

REPORTS
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PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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Kevin Kelly
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PREFACE

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, 2001 through November 30, 2002. 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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xi

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Judge

RON PRIDGIN
Judge

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CASES REPORTED

— A —		Page No.
TT-99-248, et al.	Alma Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company, Choctaw Telephone Company, Chariton Valley Telephone Company, and Peace Valley Telephone Company (Seeking to amend tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory, rejected)	252
EO-2002-215	Aquila, Inc., f/k/a UtiliCorp United Inc. (Second amended application, purchase and sale agreement between Aquila Europe, Inc., a wholly owned Aquila, Inc. subsidiary, and EI UK Holdings, Inc., approved)	265
TO-2000-374	Area Codes (Order regarding cost allocation and cost recovery for state number pooling trials)	22
TO-2000-374	Area Codes (Approval for NPA relief plan for 314 and 816 area codes, second order regarding cost allocation and cost recovery for state number pooling trials)	76
GR-2000-573	Associated Natural Gas Company (1999-2000 ACA case)	197
GM-2002-295	Atmos Energy Corporation (Merger, Mississippi Valley Gas Company merges with and into Atmos, granted).....	242
GE-2003-0007	Atmos Energy Corporation (Seeks variance from Commission rule which requires gas corporations test each of their gas meters for accuracy every 120 months, seeks Commission authority to implement a meter-sampling program, order granting variance)	519
GT-2003-0037	Atmos Energy Corporation (Proposed gas aggregation tariff, order approving agreement)	555
TT-2002-129	AT&T Communications of the Southwest, Inc. (Proposed tariff to establish a monthly in-state connection fee and surcharge approved)	5
— B —		
TO-2002-222	Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services LLC (Arbitration, Interconnection agreement with Southwestern Bell, arbitration order) ...	162
— C —		
TT-99-248, et al.	Chariton Valley Telephone Company, Choctaw Telephone Company, Alma Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company and Peace Valley Telephone Company (Seeking to amend tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory, rejected)	252

xiv	CASES REPORTED	Page No.
TT-2002-310, et al	Chariton Valley Telephone Company, Mid-Missouri Telephone Company and Northeast Missouri Rural Telephone Company (Tariffs seeking to lengthen recovery period regarding IntraLATA Dialing Parity, rejected)	272
TT-99-248, et al.	Choctaw Telephone Company, Alma Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company, Chariton Valley Telephone Company and Peace Valley Telephone Company (Seeking to amend tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory, rejected)	252
ER-2002-217	Citizens Electric Corporation (Interim rate increase, order approving agreement)	30
ER-2002-217	Citizens Electric Corporation (Rate increase, order approving agreement)	323
TC-2001-516	Comm South Companies, Inc. d/b/a Missouri Comm South, Inc., Office of the Public Counsel v. (Complaint case, OPC alleges Comm South violated Commission rules regarding quality of service, order approving agreement).....	250
TC-2002-1100	Computechology, Inc. v. Spectra Communications Group, L.L.C., CenturyTel, Inc. and GTE Midwest, Inc. d/b/a Verizon Midwest (Complaint case, order directing service restoration)	310
— E —		
SM-2002-1062	Eastern Missouri Utilities Co., Inc. (Transfer of assets to the City of Foristell, granted)	422
EE-2002-120	Empire District Electric Company (Order granting variance from affiliate transaction rule, Empire to transfer assets consisting of a software program in development to an affiliated company)	80
ER-2002-425	Empire District Electric Company (Interim electric rate increase, rejected)	280
ER-2002-1074	Empire District Electric Company (Order approving agreement reducing interim energy charge)	304
ET-2002-1058	Empire District Electric Company (Order to modify electric line extension rules, order approving agreement)	565
ER-2002-424	Empire District Electric Company (Electric rate case, order approving agreement)	604
WA-2002-65	Environmental Utilities, LLC (Certificate of public convenience and necessity to own and operate a water system in Golden Glade Subdivision in Camden County, granted)	360
WM-2003-0065	Environmental Utilities, LLC (Seeking to acquire by foreclosure the assets of Osage Water Company, order denying application in part and rejecting application in part).....	524

CASES REPORTED

xv

— G —

EO-2002-178	Gascosage Electric Cooperative, Union Electric Company d/b/a AmerenUE, (Change of electric service provider, sale, transfer and assignment of certain electric distribution facilities, substations and easements, amendment to territorial agreement, granted)	98
TM-2002-232	GTE Midwest Incorporated d/b/a Verizon Midwest (Sale of Verizon's franchise, facilities or system to CenturyTel of Missouri, LLC, granted)	288
TO-2002-481	GTE Midwest Incorporated, d/b/a Verizon Midwest (Order granting additional numbering resources)	330

— I —

EA-2002-296	IES Utilities, Inc. (Certificate of public convenience and necessity to construct, own and operate electric transmission facilities in Clark County, granted)	261
TO-2002-347	Investigation into Certification for Federal Universal Service Funds(Order establishing certification procedure)	379
OO-2002-202	Investigation into Public Utility Emergency Preparedness (Order accepting report and directing publication and filing)	96
OO-2002-202	Investigation into Public Utility Emergency Preparedness (Order accepting report)	110
TW-2003-0053	Investigation into the effects of the bankruptcy of telecommunications carriers in Missouri (Order establishing case)	517
TO-2001-439	Investigation to determine prices, terms and conditions of conditioning for xDSL-capable loops (Report and Order)	131

— K —

EF-2002-1094	Kansas City Power & Light Company (Request for extension of authority to enter into interest rate management techniques, order approving financing)...	392
EU-2002-1048	Kansas City Power & Light Company (Accounting authority order to defer costs caused by a January 2002 ice storm, granted)	419

— L —

GT-2002-387	Laclede Gas Company (Change to quarterly the number of PGA filings per year, order approving agreement)	129
GE-2002-372	Laclede Gas Company (Request for a waiver from the definition of "main", approved)	278
GE-2002-1159	Laclede Gas Company (Request for a variance to offer electronic billing, granted)	417
GR-2002-356	Laclede Gas Company (Rate case, order approving agreement)	538

CASES REPORTED

GT-2003-0032	Laclede Gas Company (Proposed gas aggregation tariff, order approving agreement)	560
GR-2002-356	Laclede Gas Company (Natural gas rate case, order approving agreement)	581
— M —		
TA-2002-446	Mark Twain Communications Company (Expansion of present certificate of service to provide basic service in Missouri, granted)	529
TO-2002-222	MCImetro Access Transmission Services LLC, Brooks Fiber Communications of Missouri, Inc. and MCI WorldCom Communications, Inc., (Arbitration, interconnection agreement with Southwestern Bell, arbitration order)	162
TO-2002-222	MCI WorldCom Communications, Inc., MCImetro Access Transmission Services LLC and Brooks Fiber Communications of Missouri, Inc. (Arbitration, interconnection agreement with Southwestern Bell, arbitration order)	162
XT-2003-0047	MCI WorldCom Communications, Inc. (Request to assess a monthly fee of \$1.95 per account, per month, on its residential customers, order denying suspension and approving tariff)	522
TT-99-428, et al.	Mid-Missouri Telephone Company, Alma Telephone Company, MoKan Dial, Inc., Choctaw Telephone Company, Chariton Valley Telephone Company and Peace Valley Telephone Company (Seeking to amend tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory, rejected)	252
TT-2002-310, et al.	Mid-Missouri Telephone Company, Chariton Valley Telephone Company and Northeast Missouri Rural Telephone Company (Tariffs seeking to lengthen recovery period regarding IntraLATA Dialing Parity, rejected)	272
WO-2002-206	Missouri-American Water Company (Proposed acquisition of Missouri-American Water Company and American Water Works Company by RWE AG, motion to review transaction denied, case closed)	3
WO-2002-273	Missouri-American Water Company (Accounting Authority Order request relating to security costs incurred, order regarding motion to dismiss, protective order and discovery)	199
GO-2002-137	Missouri Gas Energy (Request for variance pertaining to permitted hours for discontinuance of service, granted)	38
GR-96-450	Missouri Gas Energy (1996-1997 ACA)	206
GO-2002-48	Missouri Gas Energy (Safety line replacement program, amending two aspects of the program, Farm Tap Service Lines and Master Meter Trailer Parks, order approving amended application)	284

CASES REPORTED

xvii

GA-2002-377	Missouri Gas Energy (Accounting authority order, order approving agreement, accounting authority order relating to Commission's emergency rule modifying the Cold Weather Rule)	317
GC-2001-593	Missouri Gas Energy, TXU Energy Services, Inc., and Schreiber Foods, Inc. v. (Complaint case, dismissed) ...	333
GO-2003-0019	Missouri Gas Energy (Accounting for unrecognized net gain/loss amounts related to pension and non-pension post-retirement benefits, order approving agreement) .	515
GR-2001-382	Missouri Gas Energy (PGA filings for the years 1997-1998, 1998-1999, 1999-2000 and 2000-2001, order denying applications for reconsideration or rehearing but clarifying the Commission's previous order, order directing parties to file proposed procedural schedule)	567
ER-2001-672	Missouri Public Service (Electric rate case, agreement approved which reduces electric revenues)	120
GO-2002-175	Missouri Public Service & St. Joseph Light & Power (Accounting Authority Order for uncollectible expenses resulting from the winter of 2000-2001, denied)	600
TT-2002-1097	Missouri State Discount Telephone (Add exchanges for BPS Telephone Company, Chariton Valley Telephone Corporation and Mid-Missouri Telephone Company to reflect newly authorized exchanges as per recently approved interconnection agreement, order denying motion to suspend and approving tariff)	320
TO-98-329	Missouri Universal Service Fund (Report & Order establishing low-income/disabled fund)	225
TM-2002-465	Modern Telecommunications Company (Merger with Northeast Missouri Rural Telephone Company, order approving agreement)	577
TT-99-428, et al	MoKan Dial, Inc., Alma Telephone Company, Mid-Missouri Telephone Company, Choctaw Telephone Company, Chariton Valley Telephone Company and Peace Valley Telephone Company (Seeking to amend tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory, rejected)	252

— N —

TT-2002-310, et al	Northeast Missouri Rural Telephone Company, Mid-Missouri Telephone Company and Chariton Valley Telephone Company (Tariffs seeking to lengthen recovery period regarding IntraLATA Dialing Parity, rejected)	272
--------------------	---	-----

— O —

EC-2002-152	Office of the Public Counsel v. Union Electric Company d/b/a AmerenUE (Complaint case, alleged charging of late fees on arrearages under deferred payment plans, order approving agreement)	127
-------------	---	-----

CASES REPORTED

TC-2001-516	Office of the Public Counsel v. Comm South Companies, Inc. d/b/a Missouri Comm South, Inc. (Complaint case, OPC alleges Comm South violated Commission rules regarding quality of service, order approving agreement)	250
WC-2002-155	Office of the Public Counsel v. Warren County Water and Sewer Company and Gary Smith (Complaint case, order authorizing General Counsel to petition circuit court to place the utility under the control and responsibility of a receiver)	548
WE-2002-240	Osage Water Company (Order granting leave to file delinquent annual report, granted)	263
WR-2000-557	Osage Water Company (Interim rates made permanent)	328

— P —

TT-99-428, et al.	Peace Valley Telephone Company, Alma Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company, Choctaw Telephone Company and Chariton Valley Telephone Company (Seeking to amend tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory, rejected)	252
WC-2002-146	Public Service Commission Staff v. St. Louis County Water Company d/b/a Missouri-American Water Company (Complaint case, Staff alleges proposed tariff is unauthorized and unlawful because it purports to add a surcharge of \$1.00 a month, or \$3.00 quarterly to customer bills, for the purpose of service line repair, complaint dismissed, tariff ordered to be withdrawn) ...	395
EC-2002-1	Public Service Commission Staff v. Union Electric Company d/b/a AmerenUE (Rate complaint case, order approving jointly filed revised procedural schedule)	74
EC-2002-1	Public Service Commission Staff v. Union Electric Company d/b/a AmerenUE (Complaint case alleging AmerenUE's current rates should be reduced, order approving agreement to reduce rates)	411
MC-2002-12	Public Service Commission Staff v. Wightman Enterprises, Inc. d/b/a Lee's Mobile Homes (Complaint case, alleged failure to comply with the setup procedures for a manufactured home and failed to correct setup deficiencies within a reasonable amount of time, order approving agreement)	125

— Q —

WM-2002-394	Quail Run Water and Land Company (Sale of stock and transfer of assets to Public Funding Corporation of the City of Ozark, granted)	313
-------------	---	-----

CASES REPORTED

xix

— S —

TT-2002-108 & TT-2002-130	Southwestern Bell Telephone Company (Tariff filing a business MCA promotion and proposed revisions regarding CompleteLink, rejected)	8
TO-2002-185	Southwestern Bell Telephone Company (Bell Missouri), Southwestern Bell Texas, Inc. and Southwestern Bell Telephone L.P. d/b/a Southwestern Bell Telephone (Bell LP) (Corporate restructuring and stock transfer, convert Bell Missouri into Bell LP, approved)	35
TO-2001-467	Southwestern Bell Telephone Company (Investigation of state of competition in Southwestern Bell exchanges, Report and Order)	42
TT-2002-370	Southwestern Bell Telephone Company (Tariffs designed to provide an emergency promotion to be offered to customers affected by ice storm, approved)	106
TO-2002-397	Southwestern Bell Telephone Company (Determination of prices of certain unbundled network elements, order establishing case and directing notice)	247
TT-2002-227, et al	Southwestern Bell Telephone Company (Southwestern Bell and various competitive companies seek to offer discounted rates in exchange for term commitments that exceed one year, proposed tariffs rejected)	344
IT-2002-1165	Southwestern Bell Telephone Company (Request to withdraw local plus and designated number services and introduce two new block-of-time plans, granted).....	385
TC-2002-1100	Spectra Communications Group, L.L.C., CenturyTel, Inc. and GTE Midwest, Inc. d/b/a Verizon Midwest, Computechology, Inc. v. (Complaint case, order directing service restoration)	310
TT-2003-0043	Spectra Communications Group, LLC (Tariff to revise its intrastate access tariff provisions relating to when Spectra can demand a security deposit from other telecommunications carriers, order further suspending tariff, directing notice and scheduling a prehearing conference)	527
TT-2002-1136	Sprint Communications Company, LP (Request to introduce in-state access recovery charge, order approving tariff)	406
TT-2002-447	Sprint Missouri, Inc. d/b/a Sprint (Request to increase the residential and business monthly rate for Metropolitan Calling Area plan, denied)	569
GO-2002-175	St. Joseph Light & Power & Missouri Public Service (Accounting Authority Order for uncollectible expenses resulting from the winter of 2000-2001, denied)	600
WA-2001-288	St. Louis County Water Company d/b/a Missouri-American Water Company (Certificate of public convenience and necessity to provide service to Florissant and Webster Groves, granted)	84

CASES REPORTED

WC-2002-146	St. Louis County Water Company d/b/a Missouri-American Water Company, Public Service Commission Staff v. (Complaint case, Staff alleges proposed tariff is unauthorized and unlawful because it purports to add a surcharge of \$1.00 a month, or \$3.00 quarterly to customer bills, for the purpose of service line repair, complaint dismissed, tariff ordered to be withdrawn) ...	395
— T —		
GC-2001-593	TXU Energy Services, Inc., and Schreiber Foods, Inc. v. Missouri Gas Energy (Complaint case, dismissed)	333
— U —		
TO-2001-438	Unbundled Network Elements (Determination of prices, terms and conditions of certain unbundled network elements, Report & Order)	424
EC-2002-1	Union Electric Company d/b/a AmerenUE, Public Service Commission Staff v.(Rate complaint case, order approving jointly filed revised procedural schedule)	74
EO-2002-178	Union Electric Company d/b/a AmerenUE, Gascosage Electric Cooperative (Change of electric service provider, sale, transfer and assignment of certain electric distribution facilities, substations and easements, amendment to territorial agreement, granted)	98
EA-2002-131	Union Electric Company d/b/a AmerenUE (Certificate of public convenience and necessity to construct and operate a transmission line in Jefferson, St. Francois and Ste. Genevieve counties, granted)	108
EM-2001-695	Union Electric Company d/b/a AmerenUE (Transfer of electric supplier and sale and transfer of assets to Lewis County Rural Electric Cooperative, granted)	111
EC-2002-152	Union Electric Company d/b/a AmerenUE, Office of the Public Counsel v. (Complaint case, alleged charging of late fees on arrearages under deferred payment plans, order approving agreement)	127
GT-2002-400	Union Electric Company d/b/a AmerenUE (Makes changes to the number of PGA filings in a year)	245
EO-2002-458	Union Electric Company d/b/a AmerenUE (Change of supplier for approximately 800 structures in Audrain, Boone, Callaway, Montgomery and Warren counties from AmerenUE to Callaway Electric Cooperative; change of supplier for approximately 600 structures in same counties from Cooperative to AmerenUE; sale of certain AmerenUE assets; and approval of territorial agreement, order approving agreement)	389
EC-2002-1	Union Electric Company d/b/a AmerenUE, Public Service Commission Staff v. (Complaint case alleging AmerenUE's current rates should be reduced, order approving agreement to reduce rates)	411

CASES REPORTED

xxi

GT-2002-361	United Cities Gas Company (Order approving agreement which revises its PGA clause)	308
EO-2002-215	UtiliCorp United Inc. (Share purchase and sale agreement between UtiliCorp and EI UK Holdings, Inc., approved) ...	25
GA-2002-285	UtiliCorp United, Inc. d/b/a Missouri Public Service and St. Joseph Light & Power Company (Accounting authority order to account for costs of complying with the emergency amendments to the cold weather rule, order granting AAO)	78
EM-2002-297	UtiliCorp United Inc. (Merger between UtiliCorp and UtiliCorp Renaming Corporation, to effect a name change after the purchase by UtiliCorp of stock in Aquila, Inc., approved)	115
GO-2001-249	UtiliCorp United, Inc. (Investigation into various issues related to UtiliCorp United's Gas Supply Services Department, order approving agreement and closing case)	117

— V —

TM-2002-192	Verizon Advanced Data, Inc. (Transfer of assets to GTE Midwest Incorporated d/b/a Verizon Midwest, approved)	1
-------------	--	---

— W —

WC-2002-155	Warren County Water and Sewer Company and Gary Smith, Office of the Public Counsel v. (Complaint case, order authorizing General Counsel to petition circuit court to place the utility under the control and responsibility of a receiver)	548
MC-2002-12	Wightman Enterprises, Inc. d/b/a Lee's Mobile Homes, Public Service Commission Staff v. (Complaint case, alleged failure to comply with the setup procedures for a manufactured home and failed to correct setup deficiencies within a reasonable amount of time, order approving agreement)	125

UNREPORTED CASES

		Date
— A —		
TA-2002-461	ACCXX Communications, LLC (Certificate of service authority, IXC, granted)	5/1/02
XD-2002-1087	ACS Systems, Inc. (Certificate of service authority, IXC, canceled)	6/13/02
TM-2002-1155	ACSI Local Switched Services, Inc. and American Communication Services of Kansas City, Inc. (Transfer of substantially all of assets to Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Kansas City, LLC, granted)	7/9/02
TD-2003-0124	Advanced TelCom, Inc. (Certificate of service authority, IXC, canceled)	10/11/02
TA-2002-428	Advanced Tel, Inc., d/b/a EATEL (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	4/4/02
XD-2003-0154	Advanced Tel, Inc. d/b/a Eatel (Certificate of service authority, IXC, canceled)	10/31/02
CA-2002-1158	Affordaphone, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted)	10/11/02
XA-2003-0060	AGL Networks, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	10/1/02
XA-2003-0128	All-Star Acquisition Corporation (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	11/1/02
TO-2002-355	ALLTEL Communications, Inc. (Cellular/PCS interconnection agreement with Southwestern Bell Telephone Company, approved)	3/15/02
TO-2002-381	ALLTEL Communications, Inc. (Adoption of interconnection agreement between GTE Midwest Incorporated, d/b/a Verizon Midwest and Nextel West Corp., recognized)	3/19/02
TO-2002-264	ALLTEL Missouri, Inc. (Commercial mobile radio services interconnection agreement with Western Wireless Corporation, approved)	1/9/02
TM-2002-299	Alma Telephone Company, Alma Communications, Inc. d/b/a Alma Telephone Company and Alma Long Distance L.L.C. (Transfer of assets, proposed corporate reorganization and related transactions, request for certificate of service authority to provide local exchange telecommunications services, granted)	3/21/02
EO-2002-1082	Ameren Corporation (Proposed acquisition of Cilcorp, Inc., motion to review transaction denied, case closed)...	6/13/02
TD-2002-405	American Business Alliance, Inc. (Certificate of service authority, IXC and non-switched local exchange telecommunications services, canceled)	3/18/02

UNREPORTED CASES

xxiii

TK-2002-1056	American Cellular Corporation and Dobson Cellular Systems, Inc. (Cellular/PCS interconnection agreement with Southwestern Bell Telephone Company, granted)....	7/8/02
TA-2002-464	American Phone Services Corp. (Certificate of service authority, IXC, granted)	4/26/02
TD-2003-0181	American Telecommunications Enterprise, Inc. (Certificate of service authority, IXC, canceled)	11/27/02
GT-2003-0038, et al	Aquila, Inc. d/b/a Aquila Networks-L&P and Aquila Networks-MPS (Proposed gas aggregation tariff, order approving agreement)	10/15/02
EO-2002-451	Aquila, Inc. f/k/a UtiliCorp United Inc. d/b/a Aquila Networks-L&P f/k/a St. Joseph Light & Power (Order recognizing change of corporate name)	4/16/02
EO-2002-450	Aquila, Inc. f/k/a UtiliCorp United Inc. d/b/a Aquila Networks-MPS f/k/a Missouri Public Service (Order recognizing change of corporate name)	4/16/02
GR-2001-497	Aquila, Inc. d/b/a Aquila Networks-L&P (Establishing ACA balance)	8/6/02
XN-2003-0077	A.R.C. Networks, Inc. (Name change to A.R.C. Networks, Inc., d/b/a InfoHighway, recognized)	9/18/02
WR-2002-371	Argyle Estates Water Supply (Water rate increase case)	3/19/02
TA-2002-479	Arizona Telephony Brokers, L.L.C. (Certificate of service authority, IXC, granted)	5/14/02
TM-2002-283	AS Telecommunications, Inc. d/b/a Allstar Telecom (Transfer of the long distance customer base to OneStar Long Distance, Inc. d/b/a OneStar Long Distance, approved)	2/19/02

— B —

ZD-2002-1113	Baptist Medical Center (Certificate of service authority, shared tenant services, canceled)	7/18/02
TA-2002-426	Best Steak House, Inc. (Certificate of service authority, pay phones, granted)	4/2/02
TA-2002-433	Blue Ridge Telecom Systems, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	4/22/02
TA-2002-432	Blue Ridge Telecom Systems, LLC (Certificate of service authority, basic local telecommunications services, granted)	5/2/02
LD-2003-0084	Blue Ridge Telecom Systems, LLC (Certificate of service authority, IXC and local exchange telecommunications services, canceled)	11/18/02
TD-2002-406	Broadstream Corporation (Certificate of service authority, IXC, canceled)	3/18/02
XA-2002-1029	Broadview NP Acquisition Corp. d/b/a Broadview Net Plus (Certificate of service authority, IXC, granted)	5/21/02
XM-2002-1030	Broadview NP Acquisition Corp. d/b/a Broadview Net Plus (Transfer of assets of Network Plus, Inc. to Broadview, granted)	6/11/02

UNREPORTED CASES

XO-2002-1120	Broadwing Communications Services, Inc. (Request to place certain real property assets located in Missouri into a wholly owned subsidiary, granted)	7/9/02
CK-2002-1146	Brooks Fiber Communications of Missouri, Inc. (Interconnection agreement with GTE Midwest Incorporated d/b/a Verizon Midwest, granted)	8/5/02
TO-2002-222	Brooks Fiber Communications of Missouri, Inc. and MCI WorldCom Communications (Interconnection agreements with Southwestern Bell Telephone Company, approved)	10/24/02
EO-2003-0042	Brunt, Elizabeth and Matthews, Robert S. (Change of electric supplier from Union Electric Company d/b/a AmerenUE to the Sikeston Board of Municipal Utilities, granted)	10/4/02
XA-2003-0023	Budget Phone, Inc. (Certificate of service authority, IXC, granted)	9/12/02
CA-2003-0024	Budget Phone, Inc. (Certificate of service authority, basic resold and facilities-based local telecommunications services, granted)	9/18/02
XA-2003-0112	BullsEye Telecom, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	10/30/02

— C —

XN-2003-0106	Cable & Wireless, Inc. (Name change to Cable & Wireless USA, Inc., recognized)	9/23/02
XM-2003-0111	Cable & Wireless USA, Inc. (Transfer of assets to Primus Telecommunications, Inc., granted)	11/5/02
TA-2002-398	Callaway Technology, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	4/1/02
PA-2003-0003	Capital International Communications, LLC (Certificate of service authority, pay phones, granted)	7/31/02
TM-2002-151	Capsule Communications, Inc. (Merger with Covista Communications, Inc., approved)	2/26/02
TA-2002-453	CD Telecommunications, LLC (Certificate of service authority, basic local telecommunications services, granted)	7/16/02
WO-2002-208	Centralia, City of (Water territorial agreement with Public Water Supply District No. 10 of Boone County which designates boundaries in Boone County, approved)	2/7/02
LK-2003-0145	CenturyTel of Missouri, LLC (Interconnection agreement with Camarato Distributing, Inc., approved)	11/19/02
LK-2003-0140	CenturyTel of Missouri, LLC (Interconnection agreement with Snappy Phone of Texas, Inc. d/b/a Budget Phone, Inc., approved)	11/19/02
LK-2003-0139	CenturyTel of Missouri, LLC (Interconnection agreement with Missouri State Discount Telephone, approved)	11/19/02

UNREPORTED CASES

xxv

LK-2003-0142	CenturyTel of Missouri, LLC (Interconnection agreement with NOW Communications, Inc., approved)	11/19/02
LK-2003-0141	CenturyTel of Missouri, LLC (Interconnection agreement with Universal Telecom, Inc., approved)	11/26/02
LK-2003-0143	CenturyTel of Missouri, LLC (Interconnection agreement with Comm South Companies, Inc., approved)	11/26/02
XD-2003-0029	CenturyTel Telecommunications, Inc. (Certificate of service authority, IXC, canceled)	8/26/02
TM-2003-0018	CEO Telecommunications, Inc. (Transfer of assets to Legent Communications Corporation d/b/a Long Distance America, granted)	10/1/02
TA-2002-238	Chariton Valley Telecom Corporation (Certificate of service authority, basic local telecommunications services, granted)	6/4/02
CK-2003-0104	Chariton Valley Telecom Corporation (Interconnection agreement with Spectra Communications Group, LLC, approved)	10/18/02
TO-2002-261	Chariton Valley Telephone Corporation (Interconnection agreement with Missouri State Discount Telephone Company, approved)	1/18/02
TK-2002-1121	Chariton Valley Telephone Corporation (Interconnection agreement with Missouri RSA No. 5 Partnership d/b/a Chariton Valley Wireless, granted)	7/8/02
EF-2002-1123	Citizens Electric Corporation (Order approving financing)	7/16/02
TO-2002-318	Citizens Telephone Company (Interconnection agreement with Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular, approved)	3/15/02
PA-2003-0040	Cline, Kyle B. (Certificate of service authority, pay phones, granted)	9/4/02
WO-2002-298	Consolidated Public Water Supply District No. 1 of Clark County (Water territorial agreement with the City of Kahoka encompassing part of Clark County, approved)...	3/21/02
XA-2003-0050	Consolidated Telecom, Inc. (Certificate of service authority, IXC, granted)	9/9/02

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PM-2002-1089	Davel Communications, Inc. (Merge with PhoneTel Technologies, Inc., whereby PhoneTel would be a wholly-owned subsidiary of Davel, granted)	7/9/02
TA-2002-289	Direct One, L.L.C. (Certificate of service authority, IXC, granted)	1/18/02
PA-2003-0049	Douglas, Wendy (Certificate of service authority, pay phones, granted)	9/9/02
PA-2002-1071	DuPree, William R. III (Certificate of service authority, pay phones, granted)	6/20/02

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PD-2002-1027	Earl, Erwin Anthony (Certificate of service authority, pay phones, canceled)	5/3/02
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UNREPORTED CASES

TA-2002-401	ECI Communications, Inc., d/b/a ITS Network Services (Certificate of service authority, IXC, granted)	3/26/02
XA-2002-1151	Econodial, LLC (Certificate of service authority, IXC, granted)	8/14/02
IT-2003-0075	Ellington Telephone Company (To increase the rate for a temporary surcharge to recover the cost of implementation of IntraLATA equal access, order approving tariff)	8/27/02
EO-2002-1119	Empire District Electric Company (Territorial agreement with Southwest Electric Cooperative designating the boundaries of each supplier near the southern boundary of City of Strafford)	8/27/02
LA-2003-0026	Empire District Industries, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	9/9/02
TD-2002-391	Enhanced Global Convergence Services, Inc. (Certificate of service authority, IXC, canceled)	3/12/02
TD-2002-466	Evans, Mitchell and Ruth (Certificate of service authority, pay phones, canceled)	3/29/02
XK-2002-1041	Excel Telecommunications, Inc. (Adoption of terms of interconnection agreement between Verizon and VarTec Telecom, Inc., d/b/a VarTec Telecom, order recognizing adoption of interconnection agreement).....	6/13/02

— F —

TA-2002-272	Fajaryanto, Nurwahyu (Certificate of service authority, pay phones, granted)	1/2/02
TA-2002-288	Fajaryanto, Nurwahyu d/b/a NF Enterprises (Certificate of service authority, pay phones, granted)	1/14/02
TA-2002-357	FamilyTel of Missouri LLC (Certificate of service authority, basic local telecommunications services, granted)	8/9/02
PD-2003-0059	Fesler, Ray J. (Certificate of service authority, pay phones, canceled)	9/25/02
TO-2002-477	Fidelity Communication Services II, Inc. (Traffic termination agreement and related agreements with Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company, approved)	5/21/02
GR-2001-495	Fidelity Natural Gas, Inc. (Establishing ACA balance and closing case)	8/6/02
GT-2003-0036	Fidelity Natural Gas, Inc. (Proposed gas aggregation tariff, order approving agreement)	10/15/02
TD-2002-457	Franciscan Sisters of Mary (Certificate of service authority, pay phones, canceled)	3/26/02

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TA-2002-378	G & H Concessionaires, Inc. d/b/a Kansas City International Raceway (Certificate of service authority, pay phones, granted)	4/1/02
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UNREPORTED CASES

xxvii

TO-2002-379	Global Crest Communications, Inc. (Name change to Dimensions, recognized)	3/5/02
TM-2003-0110	Global Crossing Ltd. (Transfer of control of Global Crossing's Missouri-regulated utilities from Global Crossing Ltd. to GC Acquisition Limited, order dismissing application for lack of jurisdiction)	11/14/02
XA-2002-1042	Global Internetworking, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	5/17/02
TA-2002-291	Gold Line Telemangement Inc. (Certificate of service authority, IXC, granted)	1/22/02
TO-2002-313	Grand River Mutual Telephone Corporation (Wireless interconnection agreement with Dobson Cellular Systems, Inc., approved)	2/15/02
GR-2001-394	Greeley Gas Company (2000-2001 ACA, order approving agreement)	4/30/02
TD-2002-1069	Green, Richard and Lana (Certificate of service authority, pay phones, canceled)	5/31/02
TD-2002-436	Griggs, Donna (Certificate of service authority, pay phones, canceled)	3/14/02
TO-2002-281	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with VarTec Telecom, Inc. d/b/a VarTec Telecom, approved)	1/15/02
TO-2002-316	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Sprint Communications Company L.P., approved)	2/7/02
TO-2002-365	GTE Midwest Incorporated, d/b/a Verizon Midwest (Interconnection agreement with Southern Telcom Network, Inc., granted)	3/13/02
TO-2002-449	GTE Midwest, Inc. d/b/a Verizon Midwest (Interconnection agreement with Snappy Phone of Texas, Inc. d/b/a Budget Phone, Inc., approved)	5/23/02
XK-2002-1098	GTE Midwest Incorporated d/b/a Verizon (Interconnection agreement with DMJ Communications, Incorporated, approved)	8/21/02

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ZD-2002-1110	Hedrick Medical Center d/b/a Lafayette Regional Health Center (Certificate of service authority, shared tenant services, canceled)	7/18/02
TA-2002-271	Herman, Monica d/b/a ML Phones (Certificate of service authority, pay phones, granted)	1/2/02
PD-2002-1060	Hyde, David J. (Certificate of service authority, pay phones, canceled)	5/16/02

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LK-2002-1093	ICG Telecom Group, Inc. (Interconnection agreement with ALLTEL Missouri, Inc., granted)	7/8/02
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UNREPORTED CASES

XK-2002-1043	ICG Telecom Group, Inc. (Adoption of interconnection agreement between Verizon California Inc. f/k/a GTE California Incorporated and ICG Telecom Group, Inc., approved)	7/15/02
XA-2002-1045	Incomnet Communications Corporation (Transfer of assets to Ciera Network Systems, Inc., granted, Incomnet's certificate of service authority, IXC, canceled)	6/20/02
TA-2002-459	Infonet Telecommunications Corporation (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	5/24/02
XA-2003-0108	Integrated Telecommunication Service, LLC (Certificate of service authority, IXC, granted)	10/23/02
XA-2003-0061	Intelcall Communications, Inc. (Certificate of service authority, IXC, granted)	10/2/02
XN-2003-0149	Intellicall Operator Services, Inc. (Name change to ILD, recognized)	10/29/02
CK-2002-1145	Intermedia Communications, Inc. (Interconnection agreement with GTE Midwest Incorporated d/b/a Verizon Midwest, granted)	8/5/02
XM-2003-0052	Intermedia Communications, Inc. (Transfer of assets to MCI WorldCom, granted)	10/1/02
TA-2002-154	Intrado Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	12/11/01
— J —		
PD-2002-1036	James, David a/k/a David A. James (Certificate of service authority, pay phones, canceled)	5/3/02
— K —		
EF-2002-315	Kansas City Power & Light Company (Order approving financing)	3/5/02
TA-2002-380	Kiger Telephone and Telephony, LLC (Certificate of service authority, IXC, granted)	3/20/02
TO-2002-219	KMC Telecom Holdings, Inc. d/b/a KMC Telecom V, Inc. (Interconnection agreement with ALLTEL Missouri, Inc., approved)	1/10/02
TO-2002-386	KMC Telecom III, Inc. (Name change to KMC Telecom III LLC, recognized)	3/19/02
— L —		
TD-2002-463	Lammlein, Charles d/b/a Coachlite Lanes L.L.C. (Certificate of service authority, pay phones, canceled)	3/29/02
IT-2003-0078	Lathrop Telephone Company (To increase the rate for a temporary surcharge to recover the cost of implementation of IntraLATA equal access, order approving tariff)	8/29/02
ZD-2002-1109	Lee's Summit Hospital (Certificate of service authority, shared tenant services, canceled)	7/18/02

UNREPORTED CASES

xxix

TA-2002-375	Legent Communications Corporation, d/b/a Long Distance America (Certificate of service authority, IXC, granted)	4/4/02
TA-2002-376	Level 3 Communications, L.L.C. (Certificate of service authority, basic local and local exchange telecommunications services, expansion of service sought, granted)	4/18/02
TK-2002-1084	Level 3 Communications, LLC (Adoption of the interconnection agreement between GTE Midwest Incorporated d/b/a Verizon Midwest and Preferred Carrier Services, Inc. d/b/a Phones For All and Telefonos Para Todos, granted)	7/9/02
TK-2002-1164	Level 3 Communications, LLC (Interconnection agreement with ALLTEL, Missouri, Inc., granted)	8/1/02
TD-2002-483	LDD, Inc. (Certificate of service authority, canceled)	5/3/02
CK-2002-1047	Local Line America, Inc. (Resale agreement with Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company, approved)	6/7/02
TA-2002-286	Lockheed Martin Global Telecommunications Services, Inc. (Certificate of service authority, IXC, granted)	7/17/02
LM-2003-0028	Logix Communications Corp. (Transfer of assets and subscribers to Western Communications, Inc., granted)	10/8/02

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TA-2002-396	Magnus Communications, Inc. (Certificate of service authority, resold and facilities-based basic local telecommunications services, granted)	5/16/02
TA-2002-446	Mark Twain Communications Company (Request to waive Commission rule 4 CSR 240-2.060 (6) (B), denied)	8/27/02
PA-2003-0025	Martin, Thomas K. (Certificate of service authority, pay phones, granted)	9/4/02
TA-2002-448	Max-Tel Communications, Inc. (Certificate of service authority, IXC, granted)	6/4/02
IT-2003-0073	McDonald County Telephone Company (To increase the rate for a temporary surcharge to recover the cost of implementation of IntraLATA equal access, order approving tariff)	8/27/02
XM-2002-1073	MCI WorldCom Communications, Inc. (Transfer of Intermedia Communications, Inc. to MCI WorldCom, granted)	6/18/02
ZD-2002-1111	Medical Center of Independence (Certificate of service authority, shared tenant services, canceled)	7/18/02
TA-2002-224	Mercury Long Distance, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	12/7/01
TO-2002-342	Metro Teleconnect Companies, Inc. d/b/a Metro Teleconnect (Adoption of the terms of the resale agreement between GTE Southwest Incorporated d/b/a Verizon Southwest and Reitz Rentals, Inc., approved)	3/15/02
WO-2003-0086	Minton, Ronald & Nancy, d/b/a Wilden Heights Water Company (Sale of assets to Wilden Heights Homeowners Association, granted)	11/27/02

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UNREPORTED CASES

WO-2002-431	Missouri-American Water Company (Agreement with St. Louis Metropolitan Sewer District to provide for the disclosure of customer water usage information, granted)	4/9/02
WF-2002-359	Missouri-American Water Company (Order approving financing)	4/11/02
WF-2002-1096	Missouri-American Water Company (Order approving financing)	8/30/02
GT-2003-0033	Missouri Gas Energy (Proposed gas aggregation tariff, order approving agreement)	10/15/02
GA-2002-1090	Missouri Gas Energy (Certificate of public convenience and necessity to expand current certificated area in Cedar County, granted)	7/25/02
GA-2003-0123	Missouri Gas Energy (Certificate of public convenience and necessity to construct, own and operate a natural gas system in Lawrence County, granted)	10/31/02
GR-99-435	Missouri Public Service (ACA 1998-1999, order approving agreement)	4/11/02
CA-2002-1140	M.L.M. Telecommunications, Inc. (Certificate of service authority, basic local telecommunications services, granted)	8/14/02
PA-2003-0014	Morris, Ronald (Certificate of service authority, pay phones, granted)	8/14/02
PD-2003-0082	Morris, Ronald (Certificate of service authority, pay phones, canceled)	9/5/02

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TA-2002-476	National Directory Assistance, LLC (Certificate of service authority, IXC, granted)	5/23/02
TO-2002-454	Nations Bell, Inc. (Name change to Nations Broadband, Inc., recognized)	4/22/02
PA-2003-0020	Natural Resources, Missouri Department of (Certificate of service authority, pay phones, granted)	9/4/02
XA-2003-0068	NECC Telecom, Inc. (Certificate of service authority, IXC, granted)	9/19/02
TD-2002-340	Net2000 Communications Services, Inc. (Certificate of service authority, IXC, canceled)	4/8/02
TD-2002-434	NewSouth Communications Corp. (Certificate of service authority, IXC, canceled)	3/18/02
XA-2003-0119	NobelTel, LLC (Certificate of service authority, IXC, granted)	10/18/02
XA-2002-1081	North by NortheastCom, LLC (Certificate of service authority, IXC, granted)	6/24/02
TO-2002-237	NOW Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	1/7/02
PA-2003-0121	Nowell, Stephen d/b/a Nowell Communications (Certificate of service authority, pay phones, granted)....	10/22/02
TA-2002-42	NTERA, Inc. (Certificate of service authority, basic local telecommunications services, granted)	1/7/02

UNREPORTED CASES

xxxi

TA-2002-292	NUI TELECOM, INC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	1/24/02
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TA-2002-220	Oakes, Patricia (Certificate of service authority, pay phones, granted)	12/4/01
TA-2003-0055	OCMC, Inc. d/b/a 1-800-MAX-SAVE (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	10/9/02
TA-2003-0054	OCMC, Inc. d/b/a AdvantTel (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	10/9/02
XA-2003-0057	OCMC, Inc. d/b/a One Call Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted) ...	10/9/02
XA-2003-0058	OCMC, Inc. d/b/a OPTICOM (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	10/9/02
TD-2002-441	OIX, Inc. (Certificate of service authority, pay phones, canceled)	3/19/02
LN-2002-1063	One Call Communications, Inc., d/b/a 1-800-MAX-SAVE (Name change to One Call Internet, Inc., d/b/a 1-800-MAX-SAVE, recognized)	6/18/02
LN-2002-1066	One Call Communications, Inc. d/b/a AdvantTel (Name change to One Call Internet, Inc., d/b/a AdvantTel, recognized)	6/18/02
XN-2002-1065	One Call Communications, Inc. (Name change to One Call Internet, Inc., recognized)	6/18/02
XN-2002-1064	One Call Communications, Inc., d/b/a Opticom (Name change to One Call Internet, Inc., d/b/a Opticom, recognized)	6/18/02
XM-2003-0056	One Call Internet, Inc. (Transfer of assets to OCMC, Inc., granted)	10/8/02
TA-2002-393	Optical Telephone Corporation (Certificate of service authority, IXC, granted)	4/5/02

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WO-2002-226	Pacific, City of (Water territorial agreement with Public Water Supply District No. 3 of Franklin County which encompasses part of Franklin County, approved)	2/14/02
TD-2002-186	Pac-West Telecomm, Inc. (Certificate of service authority, pay phones, canceled)	12/6/01

UNREPORTED CASES

TD-2002-435	Paramount Communications, Inc. (Certificate of service authority, pay phones, canceled)	5/6/02
TD-2002-407	Pathnet, Inc. (Certificate of service authority, IXC and basic local exchange telecommunications services, canceled)	5/13/02
TM-2002-368	Payroll Advance, Inc. (Transfer of assets to The Phone Connection, Inc. d/b/a Affordable Phone Company, granted)	7/2/02
TD-2002-444	Paytel, Inc. (Certificate of service authority, pay phones, canceled)	5/13/02
IT-2003-0074	Peace Valley Telephone Company (To increase the rate for a temporary surcharge to recover the cost of implementation of IntraLATA equal access, order approving tariff)	8/27/02
TA-2002-369	Perry, Ray (Certificate of service authority, pay phones, granted)	3/5/02
TA-2002-373	Phone-Link, Inc. (Certificate of service authority, prepaid basic local telecommunications service, granted)	4/5/02
TD-2002-275	PNV.net, Inc., f/k/a Park 'N View, Inc. (Certificate of service authority, IXC, canceled)	12/20/01
XT-2003-0098	PT-1 Counsel Inc. (Name change to WorldxChange Corp., recognized)	9/24/02
TC-2003-0097	Public Service Commission Staff v. Omniplex Communications Group (Complaint case, failure to pay annual assessment fee for fiscal year beginning July 1, 2001, order granting default)	10/24/02
WC-2003-0099	Public Service Commission Staff v. Ozark Water & Wastewater Management, Inc., d/b/a English Village Sewer System (Complaint case, failure to pay annual assessment fee for fiscal year beginning July 1, 2001, order granting default)	10/24/02
SC-2003-0102	Public Service Commission Staff v. WPC Sewer Company (Complaint case, failure to pay annual assessment fee for fiscal year beginning July 1, 2001, order granting default)	10/24/02
SC-2003-0103	Public Service Commission Staff v. West 16th Street Sewer Company (Complaint case, failure to pay annual assessment fee for fiscal year beginning July 1, 2001, order granting default)	10/24/02
— Q —		
CM-2002-1160	Quick-Tel Communications, Inc. (Transfer of assets to Affordaphone, Inc., granted)	10/10/02
LD-2003-0071	Quintelco, Inc. (Certificate of service authority, IXC and basic local exchange telecommunications services, canceled)	9/26/02
TA-2002-234	QX Telecom LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	12/13/01

UNREPORTED CASES

xxxiii

— R —

XA-2003-0041	Radiant Telecom, Inc. (Certificate of service authority, IXC, granted)	9/9/02
TA-2002-469	Rash, Craig D. (Certificate of service authority, pay phones, granted)	4/22/02
TO-2002-360	RDST, Inc. (Name change to Dial-Thru, Inc., recognized)..	2/4/02
TM-2002-47	Reitz Rentals, Inc.,d/b/a SouthWest TeleConnect (Transfer of assets to Metro Teleconnect Companies, Inc., granted)	12/4/01
TD-2002-1092	Reitz Rentals, Inc., d/b/a SouthWest TeleConnect (Certificate of service authority, basic local telecommunications services, canceled)	6/24/02
ZD-2002-1116	Research Belton Hospital (Certificate of service authority, shared tenant services, canceled)	7/18/02
ZD-2002-1114	Research Medical Center (Certificate of service authority, shared tenant services, canceled)	7/18/02
TD-2002-284	Rhythms Links, Inc. (Certificate of service authority, basic local, nonswitched local exchange and interexchange telecommunications service, canceled)	1/7/02
XA-2003-0045	Ridley Telephone Company, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	9/18/02
WR-2003-0152	Rogue Creek Utilities, Inc. (Rate case, water)	11/5/02
SR-2003-0153	Rogue Creek Utilities, Inc. (Rate case, sewer)	11/5/02
PA-2002-1051	Ross, Michael (Certificate of service authority, pay phones, granted)	6/24/02
XM-2003-0120	RSL Com U.S.A., Inc. (Transfer of assets to WorldxChange Corp.,granted)	10/24/02

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TD-2002-358	Satellink Paging, LLC (Certificate of service authority, IXC, canceled)	2/11/02
TO-2002-257	SBC Advanced Solutions, Inc. (Interconnection agreement with New Edge Networks, Inc. d/b/a New Edge Networks, approved)	1/9/02
TO-2002-445	SBC Advanced Solutions, Inc. (Interconnection agreement with Southern Telecom Network, Inc., approved)	5/15/02
XK-2002-1088	SBC Advanced Solutions, Inc. (Interconnection agreement with Navigator Telecommunications, granted)	7/8/02
TA-2001-703	SBA Broadband Services, Inc. (Certificate of service authority, basic local and non-switched local exchange and interexchange telecommunications services, granted)	12/6/01
TA-2002-395	Schwartz, Richard (Certificate of service authority, pay phones, granted)	4/8/02
TD-2002-408	2nd Century Communications Group, Inc. (Certificate of service authority, IXC and basic local telecommunications services, canceled)	3/18/02

UNREPORTED CASES

XM-2002-1046	Single Billing Services, Inc., d/b/a Asian American Association (Transfer of assets to Enhanced Communications Network, Inc., granted)	5/21/02
TD-2003-0115	Slater, Craig (Certificate of service authority, pay phones, canceled)	9/27/02
TD-2003-0116	Smith, Terry (Certificate of service authority, pay phones, canceled)	9/27/02
TK-2002-1085	Socket Telecom, LLC (Adoption of interconnection agreement between GTE Midwest Incorporated d/b/a Verizon and AT&T of the Southwest, Inc., recognized)....	6/27/02
TK-2003-0010	Socket Telecom, LLC (Adoption of interconnection agreement between Sprint Missouri, Inc. and Zephion Networks Communications, Inc., order recognizing adoption of interconnection agreement)	8/29/02
GT-2003-0031	Southern Missouri Gas Company, L.P. (Proposed gas aggregation tariff, order approving agreement)	10/15/02
SR-2002-350	South Jefferson County Utility Company (Rate case, sewer)	2/28/02
TT-2002-472 & TT-2002-473	Southwestern Bell Telephone Company (Tariff filing to initiate residential customer winback promotion and to extend business customer winback promotions, order regarding motion to compel)	8/8/02
TO-2002-229	Spectra Communications Group, LLC (Interconnection agreement with Buy-Tel Communications, Inc., approved)	1/3/02
TO-2002-230	Spectra Communications Group, LLC (Resale agreement with Cat Communications International, Inc., approved)	1/10/02
TO-2002-221	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Local Line America, Inc., approved).	12/10/01
TO-2002-233	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Mobile Radio Communications, Inc., approved)	12/20/01
TO-2002-236	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with VoiceStream Wireless Corporation, approved)	12/27/01
TO-2002-346	Sprint Missouri, Inc. (Interconnection agreement with Cellco Partnership, St. Joseph CellTelCo., and Verizon Wireless LLC, approved)	3/15/02
TO-2002-385	Sprint Missouri, Inc., d/b/a Sprint (Wireless interconnection agreement between Sprint and Dobson Cellular Systems, Inc., Sygnet Communications, Inc. and American Cellular Corporation, granted)	4/2/02
TO-2002-413	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Max-tel Communications, Inc., granted)..	4/5/02
TO-2002-382	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Delta Phones, Inc., granted)	4/5/02
TO-2002-417	Sprint Missouri, Inc., d/b/a Sprint (Resale agreement with Metro Teleconnect Companies, Inc., d/b/a Metro Teleconnect, approved)	4/9/02
TO-2002-414	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Tel West Communications, L.L.C., approved)	4/10/02

UNREPORTED CASES

xxxv

TO-2002-410	Sprint Missouri, Inc., d/b/a Sprint (Resale agreement with TexasHomeTel, Inc., d/b/a 877-Ring Again, approved)	4/11/02
TO-2002-419	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Direct2Internet Corporation, approved)	4/11/02
TO-2002-418	Sprint Missouri, Inc., d/b/a Sprint (Master resale agreement with Global Connection, Inc. of America, approved)	4/11/02
TO-2002-415	Sprint Missouri, Inc., d/b/a Sprint (Master interconnection and resale agreement with 1-800-RECONEX, Inc., approved)	4/12/02
TO-2002-416	Sprint Missouri, Inc., d/b/a Sprint (Master interconnection and resale agreement with Preferred Carrier Services, Inc., approved)	4/12/02
TO-2002-421	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Premiere Network Services, Inc., approved)	4/19/02
TO-2002-420	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with NOW Communications, Inc., approved)	4/19/02
TO-2002-422	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Nextel West Corp., approved)	4/25/02
TO-2002-423	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Jilapuhn, Inc. d/b/a VI-Telco, approved)	4/25/02
LK-2002-1038	Sprint Missouri, Inc. d/b/a Sprint (Master resale agreement with DSLnet Communications, LLC d/b/a DSL.net, approved)	6/7/02
LK-2002-1150	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Level 3 Communications, LLC, approved)	7/25/02

