17 customers had responded; 10 positively and 7 negatively. In response to OPC's Comments, the Commission scheduled a local public hearing to take place in Rock Port on April 6, 1998. At the April 6 local public hearing, 26 citizens who were not affiliated with either SWBT or RPTC<sup>4</sup> spoke to the Commission concerning the proposed sale. The citizens were evenly divided concerning the sale, with 13 speaking in its favor and 13 speaking against it. Several of the speakers were residents of Iowa but had farms, other businesses or friends and family in the South Hamburg Exchange.

Nine of the citizens who spoke in favor of the sale were customers of SWBT and had received poor service from U.S. West, SWBT's contract service provider. These citizens cited fifteen examples of service problems, including lack of directory assistance and operator services for callers attempting to reach these customers, failure to print these customers' numbers in any telephone directory, failure to provide service for days, weeks and months on end, and repeated billing problems. Some of those who had experienced difficulty with SWBT's service had previously obtained service from RPTC and felt that RPTC's service was better than SWBT's. Others who spoke in favor of the sale expressed that they share a community of interest with Rock Port, and would therefore benefit from a local calling scope that includes Rock Port.

<sup>4</sup>The president of RPTC, who spoke in favor of the proposed sale, is not included in this figure.

By contrast, most of the citizens who opposed the proposed sale stated that their community of interest is with Hamburg rather than Rock Port. Hamburg lies only a few miles from the South Hamburg Exchange. These citizens would like to retain the current one-way Extended Area Service (EAS) into the Hamburg Exchange. Three of the opponents stated that they have received good service from SWBT and one opponent stated that she had experienced no problems with directory assistance. Some of the opponents also expressed concern over the effect that the proposed transaction might have on 911 service. Currently, the South Hamburg Exchange does not have 911 service. Customers in the South Hamburg Exchange can place a local call to the appropriate emergency service centers in Hamburg if they choose. Many customers would rather use emergency services from Hamburg than Rock Port because they are located much closer to Hamburg than to Rock Port and the response times are concomitantly shorter. These citizens expressed concern that if they are served by RPTC, they will have no choice but to dial 911 and be served by emergency personnel from Rock Port. However, most of those citizens stated that they would not oppose the sale on 911 grounds if they could continue to call emergency personnel in Iowa directly and if their Atchison County 911 calls could be dispatched to appropriate emergency response centers in Iowa.

At the hearing, one citizen introduced a petition into evidence that had been circulated in Missouri and Iowa in opposition to the sale. (Exh. 1). The sponsoring citizen explained that many of the signers were identified specifically as Iowa residents and that some of those identified as having Missouri addresses might actually be Iowa residents who used their work addresses in Missouri. The sponsoring citizen could not identify with certainty which of the signers were Missouri residents and had not checked to see whether there were any duplicate signatures. Several of the signatures appeared to be those of individuals who also appeared and testified at the local public hearing.

#### Findings of Fact

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all of the parties and members of the public who addressed the Commission at the local public hearing in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party or citizen does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

The Commission finds that the public interest will be served by the proposed sale of the South Hamburg Exchange from SWBT to RPTC. The Commission places great weight on the opinions of the customers located within the South Hamburg Exchange, as expressed at the April 6 local public hearing. The Commission places only minimal weight on the petition introduced as Exhibit 1 at the hearing, however. The circumstances surrounding its circulation and the identities and residences of the

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signatories are not reliable enough for the Commission to give the petition any significant weight in the Commission's deliberations.

The evidence concerning the benefit of calling scopes at the local public hearing was mixed; approximately the same number of customers currently benefit from a local calling scope with Hamburg as would benefit from a local calling scope with Rock Port. However, the evidence also showed that rates for basic local service would be lower with RPTC than the rates currently charged by SWBT. Therefore, the customers who would be required to make toll calls to reach others within their community of interest if the sale were approved could offset their long distance bills to a certain degree by lower basic local service rates. In addition, if the sale is approved, those customers who have a community of interest with Hamburg would be making interstate, interLATA calls to reach numbers in Hamburg. Currently, South Hamburg Exchange customers who have a community of interest with Rock Port must make intrastate, intraLATA calls to reach numbers in Rock Port. Generally, interstate interLATA calls are the least expensive of all toll calls. Therefore, the balance of the evidence concerning calling scopes supports approval of the proposed sale.

The Commission further finds that RPTC will provide adequate service to the customers of the South Hamburg Exchange. Nine of the citizens who attended the local public hearing described examples of the severe directory assistance, telephone listing, telephone service and billing problems that they experienced with SWBT. Only four of the citizens expressed that their service from SWBT has been acceptable. The record also shows that RPTC has kept a higher percentage of its trouble report commitments than SWBT.

Although some of the citizens expressed concerns about changes in 911 service, the Commission finds that the access to emergency services after the proposed sale will be at least as good as the access currently available to the customers in the affected exchange. Currently, South Hamburg Exchange customers who desire emergency service out of Iowa have two choices: 1) dial the appropriate service such as hospital or fire department directly as a toll free call, 2) dial a ten-digit "1-800" number for dispatch to the appropriate service. If the sale is consummated, the customers will retain the first option, but the call will be long distance. Rather than the second option, the customers will have the option of dialing 911, only three digits, to have the Atchison County, Missouri Sheriff's Department route their call to the appropriate Iowa emergency response center. The Commission finds that the effects of the proposed sale on emergency services will be positive rather than negative.

The Commission does not make any findings concerning the prudence of RPTC's purchase of the South Hamburg Exchange or the construction expenditures that RPTC intends to incur to connect the exchange to its Watson Exchange. Case No. TR-98-349 has been established by the Commission to review the Staff's overearnings investigation of RPTC, and the Commission will not make any finding in this case that would affect the ratemaking treatment to be given to RPTC's

expenditures in Case No. TR-98-349 or any subsequent rate case involving RPTC's access rates.

#### Conclusions of Law

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has asked permission to participate or requested a hearing in this case, the Commission may grant the relief requested based on the verified application.

The Commission does not have jurisdiction over the rates charged by RPTC, with the exception of access rates, because RPTC is a cooperative. §386.250(2), RSMo Supp. 1997. Nevertheless, the Commission does have jurisdiction over the proposed sale because SWBT is a regulated telephone company and RPTC's service is regulated by the Commission. §§386.020(51) and 386.250(2), RSMo Supp. 1997.

The Commission will grant a request to transfer assets whenever the proposed transfer is in the public interest. §392.300, RSMo 1994. The Commission concludes, based upon the verified application, as amended, the evidence, and its findings of fact, that the proposed sale is in the public interest and should be approved.

#### *THEREFORE, IT IS ORDERED:*

1. That the joint application of Southwestern Bell Telephone Company and Rock Port Telephone Company is approved as amended.
2. That Southwestern Bell Telephone Company and Rock Port Telephone Company are authorized to take any and all actions and to execute all instruments and other documents necessary to effectuate the transaction contemplated by the application, as amended, and this order.
3. That Southwestern Bell Telephone Company and Rock Port Telephone Company shall file tariff sheets with a minimum 30-day effective date in Case No. TM-97-528 to implement the sale described in their joint application, as amended, within 30 days after all necessary construction and technical changes that are required for Rock Port Telephone Company to serve the South Hamburg Exchange customers have been completed. Rock Port Telephone Company's proposed tariff sheets shall describe the rates, rules and regulations that Rock Port Telephone Company intends to employ for all of its intrastate services, including access services.
4. That Rock Port Telephone Company is directed to have all of the customers of the South Hamburg Exchange transferred to the tariffs of Rock Port Telephone Company within 90 days after the effective date of its implementing tariffs.
5. That the certificate of service authority of Southwestern Bell Telephone Company is amended to exclude the South Hamburg Exchange, effective 90 days after the effective date



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of the implementing tariffs to be filed by Rock Port Telephone Company and approved by the Commission in accordance with Ordered Paragraph 3.

6. That the certificate of service authority of Rock Port Telephone Company is amended to include the South Hamburg Exchange as of the date that the implementing tariffs to be filed by Rock Port Telephone Company in accordance with Ordered Paragraph 3 will take effect.

7. That Southwestern Bell Telephone Company and Rock Port Telephone Company shall file a pleading with the Missouri Public Service Commission notifying the Commission of the sale's completion within ten days after the sale has been completed.

8. That the Commission's order shall not affect the ratemaking treatment to be given to Rock Port Telephone Company's expenditures for purposes of Case No. TR-98-349 or any subsequent case involving a review of the company's access rates.

9. That this order shall become effective on June 15, 1998.

Lumpe, Ch., Drainer, Murray and Schemenauer, CC., concur.  
Crumpton, C., absent.

Randles, Regulatory Law Judge

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**In the Matter of the Application of Union Electric Company and Gascosage Electric Cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier Within Portions of Camden, Miller, Maries, Pulaski, and Phelps Counties, Missouri.**

*Case No. EO-98-279*  
*Decided June 11, 1998*

**Electric § 6.** The Commission found that the addendum to the agreement, which provided for a case-by-case procedure for exceptional customers was appropriate and not detrimental to the public interest.

**Electric § 11.** The Commission found that it had jurisdiction over the territorial agreement between an electric cooperative and a regulated electric utility pursuant to subsection 394.312.4, RSMo.

**Evidence, Practice, and Procedure §23.** The Commission concluded that the territorial agreement between the regulated electric utility and the electric cooperative was not detrimental to the public interest and should approved.

**APPEARANCES**

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*Mark W. Comley*, Newman, Comley & Ruth, 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537, for Intercounty Electric Cooperative Association.

*Lewis R. Mills*, Deputy Public Counsel, and *John B. Coffman*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Marc Poston*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Nancy Dippell.

## REPORT AND ORDER

### Procedural History

The Union Electric Company<sup>1</sup> and the Gascosage Electric Cooperative (U.E. and Gascosage or Applicants) filed a joint application on January 5, 1998, under Section 394.312, RSMo 1994<sup>2</sup>, asking the Missouri Public Service Commission (Commission) to approve a territorial agreement between the Applicants. The proposed territorial agreement is attached to this Report and Order as Attachment A<sup>3</sup>. The Commission issued an Order and Notice of Application to Enter into a Territorial Agreement on January 7 directing parties wishing to intervene in the case to do so by February 6.

Intercounty Electric Cooperative Association (Intercounty) filed an Application to Intervene One Day Out of Time on February 9 which the Commission granted on March 4. On March 23 the Commission issued an order setting a prehearing conference. The Applicants and the Staff of the Missouri Public Service Commission (Staff) filed testimony and all parties met in prehearing conference at 8:30 a.m. on April 2.

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<sup>1</sup> Since the filing of this application, the Union Electric Company has been doing business as AmerenUE. However, for purposes of this order they are referred to as Union Electric Company or U.E.

<sup>2</sup> All further statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated.

<sup>3</sup> The attachments to the Territorial Agreement include: 1) Exhibit 1, a metes and bounds description of the electric service area of Union Electric Company; 2) Exhibit 2A-2E, highway maps depicting the electric service area of Union Electric Company and Gascosage Electric Cooperative in Camden, Miller, Maries, Pulaski, and Phelps Counties; and 3) Exhibit 3, a metes and bounds description of the electric service area of Gascosage Electric Cooperative. Those attachments are not attached to this order due to their size, but are in the official case file available for public inspection.

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On April 6 Intercounty filed a Motion for Extension of the Time to Rule on Application and for Continuance. On April 8 the Commission issued an order which extended the time for the Commission to take action pursuant to Section 394.312 for good cause shown until June 14. The order also set an evidentiary hearing to begin on May 14 at 9:00 a.m. On May 1 Rebuttal Testimony of Vernon Strickland was filed by Intercounty. On May 12 the parties filed a Stipulation and Agreement. As part of the stipulation, Intercounty agreed not to submit its prefiled testimony.

At 9:00 a.m. on May 14 the Commission conducted an evidentiary hearing. All parties were represented at the evidentiary hearing on the record.

#### Discussion

U.E. is a public utility engaged in providing electric service to the public in the State of Missouri, subject to the jurisdiction of the Commission. U.E.'s principal place of business is located in St. Louis, Missouri. Gascosage is a rural electric cooperative engaged in distributing electric energy and service to its members in the State of Missouri. Gascosage's principal place of business is located in Dixon, Missouri. Gascosage is not subject to Commission regulation of its service or rates.

U.E. and Gascosage jointly applied for approval of a territorial agreement which would designate the service area of each of the Applicants in portions of the Missouri counties of Camden, Miller, Maries, Pulaski, and Phelps. The agreement is designed to avoid duplication of facilities and minimize disputes between the two suppliers. The agreement designates the boundaries of the exclusive electric service area of each of the Applicants for service of new structures within the designated areas. The territorial agreement sets boundaries which encompass territory not serviced by either party but which is serviced by other power suppliers including Intercounty. As part of the Stipulation and Agreement, U.E., Gascosage, and Intercounty agreed that the territorial agreement only defines service territory as to U.E. and Gascosage. Before approving the proposed territorial agreement the Commission must determine that it is not detrimental to the public interest.

The first factor the Commission will consider in deciding the appropriateness of this territorial agreement is the extent to which the agreement eliminates or avoids unnecessary duplication of facilities. The Applicants' testimony indicated that duplication of facilities currently exists between U.E. and Gascosage. The Applicants further testified that the territorial agreement would eliminate any further duplication of facilities and avoid any future increase in duplication in the affected area.

Second, the Commission will consider the ability of each party to the territorial agreement to provide adequate service to the customers in its exclusive service area. Gascosage's witness testified that no customers of the Cooperative are located in the territory that is assigned to U.E. under the territorial agreement. U.E.'s witness, Larry Merry, testified that there will be no exchange of customers as a result of the

agreement and either party will have the right to continue serving existing structures located in the electric service area of the other party. Mr. Merry also testified that U.E. will continue to serve customers located in Gascosage's service territory for which it must maintain distribution facilities. Mr. Merry also stated that the agreement does not limit either party's right to construct transmission and distribution facilities in one another's service areas where necessary.

Both Applicants have the ability to make available adequate power supplies. Although Gascosage is a distribution cooperative, it is a member of Sho-Me Electric Power Cooperative which supplies its power needs under a long term, all requirements contract.

The third area for Commission concern is the effect of approval of the territorial agreement on customers of the Applicants. Both the Applicants' witnesses and Staff's witness testified that no customers or facilities will be transferred.

Fourth, the Commission will consider a category of other cost and safety benefits attributed to the proposed territorial agreement. Both Applicants and Staff testified that the agreement will promote efficiency, both by avoiding the duplication of distribution facilities and minimizing or eliminating competitive disputes. The elimination of duplicated facilities will result in fewer live power lines crossing the same area, thereby increasing public safety. Staff's and Applicants' witnesses testified that the agreement should also enhance certainty in whom to call for service within the designated territories.

The last factor the Commission will consider in regard to the appropriateness of the territorial agreement is the provision for case-by-case addendum to the agreement found in Paragraph 8 of the territorial agreement. The addendum provision would permit a structure to receive service from one party even though it is located in the other party's designated service area. The party wishing the special arrangement would have to file appropriate documentation (called an "Addendum") with the Commission and the arrangement would be subject to Commission approval. A similar provision was approved in Case No. EO-95-151 as part of a territorial agreement between U.E. and Laclede Electric Cooperative, Inc.

The Commission Staff reviewed the addendum provision and Staff's witness testified that the language is acceptable to Staff. In general the addendum is acceptable to the Commission as substantially in conformance with the approved addendum in Case No. EO-95-151.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

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The Commission finds that approval of the territorial agreement signed by the Applicants on November 13, 1997, would avoid future duplication of facilities. The Commission finds that the Applicants are capable of adequately and safely providing the electric power supply, service, and maintenance needs of the customers in their service areas as designated in the proposed territorial agreement. The Commission further finds that the overall effect of the proposed territorial agreement would not be harmful to ratepayers, that the agreement would promote efficiency and safety, and reduce customer confusion. The Commission finds that the addendum providing for a case-by-case procedure for exceptional customers is appropriate and is not detrimental to the public interest.

The Commission further finds that the approval of this territorial agreement will not impair U.E.'s existing certificates of public convenience and necessity except as specifically limited by the territorial agreement.

#### Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of U.E. pursuant to Section 386.250 and Chapter 393, RSMo. The Commission does not have jurisdiction over the services, activities, and rates of rural electric cooperatives such as Gascosage except as specified in Section 394.160, RSMo.

When a cooperative enters into a territorial agreement with a regulated public utility the agreement must be approved by the Commission after hearing. §394.312, RSMo. The Commission may approve a territorial agreement if the agreement in total is not detrimental to the public interest. §394.312.4, RSMo. Based on the findings of fact it has made, the Commission concludes that the territorial agreement proposed by U.E. and Gascosage, Case No. EO-98-279, is not detrimental to the public interest and should be approved.

#### *IT IS THEREFORE ORDERED:*

1. That the Territorial Agreement attached to this order as Attachment A and signed by Union Electric Company and Gascosage Electric Cooperative on November 13, 1997, is approved.
2. That no more than 10 days after the effective date of this order Union Electric Company shall file revised tariff sheets in compliance with the Territorial Agreement approved in Ordered Paragraph 1.
3. This Report and Order shall become effective on June 23, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC.,  
concur and certify compliance with the provisions of Section 536.080,  
RSMo 1994.

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**In the Matter of the Monitoring of the Experimental Alternative  
Regulation Plan of Union Electric Company.\***

*Case No. EO-96-14  
Decided July 1, 1998*

**Electric §§1, 20, 21. Rates §§ 37, 65, 79, 104.** The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.

**ORDER APPROVING SHARING CREDIT**

On June 18, 1998, a joint recommendation was filed by Union Electric Company (UE), the Staff of the Public Service Commission (Staff), and the Office of the Public Counsel asking that the Commission approve a sharing credit of \$17,897,000. It is proposed that this credit be made by UE to its Missouri retail electric customers as a result of the second year of the UE experimental alternative regulation plan, approved by the Commission in Case No. ER-95-411.

The Commission has reviewed the proposed recommendation and sharing credit, and Staff Suggestions in Support of Stipulation and Agreement. The Commission finds the proposed sharing credit to be reasonable. The Commission will approve the credit as set out above and order the credit to be implemented on retail electric customer's bills.

***IT IS THEREFORE ORDERED:***

1. That the proposed sharing credit as a result of the second sharing period of the Union Electric experimental alternative regulatory plan is hereby approved and Union Electric Company is hereby ordered to issue credits to its retail electric customers in the amount of \$17,897,000 for the second sharing period.
2. That this order shall become effective on July 14, 1998.

Lumpe, Ch., Crumpton, Murray, Schemenauer and Drainer, CC., concur.

S. Register, Regulatory Law Judge

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\*The Commission, in an order issued on July 22, 1998, denied a motion for order regarding language. See page 319, Volume 5 MPSC 3d, for another order in this case. Also, see page 522, Volume 3 MPSC 3d, for another order relating to this case.

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**The Staff of the Missouri Public Service Commission, Complainant,  
v. Cable & Wireless, Inc., Respondent.**

*Case No. TC-98-254  
Decided July 7, 1998*

**Telecommunications § 33.** Commission approved resolution of complaint case by stipulation and agreement where carrier had collected increased rates from customers for period of time prior to filing and approving of tariff authorizing increased rates and carrier agreed to refund all amounts collected in excess of approved tariffed rates to customers.

**ORDER APPROVING STIPULATION**

The Staff of the Commission (Staff) filed a complaint against Cable & Wireless, Inc. (CWI) on December 19, 1997, alleging that CWI had increased its rates in June or July of 1997 and failed to file tariff sheets reflecting those rate increases for approval until August.

CWI filed an answer on January 23, 1998, contesting portions of Staff's complaint. The parties met in a prehearing conference on March 10 and filed a Motion to Establish Procedural Schedule on March 18. The Commission set the case for hearing and established dates for the filing of testimony, but the parties filed a motion to suspend the procedural schedule and ultimately filed a Stipulation and Agreement on May 27. Staff filed Suggestions in Support of the Stipulation on June 23.

The terms of the Stipulation call for CWI to refund to customers \$9,783.71 allocated among the services which were affected by the rate increases described in the Staff's complaint in the following manner:

**For Business First Basics:**

Total accounts affected:	464
Total amount of refund:	\$8,361.42
Total amount per account:	\$18.02

**For Business First International:**

Total accounts affected:	6
Total amount of refund:	\$734.16
Total amount per account:	\$122.36

**For Directory Assistance:**

Total accounts affected:	686
Total amount of refund:	\$688.13
Total amount per account:	\$1.00

The \$9,783.71 represents the amount that CWI realized as a result of the rate increases which are the subject matter of this complaint. The parties agreed that CWI

would make the refunds by issuing a credit to each account in the appropriate amount. In cases where an account is no longer purchasing service from CWI, CWI will send a refund check to the customer's last known address. Where refunds cannot be made within six months, the amount outstanding will be paid into the Public School Fund of the state of Missouri pursuant to Section 386.570, RSMo 1994. CWI shall also pay the sum of \$2,500 to the Public School Fund within ten days after the effective date of the order approving the Stipulation and Agreement.

The parties also agreed that, should the Commission accept the terms of the Stipulation, they would waive their rights to present testimony, cross-examine witness, present argument or written briefs, to have the transcript read by the Commission, and their rights for rehearing and judicial review.

The Commission has reviewed the Stipulation submitted by the parties, Staff's Suggestions in Support, and the official case file, and finds that the Stipulation should be approved. The Commission finds that the customer refunds, totaling the amount that CWI realized as the result of the nontariffed rate increases, are adequate to compensate customers for any improper rate increases they experienced as a result of CWI's conduct. The Commission finds that the penalty of \$2,500 to be paid into the Public School Fund of the state of Missouri is adequate under the circumstances and that the Stipulation in general is an appropriate resolution of the issues of this case. The Commission finds, however, that no accounting or time frame has been established for the refunds. Accordingly, the Commission will require CWI to account for the refunds required by the Stipulation within 30 days of the effective date of this order. In order to protect any confidential information that may be required for the accounting, the Commission will also issue its standard Protective Order to govern this case.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation of the parties filed on May 27, 1998 and attached to this order is approved.
2. That Cable & Wireless, Inc. shall comply with the provisions of the Stipulation approved in Ordered Paragraph 1.
3. That the Commission adopts the Protective Order attached to this order to govern this case.
4. That Cable & Wireless, Inc. shall file with the Commission a full accounting of the names, addresses, and amounts refunded to every customer under the protection of the Protective Order issued in this case. This accounting shall be filed with the Commission no later than 30 days after the effective date of this order.
5. That all procedural dates connected with this case are canceled.
6. That this order shall become effective on July 17, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur.

Wickliffe, Deputy Chief Regulatory Law Judge



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EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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**In the Matter of the Application of Associated Natural Gas Company, a Division of Arkansas Western Gas Company, for a Three-Year Variance from Section (19) of 4 CSR 240-10.030, Regarding the Testing of Gas Meters.**

*Case No. GO-98-567*

*Decided July 21, 1998*

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Gas §§ 2, 13, 15. Service §§ 31, 37, 46. The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy's predecessor, finding the three year variance reasonable.

ORDER GRANTING VARIANCE

On June 19, 1998, Associated Natural Gas (ANG or company), a division of Arkansas Western Gas Company, filed an application for a variance from Rule 4 CSR 240-10.030(19). ANG stated in its application that a variance from this rule will allow for extending the service life of meter change-outs consistent with maintaining billing objectives at a high accuracy level while minimizing cost. ANG proposes a program where its meters will be tested under a meter sampling program. ANG proposes this variance be limited to a three-year period with annual reports with specified information to be filed with the Commission no later than January 31 following the test year. ANG's proposal also states that recommendations for continuation or revision of the variance would be filed as a joint report (Staff and ANG) no later than November 30, 2000.

The Staff of the Commission (Staff) filed its recommendations on July 7. Staff notes in its memorandum that it discussed the proposed meter sampling program with ANG prior to filing the application. The proposed meter sampling program would apply to meters with a capacity under 500 cubic feet per hour, except for 1,605 meters which are already scheduled to be replaced within five years. The proposed meter sampling program includes 45,779 gas meters separated into three meter groups based upon the dates the meters were purchased. For each meter group, a random sample of 400 meters of the oldest vintage (years since last test date) will be tested during the first six months of a calendar year. Based upon degree of accuracy, the allowable life of the meter group will be extended by one year (above 92%), a

remediation plan will be implemented to assure at least a minimum 89% accuracy level for the meter group (below 89%), or testing will be conducted on an additional 200 meters (between 92% and 89%). ANG's application states that "For each meter group, the maximum permissible vintage period will be limited to 30 years from the last test date."

Staff's response states that three meter testing variances involving meter sample testing have already been granted by the Missouri Public Service Commission (Commission) to Union Electric (UE) (Case No. GO-98-25), Laclede Gas Company (Laclede) (Case No. GO-95-320), and to the predecessor of Missouri Gas Energy (MGE) (Case No. GO-91-353). Staff has reviewed the application and finds ANG's sample program to be comparable to the meter sample testing programs being used by UE, Laclede and MGE.

In its memorandum, Staff recommends that the Commission issue an order granting ANG a three-year variance from compliance with Rule 4 CSR 240-10.030(19) as described in the application by ANG. Further, Staff recommends that ANG be ordered to reference the granted meter sample testing variance at an appropriate location in its tariff.

Each time a meter is tested, ANG visits and observes the structure being supplied gas. If fewer meters are tested, fewer structures are visited. The Commission notes its concern about decreasing the number of visits to structures being supplied gas as it relates to the opportunity to observe and remedy potentially unsafe conditions that might be found on the premises. As was discussed by the Commission in PSC Case Number GO-95-320, In the Matter of the Application of Laclede Gas Company for a Variance Waiver from the Provisions of 4 CSR 240-10.030(19), these "lost opportunities" should be recaptured by the company through the various safety programs provided by the company. The Commission would encourage Staff and ANG to explore opportunities to improve and increase the opportunities to discover potentially hazardous conditions through various gas safety measures. The resources saved by reducing the number of meters tested annually may be used by ANG to make improvements to its safety programs. Further, ANG may wish to include any findings that it makes relating to safety after reducing the meter testing visits in its annual reports to the Commission. This case file will remain open to receive its annual reports and the recommendations to be filed November 30, 2000. If ANG desires Commission review of any new safety programs, ANG may file the proposed program for review.

The Commission finds that the three-year variance as requested is reasonable and justified. ANG shall reference the variance granted at an appropriate location in its tariff. Annual reports shall be filed with the Commission in this case, including the information specified in the application, no later than January 31 following the test year. Staff and ANG shall file a report, jointly or separately, with their recommendations for continuation or revision of the variance no later than November 30, 2000.

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*IT IS THEREFORE ORDERED:*

1. That the Application for Variance filed by Associated Natural Gas, a division of Arkansas Western Gas Company on June 7, 1998, is granted.
2. That Associated Natural Gas shall file reference to the variance granted at an appropriate location in its tariff, and such references or revised tariff sheets shall be filed no later than August 31, 1998.
3. That Associated Natural Gas shall file annual reports with the Commission in this case including the information specified in the application no later than January 31 following the test year.
4. That the Staff of the Commission and Associated Natural Gas shall file a report, jointly or separately, with their recommendations for continuation or revision of the variance no later than November 30, 2000.
5. That this order shall become effective on July 31, 1998.

Lumpe, Ch., Crumpton, Murray, Schemenauer and Drainer, CC., concur.  
Register, Regulatory Law Judge

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**In the Matter of the Application of UtiliCorp United Inc. for Authority To Acquire, Indirectly, an Ownership Interest in Natural Gas Businesses to be Privatized by the State of Victoria, Australia, and to Take All Other Actions Reasonably Necessary to Effectuate Said Transaction.**

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*Case No. GM-98-531*  
*Decided July 21, 1998*

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**Electric § 5.** The Commission found that allowing UtiliCorp United, Inc. to bid on and acquire one or more natural gas businesses in the State of Victoria, Australia would not be detrimental to the public interest if certain conditions were imposed, and approved the transaction.

ORDER APPROVING APPLICATION

On May 26, 1998, UtiliCorp United Inc., d/b/a/ Missouri Public Service (UCU or Applicant) filed an application with the Commission requesting authority to bid on and acquire one or more natural gas businesses in the State of Victoria, Australia. Applicant also requested expedited consideration. On June 9, the Commission issued an order directing the Staff to respond to the application and allowing the Office of the Public Counsel to respond as well. On June 29, UCU filed an amended application in which it requested approval of investments in New Zealand in addition to the investments in Australia contained in the original application.

UCU states that it is engaged in a process designed to lead to the indirect acquisition by it of up to a 50% equity ownership interest in one or more of three "stapled" natural gas businesses in the State of Victoria, Australia. Each of these businesses is comprised of a distributor and a retailer, hence the term "stapled." In addition to these businesses, UCU may also bid to acquire up to 50% of certain natural gas pipeline and storage businesses. Because the sale of all of these businesses is through competitive bidding, UCU is not able at this point to determine precisely in which of the businesses, if any, it will ultimately invest. UCU asks the Commission to generally approve its investment in these businesses without requiring it to file for and receive specific regulatory approval to bid on each business. UCU asserts that, because of the timing of the bidding process, requiring it to receive specific regulatory approval to bid on each business would effectively preclude it from bidding at all.

UCU, in its amended application, states that it is presently engaged in a process designed to lead to the indirect acquisition of up to an 80% ownership interest in PowerNew Zealand Limited (PNZ). UCU states that a New Zealand corporation that owns a substantial block of the shares of PNZ wants to sell them. UCU, through current or new subsidiaries, proposes to acquire that block as well as other shares on the open market so that it will hold up to an 80% share of PNZ. UCU asserts that this increased share will allow it to gain operating control of PNZ and increase business efficiency.

UCU contemplates that its direct financial obligations in the Australian gas business(es) and PNZ will not exceed \$500 million, and that it will likely be required to directly or indirectly guarantee some portion of the financing of its subsidiaries' purchases. UCU contends that the investments will have no adverse effect on its Missouri customers, and consequently are not detrimental to the public interest.

UCU intends to petition the Securities and Exchange Commission for an order exempting it from the requirement to register as a holding company because of the acquisitions. For such a petition, UCU requests that the Commission certify to the SEC that it has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise that authority.

UCU also affirmatively states that there are no stock purchase agreements relating to either the Australian or the New Zealand acquisitions, and requests the Commission waive the requirement in 4 CSR 240-2.060(9)(A) that such an agreement be included with the application. UCU's affirmative statement that there are no such agreements meets the requirements of that rule.

On July 7, the Staff filed its memorandum in which it recommends approval of the application. Staff states that UCU is currently rated BBB by Standard and Poor's (S & P), and notes that this is the lowest rating considered to be "investment grade." Staff calculates that if UCU were to commit the \$500 million contemplated in the application, its capital structure would be at the limit of the range for a BBB rating. Staff believes that, based on its review of pro forma financial data, UCU's interest coverage ratio would remain reasonable for attracting capital.

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Nonetheless, Staff does express concerns about UCU's future credit rating and its ability to attract capital. Staff notes that S & P's credit report for UCU in August 1997 considered UCU's credit rating outlook to be "Stable." That report cautioned, however, that UCU must take steps necessary to strengthen financial performance and reduce leverage. Staff spoke with the author of S & P's credit report, and he indicated that UCU has taken steps to reduce its debt level since the report was published. In an initial public offering in May 1998, UCU netted \$390 million, part of which was used to pay down some subordinated debt. UCU also plans to sell its majority interest in Aquila Gas Pipeline Corporation and is expected to use proceeds from the sale to reduce debt.

Staff states that these facts and expectations for the future, taken together, buffer its concerns regarding the highly leveraged capital structure that may result if UCU succeeds in investing an additional \$500 million in Australia and New Zealand. Staff concludes that the transactions proposed in the amended application will not be detrimental to the ratepayers of UCU's Missouri Public Service division. Staff recommends approval with the following conditions:

(A) That nothing in the Commission's order shall be considered a finding by the Commission of the value of this transaction for ratemaking purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions in any later proceeding.

(B) That the Commission's order shall not be deemed to be precedent for any future financing even if the facts may be similar.

(C) That any adverse financial effects of these acquisitions shall be borne by UCU's stockholders and not by Missouri ratepayers.

(D) That all records pertaining to these transactions shall be maintained at UCU's headquarters and made available to the Staff as the Staff deems necessary.

(E) That UCU shall be prepared to provide documentation of proper cost allocations to non-regulated entities.

(F) That UCU shall include any costs borne by Missouri Public Service related to these non-regulated subsidiaries in the monthly surveillance reports sent to the Staff. This detail should also include the "reasonable remuneration" (Deed, Article 6.7 and 6.8) which the receiving party is required to pay to the entity providing the service as well as the account where such remuneration is booked.

No party other than Staff filed a response to the application, and no party filed a response to the Staff memorandum.

The Commission finds that, with the conditions recommended by Staff, allowing the transactions proposed in the application will not be detrimental to Missouri ratepayers. Reserving ratemaking treatment will ensure that the transactions are examined in an appropriate case along with all other relevant factors. Limiting any adverse effects to UCU shareholders rather than MPS ratepayers will align the risk of the transactions with the possible benefits, and is consistent with the treatment afforded other UCU foreign investments. Maintaining records and documents and preparing reports in accordance with the conditions proposed by Staff will allow the

Staff to confirm that no adverse effects of the transactions are borne by Missouri ratepayers. The Commission will accordingly grant the application subject to those conditions.

IT IS THEREFORE ORDERED:

1. That UtiliCorp United Inc., d/b/a/ Missouri Public Service is hereby authorized to acquire, through a subsidiary, up to and including 50% of the capital stock of one of three Australian gas businesses, up to and including 50% of the capital stock of the Australian pipeline and storage business, as described in the amended application filed June 29, 1998, and to do such other acts as are necessary to consummate the transaction contemplated in the application.

2. That UtiliCorp United Inc., d/b/a/ Missouri Public Service, or its controlled subsidiary, is hereby authorized to acquire up to and including 80% of the capital stock of Power New Zealand Limited, as described in the amended application filed June 29, 1998, and to do such other acts as are necessary to consummate the transaction contemplated in the application.

3. That the authority granted in paragraphs 1 and 2 above is subject to the following conditions:

(A) That nothing in this order shall be considered a finding by the Commission of the value of this transaction for ratemaking purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions in any later proceeding.

(B) That this order shall not be deemed to be precedent for any future financing even if the facts may be similar.

(C) That any adverse financial effects of these acquisitions be borne by UCU's stockholders and not by Missouri ratepayers.

(D) That all records pertaining to these transactions shall be maintained at UCU's headquarters and made available to the Staff as the Staff deems necessary.

(E) That UCU shall be prepared to provide documentation of proper cost allocations to non-regulated entities.

(F) That UCU shall include any costs borne by Missouri Public Service related to these non-regulated subsidiaries in the monthly surveillance reports sent to the Staff.

4. That the Secretary of the Commission shall certify to the Securities and Exchange Commission, by a letter substantially similar to that attached to the application, that the Commission has the authority, resources, and intent to protect Missouri ratepayers.

5. That this order shall become effective on July 31, 1998.

Lumpe, Ch., Murray, and Drainer, CC., concur. Crumpton and Schemenauer, CC., dissent.

Mills, Deputy Chief Regulatory Law Judge

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7 Mo. P.S.C. 3d

**In the Matter of AT&T Communications of the Southwest, Inc.'s  
Petition for Arbitration Pursuant to Section 252(b) of the Tele-  
communications Act of 1996 to Establish an Interconnection  
Agreement Between AT&T Communications of the Southwest,  
Inc. and GTE Midwest Incorporated.**

*Case No. TO-97-63*  
*Decided July 22, 1998*

**Telecommunications §46.1.** The Commission approved the interconnection agreement submitted by the parties in compliance with the Commission's Arbitration Order, and directed that the parties submit any modifications to the Commission for approval.

**ORDER APPROVING INTERCONNECTION AGREEMENT**

This case was initiated by AT&T Communications of the Southwest, Inc. (AT&T) by a petition for arbitration filed on August 15, 1996, under the provisions of the Telecommunications Act of 1996 (the Act). The Commission issued an Arbitration Order on December 10, 1996, establishing interim rates for unbundled network elements (UNEs) and an interim resale discount rate for the resale of basic local telecommunications services. The Commission issued a further order on July 31, 1997, establishing permanent rates and directing the parties to file an agreement in conformance with all outstanding Commission orders. After numerous extensions of time the parties filed an interconnection agreement (the Agreement) on June 12, 1998. However, the Agreement was not signed by both parties. On June 23 GTE filed its signature page.

The Commission, under the provisions of Section 252(e) of the Act, has authority to approve an interconnection agreement arbitrated between an incumbent local exchange company (LEC) and a new provider of basic local exchange service. The Commission may reject an interconnection agreement only if the agreement is discriminatory or is inconsistent with the public interest, convenience and necessity. Section 252(e)(4) requires a state Commission to act to approve or reject an agreement adopted by arbitration within 30 days after submission.

**Discussion**

AT&T was granted certificates of service authority to provide basic local and local exchange telecommunications services on February 21, 1997, in Case No. TA-96-322. AT&T does not yet have on file an approved basic local service tariff.

The Staff of the Commission (Staff) filed a memorandum on July 15 recommending that the Commission approve the proposed interconnection Agreement between AT&T and GTE. Staff reviewed the proposed Agreement and believes it

See page 545, Volume 6 MPSC 3d, for another order in this case.

meets the limited requirements of the Act in that it does not appear to discriminate against telecommunications carriers who are not parties to the Agreement and it does not appear to be against the public interest.

Staff pointed out that the Agreement contains disputed language relating to the issue of whether GTE should be required to combine certain unbundled network elements for AT&T. The parties note in the text of their Agreement that the issue of whether an incumbent LEC is required to recombine UNEs is currently pending on appeal and will be taken up by the U.S. Supreme Court. The parties jointly requested that this Commission leave the recombination issue unresolved pending the outcome of that appeal. According to Staff, the parties have agreed that GTE will not recombine UNEs in the interim. Staff recommended that the Commission grant this request and direct the parties to file a revised agreement once the issue has been judicially resolved. Staff also recommended that all modifications be submitted to the Commission for approval.

The Agreement includes 15 attachments containing provisions for Resale, Dialing and Service Parity, E911/911 Services, Directory Assistance, Operator Services, UNEs, Collocation, Provisioning and Ordering, Local Number Portability, Pricing, and other matters. The parties have agreed to submit disputes between them to an alternative dispute resolution process that includes negotiation and arbitration before calling upon any agency or court for intervention.

Pursuant to the agreement of the parties, the Agreement will become effective five business days after the parties receive notice of Commission approval and will remain in effect for three years. The Agreement will remain in effect for another year unless either party gives 90 days written notice of termination.

The Agreement permits interconnection at any technically feasible point within GTE's network for a given LATA. GTE agrees that it will provide transit service, i.e., the delivery of traffic between AT&T and third-party LECs, over the local/intraLATA trunks. GTE agrees to deliver local and intraLATA toll traffic originated from AT&T to a third-party LEC, or originated from a third-party LEC and terminated to AT&T. While the parties agree that it is the responsibility of each third-party LEC to enter into arrangements to deliver local traffic between itself and AT&T, such arrangements are not currently in place. As an interim arrangement to ensure traffic completion the parties agree that GTE will terminate third-party traffic until either party has entered into an arrangement with third-party LECs to deliver local traffic via direct trunks.

The parties agree that reciprocal compensation for transport and termination of local traffic will be made on a "bill and keep" basis subject to the right of either party to demand that compensation be calculated based upon actual traffic volumes. See Attachment 14. Standard meet point billing will apply when the completion of a toll call involves both GTE and AT&T facilities.

GTE's local services will be available to AT&T on a resale basis at a wholesale discount rate of 25.40 percent. GTE will charge a nonrecurring fee of \$3.92 to switch



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a customer from GTE to AT&T. Prices for UNEs are specified in Appendix 2 to Attachment 14. Certain items have no price indicated or are marked TBD, meaning "to be determined". Before AT&T orders any TBD item, the Parties agree to meet and confer to establish a price. See Attachment 14, Section 6. Collocation will be priced on an individual case basis in accordance with the Commission's prior orders. GTE will charge AT&T the same rates it charges cable television providers for Rights-of-Way, Conduit and Pole Attachments.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has considered the proposed Agreement, the official case file, and Staff's recommendation. Based upon that review the Commission has reached the conclusion that the interconnection Agreement between AT&T and GTE meets the requirements of the Act in that it does not unduly discriminate against a nonparty carrier, and implementation of the Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that approval of the Agreement should be conditioned upon the parties submitting to the Commission for approval any agreement they reach regarding the recombination of UNEs in the form of a separate revision filed in the official case file. It will not be necessary for the parties to resubmit the entire agreement but only those portions affected by this issue. The Commission further finds that approval of the Agreement is conditioned upon the parties submitting any modifications or amendments, other than the recombination of elements portions, to the Commission for approval pursuant to the procedure set out below.

#### Modification Procedure

This Commission's first duty is to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act. 47 U.S.C. §252. In order for the Commission's role of review and approval to be effective, the Commission must also review and approve modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection. 47 U.S.C. §252(h). This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission. 4 CSR 240-30.010.

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

The parties shall provide the Telecommunications Staff with a copy of the resale or interconnection agreement with the pages numbered consecutively in the lower right-hand corner. Modifications to an agreement must be submitted to the Staff for review. When approved the modified pages will be substituted in the agreement which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the pages when they are inserted into the Agreement. The official record of the original agreement and all the modifications made will be maintained by the Telecommunications Staff in the Commission's tariff room.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the modification will be approved once Staff has verified that the provision is an approved provision, and prepared a recommendation advising approval. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission, under the provisions of Section 252 of the Telecommunications Act of 1996, is required to review arbitrated interconnection agreements, and may only reject an agreement upon a finding that its implementation would be discriminatory to a nonparty or inconsistent with the public interest, convenience and necessity. Based upon its review of the interconnection Agreement between AT&T and GTE and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and should be approved.

#### *IT IS THEREFORE ORDERED:*

1. That the interconnection agreement between AT&T Communications of the Southwest, Inc. and GTE Midwest Incorporated filed on June 12 and executed by GTE on June 23, 1998, is approved.
2. That AT&T Communications of the Southwest, Inc. and GTE Midwest Incorporated shall file a copy of this agreement with the Staff of the Missouri Public Service Commission, with the pages numbered seriatim in the lower right-hand corner, no later than August 4, 1998.
3. That any changes or modifications to this agreement shall be filed with the Commission for approval pursuant to the procedure outlined in this Order.

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4. That the request of the parties to defer resolution of the issue of recombination of unbundled network elements until the appeal pending before the U.S. Supreme Court has been decided is granted.

5. That the parties shall submit to the Commission for approval any agreement they reach regarding the recombination of unbundled network elements in the form of a separate revision filed in the official case file at the earliest possible opportunity.

6. That this Order shall become effective on August 4, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur.  
Wickliffe, Deputy Chief Regulatory Law Judge

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**In the Matter of the Investigation into the Exhaustion of Central  
Office Codes in the 314 Numbering Plan Area.**

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*Case No. TO-98-212*  
*Decided July 22, 1998*

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**Telecommunications §§ 1, 8.** After finding significant advantages and disadvantages to both geographic splits and all services overlays methods of introducing a new numbering plan areas (NPA), the three-number area code, the Commission found that customer impacts favoring the geographic split method of implementing a new area code preferably, and the Commission ordered the parties to submit a plan for implementing a new area code using a geographic split of the area served by the 314 area code.

**Telecommunications §§ 1, 8.** Certain methods of number conservation, including 1,000s block number pooling, sequential number assignment and rate center consolidation, while not ready for immediate implementation, have significant potential for promoting the efficient utilization of numbering resources in the future and could dramatically prolong the lives of the NPAs if implemented as soon as possible.

**APPEARANCES**

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*Leland B. Curtis*, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation.

*Rick Zucker*, Attorney, GTE Telephone Operations, 1000 GTE Drive, Post Office Box 307, Wentzville, Missouri 63385, for GTE Midwest Incorporated.

*Paul S. DeFord*, Lathrop & Gage L.C., 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*W.R. England, III*, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for Orchard Farm Telephone Company.

*Thomas E. Pulliam*, Ottsen, Mauzé, Leggat & Belz, L.C., 112 South Hanley Road, St. Louis, Missouri 63105, for Ameritech Mobile Communications, Inc.

*Michael F. Dandino*, Senior Counsel, and *Douglas E. Micheel*, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*William K. Haas*, Senior Counsel, and *Marc D. Poston*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Amy E. Randles.

## REPORT AND ORDER

### Background

The system developed to provide telephone numbers to customers who wish to obtain telecommunications service within the United States is known as the North American Numbering Plan (NANP), which has generally divided the fifty states into geographic areas known as numbering plan areas (NPAs). In the Matter of the Investigation into the Exhaustion of Telephone Numbers in the 314 Numbering plan Area, 3 Mo. P.S.C. 3d (1995 Exhaustion Case), pp. 461-462. Each NPA has a three-number designation (NPA code) that corresponds to a geographic area, and is commonly referred to as an area code. 1995 Exhaustion Case, p. 462. The first three digits of a ten digit telephone number constitute the NPA code. The fourth, fifth and sixth digits of a ten digit number constitute the central office code (CO code), which is commonly called a prefix. The CO code is also referred to as an "NXX code" because the first of the three digits must always be a numeral between 2 and 9 and the second and third digits may each be any numeral between 0 and 9. There are 10,000 telephone numbers associated with each NXX code.

The assignment of area codes has historically been the responsibility of the NANP Administrator. 1995 Exhaustion Case, p. 462. This function is in the process of being turned over to an independent contractor for future NPA relief activities<sup>1</sup>. The assignment of NXX codes within an NPA is the responsibility of

<sup>1</sup>In the Matters of Implementation of the local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98); Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers (CC Docket No. 95-185); Area Code Relief Plan for Dallas and Houston. Ordered by the Public Utility Commission of Texas (NSD File No. 96-8); administration of the North American Numbering Plan (CC Docket No. 92-237); Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois (IAD File No. 94-102), Second Report and Order and Memorandum Opinion and Order (Released August 8, 1996) (FCC 96-333), & 261.

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the Central Office Code Administrator. The Administrator in the 314 NPA is William T. Adair of Southwestern Bell Telephone Company.

An NPA has 792 NXX codes potentially available for assignment to telecommunications carriers and to such carriers' customers. There are 800 usable NXX codes (consisting of numbers between 200 and 999) in an NPA. Eight of these codes (211, 311, etc.) are reserved for public safety and present and future public access. In the 314 NPA an additional 42 NXX codes are reserved for future use, serve as test codes or serve other special purposes. Therefore, only 750 NXX codes were initially available for assignment to telecommunications carriers in the 314 NPA. As of December 15, 1997, only 204 of those 750 NXX codes had not yet been assigned to telecommunications carriers in the 314 NPA. An NPA code is considered to be in "jeopardy" when the forecasted or actual demand for NXX codes will exceed the known supply during the planning and implementation interval for relief. In jeopardy situations, a rationing plan is used for the assignment of the remaining NXX codes until NPA relief is provided.

This case was established by the Commission on November 25, 1997, to address impending exhaustion of central office codes in the 314 numbering plan area. The current 314 NPA was established pursuant to the Commission's Report and Order in the 1995 Exhaustion Case, when the 573 NPA was split from a larger 314 NPA. The evidence before the Commission in that case suggested that the 573/314 NPA split would provide relief for the 314 NPA for eight years. 1995 Exhaustion Case, p. 467. From the 1995 Exhaust Case, the Commission created Case No. TO-96-1 to address NXX code exhaustion statewide. In Case No. TO-96-1, the parties filed a report on September 12, 1997 (1997 Report) indicating that the current 314 NPA was projected to exhaust in the fourth quarter of 1999. The Commission bifurcated this case from Case No. TO-96-1 in order to concentrate its efforts on the 314 NPA rather than the other Missouri NPA codes. The Commission has left Case No. TO-96-1 open for the purpose of addressing NXX code exhaustion and related issues in NPAs other than the 314 numbering plan area in the future.

#### Procedural History

In its November 25 order establishing Case No. TO-98-212, the Commission gave notice and an opportunity to intervene to interested persons. All parties to Case No. TO-96-1 were ordered to notify the Commission of their intent to participate in Case No. TO-98-212. The Commission also informed the parties that it would treat the proposed procedural schedule that had been filed by Staff in Case No. TO-96-1 as having been filed in Case No. TO-98-212.

Several of the parties to Case No. TO-96-1 filed timely notices of their intent to retain party status in this proceeding. In addition, Orchard Farm Telephone Company (Orchard Farm) filed a timely application to intervene. On December 18, the Commission granted intervention to the following parties:

**Ameritech Mobile Communications, Inc. (Ameritech Mobile);**

**AT&T Communications of the Southwest, Inc. (AT&T);**

**GTE Midwest Incorporated (GTE);**

**MCI Telecommunications Corporation (MCI);**

**Midwest Independent Coin Payphone Association (MICPA);**

**Orchard Farm Telephone Company (Orchard Farm);**

**The Mid-Missouri Group of Telephone Companies** (Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company) **(Mid-Missouri Group);**

**Southwestern Bell Mobile Systems, Inc. (SWB Mobile);**

**Southwestern Bell Telephone Company (SWBT);**

**TCG St. Louis (TCG); and**

**Sprint Missouri, Inc., f/k/a United Telephone Company of Missouri d / b / a Sprint (Sprint).**

The Commission's December 18 order also established dates for the filing of direct and rebuttal testimony and a Hearing Memorandum, and dates for an evidentiary hearing. In addition, the Commission ordered the Technical Committee established in Case No. TO-96-1 to file a report concerning conservation of number resources in the 314 NPA in Case No. TO-98-212. Finally, the Commission set a deadline for parties to propose dates for local public hearings.

The Commission subsequently scheduled five local public hearings to take place in the 314 NPA on January 22, 23 and 29, 1998. These hearings were held at the Commission's office in Chesterfield, at St. Charles Community College in St. Peters, at the University of Missouri-St. Louis in St. Louis, at Harris-Stowe State College in St. Louis, and at Fox High School in Arnold.

After the Technical Committee had filed its number conservation report on January 9 (1998 Report), and the parties had filed direct and rebuttal testimony and a Hearing Memorandum, the Commission conducted an evidentiary hearing on February 9, 10 and 11 in Jefferson City. The Mid-Missouri Group, MICPA, Sprint and

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TCG had not filed testimony and were excused from participating in the hearing. Orchard Farm had filed rebuttal testimony on only one issue and requested permission to be excused from further participation after its witness was cross-examined.

At the hearing, Exhibit Nos. 1 through 30 and 33 were offered and admitted into evidence. The Commission ordered the parties to submit certain evidence in the form of late-filed exhibits and reserved Exhibit Nos. 31, 32, 34, 35, 36, 37, 38 and 39 for this purpose. Following the evidentiary hearing, the parties submitted the requested late-filed exhibits and were given an opportunity to object. SWBT filed a motion to strike Exhibit No. 37 on March 5. OPC opposed SWBT's motion to strike Exhibit No. 37, but simultaneously filed a corrected version of Exhibit No. 37. On March 18, the Commission issued an order denying SWBT's motion to strike and admitting the corrected version of Exhibit No. 37. The Commission decided that the original version of Exhibit No. 37 was no longer being offered into evidence. The Commission has not taken action prior to this Report and Order concerning late-filed Exhibit Nos. 31, 32, 34, 35, 36, 38 and 39.

The parties filed initial briefs on April 6, and reply briefs on April 20, on which date the case was fully submitted.

After its initial review of the evidence, the Commission determined that additional information was required in order to choose the best solution for the problem of NXX code exhaustion in the 314 NPA. The Commission issued an order on May 22 that required OPC to submit exhaustion date forecasts for the NPAs that would result if the Commission were to allow all exchanges located primarily within St. Louis City or St. Louis County to retain the 314 NPA and to assign either one or two new NPAs to the remaining exchanges within the current 314 NPA (two-way and three-way county line splits). Under the three-way county line split scenario, the Commission ordered OPC to perform its calculations under the assumptions that all such counties north of the Missouri River would receive one new NPA, and all such counties south of the Missouri River would receive another new NPA. OPC was ordered to use the Lockheed Martin forecasting model that it had used to generate Exhibit 32<sup>2</sup>, and to project exhaust dates once using the same number conservation assumptions that OPC had used to generate Exhibit 32 at the hearing, and once using the assumption that no number conservation methods would be implemented. On June 1, the Office of Public Counsel filed the forecast information required by the Commission's May 22 order, including its exhaust projections, its adjustments to the model, and its adjustments to the inputs for the model. OPC clarified that it was not endorsing the proposal by responding to the Commission's order. On June 8, Staff and SWBT filed responses to OPC's projections, and OPC commented on its own projections, as well.

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<sup>2</sup>The Lockheed Martin forecasting model (model) can be used to project an NPA exhaust date in a number pooling environment. Number pooling is discussed in section D.1. below.

Meanwhile, on June 4, the Commission ordered OPC to file a second set of forecasts by June 10. This second order required OPC to use the model to project exhaust dates for another three-way split (city/county line split) involving: one NPA for exchanges lying primarily in St. Louis City, a second NPA for exchanges lying primarily in St. Louis County, and a third NPA for exchanges lying primarily outside of St. Louis City and St. Louis County. Again, OPC was to project exhaust dates once assuming that the Exhibit 32 assumptions relating to number conservation would apply, and once assuming that no number conservation would be implemented. The Commission also ordered OPC to file a map showing the relationship of exchange boundaries to political boundaries in the current 314 NPA. OPC filed its projections and map on June 10 as ordered and commented on its projections on June 16. Responses to the projections were filed by SWBT and SWB Mobile on June 16. Also on June 16, Staff filed a reply to OPC's June 8 comments about the first set of Commission ordered exhaust projections.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

##### **A. Late-Filed Exhibits**

No parties objected to the admission of Exhibit Nos. 31, 32, 34, 35, 36, 38 and 39. The Commission finds that the information contained in these exhibits is relevant and finds that these exhibits should be admitted into evidence.

##### **B. Overview**

The parties presented conflicting evidence regarding the date on which there will be an exhaustion of NXX codes in the current 314 NPA and the effect that number conservation measures could have on the exhaustion date. All parties agreed that NPA jeopardy should be avoided at all costs, and that even if conservation measures are employed in the near future, there are so few NXX codes remaining in the 314 NPA that a new NPA must be assigned if jeopardy is to be avoided.

The parties presented evidence to support their positions on various forms of NPA relief, including methods of introducing new NPA codes and methods of conserving NXX codes to delay the need for introducing new NPA codes or to extend the life of the 314 and any new NPAs. The following discussion addresses first the Commission's findings concerning those forms of relief that involve introduction of new NPA codes, then the Commission's findings concerning those forms of relief that involve number conservation, and then the Commission's findings concerning the implementation of various forms of NPA relief.



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### **C. NPA Relief in the Form of Introducing New NPA(s)**

The following methods of introducing new NPA codes will be discussed because significant evidence was presented concerning these methods. Other methods, such as boundary realignment<sup>3</sup>, were also described in the record but were not presented by any of the parties or the citizens as the best alternatives.

#### **1. All-Services Overlay**

If the Commission were to adopt an all-services overlay, this would involve introducing a new NPA code using the existing 314 area code geographic region. The 314 area code would also remain in use in those exchanges, so that both NPA codes would share the same geographic footprint. As the 314 area code NXXs became fully assigned, telephone numbers in the new NPA code could be used to meet requests for new or additional exchange prefixes. The proponents<sup>4</sup> of an all services overlay explained that it has numerous advantages. All existing customers would retain their existing ten-digit telephone number, and no change in area code boundaries would occur. Thus, customers could avoid significant costs related to changing stationery, checks, signs, publications, and data entry or programming for their computers. Cellular customers would not be required to reprogram their telephones<sup>5</sup>. Moreover, an all services overlay could be more quickly implemented by providers. Such an overlay would also maximize the efficiency in utilizing numbers in the new area code, because the Commission would not need to decide where to draw a new boundary to accommodate an even pace of growth in number consumption between existing and new area codes. The new area code would take longer to exhaust if implemented via an overlay because the NXX codes for the new area code would be available for assignment anywhere within the geographic boundaries of the current 314 NPA.

By contrast, the opponents of the overlay approach pointed out a number of its disadvantages. The opponents asserted that confusion would arise from having different area codes assigned in the same business, home or neighborhood. They also asserted that there would be costs with an overlay approach for customers who currently only print seven digits on their stationery and publications, and for customers with automatic dialing systems, such as home alarm and elevator emergency phones, that currently use only seven digits. Opponents argued that an overlay would necessitate greater customer education efforts than a geographic

<sup>3</sup>Boundary realignment would involve moving additional, outlying portions of the current 314 NPA into the 573 NPA that was previously split off from the 314 NPA in the 1995 Exhaust Case. However, this option would require individuals being moved out of the 314 NPA who have the same seven digit telephone number as someone in the current 573 NPA to change their seven digit telephone number.

<sup>4</sup>The proponents included GTE, Staff, Ameritech Mobile, SWB Mobile, and SWBT. AT&T stated that it could support either a geographic split or, if certain conditions were imposed, an overlay.

<sup>5</sup>The geographic split method of introducing a new NPA, discussed below in section C.2., would not necessarily require customers to have their wireless numbers reprogrammed, either.

split because the concept is new and unfamiliar<sup>6</sup>. Also, an overlay would preclude subsequent adoption of further geographic splits. Opponents argued that, in light of the fact that overlays have only been tried in a few NPAs nationwide, using an overlay at this time would be premature.

Proponents and opponents of the overlay approach presented conflicting evidence about its effects on competition. On the one hand, incumbent local exchange carriers (ILECs) argued that an overlay would be fairer to them than a geographic split. According to GTE, customers might blame the ILECs for the need to switch area codes. By contrast, MCI alleged that an overlay would put facilities-based competitive local exchange carriers (CLECs) at a disadvantage because customers are likely to prefer an ILEC who can provide the same area code for both telephone and fax lines or other additional lines within one household or business, and ILECs would have a disproportionately large number of NXX codes from the 314 NPA<sup>7</sup>. OPC alleged that customers, and particularly business customers, are likely to prefer the old NPA numbers because a new NPA number would convey that they are new to the area rather than established. Callers from outside of the St. Louis area would not associate the CLECs' customers' numbers with the St. Louis metropolitan area. Staff pointed out that the Federal Communications Commission (FCC) has mandated that, when all services overlays are imposed, each new entrant is entitled to one NXX code from the old NPA for so long as NXX codes are available, and that sufficient codes remain available in the 314 NPA to accomplish this. FCC-333 & 283. However, MCI argued that reservation of a single NXX code is not sufficient in an environment where competitors must have one NXX code for each ILEC rate center to properly rate and route their calls<sup>8</sup>. Overlay proponents responded by pointing out that, with the advent of local number portability (LNP)<sup>9</sup>, customers switching to a new entrants' service will be able to retain their existing telephone numbers. They also suggested that there were 204 NXX codes left as of December 15, 1997 that could be assigned to facilities-based entrants<sup>10</sup>. Some parties further testified in response that

Conflicting evidence was also presented by proponents and opponents of the overlay approach in relation to issues of geographic identity and dialing simplicity. Proponents of the overlay approach testified that an additional advantage of the number pooling (see section D.1. below) would alleviate anti-competitive effects because competitors could obtain numbers from the ILECs' already assigned NXX codes.

<sup>6</sup>Overlays have only been adopted in Colorado, Georgia, New York, Florida and Maryland.

<sup>7</sup>This problem would not exist for CLECs offering resold services.

<sup>8</sup>See discussion of rate center consolidation in section D.3. below.

<sup>9</sup>LNP will permit customers to retain their telephone numbers when switching local service providers or moving geographically within a rate center.

<sup>10</sup>As of May 27, 1998, only 165 NXX codes remained available for assignment.

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overlay would be that all telephone users in the area would dial local calls using the same number of digits, namely ten, thus minimizing confusion. This would occur regardless of the area called, in contrast to the combination of seven digit and ten digit dialing that would occur with a geographic split<sup>11</sup>. Proponents of the overlay approach also argued that an overlay would promote geographic identity by keeping the St. Louis geographic region in its present form rather than splitting it into smaller areas. Opponents disagreed with the proponents' assertions about geographic identity and dialing pattern simplicity, as discussed below under section C.3.

The majority of the parties that filed testimony and participated in the evidentiary hearing supported an all-services overlay, but several of the parties supported the imposition of several conditions on the introduction of an overlay to mitigate its potential anti-competitive effects. AT&T proposed the following conditions:

- 1) mandatory ten digit dialing for all calls within affected NPAs;
- 2) equitable allocation of the remaining NXX codes in the old NPA to non-ILECs only;
- 3) permanent LNP implementation by wireline carriers in the MSA involved; and
- 4) application to all telecommunications carriers and services.

As discussed below in connection with service-specific overlays in section C.2., the fourth condition is a requirement of the FCC. GTE, an overlay supporter, also argued that any overlay should cover all services and involve mandatory ten digit dialing. Staff, another overlay supporter, supported AT&T's conditions. MCI, a split supporter, supported AT&T's conditions in the event of an overlay, but also insisted that rate center consolidation and number pooling should be pursued if an overlay is implemented. SWBT opposed AT&T's second condition, arguing that all carriers should be treated equally and that SWBT should have equal access to the remaining NXX codes if an overlay is imposed.

### **2. Service-Specific Overlay**

A service-specific overlay is similar to an all services overlay but does not involve traditional landline telecommunications carriers in the new NPA. The Commission could, for example, request a new NPA and require all wireless service providers to obtain NXX code assignments solely out of the new NPA. This would lessen demand for codes in the 314 NPA and permit a delay of further relief for the 314 NPA without affecting all customers and providers in the 314 NPA. Other examples of specific services and technologies that could be segregated include pager services, fax and modem lines, credit card verification lines and ATM transaction lines.

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<sup>11</sup>Under either the overlay or the geographic split approach, customers would have to dial 11 digits to make long distance calls outside of the local calling scope. Calls dialed with ten digits would continue to be rated as local calls.

Schedule 1 to the direct testimony of William T. Adair that was filed on January 16 (Schedule 1), contained statistics on the numbers of NXX codes assigned to various segments of the telecommunications industry during each month in 1995, 1996 and 1997. Schedule 1 shows that, had the 314 NPA not regained some NXX codes upon implementation of the 314/573 NPA split in January of 1996, there would have been a total growth in NXX code assignments of 184 between January of 1995 and December of 1997. Of the additional 184 NXX codes assigned during this period, 43 were assigned to wireless carriers, 38 were assigned to pager companies, and 8 were assigned in the PCS market, for a total of 87 out of 184 assigned to carriers in these technology markets. Thus, almost half of the new NXX code assignments were to non-landline telecommunications carriers during this period.

On February 6, the Commission issued a Notice of Expansion of Issues that explained to the parties that the Commission intended to inquire about wireless-specific overlays at the evidentiary hearing. In response to the Commission's notice, SWB Mobile and Ameritech Mobile filed a memorandum explaining the FCC's position on wireless-specific and other service-specific or technology-specific overlays. They pointed out that the FCC has rejected service/technology-specific overlay plans proposed by Ameritech-Illinois and by the Public Utility Commission of Texas. The FCC has found that any overlay that would segregate only particular types of telecommunications services or technologies in discrete area codes would be unreasonably discriminatory and would unduly inhibit competition, and would therefore violate the Federal Communications act<sup>12</sup>. The FCC has now codified its prohibition in the form of a regulation. See 47 C.F.R. Ch. I, §52.19(c)(3)(i-iii).

Following the hearing, OPC submitted information to update the Commission on the number of NXX codes remaining, and included a breakdown of NXX code consumption by type of carrier. Of the 39 additional NXX codes assigned between December 15, 1997 and May 27, 1998, 15 were assigned to wireless carriers.

### **3. Geographic Splits**

The geographic split method of introducing a new NPA involves dividing the existing NPA into two, smaller geographic areas. One area retains the existing NPA code and the other area is assigned a new NPA code. Customers throughout both areas retain their seven digit telephone numbers, but those located in the new NPA area must change to a different three digit NPA code preceding their seven digit telephone number. The existing NPA can also be split into multiple areas, with one retaining the existing NPA code and each of the new areas obtaining a new, distinct NPA code.

<sup>12</sup>See In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, IAD 94-102, *Declaratory Ruling and Order*, para. 2 (Released January 23, 1995) (Ameritech Order). See also FCC 96-333, && 291-305.

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OPC proposed a specific two-way split, which MCI endorsed<sup>13</sup>. Under OPC's proposed two-way split, the 314 NPA would be retained for all numbers located inside of an area defined roughly<sup>14</sup> as follows: beginning at the confluence of the Missouri River and the Mississippi River, heading south along the Mississippi River to the county line between St. Louis County and Jefferson County, then west/northwest along that county line to the Jefferson Barracks Bridge, then along I-270 from the Jefferson Barracks Bridge to US 40/61, then west along US 40/61 from I-270 to the Missouri River, then east along the Missouri River to the beginning point. The specific exchanges that OPC proposed to include in the reduced size 314 NPA (OPC's revised 314 NPA) either fall within the "principal" zone or are labeled with a "1" or a "2" on the first map attached to this Report and Order (Attachment 1)<sup>15</sup>. The new area code would be assigned to all numbers in the remaining exchanges of the existing 314 NPA under this proposal. The boundary of OPC's split is the same as that which separates mandatory MCA areas from optional MCA areas, and is widely available in the telephone directory. See Attachment 1. OPC stated that, under its proposed split, the 314 NPA would be retained for 151 of the approximately 160 wireless NXX codes that were assigned in the 314 NPA as of the time testimony was filed. According to OPC, under this proposal, the revised 314 NPA would not be likely to exhaust until the year 2012 and the new NPA would not be likely to exhaust until the year 2045 if the Commission were to implement certain number conservation measures. OPC did not perform any calculation of the proposed exhaust dates if no conservation measures were implemented. SWBT witnesses estimated that OPC's revised 314 NPA could exhaust as early as the year 2002, and OPC's new NPA could exhaust as early as 2009, if no conservation measures were implemented.

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<sup>13</sup>Most of the overlay proponents did not question OPC's proposed split boundary, emphasizing that their opposition to the geographic split method was based on problems associated with geographic splits in general rather than the specific split advocated by OPC.

<sup>14</sup>The Commission notes that NPAs must follow exchange boundaries, which as a rule do not follow the boundaries that define political subdivisions or landmarks such as highways. One exception to the rule is the Missouri River; none of the exchanges in the current 314 NPA span the Missouri River.

<sup>15</sup>This is the geographic area in which telecommunications carriers are required to provide service at their regular local rates to all customers, and is also referred to as the mandatory metropolitan calling area (mandatory MCA). See In the matter of the establishment of a plan for expanded calling scopes in metropolitan and outstate exchanges, 2 Mo. P.S.C. 3d (decided December 23, 1992) (1992 Expanded Calling Scopes Case). It consists of a center (or "principal") zone, a set of "Tier 1" exchanges, and a set of "Tier 2" exchanges. Id. Outside of the mandatory MCA boundary are three additional zones of exchanges (Tier 3, Tier 4 and Tier 5 exchanges) in which MCA service is optional for the customer and in which the carriers charge a flat rate in addition to the local rate to those customers who opt in (optional MCA subscribers). Id. The 314 NPA exchanges are numbered on Attachment 1 in accordance with their Tier in the MCA. Exchanges that are numbered are not included in the MCA.

OPC also pointed out that the Technical Committee's 1997 Report, filed in Case No. TO-96-1, had also discussed an illustrative three-way split, as well as an illustrative two-way split that differed from OPC's proposed two-way split. The Committee's two-way and three-way splits would each include 11 of the mandatory MCA exchanges in the 314 NPA (Committee's revised 314 NPA)<sup>16</sup>, and the remainder of the current 314 NPA exchanges in one or more new NPA(s). See pp. 26-27, 1997 Report. Under the Committee's illustrative two-way split, the revised 314 NPA was projected to last until the year 2005 and the new NPA was projected to last until the year 2007 without conservation. 1997 Report, p. 27. OPC supported its proposed two-way split rather than the splits discussed by the Technical Committee. According to OPC, the benefits of a geographic split begin to diminish as the NPAs begin to diminish in size. However, OPC emphasized that a three-way split would be preferable to an overlay. Proponents of the geographic split method<sup>17</sup> pointed out that, under a geographic split, customers would preserve the ability to dial seven digits within each NPA's boundaries<sup>18</sup>. Proponents argued that the public is more familiar with geographic splits because they have been used in the past, and that a split at this point in time would preserve the public's opportunity to resolve future NPA exhaust problems through either further geographic splits or overlays, whereas an overlay would not. Also, proponents argued that customers prefer to associate each NPA code with a unique geographic area so that they can discern the geographic location of a calling or called number.

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<sup>16</sup>The 11 exchanges were as follows: Overland, Ferguson, Riverview, Parkview, Evergreen, Forest, Jefferson, Mission, Chestnut, Prospect and Flanders. All of these except for Overland, Ferguson and Riverview constitute the principal zone as shown on Attachment 1.

<sup>17</sup>The proponents are OPC and MCI. AT&T also supports this method, but not exclusively, as explained in footnote 4, supra.

<sup>18</sup>Customers calling within each NPA could *choose* to dial ten digits and their calls would be completed, but they would only be *required* to dial seven digits to complete such calls. It should be noted that customers making intra-NPA calls who are not optional MCA subscribers will still have to pay toll charges and dial eleven (1+10) digits when calling intra-NPA to a different exchange. Non-subscribing customers in optional MCA zones (Tiers 3, 4 and 5) already dial eleven digits across the line that separates them from the mandatory MCA area (principal zone and Tiers 1 and 2). Even optional MCA subscribers must currently dial eleven digits and pay toll charges when making certain calls within their NPA, and customers in 314 NPA exchanges that are outside of the optional MCA areas must always dial eleven digits when calling to another exchange. A geographic split would not reduce the incidence of eleven digit dialing that currently takes place outside of the mandatory MCA (principal zone, Tier 1 and Tier 2 exchanges).

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Customers who make many calls per day in connection with their jobs would be spared the effort of dialing an additional three digits when calling in the same NPA. Proponents further asserted that mandatory ten digit dialing across the entire existing 314 NPA would make it difficult for customers to distinguish between local and toll calls. Finally, geographic split proponents suggested that their method would be more competitively neutral than an overlay, for the reasons discussed above in section C.1.

Opponents of the geographic split method disputed the advantages of seven digit dialing. First, they pointed out that seven digit dialing would only be possible for certain intra-NPA calls<sup>19</sup>. Under the two-way split proposed by OPC, the new 314 area would consist only of St. Louis City and portions of St. Louis County, as shown on the second attached map (Attachment 2). Any calls across the boundary between this area and the area with the new NPA would involve ten digit dialing. Therefore, on many calls<sup>20</sup>, callers would not be spared from dialing ten digits and, for all of their calls, callers would have to know the geographic area of the called party in order to know whether to dial seven or ten digits. This would be difficult because a split boundary must follow exchange boundaries, which do not follow naturally occurring or man-made boundaries such as political boundaries. Calls dialed with seven digits that should be dialed with ten digits would reach a wrong number. Opponents claimed that this would be more confusing and time consuming than simply dialing ten digits for all local calls.

Opponents also explained that wireless phones might have to be reprogrammed. Wireless technology is such that a wireless customer can roam into an NPA that has a different code than the customer's own NPA code and receive calls from persons who have dialed the customer's NPA code rather than the NPA code of the location called. However, it would be up to the Commission to mandate whether wireless customers should have to switch their wireless phones to the new NPA. Reprogramming would be time-consuming and costly. The benefits of requiring reprogramming based on whether the customer's billing address is in the revised 314 NPA or the new NPA are debatable. Currently, each NXX code assigned to a wireless carrier is used to assign telephone numbers throughout an NPA and even beyond NPA boundaries; use of the NXX codes is not restricted to a particular exchange. Therefore, it is unlikely that any entire NXX codes would be emptied for use in the revised 314 NPA as a result of compelling customers with billing addresses in the new NPA to change their NPA.

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<sup>19</sup>As discussed previously, many intra-NPA calls outside of the mandatory MCA are rated as long distance and require eleven digit dialing today. See footnote 18, *supra*.

<sup>20</sup>No parties were aware of any calling pattern studies that had been done to measure the amount of calling across OPC's proposed boundary. Cost estimates of performing such a study were submitted as Exhibits 34 and 38 and totaled \$950,000.

It is possible that wireless customers could in any event avoid switching their NPA by changing their billing addresses. Also, cellular carriers have the ability to move the rate centers out of which their customers' phones are rated. Therefore, if the rate center location were to determine which NPA code would apply to each customer, Ameritech Mobile could move its Ladue rate center to the same location as its St. Louis City rate center, so that its customers could continue to use their phones without having them reprogrammed.

SWB Mobile requested that the Commission give wireless customers their choice of NPA in the event that a geographic split is imposed. The Technical Committee made a similar recommendation. The Technical Committee stated that NXX codes in the 314 NPA that are voluntarily shared by wireline and wireless carriers should be returned, and only those NXX codes assigned completely to a wireless carrier should remain with that carrier, for wireless carriers whose service territories are divided by the split boundary. For wireless carriers whose service territories lie entirely within the new NPA, the Committee recommended that all NXX codes should be returned and customers should be required to change their wireless numbers. Ameritech Mobile's witness testified, however, that customers would be likely to voluntarily reprogram their cellular phones to match the NPA code for their wireline phone(s), as they did after the 573/314 split. Thus, the costs of reprogramming would not necessarily be avoided even if the Commission made reprogramming voluntary.

Another request of Ameritech Mobile and the Technical Committee was to have the Central Office Code Administrator assign any NXX codes in the new NPA that duplicate NXX codes held by a wireless carrier in the 314 NPA only to that wireless carrier or a wireline company, but not to a different wireless company. No party opposed this request.

Opponents claimed that an overlay would last longer than any geographic split. GTE concurred, suggesting that an overlay could last for ten years. GTE noted that in other areas of the country where splits have been implemented, the new NPAs have been exhausting prior to their forecasted exhaust dates. GTE objected to OPC's assumptions about the timing of conservation method implementation, and therefore with OPC's estimates of how much the new NPAs' lives could be extended by such measures. OPC conceded that an overlay would be likely to last somewhat longer than a geographic split in this case if no number conservation measures are imposed.

Following submission of briefs, the Commission ordered OPC to file exhaust projections under additional split scenarios. One of those scenarios involved a two-way split including all of the exchanges in St. Louis City and St. Louis County in the revised 314 NPA. OPC projected that, without number conservation, the NXX codes in a revised 314 NPA with such a boundary would exhaust by March of 1999. If number conservation measures were implemented, the life of the revised NPA could be



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extended to June of 2008<sup>21</sup>. Another scenario involved a three-way split that included all of the St. Louis City exchanges in one NPA, all of the St. Louis County exchanges in a second NPA and the remaining exchanges in a third NPA. OPC projected that, without number conservation, the new NPA for the St. Louis County exchanges would exhaust by January of 2003, and with certain conservation measures, the life of the St. Louis County NPA could be extended to as late as January 2037. The NPA for St. Louis City would last until July 2021 without conservation, and until July 2078 if certain conservation measures could be implemented. The other parties disputed OPC's projections, but did not provide evidence to support alternative projections.

#### **4. Public Sentiment**

At the local public hearings conducted by the Commission, the public overwhelmingly expressed support for a geographic split rather than an overlay. Of the 16 members of the public who attended the Commission's five local public hearings, not one citizen supported an all services overlay as a first choice. One citizen stated that an all services overlay would be an acceptable alternative to number pooling. Seven citizens expressed support for either a two-way or a multiple-way geographic split. Four additional citizens expressed support for either a geographic split or a service specific overlay. Five citizens expressed support for either number conservation or a service specific overlay, or both.

OPC offered Group Exhibits 6, 7, 28 and 29 into evidence at the hearing to make a record of the letters sent by citizens to the Commission and to OPC regarding this case. See also Corrected Exhibit 37. These letters overwhelmingly expressed support for a geographic split, or a service specific overlay, as opposed to an all services overlay. Only seven of the 52 letters expressed support for an all services overlay. Twenty of the letters expressed support for a wireless-specific or other technology-specific overlay. Thirty-three expressed either support for a geographic split or opposition to an all services overlay.

Moreover, through letters and at the public hearings, citizens repeatedly stated that, whatever solution the Commission devises, the solution should prevent the need for further NPA relief for years to come.

#### **5. Findings**

The Commission finds that a service-specific overlay or technology-specific overlay would be inappropriate in light of the FCC's position on these types of overlays. Moreover, even though a significant portion of the NXX code consumption during 1995, 1996, 1997 and the first part of 1998 was in the wireless, pager and PCS markets, at this point in time there are so few NXX codes left in the 314 NPA that creating a service-specific or technology-specific overlay for these markets would not be likely to significantly lengthen the life of the 314 NPA.

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<sup>21</sup> Adding all of the Tier 3 exchanges would reduce the life expectancy of the revised 314 NPA to seven years if conservation measures were implemented as OPC assumed.

The Commission finds that there are significant advantages, and disadvantages, to both geographic splits and all services overlays. With respect to all of the factors save customer impacts, the Commission finds that the evidence is fairly evenly balanced. If the Commission were to disregard customer impacts in rendering a decision, an all services overlay would be somewhat preferable to a geographic split under the facts of this case.

However, the Commission finds that the evidence concerning customer impacts clearly and unequivocally tips the scale in the direction of a geographic split rather than an overlay. The customers have made their assessment of these issues clear on the record before the Commission, and the Commission therefore finds that, from the standpoint of customer impacts, a geographic split is preferable to an all services overlay at this time. The Commission therefore finds that it should implement a geographic split rather than an all services overlay or a service specific overlay in this case.