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PD-2003-0070	Taylor, Kent (Certificate of service authority, pay phones, canceled)	11/18/02
TA-2002-212	TDI Communications, Inc. (Certificate of service authority, IXC, granted)	12/6/01
TO-2002-200	TDS Telecommunications Corporation (Master resale agreement with Missouri State Discount Telephone, approved)	12/6/01
XO-2003-0079	Telcorp, Ltd (Transfer of assets to NUI Telecom, Inc., granted)	10/24/02
TA-2002-209	Telegenius, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	12/10/01
XA-2003-0013	Telenational Communications, Inc. d/b/a T.N.C., Inc. (Certificate of service authority, IXC, granted)	8/12/02
TA-2002-474	TELLISS, LLC (Certificate of service authority, interexchange and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	5/13/02

UNREPORTED CASES

XD-2003-0173	Telseon Carrier Services, Inc. (Certificate of service authority, IXC and local exchange telecommunications services, canceled)	11/13/02
PN-2002-1031	The David Co. (Name change to Coyote Call, Inc., recognized)	5/1/02
XA-2003-0118	The Pager Company d/b/a The Pager & Phone Company (Certificate of service authority, IXC, granted)	11/5/02
TA-2002-367	The Phone Connection, Inc. d/b/a Affordable Phone Company (Certificate of service authority, basic local telecommunications services, granted)	7/2/02
PA-2002-1034	Thomas, Dennis (Certificate of service authority, pay phones, granted)	5/21/02
SA-2002-404	Timber Creek Sewer Company (Certificate of public convenience and necessity to construct, own and operate a sewer system in an unincorporated area of Platte County, granted)	8/8/02
SO-2002-1061	Timber Creek Sewer Company (Certificate of public convenience and necessity to construct, own and operate a sewer system in an unincorporated area of Platte County, granted)	8/27/02
TK-2002-1095	TMP Corporation (Interconnection agreement with Southwestern Bell Telephone Company, approved)	7/15/02
CD-2003-0114	Toledo Area Telecommunications Service, Inc. d/b/a Buckeye TeleSystem (Certificate of service authority, IXC, canceled)	10/4/02
XA-2003-0105	Touchtone Communications, Inc. (Certificate of service authority, IXC, granted)	10/18/02
XA-2003-0046	Tralee Telephone Company, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	9/9/02
TD-2002-482	TranStar Communications, LLC (Certificate of service authority, basic local telecommunications services, canceled)	5/3/02
ZD-2002-1112	Trinity Lutheran Hospital (Certificate of service authority, shared tenant services, canceled)	7/18/02
TO-2003-0072	TTI National, Inc. (Transfer of customers from PT-1 Communications, Inc. and PT-1 Long Distance, Inc. to TTI, granted)	9/24/02
TA-2002-341	Twiss, Thomas (Certificate of service authority, pay phones, granted)	2/13/02
—U—		
GT-2003-0034	Union Electric Company d/b/a AmerenUE (Proposed gas aggregation tariff, order approving agreement)	10/15/02
GR-2001-488 & GR-2002-579	Union Electric Company d/b/a AmerenUE (ACA cases 1999-2000 and 2000-2001, order approving agreement)	5/21/02
EO-2002-1091	Union Electric Company d/b/a AmerenUE (Written second territorial agreement with Cuivre River Electric Cooperative designating the boundaries of each supplier in portions of Lincoln and Warren Counties, granted)	9/17/02
EO-2003-0035	Union Electric Company d/b/a AmerenUE (Transfer of certain assets to the City of Bowling Green, granted) ...	11/14/02

UNREPORTED CASES

xxxvii

TA-2002-439	Universal Broadband Communications, Inc., d/b/a Business Savings Plan (Certificate of service authority, IXC, granted)	4/9/02
TA-2002-183	Universal Telecom, Inc. (Certificate of service authority, basic local exchange telecommunications service, granted)	3/21/02
TK-2002-1050	Universal Telecom, Inc. (Interconnection agreement with Illinois Bell Telephone, et al, amendment to interconnection agreement granted)	5/28/02
TA-2002-470	Universal Telecommunications, Inc. (Certificate of service authority, IXC, granted)	5/2/02
TM-2002-218	Universal Telephone, Inc. (Transfer of customers to Reitz Rentals, Inc., d/b/a SouthWest TeleConnect, on a going-forward basis, and also the subsequent transfer of SouthWest's customers to Metro Teleconnect Companies, Inc., approved)	2/7/02
TA-2002-239	USA Telecom (Certificate of service authority, IXC, transfer of assets from Essential.com to USA Telecom, granted)	1/18/02
TD-2002-366	US WEST Long Distance, Inc. (Certificate of service authority, IXC, canceled)	2/11/02

— V —

SR-2002-475	Valley Woods Water Company (Rate cases, water and sewer)	5/16/02
TD-2002-471	Van Diest Supply Company (Certificate of service authority, pay phones, canceled).....	4/4/02
TA-2003-0022	Viva Telecom, L.L.C. (Certificate of service authority, IXC, granted)	9/4/02

— W —

PD-2002-1131	Wachsnicht, Gale (Certificate of service authority, pay phones, canceled)	6/19/02
PD-2003-0008	Walrath, Dennis (Certificate of service authority, pay phones, canceled)	8/2/02
LA-2003-0027	Western Communications, Inc. (Certificate of service authority, basic local, local exchange, exchange access and IXC, granted)	9/24/02
LA-2003-0027	Western Communications, Inc. (Name change to Western Communications, Inc. d/b/a Logix Communications, acknowledged)	10/10/02
TA-2002-300	Weston Telecommunications, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	1/31/02
LN-2002-1049	Weston Telecommunications, LLC (Name change to Easton Telecom Service, L.L.C., recognized)	5/22/02
TA-2002-430	Westport Community Secondary Schools (Certificate of service authority, pay phones, granted)	4/2/02
XA-2002-1117	Wholesale Carrier Services, Inc. (Certificate of service authority, IXC, granted)	7/12/02

UNREPORTED CASES

TK-2003-0089	Williams Local Network, LLC (Interconnection agreement with Southwestern Bell Telephone Company, granted)	10/15/02
TA-2002-353	Winstar Communications, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, restricted to providing dedicated private line services, granted)	3/21/02
TA-2002-352	Winstar Communications, LLC (Certificate of service authority, basic local telecommunications services, granted)	3/21/02
CK-2002-1086	Winstar Communications, LLC (Interconnection agreement with Southwestern Bell Telephone Company, granted)	7/3/02
TM-2002-354	Winstar Wireless, Inc. (Transfer of customers and core domestic telecommunications assets from Winstar Wireless, Inc. to Winstar Communications, LLC, granted)	3/21/02
TM-2002-223	Working Assets Funding Services, Inc. d/b/a Working Assets Long Distance (Merger with Working Assets Merger Sub, Inc., approved)	12/27/01
TD-2002-462	WorkNet Communications, Inc. (Certificate of service authority, IXC and nonswitched local exchange services, restricted to dedicated private line services, canceled)	4/23/02
TM-2002-344	WorldCom, Inc. (Transfer of customers from Intermedia, a subsidiary of WorldCom to another WorldCom subsidiary, MCI WorldCom Communications, Inc., granted)	1/29/02

— X —

XA-2002-1154	Xspedius Management Co. of Kansas City, LLC (Certificate of service authority, IXC and non-switched local exchange telecommunications services, order granting temporary certificate)	7/9/02
CA-2002-1153	Xspedius Management Co. Switched Services, LLC (Certificate of service authority, basic local telecommunications service, temporary certificate granted)	7/9/02
LA-2003-0001	Xspedius Management Co. Switched Services, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications service, temporary certificate granted)	7/15/02

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

**In the Matter of the Application of GTE Midwest Incorporated,
d/b/a Verizon Midwest, and Verizon Advanced Data Inc. to
Transfer Intrastate Advanced Data Services Assets.**

*Case No. TM-2002-192
Decided December 11, 2001*

Telecommunications §4. The Commission approved the transfer of advanced data services assets from Verizon Advanced Data Inc. to GTE Midwest Incorporated, d/b/a Verizon Midwest. The same assets had been transferred to Verizon Advanced Data Inc. from its affiliate, Verizon Midwest, by request of the parties because of an FCC condition for a merger by GTE. However, when the United States Court of Appeals for the District of Columbia overturned a similar requirement, Verizon Midwest and Verizon Advanced Data Inc. requested that the Commission reverse the transfer.

ORDER APPROVING TRANSFER OF ASSETS

This order approves the transfer of assets from Verizon Advanced Data Inc. to GTE Midwest Incorporated, d/b/a Verizon Midwest (Verizon Midwest), and grants a waiver of Commission rule 4 CSR 240-33.150.

On October 17, 2001, Verizon Midwest and Verizon Advanced Data Inc. filed a joint Application for Approval to Transfer Assets from Verizon Advanced Data Inc. In the proposed transaction, Verizon Advanced Data Inc. would transfer to Verizon Midwest certain assets used to provide intrastate advanced data services. This transfer would reverse the transfer authorized by the Commission in Case No. TM-2001-129. In that case, Verizon Midwest transferred the same assets to Verizon Advanced Data Inc. in order to allow the companies to meet one of the conditions established by the Federal Communications Commission (FCC) as part of a merger between the parent companies, GTE Corporation and Bell Atlantic Corporation.¹ On December 4, 2000, the Staff of the Missouri Public Service Commission filed a Recommendation.

Verizon Midwest is a public utility as defined in Section 386.020(42), RSMo 2000, and provides local exchange telecommunications services in Missouri. Verizon Advanced Data Services Inc. is a telecommunication company as defined in

¹ *In the Matter of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, para. 260 (June 16, 2001) (hereinafter referred to as "FCC Merger Order").

Section 386.020(15), RSMo 2000, and is authorized to provide intrastate telecommunications services. Verizon Advanced Data Inc. was granted a certificate by the Commission in Case No. TA-2000-858 to provide competitive interexchange telecommunications services under the name of Bell Atlantic Network Data, Inc. The entity's name change to Verizon Advanced Data Inc. was acknowledged on September 14, 2000, in Case No. TO-2001-127.

Verizon Advanced Data Inc. currently offers advanced data services to customers in Missouri. Verizon Advanced Data Inc. is a separate affiliate of Verizon Midwest and was created in response to the FCC Merger Order. The FCC Merger Order required Verizon Midwest to provide certain "Advanced Services" through a structurally separate affiliate. The requirement for a structurally separate affiliate has been recently overturned by the United States Court of Appeals for the District of Columbia.² In the *Ascent* decision, the court vacated an identical requirement for Southwestern Bell and Ameritech.

Verizon Advanced Data Inc. proposes to transfer all facilities and other assets required for the provision of Frame Relay to Verizon Midwest. The applicants stated that the transfer of assets will have no tax impact on any political subdivision in Missouri and that the companies have no pending or final judgments against them from any state or federal agency that involve customer service or rates. Applicants stated that they were current on Missouri assessments and fees and in filing annual reports.

The applicants argue that Commission rule 4 CSR 240-33.150 is not applicable to this unusual transaction because Verizon Advanced Data Inc. has been determined the successor and assign of Verizon Midwest under the *Ascent* decision and that the FCC Merger Order provided for the return of assets if the order was not sustained on appeal. The applicants argue "that the customers are returning back to their service provider of choice before a federal regulatory agency intervened and changed the relationship." In the alternative, the applicants request that the Commission grant a waiver of the rule. The applicants state that the service contracts of Verizon Advanced Data Inc. will be assigned to Verizon Midwest and that customers will continue to receive the same services under the same rates, terms, and conditions. In addition, applicants state that customers will not be inconvenienced and that the companies will provide customer notice.

Staff's recommendation concludes that the proposed transaction will not be detrimental to the public interest. Staff recommends that the Commission issue an Order that: (1) approves the transfer of assets; (2) requires Verizon Midwest to file within 45 days a revised tariff incorporating the rates, terms, and conditions of Verizon Advanced Data Inc.'s tariff; (3) cancels Verizon Advanced Data Inc.'s tariff and certificate granted in Case No. TA-2000-858 within 45 days of the approval of Verizon Midwest's tariff; and (4) grants a waiver of rule 4 CSR 240-33.150 for good cause shown. Staff stated that the other parties to the case were in agreement with these recommendations. There were no objections to Staff's recommendations.

The standard for approval for a transfer of assets is that the transfer will not be detrimental to the public interest.³ The Commission has reviewed the application

² *Association of Communications Enterprises (Ascent) v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

³ *State ex. rel. Fee Fee Trunk Sewer Inc. v. Litz*, 596 S.W. 2d 466, 468 (Mo. App. E.D. 1980).

11 Mo. P.S.C. 3d

and Staff's recommendations and finds that the proposed transfer of assets will have no adverse impact on the Missouri customers of the applicants. The transfer will consist of the assignment of customer contracts and the customers will continue to receive the same services under the same rates and terms. The Commission finds that the transaction is not detrimental to the public interest and should be approved.

The Commission finds that the conditions recommended by Staff are appropriate. However, to streamline the procedure the Commission will order that the certificate and tariff granted in Case No. TA-2000-858 be canceled concurrently with the approval of Verizon Midwest's revised tariff.

The Commission also determines that waiver of 4 CSR 240-33.150 is consistent with the purposes of Chapter 392, RSMo, and reasonable so long as the customers of the applicants receive notice. Therefore, the Commission will grant a waiver of 4 CSR 240-33.150.

IT IS THEREFORE ORDERED:

1. That the Application for Approval to Transfer Assets From Verizon Advanced Data Inc. is approved.
2. That no later than February 4, 2002, GTE Midwest Incorporated, d/b/a Verizon Midwest, shall file in this case a revision to its tariff to provide for services under the same rates, terms, and conditions as were provided by Verizon Advanced Data Inc.
3. That upon the effective date of the approval of tariff revisions directed in Ordered Paragraph No. 2, the tariff and certificates of Verizon Advanced Data Inc. granted in Case No. TA-2000-858, shall be canceled.
4. That the request for waiver of Commission Rule 4 CSR 240-33.150 is granted.
5. That this order shall become effective on December 21, 2001.

Nancy Dippell, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

In the Matter of the Proposed Acquisition of Missouri-American Water Company and American Water Works Company by the German Corporation RWE AG.

*Case No. WO-2002-206
Decided December 13, 2001*

Public Utilities §7. The Commission determined that it had no jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company.

ORDER CLOSING CASE

This case was opened when the Office of the Public Counsel, on October 25, 2001, filed a "Motion to Review Proposed Acquisition of Missouri-American Water Company and American Water Works Company, by RWE AG, a German Corporation." In that motion, Public Counsel requested that the Commission open a case to review the proposed acquisition of Missouri-American Water Company and its parent American Water Works Company by the German corporation RWE AG.

American Water Works Company owns Missouri-American Water Company, a Missouri corporation that operates as a regulated water utility in Missouri. American Water Works is not a regulated water corporation or public utility, nor is RWE.

On November 20, Missouri-American, American Water Works, and RWE filed a joint response opposing Public Counsel's motion. They asserted that the transaction is between the parent company of Missouri-American and a non-regulated German corporation, and that the Commission does not have jurisdiction to review the transaction. They noted that when the transaction is complete, Missouri-American will remain a wholly owned subsidiary of American Water Works, and that the transaction will be transparent to its customers.

On November 28, Public Counsel filed a pleading responding to Missouri-American, American Water Works, and RWE. On December 4, Missouri-American, American Water Works, and RWE responded to Public Counsel's November 28 reply. On December 7, the Staff of the Commission filed a pleading concurring with the position taken by Missouri-American, American Water Works, and RWE.

The Commission has reviewed the pleadings, the cases and the Missouri statutes cited by parties, and the structure of the proposed transaction. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company. The Commission's past approach to transactions of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction, it will close this case.

IT IS THEREFORE ORDERED:

1. That the motion to review the proposed transaction filed by the Office of the Public Counsel on October 25, 2001, is denied.
2. That this order shall become effective on December 23, 2001.
3. That this case may be closed on December 24, 2001.

Simmons, Ch., Murray, Gaw and Forbis, CC., concur Lumpe, C., absent

Mills, Deputy Chief Regulatory Law Judge

11 Mo. P.S.C. 3d

**In the Matter of AT&T Communications of the Southwest, Inc.'s
Proposed Tariff to Establish a Monthly Instate Connection
Fee and Surcharge.***

*Case No. TT-2002-129
December 13, 2001*

Telecommunications §14. Without a hearing, the Commission approved the request by AT&T to amend its tariffs to allow them to collect an in-state connection fee. Sections 392.200 and 392.500 RSMo do not require the Commission to conduct an evidentiary hearing, even if requested by an adverse party.

ORDER APPROVING TARIFF

This order approves the proposed tariff sheets filed by AT&T.

Brief Procedural History

On September 4, 2001, the Office of the Public Counsel filed with the Missouri Public Service Commission its motion to suspend and reject the proposed tariff sheets of AT&T Communications of the Southwest, filed on August 14, 2001.

Briefly restated, the motion contained the following major points: Public Counsel noted that it filed the motion under Sections 392.200 and 392.185, RSMo 2000.¹ According to Public Counsel, these statutes provide the statutory basis for the Commission to review and suspend the tariff. (The Commission notes that Public Counsel should have cited Section 392.230(3), under which the Commission has the discretionary authority to suspend the effective date of a tariff.) Public Counsel stated that under Section 392.185, the Commission has broad power to protect consumers even if the telecommunications provider is a competitive company and is providing a competitive service. According to Public Counsel, the Commission's oversight and authority to suspend is an essential power of the Commission to carry out the legislative purpose of Chapters 386 and 392, RSMo.

On September 6, 2001, the Commission ordered that any party wishing to respond to Public Counsel's motion should do so by September 7, 2001. On September 7, 2001, the Staff of the Commission (among others) filed its response, which described the proposed tariff and recommended its approval. Briefly restated, Staff's pleading contained the following major points:

*The Commission, in an order issued on January 15, 2002, denied an application for rehearing in this case. Please see page 440, Volume 10, MPSC 3d, for another order in this case. On February 14, 2002, this case was appealed to Cole County Circuit Court (02CV323345).

¹References to Sections of the Revised Statutes of Missouri, unless otherwise specified, are to the revision of the year 2000.

- (1) The Commission has granted AT&T competitive status as a provider of competitive telecommunications service;
- (2) The Commission does not typically scrutinize the rate structure of competitive long distance service providers beyond compliance with a few limited rate requirements identified in Missouri statutes;
- (3) Customers have the ability to switch service providers;
- (4) Public Counsel has suggested that the Commission did not receive a copy of the notice provided to customers as part of the tariff filing, but, in fact, a copy was included with the tariff filing;
- (5) Staff does not believe the charges are discriminatory; and
- (6) Staff observes that monthly-recurring charges and surcharges are common in the industry, and would suggest that AT&T should not be singled out for special treatment by the Commission or the Public Counsel based on AT&T's tariff filing.

The Commission found that, in order to allow more time to study the effect of the proposed tariff sheets, they should be suspended under Section 392.230(3), and on September 13, 2001, suspended the tariff until October 15, 2001. On September 27, 2001, the Commission suspended the tariff until November 17, 2001, and also ordered that a question-and-answer session on the record should be held on October 31, 2001. That session was held as scheduled and the parties subsequently filed position papers. On November 16, 2001, the Commission further suspended the tariff until December 22, 2001.

Issue and Decision

Has AT&T complied with the statutory provisions governing the filing of tariffs by a competitive telecommunications company? The Commission answers yes, and will thus approve AT&T's tariff.

Discussion

The filing of a tariff that increases rates or charges of a competitive telecommunications company is governed by Section 392.500(2). The statute requires that a proposed tariff increasing rates or charges is allowed to go into effect only after the proposed tariff has been filed with the Commission and the affected customers are given no less than ten days' notice.

The sufficiency of the record upon which the Commission bases its decision may be established by examining the tariff sheets filed by AT&T. If the Commission issues a decision approving a tariff as filed, it need not have before it evidence

11 Mo. P.S.C. 3d

meeting the standard of admissibility in a court of law (i.e., more than an unverified tariff sheet). Neither does the filing of a motion to suspend a tariff require the Commission to conduct an evidentiary hearing.

Section 392.500 sets out the procedure where proposed tariffs complying with the law go into effect unless the Commission acts to suspend the rates prior to their effective date. That statute does not impose the requirement of conducting a hearing by the Commission, although the suspension authorized in Section 392.230(3) gives discretionary power to the Commission to suspend the tariff and have a "full hearing." The plain wording of these statutes, however, shows that the tariff sheets may themselves constitute an adequate record for review. The mere fact that some party raises a challenge should not change the minimal evidence—the filed tariff sheets—upon which the Commission may base its decision. Similarly, the issuance of a decision from the Commission approving the rates filed, rather than allowing them to go into effect by operation of law, should have no impact on the standard for the minimal record required to implement new rates. So long as they comply with the requirements of the law, tariff sheets filed by a company may be an adequate record for Commission review.

The only exception to this procedure is under Section 392.200 when: (i) a proposed tariff is not just and not reasonable; (ii) customers do not pay the same amount for the same service given to other customers; (iii) undue or unreasonable preference or advantage is given to any customer; (iv) geographic deaveraging of rates occurs; and (v) the company violates its duty to transmit without delay the messages of other telephone companies. None of the exceptions apply here.

Findings of Fact

Because AT&T's proposed rate increase of \$1.95 applies only to a competitive service, consumers are free to obtain service from an alternative provider if they object to the rate.

AT&T's proposed tariff sheets exempt low-income and low-volume users of telecommunications, which, if "discriminatory," is "reasonable discrimination" as a matter of public policy.

AT&T's direct mail notice was clear that this charge would apply to any AT&T customer (with the noted exceptions) who had more than \$1.00 in charges billable by AT&T. The notice also informed each customer of a toll-free number and a website where customers could learn more about the charge.

Conclusions of Law

The Commission has reviewed AT&T's tariff submission, the motion to suspend, and Staff's recommendation, and finds that the motion for suspension of the proposed tariff should be denied, and, since there are no exceptions under Section 392.200, the tariff sheets should be approved.

IT IS THEREFORE ORDERED:

1. That the motion filed by the Office of the Public Counsel on September 4, 2001, to suspend the tariff filed by AT&T Communications of the Southwest, Inc., on August 14, 2001, is denied.

2. That the tariff filed by AT&T Communications of the Southwest, Inc., on August 14, 2001, is approved. The approved tariff sheets are:

P.S.C. Mo. No. 15

**Section 1, 7th Revised Sheet 7; Replacing Revised Sheet 7
and**

Section 1, 7th Revised Sheet 8; Replacing Revised Sheet 8

3. That this order will become effective on December 22, 2001.

Simmons, Ch., Murray and Forbis, CC., concur
Gaw, C., dissents
Lumpe, C., absent

Hopkins, Senior Regulatory Law Judge

**In the Matter of Southwestern Bell Telephone Company's Tariff
Filing to Initiate a Business MCA Promotion.***

**In the Matter of Southwestern Bell Telephone Company's
Proposed Revisions to PSC Mo. No. 35 (General Exchange
Tariff) Regarding CompleteLink.***

*Case Nos. TT-2002-108 & TT-2002-130
Decided December 18, 2001*

Telecommunications §45. The Commission rejected as harmful to competition, two tariffs submitted by an incumbent local exchange carrier that would have offered rate discounts to business customers that signed term contracts that would discourage those customers from switching to an alternative telecommunications services provider.

Telecommunications §45. The Commission rejected as harmful to competition, a tariff submitted by an incumbent local exchange carrier that would have offered rate discounts to business customers that rejected a competitor's offer of service to return to, or remain with, the incumbent carrier.

Telecommunications §45. The Commission found that the use of long-term contracts, or save and winback contracts, by an incumbent local exchange carrier would threaten the existence of competition in the local services market.

Telecommunications §§7, 45. The Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition.

*This order contains changes approved by the Commission in an order issued on January 8, 2002. The Commission, in an order issued on January 10, 2002, denied an application for rehearing in this case.

11 Mo. P.S.C. 3d

Telecommunications §§7, 45. The Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition.

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REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

Southwestern Bell Telephone Company has submitted a tariff that would implement a discount for its Business MCA service based on the customer's execution of a one-, three- or five-year term agreement. In a separate tariff, Southwestern Bell would establish a CompleteLink service offer that would grant discounts to customers who agreed to term and volume commitments. The Commission suspended both tariffs and now finds that the proposed tariffs would harm competition in the local exchange services market. For that reason, Southwestern Bell's tariffs are rejected.

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 in making this decision has considered the positions and arguments of all of the parties. 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.

Procedural History

On August 21, 2001, acting on its own motion, the Commission issued an order in Case Number TT-2002-108 that suspended a tariff filed by Southwestern Bell Telephone Company. Southwestern Bell's tariff would implement a promotion that would discount optional Metropolitan Calling Area (MCA) service rates pursuant to term contracts signed by business customers. In its order suspending Southwestern Bell's tariff, the Commission expressed its concern that the proposal to offer rate discounts in long-term contracts might adversely affect competition. So that it would have sufficient time to study the effect of the proposed tariff, the Commission suspended Southwestern Bell's tariff for a period of 120 days, from August 22 to December 20. On December 13, the Commission issued an order further suspending the tariff until December 31, so that this Report and Order could be given a ten-day effective date.

In its order suspending Southwestern Bell's tariff, the Commission directed its records department to send notice of the tariff suspension to all telecommunications companies certificated to do business in Missouri. The Commission also directed that any proper person or entity desiring to intervene should submit an application to intervene no later than September 10. The Commission received timely applications to intervene from Choctaw Telephone Company and MoKan

11 Mo. P.S.C. 3d

Dial, Inc., NuVox Communications of Missouri, Inc., and AT&T Communications of the Southwest, Inc. On September 19, the Commission issued an order granting each of those applications to intervene.

On September 4, NuVox Communications of Missouri, Inc. filed a motion asking the Commission to suspend or reject a tariff filed by Southwestern Bell. NuVox's motion was assigned case number TT-2002-130. The tariff that NuVox asked the Commission to suspend or reject would modify Southwestern Bell's general exchange tariff to introduce what Southwestern Bell calls CompleteLink service.

Southwestern Bell, AT&T, and Staff filed responses to NuVox motion to suspend on September 12. Southwestern Bell opposed the motion to suspend. AT&T and Staff supported the proposed suspension and both filed motions asking the Commission to consolidate case numbers TT-2002-108 and TT-2002-130, as the issues regarding the two tariffs are similar.

On September 20, the Commission issued an order that suspended Southwestern Bell's CompleteLink tariff until January 22, 2002. In the same order, the Commission directed its records department to provide notice of the tariff suspension to all telecommunications companies certificated to do business in Missouri and directed any proper person or entity wishing to intervene to file an application to intervene no later than October 10.

On September 28, the Commission issued an order that consolidated case numbers TT-2002-108 and TT-2002-130. In the same order, the Commission adopted a procedural schedule for the consolidated cases. All parties in either case were made parties in the consolidated case. Subsequently, on October 25, IP Communications Corporation, which had timely applied for intervention in TT-2002-130, was made a party to the consolidated case.

The parties submitted prefiled direct, rebuttal and surrebuttal testimony and the consolidated case proceeded to hearing on November 5 and November 7. Southwestern Bell, Staff, Public Counsel, and AT&T and NuVox filed initial briefs and proposed findings of fact and conclusions of law on November 21.¹ The same parties filed reply briefs on November 28.

The Two Tariffs

The Commission has suspended two tariffs filed by Southwestern Bell. Under the first tariff, referred to as the Business MCA Promotion,² business customers are eligible to receive a discount on each of the optional MCA services that they subscribe to in return for a one-, three-, or five-year term commitment for their local access line and optional MCA services. The tariff provides that customers will receive an eighteen percent discount on a one-year contract, a twenty-two percent discount on a three-year contract, or a twenty-five percent discount on a five-year contract. Southwestern Bell's Business MCA promotion is available to all business customers in the optional MCA areas.

¹At their request, Choctaw Telephone Company and MoKan Dial, Inc. were excused from participation in the hearing and have not filed briefs.

² MCA is an acronym for Metropolitan Calling Area. The MCA service is available in several of Missouri's larger cities and permits a customer to make discounted calls across exchange boundaries within the metropolitan area.

If a Southwestern Bell business customer signs a term commitment under the Business MCA promotion and then disconnects any portion of its contracted service prior to the expiration of the term commitment, that customer will be required to pay an early termination fee. The tariff provides that the early termination fee will be fifty percent of the monthly rate for the service that was disconnected, multiplied by the number of months remaining on the contract.

Southwestern Bell's Business MCA promotion is optional. No customer will be required to enter in to a term commitment. A business customer may choose to purchase MCA service at a standard month-to-month retail price with no term commitment, no term discount, and no risk of imposition of an early termination fee.

The second suspended tariff is referred to as the CompleteLink service offer. CompleteLink is an optional term and volume discount plan by which a business customer receives discounts on the multiple services that a customer purchases from Southwestern Bell. For example, a customer might receive a discount on its local access, local usage, toll usage, toll-free usage and various vertical features that it might purchase, such as call waiting, call forwarding, and other custom calling features. The CompleteLink plan does not require the customer to purchase any set number of products or services.

Under the CompleteLink plan, a business customer would receive monthly discounts on the products and services it purchases from Southwestern Bell, based on the customer's Minimum Annual Revenue Commitment, referred to as the Customer's MARC. The customer's MARC is the sum total of the customer's annual billed charges, before any discount is applied, for regulated services provided by Southwestern Bell in its five state region, consisting of Missouri, Arkansas, Kansas, Oklahoma, and Texas. The business customer may subscribe to CompleteLink by agreeing to a one-, three-, or five-year service agreement.

The CompleteLink customer that chooses a longer length of service agreement will receive a greater percentage discount. For example, if a customer has a MARC of \$12,000 and signs a one-year service agreement, the customer would receive a 6.5 percent discount. If that same customer signs a five-year service agreement, the customer would receive a 9 percent discount. Similarly, a customer with a higher MARC will receive a greater percentage discount. For example, a customer with a \$12,000 MARC and a one-year service agreement would receive a 6.5 percent discount, but a customer with a \$150,000 MARC and a one-year service agreement would receive a 10 percent discount.

CompleteLink customers who fail to meet their MARC will be billed the difference between their MARC and the annual revenue billed. Customers terminating a CompleteLink service agreement prior to the expiration of the service agreement would be subject to an early termination fee equal to 50 percent of the MARC multiplied by the number of years, or portions of a year, remaining in the customer's service agreement. For example, if a customer has a MARC of \$7,000 and agrees to a three-year service agreement, but cancels after two years, the termination charge would be \$3,500. The CompleteLink tariff does contain a provision that allows a customer to cancel the agreement within 90 days of execution without incurring an early termination fee.

11 Mo. P.S.C. 3d

CompleteLink is available to all business customers, but business customers who have received a written competitive offer, and are considering taking that offer, but decide to stay with Southwestern Bell, will receive an additional four percent discount. That provision is referred to as a “save” or “retention” provision. A business customer who has left Southwestern Bell and is returning to Southwestern Bell by committing to a CompleteLink agreement will receive an additional eight percent discount. That provision of the tariff is referred to as a “winback” provision.

Competitive Position of Southwestern Bell

Southwestern Bell is an incumbent local exchange carrier (ILEC) as that term is defined in Section 251(h) of the Telecommunications Act of 1996.³ That means that before the passage of the Telecommunications Act of 1996, Southwestern Bell was a regulated monopoly provider of local exchange service within its exchanges. In other words, before the advent of competition, all local service customers within Southwestern Bell’s exchanges were customers of Southwestern Bell.

The Telecommunications Act of 1996 permitted the creation of competitive local exchange carriers (CLECs). CLECs are telecommunications carriers that have decided to go into the exchange of an ILEC to compete to provide local telephone services. Currently there are 66 CLECs competing with Southwestern Bell in its Missouri exchanges. At least one CLEC is operating, and serving customers in each of Southwestern Bell’s 160 Missouri exchanges. Furthermore, at least 22 percent of the business market in Southwestern Bell’s exchanges is controlled by a CLEC.

Southwestern Bell suggests that the current level of competition in its exchanges justifies its attempts to maintain, or increase its market share using term agreements, and retain and winback provisions, as promotional tools. However, Southwestern Bell is still in a position to dominate its CLEC rivals. While the CLECs collectively may control 22 percent of the business market in Southwestern Bell’s exchanges, that 22 percent is spread out among 66 different CLECs. No CLEC has the resources to attempt to duplicate Southwestern Bell’s telecommunications network. As a result, CLEC competitors must rely on their ability to utilize all or a portion of Southwestern Bell’s network in order to provide services to their own customers.

Walt Cecil, a regulatory economist for the Staff of the Commission, testified that because of its powerful position in the local telephone market, Southwestern Bell “is in a position to threaten competitors’ market shares and continued existence, while the competitors are not yet in a position to threaten SWBT’s (Southwestern Bell’s) existence in its own exchanges.”⁴ Mr. Cecil goes on to testify that “SWBT is different than its competitors and therefore should be subject to more stringent regulatory oversights until those differences become less substantial.”⁵ The Commission agrees with Mr. Cecil’s statement. If effective competition in the local telecommunications market is to survive and prosper in Southwestern Bell’s exchanges, Southwestern Bell must be subject to heightened regulatory oversight.

³ 47 U.S.C. 251(h).

⁴ Cecil Rebuttal, exhibit 6, at 3.

⁵ Cecil Rebuttal, exhibit 6, at 3.

Effect of Term Agreements on Competition

Both the Business MCA Promotion and the CompleteLink tariff provide that customers who want to obtain discounted rates must agree to remain as customers of Southwestern Bell for periods of one, three, or five years. The requirement that the customer remain with Southwestern Bell throughout the length of the term agreement is enforced by the requirement that a customer leaving Southwestern Bell before the expiration of its term agreement pay a substantial early termination fee.

There is nothing inherently improper about the imposition of an early termination fee. As Southwestern Bell points out, many tariffs of its competitors - tariffs that have been approved by the Commission - contain similar early termination fees. Similarly, there is no indication that the amount of the fee that would be imposed by Southwestern Bell is unusual or excessive. Again, the early termination fees charged by some of Southwestern Bell's competitors may be higher than those that Southwestern Bell plans to impose. Nevertheless, there can be no doubt that the early termination fees would achieve their desired goal of providing a strong incentive for a business customer not to switch its service to a competing provider during the term of the service agreement. Any CLEC attempting to persuade a customer to leave Southwestern Bell while subject to a term agreement would not only have to offer a better rate but would also have to find a way to convince the customer to pay a large upfront penalty for leaving Southwestern Bell.

In addressing the possible impact of long-term service agreements, Walt Cecil, witness for the Staff, stated that:

[i]n general, multi-year contracts artificially reduce the pool of potential CLEC customers and forestall the intended effects of the Act. By reducing the pool of potential customers, CLEC growth plans and investment recovery, essentially the opportunities to grow and to successfully compete are constrained.⁶

Cecil then went on to say that "Long term contracts offer lower prices and are more attractive to end-users. If end-users choose these lower priced, long-term relationships, the competitive environment in the long run is at risk of collapsing."⁷ The Commission agrees with and accepts the expert opinion of Mr. Cecil.

Effect of Save and Winback Provisions

In addition to its provisions for term agreements, Southwestern Bell's CompleteLink tariff contains provisions that would give an additional four percent discount to customers who turn down a service offer from a CLEC to stay with Southwestern Bell. Furthermore, the tariff would reward customers who return to Southwestern Bell after having purchased services from a CLEC by giving them an

⁶ Cecil Rebuttal, exhibit 6, at 5.

⁷ Cecil Rebuttal, exhibit 6, at 6.

11 Mo. P.S.C. 3d

additional eight percent discount. These tariff terms are referred to as “save” and “winback” provisions.

Southwestern Bell’s save and winback provisions would have much the same impact on the health of competition in the local service market as would term agreements. But, in addition to the anticompetitive effects resulting from the use of term agreements by a dominant ILEC, save and winback provisions can cause further damage to the emerging competitive market. Such provisions are targeted directly at the customer base of the CLECs. If Southwestern Bell takes back many of those customers with save and winback provisions, and then locks them up with long-term contracts, CLECs might be left without a customer base to which they can market. Edward J. Cadieux, witness for NuVox Communications of Missouri, Inc., one of the CLECs currently attempting to compete against Southwestern Bell, testified that the combination of term discounts and save and winback provisions might freeze competition at its currently inadequate level. If the CLECs are frozen out of the competitive market, they would then be forced to abandon their attempt to compete in Missouri, leaving only Southwestern Bell as a viable local service provider. Until the CLECs are in a strong enough position to effectively compete with Southwestern Bell, the use of save and winback provisions by Southwestern Bell is anticompetitive.

CONCLUSIONS OF LAW

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

Southwestern Bell is a “Telecommunications Company” as that term is defined in Section 386.020(51), RSMo 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company. That same section authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days, plus an additional six months if the hearing regarding such suspension cannot be concluded within 120 days.

In 1996 the Missouri General Assembly passed legislation aimed at promoting competition in Missouri’s telecommunications industry. Section 392.185, RSMo 2000, which establishes the purpose of that legislation, states that:

The provisions of this chapter shall be construed to: (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri; (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.”

Therefore, the Public Service Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition.

Section 392.200.2, RSMo 2000, provides in pertinent part as follows:

No telecommunications company shall directly or indirectly or by a special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. *Promotional programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission. ... (emphasis added)*

This statute means that the Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition.

Section 392.200.3, RSMo 2000, provides as follows:

No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

This statute has been interpreted to "forbid discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions."⁸ Rate differences are permitted only if there is any "reasonable and fair difference in condition which equitably and logically justifies a different rate."⁹

⁸ *State ex rel. DePaul Hospital v. PSC*, 464 S.W.2d 737, 738 (Mo. App. 1970).

⁹ *Id.* at 740.

11 Mo. P.S.C. 3d

The Commission has previously found, as a matter of fact, that Southwestern Bell's proposed promotional tariffs will be detrimental to the health and development of competition in Missouri's local exchange market. Those tariffs are therefore unjust and unreasonable. In keeping with the Commission's obligation under Section 392.200, RSMo 2000, the Commission must reject Southwestern Bell's tariffs.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

- 1. Should the Missouri Public Service Commission approve Southwestern Bell Telephone Company's Business Metropolitan Calling Area Service Promotion, which would discount Optional Metropolitan Call Area service rates pursuant to term contracts signed by business customers?**
- 2. Should the Missouri Public Service Commission approve Southwestern Bell Telephone Company's CompleteLink Tariff, which contains term commitments and retention and winback provisions?**

Southwestern Bell argues that its tariffs should not be rejected for six reasons. The Commission is not persuaded by any of Southwestern Bell's arguments. Southwestern Bell's first argument is that its Business MCA promotion and CompleteLink service offers are optional. In other words, no business customer will be obliged to sign up for these offers. The optional nature of Southwestern Bell's promotional offers would be relevant only if the Commission were concerned about the fairness of these offers as they impact individual customers. The Commission does not doubt that these offers could be of short-term benefit to individual business customers. Certainly, business customers are sophisticated enough to do the necessary cost-benefit analysis to determine whether they will benefit from the proposed promotions. The Commission's concern is not with protecting the individual business customer. Rather, it is concerned about protecting the viability of the overall market for local exchange telecommunications services.

Indeed the problem may be that these promotions will be such a good deal for individual business customers that Southwestern Bell will be able to claim, and lock up for an extended period, so many customers that its competitors will be weakened, or even driven out of the market entirely. If that happens, competition will have failed and business customers will ultimately lose the benefits of competition.

Southwestern Bell's second argument is that its Business MCA promotion and CompleteLink service offer benefit customers through increased options and lower prices. Again, while the offers will benefit individual customers, at least in the short term, the Commission has found that Southwestern Bell's offers are a threat to the long-term health of the competitive market for local phone service. Ultimately, if the market fails, customers will be left with no choice except Southwestern Bell.

Third, Southwestern Bell argues that its Business MCA promotion and CompleteLink service offers are being made in response to the demands of its customers. Southwestern Bell asserts that its customers want: (a) to receive telecommunications services at lower prices; (b) service offerings that recognize the full volume of services that they are purchasing from SWBT; (c) term commitments that allow them to project the costs of their telecommunications needs; and (d) to purchase Southwestern Bell's CompleteLink service offer, which is available in the four other SBC Southwestern Bell states and the five SBC Ameritech states. The Commission does not doubt that there will be customer demand for the promotional offers that Southwestern Bell would like to make available. All businesses are interested in their bottom line, not necessarily with the health of competition. But the Commission has a duty to look beyond the bottom line. The Commission is obligated to protect the viability of the competitive market in order to protect Missouri's telecommunications customers from the threat of monopoly power in a future without viable competition in the local telecommunications market.

Southwestern Bell's fourth argument is that it is offering its Business MCA promotion and CompleteLink service offer in response to the competitive market and that its proposed offerings will increase rather than harm competition. Southwestern Bell argues that this Commission and the Federal Communications Commission have recently found that Southwestern Bell has opened its local market in Missouri to competition when they approved Southwestern Bell's application to provide interLATA long distance service in Missouri. Southwestern Bell also points to the fact that ever larger numbers of CLECs are offering competitive services in its exchanges, testimony indicated that approximately 22 percent of the business market is now controlled by CLECs.

While this Commission and the FCC have found that Southwestern Bell satisfied the fourteen-point checklist found in Section 271 of the Telecommunication Act of 1996,¹⁰ that finding only indicates that the local telecommunications market in Missouri is open to competition. It does not mean that the competitive market is mature enough to withstand the pressures that would be placed on it by the promotions proposed by Southwestern Bell. Unless the Commission acts to protect competition, the local exchange market may be open to competition but have no surviving competitors.

Southwestern Bell's fifth argument is that its Business MCA promotion and CompleteLink service offer are consistent with previous decisions of this Commission. Southwestern Bell presented evidence at the hearing of seventeen tariffs offering term discounts by seven of Southwestern Bell's competitors, fourteen tariffs offering volume discounts by eight of Southwestern Bell's competitors, and seventeen tariffs from ten of Southwestern Bell's competitors that contain save or winback provisions. Southwestern Bell also points out that the Commission has previously approved term, volume, save, or winback provisions in other tariffs that it has submitted.

¹⁰ 47 U.S.C. 271(c)(2)(B)

11 Mo. P.S.C. 3d

Southwestern Bell is correct when it contends that the Commission has previously approved, or allowed to go into effect, tariffs that contain provisions similar, or nearly identical to the provisions that it is rejecting in this order. However, the Commission is not bound to comply with its previous decisions. As an administrative agency the Commission is not bound by *stare decisis*,¹¹ and the failure of the Commission to explain why it is not taking the same position in one case that it took in a previous case is not a basis for overturning the Commission's action.¹² Furthermore, only these two tariffs are currently before the Commission. In finding that these two particular tariffs will harm competition, the Commission is not attempting to establish a rule with application beyond the facts of these cases. If other tariffs are brought to the attention of the Commission, the Commission will deal with those tariffs on their own merits. Similarly, the Commission will examine on their own merits tariffs submitted by CLECs that may contain term or volume discounts, or save or winback provisions.

The Commission makes no binding decision in this report and order beyond its rejection of the two tariffs currently before it. However, the Commission is currently considering another tariff filed by Southwestern Bell, as well as tariffs filed by various CLECs that also contain term agreements. While it does not wish to prejudge those cases, for the guidance of the telecommunications industry, the Commission will set forth its views regarding term agreements. The Commission believes that term agreements exceeding one year in length are an unacceptable threat to the health of competition. Term agreements that do not exceed one year in length may be acceptable.

Finally, Southwestern Bell argues that there is no statutory authority that would allow the Commission to reject its tariffs, or to treat its tariffs differently than those of its competitors. In its conclusions of law the Commission has found to the contrary. The Commission believes that sound public policy requires that it take the steps necessary to preserve the existence of the competitive market for local exchange telecommunications services.

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that Southwestern Bell's tariff to add a Business MCA promotion and its tariff to introduce its CompleteLink service offer are unjust and unreasonable and should be rejected.

IT IS THEREFORE ORDERED:

1. That the proposed tariff sheet submitted on July 20, 2001, by Southwestern Bell Telephone Company, and assigned Tariff No. 200200051, is rejected. The tariff sheet rejected is:

P.S.C. Mo. – No. 24
Local Exchange Tariff
Original Sheet 1.0302

¹¹ *State ex rel. GTE North v. PSC* 835 S.W.2d 356 (Mo. App. W.D. 1992)

¹² *Id.*

2. That the proposed tariff sheets submitted on August 23, 2001, by Southwestern Bell Telephone Company, and assigned Tariff No. 200200151, are rejected. The tariff sheets rejected are:

P.S.C. Mo. – No. 35
General Exchange Tariff
Section 54

Original Sheet 1 through Original Sheet 5

3. That this Report and Order shall become effective on December 28, 2001.

Simmons, Ch., and Lumpe, C., concur;
Gaw, C., concurs, with concurring opinion attached;
Murray, C., dissents, with dissenting opinion attached;
certify compliance with the provisions of
Section 536.080, RSMo 2000.
Forbis, C., not participating.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I join in the decision of the majority but write separately to state that I agree that save and winback provisions, when used in conjunction with term agreements exceeding one year in length, are a threat to competition. However, I express no opinion today as to whether save and winback provisions, when not associated with term agreements exceeding one year, should be allowed.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully disagree with the majority's decision. The Commission has rejected two tariffs filed by Southwestern Bell Telephone Company that would offer reduced rates and other benefits to customers. The Commission indicates that it has taken this step because it fears that the tariffs will threaten competition in the basic local service market.

Without question, Southwestern Bell wants to offer these promotions so that it can improve its position in the competitive basic local service market. That is what competitor's do in a competitive market. It is equally understandable that Southwestern Bell's competitors, including those that appeared in this case, would like to prevent Southwestern Bell from improving its competitive position, while at the same time improving their own position. Again, that is what competitors do in a competitive market. There is, however, no sufficient evidence in the record for the Commission to conclude that it must step into the competitive market to protect certain competitors by rejecting Southwestern Bell's promotional tariffs.

The types of promotions that Southwestern Bell is attempting to offer are not new. The evidence established numerous instances in which the Commission has approved term agreements, "save" provisions, and "winback" provisions as well as early-termination-fee provisions that are substantially similar to the provisions in the tariffs at issue. Those provisions have been offered by Southwest-

11 Mo. P.S.C. 3d

ern Bell, as well as by its competitors. Yet there was no evidence presented that would indicate that these provisions have harmed the state of competition. Instead, the evidence indicates that the market continues to become more competitive.

The number of competitive local exchange carriers competing in that portion of the local market served by Southwestern Bell has increased from 47 in June of 2000, to 66 at the time of the hearing. CLEC's serve customers in every one of Southwestern Bell's exchanges and serve a minimum of 22 percent of the lucrative business market. Far from being stifled, competition in the basic local service market has continued to grow, and there is no reason to believe that the promotions proposed by Southwestern Bell will stifle competition in the future.

When competition was introduced to the basic local service market in 1996 there was an expectation that competition would provide an incentive for incumbent local exchange carriers, such as Southwestern Bell, to improve the service they offer their customers by offering more options and lower prices. Missourians have seen the fruits of that competition through promotional offers such as those that Southwestern Bell has been offering in the state and would like to continue to make available to its customers.

The proposed offers would be available for resale to CLECs at the resale discount. The result would be continued growth of competition with customers of both ILECs and CLECs having more options and lower prices. Furthermore, facilities-based CLECs have been free to offer similar services. If Southwestern Bell's proposed tariff were approved there would be an incentive for CLECs to respond in kind. Competing services are one of the benefits of a competitive environment which would flow from the Commission's approval of Southwestern Bell's Business MCA promotion and Complete Link service offer.

The majority states that the use of the proposed tariffs by Southwestern Bell would be detrimental to the health and development of competition in Missouri's local exchange market. Yet, there are no findings of fact from the record that support that conclusion. In fact, there is no explanation of why those tariffs "are . . . unjust and unreasonable" in today's market which admittedly is more competitive than the market that existed when similar tariffs were previously found to be just and reasonable. Today's decision unnecessarily denies Missouri consumers many of the benefits of competition.

I respectfully dissent.

In the Matter of the Petition of the North American Numbering Plan Administrator, on Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.*

*Case No. TO-2000-374
Decided December 18, 2001*

Telecommunications §13. Under the authority of *In the Matter of Numbering Resources Optimization*, Federal Communications Docket CC Docket Nos. 99-200 and 96-98, the Commission ordered that its Staff and the telephone industry must allocate costs for costs associated with state number pooling trials and also ordered a deadline for the industry to file its proposed cost recovery plan as well as a deadline for a Staff report and for replies. The Commission further ordered that the cost allocation must be done according to the national Local Numbering Portability cost recovery model, based on a state-specific basis with a pro-rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate, and international telecommunications revenues irrespective of whether carriers are participating in the pooling trial.

ORDER REGARDING COST ALLOCATION AND COST RECOVERY FOR STATE NUMBER POOLING TRIALS

Syllabus:

This order addresses Staff's Motion to Establish Cost Allocation Method and to Set Deadline for Industry to File a Proposed Cost Recovery Plan filed on November 21, 2001. The Commission determines a cost allocation method for costs associated with state number pooling trials and sets a deadline for the industry to file its proposed cost recovery plan as well as a deadline for a Staff report and for replies.

Staff Position and Responses:

On September 25, 2001, the Commission ordered state number pooling trials in the 314 and 816 NPAs. On October 25, 2001, the Commission issued an order granting a motion filed on behalf of various industry participants resetting the implementation dates for number pooling from January 2, 2002, and February 1, 2002, for the 314 and 816 NPAs respectively to January 22, 2002, and February 22, 2002, respectively.

Staff filed its motion regarding cost allocation and cost recovery on November 21, 2001. Nextel West Corp. (Nextel) and Southwestern Bell Telephone Company (SWBT) each filed responses on December 3, 2001. No other parties responded to Staff's motion.

*The Commission, in an order issued on December 28, 2001, extended the effective date of the order regarding cost allocation and cost recovery for state number pooling trials to January 11, 2002. See pages 367 and 499, Volume 9 MPSC 3d as well as pages 82, 237, 500, 503 and 549, Volume 10 MPSC 3d for other orders in this case.

11 Mo. P.S.C. 3d

Staff states that NeuStar, the number pooling administrator, requires a cost allocation method to be established in order to bill its costs to carriers. Staff also recommended that a deadline be set for the industry to submit a cost recovery plan. Staff cited the Federal Communications Commission in support of its recommendations.¹

Cost allocation refers to a method of distributing joint costs of implementing and sustaining number pooling over carriers requiring and benefiting from the allocation of numbering resources. Cost recovery refers to identification and recovery of carrier specific costs to implement and sustain number pooling.

For cost allocation Staff recommended that there should be a pro rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate and international telecommunications revenues irrespective of whether carriers are participating in the pooling trial.

SWBT supported the Staff recommendation for cost allocation citing the same FCC orders presented by Staff. SWBT cited FCC findings that even those carriers that cannot participate in number pooling benefit from the more efficient use of numbering resources that pooling will facilitate. *Id.* CC Docket Nos. 99-200 and 96-98. SWBT stated that Staff's proposal was consistent with the authority the FCC granted to state commissions.

Nextel did not oppose Staff's recommendation for cost allocation but suggested that it lacked adequate detail and could present issues of confidentiality of competitively sensitive carrier information. Nextel suggested use of existing revenue databases such as those used by the FCC for national Local Numbering Portability (LNP) cost recovery. Nextel presented this procedure with state specific data, as recently adopted in Michigan for the allocation of joint industry costs, as an example.²

With respect to cost recovery, Staff simply recommended that the Commission set a deadline of March 22, 2002, for filing of an industry proposal, as previously directed in the Commission's September 25, 2001 order. SWBT indicated that it would work with the industry on a proposal and believes that a proposal could be submitted much earlier than March 22, 2002. Nextel questioned the Commission's jurisdiction to address the costs of wireless carriers and noted that carrier specific costs for number pooling are only one of myriad costs incurred and carriers recover their costs through various mechanisms or procedures available to the carrier.

The Commission notes that the Michigan case (see footnote 2) cited by Nextel determined that carrier specific costs, including the joint costs allocated to carriers, were a cost of doing business not requiring a special cost recovery mechanism. The Michigan Public Service Commission found this treatment to be competitively neutral and compared the costs of number pooling to costs of common updates

¹ *Report and Order and Further Notice of Proposed Rulemaking in the Matter of Numbering Resource Optimization*, CC Docket No. 99-200 and *In the Matter of Numbering Resources Optimization*, CC Docket Nos. 99-200, 96-98.

² *In the Matter, on the Commission's Own Motion, to Consider the Implementation of Limited Number Pooling Trials*. Case No. U-13086 Michigan Public Service Commission (November 20, 2001).

and improvements of a company's operating systems. The Michigan Commission also suggested these costs result in numerous benefits to the carriers that can ultimately reduce overall costs.

Cost Allocation Method and Cost Recovery Proposal Filing Date:

The Commission finds that all carriers benefit from the more efficient use of numbering resources and that Staff's proposal presents a fair allocation of the joint costs incurred for number pooling. Staff, NeuStar and the industry shall allocate costs according to the LNP model on a state specific basis with a pro rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate and international telecommunications revenues irrespective of whether carriers are participating in the pooling trial. Joint costs shall be promptly allocated against data from the most recent reporting period that is available and billed at intervals or times that minimize administrative costs. Joint costs, allocation and billing data shall be reported to the Commission Staff.

The Commission finds further that the industry shall submit a proposal for recovery of carrier specific costs, including joint costs allocated to a specific carrier, no later than March 22, 2002. Staff shall submit its report and recommendation to the Commission regarding the industry proposal no later than April 22, 2002. And further, Staff's report shall evaluate and present arguments supporting the position that carrier specific costs, including the costs allocated to carriers, present a cost of doing business not requiring a special cost recovery mechanism. Any party may file a response to the industry proposal or to Staff's filing within 15 days of the respective filing.

IT IS THEREFORE ORDERED:

1. That Staff, NeuStar and the industry shall allocate costs according to the LNP model on a state specific basis with a pro rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate and international telecommunications revenues irrespective of whether carriers are participating in the pooling trial. Joint costs, allocation and billing data shall be reported to the Commission Staff.
2. That the industry shall submit a proposal for recovery of carrier specific costs, including joint costs allocated to a specific carrier, no later than March 22, 2002.
3. That Staff shall submit its report and recommendation to the Commission regarding the industry proposal no later than April 22, 2002. And further, Staff's report shall evaluate and present arguments supporting the position that carrier specific costs, including the costs allocated to carriers, present a cost of doing business not requiring a special cost recovery mechanism.
4. That any party may file a response to the industry proposal or to Staff's filing within 15 days of the actual filed date for the respective filing described in paragraphs 2 and 3.
5. That this order shall become effective on December 28, 2001.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Thornburg, Regulatory Law Judge

11 Mo. P.S.C. 3d

**In the Matter of the Application of UtiliCorp United Inc., for
Authority to Acquire the Shares of Avon Energy Partners
Holdings and to Take All Other Actions Reasonably Neces-
sary to Effectuate Said Transaction.**

Case No. EO-2002-215
Decided December 18, 2001

Electric § 4. The Commission authorized UtiliCorp United Inc. to acquire all the outstanding shares of Avon Energy Partners Holdings from EI UK Holdings, Inc.

Electric § 4. The Commission determined that the acquisition by UtiliCorp United Inc. of all the outstanding shares of Avon Energy Partners Holdings would expand and diversify UtiliCorp's operations in the United Kingdom and the rest of Europe and would not adversely affect its investment grade credit rating or its ability to attract capital to fund its operations. Therefore, the Commission determined that approval of the application would benefit UtiliCorp and would not be detrimental to the public interest.

ORDER APPROVING APPLICATION

Syllabus:

On October 30, 2001, UtiliCorp United Inc. (UtiliCorp) filed an application with the Commission requesting approval of a Share Purchase and Sale Agreement between UtiliCorp, as purchaser, and EI UK Holdings, Inc. (EI UK), as seller, providing for UtiliCorp to acquire all the outstanding shares of Avon Energy Partners Holdings (Avon) from EI UK. This order approves the application and authorizes UtiliCorp to complete the transaction acquiring Avon.

Standard of Review:

UtiliCorp requests approval of its application and proposed acquisition pursuant to Section 393.190, RSMo 2000, and 4 CSR 240-2.060(12). Section 393.190 requires an electrical corporation regulated by the Commission to obtain the Commission's approval to acquire the stock of any other corporation engaged in the same or similar business. Under the regulation UtiliCorp must provide the Commission with a copy of its agreement to acquire the stock of the public utility (Avon), a copy of the resolution of its board authorizing the acquisition and show why the transaction is not detrimental to the public interest.

The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no proper party is granted intervention and neither the Commission's Staff nor the Office of the Public Counsel requests a hearing, the Commission may determine that a hearing is not necessary and that the applicant may submit its evidence in support of the application by verified statement.¹

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

No applications for intervention were filed. No party has requested a hearing.

Procedural History:

UtiliCorp filed its application on October 30, 2001, with supporting exhibits and schedules. On October 31, 2001, UtiliCorp filed a Motion for Protective Order. The Commission issued a protective order on November 8, 2001. The Commission also issued an order directing the filing of a Staff recommendation no later than November 30, 2001, and providing that the Office of the Public Counsel file its response to the application by November 30, 2001.

UtiliCorp supplemented its application on November 6, 2001, stating that it would list pending actions or unsatisfied judgments against it involving customer service or rates in a late-filed appendix. UtiliCorp filed this appendix on November 19, 2001. On November 13, 2001, UtiliCorp filed its Share Purchase and Sale Agreement that is the subject of the application. On November 19, 2001, UtiliCorp filed a certified copy of the resolution of its board authorizing the agreement and acquisition as adopted at a meeting held on October 11, 2001. UtiliCorp also filed additional financial and pro forma financial information in support of its application.

Staff filed its response and memorandum on November 29, 2001. The Public Counsel filed its response on November 30, 2001. Staff recommended approval of the application with certain conditions. The Public Counsel recommended approval of the application provided that the Commission incorporate the conditions proposed by Staff and the commitments offered by UtiliCorp. UtiliCorp has not objected to the responses and recommendations.

The Transaction and Its Impact:

UtiliCorp is a Delaware corporation with its principal place of business in Kansas City, Missouri. UtiliCorp is authorized to conduct business in Missouri and provides electrical, natural gas and industrial steam utility services through its Missouri Public Service (MPS) and St. Joseph Light & Power (SJLP) operating divisions in those areas in Missouri certificated to it by the Commission.

Avon owns and operates Midlands Electricity plc, which is a substantial electric utility distribution business and related businesses based in the United Kingdom. Midlands is one of twelve regional electricity companies in the UK that came into existence as a result of privatization of the UK electricity industry in 1990. Midlands provides regulated distribution of electricity to approximately 2.3 million industrial, commercial and residential customers in south-central England. Midlands also has unregulated businesses in electricity generation, electrical contracting, metering services and related businesses and through a subsidiary owns minority interests in several generating plants in the UK and overseas.

UtiliCorp proposes to pay \$362 million, subject to certain adjustments, to acquire 100% of the stock of Avon. UtiliCorp will also incur transaction costs. UtiliCorp states that it will obtain a 50% partner for its investment and acquisition of Avon. Staff's response indicated that closing costs could be approximately \$19 million and that UtiliCorp has presented that its total investment and costs would not exceed \$200 million because it will obtain an ownership and investment partner. UtiliCorp states that its acquisition of Avon and the Midlands business will provide it with a base to expand and diversify its operations in the UK and the rest of Europe.

11 Mo. P.S.C. 3d

UtiliCorp's transaction is a spin-off of a pending merger between two other companies. FirstEnergy Corp. is a diversified energy services holding company headquartered in Akron, Ohio. GPU, Inc., is an electric utility holding company that provides electric service to customers in New Jersey and Pennsylvania and also develops and owns electrical generation, transmission and distribution facilities. EI UK is a subsidiary of GPU, which in turn owns Avon. FirstEnergy and GPU are expected to merge prior to December 31, 2001. UtiliCorp made an offer to FirstEnergy to acquire 100% of Avon from EI UK after the closing of the FirstEnergy/GPU merger. The Share Purchase Agreement between UtiliCorp and EI UK presented for approval with the application documents the transaction proposed by UtiliCorp. Appendix 3 to the application shows the ownership structures of these companies prior to and after the transactions.

Following the acquisition Avon and its subsidiaries will maintain significant debt related to operations that will be no recourse to UtiliCorp, meaning that creditors cannot demand payment from UtiliCorp. UtiliCorp may, however, borrow monies to fund its share of the acquisition of Avon. UtiliCorp expects eventually to structure its funding of the acquisition as 55% debt and 45% equity, but, initially it will be 100% debt.

Staff calculated and evaluated the impact of the acquisition on the financial position of UtiliCorp based upon the "most conservative" (worst case) scenario of 100% debt financing. Based upon Staff's review of current and pro forma financial data submitted by UtiliCorp, the company's capital structure as of June 30, 2001, consisted of 44.50% long-term debt, 2.70% short-term debt, 6.30% preferred stock, and 46.50% common equity. If the company incurs \$200 million of long-term debt to complete the acquisition its capital structure would consist of 46.40% long-term debt, 2.60% short-term debt, 6.10% preferred stock, and 44.90% common equity. The total debt of the company would increase 1.8% from 47.20% to 49.00% of total capital.

Staff stated that a 49% debt ratio would be consistent with UtiliCorp's current BBB rating for electric utilities assigned by Standard & Poors. Staff further stated that Standard & Poors reaffirmed UtiliCorp's BBB rating following the announcement of the proposed acquisition and stated the outlook for UtiliCorp was "stable." ~~Standard & Poors~~ *Utilities & Perspectives*, October 29, 2001.

Staff also reviewed the company's pro forma pre-tax interest coverage ratios showing that funds from operations compared to interest and to total debt were consistent with BBB rated utilities. Staff concluded that UtiliCorp would continue its ability to attract capital after the transaction.

UtiliCorp Commitments:

UtiliCorp represented in its application that it is committed to maintaining its investment grade credit rating. UtiliCorp stated that cost allocations to its Missouri jurisdictional operations would not increase as a result of the transaction and that it will reduce allocations where appropriate to reflect the effect of the transaction. UtiliCorp stated that any acquisition premium paid by UtiliCorp will be treated below-the-line for ratemaking purposes and that no recovery of any acquisition premium would be sought in any future Missouri rate case. UtiliCorp stated that

it would not seek an increase in its cost of capital or request a risk premium as a result of the acquisition. UtiliCorp stated that it would provide the Staff and the Public Counsel with post-closure information about the transaction if it is approved and current credit agency reports as available.

Staff Conditions:

Staff recommended approval of the application be subject to conditions as follows. That nothing in the Commission's order 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 subsequent proceeding.

That the Commission's order shall not be deemed to be precedent for any future financing even if the facts may be similar. That any adverse financial effects of this acquisition be borne by the shareholders of UtiliCorp United Inc., and not by ratepayers.

That all records pertaining to these transactions be maintained at UtiliCorp United Inc.'s headquarters and made available to the Commission's Staff, as Staff deems necessary. That UtiliCorp United Inc., provide documentation of proper cost allocations to nonregulated entities. That UtiliCorp United Inc., include any costs borne by Missouri Public Service related to the nonregulated subsidiaries in monthly surveillance reports sent to the Commission's Staff.

UtiliCorp's Financial Partnership:

UtiliCorp's application was submitted based upon having a financial partner with a 50% interest in the acquisition of Avon. The application did not identify a particular partner. On December 13, 2001, UtiliCorp filed a notice to the Commission and the parties that due to recent events its prospective partner could decide to withdraw from the transaction. UtiliCorp indicated that the recent financial "collapse of Enron Corp." could financially impact a subsidiary of Avon. If UtiliCorp proceeded without a partner, then the impact of the transaction and the risks associated with the transaction affecting UtiliCorp would be much different than the pro forma information submitted to the Commission. UtiliCorp suggested that the Commission specifically condition its approval upon the representations in the application that UtiliCorp have a financial partner.

The Staff filed its response to this late information on December 17, 2001. Staff stated that its recommendation was based upon the information and representations in the application, including the projected financial implications to UtiliCorp and the requirement for a financial partner. If the basis of the transaction should change, Staff believed that UtiliCorp should submit a new application. Staff agreed that the Commission's approval should be conditional on a financial partnership as presented in the application.

Decision:

UtiliCorp has provided the Commission with a copy of its agreement to acquire the stock of a public utility (Avon) and a copy of the resolution of its board authorizing the acquisition. UtiliCorp's application and supplemental information and the responses filed by the Staff and the Public Counsel demonstrate that the transaction is not detrimental to the public interest and offer conditions that protect the

11 Mo. P.S.C. 3d

public interest. Thus, the application satisfies all the requirements of Section 393.190, RSMo 2000, and 4 CSR 240-2.060(12).

The acquisition will permit UtiliCorp to expand and diversify its operations by extending and expanding its operations in the UK and the rest of Europe. The investment and any related debt will not adversely affect UtiliCorp's investment grade credit rating or its ability to attract capital to fund its operations. Therefore, approval of the application will benefit UtiliCorp with no detriment to the public interest.

In addition, the commitments offered by UtiliCorp and Staff's conditions, including the requirement that UtiliCorp have a financial partner, provide further assurance that there will be no detriment to the public interest by the Commission's approval of the application.

The Commission finds that the transactions presented in UtiliCorp's application are not detrimental to the public interest and may be approved subject to the commitments offered by UtiliCorp and the specific conditions recommended by Staff.

IT IS THEREFORE ORDERED:

1. That the application of UtiliCorp United Inc., requesting the Commission to authorize UtiliCorp's acquisition of the outstanding shares of Avon Energy Partners Holdings as provided in the Share Purchase and Sale Agreement between UtiliCorp and EI UK Holdings, Inc., is hereby approved.
2. That UtiliCorp United Inc., may take the actions necessary and as authorized in this proceeding to carry out the transactions as described in the application.
3. That the authority granted in this order is conditioned on the participation of a financial partner and the representations described in the application, particularly paragraphs 8 and 12. If UtiliCorp United Inc., determines to proceed differently UtiliCorp shall file a new application.
4. 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 subsequent proceeding.
5. That the Commission's order shall not be deemed to be precedent for any future financing even if the facts may be similar.
6. That any adverse financial effects of this acquisition are borne by the shareholders of UtiliCorp United Inc.
7. That all records pertaining to these transactions be maintained at UtiliCorp United Inc.'s headquarters and made available to the Commission's Staff, as Staff deems necessary.
8. That UtiliCorp United Inc., provide documentation of proper cost allocations to nonregulated entities.
9. That UtiliCorp United Inc., include any costs borne by Missouri Public Service related to the nonregulated subsidiaries in monthly surveillance reports sent to the Commission's Staff.
10. That UtiliCorp United Inc., exercise reasonable diligence and prudence to maintain its investment grade credit rating.

11. That UtiliCorp United Inc.'s cost allocations to its Missouri jurisdictional operations not increase as a result of the transaction and that UtiliCorp United Inc., will reduce allocations where appropriate to reflect the effect of the transaction.
12. That UtiliCorp United Inc., treat any acquisition premium below-the-line for ratemaking purposes and that it shall not seek recovery of any acquisition premium resulting from the transaction in any future Missouri rate case.
13. That UtiliCorp United Inc., shall not seek an increase in its cost of capital or request a risk premium as a result of the acquisition.
14. UtiliCorp United Inc., shall provide the Commission's Staff and the Office of the Public Counsel with post-closure information concerning the transaction 30 days after closing and shall provide current credit agency reports as available.
15. That UtiliCorp United Inc., file status reports in this proceeding beginning 60 days from the date of this order and each 30 days thereafter advising of the status of the transaction so that the Commission may be apprised of the status of the transactions presented in this case and when this case may be closed.
16. That this order shall become effective on December 28, 2001.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Thornburg, Regulatory Law Judge

**In the Matter of the Application of Citizens Electric Corporation
for Approval of Interim Rates, Subject to Refund, and for a
Permanent Rate Increase.***

*Case No. ER-2002-217
Decided December 20, 2001*

Electric §20. The Commission found that the stipulation and agreement of the parties was reasonable in that it provided for just and reasonable rates to be set in the ongoing permanent rate case and allowed Citizens Electric Corporation to recover in the interim, subject to refund, the increased costs of its new purchased power agreement, therefore allowing Citizens to provide safe, adequate, and reliable service without incurring additional debt or impairing its financial stability.

Rates § 1. The Commission held that it is appropriate under the facts of this case to grant interim rate relief on a nonemergency basis.

Rates § 14. Where the parties all agreed that interim rate relief was appropriate, the Commission found that Citizens Electric Corporation was so similar to a rural electric cooperative, and so different than other electrical corporations regulated by the Commission, that it was appropriate to grant interim rate relief on a nonemergency standard to recover additional costs from a wholesale power agreement.

*See page 000 for another order in this case.

11 Mo. P.S.C. 3d

Rates § 114. Where the parties all agreed that interim rate relief was appropriate, the Commission found that Citizens Electric Corporation was so similar to a rural electric cooperative, and so different than other electrical corporations regulated by the Commission, that it was appropriate to grant interim rate relief on a nonemergency standard to recover additional costs from a wholesale power agreement.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves a stipulation and agreement submitted by the parties regarding an interim rate increase for Citizens Electric Corporation. The order also directs Citizens to file tariff sheets and directs Staff to file a recommendation.

On November 1, 2001, Citizens filed with the Commission proposed permanent tariff sheets designed to increase revenues 13.9 percent, or \$6,548,804 annually. Citizens stated that the increase was necessary to offset a January 1, 2002, increase in its costs for wholesale power by \$4,665,565 annually, and increases in other costs by \$1,883,240 annually. Citizens' tariff bore an effective date of December 1, 2001.

On November 2, 2001, Citizens filed a motion requesting expedited treatment. Citizens stated that it needed approval of its proposed rates on an interim basis, to be effective no later than January 1, 2002. Citizens stated that without the interim increase, it would suffer the loss of approximately \$13,000 per day under the new contracted price for power.

Citizens is a public utility engaged in providing electric service to approximately 24,000 customers in Ste. Genevieve, Perry, northern Cape Girardeau, and St. Francois Counties in Missouri. The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Citizens pursuant to Section 386.250 and Chapter 393, RSMo.

Citizens Electric Corporation is a uniquely situated entity. Like most of the utilities that come before the Commission, it is a corporation established under Chapter 351 RSMo. Unlike other corporate entities regulated by the Commission, however, Citizens is structured such that it operates on a business plan similar to a cooperative electric corporation. Citizens' stockholders are also the consumers of the power that Citizens sells. Citizens refers to these consumers as members. Under Citizens' business plan, all revenues in excess of costs are returned to its members in the form of capital credits. Because of its business plan, Citizens has many of the same characteristics of a rural electric cooperative.

Citizens does not generate any power. Citizens purchases all of its power under contracts in the wholesale energy market. Citizens recently completed negotiations for a new purchased power agreement which will increase the costs of its wholesale power by 15 percent beginning January 1, 2002. Citizens has not requested a general rate increase since 1982.

On November 21, 2001, the Staff of the Missouri Public Service Commission filed a motion to suspend Citizens' proposed tariffs. On November 29, 2001, the Commission granted Staff's motion and suspended the tariff sheets until March 31, 2002. The Commission also directed the parties to either enter into a stipulation and agreement or to request a hearing on the issue of interim rates by December 21, 2001. The Commission further directed the parties to submit proposed

procedural schedules with regard to the permanent ratemaking no later than December 21, 2001.

On December 14, 2001, the parties jointly filed a unanimous stipulation and agreement. Staff filed suggestions in support of the stipulation and agreement on December 17, 2001. On December 18, 2001, the parties filed a correction to paragraph 8 of the agreement.

The parties agreed that the Commission should order Citizens to file tariff sheets in conformance with the illustrative tariff sheets attached to the agreement as Exhibit 1. The parties agreed that the illustrative tariff sheets will provide necessary interim rate relief for Citizens and that the rate relief is limited to the increased cost of the wholesale power contract, or \$4,665,565 per annum. The parties agreed that the interim rates should be collected subject to refund pending the determination of permanent rates by the Commission at the conclusion of this case. The balance of Citizens' rate increase request, or \$1,883,240 per annum, and a review of the prudence of the power supply agreement will be addressed in the subsequent portions of this proceeding.

The parties also agreed that the customer class cost-of-service study and the rate design for the proposed permanent rates filed by Citizens are suitable for both interim and permanent rates. The revenue increases required for each class to cover its cost of service and the proposed interim and permanent revenue increases requested by Citizens are shown in the following table.

Rate Class	Cost-of-Service Increase	Interim Increase	Proposed Permanent Increase
Residential	21.2%	12.2%	18.8%
General Service	10.6%	9.3%	14.3%
Large Power	17.2%	10.7%	16.5%
Outdoor Lighting	-5.2%	5.8%	8.9%
Street Lighting	93.0%	26.0%	40.1%
Contracts	5.2%	7.1%	7.1%
Total	13.9%	9.9%	13.9%

The parties further agreed to a refund process, if it is necessary, that will begin no later than the April 2003 billing month. The parties agreed to this particular time frame because the consumers, who are also the members, typically receive their annual capital credits in April. By timing the refunds in this manner, Citizens will have sufficient time to calculate and process any refunds in a timely manner. Because the members would effectively be paying the interest to themselves, the parties agreed not to require the payment of interest on any refunded amount.

Contingent upon the Commission's acceptance of the agreement, the parties agreed that the direct testimony of Dan Rodamaker, Jody Breazeale, and Georgia Peifer may be received into evidence to the extent that the testimony applies to the issues settled in the agreement. The Commission therefore, will accept into the record the sworn direct testimony of Dan Rodamaker, Jody Breazeale, and Georgia Peifer as it relates to the stipulation and agreement and the issues settled therein.

11 Mo. P.S.C. 3d

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties pursuant to Section 536.060, RSMo 2000. 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.¹ Since no one has requested a hearing regarding the issue of interim rates, the Commission may grant the relief requested based on the agreement.

The Commission has reviewed the verified application, the unanimous agreement, Staff's suggestions in support of the agreement, and the sworn testimony. The Commission finds that the agreement is reasonable in that it provides for just and reasonable rates to be set in the ongoing permanent rate case and it allows Citizens to recover in the interim, subject to refund, the increased costs of its new purchased power agreement. Therefore, Citizens will be able to provide safe, adequate and reliable service without incurring additional debt or impairing its financial stability.

Without the interim increase in rates, Citizens would be placed in the position of losing substantial income each day after January 1, 2002. This potential loss in income would cause Citizens difficulty borrowing money to maintain other operations and proceed with its construction contracts, negatively impacting Citizens' ability to provide safe, adequate and reliable service to its members. In addition, because of its unique business plan, the increased interest on borrowed money will ultimately be paid by the consumers themselves, by virtue of their positions as stockholders. Citizens also indicated that financial problems could result in the elimination of services to the members.

The standards for interim rate relief have been previously determined by the Commission.² According to the *Missouri Public Service* case, to be eligible for interim rate relief a utility company must show that: (1) it needs the additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief. The Commission has, however, granted interim rate relief on a nonemergency basis.³ The Western District Court of Appeals has also held that it is possible to grant interim rate relief on a nonemergency basis.⁴

The interim increase is limited to the increased costs under the purchased power contract and the value of that contract is known. Citizens has established that it needs additional funds by January 1, 2002, to avoid financial harm and potential detriment to its consumers. All the parties agree that interim rate relief is appropriate. Because Citizens' organization is very similar to a rural electric cooperative, the Commission finds that it is differently situated than other electrical corporations regulated by the Commission. Therefore, the Commission concludes that it is appropriate to grant interim rate relief on a nonemergency standard

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

² *In re Missouri Public Service Company*, Case No. 18,502, 20 Mo. P.S.C. (N.S.) 244 (1975).

³ *In re Missouri Power & Light Company*, Case Nos. GR-81-355 and ER-81-356 (1981).

⁴ *State ex rel. Laclède Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App. 1976).

in this instance to permit interim rates to recover additional costs from the wholesale power agreement commencing January 1, 2002. The Commission finds that the unanimous stipulation and agreement filed on December 14, 2001, as corrected on December 18, 2001, is just and reasonable and should be approved.

The Commission will direct Citizens to file interim, subject to refund, tariff sheets for the Commission's approval consistent with the agreement and in substantial conformance with the illustrative tariff sheets attached as Exhibit 1. The Commission further finds that good cause exists to approve those tariff sheets on an expedited basis with an effective date of January 1, 2002. The Commission will direct its Staff to file a recommendation stating whether or not the tariff sheets, if filed, comply with the Commission's order no later than December 26, 2001.

IT IS THEREFORE ORDERED:

1. That the unanimous stipulation and agreement filed on December 14, 2001, by Citizens Electric Corporation, the Staff of the Public Service Commission, and the Office of the Public Counsel, as corrected on December 18, 2001, is hereby approved. With the exception of the Highly Confidential Exhibit 2, the agreement is attached to this order as Attachment 1.
2. That Citizens Electric Corporation shall file interim tariff sheets, subject to refund, in conformance with the illustrative tariff sheets attached to the unanimous stipulation and agreement.
3. That if tariffs have been filed, the Staff of the Missouri Public Service Commission shall file its recommendation stating whether or not the tariffs are in compliance with the Commission's order and should be approved. Staff shall file its recommendation no later than December 26, 2001.
4. That this order shall become effective on December 26, 2001.

Simmons, Ch., Murray, Lumpe, and Forbis, CC., concur.
Gaw, C., dissents.

Dippell, Senior 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.

11 Mo. P.S.C. 3d

In the Matter of the Application of Southwestern Bell Telephone Company to Transfer Property and Ownership of Stock Pursuant to Section 392.300, RSMo.

*Case No. TO-2002-185
Decided December 20, 2001*

Telecommunications §4. Southwestern Bell Telephone Company, a Missouri corporation regulated as a telephone corporation by this Commission, requested authority to reorganize as a Texas limited partnership. The Commission determined that there would be no effect on customers or on tax revenues, the reorganization would not be detrimental to the public interest, and the Commission approved the application.

ORDER APPROVING REORGANIZATION

Syllabus: Southwestern Bell Telephone Company, a Missouri corporation regulated as a telephone corporation by this Commission, requests authority to reorganize as a Texas limited partnership. The Commission determines that there will be no effect on customers or on tax revenues, the reorganization will not be detrimental to the public interest, and the Commission approves the application.

The transaction: On October 12, 2001, Southwestern Bell Telephone Company (Bell Missouri), Southwestern Bell Texas, Inc., and Southwestern Bell Telephone L.P. d/b/a Southwestern Bell Telephone Company (Bell LP; collectively Applicants) filed a verified application requesting that the Commission approve a corporate restructuring and stock transfer. The effect of these transactions will be to convert Bell Missouri, a Missouri corporation, into Bell LP, a Texas limited partnership. The Applicants state that the purpose of the conversion is to achieve tax savings, that the conversion will be transparent to its customers, and will have no effect on Missouri tax revenues. They request expedited approval, with a decision by December 20.

The transaction is rather complicated, but the end result is that the entity providing telephone service in Missouri will change from a Missouri corporation directly owned by SBC Communications, Inc. to a Texas limited partnership that is a second tier subsidiary of SBC. The transaction essentially consists of the following steps:

1. SBC will form a new subsidiary, Southwestern Bell Texas Holdings, Inc. (Texas Holdings), as a Delaware corporation.
2. In turn, Texas Holdings will form two subsidiaries: SWBT Texas L.L.C. and Southwestern Bell Texas, Inc. (Bell Texas), a Texas corporation. Texas Holdings will own 99 percent of Bell Texas and SWBT Texas L.L.C. will own one percent.

3. Bell Missouri and Bell Texas will merge with Bell Texas being the surviving entity.
4. Bell Texas will convert itself under Texas law into a Texas limited partnership, Bell LP. SWBT Texas L.L.C. will be the general partner and will own one percent of the partnership, and Texas Holdings will be the limited partner and will own 99 percent of the partnership.
5. Bell LP will elect to be treated as an association taxable as a corporation for federal income tax purposes.

The filings: On October 29, the Office of the Public Counsel, the Small Telephone Company Group¹ and the Missouri Independent Telephone Company Group,² filed separate responses and requests for hearing. The STCG and the MITG also requested intervention, which was granted by an order issued November 27. These three parties raise questions about whether Bell LP will need to apply for and receive a certificate of service authority before it can begin serving customers and whether Bell LP will be regulated as a "price cap" company in the same way that Bell Missouri is. The Staff of the Commission also filed a response on October 29.

On November 8, Applicants filed a reply to the responses. Applicants assert that Bell Missouri can freely assign the charter under which it operates with no need to apply for a certificate and that any successor in interest will retain its price cap status.

On November 15, 2001, the Staff filed its recommendation. Staff states that the Commission should review the transaction in light of the "not detrimental to the public interest" standard, and states that the transaction is not detrimental to the public interest. Staff agrees with Applicants that Bell LP will not need a certificate of service authority, but will continue to serve customers pursuant to the franchise granted to Bell Missouri's predecessors. Staff states that there will be no effect on the tax revenues of any political subdivisions, nor will there be any change in the

¹ The Small Telephone Company Group, or STCG, 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, 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, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Spectra Communications Group, Inc., and Steelville Telephone Exchange, Inc.

² The Missouri Independent Telephone Company Group, or MITG, consists of 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.

11 Mo. P.S.C. 3d

Missouri income tax classification of the operating entity, as a result of the transactions. Staff also states that price cap regulation is not dependent on the organizational structure of the regulated company, and so Bell LP will be regulated in the same way that Bell Missouri is. Finally, Staff recommends that the Commission order Bell LP to file an adoption notice and revised title sheets along with evidence of the registration of the name with the Missouri Secretary of State. No party responded to this final recommendation, it seems reasonable, and the Commission will order it.

Pursuant to Commission orders, the parties filed briefs on the issues raised by the application. In their briefs, the parties further explained the positions they had taken in their previous pleadings, and offered additional authorities to support those positions.

Decision: The standard to be applied to this application is that the Commission must approve it unless approval would be detrimental to the public interest. No party has raised any significant arguments about how it could prove detrimental to the public interest. The main question the parties raised is with whether Bell LP will need to apply for and receive a certificate of service authority before it can begin serving customers. Applicants argue that it will not need to do so because of Bell Missouri's unique status as a telephone company incorporated pursuant to Article V, Chapter 21 of the Revised Statutes of Missouri 1879. The Applicants claim that the franchise granted to its predecessor is perpetual and freely assignable. Staff agrees, with the caveat that it is only assignable if the assignment is not detrimental to the public interest. The STCG and the MITG, and, to a lesser extent, Public Counsel, argue that Bell LP should be treated just like another new company seeking to provide telephone service in Missouri, and be required to apply for a certificate of service authority. They point out that the Commission normally requires a new entity to apply for a certificate of service authority even if that new entity is simply assuming the operations of a currently-certificated company. The Commission agrees with the Applicants and Staff that the authority under which Bell Missouri operates is different than the authority under which every other telephone company operates, and accordingly the ability to assign that authority is different. It is not inconsistent to find, as the Commission does here, that Bell Missouri can assign the authority under which it operates (so long as that assignment is not detrimental to the public interest) but that a company that operates under a certificate of service authority cannot assign that authority.

Public Counsel also raised the question of whether Bell LP will operate under price cap regulation or rate of return regulation. Public Counsel notes that the price cap statute (Section 392.450, RSMo 2000) does not explicitly provide that price cap status may be transferred to a new entity. Public Counsel also suggests that Bell LP "must qualify on its own terms for price cap regulation." However, Public Counsel does not disagree with the representations in the verified application that the only change as a result of the proposed transactions will be to the business organization of the regulated company. Nothing will change in the actual operations and nothing will occur that would make Bell LP ineligible to operate under the same type of regulation as Bell Missouri. The Commission determines that SWBT LP will be regulated as a price cap company just as Bell Missouri is now regulated.

The parties also briefed, at the Commission's direction, the question of whether the Commission would have any different oversight over Bell LP than it now has over Bell Missouri. The Commission determines that, as a practical matter, the oversight it will have over Bell LP will not be significantly different than the oversight it now has over Bell Missouri.

The Commission concludes that there will be no effect on customers or on tax revenues, the reorganization will not be detrimental to the public interest, and the Commission will approve the application.

IT IS THEREFORE ORDERED:

1. That the application for authority to permit corporate restructuring is granted, and the Applicants may complete the transactions set out in the application.
2. That the requests for hearing filed on October 29, 2001, are denied.
3. That Southwestern Bell Telephone L.P. d/b/a Southwestern Bell Telephone Company shall, pursuant to 4 CSR 240-2.060(16), file an adoption notice and revised title sheets along with evidence of the registration of its fictitious name with the Missouri Secretary of State no later than January 18, 2002.
4. That this order shall become effective on December 30, 2001.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of Missouri Gas Energy's Application for a
Variance from 4 CSR 240-13.050(3) Pertaining to Permitted
Hours for Discontinuance of Service.**

*Case No. GO-2002-137
Decided December 20, 2001*

Expense § 34. The Commission granted MGE a variance from the rule that sets hours MGE could disconnect its customers. This variance allows MGE to minimize the number of disconnected customers and to increase its collections. The additional hours MGE can disconnect also makes it more likely a customer would be at home and would make arrangements with MGE to avoid disconnection.

ORDER GRANTING APPLICATION FOR VARIANCE

Syllabus:

Missouri Gas Energy (MGE) filed an Application for Variance on September 7, 2001, requesting a variance from 4 CSR 240-13.050(3) to allow greater flexibility related to service disconnections by extending the hours during which utility service

11 Mo. P.S.C. 3d

may be disconnected. This order grants the application and approves the variance with conditions agreed by the parties.

Procedural History and Positions of the Parties:

The Office of the Public Counsel filed a response on October 3, 2001, stating that it would not oppose the variance if suggested conditions were met. Staff filed a response on October 19, 2001, endorsing Public Counsel's conditions, but suggested modifications and additional conditions.

MGE moved for an extension of time on October 15, 2001, to reply to Public Counsel's response, and anticipating Staff's filing, stated that an extension would allow it to reply to both Public Counsel's response and Staff's response at the same time in a single filing. The Commission granted the extension in an Order Granting Extension and Directing Filing issued on October 23, 2001. MGE was directed to review proposed conditions with the Public Counsel and with Staff and indicate its position on each proposed condition. If any condition and a statement of the condition was agreed and accepted by all the parties, MGE was directed to state the agreed condition in its reply and indicate the concurrence of the parties.

On November 1, 2001, MGE requested a second extension that the Commission granted. On November 30, 2001, MGE filed its reply. MGE presents the conditions agreed to by MGE, Staff and the Public Counsel and restates its request that the Commission grant its variance request from 4 CSR 240-13.050(3).

Standard of Review:

The Commission's rules related to service and billing practices for residential customers of electric, gas and water utilities are published at 4 CSR 240-13. Pursuant to 4 CSR 240-13.065 the Commission may grant a variance to these rules for good cause shown. The applicant must notify the media, the Public Counsel and each party to its most recent rate case of its request for variance. MGE certified its compliance with the notice requirement in its application.

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.

Variance Request and Conditions:

MGE is a gas corporation and public utility providing natural gas distribution at retail to customers in Missouri in service areas authorized by the Commission. Pursuant to 4 CSR 240-13.050(3) the hours during which company personnel may act to discontinue service to a residential customer are limited to the hours between 8:00 a.m. and 4:00 p.m. MGE requests a variance to extend these hours to 7:00 a.m. to 7:00 p.m. MGE asserted various benefits, including a reduced number of disconnections because it would be more likely that a customer might be at home and available to make payment arrangements and avoid discontinuance of service. MGE believes the change would increase customer satisfaction and be cost effective because collections would increase and service disconnections and corresponding re-connections would decrease.

The Commission's Staff and the Public Counsel do not oppose a variance but suggested conditions. According to MGE's reply filed on November 30, 2001, the variance with agreed conditions should be as follows:

- A. The variance allows MGE to discontinue service to a customer between sunrise and sunset, but no earlier than 7:00 a.m. nor later than 7:00 p.m.
- B. The variance shall expire at midnight on October 31, 2002, unless extended by the Commission.
- C. No later than the 20th day of the month after undertaking service discontinuance under this variance, MGE shall submit to the Staff and Public Counsel information on i) the number of collection visits made during the extended hours; ii) the number of service discontinuances made during the extended hours; iii) the number of collections made to avoid discontinuance of service during the extended hours; iv) the number of accounts left on for other reasons during the extended hours; v) customer complaints related to the extended collection hours; vi) the number of collection visits made during regular hours; vii) the number of service discontinuances made during regular hours; viii) the number of collections made to avoid discontinuance of service during regular hours; and ix) the number of accounts left on for other reasons during regular hours. No later than December 15, 2002, MGE shall submit to the Staff and Public Counsel an overall assessment of the effectiveness, including the cost-effectiveness, of the variance.
- D. MGE shall have sufficient personnel to reconnect service discontinued under this variance upon payment of delinquent accounts for a period of three hours following the last discontinuance made under this variance on the day that customer's service was discontinued. Otherwise, MGE shall have sufficient personnel to reconnect service within the time frames provided under 4 CSR 240-13.050(11).
- E. MGE shall provide the Staff and Public Counsel the name and telephone number of a company employee who can be contacted concerning inquiries or complaints relating to the variance.
- F. The Commission's Consumer Services Department shall keep records of any complaints concerning the variance.

11 Mo. P.S.C. 3d

Decision:

The Commission has reviewed the application for variance and the conditions proposed by the parties. MGE has stated good cause to support the variance. With the conditions protecting consumers, monitoring of the impact of the variance and placing a sunset on the variance unless extended, the proposed variance presents no adverse impact on Missouri customers or other public utilities. The variance may lead to fewer disconnections, greater customer satisfaction and reduced expenses. The Commission finds that the variance may be granted with the conditions agreed to by MGE, the Staff and the Public Counsel.

IT IS THEREFORE ORDERED:

1. That the Application for Variance filed by Missouri Gas Energy requesting a variance from 4 CSR 240-13.050(3) shall be granted with conditions as follows:
 - A. The variance allows MGE to discontinue service to a customer between sunrise and sunset, but no earlier than 7:00 a.m. nor later than 7:00 p.m.
 - B. The variance shall expire at midnight on October 31, 2002, unless extended by the Commission.
 - C. No later than the 20th day of the month after undertaking service discontinuance under this variance, MGE shall submit to the Staff and Public Counsel information on i) the number of collection visits made during the extended hours; ii) the number of service discontinuances made during the extended hours; iii) the number of collections made to avoid discontinuance of service during the extended hours; iv) the number of accounts left on for other reasons during the extended hours; v) customer complaints related to the extended collection hours; vi) the number of collection visits made during regular hours; vii) the number of service discontinuances made during regular hours; viii) the number of collections made to avoid discontinuance of service during regular hours; and ix) the number of accounts left on for other reasons during regular hours. No later than December 15, 2002, MGE shall submit to the Staff and Public Counsel an overall assessment of the effectiveness, including the cost-effectiveness, of the variance.
 - D. MGE shall have sufficient personnel to reconnect service discontinued under this variance upon payment of delinquent accounts for a period of three hours following the last discontinuance made under this variance on the day that customer's service was discontinued. Otherwise, MGE shall have sufficient personnel to reconnect service within the time frames provided under 4 CSR 240-13.050(11).
 - E. MGE shall provide the Staff and Public Counsel the name and telephone number of a company employee who can be contacted concerning inquiries or complaints relating to the variance.
 - F. The Commission's Consumer Services Department shall keep records of any complaints concerning the variance.

2. That this order shall become effective on December 30, 2001.
3. That this case may be closed on December 31, 2001.

Murray, Lumpe and Forbis, CC., concur
Simmons, Ch., and Gaw, C., dissent

Thornburg, Regulatory Law Judge

**In the Matter of the Investigation of the State of Competition
in the Exchanges of Southwestern Bell Telephone Com-
pany.***

*Case No. TO-2001-467
Decided December 27, 2001*

Telecommunications § 7. The Commission investigated under Section 392.245.5, RSMo, and made a determination as to whether "effective competition" existed in each of Southwestern Bell Telephone Company's Missouri exchanges.

Telecommunications § 45. The Commission found that in Section 392.245.5, RSMo, the presumption of competition controls only where a competitor of Southwestern Bell has been both certified and has been providing service for at least five years.

Telecommunications § 45. The Commission found that effective competition exists: (1) in the Kansas City and St. Louis exchanges for core business switched services, business line-related services, directory assistance services for business customers, and the operator services of Busy Line Verification and Busy Line Interrupt for business customers; (2) in the Harvester and St. Charles exchanges for residential access line services, residential access line-related services, Optional Metropolitan Calling Area service, directory assistance services for residential customers, and Busy Line Verification and Busy Line Interrupt for residential customers; and (3) in all of Southwestern Bell's exchanges for Common Channel Signaling/Signaling System 7 (SS7) and Line Information Database (LIDB) services.

Telecommunications § 45. The Commission found that determining what constitutes effective competition must include an analysis of all relevant factors.

Telecommunications § 40. The Commission concluded that certain services that had been declared transitionally competitive in Case No. TO-93-116, had become competitive services in accordance with Section 392.370, RSMo 2000, in all of Southwestern Bell's Missouri exchanges.

Telecommunications § 45. The Commission determined that Section 392.200.8, authorized Southwestern Bell to price high capacity exchange access line services and Plexar services on an individual customer basis.

Telecommunications § 45. The Commission, determined that Local Plus and switched access services were not subject to effective competition.

*The Commission, in an order issued on March 7, 2002, denied applications for rehearing in this case. On April 5, 2002, this case was appealed to Cole County Circuit Court (02CV32362). On July 8, 2003, this case was appealed to the Missouri Court of Appeals - Western District (WD63075).

11 Mo. P.S.C. 3d

Evidence, Practice, and Procedure § 4. The Commission found that in the first sentence of Section 392.245.5, RSMo, the presumption of competition controls only where a competitor of Southwestern Bell has been both certified and has been providing service for at least five years.

Evidence, Practice, and Procedure § 4. The Commission found that in the second sentence of Section 392.245.5, RSMo, there is no presumption of competition and therefore the Commission can only make an affirmative finding of effective competition based on competent and substantial evidence.

Evidence, Practice, and Procedure § 4. The Commission found that generally the party seeking relief bears the burden of proof.

Evidence, Practice, and Procedure § 4. The Commission found that the burden of proof remains upon the party asserting the affirmative of the ultimate issue throughout a proceeding.

APPEARANCES

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William K. Haas, Deputy 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: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

This order presents the Commission's determination of which Southwestern Bell Telephone Company services in which exchanges should be designated competitive services, if any. The Commission finds that where effective competition exists, Southwestern Bell's services should be designated as competitive. The Commission finds that effective competition exists: (1) in the Kansas City and St. Louis exchanges for core business switched services, business line-related services, directory assistance services for business customers, and the operator services of Busy Line Verification and Busy Line Interrupt for business customers; (2) in the Harvester and St. Charles exchanges for residential access line services, residential access line-related services, Optional Metropolitan Calling Area service, directory assistance services for residential customers, and Busy Line Verification and Busy Line Interrupt for residential customers; and (3) in all of Southwestern Bell's exchanges for Common Channel Signaling/Signaling System 7 (SS7) and Line Information Database (LIDB) services.

The Commission also concludes that certain services that had been declared transitionally competitive in Case No. TO-93-116,¹ are now competitive services in accordance with Section 392.370, RSMo 2000,² in all of Southwestern Bell's Missouri exchanges. The services are intraLATA private line/dedicated services, intraLATA toll services, Wide Area Telecommunications Services (WATS) and 800 services, special access services, station-to-station, person-to-person, and calling card services. In addition, the Commission determines that Section 392.200.8, authorizes Southwestern Bell to price high capacity exchange access line services and Plexar services on an individual customer basis. Finally, the Commission, determines that Local Plus and switched access services are not subject to effective competition.

Procedural History

This case was established on March 13, 2001, in response to the Staff of the Missouri Public Service Commission's Motion to Open Case. In its motion, Staff requested that the Commission open a new case to investigate the status of competition in Southwestern Bell's exchanges pursuant to Section 392.245.5. Under that section, the Commission must determine whether effective competition exists for each telecommunications service of an incumbent local exchange

¹ *In the Matter of Southwestern Bell Telephone Company's application for classification of certain services as transitionally competitive*, Case No. TO-93-116, *Report and Order*, effective December 21, 1992.

² All references are to the Revised Statutes of Missouri (RSMo), the revision of 2000, unless otherwise noted.

11 Mo. P.S.C. 3d

company (ILEC) in each of the company's exchanges where an alternative local exchange telecommunications company has been certified. The Commission is required to make this review no later than five years following the first certification of an alternative provider. Because alternative local exchange telecommunications companies are currently certified in every exchange in which Southwestern Bell operates, the Commission established this case to review the status of competition in all of Southwestern Bell's exchanges.

Southwestern Bell, Staff, the Office of the Public Counsel, and 70 alternative local exchange telecommunications companies were made parties to this case. The Commission held an evidentiary hearing beginning on September 24, 2001. After the conclusion of the hearing, the Commission dismissed many of the alternative local exchange companies that did not appear at the hearing.

Post-Hearing Exhibit

On October 9, 2001, Southwestern Bell filed post-hearing Exhibit 29. Exhibit 29 is a statement of the rate increases and decreases that Southwestern Bell has implemented since coming under price cap regulation in 1997. The Commission directed that responses and objections to the exhibit must be filed no later than ten days from the submission of the exhibit. There were no objections filed. Therefore, the Commission will admit Exhibit 29 into the record.

Findings of Fact and Conclusions of Law

The Commission has considered all of the competent and substantial evidence upon the whole record and makes the following findings of fact and conclusions of law. The Commission in making this decision has considered the positions and arguments of all of the parties. 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.

General Findings of Fact

Southwestern Bell is a large incumbent local exchange carrier subject to price cap regulation under Section 392.245. Communications Cable-Laying Company, d/b/a Dial US, was the first alternative local exchange telecommunications company to be granted a certificate in a Southwestern Bell exchange. Dial US's certificate became effective on December 31, 1996. However, no alternative local exchange telecommunications company has actually *provided* basic local telecommunications service in any of Southwestern Bell's exchanges for a period of five years.

The Commission has classified numerous alternative local exchange companies as competitive carriers when approving each company's basic local certification. Numerous interexchange telecommunications companies have also been classified as competitive carriers in Missouri.

General Conclusions of Law

The Commission has jurisdiction in this case pursuant to its general authority over Southwestern Bell as a telecommunications company under Section 386.250,

and pursuant to its specific responsibilities under the price cap statute, Section 392.245.

Under Section 392.245.2, a large ILEC becomes subject to price cap regulation when an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service, and is providing such service, in any part of the large ILEC's service area. On March 21, 1997, Southwestern Bell asked the Commission to determine that it was subject to price cap regulation pursuant to Section 392.245.2. In Case No. TO-97-397,³ the Commission approved Southwestern Bell as a price cap regulated company.

Unlike a price cap company, alternative local exchange companies and IXCs, which are classified as competitive, have the authority to increase or decrease their prices on short notice to the Commission without the need of providing cost support for the change.⁴ This flexibility allows them to modify their offerings to meet customer needs, or to respond to the offerings of their competitors in the local market.

Burden of Proof

Which party has the burden of proof became an issue in this case. A finding under Section 392.245.5, that effective competition exists for a particular service in an exchange would authorize Southwestern Bell to increase or to decrease its rates in response to competition. Currently, Southwestern Bell is subject to a price cap under Section 392.245. Thus, Southwestern Bell may adjust its rates downward, but there is a statutory limit on any increased prices.

The Staff and other parties argued that because Southwestern Bell would be the beneficiary of a change in the status quo, Southwestern Bell bears the burden of persuasion.⁵ Southwestern Bell argues that the presumption of the statute is that there is effective competition, unless other parties produce evidence that there is not effective competition.

Section 392.245.5, provides in part:

Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, unless the commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service. The Commission shall, from time to time, on its own motion or motion by an incumbent local

³ *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, Case No. TO-97-397.

⁴ *Id.*

⁵ 29 Am. Jur. 2d, Evidence § 158.

11 Mo. P.S.C. 3d

exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunications company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunications company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company.

In the first sentence set out above, there is a presumption of effective competition. In that sentence, Southwestern Bell must be classified as competitive “unless the commission determines . . . that effective competition does not exist.” This sentence is not applicable in this case. The presumption of competition controls only where a competitor of Southwestern Bell has been both certified and has been providing service for at least five years. No competitor has been certified and providing service for a period of at least five years.

The second sentence of Section 392.245.5, set out above, does not include the presumption. Instead, it says that the Commission “shall determine . . . whether effective competition exists . . .” The Commission can only make such an affirmative finding based on competent and substantial evidence.⁶ Consequently, the debate between the witnesses and parties regarding who bears the burden of proof is moot. Regardless of which party bears the burden of proof, absent competent and substantial evidence of effective competition the Commission cannot find that it exists.

Generally, the party seeking relief from the Commission bears the burden of proof.⁷ The burden of proof remains upon the party asserting the affirmative of the ultimate issue throughout a proceeding.⁸ In order for the Commission to make that determination it must have evidence of effective competition. Since Southwestern Bell is the only party advocating that position, the burden of proof and, therefore, the burden to present competent and substantial evidence, falls to Southwestern Bell.

Effective Competition

What constitutes effective competition is also an issue. The legislature left the determination of what is effective competition to the Commission. The statutes do not define effective competition, but rather Section 386.020(13), lists the following factors that the Commission should consider in determining effective competition:

- (a) The extent to which services are available from alternative providers in the relevant market;
- (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

⁶ See, e.g., *State ex rel. Rice v. PSC*, 220 S.W.2d 61, 64 (Mo. 1949).

⁷ See Section 386.430; *State ex rel. Rice v. PSC*, 220 S.W.2d 61, 66 (Mo. 1949).