The Commission notes that there is evidence supporting a number of alternative two-way and three-way split proposals. While numerous citizens at the local public hearings suggested a multiple-way split, most of these citizens explained that their purpose in making the such a proposal was to achieve a solution that would last for a significant number of years. The St. Louis County line two-way split that the Commission required OPC to forecast following the hearing would not provide significant relief because the revised 314 NPA would exhaust within a year. Under OPC's proposed two-way geographic split, the area codes are projected to last until the year 2012 in the revised 314 NPA and until the year 2045 in the new NPA, if the Commission would implement certain conservation methods<sup>22</sup>. It is true that the Technical Committee's illustrative two-way split might last longer than OPC's in the absence of number conservation efforts. At the same time, all parties acknowledge that number conservation measures could extend the life of each NPA in OPC's proposed two-way geographic split, and the Commission intends to order implementation of certain number conservation measures in the near future, as discussed in section D below. The split boundaries in the Technical Committee's illustrative two-way split and the two-way county line split are not as easily identifiable to the public as OPC's proposed two-way split. The Commission is also mindful of the parties' arguments that dividing the current 314 NPA into more than two areas would result in such small NPAs that the benefits of a geographic split would be significantly reduced, and rejects the

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<sup>22</sup>OPC assumed that LNP would begin in the third quarter of 1998 and pooling for wireline carriers would begin in the first quarter of 1999. OPC assumed that Option 2 rate center consolidation would be implemented, and made certain other assumptions about pooling for wireless carriers and the rates of growth and NXX code consumption for various categories of carriers. For a discussion of pooling and rate center consolidation, see sections D.1. and D.3 below.

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three-way county line and city/county line splits and the Committee's illustrative three-way split for this reason. The Commission finds that, on the record before it, the two-way geographic split proposed by OPC is the best method for implementing a new NPA to prevent exhaustion of NXX codes in the current 314 NPA<sup>23</sup>.

The Technical Committee proposed to let wireless customers choose whether they want to undergo the reprogramming of their phones in order to switch to a new NPA when their carriers do not share NXX codes with wireline providers and their carriers' service territories are split by an NPA boundary. The remainder of the wireless customers would have to reprogram their wireless phones. The Technical Committee also proposed that NXX codes in the new NPA that duplicate NXX codes held by wireless carriers in the 314 NPA not be assigned to competing wireless carriers. No party opposed the Technical Committee's proposals, and Ameritech Mobile explicitly endorsed them. Therefore, the Commission finds that the Technical Committee's proposed treatment of wireless carriers, as described on pages 20 to 22 of the 1997 Report, should be adopted.

The parties did not present any evidence to the Commission about whether a particular NPA code could be requested from the NANP Administrator, or whether NPA codes 310, 311, 312, 313, 315, 316, 317, 318 and 319 are already assigned in other areas. The Commission finds that, if any of these NPA codes is available and may be requested from the NANP Administrator, the parties should request one of these codes for the new St. Louis area NPA so that customers can more easily learn the new NPA code. Also, the Commission finds that the parties should inform the Commission of whether an assignment of NPA code 310, 311, 312, 315, 316, 317, 318 or 319 will be possible and whether customers would be able to dial eight digits rather than ten digits across the split boundary if one of these codes were assigned.

#### **D. NPA Relief in the Form of Number Conservation**

The following methods of conserving number resources are discussed in detail because significant evidence was presented concerning these methods. Other methods, such as individual number pooling and inconsistent rate center consolidation, were also described in the record but were not presented by any of the parties or the citizens as the best alternatives.

##### **1. 1,000s Block Number Pooling**

Numbers are currently assigned to telecommunications companies one NXX code at a time. There are 10,000 individual telephone numbers associated with

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<sup>23</sup>The Commission notes that an overlay could be done retroactively after a split is implemented. However, customers who would be required to change their NPA because of a geographic split would not be able to subsequently switch back to the 314 NPA upon implementation of a retroactive overlay if their number had already been given to someone else in the revised 314 NPA. By contrast, imposing an overlay at this point would eliminate any incentives to provide relief via a geographic split in the future.

each NXX code. The entity responsible for assignment of NXX codes is the NXX Code Administrator. The NXX Code Administrator follows NXX Code Assignment Guidelines (Guidelines) developed at the request of the FCC and are the basis upon which numbering resources are used within the North American Numbering Plan. Currently, the Guidelines specifically provide for the assignment of entire NXX codes to applicants. The reason for assigning NXX codes in their entirety is tied to the current method of rating and routing calls. The NXX code imparts information to the companies providing service about the locations, carriers and rates associated with each call. Any change in the assignment criteria would require both national and local changes to guidelines, operational support systems and various network translation modifications. The Commission may not have the authority to require all those changes, and they may take time to accomplish if the Commission does have authority.

One of the number conservation methods discussed in the Technical Committee's report is 1,000s block number pooling. This method would involve assigning only 1,000 numbers to carriers at a time, rather than 10,000 numbers at a time. Many companies have few customers and do not require an entire NXX code to serve their customers' needs. The evidence presented showed that in 18 of the approximately 60 exchanges in the current 314 NPA, the utilization rate for telephone numbers assigned to carriers is lower than 25 percent. In 26 of the exchanges, the utilization rate is lower than 40 percent<sup>24</sup>. Thus, the need to assign a minimum of 10,000 telephone numbers to each carrier is a significant contributor to NXX code waste.

Most of the parties argued that 1,000s block pooling is not ready for implementation at the present time. In order to implement 1,000s block number pooling and retain the rating and routing capabilities described above, computer systems and databases must be altered so as to analyze not only the three digit NPA code and the three digit NXX code, but also the first digit of the telephone number. Also, permanent local number portability (LNP) among carriers is a prerequisite to 1,000s block number pooling. The FCC established a deadline of May 15, 1998 for wireline carriers to implement LNP, and a deadline of July 1999 for wireless carriers to implement LNP, in the St. Louis area. Wireless carriers have asked for a nine month extension of their deadline. Another problem is that after LNP is in place, number pooling could significantly increase the capacity needed in the LNP database. Furthermore, administrative guidelines would have to be developed for the pool, and implementation costs would have to be fairly allocated.

Some of the technical changes other than LNP that would be required to implement 1,000s block number pooling are currently being discussed at the national level, and national standards for implementation are being developed. This work is being done within the North American Numbering Council (NANC)

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<sup>24</sup>As GTE pointed out, many of the unused numbers result from the assignment of 2 NXX codes per exchange to carriers offering optional MCA in Tiers 3, 4 and 5.

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through the Industry Numbering Council (INC). The evidence submitted to the Commission showed that national work is being done on the following technical issues in addition to LNP: pre-port versus port on demand, utilization of embedded numbers for establishment of pool, snap-back, national pool architecture and assignment guidelines/requirements. Additional issues are LNP database capacity upgrades and operation support systems (OSS) changes. NANC has set a goal of the second quarter of 1999 for development of national standards. Any pooling done at the state level that turns out to be inconsistent with national standards would, however, ultimately have to be changed to conform to the national standards. In the 847 NPA in Illinois, a number pooling trial has been ordered. The trial is scheduled to conclude at the end of 1998.

According to AT&T, even though these issues must be resolved nationally before pooling is implemented, the Commission should target a date in the future by which pooling should be implemented anticipating that the standards will be established in the meantime. AT&T's witness testified that the national standards are taking shape now and that it would be realistic for the Commission to establish a deadline in the first quarter of 1999 for beginning implementation of 1,000s block number pooling in all exchanges except Orchard Farm's exchange, and to create a team to iron out the details in the meantime and to address implementation issues over a twelve month period following that deadline. A similar grassroots approach has been taken in Illinois and New York in anticipation of national standards being developed.

AT&T argued that implementation would be unlikely to come about unless the Commission orders it. However, most of the parties urged the Commission to await the development of national standards before ordering implementation of 1,000s block number pooling in the 314 NPA.

### **2. Sequential Number Assignment**

Sequential number assignment is a method of conservation that encourages companies to assign telephone numbers to their customers in an efficient sequence. This has the effect of reducing the number of NXX codes or, under a system of 1,000s block number pooling, the number of 1,000s blocks, that must be assigned to each company. Sequential number assignment conserves 1,000s blocks in anticipation of 1,000s block number pooling.

Under sequential number assignment, each carrier would be required to use up all of the numbers in any given 1,000s block before assigning telephone numbers out of another 1,000s block. Sequential number assignment could also require each carrier to assign the telephone numbers in a certain order, for example by assigning numbers in the range 0001 to 1000 before assigning telephone numbers in the range 1001 to 2000, and so on. However, in Texas, where sequential number assignment has been ordered, the carriers are not required to proceed in any order within 1,000s blocks or from one 1,000s block to another. AT&T's witness testified that efficiency would not be enhanced by requiring carriers to use numbers in any particular order.

A sequential numbering plan could permit carriers to assign from a new 1,000s block when a certain percentage of their existing blocks are in use. There would need to be exceptions to accommodate customer requests for vanity numbers and to accommodate the needs of customers who request large blocks of numbers for businesses or other purposes. Also, certain customers might be limited in their ability to utilize certain telephone numbers because of the nature of their computer or telephone systems. For example, GTE assigns numbers in the 0000, 1000, 8000 and 9000 blocks only to residential customers, as many businesses cannot use them.

The parties debated what the guidelines for sequential number assignment should be and how much the Commission should be involved in developing the details of a sequential number assignment plan. AT&T suggested that the Commission should order implementation of a sequential number assignment plan and order the parties to propose details for subsequent Commission approval prior to the date of implementation. None of the parties expressed serious disagreement with this proposal.

### **3. Rate Center Consolidation**

Before competition in the local exchange telecommunications services market was permitted to develop, ILECs established rate centers within their exchanges for the purposes of routing and rating calls. Each exchange had one or more rate centers, and each rate center was identified by a unique pair of vertical and horizontal coordinates (V & H coordinates) that was used to calculate the distance of calls. Charges for long distance services, whether offered by the ILEC or interexchange carriers, were billed on a distance-sensitive basis. Distance-sensitive rates remain the practice for some carriers and services today.

Following passage of the federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, competitive local exchange carriers (CLECs) entered the market. Facilities-based CLECs must mirror the ILECs rate center structure so that rating and routing of calls can be correctly performed<sup>25</sup>. In order to rate and route the CLECs' calls, one NXX code is needed for each ILEC rate center, no matter how many customers the CLEC has<sup>26</sup>. Thus, in an exchange where the ILEC has 5 rate centers, the CLEC will require 5 NXX codes<sup>27</sup>, or 50,000 telephone numbers, even if it only has 500 customers within the exchange. The result is inefficient use of numbering resources.

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<sup>25</sup>Wireless carriers are an exception; they do not need to mirror the ILECs' rate center structure. SWB Mobile has only one rating point for all of its NXX codes, and Ameritech Mobile has two.

<sup>26</sup>As of the date of the evidentiary hearing, four new entrants had been assigned 37 NXX codes in the 314 NPA.

<sup>27</sup>As discussed above, assignment of less than a full NXX code for each area is not yet feasible under the CO Code Assignment Guidelines.

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One method of eliminating inefficiencies in the current system is to reduce the number of rate centers used by the ILEC for each exchange by collapsing multiple rate centers into a new, larger rate center. Rate center consolidation results in a single V & H coordinate serving as the toll reference point for central office switches that previously were associated with different V & H coordinates. Rate center consolidation can enhance the effectiveness of pooling by lowering NXX code demand<sup>28</sup>. The original purposes for establishing numerous rate centers, such as older switch technology and cost variations based on small differences in call distances, no longer exist.

While it is technically feasible to implement rate center consolidation at this point in time, most of the parties have urged the Commission to study the revenue implications of rate center consolidation before ordering implementation. The V & H coordinates would change for all telephone numbers associated with one of the rate centers to be eliminated in a consolidation. This would have revenue impacts for local exchange and interexchange carriers and affect the amounts to be billed to customers located inside and outside of the consolidated exchanges<sup>29</sup>. Certain customers' bills would increase and certain customers' bills would decrease. To complicate matters further, most of the exchanges in the current 314 NPA fall within either the mandatory calling area or one of the optional calling areas of the St. Louis MCA, and Extended Area Service (EAS) arrangements exist between certain sets of exchanges, as well. Finally, the Technical Committee did not investigate 911 impacts before filing its 1998 Report.

The Technical Committee discussed six different rate center consolidation plans that the Commission might want to consider, but did not recommend implementation of any of the plans without further planning by the affected parties. At the evidentiary hearing, most of the parties asked the Commission to give the Technical Committee more specific direction concerning the rate center consolidation options described in its report and then permit the Technical Committee to work out the details of implementation for Commission approval.

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<sup>28</sup>Neither rate center consolidation nor pooling would eliminate the need to assign a minimum of two NXX codes per exchange to each carrier offering optional MCA in Tiers 3, 4 and 5.

<sup>29</sup>Even though wireless carriers' rate centers do not coincide with those of wireline carriers, wireless carriers and their customers would also be impacted because of changes in the rates charged for land to mobile calls. Wireline customers located outside of the consolidated exchanges would be impacted by higher or lower toll charges when calling into the consolidated area, as would their providers.

The simplest proposal (Option 1) discussed in the Technical Committee's 1998 Report would involve consolidation of nine rate centers located in the St. Louis core area. These would be collapsed into a single rate center. AT&T supported adoption of Option 1 and further study of the five other options discussed in the Technical Committee's report. AT&T's witness testified that Option 1 would have little impact on customer charges or companies' toll revenues. Option 1 would involve no calling scope issues because all of the rate centers have the same local rates and calling scopes, but it would involve EAS issues because customers in the principal zone have EAS into Illinois. AT&T argued that customer impact issues could be dealt with following implementation. MCI also supported implementation of Option 1.

The Option 2 rate center consolidation plan identified in the Technical Committee report was supported by OPC. Under Option 2, the entire metropolitan exchange, including the principal zone and the mandatory calling areas identified as Tier 1 and Tier 2 exchanges on the attached map, would be consolidated. Option 2 would collapse 14 rate centers into one. Four of the rate centers (Mehlville, Sappington, Creve Coeur and Kirkwood) have EAS into six Tier 3 exchanges, where MCA is optional. Option 2 rate center consolidation would make calls between the six Tier 3 exchanges and the entire metropolitan exchange area local, and thus would affect local calling scopes. However, OPC argued that Option 2 might not have a significant revenue impact on SWBT if optional MCA subscription rates are high. SWBT argued that high subscription rates would correlate with a greater, rather than a lesser, revenue impact. Implementation of a similar plan was estimated to take six to nine months to implement in Texas.

The remaining four options discussed in the 1998 Report are more complicated than Options 1 and 2. The 911 impacts of each of the six options remain unknown at this time. The Commission would need to address the impacts of changing V & H coordinates on customer charges, company revenues and local calling scopes in the St. Louis area if it were to order rate center consolidation. Also, the Commission would need to consider the fact that consolidation would prevent further geographic splits in the consolidated exchanges in the event that a new NPA must be introduced again in the future. Although some assigned NXX codes that are "freed up" as a result of consolidation could be returned to the CO Code Administrator, the primary benefit of rate center consolidation would be to slow the rate of assignment of previously unassigned NXX codes. None of the parties suggested that rate center consolidation or any of the other conservation measures proposed should take the place of NPA relief.

#### **4. Public Sentiment**

At the Commission's five public hearings, only seven of the 16 speakers mentioned conservation. Of those seven, two discussed recycling of disconnected numbers, three discussed pooling, one discussed recycling and pooling and stated that the Commission should not introduce a new NPA until the companies demon-



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strated a need, and one mentioned conservation in a general fashion without specifying any particular conservation methods.

Letters sent to the Commission and to OPC by citizens and representatives of citizens also demonstrated support for conservation efforts. Twelve of the 52 letters expressed support for conservation in a general fashion. One named pooling explicitly. An additional six described ideas similar to either sequential number assignment or pooling or variations thereof.

#### **5. Findings**

The Commission finds that none of the methods of number conservation discussed in the Technical Committee's report or by the parties are ready for immediate implementation. However, the Commission finds that 1,000s block number pooling, sequential number assignment and rate center consolidation have significant potential for promoting the efficient utilization of numbering resources in the future and could dramatically prolong the lives of the NPAs if implemented as soon as possible. The Commission finds that, with national standards for 1,000s block pooling scheduled to be completed in 1999, the public interest would be best served if 1,000s block number pooling were implemented as soon as possible following completion of national standards, but not before. By contrast, the details of sequential number assignment and rate center consolidation can be addressed by the parties and presented to the Commission for approval without delay.

Therefore, the Commission finds that it should establish a new case for the purpose of addressing these three methods of number conservation in the geographic area that currently comprises the 314 NPA and that it should assign the number TO-99-14 to the new case. The Commission finds that it should order all parties to this case to propose a schedule of meetings at which they will develop plans and proposed time frames for implementing sequential number assignment and rate center consolidation. The parties to Case No. TO-99-14 shall also be required to prepare for eventual implementation of 1,000s block number pooling in anticipation of the development of national standards. The Commission will set forth the tasks to be accomplished in Case No. TO-99-14 by a separate Order and Notice in that case.

#### **E. Implementation of New NPA**

Most of the parties estimated that it would take from nine to 15 months to implement a geographic split to introduce a new NPA. The Commission finds that the Technical Committee should submit a plan for implementing OPC's proposed two-way split in the manner specified in this Report and Order within 15 days. The parties' plan should include a proposed schedule for accomplishing technical changes, obtaining a new NPA code, educating the public, beginning permissive dialing and beginning mandatory dialing for the new NPA. The specific dates of educational meetings, and the specific contacts to be made with newspaper, radio and television media, should be described in the plan. The plan should also include samples of the materials to be distributed to media, customers and governmental bodies. Finally,

the plan should inform the Commission regarding the possibility of obtaining 310, 311, 312, 313, 315, 316, 317, 318 or 319 as the new NPA code and the possibility of dialing eight digits rather than ten digits if one of these codes is assigned.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction over the subject matter of this case pursuant to §386.250 and §392.520, RSMo 1994. These statutes provide the Commission with general regulatory authority over the operations of the telecommunications companies within its jurisdiction and over the conditions and methods of providing service. The selection of a method for addressing NPA exhaustion and the changing of customer dialing patterns is within this broad statutory authority. In addition, the FCC has recognized that state commissions have a significant role in determining what method should be adopted to remedy the exhaustion problem. See Ameritech Order; FCC 96-333, & 268. The NPA guidelines also anticipate regulatory oversight of the decision. See Code Relief Planning and Notification Guidelines, Industry Numbering Committee, & 2.10 (issued April 4, 1997) (NPA Guidelines).

The Commission has found that the geographic split alternative is more reasonable than the all services overlay and service specific overlay plans, and that the two-way split proposed by the Office of Public Counsel is the most reasonable of the split alternatives. The Commission concludes that OPC's proposed geographic split will meet the NPA Guidelines, and that this split should be adopted and implemented without delay.

The Commission has further found that 1,000s block number pooling, sequential number assignment and rate center consolidation have the potential to dramatically lengthen the lives of the revised 314 NPA and the new NPA that will be come into existence if the geographic split proposed by OPC is implemented. The Commission therefore concludes that Case No. TO-99-14 should be established for the purpose of addressing implementation plans and deadlines for sequential number assignment and rate center consolidation as soon as possible, and preparation for eventual implementation of 1,000s block number pooling, in the St. Louis area.

#### *IT IS THEREFORE ORDERED:*

1. That the Commission will accept and order the implementation of the two-way geographic split proposed by the Office of the Public Counsel.
2. That the Technical Committee shall file a plan for implementation of the new NPA in accordance with this Report and Order. Such plan shall be filed not later than August 6, 1998.

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3. That Case No. TO-99-14 is established for the purpose of developing implementation plans and schedules for 1,000s block number pooling, sequential number assignment, and rate center consolidation in the geographic area currently comprising the 314 Numbering Plan Area.

4. That every party to Case No. TO-98-212 is granted intervention in Case No. TO-99-14.

5. That the Commission shall issue a separate order in Case No. TO-99-14 giving notice and establishing appropriate deadlines and directives for the parties.

6. That the Records Department of the Missouri Public Service Commission shall serve copies of this Report and Order on all parties in Case No. TO-96-1 and TO-98-212.

7. That this Report and Order shall become effective on August 4, 1998.

Lumpe, Ch., Crumpton, Murray, Schemenauer and Drainer, CC., concur.

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EDITOR'S NOTE: Attachments 1 and 2, the 314 NPA maps, have not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

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### **In the Matter of the Implementation of Number Conservation Methods in the St. Louis, Missouri Area.**

*Case No. TO-99-14  
Decided July 22, 1998*

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**Telecommunications §§ 1, 8.** The Commission established a new case for the purpose of directing a technical committee to study and report to the Commission on three methods of number conservation in the geographic area that currently comprises the 314 NPA, including 1,000s block number pooling, sequential number assignment and rate center consolidation

#### **ORDER GIVING NOTICE AND ESTABLISHING DEADLINES FOR FILING OF INTERVENTION APPLICATIONS, PROCEDURAL SCHEDULE AND FINAL REPORT**

The Commission established this case in its Report and Order issued on July 22, 1998 in Case No. TO-98-212. Case No. TO-98-212 involved the issue of Central Office code (NXX code or CO code) exhaustion in the 314 Numbering Plan Area (NPA), as that area was defined at the time Case No. TO-98-212 was bifurcated from Case No. TO-96-1. In its Report and Order of July 22, the Commission ordered this area to be split into a revised, smaller 314 NPA for the inner exchanges (revised 314 NPA) and a new, separate NPA for the outlying exchanges (new NPA). The Commission also

determined that three methods of number conservation had the potential for significantly extending the life of the newly split NPA areas: 1) sequential number assignment, 2) rate center consolidation, and 3) 1,000s block number pooling. Specifically, the Commission determined that sequential number assignment and rate center consolidation should be implemented in the St. Louis area as soon as possible and that all technical and administrative issues can be resolved by the Commission without awaiting developments outside of Missouri. The Commission also determined that 1,000s block number pooling should be implemented as soon as possible, but only after additional progress is made to resolve technical and administrative difficulties in other states or at the national level.

The Commission will require the parties to this case to meet to develop means of implementing these three forms of number conservation in the geographic area for which the Commission addressed NPA relief in Case No. TO-98-212 (the St. Louis area), with the purpose of preparing three reports to be filed with the Commission. The parties will carry on with the work of the Technical Committee that was established in Case No. TO-96-1 and continued in Case No. TO-98-212. The purpose of the reports will be to provide the Commission with enough information to order implementation of specific sequential number assignment and rate center consolidation plans and to specify further steps to be taken to prepare for eventual implementation of 1,000s block number pooling. The parties should consult with and involve the Central Office Code Administrator and the North American Numbering Plan Administrator as needed to make the reports complete.

The first report (Sequential Numbering Assignment Report) shall be filed within three months and shall set forth the rules that NXX code holders should follow when assigning individual telephone numbers to their customers. At a minimum, the parties should include a requirement that carriers use up a certain percentage of the numbers within a given 1,000s block before using numbers from another 1,000s block and that this rule be applied to the extent possible to 1,000s blocks that are already contaminated. The parties should address whether more stringent numbering assignment rules should apply, and should address what contamination factor and exceptions should apply to the number assignment rules. Issues such as administration and compliance should be addressed as well. The report should also estimate the impact of sequential number assignment rules on the rate of consumption of NXX codes in, and the projected exhaust dates for, the affected NPAs.

The second report (Rate Center Consolidation Report) should be filed within five months and should set forth the following in detail:

- 1) The estimated revenue impacts of rate center consolidation for telecommunications carriers.
- 2) An assessment of whether revenue neutrality and competitive neutrality should be goals of rate center consolidation from legal and policy perspectives,

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taking into account the fact that Southwestern Bell Telephone Company operates under price-cap regulation.

3) Estimates of changes in average customers' local and long distance charges that would result if rate center consolidation were to be accomplished on a revenue neutral basis.

4) An explanation of the impacts that rate center consolidation would have on local calling scopes.

5) An explanation of the 911 impacts of rate center consolidation.

6) An explanation of any administrative and any network or other technical changes that would have to be made to accomplish rate center consolidation.

7) Estimates of any non-revenue related costs associated with consolidating rate centers.

8) The estimated impact of rate center consolidation on the rate of consumption of NXX codes in, and the projected exhaust date(s) for, the affected NPA(s).

All of these issues should be addressed with respect to each of the six rate center consolidation options identified in the report filed on January 9, 1998 by the Technical Committee in Case No. TO-98-212, as well as the rate center consolidation proposal described by witness Unruh at the evidentiary hearing in Case No. TO-98-212 (Tr. pp.696-697).

The third report (Pooling Report) should be filed within seven months and should set forth the following:

1) Detailed information concerning the status of efforts at the national level and in other states to overcome technological difficulties associated with, and develop guidelines for the implementation and administration of, 1,000s block number pooling, including the status of efforts to address:

- a) database capacity difficulties;
- b) necessary OSS system changes;
- c) pre-port versus port on demand;
- d) utilization of embedded numbers for establishment of pool;
- e) snap-back;
- f) national pool architecture;
- g) pool assignment guidelines;
- h) pool administration;
- i) allocation of implementation and administration costs;

as well as any other outstanding issues relating to 1,000s block number pooling.

2) An estimate of the date on which the issues identified in paragraph 1 shall be resolved at the national level or in any other states.

3) An estimate of the earliest date on which 1,000s block number pooling could be implemented in the St. Louis area, together with a discussion of any issues relating specifically to the St. Louis area.

4) The steps that could be taken by the parties to prepare for implementation and administration of 1,000s block number pooling in the St. Louis area in anticipation of a national resolution to the issues identified in paragraph 1.

5) The estimated impact of 1,000s block number pooling on the rate of consumption of NXX codes in, and the projected exhaust dates for, the affected NPAs.

6) The status of efforts to implement individual line number pooling at the national level and in other states, and an estimate of the date on which such efforts shall be completed.

7) An estimate of the earliest date on which individual line number pooling could be implemented in the 314 NPA.

The Commission has ordered that all parties to Case No. TO-98-212 shall be parties to this case. The Commission will give notice of this order to all interexchange and local exchange carriers, as well as all parties to Case No. TO-96-1. The Commission finds that proper persons should be allowed 30 days from the issuance of this order to file a motion for hearing or an application to intervene.

The Commission finds that the parties should file a proposed procedural schedule setting forth the dates on which meetings are to occur. The procedural schedule shall also set forth proposed dates for the filing of testimony and for a prehearing conference and an evidentiary hearing to address any contested issues concerning the implementation of sequential number assignment and rate center consolidation in the St. Louis area. The parties may file a stipulation concerning implementation of sequential number assignment or rate center consolidation if they are in agreement.

*IT IS THEREFORE ORDERED:*

1. That the parties to Case No. TO-98-212 are parties to this case for all purposes.
2. That the Records Department of the Commission shall send copies of this order to all interexchange and local exchange telecommunications companies, and all parties to Case Nos. TO-96-1 and TO-98-212.
3. That any party wishing to request a hearing or to intervene in this matter shall file an application no later than August 24, 1998 with the Secretary of the Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri, 65102, and send copies to:

Paul G. Lane, General Attorney-Missouri  
Leo J. Bub, Attorney  
Diana J. Harter, Attorney  
Southwestern Bell Telephone Company  
One Bell Center, Room 3518,  
St. Louis, Missouri 63101

Bruce E. Beard, Attorney  
Southwestern Bell Mobile Systems, Inc.  
13075 Manchester Road, Suite 100A  
St. Louis, Missouri 63131

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P.O. Box 537  
Jefferson City, Missouri 65102-0537

Linda K. Gardner, Senior Attorney  
United Telephone Company of Missouri  
5454 West 110th Street  
Overland Park, Kansas 66211

Craig S. Johnson  
Andereck, Evans, Milne, Peace & Baumhoer  
301 East McCarty Street, 3rd Floor  
Jefferson City, Missouri 65102

5. That the parties shall a proposed procedural schedule no later than September 22, 1998.
6. That the parties shall file a Sequential Number Assignment Report no later than October 22, 1998.
7. That the parties shall file a Rate Center Consolidation Report no later than December 22, 1998.
8. That the parties shall file a Pooling Report no later than February 22, 1999.
9. That this order shall become effective on August 4, 1998.

Lumpe, Ch., Crumpton, Murray, Schemenauer and Drainer, CC., concur.  
Randles, Regulatory Law Judge

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**In the Matter of the Application of Missouri Public Service for a  
Permanent Waiver from Certain Provisions of 4 CSR 240-  
40.030(11)(B)5 and 4 CSR 240-40.030(12)(M)1.B for a Pipeline  
Segment Near Nevada, Missouri.**

*Case No. GO-98-508*  
*Decided July 22, 1998*

**Gas §§16, 20.** The Commission found that waiving a rule governing uprating of pipelines under the specific circumstances involved herein was in the public interest and would not compromise safety, and so granted the waiver.

**ORDER GRANTING WAIVER**

On May 12, 1998, Missouri Public Service (MPS or Company) filed an application for a permanent waiver from Commission rules 4 CSR 240-40.030(11)(B)5 and 4 CSR 240-40.030(12)(M)1.B. These rules require the Company to pressure test a segment of gas pipeline before increasing the operating pressure above its rated Maximum



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Allowable Operating Pressure (MAOP). MPS wants to operate a sixteen mile segment of line that serves the city of Nevada at a pressure of 175 pounds per square inch gauge (psig). Thirteen miles of this pipeline is currently rated to operate at this pressure, but three miles is rated at only 118 psig. The increase in MAOP from 118 psig to 175 psig is needed in order to serve the increased demand for natural gas in Nevada, Missouri.

The rules from which MPS seeks a waiver would require MPS to increase the pressure on the three mile segment to 262.5 psig (1.5 times 175) and test it for leaks. Because of logistical problems with performing such a test on this segment of pipe, MPS requests that the Commission waive the requirement for it. Although it is presently required to leak survey this segment of pipeline once every three years, MPS proposes to increase surveys to once a year. MPS states that safety will not be jeopardized by the granting of the waiver.

In its memorandum filed on June 11, Staff states that the safety benefits derived from leak surveying this pipeline more frequently than required would exceed any safety benefits that would result from a one-time pressure test at 262.5 psig. Staff notes that this pipeline segment passed an uprating procedure in September of 1997 that involved raising the pressure from 60 psig to 175 psig in four equal steps, and conducting a leak survey after each pressure increase. Staff recommends that MPS be allowed to increase the MAOP of this pipeline segment to 175 psig by raising the pressure to 175 psig and conducting a leak survey, conditioned on MPS following the proposal in the application to conduct an annual leak survey over the involved pipeline segment.

The Commission finds that granting a waiver of the required uprating procedure under the specific circumstances involved herein is in the public interest, and will not compromise safety. MPS need not raise the pressure on the three mile segment of eight inch steel main to 262.5 psig in order to uprate it to a 175 psig MAOP, but may do so by raising the pressure to 175 psig in one increment, leak testing the line, and thereafter conducting annual leak surveys. To ensure that the pressurization of the line at 175 psig does not raise any safety problems, the Commission will order its gas safety staff to observe the leak survey conducted after the pressure is raised. Furthermore, because of the possible safety implications of granting this waiver, the Commission will not permanently waive the application of the rule as requested by MGE, but will waive its application for a period of three years. If MGE wants to continue to operate the line at 175 psig after the three-year period, it may apply for another waiver. At that point the Commission will be able to evaluate the operating history of the line and determine whether to grant the waiver for an additional period, or even grant it permanently. The Commission will provide written notice to the Department of Transportation as requested by MPS.

*IT IS THEREFORE ORDERED:*

1. That the application for waiver filed by Missouri Public Service on May 12, 1998, is granted for a period of three years from the effective date of this order.
2. That Missouri Public Service shall conduct a leak survey on the three mile segment annually.
3. That the gas safety staff of the Commission shall perform random observations of the leak survey of the line after the increase in pressure, and shall file a memorandum in this case relating the results of those observations.
4. That the Records Department of the Commission shall provide, by overnight delivery service, notice of the waiver granted herein (including a copy of the application, the Staff memorandum, and this order) to:  
Richard B. Felder  
Associate Administrator for Pipeline Safety  
U.S. Department of Transportation - RSPA/Office of Pipeline Safety  
400 Seventh Street, S.W., Room 2335  
Washington, DC 20590.
5. That this order shall become effective on September 25, 1998.

Lumpe, Ch., Crumpton, Murray, Schemenauer and Drainer, CC., concur.  
Mills, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of Ozark Telephone Company for Authority to Borrow an Amount Not to Exceed \$5,882,200 from the Rural Utilities Service and the Rural Telephone Bank and in Connection Therewith to Execute a Loan Agreement, Promissory Notes, and a Mortgage, Security Agreement and Financing Statement.**

*Case No. TF-98-549*  
*Decided July 22, 1998*

**Telecommunications §19.** The Commission approved a telephone company's plan to borrow 3.7 million dollars from the Rural Utilities Service and 2.2 million dollars from the Rural Telephone Bank to fund the company's modernization plan.

**ORDER APPROVING FINANCING**

Ozark Telephone Company (Ozark) is a telephone corporation organized under the laws of the State of Missouri and a public utility subject to the jurisdiction of the Missouri Public Service Commission under Section 386.250(2), RSMo Supp. 1997. Ozark is generally engaged in the business of providing telecommunications service

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to approximately 1,841 customers in two exchanges located in McDonald County, Missouri as well as approximately 267 customers in Arkansas and Oklahoma. The Company filed an application on June 5, 1998, asking the Commission to approve the borrowing of certain sums, not to exceed \$5,882,200.00, from the Rural Utilities Service (RUS) and the Rural Telephone Bank (RTB) to finance capital improvements and operating needs of Ozark for the benefit of its customers. Ozark made its request in compliance with Section 392.310, RSMo 1994 and 4 CSR 240-2.060.

Ozark provided documentation required by 4 CSR 240-2.060(8) including a statement of the purpose for which the financing was sought, a pro forma balance sheet, income statements, and a certified copy of the resolution of the Board of Directors authorizing the loan. Ozark indicated it had not included the required five year capitalization expenditure schedule as it had acquired the assets in question April 1, 1996 and therefore did not have five years of information. Ozark provided a capitalization expenditure schedule covering the time period it had owned the assets and requested a waiver of the requirement of a five-year capitalization expenditure schedule. Since the instruments defining the terms of the loan have not been executed, the company included copies of the instruments it proposes to execute following Commission approval of its actions. Ozark stated a portion of the loan would be used for the purpose of taking over, refunding, discharging or retiring existing indebtedness so would not be subject to the fee schedule set out in Section 386.300, RSMo Supp. 1997.

Ozark has requested financing authority in order to complete projects related to its Modernization Plan, approved by the Commission in Case No. TM-95-134 on September 25, 1997. Specifically, Ozark wishes to use the proceeds of the loan to (1) improve and extend services on an all one-party basis, (2) install COE electronics for establishing electronic serving areas in its exchanges, (3) replace remaining air-core cable with buried filled cable, (4) install fiber optic cable from Noel to Southwest City and upgrade the subscriber feeder network to lightweight facilities, (5) reinforce existing copper cable, and (6) install an underground fiber and duct system.

In order to finance these projects, Ozark asks the Commission to approve its borrowing of \$3,715,000.00 from RUS and \$2,167,200.00 from RTB. As part of this transaction, Ozark plans to issue a Mortgage Note payable to the United States of America acting through the Administrator of the RUS in the amount of \$3,715,000.00 and a Mortgage Note payable to RTB in the amount of \$2,167,200.00, with both notes providing for the payment of the indebtedness evidenced thereby within twenty-two (22) years. As security for the loan, Ozark plans to execute and deliver a mortgage, security agreement, and financing statement giving RUS and RTB an equal ratable priority lien with Ozark's prior lien held by the Rural Telephone Finance Cooperative on all of Ozark's assets.

Staff, including the Telecommunications and Financial Analysis Departments, reviewed Ozark's application and exhibits and filed a memorandum recommendation on July 10, 1998. Staff indicated that the construction, completion, extension and improvement of facilities proposed by Ozark are fair, reasonable, and required by its Modernization Plan. Staff recommended the Commission approve Ozark's Application subject to the requirements that Ozark be required to file with the Commission a copy of the final Mortgage Notes executed with RUS and RTB, that Ozark be required to file with the Commission any information concerning deviations from its stated use of the funds or any information that would materially change the pro forma capitalization and financial ratios, and that the Commission would reserve the right to consider at a later date the ratemaking treatment to be afforded the transactions and the resulting cost of capital. Staff also noted that Ozark had indicated it expected the interest rate on the loans to be approximately 5.75 percent. In its Application, Ozark had referenced a recent change to the definition of "cost of money" in Public Law 104-180 which would allow Ozark's interest rates to exceed 7 percent per year. Staff stated that this change in the law did not prevent the Commission from placing a cap on the interest rate it would approve. For this reason, Staff recommended an additional condition be placed on the approval of Ozark's Application, specifically that the interest rate for the debt issuance be equal to the current "cost of money" but not to exceed 7 percent.

Staff stated that the result of the proposed transactions would be \$5,882,200 in new long-term debt. If the financing is approved, the company's Pre-Tax Interest Coverage ratio would decrease from the current 1.67x to 1.22x and its Funds Flow Interest Coverage ratio would decrease from the current 2.16x to 1.74x. The financing would increase the company's total debt to total capital ratio from 72.53 percent to 86.10 percent. Staff stated that although the proposed transactions appeared to cause a significant increase in Ozark's total debt to total capital ratio in the short term, Staff felt the long-term outlook provided a more accurate portrayal of Ozark's ability to support the financing it had requested. Staff stated that Ozark projected that by 2002 its total debt to total capital ratio would improve to 60.41 percent, its Pre-Tax Interest Coverage ratio would increase to 3.05x, and its Funds Flow Interest Coverage ratio would increase to 3.84x. Staff indicated all of these figures would allow Ozark to achieve a rating consistent with a "BBB" rated telecommunications company as defined by Standard & Poor's Cooperation. Staff made no objection to the waiver of the filing of a five year capitalization expenditure schedule requested by Ozark.

The Commission has reviewed Ozark's application for financing and exhibits, Staff's memorandum, its attachments and specific recommendations. The Commission finds that Ozark should be authorized to execute Loan Agreements, Promissory Notes, Mortgages, Security Agreements, and Financing Statements in an amount not to exceed \$5,882,200.00 as described in its application subject to the condition proposed by Staff. Based upon Staff's review, Ozark's proposed improvement plans

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appear reasonable and the net effect on Ozark from the issuance of the debt and equity falls within a reasonable range. The Commission finds that the funds are reasonably required for the purposes of constructing and modifying facilities and are not reasonably chargeable to operating expenses or to income.

*IT IS THEREFORE ORDERED:*

1. That the application filed by the Ozark Telephone Company on June 5, 1998, for financing and the specific relief requested in that application, is granted.
2. That Ozark Telephone Company is authorized to execute and deliver a Mortgage Note payable to the United States of America through the Administrator of the Rural Utilities Service in the principal aggregate amount of \$3,715,000.00.
3. That Ozark Telephone Company is authorized to execute and deliver a Mortgage Note payable to the Rural Telephone Bank in the principal aggregate amount of \$2,167,200.00.
4. That Ozark Telephone Company is authorized to do all things necessary to complete the transactions specifically authorized in this order, including executing security agreements, financing statements, loan agreements, promissory notes, mortgages, and other documents, except those things contrary to law or to the rules and regulations of the Commission.
5. That the proceeds of the loans authorized by this order shall be used for the purposes specified in this order and for no other purposes.
6. That the interest rate applicable to the debt issuance shall be equal to the current "cost of money" but is not to exceed 7 percent.
7. That the waiver requested by Ozark Telephone Company of the provision in 4 CSR 240-2.060(8) requiring the filing of a five year capitalization expenditure schedule with this Application is granted.
8. That Ozark Telephone Company shall file a copy of the final Mortgage Notes executed with the Rural Utilities Service and Rural Telephone Bank as well as any other final terms and conditions associated with the financing transactions, and copies of the executed agreements, to the Commission's Official Case File within 10 days of the completion of any such transaction.
9. That Ozark Telephone Company shall submit to the Commission any information concerning deviations from its stated use of the funds or any information that would materially change the pro forma capitalization and financial ratios.
10. That Ozark Telephone Company shall submit to the Commission's Internal Accounting Department a report verified by an appropriate company official reflecting the journal entries recorded relating to the application of the proceeds from the loans authorized by this order within 30 days of the entries.
11. That nothing in this order shall be considered a finding by the Commission of the reasonableness of the expenditures involved in these financing transactions or of the value, for ratemaking purposes, of the properties involved, or as an acquiescence in the value placed upon those properties by the Company. The Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions, and the resulting cost of capital, in any later proceeding.

12. That this Order shall become effective on August 4, 1998.

Lumpe, Ch., Drainer, Murray and Schemenauer, CC., concur. Crumpton, C., dissents.

Harper, Regulatory Law Judge

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**In the Matter of the Mediation and Arbitration of Remaining Interconnection Issues Between MCI Telecommunications Corporation and Its Affiliates and Southwestern Bell Telephone Company.\***

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*Case No. TO-98-200*  
*Decided July 22, 1998*

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**Telecommunications § 36.** The Commission approved an interconnection agreement after a review as required under provisions of § 252 of the Telecommunications Act of 1976, concluding that the agreement is neither discriminatory nor inconsistent with the public interest.

**ORDER APPROVING INTERCONNECTION AGREEMENT**

This case was established when MCI Telecommunications Corporation and its Affiliates, including MCI metro Access Transmission Services, Inc., (MCI) filed a petition for arbitration of an interconnection agreement with Southwestern Bell Telephone Company (SWBT) on November 20, 1997. After the Commission had established a procedural schedule for resolving the issues presented for arbitration pursuant to the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 151 et seq., MCI decided to adopt another interconnection agreement rather than pursue its arbitration. The agreement that MCI subsequently submitted for Commission approval to implement its adoption (Agreement) is opposed in certain respects by SWBT. A more precise procedural history is set forth below, followed by the Commission's findings of fact and conclusions of law concerning the issues raised by SWBT.

**Procedural History**

On March 11, 1998, the Commission modified its procedural schedule to permit MCI to adopt the agreement filed on March 4 by SWBT and AT&T Communications of the Southwest, Inc. (AT&T) in Case No. TO-98-115 (the "March 4" or "SWBT/AT&T" agreement) as an alternative to mediating and arbitrating their disputed issues. SWBT and AT&T had not reached portions of the March 4 agreement voluntarily. Rather, their signed March 4 agreement was filed in compliance with, and in order to implement, the Commission's December 23, 1997 Arbitration Order in Case No. TO-98-115.

\*See page 148 for another order in this case.

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MCI had filed a motion on March 5, 1998 to extend the mediation and arbitration schedule so that MCI could review the SWBT and AT&T agreement and decide whether to adopt its terms. In its March 11 order eliminating the mediation portion of the schedule, the Commission directed MCI to file an adoption notice by March 20 if it wished to proceed with adoption rather than arbitration and, by separate order of the same date, ordered its Staff to file a Memorandum concerning the SWBT and AT&T agreement in Case No. TO-98-115 by March 17. Finally, MCI was ordered to file a dismissal of its petition in this case by noon on March 25 if the Commission had approved any adoption notice filed by MCI by that time.

The Staff filed its recommendation in Case No. TO-98-115 and, on March 19, the Commission approved the agreement between SWBT and AT&T. The Commission's order became effective on March 30. On March 20, MCI filed a notice in this case to adopt the March 4 agreement between SWBT and AT&T. MCI stated that its adoption would be effective on March 30, and made the adoption contingent upon the Commission's March 19 order taking effect without modification. MCI requested the Commission to establish a deadline for MCI and SWBT to file a signed interconnection agreement to implement the adoption. The Commission's March 11 order had established a deadline of March 23 for other parties to file responses to any adoption notice filed by MCI. No party filed responses.

The Commission approved MCI's adoption notice on March 25. The Commission found that MCI's adoption notice substantially complied with the Commission's order of March 11 in that it unequivocally stated its intent to adopt the agreement filed on March 4 by SWBT and AT&T in Case No. TO-98-115. A dismissal was filed on March 26. The Commission issued a notice on April 3 that the evidentiary hearing was cancelled due to MCI's dismissal of its petition for arbitration.

On April 24, MCI filed a Motion for Approval of Interconnection Agreement and simultaneously submitted an agreement that had been signed by MCI but not SWBT. MCI stated in its motion that the Agreement was identical in substance to the agreement between AT&T and SWBT, with the only changes pertaining to the change in identity of the interconnecting local competitor from AT&T to MCI. MCI stated that SWBT had refused to sign the Agreement, but urged its approval. On May 1, SWBT filed objections to the interconnection Agreement signed by MCI. MCI replied to SWBT's objections on May 11.

The Commission, by its Order and Notice issued June 29, established a deadline of July 14 for proper parties to request permission to participate without intervention or to request a hearing. No parties requested to participate without intervention or requested a hearing. The Commission's Order and Notice also directed parties wishing to file comments to do so by July 14 and directed the Commission Staff (Staff) to file a memorandum advising the Commission of its recommendation by July 14.

Staff filed a Memorandum on July 10, recommending that the Agreement be approved. No timely comments were filed, but SWBT filed suggestions on July 20 that reiterated its prior objections. MCI moved to strike these suggestions on July 20. SWBT filed a response to the Staff's recommendation on July 21. At no time did SWBT request a hearing on the proposed interconnection Agreement. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the verified application.

#### Findings of Fact

Staff stated in its Memorandum that it has reviewed the Agreement and the Agreement is identical to the SWBT/AT&T agreement approved by the Commission in Case No. TO-98-115. Staff stated that the Agreement does not appear to discriminate against telecommunications carriers not a party to the agreement and does not appear to be against the public interest. Staff recommended that the Commission approve the Agreement and order SWBT and MCI to submit a "complete" agreement with pages numbered seriatim on the bottom right hand margin, and that the parties be required to submit any modifications or amendments to the Commission for approval.

The Commission has reviewed Staff's Memorandum and the relevant case papers and determined that MCI's April 24 Agreement is identical to the SWBT/AT&T interconnection agreement approved in Case No. TO-98-115.

#### Conclusions of Law

The issues raised by SWBT are legal rather than factual. SWBT stated in its May 1 objections that it refused to sign the submitted Agreement for two reasons. The first reason was that MCI had refused to add the following language to the Agreement:

The parties recognize and agree that in the event of any subsequent administrative, regulatory, legislative, or judicial order, rule, opinion, or any subsequent Agreement between SWBT and AT&T which revises or modifies SWBT's rights and/or obligations pertaining to any matter contained in the AT&T interconnection agreements [*sic*], the relevant provisions of this agreement shall be deemed to be automatically modified, amended, or conformed to be consistent with such subsequent development.

SWBT stated that since MCI has chosen to accept the terms of the AT&T/SWBT agreement, any modifications to those terms must automatically modify MCI's Agreement with SWBT. SWBT argued that MCI's rights should be subject to appeal



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just as AT&T's rights are, and that MCI should not be permitted to adopt AT&T's contract and then obtain additional rights beyond those available to AT&T.

Second, SWBT objected to the portion of the Agreement that deals with the combining and separating of unbundled network elements. SWBT argued that the Commission's arbitration order in Case No. TO-98-115 was based on an erroneous interpretation of federal law. SWBT suggested that MCI could not adopt those portions of the Agreement that were signed by SWBT only in compliance with a Commission order that is contrary to law. SWBT further argued that, even if it had voluntarily agreed to the terms of the Agreement that relate to separation and recombination of unbundled network elements with AT&T in Case No. TO-97-40 and this was the basis for the Commission's decision in Case No. TO-98-115, SWBT has not reached any agreement to such terms with MCI. SWBT specified provisions of MCI's April 24 filing that should not be approved for these reasons, but stated that the rest of the Agreement should be approved by the Commission.

MCI stated in its May 11 reply that it had adopted the SWBT/AT&T agreement pursuant to §252(i) of the Act and requested approval pursuant to §252(e) of the Act. MCI admitted that SWBT would be free to assert its appeal rights in the future in the event of a dispute, but argued that SWBT did not have a right to compel MCI to add substantive language to an agreement that MCI wished to adopt. MCI stated that §252(i) of the Act requires SWBT to make available to MCI any interconnection, service or network element provided under an agreement that has been approved pursuant to §252 upon the same terms and conditions as those provided in the agreement. According to MCI, SWBT cannot force MCI to accept changes to the terms and conditions of the previously approved SWBT/AT&T agreement. In response to SWBT allegations about a change in the law regarding recombining unbundled network elements, MCI pointed out that Section 3 of the General Terms and Conditions of the SWBT/AT&T agreement already deals with the question of intervening law. MCI reiterated its request for Commission approval of the April 24 Agreement and requested that the Commission overrule SWBT's objections and require SWBT to sign the submitted Agreement within 10 days of approval.

In its recommendation, Staff pointed out that Section 3.1 on page 2 of the General Terms and Conditions portion of the SWBT/AT&T agreement states as follows:

If the actions of Missouri or federal legislative bodies, courts, or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the basis for a provision of the contract required by the Arbitration Award approved by the State Commission, the affected provision will be invalidated, modified, or stayed as required by the legislative body, court, or regulatory agency. In such event, the parties will expend diligent efforts to arrive at an agreement respecting the modifications to the Agreement required.

Staff also pointed out that Sections 2.23 and 2.24 on page 8 of Attachment UNE to the SWBT/AT&T agreement state:

The provisions of this agreement that require SWBT not to separate unbundled network elements that are already combined when ordered (e.g., Attachment 6, Section 2.8), will remain in effect, independent of the decisions of the United States Court of Appeals for the 8th Circuit in Iowa Utilities Board v. FCC.

The provisions of this agreement that require SWBT to combine unbundled network elements for MCI-AT&T (e.g., Attachment 6, Section 11.2, Attachment 7, Section 1.5.1.) Will remain in effect, independent of the decisions of the United States Court of Appeals for the 8th Circuit in Iowa Utilities Board v. F.C.C.

According to Staff, the more specific language in Attachment UNE controls over the more general language in the General Terms and Conditions, and that this language means SWBT has waived its right to appeal the UNE provisions in the SWBT/AT&T arbitration case. Staff also suggests that the Commission could require SWBT to combine UNEs for AT&T and MCI pursuant to the provisions of §386.250, RSMo Supp. 1997. SWBT's July 20 suggestions and July 21 response to the Staff's recommendation reiterate its earlier arguments, but also argue that Staff's interpretation of §386.250, RSMo Supp. 1997, is wrong.

Before resolving the issues presented by the parties, the Commission will first review the applicable provisions of the Act in order to put the issues in perspective.

The Act authorizes several means by which competitive local exchange carriers such as AT&T or MCI may develop terms and conditions upon which they will interconnect with, obtain unbundled network elements from, or resell the services of incumbent local exchange providers such as SWBT. For the sake of convenience, the Commission will refer to resale, interconnection and unbundled network element agreements as "interconnection agreements." Section 252(a) authorizes carriers to reach interconnection agreements voluntarily through negotiation or through mediation under the auspices of state agencies such as the Commission. If carriers have attempted to reach agreement through negotiation but have failed, either of the negotiating carriers may file a petition for arbitration with the Commission within a specified statutory time frame, and the Commission is to resolve all disputed issues presented in either the petition or the response to the petition pursuant to §252(b).

If the Commission is presented with a request to approve a negotiated agreement that is mutually acceptable to the parties, the Commission must apply the following standards in reviewing the agreement submitted to it:

- (2) GROUND FOR REJECTION - The State commission may only reject—
  - (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

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(i) the agreement (or portion thereof) discriminates against a tele communications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

47 U.S.C. §252(e)(2). By contrast, if the Commission resolves disputed issues presented to it in an arbitration proceeding and the parties submit an agreement to implement the Commission's arbitration order, the Commission must apply the following standards in reviewing the agreement submitted to it:

(2) GROUND FOR REJECTION - The State commission may only reject—

\* \* \*

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

47 U.S.C. §252(e)(2). Section 251 of the Act describes the minimum obligations that carriers must meet when other carriers seek to interconnect with them, resell their services or purchase unbundled network elements from them. 47 U.S.C. §251. Subsection (d) of §252 of the Act describes the standards to be employed by the Commission when determining the just and reasonable rates to be charged for interconnection, unbundled access and resale of services. 47 U.S.C. §252(d).

The Act also explicitly addresses the period of time that the Commission has to review these two types of agreements:

(e) APPROVAL BY STATE COMMISSION -

(1) APPROVAL REQUIRED - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(4) SCHEDULE FOR DECISION - If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved.

47 U.S.C. §252(e)(1) and (4).

The Act clearly contemplates a third method<sup>1</sup> of developing interconnection agreements, describing carriers' obligations as follows:

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS - A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. §252(i). Unfortunately, the Act does not explicitly address the procedure that a "requesting telecommunications carrier" should follow to adopt a previously approved agreement, or the procedure or standards to be followed by the Commission in reviewing an adopted agreement.

The Commission was presented with some of these issues in Case No. TO-98-154, involving TCG St. Louis (TCG). TCG initiated Case No. TO-98-154 by filing a pleading entitled "Notice of Adoption by TCG St. Louis of Interconnection Agreement Between Brooks Fiber and Southwestern Bell Telephone Company Pursuant to Section 252(i) of the Telecommunications Act of 1996." TCG submitted with its notice an interconnection agreement that had been executed by TCG and SWBT and explained in its notice what differences existed between its agreement and the previously approved agreement that it was adopting. TCG asserted in its notice that no Commission approval was necessary and that the adopted agreement should take effect immediately under federal law. SWBT intervened and disputed TCG's assertion that no Commission approval was necessary.

The Commission rejected TCG's argument, and found that the Commission's authority over interconnection agreements arrived at through adoption is the same as for interconnection agreements arrived at through negotiation. See Order and Notice issued November 6, 1997 in Case No. TO-98-154, p. 3. The Commission reasoned that the Commission's Staff (Staff) needs an opportunity to review any proposed adopted interconnection agreement to ensure that it does not contain terms that differ in substance from the agreement allegedly being adopted. The Commission also reasoned that interested parties should be permitted to participate or intervene and comment on a proposed adopted interconnection agreement so that any aspects of the proposal that are discriminatory or against the public interest may be brought to the Commission's attention. Id. The Commission anticipated that the parties to the previously approved interconnection agreement might have an interest in commenting on the adoption of their agreement. In Case No. TO-98-154, the Commission employed the same 90 day time frame for rendering a decision that the Commission regularly uses for negotiated interconnection agreements under §252(e)(4).

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<sup>1</sup>Commission approved interconnection agreements may also be assigned to new parties in some instances. An assignment constitutes a modification to an existing agreement rather than implementation of a new agreement.

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The Commission needs 90 days to review a negotiated interconnection agreement submitted to the Commission for approval because members of the public need to be given an opportunity to intervene or participate and the Commission's Staff needs time to review the agreement for consistency with the adopted agreement and compliance with the non-discrimination and public interest standards set forth in §252(e)(2)(A). By contrast, the Commission only needs 30 days to act on an agreement submitted to implement an arbitration decision because by the time the arbitration decision is rendered by the Commission, the resolved issues have been on file with the Commission for several months, pursuant to §252(b)(2)(A)(iii) of the Act, which requires submission of documentation of resolved issues with a petition for arbitration. Moreover, the Commission has already made a determination regarding the unresolved issues in accordance with the standards enunciated in §252(c) and (e)(2)(B) of the Act. No intervention period is required following issuance of the Commission's arbitration decision. The only task that the Commission is faced with following the arbitration decision is a review of the implementing agreement for compliance with the Commission's prior findings. For these reasons, the Commission concludes that an agreement presented to the Commission as an adoption of a previously approved agreement should be subject to the same standards, procedure and decisional time frame as a negotiated agreement under §252(a) of the Act.

The Commission notes that TCG initiated a new case (Case No. TO-98-154) when it filed its adoption notice and submitted an executed interconnection agreement with its notice, and MCI did not. However, because of the circumstances under which MCI considered adoption in lieu of proceeding with arbitration, the Commission ordered MCI to file its notice of adoption of the SWBT/AT&T agreement in Case No. TO-98-200 rather than a new case. MCI was given a very short period of time in which to file this notice, and did not have sufficient time to submit a completed agreement with its notice. For these reasons, the Commission concludes that the MCI adoption notice should be subject to the same procedures and time frames as the TCG adoption notice in spite of the fact that it was filed in MCI's arbitration case without an agreement attached, and that the Commission's 90 day time frame for approving or rejecting the adoption Agreement began when MCI filed the proposed Agreement with the Commission on April 24.

MCI's adoption also differs from TCG's in that SWBT did not execute the adoption Agreement submitted by MCI. A local exchange carrier is obligated to make available interconnection, services and network elements provided under any of its approved agreements to any requesting carrier "upon the same terms and conditions as those provided in the agreement." 47 U.S.C. §252(i). The Act does not explicitly address whether an agreement may be adopted when it is subject to appeal. Rather, the prerequisite for adoption is that the carrier receiving the request provides the requested interconnection, service, or network element under "an agreement approved under this section." *Id.* SWBT urges the Commission to require the addition of language to the adoption Agreement to clarify that, if SWBT successfully appeals

and overturns aspects of the arbitration decision in Case No. TO-98-115 and the SWBT/AT&T agreement is subsequently modified, MCI will have not have acquired through its adoption any rights over and above those afforded AT&T. MCI objections to the inclusion of additional language because then the Agreement would not contain the same terms and conditions as the agreement being adopted.

The Commission has reviewed the applicable statutory provision and concludes that it provides adequate protection for SWBT in the event that the SWBT/AT&T agreement must be revised to reflect the decisions of regulatory or judicial tribunals that may result from SWBT's or AT&T's appeal of the Commission's December 23, 1997 arbitration order. In the event that the Commission's arbitration order is overturned or remanded, the March 4 agreement approved for SWBT/AT&T will have to be revised accordingly, and the March 4 agreement will cease to be approved. The Agreement will therefore no longer constitute an "approved agreement" that is subject to adoption pursuant to §252(i), and the terms of the adopted Agreement would no longer apply between SWBT and MCI. MCI should not be permitted to acquire rights greater than AT&T is entitled to by using the adoption process rather than proceeding with arbitration. If the AT&T/SWBT agreement is revised as a result of administrative or judicial review, then it will be because the Commission abused its broad discretion as an arbitrator in some fashion. The Commission could not permit MCI to exercise rights that the Commission granted to AT&T in error, because if MCI were to acquire such rights through an arbitration agreement then MCI's rights would be subject to challenge. The Commission concludes that MCI's adoption Agreement will no longer be in effect to the extent that the underlying agreement between AT&T and SWBT is rendered void or partially void on judicial or administrative review. Therefore, SWBT's concern that MCI could acquire greater rights than AT&T by adopting the SWBT/AT&T agreement of March 4 is unfounded.

This begs the question of what terms and conditions would apply to interconnection, resale and unbundling issues between MCI and SWBT if the SWBT/AT&T agreement were revised or stayed, whether pursuant to judicial or administrative review or otherwise. The Commission is mindful that "holes" could be created in the agreement if the AT&T and SWBT arbitration decision is partially or wholly overturned and the reviewing court or agency does not specify alternative terms for interconnection, resale or unbundling. However, the Commission finds that the parties' legal obligations in such a situation should not be determined in a vacuum. Rather, if such an event occurs, the parties should approach the Commission regarding the proper solution at that time.

The Commission agrees with Staff and MCI that the SWBT/AT&T agreement is binding on SWBT with respect to unbundling and combining network elements regardless of the Eighth Circuit's decision in the Iowa Utilities Board v. FCC decision. However, more importantly, SWBT's arguments concerning recombination of unbundled network elements and unbundling of combined network elements are not

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relevant in this case, because the Commission will be reviewing the agreement under the standards set forth in §252(e)(2)(A) for negotiated interconnection agreements rather than the standards set forth in §252(e)(2)(B) for arbitration decisions. The Act does not prevent carriers from requesting the same terms and conditions as another carrier has received pursuant to an arbitration agreement. Rather, the Act permits carriers to request terms and conditions offered under any agreement approved under "this section." 47 U.S.C. §252(i). The phrase "this section" refers to §252, which addresses both negotiated and arbitrated agreements.

Based upon the Commission's conclusions above, SWBT will preserve its right to contest the unbundling and recombination terms of the SWBT and AT&T agreement in Case No. TO-98-115 on appeal, and will not be required to offer to MCI any terms found by a reviewing tribunal to be contrary to the Act. Therefore, the Commission concludes that it should overrule the objections filed by SWBT and approve MCI's April 24 Agreement. The Commission has considered the Agreement, the arguments of the parties, and Staff's recommendation. Based upon that review the Commission has reached the conclusion that the Agreement meets the requirements of the Act in that it does not unduly discriminate against a nonparty carrier, and implementation of the Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that approval of the Agreement should be conditioned upon the parties submitting any modifications or amendments to the Commission for approval pursuant to the procedure set out below. The Commission will order SWBT and MCI to sign the agreement and submit it to the Commission's Staff as described in this order.

Finally, the Commission concludes that its decision concerning the proposed Agreement rendered MCI's motion to strike SWBT's July 20 suggestions moot.

#### **Modification Procedure**

This Commission's first duty is to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act. 47 U.S.C. §252. In order for the Commission's role of review and approval to be effective, the Commission must also review and approve modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection. 47 U.S.C. §252(h). This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission. 4 CSR 240-30.010.

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

The parties shall provide the Telecommunications Staff with a copy of the resale or interconnection agreement with the pages numbered consecutively in the lower

right-hand corner. Modifications to an agreement must be submitted to the Staff for review. When approved the modified pages will be substituted in the agreement which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the pages when they are inserted into the Agreement. The official record of the original agreement and all the modifications made will be maintained by the Telecommunications Staff in the Commission's tariff room.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the modification will be approved once Staff has verified that the provision is an approved provision, and prepared a recommendation advising approval. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

*IT IS THEREFORE ORDERED:*

1. That the agreement submitted on April 24, 1998 by MCI Telecommunications Corporation and its Affiliates, including MCImetro Access Transmission Services, Inc. is approved.
2. That Southwestern Bell Telephone Company's objections are overruled.
3. That Southwestern Bell Telephone Company and MCI Telecommunications Corporation and its Affiliates, including MCImetro Access Transmission Services, Inc. shall file a copy of this agreement with the Staff of the Missouri Public Service Commission, with the pages numbered seriatim in the lower right-hand corner.
4. That any changes or modifications to this agreement shall be filed with the Commission for approval pursuant to the procedures outlined in this order.
5. That the Commission, by approving this agreement, makes no finding as to whether Southwestern Bell Telephone Company has fulfilled the requirements of Section 271 of the Telecommunications Act of 1996, including the competitive checklist of any of the fourteen items listed in Section 271(c)92)(B).
6. That this order shall become effective on August 4, 1998.
7. That this case may be closed on August 5, 1998.

Randles, Regulatory Law Judge

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**In the Matter of the Investigation into the Earnings of Fidelity Telephone Company and Bourbeuse Telephone Company.**

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*Case No. TR-98-344*  
*Decided August 4, 1998*

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**Telecommunications §14.** The Commission approved a stipulation and agreement whereby the telephone companies agreed to a decrease in revenues of \$799,923 per year to reflect savings resulting from a pending merger between the two companies.

**ORDER APPROVING STIPULATION AND AGREEMENT**

The Staff of the Commission (Staff), Fidelity Telephone Company, and Bourbeuse Telephone Company (Fidelity/Bourbeuse) filed a Stipulation and Agreement (Agreement) and a Motion to Open Docket on February 13, 1998. The motion stated that Staff had conducted an audit of Fidelity/Bourbeuse's earnings and, as a result, Staff and the companies agreed to a decrease in revenues of \$799,923 per year. The rate elements to be decreased are set out in the Agreement and specifically described in Attachment A. Staff and Fidelity/Bourbeuse are the only signatories.

Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) filed timely applications to intervene which were granted on April 8. The parties met in a prehearing conference after which they advised the Commission that the parties were not requesting an evidentiary hearing regarding the reasonableness of the Agreement. SWBT, AT&T, and the Office of the Public Counsel (OPC) all filed letters advising the Commission that they had no objection to approval of the Agreement without hearing.

The Agreement proposed by the parties, and included with this order as Exhibit 1, was the result of an earnings investigation undertaken by Staff and subsequent negotiations between Staff and Fidelity/Bourbeuse. Staff conducted a per book review of Fidelity/Bourbeuse's earnings based on the 12 months ending December 31, 1996, and updated for known and measurable changes occurring during 1997. Central to the agreed-upon result is a proposed merger between Fidelity and Bourbeuse that would permit rate consolidation and an expanded calling scope for end users. The proposed merger is pending before the Commission as Case No. TM-98-444.

The Agreement calls for Fidelity and Bourbeuse to merge and eliminate all toll charges for calls between their exchanges. This would increase the calling scope of their end users to 15,248 lines and decrease the combined company's revenues by \$330,955 annually. After the merger, Bourbeuse's rates will be changed to match Fidelity's. This adjustment will result in increases in residential and business rates for local service, with a net increase in revenues of \$49,717 per year. However,

intraLATA toll rates will be reduced significantly, reducing overall revenues by \$132,381 per year.

End user charges for Touch-tone service will be eliminated, and rates for ten vertical services, such as call waiting and caller ID, will be reduced. In addition, rates for E911 trunks will be reduced and educational institutions will receive a 50 percent discount. The combined effect of these reductions will be a decrease in revenues of \$87,687 per year. Fidelity/Bourbeuse will also eliminate an existing surcharge on foreign exchange private lines, used primarily by businesses, for a further revenue reduction of \$24,629 annually.

Fidelity/Bourbeuse will upgrade its system by replacing all its analog equipment with digital equipment at a cost of \$275,000. The net revenue impact of these upgrades will be a revenue reduction of \$50,000 per year.

The largest single impact on Fidelity/Bourbeuse's rates provided for by the Agreement is the implementation of parity between originating and terminating access rates. Making this change will reduce revenues by \$224,081 annually.

The Commission has reviewed the proposed Agreement and its official case file and finds that the Stipulation and Agreement filed by Staff and Fidelity/Bourbeuse should be approved without an evidentiary hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing, the Commission may grant the relief requested based on the Agreement submitted and the filed letters stating the intentions of the intervenors. The Commission may accept a Stipulation and Agreement offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo Supp. 1997.

The Commission finds that the merger proposed between Fidelity and Bourbeuse will permit a consolidation of rates and expanded calling scope that will produce more efficient operations and provide value to the end users of both companies by expanding the local calling scope. Increases in basic local service costs to Bourbeuse's customers will be more than offset by these advantages and by other rate reductions, particularly intraLATA toll reductions, and by the improvement in service attendant upon the installation of digital equipment. The Commission finds that the implementation of parity between originating and terminating access rates is in keeping with the move to a more competitive toll market. The Commission will direct Fidelity/Bourbeuse to file tariffs to implement the revenue changes approved. Because implementation is dependent upon the successful completion of the merger between Fidelity and Bourbeuse, the tariff sheets will not be due until the merger has been approved and the necessary transactions completed.

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*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the Staff of the Commission, Fidelity Telephone Company, and Bourbeuse Telephone Company on February 13, 1998, is approved. The Agreement shall become effective on the effective date of tariffs filed in conformance with this order to implement the authorized rate changes.

2. That Fidelity Telephone Company and Bourbeuse Telephone Company shall file 30-day tariff sheets designed to implement the rate changes set out in the Stipulation and Agreement approved by this order no later than ten days after the parties have advised the Commission by appropriate notice that the merger between them, proposed in Case No. TM-98-444, has been approved by the Commission and the necessary transactions completed.

3. That this order shall become effective on August 14, 1998.

Lumpe, Ch., Drainer, Murray and Schemenauer, CC., concur.  
Crumpton, C., absent.

Wickliffe, Deputy Chief Regulatory Law Judge

EDITOR'S NOTE: Exhibit 1, the Stipulation and Agreement in this case, has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of the Application of Ozark Natural Gas Co., Inc. for a Certificate of Public Convenience and Necessity to Construct, Own, and Operate an Intrastate Natural Gas Pipeline and Gas Utility to Serve Portions of Stone, Taney and Christian Counties, and for the Establishment of Utility Rates.\***

*Case No. GA-98-227*  
*Decided August 4, 1998*

**Gas § 4.** The Commission approved a stipulation and granted the application of Ozark Natural Gas Co. for a certificate of convenience and necessity to construct and manage a gas transmission pipeline.

**Gas § 22.** The Commission authorized initial rates for Ozark Natural Gas Co. based on a Stipulation and Agreement.

\*The Commission, in an order issued on August 10, 2000, denied a motion for a six month extension of the effective date of this case.

## ORDER APPROVING STIPULATION AND AGREEMENT

On December 3, 1997, Ozark Natural Gas Company, Inc. filed an application for a certificate of convenience and necessity (CCN) to build and operate an intrastate natural gas pipeline in southwestern Missouri, and to serve customers in Christian, Stone and Taney counties. According to the application, the pipeline will originate in Greene County near Springfield, pass through Greene, Christian, Stone and Taney counties and end near Branson. Timely applications to intervene were filed by Williams Natural Gas Company<sup>1</sup> (Williams); Missouri Gas Energy, a division of Southern Union Company (MGE); The Empire District Electric Company (Empire); City Utilities of Springfield (CU); Conoco Inc. (Conoco); the City of Hollister (Hollister); All Star Gas Corp.; Anderson Propane, Inc.; Town & Country Propane, Inc.; MFA Oil Company; National Propane, L.P. d/b/a Morris Propane; Cornerstone Propane, L.P.; and Cornerstone Propane, L.P. d/b/a Lake Country Propane (Propane Intervenors). On January 29, 1998, the Commission granted intervention to all of these entities. The parties filed testimony pursuant to a procedural schedule, and on May 12, certain of the parties filed stipulations. Ozark filed a Stipulation and Agreement and Joint Recommendation with Empire, one with CU, and one with MGE. These stipulations are attached to this order and incorporated by reference herein, as Attachments A, B, and C, respectively. A further Stipulation and Agreement, appended to this order as Attachment D, was filed by Ozark, Staff, Empire, Public Counsel, Conoco, Propane Intervenors, Hollister, and Williams on June 24. Upon the filing of this stipulation, the remainder of the procedural schedule was suspended by order issued June 26.

Although none of the four stipulations were signed by all parties, no party requested a hearing on them. Therefore, pursuant to 4 CSR 240-2.115, the Commission will treat all four stipulations as unanimous.

The Stipulation and Agreement between Ozark and Empire (Attachment A) provides that Ozark agrees to certain conditions designed to minimize construction risks, since its proposed construction will be in the same area in which Empire has facilities. These conditions are:

(A) Ozark shall define the route of its proposed pipeline in detail and meet with Empire prior to construction to determine where existing Empire facilities are located in order to address or eliminate conflicts.

(B) Ozark shall advise Empire in writing and in advance of the construction dates and hold pre-construction conferences to address or eliminate potential conflicts.

(C) Ozark shall use the Missouri One-Call system to locate all underground utilities at least three days prior to any excavation.

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<sup>1</sup>On June 4, 1998, Intervenor Williams Natural Gas Company filed a motion to substitute Williams Gas Pipelines Central, Inc. as the named intervenor, reflecting a corporate name change. That motion will be granted herein.

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(D) Ozark shall personally contact Empire in advance when crossing or constructing under Empire facilities so Empire will have the opportunity to observe or inspect.

(E) Ozark shall communicate with Empire before and during the construction phase of the proposed pipeline to cooperate in providing safe operating conditions.

The Stipulation and Agreement between Ozark and CU (Attachment B) contains the same conditions as those in the stipulation with Empire, with the addition of the following:

Before transporting any natural gas over Williams' interstate pipeline facilities, Ozark shall make arrangements with Williams to make improvements to the Williams system so that CU's capacity and pressure on Williams are not adversely affected by Ozark's use of the pipeline.

The Stipulation and Agreement between Ozark and MGE (Attachment C) contains the same conditions as the one between Ozark and Empire (Attachment A), and adds certain other conditions. These other conditions are summarized as follows:

(A) that Ozark shall not apply to this Commission for a CCN for portions of Christian, Greene, and Taney Counties where MGE holds a CCN;

(B) that Ozark shall not apply for a CCN for certain defined periods of time in other areas of these counties;

(C) that Ozark agrees that in certain areas the certificate it is requesting in this case be a "line certificate" only (that is, in those areas Ozark shall be allowed to build and maintain a pipeline to transport gas, but shall not be allowed to serve end use customers other than MGE);

(D) that Ozark agrees to clear MGE buried pipelines by a minimum of 15 feet when paralleling, and by a minimum of 24 inches in crossing situations where there is a potential conflict or interference with cathodic protection; and

(E) that if Ozark installs an impressed current cathodic protection system, its details and any mitigation shall be discussed with MGE prior to installation.

The fourth Stipulation and Agreement is more global than the first three in that it addresses more issues and is entered into by more parties. In it, the signatories recommend that Ozark be granted a CCN subject to certain conditions. In general, Ozark agrees to serve a smaller area than it originally applied to serve, it agrees on depreciation rates and rates for service, it agrees that its tariffs will be similar to those of Southern Missouri Gas Company, and it agrees to file a general rate case within four years.

On July 6, the Staff filed the testimony of Daniel Beck in support of the global stipulation. Although MGE filed a response (discussed below), no party objected to that testimony and it will be admitted. Mr. Beck states that Staff supports the approval of the application as amended by the stipulation. Mr. Beck testifies, however, that the Staff does not support the stipulation entered into by Ozark and

MGE (MGE/Ozark Agreement). Staff apparently opposes the provisions of the MGE/Ozark Agreement in which Ozark agrees not to serve certain areas, either forever or for specified periods of time.

On July 9, MGE filed a response to Staff's testimony in support of the stipulation. MGE notes that Staff did not request a hearing on the MGE/Ozark Agreement pursuant to 4 CSR 240-2.115, and as a result, that agreement is considered unanimous. MGE also notes that in the Stipulation and Agreement filed on June 24, Staff took no position on the MGE/Ozark Agreement. MGE states that it has a legitimate interest in protecting its certificated service areas and areas immediately adjacent thereto, and claims that Staff and the Commission should not be concerned that Ozark has voluntarily placed limits on the extent of its initial service area.

The Commission recognizes Staff's concern over Ozark voluntarily waiving its right to serve certain areas of the state. It is possible that there will be a demand for natural gas service in those areas that can most efficiently be met by Ozark. However, simply because Ozark has decided that it will not serve in certain areas does not detract from the fact that granting a certificate for the area defined by the stipulations in this case is in the public interest. Furthermore, the Commission cannot force Ozark to apply for a certificate for areas in which it does not wish to serve.

The Commission finds that there is a need for natural gas service in this area, and that the provision of such service by Ozark is necessary and convenient for the public interest. The Commission has reviewed all the Stipulations and Agreements and evidence of record in this matter and finds that substantial and competent evidence of record exists to find the Stipulations and Agreements to be reasonable and in the public interest and will, therefore, approve them.

*IT IS THEREFORE ORDERED:*

1. That the Stipulations and Agreements, Attachments A through D to this order, are hereby approved.
2. That Ozark Natural Gas Company, Inc. is hereby authorized to build and operate a natural gas pipeline and provide natural gas service pursuant to the terms and conditions of Attachments A through D hereto.
3. That Ozark Natural Gas Company, Inc. shall file tariff sheets substantially similar to those filed July 17, 1998.
4. That all of the prefiled testimony in this case shall be admitted into the record.
5. That the Motion to Change Name of Intervenor of Williams Natural Gas Company is granted.
6. That the procedural schedule established in this case is canceled.
7. That this order shall become effective on August 14, 1998.

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Lumpe, Ch., Murray, Schemenauer and Drainer, CC., concur.  
Crumpton, C., absent.

Mills, Deputy Chief Regulatory Law Judge

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EDITOR'S NOTE: The Stipulations and Agreements, Attachments A through D, have not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

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**In the Matter of the Assessment Against the Public Utilities in the State Of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 1998.\***

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*Case No. OO-99-44*  
*Decided August 5, 1998*

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**Public Utilities § 5:** The Commission will grant rehearing where various regulated entities have challenged the transfer of funds from the Public Service Commission Fund to the General Revenue Fund in order to underwrite refunds pursuant to the so-called Hancock Amendment, Mo. Const. art. X, § 16-24, in order to make a record for further review.

**ORDER REGARDING APPLICATION FOR REHEARING AND STAY**

On July 28, 1998, West Elm Place Corporation, The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Laclede Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service (Applicants) filed an Application For Rehearing And Stay pursuant to Section 386.500<sup>1</sup> and 4 CSR 240-2.160. Applicants seek rehearing regarding the Commission's June 29 Supplemental Order No. 52 (Order 52) in Case No. 11,110. The Commission has established Case No. OO-99-44 to address the application for rehearing and stay.

Order 52 is the order in which the Commission has set out its assessments of expenses directly attributable to all groups of public utilities and also the amounts of expenses not directly attributable to any such group. The purpose of Order 52 was to make the public utility assessments provided for, pursuant to Section 386.370, for the Commission's fiscal year commencing July 1, 1998 (the 1999 fiscal year or FY99). The Applicants have requested the Commission reconsider its decision in this order.

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\*See page 463 for another order in this case

<sup>1</sup> All statutory citations herein are RSMo. 1994 unless otherwise stated.

Monies paid into the Public Service Commission fund (the Fund) by regulated utilities have been transferred, in part, out of the Fund and into the General Revenues of the State of Missouri to facilitate tax refunds to the general public which have been mandated by Mo. Const. art. X, § 16-24 (the Hancock Amendment). The Applicants assert that the depletion of the Fund for this purpose is not authorized by law. According to the Applicants, Section 386.370.4 provides that any amount in the Fund "shall not revert to the general revenue fund." However, the statute read in its entirety states that the amount remaining in the PSC fund *at the end of the year* shall not revert into the general revenue fund. (Emphasis added.) It is unclear whether funds can be removed from the PSC Fund during the year for an "Article X transfer." This may be a case of first impression on this issue and the applicants should be prepared to brief this issue.

For their remedy, Applicants request that the Commission stay the effectiveness and enforcement of its Order 52. Applicants also assert that this particular order is unlawful and of no effect inasmuch as the order the Commission was made effective the day of issuance. Two cases exist which have addressed effective dates of Commission orders. Those cases state that the Commission must provide a reasonable amount of time between the issuance of its order and the effective date. Making a Report and Order effective one day after its issuance causes the report and order to be unlawful. State ex rel. St. Louis v. Public Serv. Comm'n, 228 S.W.2d 1, 2 (Mo. 1950). The court has found the Commission complies with Section 386.500 by making orders effective ten days after issuance. State ex rel. Kansas City, Independence & Fairmount Stage Lines Co. v. Public Serv. Comm'n, 63 S.W.2d 88, 93 (Mo. 1933).

However, it is important to note that these cases specifically, and exclusively, deal with orders which resolve contested cases. In fact, the Circuit Court of Cole County has recently issued a declaratory judgment in which it has likewise directed the Commission to provide an adequate effective date but limited the effect of that order to prohibiting "making an order or decision, in which a controverted matter is decided, effective on the date thereof ..." <sup>2</sup> This distinction is important inasmuch as Supplemental Order No. 52 was not issued to resolve a controverted matter and for that reason it is not clear that an effective date "on the date hereof" was, in fact, inappropriate.

Notwithstanding that fact, the Commission will grant rehearing for the purpose of adducing additional facts on the record and accepting pertinent legal arguments regarding the constitutional and procedural issues set out in the Applicants' motion. The Commission will provide an opportunity for intervention and additional pleadings prior to determining the need for an evidentiary hearing. The Commission will also direct the applicants to plead with specificity their intent as to the assessments in question.

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<sup>2</sup> State ex rel. County of Jackson v. The Public Service Commission of Missouri, CV197-1833cc, Declaratory Judgment (March 11, 1998).



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Several of the Applicants have sent letters to the Commission, as well as to the Department of Revenue, in which they either "challenge" or "protest" some portion of the assessment in question. Copies of those letters will be made a part of this record so that they may be available and any party wishing to may respond to the statements contained therein. The Applicants will be directed to file a pleading to indicate whether they intend to pay their assessments "under protest" and, if so, what authority exists for the interim treatment of those payments.

Although the Commission intends to review the Applicants' Motion for Rehearing it must be noted that agency adjudicative power extends only to the ascertainment of facts and the application of existing law in order to resolve issues within the given area of agency expertise. In re City of Kinloch, 242 S.W.2d 59, 63 (1951). "[A]n administrative body or even a quasi-judicial body is not and cannot be a court in a Constitutional sense." Id. The judicial power of the State is vested only in the courts designated in Mo. Const. Art. V, Sec. 1. The Public Service Commission has no power to declare any principle of law or equity. Lightfoot v. City of Springfield, 236 S.W.2d 348, 352 (1951). Therefore, the PSC has no power to declare statutes unconstitutional. State ex rel. Missouri Southern Railroad v. Public Service Commission, 168 S.W.2d 1156, 1164 (banc 1914). The PSC may hear evidence from a party regarding the constitutionality of the statute but only for the purposes of creating a record for the issue to be resolved judicially. Missouri Bluffs Golf Venture v. St. Charles County Board of Equalization, 943 S.W.2d 752, 755 (Mo. App. Ct. 1997).

Because Missouri common law states that an administrative agency, such as the Missouri Public Service Commission, has no jurisdiction to determine the constitutionality of a statute, it seems equally apparent that the Commission also lacks the jurisdiction to rule on the constitutionality of an Executive Order such as the directive issued by the Missouri Office of Administration to transfer moneys out of the Fund and into general revenues. Therefore, the Commission will entertain requests for hearing. However, the common law of Missouri suggests that any such hearing would be limited to the creation of a record for the issue(s) to be resolved judicially.

The Commission will schedule a prehearing conference for the purpose of entertaining arguments and motions as to the next step in this matter. The Commission will expedite the time period for interventions and expedite the setting of the prehearing conference. The Commission will also direct the Records Department to serve a copy of this order upon the Office of Administration and the Attorney General.

***IT IS THEREFORE ORDERED:***

1. That the Application For Rehearing And Stay shall be granted in part in that a rehearing is hereby granted.
2. That the Application For Rehearing And Stay shall be denied in part as to the Stay pending submission of pleadings ordered herein regarding the exact nature of the stay requested.

3. That each of the individual applicants shall file a pleading setting out with specificity:

- A. the exact nature of the stay requested and the remedy sought,
- B. the nature of any "protest" or "challenge" to the assessment payments and whether the protest goes only to the increased portion of the assessment or to the entirety of the assessment,
- C. Details setting out the total amount of "Article X" distribution received by each Applicant to date, and
- D. legal authority in support of the respective applicant's argument(s) on each issue, e.g. authority in support of the stay, the protest and other legal issues.
- E. These pleadings shall be filed not later than August 31, 1998.

4. That any party seeking to intervene shall do so by submitting an application to intervene to: the Secretary of the Commission, P.O. Box 360, Jefferson City, MO 65102-0360 not later than August 31, 1998. Copies of Applications to Intervene shall be submitted to:

James C. Swearengen  
Paul A. Boudreau  
Brydon, Swearengen & England P.C.  
P.O. Box 456  
Jefferson City, MO 65102-0456

and

Michael C. Pendergast  
Laclede Gas Company  
720 Olive Street, Room 1520  
St. Louis, MO 63101.

5. That the parties shall appear for prehearing conference for the purpose of narrowing the issues and legal question(s) presented by the Application For Rehearing And Stay. This prehearing conference shall be held in Room 520B of the Harry S Truman State Office Building on September 2, 1998, at 9:00 a.m.

6. That anyone with special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one of the following numbers: Consumer Services Hotline — 1-800-392-4211, or TDD Hotline — 1-800-829-7541.

7. That the Records Department shall serve a copy of this order upon:

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Jeremiah W. Nixon, Attorney General  
Attn: Ron Molteni  
Office of Attorney General  
Supreme Court Building  
Washington and High Streets  
P.O. Box 899  
Jefferson City, MO 65102-0899  
and

Karen Winn, General Counsel  
Office of the Commissioner of Administration  
Capitol Building, Room 125  
Jefferson City, MO 65101

8. That this order shall become effective on August 15, 1998.

Lumpe, Ch., Murray, Schemenauer, and Drainer, CC., Concur.  
Crumpton, C., Absent.  
Roberts, Chief Regulatory Law Judge

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**In the Matter of the Joint Application of Bourbeuse Telephone Company and Fidelity Telephone Company for Permission to Merge, With Fidelity Telephone Company Becoming the Surviving Corporation.**

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*Case No. TM-98-444*  
*Decided August 20, 1998*

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**Telecommunications §4.** The Commission approved a merger plan whereby two companies providing basic local telecommunications service were merged into a single company.

ORDER APPROVING MERGER

Bourbeuse Telephone Company (Bourbeuse) and Fidelity Telephone Company (Fidelity) filed a Joint Application on April 9, 1998 asking the Commission to approve a merger between them. Bourbeuse and Fidelity are both Missouri corporations with principal offices at 64 North Clark, Sullivan, Missouri 63080. Both are local exchange telecommunications companies and public utilities subject to Commission jurisdiction. Bourbeuse provides basic local telecommunications services in the Gerald exchange. Fidelity provides basic local telecommunications services in the Berger, Japan, Lyon, New Haven, Owensville, Spring Bluff, Stanton, and Sullivan exchanges.

Fidelity is a Primary Toll Carrier (PTC) pursuant to the Missouri PTC Plan and provides intrastate intraLATA interexchange telecommunications services to customers in its exchanges and in the Gerald exchange served by Bourbeuse.

The parties wish approval for a plan whereby Bourbeuse would merge into Fidelity, with Fidelity being the surviving corporation. To effectuate the merger each share of the capital stock of Bourbeuse will be exchanged for one share of Fidelity stock. The application states that the proposed merger will result in no change in the ownership or control of Bourbeuse or of Fidelity, and will not be detrimental to the public interest in that it will not adversely affect either company's operations or ratepayers. Fidelity, as the surviving company, will continue to provide telecommunications services to the former end users served by Bourbeuse. The parties wish to cancel Bourbeuse's existing tariff and amend Fidelity's existing tariff to include the Gerald exchange. The applicants state that the proposed merger should be transparent from the standpoint of current customers, and that the merger will simplify the existing corporate structure and eliminate duplications in operations. Finally, the applicants state that the merger will not result in the relocation of any property subject to taxation and, therefore, will not have an adverse impact on the tax revenues of any political subdivision. In support of their application, Bourbeuse and Fidelity submitted the Plan of Merger, the Resolutions of their respective Boards of Directors, and their financial statements.

The Staff of the Commission (Staff) filed a Memorandum on August 7 recommending approval of the merger. Staff stated that the application meets the requirements of the Commission's rule, 4 CSR 240-2.060(6), and that Staff has no objections to the merger. Staff recommended that the Commission issue an order approving the merger of Bourbeuse into Fidelity, directing Fidelity to make the necessary tariff filings, and canceling Bourbeuse's certificate of service authority and tariff simultaneously with the effective date of Fidelity's revised tariff.

The Commission has reviewed the Joint Application and Staff's recommendation and finds that the proposed merger would not be detrimental to the public interest. The Commission finds that the merger will be transparent to customers and that Fidelity, as the surviving corporation, will continue to serve the customers now served by Bourbeuse under existing tariffs. The Commission also finds that the proposed merger will eliminate certain duplications in operations and streamline Fidelity's corporate structure. The Commission notes that the merger will result in an expansion of the local calling scope of both companies' customers.

*IT IS THEREFORE ORDERED:*

1. That the Joint Application filed by Bourbeuse Telephone Company and Fidelity Telephone Company on April 9, 1998 is approved.
2. That Bourbeuse Telephone Company is authorized to merge into Fidelity Telephone Company, leaving Fidelity Telephone Company as the surviving corporation.

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3. That the parties are authorized to undertake any and all actions necessary to effectuate the proposed merger.
4. That once the merger has taken place, Fidelity Telephone Company shall serve former customers of Bourbeuse Telephone Company under Fidelity Telephone Company's existing tariff.
5. That Fidelity Telephone Company shall file revised tariff sheets designed to include the Gerald exchange in the exchanges it serves no later than September 11, 1998.
6. That Bourbeuse Telephone Company's certificate of service authority and tariff shall be canceled simultaneously with the effective date of the revised tariff Fidelity Telephone Company files in compliance with Ordered Paragraph 5.
7. That Fidelity Telephone Company shall notify the Commission and all customers of Fidelity Telephone Company and Bourbeuse Telephone Company of the merger no later than ten days after the transaction is completed.
8. That this order shall become effective on September 1, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur.

Wickliffe, Regulatory Law Judge

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**In Re the Matter of an Investigation Into Public Utility  
Preparedness for Year 2000 Conversion.\***

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*Case No. OO-99-43*  
*Decided August 18, 1998*

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**Public Utilities § 5:** The Commission will establish a case in which to examine the preparations and readiness of regulated entities for the advent of the year 2000, so-called "Y2K," and consequent operational difficulties anticipated by some persons.

ORDER ESTABLISHING CASE

There are only 500 days remaining until the year 2000. Numerous recent reports, including one study just released by the Senate Special Committee on the Year 2000 and another undertaken by the National Regulatory Research Institute, show utility companies lagging behind in their preparedness for the change in

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\*This order contains changes approved by the Commission in an order issued on August 26, 1998.

millennia. As the immovable deadline approaches, the Commission has determined that the focus must change from technical compliance to actual business readiness. The Commission must ensure that the utility industry remains ready to serve Missouri's ratepayers into the next century.

The year 2000 date field exists primarily within computer software and presents an ubiquitous problem which, if not properly addressed, could cause disastrous results. The year 2000 (Y2K) problem occurs in three different areas: two-digit date storage, leap year calculations, and special meanings for dates.

The most common problem is the two-digit date storage wherein a date is entered using only two digits each for the month, day and year (MM/DD/YY or 08/18/98). The two-digit date convention assumes that the century is "19." Thus, 98 equals 1998 and 99 equals 1999. However, 00 may indicate to most computers the year 1900. When the calendar reaches January 1, 2000, these systems may produce nonsensical results, or shut down (crash) because they will read the date 00 as 1900 rather than 2000.

Leap year calculations are complicated by the fact that the rules for leap year calculations suggest that a year is a leap year if it is divisible by four, but if it is divisible by 100 it is not a leap year. However, the year 2000 is a special case leap year which occurs only once every 400 years. It is not clear that software programs in existence will recognize this fact.

Lastly, Y2K solutions must address special meanings for dates. In order to write more efficient code, which allowed for the use of less memory, many date fields were also used to provide special functionality. The most common date used for this was 9/9/99. This code was used in some applications to indicate "save this data item forever" or "remove this data item automatically after 30 days." The specific meaning for this code varies by organization and software application. The solution for 9/9/99 obviously cannot wait until the year 2000. Data entries which refer to September 9, 1999 will invoke this problem.

Illustrations of the potential magnitude of the Y2K problem may be found in each industry. For instance: a five minute telephone call placed just before midnight on December 31, 1999, may be billed as a million-minute call, lasting from 1900 to 1999 because of software inability to distinguish between the year 1900 and the year 2000.

Another example of the potential damage may be demonstrated by the way in which electric utility companies conduct their business using the World Wide Web. In April 1996, the Federal Energy Regulatory Commission (FERC) issued an order directing all electric companies to build web sites to allow wholesale electric customers to shop and place orders freely. This FERC order resulted in the establishment of "Open Access Same-time Information Systems" (OASIS) web sites. The ruling mandated that public electric utilities use the web to give wholesale sellers and purchasers equal access to information on transmission availability and pricing. Using the web to open up the reservation process was a key part of deregulation and

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it has been estimated that between \$25 to \$50 billion worth of transactions were conducted over the Oasis system(s) in 1997. A Y2K induced crash could put the entire electric utility network at risk.

Even if such disasters are averted, a failure to respond in advance may still result in adverse impacts on Missouri's ratepayers. The failure to deal with the Y2K problem in a timely manner may mean that the costs to correct this problem become unreasonably high when the issue must be dealt with, and corrected, on an emergency basis. The Commission must ensure that if any such inefficiencies occur, they are not passed on to Missouri's ratepayers. However, it would be premature to use this case to determine whether the costs for Y2K correction should be borne by the shareholder or the ratepayer. Federal Communications Commissioner Michael Powell recently characterized that issue stating that "Such squabbling will suck up precious time we don't have. The time to fight those battles is in 2001, not now." While the cost issue may not need to be delayed until 2001, it is clear that the first order of business is avoiding any interruption in utility service to Missouri's ratepayers. Once that goal has been accomplished, assessing reasonable and prudent expenditures will be much more clear.

The Commission initially addressed this matter with a survey it sent to all regulated utilities in February of 1998. That survey requested information from each utility regarding actions taken to become Y2K compliant. In addition to this survey, additional information was requested from all electric providers that have nuclear generation to ensure Y2K compliance. The Commission Staff also requested specific information from telecommunications utilities that provide 911 emergency service to ensure their systems are Y2K compliant as well. Unfortunately, some responses were incomplete or, in some cases, simply were not provided and the time to await voluntary compliance has passed.

Therefore, the Commission has determined it appropriate to open this investigatory case so that it may ascertain the state of preparedness of all regulated utilities within the state of Missouri as well as municipalities, cooperatives and all other utility entities which come under the jurisdiction of the Commission for the purpose of safety. The Commission will direct every such entity to file with the Commission a completed and verified copy of the attached preparedness survey. Thereafter, the Commission will ascertain the need for hearings or for additional filings as may be appropriate. The Commission is aware that many utilities have already responded. Those entities may simply verify their survey as required herein and complete the additional questions. Any entity which has been ordered to submit a report on Y2K readiness to the FERC, Federal Communications Commission (FCC), or the Nuclear Regulatory Commission (NRC) should provide a copy of those same reports to the Public Service Commission.

The Commission does not intend to interfere with the utility companies on how they conduct their business on a daily basis. The courts have held that the Public Service Commission's authority to regulate does not include right to dictate the

manner in which the utility company shall conduct business. State ex rel. Public Service Commission v. Bonacker, 906 S.W.2d 896, 899 (Mo Ct App 1995) and the Public Service Commission has no authority to take over general management of any utility. State ex rel. Laclede Gas Co. V. Public Service Commission, 600 S.W.2d 222 (Mo.App. 1980). However, the Commission does have the jurisdiction and authority to ensure public safety and the safe provision of utility services from both regulated utilities and non-regulated utilities. A number of statutory sections, as well as decisions on the Missouri courts address this. Generally stated, "The power of the public service commission is an exercise of the police power of the state granted by the lawmaking power to that tribunal and overrides all contracts, privileges, franchises, charters, or city ordinances." State v. Public Service Commission of Missouri, 50 S.W.2d 114 (Mo. 1950). See also, Sections 386.310 and 393.140 RSMo 1996.

The top priorities by utility companies should include the following activities: conversion and testing of all, not just "critical" systems; assessing Y2K compliance of all external contractors, vendors and other business partners; assessing and acting upon all other supply chain issues; and, lastly, developing contingency plans.

*IT IS THEREFORE ORDERED:*

1. That case number OO-99-43 is established for an Investigation Into Public Utility Preparedness for Year 2000 Conversion.
2. That every utility which has been certificated by the Missouri Public Service Commission to provide service in the State of Missouri shall complete and file the Entry Of Appearance form attached to this order with and file it with the Secretary of the Commission, P.O. Box 360, Jefferson City, Missouri 65102, not later than September 2, 1998.
3. That every utility which is not certificated by the Missouri Public Service Commission but which is subject to the jurisdiction of the Missouri Public Service Commission for the purposes of safety shall complete and file the Entry Of Appearance form attached to this order with and file it with the Secretary of the Commission, P.O. Box 360, Jefferson City, Missouri 65102, not later than September 2, 1998.
4. That every party to this case shall complete the attached survey and file it with the Secretary of the Commission, P.O. Box 360, Jefferson City, Missouri 65102, not later than September 17, 1998.
5. That any party to this case which has previously filed documentation regarding Year 2000 with the Federal Energy Regulatory Commission, Federal Communications Commission, or the Nuclear Regulatory Commission shall provide a copy of those same reports to the Public Service Commission not later than September 17, 1998, and shall continue to provide copies of all such filings in the future to this commission.



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6. That this order shall become effective on August 28, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur.

Roberts, Chief Regulatory Law Judge

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EDITOR'S NOTE: The Entry of Appearance form and the Y2K Questionnaire in this case have not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

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**In the Matter of the Investigation into the Overearnings of Northeast Missouri Rural Telephone Company.\***

**In the Matter of the Proposed Tariff Sheets of Northeast Missouri Rural Telephone Company.**

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*Case Nos. TO-98-216 & TT-98-277  
Decided August 18, 1998*

**Evidence, Practice, and Procedure § 5.** The Commission overruled an objection based on failure to establish a proper foundation for a data request where a witness testified that he was aware of the content of the data requests propounded by another party and testified that he had supervised the preparation of the answer to the data request.

**Evidence, Practice, and Procedure § 5.** The Commission overruled an objection based on failure to establish a proper foundation because the Commission is not bound by the technical rules of evidence.

**Evidence, Practice, and Procedure § 5.** The Commission sustained relevancy objections to several data requests where those requests were not tied to specific traffic in the telephone company's exchanges, but instead involved revenue information on a statewide basis.

**Evidence, Practice, and Procedure § 10.** The Commission found that it was not bound by the technical rules of evidence and overruled hearsay objections where the objecting parties had not made the admissions.

**Telecommunications § 7.** The Commission found that its primary goal under the federal Telecommunications Act of 1996 is to promote competition as the vestiges of divestiture are slowly being dismantled and that considerations such as the relative profit margins, ability to contribute and historical contributions of companies serving different market segments should not influence the Commission's decision in the new atmosphere of free market competition.

**Telecommunications § 45.** The Commission found that its primary goal under the federal Telecommunications Act of 1996 is to promote competition as the vestiges of divestiture are slowly being dismantled and that considerations such as the relative profit margins, ability to contribute and historical contributions of companies serving different market segments should not influence the Commission's decision in the new atmosphere of free market competition.

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\*The Commission, in an order issued on November 19, 1998, denied an application for rehearing.

**Telecommunications § 14.** The Commission found that the intervenor had not met its burden of demonstrating that the other parties' agreement to equalize intraLATA and interLATA access rates and to eliminate the common carrier line charge (CCL) cap was inappropriate or unfair.

**Evidence, Practice, and Procedure § 6.** The Commission found that the intervenor had not met its burden of demonstrating that the other parties' agreement to equalize intraLATA and interLATA access rates and to eliminate the common carrier line charge (CCL) cap was inappropriate or unfair.

**Rates § 110.** The Commission found that the intervenor had not met its burden of demonstrating that the other parties' agreement to equalize intraLATA and interLATA access rates and to eliminate the common carrier line charge (CCL) cap was inappropriate or unfair.

**Rates § 110.** The Commission rejected the intervenor's allegations that the rates proposed by the signatories to the stipulation and agreement would result in a revenue increase or only a slight revenue decrease when applied to current usage levels.

**Rates § 40.** The Commission rejected the intervenor's allegations that the rates proposed by the signatories to the stipulation and agreement would result in a revenue increase or only a slight revenue decrease when applied to current usage levels.

**Telecommunications § 14.** The Commission rejected the intervenor's allegations that the rates proposed by the signatories to the stipulation and agreement would result in a revenue increase or only a slight revenue decrease when applied to current usage levels.

**Telecommunications § 16.** The Commission found that a non-unanimous stipulation and agreement in an overearnings investigation was in the public interest because it was designed to decrease the telephone company's revenues as quickly as possible by an amount that all parties considered appropriate, the agreement would reduce some of the highest access rates in Missouri, thereby benefiting all ratepayers in the state, and the agreement contained a revenue design and tariffs which were fair to all carriers in the competitive environment.

**Telecommunications § 45.** The Commission found that a non-unanimous stipulation and agreement in an overearnings investigation was in the public interest because it was designed to decrease the telephone company's revenues as quickly as possible by an amount that all parties considered appropriate, the agreement would reduce some of the highest access rates in Missouri, thereby benefiting all ratepayers in the state, and the agreement contained a revenue design and tariffs which were fair to all carriers in the competitive environment.

**Rates § 123.** The Commission found that a non-unanimous stipulation and agreement in an overearnings investigation was in the public interest because it was designed to decrease the telephone company's revenues as quickly as possible by an amount that all parties considered appropriate, the agreement would reduce some of the highest access rates in Missouri, thereby benefiting all ratepayers in the state, and the agreement contained a revenue design and tariffs which were fair to all carriers in the competitive environment.

#### APPEARANCES

*Craig S. Johnson*, Andereck, Evans, Milne, Peace & Baumhoer, P.O. 1438, Jefferson City, Missouri 65102, Northeast Missouri Rural Telephone Company.

*Leo J. Bub*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Paul S. DeFord*, Lathrop & Gage L.C., 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Michael F. Dandino*, Senior Counsel, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

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*Roger W. Steiner*, Assistant General Counsel, and *Marc D. Poston*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Amy E. Randles.

## REPORT AND ORDER

### Background

On November 21, 1997, the Staff of the Missouri Public Service Commission (Staff) filed a pleading entitled "Motion to Open Docket" with the Commission in which it requested the Commission to open a case to consider the Stipulation and Agreement (Agreement) reached between Staff, the Office of the Public Counsel (OPC), Northeast Missouri Rural Telephone Company (Northeast) and AT&T Communications of the Southwest, Inc. (AT&T)<sup>1</sup> that was filed with Staff's motion. A copy of the Agreement is attached to this Report and Order (Attachment 1).

In its motion, Staff alleged that it had initiated an overearnings investigation of Northeast in May of 1997, and that Staff, AT&T, OPC, Northeast and Southwestern Bell Telephone Company (SWBT) discussed Staff's preliminary per book earnings analysis. These discussions resulted in the nonunanimous Agreement proposed by Staff, AT&T, OPC and Northeast, which would reduce Northeast's revenues by approximately \$222,595 annually. Under the proposed Agreement, Northeast's charges for Originating CCL, Terminating CCL, Local Transport, Local Switching, Directory Assistance and other parts of access would be lowered and its intraLATA and interLATA rates would be equalized. The Commission established Case No. TO-98-216 to determine whether the nonunanimous Agreement should be approved.

Northeast filed a proposed tariff (File No. 9800470) on December 8, for Commission approval. This tariff filing would implement the rate restructuring plan proposed in the nonunanimous Agreement that was filed by the Staff on November 21. Case No. TO-98-277 was established to consider Northeast's tariff filing.

The Stipulation and Agreement, and Northeast's implementing tariff, present numerous interrelated issues for decision by the Commission. The parties do not dispute whether the proposed revenue reduction amount is appropriate. Rather, all parties agree with the goals of reducing Northeast's revenues by approximately

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<sup>1</sup> Northeast, Staff, OPC and AT&T shall be referred to collectively as the "signatory" or "stipulating" parties throughout this Report and Order.

\$222,595 annually, and of reducing access rates to achieve the reduction. The dispute focuses on how these goals should be achieved. One issue in dispute is whether intraLATA and interLATA access rates should be equalized. Related to this issue is whether the cap for originating and terminating CCL minutes of use should be eliminated. The parties also dispute whether the Commission should use 1996 or 1997 minutes of use together with the revenues of the company in order to determine the appropriate access rates, and whether the intended revenue reduction will be achieved under either of these scenarios. In addition to these issues, the Commission must determine whether the proposed Agreement and tariffs are in the public interest.

#### Procedural History

On December 16, the Commission issued an order establishing Case No. TO-98-216 to consider the Agreement. In its order, the Commission granted intervention to SWBT and gave notice of the case, establishing a deadline of January 2, 1998 for further applications to intervene. The Commission also established dates for a prehearing conference and an evidentiary hearing. AT&T applied for intervention on December 29, 1997, and the Commission granted AT&T permission to intervene at the prehearing conference held on January 5, 1998. There were no other intervenors. On January 6, the Commission consolidated Case No. TT-98-277 with Case No. TO-98-216, designating Case No. TO-98-216 as the lead case. On January 6, the Commission suspended the effective date of the tariff to July 7.

The Commission held an evidentiary hearing concerning the proposed Agreement on May 11, following which the parties submitted late filed Exhibits 11, 12, 13, 16 and 16HC. Northeast filed a pleading on May 18 indicating that it consented to a further suspension of its tariff for up to 60 days. Initial briefs were filed on June 8, and reply briefs were filed on June 18. On July 2, the Commission suspended Northeast's tariff for an additional 30 days, to August 6, in order that the Commission would have adequate time to review the record and render a decision. On August 5, the Commission suspended Northeast's tariff for an additional 15 days, to August 21, in order to complete the process of rendering a decision.

#### Evidentiary Rulings

At the hearing, SWBT offered into evidence Exhibit 14HC, consisting of AT&T's responses to seven data requests that had been propounded to AT&T by SWBT. The exhibit consists of seven pages, with one Data Request per page. Data Requests 1 through 6 called for AT&T's intraLATA and interLATA average lengths of haul, average revenue per minute, and average call duration for its intrastate traffic. Data Request 7 asked for the percentages of intraLATA and interLATA traffic carried by AT&T out of Northeast's exchanges. AT&T had answered the Data Requests after the Commission granted SWBT's motion to compel answers. AT&T had not opposed SWBT's motion to compel answers to SWBT's discovery while the motion was pending before the Commission.

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Northeast and Staff objected to the entire exhibit on the grounds that SWBT had not demonstrated an adequate foundation for the seven Data Request answers. Northeast further asserted a hearsay objection to Exhibit 14HC. AT&T objected to Data Requests 1 through 6 on the grounds of relevance.

SWBT responded to the relevance objection by arguing that the information contained in Exhibit 14HC would demonstrate that interLATA carriers have a greater ability to contribute to Northeast's switched access revenues than do intraLATA carriers. SWBT elicited testimony from an AT&T witness, who testified that he was aware of the content of the data requests propounded by SWBT and that he had supervised the preparation of the answer to Data Request 7. The witness was not aware of who had prepared the answers provided to Data Requests 1 through 6, how these answers had been prepared, or whether they were accurate. SWBT responded to the hearsay objection by arguing that AT&T's answers constituted admissions against interest, thus defeating the hearsay objection. On May 22, SWBT filed suggestions in support of the admission of Exhibit 14HC. SWBT restated its arguments concerning relevance and cited cases that purportedly support its assertion that the answers to Data Requests 1 through 7 are AT&T's admissions against SWBT, a party opponent, and therefore may be admitted under an exception to the hearsay rule. SWBT also cited a case in support of its position that a party's admissions against interest may be received in evidence during an opponent's case without calling the person making the admission to the stand.

The Commission finds that SWBT clearly established a proper foundation for Data Request 7. It is questionable whether SWBT met the technical requirements for establishing a proper foundation for AT&T's answers to Data Requests 1 through 6. The Commission is not bound by the technical rules of evidence. § 386.410.1, RSMo Supp. 1997. For this reason, the Commission will overrule the foundation objections to Exhibit 14HC.

Moreover, the Commission finds that Northeast's hearsay objection to Exhibit 14HC should be overruled. Although none of the cases cited by SWBT are clearly applicable to a situation where parties who did not make the admission object on hearsay grounds, the Commission is not bound by the technical rules of evidence. § 386.410.1, RSMo Supp. 1997.

However, the Commission finds that Data Requests 1 through 6 are not relevant to the issues before the Commission because they are not tied specifically to traffic in Northeast's exchanges. Rather, they involve AT&T revenue information on a statewide basis. Although the Commission granted SWBT's motion to compel AT&T's answers to these Data Requests, the Commission did so in light of AT&T's failure to respond to SWBT's motion to compel and the Commission did not make a finding as to the information's relevance in its order granting the motion.

The Commission therefore sustains the relevancy objection to pages 1 through 6 of Exhibit 14HC, but overrules the hearsay and foundation objections to the entire exhibit and admits page 7 of Exhibit 14HC.

The Commission issued notices regarding late filed Exhibits 11, 12, 13, 16 and 16HC on June 3 and 17, permitting the parties an opportunity to object. No party objected to the admission of any of these exhibits. Therefore, the Commission admits late filed Exhibits 11, 12, 13, 16 and 16HC.

#### Findings of Fact

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has also considered the positions and arguments of all of the parties in making these findings. Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

#### **A. Equalization of IntraLATA and InterLATA Access Rates and Elimination of CCL Cap**

The primary issues in dispute are whether intraLATA and interLATA access rates should be brought into parity and whether the CCL cap should be eliminated, as the stipulating parties have agreed to. In Northeast's exchanges, the current and proposed composite access rates are as follows:

	<b><u>Existing Rates</u></b>		<b><u>Proposed Rates</u></b>
	<b>IntraLATA</b>	<b>InterLATA</b>	<b>IntraLATA and InterLATA</b>
<b>Composite Originating Rate</b>	0.105034	0.135997	0.092997
<b>Composite Terminating Rate</b>	0.133412	0.200197	0.130317

The current disparity between intraLATA and interLATA switched access rates exists because, in January of 1987, the interLATA rates were set at a level to recover the cost of service as determined by the prior interLATA access pool, and in July of 1988, the intraLATA rates were set at a level to recover the cost of service as determined by the prior intraLATA toll pool settlements during a test period. Because the intraLATA and interLATA toll pools were dissolved at different points in time, with different study period calling volumes and different revenue requirements, the intraLATA access rates ended up lower than interLATA rates, and there has been no CCL cap for interLATA rates. See Exh. 3, page 7.

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Also, currently a "cap" exists on the number of intraLATA access minutes for which Northeast may charge a higher Carrier Common Line (CCL) rate; the cap is 3,286,714 minutes for originating access and 2,782,731 for terminating access. After these caps have been reached in a given calendar year, Northeast charges a lower, "after cap" discount rate for each minute of use. The CCL cap is designed so that, once a certain level of access usage occurs in a year which permits recovery of the non-usage sensitive costs of providing access, access rates are discounted appropriately. Exh. 3, page 11. The signatories propose to eliminate the cap and the attendant two tiered rate structure and replace it with single rates that will apply to originating CCL and terminating CCL, respectively, regardless of the number of minutes of use experienced by Northeast in any given year, as follows:

	<u>Existing Rates</u>		<u>Proposed Rates</u>
	<b>IntraLATA</b>	<b>InterLATA</b>	<b>IntraLATA and InterLATA</b>
<b>Originating CCL</b>	0.076100	0.090000	0.047000
<b>Terminating CCL</b>	0.130400	0.154200	0.084320
<b>Originating CCL after CAP</b>	0.009100	0.090000	0.047000
<b>Terminating CCL after CAP</b>	0.015500	0.154200	0.084320

See Schedule 1 to Exh. 8. According to Northeast's witness Godfrey, the proposal would reduce intraLATA access revenue by \$103,760, or 6.7%, and would reduce interLATA access revenue by \$118,835, or 33.9%. Approximately 47% of the revenue reduction would be accomplished by lowering intraLATA access rates and approximately 53% of the revenue reduction would be accomplished by lowering interLATA access rates.

SWBT, the only party opposing the Agreement, alleges that intraLATA and interLATA access rates were originally determined by considering the contributions made to access revenues by various groups of providers, namely intraLATA versus interLATA providers. Typically, intraLATA access providers such as SWBT contributed more to access revenues than interLATA providers such as AT&T, in spite of the lower per minute intraLATA access rates, because there were more

minutes of use in intraLATA service than in interLATA service<sup>2</sup>. According to SWBT, the Commission also gave consideration to the fact that interLATA toll produces a higher average revenue per minute than intraLATA toll, so that interLATA service providers could afford to contribute more to access revenues on a per minute basis than could intraLATA service providers. For these reasons, SWBT asserts that any reduction in access revenue should be distributed by lowering intraLATA access rates more than interLATA access rates. Specifically, SWBT asserts that the respective rates should be set so that 81.5% of Northeast's revenue reduction should be achieved through lowering intraLATA access rates rather than interLATA access rates. This proposal is based on the fact that intraLATA access produced 81.5% of Northeast's total access revenue in 1996. SWBT's proposed distribution would recognize SWBT's and other intraLATA service providers' historically higher contribution to Northeast's overearnings and reflect the continued ability of interLATA service providers to pay more per minute in access while staying profitable.

SWBT opposes the elimination of the intraLATA CCL cap because SWBT claims that the proposal effectively amounts to a rate increase for access minutes of use above the test period level. SWBT alleges that the "after cap" discount rate will no longer be available and that the proposed decrease in Northeast's "pre-cap" originating and terminating CCL rates will not be enough to offset the higher cost for minutes of use above the current cap. SWBT suggests that the CCL cap should be updated rather than eliminated. According to SWBT, after the 1997 usage levels are used to proportionately distribute reductions between pre-cap interLATA and intraLATA access rates as SWBT proposes, the actual 1997 usage levels could become the new cap levels. SWBT suggests that usage above the 1997 level (the new cap) should be charged for at the current post-cap rates charged by Northeast, so that a discount continues to apply.

The signatories to the Agreement argue that intraLATA and interLATA access rates should be equalized because the costs of provisioning these services are in most respects identical. They emphasize that other companies have equalized intraLATA and interLATA access rates and eliminated the CCL cap. They argue that the current difference in access rates is unjustified and inappropriate in light of the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 151 *et seq.*,

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<sup>2</sup> See Attachment A to Agreement (Attachment 1). Currently, the only portion of intraLATA access rates that is more expensive than its interLATA counterpart is the Local Transport element. This causes Northeast's intraLATA composite originating rate below the cap to be higher than its interLATA composite originating rate below the cap. However, Northeast's overall intraLATA composite originating rate is still lower than its overall interLATA composite originating rate.



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because the historical difference in rates came about as a result of divestiture proceedings. The Commission's primary goal under the Act is to promote competition as the vestiges of divestiture are slowly being dismantled. Considerations such as the relative profit margins, ability to contribute and historical contributions of companies serving different market segments should not influence the Commission's decision in the new atmosphere of free market competition.

In addition, they emphasize that in overearnings proceedings, the amount of overearnings is calculated by looking at the subject company's total revenues without respect to which group of ratepayers generated the excess revenues. They argue that rate design is forward-looking and should prevent the subject company from overearning in the future. Rate design is not supposed to allow a rate-paying group to recover what has been paid in the past. They also dispute whether interLATA toll service remains more profitable than intraLATA toll service today. Finally, they presented evidence that other secondary carriers, such as Green Hills Telephone Company, Citizens Telephone company and Steeleville Telephone Exchange have been permitted to institute intraLATA and interLATA access rate parity.

With respect to the CCL cap, the stipulating parties point out that the cap currently produces the odd result that a minute of access could cost more to ratepayers in December than in January, even though the cost of providing switched access has not changed. They point out that SWBT and 14 other local exchange carriers in Missouri currently do not have a cap. They also assert that the cap will be difficult to administer when multiple competitive carriers are providing service.

**B. 1996 Versus 1997 Minutes of Use/Achievement of Revenue Reduction**

SWBT asserts that the access rates proposed under the Agreement will not achieve the intended revenue reduction of \$222,595 because Northeast has experienced an average annual growth rate of 12.3% in its access minutes of use since divestiture. The parties to the Agreement used 1996 as their test year. SWBT argues that the proposed access rates will not achieve a significant revenue reduction, and might even result in a revenue increase, because 1996 usage levels are not the usage levels to which the rates will be applied. According to SWBT, if unrealistically low service quantities are used, the rates will be set higher than necessary to achieve the revenue objective. For example, if Northeast were to apply its proposed access rates to the actual usage paid for by SWBT in 1997 and to interLATA usage volumes which assume ten percent growth since 1996, they would produce revenue of approximately \$16,575 over Northeast's 1996 access revenue<sup>3</sup>. See Exh. 10, page 5. SWBT points out that the 1997 minutes of use are

<sup>3</sup>SWBT did not have information about other carriers' usage levels or interLATA usage growth during this time period. However, SWBT's witness testified that if interLATA access usage remained the same as in 1996, the proposed rates would only produce a revenue reduction of \$6,643 for Northeast when applied to SWBT's 1997 minutes of use. Exh. 10, page 6.

known and measurable and are therefore an appropriate adjustment to the test period. SWBT proposes that Northeast be required to update the access service quantities used to determine new rate levels.

The stipulating parties oppose SWBT's proposal to use 1997 minutes of use for a number of reasons. First, they emphasize that the 1997 usage levels were not known and measurable at the time the parties entered into their Agreement. They also assert that SWBT is "comparing apples to oranges." They assert that a higher level of use in 1997 would have produced higher revenues, as well, and that if SWBT wishes to use 1997 minutes to estimate the effects of the rate changes, then SWBT should compare its estimated 1997 revenues to actual 1997 revenues under the current rate structure to see whether the intended revenue reduction will be achieved by the proposed rate decreases. Second, they point out the clause in their Agreement which states that if the Agreement is not accepted in its entirety by the Commission, it will not be binding on the signatories. They assert that if the Commission attempts to place any conditions on the Agreement, then the Agreement will be null and void, the Staff will have to complete a full overearnings investigation and the Commission will have to conduct a full blown rate case. The signatory parties also dispute SWBT's assertion that using 1996 minutes of use will result in a revenue increase or only a very small revenue decrease. They suggest that if 1997 minutes of use are to be used to calculate access rates, then 1997 revenue would also have to be used. The parties did not submit 1997 revenue information.

### **C. Summary**

The Commission finds that SWBT has not met its burden of demonstrating that the signatory parties' proposal to equalize intraLATA and interLATA access rates and to eliminate the CCL cap is inappropriate or unfair. SWBT emphasizes that the access rates are not, and have never been, cost justified, but also acknowledges that the costs of providing interLATA and intraLATA service are not significantly different. Exh. 10, p. 8. While SWBT complains that intraLATA service providers have contributed more to Northeast's access revenues than have interLATA service providers, it ignores the fact that interLATA service providers have contributed more per minute of use than have intraLATA service providers. See Schedule 1 to Exhibit 8. SWBT's argument that past levels of contribution should form the basis of future revenue decreases is not convincing on the record before the Commission.

Moreover, the Commission finds SWBT's allegations that the rates proposed by the signatory parties will result in a revenue increase or only a slight revenue decrease when applied to current usage levels unconvincing. SWBT's examples are based solely on SWBT's actual 1997 minutes of use and not on actual data concerning all carriers' minutes of use. Exh. 10, pp. 5-6. Staff's response to SWBT's allegations is convincing. The Commission finds that it is not necessary to use 1997 usage levels to calculate the rates necessary to achieve the intended \$222,595 revenue reduction.

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The Commission finds that it would be inappropriate to update the test year to include 1997 minutes of use without also updating the test year to include actual 1997 revenues. Northeast's actual 1997 revenues are not in the record.

Overall, the Commission finds that the Agreement is in the public interest because it is designed to decrease Northeast's revenues as quickly as possible by an amount that all parties consider to be appropriate. The Commission finds that the Agreement will accomplish its stated objective of reducing Northeast's access revenues by approximately \$222,595 annually. The Commission finds that the Agreement will reduce some of the highest access rates charged in Missouri and will therefore benefit all ratepayers. Finally, the Commission finds that the revenue design in the Agreement and implementing tariffs is in the public interest because it is fair to all carriers in the competitive environment that is being developed pursuant to the Telecommunications Act of 1996. For these reasons, the Commission finds that the rate design proposed by Northeast, Staff, OPC and AT&T is appropriate and should be approved.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The extent of the Commission's jurisdiction over the proposed Agreement and tariff is defined by the following statutes:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(2) To all telecommunications facilities, telecommunications services and to all telecommunications companies . . . , *except that nothing contained in this section shall be construed as conferring jurisdiction upon the Commission over the rates charged by a telephone cooperative for providing telecommunications service within an exchange or within a local calling scope as determined by the commission, except for exchange access service;*

§ 386.250, RSMo Supp. 1997 (emphasis added). See also § 392.220.5, RSMo Supp. 1997. A "telephone cooperative" is defined to be a telecommunications company:

. . . in which at least ninety percent of those persons and corporations subscribing to receive local telecommunications service from the corporation own at least ninety percent of the corporation's outstanding and issued capital stock and in which no subscriber owns more than two shares of the corporation's outstanding and issued capital stock.

§ 386.020(54), RSMo Supp. 1997. Northeast asserted, and no party disputed, that Northeast is a telephone cooperative. The Commission therefore has jurisdiction to approve or reject any proposed change in Northeast's access rates. Based upon its findings, above, the Commission concludes that the proposed changes in Northeast's access rates are in the public interest and should be approved.

The Commission does not conclude that lowering access rates, or equalizing access rates, will necessarily be the best application of a revenue reduction in any other cases involving small incumbent local exchange carriers, whether or not they are cooperatives. The Commission notes that numerous cases are pending before it in which SWBT is opposing agreements submitted by Staff and other small incumbent local exchange carriers on the same grounds that it opposes the Agreement in this case. The Commission's decision in this case shall not be construed as reaching the general question of whether stipulated revenue reductions that are proposed by small incumbent local exchange carriers and involve lowering or equalizing access rates or eliminating CCL caps should be approved.

*IT IS THEREFORE ORDERED:*

1. That the hearsay and foundation objections to Exhibit 14HC are overruled, and that the relevance objection to pages 1 through 6 of Exhibit 14HC is sustained.
2. That pages 1 through 6 of Exhibit 14HC are rejected, and page 7 of Exhibit 14HC is admitted.
3. That Exhibits 11, 12, 13, 16 and 16HC are admitted.
4. That the Stipulation and Agreement signed by the Commission's Staff, the Office of the Public Counsel, Northeast Missouri Rural Telephone Company and AT&T Communications of the Southwest, Inc. is approved.
5. That the tariff filed by Northeast Missouri Rural Telephone Company on December 8, 1997, is approved to become effective on August 21, 1998. The tariff approved is:

**P.S.C. MO. No. 2 Consolidated**

4th Revised Sheet No. A.1	Canceling 3rd Revised Sheet No. A.1
4th Revised Sheet No. A.1.1	Canceling 3rd Revised Sheet No. A.1.1

6. That this Report and Order shall not be construed as addressing whether stipulated revenue reductions that are proposed by small incumbent local exchange carriers and involve lowering or equalizing access rates or eliminating CCL caps in other cases should be approved.

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7. That this Report and Order shall become effective on August 28, 1998.

Lumpe, Ch., Murray, Schemenauer and Drainer, CC., concur.  
Crumpton, C., dissents.

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**DISSENTING OPINION OF COMMISSIONER HAROLD CRUMPTON**

I respectfully disagree with my distinguished colleagues in Case Number TO-98-216 and TT-98-277. I recognize the fact that the Commission has limited responsibility when dealing with telephone cooperatives such as the one in this case, Northeast Missouri Rural Telephone Company (NMRTC). However, it is my belief that NMRTC customers would have preferred a reduction in interexchange toll rates between Northeast Missouri Rural Telephone Company exchanges, as well as to other local telephone company exchanges. The Commission should have rejected the Stipulation and Agreement, and held public hearings to confirm that this would have been the best, or at least better way, to address NMRTC's overearnings.

The Commission case TO-98-329, In the Matter of an Investigation into Various Issues Related to the Missouri Universal Service Fund, is now the proper forum for reducing access charges.

The goal of good utility regulation should be just, reasonable and affordable rates for utility customers. Considering the fact that NMRTC customers are concerned about the short haul toll charges they have to pay in order to reach essential parties, e.g., doctors, ministers, schools, stores, etc., Staff, OPC and the management of NMRTC should have pursued solutions to reduce or remove short haul toll charges from NMRTC customer bills.

The Commission was the ratepayers' last bastion of hope. Having read AT&T's admission "...that there will be no immediate reduction in local rates....", the majority should have rejected the Stipulation and Agreement.

It is my hope that in the future, Staff, OPC, and the local telephone company will be more attentive to the ratepayers. Failing that hoped for event, I am certain that my colleagues will take appropriate action and provide short haul toll relief to rural local telephone company customers.

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**In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area.\***

**In the Matter of Missouri Gas Energy's Proposed Modifications to its Facilities Extension Policy.**

*Case Nos. GR-98-140 & GT-98-237  
Decided August 21, 1998*

**Gas §20.** The Commission found that the return on equity, or the allowable profit earned on the investment made by the common shareholders, of 10.93 percent, is just and reasonable.

**Accounting §42; Expense §§11, 16, 20, 22, 25, 48; Gas §§29, 32, 34, 88.** The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.

**Accounting §42; Expense §§22, 48; Gas §§24, 32, 34, 88.** The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.

**Accounting §42; Expense §§22, 48; Gas §§ 24, 32, 34.** Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a "return of " and a "return on" the safety line replacement program deferred account balance.

**Accounting §42; Expense §§17, 22, 48; Gas §§24, 32, 34, 88.** The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.

**Expense §§11, 16, 22, 25, 69; Gas §§29, 33, 20, 77.** The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.

**Accounting §41; Expense §§11, 16, 22, 46; Gas §§29, 63; Rates §20.** The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.

\*The Commission issued an order of correction on August 26, 1998. In addition, the Commission, in an order issued on August 31, 1998, denied a motion for correction to revenue requirement.

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**Evidence, Practice and Procedure §§7, 24; Expense §§11, 16, 25, 28, 39, 69; Gas §29.** The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company's Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.

#### APPEARANCES

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*William K. Haas*, Senior General Counsel, *Roger W. Steiner*, Assistant General Counsel, *Cynthia Bryant*, Assistant General Counsel and *Denny Frey*, Assistant General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE:

Shelly A. Register

## REPORT AND ORDER

**I. Procedural History**

On October 3, 1997, Missouri Gas Energy (MGE or Company), a division of Southern Union Company, submitted to the Missouri Public Service Commission (Commission) tariffs reflecting increased rates for gas service provided to the customers in the Missouri service area of the Company. The proposed tariffs contained a requested effective date of November 2, 1997, and were designed to produce an annual increase of \$27,817,140 or 6.89 percent in the Company's revenues excluding gross receipts taxes, franchise fees or other similar fees or taxes. By order dated October 29, 1997, the Commission suspended the tariffs to September 2, 1998. The following entities filed timely applications to intervene, which were granted on December 9, 1997:

The County of Jackson, Central Missouri State University, University of Missouri-Kansas City, (Jackson County, et al.);

Williams Natural Gas Company (WNG);

Riverside Pipeline Company, L.P. and Mid-Kansas Partnership (Riverside/Mid-Kansas);

Mountain Energy Corporation (Mountain Energy); and

The City of Kansas City.

The Commission also granted the application of the City of St. Joseph to participate without intervention. By its order dated February 11, 1998, the Commission granted intervention to Kansas City Power & Light (KCPL) and Midwest Gas Users' Association (MGUA), and by its order dated February 26, 1998, the Commission granted intervention to Missouri Developers, et al. (MDEA).

On November 26, 1997, the Company filed its direct testimony and updated its direct testimony with a filing on January 30, 1998. On March 13, 1998, the Staff of the Missouri Public Service Commission (Staff) filed direct testimony, in addition to the Office of the Public Counsel (OPC) and MDEA. On March 17, Staff, OPC, Jackson County, et al. and MGUA filed rate design testimony.

A prehearing conference occurred the week of April 6.

The parties filed rebuttal testimony on April 23 and surrebuttal testimony on May 15. A hearing was held and evidence adduced from May 26 through June 4. All prefiled true-up testimony was filed on July 13. Initial briefs were filed on July 14. A true-up hearing was held on July 16 and reply briefs including true-up arguments were filed on July 31.

**A. Stipulation and Agreements****1. Stipulation and Agreement Related to Rate Base, Income Statement and Return Issues:**

On May 22, 1998, Staff, OPC and MGE filed a Stipulation and Agreement (Attachment A) in this proceeding relating to issues resolved under rate base, income



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statement and return. On May 29, intervenor Williams Natural Gas (WNG) filed a letter with the Commission indicating that WNG had no objection to the Stipulation and Agreement filed by the stipulating parties. On June 1, intervenors Jackson County, et al., and MGUA notified the Commission of their agreement with the Stipulation and Agreement.

The agreement provided that the parties have resolved various revenue requirement issues among themselves. If approved by the Commission, the Stipulation and Agreement would resolve the following issues:

1) Rate Base

a. Automated Meter Reading (AMR), except: 1) the issue between MGE and Staff of adding back meter readers consistent with the level of AMR investment in rate base prior to true-up; 2) the issue of the appropriate level of encoder-receiver-transmitters (ERTs) to be held in inventory; and 3) the issue of the appropriate depreciation rate to be applied to ERTs;

b. Gas inventory;

c. Unamortized deferred credit per Case No. GM-94-40;

d. Customer advances;

e. Customer deposits;

f. Materials & supplies, except for the level of ERTs to be held in inventory;

g. Cash working capital; and

h. Prepayments.

2) Income Statement

a. Revenues and billing determinants;

b. Payroll, payroll taxes, benefits, insurance/ injuries & damages;

c. Joint and common costs;

d. Uncollectibles;

e. Public Service Commission assessment;

f. Interest on customer deposits;

g. Clearing account issues;

h. State franchise and property tax issues;

i. Call center/telecommunications equipment upgrades;

j. Weatherization program expense;

k. 39th & Main public business office and Broadway building lease;

l. Dues and donations;

m. Controller's contingency;

n. Depreciation rate on corporate computer equipment;

o. Miscellaneous lease expense;

p. Legal, lobbying and other outside services expenses;

q. Advertising;

r. Federal income taxes, including but not limited to the rate base item of deferred taxes; and

- s. Gross-up of revenue deficiency related to uncollectibles expense and gross down of revenue deficiency related to late payment charge revenues.
- 3) Return
  - a. Capital structure/cost of debt/cost of preferred stock.

The agreement provided that the resolution of these revenue requirement issues among Staff, OPC and MGE produced the starting point of Staff, OPC and MGE, from which adjustments were to be made as part of the true-up proceeding requested by MGE. The agreement also provided that resolution of the overall revenue requirement issues among Staff, OPC and MGE did not purport to affect the distribution of costs for such issues as class revenue responsibility. In particular, the agreement reflected that MGUA, Jackson County, et al., may desire to inquire into the distribution of costs to the various customer classes associated with: 1) gas storage inventory; 2) AMR; 3) customer advances; 4) customer deposits; 5) uncollectibles; and 6) flex rates, economic development rates and the number of billable large volume service meters (which are components of the revenues and billing determinants issue). The agreement also provided that

commencing during the fiscal year which begins July 1, 1998, and continuing at least through the effective date of the new rates resulting from MGE's next rate proceeding, MGE will use a five-year average (when five years of information is available; prior to that time the average of the number of years of available information will be used) for determining the unrecognized net gain/loss to be amortized over five years in calculating MGE's direct FAS 87 and FAS 106 costs for financial reporting purposes.

The stipulating parties also agreed that

in the event that in any given year the amount of the amortization of the unrecognized net gain/loss determined under the agreed-to methodology described above is less than the minimum amortization required under FAS 87 or FAS 106, then the amortization for such year shall be the minimum amortization required under FAS 87 and/or FAS 106.

Staff, OPC and MGE also agreed to the following miscellaneous tariff changes:

- 1. Reduce the late payment charge to 1.5% consistent with Staff recommendation (Solt Direct, p. 7; Cummings Rebuttal, p. 2).

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2. Increase the reconnect fee currently set at \$15 in MGE's tariff to \$29.
3. Change the rate at which MGE pays interest on customer deposits to the prime rate plus one percentage point, and which rate is to be adjusted only in the context of future general rate proceedings consistent with OPC's recommendation. (Robertson Direct, p. 17).

On June 1 Staff, OPC and MGE filed an Addendum to Stipulation and Agreement (Attachment B) with the Commission. The Addendum reflected the agreement of MGUA and Jackson County, et al., not to oppose the Stipulation and Agreement filed on May 20, 1998, as modified and supplemented in exchange for Staff, OPC and MGE's agreement to make the following modifications to the Stipulation and Agreement:

- 1) The following tariff change to tariff sheet No. 40 shall be accepted by the parties and made part of the Stipulation and Agreement:

When more than one meter is set at a single address or location for the customer's convenience, an LVS customer charge shall be assessed for each of the first two meters. For each such remaining installed meter, customer charges will be computed at 50 percent of the LVS customer charge.

Gas delivered through all meters set at a single address or location will be aggregated for the purpose of calculating the monthly sales or transportation charges.

This language will replace the last paragraph on tariff sheet No. 40. MGE agrees that, for the purpose of this case, no revenue adjustment associated with this agreed language change on tariff sheet No. 40 shall be incorporated in MGE's revenue requirement. The stipulating parties agreed that MGE will present in its next rate filing the results of a study to determine if cost reductions or economies of scale exist for Large Volume Service customers with multiple meters at a single address or location when compared to single meter customers. Staff, OPC and MGE agreed that Issues 1.9 Revenue and Billing Determinants Associated with LVS Meters, 1.10 Flexible Tariffs/EDR Rates, and 2.5.i. Multiple Customer Charges for Multiple Meters as set out in the Revised Hearing Memorandum would be removed and corresponding changes made to the hearing schedule.

On June 5 Staff, OPC and MGE filed a Second Addendum to Stipulation and Agreement (Attachment C) with the Commission. This addendum to the agreement was filed pursuant to the request of the Commission for clarification regarding interest on customer deposits. The stipulating parties clarified by stating

The customer deposit interest rate shall be the current prime interest rate plus one. The current prime interest rate is 8.5%. This rate is published each day in the Wall Street Journal and is located in the Money and Investment section under the box labeled with banner, "MONEY RATES." For purposes of the stipulation and agreement the prime interest rate was determined as of May 20, 1998. It should be noted that the prime interest rate has not changed since May 20, 1998. The stipulation and agreement does not provide for a change in the rate on customer deposits until the next general rate case.

The stipulating parties requested that the Commission issue an order approving the Stipulation and Agreement filed on May 20, 1998, including all addenda to the Stipulation and Agreement.

The Commission has reviewed the agreement, the addenda to the agreement, and the evidence adduced relating to the agreement. The Commission finds the agreement just and reasonable and will approve the Stipulation and Agreement including all Addenda filed.

**2. Stipulation and Agreement Regarding True-Up Audit and Hearing**

On June 11, 1998, after an evidentiary hearing, the Commission issued its Order Establishing a True-Up Audit and Hearing. The Commission ordered that the true-up audit shall cover the period from January 1, 1998 through May 31, 1998, and was to address the specified items contained in the Stipulation and Agreement adopted in the same order. Further, the Commission ordered that the true-up hearing be held July 16. The evidence adduced in that hearing was briefed by the parties in the reply briefs filed July 31 and is considered as a part of this Report and Order.

**B. Late-Filed Exhibits**

Exhibit 211 was filed after the close of the evidentiary hearing. Exhibits 229, 231, 232, 235 and 236 were filed after the close of the true-up evidentiary hearing on July 16. These exhibits were filed at the direction of the bench. Counsel were afforded a ten-day period in which to file an objection to the admission of these exhibits.

The Commission has received no objections to the receipt of the late-filed exhibits.

Late-filed Exhibits 211, 229, 231, 232, 235 and 236 shall be received into the record.

**C. Pending Motions**

**1. Motion for Addendum or Correction of True-Up Revenue Requirement**

On August 5, 1998, Staff filed a letter with the Commission advising the Commission of its need to correct the costs shown on the revenue requirement

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scenarios associated with the rate case expense. Staff Counsel explained that Staff's true-up revenue requirement filed July 16 failed to include \$39,550. This amount represented the cost for MGE to send the notice of public hearings separate from its normal billing cycle because of the shortened time frame between the Commission's notice and the day of public hearings. Staff noted that this would only be an issue if the Commission were to adopt the position proposed by Staff regarding rate case expense.

On August 6 OPC filed its Motion to Reject Staff's "Addendum to Revenue Requirement" and Request for Expedited Treatment. On August 10 MGUA and Jackson County, et al., filed their Motion to Reject "Addendum" filing or/and (sic) Alternative Motion to Strike with the Commission. On August 10 MGE's Response in Opposition to Public Counsel's Motion to Reject "Staff's Addendum to Revenue Requirement" was filed with the Commission. On August 10 Staff filed its Response to Public Counsel's Motion to Reject.

Given that the Commission has not adopted Staff's recommended revenue requirement in this Report and Order, this issue is moot and poses no controversy to be decided by the Commission. Staff's request is denied.

## **II. Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission has reviewed and considered all of the evidence and arguments presented by the various parties and intervenors. Because of the volume of material presented to the Commission, some evidence and positions on certain issues may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or the position of a party indicates that, while the evidence or position was considered, it was not found to be necessary to the resolution of the issue.

Some evidence was introduced by the parties which is proprietary or highly confidential in nature and is protected by order of the Commission. While all protected material was considered by the Commission in making its decision, no highly confidential or proprietary information will appear in this order except by general reference.

### **1. Revenue Requirement**

#### **1.1 Return on Equity**

Return on equity (ROE) is the actual or allowable profit earned on the investment made by the common shareholders. Return on equity equals the income available to common stock divided by the total common stockholders' equity.

MGE recommended a 12 percent return on equity. MGE believes this ROE to be commensurate with the risks assumed by Southern Union Company shareholders. MGE stated that the cost of equity estimates for MGE were developed using both the constant growth discounted cash flow (DCF) model and risk premium methods.

MGE contended that the use of DCF models to estimate the cost of equity is essentially an attempt to replicate the market valuation process which leads to the price investors are willing to pay for a share of a company's stock. It is predicated on the assumption that investors evaluate the risks and expected rates of return from all securities in the capital markets. Given these expected rates of return, the price of each share of stock is adjusted by the market so that investors are adequately compensated for the risks to which they are exposed. Applications of the DCF model to a group of 17 gas distribution utilities using both historical and projected growth rates produced cost of equity estimates ranging from approximately 6.4 to 11.9 percent.

By using a growth rate between 5.5 to 6.5 percent and combining it with the group's average dividend yield of 5.1 percent, MGE produced a DCF cost of equity range for the group of local distribution companies of between 10.6 and 11.6 percent. To account for the greater investment risk, MGE added 60 basis points to the DCF cost of equity range to bring MGE to a DCF cost of equity of between 11.2 and 12.2 percent.

With the risk premium method, MGE stated the cost of equity is estimated by determining the additional return investors require to forego the relative safety of bonds and to bear the greater risks associated with common stock, and then adding this equity risk premium to the current yield on bonds. Like the DCF model, risk premium analyses are capital market oriented, but unlike DCF methods where the cost of equity is indirectly imputed, risk premium methods estimate investors' required rate of return directly by adding an equity risk premium to observable bond yields. MGE also used the risk premium analysis relying on mechanistic estimates of the cost of equity, surveys, and historically-realized rates of return to determine equity risks. After making adjustments to reflect present capital market conditions and risk differences, MGE stated that the various risk premium methods produced cost of equity estimates for MGE ranging from 11.66 to 14.87 percent. After eliminating implausible values, and narrowing the resulting range to include all but the highest and lowest values, MGE arrived at a risk premium cost of equity range between approximately 11.8 and 13.0 percent.

MGE stated that neither Staff nor OPC witnesses made any increase in MGE's ROE recommendations to reflect the additional financial risk attributable to the low common equity ratio in the capital structure of MGE's parent, Southern Union. Also, MGE points out that in its last rate case, Case No. GR-96-285, Staff's approach was adopted by the Commission whereby MGE's ROE was increased to reflect the greater financial risk associated with the low common equity ratio in its capital structure.

From a financial analysis viewpoint, Staff recommended a return on equity range of 10.67 percent to 11.19 percent with a midpoint of 10.93 percent. Staff believes that the Commission has the authority to consider poor customer service when determining a reasonable return on equity. Staff used a continuous growth form of the DCF

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model in estimating the cost of equity for Southern Union. This model relies upon the fact that a company's common stock price is dependent upon the expected cash dividends and upon cash flows received through capital gains or losses that result from stock price changes. Staff could not directly analyze the cost of equity for Southern Union. In order to arrive at a company-specific DCF result, the Company must have common stock that is market-traded and pays cash dividends. Southern Union does not pay cash dividends; and therefore, Staff could not directly analyze the cost of equity for Southern Union.

Staff derived its range for MGE's return on equity between 10.67 to 11.19 percent by conducting two different DCF analyses. One DCF analysis was conducted on eight companies representative of the natural gas industry which have a common equity ratio of 53 percent compared to MGE with a common equity ratio of approximately 37 percent. The other DCF analysis was calculated on a group of four "comparable" local distribution companies that are riskier than the industry companies (common equity ratio of 49 percent). Staff stated that these results were checked for reasonableness by comparing them to the results obtained from using a risk premium model and a capital asset pricing model (CAPM). Based upon this analysis, Staff does not believe that Southern Union has a level of risk that requires additional basis points added to the ROE. This was also evidenced by the fact that Standard & Poor's upgraded Southern Union's credit rating from BBB to BBB+ in April 1998. A higher credit rating reflects lower business risk.

Flotation costs are the expenses incurred whenever capital such as a common stock is issued. MGE believes that it is necessary to recover flotation costs through an upward adjustment of the return on equity. Staff disagrees. Staff does not believe that flotation costs should be recovered by an adjustment to the ROE. Staff argued that this effectively protects the ratepayer from continually bearing the cost of "unascertained purported past expenses". Staff maintains that MGE did not provide any evidence to indicate that common stock would be issued within the test period for this case. In Case No. ER-83-49, the Commission adopted the position that "flotation cost adjustments should apply only to issues of new common stock, or issues that will occur during the period that the rates to be set will be in effect." Kansas City Power & Light Company, 26 Mo. P.S.C. (N.S.) 104, 145 (1983). Staff stated that where there is no evidence to show that common stock will be issued within the applicable test period, an adjustment for flotation costs is not appropriate. Further, Staff indicates that flotation costs are normally recovered on a dollar-for-dollar basis as opposed to being accounted for indirectly with an upward adjustment to the ROE.

OPC recommended MGE be authorized 10.7 percent return on equity. This return on common equity was determined using the discounted cash flow (DCF) method applied to a group of ten comparable companies and supported by a capital asset pricing model analysis and a market-to-book (MTB) ratio analysis. The MTB method is a derivative of the DCF model that compensates for differences between market

price and book value per share of a firm's common shares. OPC did not make a specific adjustment to ROE to recognize Southern Union's Standard & Poor's bond rating of BBB (since increased to BBB+). OPC opposed such an adjustment. Southern Union's debt-heavy capital structure was the result of a decision of the Company's management and, therefore, the risk associated with that decision should not be borne by the ratepayers.

The Commission finds that the rate of equity should be 10.93 percent as supported by competent and substantial evidence adduced in this hearing. The recommendations of MGE, Staff and OPC range from 10.70 percent to 12.25 percent, with 10.93 percent being the midpoint of Staff's position. While MGE argued that its capital structure was riskier than all other companies, MGE's risk level decreased in April 1998 when its ratings improved to BBB+. Further, management determines the capital structure. Finally, MGE still provides less than satisfactory customer service. MGE has not yet fully complied with the commitments it made in the prior rate case, GR-96-285 through Stipulation and Agreement. Therefore, the Commission finds a return on equity of 10.93 percent is just and reasonable.

## **1.2 SLRP Deferrals**

### **a. Carrying Cost Rate**

This issue relates to the costs that MGE incurs by deferring the costs of improvements that MGE has made through its safety line replacement program (SLRP) by replacing mains and services lines pursuant to Commission Rule 4 CSR 240-40.030 (1995). The carrying costs of construction could be recovered immediately through a price increase if the Company were not a regulated industry required to obtain the approval of the Commission prior to any increase in rates. The Commission established the use of the accounting authority order (AAO) to allow MGE to book, in addition to the actual costs of the improvements, the carrying costs of those investments until the next rate case is filed with the Commission. The AAO has no guaranteed ratemaking treatment. The company is required to request ratemaking treatment of the amounts booked under the AAO in the next rate case the Company files. Under certain circumstances, companies regulated by the Commission are allowed to suspend normal accounting procedures through the use of an AAO.

MGE has used weighted average cost of capital-based carrying cost rates of 10.54 percent in calculating deferrals associated with the AAO granted in Case No. GO-94-234 and 9.46 percent in calculating deferrals associated with the AAO granted in Case No. GO-97-301. MGE believes that the 10.54 percent rate was ordered by the Commission when MGE was granted an AAO in Case No. GO-94-234. They cite the following language:



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**IT IS THEREFORE ORDERED:**

1. That Missouri Gas Energy is authorized to defer and book to Account No. 182.3, beginning February 1, 1994, and continuing through January 31, 1997, depreciation expense, property taxes, and carrying costs at 10.54% on the costs incurred . . . "

The weighted average cost of capital in Case No. GO-97-301 was 9.46 percent.

Staff believes the deferral rate should approximate the actual financing cost rate incurred by MGE in financing the SLRP. Staff's position is that the Company's Allowance for Funds Used During Construction (AFUDC) rate is an appropriate measure of MGE's actual construction financing cost. In addition, Staff points out that orders in Case Nos. GO-94-234 and GO-97-301 did not guarantee any ratemaking treatment of the deferrals. The correct AFUDC rate for the 12 months ending December 31, 1997 is 6.107 percent.

Staff points out that under normal accounting, MGE's investment in the service line and main replacement program would not be entitled to a deferral of any carrying cost. Accounting authority orders were developed for the purpose of allowing companies to defer and book costs to Account No. 182.3 for consideration in the next rate case by the Commission. The Commission's grant of an AAO does not have any effect for the purposes of ratemaking.

OPC supports Staff's position. OPC utilized the AFUDC rate consistent with the Commission's decision on this issue in MGE's last rate case, GR-96-285. MGE opposed the use of a carrying cost rate based on its AFUDC rate.

The Commission finds that the AFUDC rate of 6.107 is the appropriate carrying cost rate for the deferred amounts pursuant to the AAOs granted to MGE in Case No. GO-94-234 and Case No. GO-97-301 and is supported by competent and substantial evidence. The Commission finds that Staff's position on this issue is just and reasonable.

**h. Amortization Period**

This issue relates to the adjustment to revenue for the SLRP deferrals and carrying costs which have been booked in temporary accounts and the period over which those SLRP deferrals and carrying costs should be recovered by the Company. Under the Federal Energy Regulatory Commission's (FERC) Uniform Standard of Accounting (USOA), amortization is defined as: "the gradual extinguishment of an amount in an account by distributing such amounts over a fixed period, over the life of the asset or liability to which it applies, or over the period during which it is anticipated the benefits will be realized." In the prior MGE rate case, GR-96-285, the Commission found that the "20-year amortization is appropriate because the line replacements should last at least 20 years." The Commission stated in its Report and Order in Case No. GR-96-285 that the Commission had to choose between two extreme positions in this case, a three year amortization period proposed by MGE and a 20-year amortization period proposed by Staff.

MGE proposed a ten-year amortization period for the deferrals authorized by the Commission. MGE stated that a ten-year amortization period would be beneficial to the Company and to the customers. MGE stated that the customers would benefit by receiving a lower future cost of service. The Company benefits because accelerated amortization usually results in lower present value cost of capital. Although the accounting theory referred to as the "matching principle" requires revenues and expenses to be matched and costs to be allocated to reporting periods in a systematic and rational manner, MGE stated that the accounting principle of matching only relates to the matching of an expense with revenues related to the recovery of that expense for a particular item. Further, MGE stated that the Commission has historically used a five-year amortization period for extraordinary items related to income statement amounts, such as expense items. The amortization period for the SLRP deferral carrying cost is an expense item related to the plant in service.

Staff proposed and provides evidence in support of a 20-year amortization period. Staff stated a 20-year amortization period is more appropriate since it better corresponds to the actual recovery period of MGE's SLRP plant (service lines and mains). In addition, Staff stated the 20-year recovery period is consistent with Commission precedent. Staff continues by stating that the Commission could even consider a 28-year recovery period of MGE's SLRP deferrals because other construction costs to produce the plant are already being recovered over a 28-year period. However, Staff recommended a 20-year recovery or amortization period instead of a 28-year recovery period because it historically has recommended a 20-year recovery period. This approximates the full 28-year amortization period on actual plant in service while conservatively limiting the number of years the Company has to recover the carrying cost rate. A higher number of recovery years decreases the overall revenue requirement required annually to be paid by the ratepayer.

OPC has also proposed a 20-year amortization period for the same reasons as Staff. OPC stated this period is more appropriate since it better corresponds to the life of the service lines and mains. OPC stated this period is also consistent with the Commission's decision in MGE's last rate case, GR-96-285.

The Commission finds that competent and substantial evidence has been presented and adduced to support the Commission's approval of the recovery of the SLRP carrying cost over a ten-year period. Ten years relates better to the period in which it is anticipated the benefits will be realized and ten years relates closer to the deferral period itself, and is, therefore, just and reasonable. The Commission does note that Staff has provided ample evidence to show that its proposal of the 20-year amortization period was not extreme as noted in the Commission's Report and Order in the prior MGE rate case, Case No. GR-96-285. While Staff has produced sufficient evidence to support its position, the Commission finds that it is not necessary to relate the amortization period for the deferral or carrying costs to the life of the

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property constructed but rather to the deferral period or the period during which it is anticipated the benefits will be realized.

**c. Treatment of "Stub" Period**

This issue relates to whether there are expenses deferred and booked under the AAO authorized in Case No. GO-97-301 which were not addressed in the last ratemaking case, Case No. GR-96-285, and which are carried over into this ratemaking period. The period of time at issue is the period from November 1, 1996 through January 31, 1997. Also at issue is the proper carrying cost rate.

MGE has calculated the deferral associated with Case No. GO-94-234 through January 31, 1997, in accordance with the language of that order which allows MGE to use 10.54 percent for its actual carrying costs. Staff's position is that the SLRP deferrals should be cut off at October 31, 1996, in accordance with the Commission's order in MGE's last rate case, Case No. GR-96-285. OPC supports the position of Staff.

The Commission finds that in its order in Case No. GR-96-285, the Commission stated that

[MGE] may continue to record as regulatory assets the deferrals of carrying costs, property taxes, and depreciation expense incurred . . . for the period of November 1, 1996 through January 31, 1997, and may request rate recovery of such assets in its next rate proceeding.

All deferrals given rate recovery in this proceeding will be calculated beginning with a zero balance as of November 1, 1996 and ending with a deferral balance as of the end of the true-up period ordered by the Commission in this case, May 31, 1998. The Commission's order in GR-96-285 clearly stated the periods of deferral to be included and makes no reference to amounts carried over.

The Commission finds that the carrying cost rate for the period beginning November 1, 1996 through January 31, 1997 is 6.107 percent, for the reasons stated above in Section II.1.2.a.

The Commission finds that Staff's position that no "stub period" treatment is required is supported by competent and substantial evidence. Staff's position is just and reasonable because the account balance began at zero and the carrying cost rate is the same for the entire accrual period.

**d. Inclusion of Unamortized Balance in Rate Base (OPC Issue)**

This issue requires the Commission to determine whether the unamortized balance of the SLRP deferrals should be included in the rate base. If the unamortized balance of the SLRP deferral account is also included in rate base, not only would the Company have the opportunity to receive a "return of" its investment, but also would have the opportunity to receive a "return on" the investment.

MGE has included in rate base the unamortized balance of SLRP deferrals. MGE stated that this position is consistent with past Commission treatment of these deferrals.

Staff also included in rate base the unamortized balance of SLRP deferrals authorized.

OPC has not adjusted Company's rate base so that MGE can earn a "return on" the deferred balance. OPC believes that guaranteeing the Company a "return of" and "return on" the SLRP deferred balance is not a fair allocation of regulatory lag resulting from the Company's ongoing construction projects. This view is based on the fact that OPC believes management is responsible for planning and operating the activities of the Company. OPC argued that if the Company is unable to, or chooses not to, implement processes and procedures which would limit the effect of regulatory lag on its finances, the Company should not be protected by the Commission with "guaranteed earnings", or the total effect of the regulatory lag. Therefore, in order that ratepayers and shareholders both share in the effect of regulatory lag, OPC is recommending that MGE be allowed to earn a "return of" the SLRP deferred balance, but not a "return on" the SLRP deferred balance.

The Commission finds that the unamortized balance of SLRP deferrals should not be included in the rate base for MGE. The AAOs issued by the Commission authorize the Company to book and defer the amount requested but do not approve any ratemaking treatment of amounts from the deferred and booked balances. AAOs are not intended to eliminate regulatory lag but are intended to mitigate the cost incurred by the Company because of regulatory lag. Given that the Company will recover the amortized amount of the SLRP deferral at the AFUDC rate in ten years, instead of the previous 20 years' amortization period, it is proper for the ratepayers and shareholders to share the effect of regulatory lag by allowing the Company to earn a return of the SLRP deferred balance but not a return on the SLRP deferred balance. The Commission has noted previously in the consolidated cases entitled In The Application of Missouri Public Service for the Issuance of an Accounting Order Relating to Its Electrical Operations, and In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments, 1 Mo. P.S.C. 3rd 200, that "the Court upheld the Commission's decision to place the initial risk of cancellation on the shareholders since to do otherwise would be to make the investment practically risk-free." State ex rel. Union Electric Company v. PSC (UE), 765 S.W.2d 618, 622 (Mo. App. 1988); State ex rel Hotel Continental v. Burton, 334 S.W.2d 75, 80 (Mo. 1960). Most recently, the Western District Court found that "AAOs are not a guarantee of an ultimate recovery of a certain amount by the utility." Missouri Gas Energy v. P.S.C., 1998 W.D. 54710 (Mo. App. Aug. 18, 1998). All of the parties agree that it is the purpose of the AAO to lessen the effect of the regulatory lag, not to eliminate it nor to protect the Company completely from risk. Without the inclusion of the unamortized balance of the AAO account included in the rate base, MGE will still recover the amounts booked and deferred, including the cost of carrying these SLRP deferral costs, property taxes and depreciation expenses through the true-up period ending May

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31, 1998. The Commission finds that OPC's position on this issue is just and reasonable and is supported by competent and substantial evidence in the record.

**e. Issuance of Another Accounting Authority Order (AAO)**

MGE requests that the Commission issue another accounting authority order for MGE's extraordinary SLRP investment as it has numerous times in the past, using language similar to that adopted in Case No. GO-97-301. Staff is opposed to the issuance of another AAO at this time. Staff believes that it is premature for the Commission to issue another accounting authority order for MGE's SLRP investment in this case. Staff believes it is more appropriate to address this issue in a separate AAO application. OPC supports Staff's position.

The Commission finds that another AAO related to the SLRP costs, property taxes, and depreciation cost should be authorized by the Commission. These SLRP related costs have been considered "extraordinary items" since the gas safety rules issued by the Commission have required the companies to replace main and service lines within their service areas. As the majority of the SLRP project is almost complete, the Commission finds that MGE's position is just and reasonable and there is competent and substantial evidence to support MGE's request for an AAO. The Commission shall issue an AAO authorizing MGE to defer and book costs relating to SLRP deferral carrying costs, property taxes and depreciation expenses. The balance of the account for the deferral period beginning the day after the effective date of this Report and Order shall begin with a zero balance. MGE may book these costs at a reasonable rate as determined by the Company. In determining the rate at which it should book the deferral costs related to the SLRP, the Company should keep in mind the past ratemaking decisions which have determined that the SLRP carrying costs are recovered at the AFUDC rate. If for other reasons, including tax implications, the Company chooses to book the SLRP deferral rates at a higher rate than AFUDC, MGE should also keep in mind that it is not guaranteed any specific rate of return. Further, the period for which this AAO authorizes that costs be deferred and booked as an extraordinary expense begins on the day after the effective date of this Report and Order in Case No. GR-98-140 and GT-98-237. The period shall end at the end of the test year, or at the end of the known and measurable period following the test year, or at the end of true-up period, as applied in the next rate case filed by the Company. Nothing in this order authorizing the deferral of SLRP carrying costs, property taxes or depreciation expenses shall be considered to have any effect for the purpose of ratemaking treatment.

**1.3 Billing Process Improvement Costs/Billing Correction Costs; Uncollectibles**

MGE requests inclusion in the revenue requirement of its costs incurred for the billing process improvements project, certain billing correction costs not previously waived, and bad debt amounts uncollectible from the customers to whom the gas

services were provided. At issue are the costs associated with the contract services of Theodore Berry & Associates (TBA) for its role in facilitating the billing process improvement project referred to as Billing Accuracy and Service Improvement Commitment (BASIC) Team Project. MGE stated that the beneficial results of the billing process improvement effort are demonstrated by the absence of any significant billing issues occurring in the winter of 1997-1998.