⁸ See, e.g., *Been v. Jolly*, 247 S.W.2d 840, 854 (Mo. 1952).

- (c) The extent to which the purposes and policies of Chapter 392, RSMo, including the reasonableness of rates, as set out in Section 392.185, RSMo, are being advanced;
- (d) Existing economic or regulatory barriers to entry; and
- (e) Any other factors deemed relevant by the Commission and necessary to implement the purposes and policies of Chapter 392, RSMo.

At issue was the determination of how much, if any, weight should be given to competition provided by unregulated services such as wireless, cable, Internet, fixed satellite, and customer premises equipment manufacturers.

Sprint and Southwestern Bell argued that the Commission should consider services beyond those provided by certificated telecommunications providers. They argue that, if the legislature had meant to limit the Commission's evaluation to only regulated services, it would have included the more limited term "telecommunications service" instead of the term "services." Staff argues that because the term "service" is defined in Section 386.020(47), using the terms "devoted to the public purposes," that this should be considered synonymous with "regulated service." Staff also argues that customer premises equipment and wireless service are specifically excluded from the definition of "telecommunications service." Public Counsel agrees with Staff, but it reasons that "services" used in Section 386.020(13), regarding effective competition is equivalent to the term "telecommunications services" as defined in Section 386.050(53).

The determination of what is effective competition does not necessarily turn on the definition of the term "service". Nor does it turn on whether competitors that are not regulated by the Commission are considered. Given the final factor of Section 386.020(13), the Commission's analysis must include *all relevant* factors. As stated by several witnesses, including Dr. Aron, Mr. Price, Ms. Meisenheimer, and Mr. Voight, no single factor can be determinative.

The purposes and policies of Chapter 392 as set out in Section 392.185 (as referenced in Subsection 386.020(13)(c)) are as follows:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

11 Mo. P.S.C. 3d

- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

When considered in the full context of Sections 392.245.5 and 386.020(13), “effective competition” as used in subsection 5 of the price cap statute refers to competition that is adequate to accomplish the purposes that were previously to have been accomplished by the cost floors and maximum prices and, to produce the intended or expected results, namely accomplishing the “purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185,” over a sustained period running up to five years into the future. As witnesses such as Dr. Aron testified, this means that “effective competition” is competition that exerts sustainable discipline on prices and moves them to the competitive level of true economic cost.

Neither Section 392.245.5, nor Section 386.020(13), require any quantitative market share loss test to determine whether effective competition exists for Southwestern Bell’s services in Missouri. While specific market share thresholds should not be utilized to determine whether or not Southwestern Bell faces effective competition, it is one factor which the Commission finds particularly determinative of “[t]he extent to which services are available from alternative providers in the relevant market.”

In making its determinations, the Commission has considered all the relevant factors set out in Section 386.020(13), and the purposes of Chapter 392, as set out in Section 392.185. The Commission has also previously set out numerous criteria for determining which competing services are “substitutable.” The Commission held in Case No. TO-93-116 that those criteria should be applied on a case-by-case basis to each service.

The Commission has, for purposes of this case, considered all the possible alternatives telecommunications consumers have as that evidence was presented and, in its discretion, determined what weight to give to evidence of forms of competition that are not regulated by the Commission.

Extent Services Available from Alternative Providers

Subsection 386.020(13)(a), provides that the first factor which the Commission must consider when determining whether effective competition exists for Southwestern Bell’s services is “the extent to which services are available from alternative providers in the relevant market.”

The Commission’s findings in Case No. TO-99-227⁹ are relevant to the Commission’s investigation of the status of competition. In that case, the Commission found that alternative local exchange companies are providing service to customers in all of Southwestern Bell’s exchanges, and that Southwest-

⁹ *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

ern Bell has opened its markets to competition. The Commission also found that competitive local exchange companies (CLECs)¹⁰ were serving approximately 12 percent of the access lines across all of Southwestern Bell's basic local service area. It is undisputed that these CLECs are providing local services and related services to business and residential customers in various Southwestern Bell exchanges, via resale of Southwestern Bell's services, the use of unbundled network elements purchased from Southwestern Bell on a wholesale basis, and the use of the CLECs' own facilities.

These competitors are not, however, providing service equally throughout all of Southwestern Bell's exchanges. Southwestern Bell provides basic local telecommunications in 160 exchanges within the state of Missouri. Competition is greatest in the more urbanized areas. For example, in the St. Louis Principal and MCA-1 and MCA-2 zones, at least 59 CLECs are providing service. Fifty-one CLECs are providing service in the Kansas City Principal, MCA-1 and MCA-2 zones. Thirty-seven CLECs are providing service in Southwestern Bell's St. Charles exchange, and 36 CLECs are providing service in Southwestern Bell's Springfield Principal and MCA-1 zone.

Attached to Southwestern Bell witness Thomas Hughes' Surrebuttal Testimony as Schedules 1-1, 1-2 and 1-3 were maps identifying the number of active CLECs competing in each Southwestern Bell exchange throughout Missouri. These maps depict the level of CLEC competition as estimated by Southwestern Bell throughout its Missouri exchanges. In his Surrebuttal Testimony, Mr. Hughes also identified, by exchange, the total lines served by Southwestern Bell, and its estimated minimum number of lines served by CLECs.¹¹

Mr. Hughes' testimony demonstrates that competitors are providing local service in the less urbanized areas. After a review of the highly confidential information provided by Mr. Hughes, including the percent of market share lost by Southwestern Bell to its competitors in each exchange, the Commission finds that with the exception of two exchanges, alternative local exchange telecommunications companies are providing less than a substantial percentage of the residential local service in each Southwestern Bell exchange. Also, the majority of the service being provided in these areas is not CLEC-owned facilities-based service.

The highly confidential evidence contained in Mr. Hughes' testimony also shows that in most of Southwestern Bell's exchanges, alternative local exchange telecommunications companies have captured less than a substantial percentage of the business local service market. On the other hand, the evidence shows that in some of the exchanges, alternative local exchange telecommunications companies have captured a substantial market share of business local service. The Commission finds, however, that even in the exchanges where market share is substantial, without further substantial evidence of the effect of competition, market share alone is not sufficient for the Commission to find that effective competition exists.

¹⁰ CLECs are also alternative local exchange telecommunications companies.

¹¹ Hughes Surrebuttal, Schedules 4-1, 4-2, 4-3 and 4-4 have been designated as "highly confidential."

11 Mo. P.S.C. 3d

The Commission finds that the lines identified as CLEC lines by Mr. Hughes represent only an estimate, and therefore, CLEC market share may be greater than reported in Mr. Hughes' Schedules. The reason for this is that Southwestern Bell should be able to accurately estimate the number of access lines when a CLEC is reselling Southwestern Bell's service and when a CLEC purchases unbundled network elements from Southwestern Bell. Additionally, Southwestern Bell can identify the number of E-911 listings that CLECs place in 911 databases,¹² but as Mr. Hughes and Dr. Aron explain in their testimony, the number of CLEC E-911 listings may understate the number of access lines served by facilities-based CLECs. For example, only outbound lines have 911 listings associated with them. From the evidence presented, however, the Commission cannot determine how many more, if any, access lines in each particular exchange are being served. The Commission finds that Southwestern Bell's estimates for the minimum number of access lines being served by competitors for both business and residential customers are reasonable estimates reflecting the minimum CLEC business market share and residential market share throughout Southwestern Bell's exchanges.

Extent of Services Functionally Equivalent or Substitutable at Comparable Rates, Terms, and Conditions

The second factor that the Commission must consider in determining effective competition is "the extent to which these services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions."¹³ The parties presented argument and testimony about whether services such as wireless carriers, cable TV providers, Internet service providers, fixed satellite providers, and customer premises equipment manufacturers constitute "equivalent or substitutable service." The Commission finds that it is appropriate for the Commission to consider these services when evaluating all the relevant factors of effective competition. The Commission finds, however, that even if it were to find that such services are equivalent and substitutable, the testimony of Southwestern Bell's witnesses was not persuasive as to the existence of effective competition from competitors that are not regulated by the Commission because the witnesses had very little Missouri-specific information and based the majority of their testimony on national publications, general trends in the communications industry, and unverified sources. Southwestern Bell's witnesses provided very little

¹² There were allegations that Southwestern Bell's use of E-911 information was a violation of Commission orders and confidentiality clauses between some of the parties in interconnection agreements. The Commission did not base its decision solely on any one factor in making its determinations in this case. The Commission also finds that it must consider all relevant factors in determining whether or not "effective competition" exists. The Commission finds that it does not have sufficient evidence to determine if these allegations are correct and if sanctions are appropriate. The Commission concludes that if Southwestern Bell has indeed violated Commission orders by using E-911 information in an inappropriate manner, the offended party or the Commission's Staff should seek the appropriate remedy in a formal complaint proceeding before the Commission, or other appropriate jurisdiction.

¹³ Subsection 386.020(13)(b).

evidence that competition has had any specific impact on Southwestern Bell's prices or its pricing and product policies, strategies or plans. Therefore, as described below, the Commission finds that Southwestern Bell has not provided substantial evidence that establishes that, for *all* of Southwestern Bell's regulated service offerings, there are alternative providers who are providing functionally equivalent or substitutable services throughout each of Southwestern Bell's Missouri exchanges, at comparable rates, terms and conditions.

The Extent to Which the Purposes and Policies of Chapter 392 are Advanced

The third factor that the Commission is required to consider in connection with its evaluation of whether effective competition exists is “[t]he extent to which the purposes and policies of Chapter 392, RSMo, including the reasonableness of rates, as set out in Section 392.185, RSMo, are being advanced.”¹⁴ The purposes of Chapter 392 have been set out above. Section 386.020(13), clearly sets apart the purpose of ensuring “that customers pay only reasonable charges for the telecommunications service” for the Commission to consider in determining whether there is effective competition. The Commission finds that full and fair competition acts as a substitute for regulation by exerting discipline on prices and moving those prices toward economic cost. Thus, customers benefit from competition because of the competing companies' ability to quickly adapt to a changing marketplace. The customers also benefit because they are assured that the prices are reasonable because they are near cost.

Existing Economic or Regulatory Barriers to Entry

The fourth factor is consideration of the “[e]xisting economic or regulatory barriers to entry.”¹⁵ The number of companies that have become certificated and have approved tariffs is relevant to analyzing the barriers to entry and the overall status of competition. Southwestern Bell presented evidence of many CLECs that have certificates and tariffs that authorize them to provide service in all of Southwestern Bell's Missouri exchanges. The Commission finds that the evidence presented by Southwestern Bell in the form of a count of the number of CLECs or IXCs certified or tariffed in the state or in any particular exchange is evidence of competition; however, the mere existence of such “paper competition” by itself does not persuade the Commission that effective competition exists.

Southwestern Bell's evidence leads the Commission to conclude that the availability of resale and unbundled network elements, including combinations of unbundled network elements, provide effective ways for CLECs to enter the market with little capital investment. Given the multitude of companies providing services, it is clear that the regulatory barriers that once prevented competitors from offering alternatives in the marketplace are disappearing. However, for most of Southwestern Bell's services in most of its exchanges, very little evidence was presented to persuade the Commission that alternative providers are actually offering services that are functionally equivalent or substitutable for Southwestern Bell's services at comparable rates, terms and conditions. The Commission finds that

¹⁴ Subsection 386.020(13)(c).

¹⁵ Subsection 382.020(13)(d).

11 Mo. P.S.C. 3d

Ms. Meisenheimer's testimony regarding her investigation into which competitive companies are actually providing services in particular exchanges is more persuasive evidence of effective competition, or the lack thereof in a particular exchange.

The Commission's decision in Case No. TO-99-227, is also relevant to the analysis of the existing regulatory barriers to entry. The Commission determined in that case, that Southwestern Bell had complied with Section 271 of the federal Telecommunications Act of 1996, and that Southwestern Bell's local markets were *open* to competition. This finding is not equivalent, however, to a finding that effective competition exists. Southwestern Bell's own witnesses agreed with this conclusion.

Alternative local exchange telecommunications companies may experience barriers to entering the local exchange market due to current economic conditions, including limited access to capital and the current retail rate structures of ILECs. Although economic conditions and regulatory proceedings generally do not constitute insurmountable barriers to entry, AT&T presented testimony that such barriers may impede the ability of alternative local exchange telecommunication companies to enter the market, to expand their operations, and to provide competitive alternatives to Southwestern Bell. The Commission found this testimony persuasive with regard to current alternative local exchange company plans for continued service and expansion in Southwestern Bell exchanges.

Any Other Relevant Factors Necessary to Implement the Purposes and Policies of Chapter 392

The fifth factor the Commission must consider is "[a]ny other factors deemed relevant by the commission and necessary to implement the purposes and policies of Chapter 392."¹⁶ Other factors that the Commission deems relevant and necessary in this case are discussed below.

The Commission considers alternative communications that are not regulated by the Commission, such as e-mail, cable broadband, and mobile phones as "other factors" under Subsection 386.020(13)(e) that might be "relevant . . . and necessary to implement the purposes and policies of Chapter 392." However, the evidence did not persuade the Commission that the generalized presence of such alternative communications throughout the state constitutes, in the absence of CLEC-owned, facilities-based competition, effective competition to Southwestern Bell's telecommunications services.

Southwestern Bell's witness Thomas Hughes commented that additional pricing flexibility would "increase Southwestern Bell's ability to restructure services and offer value-added packaging." He observed that "Southwestern Bell has had only limited price changes for most of its services since 1984." He testified Southwestern Bell has no current plans to change rates. He supplied Exhibit 29, which provides information on recent Southwestern Bell price changes, including changes mandated by the price cap statute. There was no testimony that any specific changes were made as a result of competition or explaining the specific analysis that resulted in such changes.

¹⁶ Subsection 386.020(13)(e).

Issues as Presented by the Parties

Section 392.245.5, requires that the Commission make a determination for each service in each exchange of the ILEC. Because of the large number of services and exchanges of the ILEC, the parties grouped the services into categories and presented 17 groups of services to the Commission for determination as to the existence of effective competition. The parties agreed to consider Southwestern Bell's services in these categories. The Commission has adopted this method of categorization for its review of the status of competition in Southwestern Bell exchanges.

Southwestern Bell provides the following telecommunications services in its exchanges:

- Core business switched services;
- Business line-related services;
- High capacity exchange access line services;
- Plexar services;
- IntraLATA private line/dedicated services;
- Residential access line services;
- Residential access line-related services;
- IntraLATA toll services;
- Local Plus service;
- Optional Metropolitan Calling Area service;
- Wide Area Telecommunications Services and 800 services;
- Special access services;
- Switched access services;
- Common Channel Signaling/Signaling System 7 services;
- Line Information Database services;
- Directory Assistance (DA) services; and
- Operator services (OS).

The parties also included an additional issue for Commission determination. That issue was:

In each exchange served by Southwestern Bell, which if any alternative local exchange telecommunications company has been certified under Section 392.455 and has provided basic local telecommunications service in that exchange for at least five years (or if none, what is the longest period of time that a certified alternative local exchange company has provided basic local telecommunications service in that exchange)?

The Commission has determined that no alternative local exchange telecommunications company has been certified and providing service in any of Southwestern Bell's exchanges for a period of five years. As to the parenthetical issue, for the purposes of this case the Commission need not make that determination.

Findings of Fact and Conclusions of Law
Applicable to Specific Issues

Issue 1: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's core business switched services be classified as competitive pursuant to Section 392.245.2?

Findings of Fact

Southwestern Bell's core business switched services include the various basic business access services, including exchange access lines, analog trunks, and Basic Rate ISDN (DigiLineK Service) that Southwestern Bell's business customers use to make and receive calls over the public switched telephone network. Southwestern Bell's basic business exchange access line is a line that provides customers the ability to make and receive telephone calls. These lines can be used to make voice telephone calls or to transmit data to or from the public switched telephone network. Analog trunks are used to connect the central office to a private branch exchange or key system, located on the customer's premises.

The Commission finds that Southwestern Bell has experienced a substantial market share loss in the St. Louis and Kansas City exchanges for core business services. This market share loss is due to alternative providers providing substitutable or functionally equivalent services to Southwestern Bell's core business switched services in these exchanges. The Commission also finds that there was some evidence presented, although not strong evidence, of competition throughout Southwestern Bell's exchanges from entities not regulated by the Commission. In addition, as Staff's witness testified, there are CLEC-owned facilities, specifically fiber networks, within 1,000 feet of a significant quantity of business and residential customers in those two exchanges.

Southwestern Bell presented evidence showing a similar or higher market share loss for other exchanges; however, the Commission must make the determination of effective competition based on all the relevant factors. The Commission finds that market share alone is not determinative of this issue. However, when market share is considered in conjunction with the evidence of the number of carriers, including resellers, actually providing both resale and facilities-based service in the exchanges, the overwhelming number of carriers certified to do business in the St. Louis and Kansas City exchanges, the comparative longevity of the companies doing business, and CLEC-owned fiber networks, the Commission determines that effective competition exists in those two exchanges.

Conclusions of Law

The Commission finds that a substantial number of business customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned facilities in the St. Louis and Kansas City exchanges. Accordingly, the Commission finds that effective competition exists for Southwestern Bell's core business switched services which are hereby classified as competitive pursuant to Section 392.245, in these two exchanges.

With due consideration to all factors set forth under Section 386.020(13), the Commission finds that Southwestern Bell's core business services in Southwest-

ern Bell's other exchanges do not face effective competition. In particular, the evidence did not establish that a substantial number of business customers were being provided service from widely available CLEC-owned facilities in any of Southwestern Bell's other exchanges.

While the Commission considers resale a form of substitutable service, the mere presence of resellers is not substantial evidence for the Commission to determine that effective competition exists. Alternative local exchange telecommunications companies that provide service via resale of Southwestern Bell's services are limited in their ability to differentiate their service offerings based on price, because the minimum cost that a reseller incurs to provide service is directly tied to Southwestern Bell's retail rate for the resold service.

Issue 2: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's business line-related services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Line-related or vertical services are services a business customer may add to the customer's business access line and which provide additional functions to that line. Line-related or vertical services are related to core business switched access line services. Examples of line-related services include services such as call waiting, return call, three-way calling, call forwarding, caller I.D., and speed calling. CLECs are the most evident type of competitor for business access line customers, providing business access line services that are substitutable or functionally equivalent to Southwestern Bell's services. In addition to using their own facilities, CLECs use unbundled network elements to provide business access line-related services. CLECs offer their customers the same line-related services as those offered by Southwestern Bell.

The Commission finds that vertical services and custom calling features are inseparable from the underlying basic local service because vertical services and custom calling features are not available to the customer without that customer being provided the basic local service.

The Commission finds that the same facts found with regard to Southwestern Bell's core business services are applicable to its business related services. Thus, when all the factors of effective competition are considered, the evidence of market share lost, the number of carriers, including resellers, actually providing service both resale and facilities-based services in the exchanges, the large number of carriers certified to do business in the exchanges, the comparative longevity of those companies, and CLEC-owned fiber networks, the Commission determines that effective competition exists for business-related services in the Kansas City and St. Louis exchanges.

Likewise, when considering all the relevant factors, the weight of the evidence is not as great in Southwestern Bell's other exchanges. Therefore, the Commission finds that there is not sufficient evidence to find that business line-related services are subject to effective competition in Southwestern Bell's other exchanges.

11 Mo. P.S.C. 3d

Conclusions of Law

The same analysis used to apply the five factors for determining effective competition to Southwestern Bell's core business line-related services is applicable to Southwestern Bell's core business switched services because the two groups of services are closely related, that is, line-related services cannot be provided without first providing the underlying core business service. The Commission has concluded that Southwestern Bell's core business switched services face effective competition from CLECs in the St. Louis and Kansas City exchanges. The Commission concludes that Southwestern Bell's business line-related services also face effective competition in the Kansas City and St. Louis exchanges. Therefore, the Commission finds that Southwestern Bell's business line-related services should be classified as competitive in those two exchanges pursuant to Section 392.245.5.

The Commission did not find that effective competition exists for the core business services in any other exchanges, and for similar reasons find that there is not effective competition for the business line-related services in any other exchange.

Issue 3: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's high capacity exchange access line services be classified as competitive pursuant to Section 392.245.5?**Findings of Fact**

There are generally three types of high capacity exchange access line services offered by Southwestern Bell throughout Missouri. Staff's witness testified that Southwestern Bell's high capacity exchange access services face effective competition in the St. Louis and Kansas City exchanges. Southwestern Bell argues that the Commission should find that all of its exchanges are subject to effective competition with regard to these services. There was no evidence presented that there was effective competition in Southwestern Bell's other exchanges. There was evidence that alternative providers are certificated, but no exchange-by-exchange analysis of the extent of competition, how effective that competition may be, or the rates and terms available.

For the same reasons as Southwestern Bell's core business line services, the Commission finds that in the Kansas City and St. Louis exchanges, Southwestern Bell's high capacity line services are subject to effective competition and should be granted competitive classification.

Conclusions of Law

The same analysis used to apply the five factors for determining effective competition to Southwestern Bell's core business related services is applicable to Southwestern Bell's high capacity line services. The Commission concludes that Southwestern Bell's high capacity line-related services face effective competition in the Kansas City and St. Louis exchanges. Therefore, the Commission finds that Southwestern Bell's high capacity line services should be classified as competitive in those two exchanges pursuant to Section 392.245.5.

The Commission did not find that effective competition exists for the high capacity line services in any other exchanges, and for similar reasons to the core business line services finds that there is not effective competition for high capacity line services in any other exchanges.

Although it is not specifically an issue in this case, Staff asks the Commission to recognize that Southwestern Bell is authorized by Section 392.200.8 to use customer specific pricing for its high capacity line services in all of its exchanges. Section 392.200.8 is a specific exception to the general requirement that regulated telecommunications companies charge the same rate for similarly situated customers. Under this exception, Southwestern Bell is authorized to price its high capacity line services on an individual customer basis. NuVox and others argue that Southwestern Bell's services cannot be subject to price cap regulation and subject to the exception in Section 392.200.8. The Commission concludes, however, that one does not preclude the other. Section 392.245, is a transitional regulatory step of price cap regulation, moving from the more rigid regulation of Section 392.200. Thus, an exception to Section 392.200, can easily be translated into a continuing exception under the less stringent regulation. The Commission concludes that Southwestern Bell can utilize individual customer pricing for its high capacity line services.

Issue 4: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Plexar services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Plexar is a central office based communications system that allows business customers to use Southwestern Bell's central office technology instead of purchasing their own switching equipment. The Plexar family of services includes Plexar I, Plexar Express, Plexar II, and Plexar-Custom. A business customer has no capital outlay since Plexar switching equipment is provided, housed, and maintained in Southwestern Bell's central offices. The telecommunications industry often refers to services such as Southwestern Bell's Plexar services as "Centrex".

The Plexar system and station features are changeable by Southwestern Bell, and optionally, with some Plexar offers, by the customer. Plexar service provides basic call processing capabilities, such as call hold, call transfer, and three-way calling. Additionally, some Plexar services also offer advanced voice and data call handling such as basic rate interface and integrated service digital network capabilities.

Southwestern Bell provided testimony about many different types of services and equipment that could be considered competition for Plexar. Southwestern Bell also provided testimony regarding alternative local exchange companies that have approved tariffs to provide a similar type of service. However, Southwestern Bell did not provide any exchange-by-exchange analysis or evidence of companies actually providing this service. Therefore the Commission cannot make a finding of effective competition for this service.

11 Mo. P.S.C. 3d

Conclusions of Law

The Commission found no substantial evidence to support a determination that effective competition exists under the five factors set out in Section 386.020(13). The Commission does recognize, however, that Centrex services are subject to individual customer pricing under Section 392.200.8, in the same manner as high capacity line services. The Commission concludes that Southwestern Bell can utilize individual customer pricing for its Plexar service.

Issue 5: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's intraLATA private line/dedicated services be classified as competitive pursuant to Section 392.245.5?**Findings of Fact**

Private line services are nonswitched, dedicated circuits, for which Southwestern Bell furnishes the requisite facilities, including channels and network terminating equipment, to enable customers and authorized users to communicate between specified locations within a LATA on a continuous basis. They are most frequently utilized for data transmissions, but are also utilized for transporting voice or integrated data/voice communications in private networks. Private line services include Analog Service; DS0 Service; DS1 Service; DS3 Service; Network Reconfiguration Service; and GigaMAN Service.

The Commission finds that significant competition has existed in the retail intraLATA private line market in Missouri for nearly 15 years. Undisputed evidence shows that many alternative providers, such as AT&T, Sprint, MCI and numerous CLECs offer nonswitched, dedicated private line type services, and the services and functionality they provide are substitutable for or functionally equivalent to Southwestern Bell's private line services. These alternatives, against which Southwestern Bell competes, are either not regulated by the Commission or at least not price regulated in the same manner as Southwestern Bell. In addition to direct competition for traditional private line services, there are many service providers in the marketplace offering a variety of networking solutions, with different technologies, that can meet the same transport needs as Southwestern Bell's private line services.

In Case No. TO-93-116, the Commission found that services provided by interexchange carriers were "equivalent" and completely interchangeable with Southwestern Bell's private line services. Accordingly, the Commission granted Southwestern Bell's request for reclassification of private line services to a "transitionally competitive" classification. Given the extensive nature of competition for private line services and the prior determinations of competitive status, the Commission finds that it should confirm competitive classification for Southwestern Bell's private line services in all of its Missouri exchanges.

Conclusions of Law

Section 392.200.8 authorizes Southwestern Bell, to freely price private line services. That section states:

Customer-specific pricing is authorized for dedicated, nonswitched, private line and special access services and for central office-based switching systems which substitute for customer premise, private branch exchange (PBX) services, provided such customer-specific pricing shall be equally available to incumbent and alternative local exchange telecommunications companies.¹⁷

The Commission has recognized the existence of competition in the intraLATA private line market in Case No. TO-93-116. In that case, the Commission found that services provided by interexchange carriers were equivalent and completely interchangeable with Southwestern Bell's private line services. Accordingly, the Commission granted Southwestern Bell's request for reclassification of private line services to a transitionally competitive classification.

Under Sections 392.370.1 and 2, a service classified as transitionally competitive automatically becomes classified as competitive three years after such designation unless the Commission affirmatively extends the transitionally competitive status for a specified period. Three years after private line services were declared transitionally competitive (January 10, 1996), the Commission, with Southwestern Bell's agreement, extended the transitionally competitive status for an additional three years (until January 10, 1999). The Commission, however, did not further extend it. Thus, the Commission determines that Southwestern Bell's private line services became classified as competitive on January 10, 1999, by operation of law.

Issue 6: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's residential access line services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Residential access line services are those services that provide basic voice access for residences to the telecommunications network. For residential service, the most typical form of residential access line service is flat rate telephone service. Flat rate service is an exchange service furnished for a specified sum without regard to the amount of use. These lines may be used to make voice telephone calls or to transmit data to or from the public switched network. Residential access line service also includes measured service and message rate service.

The Commission finds that a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned cable telephony facilities in the St. Charles and Harvester exchanges. The evidence shows that there are actually 27 CLECs serving residential customers in the Harvester exchange and 31 CLECs serving residential customers in the St. Charles exchange. In addition, Southwestern Bell has lost a substantial market share of residential customers in those exchanges.

¹⁷ Section 392.200(8).

11 Mo. P.S.C. 3d

When considered with all the other factors of effective competition, the Commission finds that most residential customers in these two exchanges have not only the many choices from resale providers, but also a choice of CLEC-owned, facilities—based providers. The Commission also finds that there was some evidence presented, although not strong evidence, of competition throughout Southwestern Bell's exchanges from entities not regulated by the Commission. These factors lead the Commission to find that Southwestern Bell's residential access line services face effective competition in the Harvester and St. Charles exchanges and should be classified as competitive pursuant to Section 392.245.5 in these two exchanges.

The Commission was not persuaded by Southwestern Bell's evidence of prepaid basic local service as effective competition. Prepaid basic local service requires a customer to pay rates that are many times higher than Southwestern Bell's basic local rate. The increased rate is usually attributable to the customers problematic credit history. The evidence showed that Southwestern Bell is not currently providing prepaid service in Missouri.

Southwestern Bell presented evidence showing a similar or higher market share loss for other exchanges; however, the Commission must make the determination of effective competition based on all the relevant factors. The Commission finds that market share alone is not determinative of this issue. However, when market share is considered in conjunction with the evidence of the number of carriers, including resellers, actually providing service both resale and facilities-based in the exchanges, the large number of carriers certified to do business in the exchanges, the comparative longevity of those companies, and CLEC-owned fiber networks, the Commission determines that effective competition exists in the Harvester and St. Charles exchanges.

Conclusions of Law

The Commission finds that a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned cable telephony facilities in the St. Charles and Harvester exchanges. Accordingly, the Commission finds that effective competition exists for Southwestern Bell's residential access line services in those two exchanges. Those services are hereby classified as competitive pursuant to Section 392.245, in the Harvester and St. Charles exchanges.

With due consideration to all factors set forth under Section 386.020(13), the Commission finds that Southwestern Bell's residential access line services in Southwestern Bell's other exchanges do not face effective competition. In particular, the evidence did not establish that a substantial number of residential customers were being provided service from widely available CLEC-owned facilities in any of Southwestern Bell's other exchanges.

As the Commission has previously found, resale is a competing service. The mere presence of resellers, however, is not substantial evidence for the Commission to determine that effective competition exists.

Issue 7: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's residential access line-related services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

The Commission finds that vertical services and custom calling features are inseparable from the underlying basic local service because vertical services and custom calling features are not available to the customer without that customer being provided the basic local service.

The Commission finds that the same facts found with regard to Southwestern Bell's residential access line services are applicable to its residential access line-related services. Thus, when all the factors of effective competition are considered the Commission determines that effective competition exists for residential access line-related services in the Harvester and St. Charles exchanges.

Likewise, when considering all the relevant factors, the weight of the evidence is not as great in Southwestern Bell's other exchanges. Therefore, the Commission finds that there is not sufficient evidence to find that residential access line-related services are subject to effective competition in Southwestern Bell's other exchanges.

Conclusions of Law

The same analysis used to apply the five factors for determining effective competition to Southwestern Bell's residential access line services is applicable to Southwestern Bell's residential access line-related services because the two groups of services are closely related, that is, line-related services cannot be provided without first providing the underlying basic residential service. The Commission has concluded that Southwestern Bell's residential access line services face effective competition from CLECs in the Harvester and St. Charles exchanges. The Commission concludes that Southwestern Bell's residential access line-related services also face effective competition in those two exchanges. Therefore, the Commission finds that Southwestern Bell's residential access line-related services should be classified as competitive in those two exchanges pursuant to Section 392.245.5.

The Commission did not find that effective competition exists for the residential access line-related services in any other exchanges, and for similar reasons find that there is not effective competition for the residential access line-related services in those exchanges.

Issue 8: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's intraLATA services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

IntraLATA toll service furnishes telecommunications between points in different local service areas within the same LATA. It provides a customer with the ability to make a telephone call to someone outside that customer's local calling scope, but within the LATA.

11 Mo. P.S.C. 3d

Southwestern Bell requests that its intraLATA toll services be classified as competitive in all Southwestern Bell exchanges based on prior Commission determinations and the extensive nature of competition in the intraLATA toll market. Staff agreed that the Commission should approve a statewide competitive classification for Southwestern Bell's intraLATA toll services. In its Statement of Position, the Office of the Public Counsel also agreed, with the exception of flat-rated interexchange services.

The Commission finds that competition has existed in the intraLATA toll market since July 24, 1986, when the Commission authorized intraLATA toll competition in Missouri.¹⁸ In that case, the Commission found that intraLATA toll competition was in the public interest and would result in new and improved services, lower prices and faster responses to customers' needs.

Currently, there are over 600 interexchange carriers certified to provide intrastate interexchange service in Missouri. These include many that offer both intraLATA and interLATA toll service. The intraLATA toll services provided by AT&T, MCI, Sprint, WorldCom, and other IXC are equivalent to or substitutable for Southwestern Bell's intraLATA toll service, in that all these services provide customers with the ability to place intraLATA toll calls. The large number of certified IXCs supports Southwestern Bell's contention that customer choices are widely available and it reflects the relative ease of entry for firms wishing to enter the intraLATA toll market.

With the implementation of intraLATA presubscription in July 1999, IXCs now offer their customers the ability to make intraLATA toll calls without dialing extra digits. In every Southwestern Bell exchange, there is a minimum of 73 IXCs certified to provide 1+ intraLATA toll services. Some exchanges have up to 140 IXCs. While the number of certificated carriers is not by itself determinative of this issue, based on the large numbers of available IXCs in each Southwestern Bell exchange, it is very apparent that robust competition exists for Southwestern Bell's intraLATA toll services.

In addition to the traditional forms of competition from IXCs and CLECs, Southwestern Bell customers have several nontraditional choices for intraLATA toll. These include wireless service, prepaid telephone cards, and Internet telephony.

Given the extensive nature of competition for intraLATA toll services and the prior determinations of competitive status, the Commission finds that it should confirm competitive classification for Southwestern Bell's intraLATA toll services in all of its Missouri exchanges.

Conclusions of Law

The Commission recognized the existence of competition in the intraLATA toll market in Case No. TO-93-116. In that case, the Commission found that services provided by interexchange carriers were substitutable with Southwestern Bell's intraLATA toll services. Accordingly, the Commission granted Southwestern Bell's

¹⁸ *In the Matter of the Application of the Chinese Chef, Inc. for Certificate of Service Authority to Provide Private Pay Telephone Service within the State of Missouri*, Case No. TO-94-222, et al., *Report and Order*, issued July 24, 1986.

request for reclassification of its toll services to a transitionally competitive classification.

Under Sections 392.370.1 and 2, a service classified as transitionally competitive automatically becomes classified as competitive three years after such designation unless the Commission affirmatively extends the transitionally competitive status for a specified period. Three years after intraLATA toll services were declared transitionally competitive (January 10, 1996), the Commission, with Southwestern Bell's agreement, extended the transitionally competitive status for an additional three years (until January 10, 1999). The Commission, however, did not further extend it. Thus, intraLATA toll service became classified as competitive on January 10, 1999, by operation of law.

Issue 9: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Local Plus services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Southwestern Bell's Local Plus service is an optional one-way expanded calling plan that provides subscribers with flat rate unlimited calling to all customers within the LATA. Southwestern Bell does not pay itself access charges when Local Plus calls terminate to its own customers, but a competitor trying to provide a facilities-based alternative to Local Plus would pay Southwestern Bell access charges for calls terminating to Southwestern Bell's customers. To mitigate this economic barrier to entry, the Commission previously found in Case No. TT-98-351 that "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 unbundled network element basis."¹⁹ In Case No. TO-2000-667, the Commission determined "that Southwestern Bell had not made its Local Plus service available for resale by companies providing service to their customers through the use of UNE's or through the use of their own facilities."²⁰

The Commission specifically ordered Southwestern Bell to make its Local Plus service available for resale to companies providing service to their customers through the purchase of switching from Southwestern Bell or through the use of the company's own switch.²¹ Southwestern Bell has petitioned the circuit court to review the Commission's Report and Order in Case No. TO-2000-667. Thus, there is no evidence that Southwestern Bell is currently providing Local Plus as directed by the Commission.

¹⁹ *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, *Report and Order* issued September 17, 1998, at 39-40.

²⁰ *In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange Companies and Facilities-Based Competitive Local Exchange Companies*, Case No. TO-2000-667, *Report and Order* issued May 1, 2001, at 14.

²¹ *Id.* at 14-15.

11 Mo. P.S.C. 3d

The Commission also heard no specific evidence regarding competition for Local Plus service. Southwestern Bell's witness Barbara Jablonski testified that the Local Plus service faces competition from IXCs, CLECs, and other competitors that are not regulated by the Commission. The Commission does not find Ms. Jablonski's testimony persuasive, however, since she did not provide any specific information regarding particular calling plans that are equivalent and substitutable for Local Plus. The Commission finds that without specific evidence of equivalent and substitutable competition and without evidence that Southwestern Bell is making the resale of this service available in accordance with its orders, the risk that predatory pricing may endanger competition remains. Therefore, the Commission concludes that Southwestern Bell cannot be said to face effective competition for Local Plus.

Conclusions of Law

The Commission takes notice of its previous orders regarding the provisioning of Local Plus. The Commission also takes notice that its most recent order in TO-2000-667 is currently pending upon review by the circuit court. In Case No. TT-98-351, the Commission found that Local Plus was a unique service because it was a hybrid of toll and local service. Because it found Local Plus to be unique, the Commission imposed the requirement that Southwestern Bell make Local Plus available for resale. In Case No. TO-2000-667, the Commission found that Southwestern Bell was not abiding by those original requirements and therefore, that "companies seeking to compete against Southwestern Bell in the Basic Local Service market through use of their own facilities, or through use of unbundled network elements, have been placed at a competitive disadvantage." The Commission also directed Southwestern Bell to comply with its previous order.

Until the issue regarding the resale of Local Plus is final, the Commission cannot, considering all the relevant factors, make a determination that Southwestern Bell's Local Plus faces effective competition.

Issue 10: In Which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Optional Metropolitan Calling Area services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

MCA is an optional interexchange plan available in three distinct areas in Missouri: the St. Louis MCA, the Kansas City MCA and the Springfield MCA. This optional plan provides subscribers with a calling area that includes their respective metropolitan exchange and certain customers in other exchanges where MCA service is also available. The Commission, in Case No. TO-92-306,²² created MCA service to address customer requests for expanded calling scopes in the areas surrounding the three major metropolitan areas of St. Louis, Kansas City and Springfield. The existing calling scopes were modified to address the changing

²² *In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges*, Case No. TO-92-306.

demographics of the metropolitan areas by creating an optional service that expands the local calling scopes for a flat-rated monthly charge.

Southwestern Bell's optional MCA service is not classified as interexchange message telecommunications service. Rather, MCA is similar to basic local telephone service. Southwestern Bell's optional MCA service is very closely related to its corresponding basic local service and, like residential access line-related services, cannot be separated from it for purposes of analyzing whether or not effective competition exists. Accordingly, the Commission finds that Southwestern Bell's optional MCA services face effective competition and should be classified as competitive pursuant to Section 392.245.5 only for residential customers in the St. Charles and Harvester exchanges.

Conclusions of Law

The Commission concludes that applying the factors contained in Section 386.020(13), Southwestern Bell's optional MCA service faces effective competition only for residential customers in the St. Charles and Harvester exchanges. It also follows that because Southwestern Bell's residential access line services have not been shown to face effective competition in its other exchanges, that its optional MCA services do not face effective competition in its other exchanges either.

Issue 11: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Wide Area Telecommunications Services and 800 services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Wide Area Telecommunications Services includes both 800 service and outward WATS (OUTWATS). 800 service provides the subscribers with the ability to receive incoming intraLATA interexchange calls that are toll-free to the calling party. OUTWATS service provides subscribers with the ability to place outgoing intraLATA, interexchange calls that are billed on a usage-sensitive basis.

Southwestern Bell requests that its WATS and 800 services be classified as competitive in each of its Missouri exchanges. Staff agrees that the Commission should approve a statewide competitive classification for Southwestern Bell's WATS service. No party presented any evidence with respect to these services that would support a different conclusion.

There are over 600 certified IXCs authorized to provide interexchange services in Missouri. As part of their interexchange services, IXCs typically provide WATS and 800 services to customers. CLECs can also offer WATS and 800 service. The services provided by IXCs and CLECs are functionally equivalent to and substitutable for Southwestern Bell's WATS and 800 service. The Commission finds that the large number of certified companies indicates that customer choices are available and reflects the relative ease of entry for firms wishing to enter the WATS and 800 markets.

In addition to IXCs and CLECs, WATS and 800 service faces competition from nontraditional competitors. Many companies are utilizing various e-commerce methods to communicate with their customers. For instance, consumers can

11 Mo. P.S.C. 3d

purchase airplane tickets, rent cars, or check the balance on their credit card via the Internet, making calls to a company's 800 number unnecessary.

Given the extensive nature of competition for WATS and 800 service and the prior determinations of competitive status, the Commission finds that it should confirm competitive classification for Southwestern Bell's WATS and 800 service in all of its Missouri exchanges.

Conclusions of Law

The Commission recognized the existence of substantial competition in the WATS and 800 service markets in Case No. TO-93-116. In that case, the Commission found that WATS and 800 service provided by IXCs was "substitutable" for Southwestern Bell's WATS and 800 services. Accordingly, the Commission granted Southwestern Bell's request for reclassification of its WATS and 800 service to a "transitionally competitive" classification.

Under Sections 392.370.1 and 2, a service classified as transitionally competitive automatically becomes classified as competitive three years after such designation unless the Commission affirmatively extends the transitionally competitive status for a specified period. Three years after WATS and 800 services were declared transitionally competitive (January 10, 1996), the Commission with Southwestern Bell's agreement extended the transitionally competitive status for an additional three years (until January 10, 1999). The Commission, however, did not further extend it. Thus, Southwestern Bell's WATS and 800 services became classified as competitive on January 10, 1999, by operation of law.

Issue 12: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's special access services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Special access services are dedicated, nonswitched services used to connect one or more end-user customer premises with an IXC's location, commonly referred to as a point of presence. Special access services are used to carry voice and data applications and, at higher speeds, video. Southwestern Bell offers eight categories of special access services: Metallic, Telegraph Grade, Voice Grade, Wideband Analog, Wideband Data, MegaLink Data (DS1), High Capacity (DS3), and DovLink service (data over a voice grade facility).

Conclusions of Law

The Commission recognized the existence of competition in the intraLATA special access market in Case No. TO-93-116. In that case, the Commission found that services provided by interexchange carriers were "equivalent" and completely interchangeable with Southwestern Bell's special access services. Accordingly, the Commission granted Southwestern Bell's request for reclassification of special access services to a "transitionally competitive" classification.

Under Sections 392.370.1 and 2, a service classified as transitionally competitive automatically becomes classified as competitive three years after such designation unless the Commission affirmatively extends the transitionally com-

petitive status for a specified period. Three years after special access services were declared transitionally competitive (January 10, 1996), the Commission with Southwestern Bell's agreement extended the transitionally competitive status for an additional three years (until January 10, 1999). The Commission, however, did not further extend it. Thus, special access service became classified as competitive on January 10, 1999, by operation of law.

Issue 13: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's switched access services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Switched access service refers to the line of services sold to IXCs who wish to access the local public switched network in order to provide long distance service to end-users. It enables IXCs to originate or terminate their customers' long distance calls from an end-user's premise. Switched access has four categories of service, which are designated by feature groups. Feature groups are differentiated by their technical characteristics and how an end-user accesses each of these services. The four categories of feature groups are: Feature Group A, which is a line side connection; Feature Group B, which is a trunk side connection accessed via the 950 access code; Feature Group C and Feature Group D, which are both trunk side connections allowing 1+ dialing of long distance calls. Switched access has three major components: the common line element, the end office element and the transport element.

Southwestern Bell is the dominant provider of exchange access services within its service territory. Southwestern Bell does not pay itself exchange access rates. Thus, switched access by its very nature is a locational monopoly. Southwestern Bell's witness Dr. Aron agreed that an IXC cannot bypass Southwestern Bell's terminating access. IXCs have no choice but to pay exchange access rates in order to complete their subscribers' calls. An IXC cannot select a lower cost alternative because there is no lower cost alternative.

The Commission has granted many CLECs competitive status for their switched access services. The Commission has, however, placed the restriction on CLEC switched access service that those rates may not be restructured if the aggregate of the rates is greater than the incumbent local exchange company's switched access rates. There was general agreement in the testimony that switched access is a locational monopoly no matter whether an incumbent or a competitive company provides the access. The Commission finds that Southwestern Bell's switched access services are no different than CLEC switched access services.

In its surrebuttal testimony and at the hearing, Southwestern Bell indicated that it is willing to provide this service subject to the same conditions applicable to CLEC provision of switched access service, specifically, Southwestern Bell's switched access service would remain subject to price caps, but Southwestern Bell would have greater flexibility to restructure its rates under that cap.

Conclusions of Law

Pursuant to the Commission's decision in Case No. TO-99-596,²³ CLECs' switched access rates are capped at the rate of the incumbent local exchange company in whose territory the CLEC competes. The CLEC, however, is not required to match the ILECs rate structure so long as the overall average is within the cap.

Southwestern Bell requests that its switched access services be classified as competitive in all of its exchanges in Missouri. Southwestern Bell indicates, however, that it is willing to provide this service subject to the same conditions applicable to CLEC provision of switched access service, specifically, Southwestern Bell's switched access service would remain subject to price caps, but Southwestern Bell would have greater flexibility to restructure its rates under that cap.

The Commission has determined that the switched access service of CLECs is competitive under Section 392.361. Under that section, the Commission determines that a service is competitive by finding that the "telecommunications . . . service . . . [is] subject to sufficient competition to justify a lesser degree of regulation." Section 392.245.8 sets out a different standard for the Commission with regard to a company under price cap regulation. Under that statutory provision, the Commission is required to determine whether or not effective competition exists for switched access service. Having found that Southwestern Bell's switched access service is a locational monopoly service, the Commission cannot find that switched access is subject to effective competition.

Issue 14: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Common Channel Signaling/Signaling System 7 services be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Southwestern Bell's SS7 provides a dedicated two-way signaling path between a customer and Southwestern Bell's Signal Transfer Point and provides access to Southwestern Bell's SS7 network. Where available, SS7 signaling is used with switched access service to carry the signals associated with a call on a transmission path that is separate from the voice path. In addition, SS7 is utilized to access Southwestern Bell's line information database and switched access 800 number portability access service.

The evidence presented shows that competition for SS7 services is significant. Southwestern Bell faces direct competition from Illuminet, TSI Telecommunications Services, Inc., and IDN, LLC, in Missouri and on a nationwide basis. No party presented evidence to dispute this fact. Staff agrees with Southwestern Bell that SS7 services are subject to effective competition in all its Missouri exchanges.

²³ *In the Matter of the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, Case No. TO-99-596.

Conclusions of Law

The Commission concludes that given the extensive nature of competition, there is effective competition throughout all of Southwestern Bell's Missouri exchanges for SS7 services. The Commission concludes therefore that this service should be classified as competitive under Section 392.345.5 in all of Southwestern Bell's Missouri exchanges.

Issue 15: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Line Information Database services be classified as competitive pursuant to Section 392.245.5?**Findings of Fact**

LIDB provides the customer with the ability to query billing validation data in Southwestern Bell's database in support of alternate billing services, such as Calling Card, collect, and third number billing. Alternate billing services allow telecommunications companies to bill calls to an account that might not be associated with the originating line.

As with SS7 services, the evidence presented shows that competition for SS7 services is significant. Southwestern Bell faces direct competition from Illuminet, TSI Telecommunications Services, Inc., and IDN, LLC, in Missouri and on a nationwide basis. No party presented evidence to dispute this fact. Staff agrees with Southwestern Bell that LIDB services are subject to effective competition in all its Missouri exchanges.

Conclusions of Law

The Commission concludes that given the extensive nature of competition, there is effective competition throughout all of Southwestern Bell's Missouri exchanges for LIDB services. The Commission concludes, therefore, that this service should be classified as competitive under Section 392.345.5 in all of Southwestern Bell's Missouri exchanges.

Issue 16: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's directory assistance (DA) services be classified as competitive pursuant to Section 392.245.5?**Findings of Fact**

Directory Assistance Services provide callers with assistance in obtaining telephone listing information. The directory assistance services currently offered by Southwestern Bell locally include local directory assistance, directory assistance call completion (including AutoConnect) and national directory assistance. Local directory assistance provides callers with listed telephone numbers of subscribers who are located in the same local calling area and in the calling customer's home numbering plan area. Directory assistance call completion provides the customer the option of having local or intraLATA long distance calls automatically completed by pressing "1" after the listed telephone number is received from directory assistance.

11 Mo. P.S.C. 3d

AutoConnect is another form of call completion service available to callers to directory assistance. AutoConnect differs, however, in that there is no charge to the caller for the service. Rather, call completion charge is billed to the called AutoConnect subscriber. If the directory assistance caller requests the telephone number of a caller subscribing to AutoConnect, the caller will be advised that the call can be completed at no additional call completion charge to the caller. Finally, national directory assistance is a service whereby customers may obtain telephone listing information for areas outside their local calling area.

Staff and Public Counsel presented persuasive testimony about the link between directory assistance and basic local service. Directory assistance has historically been accessed when customers dial "411." When customers dial in this manner, the calls are routed to the local exchange carrier. Southwestern Bell presented evidence of several other types of directory assistance available on a statewide basis in Missouri.

The Commission finds that directory assistance is so closely related to basic local service that it cannot be subject to effective competition where basic local is not subject to effective competition. Therefore, the Commission determines that where it has found basic local service to be subject to effective competition, directory assistance services are also subject to effective competition and should be classified as competitive.

Conclusions of Law

In weighing all the relevant factors, the Commission finds that directory assistance is so closely related to basic local service that it cannot be subject to effective competition where basic local is not subject to effective competition. The Commission has found above that for basic local business customers the Kansas City and St. Louis exchanges are subject to effective competition, and for basic local residential customers the Harvester and St. Charles exchanges have been determined to be subject to effective competition. Therefore, the Commission determines that directory assistance services for those business and residential customer are also subject to effective competition and should be classified as competitive.

Issue 17: In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's operator services (OS) be classified as competitive pursuant to Section 392.245.5?

Findings of Fact

Operator Services refer to a variety of call completion services that Southwestern Bell offers its customers in Missouri. These services facilitate the completion of a call, often using live operators or through an automated Interactive Voice System. Southwestern Bell's operator services in Missouri include calling cards, collect calls, calls billed to a third number, sent paid calls, person-to-person, line status verification, and busy line interrupt service. A customer may use operator services by dialing "0" or "0 + number" from any telephone, but generally customers utilize operator services when placing a call when away from their home or office.

Southwestern Bell's Station to Station, Person to Person and Calling Card Services were previously declared transitionally competitive in Case No. TO-93-116. The Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996, to January 10, 1999. The Commission finds that these services became classified as competitive at that time.

Southwestern Bell's other operator services are busy line verification and busy line verification interrupt. Staff and Public Counsel presented persuasive testimony that the same interrelationship between local service and directory assistance applies to busy line verification and busy line interrupt. Historically, customers have dialed "0" to use these operator services. When customers dial in this manner the calls are routed to the local exchange carrier. Thus, as with directory assistance, busy line verification and busy line interrupt are too closely related to the provision of basic local service to be considered subject to effective competition where the underlying basic local service is not also subject to effective competition.

Conclusions of Law

Southwestern Bell's station-to-station, person-to-person, and calling card operator services were found to be transitionally competitive in Case No. TO-93-116. Subsequent to that finding, and following a three-year extension of the transitionally competitive classification, these services have become classified as competitive as of January 10, 1999.

The Commission finds that Southwestern Bell's busy line verification and busy line verification interrupt services face effective competition and are hereby classified as competitive pursuant to Section 392.245.5 for business customers in only the Kansas City and St. Louis exchanges and for residential customers in only the St. Charles and Harvester exchanges. It also follows that because Southwestern Bell's business and residential services have not been shown to face effective competition in its other exchanges, that its busy line verification and busy line verification interrupt services do not face effective competition in its other exchanges either.