Staff took the position that these billing process improvements were actually improvements to MGE's Customer Service System which is booked to Account 303, Miscellaneous Intangible Plant. Staff stated that it would agree with the inclusion of any reasonable and prudently incurred costs related to the billing process as long as those costs were amortized over the remaining economic life of the Customer Service System, approximately nine years. MGE agreed with Staff's position on this point.

Staff reviewed all billing process improvements through the true-up period ending May 31, 1998, and Staff recommended that all prudently incurred costs associated with billing process improvements should be included in Account 303, Miscellaneous Intangible Plant. Staff also recommended that, in addition to the \$237,970 costs incurred in the test year and capitalized in Account 303, an additional \$1,070,971 in costs relating to billing process improvement should be added. The total capitalized amount would equal \$1,308,941. Staff calculated the annual revenue requirement impact of capitalizing \$1,308,941 and determined that it would be approximately \$250,000 which is the amount of annual ratepayer benefits that must be achieved to offset costs incurred to avoid ratepayer detriment. Staff stated "[R]eductions in expense or additional revenue must exceed \$250,000 per year for this to be a prudent expenditure." Therefore, Staff recommended reducing the billing cost expenses by \$250,000 per year to allow for the required savings necessary to make these billing process improvement project costs prudent.

OPC recommended that the Commission disallow the Company recovery of all TBA costs shown on Schedule H-24 of MGE's updated revenue requirement work papers. OPC believes that these charges were incurred as a direct result of management downsizing to staffing levels so low that MGE was unable to provide basic levels of service, or were incurred to correct other problems that precipitated the filing of OPC complaint Case No. GC-97-497 and Staff complaint Case No. GC-97-33. In addition, OPC stated that these costs are non-recurring expenses. As for the non-TBA costs, OPC believes that only those costs which have the verifiable purpose of creating or bettering MGE's products or services should be capitalized. All remaining charges should be disallowed for the same reasons that the TBA costs should be disallowed. The total amount to be disallowed is \$94,854 from expenses and \$122,340 from rate base.

The Commission finds that OPC's position is just and reasonable, is supported by competent and substantial evidence and reasonably protects ratepayers from Company errors and costs related to those errors. The customers have a right to

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expect accurate and timely billing as a basic feature of the service they receive. The customers should not have to bear the cost of making corrections to the billing system so that it can meet that minimal basic expectation. Further, the Commission cannot find that all of the expenditures relating to the billing process improvements were prudent expenses. Those charges which were not found to be prudent are disallowed as recommended by OPC in the amount of \$94,854 from expenses and \$122,340 from rate base. While the Commission commends the Company for making efforts to restore its billing system to an acceptable level of accuracy, the Commission also requires the Company to continue to strive to satisfy basic customer needs.

MGE has made commitments in Case No. GC-97-497 and Case No. GC-97-33 to provide a cost/benefit analysis and a time schedule for completion of each item on the BASIC Team Summary of Findings. Neither of these commitments has been met. The agreement entered into by MGE in Case No. GC-97-497 and Case No. GC-97-33 was approved by the Commission. Therefore, the Commission expects the Company to comply with the Stipulation and Agreement as approved before the Company files its next rate proceeding.

Relating to the issue of uncollectibles, MGUA opposed MGE's proposed treatment of allocating costs associated with uncollectible accounts to transportation customers that are not caused specifically by transportation customers. The Commission will address these arguments in Section II.2.

#### **1.4 Rate Case Expense; Customer Advance; Customer Deposits**

MGE proposed that actual rate case expense, including costs not yet recovered for Case No. GR-96-285, be amortized over two years. True-up testimony indicated that MGE's claim for rate case expense had reached \$928,210 as of May 31, 1998. At the true-up hearing, MGE indicated that it had reached an agreement with OPC and Staff to adjust rate case expense included in the revenue requirement by removing expenses for such items as stress balls, massages for staff at a rate case conference, mini-travel bottles, posters, opera tickets, calculators, a rate case luncheon at the rented Uptown Theatre, catered food items, rented tables and chairs, entertainment expenses for staff at a rate case luncheon, travel costs for corporate officers to travel from Austin to Kansas City for the rate case luncheon, expenses from hotel rooms that went unused and not timely canceled, and meal expenses for employees in the home base location.

Staff proposed a normalized level of rate case expense to be recovered over a two-year time period. Staff originally agreed with MGE that the actual rate case expense incurred for MGE's previous rate case, Case No. GR-96-285, was the appropriate amount of rate case expense that should be included in the cost of service as a reflection of an ongoing level of rate case expense. However, MGE believes that amount should include the costs associated with the appeal of the order in Case No. GR-96-285 while Staff does not. Staff has identified the specific amount of \$537,186

claimed as the rate case expense approved by the Commission in Case No. GR-96-285. Staff believes this is a reasonable estimate of the ongoing amount of rate case expense for purposes of the current case. Staff opposed any additions to the normalized rate case expense of \$537,186 for appeals. The normalized rate case expense according to Staff's position recovered over a two-year period equals recovery of \$268,593 per year.

OPC proposed the actual amount of rate case expense prudently incurred for this rate case is the most appropriate amount to include as the rate case expense. OPC performed a full audit on MGE's rate case expenses. OPC also recommended normalizing the actual amount of expenses for a two-year period, which OPC believes reflects the cycle of rate case occurrences. OPC also believes the consulting fees for Dennis Gillmore should be excluded from the rate case expense normalization. OPC stated Mr. Gillmore did not provide the services he was contracted to provide. The ratepayers should not pay for services the Company never received. OPC also stated the cost of the *amicus* brief filed by Coopers & Lybrand in the appeal of the Commission's decision in GR-96-285 is not an appropriate rate case expense, and it should be deducted. OPC's audit revealed numerous expenses which are inappropriately passed on to the ratepayers, some which MGE agreed to deduct at the true-up hearing. In its proposal, OPC has disallowed any questionable expense that MGE did not agree to remove from its own expenses.

In its true-up audit, OPC included all of the rate case expenses for the true-up period ordered by the Commission. OPC determined after completing its audit that MGE prudently incurred \$579,565.64 in actual rate case expense. OPC's result of annualizing this total amount over a two-year period is \$289,782.82.

The Commission finds that there is competent and substantial evidence to support OPC's position on the rate case expense and its position is just and reasonable. The costs claimed by the Company in this case in the amount of \$928,210 is excessive and many of the costs the Company claims such as the fees for Dennis Gillmore and the Coopers and Lybrand's *amicus* brief are simply imprudent. The rate case litigated in GR-96-285 was a more complex case with 59 litigated issues, including several issues that were unique and controversial. Many of the issues in this case have been litigated in Case No. GR-96-285. Those issues were upheld in the Cole County Circuit Court, and that decision was affirmed by the Appellate Court, Western District of Missouri, on August 18, 1998. The expenses for the appeal should be born by the shareholders.

The remaining issues raised by MGUA and Jackson County, et al., relating to customer advances and customer deposits will be included in Section II.2., Class Cost of Service/Rate Base.

With regard to the most recent PSC assessment, OPC has recommended that MGE be allowed to include the July 1, 1998 Public Service Commission annual assessment in rates despite the fact that the assessment occurred beyond the true-



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up period ending May 31, 1998. Staff and OPC agreed, but OPC recommended making two additional adjustments. First, OPC normalized the Hancock Article X costs over a three-year period to reflect the three-year period these costs covered from 1995-1997. OPC also adjusted the costs for the one time move to the Hotel Governor over a two-year period. OPC is recommending that MGE be allowed a total normalized Commission assessment of \$1,341,812.35. MGE and Staff recommend the new PSC assessment be included in current ratemaking expenses without the adjustments proposed by OPC.

The Commission finds that PSC assessment expenses may be included, even though they are beyond the true-up period, and OPC, Staff and MGE agree that it is reasonable to consider the latest assessment in this ratemaking case. No other objections were received. The Commission finds that no adjustments should be made to the PSC assessment and the PSC assessment expense should be included in current rate case expenses as recommended by Staff and MGE.

#### **1.5 Public Affairs and Community Relations**

MGE included in its request for costs to be recovered in the revenue requirement the costs of public affairs and community relations. These costs were incurred by the Public Affairs and Community Relations Department of MGE.

Staff's audit of MGE's Public Affairs and Community Relations Department indicated that this department engages in activities the cost of which are not properly recovered from ratepayers, such as lobbying, participation in charitable and civic organizations, and corporate image building. Staff also found that the department participates in activities related to education and safety which are properly recovered from ratepayers. However, the Company had less documentation supporting department activities than it did in MGE's last rate case, Case No. GR-96-285. The Company did not have complete records, but was able to show that the department did perform some rate recoverable services. As a result, Staff recommended that only 50 percent of the cost relating to the activities of the Public Affairs and Community Relations Department be allowed.

OPC recommended that 75 percent of the adjusted expenses the Company incurred to operate and staff the department during the test year be excluded from the cost of service. OPC has based this recommendation on the fact that the employees of this department are involved in both activities whose costs are properly recovered from ratepayers and activities whose cost are not properly recovered from ratepayers. The costs of activities that should not be recovered from ratepayers include corporate image building, participation in charitable and various civic organizations, economic development activities, and legislative/lobbying activities.

Because documentation and records that would support a more accurate allocation of the recoverable expenses were not developed or maintained by the Company, OPC believes a 75 percent disallowance (\$366,588) is appropriate. OPC believes that

its recommendation is reasonable because it will more than likely prevent any allocation of inappropriate expenses being included in rates, and will also provide the Company with an incentive to develop and maintain auditable documentation before it files its next general rate increase case.

MGE opposed the proposals of Staff and OPC to disallow, respectively, 50 percent and 75 percent of the costs of the Public Affairs and Community Relations department's expenses. MGE believes that it has submitted adequate documentation and evidence through the testimony of the employees of the Public Affairs and Community Relations Department along with their expense account reports and personal calendars. MGE claimed the customers benefit from 100 percent of its proposed expenses. At most, MGE argued that only 15 percent of its expense is disallowable.

The Commission finds that the position of Staff is the most reasonable position supported by competent and substantial evidence which shows that the Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers. The difficulty is based upon the fact that MGE failed to create accurate documentation which would allow Staff or OPC to audit the Public Affairs and Community Relations Department to verify which activities are properly recovered from ratepayers and which are not. MGE should keep time records that would at least show the time expense spent by staff members on regulated or recoverable activities. This would give the Commission competent documentary evidence indicating the respective amount of time spent on the various activities assigned to the Public Affairs and Community Relations Department. Lacking such competent evidence, the Commission must disallow any expense that is not supported by competent and substantial evidence.

#### **1.6 AMR Meter Reader Add Back; AMR**

MGE, Staff and OPC announced at the true-up hearing on July 16, 1998 that they had reached an agreement on the AMR meter reading expense as of May 31, and that MGE would reflect that agreement in its revised reconciliation. Neither Staff nor OPC has any objection to the expense as it now appears in the revised reconciliation. Thus, there does not appear to be a controversy regarding this issue.

While MGUA and Jackson County, et al., did not take a position on the level of expenses or costs for AMR equipment, MGUA and Jackson County, et al., do not believe this item of expense benefits the Large Volume Service class and argue that there should be no portion of this cost allocated to transportation customers or to the Large Volume Service class. This objection will be addressed in Section II.2.

#### **1.7 Encoder-Receiver-Transmitter (ERT) Inventory**

MGE, Staff and OPC announced at the true-up hearing on July 16 that they had reached an agreement on the number of ERT devices in inventory as of May 31, and that MGE would reflect that agreement in its revenue requirement in the revised

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reconciliation. Neither Staff nor OPC has any objection to the expense as it now appears in the revised reconciliation. Thus, there does not appear to be a controversy regarding this issue.

While MGUA and Jackson County, et al., are not taking a position on the level of expenses or costs for ERT inventory, MGUA and Jackson County, et al., do not believe this item of expense benefits the Large Volume Service class and argue that there should be no portion of this cost allocated to transportation customers or to the Large Volume Service class. This objection will be addressed in Section II.2.

### **1.8 Depreciation Expense**

There are three main issues under the general topic of depreciation. First, Staff proposed that the Commission adopt new depreciation rates for MGE's accounts which constitute almost 90 percent of the plant. These accounts are Account 376, Mains; Account 380, Services; Account 381, Meters; and Account 382, Meters/Regulator Installations. The second issue relates to the appropriate depreciation rate to be used for the automated meter reading (AMR) equipment MGE is currently installing. The AMR equipment is divided into two accounts for the two types of equipment: Account 397.1, Communications Equipment, for the ERT device which is attached to standard gas meters, and Account 385, Electronic Gas Metering (EGM), used for transportation customers. The third issue is Staff's request that MGE be ordered to re-create the documentation necessary to support a full depreciation study.

Under Rule 4 CSR 240.040(6), gas corporations subject to the Commission's jurisdiction are required to submit a depreciation study, data base and property unit catalog to the Commission and to OPC every five years. MGE was required to submit its first gas study according to the rule by July 1, 1995. MGE did submit a depreciation study to the Missouri Public Service Commission in June of 1995. On November 2, 1995, a letter was issued to MGE indicating that Staff proposed no change to the currently prescribed depreciation rates at that time. MGE will be submitting its next gas study by June, 2000.

#### **a. Existing Rates**

Staff believes that the Company's depreciation rates for its four major accounts need to be updated to reflect the service line replacement program. Because MGE does not have sufficient data to determine new rates based on Company retirement data, Staff used the depreciation rates of a neighboring gas utility, Missouri Public Service (MoPub), as a surrogate. Staff supports the choice of MoPub as a surrogate for the following reasons: 1) MGE and MoPub have common service areas, and 2) From an operations standpoint, Staff determined that MGE and MoPub are similar. Staff's proposed rates are: Account 376, Mains - 2.40 percent; Account 380, Services - 4.68 percent; Account 381, Meters - 1.67 percent; Account 382, Meter/Regulator Installations - 2.00 percent. OPC supports Staff's position.

MGE opposed the changes to existing depreciation rates proposed by Staff. MGE stated that Staff has relied upon the comparison of rates used by comparable companies in the industry which operate in Missouri, including Laclede, AmerenUE and Missouri Public Service. Staff's analysis and recommendation failed to note that MoPub has not updated its meter reading systems to include any AMR equipment, and therefore, the Commission finds that MoPub is not an appropriate comparable company.

The Commission finds that there is not sufficient evidence upon which to support any changes to the existing depreciation rates. Given the fact that MGE will be filing a new depreciation study by June, 2000, the Commission finds it would be appropriate to defer any change in existing depreciation rates for existing plant until then. The Commission expects the depreciation study and other documentation submitted pursuant to Rule 4 CSR 240-40.040(6) filed by the Company to be as complete as possible and further expects the Company to cooperate with Staff and OPC in evaluating the need for changes to the existing property depreciation rates at that time.

**h. Automated Meter Reading (AMR) Equipment**

MGE, Staff and OPC agreed to the depreciation rate of 5 percent for EGMs in the parties' Stipulation and Agreement discussed under Section I.A.1. under Procedural History. Therefore, the part of this issue relating to depreciation rate for EGMs is resolved upon the Commission's approval of the Stipulation and Agreement, with Addenda. MGE proposed a depreciation rate of 6.67 percent for ERTs, to be booked to Account 397.1, Communication Equipment. MGE bases its proposed depreciation rate of 6.67 percent for ERTs on the fact that even though the ERT equipment has a service life of approximately 17 to 20 years, the batteries for the ERT only have a service life of 15 years. MGE claims that it does not intend to replace batteries in a ERT device that will only have a remaining life of approximately two years. This analysis allows MGE to claim a service life of 15 years for the ERT device. However, the manufacturer of the ERT device, Itron, requested a study by the American Appraisal Associates which recommended a 20-year useful life for the ERT devices.

Staff disagreed with MGE's position that the AMR equipment will only last 15 years. Staff's estimate shows that with a battery replacement, the equipment will last 29.7 years. Staff maintained that because batteries account for only 10 percent of the total cost of the ERT unit it would not make sense for MGE to scrap its ERT system (representing \$27 to \$30 million investment) if its useful life could be extended by a simple battery change.

OPC's analysis included the application and manufacture of the ERT devices which represent the bulk of the cost associated with the Company's AMR project. The apparent expectations of those making use of the ERT devices that a reasonable expected life for the devices should be on the order of two ERT battery lifetimes or approximately 27.5 years. Depreciation rates for this account should be based on this expected useful life.

While MGUA and Jackson County, et al., are not taking a position on the level of expenses or costs for depreciation on AMR equipment, MGUA and Jackson

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County, et al., do not believe this item of expense benefits the Large Volume Service class and argue that there should be no portion of this cost allocated to transportation customers or to the Large Volume Service class. This objection will be addressed in Section II.2.

The Commission finds that the evidence shows that the ERT devices have a service life of 20 years and that a depreciation rate for the ERT devices of five percent would be appropriate. The manufacturer completed an independent study that determined that the ERT equipment has 20-year service life. Given all other factors, including the standardized life assigned to the ERT batteries, the Commission finds it just and reasonable to adopt the ERT equipment service life as determined by the American Appraisal Associates of 20 years, without adjustments. MGE has established by its own evidence that a 20-year service life will result in a five percent depreciation rate. Therefore, the depreciation rate is appropriately calculated to be five percent.

**c. Depreciation Data**

Staff recommended that the Commission order MGE to update its depreciation records to comply with Commission rules. Specifically, Staff recommended that MGE should reconstruct and maintain plant property records for Account 376, Mains; Account 380, Services; Account 381, Meters; and Account 382, Meters/Regulator Installations. Staff also asks that MGE provide Staff and OPC with this data within three years of the effective date of the Report and Order in this case. OPC supports Staff's position.

MGE opposed Staff's recommended record keeping reconstruction. Some of the records needed for a good depreciation study do not exist, and some exist but are not complete, according to MGE. MGE further stated that it took legal action against Western Resources to obtain the documentation for either depreciation or retirement of certain properties which Western Resources presumably failed to maintain.

The Commission finds that it would not be appropriate to require the reconstruction or re-creation of records that apparently do not exist or cannot be completed by any reasonable efforts of MGE. As indicated in Section 1.8.a., the Commission will expect MGE to prepare a thorough depreciation study by June, 2000, and that all available information will have been gathered and submitted to Staff and OPC for review and consideration at that time.

**1.9 Revenue and Billing Determinants Associated with LVS Meters**

This issue was resolved by the Addendum to Stipulation and Agreement filed by the parties June 1, 1998, as discussed in Section I.A.1.

**1.10 Flexible Tariffs/EDR Rates**

This issue was resolved by the Addendum to Stipulation and Agreement filed by the parties June 1, 1998, as discussed in Section I.A.1.

## **2. Class Cost of Service/Rate Design**

### **2.1 Class Cost of Service Issues (including 2.1.a. Services, Meters, Meter/Regulators Installations; 2.1.b. Mains; 2.1.c. Customer Records and Collection/Expense Allocation; 2.1.d. Allocators Used for Other Cost Categories; 2.1.e. Peak Demands That Should Be Used in the Allocation of Capacity-related Costs; 2.1.f. Costs to be Collected Through the Monthly Customer Charge)**

The purpose of a class cost of service study is to provide an indication of the costs incurred by a utility providing service to its various classes of customers in relation to the revenues collected from those customers. It provides a guide to the Commission for distributing the overall revenue increase to the various customer classes. While reliance on a cost of service study to design rates would produce cost based rates, other factors, such as the magnitude and impact of required increases on the individual rate classes should temper the use of the results.

For the purpose of cost of service studies, costs associated with MGE (mains, meters, services, etc.) were separated into the following cost components:

1. Customer costs depending only on the number of customers served, independent of gas usage;
2. Capacity costs depending upon the maximum delivery requirements of the distribution system on its peak days;
3. Commodity costs depending upon the volume of gas used.

To determine each class' responsibility for MGE's facilities costs, these costs were allocated to MGE's five rate classes:

1. Residential (RES or residential);
2. Small General Service (SGS or small general service);
3. Large General Service (LGS or large general service);
4. Large Volume Service (LVS or large volume service);
5. Unmetered Gas Lights (UGL\*).

(\*UGL represents nominal amounts and will not be discussed further.)

The class allocations are based on the relative numbers of customers for customer costs, contributions to peak demand for capacity costs, and relative sales volumes for commodity costs.

A large component of the differences in overall results among the parties for the respective class cost of service studies is the allocation of costs associated with MGE's distribution mains, because a substantial portion of the MGE's investment in facilities is represented by the cost of the mains.

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MGE used a two inch diameter minimum system study to allocate distribution system costs to its various classes of ratepayers. The basic purpose of the minimum system study was to segregate the actual cost of mains in the existing distribution system by recognizing that this cost depends on the number of customers to be served, the locations (which determines main length), and the maximum amount of gas that has to flow through the mains to meet customer demands (which determines main diameter). In other words, it separates the embedded cost of mains in the existing system between customer-related and demand-related components. Customers must be connected to the system of distribution mains with at least a minimum size pipe if they are to receive any service. This portion of the mains costs is the customer-related component. The remainder of the costs of mains relates to the sizing of the mains to meet the demands customers place on the system. This portion of the mains costs is the demand-related component.

MGE did not develop a separate customer allocator for mains. Rather, the Company developed one composite allocator applicable to all customer-related costs. The purpose of developing one composite allocator was to recognize that it costs more to serve a large customer than a small one.

Staff submitted two class cost of service studies. The first class cost of service study was essentially an updated version of the cost of service study that Staff conducted in MGE's prior rate case, Case No. GR-96-285. Staff allocated distribution mains using a stand-alone integrated system method. This stand-alone method considers the length and diameter of mains required to serve a typical customer if that customer is located adjacent to the city gate. All other mains costs are assumed to be shared by all customers on the system.

In the second class cost of service study, Staff allocated costs to the various customer classes based on the value of the service that the class derives from a given functional category throughout the year. To allocate distribution mains, Staff used a capacity utilization method, which uses 12 monthly peaks to approximate the incremental demands and the benefits received by each class. To determine the customer/demand split for allocating meters and regulators, Staff used data from Case No. GR-97-272, Associated Natural Gas (ANG). Staff used ANG's data because it was readily available and MGE's was not. Staff believes that use of ANG's data is reasonable because MGE's costs for these items should be the same as ANG's costs.

OPC allocated distribution mains based upon the modified Relative System Utilization Method (RSUM). The modified RSUM allocators are calculated using incremental noncoincident monthly demands and the nonlinear cost-capacity relationship for distribution mains (The nonlinear cost-capacity relationship for mains comes from the result that the capacity of distribution mains increases faster than its cost). All costs associated with distribution mains less than four inches in diameter were allocated solely between residential and the small general service classes. Mains of less than four inches in diameter account for over 45 percent of the length

of mains in MGE's distribution system. Distribution mains four inches and larger are considered to be part of the common system necessary to serve all customer classes. They were, therefore, allocated among all classes by modified RSUM allocators.

When OPC derived the meter, regulator and service allocators, costs were allocated by considering three factors: customer counts for each rate class; average costs for each type of meter, regulator and service; and the number of meters, regulators or services used by a customer for each customer class. The class meter, regulator and service allocators are based on the typical meter, service, regulator and installation costs provided by MGE and the updated, prorated customer count calculated by Staff.

OPC rejects methods which break the costs of the distribution system into two portions which supposedly depend on two different causes. Historically, OPC claims that the application of the *minimum system* method has resulted in residential and small commercial customers paying more than the fair share of distribution mains costs for both of these classes. The costs would be significantly higher to compose the system as a minimum system plus additions necessary to provide the current level of service.

MGUA and Jackson County, et al., believe that the methodologies recommended by MGE reflect the proper methods of functionalizing and classifying costs. For distribution mains, MGUA and Jackson County, et al., recommend use of the minimum system method. However, MGUA corrects MGE's method in two areas to more accurately allocate costs to the various customer classes. These areas dealt with the incorrect use of weighted customers to allocate certain customer related costs, and the allocation of MGE's gas storage inventory costs to transportation customers.

A summary of each party's allocation factors for four of MGE's five rate classes is given below:

Summary of Mains, Services, Meters, Meter Installation and Regulators

	RES	SGS	LGS	LVS	Total*
MGE mains	68.46	22.31	2.37	6.86	100.00**
MGE other	75.67	20.82	0.99	2.52	100.00
Staff #1 mains	60.26	20.97	2.94	15.83	100.00
Staff #1 meters	78.67	15.34	0.64	5.34	100.00
Staff #1 regs.	37.80	59.48	0.60	2.11	100.00
Staff #1 services	82.02	16.51	0.72	0.76	100.00
Staff #2 mains	51.06	19.89	3.58	25.48	100.00
Staff #2 M&R	62.07	19.73	2.91	15.30	100.00
Staff #2 services	81.34	13.93	0.75	3.98	100.00



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OPCRSUM	52.46	20.47	2.70	24.37	100.00
OPC meters	67.06	22.29	1.58	9.08	100.00
OPC regulators	34.90	60.40	1.40	3.30	100.00
OPC services	83.50	13.10	0.90	2.50	100.00

\* No UGL figures are listed because the amounts are negligible.

\*\* Totals approximate 100 percent; they may vary because of rounding.

Methods of allocation used by MGE, Staff and OPC for other plant accounts are listed in each party's respective prefiled testimony. These accounts comprise a very small percentage of the overall rate base. However, MGUA and Jackson County, et al., disputed some of these allocations because they alleged that it unfairly assigns costs to transportation customers.

MGUA and Jackson County, et al., opposed the proposed treatment of allocating uncollectible accounts to transportation customers that are not caused by transportation customers. Sales customers' unpaid billings represent substantial amounts of gas purchased by MGE and delivered to sales customers for which these customers did not pay. Since transportation customers purchase gas directly, requiring the transportation customer to pay these charges in effect forces them to not only purchase its own gas supplies but also to pay for gas that is sold to system sales customers but not paid for by the system sales customers. MGUA and Jackson County, et al., state that unless and until these uncollectibles are broken out properly, MGUA, Jackson County, et al., oppose the recovery of uncollectible accounts as a revenue or rate base item for MGE.

In addition, MGUA and Jackson County, et al., dispute several other items in the other parties' class cost of service studies. Those issues that appear most controversial along with the position argued by MGUA and Jackson County, et al., are:

1. Gas storage inventory: No portion should be charged or allocated to transportation customers.
2. Customer advances for construction: Directly assign to Large Volume Service/LGS class.
3. Customer deposits: Directly assign to Large Volume Service/LGS class.
4. AMR equipment costs: Not the responsibility of transportation customers who are required to purchase its own EGM equipment.

5. Uncollectible Accounts:                      Transportation customers' class should be assigned only the portion of such costs for which they are responsible, if any.

MGE incorporated interruptibility in the peak demand calculation (reduction of 50 percent of peak demand) for its LVS class. The resulting diminished potential use of the Company's distribution system by Large Volume Service customers is recognized in this adjustment. MGE alleges support for the interruptibility recognition because there is a higher probability that Large Volume Service customers will be interrupted upstream of MGE's distribution system by higher priority customers.

In Staff's class cost of service study, actual peak day demands were weather normalized to properly reflect the extreme weather that has occurred over a 30-year period and were also adjusted for customer growth. Large Volume Service customers' peak day demands were increased by 25 percent to adjust for normal weather and growth.

A significant portion of the difference between MGE's and MGUA's class cost of service studies and those class cost of service studies performed by Staff and OPC is MGE's and MGUA's assumption that January volumes for Large Volume Service customers are reduced 50 percent. Staff contends that if these volumes were not reduced, the Large Volume Service revenue requirement would increase by \$2.35 million. In addition, Staff stated that MGE has not experienced any distribution system constraints during its ownership. Both Staff and OPC believe that no sound reason exists for the 50 percent reduction (which MGE referred to as an "interruptibility recognition") in the Large Volume Service customer peak demands that were used by MGE and MGUA to allocate costs that MGE and MGUA believed were capacity related.

MGUA and Jackson County, et al., agree with MGE that some level of interruptibility or priority of service should be reflected in the demand allocator for transportation customers in the Large Volume Service class. MGUA does not agree with Staff's use of peak day demands because they are estimated and MGUA argued that "factoring up" large volume service demand by 25 percent artificially inflates capacity costs related to its customers.

The Commission has carefully reviewed each party's cost of service study. In doing so, the Commission has remained mindful that the cost of service is but one consideration in determining the reasonableness of rates. Shepherd v. Wentzville, 645 S.W.2d 130 (Mo. App. 1982). It is not just the methodology or theory behind any proposed rates but the rate impact which counts in determining whether rates are just, reasonable, lawful, and nondiscriminating. State ex rel. Associated Natural Gas Co. v. Public Service Commission, 706 S.W.2d 870, 879 (Mo. App. 1985). The quintessence of a just and reasonable rate is that it is just and reasonable to both the utility and its customers. State ex rel. Val Sewage Co. v. Public Service Commission, 515 S.W.2d 845 (Mo. App. 1974).

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The Commission finds that the current division of cost by class remains just and reasonable. The Commission finds that there is not sufficient evidence presented in the record to support the findings proposed by the parties to change the current class cost of service percentage. There has not been any evidence of a significant change or development that would have supported any of the changes proposed. Therefore, there should be no change in the class cost of service as allocated among the rate classes and found to be just and reasonable under the prior case, Case No. GR-96-285, issued on October 31, 1996.

### **2.2. Class Revenue Responsibility**

MGE's cost of service study indicates that revenues collected from residential service and small general service classes should be increased, while large general service and large volume service revenues should be reduced. However, MGE does not propose to implement those reductions in order to temper the increases to residential and small general service rates. MGE proposed to reduce commodity rates for the large general service and large volume service classes only to the extent necessary to offset the proposed customer charge increases for these classes, thereby producing no overall change in revenues collected from each of these classes. Assuming the midpoint of Staff's revenue requirement increase of \$8,388,834 is adopted, MGE proposed no change to the revenue responsibility of the large general service and large volume service customer classes and proposed that the revenue responsibility of the residential and small general service customer classes be increased by 8.4 percent and 5.6 percent, respectively. In the alternative, if the Commission believes that all customer classes should share in a revenue increase, then MGE proposed that large general service revenues be increased by no more than 3.5 percent and large volume service revenues should be increased by no more than 2.8 percent. MGE proposed that the remainder of the revenue increase be spread to the residential and small general service classes with each receiving the same percentage increase.

Assuming that Staff's proposed increase at the midpoint of \$8,388,833 is adopted, Staff proposed that the residential class receive a 6.87 percent increase which is the percentage of overall recommended revenue increase. In addition, Staff proposed that the Small General Service and Large General Service classes receive approximately a 3.44 percent increase, or one half of the percent increase for the residential class. Staff further recommended that the Large Volume Service class receive the remaining increase which would be approximately a 17 percent increase.

If the Commission were to determine that the appropriate level of revenue increase is significantly greater than Staff's midpoint proposal of \$8,388,835, then Staff recommended that the Commission give serious consideration to an equal percentage increase for all classes in order to lessen the rate impacts on the various customer classes.

OPC's class cost of service indicates that residential, small general service and large general service revenue requirements should be decreased. OPC recommended that the Commission adopt a rate design that considers rate impact and affordability factors when determining the amount of movement, if any, towards class cost of service. The Commission should impose, at maximum, revenue shifts equal to one-half of the revenue neutral shifts indicated by OPC's class cost of service study.

Additionally, to ensure that rates remain affordable and that the overall revenue requirement increase is shared equitably among the customer classes, OPC stated that two other factors should be considered. First, no class should receive a net decrease in revenue requirement (from the combined effect of interclass revenue shifts and an increase in the overall revenue requirement) while another class receives a net increase. Second, if the Commission decides to grant an increase in the overall revenue requirement that approaches the amount requested by the Company, then the Commission should not make any interclass revenue shifts and all customer classes should have its rates increased by equal percentages.

OPC suggests that the Commission consider the impact of significant increases in residential rates when it considers revenue shifts proposed by other parties in this case. OPC utilized a two step process in determining class revenue responsibility. To ease the impact of proposed revenue shifts on any one class, OPC halved the revenue neutral shifts indicated by its class cost of service study. Also, OPC limited the revenue shifts to ensure that no customer class receives a net decrease while another class receives a net increase.

MGUA's cost of service study, as does MGE's, reflects that the Large Volume Service and Large General Service classes have current rates that are too high while residential class rates are too low. MGUA and Jackson County, et al., would propose no revenue change to the Large Volume Service and Large General Service customer classes.

The Commission finds that the current class revenue responsibility remains just and reasonable. The Commission finds that there is not sufficient evidence in the record to support the positions of the parties regarding shifts in class revenue responsibility. Therefore, there should be no change in the allocated class cost of service. The allocation currently in place was found to be just and reasonable under the prior case, Case No. GR-96-285, issued on October 31, 1996.

### **2.3 Rate Design-Customer Charge Levels**

MGE's cost of service study shows that substantial customer charge increases are warranted. MGE proposed that only a portion of the indicated customer charge increases be implemented at this time. Specifically, MGE originally proposed a residential customer charge of \$12.75, a small general service customer charge of \$15.50, a large general service customer charge of \$92.50, and a large volume service customer charge of \$575.00. For each class, the proposed charges recover a greater

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portion of customer related costs through customer charges rather than relying as extensively on volumetric rates to recover these costs. MGE argued that the proposed changes are more equitable to customers because each customer would pay an amount that reflects the costs to serve that customer, independent of the customer usage. The proposed customer charges would also serve to reduce seasonal billing impacts, and for weather sensitive customers, would lessen bill swings caused by seasonal weather variations. MGE's residential service customer charge, calculated on a minimum system approach, includes costs associated with distribution mains.

For the residential service and Large General Service classes, Staff is proposing that the customer charges remain at the current levels of \$9.05 and \$65.80, respectively. For the Small General Service class, Staff recommended that the customer charge be increased from \$11.05 to \$12.50. For the Large Volume Service class, Staff recommended that the customer charge be increased from \$409.30 to \$479.00.

Staff proposed to increase both the large volume service customer charge and the large volume service margin commodity charges by the same approximate percentage to lessen the impact on customers within the Large Volume Service class. If the percentage change in the customer charge is significantly different than the percentage change in the class revenue requirement, the impacts within classes could be a concern. Impacts within a class can be minimized by increasing the customer charge by the same percentage as class revenue.

OPC recommended that the residential customer charge remain at its current level of \$9.05 because OPC's cost of service study indicates that the costs that should be collected through this charge are nearly identical to the current level of the customer charge. No costs associated with distribution mains are included in OPC's customer charge. According to OPC, this is because the addition of a single customer does not necessarily require any increase in investment in distribution mains. OPC believes that only costs that vary directly with the addition of customers should be included when determining a reasonable level of the monthly residential customer charge. These costs include the following:

1. services;
2. meters;
3. house regulators;
4. customer accounts;
5. associated depreciation expense;
6. associated O&M expenses;
7. return on rate base.

MGUA proposed the following customer charges: Residential Service, \$15.77; Small General Service, \$26.26; Large General Service, \$138.13; and Large Volume Service, \$390.94. MGUA and Jackson County, et al., propose that the customer

charges for all classes be computed in a similar manner. The same costs that are included in the residential customer charge should be included in the Large Volume Service and Large General Service customer charges. In addition, MGUA, Jackson County, et al., recommend that smaller customers transporting gas pursuant to contiguous property language in the transportation tariff only be assessed a customer charge commensurate with the equipment in place for the customers.

Intervenor Mountain Energy takes the position that MGE's proposed large volume service customer charge level is excessive and unreasonable.

The Commission finds that current customer charge levels remain just and reasonable. The Commission finds that there is not sufficient evidence in the record to support any of the positions proposed by the parties regarding customer charge levels. Therefore, there should be no change in the customer charge levels for any of the rate classes. The customer charge rates were found to be just and reasonable under the prior case, Case No. GR-96-285, issued on October 31, 1996.

The increase in the revenue requirement should be collected through the commodity charges for all classes of service.

#### **2.4 Facilities Extension Policy**

This issue relates to MGE's tariff sheet R-58 which currently allows for the installation of free main extensions up to 75 feet for a customer whose annual gas consumption is less than 600 Mcf, and service line extensions at no charge to the customer for the first 40 feet or \$450 in costs, whichever is less. Under MGE's current tariff, these free footage allowances are made regardless of the usage indicated as long as the projected annual usage is less than 600 Mcf. Free footage allowances for mains and service lines become a part of the rate base; customer contributions toward facilities extensions do not. Under the current facilities extension policy, 96 percent of the total cost of facilities extensions to serve new customers will be recovered through the rates to be set in this proceeding and paid by all customers. MGE proposed to increase the cost to be paid directly by a new customer to 25 percent, thereby reducing the amount of the cost to be recovered through rate base to 75 percent. MGE argued it could recover more of the costs of extensions from those who cause the costs, and reduce the amount of the costs that would otherwise be borne by MGE's other customers.

Staff does not object to MGE's proposed tariff changes regarding extensions of main lines, but opposed MGE's proposed changes as they pertain to service line extensions. With regard to the latter, Staff believes that new residential customers whose annual gas consumption is less than 600 Mcf should receive the first 60 feet of service line extension at no cost, provided there are no unusual construction conditions.

MGE's proposal is different from its existing tariff and the tariffs of other local distribution companies which provide for a set minimum amount of footage before charges are levied for an extension.

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OPC opposed the proposed provisions because OPC argued that it is the Company's duty as a certificated (publicly franchised) provider of services to make the investments necessary to extend service to customers. Charges for excess extension costs have historically been put into place to provide reimbursement to companies for extensions which are more costly than the ordinary extension. Second, MGE's requested change in this tariff represents a marked departure from the policies established in the tariffs of other energy suppliers in this state. Such a change in the basic nature of these tariffs should not be considered on an unilateral basis.

KCPL objects to MGE's proposed facilities extension policy. KCPL maintains that some level of main and service line extensions should be provided to residential customers at no cost. KCPL states that its position is consistent both with the policies of other jurisdictional utilities and long-standing Commission practice to include some amount of extension facilities in the Company's rates. In addition, KCPL opposed MGE's proposal because the change is limited to customers under 600 Mcf as an attempt to tie construction deposit refunds to the amount and types of appliances installed in the home (i.e., greater refunds to homes with greater use of gas appliances). KCPL maintains that deposits should be refunded without regard to usage.

MDEA opposed MGE's proposed facilities extension policies tariff because: 1) it gives MGE too much discretion over setting gas facilities extension charges for residential subdivisions; 2) it changes the reimbursement of facilities construction advances to a revenue-based formula that would pressure builders to install gas piping that would increase the cost of homes, restrict new homeowners' end choice of appliances, and put the developer or builder in the role of marketer for MGE's services; 3) its proposed charge for four-inch main extensions is unreasonably high; and 4) it permits MGE too much discretion over construction deposits where MGE determines that greater than a four-inch line is required or where MGE finds unusual construction conditions.

The Commission finds that there is not sufficient evidence to support the amendment to the facilities extension policy proposed by MGE. MGE has failed to provide competent and substantial evidence to show that the proposed amendment would produce just and reasonable rates.

## **2.5 Other Tariff Issues**

### **a. Pooled Transportation**

MGE proposed tariff sheets No. 61.1 and 61.2 to introduce a voluntary pooled service option for transportation customers meeting some volume minimums, approximately 100 Mcf per day. Through this proposed service option, the gas supplies of a group of eligible customers served by a single supplier may be aggregated for the purpose of determining or avoiding penalties during pipeline operational orders and local distribution curtailments. Staff has no objection to MGE's proposal and OPC takes no position on this issue.

Mountain Energy objects to the proposed charge for the voluntary pooled transportation service, and argued that the service should be available to all customers, regardless of usage. Mountain Energy claims that the minimum required use of 100 Mcf per day is unreasonably restrictive and discriminates among the various users. Finally, Mountain Energy stated that this pooled transportation service is not needed if the burner tip balancing (BTB) as set out in Case No. GR-93-240 is appropriately applied by MGE.

MGUA and Jackson County, et al., do not agree with the pooled transportation proposal offered by MGE either. MGUA and Jackson County, et al., do not believe that the pooled transportation service option, voluntary or otherwise, is necessary because all transportation customers currently participate in the burner tip balancing mechanism pursuant to the prior agreement.

The Commission finds that as the proposed service which MGE wishes to offer is a voluntary service, there is no harm in permitting MGE to include this proposed voluntary service in its tariff sheets. Since no entity is required to participate in this program unless it has negotiated an agreement voluntarily with MGE, there is no detriment to other ratepayers and the voluntary nature of the program makes the proposal just and reasonable. The Commission finds that the approval of tariff sheets 61.1 and 61.2 does not in any way negate any interpretation of the burner tip balancing agreements currently in place.

**h Deferral of Deliveries during System Emergencies**

MGUA proposed to delete tariff sheet No. 68. Tariff sheet No. 68 permits MGE to defer delivery of a customer's gas in the event of a system supply emergency. A system supply emergency occurs when the supply of natural gas available to the Company in any area is less than the amount required to meet the demands of its sales customers. A system supply emergency would result from MGE failing to nominate sufficient gas supplies for its sales customers at a given time. A system capacity emergency, on the other hand, would result from an inadequate supply of gas being available from the pipeline to meet MGE's requirements. The priority of service section of tariff sheet No. 66 of MGE's tariff stated that

[i]f a supply deficiency occurs in the volume of gas available to the Company for resale, and the customer supply delivered to the Company for transportation continues to be available, then the customer may continue to receive transportation service even though sales gas of the same or higher priority is being curtailed.

Comparison of the language in tariff sheet No. 66 and tariff sheet No. 68 shows that the language of the two tariff sheets is contradictory. MGUA and Jackson County, et al., assert that this provision, which permits the borrowing of transportation customers' gas supplies, wherever appropriate, is no longer appropriate after



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FERC Order 636. MGE should be fully responsible for providing sufficient and reliable supplies of gas for its system supply customers without relying on its transportation customers' gas supplies. MGUA and Jackson Co., et al., argued that the Tariff 68 provision is also inconsistent with MGE's curtailment priorities. MGUA and Jackson County, et al., stated that transportation customers should no longer be required to provide free insurance against MGE's failures to fulfill its public utility obligation. The intervenors point out that this is not a safety or reliability issue; it is a responsibility issue for MGE.

MGE's opposition to MGUA's proposal regarding deferral of deliveries during system emergencies is based on its understanding of the Commission's policy to ensure that supplies are available during emergency situations to serve human needs customers. If the Commission determines that this is a policy that should be changed consistent with the position advanced by MGUA, MGE will accept that determination.

Staff agreed with the proposal of MGUA and Jackson County, et al., to delete the language on MGE's tariff sheet No. 68. This tariff language allows MGE to defer delivery of a transport customer's gas when MGE has failed to nominate sufficient gas supplies for its sales customers. Staff believes that deletion of the sheet No. 68 language would not compromise public safety because if a system supply deficiency became serious enough that human needs were jeopardized, there would almost certainly be enough gas on the pipeline available to MGE to meet human needs (even if at substantial cost and with substantial penalties attached). If gas were not available on the pipeline because the pipeline was physically incapable of supplying the gas, the situation would become one of a system capacity deficiency. Under MGE's tariff sheet Nos. R-81 and R-82, MGE may curtail gas to low priority customers when an inadequate supply of gas is available from the pipeline. Existing language in tariff sheet Nos. R-81 and R-82 provide sufficient protection for human needs in the event of an emergency.

Mountain Energy supports the position of the Midwest Gas Users' Association on this issue. OPC takes no position on this issue.

The Commission finds that tariff sheet No. 68 of MGE's tariff is neither warranted, just nor reasonable in light of the other tariff sheets available for the protection of critical human needs, such as Tariff Sheets R-81 and R-82. The language in tariff sheet No. 68 contradicts the language in tariff sheet No. 66, and given the fact that this tariff sheet language has never been invoked, the language in tariff sheet No. 68 is clearly not warranted. The Company shall be ordered to remove tariff sheet No. 68.

**c. Unauthorized Use Charges**

Under MGE's current tariffs, MGE is permitted to implement a separate unauthorized use charge when excess gas is delivered to a transportation customer, if at the same time such customer is subject to upstream interstate pipeline penalties.

Mountain Energy requests that MGE not be permitted to penalize a transport customer if MGE has not been penalized on the interstate pipeline system. Mountain Energy requests that the tariff sheet relating to unauthorized use charges be removed from MGE's tariff.

MGUA and Jackson County, et al., also recommended that all customers share in that portion of the penalty revenues in excess of the cost of gas. There is no reason to eliminate transportation customers from sharing non-gas penalty revenues. MGUA stated that to the extent that MGE collects penalty revenue from transportation customers that exceed the cost of the natural gas commodity that may have been taken in excess of current nomination, the excess should flow back to benefit transportation customers who are in compliance. MGUA alleges that by creating a profit center for MGE, in connection with the experimental gas tariff, a perverse incentive is created for MGE to penalize its transportation customers without justification.

Staff believes that MGE's current tariff provision is reasonable. Staff stated in support of its position that if there are shortfalls in deliveries, it is MGE's systems supply and transportation agreements that provide the swing capability necessary to maintain reliable and safe deliveries to all customers, including transportation customers. Staff stated that it is most appropriate to have penalty revenues credited to the sales customers to the extent they are paying the cost incurred. During critical periods on the interstate pipeline system, MGE's contracts are covering the transport customers' shortfalls to the detriment of the sales customers, who may pay a higher price for replacement supplies. Penalties in MGE's tariffs are for unauthorized taking of gas from MGE's system, not for activities on the upstream pipeline.

MGE supports its current tariff on unauthorized use charges. OPC takes no position on this issue.

The Commission finds that MGE's current tariff regarding the unauthorized use charges is reasonable and shall remain a part of MGE's tariff. There has not been sufficient evidence produced to support any change to the current tariff.

**d. Twelve-Month Notice for Transport Switching**

MGE tariff sheet No. 41 relates to the time required for notice to be given by customers to MGE to switch from transport service to sales service or from sales service to transport service.

In response to the concern of Mountain Energy, MGE is willing to allow customers who have never had transportation service to initiate transport service upon 60 days' notice (instead of the current 12 months) following installation of electronic gas measurement equipment. Customers wanting to switch from transportation service to sales service should still be required to wait 12 months, however.

Staff believes that MGE's current tariff provision is reasonable. Allowing a customer to initiate transportation service upon 60 days' notice may result in excess

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capacity which could harm the remaining sales customers. OPC takes no position on this issue.

Mountain Energy's position is that the 12-month notice for transport switching is excessively long and should be reduced. While Mountain Energy recognized that MGE needs some time and notice before a customer switches between these two services, it stated that in a competitive marketplace the 12-month provision is artificially high. Mountain Energy supports the initiative to change the existing tariff to allow a customer to initiate transport service upon 60 days' notice. Mountain Energy claims that the 60-day notice is sufficient to allow MGE to install the EGM equipment. It believes the 60-day notice should include installation of the EGM, not exclude it.

Mountain Energy stated that a transportation customer that wishes to switch from transportation service to sales service should not be required to wait the 12 months as proposed by MGE. The switch should be effected in no less than 60 days with that customer agreeing to take the higher of the system weighted average cost of gas or the additional incremental cost of short-term supplies. Mountain Energy believes that such arrangements should not penalize a switching customer, but should be limited in duration, after which the customer should be treated as any other sales customer.

The Commission finds that the MGE tariff sheet No. 41 is reasonable and no changes should be made. This tariff sheet permits MGE time to adjust its upstream pipeline capacity contracts and its separate commodity contracts to match its projected sales and service requirements. There is not sufficient evidence to support any change to the tariff regarding switching from transportation service to sales service or from sales service to transportation service without the required 12 month notice.

**e. LVS Complaint Procedures**

MGUA requests the Commission require MGE to incorporate a Large Volume Service complaint procedure into its tariffs. MGUA stated that the current complaint procedure is discriminatory and unreasonable in that it treats large volume service customers differently. Mountain Energy supports Midwest Gas Users' Association on this issue.

MGUA and Mountain Energy believe that MGE should have a process applicable to all its customers that prevents MGE from threatening to cut off service to force payment of amounts that are in dispute. These parties believe that residential customers have this protection and that protection is needed for large customers also. MGUA has proposed a tariff change which will make MGE tariffs consistent with the tariffs of other utilities in this regard.

MGE opposed the proposals of MGUA and Mountain Energy to implement a complaint procedure in its tariff for large volume service customers.

Staff presented evidence that indicated that this issue is not an appropriate issue for a rate case. It is a general policy question applicable to all utilities, not something

that is unique to MGE. The Commission's existing policy is that a dispute resolution procedure is appropriate for residential customers. It has had such provisions in place in Chapter 13 of its rules (4 CSR 240-13) for more than 20 years. There has been no evidence presented here of a need for such a procedure for nonresidential customers. There is no need for a such a provision. The Commission finds that, given that MGE has a separate department set up to deal specifically with large volume customers, which represent approximately 400 customers on the system, a tariffed informal complaint procedure does not appear to be warranted. Additionally, a Large Volume Service customer may file a formal or informal complaint with the Commission pursuant to 4 CSR 240-2.070.

**f. Fifteen-Day LVS Bill Payment Requirement**

Mountain Energy claims that MGE's requirement that Large Volume Service (LVS) customers pay their bills in 15 days instead of 21 days as allowed for the other customer classes is unreasonable and discriminatory.

MGE opposed the proposal of Mountain Energy to increase the time within which large volume service customers have to pay their bills from 15 to 21 days. Any change in this requirement will increase revenue requirement impact by an amount which has not been quantified, and therefore no action on this request should be taken. Since the current provision is currently deemed just and reasonable, MGE stated that Mountain Energy bears the burden of convincing the Commission otherwise.

Staff believes that MGE's current tariff provision requiring full payment within 15 days is reasonable. Staff witnesses testified that Large Volume Service customers tend to be very large, and their gas supply and transportation service is governed by contractual relations. Given that common industry practice requires payment for supply and transportation services in a 10 to 15 day time frame, MGE's requirement that Large Volume Service customers pay their bills within 15 days is not onerous. OPC takes no position on this issue.

The Commission finds that Staff's and MGE's position regarding MGE's current tariff provision relating to the 15-day Large Volume Service bill payment requirement is reasonable, and the tariff provision remains just and reasonable. There is not sufficient evidence to show that this provision warrants any change.

**g. EGM Cost**

MGUA and Jackson County, et al., recommend that the Commission order MGE to aggressively explore less costly electronic gas measurement (EGM) technology for its customers. Mountain Energy concurs with Midwest Gas Users' Association that the EGM cost should be decreasing as other technology of this type decreases in cost and becomes more efficient.

MGE continues to believe that EGM equipment is necessary for large volume transportation customers. In addition, the cost incurred for EGM installations is reasonable. Under MGE's tariff, the Large Volume Service customer is charged the lesser of the actual cost or \$5,000 per EGM meter.

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Staff believes that MGE's current tariff provision is reasonable. OPC takes no position on this issue.

The Commission finds that the current tariff regarding the Large Volume Service customer's EGM cost is reasonable and adopts Staff's and MGE's position on this issue. Under MGE's tariff, the Large Volume Service customer is charged the lesser of the actual cost or \$5,000 per EGM meter. As \$5,000 is the maximum price per EGM meter permitted under the tariff, and the EGM equipment is absolutely necessary for operation of the Large Volume Service customer's gas service, the Commission finds that MGE's current tariff continues to be just and reasonable. There is not sufficient evidence to support any change in this current tariff.

**h. SGS, LGS, LVS Volume Distinctions**

It is Mountain Energy's position that the volume distinctions and classifications between Small General Service (SGS), Large General Service (LGS) and Large Volume Service (LVS) place an artificial barrier between the levels of customers who could potentially transport. Mountain Energy points out that Illinois has no barriers on who can transport. Mountain Energy stated that because these volume distinctions are based on peak usage and not on an annual usage they can have unfair effects. Mountain Energy proposed that these distinctions be modified or removed to allow those customers who can benefit from transportation to take advantage of the open marketplace.

MGE has made no specific proposal to alter class definitions in this case. MGE made a proposal to make transportation service available to large general service customers primarily on the grounds that EGM should have been required for large general service customers in Case No. GR-96-285. The Commission rejected MGE's proposal at that time. Given the short period of time between this case and the last, MGE made no proposal to expand transportation availability in this case. MGE claims it will be addressing these matters in a filing to be made with the Commission in the future, and therefore, MGE argued that the Commission need not adopt Mountain Energy's concept in this proceeding. MGE points out that the record in this case lacks sufficient evidence to support such a change in the current tariff provisions regarding classification of service.

Staff is opposed to modification in the Small General Service, Large General Service and Large Volume Service class definitions in this case. Such changes could impact the Company's revenues, as well as the cost other customers pay.

The Commission finds that there is not sufficient evidence in the record to support any changes to volume distinctions and classifications and adopts Staff's position as just and reasonable. Given the various proposals in the last rate case and this rate case, the Commission suggests that the parties request an investigation to allow for the discussion of the modification of volume distinctions and classifications among classes as a separate case. A separate case would provide other parties with the opportunity to intervene and propose language for changes.

**i. Multiple Customer Charges for Multiple Meters**

See Issue I.A.1., *infra*.

**j. Expansion of Transportation Availability**

Mountain Energy proposed that MGE eliminate the tariffed threshold for a customer to transport gas on MGE's system. Mountain Energy supports the expansion of transportation services to customers who are currently not able to transport under MGE's existing tariffs.

MGE indicates that this issue is conceptually similar to the volume distinctions and classifications among customers as discussed Section II.2.5.h. of this Report and Order, *supra*. MGE has not proposed to expand transportation availability in this case. MGE believes its current tariff remains just and reasonable.

Staff also believes that MGE's current tariff provision is reasonable. Staff is concerned that changes could impact the Company's revenues, as well as the costs other customers pay.

The Commission finds that there is not sufficient evidence to warrant any change of this tariff at this time. Further, the Commission finds that MGE's current provision is just and reasonable and adopts Staff's and MGE's position. As indicated under the Commission's findings in Section II.2.5.h., this issue may be appropriate for discussion as part of another case along with the issue of volume distinction and customer classification.

**k. Ccf Billing**

MGE proposed to change its billing units from Mcf (1,000 cubic feet) to Ccf (100 cubic feet) to improve customer understanding of bills during periods of low gas usage. Staff supports the Company's proposal. Mountain Energy has no position on this issue. No parties objected to MGE's proposal on this issue.

The Commission finds that MGE's proposal to change its billing units from Mcf (1,000 cubic feet) to Ccf (100 cubic feet) is just and reasonable, and is hereby approved by the Commission.

**l. Limit LVS Class to Transport Customers**

MGE proposed to establish the large general service schedule as the large customer sales service schedule and make the large volume service schedule transportation-only service.

Staff believes that MGE's current tariff provision is reasonable. Staff stated that MGE has only two current sales customers in the Large Volume Service class and those customers have usage characteristics consistent with the other Large Volume Service customers.

The Commission finds that MGE's current tariff provision is reasonable and adopts Staff's position on this issue. There is not sufficient evidence to support any change to the current tariff provision.

**3. Customer Service Matters**

It is the Commission's understanding that the customer service matters were addressed and evidence presented by the parties for the Commission's information

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to advise the Commission of the status of MGE's ongoing projects on which MGE is working. Despite a delay in implementing these customer service programs, it was apparent by the evidence that MGE has begun to make improvements in its customer service areas. The Commission urges the Company to redouble its efforts and fulfill prior commitments made in Case No. GR-96-285 in order to ensure timely and successful completion of customer service improvements. The Commission wishes to reinforce the parties' understanding that prior commitments ordered in Case No. GR-96-285 remain in effect and will continue to be in effect until such time as an order relieving MGE of said commitments is issued. The Commission will accept and seriously review any complaints received where it appears that MGE has failed to comply with the commitments ordered in Case No. GR-96-285, or any other valid order of this Commission. The Commission commends MGE's current efforts and encourages MGE to continue these efforts toward improved customer service.

MGE has undertaken substantial measures that have directly improved the quality of customer service. MGE claims that most, if not all, of these measures represent continuous and ongoing, rather than "one-time," projects that will continue to improve the levels of customer service quality in the future.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

Missouri Gas Energy, a division of the Southern Union Company, is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

The Commission has authority under Chapter 393, RSMo 1994, to set just and reasonable rates for the provision of service by regulated gas utilities.

The orders of the Commission must be based on substantial and competent evidence, taken on the record as a whole, and must be reasonable and not arbitrary, capricious, or contrary to law. In that regard, and in setting rates which are just and reasonable, the Commission has considered all relevant evidence and determines, as set out in the findings of fact, that Missouri Gas Energy's revenue requirement will be increased in the amount of \$ \$13,217,754 as set out in this Report and Order.

The proposed Stipulation and Agreement, with Addenda, is treated as unanimous by operation of rule 4 CSR 240-2.115, is in the public interest, and is approved.

#### *IT IS THEREFORE ORDERED:*

1. That the Commission's Scenarios A and B are made a part of the the Report and Order, marked as Attachment D, pp. 1-2, and attached to this Report and Order.

2. That Tariff No. 9800264 and Tariff No. 9800378, submitted in File No. GR-98-140 and GT-98-237 respectively, by Missouri Gas Energy, a division of Southern Union Company, on October 3, 1997, are hereby rejected.
3. That the Commission approves the Stipulation and Agreement with the Addenda filed.
4. That Missouri Gas Energy, a division of Southern Union Company, is hereby directed to file, not later than September 2, 1998, revised tariff sheets with a thirty day effective date in accordance with the findings in this Report and Order, which should include the rate increase of \$13,217,754 and all other changes consistent with this order.
5. That the above-ordered increase in rates will be applied as commodity charges at an equal percentage across all rates and rate classes.
6. That Missouri Gas Energy, a division of Southern Union Company, the Office of the Public Counsel, and the Staff of the Commission are ordered to recalculate and file depreciation rates, either jointly or separately, in accordance with the findings in this Report and Order no later than August 27, 1998.
7. That Missouri Gas Energy is granted an Accounting Authority Order as set out in the findings of this Report and Order. Nothing in this order granting this new Accounting Authority Order (AAO) shall be considered to have any effect for the purpose of ratemaking treatment.
8. That all objections not specifically ruled upon are overruled and all motions not specifically ruled upon are denied.
9. That this Report and Order shall become effective on September 2, 1998.

Lumpe, Ch., and Crumpton, CC., concur. Schemenauer, C., concurs with opinion to follow. Murray, C., dissents with opinion. Drainer, C., dissents with opinion.

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EDITOR'S NOTE: The Stipulation and Agreement and the addendum to the Stipulation and Agreement have not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

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**CONCURRING OPINION OF**  
**COMMISSIONER ROBERT SCHEMENAUER**

I wholeheartedly concur with the decision of the majority on all issues in this case. I specifically concur with the decision to disallow the inclusion of the unamortized balance of the Safety Line Replacement Program (SLRP) deferrals in MGE's (Company) rate base.

The arguments presented by the Company and Staff in support of the inclusion of the SLRP deferrals in rate base rely upon the premise that this Commission's decision regarding this issue must not only be consistent with prior Commissions



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decisions in Case Nos. GR-96-285 and ER-93-37 but it must mirror those decisions. This argument is weak at best, and suffers from many defects. The most damaging being that future Commissions be bound to render decisions in perpetuity based on the illogical premise that consistency requires it. Rather, Commissions are required to conduct their deliberations and base their decisions upon the facts and evidence presented to them in the context of the case under consideration. If the majority had based its decision in this case solely upon this “consistency premise” without consideration of the facts, evidence and arguments presented, an illogical conclusion would have been reached.

The decisions in GR-96-285 and ER-93-37 were rendered by different Commissions based upon their examination and evaluation of the facts, evidence and arguments presented. Both of the cited cases were evaluated and decided in an entirely different context. The situations presented to the Commissions then and the urgency, expense and unknown complexities were much different from the situation presented in this case. After five years MGE should be well versed in its understanding of regulatory lag. Regulatory lag is not an economic phenomenon. It is not an unusual, significant, or unaccountable occurrence that suddenly appears for no explainable reason. Management is responsible for planning and operating the activities of the Company. If the Company is unable to or chooses not to implement processes and procedures which would limit the effect of regulatory lag upon its finances, it should not expect the Commission to protect it from any resulting economic detriment if any occur. To do so would unfairly foist costs upon its customers of \$2 million in additional annual rate increases.

Utility customers served by a monopoly provider, by and large, have no choice regarding the price they must pay for a commodity or from whom they may purchase it. Neither are they able to purchase reasonable substitutes or to forego purchasing the commodity. The deferral amounts being amortized over ten years allow the Company to recover all of its costs (interest, taxes and depreciation) from its customers. The planning, timing and execution of decisions regarding those costs were made solely by the Company with no input from its customers.

Lastly, the majority correctly based its decision to allow a 10-year recovery period for the deferrals upon sound accounting principles. The principle of matching an expense with revenues related to the recovery of that expense was applied. The SLRP deferrals are expenses related to previous periods when the rates were not sufficiently tariffed to provide revenue recovery. The Commission in a previous case granted an Accounting Authority Order (AAO) to the Company which allowed it to suspend normal accounting requirements and to defer the SLRP costs until the next rate case was filed.

Those deferrals included the expenses of depreciation, interest and taxes from the prior periods and were considered for treatment in this case. Here, the majority granted relief by allowing full recovery of these deferred costs over 10 years rather than 20 years. It was rightfully concluded that a 10-year amortization period more

closely matched revenues with the expenses deferred from the prior period. No injustice was done to the Company by disallowing the inclusion of these deferrals into its rate base.

For all of the foregoing reasons I reiterate my concurrence.

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**DISSENTING OPINION OF VICE CHAIRMAN DIANNE DRAINER**

I respectfully disagree with the opinion of the majority in the Report and Order. I am not convinced that the evidence presented is sufficient to support the findings of the majority on the issues of Billing Process Improvement Costs/Billing Corrections Costs and Inclusion of Unamortized Balance in Rate Base. I found the evidence presented by the Missouri Public Service Commission Staff to be more persuasive, just and reasonable with respect to the above two issues. For this reason, I respectfully dissent.

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**DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY**

Based upon my disagreement with the findings and conclusions of the majority on two important issues, I respectfully dissent. I would include the unamortized balance of the Safety Line Replacement Program (SLRP) deferrals in rate base and would include in the revenue requirement the costs associated with the contract services of Theodore Berry & Associates (TBA).

Both MGE and Staff include the unamortized balance of SLRP deferrals in rate base. This is consistent with Commission decisions in Case Numbers GR-96-285 and ER-93-37.

The reasoning of the majority that “it is proper for the ratepayers and shareholders to share the effect of regulatory lag by allowing the Company to earn a return of the SLRP deferred balance but not a return on the SLRP deferred balance” is flawed. Regulatory lag is a phenomenon that occurs because of the lapse of time between a petition for a rate change and the formal action by the regulatory body which allows the rate change to become effective. Regulatory lag is not a carrot that regulatory bodies award to one or another party to a rate case as the majority’s reasoning seems to suggest. The effects of regulatory lag should not form the basis of a decision on inclusion of the unamortized balance in rate base.

Neither should a 10-year recovery period versus a 20-year recovery period form the basis of a decision on inclusion of the unamortized balance in rate base. The majority’s disallowance of a return on the unamortized portion of the deferral results in the company recovering one amount fixed over time. The amount recovered does not change whether the time is tomorrow or 10 years or 20 years. Therefore, the value of the recovery to the company diminishes over time. While it is true that the value

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to the company will be greater with a 10-year recovery period than with a 20-year recovery period, that value remains less than the present value of the SLRP costs.

The SLRP costs are real costs of providing service. They represent dollars that MGE has already spent. The Commission has determined that these costs were prudently incurred. Therefore, the company is entitled to recovery in rates. In order to prevent the ratepayers from bearing these extraordinary costs all at once, the Commission appropriately is requiring the company to amortize them over a period of 10 years, thereby waiting 10 years to be made whole. In the meantime, all unamortized amounts remain unavailable to the company for other investments. It is as if the shareholders are making a loan to the ratepayers in the amount of the SLRP deferrals to be repaid over a period of 10 years. The company should be allowed to include the unamortized amounts in rate base; otherwise, the loan to the ratepayers is interest free.

The majority cites OPC's arguments against guaranteeing the Company a return on the unamortized portions of the deferred amounts without pointing out, as it should, that utilities are never guaranteed that a fair return will be realized. The inclusion of the unamortized amounts in rate base would merely assure the opportunity to earn a fair return on the SLRP investments. I believe the Company is entitled to this opportunity.

The other issue upon which I disagree with the majority is the treatment of the costs associated with the contract services of Theodore Berry & Associates (TBA) for its role in facilitating the billing process improvement project referred to as Billing Accuracy and Service Improvement Commitment (BASIC) Team Project. Staff's position is that MGE should be allowed to capitalize the costs associated with billing process improvements which are "in-service" to the Miscellaneous Intangible Plant Account 303 and to amortize them over the remaining economic life of the Customer Service System (CSS), which is nine years. Staff also recommends an offsetting reduction in the billing cost expenses of \$250,000 per year. I would adopt Staff's position on this issue.

The BASIC team was formed in February of 1997. From then until the first part of May 1997, the BASIC team's primary focus was on the correction of past billing errors.

As a result of Case Number GC-97-497, MGE absorbed the following costs to correct billing errors from the 1996-1997 winter heating season:

a. Waived under billings	\$ 394,492
b. Interest on over billings	16,321
c. \$15 settlement credit	1,578,480
d. Low income assistance	550,000
	<u>2,539,293</u>

The shareholders have already absorbed more than 2.5 million dollars related to the billing errors of the past.

Theodore Barry & Associates was hired in May of 1997 to work with the BASIC team to provide expertise for future billing improvements. MGE presented evidence that the focus of the BASIC team after the inclusion of TBA was forward looking. The company testified that TBA did not work on correcting any past billing errors, but directed its efforts solely at improvement of MGE's billing and other customer-service related processes. Recommendations resulting from the project included identifying and implementing improvements in the meter reading, billing and service-order processes. The design and implementation of CSS enhancements were paramount.

Some of the billing improvements that have been realized and can be expected to continue into the future include appointments for service orders; same-day completion of service orders in the field; same-day completion of service orders in the CSS; enhanced training of phone center consultants. Evidence was presented that there were 21,000 fewer estimated meter readings in December of 1997 than the previous December, that estimated bills were down from 10 percent during the test year to less than 1 percent from February through May of 1998, and that no major billing issues arose during the 1997-1998 winter season. Because ratepayers have benefitted and will continue to benefit from these billing process improvements, it is appropriate that the costs of these improvements should be included in the revenue requirement.

For the foregoing reasons, I dissent.

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**In the Matter of the Tariff Filing of ALLTEL Missouri, Inc., to Consolidate Its Access Rate Tariffs.**

*Case No. TR-97-567*  
*Decided August 27, 1998*

**Telecommunications §§ 36, 39.** The Commission found that the proposed consolidated access rate tariff filed by a telephone company was not just, reasonable, nor in the public interest because it restructured the company's access rates in a manner that would shift significant and unreasonable amounts of revenue from originating to terminating minutes of use.

**Telecommunications §14.** The Commission found that a telephone company should be permitted to eliminate the existing Carrier Common Line (CCL) rate cap in the context of access tariffs that are revenue neutral to the company and otherwise found reasonable by the Commission.

**Telecommunications §§36, 39.** The Commission found that the terminating to originating ratio of 12.62:1 proposed by a telephone company was anti-competitive and unreasonable. Approval of the proposed ratio would shift a disproportionate share of the company's revenue requirement from originating to terminating minutes and act to discourage the development of intraLATA competition.

**Telecommunications §§36, 39.** The Commission found that a telephone company should be permitted to set its interLATA and intraLATA Carrier Common Line (CCL) rates at parity to the extent that it can be achieved without an inordinate adverse impact on the company's access customers.

**APPEARANCES**

*W.R. England, III*, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for ALLTEL Missouri, Inc.

*Leo J. Bub*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*Leland B. Curtis*, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation.

*Rick Zucker*, Attorney, GTE Service Corporation, 225 Madison Street, 2<sup>nd</sup> Floor, Jefferson City, Missouri 65101, for GTE Midwest Incorporated.

*Linda K. Gardner*, Senior Attorney, Sprint, Inc., 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Missouri, Inc. (formerly known as United Telephone Company of Missouri, d/b/a Sprint).

*Paul S. DeFord*, Lathrop & Gage, 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Michael F. Dandino*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Cherlyn D. McGowan*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: L. Anne Wickliffe, Deputy Chief.

#### REPORT AND ORDER

##### Procedural History

On June 30, 1997, ALLTEL Missouri, Inc. (Alltel) filed tariff sheets with the Commission on June 30, 1997, designed to consolidate its intrastate access rates. The Commission approved a merger between Eastern Missouri Telephone Company, Missouri Telephone Company, and Alltel, with Alltel as the surviving entity in Case No. TM-95-87, on December 12, 1995. In a related case, Case No. TO-96-147, the Commission approved an agreement of the parties that called for Alltel to file a set of consolidated access tariffs no later than 18 months after the effective date of the Commission's order approving the merger in TM-95-87, i.e. June 30, 1997. The tariffs at issue here were filed in compliance with that order.

Southwestern Bell Telephone Company (SWBT) filed an Application to Intervene and Motion to Suspend and Investigate on July 22, 1997. Alltel voluntarily extended the effective date of its proposed tariff until November 1, 1997, and the Commission issued an order granting SWBT's application to intervene, denying its motion to suspend the tariff sheets, and setting a prehearing conference on August 22. The Commission conducted a prehearing conference on September 10 and granted intervention on the record to MCI Telecommunications Corporation (MCI) and GTE Midwest Incorporated (GTE). United Telephone Company of Missouri d/b/a Sprint<sup>1</sup> (Sprint) filed an Application to Intervene on September 17 which was granted on October 7.

The Staff of the Missouri Public Service Commission (Staff) filed a Motion to Establish Procedural Schedule on September 16. The Commission issued an order suspending the tariff sheets until September 1, 1998 and adopting the proposed procedural schedule on October 7. The Commission directed parties wishing to intervene to do so by October 27, 1997, and set a prehearing conference for April 1, 1998, and an evidentiary hearing for April 15-16.

AT&T Communications of the Southwest, Inc. (AT&T) filed an Application to Intervene on October 27, 1997, which was granted on November 12.

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<sup>1</sup> United Telephone Company of Missouri is now Sprint Missouri, Inc.

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The parties submitted prefiled testimony, met in a prehearing conference on April 1, 1998, and filed a Hearing Memorandum on April 7. The Commission conducted an evidentiary hearing on April 15-16. Alltel submitted late-filed exhibit number 18, consisting of Alltel's responses to Data Requests 1 and 2 propounded by SWBT. No objections were filed to this late-filed exhibit. The parties filed initial briefs on June 12 and reply briefs on July 8.

#### Discussion

Alltel provides telecommunications services in various exchanges throughout the state of Missouri. In the Order Approving Stipulation and Agreement issued by the Commission December 21, 1995 in Case No. TO-96-147, Alltel was directed to file consolidated access rate tariffs. The contested issues in the hearing revolved around the method Alltel has used to consolidate the tariffs of the three pre-merger companies into a single tariff filing. The Commission will discuss below the issues presented for decision as reflected in the Hearing Memorandum.

#### **A. Are the traffic sensitive rates contained in Alltel's proposed tariff appropriate?**

Alltel's proposal would establish certain intrastate traffic sensitive access rates at the same level as its interstate rates. Specifically, Alltel proposes to: 1) apply its existing interstate access rates to 800 Data Base Query, Information Surcharge and Local Switching; 2) use existing interstate access rates for Local Transport, but maintain the existing intrastate local transport structure of one rate per minute, rather than moving to a mileage-sensitive element; and 3) eliminate the existing intrastate line termination access element. Alltel's witness, Mr. Beurer, testified that the company's current interstate rates are based on company-specific costs using Federal Communications Commission (FCC) rules. He stated that the cost of switching and transporting an interstate call is no different from the cost of switching and transporting an intrastate call. On cross-examination Mr. Beurer stated that the rates were not based on forward-looking cost studies but on FCC Part 36 and 69 rules designed to allocate costs between interstate and intrastate jurisdictions, and to allocate interstate costs among rate elements. Mr. Beurer testified that he had not conducted a study to determine the Missouri state costs for the rate elements addressed by Alltel's proposed access rate design.

Mr. Beurer testified that the proposal was designed to be revenue neutral to Alltel but would have disparate impacts on the company's access customers. Schedule LB-5 HC to his direct testimony sets out the company's calculations of the expected impacts on its primary access customers and shows a range from large decreases in access expense for some carriers to large increases for others. Mr. Beurer stated on cross-examination that he was aware of other methods of consolidating Alltel's rates that would minimize the disparate impacts on access customers but still permit elimination of the CCL cap. In particular Mr. Beurer stated that one of the scenarios Alltel considered would have significantly reduced the negative impact on

SWBT and still have resulted in a decrease in AT&T's access expense. See Exhibit 15-HC.

AT&T's witness, however, testified on cross-examination that the scenario set out in Exhibit 15-HC is unacceptable to AT&T because interLATA and intraLATA rates are not priced the same though the costs of providing the service are the same and the proposal is, therefore, not competitively neutral. AT&T and MCI were not opposed to the traffic sensitive rates in Alltel's filed proposal. Both of these companies would experience a decrease in access expense according to Mr. Beurer's calculations.

Staff objects to the traffic sensitive rates Alltel proposed because the company was not consistent in applying its interstate rate elements to the corresponding intrastate rate elements. Staff's position is that Alltel's proposal results in a disproportionate skewing of the rates because of this inconsistency. Staff's witness, Ms. Anson, objected particularly to the proposal to set the interstate and intrastate originating CCL rates at the same level while maintaining a disparity between the interstate and intrastate terminating CCL rates. The result is a terminating to originating ratio (T/O Ratio) of approximately 12.62 to 1, which Ms. Anson testified would be significantly higher than the ratio for any other local exchange company in Missouri. Ms. Anson testified that Alltel's proposal goes beyond consolidation of three rate structures into one and attempts a complete access rate rebalancing. Staff proposed an alternative rate design in Schedule E to Ms. Anson's Rebuttal Testimony.

SWBT's position is that Alltel's proposal is inappropriate because the Commission's order in TO-96-147 was for the company to consolidate the three sets of pre-merger access tariffs into one set of access rates. Instead, Alltel has filed a proposal that would increase its revenues and significantly affect the access expense of SWBT and other Alltel access customers. SWBT's witness, Mr. Taylor, testified that the proposal is discriminatory because Southwestern Bell would experience a significant access rate increase while other carriers would experience lesser increases or even decreases, and Alltel would remain revenue neutral. Mr. Taylor set out his calculation of the expected impact of Alltel's proposal on SWBT in the highly confidential Schedule 2-1 to his rebuttal testimony. According to SWBT, Alltel could consolidate its access rates without such a large effect on the expenses of its access customers. SWBT proposed retaining the company's three sets of access rates until a more equitable approach could be developed.

SWBT also opposed the rate design proposed by Staff as discriminatory because it would also result in a large increase to SWBT's access expense while reducing the access expenses of some other carriers. In addition, Staff's proposal includes the elimination of the CCL cap which SWBT opposes as a de facto rate increase. In addition, Mr. Cowdrey testified on behalf of Sprint that it would be more equitable to retain the three existing access rates until a rate design with a less significant impact on access customers could be developed.



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GTE's position is that establishing parity between rates would be appropriate, but not when it creates an adverse financial impact on other carriers as Alltel's proposal does. Mr. Shannon testified that the Commission should consider removing at least some of the subsidies residing in Alltel's access rates.

**B. Issues Related to Appropriate Carrier Common Line (ACCL) Rates**

**1. Is Alltel's proposed tariff appropriate in that it removes the existing rate cap on CCL Rates in the pre-merger Alltel and Eastern Missouri Telephone Exchange Company exchanges?**

Alltel's proposal includes the elimination of the CCL (carrier common line) cap which currently exists in the exchanges served by the pre-merger companies of Eastern Missouri Telephone Company and Alltel. The pre-merger Missouri Telephone Company does not have a CCL cap. Alltel's witness stated that the application of the CCL rate cap has resulted in "reduction in intraLATA CCL revenues far in excess of the 20% reduction the PTCs [primary toll carriers] have" made. Mr. Beurer also complained about the administrative time and money required for Alltel to manually monitor each month's total intraLATA usage and properly apply the cap. In response to questions from the bench Mr. Beurer stated that he did not know what the administrative costs are to administer the CCL cap. Mr. Beurer pointed out that approximately 15 Missouri LECs no longer have a CCL cap. He also testified that the cap was put into place with the Primary Toll Carrier Plan in 1988 and that no adjustments were ever made for the increased minutes of use that have occurred since then.

Staff agrees with Alltel that elimination of the CCL cap is appropriate as a way to eliminate disparities and achieve similar rates for similar services. AT&T and MCI also do not oppose eliminating the CCL cap but they argue that, if the cap is retained, it should be applied to both interLATA and intraLATA minutes of use.

GTE and Sprint do not oppose the elimination of the CCL cap in principle. However, both object to elimination of the cap if it would result in adverse economic impacts on access customers.

SWBT opposes the elimination of Alltel's CCL cap on the grounds that its elimination would not be revenue neutral to Alltel but would actually result in a rate increase of approximately 6.9 percent because Alltel used 1996 usage levels in its calculations. SWBT argued that the base data should have been trued up to a more recent period and that the existing proposal would result in a rate increase that is not supported by evidence. Mr. Taylor testified that if Alltel proposes consolidated rates that are revenue neutral to Alltel, they should also be expense neutral to its access customers. Mr. Taylor testified that the CCL rate cap was implemented when the PTC Plan was developed in 1988. Secondary carriers under the Plan were permitted to either implement an intraLATA CCL cap or shift a portion of their non-traffic sensitive costs to local service rates.