CONCLUSION

The Commission has examined the status of competition within each of Southwestern Bell's exchanges. The Commission considered all the relevant factors set out in Section 386.020(13), and the purposes of Chapter 392, as set out in Section 392.185, and made the above findings and conclusions. Therefore, the Commission, in accordance with those findings and conclusions, will designate certain of Southwestern Bell's services in certain exchanges as competitive.

IT IS THEREFORE ORDERED:

1. That the core business switched services of Southwestern Bell Telephone Company in the Kansas City and St. Louis exchanges are classified as competitive.
2. That the business line-related services of Southwestern Bell Telephone Company in the Kansas City and St. Louis exchanges are classified as competitive.

11 Mo. P.S.C. 3d

3. That the directory assistance services for business customers of Southwestern Bell Telephone Company in the Kansas City and St. Louis exchanges are classified as competitive.

4. That the Busy Line Verification and Busy Line Interrupt services for business customers of Southwestern Bell Telephone Company in the Kansas City and St. Louis exchanges are classified as competitive.

5. That residential access line services of Southwestern Bell Telephone Company in the Harvester and St. Charles exchanges are classified as competitive.

6. That residential access line-related services of Southwestern Bell Telephone Company in the Harvester and St. Charles exchanges are classified as competitive.

7. That the Optional Metropolitan Calling Area service for residential customers of Southwestern Bell Telephone Company in the Harvester and St. Charles exchanges are classified as competitive.

8. That the directory assistance services for residential customers of Southwestern Bell Telephone Company in the Harvester and St. Charles exchanges are classified as competitive.

9. That the Busy Line Verification and Busy Line Interrupt for residential customers of Southwestern Bell Telephone Company in the Harvester and St. Charles exchanges are classified as competitive.

10. That Southwestern Bell Telephone Company's Common Channel Signaling/Signaling System 7 services are classified as competitive in all of its Missouri exchanges.

11. That Southwestern Bell Telephone Company's Line Information Database services are classified as competitive in all of its Missouri exchanges.

12. That any motion not previously ruled on is denied and any objection not previously ruled on is overruled.

13. That this Report and Order shall become effective on January 6, 2002.

Simmons, Ch., Murray, and Lumpe, CC., concur;
Gaw, C., dissents; certify compliance with the
provisions of Section 536.080, RSMo 2000.
Forbis, C., not participating.

**Staff of the Missouri Public Service Commission, Complainant,
v. Union Electric Company, d/b/a AmerenUE, Respondent.**

*Case No. EC-2002-1
Decided January 3, 2002*

Evidence, Practice and Procedure § 24. The Commission adopted the parties' proposed procedural schedule. The Commission is hesitant to grant a procedural schedule that delays resolution of the case. However, AmerenUE's tariff will make a potential rate reduction retroactive. Therefore, Missouri ratepayers are protected, and the Commission will allow the parties ample time to conduct discovery and file testimony.

**ORDER APPROVING JOINTLY FILED
REVISED PROCEDURAL SCHEDULE**

This order will revise the procedural schedule in accordance with a joint proposal filed by the Complainant and the Respondent. That proposal allows additional time for the parties to work with a more current test year and provides a guaranteed mechanism by which Union Electric will retroactively apply any rate reduction which occurs at the completion of this case.

On December 26, 2001, AmerenUE and Staff of the Public Service Commission jointly filed a proposed procedural schedule which would allow additional time for all parties to conduct discovery and file testimony based upon the more current test year as ordered by the Commission on December 6, 2001. Office of the Public Counsel, a party to this case pursuant to Section 386.710(2), supports the proposed procedural schedule. The interveners were ordered on December 28, 2001, to file a response to the proposal and every intervener which complied with that order supports the proposed procedural schedule. However, the Missouri Industrial Energy Customers, as represented by Diana Vuylsteke, did not comply with the order.

Under any other circumstance, the Commission would not consider any proposal which would delay the resolution of this case. However, the Commission's first interest must be a full and fair hearing which will reveal all admissible evidence. The virtue of this proposed schedule is the component whereby AmerenUE will file a tariff which legally binds it to implement any rate reduction from this case retroactively to April 1, 2002. This protection for Missouri ratepayers combined with the enhanced opportunity for discovery of all pertinent facts creates "win-win" proposal. Therefore, the Commission is compelled to grant the additional time requested by the parties. Although this additional time will somewhat delay the Commission's schedule, the benefit which this delay provides for the ratepayers outweighs any other consideration.

IT IS THEREFORE ORDERED:

1. That the Commission accepts the procedural schedule proposed jointly by the Staff of the Public Service Commission and AmerenUE on December 26, 2001.
2. That the procedural schedule for this case is now as follows:

11 Mo. P.S.C. 3d

<u>Event</u>	<u>Jointly Proposed Date</u>	<u>Days Between Successive Events</u>
Order Setting Forth Procedural Schedule & Test Year/Update Period	December 6, 2001	85 days
Staff Files Direct Testimony	March 1, 2002	70 days
UE and OPC File Rebuttal Testimony	May 10, 2002	7 days
All Interveners File Rebuttal Testimony	May 17, 2002	11 days
Prehearing Conference	May 28-31, 2002	27 days
Staff Files Surrebuttal Testimony and UE, OPC, And All Interveners File Cross-Surrebuttal	June 24, 2002	2 days
Joint Filing of List of Issues, Order of Issues And Order of Cross-Examination	June 26, 2002	5 days
Parties File Statements Of Position	July 1, 2002	10 days
Hearings	July 11-12, 15-19, 22-26, Aug. 1-2, 2002	

3. That the parties shall be bound by the following conditions:

- (a) the test year in this proceeding will be the twelve months ended June 30, 2001 (the "Test Year");
- (b) the Test Year may be updated through September 30, 2001;
- (c) the Company will be allowed to file an alternative rate regulation plan as part of its filing of Rebuttal Testimony on May 10, 2002;
- (d) the Company agrees that any reduction in rates ordered by this Commission will be retroactive to April 1, 2002;
- (e) within 20 days of Commission approval of this Stipulation, the Company will file tariff sheet(s) making rates charged on and after April 1, 2002, interim, subject to refund based upon a final non-appealable order of the Commission setting rates in this proceeding. Based upon further discussion, the Company will maintain appropriate records respecting customers on and after April 1, 2002 to facilitate any refund.
- (f) the Company agrees to file its revised depreciation study no later than January 31, 2002 and at that time provide all workpapers to the Staff;

- (g) and the Company agrees, without waiving its right to object to any specific data request, to use its best efforts to respond to Staff's data requests as quickly as possible.

4. That this order shall be effective on January 3, 2002.

Simmons, Ch., Murray, Lumpe, Forbis,
CC., concur. Gaw, C., dissents.

Roberts, Chief Regulatory Law Judge

**In the Matter of the Petition of the North American Numbering
Plan Administrator, On Behalf of the Missouri Telecommu-
nications Industry, for Approval of NPA Relief Plan for the
314 and 816 Area Codes.***

*Case No. TO-2000-374
Decided January 10, 2002*

Telecommunications § 1. The Commission granted its Staff's request for reconsideration and restated the cost allocation methodology by deleting the phrase "state specific basis."

Telecommunications § 13. The Commission granted its Staff's request for reconsideration and restated the cost allocation methodology by deleting the phrase "state specific basis."

Telecommunications § 32. The Commission clarified its previous order by stating that it did not intend to require detailed data reporting to the Staff, or extensive Staff review or calculations.

**SECOND ORDER REGARDING COST ALLOCATION AND COST RE-
COVERY FOR STATE NUMBER POOLING TRIALS**

Syllabus:

This order addresses Staff's Motion to Extend Effective Date and for Reconsideration filed on December 20, 2001. This order modifies the Commission's Order Regarding Cost Allocation and Cost Recovery for State Number Pooling Trials issued on December 18, 2001.

Issue Regarding Cost Allocation and Reporting:

The Commission issued an order on December 28, 2001, that extended the effective date of the Commission's December 18 order and directed responses to Staff's motion no later than January 4, 2002. No responses to Staff's motion have been filed.

* See page 000 for another order in this case. See pages 367 and 499, Volume 9 MPSC 3d as well as pages 82, 237, 500, 503 and 549, Volume 10 MPSC 3d, for other orders in this case.

11 Mo. P.S.C. 3d

In the Commission's December 18, 2001 Order Regarding Cost Allocation and Cost Recovery for State Number Pooling Trials, ordered paragraph number one provided that: "Staff, NeuStar and the industry shall allocate costs according to the LNP model on a state specific basis with a pro rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate and international telecommunications revenues irrespective of whether carriers are participating in the pooling trial. Joint costs, allocation and billing data shall be reported to the Commission Staff." Staff's December 20 motion requests reconsideration of this ordered paragraph.

Staff states that it intended that "shared pooling costs should be allocated based upon the National LNP model, which is based on end-user revenue already routinely provided to the National Exchange Carriers Association (NECA). Specifying a "state specific basis" in the order will require hundreds of carriers, the great majority of which are not parties to this case, to calculate and report their Missouri specific interstate, intrastate and international telecommunications revenues." Staff further stated that modifying the order to expressly use the National LNP model which is based on end-user revenue already routinely provided to NECA will allow NeuStar to have the information it needs readily available and in a timely manner.

It was the Commission's intent that cost allocation should be based upon the LNP model and that readily available information be used for this allocation. Therefore, the Commission will grant Staff's request for reconsideration and restate the cost allocation methodology in this order and particularly delete the phrase "state specific basis."

Staff also requested that the Commission reconsider the requirement that carriers submit their joint costs, allocation and billing data to Staff for "extensive review and calculations." The Commission did not intend to require detailed data reporting to the Staff, or extensive Staff review or calculations. The Commission simply needs to know how much the joint costs are and the end result of the apportionment of the costs. If this information can be obtained directly from NeuStar, then that is all that the order requires. The Commission will clarify its previous order.

IT IS THEREFORE ORDERED:

1. That Staff's motion filed on December 20, 2001, requesting reconsideration of the Commission's Order Regarding Cost Allocation and Cost Recovery for State Number Pooling Trials is granted. The Commission's Order Regarding Cost Allocation and Cost Recovery for State Number Pooling Trials issued on December 18, 2001, shall be conformed to this Second Order Regarding Cost Allocation and Cost Recovery for State Number Pooling Trials.

2. That Staff, NeuStar and the industry shall allocate costs according to the National LNP model with a pro rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate and international telecommunications end-user revenues using data provided to the National Exchange Carriers Association irrespective of whether carriers are participating in the pooling trial. Total joint costs incurred and allocated to the industry and the apportionment of the costs shall be reported to the Commission Staff.

3. That this order shall become effective on January 20, 2002.

Murray, Lumpe, Gaw and Forbis, CC., concur
Simmons, Ch., absent

Thornburg, Regulatory Law Judge

**In the Matter of the Application of UtiliCorp United Inc., d/b/a
Missouri Public Service and St. Joseph Light and Power
Company for an Accounting Authority Order Relating to
Commission Rule 4 CSR 240-13.055(13).**

*Case No. GA-2002-285
Decided January 10, 2002*

Gas § 34. The Commission granted UtiliCorp's request for an Accounting Authority Order that would allow UtiliCorp to defer costs of complying with the emergency amendments to the Cold Weather Rule. UtiliCorp has the burden of proving it should recover those costs in rates. That burden gives UtiliCorp incentive to gather evidence that proves those costs actually are incremental costs of complying with the emergency amendment.

ORDER GRANTING ACCOUNTING AUTHORITY ORDER

On December 14, 2001, UtiliCorp United Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company filed an application for an accounting authority order. UtiliCorp requested a decision by the Commission by January 11, 2002. The purpose of the accounting authority order requested is to account for the costs of compliance with the emergency amendments to the cold weather rule (4 CSR 240-13.055).

On January 3, 2002, the Staff of the Commission filed its memorandum and recommendation in which it recommends that the Commission approve the request, with two caveats. The caveats are: A) that the Commission make clear that any amounts deferred are subject to review in subsequent rate proceedings for prudence and for verification of the incremental nature of the costs in question; and B) that any amounts recovered in Case No. GO-2002-175 be netted against the deferrals made pursuant to the accounting authority granted in this case.

On January 7, UtiliCorp filed a response to the Staff recommendation. UtiliCorp states that, in its view, nothing in the Staff recommendation will prohibit it from proposing that the Commission adopt a method of calculating the relevant costs that is different from the one Staff proposes. The Commission agrees with UtiliCorp; if it and Staff are unable to agree on the costs, or on the method of calculating costs, it is free to propose costs or calculations different from the Staff's.

11 Mo. P.S.C. 3d

On January 8, the Office of the Public Counsel filed a pleading in which it stated that it supports the Staff recommendation.

On January 9, the Staff filed a reply to UtiliCorp's January 7 response. Staff requested that the Commission direct UtiliCorp to gather and maintain the data needed to measure the deferrals according to the matrix attached to Staff's memorandum. Staff also asked that "if UtiliCorp has divined a superior measure of the cost of the emergency amendment, the Commission should direct UtiliCorp to present it to the Commission...."

Later in the day on January 9, UtiliCorp filed a response to Staff's pleading. UtiliCorp explained that it will be difficult to gather and maintain the information Staff seeks. UtiliCorp acknowledges that it will bear the burden of proof in any future rate case to approve recovery of these costs. UtiliCorp does not claim to have a superior method of cost identification, but states that it intends to challenge at least some aspects of Staff's proposed matrix.

The Commission has reviewed the verified application, the Staff recommendation, and the responses. Accounting authority orders such as the one UtiliCorp seeks are expressly authorized by 4 CSR 240-13.055(13)(F). Granting UtiliCorp its requested authority is consistent with the emergency amendment, and will not be detrimental to the public interest. The Commission will grant the requested authority, heeding the caveats noted by Staff. With respect to the pleadings filed January 9, the Commission will not order any action to be taken. UtiliCorp bears the burden of proving that any costs deferred should be recovered in rates, and so it has an incentive to gather the data needed to prove that the costs deferred are indeed incremental costs of complying with the emergency amendment. UtiliCorp does not profess to have a superior method of cost calculation, and the Commission will not order it to produce one. The Commission intends that rates established in UtiliCorp's next general rate case will include, *inter alia*, treatment of the amounts deferred pursuant to the accounting authority order, and, if amortized, amortization of the deferred amounts over a period of time not longer than three years beginning with the date rates become effective in the next general rate case.

IT IS THEREFORE ORDERED:

1. That the application for an accounting authority order filed by UtiliCorp United Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company on December 14, 2001, is granted, and UtiliCorp United Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company is authorized to maintain on its books a regulatory asset which represents all incremental expenses incurred and incremental revenues that are caused by 4 CSR 240-13.055(13) between the effective date of 4 CSR 240-13.055(13) and September 30, 2003.

2. That the regulatory asset authorized in Ordered Paragraph 1 may remain on the books of UtiliCorp United Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company until the effective date of a Report and Order in its next general rate case.

3. That any special recovery of bad debt expense allowed UtiliCorp United Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company in Case No. GO-2002-175 will be netted against any amounts deferred pursuant to the authority granted herein.

4. That any amounts deferred pursuant to the authority granted herein are subject to review in subsequent rate proceedings for prudence and for verification of the incremental nature of the costs in question.
5. That this order shall become effective on January 20, 2002.
6. That this case may be closed on January 21, 2002.

Murray, Lumpe, Gaw and Forbis, CC., concur Simmons, Ch., absent

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Application of The Empire District Electric Company for Permission to Transfer its Centurion Software to a Subsidiary Corporation Pursuant to Certain Conditions and for a Variance from 4 CSR 240-20.015 for the Transaction.

*Case No. EE-2002-120
Decided January 10, 2002*

Electric § 4. The Commission approved a Unanimous Stipulation and Agreement that allowed Empire to sell software to an unregulated subsidiary.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

Syllabus: This order approves the Unanimous Stipulation and Agreement reached between the parties, approves the proposed transfer of assets consisting of a software program in development, and grants Empire a variance from the affiliate transaction rule, 4 CSR 240-20.015.

On August 23, 2001, The Empire District Electric Company filed its application with the Missouri Public Service Commission requesting an order approving a proposed transfer of assets to an affiliated company and requesting the Commission grant a variance of Sections (2), (3), (4), and (5) of the affiliate transaction rule.¹ Empire seeks the Commission's approval for the proposed transfer of a developmental version of a computer software program for a customer information and billing software program called Centurion.

The Centurion software was developed, installed and modified by Empire employees as an effort to deal with the worldwide concerns over expected computer failures or malfunctions on January 1, 2000. The software is not marketable in its current form but represents a great value to Empire and its customers when the capitalized cost is compared to market alternatives for similar computer programs. Empire proposes to transfer the developmental version of Centurion software to

¹ Commission Rule 4 CSR 240-20.015, effective February 29, 2000.

11 Mo. P.S.C. 3d

an unregulated subsidiary affiliate of Empire's that will invest substantial additional time and capital to minimize future operating risks by completing the software program described, as a "work-in-progress." In exchange, certain considerations will be given to Empire, including use of the Centurion software. In consideration for the transfer of the Centurion computer software program to the unregulated subsidiary affiliate of Empire, Empire will receive continued use of the Centurion system, a completed and documented version of the Centurion software, along with a software license, at no cost to Empire, and an annual software maintenance agreement for the first 12 years at no cost to Empire. Transfer of the Centurion software program to the unregulated subsidiary affiliate of Empire will permit Empire to avoid expenses in the amount of \$2 million for future development and maintenance costs of the Centurion software program. A perpetual license will be provided to Empire at no cost to Empire, other than the consideration already given by the transfer of the software program.

On November 30, 2001, a Unanimous Stipulation and Agreement was filed by Empire, Staff, and the Office of the Public Counsel. The parties recommend that the Commission issue an order that approves the proposed transfer of the Centurion software under the conditions as set forth in the Agreement. The parties agreed that the proposed "Contribution of Technology and Software Licensing and Maintenance Agreement" should be modified in the following respects: 1) the explanation of the materials and services associated with the license is expanded; 2) the term of the licensing and maintenance contract is increased from seven years to 12 years; and 3) a new section is added to address contractual obligations of the subsidiary regarding access to records pursuant to the discovery process of the Commission.

In addition to the changes embodied in Appendix A-1, the parties agreed that paragraph 11 of Empire's original application would be modified to read:

For purposes of future Missouri rate cases, Empire will guarantee that its retail customers will be held harmless from a ratemaking standpoint if the transfer of the Centurion intellectual property to the subsidiary as described herein, or the operation of the subsidiary, results in a higher revenue requirement for Empire in a future rate case than if the transfer had not occurred. Empire reserves the right to present evidence and arguments in any situation where it is alleged that there is a higher revenue requirement as a result of the transfer or operation of the subsidiary.

In the Agreement Empire also agrees that it will ensure that the Centurion software system, after the transfer, will be capable of producing reports containing the data described in Appendix A-2 to the Agreement. Empire guarantees that its retail customers will be held harmless if the transfer of the Centurion intellectual property to the subsidiary, or the operation of the subsidiary, results in a higher revenue requirement for Empire.

In its suggestions filed in support of the Agreement, Staff stated:

In order to approve the transfer of the computer software program as recommended by the parties, it will be necessary for the Commission to grant a variance to Empire from the provisions of Sections (2), (3), (4), and (5) of Commission Rule 4 CSR 240-20.015 for so long as the Centurion system is used by Empire.

Commission Rule 4 CSR 240-20.015(1)(B) defines an affiliate transaction as

any transaction for the provision, purchase or sale of any information, asset, product or service, or portion of any product or service, between a regulated electrical corporation and an affiliated entity, and shall include all transactions carried out between any unregulated business operation of a regulated electrical corporation and the regulated business operations of an electrical corporation. An affiliate transaction for the purpose of this rule excludes heating, ventilating and air conditioning (HVAC) services as defined in section 386.754 by the General Assembly of Missouri.

Commission Rule 4 CSR 240-20.015(2)(D) prohibits a regulated electrical corporation from participating in any affiliated transactions which are not in compliance with this rule, except where a variance is granted by the Commission. In its application, Empire seeks approval of transfer of a computer software program to an unregulated affiliate company and also seeks a variance from the provisions of Sections (2), (3), (4), and (5) of Commission Rule 4 CSR 240-20.015, with regard to the transfer of the Centurion software program for so long as the Centurion software system is used by Empire under the terms of the agreement with its affiliate. Empire has complied with Commission Rule 4 CSR 240-20.015(10)(A)1 and 4 CSR 240-2.060(11). Further, the Commission determines that the proposed transaction, including the variance, will benefit consumers and is therefore in the public interest. The Commission will approve the variance.

The Commission concludes that the transfer of the Centurion software program from Empire to an unregulated subsidiary affiliated company, which has yet to be formed, in exchange for the consideration given and agreed to by the parties in this Agreement, is fair and reasonable. The transfer of the Centurion software program is in the public interest because it relieves Empire of further costs associated with completion of the software program while at the same time providing Empire with use and access to the software program it originally developed.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on November 30, 2001, is approved.
2. That the proposed transfer of the Centurion software pursuant to the modified contract contained in Appendix A-1 to the Unanimous Stipulation and Agreement filed on November 30, 2001, or a document substantially similar thereto, subject to the conditions contained in paragraphs 4.B and 4.C of the Unanimous Stipulation and Agreement, is approved.

11 Mo. P.S.C. 3d

3. That the Commission's approval of the proposed transaction by The Empire District Electric Company is specifically conditioned upon the parties' Unanimous Stipulation and Agreement, a copy of which is attached hereto as Attachment 1.

4. That the request for a variance from Sections (2), (3), (4), and (5) of Commission Rule 4 CSR 240-20.015 is granted with regard to the subject matter of the Centurion software transaction as described in the Unanimous Stipulation and Agreement filed on November 30, 2001, for so long as the Centurion system is used by The Empire District Electric Company under the terms of the agreement with its affiliate.

5. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties and transactions herein involved.

6. That the Commission reserves the right to consider any ratemaking treatment to be afforded the properties and transactions herein involved in a later proceeding.

7. That this order shall become effective on January 20, 2002.

8. That this case may be closed on January 21, 2002.

Murray, Lumpe and Forbis, CC., concur

Gaw, C., dissents

Simmons, Ch., absent

Mills, Deputy Chief 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 Missouri Public Service Commission.

In the Matter of the Application of St. Louis County Water Company, doing business as Missouri-American Water Company, for Restatement and Clarification of Its Certificate of Convenience and Necessity for St. Louis County, Missouri.

*Case No. WA-2001-288
Decided January 17, 2002*

Water §2. The Commission approved a settlement agreement and granted St. Louis Water Company, d/b/a Missouri-American Water Company, Certificates of Convenience and Necessity for Florissant and Webster Groves.

**ORDER APPROVING UNANIMOUS SETTLEMENT AGREEMENT,
GRANTING CERTIFICATES OF CONVENIENCE AND NECESSITY,
AND CLOSING CASE**

Syllabus:

This case approves a unanimous settlement agreement, grants Applicant a Certificate of Convenience and Necessity for Florissant and a Certificate of Convenience and Necessity for Webster Groves, and closes this case.

Procedural History:

On October 31, 2000, St. Louis County Water Company, doing business as Missouri-American Water Company, filed its application for restatement and clarification of its Certificate of Convenience and Necessity for St. Louis County, Missouri.

The Missouri Public Service Commission issued its Order Directing Notice on November 14. Therein, the Commission established an intervention period of 30 days, ending on December 14, and directed MAWC to serve its application on each affected municipality and to file proof of service in this case on or before November 24. MAWC filed proof of service on November 22.

Thereafter, the Cities of Winchester and Maryland Heights jointly moved for leave to intervene and moved for a hearing on December 12. The City of Chesterfield moved for leave to intervene on December 13. The City of St. Ann applied to intervene on December 14. On December 15, the Cities and Villages of Ballwin, Bel-Nor, Bel-Ridge, Bella Villa, Bellerive, Bellefontaine Neighbors, Breckenridge Hills, Bridgeton, Clayton, Cool Valley, Crestwood, Des Peres, Green Park, Hazelwood, Manchester, Maplewood, Normandy, Pasadena Hills, Pine Lawn, Richmond Heights, Riverview, Rock Hill, Town and Country, University City, Velda City, and Wildwood (Cities and Villages) jointly filed their application to intervene out-of-time. On December 21, counsel for Company filed a copy of a letter that Company sent to each proposed intervenor. On January 11, 2001, the Commission granted intervention to all applicants, set a prehearing conference for

11 Mo. P.S.C. 3d

January 25, and directed that a proposed procedural schedule be jointly developed and filed by February 1.

On January 25, the Commission convened the prehearing conference as scheduled. However, on February 1, the parties did not file a proposed procedural schedule; rather, MAWC filed a Motion for Continuance, requesting that the due date for the proposed procedural schedule be reset to February 15. On the same day, the Staff of the Missouri Public Service Commission filed its concurrence with MAWC's motion. Before the Commission had an opportunity to take up and rule on MAWC's motion and Staff's concurrence, MAWC filed its Unanimous Stipulation and Partial Settlement and Continuance of Remaining Issues on February 7. The Commission approved the Partial Settlement on February 20 and, according to the terms of the Partial Settlement, granted MAWC a Certificate of Convenience and Necessity to serve Valley Park.

The order of February 20 also required the parties to file a proposed procedural schedule by May 31. On May 24, certain intervenors moved to extend that date to September 30. Staff and the Office of the Public Counsel both advised the Commission, on May 30, that they did not object. On June 14, the Commission granted the motion.

On September 28, the parties filed their Unanimous Settlement Agreement, a copy of which is attached hereto as Attachment 1. On October 4, the Commission directed the Staff to file its supporting suggestions by October 12. The Commission also directed all of the parties to cooperate with Staff in developing suggested language for the final order. Staff filed its suggestions in support of the Unanimous Settlement Agreement on October 12.

Because the parties resolved their dispute and entered into a unanimous settlement agreement, the basic issue of the Commission's authority to grant the requested relief was not well-developed. Therefore, on October 24, the Commission issued its Order Directing Filing, requiring MAWC to brief "the exact relief sought and the Commission's authority to grant that relief." MAWC filed its brief on November 21.¹

In its Brief of November 21, the Company informed the Commission – for the first time in this proceeding – that acquisitions of the Florissant and Webster Groves systems are imminent and that it sought prompt approval. However, because Company had not yet met the statutory preconditions for relief, the Commission issued its Order Directing Filing on January 9, 2002.

Section 393.170² authorizes the Commission to grant Certificates of Convenience and Necessity to water corporations. Subsection 2 of that section states in part: "Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities." Missouri Courts

¹ While only MAWC, as the applicant, was required to brief these points, all of the parties were invited to file briefs. However, they declined.

² All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

have uniformly held that municipal permission is a necessary precondition to the Commission's grant of a Certificate of Public Convenience and Necessity.³ Because the record did not show that MAWC had obtained the necessary municipal franchises, the Commission directed that MAWC file proof thereof. MAWC complied on January 14.

Discussion:

Background

This case arose out of MAWC's proposed acquisition of the water distribution assets of the cities of Valley Park, Webster Groves and Florissant in St. Louis County, Missouri, and MAWC's corresponding need for legal authority to operate those systems.

In its application, MAWC states that its predecessor-in-interest obtained, in 1902, a perpetual franchise from the no-longer-existing County Court of St. Louis County, Missouri, to provide public water service throughout the county. In the six existing incorporated cities of the county, Kirkwood, Webster Groves, Ferguson, Bridgeton, Pacific, and Florissant, a municipal franchise was also required. Likewise, a municipal franchise was also required in any subsequently incorporated city except to the extent that MAWC's predecessor served the residents of that city prior to its incorporation. With the creation of this Commission in 1913, it was believed that a certificate of convenience and necessity from the Commission was also required for MAWC's predecessor to expand its services to previously unserved county residents.

While both Webster Groves and Florissant already existed as municipal corporations in 1902, Valley Park was not incorporated until 1917, subsequent to the County Court franchise granted to MAWC's predecessor in 1902. At that time, MAWC's predecessor did not serve any customers in Valley Park. In 1982, MAWC's predecessor sought and obtained limited authority which authorized it to serve a single housing development in Valley Park.⁴ Since 1982, Valley Park has annexed certain unincorporated sections of the county served by MAWC. Today, MAWC provides all of the water used by the residents of Valley Park and directly serves some of those residents. However, MAWC believed that it needed a certificate of convenience and necessity from this Commission in order to operate the water distribution system previously belonging to the City of Valley Park and, thereby, to serve the whole of that city.

Because the closing of the Valley Park transaction was imminent, that aspect of the case was resolved separately. Valley Park granted the requisite municipal franchise to MAWC on November 20, 2000, and the Commission granted a certificate of convenience and necessity to MAWC for Valley Park on February 20, 2001.

³*E.g., St. ex rel. PWSB No. 2 of Jackson Co. v. Burton*, 379 S.W.2d 593, 599 (Mo. 1964).

⁴*In the Matter of St. Louis County Water Company*, Case No. WA-82-141 (Order, issued April 23, 1982).

The Unanimous Settlement Agreement

The certificate granted on February 20, 2001, concerned only Valley Park, leaving the issues of Webster Groves and Florissant to be resolved later. At the urging of the parties, the Commission put off the development of a procedural schedule in order to permit an attempt to resolve the case by negotiation. That effort was ultimately successful.

The parties have negotiated a resolution of the remaining issues. In their Unanimous Settlement Agreement of September 28, the parties state that the passage of Senate Bill 369 during the last legislative session addressed some of the intervenors' concerns.⁵ Their remaining concerns were addressed by the development of a generic franchise agreement and MAWC's offer to enter into that agreement with any requesting intervenor.

Staff's Suggestions

On October 12, 2001, Staff filed its Suggestions in support of the Unanimous Settlement Agreement. In its terse pleading, Staff states that the Commission should approve the Unanimous Settlement Agreement and grant the requested restatement of MAWC's authority because it will permit convenient specification of MAWC's authority in the Commission's records; it will resolve ambiguity and confusion attending the perpetual franchise granted in 1902; and it will render future litigation less likely. Staff further recommends that the Commission include MAWC's Jefferson County service area in the restatement of MAWC's authority as requested by the parties. Finally, Staff offers certain suggested language for the Commission's use.⁶

What is the Relief Sought by MAWC?

Just what relief does MAWC seek in this proceeding? In its prayer contained in its Application, MAWC prays that the Commission will

issue its order stating that Applicant has a Certificate of Convenience and Necessity to provide retail water service to areas of Jefferson County previously defined in Case No. 15,297, as well as to all areas of St. Louis County, Missouri, where Applicant is otherwise legally permitted to provide service consistent with its legal relationship with each respective incorporated municipality, and that such grant of authority does not restrict or limit Applicant's existing authority under its perpetual franchise from the St. Louis County Court.

⁵Relating to municipal control of utility rights-of-way and codified as Sections 67.1830, 67.1832, 67.1834, 67.1836, 67.1838, 67.1840, 67.1842, 67.1844, and 67.1846, RSMo Supp. 2001.

⁶The Commission requested suggested language in its Order Directing Filing issued on October 4. The suggested language supplied consists only of legal descriptions of St. Louis County and the affected portion of Jefferson County.

Paragraph 6 of the Application states:

In discussions between the Company and the Commission Staff over the years, it has often been suggested that the Company should seek to restate and clarify its grandfather authority. This would permit the Applicant's authority to be represented in the Commission's records in a manner that is traditional for other utilities within the state. It would also eliminate administrative confusion and uncertainty with respect to the interpretation of the perpetual county court franchise, as well as the pragmatic necessity for piecemeal applications as is deemed necessary at this time for clarification of Applicant's authority to serve the City of Valley Park.

Taking the prayer and Paragraph 6 together, it appears from the Application that MAWC seeks a declaration from the Commission to the effect that its 1902 St. Louis County Court franchise, plus the Commission's order in Case No. 15,297, together constitute a certificate of convenience and necessity authorizing MAWC to serve all of the comprehended area without any need for further action of the Commission.⁷ This interpretation corresponds with MAWC's announced goal, in Paragraph 6, of avoiding "piecemeal applications" and also gives meaning to its use of the words "restatement" and "clarification" in the title of its application.

Because the Application was unclear with respect to the specific relief sought herein by MAWC, the Commission on October 24 directed MAWC to brief the Commission as to the specific relief sought and the Commission's authority to grant that relief. The other parties were invited to brief these questions, but were not required to do so. MAWC filed its brief on November 21; no other party filed a brief.

In its Brief, MAWC explains that the relief it seeks has changed over the course of this proceeding:⁸

The Commission's Order Directing Filing raises profound questions; but due to negotiations and consequent changes to the relief requested in the Unanimous Settlement Agreement, perhaps those questions are more profound than necessary under the circumstances now existing. The relief requested in the Application has been significantly simplified by the Unanimous Settlement Agreement.

MAWC explains, in its Brief, that its use of the word "restatement" was drawn from the language of corporate law and that a corporation may "restate" its previously

⁷ However, contrary to the scope of relief sought in the prayer, Paragraph 7 of the Application states, "Areas specifically defined in Jefferson County by prior order of this Commission are unaffected by this application, as this Application refers only to St. Louis County."

⁸ *Brief of St. Louis County Water Company d/b/a Missouri-American Water Company in Response to Order Directing Filing*, p. 1 (filed on November 21, 2001).

11 Mo. P.S.C. 3d

amended articles into one document in the interest of housekeeping.”⁹ The term “clarification,” in turn, “was used to indicate that no declaration about the past status was necessary.”¹⁰ Borrowed from Section 392.530, the term was employed to signify that a grant of authority now did not imply that authority had not existed previously.¹¹ The Brief states that the relief sought in the Application has been superseded by the Unanimous Settlement Agreement. That document includes the following prayer for relief:¹²

Wherefore, the undersigned being the attorneys of record for all of the parties in the instant case, herewith Stipulate and Agree that the Commission may issue its Order restating and clarifying Applicant’s Certificate of Convenience and Necessity for St. Louis County, Missouri, and those portions of Jefferson County previously authorized in Case No. 15,297. Intervenors have no objection to inclusion of the Intervenor Cities identified herein within the certificated area or to the inclusion of the remainder of St. Louis County and those other Cities who did not choose to intervene following receipt of notice as directed by the Commission’s Order of November 24, 2000. In addition, Applicant herewith requests expedited approval of the instant Unanimous Settlement Agreement so that it may honor the request of the City of Webster Groves, Missouri, to provide water service within such city consistent with a franchise agreement heretofore awarded to Applicant by such City.

Contrary to the assertion of MAWC’s Brief, it does not appear that the Unanimous Settlement Agreement seeks relief different from that sought in MAWC’s original application. Indeed, the Unanimous Settlement Agreement elsewhere states:

⁹ *Brief of St. Louis County Water Company*, p. 2.

¹⁰ *Id.*

¹¹ Section 392.530 provides: “Sections 392.361 to 392.520 are enacted in part to clarify and specify the law existing prior to September 28, 1987. Any specific grant of authority to the commission contained in those provisions shall not be construed as indicating or meaning that the commission did not possess such authority under the law existing prior to September 28, 1987.”

¹² *Unanimous Settlement Agreement*, p. 4 (emphasis deleted). The prayer for relief contains a request for expedited treatment. Commission Rule 4 CSR 240-2.080(17) requires that: “[a]ny party seeking expedited treatment in any case shall include in the title of the pleading the words “Motion for Expedited Treatment.” The pleading shall also set out with particularity the following: (A) The date by which the party desires the commission to act; (B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party’s customers or the general public, if the commission acts by the date desired by the party; and (C) That the pleading was filed as soon as it could have been or an explanation why it was not.” The *Unanimous Settlement Agreement* does not meet the requirements of this rule.

Accordingly, Intervenor Cities have no further objections to the granting of the relief requested in the Application. Similarly, Staff and the Office of the Public Counsel have no objection to the granting of the relief requested in the Application.¹³

Unlike the Unanimous Settlement Agreement, MAWC's Brief does seek a different form of relief. MAWC's Brief states:¹⁴

Implications in the Application that some declaration was requested from the Commission with respect to the "perpetual franchise" held by the Applicant (hereinafter explained), have been eliminated. What is requested now, is simply a Certificate of Convenience and Necessity without regard to the presence or absence of any other rights which may or may not be held by the Applicant.

* * *

What is sought in this case, is a pronouncement from the Commission that the Applicant has now been afforded all the authority from the Commission that is necessary *regardless of any pre-existing rights*, for the Applicant to provide service in the areas described in the Application. * * * [A]ll the Company actually needed was Commission authority to serve in several areas where the Company itself conceded no exemption or prior rights existed.

Rather than a declaration or restatement to the effect that MAWC's original county franchise constitutes sufficient authority to provide water service in every part of St. Louis County without the need for further Commission action, MAWC now seeks a Certificate of Convenience and Necessity from this Commission encompassing all of St. Louis County. MAWC's Brief states:¹⁵

All the requirements for the award of an initial Certificate required by 4 CSR 240-2.060 were met in the Applicant's verified Application. The relief requested by the Unanimous Settlement Agreement, i.e. permission to serve the legally described areas of all of St. Louis County, should be easily within the Commission's authority to authorize.

MAWC's Brief goes on to state an alternative scope of relief:¹⁶

But acquisitions of the systems of both Webster Groves and Florissant are presently pending, and certification from the Commission for the Company to serve those areas is a critical precondition to completion of those transactions. If, regardless of the reason, the Commission does not feel comfortable

¹³ *Unanimous Settlement Agreement*, p. 2.

¹⁴ *Brief of St. Louis County Water Company*, pp. 1 and 2-3.

¹⁵ *Brief of St. Louis County Water Company*, p. 6.

¹⁶ *Id.*

11 Mo. P.S.C. 3d

issuing an Order defining the Company's certificated area to include the totality of St. Louis County, it should at least authorize certification for the cities of Florissant and Webster Groves.

To sum up: having examined the Application, the Unanimous Settlement Agreement, Staff's Suggestions in Support of the Unanimous Settlement Agreement, and MAWC's Brief, the Commission determines that MAWC seeks a Certificate of Convenience and Necessity encompassing all of St. Louis County, Missouri, plus that portion of Jefferson County, Missouri, that MAWC is already authorized to serve under a prior order of this Commission. In the alternative, MAWC seeks a Certificate of Convenience and Necessity authorizing it to serve the cities of Florissant and Webster Groves in St. Louis County, Missouri.

The Commission's Authority to Grant the Requested Relief

Section 393.170 authorizes the Commission to grant Certificates of Convenience and Necessity to water corporations:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Subsection 1 of Section 393.170 prohibits the construction of utility plant without prior approval of the Commission. It has been interpreted as applying to a utility's initial entry into public service. The application presently pending before

the Commission does not seek authority to construct any utility plant and this is hardly MAWC's initial entry into public service. Subsection 3 of Section 393.170, in turn, specifies *how* the Commission shall exercise the authority granted in Subsections 1 and 2; it also authorizes the Commission to impose conditions on grants of authority under Subsections 1 and 2.

Subsection 2 of Section 393.170 is the provision applicable to this matter. It prohibits the "exercise [of] any right or privilege under any franchise hereafter granted . . . without first having obtained the permission and approval of the commission." The intent of the legislature as expressed in a statute must be determined from the language used, giving the words their plain and ordinary meaning.¹⁷ The plain and ordinary meaning of a word is found in the dictionary.¹⁸ "Hereafter" means "after this"; and "hereafter granted" therefore refers to a franchise granted *after* the effective date of Section 393.170.2.¹⁹ According to the "historical and statutory notes" in Vernon's Annotated Missouri Statutes, this section originated in Missouri Laws of 1913.²⁰ The franchise granted by the St. Louis County Court to MAWC's predecessor in 1902 was not, therefore, "hereafter granted" with respect to a statute first effective in 1913.

Subsection 2 also requires the "permission and approval" of the Commission prior to the exercise of any right or privilege "under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year[.]" "Heretofore" means "previously"; and "heretofore granted" therefore refers to a franchise granted *before* the effective date of the Section 393.170.2.²¹ As has been shown, MAWC's franchise, granted by the St. Louis County Court in 1902, was indeed granted before the statute became effective in 1913. However, this authority is not a blanket authority with respect to such prior franchises, but is limited, by the plain language of the statute, to only those franchises (1) not "heretofore" actually exercised or (2) the exercise of which has been suspended for more than one year. The meaning is that Commission approval is not necessary where service was already actually being provided under a franchise granted prior to 1913; otherwise, Commission approval is necessary.

So far as the present record reveals, although the St. Louis County Court in 1902 granted a franchise extending to "all public highways as they now exist, or as hereafter may be laid out or open within the present limits of St. Louis County," MAWC's predecessor had not, by 1913, actually extended water service to all parts of St. Louis County. A question then necessarily arises whether, with respect to those still unserved portions of the county, the franchise had not yet been "actually exercised" within the meaning of the statute as of its effective date in 1913?

However, the Commission need not resolve the question stated above in order to resolve this contested case. So far as the record reveals, the only areas in

¹⁷ *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997); *Blue Cross and Blue Shield of Kansas City, Inc., v. Nixon*, 26 S.W.3d 218, 228 (Mo. App., W.D. 2000) (en banc).

¹⁸ *Curry v. Ozarks Electric Corp.*, 39 S.W.3d 494, 496 (Mo. banc 2001).

¹⁹ *American Heritage Dictionary, Second College Edition* (1985), at 607.

²⁰ At page 610.

²¹ *American Heritage Dictionary, supra*.

11 Mo. P.S.C. 3d

St. Louis County to which MAWC presently proposes to extend service are the cities of Florissant and Webster Groves. These cities were both already incorporated in 1902 and, consequently, the 1902 county franchise could not, and did not, authorize MAWC's predecessor-in-interest to serve them.²² Only with the express permission of each of those cities could MAWC extend service to them.²³ That was true in 1902, it was true in 1913 and it is still true today.

Whether or not the 1902 county franchise authorized MAWC's predecessor-in-interest to serve Florissant and Webster Groves, that franchise could not, and did not, relieve MAWC of the necessity of obtaining a Certificate of Convenience and Necessity from this Commission with respect to those cities. "[T]he state as the sovereign power may condition the exercise of a privilege granted by one agency upon approval of another. Such was done in the passage of the Public Service Commission Act, particularly instanced in the commission's authority to grant or withhold certificates of convenience and necessity[.]"²⁴ The effect of the Commission's Certificate of Convenience and Necessity is not to "confer any new powers upon [an applicant]"; rather, it permits the applicant "to exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent."²⁵

Certificates of Convenience and Necessity

MAWC has met the statutory precondition for the certificates it seeks by submitting proof that it has obtained the necessary municipal franchises.²⁶ All of the parties have, by joining in the Unanimous Settlement, consented to the issue of these certificates. It remains only for the Commission to determine whether "after due hearing . . . such exercise of the right, privilege or franchise is necessary or convenient for the public service."²⁷

As for the statutory reference to a hearing, the Commission determines that, since all of the parties agree that the requested certificates be granted and since there are no requests for a hearing, no hearing is necessary.²⁸ In view of the unusual nature of this case, the Commission will waive compliance with Commission Rule 4 CSR 240-2.060, (1) and (4). Based on the Application and other pleadings of record, the Commission finds that St. Louis County Water Company lawfully does

²² See Exhibit B to Application, at pp. 34-35: "At the time of the franchise granted by the St. Louis County Court . . . there were in existence a number of incorporated cities in St. Louis County The St. Louis County Court had no jurisdiction over the roads in these incorporated cities and the roads and streets in these incorporated cities were not county highways to which the franchise of the St. Louis County Court was applicable. The St. Louis County Court had no power to and did not attempt to grant franchises for the use of the streets in those cities."

²³ The consent of the municipality is an "absolute prerequisite." *St. ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 350, 53 S.W.2d 394, 399 (Mo. banc 1932).

²⁴ *Shartel*, *supra*, 331 Mo. at 347-348, 53 S.W.2d at 397.

²⁵ *Shartel*, *supra*, 331 Mo. at 350-351, 53 S.W.2d at 399.

²⁶ Section 393.170.2.

²⁷ Section 393.170.3.

²⁸ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

business as Missouri-American Water Company and is a water corporation, subject to the jurisdiction of this Commission. The Commission further finds that MAWC presently serves some 300,000 customers in St. Louis County and a portion of Jefferson County pursuant to authorization by this Commission and various other governmental bodies. MAWC is the largest single water corporation in the state of Missouri.²⁹ MAWC presently serves some citizens of Florissant and provides all of the water which the city distributes to the rest. MAWC also serves some residents of Webster Groves and supplies some of the water that the city distributes to the rest.

The Commission has historically considered a range of factors in determining whether or not to grant a Certificate of Convenience and Necessity:³⁰

The PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service." The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate.

In the present case, no new construction is proposed. Rather, the large, private, regulated utility that already supplies the greater part of the water used by the residents of Florissant and Webster Groves will acquire those cities' existing distribution systems and will provide water service directly rather than through the intermediary of the city. The result will necessarily be a more efficient, integrated system. An economy of scale should result in reduced costs for maintenance, administration and billing and collection, but no information has been provided as to present or future rates.

Based on the foregoing, the Commission concludes that the Unanimous Settlement Agreement should be approved and the requested Certificates of Convenience and Necessity granted.

IT IS THEREFORE ORDERED:

1. That the Unanimous Settlement Agreement filed by the parties on September 28, 2001, is approved.

²⁹ 2001 Annual Report of the Missouri Public Service Commission, p. 48.

³⁰ *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App., W.D. 1993).

11 Mo. P.S.C. 3d

2. That the Commission waives compliance with Commission Rule 4 CSR 240-2.060, (1) and (4).

3. That St. Louis County Water Company, doing business as Missouri-American Water Company, is granted a certificate of public convenience and necessity to own, operate, control, manage, and maintain public drinking water facilities and to render drinking water service to the public within the City of Florissant, Missouri, located in St. Louis County, Missouri.

4. That St. Louis County Water Company, doing business as Missouri-American Water Company, is granted a certificate of public convenience and necessity to own, operate, control, manage, and maintain public drinking water facilities and to render drinking water service to the public within the City of Webster Groves, Missouri, located in St. Louis County, Missouri.

5. That this order shall become effective on January 27, 2002.

6. That this case may be closed on January 28, 2002.

Murray, Lumpe, and Forbis, CC., concur.

Gaw, C., dissents, with dissenting opinion to follow.

Simmons, Ch., absent.

Thompson, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I respectfully dissent because the parties have failed to provide any information from which this Commission may determine whether it is in the public interest to grant the requested certificates.

The Missouri Supreme Court has said that “the single question presented” to this Commission is whether “the exercise of the franchise . . . is necessary or convenient for the public service.”³¹ The Western District has said, “[I]t is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate.”³² Yet, the record in this case contains nothing with respect to this point. The Company’s original Application, filed on October 31, 2000, does not address the acquisition of the Florissant and Webster Groves distribution systems. Nowhere in the record, for example, is there any indication as to the rates that the Company will charge in Florissant and Webster Groves. Will those rates be higher or lower than the charges those citizens are paying now? The Commission simply does not have this information in the record. There is not enough evidence in this case by which the Commission may determine, in the words of the Western District, that “the public interest would be served in the award of the certificate.”³³

³¹*St. ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 349, 53 S.W.2d 394, 398 (Mo. banc 1932).

³²*St. ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App., W.D. 1993).

³³*Id.*

Furthermore, the Commission could have held local public hearings in Florissant and Webster Groves, on appropriate public notice, in order to hear from the affected ratepayers on the desirability of this transaction. As it is, the Commission is granting these certificates without knowing whether the public received any notice that such a thing was imminent. I cannot say, based upon the present record in this case, that the proposed transaction is or is not in the best interest of the public. I am not completely confident that this Commission has been made aware of all that this transaction involves. With proper development of the record, I very well could have agreed with the decision of the majority. As it is, my duty to determine whether this transaction is in the public interest cannot be fulfilled.

For these reasons, I respectfully dissent.

In the Matter of an Investigation into Public Utility Emergency Preparedness.*

*Case No. OO-2002-202
Decided January 24, 2002*

Security Issues § 1. The Commission accepted Staff's report summarizing the findings of its survey concerning the preparedness of Missouri utilities for disaster and emergency situations.

Public Utilities § 1. The Commission accepted Staff's report summarizing the findings of its survey concerning the preparedness of Missouri utilities for disaster and emergency situations.

**ORDER ACCEPTING REPORT AND
DIRECTING PUBLICATION AND
DIRECTING FILING**

On October 23, 2001, the Commission's Staff filed a motion to establish an investigative case. Staff proposed to survey Missouri utilities concerning their preparedness for disaster and emergency situations including procedures for dealing with terrorist threats or attacks.¹ Staff proposed presenting its findings periodically to the Commission and to file a formal report by December 31, 2001.

The Commission issued its Order Establishing Case on October 31, 2001. Staff filed an update of its activities on December 14, 2001. Staff filed its report on December 31, 2001. The report includes a statement titled "Best Practices for Improving Security" for Missouri utilities for emergency and disaster preparedness that Staff developed based upon its evaluation of the survey results, application of its expertise, and similar industry documents.

*See page 000 for another order in this case. The case number in this case was later changed to AO-2002-202.

¹The Commission and Staff have worked closely with the Missouri State Emergency Management Agency and with Missouri's Homeland Security programs and will continue to do so.

11 Mo. P.S.C. 3d

The Commission has reviewed the report. On January 22, 2002, the Commission discussed and reviewed the information presented in the report with Staff during the Commission's regular agenda. The Commission accepts Staff's report.

As a result of the Staff report and the Commission's review and consideration of the matters presented, the Commission determines that there is a continuous need to disseminate information and to review procedures and prepare responses for natural and man-made disasters that affect Missouri utilities and their customers in meeting essential needs for energy, communications, water and sanitary services critical to the health, welfare and safety of citizens and vital to economic development and performance. Therefore, the Commission directs Staff to publish the Best Practices for Improving Security by publishing the same on the Commission's website and by mailing this document to utility companies and to municipal and cooperative organizations operating utility systems. The information provided may also include contact information for the Commission's Staff and for other state agencies and officials with responsibility for homeland security and for disaster preparedness.

In addition, Staff shall prepare and file a follow-up report within 120 days. The report should present information that the Staff collects to supplement or complete survey information, information obtained by Staff in providing field assistance or investigating utility operations in the state, and information obtained from state and local officials regarding emergency planning, preparedness and response. Staff should also describe internal structures and lines of communication and authority within the Commission specifically associated with coordinating information, responses and assistance regarding emergency planning, preparedness and response.

IT IS THEREFORE ORDERED:

1. That Staff's report filed on December 31, 2001, is accepted.
2. That "Best Practices for Improving Security" shall be published on the Commission's website and by mailing this document to utility companies and to municipal and cooperative organizations operating utility systems. The information provided may also include contact information for the Commission's Staff and for other state agencies and officials with responsibility for homeland security and for disaster preparedness.
3. That the Commission's Staff shall prepare a follow-up report as described in this order and file the same within 120 days of the effective date of this order.
4. That this order shall become effective on February 3, 2002.