**2. Is Alltel's proposed tariff appropriate in that it establishes a 1:12 ratio between originating and terminating CCL rates per minute?**

Alltel is proposing to establish its intrastate originating carrier common line rate at one cent (the same as its interstate originating CCL rate) and residually price its intrastate terminating CCL. This proposal would result in a T/O Ratio of approximately 12:1.

Mr. Beurer testified that high originating CCL rates can create bypass situations, where long distance providers use special access service circuits to connect a customer directly to their toll switch. Bypass scenarios result in a loss to Alltel of originating CCL minutes which, according to Mr. Beurer, could force the company to increase its access rates or local rates. Mr. Beurer also argued that CCL revenues are non-traffic sensitive and therefore serve to support basic local telecommunications service. Alltel wants to establish the 12:1 T/O Ratio to avoid bypass and help the company maintain current local rates until Missouri's Universal Service Fund is operational. Mr. Beurer testified in response to questions from the bench that Alltel generates more originating minutes of use (in 1996 96.2 million) than terminating minutes (in 1996 76.97 million). He stated further that Alltel is subject to losing originating minutes through special access bypass but its terminating minutes of use (MOU) have continued to grow and at a faster rate than originating MOU.

Staff's position is that Alltel's proposal of a T/O Ratio of 12.62 to 1 is inappropriate. Ms. Anson testified that approval of this ratio would result in Alltel generating only 19 percent of its revenues from originating CCL minutes, and approximately 81 percent from terminating minutes. She stated that Alltel's proposed CCL ratio is significantly higher than that of any other local exchange company (LEC) in the state. Ms. Anson included in her rebuttal testimony a schedule demonstrating that the majority of LECs have a CCL T/O Ratio of 2 to 1, or lower, and the highest CCL T/O Ratio currently in effect in Missouri is 5.85 to 1. Staff argues that this proposed ratio is not appropriate given that the cost of originating and terminating such traffic is virtually identical. Ms. Anson stated that Staff is concerned with creating a level playing field for purposes of encouraging competition and that establishing parity between originating and terminating CCL rates is a first step in that direction.

SWBT, GTE, Sprint, AT&T, and MCI all oppose Alltel's proposed T/O Ratio. Mr. Taylor testified on behalf of SWBT that Alltel has offered no justification for the dramatic differential between terminating and originating rates, and that the proposed T/O Ratio would place approximately 70 percent of Alltel's total access revenue on the terminating access rate element. Mr. Taylor testified that this proposed rate design would shift expense away from Alltel-originated toll traffic and place that burden unfairly on carriers whose traffic terminates in Alltel's exchanges.

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GTE argues that, in addition to the T/O Ratio being a distortion of rates for what is basically the same service, the proposal would cause losses to other carriers. Mr. Shannon testified that Alltel's proposal would result in a loss of approximately \$440,000 to GTE. For purposes of this case Mr. Shannon supports AT&T's proposal described below. However, he stated on cross-examination that his support of that proposal was limited to the facts of this case and GTE would prefer the establishment of a generic docket to take up access and toll rate reform.

Sprint points out that Alltel's proposed 12:1 T/O Ratio is outside the norm for Missouri, referencing Schedule D to Ms. Anson's rebuttal testimony. The current range for companies in Missouri is approximately 1.7:1 to 5.8:1, with many companies in the 1.7:1 range. Alltel's proposal is more than twice the most extreme ratio currently existing for Missouri local exchange carriers and would result in an increase of more than 250 percent to the terminating CCL rate. Mr. Cowdrey testified that he was not aware of any cost basis that would support the proposed disparity between terminating and originating access. He proposes that, should the Commission determine that an originating CCL rate of approximately \$.01 per minute is appropriate for the industry, then all access providers should move to this rate structure simultaneously.

AT&T and MCI oppose Alltel's proposed T/O Ratio on the grounds that it is anti-competitive. Mr. Pauls testified for AT&T that originating and terminating CCL access service rates should be set at the same level, at a T/O Ratio of 1:1, in order to more equitably apportion the CCL cost/contribution recovery among Alltel's intrastate access customers. Mr. Pauls proposed that intrastate traffic sensitive rates be set at parity with interstate rates, and that both interLATA and intraLATA originating and terminating CCL rates be set at \$0.064825 per minute. He stated that his proposal would be revenue neutral to Alltel, and that there is no economic or physical reason for an originating CCL access service minute of use to be priced differently than a terminating CCL access service minute of use.

**3. Is Alltel's proposed tariff appropriate in that it establishes interLATA/intraLATA parity among its CCL rates?**

Alltel's position is that it is appropriate to establish parity between its interLATA and intraLATA intrastate CCL rates. Mr. Beurer testified that there is no difference in the cost of handling intraLATA versus interLATA toll calls. Mr. Beurer testified that there are currently fourteen different rates for the CCL service element. Alltel argues that consolidating its CCL rates into one originating and one terminating rate will streamline the billing and bill verification process.

Staff, AT&T, and MCI all agree with Alltel's proposal to establish interLATA/intraLATA parity in rates. Ms. Anson testified that she supports elimination of disparities and the establishment of similar rates for similar services. AT&T's witness, Mr. Pauls, argued that the clear intent of the Stipulation and Agreement approved in TO-96-147 was to consolidate all interLATA and intraLATA CCL rates

into a single set of intrastate (originating and terminating) CCL rates. Mr. Pauls testified that Alltel's intraLATA customers have been enjoying lower CCL rates than its interLATA access customers and the proposed consolidated rates would remedy past disparate treatment.

GTE and Sprint take the position that, though there is nothing inappropriate in establishing parity between interLATA and intraLATA rates, establishing parity should not create an adverse financial impact on other carriers. They argue that Alltel's proposal would cause losses to other carriers, including GTE and Sprint. Sprint argues that Alltel's flash cut proposal to remove the disparity between interLATA and intraLATA CCLs is unwarranted because it would force large access expense increases on carriers who carry primarily intraLATA access traffic. Sprint's position is that parity for all carriers should be considered in an industry-wide access reform docket. Absent such a docket, a reasonable transition to interLATA and intraLATA CCL parity to minimize the adverse effect on customers is preferable to Alltel's proposal.

SWBT opposes Alltel's attempt to achieve parity between interLATA and intraLATA access rates. SWBT characterizes the proposal as increasing intraLATA access to fund a decrease in interLATA access and argues that Alltel has offered no justification to support such an increase. Mr. Taylor testified that none of the parties has claimed that Alltel's intraLATA access rates are priced unreasonably low, that they produce inadequate revenue for Alltel, or that they fail to recover costs plus significant contribution. Therefore, there is no basis for increasing intraLATA access rates in this case.

**C. Is Alltel's proposed tariff appropriate given that it would not maintain revenue neutrality among the local exchange companies and interexchange telecommunications companies operating in Alltel's exchanges?**

Alltel's witness testified that the company's proposed tariff filing would be "revenue neutral" to Alltel, with the exception of the removal of approximately \$90,000 as a result of federal deregulation of payphones. Alltel argues that it is not possible to develop a single set of access rates that would have a revenue neutral impact on all of the company's access customers. Mr. Beurer stated that because of the variations in the exchanges in which different long distance providers do business, and the variations in pre-merger company rates, some companies would experience reductions in access expense under Alltel's proposals and others would experience increases. He testified that, using 1996 billed information, only two companies would have annual increases in access expense of more than \$100,000; six companies would have increases of from one dollar to \$669; and eighteen would see a decrease in access expense.

Staff's position is that the failure of Alltel's proposal to maintain revenue neutrality among the LECs and IXC's operating in its exchanges should not be a basis upon which to reject the proposed tariff. However, Staff did point out that the revenue impact upon these access customers could be significant and suggested that the

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Commission direct Alltel to file a revised tariff that would minimize these impacts. Staff also proposed an alternative rate design in Schedule E to Ms. Anson's rebuttal testimony.

AT&T and MCI support Alltel's proposal. They argue that the company's intraLATA access customers have been enjoying lower CCL rates than interLATA customers for some time and that the disparity should be eliminated.

SWBT, Sprint, and GTE all oppose Alltel's proposal for interLATA/intraLATA parity because of the increase in expenses to some of its access customers. SWBT argues that the Commission's order in TO-96-147 did not authorize the company to increase or decrease its revenues, or to increase or decrease carriers' access expense.

GTE also takes the position that it is not equitable for other carriers to suffer a loss to enable Alltel to have consolidated access tariffs. Sprint agrees with SWBT that the Commission's order in TO-96-147 does not require the extensive access rate structure changes Alltel has proposed. Mr. Cowdrey testified that the most equitable treatment would be to combine the revenues and minutes of the three companies under the current rate structure, reduce the revenues by the required \$90,000 amount (because of deregulation of payphones), calculate the resulting rates and file those same rates in the consolidated tariff. This approach would preserve Alltel's revenue neutrality without the dramatic swings between «winners» and «losers» that would result from Alltel's proposal.

**D. What discernable impact, if any, would Alltel's becoming a toll carrier and thus relieving the primary toll carriers of responsibility for toll in Alltel exchanges have upon Alltel's filing in this docket?**

The Commission ordered the phasing out of the Primary Toll Carrier Plan in March in Case No. TO-97-217. As a result, Alltel will become an intraLATA toll carrier for its own customers. Alltel's position is that there will be some impact upon future access expenses of the parties to this case who are currently serving as PTCS. However, Alltel has not been able to quantify this impact and merely alleges that the overall impact would mitigate any adverse impact its proposed consolidated access rates will have on those companies.

Staff agrees that the information necessary to quantify the impact of Alltel becoming a toll provider is not presently available. Staff concurs with Alltel's allegation that the impact would be to reduce the increase in access expenses to the companies currently serving as PTCs.

SWBT and Sprint take the position that Alltel's becoming a toll provider would actually increase the negative impact on the companies currently serving as PTCs in Alltel exchanges. SWBT argues that the impact of the PTC case decision should be considered in this case. Mr. Taylor testified that Alltel's proposed rates would place a dramatically higher access burden on carriers terminating traffic to Alltel than Alltel would incur itself in an ORP environment because of the 12:1 T/O Ratio. Mr. Taylor argued that Alltel's proposed rates were designed with the move to an

Originating Responsibility Plan (ORP) in mind to advantage Alltel to the detriment of other carriers.

Sprint also believes the impact of Alltel's proposed rate restructuring on the current PTCs, i.e. Sprint, Southwestern Bell, GTE and Fidelity, may actually be worse in an ORP situation. If Alltel becomes the toll carrier of last resort for its customers, Sprint and other toll carriers would pay Alltel's higher \$.12 terminating CCL rate but receive no expense relief as a result of the lower \$.01 CCL originating rate. Sprint argues that the rate impact reflected in Beurer Schedule LB-5 is understated since it reflects the net of the originating CCL rate savings and the terminating CCL rate increase. Mr. Cowdrey pointed out that there may be other cost savings to the current PTCs associated with Alltel's assumption of the toll carrier responsibility, such as billing and collection expenses, that are unrelated to the access rate consolidation. Mr. Cowdrey stated that, at this point, Sprint has been unable to calculate the effect of Alltel becoming a toll provider.

#### Findings of Fact

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

A. The Commission finds that the proposed consolidated access rate tariff submitted by Alltel is not just, reasonable, nor in the public interest because it restructures the company's access rates in a manner that would shift significant and unreasonable amounts of revenue from originating to terminating minutes of use, and is not supported by substantial and competent evidence.

B. The Commission finds that Alltel should be permitted to eliminate the existing CCL rate cap in the context of access tariffs that are revenue neutral to Alltel and otherwise found reasonable by the Commission. When the PTC Plan was implemented each secondary carrier had the option of implementing a cap on CCL rates or shifting a portion of its non-traffic sensitive revenue requirement from access rates to local rates. The Commission ordered the phasing out of the PTC Plan in Case No. TO-97-217 on the grounds that the plan is inconsistent with intraLATA presubscription and the establishment of a competitive environment. The CCL cap, as an accoutrement of the PTC Plan, is an unnecessary complication to access rate structures. Although the Commission does not find the cap to be so anti-competitive as to require its immediate elimination in every exchange, the Commission finds that companies with access rate changes pending for approval may eliminate the cap where appropriate. Although the parties to this case did not specifically quantify the administrative costs associated with implementing the cap, there is no dispute that

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there are such costs. Simplifying access rates and reducing administrative costs are positive steps in leveling the playing field for all telecommunications companies operating in Missouri.

C. The Commission finds that the terminating to originating ratio of 12.62:1 proposed by Alltel is anti-competitive, far greater than any ratio previously approved in Missouri, and unreasonable. Approval of Alltel's T/O Ratio proposal would shift a disproportionate share of the company's revenue requirement from originating to terminating minutes and act to discourage the development of intraLATA competition in Alltel exchanges.

D. The Commission finds that Alltel should be permitted to set its interLATA and intraLATA CCL rates at parity to the extent that it can be achieved without an inordinate adverse impact on the company's access customers. The parties uniformly testified that there is no cost differential between providing interLATA and intraLATA access and, therefore, parity between these rates is more competitively neutral than the existing disparities. Although the Commission makes this finding in favor of parity between rates for similar services, the Commission also finds that the impact on the company's access customers must be mitigated where possible during this period of transition to a competitive environment.

E. The Commission finds that, although revenue neutrality among the local exchange companies and interexchange telecommunications companies operating in Alltel's exchanges may not be possible, Alltel's proposal unreasonably shifts the company's revenue requirements onto the terminating access element at the expense of access customers.

F. The Commission finds that the evidence on the record is insufficient to determine what effect Alltel's becoming a toll carrier would have on the expenses of its access customers. Furthermore, since the Commission has found that Alltel's proposed access tariff is unjust, unreasonable, and not in the public interest, this question is moot.

G. The Commission finds that Staff's proposal, which set a T/O Ratio of 1.96:1 is more reasonable than Alltel's proposal but that Staff failed to support its rate design with sufficient evidence to permit wholesale approval. The Commission also finds that AT&T's proposal of a 1:1 T/O Ratio is more reasonable than Alltel's proposal and has appeal as pro-competitive. However, AT&T's support of its rate proposal consisted of policy arguments and there is insufficient evidence on the record to permit the Commission to adopt its resolution of the issues.

H. The Commission finds that Alltel should submit a new consolidated access tariff which incorporates the preferences expressed by this Commission in its findings and conclusions of law, to the extent that it is possible to do so without placing a disproportionate financial burden on the company's access customers.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

The Commission has jurisdiction over the operations of, and the rates charged by, Alltel Missouri, Inc. pursuant to Chapters 386 and 392 of the Revised Statutes of Missouri 1994. This law also gives the Commission authority to review all tariffs filed with the Commission and to reject or suspend tariffs that fail to comply with state law, Commission rule or order, if they include unjust or unreasonable rates, or are not in the public interest. § § 386.250, 386.310, 386.320, and 392.200.12, RSMo Supp. 1997.

Missouri law generally prohibits the charging of different rates for the same service based upon the geographic area in which the service is offered, unless the geographic distinction is reasonably necessary to promote the public interest. § 392.200, RSMo Supp. 1997. For that reason the Commission directed the post-merger company, Alltel, to file access tariffs consolidating the rates of the three pre-merger companies.

Alltel complied with that direction but the burden of proof to show that proposed rates are just and reasonable is upon the telecommunications company. § 392.230.6, RSMo 1994. Based upon its findings of fact, the Commission concludes that Alltel has failed to meet this burden of proof. However, § 392.200, RSMo Supp. 1997 requires Alltel to replace its pre-merger tariffs with a single set of access tariffs. Therefore, based upon this statutory mandate and its findings of fact, the Commission will reject the proposed tariff sheets and direct Alltel to file tariff sheets in conformance with this Report and Order.

*IT IS THEREFORE ORDERED:*

1. That late-filed Exhibit 18 submitted by ALLTEL Missouri, Inc. is received into evidence.
2. That the following tariff sheets filed by ALLTEL Missouri, Inc. On June 30, 1997 are rejected:

Mo. P.S.C. No. 3 C Intrastate Access Tariff

- 1st Revised Page 45, Replacing Original Page 45
- 1st Revised Page 134, Replacing Original Page 134
- 1st Revised Page 136, Replacing Original Page 136
- 1st Revised Page 138, Replacing Original Page 138
- 1st Revised Page 139, Replacing Original Page 139
- 1st Revised Page 164, Replacing Original Page 164
- 1st Revised Page 165, Replacing Original Page 165
- 1st Revised Page 166, Replacing Original Page 166
- 1st Revised Page 167, Replacing Original Page 167
- 1st Revised Page 408, Replacing Original Page 408
- 1st Revised Page 411, Replacing Original Page 411



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3rd Revised Page 412, Replacing 2nd Revised Page 412

1st Revised Page 413, Replacing Original Page 413

1st Revised Page 414, Replacing Original Page 414

3. That ALLTEL Missouri, Inc. shall file tariff sheets in conformance with the preferences expressed by the Commission in this Report and Order no later than September 28, 1998. Alltel shall endeavor to develop a proposal that does not impose a disproportionate financial burden on its access customers.

4. That this Report and Order shall become effective on September 1, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**In Re New London Telephone Company's Tariff Sheets To Add  
E-911 Service.**

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*Case No. TT-99-92*

*Decided September 3, 1998*

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**Telecommunications § 14.** The Commission rejected a tariff proposing rates for E-911 service based on a finding that the telephone company's cost studies and rate methodology were insufficient to support the level of rates proposed.

**Rates § 110.** The Commission rejected a tariff proposing rates for E-911 service based on a finding that the telephone company's cost studies and rate methodology were insufficient to support the level of rates proposed.

**ORDER REJECTING TARIFF**

On July 27, 1998, New London Telephone Company (New London) submitted tariff sheets to add emergency telephone service (911) and terms and conditions related to providing 911 service. The tariff sheets were issued on July 27, 1998, however, the effective date was extended by New London to September 4, 1998.

The Telecommunications Department Staff (Staff) circulated a memorandum regarding the proposed tariff changes and this matter was discussed on the Commission's agenda on September 2. The Commission has docketed this case to address New London's tariff no. 9900059.

New London submitted rate and cost information setting out the cost to provide various portions of the 911 service and the rates to be charged. Staff stated in its memorandum that the rates proposed by New London are significantly higher than

rates recently approved by the Commission for similar services with other telecommunications companies. Staff noted that the rates charged for trunks are mileage based rather than flat rated. Staff has suggested that a \$25.00 per month flat rate is more common in the industry. Staff also noted that the rate for the Automatic Location Identification (ALI) database updates is substantially higher than similar rates recently approved by the Commission. In support of this, Staff cited tariff file no. 98000784 as approved for the Miller Telephone Company. Staff noted that it did not necessarily accept the cost studies or the rate methodology employed by New London. However, Staff was hesitant to recommend against the approval of a 911 service. Staff based its recommendation for approval upon the need to provide emergency 911 services to Ralls County.

The Commission has carefully reviewed the tariff sheets filed by New London and the memorandum prepared by Staff. The Commission empathizes with Staff's hesitance at recommending against approval of a 911 service. State-wide uninhibited access to emergency 911 service is a goal which the Commission supports without reservation. However, the rates and charges proposed by New London appear excessive and the Commission cannot approve them as presented in the tariff. New London's cost studies and rate methodology are insufficient to support the level of rates which New London proposes. The Commission is concerned by New London's proposal to charge \$.60 for a database monthly update per subscriber record where the more common practice is closer to \$.38 per subscriber record. The Commission is particularly concerned by New London's proposal to charge a mileage fee and a trunk termination fee for the interoffice trunk portion.

In addition, the Commission is troubled by the proposal set out in Section 4, Sheet 33 A footnote (2) where New London identifies certain elements and states "These items are purchased from the Company's Special Access Tariff, Section 10, and shall change as those rates change. The Company will be reimbursed through the settlement with Southwestern Bell." This component of the tariff would allow the rates for 911 service to increase in relation or response to changes in other tariffs which are not set out on this sheet. This hidden variable could mean that increases to unrelated tariffs would result in even greater fees for 911 service.

The Commission is anxious to see 911 service available in every county in Missouri, but cannot accept the rate structure proposed by New London. The Commission encourages New London to refile the proposed tariff with a more appropriate rate structure, such as the flat rates used elsewhere in industry. The Commission's Staff is prepared to work with New London, as well as every other telecommunications provider, to ensure appropriate tariff provisions and to facilitate the approval process. In addition, the Commission is prepared to expedite its consideration of a subsequent filing of this tariff so that 911 service will be provided to the public as quickly as possible.

The Commission must reject the tariff, as submitted.

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*IT IS THEREFORE ORDERED:*

1. That tariff sheet 9900059, docketed as Commission Case File TT-99-92 is hereby rejected.
2. That this order is effective on September 3, 1998.

Lumpe, Ch., Crumpton, Murray, and Schemenauer, CC., Concur.  
Drainer, C., Absent.

Roberts, Chief Regulatory Law Judge

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**Director of the Division of Manufactured Homes, Recreational  
Vehicles and Modular Units of the Public Service Commission,  
Complainant, v. Amega Mobile Home Sales, Inc., d/b/a Quality  
Preowned Homes, Respondent.**

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*Case No. MC-97-542  
Decided September 15, 1998*

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**Evidence, Practice and Procedures §25.** The Commission denied a motion to strike portions of a party's brief for allegedly misstating the evidence that was presented to the Commission because the Commission is capable of reviewing the evidence and arguments and deciding for itself whether or not the arguments of the parties are supported by the evidence.

**Evidence, Practice and Procedures §§2, 4.** The Commission has jurisdiction to suspend a manufactured housing dealer's license if it finds that the dealer has engaged in conduct in violation of section 700.045, RSMo, even though such conduct may also constitute a criminal act.

**Manufactured Housing §16.** In a complaint against a manufactured housing dealer, the Director of the Division of Manufactured Homes failed to carry his burden of proving all elements of the alleged violation of statute and regulation. As a result the Director's request to suspend the dealers license was denied.

**APPEARANCES**

*R. Blair Hosford*, Assistant General Counsel, and *Stephen H. Gunn*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission.

*Danieal H. Miller*, Danieal H. Miller, P.C., 309 South Providence Road, Columbia, Missouri 65201 and *Thomas M. Harrison*, Van Matre and Harrison, P.C., 1103 East Broadway, Suite 101, Columbia, Missouri 65201, for Amega Mobile Home Sales, Inc., d/b/a Quality Preowned Homes.

REGULATORYLAWJUDGE: Morris L. Woodruff.

## REPORT AND ORDER

## Procedural History

This complaint was filed by the Director of the Division of Manufactured Housing, Recreational Vehicles and Modular Units of the Public Service Commission (Director) on June 16, 1997. On July 16, Amega Mobile Home Sales, Inc. d/b/a Quality Preowned Homes (Amega) filed its Answer and Affirmative Defenses, a Motion to Dismiss or Alternative Motion to Strike, a Motion to Disqualify Counsel, and a Request for Hearing. On July 28, Director filed an Amended Complaint. On the same date, Director also filed the following documents: Reply to Respondent's Answer and Affirmative Defenses; Reply to Respondent's Motion to Dismiss or Alternative Motion to Strike; and Reply to Respondent's Motion to Disqualify Counsel. On August 5, the Commission issued an order which found that Director's Amended Complaint sufficiently stated a cause of action and denied each of Amega's motions. The parties were ordered to file a suggested procedural schedule.

On August 19, Amega filed its Answer and Affirmative Defenses to Amended Complaint, a Motion to Dismiss Amended Complaint or Alternative Motion to Strike, a Motion to Disqualify Counsel and a Request for Hearing. Amega filed its Proposed Scheduling Order on August 29. Director filed his Suggested Procedural Schedule on September 2. Director subsequently, on September 4, filed a Request to File Reply Pleadings or Alternatively, for Leave to File Out of Time, a Reply to Respondent's Answer and Affirmative Defenses to Complainant's Amended Complaint, a Reply to Respondent's Motion to Dismiss or Alternative Motion to Strike, and a Reply to Respondent's Motion to Disqualify Counsel.

The Commission issued its Order Denying Motions and Adopting Procedural Schedule on October 9. Director filed his direct testimony on October 27. No further testimony was prefiled in this case. On November 14, Amega filed objections to Director's first data request. Director responded on December 8 with a motion to compel discovery. Amega responded to the motion to compel on December 15. The parties subsequently reached an agreement on their discovery dispute during a prehearing conference on January 5, 1998, and Director withdrew his motion to compel discovery on January 14.

An evidentiary hearing was held before the Commission on January 22 at which four witnesses testified. During the course of the hearing, Director was requested to provide, as a late-filed exhibit, a document known as a "Manufacturer's Statement of Origin" relating to the manufactured home at issue in this case. On February 6, Director moved for an extension of time in which to file the exhibit. On February 13, Director notified the Commission that he had been informed by the State of Illinois that the Manufacturer's Statement of Origin was not available. The parties filed simultaneous briefs on March 17 and reply briefs on March 27. Additionally, on March 27, Director filed a motion to strike certain statements in Amega's brief. On April 7, Amega filed its response to Director's motion to strike.

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## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **INTRODUCTION**

The Director brought this complaint before the Commission alleging that on October 4, 1996, Amega sold a previously owned manufactured home to Larry and Phyllis Smith. The Director alleges that the manufactured home was sold without a HUD or Missouri State Seal affixed to the home. 4 CSR 240-121.030(1) provides that "[n]o preowned mobile home which entered the first stage of production after January 1, 1974 shall be rented, leased or sold or offered for rent, lease or sale in this state unless a seal or approval insignia is properly affixed to it." Section 700.045, RSMo (1994) provides that the sale, without the appropriate seal, of a home that was manufactured before January 1, 1974, is a misdemeanor. Section 700.100.2, RSMo (1994) authorizes the Commission to suspend, revoke or place on probation, a dealer's registration if the dealer has engaged in conduct in violation of section 700.045. Accordingly, the Director's Amended Complaint requests that the Commission suspend Amega's dealer's registration for the period of two weeks.

In response to this complaint, Amega argues that the Commission lacks jurisdiction to hear this complaint because Amega is being accused of a crime in violating the requirements of Section 700.045, RSMo and that, as a result, this action can be prosecuted only in the appropriate circuit court. Amega also argues that the Director has failed to prove that the manufactured home did not contain the required seal at the time it was sold. Amega further contends that the Director has failed to prove that the manufactured home required a seal before it could be sold in that there was no proof that the home was manufactured after January 1, 1974.

### **EVIDENCE PRESENTED**

The Director's evidence indicates that Amega sold a preowned manufactured home to Larry and Phyllis Smith on October 4, 1996. (Exhibit 1, p. 1). The bill of sale given to the Smiths by Amega (Exhibit 5) states that the mobile home being sold was a 1979 National, serial number 42495. The bill of sale also includes the notation "(Briggs)." Phyllis Smith testified that she and her husband did not receive a title to the mobile home until March of 1997. (Exhibit 1, p. 2) The title which was sent to the Smiths by Amega (Exhibit 6) indicates that the mobile home was previously owned by Joyce E. Briggs and describes the mobile home as a 1976 Skyline (SKYL) with a vehicle identification number of 3663.

At some point, Mr. and Mrs. Smith attempted to sell the mobile home but were informed by another dealer that they could not sell it because there was no HUD or Missouri Seal on the home. After some discussions with employees of Amega, the

Smiths filed a complaint with the Missouri Public Service Commission. (Exhibit 1, pp. 3-4)

Mr. Tim Haden, a Field Inspector for the Division of Manufactured Housing, Recreational Vehicles and Modular Units (Division), testified that he responded to the Smith's complaint. Haden inspected the mobile home on May 9, 1997 but did not find either a HUD seal or a Missouri seal. (Exhibit 3, pp. 4-5) Following his inspection, Haden prepared a Field Inspection Report in which he concluded that there was no HUD seal on the home. (Exhibit 8)

The Agency presented the testimony of Joyce E. (Briggs) Schmitz. Ms. Schmitz testified that she is the former owner of a manufactured home which she identified as a 1976 National Fifth Avenue with a VIN of 3663. She testified that she purchased the mobile home in April of 1991 and sold it in June of 1996. (Exhibit 2, p. 1) At that time, she traded the mobile home to Amega Mobile Home Sales. (Exhibit 2, p. 3) Ms. Schmitz testified that she lived in the mobile home for five years and performed maintenance on the home during that time. During that time she did not notice any seals or stickers on the outside of the mobile home. (Exhibit 2, p. 2).

James Phillips, Director of the Division of Manufactured Housing, Recreational Vehicles and Modular Units, also testified. Mr. Phillips indicated that he called the Housing and Building Technology Department of the National Conference of States on Building Codes and Standards and asked that agency for assistance in tracking the history of the mobile home in question. He was told that the mobile home in question, serial number 3663, was manufactured by National Mobile Homes sometime prior to June 15, 1976. (Exhibit 4, p. 7). Phillips also contacted the Missouri Department of Revenue and requested a title search on the mobile home. (Exhibit 4, p. 7). The earliest date revealed in that title search is an Illinois title submitted to Missouri as part of a 1981 title application. The Illinois title indicates that a bank lien was placed on the mobile home on December 4, 1975. (Exhibit 14A, p. 5). The title indicates that the mobile home is a 1976 Fifth Avenue, serial number 3663. Phillips testified that he did not know whether or not this was the first title issued on this mobile home. (Tr. P. 152). The Missouri Department of Revenue issued a title for the mobile home on May 28, 1981 which indicates that the make of the mobile home is "5th" with a year of "76" with a serial number of 3663. (Exhibit 14b, p. 3). That title also contains a handwritten notation of "corrected make." On June 7, 1981, the Missouri Department of Revenue issued a second Certificate of Title. (Exhibit 14c, p. 3) This Title refers to a 1976 Skyline make with a serial number of 3663. Phillips testified that a Manufacturer's Statement of Origin would have accompanied the mobile home when it was new but that such a statement of origin was not included in the documents which the Director had been able to obtain.

Amega did not present any evidence.

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#### **PENDING MOTION**

The initial issue which must be addressed is the Director's Motion to Strike filed on March 27, 1998. That Motion suggests that the Commission strike certain passages from Amega's brief because they misstate the evidence that was presented to the Commission. The Commission is capable of reviewing the evidence and arguments and deciding for itself whether or not the arguments of the parties are supported by the evidence. If the statements of which the Director complains are improper, they are not of a nature which would interfere with the ability of the Commission to determine the case on the merits. There is no need to strike any portion of Amega's brief. Accordingly, the Director's Motion to Strike is denied. See. Zurheide-Hermann, Inc. v. London Square Development Corp., 504 S.W.2d 161 (Mo. 1973).

#### **FINDINGS OF FACT**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Director's Amended Complaint requests that the Commission suspend the Dealer's Registration of Amega Mobile Home Sales, Inc. for a period of two weeks pursuant to the authority granted to the Commission by Section 700.100.2, RSMo (1994), which provides that "[t]he commission may consider a complaint filed with it charging a registered manufacturer or dealer with a violation of the provisions of this section, which charges, if proven, shall constitute grounds for revocation or suspension of his registration, or the placing of the registered manufacturer or dealer on probation." The Director's Complaint alleges that the specific grounds for the proposed suspension are to be found at Section 700.100.3(9), RSMo (1994) which provides that "[t]he following specifications shall constitute grounds for the suspension, revocation or placing on probation of a manufacturer's or dealer's registration: . . . (9) Engaging in conduct in violation of section 700.045." Section 700.045, RSMo (1994) provides in relevant part that A[I]t shall be a misdemeanor: . . . (2) To rent, lease, sell, or offer to sell any manufactured home or modular unit manufactured after January 1, 1974, or any new recreational vehicle which does not bear a seal as required by sections 700.010 to 700.115." The Commission has further defined the term "manufactured after January 1, 1974" by regulation to provide that A[n]o preowned mobile home which *entered the first stage of production* after January 1, 1974 shall be rented, leased or sold or offered for rent, lease or sale in this state unless a seal or approval insignia is properly affixed to it." 4 CSR 240-121.030(1) (emphasis added) The Director's Amended Complaint also requests that the Commission authorize the Office of General Counsel to seek additional financial penalties pursuant to Sections 700.115.2 and 386.570.1, RSMo (1994).

Amega argues that the Commission lacks jurisdiction in this case because Amega has been alleged to have violated the provisions of Section 700.045(2) which makes it a misdemeanor to "rent, lease, sell or offer to sell any manufactured home or modular unit manufactured after January 1, 1974, or any new recreational vehicle which does not bear a seal as required by sections 700.010 to 700.115." Amega contends that this action is essentially a criminal prosecution over which the circuit courts of Missouri have exclusive jurisdiction. (Brief of Respondent, p. 11) Amega misunderstands the nature of this action.

Amega has not been charged with any crime. Rather the Director has asked the Commission to suspend Amega's registration as a manufactured housing dealer. The Commission is specifically granted the authority to consider such a complaint by the provisions of Section 700.100.2, RSMo (1994). Section 700.100.3(9), RSMo (1994) authorizes the Commission to suspend a dealer's registration if the dealer has *engaged in conduct* in violation of Section 700.045. (Emphasis added) Note that this provision does not require that the dealer be criminally convicted of a violation of Section 700.045 before his registration may be suspended. In order to justify a suspension of Amega's registration, the Commission need merely find that Amega has engaged in conduct which is proscribed by Section 700.045. The Commission is not conducting a criminal prosecution and does have jurisdiction to proceed under the authority granted by the legislature in Section 700.100, RSMo (1994).

Because this is an administrative proceeding rather than a criminal prosecution, the proper standard of proof is the standard applicable to administrative decisions. The applicable standard is that the Commission's decision must be supported by competent and substantial evidence. See. State ex rel. Associated Natural Gas Co. v. Public Service Commission, 954 S.W.2d 520 (Mo. App. W.D. 1997).

Whatever the standard of proof, the Director, as the Complainant in this action, has the burden of proving that Amega's registration is subject to discipline. Amega's brief correctly lists the four elements which must be proven:

- A. That Amega rented, leased, sold, or offered to sell a manufactured home or modular home.
- B. That the modular home or manufactured home in question entered the first stage of production after January 1, 1974.
- C. That the modular home or manufactured home in question did not bear the seal or an approved insignia required by sections 700.010 to 700.115, RSMo, and
- D. That the act complained of took place in the state of Missouri. (Brief of Respondent, p. 11)

The Director has failed to prove the second element of the case. Despite his attempts to do so, the Director was unable to offer competent and substantial



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evidence to establish the date when the mobile home in question was manufactured. The best evidence of when the mobile home was manufactured would be a manufacturer's statement of origin which should have accompanied the mobile home when it was first titled. (Tr. p. 151) However, a manufacturer's statement of origin was not available. (Notice Regarding Late-Filed Exhibit No. 15) In the absence of a Statement of Origin, the Director sought to establish the age of the mobile home by submitting documents obtained through a title search conducted by the Missouri Department of Revenue. (Exhibit 4, p.7) The earliest date revealed in that title search is an Illinois title submitted to Missouri as part of a 1981 title application. The Illinois title indicates that a bank lien was placed on the mobile home on December 4, 1975. (Exhibit 14A, p. 5) However, there is no way of knowing whether or not this was the first title issued on this mobile home. (Tr. P. 152).

The titles submitted by the Director do indicate that the mobile home is a 1976 model. Testimony by James Phillips indicates that the industry practice is that a 1976 model would have been manufactured between June 15, 1975 and June 15, 1976. (Tr. p. 128) However, even if that testimony is accepted as establishing the industry practice, it does not establish the age of this mobile home. Given the ease with which the make of the mobile home in question was transformed from a National Fifth Avenue into a Skyline through a simple notation in a title application, (Exhibits 14b and 14c) it is apparent that the notation of a model year in a title is not a reliable indicator of the actual date when the mobile home was manufactured.

The Director has failed to meet his burden of proof in that he has failed to present competent and substantial evidence to establish that the mobile home allegedly sold by Amega was manufactured after January 1, 1974. Therefore, the Director has failed to establish that Amega has engaged in conduct in violation of Section 700.045, RSMo(1994).

#### CONCLUSIONS OF LAW

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction of this matter under the authority granted by Section 700.100.2, RSMo (1994), which provides that "[t]he commission may consider a complaint filed with it charging a registered manufacturer or dealer with a violation of the provisions of this section, which charges, if proven, shall constitute grounds for revocation or suspension of his registration, or the placing of the registered manufacturer or dealer on probation."

Section 700.100.3(9), RSMo (1994) provides that "[t]he following specifications shall constitute grounds for the suspension, revocation or placing on probation of a manufacturer's or dealer's registration: . . . (9) Engaging in conduct in violation of section 700.045."

Section 700.045, RSMo (1994) provides in relevant part that A[I]t shall be a misdemeanor: . . . (2) To rent, lease, sell, or offer to sell any manufactured home or modular unit manufactured after January 1, 1974, or any new recreational vehicle which does not bear a seal as required by sections 700.010 to 700.115."

4 CSR 240-121.030(1) provides that "[n]o preowned mobile home which entered the first stage of production after January 1, 1974 shall be rented, leased or sold or offered for rent, lease or sale in this state unless a seal or approval insignia is properly affixed to it."

The Director, as the Complainant in this action, has the burden of proving by competent and substantial evidence that Amega's registration is subject to discipline.

The Director has failed to meet that burden.

*IT IS THEREFORE ORDERED:*

1. That the Motion to Strike filed by the Director of the Commission on March 27, 1998, is denied.
2. That, because no conduct in violation of Section 700.045 has been established, there is no basis under Section 700.100, RSMo (1994) to suspend the registration of Amega Mobile Home Sales, Inc.
3. That the Office of General Counsel is not authorized to seek additional financial penalties pursuant to sections 700.115.2 and 386.570.1, RSMo (1994).
4. That this Report and Order shall become effective on September 25, 1998.
5. That this case shall be closed on September 26, 1998.

Crumpton, Murray, Schemenauer and Drainer, CC., concur.  
Lumpe, Ch., absent.

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7 Mo. P.S.C. 3d

**In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 1998.\***

*Case No. OO-99-44*  
*Decided September 17, 1998*

**Public Utilities § 5:** Intervenors shall be subject to the same pleading requirements as other parties to this case. All parties are placed under a continuing obligation to inform the Commission as to any monies received as Hancock Amendment tax refunds.

**ORDER REGARDING RESPONSES OF  
APPLICANTS AND INTERVENORS**

On August 5, 1998, the Commission issued an Order Regarding Application For Rehearing And Stay. Ordered paragraph #3 (A-E) established specific pleading requirements for each of the applicants.

On September 1, the Commission issued an Order Granting Intervention to Fidelity Natural Gas Company and Fidelity Telephone Company, Atmos Energy Corp., Southern Missouri Gas Company, Missouri Gas Energy, Kansas City Power & Light, and Southwestern Bell Telephone. Upon review, the Commission has determined that the pleading requirements established for the original applicants should apply to the intervening parties as well.

In addition, it is public knowledge that the Missouri Department of Revenue is currently processing additional disbursements as required by Missouri Constitution Article X, Section 16-24 (the Hancock Amendment). The initial applicants have already filed a responsive pleading which sets out an answer to Ordered Section 3C by detailing the total amount of "Article X" distribution received by each applicant to date. The Commission has determined it appropriate for the parties who have been granted intervention to also respond to that question. In addition, the Commission will direct all parties to provide continuing information to the Commission of any monies received from the Missouri Department of Revenue as "Article X distributions" during the pendency of this matter. Any party who considers this information to be proprietary or highly confidential may request a protective order under the Commission's rules.

***IT IS THEREFORE ORDERED:***

1. That any party to this case, whether by original application or intervention, which has not already done so shall comply with Ordered Paragraph #3 of the Commission's order of August 5, 1998, and provide the following information:

A. the exact nature of the stay requested and the remedy sought,

\*See page 371 for another order in this case.

B. the nature of any "protest" or "challenge" to the assessment payments and whether the protest goes only to the increased portion of the assessment or to the entirety of the assessment,

C. Details setting out the total amount of "Article X" distribution received by each Applicant to date, and

D. legal authority in support of the respective applicant's argument(s) on each issue, e.g. authority in support of the stay, the protest and other legal issues.

E. These pleadings shall be filed not later than September 30, 1998.

2. That all parties are ordered on an ongoing basis to report any and all monies received from the Missouri Department of Revenue pursuant to the Missouri Constitution, Article X, Section 16-24 (the Hancock Amendment) during the pendency of this matter.

3. That any party which requires a protective order shall file their request pursuant to the procedure set out in 4 CSR 240-2.080(13) or 4 CSR 240-2.130(15).

4. That this order shall be effective on September 17, 1998.

Crumpton, Murray, Schemenauer, and Drainer, CC., Concur.  
Lumpe, Ch., Absent.

Roberts, Chief Regulatory Law Judge

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**In the matter of Southwestern Bell Telephone Company's Tariff  
Revisions Designed to Introduce a LATA-wide Extended Area  
Service (EAS) Called Local Plus, and a One-Way COS Plan.**

*Case No. TT-98-351*

*Decided September 17, 1998*

**Rates § 13.** The Commission found that the telephone company's proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company's general exchange tariff and not the company's local exchange tariff.

**Rates § 13.** The Commission found that the classification of hybrid services should be considered on a case by case basis.

**Rates § 91.** The Commission found that the telephone company's proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company's general exchange tariff and not the company's local exchange tariff.

**Telecommunications § 29.** The Commission found that the telephone company's proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company's general exchange tariff and not the company's local exchange tariff.

**Telecommunications § 31.** The Commission found that the telephone company's proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company's general exchange tariff and not the company's local exchange tariff.

**Telecommunications § 34.** The Commission found that the classification of hybrid services should be considered on a case by case basis.

**Telecommunications §§ 5, 45.** The Commission has authority to review all tariffs filed with the Commission and to reject or suspend tariffs that fail to comply with state law, Commission rule or order, if they include unjust or unreasonable rates, or are not in the public interest.

**Evidence, Practice and Procedure § 26.** The burden of proof to show that a proposed tariff is just and reasonable is upon the company filing the tariff.

**Telecommunications § 45.** The Commission concluded that pursuant to Section 251(b)(1) of the Telecommunications Act of 1996, each local exchange carrier has the duty not to prohibit, and not to impose unreasonable or discriminatory limitations on, the resale of its telecommunications services.

**Telecommunications § 45.** The Commission concluded that pursuant to Section 251(c)(4) of the Telecommunications Act of 1996, local exchange carrier have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

**Telecommunications § 39.** The Commission found that for the particular hybrid service, terminating access charges were the appropriate method of intercompany compensation; however, imputation of access charges would not be necessary if this service were available for resale at a wholesale discount to competitive local exchange companies and interexchange companies.

**Telecommunications § 14.** The Commission found that for the particular hybrid service, terminating access charges were the appropriate method of intercompany compensation; however, imputation of access charges would not be necessary if this service were available for resale at a wholesale discount to competitive local exchange companies and interexchange companies.

**Telecommunications § 33.** The Commission found that it is in the public interest for a hybrid extended area service plan to include optional detailed billing for customers at no more than a nominal fee.

**Telecommunications § 14.** The Commission found that a restriction on aggregation of this particular hybrid telephone service is a reasonable restriction on resale.

**Telecommunications § 45.** The Commission found that a restriction on aggregation of this particular hybrid telephone service is a reasonable restriction on resale.

#### APPEARANCES

*Paul G. Lane*, General Attorney-Missouri, and *Leo J. Bub*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

*W.R. England, III*, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for: ALLTEL Missouri, Inc., BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (the Small Telephone Company Group).

*Mark W. Comley*, Newman, Comley & Ruth P.C., 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537, for COMPTEL-MO.

*Craig S. Johnson* and *Victor S. Scott*, Andereck, Evans, Milne, Peace & Baumhoer, 305 East McCarty Street, Post Office Box 1438, Jefferson City, Missouri 65102, for: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company (the Mid-Missouri Group of Local Exchange Companies).

*Carl J. Lumley* and *Leland B. Curtis*, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation.

*David Evans*, Attorney, GTE Service Corporation, 225 Madison Street, 2nd Floor, Jefferson City, Missouri 65101, for GTE Midwest Incorporated.

*Paul S. DeFord*, Lathrop & Gage, 2345 Grand Boulevard, Suite 2500, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

*Michael F. Dandino*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

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*Penny G. Baker*, Deputy General Counsel, and *Lera Shemwell*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGES: Elaine E. Bensavage and Nancy Dippell.

## REPORT AND ORDER

### Procedural History

Southwestern Bell Telephone Company (SWBT) filed proposed revisions to its Local Exchange Tariff, P.S.C. Mo.-No. 24 on February 5, 1998. The proposed revision includes the offering of a local one-way Interim Community Optional Service (ICOS) plan, and the introduction of a LATA-wide Extended Area Service calling scope plan called Local Plus. The tariff sheets had an effective date of March 9. On February 13, AT&T Communications of the Southwest, Inc. (AT&T) and COMPTEL-Mo filed motions to intervene and to suspend the tariff. Similar motions to intervene and to suspend the tariff were filed on February 18 by the Mid-Missouri Group<sup>1</sup> and on February 20 by the Small Telephone Company Group.<sup>2</sup> SWBT filed its opposition to the applications to intervene and motions to suspend on February 23. On February 25 the Staff of the Commission (Staff) filed a motion to suspend the tariff.

The Commission issued an order on February 25 granting intervention to AT&T, COMPTEL-MO, and the Mid-Missouri Group. The Commission suspended the tariff sheets until July 7, 1998, scheduled an early prehearing conference, and directed the parties to file a procedural schedule. The parties met in prehearing conference on March 17 and filed a proposed procedural schedule on March 24.

<sup>1</sup> For purposes of this case, the Mid-Missouri Group consists of: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company.

<sup>2</sup> For purposes of this case, the Small Telephone Company Group consists of: BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

The Commission granted intervention to the Small Telephone Company Group (STCG), GTE Midwest Incorporated (GTE), and MCI Telecommunications Corporation (MCI) on March 27. On April 3 the Commission issued an order establishing the procedural schedule. The parties prefiled testimony and a hearing was held on May 4-7.

The Commission filed Notice of Ex Parte Contact memorandum in this case on May 14. The notice states that comments relating to this case were made at a public hearing in Case No. TW-98-356. The Commission issued a correction to that Notice on May 18. On May 21, the Commission established a briefing schedule and further suspended the tariff until August 6, 1998.

#### **Pending Motions and Late-Filed Exhibits**

At the hearing, Exhibit No. 26 was reserved for late-filing of an exhibit showing the total dollar amount for switching and trunking used by witness Moore in the volume-sensitive recurring cost analysis. Exhibit No. 27 was reserved for the estimated cost to develop detailed end-user billing. On May 26 SWBT filed Exhibit No. 26 and Exhibit No. 27<sup>3</sup> along with a cover letter which explained why the latter exhibit did not contain all the information requested by the Commission. No objections to late-filed Exhibits No. 26 and 27 were received. On June 19 the Commission issued an order which excused SWBT from filing any additional information related to Exhibit No. 27. In that same order, the Commission further suspended the tariff until October 5, 1998. The parties submitted initial briefs on June 5 and reply briefs on June 15.

SWBT filed Motions for Leave to File Brief in Excess of Page Limit for both its initial and reply briefs. MCI filed a Motion to Exceed Page Limitations and to Include HC Information in Its Initial Brief. SWBT filed a response to MCI's motion stating that it did not object to MCI including the highly confidential material in its brief, but it did object to MCI's alternative suggestion to declassify the information.

On July 8 SWBT requested leave to file a late-filed exhibit consisting of the Oklahoma Corporation Commission's (Oklahoma Commission) June 26, 1998 Final Order approving SWBT's Local Plus offering for Oklahoma. MCI filed a response to SWBT's motion but did not object to the exhibit being included in the record.

#### **Discussion**

SWBT provides telecommunications services in various exchanges throughout the state of Missouri. SWBT proposed changes to its Local Exchange Tariff, P.S.C. Mo.-No. 24, to introduce a LATA-wide Extended Area Service called Local Plus which allows customers of SWBT to call anywhere in the Local Access and Transportation Area (LATA) for a flat monthly fee. SWBT also proposes an interim one-way COS plan in the existing SWBT COS petitioning exchanges until Local Plus is available.

<sup>3</sup> "HC" designates highly confidential material.



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**I SHOULD INTERIM COMMUNITY OPTIONAL SERVICE (ICOS) BE APPROVED?**

**A. WOULD ICOS PROVIDE BENEFITS TO CUSTOMERS?**

SWBT's witness, Sherry A. Myers, testified that ICOS is an interim measure that will benefit customers in petitioning exchanges where COS is being eliminated until a permanent plan can be implemented. OPC witness, Barbara A. Meisenheimer, testified that the service would provide a "significant benefit" to SWBT customers where the plan is available. Staff witness, Ben Childers, testified that this service would be a "worthy addition" to plans presently offered by SWBT.

STCG acknowledged in its brief that customers have a need for expanded, toll-free calling within their community of interest and that COS currently meets that need. STCG argued that since COS is scheduled for elimination and SWBT's Interim COS is limited to approximately 2,000 customers, it may be appropriate to allow an interim plan until a permanent expanded calling plan can be implemented. None of the other parties denied that ICOS would provide a benefit to customers in the SWBT exchanges where it was available, although the parties stated other objections to the tariff as filed.

**1. Do all SWBT exchanges qualify for this service?**

Ms. Myers testified for SWBT that Interim COS is a one-way optional calling plan that "will be offered only to customers in the existing SWBT petitioning exchanges." The specific exchanges are set out in the proposed tariff at Sheet 54.

**2. Is it appropriate for this plan to be implemented before COS is actually eliminated?**

Ms. Myers testified that SWBT intends to make Interim COS available immediately because this service is proposed as a temporary solution until the permanent expanded calling plan, Local Plus, can be implemented. In a cover letter filed along with the tariff, and attached to Ms. Myers's prefiled direct testimony as Schedule 2-1, SWBT indicated that because of demands on its resources from implementing Local Number Portability, Local Plus would not be fully implemented for approximately 6-9 months after approval. OPC, Staff, and STCG agreed that it was appropriate to implement ICOS upon the elimination of COS. The other parties to the proceeding were opposed to ICOS but did not take a position on whether it should be implemented before COS is eliminated.

In the Commission's Report and Order in Case No. TW-97-333, the Commission ordered COS to be eliminated by March 1, 1998. On February 17, 1998, the Commission issued an order extending the deadline and allowing the service to be eliminated in phases beginning June 1, 1998. However, in no event is COS to be eliminated later than February 28, 1999.

**3. Should the "morphing clause" that allows SWBT to change the provisions of this tariff without Commission approval be approved?**

The clause in the tariff which the Staff has labeled as a "morphing clause" is part of the Local Plus offering rather than the ICOS offering and therefore, is more appropriately addressed in that context.

**B. IS ICOS PRICED APPROPRIATELY?**

**1. Should this plan be classified as local or toll?**

Ms. Myers testified that SWBT offered this service as a local service because it has numerous attributes of a local service. ICOS uses a local dialing pattern (7 digits or 10 digits), the service is available for a flat rate, and the service is provisioned in the switch. Ms. Myers also testified that COS was offered as a local plan in the past by SWBT and that SWBT believes that its Local Exchange Tariff is the appropriate location for Local Plus. Ms. Myers stated during cross-examination that COS service is currently classified as toll in SWBT's tariff.

Dr. Childers testified for Staff that ICOS should be offered as a toll plan, and the intervenors and OPC generally agree with Dr. Childers's opinion. However, most of the evidence presented regarding the question of whether the proposals in the tariff were toll or local was directed at the filing of the Local Plus portion of the tariff.

MMG argues that because ICOS will replace COS which is currently classified as toll, ICOS should also be classified as toll.

**2. What cost study should be provided to the Commission?**

SWBT argues that no cost study is needed due to the extenuating circumstances surrounding this proposal. Ms. Myers testified that SWBT did not perform a cost study for ICOS for several reasons. First, SWBT was attempting to avoid the time delay necessary to conduct a cost study, so that ICOS could begin benefiting customers immediately upon the elimination of COS. Second, SWBT had filed the same rates as those previously approved by the Commission for GTE for one-way Interim COS in Tariff No. 9800607. Third, Ms. Myers testified that because this was proposed as an interim filing and was only available in a limited number of specified exchanges, SWBT would suffer no irreparable harm if these rates did not cover their costs. Finally, SWBT believed that the proposed rates would be acceptable to Staff because the rates proposed for ICOS are higher than the rates proposed by Staff in Case No. TW-97-333.

OPC indicated in the Hearing Memorandum and its briefs that it was not opposed to the proposed price for ICOS.

Staff's witness, Ben Childers, testified that ICOS should be subject to a cost study to determine that it is priced above cost, including imputed access charges, and is providing a contribution to joint and common costs.

AT&T's witness, Michael J. Pauls, testified that the rates should cover all costs of providing the service. According to Mr. Pauls's testimony, to do otherwise could create a barrier to competition in the intraLATA toll market within the state of Missouri.

**3. Is ICOS offered above cost?**

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All the parties agree that there is no way to determine if ICOS is offered above cost without a cost study.

**C. SHOULD A DEFINITE SCHEDULE FOR IMPLEMENTATION BE REQUIRED IN THE TARIFF?**

SWBT argues in its brief that it cannot provide an implementation schedule for ICOS because it will be implemented as the "target local exchanges are converted to equal access pursuant to schedules" to be developed which are not under the control of SWBT. However, SWBT indicates that it will have the service available for its customers as COS is eliminated in the petitioning exchanges. SWBT provided a list in its proposed tariff of the exchanges in which ICOS would be available.

Dr. Childers testified that usually an implementation schedule is not necessary because services will be available on the effective date of the tariff. Dr. Childers stated that Staff would prefer an implementation schedule for ICOS but that, because of the particular circumstances surrounding this filing, SWBT could not provide such a schedule.

**II. SHOULD LOCAL PLUS BE APPROVED?<sup>4</sup>**

**A. DOES LOCAL PLUS PROVIDE BENEFITS TO CUSTOMERS?**

SWBT witness, Linda Countryman, testified that SWBT proposed Local Plus in response to the demand for expanded local calling services from its customers. She stated that the LATA-wide service would allow each customer to determine what calling scope fits the customer's needs. Ms. Countryman testified that both SWBT market research and experience indicate that customers want optional, flat-rated, and locally dialed calling plans, along with a larger calling scope. In addition, Ms. Countryman stated that because the plan was offered equally to rural and urban customers it would eliminate some of the "looking over the fence issues" among its customers.

Ms. Countryman testified that Local Plus will act as a replacement service for some COS customers. She testified that the popularity of other expanded calling plans, such as MCA in Missouri and Local Plus in Texas, prompted SWBT to file this tariff. Ms. Countryman testified that the specific benefits Local Plus will offer to customers who purchase the service are: 1) monetary savings; 2) ability to budget more effectively because of the flat-rate structure; 3) ability to call any number of times, any time of day, and talk as long as the customer wishes without having to make a buying decision about each call; and 4) the opportunity for business customers to expand and to provide better service to their customers.

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<sup>4</sup> The Hearing Memorandum set forth numerous issues. In this order, the Commission has combined some of those issues for purposes of discussion. Therefore, while the Commission has attempted to follow the outline of issues provided by the Hearing Memorandum, the remainder of this decision may not follow the exact sequential organization of that memorandum.

Ms. Countryman testified that Local Plus would offer benefits to the communities where it is available, especially in rural areas where essential services such as schools and hospitals have consolidated in an effort to reduce expenses.

Ms. Myers stated that a SWBT survey shows that customers "at all usage levels" are interested in purchasing a flat-rated, unlimited calling plan. The survey also indicates that customers prefer a local dialing pattern. The survey results were entered into the record as Exhibit 9HC.

Ms. Meisenheimer testified that OPC "generally supports the proposed services because . . . [it] recognize[s] the significant benefit that qualifying customers might receive from subscribing to the proposed plans." Ms. Meisenheimer testified that a LATA-wide service would provide those customers with an additional choice for telecommunications services. Ms. Meisenheimer stated that toll users with a large volume of calls would also benefit from the monetary savings and that the proposed service would lessen the impact of the loss of COS on rural subscribers. OPC's objection to the proposed service is to its classification as a local service. Ms. Meisenheimer stated that the service should be classified as toll and provided to the customers of the Secondary Carriers (SCs) for which SWBT is the Primary Toll Carrier (PTC).

Dr. Childers testified for Staff that although Local Plus would be a "good calling plan for Southwestern Bell customers," other policy considerations outweigh the benefits provided to customers. These considerations include: the resale restrictions, the "morphing clause", and, the possibility of geographic deaveraging. STCG, MMG, and COMPTEL-MO made similar arguments.

MCI witness, Randy R. Klaus, stated in his testimony that there are two basic problems with Local Plus: it does not recover the imputed price of access; and, it "unreasonably and unnecessarily prohibits resale by interexchange carriers." Mr. Klaus testified that if resale without aggregation is allowed by the interexchange carriers (IXCs) and a usage-sensitive rate structure is added to the flat rate, these problems will be resolved.

#### **B. IS LOCAL PLUS PROPERLY CLASSIFIED AS A NEW SERVICE?**

MCI and AT&T argue that Local Plus is merely a new price for an existing service. They claim that SWBT is repricing intraLATA toll from usage-sensitive rates to flat rates. MCI and Staff argue that allowing SWBT to treat this plan as a new service would permit SWBT to avoid price cap restrictions which would be applicable if the service were not considered a "new service."

MMG argues in its brief that because SWBT failed to comply with the requirements of Section 392.220.4, RSMo Supp. 1997, by not filing with the tariff "its justification for considering such offering a new service," and not identifying the "service as noncompetitive, transitionally competitive or competitive," this issue is not before the Commission for decision.

SWBT argues that this is a new service because there is no service currently in existence which would allow flat-rated, unlimited calling with a local dialing pattern.

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Ms. Myers testified that Local Plus is not intended to replace any of the expanded calling services which SWBT currently offers, with the possible exception of COS. Ms. Myers testified that this expanded calling service is designed to meet the individual needs of customers rather than the needs of the community as other expanded calling services do.

SWBT argues that the only purpose of Section 392.220.4, RSMo Supp. 1997, is to require an expedited decision by the Commission. Because it did not file its tariff in compliance with that provision, SWBT believes Section 392.220.4 does not apply. SWBT admits that, regardless of whether this service is classified as new, all of SWBT's services will remain subject to Section 392.245, RSMo Supp. 1997, including Local Plus.

In answer to questions from the bench, Ms. Myers testified that Local Plus was filed as a new service but that neither expedited approval nor any type of competitive classification were requested. SWBT witness, William C. Bailey, testified under cross-examination that the tariff was not filed as a new service for purposes of expedited treatment.

#### **C. SHOULD LOCAL PLUS BE CLASSIFIED AS LOCAL OR TOLL?**

Ms. Myers testified for SWBT that Local Plus has many features of a local service including a flat-rate, unlimited calling, and a local dialing pattern. She stated that toll plans are generally implemented through the billing system, but Local Plus would be switch based. Ms. Myers testified that Local Plus was consistent with the desires of customers for a larger local calling scope. She stated that the Commission has previously classified both Metropolitan Calling Area (MCA) and Extended Area Service (EAS) as local services, and each of those services is an expanded calling service that provides interexchange calling.

SWBT also sponsored the testimony of Nancy L. Reiter. Ms. Reiter testified that the revenues from Local Plus were expected to be cross-elastic with revenues from DDD Toll, MCA, and intraLATA access services. Ms. Reiter explained that this means that the demand for Local Plus is expected to impact the demand for SWBT's other services.

SWBT argues that because of changes in the industry the traditional lines between local and toll have been blurred. SWBT states that the service may replace intraLATA toll for some customers, but in some instances it will also replace MCA which is a local service. In its brief SWBT argues that "COS is a locally dialed interexchange calling service" that was previously classified as a non-toll service and is currently classified as toll. On the other hand, MCA, which also has a local dialing pattern is classified as local. SWBT points out that cellular providers define local calling scopes which include what would traditionally be called a toll service if provided on the landline system. Attached as Schedule 1 to Ms. Myers's Surrebuttal Testimony were examples of advertisements by MCI and AT&T characterizing some of their intraLATA toll services as "local toll" thus further blurring the distinction.

Ms. Myers testified that the Texas Public Utility Commission (Texas Commission) has determined Local Plus to be a hybrid service with characteristics of both local and toll services. Ms. Myers stated that the Texas Commission allowed SWBT to file Local Plus in its General Exchange Tariff rather than its Local Exchange Tariff. SWBT also offered as an exhibit to its brief the Report and Recommendations of the Administrative Law Judge in Cause No. PUD 980000134 before the Oklahoma Commission, and as a late-filed exhibit, the final decision of the Oklahoma Commission in a similar LATA-wide Local Plus offering. The Oklahoma Commission found that the service was neither local nor toll, but allowed SWBT to include the service in its General Exchange Tariff.

COMPTEL-MO witness, Michael Jay Ensrud, stated during cross-examination that because this service has characteristics of both local and toll it is possible to characterize it as a hybrid.

Ms. Meisenheimer testified that it is OPC's position that Local Plus is "more closely aligned with current toll offerings than with local offerings and will be perceived by customers as [a] substitute for toll services to which they already subscribe."

Dr. Childers testified for Staff that there are many characteristics of Local Plus which make it similar to a toll plan, including: 1) the lack of a community of interest; 2) its role as a replacement for intraLATA toll calling plans; 3) the fact that it is a one-way service, while local is generally a two-way service; and 4) the fact that SWBT intends to pay access in the same manner as it pays access for intraLATA toll traffic. Dr. Childers also testified in response to questions from the bench that the fact that SWBT is offering to pay access charges for a local service makes the service a "hybrid situation."

MCI and Staff argued in their briefs that the service is interexchange as defined in Section 386.020(24), RSMo, and, therefore, not a local service. MMG's witness, William Biere, testified that a call could traverse up to 430 miles under the Local Plus plan. MMG argued that traveling a long distance is characteristic of toll rather than local service. COMPTEL-MO concurs that the service should be classified as toll, citing the same factors as Staff and the intervenors. STCG also concurs and adds that Local Plus is similar to the Outstate Calling Area (OCA) service and SWBT's Designated Number Optional Calling Plan which are both classified as toll services.

**1. What are the implications of classification as either local or toll?**

SWBT argues that local classification of Local Plus will allow it to provide the service using a locally-dialed (7- or 10-digit) calling pattern. Ms. Myers and Ms. Countryman testified that the survey conducted by SWBT shows that a local dialing pattern would be a factor in many customers' determination of whether to purchase the service. Ms. Myers testified that subscribers to Local Plus will receive a message indicating there is no need to dial a "1" if the subscriber attempts to make an intraLATA call using "1+". She agreed during cross-examination that a customer

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who has chosen to subscribe to Local Plus will not be able to obtain intraLATA service from any other carrier by dialing "1+". Ms. Myers stated that this feature was intended to protect the customer from paying a per-minute rate for a service previously purchased on a flat-rated basis. Both Ms. Reiter and Ms. Countryman testified that even with the successful introduction of a similar Local Plus service in Texas, the 10XXX<sup>5</sup> calling traffic continues to increase in that state.

Ms. Meisenheimer testified that if the service is classified as local the classification may preclude toll providers from being eligible to resell the service without obtaining additional authority from the Commission. Therefore, toll providers who are not also certified as local service providers may have a competitive disadvantage. Ms. Meisenheimer testified that OPC takes the position that classifying the service as toll would benefit SWBT's secondary carriers' (SCs) customers because the service would also have to be made available to those customers under the PTC Plan.

The Staff's position, as testified to by Dr. Childers, is that Local Plus would be anticompetitive because intraLATA presubscription will not affect Local Plus customers. Dr. Childers testified that this creates a barrier to entry which is prohibited under 47 U.S.C. 253. Dr. Childers also raised the issue of a potential increase in the amount SWBT might receive from both the federal and state Universal Service Fund if this service were classified as local. He stated that if "intraLATA toll is converted to local, it may be that all or almost all of SWBT's instate network may be classified as local for fund recovery." Dr. Childers indicated that by classifying the service as local, SWBT can avoid imputing the cost of access and thereby avoid having to demonstrate that the service is priced above cost.

MCI concurred with Staff's assessment that classifying this service as local would be anti-competitive. MCI witness, Randy R. Klaus, testified that the IXCs could not sell a LATA-wide unlimited calling plan on a flat-rated basis because the IXCs would have to pay access charges on a usage-sensitive basis. MCI argued that SWBT intends to price this service so that no competitor can match the price and thus retain high volume customers when intraLATA presubscription is implemented in SWBT's service area. MCI and COMPTel-Mo noted that local classification would mean that a company which only has interexchange service authority would not be able to resell Local Plus without obtaining a certificate of local service authority.

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<sup>5</sup> It should be noted that 10XXX dialing now requires dialing 10-10-XXX. This is a dial-around feature that allows a customer to make a call using the interexchange carrier of the customer's choice by dialing the interexchange carrier's code in the form of 10-10-XXX, regardless of who the customer's presubscribed interexchange carrier is.

Mr. Biere testified for MMG that if Local Plus is classified as local, the 1996 Telecommunications Act will require SWBT to negotiate interconnection agreements with other local exchange carriers (LECs) in order to terminate Local Plus traffic in their exchanges. Mr. Biere stated that if Local Plus, which he believes is a toll service, is implemented without being provided to the SCs, this would violate the public policy which prohibits defining a toll service differently based upon locality or exchange. If the service is classified as toll, Mr. Biere stated that equal access and dialing parity would have to be provided to the IXC's or the service would be anticompetitive. Because Local Plus customers would not be able to reach intraLATA toll carriers by dialing "1+" (to dialing 10XXX), dialing parity would be precluded.

Mr. Pauls testified on behalf of AT&T that if the service were classified as toll, as in his opinion it should be, it would have to meet an imputation test. He stated that if Local Plus is classified as toll, IXC's will be able to offer similar plans on their own or through resale without the expense and delay of obtaining additional service authority or interconnection agreements. Mr. Pauls also testified that if the service were characterized as local, resale would be precluded by IXC's which did not also have local service authority.

Mr. Ensrud testified on behalf of COMPTEL-MO that SWBT would need to impute the cost of applicable access in order to avoid predatory pricing.

STCG witness Robert C. Schoonmaker testified that, assuming the PTC Plan is eliminated and SWBT exits the Secondary Carrier markets, if SWBT later chooses to re-enter those markets it will not have to provide Local Plus to the SCs' customers if it has been designated as a local service. Only toll services are required to be made available to all exchanges. Mr. Schoonmaker also theorized that IXC's might follow this lead and reclassify services as local in high cost, rural areas.

## **2. What is the appropriate costing standard?**

SWBT argued that the appropriate cost standard is that Local Plus must cover incremental costs. Ms. Reiter testified that SWBT had performed a contribution analysis, the results of which were attached as Schedule 3 to her prefiled Direct Testimony. Ms. Reiter testified that the contribution analysis showed that Local Plus revenues are expected to exceed the incremental costs of the service and to make a contribution to common costs. She testified that SWBT also completed a service benefit analysis and determined that Local Plus will have a positive net impact over a three-year period. Schedule 2 attached to Mr. Moore's testimony is SWBT's 1997-1999 Missouri Local Plus Cost Study which identifies the incremental recurring and nonrecurring costs associated with Local Plus.

Ms. Myers testified that SWBT would "revise its Local Exchange Tariff to make Local Plus available for resale under the same terms and conditions SWBT applies to its own end users." She stated that certified Competitive Local Exchange Carriers (CLECs) can resell Local Plus at wholesale discount rates. Ms. Reiter testified that it is SWBT's position that making a service available for resale guards against being



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priced under cost and, therefore, imputation of access charges is not necessary. She stated that, since SWBT is the underlying carrier, it is assuming the risk and will be the one harmed if the service is priced inappropriately.

SWBT cited to the Commission's previous decision in In the Matter of Southwestern Bell's tariffs to revise P.S.C. Mo-No. 26, Long Distance Message Telecommunications Service Tariff to introduce Designated Number Optional Calling Plan, Case No. TT-96-268, Report and Order, issued December 20, 1996, which held that an imputation test is not needed if the service is made available for resale with the appropriate wholesale discounts. SWBT also argued that both the Texas Commission and the Oklahoma Commission concluded that the availability of resale to competitors eliminates the need for an imputation test.

OPC and MMG took the position that the service should recover its costs and make a contribution to joint and common costs.

Staff's position was that, if classified as a local service, Local Plus should be priced to recover all costs, including imputation of access charges, and a reasonable contribution to joint and common costs. Dr. Childers testified if Local Plus is classified as an intraLATA toll service it should be priced above cost, including imputation of access charges.

MCI took the position that Local Plus should have to meet an imputation test. Mr. Klaus testified that Local Plus would not pass an imputation test unless a large number of customers purchasing the service are low volume customers. These low volume customers will not receive any financial benefit from paying the flat rate. Mr. Klaus stated that customers are not likely to choose to do that. Mr. Klaus testified that the Commission could cure this defect by altering the rate structure of the tariff to include a usage-sensitive component.

COMPTEL-Mo also took the position that an imputation test is needed. Mr. Ensrud testified that Local Plus could not pass an imputation test. He provided an example based on composite SWBT originating and terminating access rates to demonstrate that if an IXC attempted to duplicate SWBT's service it would reach a "break-even" point at between 5 and 9.08 hours of use for the residential customer. Mr. Ensrud testified that access charges of the other incumbent LECs were higher than SWBT's access charges. COMPTEL-Mo argued that, given the estimates provided in Ms. Reiter's highly confidential testimony for calls on the high end of the access charge rates, Local Plus will not recover the cost of access.

STCG also argued that Local Plus should have to pass an imputation test.

Mr. Pauls testified for AT&T that one way to mitigate the anticompetitive aspect of SWBT's failure to meet an imputation test would be to offer Local Plus for resale at wholesale rates on an unrestricted basis. Mr. Pauls stated that this would be in compliance with Section 251(c)(4)(A) of the Telecommunications Act of 1996 which requires incumbent LECs to offer any of its retail services to other telecommunications companies for resale at wholesale rates. He testified that resale "would at least allow all intraLATA toll providers to compete in the sale of service to end-users, even

if access prices would otherwise preclude such competition."

STCG argued, and Mr. Ensrud testified, that for its members to remain revenue-neutral in an Originating Responsibility Plan (ORP) environment they would also have to impute originating and terminating access in order to provide a service similar to Local Plus. According to Mr. Ensrud, imputing these charges would make it an "economic impossibility" for the small LECs to offer a similar service.

**3. What are the appropriate terms and conditions for terminating calls in third-party LEC exchanges?**

Mr. Schoonmaker testified for STCG that if Local Plus was classified as local interconnection agreements would need to be negotiated with the LECs where the termination of traffic would occur. During cross-examination, Mr. Schoonmaker testified that, regardless of how the Commission classified this service, STCG's clients would view terminating access as the appropriate mechanism for intercompany compensation. He testified that paying the rates established in access tariffs would be consistent with STCG's clients' negotiated interconnection agreements with SWBT.

If the service is classed as toll, Mr. Schoonmaker stated that STCG would expect the same terms and conditions that apply under the PTC Plan to apply to Local Plus. STCG would also want any changes determined by the Technical Committee formed pursuant to Case No. TO-97-217<sup>6</sup> to apply. Mr. Schoonmaker admitted that, according to the figures provided by Ms. Reiter, the small telephone companies could expect revenue from the Local Plus traffic terminating to their exchanges to be ten times greater over a three-year period than the loss of toll traffic terminating access revenues.

Mr. Biere testified for MMG that he believed terminating access charges should be paid if the service is classified as toll. Mr. Biere stated that if the Commission determines the service is local, access charges would be a "good way" to handle the compensation issue.

SWBT argues that access tariffs apply to the termination of this traffic because it is interexchange traffic regardless of how it is classified. SWBT also argues that paying terminating access charges is consistent with the negotiated interconnection agreements SWBT has with CLECs which have been approved by the Commission. Ms. Reiter provided confidential documentation showing that, if the traffic terminating to the small telephone company exchanges increased as Mr. Schoonmaker suggested, then STCG members would likely receive a windfall of revenues from the access charges.

<sup>6</sup>In the Matter of an Investigation Concerning the Continuation or Modification of the Primary Toll Carrier Plan When IntraLATA Presubscription is Implemented in Missouri (the PTC case).

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Staff argued that the proper classification of this service is toll and therefore terminating access charges would be the appropriate method of compensation. However, Staff suggested that because the issues of compensation and payment of access are currently being considered by the Technical Committee in the PTC case, the Commission should refrain from determining what compensation is appropriate until it receives the final recommendations of the Technical Committee.

MCI, AT&T, and OPC agreed that terminating access is appropriate intercompany compensation if the service is classified as a toll service.

Mr. Biere testified on behalf of MMG that compensation at the access tariff rate is consistent with SWBT's interconnection agreements. However, he also stated that Local Plus should not be made available until interconnection agreements have been submitted and approved by the Commission in accordance with 47 U.S.C. 252(e). Mr. Biere recommended that the tariff be rejected and not reconsidered until after the elimination of the PTC Plan is completed. He suggested that whatever conditions for terminating access are found to be applicable as a result of the PTC case should also be applied to this traffic.

**4. May SWBT reclassify a transitionally competitive toll service as a noncompetitive local telecommunications service?**

Dr. Childers testified for Staff that if Local Plus is approved with a local classification, the Commission would be reclassifying a transitionally competitive toll service as a noncompetitive local service. Dr. Childers's concern is that this moves in the direction of less competition instead of more competition.

SWBT responded that it had not requested any specific type of competitive classification of this service, nor had it requested the proceeding contemplated by Sections 392.361 and 392.370, RSMo, for classifying or reclassifying telecommunication services. Ms. Myers testified that this service will not replace intraLATA toll, but would be another option for customers.

Dr. Childers agreed during cross-examination that SWBT had not requested that its message toll, WATS, 800 number, or other services which have been previously classified as competitive be reclassified, and that those services will remain available to SWBT customers. However, Dr. Childers added that the customers who subscribe to Local Plus will not need another intraLATA toll service.

MMG argued that, under Section 392.400, RSMo, if Local Plus were approved as a local service, it would be eligible to be subsidized by SWBT's toll services. MMG states that, if approved as a toll service, pursuant to Section 392.400, RSMo, Local Plus would be able to contribute to the cost of local services, but local services would not be able to contribute to the cost of Local Plus.

OPC, MCI, and AT&T agree that only the Commission can reclassify Local Plus as transitionally competitive or competitive, but presented no further evidence or argument regarding this issue.

**D. SHOULD LOCAL PLUS BE AVAILABLE TO THE EXCHANGES WHERE SWBT IS THE PRIMARY TOLL CARRIER?**

STCG argued that Local Plus should be available to the customers of the SCs where SWBT is the PTC. Mr. Schoonmaker testified for STCG that "SWBT should be required to offer Local Plus to all customers that are offered toll service from its message toll tariffs whether they reside in Southwestern Bell exchanges or in the exchanges of other telephone companies."

Mr. Ensrud testified for COMPTEL-MO that SWBT's failure to offer Local Plus to customers of the SCs is a "reasonable business choice" because SWBT cannot pay both originating and terminating access charges to the SCs for Local Plus and have the service remain profitable.

MMG argued in its brief that if Local Plus is approved it should be available to all customers in each LATA. However, Mr. Biere testified for MMG that he would not recommend offering the service only to have it removed. He stated that in his experience, customers did not like having services eliminated. Mr. Biere suggested that the tariff be rejected and not be reconsidered again until after the elimination of the PTC Plan.

Ms. Meisenheimer stated on behalf of OPC that as long as the PTC Plan is in effect, SWBT should provide Local Plus to the customers of the SCs.

Ms. Myers testified for SWBT that Local Plus will not be implemented for six to nine months from the date of approval of the tariff. Ms. Myers suggested that SWBT will not be offering toll services to the SCs' exchanges after the elimination of the PTC Plan. She stated that it would cause great customer dissatisfaction to offer Local Plus for a short time to the SCs' customers and then take the service away. In addition, SWBT argued that even if there is some overlap between the PTC Plan and the implementation of Local Plus, it would be a relatively short interval. Therefore, it would be confusing to the customers of the SCs to have Local Plus for a short period of time only to have it removed when SWBT is no longer the primary toll carrier.

STCG witness Robert Schoonmaker agreed during cross-examination that it would not be appropriate to include the SC exchanges in the tariff if the PTC Plan has been eliminated by the implementation date of Local Plus.

**E. WILL LOCAL PLUS BE AVAILABLE FOR RESALE?**

Ms. Myers testified that SWBT would "revise its Local Exchange Tariff to make Local Plus available for resale under the same terms and conditions SWBT applies to its own end users." Ms. Myers stated that CLECs would be able to sell the service at a discounted rate, and IXCs would be offered the service at the tariffed rate. She testified that SWBT had not yet amended its tariff or filed amended local exchange tariff sheets which would make the changes necessary to allow resale. SWBT argued that the Federal Telecommunications Act of 1996 (the Act) does not require resale at a discount to the IXCs. However, Mr. Bailey testified that SWBT would be willing to negotiate with the IXCs regarding a discounted rate.

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Staff, MCI and AT&T agree that 47 U.S.C. 251(c) requires that an incumbent LEC offer services such as Local Plus for resale at a wholesale rate and argues that the tariff must be rejected at least until these tariff changes are made. Mr. Klaus testified for AT&T that it is in the public interest to eliminate restrictions on resale, in that it encourages the creation of new services and technology, results in more efficient use of facilities, lower rates, and moves rates toward a cost-based structure thus enhancing competition. Mr. Klaus testified that an IXC could not effectively compete by reselling the service without a discount.

COMPTEL-Mo argued in its brief that even if the tariff allows resale, the certificate of an IXC only authorizes the sale of interexchange services and not local exchange services. COMPTEL-Mo argued that the IXCs would have to get additional authority from the Commission in order to resell Local Plus. COMPTEL-Mo also argued that if the Commission does not require resale at a wholesale rate, it would impede competition, because negotiating with SWBT for a discount would be a lengthy process.

Mr. Pauls testified that AT&T already has an interconnection agreement with SWBT that would allow it to purchase Local Plus as a CLEC at a wholesale discount of 19.2 percent.

**1. Is a restriction on aggregation by resellers appropriate?**

Ms. Myers stated that SWBT wants the resale of Local Plus to other carriers to include the same restrictions it places on its own customers. She stated that the major concern of SWBT in restricting resale is that there be no aggregation<sup>7</sup> of the service. She stated that SWBT does not intend for the customer, including another telecommunications company, who purchases a single plan at the tariffed or wholesale rate to be able to resell the service to multiple users. Ms. Myers testified that the agreements SWBT has with CLECs, with the exception of MCI and AT&T, all restrict aggregation in this manner. She stated that SWBT will not offer the service if aggregation is allowed as it would not be financially viable.

Ms. Reiter testified that the cost study done by SWBT presumed only one end user per plan purchased, and if the service was available for aggregation SWBT would not be able to cover its costs of providing the service. Additionally, SWBT argued that the Act does not prohibit all restrictions, but only requires that restrictions on resale be reasonable, and states that the Commission has previously determined that restrictions on aggregation are reasonable.

COMPTEL-Mo was the only party which proposed that there be no restriction on aggregation. Mr. Ensrud testified regarding how aggregation would work. He admitted during cross-examination that the Commission has the authority to determine whether restrictions in the tariff are reasonable. COMPTEL-Mo argues that aggregation should be allowed as it would be no different than a single end user using the service 24 hours a day, which is authorized by the tariff.

<sup>7</sup>The term "aggregation" used in this context was defined by Mr. Ensrud, as being "the buying of a large component and parceling it out to a number of different customers."

Staff pointed out that the Commission has only determined that aggregation is a reasonable restriction as to toll services, but has not yet made such a ruling as to local services.

**2. Should consideration of Local Plus be denied or delayed until SWBT has negotiated interconnection agreements with other ILECs, giving those ILECs an opportunity under the provisions of the 1996 Telecommunications Act to negotiate arrangements suitable for their internal business purposes and for their customers?**

Mr. Bailey testified that SWBT did not need to negotiate interconnection agreements because the Act only requires negotiation when wireline traffic originates and terminates within the mandatory local calling scope. If the wireline traffic is not both originating and terminating, it is subject to the applicable interstate or intrastate tariffs. Thus, in the case of Local Plus, Mr. Bailey claims that terminating access charges are the appropriate intercompany compensation. Mr. Bailey testified that if a negotiated rate is necessary, the CLECs will receive less compensation than they would if terminating access is paid.

The other parties agree that unless the service is classified as a local service no interconnection negotiations will be necessary.

**F. HOW IS TRAFFIC MEASUREMENT AFFECTED?**

**1. What network changes are required to accommodate Local Plus and should SWBT be required to obtain other LECs concurrence before implementing such network changes?**

Mr. Bailey and Ms. Myers testified for SWBT that the network reconfigurations required by SWBT would be translation changes in the switches so that the Local Plus traffic could be recognized. Mr. Bailey testified that otherwise the traffic measurement would remain the same.

No evidence was presented to indicate that significant changes would be necessary by the other LECs to accommodate Local Plus traffic. However, STCG indicated that because SWBT stated there may be a need for additional trunking facilities and terminating traffic was expected to grow, more information is necessary to make this determination. MMG also argued that SWBT's admission that more trunking facilities might be necessary means that SWBT should be required to get consent from the independent companies before increasing the amount of terminating traffic.

SWBT argued that since the LECs would be paid their full tariffed rate they will be fully compensated for the use of their facilities. In addition, SWBT argued that none of the long distance companies had ever been required to get permission from the LECs to increase the amount of traffic they terminated.

**2. What suitable assurances and verifications will be required of SWBT to assure that Local Plus traffic is appropriately measured?**

Ms. Myers and Mr. Bailey testified that once the network reconfigurations are in place, Local Plus traffic will be measured the same as any other terminating traffic. Mr. Bailey stated that SWBT will measure Local Plus traffic which terminates to other

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LECs and traffic that terminates to customers served by CLECs operating in SWBT exchanges. He testified during cross-examination that if the method of intercompany compensation changes because of the PTC case, SWBT will use the new method for paying for terminating calls. Mr. Bailey also stated that SWBT will allow the independent companies to audit its billing mechanism. In addition, the witnesses stated that the measurement of MCA traffic would not be changed.

MMG argued that, for verification purposes, SWBT should be required to record all Local Plus traffic both terminating and originating. Mr. Biere testified for MMG that if the LEC does not have the ability to record traffic put on its network by another carrier, then it cannot be assured that it is receiving the appropriate compensation.

Mr. Klaus testified on behalf of MCI that in order for the service to be competitive, a usage-sensitive rate structure should be used. All traffic would have to be measured, in order to implement a usage-sensitive structure.

COMPTEL-Mo argued that SWBT should measure all traffic so that it can provide detailed billing to its customers. COMPTEL-Mo argued that without detailed billing, customers cannot make an informed choice about how they should handle intraLATA charges.

MCI, AT&T, and OPC also argued that customers should be able to receive detailed billing in order to make an informed decision about the cost of the service.

Ms. Reiter testified that SWBT does not intend to make detailed billing available to its customers. She stated that in her experience, very few customers have requested detailed billing when it was available. In addition, she believed that customers actually want less detail on their monthly statements. SWBT late-filed Exhibit 27HC explaining the costs of implementing such a billing system.

**3. Should Local Plus, with its implicit assumption that LEC-to-LEC PTC Plan feature group C signaling and traffic measurement protocols will be retained indefinitely, be approved in light of the Commission decision to determine the PTC Plan?**

SWBT has stated that any changes in measurement recommended by the Technical Committee in the PTC case would also be implemented for Local Plus traffic. This issue has been assigned to the Technical Committee in the PTC case currently pending before the Commission; therefore, no determination of this issue is necessary in this proceeding.

**4. Is the provisioning of Local Plus with LEC-to-LEC feature group C signaling and traffic measurement protocols consistent with intraLATA toll equal access, if IXCs will be required to utilize feature group D signaling and traffic measurement protocols?**

SWBT has stated that any changes in measurement recommended by the Technical Committee in the PTC case would also be implemented for Local Plus traffic. This issue has been assigned to the Technical Committee in the PTC case currently

pending before the Commission; therefore, no determination of this issue is necessary in this proceeding.

**G. IS LOCAL PLUS DISCRIMINATORY?**

SWBT argued that Local Plus offers parity of service under Section 392.185(7), RSMo Supp. 1997, because the service is offered equally to SWBT's rural and urban customers. However, Ms. Myers testified on behalf of SWBT that customers who are served by an exchange which has a central office in another state will not be eligible for the service. Ms. Myers testified that MCA subscribers could purchase the service at a discounted rate.

SWBT argued that the other LECs can offer a similar service to their customers, and that Local Plus should not be rejected because other companies are not willing to offer this type of service. Ms. Myers testified that by offering Local Plus, SWBT will be able to address the demands of many of its customers for an optional expanded calling service.

Staff agreed that the parity issue alone is not sufficient to reject SWBT's tariff. OPC agreed with SWBT's arguments regarding parity, so long as the service was not classified as a local service.

Dr. Childers testified on behalf of Staff that charging a different price for the subscribers of MCA and nonsubscribers would create a disparity between rural and urban customers.

MCI and AT&T argued that Local Plus is discriminatory to IXC's if they are not allowed to purchase the service at a wholesale discount for resale or if an imputation test is not used. They argued that SWBT controls an essential input which is needed for a competitor to provide the service and without one of these safeguards, SWBT is able to gain a competitive advantage which is discriminatory to the competition.

MMG argued that disparity will be created because the carriers serving less densely populated areas and high cost exchanges do not have the economies of scale to enable them to provide this type of service. MMG believes that Local Plus is discriminatory to the independent companies because its customers will be unable to receive like services for equal prices. MMG's witness, Mr. Biere, argued that Local Plus is discriminatory because it is charging a different price for a service that SWBT already offers, *i.e.* regular Message Toll Service (MTS). Mr. Biere stated that, by charging a flat rate for Local Plus, SWBT is basically charging a different rate for the same service for subscribers to Local Plus and nonsubscribers who use regular MTS.

Ms. Myers testified, and the tariff indicates, that customers who subscribe to MCA and to Local Plus will only be charged \$20 per month for residential Local Plus service and \$40 per month for business service. Thus, Local Plus is being offered at a discount to MCA subscribers. Ms. Myers stated that the reason for the discount is that MCA is a two-way expanded calling plan which already allows the customer to call many of the same people in the LATA that Local Plus would allow the customer to call. SWBT argues that the customer should not have to pay the charge a second



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time for service they are already receiving through MCA if they want the added benefits from Local Plus of calling one-way to the rest of the LATA. Ms. Myers also testified that if a customer decides to purchase Local Plus and drop MCA service, she would have to change her phone number. Therefore, some customers may prefer to pay for both services in order to avoid the inconvenience of changing phone numbers.

Dr. Childers testified for Staff that by charging different rates for MCA and non-MCA customers, the service will result in geographic deaveraging in violation of Section 392.200.5, RSMo Supp. 1997.

**H SHOULD LOCAL PLUS BE APPROVED PRIOR TO SWBT'S IMPLEMENTATION OF INTRALATA PRESUBSCRIPTION IN ITS 166 EXCHANGES SERVING 2.4 MILLION, OR 80 PERCENT OF MISSOURI'S CUSTOMERS?**

SWBT argued that the service should be implemented as quickly as possible. SWBT offered its customer survey into evidence to support Ms. Myers's and Ms. Reiter's testimony that there is a demand for this service. In addition, SWBT intends to offer this service in part as an option to customers who are losing COS. Ms. Myers testified to the benefits the service would provide to the customers. SWBT argues that delay in implementing this service would harm those customers. SWBT also argues that it would not be gaining any unfair advantage over competitors since the service would be available for resale and LECs could offer a similar service to their customers through their own facilities.

MCI and AT&T argued that Local Plus should not be implemented in its current format before intraLATA presubscription is available.

Mr. Biere testified for MMG that the introduction of Local Plus before intraLATA presubscription is available would eliminate a majority of the market in which the IXCs intend to compete. MMG has concerns that, if SWBT is allowed to offer this service, it will discourage the IXCs from offering an attractive toll plan and limit competition in the less profitable areas of the state.

Dr. Childers expressed concern that implementing Local Plus before intraLATA presubscription was in place would stall competition because, for subscribers to Local Plus, intraLATA presubscription would have no meaning. Dr. Childers testified that because subscribers to Local Plus will not be able to reach another carrier by dialing 1+, this will preclude the implementation of intraLATA presubscription.

SWBT's tariff indicates that the minimum subscription period for Local Plus service is one month and the service is billed monthly. The service is also an optional service.

**I IS THE 7-DIGIT DIALING PROVISION OF LOCAL PLUS CONSISTENT WITH THE FEDERAL DIALING PARITY REQUIREMENTS?**

Staff's witness Dr. Childers and MCI's witness Mr. Klaus both expressed concern that SWBT was not planning to make the local dialing pattern available to the

competition. However, Ms. Countryman testified for SWBT that competing LECs can offer similar dialing patterns through their own facilities or through unbundled network elements purchased from SWBT. In addition, Ms. Countryman stated that competitors could offer their customers automatic dialers to access their networks. Or, in the alternative, Ms. Myers and Ms. Countryman testified that the service, with a 7- or 10-digit local dialing pattern, will be available for resale to the IXC's and the CLEC's.

**J. SHOULD THE "MORPHING CLAUSE" THAT ALLOWS SWBT TO CHANGE THE PROVISIONS OF THIS TARIFF WITHOUT COMMISSION APPROVAL BE APPROVED?**

Dr. Childers testified that Section 2.1.2.C.4 of SWBT's proposed Local Exchange Tariff, creates a situation where SWBT may unilaterally change or withdraw its tariff based on its own interpretation of state and federal law. Section 2.1.2.C.4 of SWBT's Local Exchange Tariff as filed February 5, 1998, states:

This tariff shall only be effective as long as the use restrictions and the rules and regulations in this tariff remain in effect for all users (including any exchange telecommunications company or other company reselling this service, and their customers.) In the event any of these use restrictions or rules and regulations are held not to apply to all such users, upon notification by the Telephone Company to the Commission, this tariff shall not be available except to existing subscribers of the service at existing service levels at existing locations. SWBT shall also have the right to withdraw this service offering in its entirety.

It is Staff's position that such a "morphing clause" is inappropriate and should not be approved. Dr. Childers testified that if SWBT was concerned about restricting aggregation of this service, it should have simply included such a restriction in its tariff. Staff stated in its brief that the Commission had previously determined in Case No. TO-97-40<sup>8</sup> that a restriction on the aggregation of toll services was a reasonable restriction on resale. Thus, it is Staff's position that SWBT should specifically include the restriction on aggregation in the language of the tariff.

Ms. Myers testified that the morphing clause merely permits SWBT to limit Local Plus to existing customers or discontinue the offering if the use restrictions which apply to end users of the service, including aggregation, are found not to be

<sup>8</sup> In the Matter of AT&T Communications of the Southwest, Inc's Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.

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applicable to all users of the service including other telecommunications companies. SWBT argues that it has attempted to address concerns about aggregation in other proceedings before the Commission but that the issue of whether or not resale restrictions will apply to resale of a local service has not yet been addressed.

It is OPC's position that the "morphing clause" "reduces the ability of OPC and other interested parties to effectively review and comment on the service, and severely restricts the PSC's oversight to protect the public interest and consumers." MCI, AT&T, and MMG were also generally opposed to the "morphing clause" being approved.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Although the type of services proposed by SWBT in this case are services the Commission would like to see implemented, the Commission finds that as filed, the proposals are insufficient. Specifically, the Commission finds that Local Plus is not a local service and should not be filed in the company's Local Exchange Tariff. Since the Commission is rejecting the tariff and the Interim COS service was filed as part of the same tariff as Local Plus, Interim COS must also be rejected.

Because the Commission is rejecting the tariff, not all issues have been specifically addressed in this order. However, the Commission recognizes that it is important to have options available which will meet the needs of customers for expanded calling scope services. Therefore, the Commission will make some specific comments on several of the issues raised in order to provide guidance to telecommunications companies for offering Local Plus type services.

The evidence presented suggests that a Local Plus type of service is not appropriately classified as either local or toll, but rather is a hybrid and is more appropriately filed in the company's General Exchange Tariff. The Commission recognizes that in the rapidly changing telecommunications environment certain services are not easily categorized by the traditional "local" or "toll" definitions and that services are emerging which contain characteristics of both local and toll. The classification of these services should be considered on a case by case basis.

Since Local Plus has characteristics of both local and toll, *i.e.* is a hybrid, it is appropriate to use terminating access as a method of intercompany compensation. However, imputation of access charges would not be necessary if this type of service is available for resale at a wholesale discount to CLECs and IXCs. In order to enable customers to obtain this type of service by using the same dialing pattern, the dialing pattern functionality should be made available for purchase to IXCs and CLECs on

both a resale and an unbundled network element basis. Furthermore, it is in the public interest for such a plan to include optional detailed billing for customers at no more than a nominal fee. Detailed billing will enable customers to determine if they are receiving value from the service.

A restriction on aggregation of a this type service would be a reasonable restriction on resale. In addition, IXCs should not be required to obtain any additional authority or certification to resell a hybrid service such as Local Plus and resale should be available on the same schedule of implementation for which the LEC implements the service.

Because the Commission is rejecting this tariff, the issue of the so-called "morphing clause" (paragraph C.4. of the 2nd Revised Sheet 48 of Southwestern Bell Telephone Company's Local Exchange Tariff) is moot. However, the Commission notes that in order for a company to withdraw a tariff, it must follow Commission procedures, including obtaining approval for discontinuance of the service.

Finally, the Commission encourages all telecommunications providers to offer extended calling scope services through the use of their own facilities or by contracting with others. The Commission is aware that the public interest would be served by having such services available to all customers. Therefore, we encourage all telecommunications providers to work cooperatively with other carriers and with this Commission to remove any barriers which would make such services cost prohibitive.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction over the operations of, and the rates charged by, Southwestern Bell Telephone Company pursuant to Chapters 386 and 392 of the Revised Statutes of Missouri 1994. This law also gives the Commission authority to review all tariffs filed with the Commission and to reject or suspend tariffs that fail to comply with state law, Commission rule or order, if they include unjust or unreasonable rates, or are not in the public interest. § §386.250 and 392.200, RSMo Supp. 1997.

The burden of proof to show that a proposed tariff is just and reasonable is upon the telecommunications company. §386.430. Based upon its findings of fact, the Commission concludes that Southwestern Bell Telephone Company has not met its burden of proof. Thus, the tariff is rejected and Southwestern Bell Telephone Company is encouraged to file tariffs in compliance with the Commission's findings above.

The Commission ordered the elimination of COS by March 1, 1998, in its Report and Order in Case No. TW-97-333, and by further Order issued on February 17, 1998 extended the elimination deadline. In the Order extending the deadline, the Commission authorized the elimination of COS in phases beginning June 1, 1998 and in no case ending later than February 28, 1999.

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The Commission concludes that pursuant to Section 251(b)(1) of the Telecommunications Act of 1996, each local exchange carrier has the duty not to prohibit, and not to impose unreasonable or discriminatory limitations on, the resale of its telecommunications services.

The Commission concludes that pursuant to Section 251(c)(4) of the Telecommunications Act of 1996, local exchange carriers also have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

*IT IS THEREFORE ORDERED:*

1. That Southwestern Bell Telephone Company is granted leave to file its Initial Brief in excess of the page limit.
2. That MCI Telecommunications Corporation is granted leave to file its Initial Brief in excess of the page limit and to include highly confidential information.
3. That Southwestern Bell Telephone Company is granted leave to file its Reply Brief in excess of the page limit.
4. That Southwestern Bell Telephone Company's motion to file a late-filed exhibit is granted. The Oklahoma Corporation Commission's June 26, 1998, Final Order approving Southwestern Bell Telephone Company's Local Plus offering in Oklahoma will be included in the record.
5. That the proposed tariff filed by Southwestern Bell Telephone Company on February 5, 1998, is rejected. The specific tariff sheets which are rejected are:

P.S.C. Mo.-No. 24 Local Exchange Tariff

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2nd Revised Sheet 46, Replacing 1st Revised Sheet 46

2nd Revised Sheet 47, Replacing 1st Revised Sheet 47

2nd Revised Sheet 48, Replacing 1st Revised Sheet 48

2nd Revised Sheet 49, Replacing 1st Revised Sheet 49

2nd Revised Sheet 50, Replacing 1st Revised Sheet 50

2nd Revised Sheet 51, Replacing 1st Revised Sheet 51

2nd Revised Sheet 52, Replacing 1st Revised Sheet 52

2nd Revised Sheet 53, Replacing 1st Revised Sheet 53

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6. That this Report and Order shall become effective on September 29, 1998.

Crumpton, Drainer, Murray and Schemenauer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994. Lumpe, Ch., absent.

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**Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission, Complainant, v. Discount Manufactured Housing, Inc. Respondent.**

*Case No. MC-98-92*  
*Decided September 23, 1998*

**Manufactured Housing §16.** The Commission approved a stipulation and agreement that resolved a complaint against a manufactured housing dealer for allegedly failing to properly setup a mobile home.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On August 26, 1997, the Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission (Director) filed a Complaint against Discount Manufactured Housing, Inc. (Discount), in two separate counts, alleging that Discount violated the provisions of Section 700.100.3(6), RSMo, by failing to arrange for the proper initial setup of a manufactured home sold in Missouri without first obtaining a written waiver of that service from the purchaser and deducting an amount equal to the cost of setup from the total cost of the manufactured home. Count One concerns a home sold to Mary and Mitchell Knight and Count Two concerns a home sold to Terry and Linda Shepard. On October 2, Discount filed an Answer to the complaint denying that it violated Section 700.100.3(6), and stating that a waiver had been signed by the purchasers at the time of the sale of the manufactured homes. The Commission issued an Order Granting Participation without Intervention to the Missouri Manufactured Housing Association (MMHA) on November 13. In accordance with the procedural schedule established by the Commission, the Director submitted the direct testimony of James Phillips and Silas Eugene Winn on January 16, 1998. On February 19, Discount submitted the rebuttal testimony of Larry Meyer, Bruce Rigdon and Mitchell Knight. The Director submitted the surrebuttal testimony of James Phillips on March 18.

As a result of informal discussions during the scheduled prehearing conference on March 31, the Director and Discount were able to resolve the issues between the parties. As a result of their agreement, the Director and Discount filed a Stipulation and Agreement with the Commission on April 16. A copy of that Stipulation and Agreement is attached to this order as Attachment A. The Stipulation and Agreement provides as follows:

1. Discount will install a vapor barrier at the home of Mr. and Mrs. Knight in accordance with the manufacturer's requirements and will provide to the Director a signed release from Mr. and Mrs. Knight verifying that the vapor barrier has been installed and that Mr. and Mrs. Knight have no other outstanding complaints against Discount.

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2. Discount shall install concrete base pads consisting of concrete pads with a thickness of six inches, 24 inches square to be placed upon bare ground. In lieu of one 6-inch thick concrete pad, Discount, at its option, may use two, three-inch thick pads stacked on top of each other.

3. Following placement of the base pads, Discount shall re-level the home.

4. Following placement of the base pads and re-leveling of the home, Discount shall notify the Director and the Director shall inspect the work.

The Director and Discount also agreed that when the Director verifies that the pads have been installed and the home re-leveled, he will, within one week, dismiss, with prejudice, the Complaint in this matter. The MMHA filed comments supporting the agreement on April 24 and the Office of the Public Counsel did not respond to the agreement. On April 24, the Commission entered a notice indicating that the agreement would be treated as unanimous pursuant to 4 CSR 240-2.115(1) and canceling the hearing that was set for April 29 and 30.

The Director filed Suggestions in Support of Stipulation and Agreement on May 11. In those suggestions, the Director states that the Stipulation and Agreement will resolve the concerns expressed by Mr. and Mrs. Knight and Mr. and Mrs. Shepard in their complaints regarding the set-up of their homes. The Stipulation and Agreement does not explicitly state which of the two mobile homes is the subject of the second, third and fourth provisions of the agreement. Those provisions deal with the correction of problems related to the placement of concrete base pads. That is the problem of which Mr. and Mrs. Shepard complained and the Director's Suggestions in Support of Stipulation and Agreement make it clear that those provisions are designed to take care of the problems experienced by the Shepards. The Director also states that the Stipulation and Agreement resolves all outstanding issues between the Director and Discount. The Director requests that the Commission approve the Stipulation and Agreement as being in the best interest of all parties and achieving an equitable resolution of the issues in dispute in the complaint proceeding. Discount did not file any response to the Director's Suggestions in Support.

The Commission finds that the Stipulation and Agreement is in the best interest of all parties and achieves an equitable resolution of the issues in dispute in the complaint proceeding.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement, marked as Attachment A to this Order and incorporated herein, is hereby approved.

2. That this order shall become effective on October 6, 1998.

Murray, Schemenauer and Drainer, CC., concur. Lumpe, Ch., and Crumpton, C., absent.

Woodruff, Regulatory Law Judge

EDITOR'S NOTE: Attachment A, the Stipulation and Agreement in this case, has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of Missouri Public Service's Tariff Revisions to be Reviewed in Its 1994-1995 Actual Cost Adjustment.**

*Case No. GR-95-273*

*Decided September 23, 1998*

**Gas § 17.1:** The Commission found that UtiliCorp's captive firm customers received the appropriate capacity release credits during the 1994-95 ACA period. The Commission found that the evidence did not support Staff's proposed adjustment to UtiliCorp's gas costs for the Eastern District. The Commission directed UtiliCorp to provide the type of documentation described by Staff, if and when specifically requested by Staff, beginning in the 1997-98 ACA period. The Commission found that Staff failed to adduce evidence demonstrating a need for the proposed tariff language regarding agency billing relationships. The Commission found that Staff failed to demonstrate any improper affiliate transactions between UtiliCorp and UES; consequently, the Commission declined to impose proposed Standards of Conduct for Affiliate Transactions upon UtiliCorp. The Commission found that UtiliCorp agreed that the reallocation proposed by Staff of \$95,901 in gas costs from the Northern System to the Eastern System was appropriate.

**APPEARANCES**

*James C. Swearingen* and *Dean L. Cooper*, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for UtiliCorp United Inc., d/b/a Missouri Public Service.

*Douglas E. Micheel*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Cherlyn D. McGowan*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: L. Anne Wickliffe, Deputy Chief.

**REPORT AND ORDER**

**Procedural History**

This case was established to track PGA changes to be reviewed in the company's 1994-95 annual Actual Cost Adjustment (ACA) filing. UtiliCorp United Inc. d/b/a Missouri Public Service (UtiliCorp) filed tariff sheets with the Commission on November 6, 1995, reflecting revisions to the annual ACA factors for each of its three



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Missouri systems based on reconciliation of ACA, Take-or-Pay, Transition Cost and Refund recovery balances. The adjustments will affect approximately 41,000 natural gas customers. The Commission issued an order on November 28, 1995, granting interim, subject to refund, approval of the tariff sheets pending a final determination.

The Commission Staff (Staff) filed a motion for a protective order which was granted on November 15, 1995. Staff conducted an audit and evaluation of the company's billed revenues and gas costs for the period from September 1, 1994, through August 31, 1995. Staff filed its memorandum on September 3, 1996, recommending adjustments to the figures proposed by the company for reconciling certain of the proposed ACA recovery balances. Staff also asked the Commission to direct UtiliCorp to provide Staff with documentation regarding affiliate transactions and reliability data. UtiliCorp filed a response to the Staff's recommendation on October 4, 1996, objecting to a number of the adjustments proposed by Staff. UtiliCorp also objected to Staff's requests for documentation, arguing that they should be handled through the data request process.

The parties met in an early prehearing conference on November 14, 1996. Staff filed a Motion to Establish Procedural Schedule on November 19 proposing a schedule by agreement of the parties. The Commission adopted the procedural schedule which was later modified. Staff and UtiliCorp filed a Hearing Memorandum on July 28, 1997; the Office of the Public Counsel (OPC) filed a separate Hearing Memorandum and request to file its positions out of time on July 29. OPC's request to file out of time was granted at the hearing.

The parties filed testimony and the Commission conducted an evidentiary hearing on August 5-6, 1997. On the first day of hearing Missouri Gas Energy (MGE) filed a motion for permission to intervene out of time and a motion to strike certain prefiled testimony. The Commission permitted oral argument on the record and denied both motions.

#### **Late-filed Exhibits and Pending Motions**

Revised Exhibits 18 and 19, and late-filed Exhibit 24 were filed by UtiliCorp on August 13, 1997. No objections were filed to these exhibits.

Staff filed a Motion to Strike Portion of Brief Not in Compliance with Commission Order on October 8, arguing that UtiliCorp's reply brief exceeded the Commission's page limits. The Commission issued an order regarding the procedural schedule which stated that reply briefs should be limited to 15 pages. Staff asked the Commission to strike pages 16 through 25 of UtiliCorp's reply brief or order UtiliCorp to file a brief that conforms to the 15-page limit.

UtiliCorp filed a Motion for Leave to File Reply Brief and Response to Staff Motion to Strike on October 9. UtiliCorp stated that it had not intended to thwart the Commission's order but had inadvertently failed to file, along with its reply brief, a motion for leave to file more than 15 pages. UtiliCorp argued that its 25-page brief could not have prejudiced Staff, pointing out that Staff's initial brief did not make use of the 30 pages allotted. UtiliCorp asked the Commission to accept the filing of its reply brief in its entirety.

UtiliCorp filed a Motion to Defer Capacity Release Issues on March 13, 1998. UtiliCorp asked the Commission to defer decision on the capacity release issues presented in this case because the question is one of appropriate affiliate transactions. UtiliCorp argued that the issue would be more appropriately addressed in Case No. OX-98-183, a rulemaking case designed to deal with affiliate transactions in the electric, gas, water, and sewer industries.

Staff filed a response in opposition to UtiliCorp's motion on March 23. Staff argued that Case No. GR-95-273 is the only case where UtiliCorp's actions during the 1994-1995 ACA period are reviewable. Staff stated that any rule implemented as a result of Case No. OX-98-183 would operate prospectively and would not affect the period at issue in this case.

The Commission dismissed Case No. OX-98-183 by order issued on April 21 on the grounds that Staff's proposed rule, though appropriate for some industries, could not be applied to all the industries party to the rulemaking case. The Commission directed Staff to develop separate affiliate transaction rules for the various industries whose operations differ.

### **Terminology**

The Commission notes that, in testimony and pleadings, the parties refer to the company at different times as UtiliCorp or as Missouri Public Service, or MPS. In order to maintain consistency the Commission will refer to the company throughout this order as UtiliCorp. The reader is to understand that UtiliCorp refers to UtiliCorp United Inc. d/b/a Missouri Public Service for purposes of this order.

**Capacity Release Credits:** A local distribution company (LDC) such as UtiliCorp purchases its natural gas from a supplier and pays a pipeline for transport of the gas supplies. Transportation charges include two rate elements: reservation charges and commodity charges. Commodity charges are based on the amount of natural gas that is actually transported. If no gas is transported, no commodity charges apply.

The reservation charges are designed to pay for the portion of the pipeline company's total capacity reserved specifically for the LDC. The reservation charges apply whether the LDC actually transports any natural gas or not. In order to meet their human needs requirements, LDCs typically contract for at least enough capacity to meet all firm load requirements on a day when the load is at or near peak. These days are relatively rare so there is often idle capacity for which the LDC must pay but which it does not currently require.

When the LDC has capacity reserved that it does not need, it may choose to make the idle capacity available to a third-party purchaser by means of a capacity release agreement. The agreement is between the LDC and a gas marketer or a large-volume end user. The parties must advise the pipeline company of the capacity release transaction. The pipeline company then bills the marketer for the amount negotiated between it and the LDC, and for whatever commodity charges the marketer incurs in transporting gas. The pipeline company then credits the LDC/marketer contract

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amount against the reservation charges billed to the LDC. This credit is called a capacity release credit.

**Discussion of Contested Issues**

**A. ADJUSTMENTS**

**1. Did UtiliCorp's captive firm customers (residential and commercial customers) receive the appropriate capacity release credits as a result of UtiliCorp's releases of capacity to its affiliate UES, given that UES resold that capacity to UtiliCorp's end-user transportation customers?**

Staff's position is that UtiliCorp's customers did not receive the appropriate capacity release credits and that an adjustment should be made to reflect more appropriate credit amounts. Mr. Wallis testified that the Commission should order UtiliCorp to reduce its Southern System gas costs by \$345,621 and its Northern System gas costs by \$27,654 to account for the fact that the firm captive customers of UtiliCorp did not receive a full credit for the total transportation charges collected from the end-user customers of UtiliCorp by UtiliCorp Energy Solutions, Inc. (UES). He stated that these customers pay the fixed reservation charges associated with the Williams Natural Gas Company (WNG) and Panhandle Eastern Pipe Line (PEPL) transportation contracts, and the pipeline capacity that was used by UES to deliver gas to UtiliCorp's end-user customers. Therefore, UtiliCorp's end users should receive credit for the full transportation charges.

According to Mr. Wallis, Staff believes these adjustments are necessary because: (1) UES is using UtiliCorp's firm transportation contracts to transport the gas supplies to the UtiliCorp end-user customers; (2) UES is buying the majority of UtiliCorp's released capacity; (3) the captive firm customers of UtiliCorp are ultimately paying the fixed reservation charges necessary in order to allow UES to transport the gas to the UtiliCorp end-user customers; (4) UES is providing a bundled sales service to the UtiliCorp end-user customers which includes charges for gas costs, transportation costs, taxes, and local distribution charges; and (5) UES is retaining, as profit, the difference between the transportation charges collected from UtiliCorp end-user customers and the released capacity payments (credits to UtiliCorp's captive customers) which it made to WNG and PEPL. Therefore, any profits UES makes on the transportation charges it collects from the UtiliCorp end-user customers should be flowed back to UtiliCorp's captive customers as compensation for fixed reservation charges.

Mr. Wallis testified that 94 percent of UtiliCorp's excess capacity on the Williams Natural Gas pipeline during the ACA period was purchased by UES, and that UES sells to 23 of UtiliCorp's 41 transportation end users. Mr. Wallis stated that these figures, combined with the fact that UES is providing a combined bill to these end users for the services supplied by both UES and UtiliCorp, indicate that there is a niche market for UES. Staff stated that UES is taking advantage of UtiliCorp's system assets, i.e. its contracts with pipelines and the pipeline capacity itself. Mr. Wallis testified that where a marketer is taking advantage of a niche market, the

capacity release rate is not the market rate but whatever the marketer is receiving for the capacity. Specifically, Staff's position is that UES should make no profit on the excess capacity it purchases from UtiliCorp and sells to UtiliCorp's transportation customers.

Mr. Wallis stated that UtiliCorp has made sales of excess capacity to other, nonaffiliated marketers who also get the advantage of UtiliCorp's pipeline contracts and reserved pipeline capacity. Mr. Wallis testified that he made a comparison of the rates UtiliCorp charged for excess capacity sold to nonaffiliated marketers with those charged to UES. He stated that the prices fell within a two-cent to 20-cent range, and that UES paid prices ranging from five to ten cents. Mr. Wallis also expressed a concern that UtiliCorp could be over-reserving capacity in order to benefit UES but presented no supporting evidence.

OPC supports Staff's position on the issue of capacity release credits.

UtiliCorp stated in the Hearing Memorandum that the appropriate basis for valuing released capacity is the market rate. UtiliCorp's witness, Mr. Warnock, testified the company determines the market price of released capacity at the time of transfer by consulting the interstate pipeline's electronic bulletin boards, and by calling other LDCs, marketers, or brokers to determine their sale or purchase prices for similar capacity. Mr. Warnock testified that UtiliCorp does not transfer capacity to UES at rates lower than it would offer to a nonaffiliate; "UES pays the prevailing market rate."

Mr. Warnock stated that, in addition to market price, capacity release prices are affected by whether the capacity is released subject to recall, and whether the capacity is on a constrained pipeline, i.e. one which has little or no uncommitted capacity available for sale. Capacity released subject to recall is less valuable to shippers because it may be interrupted. UtiliCorp releases capacity on both the WNG and PEPL pipelines subject to recall. Mr. Warnock testified that capacity is often recalled during cold weather to meet the needs of UtiliCorp's end users. Mr. Warnock stated that, although PEPL is usually a constrained pipeline, WNG normally has an abundance of capacity. Therefore, capacity released or transferred from the WNG pipeline has less value than that of constrained pipelines.

Mr. Warnock testified that, if UES is required to pay UtiliCorp an above-market rate for capacity releases, UES would probably purchase its capacity from another marketer, broker, or LDC, or purchase capacity directly from the pipeline. The result would be to remove UES as a viable competitor for UtiliCorp's excess capacity. According to Mr. Warnock the capacity ready for release is generally greater than the available market. There would be no guarantee that UtiliCorp could find another purchaser for its excess capacity. Mr. Warnock believes that if UES is forced out of the market for UtiliCorp's excess capacity, UtiliCorp's end users may actually receive lower capacity transfer credits than they are currently receiving due to a lack of buyers.

Mr. Warnock testified that UES is not receiving a competitive advantage by purchasing UtiliCorp's excess capacity. He stated that any nonaffiliated marketer

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could provide the same services and that UtiliCorp transfers capacity to nonaffiliates using the same market-determined rate as used for UES. Generally unused interstate pipeline capacity is transferred at less than the maximum or tariff rate of the regulated utility. A list of nonaffiliated marketers to whom UES releases capacity is included in Warnock's Direct Testimony as Schedule DWW-1.

Mr. Warnock also testified that there are nonaffiliated marketers providing rebundled sales services both to UtiliCorp's end users, and to customers of other Missouri LDCs.

**2. If the Commission determines that the appropriate release credits were not applied, should the release credits be applied beginning in the current docket for the 1994-1995 ACA period or prospectively beginning in the 1995-1996 ACA period?**

Staff's position is that the increased release credits in issue should be applied in the 1994-1995 ACA period. Staff also asks the Commission to review the release credits separately for each subsequent ACA period in the applicable ACA case. OPC supports Staff's position.

UtiliCorp's position is that any Commission decision to require that transfer credits be based on an above-market price must be prospective in effect. UtiliCorp argues that, because the Commission has not indicated before now that transfer credits would be treated in this way, either by rule or by order, it would be unfair to apply this approach to the 1994-1995 ACA period.

Mr. Warnock stated in his Direct Testimony that UtiliCorp's capacity transfer process has been used since October of 1993. UtiliCorp was not aware of Staff's objections to the process until its testimony was filed in this case. According to Mr. Warnock, requiring release credits at the maximum tariffed rate would reflect a new Commission policy and, if the Commission accepts Staff's position, all Missouri utilities should be given adequate notice.

**3. Should the Commission order UtiliCorp to reduce its Eastern District gas costs as a result of the company's overestimation of actual customer conversions for its Rolla service area (Eastern District)?**

Staff's witness, Mr. Wood, testified that the lower-than- projected growth rate in the Eastern district was the main factor in creating "excessive firm transportation cost per customer". Mr. Wood performed a peak day study to support his conclusion.

Mr. Lock testified on behalf of Staff that UtiliCorp's transportation contract with PEPL for its Eastern District exceeded its actual needs because actual customer growth was significantly lower than UtiliCorp projected. Staff made its own calculation of needed transportation capacity based on actual customer conversions, weather, and load factor analysis. Staff proposed that the difference between the contracted-for transportation capacity and Staff's calculated capacity amount be considered excess capacity and the associated expenses disallowed. Mr. Lock argued that UtiliCorp's contract with PEPL included a "ratcheting provision"

permitting the company to increase capacity as customers were added to the system and, therefore, there was no need to contract for "excess" capacity.

Mr. Lock stated that UtiliCorp's shareholders, not its customers, should bear any losses associated with the lower-than-projected customer conversions in the Rolla area. He testified that the Commission permitted UtiliCorp to expand into the Rolla area solely at the risk of UtiliCorp's shareholders. He quoted the Commission's order approving the certificate of convenience and necessity for this expansion, Case No. GA-94-325, which states "MPS bears most of the risk if it has underestimated the economic feasibility of the project."

OPC supports Staff's position.

Mr. Ono testified on behalf of UtiliCorp that its estimate of customer conversions in the Rolla area was appropriate but conversions were limited by obstacles UtiliCorp could not have foreseen. He argued that Staff's calculations were made after the fact and with information that was not available to UtiliCorp before beginning the expansion. Although Staff witness Wood argued that UtiliCorp should have used a peak day study and that its "customer conversion methodology" was inadequate, Mr. Ono stated that, if Staff and the company rely on the same information, Mr. Wood's peak day study would support UtiliCorp's calculation of capacity needs.

Mr. Wood countered that the similarities in the estimates using his method and UtiliCorp's were merely coincidental. Mr. Wood did admit that it is essential for an LDC to have enough capacity available to serve its human needs customers on the coldest days.

Mr. Ono stated that UtiliCorp entered into a contract for firm transportation capacity with PEPL based on the number of customers it expected to convert. The actual conversion rate was significantly lower, resulting in losses because UtiliCorp had contracted for capacity that went unused. Mr. Ono testified that the conversion rate was affected by factors beyond UtiliCorp's control. Specifically, the completion of the I-44 bore, estimated to take two weeks, took eight weeks. UtiliCorp's crews encountered much more rock than anticipated, an amount that Mr. Ono described as "unprecedented" in UtiliCorp's experience. In addition, weather conditions prevented construction for several weeks. Mr. Ono testified that UtiliCorp had no way of anticipating these delays and pointed out that, in the Salem project, conversions are running "well ahead" of UtiliCorp's expectations. Mr. Ono stated that the conversion rate has averaged more than 90 percent in eight other recent natural gas expansion projects.

Mr. Ono admitted that the PEPL contract included a ratcheting provision that would allow the company to increase capacity as demand increased. He stated that the inclusion of this provision made the contract more valuable but also testified at the hearing that the contract did not include a corresponding provision allowing it to decrease capacity if demand was less than anticipated.

Mr. Ono testified that the consumption figures that were used for each customer class in calculating capacity needs were approved in Case No. GR-94-325 [*sic*].

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UtiliCorp's position, set out in the Hearing Memorandum, is that its costs in providing service to the Rolla service area were reasonably incurred and the company should be allowed to include them in its rates. UtiliCorp argues that this would not be inconsistent with the Commission's order in Case No. GA-94-325 because, although UtiliCorp's shareholders bear the risk that expansion into Rolla will not be profitable, they need not bear the risk for each and every otherwise prudent decision that turns out to be improvident in retrospect.

**B. DOCUMENTATION**

**1. Should the Commission order UtiliCorp to provide the Staff access to (1) a variety of information related to UtiliCorp's marketing affiliate UES, (2) methodology for pool and non-pool gas, (3) a variety of information related to UtiliCorp's gas supply division, and (4) documentation and rationale with regard to UtiliCorp's allocation methodology for transportation costs to its Northern, Southern, and Eastern Districts?**

Staff's witness, Mr. Wallis, testified that the Commission should order UtiliCorp to provide Staff with the following in all future ACA period reviews: (1) access to all contracts between UES and UtiliCorp and/or MPS with regard to gas supplies, all contracts between UES and WNG and/or PEPL (including corresponding invoices), and a schedule which shows UES's monthly use of system capacity and storage agreements and use of system gas commodity and related costs; (2) detailed documentation of UtiliCorp's allocation methodology and rationale with regard to both pool and non-pool gas supplies; (3) access to all UtiliCorp United Gas Supply Services (UtiliCorp's gas supply division) documents related to storage accounting, operations, pricing, and any other documentation with regard to future ACA filings; and (4) detailed, referenced, and indexed documentation and rationale of its allocation methodology with regard to the transportation costs being allocated to the Northern, Southern, and Eastern Districts of MPS. Mr. Wallis stated that Commission action is necessary to ensure the provision of this information because Staff had difficulty obtaining UES contracts and pricing data during its audit of UtiliCorp's 1994-1995 ACA period. Specifically, Mr. Wallis testified that Staff had problems in obtaining UES contracts through the discovery process. He also testified that Staff had difficulty obtaining pricing data, and documentation of UtiliCorp's allocation methodology regarding pool and non-pool gas supplies, transportation costs, and storage supplies. Mr. Wallis argued on behalf of Staff that these are basic informational requirements for Staff to conduct a thorough audit of future ACA filings.

OPC supports Staff's position.

UtiliCorp stated in the Hearing Memorandum that, although it has reservations about the Staff's authority to obtain information belonging to its unregulated affiliates, it has provided the information requested in regard to the 1994-1995 ACA period. Mr. Ono testified that UtiliCorp is always willing to provide Staff with the information it needs to perform its oversight function. He stated that the

information Staff has requested is generally reasonable and could be supplied in the future. However, Mr. Ono testified that UtiliCorp might not be able to provide the information until the 1997-98 ACA period because the company may not be maintaining its records in a format Staff would find usable.

**2. Should the Commission order UtiliCorp to document its bidding process for spot market gas supplies?**

Staff takes the position that the Commission should order UtiliCorp to document its bidding process for spot market gas supplies for all future ACA periods. Mr. Lock testified that UtiliCorp did not provide written documentation of its bid process for spot supplies for the 1994-1995 or 1995-1996 ACA periods. He stated that proper documentation is essential in determining the lowest spot price and for evaluating the supplies which are ultimately selected by UtiliCorp. Staff stated that proper documentation would include bids solicited from various suppliers, bids received, bids selected, and the reasons for selection of any particular bid.

OPC supports Staff's position.

UtiliCorp stated in the Hearing Memorandum that it is not opposed to providing written documentation of its bidding process for spot market gas supplies. However, UtiliCorp stated that the documentation it maintains is apparently not satisfactory to the Staff. UtiliCorp is willing to modify its documentation to provide additional information but asks the Commission to require Staff to specify exactly what information it needs. UtiliCorp also pointed out that it would probably be unable to provide this additional information before the 1997-98 ACA review.

**3. Should the Commission order UtiliCorp to provide a variety of information related to reliability, such as send-out equations by district, peak day projections, monthly load projections, pipeline transportation/storage capacity, gas supply resources, and flexibility of supply and transportation provided by UtiliCorp?**

Staff maintains that the Commission should require UtiliCorp to provide certain reliability related information (as set out in Wood Direct Testimony, Schedule 4) for the 1996-1997 ACA period for audit purposes, and for the 1997-1998 ACA period for reliability purposes. Mr. Wood testified that Staff needs this information in order to determine UtiliCorp's system reliability. Mr. Wood stated that Staff is concerned about UtiliCorp's apparent shift toward dependence upon spot market purchases and deliveries to secondary delivery points to meet the demands of human needs customers in midwinter. In addition, Staff is concerned about UtiliCorp's capability to redirect or divert a portion of supplies and/or transportation capacity allocated to serve one particular customer to a different customer, or LDC, to meet unexpected demands.

OPC supports Staff's position.

UtiliCorp agrees that the information Staff has requested is generally reasonable and UtiliCorp would be willing to provide it in the future. However, Staff has asked



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that it be provided beginning with the 1996-97 ACA period and some of this information may not be available for that period. UtiliCorp would be willing to begin providing the information in the 1997-98 ACA review.

**C. TARIFF LANGUAGE**

**1. Should the Commission adopt agency billing requirements for situations where UtiliCorp's transportation customers use a marketer as their agent for purchasing gas? If so, what requirements should be adopted?**

Staff believes the Commission should order UtiliCorp to add the following language relating to billing requirements to its tariff:

In a situation where a marketer is an agent for the end-use customer (transporter), the Company may send the agent (marketer) the bill for the customer's local distribution service only when it has received an agency agreement between the customer and the customer's agent specifically requesting such. In all such agency billing situations, the Company will additionally send a copy of the detailed bill to its end-use customer. (Hubbs Direct testimony, pages 2-3.)

According to Mr. Hubbs, Staff proposed this language in order to ensure that the company has an executed agreement from its customer to send its bill to the marketer. Staff believes that, without an explicit agreement, UtiliCorp could be violating provisions of its tariff found on Revised Sheets 21 and 22. Sheet 21 states that "Missouri Public Service will render bills monthly for transportation service furnished the previous monthly period which may include billings from third-party transporters delivering gas to Missouri Public Service on the customer's behalf." Staff's position is that the tariff language would have to be modified to permit UtiliCorp to bill a marketer instead of directly the end user. When asked if the tariff would "definitely need modification" to allow for only one bill being sent, Mr. Hubbs testified that "[i]t is kind of gray since it does not specifically address the agency type of agreements."

Staff's proposed language is also intended to ensure that the customer using a marketer is fully aware of the detail and the total amount of the company's monthly charges. Mr. Hubbs stated in his Direct Testimony that this information is necessary to assure the customer that the marketer is not reselling the transportation service at a profit. Mr. Hubbs testified at the hearing that he had no evidence to indicate that UtiliCorp is currently engaging in this type of conduct. Staff later revised its position to permit the end-user customer to forgo receiving a detailed bill from UtiliCorp by making a written request to UtiliCorp and identifying the agent to whom the bill should be sent.

OPC supports Staff's position but proposed some changes. In his Rebuttal Testimony Mr. Trippensee stated that the Commission should put utilities on notice that affiliate transactions will not be allowed where they are detrimental to ratepayers.

UtiliCorp's position is that the standards proposed by Staff are matters of regulatory policy. UtiliCorp's witness, Mr. Jurek, argued that, since Staff intends to eventually recommend that these standards apply to every Missouri LDC, they should be addressed in a generic proceeding with general applicability rather than a company-specific gas cost review case.

UtiliCorp believes having rules that apply only to UtiliCorp would place it and its subsidiaries at a competitive disadvantage. Specifically, Mr. Jurek stated that the company would be forced to incur expenses in order to comply with the tariff language that are not required of other companies, such as mailing, timekeeping, bill tracking, and computer time.

Mr. Jurek argued that implementing this tariff language would inappropriately interfere with the contractual relationship between customer and agent and would thwart a customer's decision to consolidate administrative and natural gas purchasing activities. He stated that there are no measurable benefits flowing from the imposition of these requirements that would outweigh the incremental expense to UtiliCorp, and the confusion for customers that would result. However, Mr. Jurek also testified that UtiliCorp had not attempted to quantify the costs associated with Staff's proposal.

**2. Should the Commission adopt the standards of conduct for transactions between UtiliCorp and its marketing affiliates?**

Staff recommends that the Commission order UtiliCorp to place in its tariff the Standards of Conduct set out in the Direct Testimony of Mr. Hubbs. Staff believes that including this tariff language will help ensure that UtiliCorp and all transporting parties are aware of the standards applicable to UtiliCorp when participating in transactions with marketing affiliates and their customers. The standards would also enable the Commission to obtain the necessary documentation to determine that transactions with affiliates have been consummated in a prudent manner and on a nondiscriminatory basis.

Staff offered no evidence of any conduct of UtiliCorp amounting to undue discrimination in favor of, or preferential treatment toward, UES. Mr. Hubbs stated in his Surrebuttal Testimony that he had given a deposition setting out this type of evidence. However, the deposition was not offered into the record.

Mr. Hubbs stated in his Surrebuttal Testimony that he intends to ask the Commission to impose "the affiliated standards in all cases where gas marketing affiliates can exploit utility assets." He stated at the hearing that a generic proceeding would be preferable to imposing standards of conduct on a case-by-case basis. Mr. Hubbs testified that one of his reasons for proposing the Standards of Conduct for UtiliCorp was because the Commission had not taken action in the generic docket concerning affiliate transactions for energy providers that was pending at the time of hearing. Mr. Hubbs also testified that UtiliCorp was not unique and that any LDC with a marketing affiliate should be subject to the same rules regarding transactions with affiliates.

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OPC agrees that the Commission should order UtiliCorp to place Standards of Conduct in its tariff. OPC submitted its own version of proposed tariff language in the Rebuttal Testimony of Mr. Trippensee. Mr. Trippensee's proposal includes provisions regarding use of the regulated utility's brand name recognition by an affiliate, and requires development of a cost allocations manual. (Trippensee Schedule RWT-2, p. 4M, p. 7E).

UtiliCorp's position is that the standards proposed by Staff are matters of regulatory policy. Since Staff intends to eventually recommend that these standards apply to every Missouri LDC, they should be addressed in a generic proceeding with general applicability rather than a company-specific gas cost review case. UtiliCorp argues that there is no evidence of any UtiliCorp conduct that would support the implementation of these standards and justify the additional costs associated with compliance.

#### Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

#### **Capacity Release Credits**

The Commission finds that UtiliCorp's captive firm customers received the appropriate capacity release credits during the 1994-95 ACA period. UtiliCorp presented persuasive testimony demonstrating that its sales of released capacity to UES were made at market rate. Staff's testimony corroborated UtiliCorp's assertion. Staff failed to demonstrate persuasively any competitive advantage accruing to UES as a result of these sales, or any improper affiliate transactions.

#### **Effects of Customer Conversion Shortfall**

The Commission finds that UtiliCorp's overestimation of actual customer conversions for its Eastern District was primarily a result of construction delays beyond the company's control. The Commission considered UtiliCorp's projected conversion rate in GA-95-324 and made a finding that UtiliCorp's projection figures were "as reasonable" as Staff's lower projection. Evidence presented by the company and Staff demonstrate that a peak day study, as proposed by Staff, based on a similar number of expected conversions would yield capacity needs similar to those relied upon by the company. The evidence does not support Staff's proposed adjustment to UtiliCorp's gas costs for the Eastern District.

Staff's argument that the Commission intended UtiliCorp's expansion into the Rolla service area to be at the risk of its shareholders is supported in part by the language of the Commission's order in GA-94-325. However, with one exception the Commission did not specify what costs of the expansion would be attributed to

shareholders rather than ratepayers. The Commission permitted UtiliCorp a variance from the rule prohibiting promotional practices by allowing UtiliCorp to provide a maximum of \$300.00 of free conversion, installation, and recalibration services per customer, on the customer's side of the meter. The Commission stated that "any remaining customer conversion costs paid by the Company should be appropriately borne by the shareholders, and will be accounted for below the line." This limited language, in light of the Commission's finding favoring UtiliCorp's projected customer conversion rate, does not support Staff's position that increased gas costs resulting from the lower than expected customer conversions should be disallowed in UtiliCorp's ACA filing.

#### **Documentation**

The Commission finds that UtiliCorp has agreed to provide the documentation requested by Staff regarding its relationship with UES, its spot gas purchases, and system reliability. Because the Commission's decision in this case has been considerably delayed, it is clear that UtiliCorp cannot be ordered here to provide the documentation for the 1996-97 ACA period. The Commission will direct UtiliCorp to provide the type of documentation described by Staff, if and when specifically requested by Staff, beginning in the 1997-98 ACA period.

#### **Tariff Language**

**Agency Relationships.** The Commission finds that Staff failed to adduce evidence demonstrating a need for the proposed tariff language regarding agency billing relationships. Staff alleged that when a marketer bills an end user for capacity purchased from UtiliCorp, it constitutes a violation of UtiliCorp's existing tariff. However, Mr. Hubbs testified at the hearing that whether this situation is a tariff violation is "kind of gray." Given the lack of evidence of customer dissatisfaction with this arrangement, and the testimony by UtiliCorp regarding the advantage that a single bill provides to customers who use a marketing agent, the Commission will not require UtiliCorp to include Staff's proposed tariff language regarding agency billing situations.

**Standards of Conduct.** The Commission finds that Staff has failed to demonstrate any improper affiliate transactions between UtiliCorp and UES. Absent such a showing, and in light of the conclusion of law below, the Commission finds it would be inappropriate to impose the tariffed standards of conduct on UtiliCorp in the context of this ACA review.

#### **Other Issues**

The Commission finds that UtiliCorp's filing of a 25-page reply brief does not prejudice other parties to the case and was not done with the intention of thwarting the Commission's procedural order.

The Commission finds that UtiliCorp agreed that the reallocation proposed by Staff of \$95,901 in gas costs from the Northern System to the Eastern System is appropriate.

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#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

UtiliCorp is a public utility engaged in the provision of natural gas and electric service in the State of Missouri and is subject to Commission jurisdiction under Chapters 386 and 393 of the Revised Statutes of Missouri 1994. The Commission has authority to prohibit implementation of gas service rates that are unjust or unreasonable pursuant to Section 393.130.

Orders of the Commission must be based upon competent and substantial evidence on the record. § 536.140, RSMo 1994. Based upon its findings of fact, the Commission concludes that the adjustments proposed by Staff to UtiliCorp's gas costs for the 1994-95 ACA period, and disputed by UtiliCorp, are not supported by substantial and competent evidence and shall not be implemented. For the same reason, the Commission concludes that the proposed tariff language regarding agency billing situations shall not be implemented.

Staff and OPC have proposed that the Commission impose upon UtiliCorp a set of Standards of Conduct for Affiliate Transactions by means of tariff language. Staff has admitted that it intends to propose that the same standards be imposed upon every Missouri gas local distribution company with a marketing affiliate, and admitted that such standards would be better established in a generic proceeding of general applicability. Neither Staff nor OPC offered persuasive evidence demonstrating that UtiliCorp has engaged in inappropriate affiliate transactions or other conduct that would require the imposition of this special tariff language. Further, the Commission may not issue a ruling that would have general applicability in the context of a contested case involving only one, or some, of the companies that would be affected. State of Missouri, ex rel. Beaufort Transfer Company, et al. v. Public Service Commission of Missouri, 610 S.W.2d 96 (Mo. App. 1990). Absent convincing evidence of improper conduct by UtiliCorp, the Commission concludes that the Staff's proposed Standards of Conduct will not be implemented.

#### *IT IS THEREFORE ORDERED:*

1. That Revised Exhibits 18 and 19 and late-filed Exhibit 24, filed by UtiliCorp United Inc. d/b/a Missouri Public Service on August 13, 1997, are admitted into the record.
2. That the Motion to Strike Portion of Brief Not in Compliance with Commission Order filed by the Commission Staff on October 8, 1997, is denied.
3. That the Motion for Leave to File Reply Brief filed by UtiliCorp on October 9, 1997, is granted.
4. That the Motion to Defer Capacity Release Issues filed by UtiliCorp on March 13, 1998, is denied as moot.
5. That UtiliCorp's Eastern System gas costs balance should be increased by \$95,901 and its Northern System balance decreased by the same amount by agreement of the parties.

6. That Staff's recommendation to reduce UtiliCorp's Southern System gas costs by \$345,621 and its Northern System gas costs by \$27,654 is denied.
7. That Staff's recommendation that UtiliCorp be required to bill its own end-user transportation customers for LDC charges is denied.
8. That Staff's recommendation that UtiliCorp be required to provide specified documentation beginning with the 1996-97 ACA period is denied. UtiliCorp has agreed to, and shall, provide the described documentation as specifically requested by Staff beginning with the 1997-98 ACA period.
9. That this Report and Order shall become effective on October 6, 1998.

Crumpton, Drainer and Murray, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994. Schemenauer, C., not participating. Lumpe, Ch., absent.

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**In the Matter of the Proposed Tariff of Southwestern Bell Telephone Company on Telecommunications Revenue Interactive Management System (TRIMS)**

*Case No. TT-98-97*  
*Decided September 29, 1998*

**Telecommunications § 33.** The Commission found that the proposal by Staff and Public Counsel that the Commission prohibit Southwest Bell Telephone Company from disconnecting end users from the local network for nonpayment of toll charges is inappropriate in the context of this case. The Commission found that, where a customer is direct-billed by the customer's presubscribed interexchange carrier (IXC), Southwestern Bell Telephone Company should not restrict toll traffic routed through that IXC. However, an IXC must identify its direct-billed customers in order to enable Southwestern Bell Telephone Company to exempt that IXC's charges from the TRIMS monitoring process. The Commission found that the process of using pseudo rates proposed by Southwestern Bell Telephone Company is a reasonable method of estimating toll charges. The Commission found that Southwestern Bell Telephone Company should not be allowed to block toll-restricted customers from operator services and local directory assistance. The Commission found that the TRIMS proposal, as filed, did not conflict with existing Southwestern Bell Telephone Company tariff provisions regarding disconnection. The Commission found that Southwestern Bell Telephone Company's proposed use of PIN numbers is reasonable as long as customers are notified that the alternative is available. The Commission found that, although the TRIMS proposal generally offers benefits in controlling uncollectibles and helping end users manage their toll bills, it was not just, reasonable, and in the public interest as filed; therefore, the proposed tariff was rejected.

**APPEARANCES**

*Diana J. Harter*, Attorney, and *Anthony K. Conroy*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3516, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

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*Leland B. Curtis*, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for: MCI Telecommunications Corporation and MCI metro Access Transmission Services, Inc.

*Kenneth A. Schiffman*, Attorney, Sprint Communications Company L.P., 8140 Ward Parkway, 5E, Kansas City, Missouri 64114, for Sprint Communications Company L.P.

*Michael F. Dandino*, Senior Public Counsel, and *John B. Coffman*, Assistant Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Penny G. Baker*, Deputy General Counsel, and *Marc Poston*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE:

L. Anne Wickliffe, Deputy Chief.

## REPORT AND ORDER

### Procedural History

Southwestern Bell Telephone Company (SWBT) filed proposed tariff sheets on August 14, 1997, designed to revise its P.S.C. Mo.-No. 26, Long Distance Message Telecommunications Services Tariff (File No. 9800131), to introduce the Telecommunications Revenue Interactive Management System (TRIMS). According to SWBT, TRIMS is an automatic system to assist residential consumers in avoiding the accumulation of unpaid toll charges while providing continued access to local service. TRIMS will achieve this goal by monitoring toll activity on "at-risk" customer accounts and restrict toll calls once a customer has reached a predetermined limit. The proposed tariffs carried effective dates of August 18 and September 18, 1997.

The Office of the Public Counsel (OPC) filed a Motion to Suspend on September 2, 1997, arguing that the Commission's approval of the TRIMS tariff would result in a major deviation from past policy which should be carefully considered. OPC argued that SWBT would be evaluating customers' credit worthiness using unnamed factors, that the toll limit would be established unilaterally by SWBT with no process for the customer to dispute the limit, that the TRIMS proposal would constitute an invasion of privacy, and that the proposal would limit rather than enhance access to the public telecommunications network.

SWBT extended the effective date of the proposed tariff sheets and filed a response to OPC's motion on September 11, 1997. SWBT stated that OPC raised identical arguments in Case No. TT-97-420 regarding SWBT's tariff on application scoring and advanced payments. The Commission approved SWBT's tariff in that case. SWBT argues that the TRIMS proposal is an improvement over its current

practice because it permits high-risk customers to maintain access to the public switched telecommunications network. The current practice disconnects customers who might be able to retain their services under the TRIMS proposal.

MCI Telecommunications Corporation (MCI) filed an Application to Intervene and Suggestions Opposing Public Counsel's Motion to Suspend on September 18, 1997. MCI asked to intervene on the grounds that the Commission's decision in the TRIMS case may affect MCI's interests as a provider of toll telecommunications services. MCI stated that it supported the proposed tariff and that TRIMS is an appropriate method of reducing toll fraud. MCI suggested that the Commission allow the tariffs to take effect and study the TRIMS program in action rather than examining it in theory.

SWBT further extended the effective date of the proposed tariff sheets, ultimately setting an effective date of December 12, 1997. In the meantime, MCI filed a Motion for Clarification on October 30, 1997, stating that MCI had discovered that the TRIMS system would impose toll restrictions on MCI's direct billed customers and this result is unacceptable to MCI. MCI asked the Commission to approve the tariff but include in its order a direction that SWBT should not apply toll restrictions on accounts for which it does not perform the toll billing, similar to the order issued by the Texas Public Utility Commission. SWBT responded on November 7, 1997, that end users who may be direct-billed by MCI could be affected and that, to avoid this result, MCI would have to provide SWBT with a list of its direct-billed customers. MCI responded on November 13 that it objected to SWBT's application of toll monitoring and asked the Commission to require SWBT to limit the application of TRIMS to accounts billed by SWBT, or reject the proposed tariffs altogether.

The Staff of the Commission (Staff) filed a Motion to Suspend Tariff on December 5, 1997. Staff's motion stated that the TRIMS proposal is consistent with current telephone company tariffs and Commission rules. However, Staff believes that disconnection for nonpayment of any undisputed charge is no longer appropriate. Staff believes customers should only be disconnected from the local network if they fail to pay basic local service charges, and that toll service and basic local service should be viewed as separate services. Staff asked the Commission to suspend SWBT's proposed tariff.

The Commission issued an Order on December 10 suspending the proposed tariff until April 9, 1998. In the same order the Commission granted MCI's application to intervene and established an intervention deadline of December 29. The parties met in a prehearing conference on December 30, 1997. SWBT filed a Motion to Establish Procedural Schedule on January 23, 1998, and filed a Motion for Protective Order which was granted on February 3. The Commission further suspended the proposed tariff sheets to October 9, 1998, and established a procedural schedule by agreement of the parties which called for an evidentiary hearing on April 23-24, 1998. The parties filed testimony, and filed a Hearing Memorandum on April 17.



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Sprint Communications Company L.P. (Sprint) filed an Application for Intervention Out of Time on April 14. Sprint's application stated that, although it initially supported SWBT's TRIMS proposal, problems that have arisen in the implementation of TRIMS in other states have resulted in complaints from Sprint's direct billed end users. Sprint stated that it was willing to accept the record and not file additional testimony, but wished to participate in the hearing and file a brief. SWBT filed a response to Sprint's application on April 15, objecting to the late attempt to intervene. SWBT objected that, although Sprint stated that it would accept the record before the Commission, its application pleading was filled with allegations amounting to "testimony." SWBT asked the Commission to deny the application to intervene and strike paragraphs 4, 8, 9, 10, 13 and 15 of its pleading. Sprint filed a reply on May 1.

The Commission conducted a hearing on April 23 and 24 and denied on the record Sprint's Application for Intervention Out of Time or, in the Alternative, Application for Participation Without Intervention. The Commission granted Sprint ten days to respond to SWBT's motion to strike. Sprint filed its response on May 1. After the hearing was concluded, the parties filed briefs.

#### **Pending Motions**

##### **1. SWBT's Motion to Strike Materials from Sprint's Application to Intervene**

Sprint filed an untimely application to intervene approximately eight days before the first scheduled day of hearing. In its application Sprint made certain factual allegations. SWBT filed a response on April 15, 1998, asking the Commission to strike paragraphs 4, 8, 9, 10, 13, and 15 of Sprint's application from the record. SWBT stated that the surplus information contained in Sprint's application is "inaccurate, misleading and internally inconsistent." SWBT argued that, although Sprint stated in its motion that it would accept the record already filed in the case, Sprint had attempted to file its positions by making factual allegations in its application to intervene. SWBT argued that allowing Sprint's allegations to stand would constitute introduction by Sprint of testimony which SWBT had no right to rebut and to which it had no opportunity to respond with discovery requests.

Sprint filed its reply on May 1 arguing that SWBT's motion to strike cited no order, rules, statutes, or cases to support its position. Sprint argued that, because Sprint's motion to intervene had been denied, the motion to strike was moot. Sprint did not introduce evidence at the hearing and a mere pleading is not evidence on which the Commission may base a decision.

Sprint also argued that making the allegations in its application was necessary to comply with Commission rule 4 CSR 240-2.075(5) which requires an applicant to provide full disclosure of its interests, a full statement of its position, and contentions relevant to the issues in the case. Sprint asked the Commission to deny SWBT's motion to strike.

The Commission has reviewed the pleadings filed on this issue and finds that SWBT's Motion to Strike is moot since Sprint was denied intervention and filed no evidence in the case. Pleadings do not constitute evidence, and therefore the allegations made by Sprint cannot prejudice SWBT as no evidence was presented to support them.

**2. SWBT's Motion to Strike Opening Statement by MCI**

At the close of the hearing SWBT moved to strike the portion of MCI's opening statement alleging that MCI will only do direct billing for high-volume customers in the state of Missouri. SWBT made its motion on the grounds that MCI presented no evidence to support the statement. SWBT argued that the statement was prejudicial to SWBT because, if MCI were only doing direct billing for a small number of high-volume residential customers, SWBT would be able to determine who those customers were and eliminate them from the TRIMS system. However, if MCI does direct billing for low-usage customers, it would be much more difficult for SWBT to determine the status of those customers.

MCI responded that the portions of the opening statement to which SWBT objects should not be overruled because they do not constitute evidence.

Allegations made in opening statements do not constitute evidence because they are not sworn testimony. However, it is improper for a party to make allegations in an opening statement that it has no intention to prove. Since MCI had not filed prefiled testimony and did not call a witness to testify at the hearing, the allegations that MCI direct bills only high-volume customers constitutes unsworn hearsay and was improperly included in the opening statement. Accordingly, the references in the opening statement to MCI's intent to direct bill only high-volume customers shall be stricken.

**Discussion**

SWBT's witness, Ms. Valentine, described TRIMS as a newly developed collection tool designed to manage the problem of rising uncollectible revenues. She defined uncollectible revenues as billed revenues which are ultimately written off as bad debt after collection activities have been exhausted. The TRIMS program is designed for residential customers only and will not be applied to business accounts. Specifically, SWBT has two account groups that it considers at risk for nonpayment, Account Groups 1 and 4. Account Group 1 includes customers who have had service for less than a year, and customers without verifiable prior service with SWBT or another local exchange company (LEC) and little or no commercial credit history. Account Group 4 includes: a) customers who have previously had service with SWBT and been disconnected for nonpayment; and b) existing customers whose service has been suspended twice in the previous 12 months. Ms. Valentine testified that customers in these two account groups generate more than 62.5 percent of SWBT's residential uncollectibles though they represent less than 10 percent of the total residential customer base.

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SWBT has a voluntary program for toll blocking. Customers may contact SWBT and ask for this service which will be provided for a charge. The TRIMS proposal is not voluntary; customers who are classified in Account Group 1 or 4 will be placed on TRIMS monitoring and advised by letter of their toll limit. SWBT will apply a \$200 limit to all TRIMS customers, although the \$200 is not specified in the tariff. When TRIMS-monitored customers approach \$200 in toll charges, they will receive a recorded message advising them of the toll limitation and that their toll use will be automatically restricted once the limitation is exceeded. A TRIMS customer who pays all charges with no service suspension for 12 consecutive months would be reclassified and automatically removed from TRIMS monitoring. Customers who are removed from the program will be so advised by letter.

SWBT arrived at the \$200 toll restriction figure on the basis of its experience in other states. Ms. Valentine testified that \$200 is a reasonable limit because the average monthly toll usage for Missouri residential customers is less than \$50. Customers have no option about the toll limit, i.e. the same limit will be applied to all TRIMS customers and there is no process available for having an individual customer's limit set at some other figure.

However, SWBT will maintain a TRIMS service center that is available 24 hours a day, seven days a week to address customer concerns. The TRIMS tariff language includes a provision that permits a service representative to override the toll restriction on a customer's account in the event of a billing dispute or an emergency. See Original Sheet 13.02, Section 1.2.16.H. Ms. Valentine testified that a customer can appeal to have a toll restriction lifted for 72 hours where an emergency situation justifies special treatment.

Ms. Valentine stated that the initial customer letter gives information on the availability of the emergency appeal process. She stated that service representatives are trained to evaluate requests for relief for emergency situations. TRIMS service representatives receive three to four days of special training in addition to the 17 weeks of training required for all service representatives. Ms. Valentine testified that a customer's toll use would be restricted within two hours after the required information is received through the switch. A customer's account can also be unrestricted within two hours.

SWBT would implement TRIMS by monitoring customers who are considered at risk for nonpayment, i.e., customers in Account Groups 1 and 4. Each customer placed in the TRIMS program will be advised in an initial letter that a limit would be placed on the customer's toll use. When the TRIMS customer's account reaches the toll limit, which SWBT proposes to set at \$200, the customer will receive a recorded message advising that the toll limit is near. Once the customer's account has exceeded the toll limit, toll use will be automatically restricted. The customer will still be able to make local calls, dial 911, and make toll-free calls to 800 or 888 numbers. In addition, customers with a handicapped designation can be excluded from TRIMS monitoring.

Ms. Valentine testified that currently, in order to be excluded from monitoring, handicapped customers would have to identify themselves to SWBT.

Ms. Valentine testified that, despite SWBT's efforts to reduce uncollectibles by permitting deferred payments and entering into special payment agreements, its uncollectibles continue to increase. She stated that the TRIMS program has been implemented successfully in other states. At the time of hearing TRIMS was in effect in Kansas on a trial basis; the program started with a trial period in Oklahoma and was converted to a permanent program.

**Contested Issues**

**A. Under existing rules, should the Commission require SWBT to keep customers connected to the local telephone network as long as they pay all non-toll-related charges in a timely manner?**

Staff's witness, Mr. Van Eschen, stated that SWBT's TRIMS program could provide benefits to SWBT and to customers. However, he stated that more could be done to keep customers on the network. Mr. Van Eschen recommends that the TRIMS tariff be approved but that all customer payments be first applied to local telephone charges and that, as long as the customer pays all non-toll-related charges, the customer should continue to have access to the local telephone network. Mr. Van Eschen proposes that existing company practices and tariffs, and current Commission rules, be changed to provide that all payments be applied first to basic local services and that customers not be disconnected for failure to pay toll or long distance charges.

Mr. Van Eschen admitted on cross-examination that Commission rule 4 CSR 240-33.070 permits SWBT and other local exchange companies to disconnect an end user's local service for failure to pay toll charges. He also admitted that Section 17.6 of SWBT's General Exchange Tariff permits SWBT to disconnect local service for failure to pay toll or interstate long distance charges. Mr. Van Eschen testified that, if the Commission were to accept Staff's position, other portions of SWBT's tariff would have to be revised to be consistent with this new limitation.

Mr. Van Eschen stated in rebuttal testimony that he realized that his proposal "goes beyond current expectations or requirements of local telephone companies and . . . may . . . go beyond the scope of this case." He stated that Staff expected the proposal to be addressed in a rulemaking docket and that, should the Commission wish to reserve judgment on this issue, SWBT's TRIMS proposal should be approved as submitted.

OPC's witness, Ms. Meisenheimer, agreed with Staff, arguing that local and toll are distinct services and SWBT should not be permitted to deny customer access to local services based on failure to pay toll charges. Ms. Meisenheimer stated that this constitutes an unfair exercise of monopoly power. Although Ms. Meisenheimer relied upon a report prepared by Barbara Alexander, she stated that she was only familiar with portions of the report.

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Ms. Valentine testified on behalf of SWBT that the TRIMS process does not require prepayment of toll but that payment is required only when a customer has reached his toll limit, has been toll-restricted, and wants toll restored. She testified that local calling is not interrupted during a TRIMS restriction and that implementation of the program is not an attempt by SWBT to unfairly use its monopoly power. Approval of the TRIMS proposal would not change SWBT's disconnection procedures; a person would not be disconnected from the local network sooner as a result of being assigned to TRIMS monitoring. Both Ms. Valentine and Mr. Rudloff testified that this tariff filing is not the appropriate forum in which to seek changes in Commission rules.

Mr. Rudloff testified that implementing Mr. Van Eschen's and Ms. Meisenheimer's proposal would be a major change to the telecommunications industry that goes well beyond the scope of this tariff filing. He testified that prohibiting SWBT from disconnecting customers for nonpayment of toll charges could significantly increase the level of uncollectibles overall. Mr. Rudloff also stated that this change could impact the revenue streams that local exchange carriers receive from billing and collection services provided to toll and long distance carriers.

**B. Should the Commission prohibit SWBT from imposing toll restrictions through its TRIMS system upon customers of other companies who are not billed by SWBT pursuant to a billing and collection contract but rather are directly billed by other companies?**

Staff, OPC, and MCI all take the position that SWBT should not be allowed to restrict toll for customers who are direct billed by their presubscribed interexchange carrier (IXC). Staff argues that the Commission should not permit SWBT to impose toll restrictions on customers being billed by a company other than SWBT because SWBT bears no financial risk for those customers' uncollectibles. Staff suggested that TRIMS be rejected until SWBT configure its billing system in such a way that it is restricting only customers whose failure to pay could affect its income.

MCI expressed its concern that, under TRIMS, SWBT would provide no notice to MCI that one of its direct billed customers was being toll restricted. Ms. Valentine admitted on cross-examination that under certain circumstances an MCI direct billed customer could be asked to pay money to both SWBT and MCI. For instance, if a direct billed customer were toll restricted under the TRIMS program and required to make payment to SWBT in order to remove the toll restriction, the same customer could subsequently receive a bill from MCI for the same toll charges. Ms. Valentine agreed that such a situation could cause customer irritation. MCI argued that the TRIMS tariff should not be approved until it is revised so that SWBT does not have the ability to toll restrict, and demand payment from, MCI's direct-billed customers without notice to MCI. MCI argued that these are not SWBT's customers and SWBT has no financial risk in any uncollectible revenues these customers generate.

SWBT's witness, Ms. Valentine, testified that SWBT will only apply the TRIMS program to toll charges involving IXCs with billing and collection contracts with Southwestern Bell, and SWBT's own toll charges. According to Ms. Valentine, SWBT takes the responsibility, under its B&C contracts, to collect toll charges but its liability for those charges is subject to recourse. That is, where a customer fails to pay toll charges the toll carrier is ultimately responsible for reimbursing SWBT for uncollected revenues. So, other than SWBT's own toll, SWBT is not at risk for uncollectible toll charges.

However, Ms. Valentine testified that, under its billing and collection (B&C) contracts, the IXCs have the right to audit SWBT's effectiveness in collecting toll charges. The IXCs' concern is that SWBT keep uncollectibles at an acceptable level. She also testified that MCI has filed claims against SWBT based on its B&C contracts and that other IXCs have audited the effectiveness of SWBT's collection efforts. She stated that, if an IXC requests that SWBT not monitor any of its customers' usage, SWBT would need some written agreement that would absolve SWBT of liability under the B&C contract for rising uncollectibles.

Ms. Valentine, testified that if MCI or any other carrier who direct-bills a customer, will advise SWBT of who the end user is, SWBT will mark the account and not monitor the toll routed through that particular IXC. She stated that this process would not take the customer out of the TRIMS program because the customer may be using SWBT's toll, or toll provided by other IXCs on a direct dial or dial around basis.

Ms. Valentine stated that SWBT has offered not to monitor MCI toll for MCI direct billed customers if MCI will provide a list of those customers. MCI has refused to provide that information. MCI argues that SWBT should compare the monthly electronic transmission identifying customers and toll usage with the total population of MCI PICed customers and deduce which are the direct billed customers. According to SWBT, the problem with this approach is that SWBT does not receive the customer identification until the end of the month. Making the proposed comparison would identify who MCI had direct-billed for the prior month, but would not necessarily be accurate in identifying which customers would be direct-billed in the following month. Since TRIMS monitors toll as it is being used, an after-the-fact identification would not enable SWBT to accurately identify usage that should not be monitored. Ms. Valentine also stated that comparing the list of MCI's PICed customers with MCI's monthly customer list is that SWBT wouldn't know whether the customer was actually direct-billed or simply had not used toll that month.

Finally, SWBT argues that MCI direct-billed customers are not exclusively MCI's customers. End users have the option of using a number of different toll carriers, regardless of which IXC they have chosen as their presubscribed carrier. End users also have the option of changing carriers at any time during the month and Ms. Valentine testified that they sometimes exercise that option.

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Currently SWBT's process for responding to an IXC's request that a particular direct billed end user not be toll monitored is a manual process and must be handled on a case-by-case basis. Ms. Valentine stated that SWBT is investigating a mechanized way to handle the situation but it is not yet available. MCI argues that the TRIMS tariff should not be approved until this problem is resolved.

The current procedure for exempting certain IXC traffic from monitoring does not remove the customer from the TRIMS program. Even direct-billed customers remain in TRIMS monitoring until they have established a good payment record with SWBT. Only the calls placed over the particular IXC's network who has requested special treatment will not be accumulated. If a customer were to accumulate more than \$200 in toll calls, the TRIMS restriction would automatically go into effect and the customer would not be able to make toll calls using the IXC for whom it is a direct-billed customer on a 1+ basis.