Keith Thornburg, Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

In the Matter of the Joint Application of Union Electric Company and Gascosage Electric Cooperative for an Order Approving a Change in Electric Service Supplier for Certain Union Electric Company Customers for Reasons in the Public Interest; Authorizing the Sale, Transfer, and Assignment of Certain Electric Distribution Facilities, Substations, and Easements from Union Electric Company to Gascosage Electric Cooperative; and Approving the First Amendment to the Union Electric Company and Gascosage Electric Cooperative Territorial Agreement.

*Case No. EO-2002-178
Decided January 24, 2002*

Electric § 6. The Commission found that the amendment to the agreement, which modified the designated boundaries in Camden and Miller Counties, transferred structures and assets, and changed the supplier for certain customers was 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, RSMo.

Electric §4. The Commission found that the amendment to the agreement, which modified the designated boundaries in Camden and Miller Counties, transferred structures and assets, and changed the supplier for certain customers was not detrimental to the public interest.

Electric §4.1. The Commission found that the amendment to the agreement, which modified the designated boundaries in Camden and Miller Counties, transferred structures and assets, and changed the supplier for certain customers was not detrimental to the public interest.

APPEARANCES

William B. Bobnar, Associate General Counsel, Ameren Services, One Ameren Plaza, 1901 Chouteau Avenue, Post Office Box 66149, MC 1310, St. Louis, Missouri 63166-6149, for Union Electric Company, d/b/a AmerenUE.

Victor S. Scott and Lisa Cole Chase, Andereck, Evans, Milne, Peace & Johnson, 700 East Capitol Avenue, Post Office Box 1438, Jefferson City, Missouri 65102, for Gascosage Electric Cooperative and the employees of Gascosage Electric Cooperative.

John B. Coffman, 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.

Robert Franson, Associate 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:

Nancy Dippell, Senior Regulatory Law Judge

REPORT AND ORDER

Syllabus: This order approves the amendment of the territorial agreement between Union Electric Company, d/b/a/ AmerenUE, and Gascosage Electric Cooperative, approves the change of electric supplier for approximately 1200 structures, and approves the transfer of assets between the companies.

Procedural History

On October 10, 2001, Union Electric Company, d/b/a AmerenUE, and the Gascosage Electric Cooperative filed a joint application requesting that the Missouri Public Service Commission issue an order: (1) approving a change in the electric supplier for approximately 1200 structures in and around the cities of Brumley and Ulman from AmerenUE to Gascosage pursuant to Section 393.106, RSMo 2000¹; (2) authorizing the sale, transfer, and assignment of certain substations, electric distribution facilities, easements, and other assets pursuant to Section 393.190; (3) approving the Applicants' First Amendment to the existing Territorial Agreement pursuant to Section 394.312; (4) finding that the amendment to the territorial agreement will not impair AmerenUE's certificates of public convenience and necessity, except as specifically limited by the amendment; (5) approving AmerenUE's change to its tariffs; (6) authorizing AmerenUE to perform in accordance with the terms of the First Amendment to Territorial Agreement and the Contract for Purchase and Sale of Distribution Facilities; and (7) granting such other relief as deemed necessary.

The Commission issued an Order and Notice on November 6, 2001, directing parties wishing to intervene in the case to do so by November 26, 2001. Notice was also sent to the county clerks, county commissions, legislative representatives, and newspapers in the affected areas. Applications to intervene were received and granted for the International Union of Operating Engineers Local No. 148, AFL-CIO; the International Brotherhood of Electrical Workers Local 1455, AFL-CIO; and the employees of Gascosage.² The Local 148 and Local 1455 requested leave to withdraw which was granted at the evidentiary hearing on January 8, 2002. The employees of Gascosage remain parties but presented no evidence.

On January 7, 2002, AmerenUE, Gascosage, and the Staff of the Missouri Public Service Commission filed a Nonunanimous Stipulation and Agreement stating that: a) the territorial agreement is not detrimental to the public interest and should be approved; b) the change in electric supplier is in the public interest for reasons other than rate differential and should be approved; and c) the transfer and assignment of assets between AmerenUE and Gascosage is not detrimental to the public interest and should be approved.

¹ Further statutory references are to the Revised Statutes of Missouri 2000 unless otherwise noted.

² The Gascosage employees that were granted intervention are: Karl Brandt, Deborah Alexander, Georgia Alexander, Wilford Alexander, Ethel M. Allen, Mike Allen, James Clark, Debbie Doyle, Kim Doyle, Robert Fox, Aaron George, Carmen Hartwell, Robert Hathaway, Travis Hauck, Brent Holtsclaw, Ray Howser, Beverly Hueston, Dwight Humphrey, Donna Irvin, Dawn Keeth, Shawn Lipscomb, Tony Martin, Travis Martin, Wilbert Medlen, Billy Null, Larry Prater, Janet Rigsby, Craig Rivera, JR Scott, Robbie Yoakum, and Gayle Prater.

The Office of the Public Counsel was not a signatory to the agreement. Public Counsel refused to take a position regarding whether the application in its entirety is detrimental or beneficial to the public interest. Public Counsel stated that it objected to the stipulation and agreement and requested that the Commission consider all the relevant factors and not base its decision solely on the agreement of the other parties. Because the Commission was already holding an evidentiary hearing on the issues, Public Counsel did not request that a hearing be held on the stipulation and agreement.

AmerenUE filed direct testimony on October 30, 2001, and Gascosage filed direct testimony on November 28, 2001. Rebuttal testimony was filed by Staff on December 18, 2001.

The Commission held an evidentiary hearing on January 8, 2002. All parties were represented at the evidentiary hearing with the exception of the unions whose request to withdraw was granted at the hearing.

One individual, Mr. Sidney John Doerhoff, although not an intervenor in the case, was granted permission to present oral testimony at the evidentiary hearing. Mr. Doerhoff was also subject to cross-examination. Public Counsel did not present any direct or rebuttal testimony; however, the Public Counsel did cross-examine witnesses and present exhibits on cross-examination.

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.

AmerenUE is a public utility engaged in providing electric service to the public in the state of Missouri, subject to the jurisdiction of the Commission. AmerenUE's principal place of business is located in St. Louis, Missouri. Gascosage is a rural electric cooperative corporation engaged in distributing electric energy and service to its members in Camden, Miller, Maries, Phelps, and Pulaski Counties in Missouri. Gascosage's principal place of business is located in Dixon, Missouri. Gascosage is not subject to Commission regulation of its service or rates.

AmerenUE and Gascosage previously submitted a territorial agreement that was approved by the Commission in Case No. EO-98-279.³ Under the approved territorial agreement, the Applicants have specifically designated boundaries for the provision of electric service to new structures in Camden, Miller, Maries, Phelps, and Pulaski Counties. In the current application, the Applicants' request to amend their territorial agreement by modifying the designated boundaries in Camden and Miller Counties.

³ *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.*

11 Mo. P.S.C. 3d

As part of the agreement, the electric supplier for approximately 1200 structures will be changed from AmerenUE to Gascosage. In order to provide service to these customers, certain assets described in the Contract for Purchase and Sale of Distribution Facilities will also be transferred from AmerenUE to Gascosage. Thus, the parties have requested that the Commission approve the transfer of assets, the change of electric suppliers, and the amendment to the territorial agreement.

The Applicants provided a metes and bounds description of the amended electric service areas and maps depicting the areas. The amended territorial agreement does not affect the rights of any other electric service provider in the territory.

The standard for approval of the territorial agreement and the transfer of assets is that the territorial agreement and the transfer are not detrimental to the public interest. The standard for approval of a change of electric suppliers is that the transfer is in the public interest. Thus, the Commission will examine all the relevant factors to determine the benefits and detriments of this proposal.

Elimination of the Duplication of Facilities

The first factor the Commission will consider in deciding the appropriateness of the amendment to the territorial agreement is the extent to which the agreement eliminates or avoids unnecessary duplication of facilities. The Commission previously found the territorial agreement between the parties to eliminate the duplication of facilities. Gascosage's witness testified that the territorial agreement would continue to eliminate any future duplication of facilities because there will continue to be exclusive rights, with regard to these companies, to serve customers within the boundaries of the amended territorial agreement. The amendment to the agreement, as in the original agreement, designates the boundaries of the exclusive electric service area for service of new structures.

The Commission finds that the agreement continues to be designed to avoid duplication of facilities. The Commission finds that approval of the territorial agreement signed by AmerenUE and Gascosage would avoid future duplication of facilities.

Ability to Provide Adequate Service

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. Under the terms of the amendment to the territorial agreement, approximately 1200 customers and 225 miles of electric line will be transferred to Gascosage. Gascosage currently serves approximately 7,800 customers with 1,265 miles of electric distribution line. Gascosage presented testimony that it has 32 full-time employees and has hired three new employees in anticipation of the application being approved. Gascosage also presented testimony that it has adequate equipment and main office facilities to provide service to the additional customers.

No party indicated any concern or presented any evidence questioning the ability of Gascosage to provide adequate service to the customers in this service area. There was also no evidence presented which would lead the Commission to conclude that AmerenUE's ability to provide service to its remaining customers would be compromised by this transfer.

The Commission finds that AmerenUE and Gascosage 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 amended territorial agreement.

Effect on Current Customers

The third area for Commission concern is the effect of approval of the territorial agreement on customers of the Applicants. The Applicants presented testimony that the transfer of assets and the change of electrical supplier that will result from the approval of the amendment to the territorial agreement will impact the 1200 customers whose service will be switched.

The evidence showed that the effects on the current customers of Gascosage were positive. Gascosage presented testimony that no rate increase was expected to its current customers because of the proposed amendment to the territorial agreement. Gascosage and AmerenUE also presented substantial evidence that many of Gascosage's current customers would benefit from proposed future improvements to the system.

AmerenUE's Brumley substation presently provides electric service to many of the customers that are proposed to be transferred. After the transfer, Gascosage intends to connect the transferred facilities into the transmission grid of its transmission cooperative, Sho-Me Power Cooperative. Sho-Me Power plans to build a 69 kV transmission line from its Montreal substation to Brumley. Sho-Me Power's transmission lines will be in a better location to serve the Equiline pump station in Pulaski County than AmerenUE's lines which are currently serving the pump station. There was no disagreement that this was a more desirable arrangement for providing electric service in that area.

There was also evidence presented that the customers in the proposed transfer area and the area itself are more similar to the customers and service area of Gascosage than AmerenUE's typical customer and service area. Because of the location of the customers within the service area, they are currently being served by older facilities that have had some service problems in the past. The Applicants presented evidence of prior service complaints brought against AmerenUE by customers in the proposed transfer area.

In the southeastern corner of Gascosage's service territory there are several small towns currently being served by a single feeder line. The Applicants presented evidence that by altering the service area in the manner proposed, Gascosage, through its generation and transmission cooperative, Sho-Me Power, will be able to provide additional substations in its service territory and provide loop feed service between the communities of Brumley, Ulman, and Iberia. This will provide enhanced service to Gascosage's current customers in these areas and to the customers transferred from AmerenUE. The testimony of the Applicants and from Staff showed that loop feed transmission would improve electric service reliability and respond to the previous customers' requests for improved service.

Gascosage also has plans to build additional three-phase lines and, in its long-range plan, intends to build several distribution loop feeds that will provide the areas of Crocker and Brumley with greater reliability. The additional three-phase line will also help regulate voltage problems in the area. The evidence showed that

11 Mo. P.S.C. 3d

for engineering reasons, it would not be economically feasible for AmerenUE or Gascosage to make these future modifications without the realignment of territory as proposed in the application.

No action will be required on the part of the customers for the cutover, and only a momentary outage will occur. The Commission finds that after the transfer, Gascosage will be able to safely and adequately provide electric service to the transferred customers. In addition, the Commission finds that for some customers the service will be provided more efficiently and more reliably.

Testimony regarding the rates for the transferred customers was also presented. Gascosage has a different rate structure than AmerenUE. Because of the different rate structures, the rate changes will vary depending on the usage of the customer. The "customer charge" will increase from \$7.25 for AmerenUE to \$15.00 for Gascosage. This is the cost to the customer regardless of the amount of electricity used in a month. After payment of the "customer charge," a customer's annual bill will increase or decrease depending on the time of year and amount of electricity used. The evidence showed that, generally, if a customer has a high summer usage then Gascosage rates are more favorable. The evidence also generally showed that if a customer has a low usage the annual electric cost will increase.

Public Counsel did not take a position as to the benefit or detriment to the general public of these transfers. Public Counsel provided a table showing a comparison of AmerenUE and Gascosage's rates for the customers in the transfer area during its cross-examination of AmerenUE's witness, and the parties stipulated to its admission. Public Counsel did not, however, present any witness or other evidence to analyze this information. Gascosage's witness testified that merely looking at the percentage increase or decrease to a customer's annual bill would be misleading. For instance, Mr. Greenlee testified that if a customer had a very low usage for the year, the increase would appear as a very large percentage, but the actual dollar increase may be very small. Also, many of the customers have more than one meter or do not use the location as their primary residence. These factors may skew the overall results.

The Commission has considered all the relevant evidence related to the effect on current customers of AmerenUE and Gascosage including rate increases and decreases, increased efficiency, and increased reliability. Even though some customers may face increased rates, the Commission finds that based on the evidence in this record, the overall effect of the amendment to the territorial agreement and the transfer of assets would not be detrimental to the public interest. The Commission also finds that the change of electric supplier is in the public interest.

The Commission further finds that the approval of this territorial agreement will not impair AmerenUE's existing certificates of public convenience and necessity except as specifically limited by the territorial agreement.

There was some argument with regard to the effect on AmerenUE's current customers. The only evidence provided on this issue was from Staff's witness who stated that approval of the agreement could ultimately result in a increase in the rates paid by the remaining AmerenUE customers. The possible increase will only

be known within the context of a rate case. Thus, Staff requested that the Commission make clear that it is not making any judgment as to the ratemaking treatment that will be afforded to this transaction in any subsequent ratemaking proceeding. The Commission agrees with Staff and will not prejudge any issue as to the ratemaking treatment for this transaction that will result in future cases.

Other Costs and Safety Benefits

Fourth, the Commission will consider a category of other cost and safety benefits attributed to the proposed territorial agreement. AmerenUE presented testimony that the agreement will permit the company to prudently employ its capital resources. The parties also presented evidence that the amended agreement will continue to prevent the duplication of facilities. Gascosage's witness testified that the cooperative will provide a quick response to any service problems because its trouble response personnel live in or near the customer's area.

The Applicants provided a Tax Impact Statement as Exhibit 4 to their verified application. The tax impact statement showed that because of the differing tax rates of the two companies, certain political subdivisions in the affected counties would lose tax revenue. These political subdivisions include school districts, road districts, libraries, senior citizens centers, cities, fire protection districts, an ambulance district, a county health district, and sheltered workshops.

Mr. Doerhoff, although not a party to this case, was granted permission to testify. He testified about the effect on the school districts of the lost revenue. Mr. Doerhoff stated that there are mechanisms within state law that will allow the school districts to make up a majority of the lost tax revenue after the first year. Mr. Doerhoff expressed his disappointment that the Applicants had not proposed a reimbursement plan to the school district for their lost revenue. Mr. Doerhoff suggested several remedies including cash payments and scholarship plans that he suggested the Commission consider. Mr. Doerhoff admitted that it is possible that the proposed new facilities of Gascosage could offset the lost tax revenue and eventually cause an increase in tax revenues for some local political subdivisions. In addition, there was testimony that the construction of the additional facilities could encourage growth in the area and cause additional tax revenues from other commercial and residential development.

The Commission has considered fully Mr. Doerhoff's suggestions. The Commission finds that even though it sympathizes with Mr. Doerhoff's position, the Commission does not have authority to order the type of monetary remedy that he suggests. In weighing the benefits and detriments to the public interest, the Commission must consider the negative tax impact in light of the other benefits including increased reliability and efficiency. The Commission must also consider that the additional facilities proposed by Gascosage and Sho-Me Power may ultimately increase the tax revenue for the affected areas. The Commission finds that although there is a negative tax impact projected for the first year in the affected counties, the weight of the evidence proves that the proposed transactions are in the public interest and are not detrimental to the public interest.

Conclusions of Law

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

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of AmerenUE pursuant to Section 386.250 and Chapter 393. 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 and Section 394.312.

When a cooperative enters into a territorial agreement with a regulated public utility the agreement must be approved by the Commission after hearing.⁴ The Commission may approve a territorial agreement if the agreement in total is not detrimental to the public interest.⁵ Based on the findings of fact it has made, the Commission concludes that the territorial agreement proposed by AmerenUE and GascoSage is not detrimental to the public interest and should be approved.

The Commission may approve a change in electric supplier if the change is in the public interest for a reason other than rate differential.⁶ Based on the findings of fact it has made, the Commission concludes that change in electric supplier for approximately 1200 structures in and around the cities of Brumley and Ulman from AmerenUE to GascoSage is in the public interest and should be approved.

The Commission has jurisdiction to approve a sale, transfer and assignment of assets between AmerenUE and GascoSage.⁷ The standard for approval for a transfer of assets is that the transfer will not be detrimental to the public interest.⁸ Based on the findings of fact it has made, the Commission concludes that the sale, transfer and assignment of assets between AmerenUE and GascoSage is not detrimental to the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the First Amendment to Territorial Agreement attached to this order as Attachment A⁹ and signed by Union Electric Company, d/b/a AmerenUE, and GascoSage Electric Cooperative is approved.

2. That the change in electric supplier for approximately 1200 structures in and around the cities of Brumley and Ulman is approved.

⁴ Section 394.312.

⁵ Section 394.312.4.

⁶ Section 393.106.2.

⁷ Section 393.190.

⁸ *State ex. rel. Fee Fee Trunk Sewer Inc. v. Litz*, 596 S.W. 2d 466, 468 (Mo. App. E.D. 1980).

⁹ The attachments to the First Amendment to Territorial Agreement include: 1) Exhibit 1, a metes and bounds description of the electric service area of AmerenUE within Camden and Miller Counties, Missouri; 2) Exhibit 2, maps depicting the electric service areas of AmerenUE and GascoSage in Camden and Miller Counties, Missouri; and 3) a metes and bounds description of the electric service area of GascoSage within Camden and Miller Counties. Exhibit 2 is not included in Attachment A because of its size, but is available for viewing at the Commission's offices.

3. The Union Electric Company, d/b/a AmerenUE, is authorized to sell, transfer and assign to Gascosage Electric Cooperative the assets, as more particularly described in the Contract for Purchase and Sale of Distribution Facilities.
4. Union Electric Company, d/b/a AmerenUE, is authorized to perform in accordance with the terms of the First Amendment to Territorial Agreement and the Contract for Purchase and Sale of Distribution Facilities, and to enter into and execute all other documents reasonably necessary and incidental to the performance of the transactions.
5. That no more than 30 days after the effective date of this order, Union Electric Company, d/b/a AmerenUE, shall file revised tariff sheets in compliance with the First Amendment to Territorial Agreement approved in Ordered Paragraph 1.
6. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the assets herein involved.
7. That the Commission reserves the right to consider any ratemaking treatment to be afforded the assets herein involved in later proceedings.
8. This Report and Order shall become effective on February 3, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

Editor's Note: Attachment A, the First Amendment to Territorial Agreement, has not been published. If needed, this document is available in the official files of the Public Service Commission.

In the Matter of the Proposed Change to Southwestern Bell Telephone Company's General Exchange Tariff, P.S.C. Mo. No. 35, Section 47.

*Case No. TT-2002-370
Decided February 5, 2002*

Rates § 114. The Commission approved Southwestern Bell's emergency promotion to be offered to customers affected by an ice storm. The Commission allowed Bell to revise its tariff to allow Bell to waive installation charges and one month of monthly charges for various call forwarding services.

ORDER APPROVING TARIFFS

On February 4, 2002, Southwestern Bell Telephone Company filed a tariff sheet designed to provide an emergency promotion to be offered to customers affected by the recent ice storm. The promotion will waive the installation charge and one month of monthly charges for various call forwarding services. Southwestern Bell also filed a motion for expedited treatment, asking for approval of the tariff sheet on February 5. Southwestern Bell states that the promotion would allow customers

11 Mo. P.S.C. 3d

affected by the ice storm to arrange for calls to be forwarded to another number or an answering service, without incurring an installation fee or charges for the first month of service. Southwestern Bell states that expedited treatment will allow the benefits of the promotion to be offered to customers immediately.

On February 5, the Staff of the Commission filed a memorandum in which it stated that it had reviewed the proposed tariff sheet, and recommended that the Commission approve it.

The Commission has reviewed the proposed tariff, the motion for expedited treatment, and the Staff recommendation, and will approve the tariff. Approval will allow customers affected by the ice storm and without power at their homes or businesses to forward their calls, without incurring initial costs, to other locations or to answering services.

IT IS THEREFORE ORDERED:

1. That the following tariff sheet submitted on February 4, 2002, by Southwestern Bell Telephone Company, and assigned Tariff No. 200200629, and subsequently docketed as Case No. TT-2002-370, is approved for service on and after February 5, 2002:

Southwestern Bell Telephone Company, P.S.C. Mo. No. 35

General Exchange Tariff, Section 47

1st Revised Sheet No. 12.10 canceling Original Sheet No. 12.10

2. That this order shall become effective on February 5, 2002.
3. That this case may be closed after February 6, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Application of Union Electric Company for Permission and Authority to Construct, Operate, Own, and Maintain a 345 Kilo-Volt (kV) Transmission Line in Jefferson, St. Francois, and Ste. Genevieve Counties, Missouri (“Rush Island-St. Francois 2”).

*Case No. EA-2002-131
Decided February 5, 2002*

Electric § 3. The Commission granted Union Electric Company a certificate of convenience and necessity to construct a new transmission line. Union Electric’s existing line did not supply enough electricity to meet customer demand, and building the proposed line was the most efficient way to meet that demand. The line would be built parallel and close to the existing line, which would minimize the width of the required right-of-way.

**ORDER GRANTING CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY**

On September 3, 2001, Union Electric Company filed an application with the Commission requesting authority to construct, own, and operate a transmission line in Jefferson, St. Francois, and Ste. Genevieve Counties. About 6 miles of the proposed line would be outside of Union Electric’s current service territory. Union Electric proposes to build a 345 kV line approximately 17 miles long parallel to an existing 345 kV line. Higher energy demand is causing an overloading of the existing line, and power flow on the existing line sometimes exceeds equipment ratings. Furthermore, an outage on the existing line would cause other lines to exceed their equipment ratings, possibly leading to outages or the need to use more expensive generation. Union Electric states that building the proposed line is the most efficient way to relieve these overloading conditions. Union Electric has given notice to affected property owners and public officials in the area, and conducted a public workshop to provide information about the proposed line. In an order issued on September 19, 2001, the Commission gave notice and allowed interested entities the opportunity to intervene. No applications to intervene were filed. 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.¹ Since no one has asked permission to intervene or requested a hearing, the Commission may grant the relief requested based on the application.

On January 29, 2002, Staff filed a Recommendation in which it recommends that the Commission grant the application. Staff notes that Union Electric plans to use an existing 345 kV transmission line corridor to minimize the width of the required additional right-of-way. Staff agrees with Union Electric that the existing

¹*State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

11 Mo. P.S.C. 3d

line is overloaded many times during the year, and that loss of the existing line could impose significant constraints in delivering power. Staff states that placement of the new structures next to the existing structures will minimize impacts on landowners. Staff states that the proposed transmission line is necessary for Union Electric to be able to continue to provide reliable service to its customers. The proposed line will relieve the heavy loading on an existing line and enhance system reliability.

The Commission finds it is necessary and convenient for the public interest for Union Electric to construct and operate the transmission line as described in the application, and so will grant a certificate of convenience and necessity.

IT IS THEREFORE ORDERED:

1. That Union Electric Company is granted a certificate of public convenience and necessity to construct, own, operate and maintain a transmission line in Jefferson, St. Francois, and Ste. Genevieve Counties as described in its application filed on September 3, 2001.
2. That nothing in this order shall be considered a finding by the Commission of the reasonableness of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.
3. That the Commission reserves the right to consider the ratemaking treatment to be afforded the expenditures and properties herein involved, and the resulting cost of capital, in any later proceeding.
4. That this order shall become effective on February 25, 2002.
5. That this case may be closed after February 26, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of an Investigation into Public Utility Emergency Preparedness.*

*Case No. OO-2002-202
Decided February 14, 2002*

Security Issues § 1. The Commission added to the record the Utility Committee Final Report for the Missouri Security Panel. The Commission was represented on the Utility Committee and participated in the preparation of the report. The Commission found that adding the report to the record would assist the Commission, the Staff, and Missouri utilities in identifying the practices, issues or matters that present the highest priority to mitigate or deter threats to public utility operations and services presented by terrorist activities.

Public Utilities § 1. The Commission added to the record the Utility Committee Final Report for the Missouri Security Panel. The Commission was represented on the Utility Committee and participated in the preparation of the report. The Commission found that adding the report to the record would assist the Commission, the Staff, and Missouri utilities in identifying the practices, issues or matters that present the highest priority to mitigate or deter threats to public utility operations and services presented by terrorist activities.

**ORDER ACCEPTING REPORT OF THE UTILITY COMMITTEE OF THE
STATE OF MISSOURI SECURITY PANEL**

On February 8, the Staff of the Missouri Public Service Commission filed a motion requesting the Commission to accept the Utility Committee Final Report for the Missouri Security Panel for filing in this case. The Commission was represented on the Utility Committee and participated in the preparation of the report.

The Utility Committee had four major goals. One, to identify and assess critical utility related assets for safeguarding management; two, to identify the best practices as they relate to deterring, preventing and responding to a terrorist threat or incident; three, those issues, which might require action by the Missouri General Assembly; four, to identify any type of state, local or federal regulation that might hamper or prevent the implementation of various recommendations.

This case was established to address the state of preparedness of Missouri utilities to respond to natural or manmade disasters and to consider preventive or protective measures. The Commission has found that there is a continuous need to disseminate information and to review procedures and prepare responses for natural and man-made disasters that affect Missouri utilities and their customers in meeting essential needs for energy, communications, water and sanitary services critical to the health, welfare and safety of citizens and vital to economic development and performance.

The Commission has reviewed the report. Adding this report to the record in this case will assist the Commission, the Staff and Missouri utilities in identifying the practices, issues or matters that present the highest priority to mitigate or deter threats to public utility operations and services presented by terrorist activities.

*See page 000 for another order in this case. The case number in this case was later changed to AO-2002-202.

11 Mo. P.S.C. 3d

Staff noted that it would file an updated report regarding a prior filing by the Staff and regarding a survey sent to utilities. Under the Commission's order issue January 24, 2002, a follow-up Staff report is due not later than May 24, 2002.

IT IS THEREFORE ORDERED:

1. That the Staff's motion is granted and the Utility Committee Final Report to the Missouri Security Panel shall be accepted and incorporated into the record in this case.
2. That this order shall become effective on February 24, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Thornburg, Regulatory Law Judge

In the Matter of the Joint Application of Union Electric Company and Lewis County Rural Electric Cooperative for an Order Approving the Change in Electric Supplier for Reasons in the Public Interest and Authorizing the Sale, Transfer and Assignment of Certain Electric Distribution Facilities, Easements and other Rights Generally from Union Electric Company to Lewis County Rural Electric Cooperative.

*Case No. EM-2001-695
Decided February 14, 2002*

Electric §4.1. The Commission approved an application filed by the Union Electric Company d/b/a AmerenUE and by the Lewis County Rural Electric Cooperative, requesting approval of a change of electrical supplier affecting about 550 structures and approval of the sale and transfer of assets related to supplying electricity to these structures with the change and transfer from UE to Co-op.

**ORDER APPROVING APPLICATION
FOR CHANGE OF ELECTRIC SUPPLIER
AND FOR
SALE AND TRANSFER OF ASSETS**

Syllabus:

This order approves an application filed by the Union Electric Company d/b/a AmerenUE (UE) and by the Lewis County Rural Electric Cooperative (Co-op) requesting approval of a change of electrical supplier affecting about 550 structures and approval of the sale and transfer of assets related to supplying electricity to these structures with the change and transfer from UE to Co-op.

Standard of Review:

The application was presented pursuant to Sections 393.106, 393.190 and 394.315, RSMo 2000. In addition, the Commission's administrative rules establish the pleading requirements for a sale and transfer of assets and a change of supplier at 4 CSR 240-2.060(7) and (15). The standard for approval of the sale of assets is that the sale is not detrimental to the public interest. The standard of approval for a change of electrical supplier is that the change would be in the public interest.

The requirement of a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no proper party is granted intervention and neither the Commission's Staff nor the Office of the Public Counsel requests a hearing, the Commission may determine that a hearing is not necessary and that the applicant may submit its evidence in support of the application by verified statement. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989). No applications for intervention were filed. No party has requested a hearing.

The Application:

UE and Co-op (together the "applicants") filed their application on June 15, 2001, requesting that the Commission approve a change of electric supplier from UE to Co-op affecting approximately 550 structures in and around the municipalities of Durham, Maywood, Novelty, Monticello, Medill, Arbela and Granger in the counties of Clark, Knox, Lewis and Scotland.

UE proposes to sell and Co-op to purchase identified electrical distribution facilities and to transfer easements related to the proposed change of electrical supplier. UE and Co-op have requested that the Commission approve the sale of these facilities and transfer of easements. The purchase price for the transferred electrical distribution facilities is \$700,000.

UE and Co-op previously notified affected customers and held public meetings to obtain public input. The application describes these efforts and presents UE's and Co-op's position that the change of supplier and the transfer of assets will be in the public interest and will not be detrimental to the public interest. The Commission provided notice of the application to the affected counties and to public officials representing this area of the state. The Commission also required UE to provide another customer notice after the application was filed.

According to the applicants, the transfer of assets will affect tax revenues of political subdivisions in Clark, Knox, Lewis and Scotland Counties. The Commission forwarded the applicants' tax impact statement to the county clerks in these counties under a separate notice.

According to the applicants, the structures proposed for transfer are located in Co-op's service territory under a Territorial Agreement approved by the Commission in a Report and Order dated August 1, 2000, in Case No. EO-2000-630.

The boards of UE and Co-op have approved the transactions presented. According to UE and Co-op re-aligning electrical services and facilities will result in cost savings to UE and the cost effectiveness of Co-op's operations will improve. The applicants state that the reliability and quality of electrical service to the affected

11 Mo. P.S.C. 3d

customers will improve because the integration of the transferred service facilities into Co-op's system will result in a "looped" configuration with spare capacity to better serve normal and severe service demands.

Procedural History:

The application was filed on June 15, 2001. The Commission directed notice to be given and provided a tax impact notice on June 26, 2001. UE filed the ordered customer notice on August 14, 2001. No parties requested to intervene.

A prehearing conference was held on September 28, 2001. UE, Co-op and the Commission's Staff filed a Nonunanimous Stipulation and Agreement on January 7, 2002. The Office of the Public Counsel did not join in the agreement.

All the parties requested the Commission to stay the procedural schedule to consider the agreement. The Commission suspended the procedural schedule in an order issued on January 15, 2002, but reserved the scheduled hearing date of March 1, 2002, in the event that it was needed. However, no party has requested a hearing or submitted a proposed procedural schedule requiring any further proceedings.

Staff filed its suggestions in support of the agreement on January 14, 2002. All the parties, including Public Counsel, filed a statement regarding the agreement on January 16, 2002, affirming that no party was requesting a hearing and providing for the Public Counsel to file a position statement. The Public Counsel filed a position statement on January 22, 2002. Public Counsel does not oppose the application and does not request a hearing.

Findings – Fact Findings and Legal Conclusions:

The Commission's findings are made based upon the verified joint application filed by UE and Co-op, Staff's suggestions and the information provided by each party. The Commission applies the standard of review presented above.

Union Electric Company d/b/a AmerenUE is a Missouri corporation and a public utility engaged in providing electric and gas service in Missouri under the jurisdiction of the Commission. Lewis County Rural Electric Cooperative is a Chapter 394 rural electrical cooperative engaged in the distribution of electrical energy and service to its members in Lewis, Clark, Shelby, Knox, Adair, Schulyer, Scotland and Marion Counties, Missouri.

Co-op has authority to provide service to the structures presented in the application and the area to be served is within Co-op's service area under a prior Territorial Agreement between UE and Co-op approved in Case No. EO-2000-630.

Neither UE nor Co-op has final unsatisfied judgments or decisions against it from any state or federal agency or court that involve customer service or rates against them. UE has, from time to time, pending actions in state and federal agencies and courts that do involve customer service or rates. UE has no annual report or assessment fees overdue to the Commission.

The contract for the sale of facilities from UE to Co-op presented in this case was attached to the joint application as Exhibit 1. The facilities are essentially electrical system distribution facilities and easements and rights necessary or useful to provide electrical service to the approximately 550 structures for which the

service supplier is proposed to change from UE to Co-op. The facilities to be sold and transferred are listed in Exhibit B of Exhibit 1 to the application.

The change of supplier from UE to Co-op will affect structures in the cities of Durham, Maywood, Novelty, Monticello, Medill, Arbela and Granger, Missouri. Affected customers were listed in Exhibit A of Exhibit 1 to the application. The application presents a local tax impact and the tax impact statement filed with the application was provided to the county clerks in Clark, Knox, Lewis and Scotland Counties.

The Commission's Staff investigated the facilities of both UE and Co-op and the specific facilities that are transferred under Exhibit 1 and conducted a field inspection that confirmed the applicants' representations. Staff determined that the proposed changes and integration of facilities would allow Co-op to provide reliable electric service to customers.

The application presents a positive financial impact to UE in cost savings and to Co-op in obtaining additional customers with a higher pole-mile density than exists overall in Co-op's distribution system. Customers should obtain more reliable services due to the looped configuration and additional capacity Co-op will gain in integrating the former UE facilities and also due to more rapid service response times based upon Co-op's better positioning of response service personnel and equipment in the area affected.

Because Co-op has a higher availability charge than UE (\$16 compared to \$7.25) low usage customers affected by the change of supplier may see a small annual increase in their bills but because of rate and seasonal rate differences presented compared to UE higher usage customers will have an overall cost decrease. Customer usage patterns will affect the overall annual bill.

Staff indicated that no tariff filings would be necessary because service areas defined in the UE's tariffs were previously amended by UE and approved by the Commission. Staff recommended that the Commission reserve and defer consideration of the ratemaking treatment to be afforded to the transaction to a subsequent case specifically addressed to ratemaking.

The Commission concludes that sale of assets is not detrimental to the public interest under the facts as found by the Commission. The Commission further concludes that the proposed change of electrical supplier should be approved because the change is in the public interest for reasons other than a rate differential.

IT IS THEREFORE ORDERED:

1. That the application of Union Electric Company d/b/a AmerenUE and Lewis County Rural Electric Cooperative is hereby approved.
2. That Union Electric Company d/b/a AmerenUE and Lewis County Rural Electric Cooperative, may take the actions necessary and as authorized in this proceeding to carry out the transaction as described in the application, including affecting the described change in electric supplier and completing the sale and transfer of assets presented.
3. 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 this transaction in any subsequent proceeding.

11 Mo. P.S.C. 3d

4. That the Commission's order shall not be deemed to be precedent for any future similar application.
5. That the hearing scheduled for March 1, 2002, is canceled.
6. That this order shall become effective on February 24, 2002.
7. That this case may be closed on February 25, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Thornburg, Regulatory Law Judge

**In the Matter of the Application of UtiliCorp United Inc., a
Delaware Corporation, For Authority to Merge to Effect a
Name Change.***

*Case No. EM-2002-297
Decided February 21, 2002*

Electric §4. The Commission approved the proposed acquisition of the electrical facilities, as set out in detail in the application of UtiliCorp United Inc., subject to the five conditions set out in the recommendation of the Staff filed on February 4, 2002.

ORDER APPROVING MERGER

On December 21, 2001, UtiliCorp United Inc. filed an application under Section 393.190, RSMo 2000, with the Missouri Public Service Commission for approval of the merger between UtiliCorp and UtiliCorp Renaming Corporation, to effect a name change after the purchase by UtiliCorp of stock in Aquila, Inc.

After the Office of the Public Counsel requested an evidentiary hearing by pleading filed on January 11, 2002, the Commission issued a procedural order on January 16, 2002, setting a prehearing conference and requesting a procedural schedule by February 21, 2002. On January 22, 2002, UtiliCorp filed its Motion for Reconsideration of the procedural order. The Commission held a prehearing conference as scheduled on January 29, 2002.

On January 30, 2002, Staff filed a Status Report, discussing discovery it had performed. In its filing, Staff indicated its willingness to either provide a Recommendation, should the Commission not order a hearing as requested by the Public Counsel, or file testimony for any hearing that the Commission might order, should the Commission order a hearing as requested by the Public Counsel. On January 31, 2002, the Commission ordered Staff to file its Recommendation, which Staff did on February 4, 2002.

In a pleading filed January 7, 2002, Staff noted that UtiliCorp sought Commission approval only over the statutory merger between UtiliCorp and Renaming, the stated sole purpose of which was to change the UtiliCorp name. Staff's Recom-

*This order contains corrections approved by the Commission in an order issued on February 22, 2002.

mentation noted that UtiliCorp did not seek Commission authorization to (1) issue UtiliCorp shares of common stock and acquire with these shares, through a special acquisition subsidiary, 50% of the outstanding publicly held Class A common shares of Aquila; and (2) to merge Aquila and the special acquisition subsidiary in a short-form merger and thereby own 100% of Aquila's Class A common shares. Accordingly, Staff's Recommendation addressed only the former transaction. (The Commission notes, however, that the discovery Staff conducted, and submitted to the Commission as a part of its Status Report, does address all three transactions.)

In its Recommendation, Staff recommended that the Commission approve UtiliCorp's Application, subject to four conditions.

First, Staff recommended that the Commission specify that nothing in the Commission's order will 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 this transaction in any subsequent proceeding. Staff noted that UtiliCorp had agreed to this condition, since it stated in its Motion for Reconsideration, "[i]n transactional dockets such as this case, ratemaking issues are not properly before the Commission."

Second, Staff recommended that the Commission state that the Commission's order must not be deemed precedent for any future transaction, even if the facts may be similar.

Third, Staff recommended that the Commission condition its approval on the premise that any adverse financial effects of this merger must be borne by UtiliCorp's stockholders and not by Missouri ratepayers.

Finally, Staff asks that the Commission require that all records pertaining to this transaction must be maintained at UtiliCorp's headquarters and made available to the Staff as the Staff deems necessary.

As a fifth condition, the Staff further recommended that if the merger is approved, rather than filing entirely new tariffs for its Missouri Public Service and St. Joseph Light & Power divisions, UtiliCorp, under its new name, should file adoption notices adopting the electric, gas, and steam tariffs on file for MPS and SJLP, similar in form to the ones that UtiliCorp filed in case number EM-2000-292.

UtiliCorp filed its pleading on February 6, 2002, stating that it had no objection to the first four of the conditions set out above. (UtiliCorp did not comment on the fifth condition.) On the same day, Public Counsel filed its pleading, stating that it agreed with or had no objection to all five of Staff's recommendations.

However, according to Public Counsel, under the third condition set out above, "the language should be even stronger, to wit, that the Commission condition its approval on the acceptance by [UtiliCorp] of the requirement that any adverse effects shall be borne by stockholders in UtiliCorp, under whatever name, rather than by Missouri customers." Public Counsel gave no reason for this request. The Commission finds that the additional language requested by Public Counsel is superfluous and unnecessary.

Also, according to Public Counsel, under the fourth condition set out above, the Commission should also "direct UtiliCorp, by whatever name, to make [the records of the transaction] available to Public Counsel as Public Counsel deems neces-

11 Mo. P.S.C. 3d

sary." Public Counsel gave no reason for this request. The Commission finds that the additional language requested by Public Counsel is superfluous and unnecessary.

The Commission has reviewed the application, documentation of the parties, and Staff's recommendation, and determines that approval of UtiliCorp's application is not detrimental to the public interest. The Commission will approve the application, with the conditions recommended by the Staff.

IT IS THEREFORE ORDERED:

1. That the proposed merger, as set out in detail in the application of UtiliCorp United Inc. filed on December 21, 2001, is hereby approved, subject to the five conditions set out in the recommendation of the Staff of the Missouri Public Service Commission filed on February 4, 2002.
2. That UtiliCorp United Inc. must file a notification with the Missouri Public Service Commission within 10 days after it has complied with this order.
3. That this order will become effective on March 3, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Hopkins, Senior Law Judge

**In the Matter of an Investigation into Various Issues Related to
UtiliCorp United Inc.'s Gas Supply Services Department.**

*Case No. GO-2001-249
Decided February 21, 2002*

Evidence, Practice and Procedure §8. The Commission approved a stipulation and agreement that provided that financial issues, including any issue relating to adjustments for capacity release and put and call options, would be address in an existing but separate proceeding.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND CLOSING CASE**

Syllabus:

This order resolves an investigation into alleged wrongdoing by the Gas Supply Services Department of UtiliCorp United, Inc., doing business as Missouri Public Service, by approving the parties' Unanimous Stipulation and Agreement and closing the case.

Procedural History:

On October 16, 2000, the Staff of the Missouri Public Service Commission moved the Commission to establish a case in order to investigate certain allegations of impropriety contained in an anonymous letter received by the Chair of the Commission on September 9, 2000. The allegations were that the Gas Supply Services Department of UtiliCorp United Inc., doing business as Missouri Public Service, had engaged in certain improper activities intended to increase corporate profits at the expense of Missouri ratepayers. On October 31, UtiliCorp responded to Staff's motion, denying the allegations of impropriety and supporting Staff's motion to open a case. The Commission issued its order Establishing Case and Directing Notice on November 9, 2000.

On October 1, 2001, the Staff of the Missouri Public Service Commission filed its investigation report in this case. Thereafter, on October 29, UtiliCorp United, Inc., filed its response to Staff's investigation report. UtiliCorp concurred with many, but not all, of the recommendations made by Staff in its investigation report. Therefore, on November 2, the Commission set a settlement conference for November 19. The settlement conference was attended by all parties and resulted in the settlement embodied in the Stipulation and Agreement now before the Commission.

The Unanimous Stipulation and Agreement was filed on January 24, 2002. The Stipulation and Agreement incorporates issues of financial impact, if any, into UtiliCorp's existing Purchased Gas Adjustment/Actual Charge Adjustment proceeding,¹ and adopts and implements recommendations made by Staff in its management audit, conducted as part of its investigation herein. On January 31, Staff filed its Suggestions in Support of the Stipulation and Agreement. Those Suggestions were designated "Highly Confidential" in the entirety.

Discussion:

In reviewing the Unanimous Stipulation and Agreement submitted by the parties, the Commission notes that²

[e]very decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

¹ The Purchased Gas Adjustment is universally referred to in the industry as the PGA. The Actual Cost Adjustment, in the same way, is referred to as the ACA. The PGA/ACA embodies a mechanism for dealing with highly volatile natural gas prices outside of a general rate case. In brief, each Local Distribution Company includes a PGA Clause in its Commission-approved tariff. This clause authorizes the company to make one scheduled winter and one scheduled summer PGA filing, and one unscheduled filing. These filings set the numerical values of various factors by which the rate paid by customers is determined. Rates are paid on an "interim, subject to refund" basis permitting adjustment in favor of the company or in favor of the ratepayers after an annual audit.

² Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

11 Mo. P.S.C. 3d

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The Stipulation and Agreement provides that financial issues, including any issue relating to adjustments for capacity release and put and call options, shall be addressed in UtiliCorp's existing PGA/ACA proceedings.³ The parties are free, in the PGA/ACA proceedings, to advocate or oppose any particular adjustment.

The Stipulation and Agreement further provides that UtiliCorp will implement the recommendations made by Staff in its management audit. UtiliCorp has further agreed to cooperate with Staff's compliance review with respect to these recommendations, including a future site visit by Staff.

The Stipulation and Agreement also provides that UtiliCorp shall implement a particular reporting format to document its gas supply allocation procedures. Staff and Public Counsel will review the allocation procedures and the resulting cost impact and propose such modifications and adjustments as they deem necessary. Staff, in particular, has the option of requesting additional documentation.

The Stipulation and Agreement also provides that the Commission will close its investigation into the allegations made by the anonymous letter and that UtiliCorp will share with Staff and Public Counsel any documents resulting from anonymous letter investigations in other states, subject to applicable Missouri statutes and Commission protective orders. In doing so, UtiliCorp will not waive any privileges, objections, defenses or positions that it might have respecting such documents.

The Stipulation and Agreement provides that it will become effective as directed by the Commission or within 30 days of the Commission's order approving it. The Stipulation and Agreement also includes various reservations, waivers, and the like as commonly found in such documents.

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.⁴ 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.⁵ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on January 24, 2002, is approved. A copy of the Unanimous Stipulation and Agreement is attached hereto as Attachment A.
2. That UtiliCorp United, Inc., is ordered to comply with the terms of the Unanimous Stipulation and Agreement.
3. That this Order shall become effective on March 3, 2002.

³ Case Nos. GR-99-435, GR-2000-520 and GR-2001-461.

⁴ Section 536.060, RSMo Supp. 2001.

⁵ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

4. That this case may be closed on March 4, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, 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 files of the Public Service Commission.

In the Matter of the Tariff Filing of Missouri Public Service (MPS), a Division of UtiliCorp United Inc., to Implement a General Rate Increase for Retail Electric Service Provided to Customers in the Missouri Service Area of MPS.

*Case No. ER-2001-672
Decided February 21, 2002*

Electric §22. The Commission approved a stipulation and agreement that provided for a revenue decrease of \$4,2500,000, approximately 1.43 percent, for Utilicorp's Missouri Public Service division.

Electric §20. The Commission approved a stipulation and agreement that provided for allocation of a rate decrease as an equal percentage decrease to all nonresidential classes, with the residential class receiving 50 percent of the percentage decrease allocated to the nonresidential classes.

ORDER APPROVING STIPULATION AND AGREEMENT

On June 8, 2001, Missouri Public Service, a division of UtiliCorp United, Inc., submitted to the Commission proposed tariff sheets intended to implement a general rate increase for electric service provided to retail customers in its Missouri service area. The proposed tariff sheets bear a requested effective date of July 9, 2001. The proposed electric service tariff sheets are designed to produce an annual increase of \$49,352,769 in the Company's revenues, exclusive of franchise and occupational taxes, a 16.86 percent increase. On June 21, the Commission suspended Company's proposed tariff sheets for 120 days plus six months, until May 6, 2002.

On June 27, the Commission granted the unopposed application to intervene of the Sedalia Industrial Energy Users Association.¹ On August 6, the Commission granted the unopposed applications to intervene of the City of Kansas City and of

¹ An unincorporated, voluntary association consisting of Pittsburgh Corning Corporation, Waterloo Industries, Hayes Lemmerz International, Hawker Industries, Inc., Alcan Cable Co., Gardner Denver Corporation, American Compressed Steel Corporation, and Stahl Specialty Company. Each of these entities is an industrial energy user located in or near Sedalia, Missouri, and a major electric customer of MPS. Together, they employ some 3,815 persons. For convenience, the Sedalia Industrial Energy Users Association shall be referred to herein as SIEUA.

11 Mo. P.S.C. 3d

the County of Jackson, and the contested application of the Missouri Joint Municipal Electric Utility Commission.² On August 14, 2001, the Commission set the test year and adopted a procedural schedule. On November 7, 2001, the Commission held Local Public Hearings in Raytown and Warrensburg, Missouri. Also on November 7, the Commission issued its Order Regarding Motion to Compel Discovery and Revising Procedural Schedule.

On December 6, 2001, the Staff of the Commission filed its motion for leave to file an excess earnings complaint against UtiliCorp. On December 21, Staff filed its complaint, asserting Staff's position that UtiliCorp has excess earnings amounting to about \$20 million annually.³ Also on December 21, Staff filed its Motion to Consolidate Case Nos. ER-2001-672 and EC-2002-265. In its motion, Staff explained that Case No. EC-2002-265 arose out of its preparation for trial in Case No. ER-2001-672. The Commission by its order on January 18, 2002, authorized Staff to pursue its overearnings complaint and consolidated the two cases.

On January 25, 2002, the Commission convened an evidentiary hearing. At that time, the parties advised the Commission that a settlement was imminent. The Commission canceled the schedule evidentiary hearing, issuing its Order Suspending Procedural Schedule and Directing Filing on January 31. On February 5, the Commission's Staff moved for leave to file the Unanimous Stipulation and Agreement of the parties; accompanying Staff's motion was the Unanimous Stipulation and Agreement, duly executed by all parties of record or their representatives. A copy of the Unanimous Stipulation and Agreement is attached to this order as Attachment A.

On February 8, UtiliCorp filed its Proposed Findings of Fact and Conclusions of Law. On February 11, Staff filed its Suggestions in Support of the Unanimous Stipulation and Agreement. On the same day, the Office of the Public Counsel and Intervenors Jackson County, Missouri; United States Executive Agencies; Kansas City, Missouri; and SIEUA filed their joint motion for expedited treatment, pointing out that the Unanimous Stipulation and Agreement provides for a rate reduction and that every day that passes prior to the approval of that agreement, consequently, costs UtiliCorp's ratepayers money that cannot be recovered.

The parties agree that the Unanimous Stipulation and Agreement resolves all issues in these consolidated cases. The parties filed a Joint List of Issues on January 18, which contained nearly two dozen contested issues. In reaching the settlement represented by the Unanimous Stipulation and Agreement, the parties compromised some of these issues and deferred others. Additionally, The parties agreed to the continued exchange of information in an agreed-upon format. The parties further agreed that all of the prepared testimony prefiled in this case shall be received into the record.

In summary, the Unanimous Stipulation and Agreement provides:

² A political subdivision of the state of Missouri, organized pursuant to Section 393.700, RSMo 2000, *et seq.*, with 55 member municipalities.

³ Staff states that UtiliCorp has \$37.2 million in annual excess earnings, however, Staff expects this figure to be reduced by \$17 million during the true-up.

1. Revenue requirement:

The Unanimous Stipulation and Agreement provides for a revenue *decrease* of \$4,250,000, approximately 1.43 percent, for UtiliCorp's Missouri Public Service division.

2. Rate Design:

The Unanimous Stipulation and Agreement provides for allocation of the rate decrease as an equal percentage decrease to all nonresidential classes, with the residential class receiving 50 percent of the percentage decrease allocated to the nonresidential classes. Each rate component shall be adjusted by the same percentage as the percentage adjustment to the revenue generated by that rate class.

3. Implementation:

The Unanimous Stipulation and Agreement provides that UtiliCorp will implement conforming tariff sheets within 15 days of the effective date of the Commission's approval of the Unanimous Stipulation and Agreement and the Commission will permit UtiliCorp to file its tariff sheets on less than 30 days notice.

4. Moratorium:

The Unanimous Stipulation and Agreement provides that none of the parties, barring the occurrence of some extraordinary event, shall seek either an increase or a decrease in UtiliCorp's Missouri jurisdictional electric service revenues before January 1, 2003. This moratorium is not intended to restrict any power of the Commission.