**C. Is SWBT's method of estimating toll charges reasonable?**

SWBT's TRIMS program operates by monitoring toll charges during the month. However, SWBT does not receive the actual toll rates from the carriers until the billing date. In order to monitor the approximate billing value of usage, SWBT developed a pseudo rate to apply to calls as they are made. Although SWBT experimented with different rates when it first implemented TRIMS in Oklahoma, the rate has since been adjusted. Under the current tariff filing, ongoing interexchange calls will be rated at 18 cents per minute, and international calls at 60 cents per minute. Staff supports SWBT's use of a pseudo rate.

OPC has opposed the pseudo rate method of implementing TRIMS on the grounds that the pseudo rate is not accurate enough. Ms. Meisenheimer testified that the use of pseudo rates could result in disparities. She opined, for instance, that a customer could be toll restricted based on the pseudo rate when their actual toll charges were only approximately \$20 rather than \$200. In other cases, a customer might be permitted to accumulate toll charges much greater than \$200, particularly if international calls were involved. OPC argues that the use of pseudo rates will allow some customers to evade the toll limitation and penalize others. OPC also objects to the fact that the pseudo rates are not tariffed and may be changed at SWBT's discretion. OPC argued that the discretionary nature of the pseudo rates is unreasonable given the ability of the TRIMS program to restrict access to operator services and directory assistance.

The pseudo rates are not specified in the text of SWBT's TRIMS tariff. Ms. Valentine testified that in Oklahoma SWBT started with a rate of 10 cents a minute for interexchange and 40 cents a minute for international calls. Those rates turned out to be too low. She stated that SWBT had only changed the rates once and that the 18-cent and the 60-cent pseudo rates had been working well since August of 1997. Ms. Valentine stated that SWBT could identify the pseudo rates in the tariff text, but that would make it difficult for SWBT to change the rates when industry rates increase or decrease. Mr. Rudloff testified that the time it would take to make changes in tariffs

would vary depending on the type of change but that, once the internal changes were made, a 30-day tariff filing would effectuate a change.

**D. Should SWBT be allowed to block restricted customers from local operator services and local directory assistance under the TRIMS proposal?**

The TRIMS tariff, First Revised Sheet 13.01, Section 1.2.16.D, provides that a customer whose toll usage is restricted will not be able to complete calls preceded by a "1" or a "0." Customers who are toll-restricted will not be able to reach directory assistance or operator services because those services must be accessed by dialing a "1" or a "0." Ms. Valentine testified that it's possible to reach National Directory Assistance by dialing an 800 number. However, she had no personal knowledge of how well that might work. She also testified that SWBT had not in the past advised customers of the availability of National Directory Assistance, but that they had received no complaints in the other states where TRIMS has been implemented.

Staff and OPC oppose the restriction of operator services and local directory assistance. OPC argues that directory assistance and operator services are essential local services under Missouri law and should not be restricted for nonpayment of toll charges. Ms. Meisenheimer testified that TRIMS customers should be able to access these services in the same way as other customers, that is by dialing the same number of digits and paying the same rates.

**E. Is the TRIMS proposal a reasonable method of controlling uncollectibles?**

SWBT is proposing TRIMS as a reasonable method of limiting the amount of its uncollectibles. Ms. Valentine testified that SWBT's uncollectibles, accounts receivable that are ultimately written off as bad debt, have been increasing in recent years. SWBT believes the TRIMS proposal is reasonable because it will affect a small number of customers, and because it has been implemented in other states and successfully decreased uncollectibles. Only two classes of customers would be affected by TRIMS: 1) those with little or no commercial credit history and no credit history with SWBT; and 2) those whose SWBT service has been disconnected. Ms. Valentine testified that less than 10 percent of SWBT's customer base would be affected, but that these customers account for 62.5 percent of SWBT's uncollectibles. Ms. Valentine stated that TRIMS has been implemented in Kansas, Oklahoma, Texas, and Arkansas. SWBT has examined the effectiveness of the program and found that customer disconnections for nonpayment have dropped since implementation. Ms. Valentine admitted that the reduction in disconnections could not be attributed solely to implementation of TRIMS.

Staff agrees with SWBT that the TRIMS proposal is a reasonable method of controlling uncollectibles. Staff argues that TRIMS will assist SWBT and the IXC's by decreasing uncollectibles, and benefit customers who have difficulty managing their telephone bills. Staff proposes that the Commission permit SWBT to implement



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TRIMS after it has found solutions that will not affect customers of other carriers, and permit toll restricted customers to make calls to operator services and local directory assistance.

MCI agrees that TRIMS would be a reasonable method of controlling uncollectibles, as long as SWBT is prohibited from imposing toll restrictions on customers who are direct billed by other companies.

OPC takes the position that the TRIMS proposal is unreasonable in that it offers no benefits to customers or to SWBT, and imposes burdens and inconveniences on customers. OPC believes SWBT's current procedures are sufficient to deal with uncollectibles. OPC argues that some customers who are credit worthy would be unfairly TRIMS-monitored simply because they are unknown to SWBT. Ms. Meisenheimer testified that the pseudo rate SWBT will be using will not result in a consistent toll cutoff at \$200 of use because of varying prices in the interexchange telecommunications market. She also testified that some customers who subscribe to flat-rated plans could find their toll restricted and the value of their plans reduced. Ms. Meisenheimer stated that customers are not treated equally under TRIMS because those subscribing to flat-rate or discounted plans, and those who presubscribe to an interexchange carrier with rates lower than \$.18 per minute will have their calls rated at an artificially high rate.

Ms. Meisenheimer testified that SWBT's uncollectibles are not significantly higher than in previous years, based on the company's Annual Reports for 1990 through 1996. She stated that SWBT's current tariff provisions allowing for advance payment or a deposit from customers in Account Groups 1 and 4 offer adequate protection. SWBT also has the right to refuse to provide service to customers with unpaid balances.

**F. Does the TRIMS proposal conflict with SWBT existing general tariffs relating to the time period for payment prior to disconnection?**

SWBT's General Exchange Tariff includes a Section 17.6 which addresses under what conditions service for residential service will be disconnected for nonpayment of charges. On SWBT's request the Commission took official notice of this tariff provision which reads, in relevant part: "Upon nonpayment of any undisputed, delinquent charge due the Telephone Company, the Telephone Company may, after a written notice has been furnished to the customer, without incurring any liability, forthwith discontinue the furnishing of said service." The quoted sentence ends with a footnote which states that a Lifeline customer's "local service shall not be disconnected for non-payment of toll charges."

Ms. Meisenheimer testified on behalf of OPC that restricting a customer's access to toll services without allowing 21 days for payment constitutes a violation of Section 17.6 of SWBT's tariff. OPC's position is that this creates a discrimination between SWBT customers assigned to the TRIMS program and those not in the program.

SWBT asserts that the TRIMS proposal is consistent with SWBT's existing tariff provision. Although a TRIMS customer would have to make a payment in less than

21 days to avoid disconnection of toll service, the 21 days specified in SWBT's tariff applies to disconnection from basic local service, not toll. A customer's assignment to the TRIMS program will not alter SWBT's regular disconnection practices. Mr. Rudloff testified that he agrees with OPC that a TRIMS customer's access to toll could be restricted without permitting the customer a 21-day period to make payment. However, he stated that the 21-day requirement was designed to provide customers time to pay their bills without losing their local service. He testified that the word "service" is used throughout Section 17.6 without further specification but that the references are to local service, and not to toll.

Staff agrees with SWBT that there is no inconsistency between the proposed TRIMS tariff and SWBT's existing tariffed disconnection procedures.

**G. Is SWBT's use of personal identification numbers reasonable?**

TRIMS customers will be given a SWBT telephone number for the TRIMS call center with service representatives available seven days a week, 24 hours a day. TRIMS customers will be able to obtain information about their account status and request other information about the TRIMS program. Ms. Valentine testified that, upon customer request, SWBT will provide customers with a personal identification number (PIN) to access the TRIMS automated announcement system. The purpose of a PIN number is to protect the customer's privacy. If a customer does not request a PIN number, then anyone calling in who has certain information about the customer could receive account information. According to Ms. Valentine, some customers don't want to be bothered with a PIN number. Staff supports SWBT's use of the PIN number as reasonable, citing the fact that the initial customer letter will explain the process for having a PIN assigned.

OPC is opposed to SWBT's approach to using PINs because anyone who knew a customer's name and phone number could get account information unless the use of PINs is imposed. OPC believes that account information should not be generally available to the public or to merchants, and that PIN numbers should be required to protect customer confidentiality.

**H. Should the Commission approve the TRIMS tariff?**

SWBT asks the Commission to approve TRIMS because it is an effective collection tool that will permit residential customers to maintain their access to local service, 911 emergency service, and toll-free calling to 800/888 numbers. Once a customer pays a certain amount of his toll charges toll service will be restored. Ms. Valentine testified that the pseudo rates SWBT proposes are reasonable based on the company's experience in other states. She also testified that the customer groups affected are reasonably chosen based on prior company experience.

Staff does not object to approval of the TRIMS tariff. However, Staff asks the Commission to impose the condition that SWBT not be allowed to disconnect customers from the local telephone network for failure to pay toll charges. (See

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discussion above.) In its initial brief Staff argued that the Commission should first determine that the tariff filing, as applied, does not adversely affect any company or customer.

MCI also has no objection to the Commission's approving the TRIMS tariff as long as SWBT is prohibited from imposing toll restrictions on customers who are direct-billed by other companies.

OPC opposes the TRIMS tariff proposal. OPC does not believe credit scoring and credit rating should be used as a basis for extending telecommunications services. OPC argues that TRIMS imposes burdens and inconveniences on customers that outweigh the benefits to SWBT in reducing uncollectibles. OPC believes the pseudo rates proposed are not reasonable and that the proposal conflicts with existing tariff language. OPC also opposes the proposal because the imposition of toll restrictions is not voluntary.

#### **I Other issues**

##### **1. Applicability to 911 Exchanges**

OPC's witness, Ms. Meisenheimer, expressed concern that SWBT's TRIMS tariff does not specifically limit its application to areas where 911 emergency service is available, and does not specify to which exchanges it applies.

Ms. Valentine testified on behalf of SWBT that the TRIMS program will not apply in exchanges without 911 emergency service. She stated that SWBT is willing to include wording in the tariff that will make it clear that TRIMS will not be implemented in such exchanges. Mr. Rudloff stated that SWBT prefers not to specify the exchanges to which it will be applied because, as exchanges implement 911 service they could be added to the TRIMS program. If the tariff states that it only applies in exchanges where 911 emergency service is available, it would avoid the need to propose a revised tariff each time an exchange adds 911 service.

##### **2. Effect on Designated Number Subscribers**

Ms. Meisenheimer expressed OPC's concerns regarding the effect that implementation of TRIMS would have on customers who have flat-rate or discounted toll calling plans, in particular COS and designated number plans.

Ms. Valentine testified that, if a toll-restricted customer was also a subscriber to designated number service the customer would not be able to use the designated number service while restricted but would continue to be billed for it. Mr. Rudloff stated that designated number service costs \$15 per month for a single designated number, and \$10 per month for each additional designated number. He testified that a customer could get a refund of the charges for the service for the time period during which toll was restricted. However, there is currently no automated method of removing the charge from the customer's bill and the customer would have to contact SWBT in order to get a refund. On recross Mr. Rudloff stated that SWBT could include in the initial customer letter information for customers who subscribe to special services on how to have the charges credited during toll restricted periods.

## Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Commission finds that the proposal by Staff and OPC that the Commission prohibit SWBT from disconnecting end users from the local network for nonpayment of toll charges is inappropriate in the context of this case. SWBT, and other local exchange companies, are specifically permitted by Commission rule and tariff provisions to disconnect customers for nonpayment of toll charges. The appropriate forum to address a change of this type is a rulemaking docket. Changes in policy regarding disconnection will be addressed in the currently pending process of revision of Chapter 33 of the Commission's rules regarding telecommunications.

The Commission finds that, where a customer is direct-billed by the customer's presubscribed interexchange carrier, SWBT should not restrict toll routed through that IXC. However, an IXC must identify its direct-billed customers in order to enable SWBT to exempt that IXC's charges from the TRIMS monitoring process. The interexchange market offers considerable choice for end users who are not limited to making all their interexchange calls through their presubscribed carrier. Aside from intraLATA toll, which may or may not be carried by the presubscribed IXC, the end user may use 10-10-XXX dialing to access any of a multitude of interexchange service providers. It would be unreasonable to permit a presubscribed IXC to remove a direct-billed end user from TRIMS monitoring altogether. Such a customer could conceivably incur a large intraLATA toll amount, and a large interLATA bill using 10-10-XXX dialing.

The Commission finds that the process of using pseudo rates proposed by SWBT is a reasonable method of estimating toll charges. Given the multiple providers and rates in the toll market, it is a reasonable alternative to use stand-ins for the actual rates to do ongoing toll monitoring. SWBT has committed to ongoing oversight of the pseudo rates in order to assure that the rates chosen reflect actual usage as accurately as possible.

The Commission finds that SWBT should not be allowed to block toll-restricted customers from operator services and local directory assistance. SWBT's witnesses could not assure the Commission that restricted customers would have access to alternative means of reaching these services using 800/888 dialing. SWBT should redesign its TRIMS tariff, ensuring that customers have appropriate access to operator services and local directory assistance. Although an 800/888 dialing pattern might be acceptable to the Commission, SWBT would have to be able to demonstrate

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the efficacy of such an alternative, and demonstrate that customers are adequately informed of its availability.

The Commission finds that the TRIMS proposal, as filed, does not conflict with existing SWBT tariff provisions regarding disconnection.

The Commission finds that SWBT's proposed use of PIN numbers is reasonable as long as customers are notified that the alternative is available. SWBT should not be required to impose the use of PIN numbers on all customers. SWBT's evidence that some customers find PIN numbers an inconvenience is credible.

The Commission finds that, although the TRIMS proposal generally offers benefits in controlling uncollectibles and helping end users manage their toll bills, it is not just, reasonable, and in the public interest as filed. The Commission would be receptive to reconsidering a revised TRIMS proposal which resolves the problems addressed in this Report and Order. Those problems would include specifying that TRIMS will not be applied in exchanges without 911 emergency service, fuller information in the initial customer letter, and assured access to operator services and local directory assistance.

#### Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction over the operations of, and the rates charged by, Southwestern Bell Telephone Company pursuant to Chapters 386 and 392 of the Revised Statutes of Missouri 1994. The Commission has authority to review tariffs to reject or suspend tariffs that fail to comply with state law, Commission rule or order, or that include unjust or unreasonable rates, or are not in the public interest. §§ 386.250 and 392.200, RSMo Supp. 1997.

The burden of proof to show that a proposed tariff is just and reasonable is upon the telecommunications company. § 386.430. Based upon its findings of fact, the Commission concludes that Southwestern Bell Telephone Company has not met its burden of proof. Thus, the tariff is rejected and Southwestern Bell Telephone Company is encouraged to file tariffs in compliance with the Commission's findings above.

#### *IT IS THEREFORE ORDERED:*

1. That the proposed tariff filed by Southwestern Bell Telephone Company on August 14, 1997, are rejected.
2. That this Report and Order shall become effective on October 8, 1998.

Lumpe, Ch., Crumpton, Drainer, Murray and Schemenauer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**In the Matter of an Investigation into the Provision of Community  
Optional Calling Service in Missouri.\***

*Case No. TW-97-333  
Decided October 1, 1998*

**Telecommunications §§ 29, 30:** The Cole County Circuit Court reversed and remanded the Commission's order eliminating the Primary Toll Carrier (PTC) Plan, Case No. TO-97-217, on September 11, 1998 (Case No. CV198-666CC). The Commission determined that the uncertain status of the PTC Plan may have an impact on this case as well. Therefore, the Commission further extended the deadline for the mandatory elimination of community optional service in Missouri from February 28, 1999, to a date to be determined after the final resolution of the PTC Plan.

**ORDER FURTHER EXTENDING DEADLINE FOR MANDATORY ELIMINATION OF COMMUNITY OPTIONAL SERVICE**

The Cole County Circuit Court reversed and remanded the Commission's order eliminating the Primary Toll Carrier (PTC) Plan, Case No. TO-97-217, on September 11, 1998 (Case No. CV198-666CC). The Commission has determined that the uncertain status of the PTC Plan may have an impact on this case as well. Therefore, the Commission will further extend the deadline for the mandatory elimination of community optional service in Missouri from February 28, 1999, to a date to be determined after the final resolution of the PTC Plan.

However, the Commission continues to encourage companies which are able to do so to continue to work toward the goal of elimination of community optional service and the replacement of that service with a competitive cost-based service.

***IT IS THEREFORE ORDERED:***

1. That the Commission's Order Regarding Extension Of Deadline of February 17, 1998, which extended the deadline for elimination of community optional service to February 28, 1999, is changed to further extend the deadline to a date to be determined after the resolution of the Primary Toll Carrier Plan.
2. That this order shall be effective on October 14, 1998.

Lumpe, Ch., Crumpton, Drainer, and Murray, CC., concur.  
Schemenauer, C., not participating.

Roberts, Chief Regulatory Law Judge

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\*See page 159 for another order in this case. In addition, see pages 152 and 531, Volume 6 MPSC 3d for other orders in this case

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**In the Matter of the Investigation into the Earnings of Oregon  
Farmers Mutual Telephone Company.**

*Case No. TR-98-348*

*Decided October 1, 1998*

**Telecommunications §16.** The Commission approved a stipulation and agreement by which a telephone company agreed to a decrease in revenues of \$22,436 per year.

ORDER APPROVING STIPULATION AND AGREEMENT

The Staff of the Commission (Staff) and Oregon Farmers Mutual Telephone Company (Oregon Farmers) filed a Stipulation and Agreement (Agreement) and a Motion to Open Docket on February 13, 1998. The motion stated that Staff had conducted an audit of Oregon Farmers' earnings and, as a result, Staff and the company agreed to a decrease in revenues of \$22,436.00<sup>1</sup> per year. The rate elements to be decreased are set out in the Agreement and specifically described in Attachment A. Staff and Oregon Farmers are the only signatories.

On March 30, both Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) filed timely applications to intervene. Both companies were granted intervention on April 14. The parties met in a prehearing conference on May 1 after which they advised the Commission that the parties were not requesting an evidentiary hearing regarding the reasonableness of the Agreement. SWBT, AT&T, and the Office of the Public Counsel (OPC) all filed letters advising the Commission that they had no objection to approval of the Agreement without hearing.

The Agreement proposed by the parties, and included with this order as Exhibit 1, was the result of an earnings investigation undertaken by Staff and subsequent negotiations between Staff and Oregon Farmers. Staff conducted a per book review of Oregon Farmers' earnings based on the 12 months ending December 31, 1996, and updated for known and measurable changes occurring during 1997.

The Agreement calls for Oregon Farmers to reduce its intraLATA Common Carrier Line (CCL) rates for originating and terminating minutes to parity with its interLATA CCL originating and terminating rates. Oregon Farmers will further reduce the parity rates 9 percent for originating CCL traffic and 6 percent for terminating CCL traffic. This will decrease Oregon Farmers' yearly revenue by \$20,695.10. The Agreement also calls for Oregon Farmers to reduce its various

<sup>1</sup> The information submitted by the parties indicated a revenue reduction of \$22,436.00 but an error in calculation resulted in this figure being off by \$10.00. The correct figure is \$22,426.00.

current 911 trunk rates to a flat \$25.00 per month. This will decrease Oregon Farmers' yearly revenue by \$1,730.88. Lastly, the Agreement calls for Oregon Farmers to begin accruing depreciation expenses in accordance with a new depreciation schedule contained in Attachment B of the Agreement. No effect on Oregon Farmers' yearly revenue was indicated for this action. Combining the above revenue decreases and rounding to the nearest dollar produces the total \$22,426.00 yearly revenue reduction proposed by the parties.

When reviewing the Stipulation and Agreement, the Commission determined additional information regarding the proposed new depreciation schedule was necessary. The Commission therefore issued an Order Directing Supplemental Filing on August 18, 1998 requesting Oregon Farmers provide its current depreciation rates, a statement as to when it wished to begin accruing depreciation expenses under the new schedule, and a statement as to what effect use of the new depreciation rates would have on Oregon Farmers' annual revenue.

Oregon Farmers responded to the Commission's request and submitted a Supplemental Filing on September 1. Oregon Farmers stated that, following Commission approval, it wished to begin accruing depreciation expenses under the new schedule as of January 1, 1998. Oregon Farmers also submitted as Attachment A to its filing a chart showing its current authorized depreciation rates and amounts, the proposed depreciation rates and amounts, and the overall increase in total depreciation under the proposed rates of \$17,127.00 per year. The Commission has reviewed the proposed Agreement and the official case file and finds that the Stipulation and Agreement filed by Staff and Oregon Farmers should be approved without an evidentiary hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing, the Commission may grant the relief requested based on the Agreement submitted and the filed letters stating the intentions of the intervenors. The Commission may accept a Stipulation and Agreement offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo Supp. 1997.

The Commission finds that the actions proposed by the Agreement and the related revenue reductions are appropriate. The Commission finds that the implementation of parity between interLATA and intraLATA originating and terminating CCL access rates is in keeping with the move to a more competitive market. The Commission will direct Oregon Farmers to file tariffs to implement the revenue changes approved. The Commission also directs the Staff to file, in any future earnings investigations, information similar to the additional information requested regarding depreciation rates and their effect on annual revenue. This information is necessary before Commission approval of new depreciation rates can be granted.



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*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the Staff of the Commission and Oregon Farmers Mutual Telephone Company on February 13, 1998, is approved. The Agreement shall become effective on the effective date of tariffs filed in conformance with this order to implement the authorized rate changes.

2. That Oregon Farmers Telephone Company shall file 30-day tariff sheets designed to implement the rate changes set out in the Stipulation and Agreement approved by this order no later than 10 days following the effective date of this order.

3. That this order shall become effective on October 14, 1998.

Lumpe, Ch., Drainer, Murray and Schemenauer, CC., concur.  
Crumpton, C., dissents, with dissenting opinion to follow.

Harper, Regulatory Law Judge

EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**DISSENTING OPINION OF COMMISSIONER HAROLD CRUMPTON**

I respectfully disagree with the majority in its approval of the Stipulation and Agreement of the parties in this case. In my opinion, the record was not adequate enough to justify the total revenue adjustments because the audit was only a book audit, and thus was too limited.

The parties to these over-earnings cases should pay closer attention to the needs of the customers of the small telephone companies. I believe Missourians support this idea. Reductions given to the large interexchange carriers will provide very limited relief to Missourians. On the other hand, reduction or elimination of local toll charges would have potentially a large effect on and would be welcomed by the customers of Oregon Farmers Mutual Telephone Company.

**In the Matter of the Investigation into the Earnings of Le-Ru Telephone Company**

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*Case No. TR-98-372*  
*Decided October 8, 1998*

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**Telecommunications §§ 11, 14.** The Commission approved a stipulation and agreement in which Le-Ru agreed to decrease its yearly revenue by \$312,010. The Commission found that the agreement's implementation of parity between interLATA and intraLATA originating and terminating Common Carrier Line access rates was in keeping with the move to a more competitive market. The stipulation and agreement also provided for new depreciation rates.

**Telecommunications § 39.** The Commission approved a stipulation and agreement in which Le-Ru agreed to decrease its yearly revenue by \$312,010. The Commission found that the agreement's implementation of parity between interLATA and intraLATA originating and terminating Common Carrier Line access rates was in keeping with the move to a more competitive market. The stipulation and agreement also provided for new depreciation rates.

**ORDER APPROVING STIPULATION AND AGREEMENT**

The Staff of the Commission (Staff) and Le-Ru Telephone Company (Le-Ru) filed a Stipulation and Agreement (Agreement) and a Motion to Open Docket on February 27, 1998. The motion stated that Staff had conducted an audit of Le-Ru's earnings and, as a result, Staff and the company agreed to a decrease in revenues of \$312,010.00 per year. The rate elements to be decreased are set out in the Agreement and specifically described in Attachment A. Staff and Le-Ru are the only signatories.

Both Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) filed timely applications to intervene. Both companies were granted intervention on April 15. The parties met in a prehearing conference on May 1 after which they advised the Commission that the parties were not requesting an evidentiary hearing regarding the reasonableness of the Agreement. SWBT and AT&T both filed letters advising the Commission that they had no objection to approval of the Agreement without hearing. The Office of the Public Counsel (OPC) has made no filing in this case.

The Agreement proposed by the parties, and included with this Order as Exhibit 1, was the result of an earnings investigation undertaken by Staff and subsequent negotiations between Staff and Le-Ru. Staff conducted a per-book review of Le-Ru's earnings based on the 12 months ending December 31, 1996, and updated for known and measurable changes occurring during 1997.

The Agreement calls for Le-Ru to reduce its interLATA Common Carrier Line (CCL) and intraLATA CCL rates for originating and terminating minutes and bring them into parity. In addition, the current CCL intraLATA cap and discounted CCL rates will be eliminated. Le-Ru will combine its Line Termination, End Office Switching

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and Directory Surcharge rates into a combined single Local Switching Rate. These changes will decrease Le-Ru's yearly revenue by \$204,854.00. The Agreement calls for Le-Ru to reduce its various current billing and collecting rates to decrease Le-Ru's yearly revenue by \$26,188.00. Le-Ru will decrease its current local service rates for Business, Business-School Discount, Residence, and Residence-Vacation, decreasing its yearly revenue by \$62,777.00. A final revenue reduction will be accomplished by eliminating the current charge for Touch Calling Additive. This will result in a yearly revenue reduction of \$20,218.00. Le-Ru proposes one increase, specifically to its Directory Assistance charges. This results in a yearly revenue increase of \$2,014.00. Lastly, the Agreement calls for Le-Ru to begin accruing depreciation expenses in accordance with a new depreciation schedule contained in Attachment B of the Agreement. No effect on Le-Ru's yearly revenue was indicated for this action. Combining the above revenue decreases and the one increase produces the total \$312,010.00 yearly revenue reduction proposed by the parties.

When reviewing the Stipulation and Agreement, the Commission determined additional information regarding the proposed new depreciation schedule was necessary. The Commission therefore issued an Order Directing Supplemental Filing on August 18, 1998 requesting Le-Ru provide its current depreciation rates, a statement as to when it wished to begin accruing depreciation expenses under the new schedule, and a statement as to what effect use of the new depreciation rates would have on Le-Ru's annual revenue.

Le-Ru responded to the Commission's request and submitted a Supplemental Filing on September 1. Le-Ru stated that, following Commission approval, it wished to begin accruing depreciation expenses under the new schedule as of January 1, 1998. Le-Ru also submitted as Attachment A to its filing a chart showing its current authorized depreciation rates and amounts, the proposed depreciation rates and amounts, and the overall increase in total depreciation under the proposed rates of \$27,877.00 per year.

The Commission has reviewed the proposed Agreement and the official case file and finds that the Stipulation and Agreement filed by Staff and Le-Ru should be approved without an evidentiary hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing, the Commission may grant the relief requested based on the Agreement submitted and the filed letters stating the intentions of the intervenors. The Commission may accept a Stipulation and Agreement offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo Supp. 1997.

The Commission finds that the actions proposed by the Agreement and the related revenue reductions are appropriate. The Commission finds that the implemen-

tation of parity between interLATA and intraLATA originating and terminating CCL access rates is in keeping with the move to a more competitive market. The Commission will direct Le-Ru to file tariffs to implement the revenue changes approved. The Commission also directs the Staff to file, in any future earnings investigations, information similar to the additional information requested regarding depreciation rates and their effect on annual revenue. This information is necessary before Commission approval of new depreciation rates can be granted.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement filed by the Staff of the Commission and Le-Ru Telephone Company on February 27, 1998, is approved. The Agreement shall become effective on the effective date of tariffs filed in conformance with this Order to implement the authorized rate changes.
2. That Le-Ru Telephone Company shall file 30-day tariff sheets designed to implement the rate changes set out in the Stipulation and Agreement approved by this Order no later than 10 days following the effective date of this Order.
3. That this Order shall become effective on October 20, 1998.

Lumpe, Ch., Crumpton, Drainer, and Murray, CC., concur.  
Schemenauer, C., absent.

Ruth, Regulatory Law Judge

EDITOR'S NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of the Merger of SBC Communications, Inc. and  
Ameritech Corporation.**

*Case No. TM-99-76  
Decided October 8, 1998*

**Telephone § 5.** The Commission determined that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.

**APPEARANCES**

*Paul G. Lane*, General Attorney-Missouri, and *Anthony K. Conroy*, Attorney at Law, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

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*David L. Woodsmall and Rachel Lipman*, Attorneys at Law, 8140 Ward Parkway, 5E, Kansas City, Missouri 64114, for Sprint Communications Company L.P.

*Mary Ann Young*, Attorney at Law, *William D. Steinmeier*, P.C., P.O. Box 104595, Jefferson City, Missouri 65110, for McLeodUSA Telecommunications Services, Inc. and Telecommunications Resellers Association.

*Michael F. Dandino*, Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

*Dan K. Joyce*, General Counsel, and *Cynthia R. Bryant*, Assistant General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Lewis R. Mills

## REPORT AND ORDER

### Procedural History

This case was opened to receive a Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing filed by the Office of the Public Counsel (Public Counsel) on August 21, 1998. In that motion, Public Counsel requested that the Commission open a docket to consider the proposed merger of SBC Communications, Inc. (SBC), SBC Delaware, Inc. (SBC Delaware), and Ameritech Corporation (Ameritech). Pursuant to the merger agreement, SBC Delaware, a wholly-owned subsidiary of SBC, will merge into Ameritech with Ameritech being the surviving entity. After the merger is effected, both Ameritech and Southwestern Bell Telephone Company (SWBT) will be first-tier subsidiaries of SBC. Public Counsel noted that SWBT is the largest local exchange company in Missouri, and asserted that Ameritech is certificated in Missouri as a competitive local exchange company. Public Counsel asserted that it is in the public interest for the Commission to give the proposed merger close scrutiny to assure that it provides positive benefits directly to consumers and that it promotes competition in Missouri's local telecommunications market. Public Counsel believed that the Commission has jurisdiction pursuant to Sections 386.250(2), 386.320, and 392.300<sup>1</sup>.

On August 31, SWBT filed a response opposing Public Counsel's motion. SWBT asserted that the merger will have no impact on its operations or the services it provides in Missouri, and that the Commission does not have jurisdiction to review the merger. In essence, SWBT's argument was that since the merger will

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated.

have no effect on SWBT's plant or the services it offers in Missouri, that the statutes cited by Public Counsel do not confer jurisdiction. Also on August 31, Staff filed a response to Public Counsel's motion. Staff stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger. Staff asserted that the Commission should follow this practice now, and decline to assert jurisdiction. On September 2, Public Counsel filed a pleading responding to the Staff and SWBT. By order dated September 8, the Commission set for oral argument the questions of jurisdiction and the content of its comments to the Federal Communications Commission (FCC).

On September 14, Sprint Communications Company L.P. (Sprint) filed an Application to Intervene and a Motion to Change Date of Oral Argument, and on September 15, Sprint filed suggestions supporting Public Counsel's position. On September 18, SWBT filed a pleading opposing Sprint's intervention. By order of September 23, the Commission denied Sprint's motion to change the date of oral argument and expressly reserved ruling on Sprint's intervention.

On September 25, McLeodUSA Telecommunications Services, Inc. (McLeod) filed an Application to Intervene. On September 29, Public Counsel filed additional suggestions in support of its position. On September 30, the Telecommunications Resellers Association filed an Application to Participate without Intervention, and comments generally supporting Public Counsel's position.

#### **Oral Argument**

On September 30, Public Counsel, Staff, and SWBT presented their arguments on the questions of the Commission's jurisdiction and the content of its comments to the FCC. Sprint and McLeod, although they had not been granted intervention, were allowed to address the issue of the contents of the Commission's comments to the FCC. The Telecommunications Resellers Association, although offered the opportunity at oral argument to address this issue, did not do so.

Public Counsel argued that 386.250 gives the Commission jurisdiction over all telecommunications facilities, telecommunication services, and telecommunications companies. Public Counsel also argued that 386.320.1 gives the Commission general supervision over all telephone corporations and telephone lines and the manner in which their lines and property are owned, leased, controlled or operated not only with respect to adequacy, security and accommodation offered by those services, but also with respect to their compliance with all provisions of law, orders, decisions of the Commission and charter and franchise requirements. Public Counsel noted that, pursuant to 386.610 and case law, Chapter 386 should be construed broadly with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. Public Counsel argued that 392.185 sets out the framework that should guide the Commission's consideration of its jurisdiction, and stated that

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merging companies should not be able to structure the corporate form of mergers in such a way to defeat the Commission's jurisdiction.

Staff stated that 392.300 provides that a telecommunications company certificated in Missouri must first obtain Commission approval prior to entering into a merger or consolidation. Staff stated that, based upon its review of past Commission cases and actions, the SBC/Ameritech merger does not fall within the Commission's jurisdiction. Staff reiterated its belief that the FCC proceeding is the appropriate forum in which to examine the merger.

SWBT argued generally that the sections of the statutes cited by Public Counsel do not apply to this proposed merger. SWBT stated that 386.250 makes no mention of mergers, and confers no jurisdiction on the Commission over mergers. SWBT also claimed that Ameritech, SBC Communications, and SBC Delaware are not covered by this section, as none are telecommunications companies operating in this state or certificated by this Commission.

SWBT made the same arguments about 386.320, pointing out that this section gives the Commission general supervisory powers, and power to inspect property, books, and records of corporations subject to the Commission's jurisdiction.

SWBT then discussed 393.200, which it claimed gives the Commission explicit authority over mergers and thus controls and overrides any general authority given by the other two statutory sections. SWBT argued that this section also does not apply to the SBC/Ameritech merger. SWBT noted that the merger does not involve the sale, assignment, lease or transfer of franchises, facilities or systems of Missouri-regulated telecommunication companies, nor a merger or consolidation, direct or indirect, of the lines, systems or franchises of Missouri-regulated telecommunication companies.

SWBT also pointed, as did Staff, to the Commission's consistent treatment of mergers of this type, particularly the Commission's decision in Case No. TM-96-268<sup>2</sup>. SWBT argued that the Commission's past treatment was appropriate, and should be followed in this merger.

SWBT argued that the decisions made with respect to this and similar mergers by regulatory commissions in other states should not control this Commission's determination of whether it has jurisdiction, and that Public Counsel's citation of those decisions should not be relied upon. SWBT asserted that the statutes defining the jurisdiction over mergers of those other commissions are not identical to Missouri's.

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<sup>2</sup>In the Matter of the Joint Petition of Communications Central of Georgia, Inc. and Davel Communications Group, Inc. for Approval of Merger and Transfer of Control.

## Discussion

The Commission has reviewed the arguments of the parties, the Missouri statutes cited by parties, and the structure of the proposed merger. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies. The Commission's past approach to mergers of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction over this merger, it will close this case. The applications to intervene, and the application to participate without intervention will be denied.

The Commission will not address, in this order, the suggestions presented at the oral argument about the Commission's comments to the FCC. The Commission appreciates the remarks of those entities that addressed this topic, and will bear them in mind as it deliberates what comments, if any, it should make to the FCC concerning this merger.

*IT IS THEREFORE ORDERED:*

1. That the Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing filed by the Office of the Public Counsel on August 21, 1998 is denied.
2. That the applications to intervene of Sprint Communications Company L.P. and McLeodUSA Telecommunications Services, Inc. are denied.
3. That the applications to participate without intervention of the Telecommunications Resellers Association is denied.
4. That this order shall become effective on October 20, 1998.
5. That this case may be closed on October 21, 1998.

Lumpe, Ch., Crumpton, Murray and Drainer, CC., concur.  
Schemenauer, C., absent.

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**In the matter of an Investigation of Payphone Issues Pursuant to the  
Telecommunications Act of 1996.\***

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*Case No. TW-98-207*  
*Decided October 8, 1998*

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**Telecommunications §8.** After conducting an investigation, the Commission concluded that the Commission's regulations do not contain barriers that might impact an independent payphone service provider's or local exchange company's ability to freely enter the competitive payphone market.

**Telecommunications §§8, 23.** After conducting an investigation, the Commission concluded that 4 CSR 240-32.070(4), a rule requiring local exchange company's to maintain at least one payphone in each exchange, constituted a barrier to exit from the competitive payphone market and indicated that the rule would be reviewed through the rule-making process.

**ORDER REGARDING THE INVESTIGATION OF PAYPHONE ISSUES**

**Procedural History**

On November 14, 1997, the Staff of the Missouri Public Service Commission (Staff) filed a Motion to Open Docket. Staff indicated that the Federal Communications Commission (FCC) had issued an order regarding pay telephone reclassification and compensation provisions mandating changes in the regulation of payphone operations. Staff indicated the Commission needed to consider the following two issues: (1) whether the Commission's rules and regulations contain barriers which might impact an independent payphone service provider or local exchange company's (LEC's) ability to freely enter or exit the competitive payphone market; and (2) whether the Commission should adopt provisions which provide for payphones in areas not served by the normal operation of a competitive market, commonly referred to as public interest payphones (PIPs). On December 9, the Commission issued an Order Establishing Case, stating it was going to investigate the two specific issues raised by Staff in its motion. The Commission indicated anyone interested in participating in the investigatory case should file a Notice of Participation no later than January 9, 1998.

The following parties filed a notice of participation: AT&T Communications of the Southwest, Inc. (AT&T), COMPTEL-MO, GTE Midwest Incorporated (GTE), the Kansas Payphone Association (KPA), the Mid-Missouri Group of Local Exchange Telephone Companies<sup>1</sup> (Mid-Missouri Group), the Midwest Independent Coin Payphone Association (MICPA), the Small Telephone Company

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\*See page 33 for another order in this case.

<sup>1</sup> Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc., Modern Telecommunications Company, Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company, Inc.

Group<sup>2</sup> (STCG), Southwestern Bell Telephone Company (SWBT), and Sprint Communications Company L.P. and Sprint Missouri, Inc. (filing jointly as Sprint). The Office of the Public Counsel (OPC) participated in this investigation representing the ratepayers of Missouri. The following participants filed a notice of participation but did not file any further statements regarding their positions on the issues the Commission was addressing: Brooks Fiber Communications of Missouri, Inc., Coin TelCo Inc., MCI Telecommunications Corporation, Premier Pay Phone, L.L.C., and the State of Missouri, Office of Administration. All of the above participants were granted participation via Order Granting Participation and Giving Notice of Appearances *Pro Hac Vice* issued February 2, 1998.

A prehearing conference was held January 27 during which the parties met to discuss the issues to be addressed and to establish a procedural schedule. On March 11, Staff filed a proposed procedural schedule. On March 31, Staff submitted a Motion to Submit Straw Proposal. Staff's Straw Proposal stated that Staff believed the docket should address only the issues mandated in the FCC's payphone orders, specifically, whether or not the Commission's rules and regulations contain entry or exit barriers to the payphone market and whether or not there was a need for PIPs in Missouri.

Staff's Motion to Submit Straw Proposal was granted on April 15 and its proposed procedural schedule was adopted. In its Order Granting Motion to Submit Straw Proposal and Adopting Procedural Schedule, the Commission stated the issues to be addressed would be limited to whether any entry or exit barriers to the payphone market existed and if there was a need for a PIP program in Missouri. The Commission declined KPA's request to expand the issues to be addressed.

The Mid-Missouri Group filed its comments regarding Staff's Straw Proposal on April 16. On April 22, STCG filed its comments to Staff's Straw Proposal. On April 28, COMPTel-MO, Sprint, AT&T, SWBT, GTE, and OPC all filed comments on Staff's Straw Proposal.

MICPA filed its comments to Staff's Straw Proposal on April 28. MICPA indicated it had a difference of opinion with Staff on what the scope of the docket should be. MICPA stated that the following issues should be investigated by the

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<sup>2</sup> Bourbeuse Telephone Company, BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Iamo Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Ozark Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

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Commission: (1) have the LECs filed tariffs that reflect sufficiently unbundled payphone-specific features or functions as required by the 1996 Telecommunications Act and the FCC's payphone orders; (2) are the rates charged for those services cost-based and in compliance with the "new services" test; (3) have the LECs removed all payphone cost elements from their exchange and exchange access services; and (4) are the LECs treating their own payphone divisions the same as they treat independent payphone providers. MICPA also stated the Commission should address the appropriateness of SWBT's "evergreen contracts." MICPA stated that Staff's Straw Proposal should be more ambitious and that although the issues it set out to be addressed were important, further investigation into the additional issues MICPA raised was necessary.

KPA filed its comments regarding Staff's Straw Proposal on April 28. KPA indicated it had several additional issues that required Commission investigation. KPA stated the Commission needed to investigate whether the monthly service fee charged by LECs in Missouri met the new service test and whether the demarcation point being established for a LEC payphone was the same as the one used for incumbent payphone providers. KPA also listed various other issues it thought needed to be addressed including local call usage charges, billing cycle practices, competitive fairness in treatment by LECs, and municipal regulations relating to taxation, permits and franchising.

On May 18, OPC filed reply comments to Staff's Straw Proposal. OPC indicated MICPA and KPA had raised various additional issues and that some of these issues were outside the range of Staff's Straw Proposal. OPC indicated that to the extent the issues raised qualified as entry or exit barriers, they should be addressed.

Sprint, STCG, SWBT, and GTE all filed additional comments on May 19. Sprint indicated MICPA and KPA were attempting to raise issues in the present proceeding that had previously been addressed in various other cases. Sprint stated this was a prohibited collateral attack and urged the Commission to decline the attempts of MICPA and KPA to expand the issues under investigation. STCG indicated that the scope of the docket should not be expanded as MICPA and KPA had requested. SWBT stated that the Commission should limit the issues to those stated in the Motion to Open Docket and that any attempts to expand the issue by MICPA and KPA should be denied. GTE indicated it was inappropriate to address the issues KPA and MICPA had raised as they were not within the scope of the docket.

KPA also filed additional comments May 19 indicating that it was in agreement with the comments submitted by MICPA. KPA stated that it disagreed with all other parties on the position that the issues raised in the Staff's Straw Proposal should be the only issues addressed.

Staff submitted responsive comments on May 19. Staff stated it felt the docket should be limited in scope to the issues stated in the Order Establishing Case issued

by the Commission on December 9, 1997. Staff stated that based on the comments filed, the majority of the parties supported Staff's position and that the only three parties in disagreement were OPC, MICPA, and KPA.

In response to MICPA, Staff indicated that the issues raised by MICPA had previously been addressed by the Commission in various other dockets and were not presently before the Commission.

In response to KPA's comments, Staff stated that it did not believe the present docket should be used to revisit issues already decided by the Commission and that the issues raised by KPA fit into this category. Staff also stated that many of the issues KPA brought up were not caused by Commission rules or regulations, and that this was not the type of entry or exit barrier that was to be investigated. Staff stated, in conclusion, that the issues raised by KPA were not appropriate for this docket.

On June 2, MICPA and KPA filed a joint motion to expand the issues under investigation, seeking to expand the investigation to cover all of the issues raised in their comments. SWBT, Sprint and STCG all filed replies to this motion stating their opposition to expansion of the investigation. SWBT stated that the motion's attempt to add additional issues to the investigation was the same action attempted by KPA and MICPA previously, which had been rejected by the Commission.

On June 12, Staff filed its opposition to KPA and MICPA's motion to expand the issues under investigation. In addition, on June 10 the participants filed a motion for submission of the case stating that the submission of the case was only related to the issues addressed in Staff's Straw Proposal and not those issues raised in MICPA and KPA's motion. Staff stated the participants requested Commission review of participants' filed comments and a Commission determination based on that information. Staff indicated the participants also requested the Commission cancel the scheduled evidentiary hearing.

On June 16, the Commission issued an Order Denying Motion to Expand Issues Under Investigation and Amend Procedural Schedule and Granting Request to Submit Case on the Record Presented. The Commission reiterated its determination that the investigation was specifically opened to address whether or not the Commission's rules and regulations contained barriers to free entry to and exit from the competitive payphone market, and to address the issue of PIPs in Missouri. The Commission indicated that the additional issues raised by KPA and MICPA were not related to either Commission rules or regulations or the PIP program, and therefore the motion to expand issues was denied. The Commission also determined the comments filed by the participants were an adequate statement of the various participants' positions and the issues under investigation would be decided based on those comments.

#### **Position of the Parties**

The Commission opened this docket on December 9, 1997, to investigate the following issues: (1) whether the Commission's rules and regulations contain

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barriers which might impact an independent payphone service provider or local exchange company's (LEC's) ability to freely enter or exit the competitive payphone market; and (2) whether the Commission should adopt provisions which provide for payphones in areas not served by the normal operation of a competitive market, commonly referred to as public interest payphones (PIPs). The Commission will discuss below the issues presented, addressing the existence of possible entry and exit barriers separately.

**A. Are there any entry barriers to the payphone market caused by Commission rules or regulations?**

Staff indicated that after reviewing the Commission's rules and regulations on payphones it had been unable to identify any entry barriers to the payphone market. Staff stated that, since the payphone application process had been streamlined and opened up to any interested parties, there were no longer any entry barriers to the payphone market.

GTE, the Mid-Missouri Group, COMPTEL-MO, AT&T, Sprint, and SWBT all indicated they agreed with Staff's position on entry barriers. MICPA and KPA had attempted to raise various other alleged entry barriers. This attempt was rejected by the Commission as none of the alleged barriers were related to Commission rules or regulations.

OPC stated that further investigation into possible entry barriers caused by the Commission's rules and regulations was necessary and that this investigation should also propose methods and steps to remove these barriers. OPC stated a thorough examination of the barriers and solutions to remedy them was necessary before the Commission could make a ruling.

**B. Are there any exit barriers to the payphone market caused by Commission rules or regulations?**

Staff indicated following its investigation, that it found only one existing exit barrier. Staff stated that 4 CSR 240-32.070(4) functioned as an exit barrier since it required telecommunications providers to maintain at least one payphone available to the public, 24 hours per day in each exchange in which the telecommunications company operated. Staff indicated the existing rule provided no compensation for maintaining this payphone and clearly constituted an exit barrier. Staff recommended this subsection of the regulation be rescinded in its entirety. Staff stated that without this section of the regulation, many existing payphones might disappear but that "this is the effect that competition should have." Staff indicated that if maintaining the payphone was economically feasible, the competitive marketplace would provide that it be maintained.

AT&T, COMPTEL-MO, the Mid-Missouri Group, STCG, and Sprint all agreed with Staff's position on exit barriers. SWBT stated it supported rescinding 4 CSR 240-32.070(4) and classified it as an exit barrier. GTE also supported rescinding 4 CSR 240-32.070(4). MICPA indicated it generally agreed with Staff's analysis regarding exit barriers from the payphone market.

KPA indicated it had no objection to Staff's proposed elimination of 4 CSR 240-32.070(4). KPA had again attempted to raise various other alleged exit barriers. This attempt was rejected by the Commission as none of the alleged barriers were related to Commission rules or regulations.

OPC indicated that rescinding 4 CSR 240-32.070(4) would remove any customer protection from potential failure in the payphone market, and therefore the regulation should be maintained since it was in the public interest. OPC stated that further investigation into the exit barriers caused by the Commission's rules and regulations was necessary and that this investigation should also propose methods and steps to remove these barriers. OPC stated a thorough examination of the barriers and solutions to remedy them was necessary before the Commission could make a ruling.

**C. Is there presently a need for a Public Interest Payphone (PIP) program in Missouri?**

Staff indicated that to qualify as a PIP according to the FCC, a payphone would need to meet the following requirements: (1) It must fulfill a public policy objective in health, safety, or welfare; (2) it is not provided by a location provider with an existing contract; and (3) it would not otherwise exist as a result of the operation of the competitive marketplace. Staff recommended that the Commission not establish a PIP program in Missouri as this was arguably a social program and would be difficult to administer. Staff indicated if the Commission felt further investigation was necessary in this area, the Commission should open a separate docket that had as its sole purpose an investigation of the need for PIPs. Staff stated that the competitive payphone market should be expected to adjust and accommodate the varying needs in the payphone market and that the market should be given an opportunity to meet the needs of the public prior to the institution of a PIP program.

Staff indicated OPC advocated a more thorough investigation of the need for PIPs in Missouri but did not provide any evidence to demonstrate that the competitive marketplace would fail at ensuring the existence of payphones that serve the public policy interests of health, safety, and welfare. Staff stated that, since the emerging competitive payphone market was still in its infancy all parties would essentially have to rely on speculation in assessing the future needs and concerns in the payphone market. Staff also indicated that deregulation of the payphone market and assurance of fair compensation for all completed calls would likely cause an increase in the number of payphones available to the public and not the decrease OPC envisioned.

MICPA, AT&T, COMPTEL-MO, and the Mid-Missouri Group all stated they agreed with Staff's approach regarding the establishment of a PIP program in Missouri.

SWBT indicated there was no reason to set up a PIP program before there is a demonstrable need and that the competitive marketplace would be the best tool to

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provide for PIPs. SWBT stated that the payphone market is an extremely competitive one; therefore payphone providers had an incentive to place payphones. SWBT indicated that, following the introduction of competition to the payphone market the number of payphones available to the general public had increased.

GTE stated it agreed with Staff's position that the competitive payphone market should be given an opportunity to meet the public's need for payphones prior to a PIP program being established by the Commission. GTE indicated that, by allowing the competitive marketplace to work the Commission could then later determine where payphones did not exist and where there was a public need for those payphones. GTE also expressed concerns over how a PIP program would be funded and stated that, if at a later time the Commission revisited the PIP issue, an explicit funding program should be established that reimburses payphone service providers for the costs incurred in establishing and providing service to PIP locations.

Sprint stated that until the competitive marketplace had an opportunity to operate and adjust it could not be determined whether PIPs were needed to address a legitimate public health, safety, and welfare concern, or whether that concern was being left unmet.

STCG stated the requirement that there be a payphone in each exchange found in 4 CSR 240-32.070(4) could not be considered a PIP program under the FCC guidelines, as it was not funded "fairly and equitably." STCG indicated that requiring LECs to continue to provide a payphone in each exchange with no means of funding an often unprofitable service did not comply with the FCC guidelines regarding PIPs. STCG stated that until there had been a trial by competition a determination of whether or not PIPs were needed could not be made. STCG also stated that if OPC believed PIPs were really necessary OPC should offer some proposal for consideration that meets the FCC guidelines rather than merely suggesting that the current requirement regarding one payphone per exchange be retained.

OPC indicated further investigation into the current state mechanisms that ensure the provision of PIPs was needed. OPC stated that, although the FCC had not mandated a national PIP program, the FCC had indicated a need to ensure the maintenance of payphones that serve the public policy interests of health, safety, and welfare in locations where they would not otherwise be provided as a result of the operation of the market.

OPC indicated 4 CSR 240-32.070(4) offered the solution to the provision of PIPs in Missouri and that rescinding this section of the regulation should not occur unless the Commission established some alternative mechanism to ensure the existence of PIPs in Missouri. OPC indicated that there was no evidence that Missouri's current requirement that LECs maintain at least one payphone in each exchange in which they operate was an inappropriate means of providing PIPs.

OPC indicated a review of the PIP program would need to include an examination of the need for public payphones, whether such a need had been or would be provided

by the market, and if not, what mechanisms should be adopted to provide for such a need. OPC indicated this investigation would need to evaluate whether specific payphones would disappear in a competitive marketplace and whether those phones were needed for the public policy objectives of health, safety, or welfare. OPC stated that the mere fact that this evaluation would be "difficult" did not justify not making an effort. OPC indicated a final step in the investigation of the PIP issue involved a determination of an appropriate mechanism to provide PIPs and also a determination of what would be the appropriate funding mechanism for PIPs.

OPC stated Staff's Straw Proposal did not adequately address the PIP issue. OPC indicated further investigation into the current mechanisms and proposed alternatives for providing PIPs was necessary, and until that was accomplished, OPC could not agree with Staff's conclusion that a PIP program would be "cumbersome, expensive, and inefficient to operate." OPC indicated further evidence needed to be presented by the parties regarding whether or not any current payphones satisfied the FCC's definition of a PIP.

KPA recommended the Commission establish PIP guidelines, as there is currently a need for PIPs. KPA indicated the Missouri Universal Service Fund or some other funding source should be implemented to support these phones.

#### Discussion

The Missouri Public Service Commission wishes to thank all the participants for their efforts in addressing the issues presented. The comments of the participants were helpful in reaching the determinations stated below.

The Commission finds that there are presently no entry barriers to the competitive payphone market.

The Commission finds that a potential exit barrier to the competitive payphone market was sufficiently identified by the participants. The majority of the participants felt 4 CSR 240-32.070(4) qualifies as an exit barrier and should be rescinded. The Commission shall take the necessary steps to begin the rule-making process needed to review that rule.

#### *IT IS THEREFORE ORDERED:*

1. That the investigation of payphone issues conducted by the Missouri Public Service Commission pursuant to the Telecommunications Act of 1996 is concluded.
2. That this order shall become effective on October 20, 1998.
3. That this case may be closed on October 21, 1998.

Lumpe, Ch., Crumpton, Drainer, and Murray, CC., concur.  
Schemenauer, C., absent.

Harper, Regulatory Law Judge

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**In the Matter of Laclede Gas Company's Tariff Sheets Designed to Increase Rates Provided for Gas Service to Customers in the Missouri Service Area of the Company.**

*Case No. GR-98-374*  
*Decided October 15, 1998*

**Gas § 22.** The Commission approved a stipulation that provided for certain accounting changes but did not increase rates.

**ORDER APPROVING STIPULATION AND AGREEMENT**

On February 27, 1998, Laclede Gas Company (Company) submitted to the Commission tariffs designed to produce an annual increase of approximately 5.2 percent (\$25.4 Million) for gas service provided to customers in the Missouri service area of the Company. Union Electric Company, doing business as AmerenUE, MRT Energy Marketing Company, the St. Louis Gas Users,<sup>1</sup> and O.C.A.W., AFL-CIO, through Gas Workers Local 5-6 were granted intervention.

On September 14, the parties filed a unanimous Stipulation and Agreement that resolved all issues in the case. The Stipulation and Agreement proposes no increase in rates, proposes changes to the Large Volume Transportation and Sales Service tariffs, proposes new depreciation rates, and proposes a number of changes in the way Laclede records certain items on its books.

The changes to the Large Volume Transportation and Sales Service tariffs would allow Laclede to limit gas receipts during certain periods, increase the storage charge from \$0.005 to \$0.02 per therm, and increase the unauthorized use charge from \$1 to \$2 per therm. Although these changes will affect the amounts certain customers will pay, the parties anticipate that they will not result in an increase in revenue for Laclede.

Most of the accounting changes deal with pensions and other post-employment benefits (OPEBs), and with accounting authority orders (AAOs). The proposed changes for pensions and OPEBs would allow Laclede to use the actual market value of fund assets rather than the "Market Related Value" it previously used, and to use a new "smoothing" mechanism. The Stipulation and Agreement would create a rebuttable presumption that Laclede's cost calculations in the area of pensions and OPEBs are reasonable.

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<sup>1</sup>The St. Louis Gas Users identified themselves as Adam's Mark, Anheuser-Busch Companies Inc., Barnes-Jewish Hospital, Chrysler Corporation, Emerson Electric Company, The Boeing Company, MEMC Electronic Materials, Solutia, Inc., Nooter Corporation, and Ralston Purina Company.

The provisions of the Stipulation and Agreement related to AAOs propose that Laclede be allowed to roll forward to Laclede's next rate case balances from prior AAOs created in GR-96-193. Laclede also would be allowed to defer until its next rate case or until a new AAO is granted the difference between OPEB contributions and the agreed-upon allowance for OPEB costs, and the difference between pension contributions and the agreed-upon allowance for pension costs. Laclede may defer costs incurred to achieve Year 2000 compliance, to replace service lines and mains, and to do leak surveys. Laclede would also be allowed to defer the cost to remediate or remove manufactured gas plant sites and to recover contributions from potentially liable third parties, and it would be required to book to deferral accounts any such contributions recovered. If Laclede does not file a new rate case within two years, the deferrals (except the pension and OPEB deferrals) would be void.

Other provisions of the Stipulation and Agreement propose normalization of tax timing differences for OPEBs and pensions, and transfer of service from old to new mains. Laclede also agrees to keep records sufficient to track costs related to its unregulated activities, and to provide customer billing data in electronic format.

On October 9, the Commission convened a hearing at which Laclede, the Office of the Public Counsel, the St. Louis Gas Users, and the Commission Staff appeared. These parties presented and explained the terms of the Stipulation and Agreement, and answered Commission questions concerning it.

Pursuant to Section 536.060 RSMo 1994, the Commission may accept the Stipulation and Agreement as a resolution of the issues in this case. The Commission has reviewed the Stipulation and Agreement and evidence of record in this matter and finds that substantial and competent evidence of record exists to find the Stipulation and Agreement to be reasonable and in the public interest and will, therefore, approve it. Since the Commission is accepting the Stipulation and Agreement, it will reject the tariffs filed by Laclede Gas Company on February 27 that initiated this case.

The parties urge the Commission to approve the Stipulation and Agreement so that the tariffs to be filed pursuant to it become effective for service on and after October 15, or as soon thereafter as practicable. The Commission will direct Laclede to file the tariffs with a thirty day effective date, but will, for good cause, approve them as soon after they are filed as practicable.

*IT IS THEREFORE ORDERED:*

1. That the Stipulation and Agreement, Attachment A to this order, is hereby approved.
2. That the tariffs filed by Laclede Gas Company on February 27, 1998 are rejected.
3. That Laclede Gas Company shall file tariff sheets substantially similar to those attached to the Stipulation and Agreement as Attachment 1, bearing an effective date at least thirty days after the issue date.
4. That this order shall become effective on October 27, 1998.

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Lumpe, Ch., Crumpton, Murray and Drainer, CC., concur.  
Schemenauer, C., dissents.

Mills, Deputy Chief Regulatory Law Judge

EDITOR'S NOTE: The Stipulation and Agreement (Attachment A) in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the matter of the Application of UtiliCorp United Inc., d/b/a  
Missouri Public Service, for authority to sell a part of its  
franchise, works or system.**

*Case No. GM-97-435*  
*Decided October 15, 1998*

**Gas § 5.** The Commission found that allowing UtiliCorp United, Inc. to sell a natural gas transmission pipeline to Williams Gas Pipelines Central, Inc. would not be detrimental to the public interest, and approved the transaction.

**APPEARANCES**

*Dean L. Cooper*, Attorney, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for UtiliCorp United Inc.

*Richard S. Brownlee, III*, Attorney, Hendren and Andrae, 221 Bolivar, Jefferson City, Missouri 65101, for Williams Gas Pipelines Central, Inc., f/k/a Williams Natural Gas Company.

*Douglas E. Micheel*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

*Cherlyn D. McGowan*, Assistant General Counsel, Post Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORYLAWJUDGE: Lewis R. Mills, Jr.

**REPORT AND ORDER**

**Procedural History**

On April 3, 1997, UtiliCorp United Inc. d/b/a Missouri Public Service (UCU) filed an application with the Commission requesting authorization to sell a 5.3 mile long, 12-inch diameter natural gas transmission pipeline to Williams Natural Gas Company,

now called Williams Gas Pipelines Central, Inc. (WNG). The pipeline is currently being used to supply gas to UCU's Greenwood generation facility. On May 7, the Commission granted WNG intervention. The parties filed testimony pursuant to the procedural schedule established by the Commission, and an evidentiary hearing was held on November 24 and 25.

#### Discussion

The terms of the transaction are rather complex. In general, WNG will receive the pipeline and a stream of income designed to pay back its investment in the pipeline within seven years. UCU will receive payment of approximately \$1.85 million and a certain amount of natural gas transmission on the WNG system.

Specifically, the transaction for which UCU seeks Commission approval is the sale of the pipeline and related assets for \$1.85 million pursuant to a Pipeline Sale and Purchase Agreement (the Agreement) between the Missouri Public Service (MPS) division of UCU and WNG. Two contracts were entered into by UCU and WNG before the Agreement was finalized, and these two contracts are now in effect and will remain in effect after the sale of the pipeline pursuant to the Agreement is consummated. The first contract (the Firm Contract) is for a term of seven years and provides for firm transportation of up to 8,700 cubic feet per day (MCF/day) in WNG's production area at a cost to UCU of \$640,000/year. The second contract (the Interruptible Contract) provides for interruptible transportation of up to 50,000 dekatherms (Dth)<sup>1</sup> per day through WNG's market area.

The issue at the heart of this case is whether the proposed transaction as a whole is detrimental to the public interest. Only if the Commission finds that the transaction is detrimental can it withhold approval.

Much of the testimony in the case dealt with the consequences of recognizing the cost of the transaction in rates. The Commission will not order any rates changed in this case, as that is properly done in a rate case when all relevant factors can be examined. As a result, the evidence concerning the possible detrimental effects of including the transaction in rates, while a cause for concern, is not determinative of the issues in this case.

#### Findings of Fact

##### **A. Application Not Detrimental to the Public Interest**

The main issue in this case is whether the sale is detrimental to the public interest. Both UCU and WNG assert that WNG, since it is a pipeline company, has the financial resources, the experience, and the personnel to reliably operate the pipeline and ensure that gas is delivered to the plant. They argue that since reliability will not be compromised by the sale, and that since they propose no change in rates, ratepayers will not suffer any detriment.

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<sup>1</sup> Assuming a heat content of 1000 Btu/cubic foot, one Dth, one MCF, and one MMBTU can be considered equivalent.

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Staff believes that the sale will be detrimental to the public interest because the \$640,000 annual payment required under the Firm Contract is not a prudent expenditure. The Staff bases its claim of detriment on the presumption that the costs of the Firm Contract will be passed on to ratepayers. The Commission will not make a determination of the proper ratemaking treatment to be afforded this transaction in this case. When the Commission sets rates based upon this transaction, it will need a detailed breakdown of how much of the \$640,000 annual payment can reasonably be considered as payment for gas transportation, and how much is simply reimbursement to Williams of its purchase price. Only the former properly may be included in rates.

**B. Gain on Sale of Assets**

Staff argues that there is a detriment to the public because ratepayers will not receive the gain from the sale of the facilities. Staff states that allowing any gain on the sale to flow to ratepayers will offset the harm to ratepayers that it believes will result from the Commission's approval of the sale.

Typically, the Commission has not allocated any gain on the sale of assets between ratepayers and shareholders in a case dealing with the sale of assets. Rather, the Commission defers the treatment of any gain until a rate case when all relevant factors are considered. Since the Commission does not find any harm to ratepayers from the approval of the sale in this case, there is no need to depart from the Commission's typical approach.

**C. Allocation of Overhead Costs**

Staff asserts that UCU improperly allocated too much overhead cost to the portion of the facilities it will retain. Staff asserts that overheads should be allocated between the facilities sold and the facilities retained using the same ratio as bare expenses. UCU agrees that this is the appropriate allocation. Although the Commission will reserve ratemaking treatment until the next rate case, for the purpose of recording the effects of the transaction on its books, UCU should allocate overhead cost between the facilities sold and the facilities retained using the same ratio as bare expenses.

**D. Facility Construction, Ownership and Operating Agreement**

This agreement provides the terms under which WNG will provide transportation of gas to the Greenwood facility. Staff believes that the charges UCU incurs under the agreement are too high, and that the agreement will require UCU's ratepayers to fund WNG's purchase of the pipeline. As discussed above, since UCU's rates will not change as a result of Commission approval of this sale, UCU and not its ratepayers will be funding WNG's purchase of the pipeline. Accordingly, there is no detriment to the public.

**E. Missouri Gas Energy's Proposal(s)**

Staff argues that the Agreement with WNG is detrimental to the public because there were proposals to purchase the pipeline made by Missouri Gas Energy (MGE) that the Staff believes were superior to the Agreement. The Commission finds that

the MGE proposals are not relevant to the question of whether the transaction at issue in this case is detrimental to the public interest. The record is clear that these proposals had been withdrawn by the time the Williams' proposal was accepted. Simply because there may have been proposals more favorable to ratepayers at some point does not have much bearing on whether or not the current proposal is detrimental. The MGE proposals may form the basis for a challenge in a subsequent rate case to UCU's prudence in not accepting them and accepting the WNG offer instead, but they do not have any relevance to the issues in this case.

**F. Environmental Liability**

UCU claims that the proposed sale will be beneficial to ratepayers because it will reduce its environmental exposure liability. The sale agreement provides that UCU will be liable for any environmental liability resulting from the construction of the pipeline and that WNG will be liable for such liability resulting from the operation of the pipeline. The Commission has determined that there is no detriment from the transaction. Therefore, the Commission need not make a finding as to whether any benefit exists.

**G. Stranded Costs**

UCU argues that the sale reduces its ratepayers' exposure to stranded cost if the Greenwood facility ceases operations. UCU's argument assumes that the Commission would allow recovery of UCU's cost to build the pipeline if the facility no longer uses the pipeline. Even if the Commission were to consider allowing such recovery, it would require, at a minimum, proof that UCU was prudent in building a pipeline to serve a facility that may have had a limited life at the time the pipeline was built and that UCU was prudent in allowing the facility to cease operations. However, the Commission has determined that there is no detriment from the transaction without considering any possible benefits from the alleged reduction in stranded cost exposure, and as a result will not make a finding as to whether such benefit exists.

**Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law:

UtiliCorp United Inc. d/b/a Missouri Public Service is a public utility engaged in the provision of electric service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

Specifically, the proposed sale, transfer and assignment of certain rights, properties, and assets is controlled by Section 393.190(1), which states in part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect,

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merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it to do so.

The Commission finds the proposed transaction, as reflected in the application to sell a part of its franchise, works or system filed on April 3, 1997 by UtiliCorp United Inc. d/b/a Missouri Public Service is not detrimental to the public interest.

*IT IS THEREFORE ORDERED:*

1. That the application to sell a part of its franchise, works or system filed on April 3, 1997 by UtiliCorp United Inc. d/b/a Missouri Public Service is granted.

2. That the Staff of the Commission shall, in its testimony in the next rate case in which UtiliCorp United Inc. d/b/a Missouri Public Service seeks to increase Missouri jurisdictional electric revenues, analyze the Firm Contract to determine what portion of the \$640,000 annual payment can reasonably be attributed to gas transportation.

3. That UtiliCorp United Inc. d/b/a Missouri Public Service shall keep its books and records in such a way to facilitate the analysis referred to in Paragraph 2, above, and make those books and records available to the Staff of the Commission.

4. That UtiliCorp United Inc. d/b/a Missouri Public Service shall, for the purposes of recording this sale, allocate overhead cost between the facilities sold and the facilities retained using the same ratio as bare expenses.

5. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties herein involved, or as an acquiescence in the value placed upon said properties by UtiliCorp United Inc. d/b/a Missouri Public Service. Furthermore, the Commission reserves the right to consider the ratemaking treatment to be afforded this transaction in any later proceeding.

6. That this order shall become effective on October 27, 1998.

Lumpe, Ch., Crumpton, Murray, Schemenauer and Drainer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

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**In the Matter of the Investigation by the Staff of the Missouri Public Service Commission into the Earnings of Citizens Telephone Company of Higginsville, Missouri, Inc.**

*Case No. TR-98-346*  
*Decided October 21, 1998*

**Rates §§ 64, 110. Telecommunications § 14.** A rate reduction agreed to by the parties is in the public interest and movement toward parity between interLATA and intraLATA access rates is consistent with a move toward a more competitive toll market.

**ORDER APPROVING REVISED STIPULATION AND AGREEMENT**

The Staff of the Commission (Staff) and Citizens Telephone Company of Higginsville, Missouri, Inc. (Citizens) entered into a Stipulation and Agreement that would result in a reduction to Citizen's rates of approximately \$170,024. Staff and Citizens jointly filed a motion on February 13, 1998 asking the Commission to open a case to consider approval of the stipulation.

The Commission issued an order establishing Case No. TR-98-346 and giving notice to interested parties. Timely applications to intervene were filed by Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T). The Commission granted the interventions on April 10, set a prehearing conference for May 1, and directed the parties to file a procedural schedule by May 11. The parties ultimately filed a Revised Stipulation and Agreement on June 17. SWBT, AT&T, and OPC were not signatories to the agreement but each filed a letter advising the Commission that it had no objection to approval of the Revised Stipulation and Agreement.

The Commission directed Citizens to file a supplemental pleading giving further information regarding the proposed changes in depreciation rates and reconciling an arithmetical inconsistency within the Revised Stipulation and Agreement. Citizens made its supplemental filing on October 13.

The Revised Stipulation and Agreement (Revised Agreement) was the result of an investigation into Citizens' earnings conducted by Staff, and subsequent negotiations between Staff and Citizens. Staff conducted an audit based on the 12 months ending December 31, 1996, updated for known and measurable changes that occurred during 1997.

The Revised Agreement (Exhibit A to this order) filed on June 17, 1998 calls for a reduction in Citizens' earnings of approximately \$170,121<sup>1</sup>. The specific rate

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<sup>1</sup>In its Supplemental Filing Citizens indicated that the correct amount of the total rate reduction is \$170,121 and that discrepancies between the figures in the Revised Agreement were the result of changes to the CCL (carrier common line) rates, the calculated effects of which were not rounded off.



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reductions are set out in Attachment A to the Revised Agreement. They include a reduction of \$0.10 in residential rates from \$8.50 per month to \$8.40 per month, and a 50 percent reduction in the installation fee to \$15.00. The total impact of these two reductions is \$6,902.

The Revised Agreement provides for a reduction in the rates Citizens charges other carriers for billing and collection which will reduce its total revenues by \$53,593. The CCL (carrier common line) rates for terminating interLATA traffic will be reduced in order to move closer to parity with similar rates for terminating intraLATA traffic, for an overall impact of \$109,626.

Finally, the parties agreed to new depreciation rates specified in Attachment B to the Revised Agreement. In its Supplemental Filing Citizens set out the schedule of depreciation rates and demonstrated the proposed changes. The new depreciation schedule calls for depreciation of poles at 6.19 percent annually, compared to the current rate of 18.7 percent; and for depreciation of aerial cable at 5.52 percent, compared to the current rate of 21.9 percent. These changes will reduce Citizens' overall intrastate revenue requirement by \$23,514.

The Commission has reviewed the proposed Revised Agreement, Citizens' supplemental filing, and the official case file and finds that the Stipulation and Agreement filed by Staff and Citizens should be approved without an evidentiary hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing, the Commission may grant the relief requested based on the Agreement submitted and the filed letters stating the intentions of the intervenors. The Commission may accept a Stipulation and Agreement offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo Supp. 1997.

The Commission finds that the rate reductions proposed by the parties is in the public interest. The Commission finds that the movement toward parity between interLATA and intraLATA access rates is in keeping with the move to a more competitive toll market. The Commission will direct Citizens to file tariffs to implement the revenue changes approved and to give notice to its customers of the local rate reductions. The proposed notice shall be filed for Staff review of the notice language. Any objection to the proposed notice language must be made by motion.

***IT IS THEREFORE ORDERED:***

1. That the Revised Stipulation and Agreement filed by the Staff of the Commission and Citizens Telephone Company of Higginsville, Missouri, Inc. on June 17, 1998, is approved. The Revised Agreement shall become effective on the effective date of tariffs filed in conformance with this order to implement the authorized rate changes.

2. That Citizens Telephone Company of Higginsville, Missouri, Inc. shall file 30-day tariff sheets designed to implement the rate changes set out in the Revised Stipulation and Agreement approved by this order no later than ten days after the effective date of this order.
3. That Citizens Telephone Company of Higginsville, Missouri, Inc. shall provide notice to its customers of the local rate reductions as required by this order.
4. That this order shall become effective on November 3, 1998.

Lumpe, Ch., Drainer, Murray and Schemenauer, CC., concur.  
Crumpton, C., dissents, with dissenting opinion to follow.

Wickliffe, Deputy Chief Regulatory Law Judge

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EDITOR'S NOTE: The Revised Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

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**DISSENTING OPINION OF COMMISSIONER HAROLD CRUMPTON**

I respectfully disagree with the majority in its approval of the Stipulation and Agreement of the parties in this case. In my opinion, the record was not adequate enough to justify the total revenue adjustments because the audit was too limited.

The parties to these over-earnings cases should pay closer attention to the needs of the customers of the small telephone companies. I believe Missourians support this idea. Reductions given to the large interexchange carriers will provide very limited relief to Missourians. On the other hand, reduction or elimination of local toll charges would have potentially a large effect on and would be welcomed by the customers of Citizens Telephone Company.

Given the limitations of the record, in my opinion the revenue at issue should have been used to reduce the local toll charges of Citizens' local customers.

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**In the Matter of the Application of UtiliCorp United Inc. d/b/a/  
Missouri Public Service for Variance from the Requirements of  
Certain Provisions of its Purchased Gas Adjustment Clause  
Tariffs and for Expedited Treatment.**

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*Case No. GO-99-118*  
*Decided November 3, 1998*

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**Gas §2, Rates §§7, 65.** Further delay of refunds ordered by the Federal Energy Regulatory Commission related to the Kansas ad valorem taxes would not be in the best interests of Missouri Public Service Company's customers, and therefore, MPS' application for variance of the refund provisions of its tariff sheets 37 and 38 was denied. MPS had received refunds from Williams Natural Gas Company totaling \$970,167,000 for overcharges of ad valorem taxes during the years 1983 through 1988.

**ORDER DENYING VARIANCE**

On September 25, 1998, UtiliCorp United Inc. d/b/a Missouri Public Service (MPS or Company) filed its application for a variance from certain refund provisions of its Purchased Gas Adjustment Clause (PGA) from Section IV (Refund Factors), found in its current tariffs at Sheet 37 and Sheet 38. MPS stated that it has received two refund checks in the amounts of \$429,012.02 and \$500,265.26 from Williams Natural Gas Company and one check in the amount of \$40,889.72 from Panhandle Eastern Pipe Line Company. These refund checks relate to overcharges of ad valorem taxes charged by first sellers of natural gas and collected from their customers during the years 1983 to 1988. Refunds to customers were required by order of the Federal Energy Regulatory Commission (FERC) in FERC Docket RP97-369-000. The refund checks apply to gas purchased by MPS. MPS stated that it would be inappropriate and inefficient to refund these amounts to customers of MPS at this time because, principally, the decision rendered by FERC is not yet a final judgment and is still subject to appeal and change. MPS also requested expedited treatment because MPS is required to make its winter PGA filing between October 15 and November 4, and if the Commission does not grant this variance by November 4, the Kansas ad valorem tax refund will become a part of MPS' winter PGA filing and refunds will be made in accordance with the tariff. MPS asserted that issuing refunds at this time would not be in the best interest of MPS or its customers because if the FERC order is changed or reversed, the Company may be required to recover part of the refunds from its customers.

The Commission reviewed MPS' application for variance and found it in substantial compliance with Commission rules regarding applications for a variance pursuant to 4 CSR 240-2.060(11)(A-G). Given the stated need for expedited treatment, the Commission directed Staff and any other interested party to respond by October 9.

On October 5, Staff filed its memorandum recommending that the Commission deny MPS' Application for Variance. Staff stated that it does not expect FERC or the courts to overturn the decision concerning the Kansas ad valorem tax refunds because the refund obligation has been confirmed by the U.S. Court of Appeals for the District of Columbia. The Staff also stated that on remand, the FERC has proceeded with refund procedures in a conservative manner, which minimizes the possibility that refunds will be reduced in later proceedings. Finally, Staff stated that if some future FERC or court order required the Kansas ad valorem refunds to be returned to Kansas producers, the existing PGA procedures could be used to fund such recapture at the appropriate time.

Staff also stated that if the Commission chose to grant the variance requested Staff recommended that the Commission include two conditions in its Order Granting Variance ordering MPS to:

- 1) Hold the refund amounts in an escrow account until there is a final resolution of the Kansas ad valorem tax refunds, and any administrative costs incurred in maintaining the escrow account be the responsibility of MPS, not its customers.
- 2) That interest be paid by MPS at the rate of six per cent simple interest, compounded annually, as stated in the refund provision of the Company's tariff.

MPS filed its Response to Staff Recommendation on October 13. MPS alleged that if it is required to make these refunds and then later recover these refunds, or some part, by surcharge, this process could be unpopular because the time difference between refund and surcharge could result in some difference in customers receiving refunds and those customers burdened by the surcharge. Additionally, MPS claimed that if refunds occur and recovery of excess funds is necessary, interest would need to be recovered also from the person in possession of the funds. The Company cited no authority in support of this statement. MPS stated that it has reviewed the conditions proposed by Staff if the Commission chose to grant the requested variance and MPS finds those conditions acceptable. MPS stated that the escrow of these funds potentially avoids the undeniable expense of the refund and recovery process, which can be time consuming, expensive and may be avoided, if the Company's request for variance is granted.

The Commission has reviewed the Application for Variance, Staff's memorandum, and MPS' Response to Staff Recommendation. The Commission finds that it is not necessary to delay the refunds ordered by FERC related to the Kansas ad valorem taxes because these refunds have already been delayed from the 1983 to 1988 period in which these monies were collected. Any further delay would not be in the best interest of MPS' customers. Any adjustments that may be needed at a later time can be provided for through the existing PGA procedure. Therefore, MPS' Application for Variance will be denied.

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*IT IS THEREFORE ORDERED:*

1. That the Application for Variance filed by UtiliCorp United Inc. d/b/a Missouri Public Service filed on September 25, 1998 is denied.
2. That this order shall become effective on November 13, 1998.

Lumpe, Ch., Murray, Schemenauer and Drainer, CC., concur.  
Crumpton, C., absent.

Register, Regulatory Law Judge

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**In the Matter of the Application of Southwestern Bell Telephone  
Company for Designation as an Eligible Telecommunications  
Carrier Pursuant to 47 U.S.C. Sections 214(e) And 254.**

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*Case No. TO-98-191  
Decided November 17, 1998*

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**Telecommunications §31.** The Commission amended its Order Approving Stipulation and Designation of Eligible Telecommunications Carrier, issued on December 23, 1997, to show that Southwestern Bell Telephone Company now provides services that satisfy the revised definition of toll limitations and are in compliance with the toll limitation requirements set out for Federal Universal Service Fund eligibility.