5. True-up:

The Unanimous Stipulation and Agreement provides that no true-up proceeding is necessary in this case.

6. Reliability and Call Center Reporting:

The Unanimous Stipulation and Agreement provides that UtiliCorp will maintain certain indicators and provide them to the Commission's Staff on a quarterly basis through calendar years 2002 and 2003.

7. Depreciation:

The Unanimous Stipulation and Agreement provides that UtiliCorp shall adopt and implement for its Missouri Public Service service area the depreciation rates advocated by Staff, based on average service lives and recovering only the original cost of plant. Net salvage costs shall be treated as an expense for ratemaking purposes. Current levels of net salvage costs shall be booked as an expense and not be booked against accrued depreciation reserve. The parties are free to contest the treatment of future net salvage costs in the next case in which Missouri Public Service's rates are at issue.

8. Creation of a Class Cost of Service and Rate Design Case:

The Unanimous Stipulation and Agreement provides that the Commission shall establish a new and separate case examining class cost of service and rate design in UtiliCorp's Missouri jurisdictional electric service operations. The Commission shall make the parties to the current case parties to the new case.

9. Record-keeping:

The Unanimous Stipulation and Agreement provides that, beginning with the month of May 2002, UtiliCorp shall make available 45-days after it closes its monthly books for its Missouri jurisdictional electric service divisions, certain accounting data in a specified format.

11 Mo. P.S.C. 3d

10. Tariff Matters:

The Unanimous Stipulation and Agreement provides for the resolution of several matters respecting UtiliCorp's tariffs, including service area descriptions; charges for meter reading by special appointment; reconnection charges; charges for a temporary meter set; per foot charges for excess service line lengths; and the contents of tariff sheets 62 and 63.

11. Pending Motions and Issues:

The Unanimous Stipulation and Agreement provides that all pending motions and issues, not otherwise specifically addressed in the Unanimous Stipulation and Agreement, are withdrawn and shall not be raised again during the moratorium period.

12. Effectiveness:

The Unanimous Stipulation and Agreement provides that it shall become effective on the effective date of a Commission order approving it without modification or condition, and that it shall be null and void if the Commission modifies it or conditions it.

13. Admission of Prefiled Testimony:

The Unanimous Stipulation and Agreement provides that all of the testimony prefiled in this matter shall be admitted to the records so long as the Commission approves the Unanimous Stipulation and Agreement without modification or condition.

14. Reservations:

The parties included in the Unanimous Stipulation and Agreement certain reservations and conditions common to such agreements.

15. Contingent Waiver of Rights:

The Unanimous Stipulation and Agreement provides that, so long as the Commission approves its specific terms, the parties waive their right to call, examine and cross-examine witnesses; to present oral arguments or written briefs; to require the Commissioners to read the transcript of the proceedings; and to seek either rehearing or judicial review.

16. Rights to Disclose:

The parties included in the Unanimous Stipulation and Agreement certain terms regarding the submission to the Commission of written and verbal support for the approval of the agreement.

As noted, the Commission's Staff filed suggestions in support of the Unanimous Stipulation and Agreement. Therein, Staff points out that the reconciliation prepared by Staff for the hearing in this matter showed that UtiliCorp sought a revenue *increase* of approximately \$31 million annually while Staff sought a revenue *decrease* of approximately \$22 million annually. Against this background, a compromise revenue decrease of \$4.25 million represents a significant benefit to ratepayers. The parties agree that the rates set out in the sample tariff sheets attached to the Unanimous Stipulation and Agreement are just and reasonable. In resolving this case by an agreed settlement, the parties have not only saved the costs of extended litigation, but have spared the ratepayers the uncertainties necessarily consequent upon the protracted litigation of multiple issues with a large impact on rates.

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.⁴ In reviewing the Unanimous Stipulation and Agreement submitted by the parties, the Commission notes that⁵

Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. 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.⁶ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Unanimous Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on February 5, 2002, is hereby approved as a resolution of all issues in this case (See Attachment A).
2. That UtiliCorp United, Inc., is ordered to comply with the terms of the Unanimous Stipulation and Agreement.
3. That the proposed electric service tariff sheets (File No. 200101173) submitted on June 8, 2001, by Missouri Public Service, a division of UtiliCorp United, Inc., for the purpose of increasing rates for electric service to retail customers are hereby rejected.
4. That UtiliCorp United, Inc., shall file, no later than the 15th working day after the effective date of this Order, proposed tariff sheets in compliance with the Unanimous Stipulation and Agreement approved herein.
5. That Case No. EO-2002-384 is hereby established for the purpose of examining class cost of service and rate design in UtiliCorp United Inc.'s Missouri jurisdictional electric service operations. All of the parties to the present case are hereby made parties to Case No. EO-2002-384 and the Commission's Data Center shall add them as such to the service list in Case No. EO-2002-384.
6. That this order shall become effective on February 28, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, 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.

⁴Section 536.060, RSMo Supp. 2001.

⁵Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

⁶*State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

11 Mo. P.S.C. 3d

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Petitioner, vs. Wightman Enterprises, Inc., doing business as Lee's Mobile Homes, Respondent.

Case No. MC-2002-12
Decided February 26, 2002

Manufactured Housing §16. The Commission approved a stipulation and agreement wherein a mobile home dealer agreed to arrange for inspection of the manufactured home, and subsequent repairs thereto, in accordance with standards set by the Design Approval Primary Inspection Agency.

ORDER APPROVING STIPULATION AND AGREEMENT

On July 5, 2001, the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission filed his complaint seeking discipline against the dealer registration of Wightman Enterprises, Inc., doing business as Lee's Mobile Homes. On January 18, 2002, prior to the establishment of a procedural schedule in this case, the parties advised the Commission that a settlement had been reached. On February 15, the parties filed their Joint Stipulation and Agreement.

The Joint Stipulation and Agreement purports to settle all disputes between the parties. It provides that Respondent will arrange for an inspection of the manufactured home, including the damage thereto and the subsequent repairs, by the manufacturer's engineer. The inspection will determine compliance with DAPIA standards and will be subject to approval based on those standards.¹ The Joint Stipulation and Agreement further provides that Respondent will identify the DAPIA-approved method for all repair work, provide it to the Director, and complete all repair work, including an inspection, by February 15, 2002. The Joint Stipulation and Agreement further provides that, if the manufacturer's engineer reports that the repair work to the subject manufactured home meets DAPIA standards, the Director will dismiss his complaint and Respondent will accept a probation of six months. Pending the receipt of the report of the manufacturer's engineer, the Director agrees to take no further action against Respondent.

The Commission has the legal authority to accept a stipulation and agreement offered by the parties as a resolution of issues raised in this case.² In reviewing the Joint Stipulation and Agreement submitted by the parties, the Commission notes that³

¹ "DAPIA" means Design Approval Primary Inspection Agency.

² Section 536.060, RSMo Supp. 2001.

³ Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. 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.⁴ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Joint Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Joint Stipulation and Agreement filed on February 15, 2002, is hereby approved. A copy of the Joint Stipulation and Agreement is attached hereto as Attachment A.
2. That this case shall remain open pending receipt of the report of the inspection by the manufacturer's engineer. The Director shall file that report in this case immediately upon receipt, together with his recommendation either that the Complaint be dismissed or that further proceedings against Respondent be had.
3. That this order shall become effective on March 8, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, 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.

⁴ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

Office of the Public Counsel, Petitioner, v. Union Electric Company, d/b/a AmerenUE, Respondent.

*Case No. EC-2002-152
Decided February 26, 2002*

Electric §41. The Commission approved a unanimous stipulation and agreement between the Office of the Public Counsel and AmerenUE wherein Ameren ceased its practice of assessing late payment charges upon the entire unpaid balances of gas and electric service customers who have entered into deferred payment agreements.

Gas §33. The Commission approved a unanimous stipulation and agreement between the Office of the Public Counsel and AmerenUE wherein Ameren ceased its practice of assessing late payment charges upon the entire unpaid balances of gas and electric service customers who have entered into deferred payment agreements.

ORDER APPROVING STIPULATION AND AGREEMENT

On September 20, 2001, the Office of the Public Counsel filed two nearly identical complaints against Respondent Union Electric Company, doing business as AmerenUE. While each complaint involved the same purported misconduct, that is, the charging of late fees on arrearages under deferred payment plans, one (Case No. EC-2002-152) concerned the electric service activities of Respondent and the other (Case No. GC-2002-153) concerned its natural gas service activities. On October 25, the Commission consolidated the two cases. On January 2, 2002, the Commission adopted a procedural schedule.

On February 5, the parties filed a Unanimous Stipulation and Agreement. On February 7, the Commission's Staff moved for the suspension of the procedural schedule. On February 13, Staff filed its suggestions in support of the Unanimous Stipulation and Agreement.

The parties agree that the Unanimous Stipulation and Agreement resolves all issues in these consolidated cases. The Unanimous Stipulation and Agreement provides that Ameren shall cease its practice of assessing late payment charges upon the entire unpaid balances of gas and electric service customers who have entered into, and fully complied with, deferred payment agreements. Instead, Ameren will assess late payment charges only on the unpaid portion of any deferred monthly payment that is not paid by the delinquency date shown on the customer's bill. Ameren will also assess late payment charges on unpaid amounts relating to current service. This change will take effect 14 days after the effective date of the Commission order approving this Unanimous Stipulation and Agreement.

Within ten days of the effective date of the Commission order approving this Unanimous Stipulation and Agreement, Ameren will file appropriate amended proposed tariff sheets to implement the agreed change, bearing language similar to that shown on the sample sheets attached to the Unanimous Stipulation and Agreement.

Ameren will make appropriate adjustments to each current deferred payment agreement account to eliminate the effect of each application of late fees, except

with respect to amounts not paid by the delinquency date on the applicable bill. Ameren will, within 90 days of completing these adjustments, provide a report to Staff and the Public Counsel showing the total dollar amount thereof and the month or months in which the adjustments were made. The revenue impact of these adjustments shall be recognized in Case No. EC-2002-1.

The Unanimous Stipulation and Agreement further provides that Public Counsel's Complaints shall be dismissed; that Ameren shall not be liable for any refunds except as stated in the Unanimous Stipulation and Agreement; and that Ameren shall not be found to have violated any tariffs, laws, or regulations.

As noted, the Commission's Staff filed suggestions in support of the Unanimous Stipulation and Agreement. Therein, Staff explains that the settlement reflected in the Unanimous Stipulation and Agreement constitutes a real financial benefit to ratepayers who have made deferred payment agreements with Ameren, or who make such agreements in the future. Ameren will benefit because the revenue impact of this change will be recognized in Case No. EC-2002-1.

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.¹ In reviewing the Unanimous Stipulation and Agreement submitted by the parties, the Commission notes that²

Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. 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.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Unanimous Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on February 5, 2002, is hereby approved as a resolution of all issues in this case. A copy of the Unanimous Stipulation and Agreement is attached hereto as Attachment A.
2. That Union Electric Company, doing business as Ameren UE, is ordered to comply with the terms of the Unanimous Stipulation and Agreement.
3. That this case shall remain open pending the filing of proposed amended tariff sheets in compliance with the Unanimous Stipulation and Agreement.

¹ Section 536.060, RSMo Supp. 2001.

² Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

11 Mo. P.S.C. 3d

4. That this order shall become effective on February 28, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, 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 Laclede Gas Company's Filing to Revise Its
Purchased Gas Adjustment / Actual Cost Adjustment Tariff
Sheets.**

*Case No. GT-2002-387
Decided February 28, 2002*

Gas §17.1. The Commission approved a unanimous stipulation and agreement, and accompanying tariff, that revised a gas company's Purchased Gas Adjustment / Actual Cost Adjustment tariff.

**ORDER APPROVING STIPULATION AND AGREEMENT AND
APPROVING TARIFFS**

On February 19, 2002, Laclede Gas Company submitted tariff sheets that would revise certain provisions of its Purchased Gas Adjustment (PGA) / Actual Cost Adjustment (ACA) tariffs. Laclede's tariff revisions would increase by one the maximum number of PGA filings that Laclede would be authorized to make each year. In addition, the tariff revisions would clarify how the Laclede's various gas costs would be reflected and accounted for in such filings. Laclede filed substitute tariff sheets on February 26 to correct typographical errors and to reflect a correct tariff revision number. Staff filed a recommendation regarding the tariff on February 27.

On February 19, Laclede, the Staff of the Commission, and the Office of the Public Counsel also filed a stipulation and agreement. The stipulation and agreement indicates that the signatories have agreed that the tariff revisions proposed by Laclede are acceptable. The parties ask that the Commission approve Laclede's tariff, as well as the stipulation and agreement.

The stipulation and agreement also asks that the Commission make certain findings regarding the revisions to Laclede's tariff. The stipulation and agreement indicates that the purpose of such findings is to provide Laclede and third parties useful documentation of the proper treatment to be afforded certain costs for both internal and external accounting purposes. The stipulation and agreement asks that the Commission find as follows:

(1) That ... the costs and cost reductions associated with Laclede's use of natural gas financial instruments are gas costs which, in the absence of any prior or current tariff language providing for a different treatment, are properly recognized in and recoverable through the Company's PGA/ACA Clause in the same manner, subject to prudence review, and in accordance with the same procedures as other gas costs. Treatment of the costs associated with such instruments as gas costs is fully consistent with, and already contemplated by, the language of Laclede's existing PGA/ACA tariff provisions and that a tariff revision specifically codifying such treatment is therefore unnecessary.

(2) That ... such gas costs include the carrying costs on payments made and/or received in connection with the use of such instruments and that such carrying costs shall be accounted for and included in the calculation of the Deferred Carrying Cost Balance of the Company's PGA/ACA Clause, subject to any prospective modifications approved by the Commission in Laclede's current rate case, GR-2002-356. Changes from Laclede's rate case will be implemented no sooner than the effective date of such order.

The Commission hereby makes the findings requested by the parties.

The Commission has reviewed the tariff filing and the stipulation and agreement and has determined that the stipulation and agreement, and the tariff should be approved.

IT IS THEREFORE ORDERED:

1. That the stipulation and agreement filed on February 19, 2002, by Laclede Gas Company, the Staff of the Public Service Commission, and the Office of the Public Counsel, is approved. (See Attachment 1).

2. That the following tariff sheets (Tariff File No. 200200666) issued February 19, 2002, are hereby approved, as amended, to become effective on March 22, 2002.

P.S.C. MO No. 5 Consolidated

Eighth Revised Sheet No. 15, Canceling Seventh Revised Sheet No. 15
 Second Revised Sheet No. 16-a, Canceling First Revised Sheet No. 16-a
 Seventh Revised Sheet No. 17, Canceling Sixth Revised Sheet No. 17
 Tenth Revised Sheet No. 18, Canceling Ninth Revised Sheet No. 18
 Third Revised Sheet No. 28-c, Canceling Second Revised Sheet No. 28-c
 First Revised Sheet No. 28-c.1, Canceling Original Sheet No. 28-c.1
 Second Revised Sheet No. 28-g, Canceling First Revised Sheet No. 28-g
 One Hundred and Eighty-Ninth Revised Sheet No. 29, Canceling One Hundred and Eighty-
 Eighth Revised Sheet No. 29

3. That this order shall become effective on March 22, 2002.

4. That this case may be closed on March 23, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Woodruff, Senior 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 Determining of Prices, Terms and Conditions of Conditioning for xDSL-capable Loops.

*Case No. TO-2001-439
Decided February 28, 2002*

Telecommunications § 12. The Commission determined that Southwestern Bell must give access to its network to telecommunications carriers in a nondiscriminatory manner. The Telecommunications Act of 1996 requires local exchange companies to give access to carriers under rates, terms and conditions that are just, reasonable and nondiscriminatory.

Telecommunications § 13. The Commission determined that Southwestern Bell incurs significant costs to remove inhibitors, such as load coils, excessive bridged taps and repeaters, from its network. Southwestern Bell may pass most of these costs onto the telecommunications carriers who wish to access Bell's network to give digital quality services to their customers.

Telecommunications § 14. The Commission ruled that Southwestern Bell must charge just, reasonable and nondiscriminatory rates to carriers who wish to access its network. These rates will apply to all telecommunications carriers, not just parties to the M2A standardized interconnection agreement.

Telecommunications § 25. The Commission ruled that carriers that request digital functionality must compensate Southwestern Bell for the loop conditioning Bell must perform to make the loops able to carry a digital signal.

APPEARANCES

Paul G. Lane, General Counsel-Missouri, and *Anthony K. Conroy*, Senior Counsel, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

Lisa Creighton Hendricks, Senior Attorney, 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Communications Company, LP and Sprint Missouri, Inc. d/b/a Sprint.

Rose Mulvany Henry, Director of State Regulation, Marietta Chair Building, 2020 Baltimore Avenue, Kansas City, Missouri 64108, for Birch Telecom of Missouri, Inc.

Mark W. Comley, Attorney at Law, Newman, Comley & Ruth P.C., 601 Monroe, Suite 301, P.O. Box 537, Jefferson City, Missouri 65102, for Birch Telecom of Missouri, Inc.

Michelle S. Bourianoff, Senior Attorney, 919 Congress Avenue, Suite 900, Austin, Texas 78701, for AT&T Communications of the Southwest, Inc.

Bradley R. Kruse, Attorney at Law, 6400 C Street SW, P.O. Box 3177, Cedar Rapids, Iowa 52406, for McLeod USA Telecom Services, Inc.

Mary Ann (Garr) Young, Attorney at Law, *William D. Steinmeier*, P.C., 2031 Tower Drive, P.O. Box 104595, Jefferson City, Missouri 65110, for McLeod USA Telecom Services, Inc. and MGC Communications, Inc. d/b/a Mpower Communications Corp.

Carl J. Lumley and *Leland B. Curtis*, Attorneys at Law, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for NuVox Communications of Missouri, Inc., XO Missouri, Inc., MCI WorldCom Communications, Inc., MCI Metro Access Transmission Services and Brooks Fiber Communications of Missouri, Inc.

David J. Stueven, Director, Regulatory, 6405 Metcalf, Suite 120, Overland Park, Kansas 66202, for IP Communications Corporation d/b/a IP Communications of the Southwest.

Michael Dandino, Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

William K. Haas, Deputy General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Keith A. Thornburg

REPORT AND ORDER

SUMMARY

Under the federal Telecommunications Act of 1996 Southwestern Bell Telephone Company (Bell) is an incumbent local exchange company (ILEC). As an ILEC, Bell is required to allow any requesting telecommunications carrier access to elements of its telephone network on an unbundled basis on rates, terms and conditions that are just, reasonable and nondiscriminatory.

A telephone line, or loop, may be used as a Digital Subscriber Line to send and receive data at high speeds using various types of digital technologies generically referred to as xDSL. In some cases conditions or devices that inhibit an xDSL signal exist that must be removed from the loop. These inhibitors are load coils, excessive bridged taps and repeaters.

In this case the Missouri Public Service Commission determines just, reasonable and nondiscriminatory rates, terms and conditions that Bell may impose to remove these inhibitors when requested to do so by another telecommunications carrier and alternatively the rates, terms and conditions that telecommunications carriers may obtain for Bell to remove these inhibitors.

JURISDICTION

The Missouri Public Service Commission has jurisdiction over all telecommunications facilities and services and telecommunications companies in Missouri. The Commission has the duty of general supervision over all telephone compa-

11 Mo. P.S.C. 3d

nies operating in Missouri. Section 386.320. The Commission has authority to investigate or make inquiry in the manner it determines into any act or thing done by any telecommunications company. Section 386.330.

The Commission has jurisdiction over the rates and rentals charged by telecommunications companies including rates and charges for the use of telecommunications facilities. Section 386.240. The Commission has jurisdiction to determine whether such rates, charges, rental or service terms are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any way in violation of law. Id.

Under the federal Telecommunications Act of 1996 (FTA) state public utility commissions have jurisdiction to resolve disputes over the terms for interconnection between telecommunications carriers and to determine whether rates, terms and conditions are just, reasonable, and nondiscriminatory. Sections 251 and 252 of the FTA. State commissions have jurisdiction and a duty to approve or to reject interconnection agreements adopted by arbitration or negotiation. Section 252(e) of the FTA.

STANDARD OF REVIEW

The Commission is determining rates, terms and conditions for network elements for use in interconnection agreements between telecommunications carriers and particularly rates, terms and conditions allowed to an incumbent local exchange carrier to be charged to competitive local exchange carriers. Sections 251 and 252 of the FTA require that these rates, terms and conditions be just, reasonable and nondiscriminatory. State law requires the Commission to determine that such rates, charges, rentals or services are not unjust, unreasonable, unjustly discriminatory or unduly preferential or in any way in violation of law. Section 386.240. The Commission may impose any condition that it deems reasonable and necessary upon any company providing telecommunications services. Section 392.470.

PROCEDURAL HISTORY

On March 23, 2000, the Commission issued an Arbitration Order in Case No. TO-2000-322 that decided rates, terms and conditions for conditioning loops for xDSL services between Bell and DIECA Communications Inc., d/b/a Covad Communications Company. The time allowed to the Commission to arbitrate issues presented by the parties to a proposed interconnection agreement under the federal Telecommunications Act of 1996 is very limited.¹ In the Covad arbitration, the Commission was not able to thoroughly evaluate Bell's cost study or make any adjustments to Bell's purported costs on the limited record presented.

The Commission ordered Bell to perform a new cost study for conditioning loops for xDSL services, to document its conditioning costs and to verify the data and facts supporting the cost study. The Commission ordered its Staff to participate

¹ Under the FTA the Commission has 110 to 135 days to resolve the issues presented depending upon filing date of the arbitration petition.

in the new cost study. Bell filed the cost study ten months later on January 16, 2001. Staff filed a report in review of the cost study on January 16, 2001.

On February 15, 2001, the Commission issued its order establishing this case stating: "That this case is established for the purpose of determining the prices, terms and conditions for loop conditioning of xDSL-capable loops." Ordered paragraph 1. On March 6, 2001, the Commission ordered the cost study and Staff's report from Case No. TO-2000-322 transferred into this case.

The order establishing this case made Bell, the Staff and the Office of the Public Counsel parties and directed notice to all certificated Missouri local exchange and interexchange carriers. The Commission granted all intervention requests and the following were made parties to this case: MCI metro Access Transmission Services, LLC; Brooks Fiber Communications of Missouri, Inc.; MCI WorldCom Communications, Inc.; Mpower Communications Central Corporation; NuVox Communications of Missouri, Inc., f/k/a Gabriel Communications of Missouri, Inc.; Sprint Missouri, Inc.; Sprint Communications Company L.P.; Fidelity Communication Services III, Inc.; McLeodUSA Telecommunications Services, Inc.; IP Communications Corporation; AT&T Communications of the Southwest, Inc.; MGC Communications, Inc., d/b/a Mpower Communications Corp.; Birch Telecom of Missouri, Inc.; and XO Missouri, Inc. Fidelity was granted permission to withdraw on August 23, 2001.

Prehearing conferences were held in this case on March 19, 2001 and on June 29, 2001, jointly with two other cases that address terms, conditions, costing and pricing for other network elements. Evidentiary hearings occurred in this case on August 7, 8 and 9, 2001. A procedural and settlement conference was held on October 9, 2001. Two additional days of evidentiary hearings were held on November 1 and 2, 2001.

Pursuant to Commission practice and custom - direct, rebuttal and surrebuttal testimony was pre-filed in written form. The Commission also required filing of supplemental testimony and responses. The record consists of this testimony, related exhibits and additional evidence and testimony produced at the hearings.

Proposed decision issues were filed with the Commission on July 20, 2001. However, after the record was more fully developed, the Commission ordered a detailed and restated list of issues and this list was filed on October 26, 2001. The Commission instructed the parties on briefing requirements at the end of the hearing on November 2 and in a notice issued on November 6, 2001. The Commission provided for initial and reply briefs. The parties were instructed to present their arguments following the restated issues list.

Bell, Staff and Sprint filed individual initial briefs. The Office of the Public Counsel concurred in the positions and arguments presented by Staff. AT&T, Birch, IP, NuVox, MCI Metro Access, Brooks and MCI Worldcom and XO (collectively CLECs) joined in filing an initial brief. XO joined with the CLECs but also submitted a separate statement on Issue 4(A). Bell, Staff and CLECs filed reply briefs.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW²

The restated issues list filed on October 26, 2001, presents both legal and fact issues. The issues list is organized using five primary issues with sub-issues. There are thirty-eight decision points presented.

The Commission will first address some matters generally so that decisions on the designated issues are framed clearly. The Commission will apply the standard of review it has previously defined. Under the individual issues, the Commission will state necessary conclusions of law supporting its decisions on legal issues and will state its findings of fact supporting its decisions on fact issues.

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

Under the FTA Bell is required, as an ILEC, to allow any requesting telecommunications carrier access to elements of its telephone network on an unbundled basis on rates, terms and conditions that are just, reasonable and nondiscriminatory. A telephone line, or loop, may be used as a Digital Subscriber Line to send and receive data at high speeds using various types of digital technologies generically referred to as xDSL. In some cases there may be conditions or devices that inhibit an xDSL signal that must be removed from the loop. These inhibitors are load coils, excessive bridged taps and repeaters. Loop conditioning is the process of removing these inhibitors.

Voice grade services use signal frequencies in the analog bandwidth of 200 to 3400 Hz. Electrical signals traveling through a copper loop at voice grade frequencies lose signal strength as a result of capacitance. **Load coils** are passive devices that strengthen the signal of low frequency voice grade services. Load coils are not necessary for voice grade services on loops under 18,000 feet in length.

xDSL technology operates at much higher frequencies up to 1,100,000 Hz. Load coils inhibit the higher frequency signals used for xDSL digital and data services. If load coils are present on a loop designated for xDSL service, they must be removed.

Industry practices and Bell's current design standards call for splicing load coils on loops in excess of 18,000 feet from the central office. The most common plan for load coil deployment is called "H88." Under this standard, load coils are placed at regular intervals beginning at 3,000 feet and at each 6,000-foot interval after the first load coil. A load coil cannot be placed within 3,000 feet of a loop's termination at a customer premises unless a bridged tap extends past the customer or a capacitor or other device is placed on the loop.

² The issues list of the parties stated legal and factual issues and mixed issues of fact and of law. This Report and Order addresses the legal issues in the order they are presented, however, conclusions of law are also separately stated in this Report and Order.

For more than twenty years, the telecommunications industry has deployed Digital Loop Carrier (DLC) technology to serve clusters of customers. The area served is referred to as a Carrier Serving Area (CSA). The DLC is usually connected to the central office using fiber feeder or another type of high speed connection and the customers in the CSA are then served from the DLC with copper loops that are normally 12,000 feet or shorter. As the DLC and CSA technology is deployed, feeder and distribution loops formerly in excess of 18,000 feet can be reassigned. It is not necessary to remove the load coils from the reassigned loops to provide voice grade services. Thus loops less than 18,000 feet in length with load coils may be encountered in the network where only voice grade services have been provided. Loops longer than 18,000 feet require load coils for voice grade service.

Bridged tap is a loop that extends or branches in multiple directions that are not in a straight path to the end user. A network engineer will authorize bridged tap on a case-by-case basis to provide a sufficient number of loops or extend service to a particular customer or to a new neighborhood and defer placement of and investment in additional feeder or distribution facilities. In contrast to load coils, bridged tap does not occur at regular intervals in the network.

Bridged tap is an engineering option used to avoid or defer investment in additional plant and capacity. Bridged tap is also an option used to serve a new customer more promptly when additional capacity is planned but not yet in place. Thus, bridged tap provides flexibility in management of capacity demands on the network, lowers or defers costs, and is useful in promptly meeting customer needs.

A bridged tap up to 6,000 feet in length can be used to provide voice grade services. Bridged tap can inhibit xDSL service if it adds excessive length to the loop or if signals echo off an un-terminated bridged tap. Bridged taps in excess of 2,500 feet can inhibit xDSL services.

Repeaters are used to extend the reach of specific digital services such as DS1 or ISDN over copper loops. Repeaters inhibit xDSL signals.

Inhibitors are rarely encountered on loops less than 18,000 feet. Evidence presented in the Covad arbitration suggested that load coils may be encountered about 2% of the time, bridged tap 6% of the time and repeaters .06% of the time. Data ordered and collected from Bell following the Covad arbitration decision showed that loop conditioning was required on 1.3147% of requested loops.

Bell presented rebuttal testimony of Chris Cass where Mr. Cass asserted that he had obtained a sample of loops and computed an average incidence of inhibitors on all loops under 17,500 feet. Mr. Cass determined a higher incidence of load coils and a slightly lower incidence of bridged tap than the percentages indicated previously. Mr. Cass did not address the incidence of repeaters.

When a customer or CLEC orders a loop to be used for xDSL services, a check of Bell's electronic plant records or a manual check of Bell's paper records will reveal whether inhibitors are present and if so whether an alternative loop can be selected that does not require conditioning. Bell's manual records are more complete and reliable than its electronic records but Bell charges \$84.15 for manually verifying the status of a loop.

11 Mo. P.S.C. 3d

If the status of a loop is not verified or an electronic check is in error, inhibitors may be discovered after an attempt to place a loop in service.

If a loop is ordered that requires conditioning, plant records are reviewed by clerical and engineering staff to identify the necessary conditioning work and plant reconfiguration and to prepare necessary drawings or documentation and a work order. Next a cable technician is dispatched to the location or locations where inhibitors must be removed or disabled. A work site must be prepared and safety precautions taken at each location along the loop where inhibitors will be removed.

Loops are grouped in cables of 25 or 50 pair or larger multiples. The cables may be buried in the ground, located aurally on poles, or located underground and accessed through manholes. Each of the three environments presents unique site-preparation tasks and particular sites will present variable conditions such as traffic in public rights-of-way or conditions affecting access such as water in manholes or physical obstructions to access points.

After the work site is prepared, the cable technician must locate the correct cable and loop, access the cable and loop, perform the necessary tasks to remove or disable the inhibitor, restore the integrity of the loop and the cable and close the work site.

In this case the Commission must determine whether Bell's costs to remove inhibitors to xDSL grade services may be recovered in specific charges to CLECs. If the Commission determines that the costs may be recovered, then the Commission must determine the **cost** inputs and select a **pricing** structure or structures.

The evidence in this case shows that Bell incurs significant costs to remove inhibitors. Bell asserts that it should be allowed to recover these costs and proposes per occurrence, non-recurring (upfront charge) prices for loops over 17,500 feet, and per occurrence non-recurring averaged prices on loops between 12,000 and 17,500 feet.³ Bell does not charge to condition loops under 12,000 feet.

Bell's proposes averaged non-recurring prices to condition loops between 12,000 and 17,500 feet of \$1,231.32 for load coils (assumes 3), \$751.37 for bridged taps (assumes 2), and \$447.60 for repeaters. Over 17,500 feet Bell proposes \$410.44, \$375.69 and \$447.60 respectively as each inhibitor is encountered rather than assuming that a certain number of inhibitors will be encountered. Bell presently offers this type of pricing in Missouri.

Bell also offers a recurring pricing option with a charge of \$1.67 per loop. Under this second type of pricing, a CLEC pays a monthly recurring charge on all loops it orders rather than paying an upfront non-recurring (one-time) charge on an occurrence specific basis.

³ In this case and in previous cases, Bell has advocated a loop length of 17,500 feet as the demarcation point in excess of which loops require loading for voice grade services. However, parties and witnesses in this proceeding other than Bell have described the industry standard as 18,000 feet. Bell's own witness, Terrell, identified 18,000 feet as Bell's own design standard in his direct testimony at page 6. A footnote in Staff's initial brief at p. 4 states that there is no practical difference because a loop having a total length of 18,000 feet may have a length beyond the central office of 17,500. The Commission will apply the industry standard practice and reference of 18,000 feet. The Commission will reference 17,500 feet in this Report and Order where it is stating Bell's position or restating an issue framed by the parties using the 17,500-foot demarcation.

Staff proposes that Bell be allowed to recover costs for conditioning and offers a pricing model that develops an averaged non-recurring price applicable to all xDSL capable loops under 18,000 feet (and longer than 12,000 feet). Staff proposes an average non-recurring price of \$30.33 on each xDSL capable loop under 18,000 feet. This price would be charged whether or not inhibitors are present. Staff proposes an initial three-year period for application of the averaged non-recurring price structure. Staff proposes per occurrence non-recurring prices to remove inhibitors on the portion of longer loops beyond 18,000 feet.

For the longer loops, a CLEC would pay the averaged price (related to the portion of the loop under 18,000 feet) plus specific prices for inhibitors beyond 18,000 feet as follows: \$325.84 for load coils; \$221.91 for bridged tap; and \$221.91 for repeaters. Staff developed and submitted a costing and pricing model that allows inputs into the model to be changed and the results re-computed.

Sprint agreed that Bell should be allowed to recover its costs but argued that the cost inputs were overstated, that Bell's practices were inefficient and that Bell's costing methodology resulted in overstated costs and prices. The Commission also considered Sprint's pricing methodology using Bell's inputs.

The CLECs argued that costs and pricing for the loops provided by Bell should be based upon Total Element Long Run Incremental Cost (TELRIC). This economic model assumes forward-looking economic costs so that costing for Bell's network facilities reflect the most current and efficient practices and technologies. CLECs argue that the loop charges they are now paying reflect a network built without inhibitors on loops under 18,000 feet and that if Bell is allowed conditioning charges in addition to loop costs for these loops Bell obtains a windfall.

CLECs alternatively argue that Bell's cost study is flawed, the inputs are unsupported and that the costs are overstated. CLECs devote pages 27-36 of their initial brief to pointing out the deficiencies in Bell's documentation of its cost study.

The Commission notes that it directed Bell, in Case No. TO-2000-322, Arbitration Order, ordered paragraph 4, issued and effective March 23, 2000, to "document conditioning costs based upon verified data and facts." Bell filed its cost study approximately ten months later on January 16, 2001. The portions of the record identified by CLECs in their initial brief (pp. 27-36) show that Bell prepared little if any documentation to support the assumptions and inputs used in the cost study and that if such documentation was prepared much of it was discarded.

Bell could have strengthened its position by preparing and retaining documentation to support the cost inputs and assumptions and inputs used in the cost study. The lack of documentary work papers has made evaluating the cost studies more difficult for the Commission and has impeded discovery and increased discovery costs for the parties in this case. The weight given to the cost study is necessarily reduced and greater emphasis must be given to the subject matter experts presenting testimony in this case. Some of these witnesses are employees of the telecommunications carriers joined in the case, which presents the Commission with the further task of weighing the partiality of these witnesses.

11 Mo. P.S.C. 3d

ISSUE 1. What is the scope of the applicability of the decisions in this case (and is this issue ripe for consideration)?

Bell argues that the decisions in this case regarding prices, terms and conditions for unbundled network elements (UNEs) can only be applied in a standardized interconnection agreement referred to as the M2A. The M2A is an interconnection agreement offered by Bell and approved by the Commission in Case No. TO-99-227, a case established to consider Bell's application to enter the long distance market under Section 271 of the FTA.

The M2A contained interim provisions for pricing and terms for some UNEs including those elements presented in this case. The decision in this case will be applied to the M2A. Bell relies on the association of this case with Case No. TO-99-277 and with dicta in the Commission's February 15, 2001, order establishing this case to support its position.

Every other party to this case argues that the scope of the Commission's decision in this case is not limited to terms, conditions and pricing of UNEs for the M2A. These parties also assert that it would be a waste of industry and Commission resources to invest time and effort in this case to determine costs, terms and pricing for UNEs but restrict the final decision to the M2A while requiring these same issues to be continually re-litigated or arbitrated in other cases.

The procedural history of this case, its relation to both Case Nos. TO-99-277 and TO-2000-322, does not suggest or create a restriction on the application of this decision. It is apparent that in these prior cases the Commission was dissatisfied with the sufficiency of the information presented to it in previous cases and arbitration proceedings.

In resolving interconnection disputes, the Commission can require such information as it deems necessary to be submitted by the petitioning and responding parties but if the information is not timely or forthcoming the Commission is required to proceed on the best information available. Section 252(b)(4)(B) of the FTA. The FTA's strict arbitration time frames have left the Commission too often with imperfect and incomplete information to decide the issues presented.⁴

This case was established to provide an opportunity for a more complete record, review and consideration. It would be a waste of resources to restrict application of the Commission's findings and conclusions in this case as Bell suggests. The Commission has jurisdiction over the rates and charges of telephone companies for the use of telecommunications facilities. Sections 386.240. This authority is consistent with the Commission's responsibilities under the FTA.

To the extent Bell's concern is with whether there are associated terms and conditions to the network elements addressed in this case that a CLEC must take along with the pricing determined in this case, Bell's issue is not ripe for determination. Such issues can be addressed in negotiation, arbitration or litigation with the particular requesting carrier in a future case.

⁴ The Commission has only 110 to 135 days to resolve the issues presented in an arbitration under the FTA depending on the filing date of the arbitration petition.

ISSUE 2. Should there be any charge for loop conditioning...

a. On loops up to 17,500 feet?

The CLECs suggest that the price paid to Bell to obtain the loop pays for a clean loop so that an additional non-recurring price to condition the loop would be a double recovery. CLECs assert that it is not consistent to assume one network design (modern - no inhibitors) for costing and pricing the loop and different network design (twenty years out of date – with inhibitors) for costing and pricing conditioning. CLECs argue that allowing Bell recovery for conditioning costs provides a disincentive to exercise due care to modernize or upgrade its network when growth or obsolescence would otherwise require. CLECs assert that as Bell reconfigured its network, cutting longer loops back and redeploying them, that conditioning should have been done at that time for loops under 18,000 feet. CLECs suggest that Bell should absorb conditioning costs as loop maintenance and that Bell does so for other kinds of digital services than xDSL. CLECs assert that to allow recovery here is inconsistent.

Bell asserts, and parties other than the CLEC group concede, that conditioning costs for loops less than 18,000 feet may be recovered by Bell, according to the law and taking into account practical considerations.

The Commission finds that the position of Bell, Staff, Sprint and the Public Counsel is supported by the law and by the practical considerations of building, maintaining and upgrading a large telecommunications network.

The Federal Communications Commission has determined that when a requesting carrier requests loop facilities from an ILEC and those facilities require loop conditioning for digital functionality that the ILEC must condition the loop and the requesting carrier bears the cost. *First Report and Order*, CC Docket No. 96-98, August 8, 1991 para. 383. More recently, the FCC noted that today's networks would not normally have inhibitors on loops under 18,000 feet but nevertheless the devices are sometimes present and the ILEC should be able to charge for conditioning such loops. *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, CC Docket NO. 99-98, November 5, 1999, para. 193.

The FCC has acknowledged that the charges ILECs impose to condition loops become sunk costs to the CLECs and that these costs may constitute a barrier to offering xDSL services. The FCC noted that ILECs might have an incentive to inflate the charge for line conditioning. Finally, the FCC deferred to the states to ensure that costs for line conditioning are in compliance with FCC pricing rules for nonrecurring costs. *Id.* para. 194. The FCC recognizes the authority of the states to ensure that non-recurring costs are not recovered more than once and that such charges are spread equitably among entrants. *First Report and Order*, *Id.* para. 750.

In this case the Commission will determine Bell's costs via review of the assumptions and inputs presented in Bell's cost study and application of the evidence presented in this case. Allowable costs and equitable pricing structures will be determined.

The Commission recognizes that a network built today would not have inhibitors on loops less than 18,000 feet. However, it is not realistic to assume that an ILEC managing a large telecommunications network would incur costs to reconfigure its network at every opportunity to the most modern and efficient

11 Mo. P.S.C. 3d

standards regardless of cost. To do so would unduly burden the ILEC and all end user customers with costs that provide too little return. The pace and timing of network upgrades are determined by various factors including maintenance requirements, potential maintenance savings, demand for more capacity, demand for new or additional services, technological advances and overall cost savings or revenue enhancements that a proposed network investment offers.

b. On loops over 17,500 feet?

All the parties in this case agreed that Bell should be compensated for conditioning loops over 18,000 feet. The parties disagreed on appropriate cost inputs and assumptions and on whether Bell performs loop conditioning using reasonably efficient and cost effective practices.

c. To the extent SWBT provides loop makeup information that indicates that conditioning will not be necessary?

Bell argued that if CLECs rely only on free electronic loop qualification when ordering a loop then CLECs should bear the risk and subsequent cost of conditioning if inhibitors are encountered because the electronic records are not represented as 100% accurate. Bell asserted that manual loop qualification, at a cost of \$84.15, is the only way to be certain that a loop is free of inhibitors.

Bell also stated in its reply brief that if the loop is not promptly ordered following manual loop qualification a clean loop is not assured because Bell may assign the loop to another CLEC or customer.

Staff asserted that when a CLEC pays for manual loop qualification and the data is wrong Bell should bear the subsequent loop conditioning costs. The CLECs asserted that there should be no charge for conditioning when electronic or manual loop qualification shows a clean loop. Sprint took no position on this question.

It is unfortunate that Bell's electronic plant records are not fully reliable. However, there is no evidence to refute Bell's position that "Only if manual loop qualification is performed will either Bell or CLEC know with certainty whether conditioning is required or not." Bell's Initial Brief, p. 11. The Commission notes that one advantage of Staff's average pricing structure for loops under 18,000 feet is that it will not be necessary to confirm the presence or absence of inhibitors since CLECs electing this pricing option will pay a broad-based conditioning charge on all xDSL capable loops.

For CLEC's that do not adopt the average pricing model for loops less than 18,000 feet, the Commission finds that if loop make-up information is ordered by using Bell's manual process that Bell shall bear the risk and costs if inhibitors are subsequently encountered on the loop that were not discovered in the manual qualification. If CLECs rely on electronic loop qualification data or other means not represented as fully complete or accurate, then CLECs shall bear the risks and costs if inhibitors are subsequently encountered.

ISSUE 3. If the Commission's decision on either issue 2a or 2b (or both) is "yes", in determining the costs of loop conditioning for purposes of this case...

a. Should costs associated with reattaching bridged tap, if any, be considered?

Bell asserted that absent cutting off a bridged tap to provision an xDSL capable loop that it would be there to serve a future voice customer. Bell asserts that bridged tap is reattached 34% of the time.

Staff asserted that CLECs do not cause this cost. It is a cost associated with a different customer in the future. CLECs concurred and argued further that use of bridged tap is not consistent with a modern network design – including Bell's own engineering standards. CLECs asserted that Bell only reattaches bridged tap to avoid costs of expanding and upgrading its network to serve a later voice customer of Bell or another CLEC.

Sprint asserted that restoring bridged tap is not consistent with a forward-looking network and is not consistent with industry and Bell standards. Sprint also agreed that CLECs do not cause this cost.

The Commission finds that Bell's position is not credible. The arguments of Staff, CLECs and Sprint are persuasive. At the time a CLEC orders an xDSL capable loop and bridged tap is encountered, the bridged tap is not in use and is unneeded. The loop would otherwise be in use and not available to the CLEC.

b. On loops up to 17,500 feet, should costs for removing repeaters, if any, be considered?

Bell stated that it sometimes leaves repeaters on a loop after a digital customer discontinues service because the loop would be available for a future subscriber for DS1. Bell is then able to avoid costs and delay to serve a new customer that orders this technology. Bell asserted that it should be allowed to recover the cost to remove or disable repeaters where the loop is subsequently ordered for xDSL services.

Staff's position was that this cost should be recoverable.

CLECs asserted that these devices should be removed and placed back in inventory when the associated service is discontinued. Thus, the cost should not be recovered from CLECs.

Sprint asserted that repeaters are rarely encountered because they are inconsistent with voice or xDSL loops and are too expensive to leave idle. Sprint suggests that if average non-recurring pricing (Staff's proposal) is adopted that this item should not be included and should be separately priced since it is so infrequent.

The record shows that inactive repeaters are rarely encountered and this is consistent with the costs associated with placing these devices in service. Bell has incentives to ensure that loops with repeaters are not left idle and that these loops be reassigned for similar services. Removing repeaters to provide xDSL services will be a rare occurrence since Bell has an incentive to locate other available loops to avoid removing the repeater. CLECs did not refute Bell's position in their reply brief. The Commission finds that the cost of removing repeaters is a recoverable conditioning cost.

c. Should the removal of multiple load coils at one time be assumed, and if so, how many?

Load coils occur at regularly spaced intervals on loaded cables. Because a significant portion of the cost of removing load coils is reflected in clerical and

11 Mo. P.S.C. 3d

engineering time, trip time and setting-up and closing work sites – bulk conditioning 25 or 50 pair or more loops at each location is efficient and can significantly reduce unit costs.

Bell argued against bulk conditioning of load coils because with its proposed non-recurring charge Bell would be unable to recover the incremental cost of conditioning additional loops at each work site. Bell also asserted that, indiscriminately conditioning multiple loops could adversely affect service to others and that even on loops and cable groups of less than 18,000 feet, voice-only customers have slightly better voice grade service with load coils.

Staff acknowledged that the greatest cost is for the conditioning the first loop and that bulk conditioning is an efficient practice. However, Staff did not support mandating bulk conditioning for load coils because it would inflate conditioning costs to cover the incremental cost. Staff believes that ongoing network improvements will reduce the need for conditioning. Staff noted that Bell does in fact perform bulk conditioning, presumably when it is warranted, based upon its observations of Bell's fieldwork.

CLECs asserted that Bell should bulk condition load coils because it is more cost efficient to do so, reduces damage to the network by reducing the frequency that cables are handled and splices opened and closed, maintains binder group integrity so that all pairs in a binder group are similarly engineered, and stated that there is no use for loops and cable groups under 18,000 feet. CLECs urged the Commission to assume an input for bulk conditioning 50 loop pairs at a time. The CLECs argued that Bell's position that it does not perform bulk conditioning was contradicted by Bell's written standards and that Staff's observations of fieldwork show that multiple conditioning occurs and is encouraged. CLECs stated that using Staff's averaged non-recurring charge allows a means for full cost recovery for bulk conditioning. CLECs refuted an additional argument by Bell that it would experience a loss due to doing this work in advance of payment. CLECs argued that with an average cost structure on all loops significant revenues would be received before costs are incurred as well as at the time the costs are incurred and following the time costs are incurred.

CLECs cited an FCC order where pricing for collocation must spread costs on later takers and not overly burden the first LEC. Multiple loop conditioning and an average pricing structure on all DSL loops will similarly spread costs. Multiple loop conditioning will improve – not degrade – service for voice, dial-up internet and digital customers. Using cross-connects allows the clean loops to be assigned as needed for efficient management of costs.

Sprint advocated a cost input assuming 25 pair bulk conditioning for loops under 18,000 feet. Sprint devoted pp. 20-24 of its brief to this topic and presented persuasive arguments. Bell can significantly lower its costs if it bulk conditions loops of less than 18,000 feet whenever it performs network maintenance or accepts a conditioning order. Bell can further minimize bulk conditioning costs by targeting this practice to areas where it anticipates demand for xDSL services and conditioning the number of cable groups and loops it anticipates will be needed. Staff's observations show that Bell in fact performs bulk conditioning in anticipation of future demand for services.

Assuming an input of bulk conditioning will significantly reduce costs and thus pricing for conditioning; will promote efficient network practices; will promote a practice that ensures higher integrity in Bell's network; and with Staff's average pricing model spreads costs over all entrants. The Commission adopts an input and assumption of bulk conditioning for load coils of 25 loop pairs at a time.

d. Should the removal of multiple bridged tap at one time be assumed, and if so, how many, and at how many locations?

Bell argued that removal of multiple bridged tap should not be assumed as an input. Bell argued that cost data is not available. Bell also argued that it would not recover this cost with a non-recurring price. Bell argued that bridged tap spacing is not consistent or placement predictable and that individual loops within a 25 or 50 pair group would vary meaning every loop would have to be studied. Bell argued that bulk or advance conditioning via disconnecting bridged tap that might never affect a DSL customer but that could have been used to serve a future voice customer would be imprudent.

Staff did not recommend removal of multiple bridged tap because there is no data showing its consistent placement in the network. Thus, the practice could not be carried out economically.

CLECs argued for assuming an input of removing bridged tap on 50 pair at a time at branch splices. Multiple bridged tap conditioning was observed in the field visits Staff made. This practice is asserted to reduce maintenance and improve the performance of the network. CLECs asserted that bridged tap does occur at one location on multiple pair.

Sprint took no position on this question.

The Commission finds that assuming an input for removal of multiple bridged tap is not supported in this record. Bridged tap does not always occur at predictable locations in bulk making bulk conditioning difficult to perform. Furthermore, while excessive bridged tap is an inhibitor to xDSL services it continues to serve a purpose providing voice grade services.

e. How many load coils should be assumed to be present, on average, on loops up to 17,500 feet?

Bell argued that this input should assume three load coils encountered and removed on loops 18,000 feet and less. Bell argued that even if a customer is less than 15,000 feet from the central office – a downstream load coil (third load coil) – could exist and have to be removed. Bell refuted Sprint's argument that a load coil cannot exist within 3,000 feet of a customer on the basis that a load coil could be within 3,000 if a capacitor is placed on the loop or bridged tap extends past the customer lengthening the loop.

Staff asserted an input of two load coils. Staff supported its position by asserting that its observations showed about two load coils most of the time. Staff also stated that the last load coil cannot be within 3,000 feet of the customer premises without disrupting service so a load coil at 15,000 feet on loops under 18,000 feet would be too close.

CLECs asserted an input of two load coils citing arguments similar to Staff. Alternatively CLECs asserted an input no higher than 2.39 load coils used for Bell

11 Mo. P.S.C. 3d

in Texas. CLECs also noted that if the third load coil is past the customer on a bridged tap that load coil is effectively eliminated when the bridged tap is cut.

Sprint argued for an input of two load coils. Sprint asserts that this would be consistent with the cost study methodology that is based upon *averages*. Sprint also asserted that Bell's position on this input is contrary to Bell's average cost methodology for loops less than 17,500 feet since Bell assumes the maximum rather than an average.

Sprint showed that Bell's internal network standards are consistent with industry standards. Under these standards the last load coil cannot be placed within 3,000 feet of the customer premises. Sprint asserted that absent a build out device it is impossible to have a third load coil on a loop less than 18,000 feet.

The Commission finds that the positions of Staff, CLECs and Sprint are more credible and persuasive than Bell's position. Under network design standards a third load coil will be infrequently encountered on a loop less than 18,000 feet. The average would necessarily be closer to two than to three. Because Bell will have the opportunity to lower its costs by prudently adopting bulk conditioning practices, it will suffer no significant harm by assuming an input of two load coils. There is not sufficient information in this record to justify splitting the difference or computing an average between two and three. Two is the most likely incidence.

f. How many bridged taps should be assumed to be present, on average, on loops up to 17,500 feet?

Bell argued for an input assuming two bridged taps would be encountered on loops of less than 18,000 feet. Bell noted that if there are zero bridged taps then there is no charge under its proposed pricing. Sometimes there will be one and sometimes more than two. Bell cited no data – just its experience.