**ORDER AMENDING ORDER DESIGNATING ELIGIBLE  
TELECOMMUNICATIONS CARRIER**

The Commission issued an order on December 23, 1997 approving a stipulation and agreement and designating Southwestern Bell Telephone Company (SWBT) as an eligible carrier pursuant to Section 254 of the Telecommunications Act of 1996. The Commission's Order made SWBT eligible to receive Federal Universal Service Support under 47 C.F.R. Section 54.201(d). When the Commission issued its order, 47 C.F.R. Section 54.101 required eligible carriers to provide toll limitation, which, as defined by the Federal Communications Commission (FCC), included toll control. The Commission granted SWBT status as an eligible carrier but granted it additional time to implement toll control because it did not have the technical capability to provide it. The Commission granted SWBT an extension of time until December 31, 1999 to provide toll limitations as defined by 47 C.F.R. Section 54.400, and required SWBT to file a report with the Commission by December 31, 1998 regarding the status of the technology and progress being made toward implementing toll limitation.

SWBT filed a motion on October 30, 1998 asking the Commission to amend the December 23, 1997 order. SWBT stated that the FCC altered its stance on toll

limitation in its Fourth Order on Reconsideration of the Universal Service Report and Order. The FCC's order recognized that providing customers a choice of toll blocking or toll control is not technically feasible for most companies. The FCC found that toll blocking would be sufficient to satisfy the Universal Service Fund requirements for eligible carriers, and that provision of toll control is not required. SWBT asked the Commission to amend the order granting eligible carrier status to recognize that it now meets the FCC's requirement for toll limitation, and to relieve SWBT of the duty to file reports and request waivers concerning toll limitations, and relieve it of the duty to implement toll control by December 31, 1999. No objections were filed to SWBT's request for relief.

The Commission has reviewed the official case file and the motion filed by SWBT and finds that the request is reasonable. Since the FCC has determined that the provision of toll control is not required for a company to meet the eligible carrier requirements, there is no need for the Commission to continue to enforce that requirement. Accordingly, the Commission will amend its December 23, 1997 order as requested.

*IT IS THEREFORE ORDERED:*

1. That the Motion of Southwestern Bell Telephone Company for amendment of order filed on October 30, 1998 is granted.
2. That the Order Approving Stipulation and Designation of Eligible Telecommunications Carrier issued on December 23, 1997 is amended to show that Southwestern Bell Telephone Company now provides services which satisfy the revised definition of toll limitations and are in compliance with the toll limitation requirements set out for Federal Universal Service Fund eligibility.
3. That the Order Approving Stipulation and Designation of Eligible Telecommunications Carrier issued on December 23, 1997 is amended to eliminate the extension of time until December 31, 1999 to provide toll limitation as defined by 47 C.F.R. Section 54.400, to eliminate the requirement that a report be filed with the Commission on December 31, 1998 regarding the status of the technology and progress being made toward implementing toll limitation, and to eliminate the requirement that Southwestern Bell Telephone Company file a request for additional time no later than November 1, 1999.
4. That this order shall become effective on November 27, 1998.

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur.  
Schemenauer, C., absent.

Woodruff, Regulatory Law Judge

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**In the Matter of Southwestern Bell Telephone Company's Tariff  
Proposing to Refile Its Local Plus Service and Requesting  
Expedited Approval.\***

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*Case No. TT-99-191*  
*Decided November 25, 1998*

**Telecommunications § 14.** The Commission found that the telephone company's tariff was consistent with the requirements of the Commission's order in Case No. TT-98-351 in that it provided for a service that had characteristics of both local and toll service, and was therefore filed in the company's general exchange tariff.

**Rates § 110.** The Commission found that the telephone company's tariff was consistent with the requirements of the Commission's order in Case No. TT-98-351 in that it provided for a service that had characteristics of both local and toll service, and was therefore filed in the company's general exchange tariff.

**Telecommunications § 45.** The Commission found that it was in the public interest to approve the language in the telephone company's tariff that allowed the company to discontinue the service in the event that aggregation of service is allowed by the purchaser.

**ORDER DENYING MOTIONS TO SUSPEND**

Southwestern Bell Telephone Company (SWBT) submitted a tariff filing (File No. 9800358) to the Commission on October 30, 1998, for approval with an effective date of November 29. SWBT's filing is designed to introduce its Local Plus® service. SWBT states in its cover letter filed with the tariff that Local Plus® is an optional one-way local calling plan allowing customers to call all exchanges within the customer's Local Access Transport Area (LATA) within the state of Missouri. SWBT has previously submitted changes to its local tariff to provide a Local Plus® service which was rejected by the Commission in its Report and Order in Case No. TT-98-351.

Motions to suspend the tariff and applications to intervene were filed by the Mid-Missouri Group<sup>1</sup> (MMG), MCI Telecommunications Corporation (MCI),

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\*The Commission, in an order issued on June 3, 1999, denied a rehearing in this case.

<sup>1</sup> For purposes of this proceeding, the Mid-Missouri Group consists of Alma Telephone Company, Chariton Valley Telephone Company, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company.

COMPTEL-MO, and the Small Telephone Company Group<sup>2</sup> (STCG). The companies raised numerous objections in their motions, including the following:

- a. the proposed tariff limits entry into the marketplace by competitors because it does not set out the discount rate at which the service will be available to interexchange (IXC) and competitive local exchange carriers (CLEC);
- b. the tariff has no provision for intercompany compensation for traffic from SWBT exchanges to other companies' exchanges;
- c. the plan, if approved, would violate the terms of the Primary Toll Carrier Plan;
- d. the proposed tariff does not offer detailed billing at no additional charge;
- e. the proposed restriction on aggregation is in violation of the Federal Telecommunications Act of 1996 (the Act) and the tariff language which allows SWBT to discontinue the service violates the Commission's procedures for discontinuance of service;
- f. the service as proposed is not substantially different from the Local Plus® filing in Case No. TT-98-351 which was rejected by the Commission;
- g. the classification of a tariff as a "hybrid" is unlawful;
- h. SWBT continues to characterize Local Plus® as a local service in contradiction to the Commission's Report and Order in Case No. TT-98-351;
- i. SWBT has classified the service as competitive, which may not be lawful and reasonable;
- j. the proposal will not provide dialing parity to IXCs and therefore will create new dialing disparity in violation of section 251(b)(3) of the Act constituting a substantial barrier to full and fair intraLATA interexchange competition;
- k. the proposed service has not been shown to be priced to cover the cost of imputed access rates;
- l. the plan, if approved, would deprive residents of non-SWBT local exchanges of the equal availability of SWBT-provided toll calling plans and does not provide parity between the services in rural and urban exchanges in violation of sections 392.200.2-3, RSMo Supp. 1997;

<sup>2</sup>For purposes of this proceeding, the Small Telephone Company Group consists of ALLTEL Missouri, Inc., BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.



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- m. the plan, if approved, could significantly harm the development of facilities-based competition in violation of section 253(a) of the Act;
- n. the plan, if approved, would allow SWBT to define a telecommunications service as a different service based on the geographic area in violation of section 392.200.4(1), RSMo Supp. 1997;
- o. the plan, if approved, would allow SWBT to charge different rates for the same service provided over the same distance in violation of section 392.200.5, RSMo Supp. 1997;
- p. on its face it is unclear whether the rates proposed are set above cost and provide positive contribution as required in section 392.400.5, RSMo;
- q. the proposed service is in contradiction to the public policy stated in section 392.185, RSMo Supp. 1997; and
- r. Local Plus® should not be approved prior to the implementation of intraLATA presubscription by SWBT.

On November 12, SWBT filed a response to MMG and STCG's applications to intervene and motions to suspend. In its response SWBT states that it has filed the tariff in its General Exchange Tariff and made other changes in accordance with the Commission's order in Case No. TT-98-351. SWBT states that it intends to pay terminating access as intercompany compensation. SWBT further states that the tariff filing is substantially different from the tariff in Case No. TT-98-351 in that it offers detailed billing at a nominal fee and that the same dialing pattern functionality is available to IXCs and CLECs on a resale basis.

SWBT filed an additional response on November 20 to address the issues raised by COMPTel-MO and MCI. In its November 20 response SWBT states that it has fulfilled the requirements of the Act by making the service available for resale and that there is no requirement in the Act for stating discount resale rates in the tariff. Further, SWBT states that its references to Local Plus® being a "local plan" was not intended to classify this plan as local. SWBT states that it has filed this tariff in its General Exchange Tariff, rather than its local tariff as indicated in the Commission's previous order. SWBT also states that the fee it has established for detailed billing is identical to the rate charged for optional detailed billing for Local Measured Service. SWBT states that it has proposed Local Plus® in accordance with the Commission's previous order.

The Staff of the Missouri Public Service Commission (Staff) filed a Motion to Reject, or in the Alternative, Suspend Tariff on November 20. Staff states that the tariff is inconsistent with the Commission's Report and Order in Case No. TT-98-351. Staff argues that SWBT's letter attached to its tariff filing indicates that SWBT does not believe it is necessary to provide dialing pattern functionality for IXCs which is contrary to both the Commission's order and the Act. Staff also believes there is language in the tariff which would permit SWBT to make unilateral changes to its tariffed service without Commission approval. Staff also objects to SWBT's reference to Local Plus® being a "local service." Finally, Staff indicates that the issues

of costing standards, the availability of Local Plus® to secondary carriers' customers, and price discrimination should be resolved before Local Plus® is approved. Staff requested that the tariff be rejected, or in the alternative, the tariff be suspended.

On November 23 SWBT filed a response to Staff's motion. In its November 23 response, SWBT clarifies that it intends to make the same dialing pattern functionality available on resale to both the IXCs and the CLECs. SWBT states that the tariff language does not allow it to make "unilateral changes to the tariff. . . [but] only permits Southwestern Bell to withdraw or grandfather the service if certain events occur." SWBT states that it is not attempting to avoid approval by the Commission, but rather is seeking pre-approval by the Commission. SWBT also states that the references in its cover letter to Local Plus® being a "local plan" are ultimately irrelevant to the tariff's classification. SWBT states that it performed cost studies to determine if Local Plus® is priced in excess of its incremental costs and those studies were provided in Case No. TT-98-351. SWBT argues that it is not appropriate to offer this service to the customers of the secondary carriers for which it is the PTC, because this service is not being classified as a toll service. In response to Staff's assertion that geographic deaveraging may occur if Metropolitan Calling Area (MCA) customers are charged a different amount than other customers, SWBT states that MCA customers are already paying an additive for optional expanded calling. In addition, SWBT states that since the service is not a toll service, geographic deaveraging of toll is not an issue.

The Commission has reviewed SWBT's tariff filing, the motions to suspend filed by MMG, MCI, COMPTEL-MO, STCG, and Staff, and the responses filed by SWBT. In addition, the Commission takes note of its prior Report and Order in Case No. TT-98-351.

The Commission finds that SWBT's tariff filing is consistent with the requirements of the Commission's order in Case No. TT-98-351 in that it provides for a service which has characteristics of both local and toll, and therefore was filed in the company's General Exchange Tariff. In addition SWBT indicates in its responses that the service will be available for resale at a discount rate to both IXCs and CLECs, and to CLECs on an unbundled network basis. The Commission finds that, under these circumstances, the provision at paragraph 48.2.C.4 (which allows the company to discontinue the service in the event aggregation of the service is allowed) is in the public interest. The Commission finds that SWBT's tariff filing is reasonable and in the public interest. Because the Commission has fully considered the motions filed by MMG, MCI, COMPTEL-MO, STCG, and Staff, and will not suspend the tariff, the applications to intervene are moot.

*IT IS THEREFORE ORDERED:*

1. That the Application to Intervene and Motion to Suspend Tariff filed by the Small Telephone Company Group on November 4, 1998, are denied.

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2. That the Motion to Suspend and the Application to Intervene filed by MCI Telecommunications Corporation on November 12, 1998, are denied.

3. That the Motion to Suspend Tariff(s) and Application to Intervene filed by COMPTel-MO on November 12, 1998, are denied.

4. That the Application to Intervene and Motion to Suspend Tariff filed by the Mid-Missouri Group on November 12, 1998, are denied.

5. That the Motion to Reject, or in the Alternative, Suspend Tariff filed by the Staff of the Missouri Public Service Commission on November 20, 1998, is denied.

6. That this Order shall become effective on December 5, 1998.

Crumpton, Murray and Drainer, CC., concur. Lumpe, Ch., and Schemenauer, C., dissent.

Dippell, Regulatory Law Judge

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**In the Matter of Southwestern Bell Telephone Company's Proposal  
To Re-file its Telecommunications Revenue Management  
System (TRIMS) in Accordance with Report and Order.**

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*Case No. TT-99-207*

*Decided November 19, 1998*

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**Telecommunications §33.** The Commission denied motions to suspend and approved a proposed tariff that established a Telecommunications Revenue Interactive Management System.

**ORDER DENYING MOTIONS TO SUSPEND TARIFF  
AND APPROVING TARIFF**

On October 20, 1998, Southwestern Bell Telephone Company (SWBT) filed a proposed tariff to establish a Telecommunications Revenue Interactive Management System (TRIMS). The proposed TRIMS program has already been the subject of a contested case in Case No. TT-98-97. Southwestern Bell Telephone Company (SWBT) initially filed tariffs to establish a TRIMS program on August 14, 1997. The Commission suspended the proposed tariffs and a hearing was held on April 23 and 24, 1998. A Report and Order was issued on September 29, which expressed the following concerns: (1) TRIMS should not be applied in exchanges without 911 emergency services, (2) SWBT should provide fuller information in the initial customer letter, and (3) TRIMS should still allow customers to have access to local

operator services and local directory assistance. The Report and Order rejected the tariff but encouraged SWBT to resubmit a modified tariff.

SWBT submitted a new version of the TRIMS tariff on October 20 with an effective date of November 20. On November 9, Office of the Public Counsel (OPC) filed a motion to suspend the tariff. OPC's motion urges the Commission to take a closer look at this tariff to ensure that it in fact complies with the requirements of the Report and Order. In its motion, OPC argues that the proposed tariffs unfairly restrict access to 1+ calling, lack a specific pseudo rate, and fail to protect consumers who have toll plans at a flat rate or purchase toll calling in blocks of time.

On November 17, MCI Telecommunications Corporation (MCI) filed its own Motion to Suspend. MCI's motion urges that the tariff be suspended because SWBT's TRIMS system would impose toll restrictions on MCI customers who are billed directly by MCI.

The Staff of the Missouri Public Service Commission (Staff) has prepared a recommendation that expresses the view that SWBT's proposed tariff has adequately addressed the concerns raised by the Commission in the previous Report and Order. Staff recommends that the proposed tariff be approved.

The arguments raised by OPC and MCI in their Motions to Suspend have previously been addressed by the Commission in the Report and Order in Case No. TT-98-97. Those arguments need not be readdressed. The tariff proposed by SWBT does meet the requirements established by the Commission in TT-98-97.

*IT IS THEREFORE ORDERED:*

1. That Office of the Public Counsel's Motion to Suspend Tariff is denied.
2. That MCI Telecommunications Corporation's Motion to Suspend is denied.
3. That the tariff filed by Southwestern Bell Telephone Company on October 20, 1998 (tariff file no. 9900316) is approved to become effective on November 20, 1998. The tariff approved is:

P.S.C. Mo. – No. 26

3<sup>rd</sup> Revised Sheet 13

1<sup>st</sup> Revised Sheet 13.01

Original Sheets 13.02 and 13.03

4. That this order shall become effective on November 20, 1998.

Lumpe, Ch., Crumpton, Murray and Drainer, CC., concur.  
Schemenauer, C., absent.

Woodruff, Regulatory Law Judge

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**DIGEST OF REPORTS**

**OF THE**

**PUBLIC SERVICE COMMISSION**

**OF THE**

**STATE OF MISSOURI**

## LIST OF DIGEST TOPICS

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- §3. Jurisdiction and powers of the Federal Commissions
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#### **II. DUTY TO KEEP PROPER ACCOUNTS**

- §7. Duty to keep proper accounts generally
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- §10. Additions, retirements and replacements
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- §13. Contributions by utility
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- §16. Deposits by patrons
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- §20. Franchise cost
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- §38. Taxes
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- §39.1. OPEBS, Postretirement benefits other than pensions

- §40. Working capital and current assets
- §41. Expenses generally
- §42. Accounting Authority Orders
- §43. Financial Accounting Standards Board requirements

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## ACCOUNTING

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### III. PARTICULAR ITEMS

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#### §41. Expenses generally

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

#### §42. Accounting Authority Orders

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a "return of " and a "return on" the safety line replacement program deferred account balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.



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**CERTIFICATES****I. IN GENERAL**

- §1. Generally
- §2. Unauthorized operations and construction
- §3. Obligation of the utility

**II. JURISDICTION AND POWERS**

- §4. Jurisdiction and powers generally
- §5. Jurisdiction and powers of Federal Commissions
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- §7. Jurisdiction and powers of local authorities
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- §23. Who may possess
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- §29. Unauthorized operation or construction
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- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
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- §42. Electric and power
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- §52. Transfer, mortgage or lease generally
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- §54. Dissolution
- §55. Transferability of rights
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- §56. Partial transfer
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- §58. Mortgage of certificate rights
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- §60. Revocation, cancellation and forfeiture generally
- §61. Acts or omissions justifying revocation or forfeiture
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- §63. Penalties

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**CERTIFICATES**

No cases in this volume involved the question of certificates.

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- §2. Right to allowance for depreciation
- §3. Reports, records and statements
- §4. Obligation of the utility

**II. JURISDICTION AND POWERS**

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- §25. Necessity
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- §31. Electric and power
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## DEPRECIATION

No cases in this volume involved the question of depreciation.

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- §1. Generally
- §2. Obligation of the utility
- §3. Recovery of damages for discrimination
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- §5. Reports, records and statements

### II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
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### III. RATES

- §9. Competitor's right to equal treatment
- §10. Free service
- §11. Inequality of rates
- §12. Methods of eliminating discrimination
- §13. Optional rates
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- §15. Service charge, meter rental or minimum charge
- §16. Special rates
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- §19. Bases for classification and differences
- §20. Right of the utility to classify
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- §33. Preference during shortage of supply
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- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
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### DISCRIMINATION

No cases in this volume involved the question of discrimination.

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### ELECTRIC

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- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

#### V. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
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- §10. Jurisdiction and powers of the local authorities
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- §12. Unregulated service agreements

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- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
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- §19. Discrimination
- §20. Rates
- §21. Refunds
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- §23. Return
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- §26. Valuation
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- §43. Accounting Authority orders
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- §46. Relations between connecting companies generally
- §47. Physical connection
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## ELECTRIC

### I. IN GENERAL

#### §1. Generally

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

\* \* \* \* \*

#### §6. Territorial agreements

The Commission found that the addendum to the agreement, which provided for a case-by-case procedure for exceptional customers was appropriate and not detrimental to the public interest.—Union Electric Company/Gascosage Electric Co-op 7 MPSC 3d 301.

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**II. JURISDICTION AND POWERS**

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**§11. Territorial agreements**

The Commission found that it had jurisdiction over the territorial agreement between an electric cooperative and a regulated electric utility pursuant to subsection 394.312.4, RSMo.—Union Electric Company/Gascosage Electric Co-op 7 MPSC 3d 301.

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**III. OPERATIONS**

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**§14. Rules and regulations**

The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.—Affiliate Transactions 7 MPSC 3d 259.

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**§20. Rates**

The Commission approved revised tariff sheets reducing the company’s revenue requirement in the amount of \$16,898,098. The Commission found the reduced rates will be applied as an equal percentage across all rates and rate classes.—Missouri Public Service 7 MPSC 3d 178.

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

**§21. Refunds**

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

**§24. Services generally**

The Commission closed or denied eight applicants’ request for a change of suppliers. The Commission found that most outages were not within the supplier’s control and that a change in supplier would require a duplication of facilities leaving the original supplier with a stranded investment.—Albright, et al. 7 MPSC 3d 134.

\* \* \* \* \*

**§31. Equipment**

The Commission closed or denied eight applicants’ request for a change of suppliers. The Commission found that most outages were not within the supplier’s control and that a change in supplier would require a duplication of facilities leaving the original supplier with a stranded investment.—Albright, et al. 7 MPSC 3d 134.

\* \* \* \* \*

**§34. Additions and betterments**

The Commission approved the proposed tariff revisions set forth in Schedule 4 to the direct testimony of Mr. Kovach. The Commission found the revisions will provide overall cost savings for the installation of underground distribution system extensions.—Union Electric 7 MPSC 3d 168.

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**§39. Costs and expenses**

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The Commission approved the Stipulation and Agreement establishing the decommission costs of the Callaway Plant at the end of its 40-year operating license to be \$419,975,000. The Commission found that Union Electric Company's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$6,214,184.—Union Electric Company 7 MPSC 3d 117.

The Commission approved the Stipulation and Agreement establishing the decommission costs of the Wolf Creek Plant at the end of its 40-year operating license to be \$408,887,000. The Commission found that Kansas City Power & Light Company's Missouri retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$2,303,856.—Kansas City Power & Light Company 7 MPSC 3d 124.

The Commission approved the proposed tariff revisions set forth in Schedule 4 to the direct testimony of Mr. Kovach. The Commission found the revisions will provide overall cost savings for the installation of underground distribution system extensions.—Union Electric 7 MPSC 3d 168.

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## EVIDENCE, PRACTICE AND PROCEDURE

**I. IN GENERAL**

- §1. Generally
- §2. Jurisdiction and powers
- §3. Judicial notice; matters outside the record
- §4. Presumption and burden of proof
- §5. Admissibility
- §6. Weight, effect and sufficiency
- §7. Competency
- §8. Stipulation

**II. PARTICULAR KINDS OF EVIDENCE**

- §9. Particular kinds of evidence generally
- §10. Admissions
- §11. Best and secondary evidence
- §12. Depositions
- §13. Documentary evidence
- §14. Evidence by Commission witnesses
- §15. Opinions and conclusions; evidence by experts
- §16. Petitions, questionnaires and resolutions



- §17. Photographs
- §18. Record and evidence in other proceedings
- §19. Records and books of utilities
- §20. Reports by utilities
- §21. Views

**III. PRACTICE AND PROCEDURE**

- §22. Parties
- §23. Notice and hearing
- §24. Procedures, evidence and proof
- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence

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**EVIDENCE, PRACTICE AND PROCEDURE**

**I. IN GENERAL**

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**§2. Jurisdiction and powers**

The Commission has jurisdiction to suspend a manufactured housing dealer’s license if it finds that the dealer has engaged in conduct in violation of section 700.045, RSMo, even though such conduct may also constitute a criminal act.—Public Service Commission Staff vs Amega Mobile Home Sales 7 MPSC 3d 455.

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**§4. Presumption and burden of proof**

The Commission has jurisdiction to suspend a manufactured housing dealer’s license if it finds that the dealer has engaged in conduct in violation of section 700.045, RSMo, even though such conduct may also constitute a criminal act.—Public Service Commission Staff vs Amega Mobile Home Sales 7 MPSC 3d 455.

**§5. Admissibility**

The Commission overruled an objection based on failure to establish a proper foundation for a data request where a witness testified that he was aware of the content of the data requests propounded by another party and testified that he had supervised the preparation of the answer to the data request.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission overruled an objection based on failure to establish a proper foundation because the Commission is not bound by the technical rules of evidence.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission sustained relevancy objections to several data requests where those requests were not tied to specific traffic in the telephone company’s exchanges, but

instead involved revenue information on a statewide basis.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

**§6. Weight, effect and sufficiency**

The Commission found that the intervenor had not met its burden of demonstrating that the other parties' agreement to equalize intraLATA and interLATA access rates and to eliminate the common carrier line charge (CCL) cap was inappropriate or unfair.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

**§7. Competency**

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company's Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

**§8. Stipulation**

The Commission approved an interconnection agreement submitted by the parties in compliance with the Commission's Report and Order issued on December 23, 1997. The interconnection agreement includes provisions implementing the Commission's resolution of unresolved issues submitted for arbitration under the Telecommunications Act of 1996, Title 47, United States Code. The interconnection agreement will expire in three years, unless renewed for two 1-year periods. Southwestern Bell Telephone Company will resell all services, except operator services, to AT&T at a 19.2 percent discount from retail rates; operator services will be resold at a 13.9 percent discount from wholesale rates. Other provisions include prices for unbundled network elements (UNEs), interconnection architecture and compensation, collocation, rights-of-way, conduits, pole attachments, interim number portability, 911/E911, network security and law enforcement, and other items.—AT&T/Southwestern Bell Telephone Company 7 MPSC 3d 252.

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**II. PARTICULAR KINDS OF EVIDENCE**

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**§10. Admissions**

The Commission found that it was not bound by the technical rules of evidence and overruled hearsay objections where the objecting parties had not made the admissions.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

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**III. PRACTICE AND PROCEDURE**

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**§23. Notice and hearing**

The Commission concluded that the territorial agreement between the regulated electric utility and the electric cooperative was not detrimental to the public interest

and should be approved.—Union Electric Company/Gascosage Electric Co-op 7 MPSC 3d 301.

**§24. Procedures, evidence and proof**

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company's Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

**§25. Pleadings and exhibits**

The Commission denied a motion to strike portions of a party's brief for allegedly misstating the evidence that was presented to the Commission because the Commission is capable of reviewing the evidence and arguments and deciding for itself whether or not the arguments of the parties are supported by the evidence.—Public Service Commission Staff vs Amega Mobile Home Sales 7 MPSC 3d 455.

**§26. Burden of proof**

The burden of proof to show that a proposed tariff is just and reasonable is upon the company filing the tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

**§27. Finality and conclusiveness**

Section 386.500, RSMo, does not authorize a second request for rehearing.—GTE Midwest Incorporated 7 MPSC 3d 272.

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**EXPENSE**

**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Financing practices
- §4. Apportionment
- §5. Valuation
- §6. Accounting

**II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

**III. EXPENSES OF PARTICULAR UTILITIES**

- §10. Electric and power
- §11. Gas

- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

#### IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercorporate costs or dealings

#### V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

#### VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense

- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

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**EXPENSE**

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**IV. EXPENSES OF PARTICULAR UTILITIES**

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**§11. Gas**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company's Public Affairs and Community Relations Department did participate in activities which are properly recovered from

ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

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**IV. ASCERTAINMENT OF EXPENSES**

**§16. Ascertainment of expenses generally**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company’s Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found it just and reasonable to disallow the imprudent costs of the company’s billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company’s corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company’s errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company’s Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building. —Missouri Gas Energy 7 MPSC 3d 394.

**§17. Extraordinary and unusual expenses**

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

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**§20. Methods of estimating**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company’s Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for

the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

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## V. REASONABLENESS OF EXPENSE

### §22. Reasonableness generally

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a "return of " and a "return on" the safety line replacement program deferred account balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

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## VI. PARTICULAR KIND OF EXPENSE

### §25. Particular kinds of expenses generally

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for

the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found it just and reasonable to disallow the imprudent costs of the company’s billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company’s corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company’s errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company’s Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

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**§28. Advertising, promotion and publicity**

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company’s Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

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**§39. Donations**

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company’s Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

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**§46. Expenses of rate proceedings**

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

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**§48. Financing costs and interest**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a "return of " and a "return on" the safety line replacement program deferred account balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

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**§61. Payments to affiliated interests**

The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.—Affiliate Transactions 7 MPSC 3d 259.

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**§65. Savings in operation**

The Commission approved the proposed tariff revisions set forth in Schedule 4 to the direct testimony of Mr. Kovach. The Commission found the revisions will provide overall cost savings for the installation of underground distribution system extensions.—Union Electric 7 MPSC 3d 168.

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**§69. Administrative expense**

The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely

billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company's Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

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**GAS**

**I. IN GENERAL**

- §1. **Generally**
- §2. **Obligation of the utility**
- §3. **Certificate of convenience and necessity**
- §4. **Abandonment or discontinuance**
- §5. **Liability for damages**
- §6. **Transfer, lease and sale**

**II. JURISDICTION AND POWERS**

- §7. **Jurisdiction and powers of the State Commission**
- §8. **Jurisdiction and powers of the Federal Commissions**
- §9. **Jurisdiction and powers of local authorities**

**III. CONSTRUCTION AND EQUIPMENT**

- §10. **Construction and equipment generally**
- §11. **Leakage, shrinkage and waste**
- §12. **Location**
- §13. **Additions and betterments**
- §14. **Extensions**
- §15. **Maintenance**
- §16. **Safety**

**IV. OPERATION**

- §17. **Operation generally**
- §17.1. **Purchased Gas Adjustment (PGA)**
- §17.2. **Purchased Gas-incentive mechanism**
- §18. **Rates**
- §19. **Revenue**
- §20. **Return**
- §21. **Service**
- §22. **Weatherization**
- §23. **Valuation**
- §24. **Accounting**
- §25. **Apportionment**
- §26. **Restriction of service**
- §27. **Depreciation**

- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

#### V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

#### VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Deprecation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums
- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements
- §72. Management, administration and financing fees
- §73. Materials and supplies
- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses

- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research
- §81. Salaries and wages
- §82. Savings in operation
- §83. Securities redemption or amortization
- §84. Taxes
- §85. Uncollectible accounts
- §86. Administrative expense
- §87. Engineering and superintendence expense
- §88. Interest expense
- §89. Preliminary and organization expense
- §90. Expenses incurred in acquisition of property
- §91. Demand charges
- §92. Expenses incidental to refunds for overcharges

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## GAS

### I. IN GENERAL

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#### §2. Obligation of the utility

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy's predecessor, finding the three year variance reasonable.—Associated Natural Gas 7 MPSC 3d 309.

Further delay of refunds ordered by the Federal Energy Regulatory Commission related to the Kansas ad valorem taxes would not be in the best interests of Missouri Public Service Company's customers, and therefore, MPS' application for variance of the refund provisions of its tariff sheets 37 and 38 was denied. MPS had received refunds from Williams Natural Gas Company totaling \$970,167,000 for overcharges of ad valorem taxes during the years 1983 through 1988.—UtiliCorp United 7 MPSC 3d 551.

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#### §4. Abandonment or discontinuance

The Commission approved a stipulation and granted the application of Ozark Natural Gas Co. for a certificate of convenience and necessity to construct and manage a gas transmission pipeline.—Ozark Natural Gas 7 MPSC 3d 367.

**§5. Liability for damages**

The Commission found that allowing UtiliCorp United, Inc. to sell a natural gas transmission pipeline to Williams Gas Pipelines Central, Inc. would not be detrimental to the public interest, and approved the transaction.—UtiliCorp United 7 MPSC 3d 543.

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**III. CONSTRUCTION AND EQUIPMENT**

**§10. Construction and equipment generally**

The Commission granted the motion for stay the implementation of the unauthorized use charges and tariffs regarding the elimination of sales and back-up sales service to transportation customers until August 1, 1998, when all current contracts containing balancing provisions and penalties will expire. The Commission also stayed the requirement for installation of EGM equipment to allow ANG sufficient time to order, install and test the equipment and to arrange for installation of telecommunications equipment for customers receiving transportation service.—Associated Natural Gas 7 MPSC 3d 114.

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**§13. Additions and betterments**

The Commission approved a modification of the stipulation and agreement in which the City of Granby will replace its existing steel natural gas distribution system with polyethylene pipe, valves, and fittings. The Commission ordered the City to strictly comply with all terms and conditions, reporting requirements, timetables, and the completion date as set out in the modification.—Public Service Commission Staff vs City of Granby 7 MPSC 3d 247.

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy’s predecessor, finding the three year variance reasonable.—Associated Natural Gas 7 MPSC 3d 309.

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**§15. Maintenance**

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy’s predecessor, finding the three year variance reasonable.—Associated Natural Gas 7 MPSC 3d 309.

**§16. Safety**

The Commission approved a Settlement Agreement and Satisfaction of Complaint which requires the company to revise procedures regarding service burial depth requirements.—Public Service Commission Staff vs Missouri Gas Energy 7 MPSC 3d 131.

The Commission found that waiving a rule governing uprating of pipelines under the specific circumstances involved herein was in the public interest and would not compromise safety, and so granted the waiver.—Missouri Public Service 7 MPSC 3d 348.

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**V. OPERATION**

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**§17.1. Purchased Gas Adjustment (PGA)**

The Commission found that UtiliCorp’s captive firm customers received the appropriate capacity release credits during the 1994-95 ACA period. The Commission found that the evidence did not support Staff’s proposed adjustment to UtiliCorp’s gas costs for the Eastern District. The Commission directed UtiliCorp to provide the type of documentation described by Staff, if and when specifically requested by Staff, beginning in the 1997-98 ACA period. The Commission found that Staff failed to adduce evidence demonstrating a need for the proposed tariff language regarding agency billing relationships. The Commission found that Staff failed to demonstrate any improper affiliate transactions between UtiliCorp and UES; consequently, the Commission declined to impose proposed Standards of Conduct for Affiliate Transactions upon UtiliCorp. The Commission found that UtiliCorp agreed that the reallocation proposed by Staff of \$95,901 in gas costs from the Northern System to the Eastern System was appropriate.—Missouri Public Service 7 MPSC 3d 492.

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**§18. Rates**

The Commission rejected the proposed tariff sheets filed by Associated Natural Gas Company and authorized the company to file tariff sheets designed to increase gross revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or other similar fees or taxes, by the amount of \$1,522,263 over its current revenues.—Associated Natural Gas 7 MPSC 3d 4.

The Commission approved the unanimous stipulation and agreement regarding a natural gas rate increase for the Company.—Union Electric Company 7 MPSC 3d 36.

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**§20. Return**

The Commission found that the return on equity, or the allowable profit earned on the investment made by the common shareholders, of 10.93 percent, is just and reasonable.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that waiving a rule governing uprating of pipelines under the specific circumstances involved herein was in the public interest and would not compromise safety, and so granted the waiver.—Missouri Public Service 7 MPSC 3d 348.

**§21. Service**

The Commission granted the motion for stay the implementation of the unauthorized use charges and tariffs regarding the elimination of sales and back-up sales service to transportation customers until August 1, 1998, when all current contracts containing balancing provisions and penalties will expire. The Commission also stayed the requirement for installation of EGM equipment to allow ANG sufficient time to order, install and test the equipment and to arrange for installation of telecommunications equipment for customers receiving transportation service.—Associated Natural Gas 7 MPSC 3d 114.

**§22. Weatherization**

The Commission approved a stipulation that provided for certain accounting changes but did not increase rates.—Laclede Gas Company 7 MPSC 3d 541.

The Commission authorized initial rates for Ozark Natural Gas Co. based on a Stipulation and Agreement.—Ozark Natural Gas 7 MPSC 3d 367.

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**§24. Accounting**

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a "return of " and a "return on" the safety line replacement program deferred account balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

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**§29. Costs and expenses**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the Public Affairs and Community Relations expense is reasonably disallowed because, although the company's Public Affairs and Community Relations Department did participate in activities which are properly recovered from ratepayers, the company failed to provide competent and substantial evidence which would allow the Commission to separate which amounts were properly recovered from ratepayers, and which were not, such as lobbying expenses, charitable activities, and corporate image building.—Missouri Gas Energy 7 MPSC 3d 394.

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**§32. Financing practices**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a "return of " and a "return on" the safety line replacement program deferred account balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company



to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

**§33. Billing practices**

The Commission found it just and reasonable to disallow the imprudent costs of the company’s billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company’s corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company’s errors.—Missouri Gas Energy 7 MPSC 3d 394.

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**§34. Accounting Authority orders**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company’s Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

Accounting Authority Orders are not intended to eliminate the regulatory lag but rather to mitigate the costs incurred by the company because of regulatory lag. Therefore, the Commission found it is not reasonable to include the unamortized balance of the SLRP deferrals in the rate base. The Commission found that the company is not guaranteed both a “return of “ and a “return on” the safety line replacement program deferred account balance.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

**VI. PARTICULAR KIND OF EXPENSES**

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**§63. Expenses of rate proceedings**

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the

assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

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**§77. Political and lobbying expenditures**

The Commission found it just and reasonable to disallow the imprudent costs of the company's billing process improvements project in the amount of \$94,854 from expenses and \$122,340 from rate base because the customers should not have to bear the cost of the company's corrections of its systems in order for the company to meet basic minimum standards. The customer has a right to expect accurate and timely billing as a basic feature of the service received for the base rate and should not have to pay to correct the company's errors.—Missouri Gas Energy 7 MPSC 3d 394.

**§78. Payments to affiliated interests**

The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.—Affiliate Transactions 7 MPSC 3d 259.

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**§88. Interest expense**

The Commission found that the safety line replacement program deferrals carrying cost rate should be the same as the Company's Allowance for Funds Used During Construction financing cost. The Commission found 6.107 percent, AFUDC rate for the 12 months ending December 31, 1997, a just and reasonable carrying cost rate for the amounts deferred through AAO.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that the amortization period of ten years for the SLRP deferrals is just and reasonable because ten years relates better to the period in which the SLRP benefits should be realized and ten years is closer to the period of SLRP deferral itself.—Missouri Gas Energy 7 MPSC 3d 394.

The Commission found that it is reasonable to allow the Company another AAO for the SLRP deferrals because the SLRP related costs are an extraordinary expense item and because the Commission required companies to replace mains and service lines within their service areas. The Commission issued an AAO authorizing the company to defer and book costs relating to SLRP deferral carrying costs, property taxes, and depreciation expenses for the period beginning the day after the effective date of the order through the true up period of the next rate case. The Commission directed the deferral account to begin with a zero balance.—Missouri Gas Energy 7 MPSC 3d 394.

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**MANUFACTURED HOUSING**

**I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**

- §4. Jurisdiction and powers of the State Commission
- §5. Reports, records and statements

**II. WHEN A PERMIT IS REQUIRED**

- §6. When a permit is required generally
- §7. Operations and construction

**III. GRANT OR REFUSAL OF A PERMIT**

- §8. Grant or refusal generally
- §9. Restrictions or conditions
- §10. Who may possess
- §11. Public safety

**IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION**

- §12. Operations under the permit generally
- §13. Duration of the permit
- §14. Modification and amendment of the permit generally
- §15. Transfer, mortgage or lease generally
- §16. Revocation, cancellation and forfeiture generally
- §17. Acts or omissions justifying revocation or forfeiture
- §18. Necessity of action by the Commission
- §19. Penalties

**MANUFACTURED HOUSING**

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**IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION**

\* \* \* \* \*

**§16. Revocation, cancellation and forfeiture generally**

In a complaint against a manufactured housing dealer, the Director of the Division of Manufactured Homes failed to carry his burden of proving all elements of the alleged violation of statute and regulation. As a result the Director's request to suspend the dealers license was denied.—Public Service Commission Staff vs Amega Mobile Home Sales 7 MPSC 3d 455.

The Commission approved a stipulation and agreement that resolved a complaint against a manufactured housing dealer for allegedly failing to properly setup a mobile home.—Public Service Commission Staff vs Discount Manufactured Housing 7 MPSC 3d 490.

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**PUBLIC UTILITIES**

**I. IN GENERAL**

- §1. Generally
- §2. Nature of
- §3. Functions and powers

- §4. Termination of status
- §5. Obligation of the utility

## II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

## III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general
- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

## IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally
- §24. Municipal plants
- §25. Municipal districts
- §26. Mutual companies; cooperatives
- §27. Corporations
- §28. Foreign corporations or companies
- §29. Unincorporated companies
- §30. State or federally owned or operated utility
- §31. Trustees

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## PUBLIC UTILITIES

### I. IN GENERAL

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#### §5. Obligation of the utility

The Commission will grant rehearing where various regulated entities have challenged the transfer of funds from the Public Service Commission Fund to the General Revenue Fund in order to underwrite refunds pursuant to the so-called Hancock Amendment, Mo. Const. art. X, §16-24, in order to make a record for further review.—Assessment-Utilities 7 MPSC 3d 371.

The Commission will establish a case in which to examine the preparations and readiness of regulated entities for the advent of the year 2000, so-called “Y2K,” and

consequent operational difficulties anticipated by some persons.—Year 2000 Conversion 7 MPSC 3d 377.

Intervenors shall be subject to the same pleading requirements as other parties to this case. All parties are placed under a continuing obligation to inform the Commission as to any monies received as Hancock Amendment tax refunds.—Assessment-Utilities 7 MPSC 3d 463.

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## RATES

### I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

### II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service

- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

### III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

### IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

### V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure

- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

#### VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

#### VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

#### VIII. RATE DESIGN, CLASS COST OF SERVICE

- §118. Method of allocating costs
- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities
- §123. Rate design, class cost of service for telecommunications utilities
- §124. Rate design, class cost of service for heating utilities

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**RATES**

**I. JURISDICTION AND POWERS**

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**§7. Obligation of the utility**

Further delay of refunds ordered by the Federal Energy Regulatory Commission related to the Kansas ad valorem taxes would not be in the best interests of Missouri Public Service Company's customers, and therefore, MPS' application for variance of the refund provisions of its tariff sheets 37 and 38 was denied. MPS had received refunds from Williams Natural Gas Company totaling \$970,167,000 for overcharges of ad valorem taxes during the years 1983 through 1988.—UtiliCorp United 7 MPSC 3d 551.

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**II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS**

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**§13. Character of the service**

The Commission found that the telephone company's proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company's general exchange tariff and not the company's local exchange tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission found that the classification of hybrid services should be considered on a case by case basis.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

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**§20. Costs and expenses**

The Commission found that it is just and reasonable to include only the actual amount of the rate case expense prudently incurred for this rate case and to normalize the actual amount of the expense for a two-year period. The Commission also found that it is reasonable to include the PSC assessment expense in this rate case even though the assessment occurred beyond the end of the true-up period.—Missouri Gas Energy 7 MPSC 3d 394.

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**§37. Refund and/or reduction**

The Commission ordered Respondent to refund Complainants the overpayment of the new service connection. The overpayment is computed by subtracting the appropriate CIAC charge and the charge for service line installation from the actual payment, along with interest in the amount of 6 percent per annum on the overpayment.—McLard/McClain vs Stoddard County Sewer Co.7 MPSC 3d 1.

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its



Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

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**§40. Revenues**

The Commission rejected the intervenor’s allegations that the rates proposed by the signatories to the stipulation and agreement would result in a revenue increase or only a slight revenue decrease when applied to current usage levels.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

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**§48. Violation of law or orders**

The Commission ordered Respondent to refund Complainants the overpayment of the new service connection. The overpayment is computed by subtracting the appropriate CIAC charge and the charge for service line installation from the actual payment, along with interest in the amount of 6 percent per annum on the overpayment.—McLard/McClain vs Stoddard County Sewer Co.7 MPSC 3d 1.

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**III. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO**

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**§64. Reduction of rates**

A rate reduction agreed to by the parties is in the public interest and movement toward parity between interLATA and intraLATA access rates is consistent with a move toward a more competitive toll market.—Citizens Telephone Company 7 MPSC 3d 548.

**§65. Refunds**

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

Further delay of refunds ordered by the Federal Energy Regulatory Commission related to the Kansas ad valorem taxes would not be in the best interests of Missouri Public Service Company’s customers, and therefore, MPS’ application for variance of the refund provisions of its tariff sheets 37 and 38 was denied. MPS had received refunds from Williams Natural Gas Company totaling \$970,167,000 for overcharges of ad valorem taxes during the years 1983 through 1988.—UtiliCorp United 7 MPSC 3d 551.

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**§79. Test or trial rates**

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its

Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

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**IV. KINDS AND FORMS OF RATES AND CHARGES**

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**§91. Two-part rate combinations**

The Commission found that the telephone company’s proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company’s general exchange tariff and not the company’s local exchange tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

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**VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

**§104. Electric and power**

The Commission approved a credit sharing in the amount of \$17,897,000 to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan upon finding that the proposed sharing credit amount was reasonable.—Union Electric Company 7 MPSC 3d 306.

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**§108. Gas**

The Commission rejected the proposed tariff sheets filed by Associated Natural Gas Company and authorized the company to file tariff sheets designed to increase gross revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or other similar fees or taxes, by the amount of \$1,522,263 over its current revenues.—Associated Natural Gas 7 MPSC 3d 4.

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**§110. Telecommunications**

The Commission found that the intervenor had not met its burden of demonstrating that the other parties’ agreement to equalize intraLATA and interLATA access rates and to eliminate the common carrier line charge (CCL) cap was inappropriate or unfair.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission rejected the intervenor’s allegations that the rates proposed by the signatories to the stipulation and agreement would result in a revenue increase or only a slight revenue decrease when applied to current usage levels.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission rejected a tariff proposing rates for E-911 service based on a finding that the telephone company’s cost studies and rate methodology were insufficient to support the level of rates proposed.—New London Telephone Company 7 MPSC 3d 453.

A rate reduction agreed to by the parties is in the public interest and movement toward parity between interLATA and intraLATA access rates is consistent with a move

toward a more competitive toll market.—Citizens Telephone Company 7 MPSC 3d 548.

The Commission found that the telephone company's tariff was consistent with the requirements of the Commission's order in Case No. TT-98-351 in that it provided for a service that had characteristics of both local and toll service, and was therefore filed in the company's general exchange tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 555.

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**§112. Sewers**

The Commission ordered Respondent to refund Complainants the overpayment of the new service connection. The overpayment is computed by subtracting the appropriate CIAC charge and the charge for service line installation from the actual payment, along with interest in the amount of 6 percent per annum on the overpayment.—McLard/McClain vs Stoddard County Sewer Co.7 MPSC 3d 1.

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**VII. RATE DESIGN, CLASS COST OF SERVICE**

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**§123. Rate design, class cost of service for telecommunications utilities**

The Commission found that a non-unanimous stipulation and agreement in an overearnings investigation was in the public interest because it was designed to decrease the telephone company's revenues as quickly as possible by an amount that all parties considered appropriate, the agreement would reduce some of the highest access rates in Missouri, thereby benefiting all ratepayers in the state, and the agreement contained a revenue design and tariffs which were fair to all carriers in the competitive environment.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

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**SECURITY ISSUES**

**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Authorization by a corporation
- §4. Conversion, redemption and purchase by a corporation
- §5. Decrease of capitalization
- §6. Sinking funds
- §7. Dividends
- §8. Revocation and suspension of Commission authorization
- §9. Fees and expenses
- §10. Purchase by utility
- §11. Accounting practices

**II. JURISDICTION AND POWERS**

- §12. Jurisdiction and powers in general
- §13. Jurisdiction and powers of Federal Commissions
- §14. Jurisdiction and powers of the State Commission
- §15. Jurisdiction and powers of local authorities

**III. NECESSITY OF AUTHORIZATION BY THE COMMISSION**

- §16. Necessity of authorization by the Commission generally
- §17. Installment contracts
- §18. Refunding or exchange of securities
- §19. Securities covering utility and nonutility property
- §20. Securities covering properties outside the State

**IV. FACTORS AFFECTING AUTHORIZATION**

- §21. Factors affecting authorization generally
- §21.1. Effect on bond rating
- §22. Equity capital
- §23. Charters
- §24. Competition
- §25. Compliance with the terms of a mortgage or lease
- §26. Definite plans and purposes
- §27. Financial conditions and prospects
- §28. Use of proceeds
- §29. Dividends and dividend restrictions
- §30. Improper practices and irregularities
- §31. Intercorporate relations
- §32. Necessity of issuance
- §33. Revenue
- §34. Rates and rate base
- §35. Size of the company
- §36. Title of property
- §37. Amount
- §38. Kind of security
- §39. Restrictions imposed by the security

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**SERVICE**

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**V. OPERATIONS**

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**§31. Rules and regulations**

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy’s predecessor, finding the three year variance reasonable.—Associated Natural Gas 7 MPSC 3d 309.

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**§37. Equipment**

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy’s predecessor, finding the three year variance reasonable.—Associated Natural Gas 7 MPSC 3d 309.

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**VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT**

**§46. Connections, instruments and equipment in general**

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company (ANG) to implement a meter sampling program for testing and replacement of meter equipment, similar to those variances already granted to Union Electric Company, Laclede Gas Company and to Missouri Gas Energy’s predecessor, finding the three year variance reasonable.—Associated Natural Gas 7 MPSC 3d 309.

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## SEWER

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### II. OPERATIONS



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**§26. Financing practices**

The Commission found company in default on payment for wholesale sewer service and ordered an investigation into the allegations.—West Elm Place Corp. vs Imperial Utility Corp. 7 MPSC 3d 145.

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**§28. Rules and regulations**

The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.—Affiliate Transactions 7 MPSC 3d 259.

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- §46. Relations between connecting companies generally
- §47. Physical connection
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- §49. Records and statements

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**STEAM**

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**III. OPERATIONS**

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**§14. Rules and regulations**

The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.—Affiliate Transactions 7 MPSC 3d 259.

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- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
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## TELECOMMUNICATIONS

**I. IN GENERAL****§1. Generally**

After finding significant advantages and disadvantages to both geographic splits and all services overlays methods of introducing a new numbering plan areas (NPA), the three-number area code, the Commission found that customer impacts favoring the geographic split method of implementing a new area code preferably, and the Commission ordered the parties to submit a plan for implementing a new area code using a geographic split of the area served by the 314 area code.—314 area code 7 MPSC 3d 319.

Certain methods of number conservation, including 1,000s block number pooling, sequential number assignment and rate center consolidation, while not ready for immediate implementation, have significant potential for promoting the efficient utilization of numbering resources in the future and could dramatically prolong the lives of the NPAs if implemented as soon as possible.—314 area code 7 MPSC 3d 319.

The Commission established a new case for the purpose of directing a technical committee to study and report to the Commission on three methods of number conservation in the geographic area that currently comprises the 314 NPA, including 1,000s block number pooling, sequential number assignment and rate center consolidation.—Telephone Number Conservation 7 MPSC 3d 343.

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**§3.2. Certificate of interexchange service authority**

The Commission approved a Stipulation and Agreement providing that University Place will apply for certificates of service authority to provide shared tenant services and interexchange services. The Commission found that University Place will permit current and future tenants to receive their telecommunications service from GTE if they prefer and will take no retaliatory action against any tenant who chooses to do so. The agreement requires University Place to credit the final phone bill of any tenant choosing to take service from GTE in an amount not to exceed \$20.60 (GTE's activation fee).—Public Service Commission Staff vs University Place Apartments 7 MPSC 3d 254.

The Commission denied the application for a rehearing regarding the Primary Toll Carrier Plan. The Commission amended a previous order to eliminate the requirement that secondary carriers file an application for a certificate of service authority to provide interexchange telecommunications services. The Commission further amended its order to indicate that no company is required to implement intraLATA presubscription in exchanges involved in COS routes before June 1, 1998.—Primary Toll Carrier Plan 7 MPSC 3d 275.

The Commission will grant a certificate to provide interexchange telecommunication services to Green Hills Communications, Inc., classify it and its services as competitive, and waive requested statutes and rules despite concerns raised by Southwestern Bell Telephone Company with respect to the Primary Toll Carrier Plan because Green Hills Communications, Inc., does not presently have a tariff permitting it to provide interLATA toll services and the issues raised by Southwestern Bell Telephone Company with respect to the Primary Toll Carrier Plan are better addressed when and if Green Hills files such a tariff.—Green Hills Communications, Inc. 7 MPSC 3d 286.

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**§4. Transfer, lease and sale**

The Commission approved a merger plan whereby two companies providing basic local telecommunications service were merged into a single company.—Fidelity Telephone/Bourbeuse Telephone 7 MPSC 3d 375.

**II. JURISDICTION AND POWERS****§5. Jurisdiction and powers of local authorities**

The Commission found that the sale of the South Hamburg Exchange by Southwestern Bell Telephone Company to Rock Port Telephone Company was in the public interest, and approved it.—Southwestern Bell Telephone Company/Rock Port Telephone Company 7 MPSC 3d 293.

The Commission has authority to review all tariffs filed with the Commission and to reject or suspend tariffs that fail to comply with state law, Commission rule or order, if they include unjust or unreasonable rates, or are not in the public interest.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission determined that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.—Southwestern Bell Telephone Company/Ameritech 7 MPSC 3d 528.

**§6. Jurisdiction and powers of Federal Commissions**

The Commission approved an agreement not to develop a Missouri state-specific forward-looking economic cost study for purposes of determining federal universal

service support; and instead, the Commission decided to adopt the forward-looking economic cost study which will be developed by the Federal Communications Commission (FCC).—Universal Service Fund 7 MPSC 3d 101.

The Commission approved a Stipulation and Agreement designating GTE Midwest Incorporated as an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§214(e) and 254(e). The Commission found that GTE's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. §54.207(b).—GTE Midwest Incorporated 7 MPSC 3d 104.

The Commission concluded the requests to negotiate interconnection issues were in accordance with the Telecommunications Act of 1996. The Act does not establish a minimum level of formality for making such requests. The Commission concluded the Act does not require a party with a history of prior negotiations and arbitration to carefully state whether it seeks to negotiate new issues or issues that have been previously negotiated or arbitrated.—MCI/AT&T/Southwestern Bell Telephone Company 7 MPSC 3d 148.

#### **§7. Jurisdiction and powers of the State Commission**

The Commission approved a Stipulation and Agreement providing that University Place will apply for certificates of service authority to provide shared tenant services and interexchange services. The Commission found that University Place will permit current and future tenants to receive their telecommunications service from GTE if they prefer and will take no retaliatory action against any tenant who chooses to do so. The agreement requires University Place to credit the final phone bill of any tenant choosing to take service from GTE in an amount not to exceed \$20.60 (GTE's activation fee).—Public Service Commission Staff vs University Place Apartments 7 MPSC 3d 254.

47 U.S.C. §151 et seq., establishes jurisdiction in the Commission to arbitrate disputes between interconnecting local exchange carriers.—Birch Telecom/Southwestern Bell Telephone Company 7 MPSC 3d 260.

The Commission found that its primary goal under the federal Telecommunications Act of 1996 is to promote competition as the vestiges of divestiture are slowly being dismantled and that considerations such as the relative profit margins, ability to contribute and historical contributions of companies serving different market segments should not influence the Commission's decision in the new atmosphere of free market competition.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

### **III. OPERATIONS**

#### **§8. Operations generally**

The Commission approved an agreement following allegations that company provided basic local service without approved tariff. The Commission found that the customer refunds, and the company's payment of charges necessary for reestablishment of service with SWBT, are adequate to compensate any customers for the inconvenience they may have experienced as a result of the company's conduct. The Commission found that the penalty of \$4,300 to be paid into the public school fund of the state of Missouri is an appropriate resolution of the issues of this case.—Public Service Commission Staff vs Local Fone Service, Inc. 7 MPSC 3d 256.

After finding significant advantages and disadvantages to both geographic splits and all services overlays methods of introducing a new numbering plan areas (NPA), the three-number area code, the Commission found that customer impacts favoring the

geographic split method of implementing a new area code preferably, and the Commission ordered the parties to submit a plan for implementing a new area code using a geographic split of the area served by the 314 area code.—314 area code 7 MPSC 3d 319.

Certain methods of number conservation, including 1,000s block number pooling, sequential number assignment and rate center consolidation, while not ready for immediate implementation, have significant potential for promoting the efficient utilization of numbering resources in the future and could dramatically prolong the lives of the NPA's if implemented as soon as possible.—314 area code 7 MPSC 3d 319.

The Commission established a new case for the purpose of directing a technical committee to study and report to the Commission on three methods of number conservation in the geographic area that currently comprises the 314 NPA, including 1,000s block number pooling, sequential number assignment and rate center consolidation.—Telephone Number Conservation 7 MPSC 3d 343.

After conducting an investigation, the Commission concluded that the Commission's regulations do not contain barriers that might impact an independent payphone service provider's or local exchange company's ability to freely enter the competitive payphone market.—Investigation payphone issues 7 MPSC 3d 533.

After conducting an investigation, the Commission concluded that 4 CSR 240-32.070(4), a rule requiring local exchange company's to maintain at least one payphone in each exchange, constituted a barrier to exit from the competitive payphone market and indicated that the rule would be reviewed through the rule-making process.—Investigation payphone issues 7 MPSC 3d 533.

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**§11. Depreciation**

The Commission approved a stipulation and agreement in which Le-Ru agreed to decrease its yearly revenue by \$312,010. The Commission found that the agreement's implementation of parity between interLATA and intraLATA originating and terminating Common Carrier Line access rates was in keeping with the move to a more competitive market. The stipulation and agreement also provided for new depreciation rates.—Le-Ru Telephone Company 7 MPSC 3d 526.

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**§13. Costs and expenses**

The Commission adopted the rates established in arbitration as interim rates only and that further proceedings shall be conducted to establish permanent rates. In order to implement permanent rates, the AAS in its capacity as advisor to the Commission is instructed to conduct an investigation focusing on identifying the critical inputs and analyzing the costing models.—AT&T 7 MPSC 3d 54.

The Commission approved an agreement not to develop a Missouri state-specific forward-looking economic cost study for purposes of determining federal universal service support; and instead, the Commission decided to adopt the forward-looking economic cost study which will be developed by the Federal Communications Commission (FCC).—Universal Service Fund 7 MPSC 3d 101.

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**§14. Rates**

The Commission adopted the rates established in arbitration as interim rates only and that further proceedings shall be conducted to establish permanent rates. In order to implement permanent rates, the AAS in its capacity as advisor to the Commission is instructed to conduct an investigation focusing on identifying the critical inputs and analyzing the costing models.—AT&T 7 MPSC 3d 54.

The Commission approved the Stipulation and Agreement and designated Sprint as an eligible telecommunications carrier for purposes of federal universal service support. The Commission found exceptional circumstances exist which prevent Sprint from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission found that Sprint should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.—Sprint Missouri, Inc. 7 MPSC 3d 94.

The Commission approved the Stipulation and Agreement and designated SWBT as an eligible telecommunications carrier for purposes of federal universal service support. The Commission found exceptional circumstances exist which prevent SWBT from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission found that SWBT should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.—Southwestern Bell Telephone Company 7 MPSC 3d 98.

The Commission approved a stipulation and agreement whereby the telephone companies agreed to a decrease in revenues of \$799,923 per year to reflect savings resulting from a pending merger between the two companies.—Fidelity Telephone/Bourbeuse Telephone 7 MPSC 3d 365.

The Commission found that the intervenor had not met its burden of demonstrating that the other parties' agreement to equalize intraLATA and interLATA access rates and to eliminate the common carrier line charge (CCL) cap was inappropriate or unfair.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission rejected the intervenor's allegations that the rates proposed by the signatories to the stipulation and agreement would result in a revenue increase or only a slight revenue decrease when applied to current usage levels.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission found that a telephone company should be permitted to eliminate the existing Carrier Common Line (CCL) rate cap in the context of access tariffs that are revenue neutral to the company and otherwise found reasonable by the Commission.—ALLTEL 7 MPSC 3d 441.

The Commission rejected a tariff proposing rates for E-911 service based on a finding that the telephone company's cost studies and rate methodology were insufficient to support the level of rates proposed.—New London Telephone Company 7 MPSC 3d 453.

The Commission found that for the particular hybrid service, terminating access charges were the appropriate method of intercompany compensation; however, imputation of access charges would not be necessary if this service were available for resale at a wholesale discount to competitive local exchange companies and interexchange companies.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission found that a restriction on aggregation of this particular hybrid telephone service is a reasonable restriction on resale.—Southwestern Bell Telephone Company 7 MPSC 3d 465.



A rate reduction agreed to by the parties is in the public interest and movement toward parity between interLATA and intraLATA access rates is consistent with a move toward a more competitive toll market.—Citizens Telephone Company 7 MPSC 3d 548.

The Commission found that the telephone company's tariff was consistent with the requirements of the Commission's order in Case No. TT-98-351 in that it provided for a service that had characteristics of both local and toll service, and was therefore filed in the company's general exchange tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 555.

The Commission approved a stipulation and agreement in which Le-Ru agreed to decrease its yearly revenue by \$312,010. The Commission found that the agreement's implementation of parity between interLATA and intraLATA originating and terminating Common Carrier Line access rates was in keeping with the move to a more competitive market. The stipulation and agreement also provided for new depreciation rates.—Le-Ru Telephone Company 7 MPSC 3d 526.

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#### §16. Revenue

The Commission found that a non-unanimous stipulation and agreement in an overearnings investigation was in the public interest because it was designed to decrease the telephone company's revenues as quickly as possible by an amount that all parties considered appropriate, the agreement would reduce some of the highest access rates in Missouri, thereby benefiting all ratepayers in the state, and the agreement contained a revenue design and tariffs which were fair to all carriers in the competitive environment.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission approved a stipulation and agreement by which a telephone company agreed to a decrease in revenues of \$22,436 per year.—Oregon Farmers Mutual Telephone Company 7 MPSC 3d 523.

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#### §19. Financing practices

The Commission approved a telephone company's plan to borrow 3.7 million dollars from the Rural Utilities Service and 2.2 million dollars from the Rural Telephone Bank to fund the company's modernization plan.—Ozark Telephone Company 7 MPSC 3d 350.

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#### §23. Rules and regulations

The Commission approved a stipulation and agreement and designated each applicant an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§214(e) and 254(e). The Commission found that each applicant's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. §54.207(b).—Mid-Missouri Group/Small Telephone Company Group 7 MPSC 3d 25.

The Commission established a docket to investigate Federal Telecommunications Act of 1996 compliance regarding whether the Commission's rules and regulations contain barriers to free entry and exit from the competitive payphone market; and to address the issue of provision and funding of "public interest" payphones.—Investigation payphone issues 7 MPSC 3d 33.

The Commission ordered SWBT to file a new tariff consistent with the finding that federal law does not prohibit the company from realigning its relationship with wireless carriers to provide only a transport function, and that such a realignment should be permitted. The Commission has also found that SWBT should be required to make available a Cellular Usage Summary Report that contains information sufficient to allow third-party LECs to bill wireless carriers for wireless-originating traffic which terminates in the exchanges of the third-party LECs. The Commission has further found that SWBT's interpretation of its indemnity language is unreasonable, and that some of the other language in its current tariff is unenforceable.—Southwestern Bell Telephone Company 7 MPSC 3d 38.

The Commission approved the Stipulation and Agreement and designated Sprint as an eligible telecommunications carrier for purposes of federal universal service support. The Commission found exceptional circumstances exist which prevent Sprint from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission found that Sprint should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.—Sprint Missouri, Inc. 7 MPSC 3d 94.

The Commission approved the Stipulation and Agreement and designated SWBT as an eligible telecommunications carrier for purposes of federal universal service support. The Commission found exceptional circumstances exist which prevent SWBT from providing ubiquitous single party service and toll limitation and that the requested extensions of time shall be granted. The Commission found that SWBT should be directed to file tariff revisions as necessary to implement Lifeline and Link Up services.—Southwestern Bell Telephone Company 7 MPSC 3d 98.

The Commission approved a Stipulation and Agreement designating GTE Midwest Incorporated as an eligible telecommunications carrier for purposes of federal universal service support pursuant to 47 U.S.C. §§214(e) and 254(e). The Commission found that GTE's service area shall be equivalent to its "study area" pursuant to 47 C.F.R. §54.207(b).—GTE Midwest Incorporated 7 MPSC 3d 104.

The Commission concluded the requests to negotiate interconnection issues were in accordance with the Telecommunications Act of 1996. The Act does not establish a minimum level of formality for making such requests. The Commission concluded the Act does not require a party with a history of prior negotiations and arbitration to carefully state whether it seeks to negotiate new issues or issues that have been previously negotiated or arbitrated.—MCI/AT&T/Southwestern Bell Telephone Company 7 MPSC 3d 148.

The Commission approved an agreement following allegations that company provided basic local service without approved tariff. The Commission found that the customer refunds, and the company's payment of charges necessary for reestablishment of service with SWBT, are adequate to compensate any customers for the inconvenience they may have experienced as a result of the company's conduct. The Commission found that the penalty of \$4,300 to be paid into the public school fund of the state of Missouri is an appropriate resolution of the issues of this case.—Public Service Commission Staff vs Local Fone Service, Inc. 7 MPSC 3d 256.

After conducting an investigations, the Commission concluded that 4 CSR 240-32.070(4), a rule requiring local exchange company's to maintain at least one payphone in each exchange, constituted a barrier to exit from the competitive payphone market and indicated that the rule would be reviewed through the rule-making process.—Investigation payphone issues 7 MPSC 3d 533.

**§24. Equipment**

The Commission modified certain terms and conditions relating to the Adoptive Telephone Equipment Program. The Commission denied a request to establish an intermediate level of review because it may add confusion to the applicant and does not add efficiency to the process. The Commission also eliminated the ability to “trade up” by applying vouchers.—Adaptive Telephone Equipment 7 MPSC 3d 108.

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**§26. Service generally**

The Commission approved an agreement between Ozark Telephone Company and AT&T in which Ozark will provide periodic investigation and repair reports to AT&T. The parties further agreed that AT&T will not initiate contact unless Ozark fails to provide the reports and AT&T will pay Ozark’s overtime repair expenses.—AT&T vs Ozark Telephone Company 7 MPSC 3d 175.

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**§29. Local service**

The Commission found that the telephone company’s proposed service was not appropriately classified as either a local or a toll service, but rather the service was a hybrid and therefore, should be filed in the company’s general exchange tariff and not the company’s local exchange tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Cole County Circuit Court reversed and remanded the Commission’s order eliminating the Primary Toll Carrier (PTC) Plan, Case No. TO-97-217, on September 11, 1998 (Case No. CV198-666CC). The Commission determined that the uncertain status of the PTC Plan may have an impact on this case as well. Therefore, the Commission further extended the deadline for the mandatory elimination of community optional service in Missouri from February 28, 1999, to a date to be determined after the final resolution of the PTC Plan.—Community Optional Service 7 MPSC 3d 522.

**§30. Calling scope**

That Commission established a docket to investigate calling scopes in a competitive environment in order to adequately address the needs of Missouri customers and receive essential public and industry input.—Investigation calling scopes 7 MPSC 3d 161.

The Cole County Circuit Court reversed and remanded the Commission’s order eliminating the Primary Toll Carrier (PTC) Plan, Case No. TO-97-217, on September 11, 1998 (Case No. CV198-666CC). The Commission determined that the uncertain status of the PTC Plan may have an impact on this case as well. Therefore, the Commission further extended the deadline for the mandatory elimination of community optional service in Missouri from February 28, 1999, to a date to be determined after the final resolution of the PTC Plan.—Community Optional Service 7 MPSC 3d 522.

**§31. Long distance service**

The Commission found that the telephone company’s proposed service was not appropriately classified as either a local or a toll service, but rather the service was

a hybrid and therefore, should be filed in the company's general exchange tariff and not the company's local exchange tariff.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission amended its Order Approving Stipulation and Designation of Eligible Telecommunications Carrier, issued on December 23, 1997, to show that Southwestern Bell Telephone Company now provides services that satisfy the revised definition of toll limitations and are in compliance with the toll limitation requirements set out for Federal Universal Service Fund eligibility.—Southwestern Bell Telephone Company 7 MPSC 3d 553.

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### §33. Billing practices

Commission approved resolution of complaint case by stipulation and agreement where carrier had collected increased rates from customers for period of time prior to filing and approving of tariff authorizing increased rates and carrier agreed to refund all amounts collected in excess of approved tariffed rates to customers.—Public Service Commission Staff vs Cable & Wireless, Inc. 7 MPSC 3d 307.

The Commission found that it is in the public interest for a hybrid extended area service plan to include optional detailed billing for customers at no more than a nominal fee.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission found that the proposal by Staff and Public Counsel that the Commission prohibit Southwest Bell Telephone Company from disconnecting end users from the local network for nonpayment of toll charges is inappropriate in the context of this case. The Commission found that, where a customer is direct-billed by the customer's presubscribed interexchange carrier (IXC), Southwestern Bell Telephone Company should not restrict toll traffic routed through that IXC. However, an IXC must identify its direct-billed customers in order to enable Southwestern Bell Telephone Company to exempt that IXC's charges from the TRIMS monitoring process. The Commission found that the process of using pseudo rates proposed by Southwestern Bell Telephone Company is a reasonable method of estimating toll charges. The Commission found that Southwestern Bell Telephone Company should not be allowed to block toll-restricted customers from operator services and local directory assistance. The Commission found that the TRIMS proposal, as filed, did not conflict with existing Southwestern Bell Telephone Company tariff provisions regarding disconnection. The Commission found that Southwestern Bell Telephone Company's proposed use of PIN numbers is reasonable as long as customers are notified that the alternative is available. The Commission found that, although the TRIMS proposal generally offers benefits in controlling uncollectibles and helping end users manage their toll bills, it was not just, reasonable, and in the public interest as filed; therefore, the proposed tariff was rejected.—Southwestern Bell Telephone Company 7 MPSC 3d 506.

The Commission denied motions to suspend and approved a proposed tariff that established a Telecommunications Revenue Interactive Management System.—Southwestern Bell Telephone Company 7 MPSC 3d 559.

### §34. Pricing policies

The Commission suspended the elimination of Community Optional Service and found that it shall be phased out on or after June, 1998, but no later than the federally mandated deadline of February 28, 1999. The suspension was due to the industry's unexpectedly slow response to the elimination and replacement of the COS program.—Community Optional Service 7 MPSC.

The Commission found that the classification of hybrid services should be considered on a case by case basis.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

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#### IV. RELATIONS BETWEEN CONNECTING COMPANIES

##### §36. Relations between connecting companies generally

The Commission ordered SWBT to file a new tariff consistent with the finding that federal law does not prohibit the company from realigning its relationship with wireless carriers to provide only a transport function, and that such a realignment should be permitted. The Commission has also found that SWBT should be required to make available a Cellular Usage Summary Report that contains information sufficient to allow third-party LECs to bill wireless carriers for wireless-originating traffic which terminates in the exchanges of the third-party LECs. The Commission has further found that SWBT's interpretation of its indemnity language is unreasonable, and that some of the other language in its current tariff is unenforceable.—Southwestern Bell Telephone Company 7 MPSC 3d 38.

The Commission concluded the requests to negotiate interconnection issues were in accordance with the Telecommunications Act of 1996. The Act does not establish a minimum level of formality for making such requests. The Commission concluded the Act does not require a party with a history of prior negotiations and arbitration to carefully state whether it seeks to negotiate new issues or issues that have been previously negotiated or arbitrated.—MCI/AT&T/Southwestern Bell Telephone Company 7 MPSC 3d 148.

The Commission approved an interconnection and reciprocal compensation agreement allowing SWB Wireless to become a reseller provider, a facilities-based provider, and a mixed-mode provider combining resold and facilities-based elements.—Southwestern Bell Telephone Company 7 MPSC 3d 163.

The Commission found that the record presented by the parties was not sufficiently persuasive to move the Commission to make a final decision on the issue of reciprocal compensation for calls from an end user to an Internet Service Provider within the local calling scope, pending the results of the Federal Communications Commission's proceeding on the same issue—Birch Telecom/Southwestern Bell Telephone Company 7 MPSC 3d 260.

The Commission directed that prior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to Internet Service Providers within a local calling scope, the parties were to compensate one another for such traffic in the same manner that local calls to non Internet Service Provider end users are compensated, subject to true-up following the Federal Communications Commission's determination of the issue.—Birch Telecom/Southwestern Bell Telephone Company 7 MPSC 3d 260.

The Commission found that the proposed consolidated access rate tariff filed by a telephone company was not just, reasonable, nor in the public interest because it restructured the company's access rates in a manner that would shift significant and unreasonable amounts of revenue from originating to terminating minutes of use.—ALLTEL 7 MPSC 3d 441.

The Commission found that the terminating to originating ratio of 12.62:1 proposed by a telephone company was anti-competitive and unreasonable. Approval of the proposed ratio would shift a disproportionate share of the company's revenue requirement from originating to terminating minutes and act to discourage the development of intraLATA competition.—ALLTEL 7 MPSC 3d 441.

The Commission found that a telephone company should be permitted to set its interLATA and intraLATA Carrier Common Line (CCL) rates at parity to the extent that it can be achieved without an inordinate adverse impact on the company's access customers.—ALLTEL 7 MPSC 3d 441.

The Commission approved an interconnection agreement after a review as required under provisions of § 252 of the Telecommunications Act of 1976, concluding that the agreement is neither discriminatory nor inconsistent with the public interest.—MCI/Southwestern Bell Telephone Company 7 MPSC 3d 354.

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**§39. Division of revenue, expenses, etc.**

The Commission found that the record presented by the parties was not sufficiently persuasive to move the Commission to make a final decision on the issue of reciprocal compensation for calls from an end user to an Internet Service Provider within the local calling scope, pending the results of the Federal Communications Commission's proceeding on the same issue.—Birch Telecom/Southwestern Bell Telephone Company 7 MPSC 3d 260.

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The Commission found that a telephone company should be permitted to set its interLATA and intraLATA Carrier Common Line (CCL) rates at parity to the extent that it can be achieved without an inordinate adverse impact on the company's access customers.—ALLTEL 7 MPSC 3d 441.

The Commission found that for the particular hybrid service, terminating access charges were the appropriate method of intercompany compensation; however, imputation of access charges would not be necessary if this service were available for resale at a wholesale discount to competitive local exchange companies and interexchange companies.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission approved a stipulation and agreement in which Le-Ru agreed to decrease its yearly revenue by \$312,010. The Commission found that the agreement's implementation of parity between interLATA and intraLATA originating and terminating Common Carrier Line access rates was in keeping with the move to a more competitive market. The stipulation and agreement also provided for new depreciation rates.—LeRu Telephone Company 7 MPSC 3d 526.

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**§40. Classification of company or service as noncompetitive, transitionally, or competitive.**

The Commission will grant a certificate to provide interexchange telecommunication services to Green Hills Communications, Inc., classify it and its services as competitive, and waive requested statutes and rules despite concerns raised by Southwestern Bell Telephone Company with respect to the Primary Toll Carrier Plan because Green Hills Communications, Inc., does not presently have a tariff permitting it to provide interLATA toll services and the issues raised by Southwestern Bell Telephone Company with respect to the Primary Toll Carrier Plan are better addressed when and if Green Hills files such a tariff.—Green Hills Communications, Inc. 7 MPSC 3d 286.

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**§45. Local exchange competition**

The Commission found that the PTC Plan is no longer appropriate in the emerging competitive telecommunications environment and should be replaced with an alternative to be denominated an Originating Responsibility Plan. The Commission found that the PTC Plan must be phased out in a reasonable fashion and will direct the formation of a technical committee to make recommendations regarding the transition period and needed mechanisms.—Primary Toll Carrier Plan 7 MPSC 3d 228.

The Commission found that its primary goal under the federal Telecommunications Act of 1996 is to promote competition as the vestiges of divestiture are slowly being dismantled and that considerations such as the relative profit margins, ability to contribute and historical contributions of companies serving different market segments should not influence the Commission's decision in the new atmosphere of free market competition.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission found that a non-unanimous stipulation and agreement in an overearnings investigation was in the public interest because it was designed to decrease the telephone company's revenues as quickly as possible by an amount that all parties considered appropriate, the agreement would reduce some of the highest access rates in Missouri, thereby benefiting all ratepayers in the state, and the agreement contained a revenue design and tariffs which were fair to all carriers in the competitive environment.—Northeast Missouri Rural Telephone 7 MPSC 3d 381.

The Commission has authority to review all tariffs filed with the Commission and to reject or suspend tariffs that fail to comply with state law, Commission rule or order, if they include unjust or unreasonable rates, or are not in the public interest.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission concluded that pursuant to Section 251(b)(1) of the Telecommunications Act of 1996, each local exchange carrier has the duty not to prohibit, and not to impose unreasonable or discriminatory limitations on, the resale of its telecommunications services.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission concluded that pursuant to Section 251(c)(4) of the Telecommunications Act of 1996, local exchange carrier have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission found that a restriction on aggregation of this particular hybrid telephone service is a reasonable restriction on resale.—Southwestern Bell Telephone Company 7 MPSC 3d 465.

The Commission found that it was in the public interest to approve the language in the telephone company's tariff that allowed the company to discontinue the service in the event that aggregation of service is allowed by the purchaser.—Southwestern Bell Telephone Company 7 MPSC 3d 555.

**§46. Interconnection Agreements**

Motions for rehearing denied. The Commission's Universal Service Fund rulemaking establishes that disbursements from the fund shall be revenue neutral; that assessments for the fund will be based on each carrier's Missouri net jurisdictional revenues; and that a denominated end-user Universal Service fund surcharge is unlawful.—Missouri Universal Service Fund 7 MPSC 3d 268.

**§46.1 Interconnection Agreement — Arbitrated**

The Commission approved the interconnection agreement submitted by the parties in compliance with the Commission's Arbitration Order, and directed that the parties submit any modifications to the Commission for approval.—AT&T/GTE Midwest Incorporated 7 MPSC 3d 315.

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**VALUATION**

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- §1. Generally
- §2. Constitutional limitations
- §3. Necessity for
- §4. Obligation of the utility

**II. JURISDICTION AND POWERS**

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- §74. Electric and power
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## **VALUATION**

No cases in this volume involved the question of valuation.

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**WATER**

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**II. OPERATIONS**

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**§16. Rates and revenues**

The Commission approved a stipulation and agreement resulting in an increase in annual water revenues of \$3,800,000 exclusive of any applicable license, occupation, franchise, gross receipts or other similar fees and taxes.—St. Louis County Water Company 7 MPSC 3d 30.

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**§28. Financing practices**

The Commission authorized St. Louis County Water Company to issue and deliver \$40,000,000 aggregate principal amount of its First Mortgage Bonds to the State Environmental Improvement and Energy Resources Authority. The Commission found that it will reserve ratemaking treatment of the approved financial transaction and may consider the prudence and treatment of the approved transaction in any subsequent rate proceeding.—St. Louis County Water Company 7 MPSC 3d 249.

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**§33. Rules and regulations**

The Commission concluded that development of affiliate transactions rules applicable to all regulated electric, gas, heating, sewer, and water companies is inappropriate and that these issues must be resolved on an industry-specific basis; therefore, the Commission did not promulgate the proposed rule.—Affiliate Transactions 7 MPS 3d 259.

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