Staff accepted Bells assertion of two but noted that there was no good data to support this assumption. Staff believed that if this input is overstated, it provides Bell an offsetting benefit to the possible detrimental assumption of only two load coils.

CLECs asserted an input of one bridged tap. CLECs asserted that Bell produced no data to support two. CLECs asserted that if two bridged taps are assumed even though unsupported then some other questionable cost factor must go against Bell to counter balance this input as Staff suggested.

Sprint asserted one bridged tap. Sprint states that Bell's deployment guidelines discourage excessive bridged tap. Voice service should not have more that 6,000 feet and xDSL not more than 2,500 feet of bridged tap. Even if there are two bridged taps – it is likely that only one will need to be removed to eliminate the excessive bridged tap.

The Commission sees no need to make an assumption for an input that increases costs when the assumption has so little documentary support. Furthermore, Sprint's argument is persuasive. Even if more than one bridge tap is present, removing one will often be sufficient. Just as with the input for load coils, there is not sufficient information in this record to justify splitting the difference and computing an average. Here there may be some average between one and more than one but one is the most likely incidence and there is insufficient evidence to compute an average.

g. What are the appropriate average task times for an engineer to perform conditioning activities regarding load coil, repeater, and bridged tap, at initial locations and additional locations?

Bell stood by its engineering time and task estimates and suggested these were verified by Staff field visits and observations. Bell argued that the CLECs didn't really assume any engineering time. Bell argued that Sprint presented an argument for standardized practices while Bell's own practices are different and reflect a more customized approach to each conditioning order.

Staff accepts Bell's position as reflected in the cost study relying on its observations and confirmed by the Staff's experience and expertise.

CLECs argued for the time and task estimates of their subject matter witness Riolo whom CLECs asserted as the only qualified expert presented for these issues in this case. The CLECs argued that Bell's practices should not be controlling where more efficient practices were used in the industry. CLECs argued that cost and pricing inputs should assume the most efficient practices. CLECs argued that Staff's observations were too limited to be reliable and argued that Bell's witnesses in this case could not personally verify times and no documentation exists to support the cost study inputs.

Sprint suggested that the Commission should disallow Bell's task and time estimates because Bell did not document them even though Bell was directed to do so and allowed ample time. Alternatively Sprint offered task times based on its evidence.

The CLECs and Sprint raise attractive arguments to disallow Bell's time and task estimates on the basis of Bell's poor or virtually nonexistent documentation for the cost study. However, if the Commission did so it would have to rely on evidence of general practices presented by the CLECs and Sprint. This evidence is credible with regard to industry practices and efficiencies that Bell could possibly attain. Bell's internal guidelines are consistent with industry guidelines. Nevertheless, Bell's network and its network management practices are in many ways unique to Bell.

Bell's practices are not static. Evidence presented in this case shows that Bell is in the process of reconfiguring its entire network via an upgrade to a fiber feeder network referred to as Project Pronto. This investment shows that Bell will act to obtain efficiencies when doing so is cost effective.

Staff did observe fieldwork, clerical and engineering tasks and evaluated Bell's inputs based upon its subject matter expertise. Staff found the fieldwork, clerical and engineering tasks and times to be reasonable. Staff has no basis to be biased on these inputs. The Commission accepts the cost study inputs for these factors.

h. What are the appropriate average task times for a clerk to perform conditioning activities for load coil, repeater, and bridged tap, at initial locations and additional locations?

Bell asserted that its clerical task times were supported by the cost study, by its experts and by Staff. Bell asserted that CLEC and Sprint observations were not relevant to Bell's practices.

Staff accepted Bell's cost study.

11 Mo. P.S.C. 3d

CLECs reasserted its arguments as presented for engineering time and that only their subject matter expert Riolo was qualified in this case.

Sprint supported minimal clerical task times as supported by CLEC witness Riolo and Sprint witness Davis.

Staff did observe fieldwork, clerical and engineering tasks verifying Bell's inputs and evaluating the inputs favorably based upon its subject matter expertise. Staff has no basis to be biased on these inputs. Bell's practices reflect its own unique circumstances as well as industry standards. Therefore, the Commission accepts the cost study inputs for these factors.

i. What are the appropriate average task times for a cable technician to perform conditioning activities for load coil, repeater, and bridged tap, at initial locations and additional locations?

The time and labor inputs for the cable technician to perform the conditioning activities presented in this case present a very significant set of cost inputs. Bell asserts that its times for a cable technician to perform conditioning activities are appropriate and that Staff's field observations show that the time required is actually greater.

Staff accepted Bell's practices and times presented in the cost study. Staff noted that the greatest single cost input is for splicing work. Staff observations for actual jobs indicated that these inputs in the cost study were acceptable. Staff stated that even though the sample of field visits was small, the Staff observations verified that Bell's estimates and the estimates of subject matter experts were conservative and erred on the side of understating task times. Staff believed that the work crews it observed worked efficiently even when presented with difficult site environments.

CLECs supported only the task times presented by subject matter expert Riolo. Bell criticized these task times as not supported by time and motion studies. CLECs noted and the Commission recognizes that Bell's cost study inputs were largely undocumented and Bell's witnesses supporting the cost study often lacked personal knowledge and in some instances no subject matter expertise.

Sprint asserted that the input of load coil costs should assume bulk conditioning on loops under 18,000 feet. Sprint further asserted that task times should be differentiated base on underground, buried and aerial environments.

Staff did observe fieldwork, clerical and engineering tasks and evaluated Bell's inputs based upon its subject matter expertise. Staff has no basis to be biased on these inputs. Bell's practices reflect its own unique circumstances as well as industry standards. Staff invested a significant amount of time in making field visits to observe the work of cable technicians and evaluated and judged their observations against Staff's experience and found no indication that the work and task times were overstated or that the jobs observed presented any undue factors than might have overstated these inputs. Therefore, the Commission accepts the cost study inputs for these factors.

j. Is it more appropriate to use average time inputs (combination of aerial, buried and underground) for bridged tap, repeater and load coil removals or to use separate costs for aerial, buried and underground?

Bell asserted that assuming an average mix of work environments is appropriate. Sprint was the only party to disagree. All the other parties believed that this assumption allowed certainty in costs and pricing that would not be possible if the time inputs, costs and pricing were segmented into categories.

The Commission has some concern with averaging this input since there is little if any data to confirm the mix. However, there was no indication that the mix was manipulated to the disfavor of CLECs. CLECs were in fact neutral on this input.

Having certainty in costs and pricing is a benefit to the industry and also to end user customers. Therefore, the Commission accepts the cost study inputs for these factors.

k. Is it appropriate to include an inflation factor?

Bell asserted that an inflation factor was appropriate and asserted that labor and other costs would increase over the projected three-year life of the cost/pricing determined in this case. Bell believed labor cost increases were known and inevitable. Bell argued that an offset to inflation by productivity or decline in conditioning frequency is speculative and should not be allowed. Bell also asserted that if non-recurring per occurrence pricing were adopted then frequency would have no impact. Bell alternatively asserted that a productivity factor implicitly exists because of the forward-looking aspect of the study.

Staff did not favor an inflation factor because the instances of conditioning should diminish over time making inflation less significant. Staff believed that an upward trend in wages would be offset by an upward trend in productivity so no adjustment either way is warranted.

CLECs argued that assuming an inflation factor without an offsetting productivity factor would be inappropriate. CLECs cited evidence that better equipment and practices can increase productivity. One example in the record was the potential to use higher capacity pumps to clear water in manholes more quickly and reduce time on site.

Sprint argued that it would be inappropriate to apply an inflation factor without also determining and applying a productivity factor.

The Commission finds that no input for inflation is warranted. Bell's input was not documented and it is not consistent to build in an inflation factor without also addressing productivity. Bell has significant opportunities to lower its unit costs by adopting more efficient practices such as using some degree of bulk conditioning. Furthermore, the projected life of the pricing and costing adopted in this case is about three years. This is not so great a period of time that inflation should be a significant factor.

l. Is it appropriate to include a Support Asset multiplier without adjustment?

Bell asserted that a support asset multiplier is necessary because computers, office equipment and field equipment are used to support conditioning activities.

Staff agreed with Bell's position. This support asset multiplier supports the labor used in doing the work. If you do not allow this factor, then the only other possible opportunity is in recurring costs and those elements are already established.

11 Mo. P.S.C. 3d

CLECs were neutral. Sprint asserted that this factor should only be associated with the labor of the cable technician.

The Commission finds that a support asset multiplier is appropriate and that Bell's input is acceptable. Contrary to Sprint's assertion support assets do appear to be necessary to support virtually all employees.

m. Is it appropriate to include a common cost markup in calculating a non-recurring conditioning rate?

Bell asserted that it was necessary to include a common cost markup. Bell asserted that this input could not be disallowed without increasing the common cost markup percentage on recurring charges.

Staff disagreed with Bell's position. Staff stated that these costs are recovered in loop maintenance (recurring) charges and that unless the multiplier is adjusted down, there would be an over-recovery if this multiplier were also spread over these nonrecurring costs. Staff argued that the Commission is not bound by its prior decisions related to this issue.

CLECs agreed with Staff's position that the common costs associated with loop conditioning are already spread and recovered in loop maintenance.

Sprint took no position on this issue. Bell asserted that Sprint applies a common cost markup to its nonrecurring charges.

Bell argued against Staff's position in its reply brief at pages 28 and 29 stating that the common cost allocator was developed to recover common costs over the entire group of services (recurring and nonrecurring) offered by Bell and that if non-recurring costs are excluded from the base Bell will not have a complete recovery.

However, Bell acknowledged Staff's statement that xDSL deployment began after the Commission determined rates in Case No. TO-97-40. Therefore the common cost allocator markup percentage was set before the advent of xDSL deployment. If xDSL conditioning is a new activity, it is an addition or expansion to the base whether priced on a recurring or nonrecurring classification. Applying the common cost allocator to a larger base of activity would require the percentage for the allocator to be reduced to avoid over recovery – unless one assumes common costs also increase with volume – but that would be contrary to Bell's statement that excluding a cost from the base would result in an under recovery. Bell Reply brief p. 29.

The common cost allocator could be set on a base that includes recurring costs only (such as maintenance as argued by Staff) or on a base that includes recurring and nonrecurring costs. But under either case, if the base changes, the factor should change.

Here the Commission need not address the larger question of defining the base as recurring only or as both recurring and nonrecurring. It appears that conditioning costs were not included in the base to begin with however classified. Counting these costs in the base now would broaden the base with no corresponding change in the common cost markup factor.

For purposes of xDSL conditioning costs, the Commission finds that there should be no common cost markup input.

n. Is it lawful for the Commission to use Sprint Missouri's cost model to determine SWBT's price for conditioning in Missouri, and, if so, is it reasonable to do so?

Bell objected to the use of Sprint's cost model because the necessary inputs for using this methodology were not adequately established.

Staff believed the model would be lawful but did not recommend using it. Staff preferred the model it proposes, particularly since it was an open model that permits changing the inputs.

CLECs took no position.

Sprint believed its model could be lawfully used.

The Commission has no basis to conclude that the use of Sprint's cost model would be unlawful. However, the Commission does determine that it would be unreasonable to use the model in this case because, unlike the Bell and Staff models, an adequate record is not presented to evaluate and determine the necessary inputs.

The Commission did not consider Sprint's model until it ordered its Staff to prepare a scenario considering the model at the end of the initial hearing dates in this case in August 2001. Because of this timing the Commission and the parties had little time or information to evaluate and consider the use of this model and the degree if any it requires refinements to accept the inputs identified and judged in this case, many of which are unique to Bell.

o. If the Commission's answer to Issue 3n is "yes"...

(1) What modifications, if any, should the Commission make to Sprint's Missouri cost model in determining SWBT's prices for conditioning in Missouri?

(2) What modifications, if any, should the Commission make to the inputs into Sprint's Missouri cost model in determining SWBT's prices for conditioning in Missouri?

Because the Commission has determined not to utilize Sprint's model in this case input modifications need not be decided.

p. Is it lawful for the Commission to use Staff's cost model to determine SWBT's prices for conditioning in Missouri, and, if so, is it reasonable to do so?

Staff supported its model as lawful and asserted that its model is preferable because it takes into account loops conditioned for Bell's Project Pronto. Staff asserted that loop conditioning is generic and should be competitively neutral to Bell, Bell's CLEC affiliates and to CLECs. Staff asserted that Bell's CLEC affiliate probably would not change its business plan based on Staff's costing and pricing model because it is following central office upgrades by Bell in marketing xDSL services.

Staff agreed that CLEC business plans could change since costs to CLECs under Staff's average pricing model would become more predictable. But Staff asserted that Bell would recover its costs whether or not CLECs opt into the average pricing model because if they do not opt in they will either pay the per occurrence nonrecurring price (allowing SWBT full recovery) or will not order the loop (no cost

11 Mo. P.S.C. 3d

caused). Bell's concern with adverse selection by CLECs is unfounded in Staff's view.

Bell asserted that the Staff model is not accurate and would misallocate resources because customers requiring conditioning would take advantage of Staff's average pricing structure and those not requiring conditioning would be discouraged in ordering xDSL service by the imposition of the average charge on all xDSL capable loops. Bell asserted that CLECs with different business plans would take advantage of this pricing plan. Bell asserted that the Commission cannot require all CLECs to adopt this pricing and cannot change existing interconnection agreements that do not have this pricing.

CLECs, assuming the Commission allows Bell to recover conditioning costs, believed Staff's model and proposal is lawful and reasonable. CLECs noted that Staff's open model has an advantage of allowing inputs to be modified. Most CLECs would participate and those that did not would not order loops requiring conditioning or if they did would pay per occurrence so Bell would obtain full recovery with any option or mix of pricing options. Sprint found Staff's model acceptable.

The Commission has jurisdiction over the rates and rentals charged by telecommunications companies including rates and charges for the use of telecommunications facilities. Section 386.240. The Commission has jurisdiction to determine whether such rates, charges, rental or service are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any way in violation of law. *Id.* The Commission may impose any condition that it deems reasonable and necessary upon any company providing telecommunications services. Section 392.470.

Under the federal Telecommunications Act of 1996 (FTA), state public utility commissions have jurisdiction to resolve disputes over the terms for interconnection between telecommunications carriers and to determine whether rates, terms and conditions are just, reasonable, and nondiscriminatory. Sections 251 and 252 of the FTA. State commissions have jurisdiction and a duty to approve or to reject interconnection agreements adopted by arbitration or negotiation. Section 252(e) of the FTA.

The Federal Communications Commission has determined that when a requesting carrier requests loop facilities from an ILEC and those facilities require loop conditioning for digital functionality that the ILEC must condition the loop and the requesting carrier bears the cost. **First Report and Order**, CC Docket No. 96-98, August 8, 1991 para. 383. More recently the FCC noted that today's networks would not normally have inhibitors on loops under 18,000 feet but nevertheless the devices are sometimes present and the ILEC should be able to charge for conditioning such loops. *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, CC Docket NO. 99-98, November 5, 1999, para. 193.

The FCC has acknowledged that the charges ILECs impose to condition loops become sunk costs to the CLECs and that these costs may constitute a barrier to offering xDSL services. The FCC noted that ILECs might have an incentive to inflate the charge for line conditioning. Finally, the FCC deferred to the states to ensure that costs for line conditioning are in compliance with FCC pricing rules for nonrecurring costs. *Id.* para. 194. The FCC recognizes the authority of the states

to ensure that non-recurring costs are not recovered more than once and that such charges are spread equitably among entrants. *First Report and Order*, Id. para. 750.

Bell's objections or concerns with Staff's model go primarily to assumptions about the behavior of CLECs and end user consumers to having a new pricing option particularly if per occurrence pricing remains an option. The Commission would not be surprised if CLEC or consumer behavior changed and responded to changes in price. In fact, the Commission would expect it. The Commission has a concern that high per occurrence loop conditioning charges on loops less than 18,000 feet present a barrier to entry and to widespread availability of xDSL services. Staff's average pricing proposal lowers upfront costs where inhibitors continue to be encountered with some degree of frequency. Staff's average pricing proposal provides a means to spread conditioning costs over all entrants including CLECs and CLEC affiliates of Bell.

The sincerity of Bell's concern about CLECs cherry picking pricing options seems in doubt since Bell is now offering a recurring price option as an alternative to per occurrence pricing. In addition, Bell's own non-recurring pricing uses an averaging factor in its price structure on loops less 18,000 feet. Bell's own pricing behavior has impacted CLEC and consumer behavior. Bell has no basis to complain that pricing preferences of CLECs or the Commission likewise affect CLEC or consumer behavior. The Commission does not intend to force any change to existing interconnection agreements or mandate that CLECs use one agreement over another.

Staff's pricing structure presents Bell an opportunity and an incentive to adopt efficient conditioning and maintenance activities since participating CLECs would pay on every xDSL loop whether conditioning were required or not. If Bell anticipates demand and performs bulk conditioning in areas where xDSL services will be most heavily subscribed and conditions the capacity of loops anticipated, Bell gains the opportunity to lower its unit costs.

Staff's proposed pricing structure presents just, reasonable and non-discriminatory terms. It provides a means to spread costs over all or most entrants. With appropriate inputs and assumptions the rates, charges, rentals or services under Staff's model are not unjust, unreasonable, unjustly discriminatory or unduly preferential or in any way in violation of law.

q. If the Commission's answer to Issue 3p is "yes"...

(1) What modifications, if any, should the Commission make to Staff's cost model in determining SWBT's prices for conditioning in Missouri?

(2) What modifications, if any, should the Commission make to the inputs into Staff's Missouri cost model in determining SWBT's prices for conditioning in Missouri?

Staff did not propose any changes and asserted that its assumptions are reasonable and record based. Staff's proposed averaged non-recurring price for loops less than 18,000 feet is \$30.33.

11 Mo. P.S.C. 3d

CLECs offered no adjustments to Staff's model other than to note that future downward adjustments might be necessary in a future proceeding to account for the diminishing presence of inhibitors. CLECs did propose 11 adjustments to inputs including bulk conditioning and reducing some task times. CLECs adjustments produced an average non-recurring price from \$5.94 down to \$3.36 depending on the adjustments accepted. CLECs argued that Bell's affiliate – ASI – would not change its business plan due to Staff's pricing structure and would remain a dominant provider and subscriber for xDSL capable loops. ASI's business alone would cover most of Bell's costs.

Sprint suggested that Staff's model should be changed to assume bulk conditioning for load coils on loops up to 18,000 feet, that a cable utilization factor should be added, and task times changed. Sprint suggested that repeaters should be removed from average pricing and remain a per occurrence price due to their infrequent occurrence.

Most of Bell's arguments attacked Staff's inputs. Bell asserted that costs associated with reattaching bridged tap should be included; three load coils should be assumed; Staff should use an inflation factor; Staff should use a common cost mark-up; Project Pronto loops are included inappropriately; it is inappropriate to assume that CLECs would not change their business practices in response to different pricing structures.

Bell argues that Project Pronto is a separate service offering that cannot be considered in this case and that the Commission cannot change existing interconnection agreements retroactively. Bell asserts that Staff assumed Project Pronto loops would require no conditioning. Bell says Pronto is feeder network only and that the distribution network is the same and it will have inhibitors.

Bell also asserts that presently SBC-ASI only takes loops 14,000 feet and under to reduce instances where it will require conditioning. Bell asserted that if an average pricing structure is adopted Bell will have to do more conditioning than Staff model assumes because more loops will be ordered and have to be conditioned even by its affiliate SBC-ASI.

The Commission determines at this time to implement Staff's model and pricing structure – providing no charge on loops under 12,000 feet, an average charge on all xDSL capable loops from 12,000 up to 18,000 feet, and an average charge plus per occurrence charges for inhibitors over 18,000 feet for longer loops.

The Commission finds that Staff shall make adjustments to the inputs to its cost model and pricing structure as determined in the individual findings presented in this Report and Order. Furthermore, the Commission finds that Sprint's argument to delete repeaters from Staff's average pricing structure for loops from 12,000 up to 18,000 feet is reasonable and should be adopted. The price for removing or disabling a repeater shall remain on a per occurrence basis only for loops beyond 12,000 feet.

r. Is it lawful for the Commission to use SWBT's cost model to determine SWBT's prices for conditioning in Missouri, and if so, is it reasonable to do so?

Bell asserted that its model is compliant with FCC requirements and has been used in three prior Missouri arbitrations. Bell prices conditioning at \$0 under 12,000

feet, and proposes discreet prices for load coils, repeaters and bridged tap on loops from 12,000 to 17,500 feet. Bell proposes additional but lower pricing for inhibitors on other loops at same location. Bell proposes per occurrence pricing over 17,500 feet. Bell asserts that CLECs can pass costs on to end users using any pricing mechanism they choose.

Staff states that Bell's model is lawful but that Staff's model is more reasonable and allows the Commission to change inputs as desired.

CLECs assert that the Bell's non-recurring cost model is not consistent with related cost studies for recurring charges associated with loops and so potential for double recovery exists and Bell fails, improperly, to assume efficient bulk conditioning.

Sprint accepted Bell's model only if modified. Sprint asserted that Bell failed to document its cost study as the Commission ordered and that Bell's costs reflect inefficient practices and overstated costs.

The Commission finds that it is more reasonable to use Staff's pricing model. Staff's model offers a better choice because it equitably spreads costs over all entrants; lowers costs and barriers to entry; and offers a structure that provides an incentive to Bell to adopt efficient conditioning practices to lower costs and that promotes the integrity and modernization of the network.

s. If the Commission's answer to Issue 3r is "yes"...

(1) What modifications, if any, should the Commission make to SWBT's cost model in determining SWBT's prices for conditioning in Missouri?

(2) What modifications, if any, should the Commission make to the inputs into SWBT's Missouri cost model in determining SWBT's prices for conditioning in Missouri?

Bell proposed no changes or modifications to its model and pricing structure. Bell asserted that it is not inflating its costs because it wants to sell xDSL and compete against cable, satellite and wireless providers.

Staff suggested that rather than modifying Bell's model that the Commission adopt Staff's model.

CLECs – offered no adjustments and would not use Bell's cost model.

Sprint proposed multiple conditioning for 25 pair, assumed two load coils under 17,500 feet, deleted bridged tap restoration, proposed no inflation factor, spread costs over all xDSL capable loops (staff model), and proposed differentiated costs based on plant environment. Sprint supported an asset multiplier only on the cable technician, reduced engineer and clerk times to 40 and 10 minutes respectively.

Because the Commission has determined that it is more reasonable to implement Staff's costing and pricing model it is not necessary to determine modifications to Bell's model or to determine the inputs to Bell's model.

ISSUE 4A. If the Commission's answer to Issue 2a is "yes"...

a. For loops up to 17,500 feet, should conditioning costs be recovered from the requesting carrier on a per occurrence basis, or should the costs be spread across all xDSL-capable loops?

11 Mo. P.S.C. 3d

Bell proposed per occurrence pricing. Bell asserted a pricing structure that averaged costs over all xDSL capable loops could not be effectively implemented because the Commission cannot change existing interconnection agreements. And the result would be that some CLECs would take the average pricing structure and others the per occurrence structure. Bell asserted that an average pricing structure is not economically efficient.

Staff proposed an averaged non-recurring charge on all loops longer than 12,000 feet and less than 18,000 feet of \$30.33 whether conditioning is required or not. Staff asserted that its position is equitable, spreads the costs over all entrants and lowers the pricing and will promote availability of xDSL capable loops to end-users.

CLECs favored Staff's average nonrecurring charge if the pricing can be lowered from Staff's initial proposal perhaps to the \$20-25 range. Otherwise CLECs assert the pricing is too high under the non-recurring cost proposals of both Staff and Bell and would hurt CLEC business interests.

Sprint favored spreading the costs under any pricing mechanism.

The Commission adopts Staff's costing and pricing model, which spreads costs over all xDSL capable loops. This pricing model is preferable over per-occurrence pricing because it equitably spreads costs over all entrants; lowers costs and barriers to entry; and it offers an incentive to Bell to adopt efficient conditioning practices and promotes the integrity and modernization of Bell's network. While existing interconnection agreements cannot be changed, as those agreements expire those carriers can be migrated to the new pricing model.

b. If the Commission decides that any conditioning costs should be recovered from the requesting carrier on a per occurrence basis for loops up to 17,500 feet, should there be separate prices for each outside plant environment in which conditioning will occur (i.e. aerial, buried, underground)?

Sprint proposed and favored this structure presumably because it results in more accurate pricing.

Bell objected to differentiating pricing based on the outside plant environment. Its studies average the time so it is accurate and Bell's model has the benefit of providing price certainty to Bell and to CLECs.

Staff did not favor Sprint's proposal.

CLECs did not favor this proposal. CLECs noted that Bell's position to average the costs/prices should also lead to endorsement of the Staff model – that Bell cannot object to average pricing structures when it also adopts them.

The Commission cannot adopt Sprint's proposal. The record does not contain sufficient detail and data for the Commission to confidently differentiate the prevalence of outside plant environments relative to each other and to differentiate the individual inputs under each scenario. Furthermore, Sprint's model would result in a fragmented more complex pricing structure relative to Bell and Staff's model and the CLECs disfavored this characteristic. The Commission does not believe that there would be sufficient CLEC or consumer interest to justify further documentation of the necessary inputs.

- c. For loops up to 17,500 feet, should conditioning costs be recovered on a recurring or a non-recurring basis?

Bell proposed non-recurring prices on a per occurrence basis as conditioning is ordered. Bell asserted that conditioning is a one-time cost and this pricing model offers the best match to the cost occurrence. Bell asserted that CLECs could pass the costs through to end users using any pricing structure they choose. However, Bell also offers a recurring price option of \$1.67 per loop.

Staff favored non-recurring pricing but with an averaged charge on all xDSL capable loops ordered between 12,000 and 18,000 feet and averaged price for conditioning up to 18,000 feet plus per occurrence charges on loops over 18,000 feet.

CLECs favored non-recurring pricing unless costs and prices are too high. If so CLECs would then favor recurring prices. Sprint took no position this issue.

There is not sufficient evidence in this record for the Commission to adopt or approve a recurring price model.

- d. Should CLECs or SWBT be permitted to choose between recurring and nonrecurring rates?

Bell did not favor choice. Somewhat inconsistently Bell offers a recurring price option presently and also argued that the Commission had no authority to force CLECs or Bell out of present interconnection terms and questioned the Commission's authority to force CLECs into an average price model.

Staff argued that CLECs should be able to choose and that Bell would recover its costs either way.

CLECs asserted that the only choice option is to allow only CLECs to choose from competing pricing models. A choice option permitting Bell to choose is no option since Bell would dictate terms to the detriment of CLECs. Bell will still recover costs.

XO emphasized in a separate statement that CLECs should be allowed choice so that each can follow its own business plan. Sprint took no position.

Because the Commission is adopting and approving only Staff's cost and pricing model in this case the Commission need not address choice at this time.

- e. Should any recurring charge only apply for a specific period, and if so, for what period?

Bell opposed limiting a recurring charge to a finite period because this would not assure full cost recovery. Staff proposed a three-year period as reasonable. Staff further asserted that if its nonrecurring average charge were spread over three years and imposed as a recurring charge it would be \$1.01 per monthly.

CLECs proposed a three-year limit to assure Bell doesn't over recover its costs. Sprint took no position.

Because the Commission is adopting and approving only Staff's cost and pricing model, the Commission need not set a sunset date in this case for a recurring price model.

ISSUE 4.B. If the Commission's answer to Issue 2b is "yes"...

- a. For loops over 18 kft, should conditioning costs be recovered on a per occurrence basis, or should the costs be spread across all DSL-capable loops?

11 Mo. P.S.C. 3d

a. Should conditioning costs be recovered from the requesting carrier on a per occurrence basis, or should the costs be spread across all xDSL-capable loops?

Bell asserted per occurrence pricing for loops exceeding 17,500 feet. This is contrasted to its own averaged non-recurring price model for loops between 12,000 feet and 17,500 feet (averages plant environments for instance and assumes averaged numbers of inhibitors) and its own recurring price offer which clearly is an averaged pricing model.

Staff proposes its averaged non-recurring pricing model with \$30.33 average price for loops 12,000 to 18,000 feet (\$0 price under 12,000 feet) and the average price plus per occurrence conditioning prices for inhibitors over 18,000 feet of \$325.84 for load coils, \$221.91 for bridged tap, and \$221.91 for repeaters.

CLECs favored per occurrence pricing on loops over 18,000 feet since there is no frequency data. CLECs favored Staff's average pricing model for loops or the portion of loops from 12,000 to 18,000 feet as a means to equitably spread costs over all entrants.

Sprint favored per occurrence pricing over 18,000 feet.

In this case the Commission adopts Staff's pricing model with inputs as modified and determined in this Report an Order. This provides for per occurrence pricing for removing or disabling the inhibitors occurring beyond 18,000 feet. CLECs point that frequency data is not available to determine an averaged pricing model for the inhibitors beyond 18,000 feet is well taken.

b. If the Commission decides that any conditioning costs should be recovered from the requesting carrier on a per occurrence basis for loops over 17,500 feet, should there be separate prices for each outside plant environment in which conditioning will occur (i.e. aerial, buried, underground)?

Bell proposes averaged pricing for aerial, buried and underground environments. Staff supported Bell's position. CLECs were not opposed to Bell's position but reiterated their concerns with Bell's inputs and suggested using Riolo's times and using Staff's model to calculate.

Sprint supported differentiating inputs based upon the loop or cable environment.

The Commission finds that there is insufficient data and information in this record to make the distinctions Sprint proposes. Furthermore, stratifying pricing for plant environments adds uncertainty and complexity to pricing and costs without any shown offsetting benefit.

c. Should conditioning costs be recovered on a recurring or a non-recurring basis?

Bell proposed non-recurring pricing. Staff also proposed non-recurring pricing. CLECs would accept either but as price gets higher recurring pricing becomes a better option. Sprint took no position.

The Commission finds that non-recurring pricing using Staff's model with the inputs determined in this case presents the best and most appropriate pricing option. There is inadequate information to fully substantiate a recurring price

structure. The Commission is hopeful that continuing network upgrades will result in shorter loops being universally available where there is demand for high-speed digital or data services.

d. Should CLECs or SWBT be permitted to choose between recurring and nonrecurring rates?

Bell advocated that there should be no choice. Staff proposed CLEC choice. CLECs advocated CLEC choice and asserted that if Bell chooses it's not a choice at all. Sprint took no position.

The Commission does not set a recurring price structure for loops over 18,000 feet in this case. The Commission therefore does not need to address this issue.

e. Should any recurring charge only apply for a specific period, and if so, for what period?

Bell asserted that it was not appropriate to set a time period because such a deadline would offer no assurance of complete cost recovery. Staff and CLECs proposed three years. Sprint took no position.

The Commission does not set or determine inputs of recurring pricing in this case and therefore the Commission does not set a time period. The Commission notes that Bell offers recurring pricing presently.

ISSUE 5. What information, if any, should SWBT be ordered to track on loop conditioning?

Bell stated that it could track the number of xDSL capable loops ordered and the number requiring conditioning. Bell asserted that further tracking requirements would impose costs on Bell. Bell asserted that no other tracking can or should be implemented without providing Bell means to recover the cost of tracking.

Staff proposed that Bell should also identify xDSL capable loops by their assignment to a CLEC or to an affiliate as well as the number of xDSL loops requested, the number conditioned when over 12,000 feet. Staff further proposed that Bell identify the types of facilities: specifically line sharing over Project Pronto, line sharing over copper, and loops wholly made up of traditional copper. Staff proposed quarterly reporting. Staff asserted that this information is essential to monitor cost recovery and future adjustments.

CLECs proposed tracking the removal of all inhibitors for any reason. CLECs did not propose tracking actual task times. CLECs asserted that Bell's actual time reports would have no worth absent continual PSC audits to verify the data and to assure efficient practices by Bell. Sprint proposed current requirements apparently in reference to data reporting arising out of the Covad arbitration.

The Commission will adopt Staff's proposal. The information requested has generally been required in the past and should not result in undue costs to Bell. In fact, this information should all be reflected in Bell's database. The information will enable the Commission and its Staff to monitor cost recovery and determine future adjustments to inputs and to pricing.

Additional Matters:

The Commission determines that the pricing model proposed by Staff is appropriate and that these pricing terms and conditions shall be offered by Bell and

11 Mo. P.S.C. 3d

shall be available to CLECs and affiliate CLECs. However, this pricing model is subject to the inputs and assumptions determined in this Report and Order. The Commission does not intend to effect any existing interconnection agreements other than to complete the interim provisions of the M2A.

The Commission will direct its Staff to file a report with schedules if necessary for clarity showing the pricing and terms under the Staff model within 15 days of the issue date of this Report and Order.

Staff may obtain necessary assistance from Bell or any other party. Parties may file responses or comments to the Staff report and schedules. However, failure to do so will not prejudice any party's right to petition the Commission for clarification or rehearing after Staff's report and schedules are filed and prior to the effective date of this Report and Order.

The Commission further finds that the duration of the pricing and terms and conditions is indefinite subject to the related terms of the interconnection agreement entered whether the M2A or otherwise.

The Commission makes one exception to its determination of the duration of cost recovery and pricing. This is with respect to cost recovery and pricing for load coils on loops between 12,000 and 18,000 feet. The record in this case shows that load coils are not necessary on loops up to 18,000 feet in length. They are encountered so rarely on loops of 12,000 feet and less that Bell imposes no charge to remove them. The same should be true ultimately on loops up to 18,000 feet.

Load coils can easily be bulk conditioned because of the regular intervals with which they are placed and the engineering standards in the industry to maintain cable group integrity by having loops in cables bundled with similar characteristics such as length, loading, etc.

The Commission's decision to adopt an average pricing model provides Bell a cost, pricing and profit incentive to bulk condition for load coils in anticipation of xDSL demand. This results because Bell can lower its unit cost by bulk conditioning for load coils. As a further incentive the Commission will set a three-year sunset from the effective date of the Report and Order for cost recovery and pricing for removal of load coils on loops of 18,000 feet and less. After this time no type of pricing or cost recovery will be approved for Bell for load coils on loops of 18,000 feet or less unless Bell demonstrates a continued need for cost recovery. Staff's report and schedules shall show the effect of removing cost recovery for load coils from the pricing model approved by the Commission in this case. Staff's report shall also show the effect of 25 pair loop bulk conditioning on the pricing model approved by the Commission in this case (Issue 3.c.).

ADDITIONAL CONCLUSIONS OF LAW

The Commission is determining rates, terms and conditions for network elements for use in interconnection agreements between telecommunications carrier and particularly rates, terms and conditions allowed to an incumbent local exchange carrier to be charged to competitive local exchange carriers. Sections 251 and 252 of the FTA require that these rates, terms and conditions be just, reasonable, and nondiscriminatory. State law requires the Commission to determine that such rates, charges, rentals or services are not unjust, unreason-

able, unjustly discriminatory or unduly preferential or in any way in violation of law. Section 386.240. The Commission may impose any condition that it deems reasonable and necessary upon any company providing telecommunications services. Section 392.470.

The Commission concludes that the rates, terms and conditions adopted and approved by the Commission in this case are just, reasonable and nondiscriminatory. The rates and charges are not unjust, unreasonable, unjustly discriminatory or unduly preferential or in any way in violation of law. The conditions imposed by the Commission are reasonable and necessary to assure CLECs and end users have access to unbundled network elements on reasonable terms, conditions and prices. The conditions imposed by the Commission and the rates, terms and conditions adopted and approved provide Bell with the opportunity to fully recover its costs.

IT IS THEREFORE ORDERED:

1. That the Commission approves the cost and pricing model proposed by the Commission's Staff with inputs and assumptions modified according to the terms of this Report and Order.
2. That the Commission's Staff shall file the report with term and pricing schedules described in this order within 15 days of the issue date of this Report and Order.
3. That this Report and Order shall become effective on March 30, 2002.

Simmons, Ch., Lumpe, Gaw and Forbis, CC., concur;
Murray, C., dissents with dissenting opinion attached;
certify compliance with the provisions of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully disagree with the majority's decision concerning certain key issues. Furthermore, the scope of the applicability of the decisions in this case is inadequately addressed by the Report and Order. It should have been clearly expressed that the effect of the Report and Order is to set permanent prices for xDSL conditioning for the M2A.

The Report and Order makes reference to the future availability of negotiation, arbitration or litigation to resolve which terms and conditions a requesting carrier would have to take along with the pricing established here. The Report and Order appears to make the prices available to any future requesting CLEC and to require Bell to negotiate, arbitrate or litigate, at that time, the terms and conditions to accompany that pricing. The majority finds Bell's issue "not ripe for determination"; but I submit that the issue should be clearly determined here by recognizing the appropriate scope of this case. A CLEC would have the ability to take the prices set here, by opting into the M2A. The legitimately related terms and conditions of the M2A would also apply.

While the majority states that it "would be a waste of resources to restrict application of the Commission's findings and conclusions in this case as Bell

11 Mo. P.S.C. 3d

suggests," the real waste of resources comes from not resolving the issue in this Report and Order.

I disagree that bulk conditioning of load coils should be mandated. Staff does not advocate ordering SWBT to condition multiple loops stating that it would be inappropriate under the proposed average pricing structure. Bulk conditioning is unlikely to provide cost recovery. Furthermore, SWBT makes a point that, because voice service predominates over digital service, the bulk removal of load coils is not in the public interest.

I believe that the average-pricing proposal imposed here is flawed. While average pricing might prevent conditioning costs from acting as a barrier to entry, such pricing would only be equitable if all CLECs participated in the pricing structure and the average prices were calculated properly. Neither is the case here.

Because there are existing interconnection agreements that do not use an average-pricing structure and that will be unaffected by this Report and Order, many CLECs will continue under those agreements to choose loops that do not require conditioning. They will continue to pay nothing for those loops. Other CLECs may choose to negotiate and arbitrate to seek a different price, rather than opt into an average-pricing structure. The Commission cannot force CLECs to opt into the average-pricing structure; therefore, the average is automatically inaccurate.

Additionally, the calculations that staff used to arrive at the average are flawed because they include the Project Pronto loops in the total number of loops, but fail to include the costs of conditioning those loops. Because Project Pronto replaces only the feeder portion of the local loop network, the existing distribution network will still require conditioning where inhibitors are present. Staff inappropriately included the Project Pronto loops in the base over which the charge is collected without also including the costs of conditioning those loops in the average price.

For these reasons, I dissent.

In the Matter of the Petition of MCImetro Access Transmission Services LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc., for Arbitration of an Interconnection Agreement With Southwestern Bell Telephone Company Under the Telecommunications Act of 1996.

*Case No. TO-2002-222
Decided February 28, 2002*

Telecommunications §7. The Commission determined that it had jurisdiction under the Telecommunications Act of 1996 to arbitrate the dispute between the parties.

Telecommunications §36. The Commission resolved disputed issues presented in a petition for arbitration of an interconnection agreement between MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI World Com Communications, Inc., and Southwestern Bell Telephone Company.

Telecommunications §46.1. The Commission resolved disputed issues presented in a petition for arbitration of an interconnection agreement between MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI World Com Communications, Inc., and Southwestern Bell Telephone Company.

APPEARANCES

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and

L. Kirk Kridner, Senior Counsel, SBC Communications, Inc., 175 East Houston Street, 4th Floor, San Antonio, Texas 78205, for Southwestern Bell Telephone Company.

Bruce H. Bates, 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: Vicky Ruth, Senior Regulatory Law Judge.

ARBITRATION ORDER**Procedural History**

On June 1, 2001, MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. (hereinafter collectively referred to as WCOM) and Southwestern Bell Telephone Company (now known as Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company) began negotiations to establish an interconnection agreement between WCOM and SWBT. On November 5, 2001, WCOM filed its Petition for Arbitration of Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996. Attached to WCOM's Petition was WCOM's Initial Decision Point List.

The Commission issued its Notice of Petition for Arbitration and Order Setting Prehearing Conference on November 19, 2001. The Commission made SWBT a party, ordered that the Notice be served on SWBT, and directed SWBT to respond to the Petition by November 30, 2001. The Commission further set a prehearing conference for December 3, 2001, and directed that the parties prepare and jointly file a proposed procedural schedule by December 10, 2001. That deadline was later extended to December 14, 2001.

On November 30, 2001, SWBT filed its Motion to Dismiss WCOM's Petition. That same day, SWBT filed its Response to WCOM's Petition. On December 7, 2001, WCOM filed its Suggestions Opposing SWBT's Motion to Dismiss. On December 10, 2001, the Staff of the Missouri Public Service Commission filed its Response in Opposition to SWBT's Motion to Dismiss. On December 13, 2001, SWBT filed its Reply to WCOM's Suggestions Opposing SWBT's Motion to Dismiss. On December 17, 2001, WCOM filed its Response to SWBT's Reply Regarding WCOM's Opposition to Motion to Dismiss. On December 20, 2001, WCOM filed its Revised Decision Point List, adding Issues 49 and 50.

Pursuant to an agreement between WCOM, SWBT, and Staff, WCOM and SWBT filed Direct Testimony on December 18, 2001.¹ On December 21, 2001, the Commission entered its Order Regarding Arbitration Procedures and Adopting Procedural Schedule, in which the Commission adopted procedural rules for the conduct of the arbitration and set the case schedule. The Commission also clarified Staff's role in the case.

On January 3, 2002, SWBT filed its Motion to Strike Issues 49 and 50 from WCOM's Revised Decision Point List. That same day, the Commission issued its Order Denying Motion to Dismiss. On January 4, 2002, the parties filed a Joint Motion to Establish Witness Schedule.

Pursuant to the Procedural Order, WCOM, SWBT and Staff filed Rebuttal Testimony on January 7, 2002.² Additionally, WCOM and SWBT filed a Joint

¹ On December 19, 2001, SWBT filed a Motion to File Direct Testimony After December 18, 2001, as well as a Motion to File Schedule 2 Attached to the Direct Testimony of Thomas F. Hughes After December 18, 2001. Those Motions were granted on the first day of hearing, January 14, 2002.

² On January 8, 2002, SWBT filed a Motion to File the Rebuttal Testimony of June A. Burgess Out of Time, which was later granted by the Commission.

Decision Point List with Position Statements on January 8, 2002. On January 9, 2002, WCOM and SWBT filed their Cross Examination Times Estimates. That same day, WCOM and SWBT filed a Joint Motion to Correct Decision Point List. Also on January 9, 2002, the Commission issued its Order Directing Filing, ordering Staff to file a supplemental pleading further explaining its position with regard to Attachment 26 of the Missouri 271 Interconnection Agreement (M2A) and Staff's position that UNE rates should be determined separately, as opposed to being taken as a section in their entirety.

Finally, on January 9, 2002, WCOM filed its Response to SWBT's Motion to Strike Issues 49 and 50. On January 11, 2002, Staff filed its Evaluation of Parties Positions. That same day, the Commission issued its Order Regarding Witness Schedule, allowing WCOM and SWBT to cross-examine witnesses pursuant to the estimates that they filed in their January 9, 2002 pleadings.³ Staff was limited to ten minutes of cross-examination per witness. An evidentiary hearing was held from January 14-18, 2002. On January 14, 2002, the Commission denied SWBT's Motion to Strike Issues 49 and 50.

On January 31, 2002, WCOM, SWBT and Staff filed their Initial Briefs. On the same date, Staff filed the Substitute Sheets for Joint Decision Point List and then filed Staff Modification to Substitute Sheets.

On February 6, 2002, WCOM, SWBT and Staff filed their Proposed Findings of Fact and Conclusions of Law. WCOM and SWBT filed their Reply Briefs on February 11, 2002. On that date, Staff filed a statement indicating that it would not be filing a reply brief. This case has an Arbitration Deadline of March 1, 2002.

The Protective Order

During the prehearing conference held on December 3, 2001, WCOM requested a protective order. The Commission issued its standard protective order on December 5.

The Decision Point List (DPL) and Late-filed Exhibit

WCOM and SWBT each filed issue lists with their initial pleadings. WCOM filed a revised list after SWBT's list was filed, at the direction of the Commission. The parties filed a joint DPL prior to the hearing, again at the direction of the Commission. The parties filed a final DPL on January 31, 2002, at the direction of the Commission, which is hereby received into the record as Late-filed Exhibit 53. As ordered, the final DPL includes Staff's final recommendations, as modified by a separate Staff pleading filed on January 31, 2002.

The Arbitration Hearing

The Commission conducted an evidentiary hearing on January 14, 15, 16, and 17, 2002, at its offices in Jefferson City, Missouri. Each party was represented by counsel and was permitted to offer the testimony of witnesses and other evidence. Cross-examination was permitted, although it was subject to time limitations set by the Commission.

³ During the hearing, minor adjustments were made to the time limitations.

11 Mo. P.S.C. 3d

Posthearing Proceedings

The parties filed their initial briefs on January 31, 2002, pursuant to the procedural schedule. On February 6, the parties filed their proposed findings of fact and conclusions of law. On February 11, the parties filed their reply briefs.

Discussion

As indicated above, the parties submitted the specific open issues requiring resolution in the form of a Decision Point List (DPL). This is a voluminous document containing forty-two specific disputed points requiring resolution by the Commission. The parties reorganized the issues into the following six topical categories in their Briefs:

1. General Contract Language Issues (25, 44, 29, 30, 18, 27 and 43)
2. UNEs (2-3, 5-7, 45, 8-9, 14, 21-2, 28, 35-38, 48)
3. LIDB/CNAM (13, 15-17, 33, 19-20)
4. DAL (24, 26, 47)
5. OS/DA (49)
6. Rate Issues (10-12, 23, 31, 46, 50)

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.

The Parties

The parties are WCOM and SWBT, which are telecommunications companies. SWBT is a local exchange carrier (LEC) and provides local exchange telecommunications service in Missouri and other states. SWBT and its affiliates also provide long-distance and other telecommunications services. WCOM provides local exchange telecommunications services in Missouri and other states. It is a competitive local exchange carrier (CLEC). WCOM also provides long-distance and other telecommunications services.

Background to the Dispute

The present arbitration must be considered within the larger context of the implementation of the Telecommunications Act of 1996 in Missouri (the Act).

Case No. TO-99-227 and the M2A

On November 20, 1998, SWBT notified the Commission that it intended to seek authority from the FCC to provide interLATA telecommunications services in Missouri under Section 271 of the Act. This provision bars the Bell operating companies (BOCs), such as SWBT, from entering the interLATA long-distance market without prior approval from the FCC. FCC approval is conditioned on its finding that certain statutory measures have been met in the state in question.⁴

Thereafter, the Commission opened Case No. TO-99-227 and held proceedings in order to determine whether it could support SWBT's request for authority to enter the interLATA long-distance market by giving a positive recommendation to the FCC pursuant to Section 271(d)(2)(B) of the Act. That provision requires the FCC to consult with the state commission "to verify the compliance of the Bell operating company with the requirements of subsection (c)." A positive recommendation could be made only if either the Commission determined that SWBT had entered into a binding interconnection agreement with at least one facilities-based competitor or the Commission approved a statement by SWBT of the terms and conditions upon which it generally offered to provide interconnection and access to UNEs.⁵ In either case, the interconnection agreement or statement of terms and conditions was required to satisfy the 14-point checklist at Section 271(c)(2)(B) of the Act.

To meet the 14-point checklist and thereby secure a favorable recommendation from the Commission, SWBT tendered on June 28, 2000, a model interconnection agreement for Commission approval; this agreement is referred to as the M2A. The M2A is modeled upon an agreement negotiated in the course of SWBT's Section 271 proceeding in Texas, the T2A, which has been approved by the FCC.⁶ The M2A was further modified after June 28, 2000, in response to comments by parties and interim position statements by the Commission.⁷ The M2A includes binding terms for interconnection and for access to UNEs, including UNEs not currently combined in SWBT's network, and for the resale of services.⁸

⁴ 47 U.S.C. Section 271(d)(3).

⁵ 47 U.S.C. Section 271(c)(1), (A) and (B), and Section 252(f).

⁶ In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act, Case No. TO-99-227 (Order Finding Compliance with the Requirements of Section 271 of the Telecommunications Act of 1996, issued March 6, 2001) (hereinafter the "271 Compliance Order") at 2.

⁷ *Id.*, at 3.

⁸ In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act, Case No. TO-99-227 (Report & Order, issued March 15, 2001) (hereinafter the "271 Report & Order") at 17-19.

11 Mo. P.S.C. 3d

On March 6, 2001, the Commission determined that the M2A met the 14-point checklist of Section 271, as well as the other requirements of the Act applicable to interconnection agreements.⁹ The Commission further determined that the public interest supported SWBT's entry into the interLATA long-distance market in Missouri, so long as the M2A was made available to Missouri CLECs.¹⁰ The M2A incorporates prices from the Commission's arbitration decisions in Case Nos. TO-97-40 and TO-98-115.¹¹ Three "spinoff dockets" were also initiated in order to determine costs and prices for certain other elements.¹² The results of these cases will be inserted into the M2A when they become available.¹³

SWBT'S Section 271 Application

Having obtained a favorable recommendation from the Missouri Commission, SWBT filed formal applications under Section 271 with the FCC.¹⁴ During the course of those proceedings, SWBT also requested and obtained approval from this Commission to reduce some of the prices set forth in the M2A.¹⁵ The FCC granted the application on November 16, 2001.¹⁶ As a result, SWBT extended the term of the M2A to March 5, 2005.¹⁷

Resolution of Open Issues

Resolved Issues

The final DPL (Exhibit 53) reflects that issues 1, 4, 32, 34, and 39-42 have been resolved by the parties and do not need to be decided by the Commission.

⁹ 271 Compliance Order, at 3-4.

¹⁰ *Id.*

¹¹ 271 Report & Order, at 16.

¹² In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act, Case No. TO-99-227 (Report & Order, issued March 15, 2001), at 18. The cases are TO-2001-438 (certain UNEs); TO-2001-439 (xDSL-capable loops); and TO-2001-440 (line splitting and line sharing).

¹³ *Id.*

¹⁴ See 47 U.S.C. Section 271(d)(1). SWBT's initial application was assigned CC Docket No. 01-88. SWBT withdrew its initial application and refiled, and its new application was assigned CC Docket No. 01-194.

¹⁵ See Order Granting Motion to Accept Revised Missouri Interconnection Rates, Case No. TO-99-227 (August 30, 2001).

¹⁶ In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, Memorandum and Opinion (November 16, 2001).

¹⁷ See Order Denying Motion to Reconsider Recommendation and Opening Case for Monitoring Purposes, Case No. TO-99-227 (September 4, 2001).

General Contract Language Issues**Issue 25: Should SWBT's Bona Fide Request process and associated language replace the Special Request section?**

SWBT initially proposed a new "Bona Fide Request (BFR) Process" for WCOM to use in Missouri to obtain new UNEs (or existing types of UNEs where no facilities are in place) from SWBT in the future. In response, WCOM proposed continued use of the "Special Request Process" set forth in the M2A or, in the alternative, the BFR process language contained in SWBT's "CLEC Online Handbook". Staff recommended WCOM's alternative proposal of the BFR process language contained in SWBT's "CLEC Online Handbook". In its Brief, SWBT indicated it did not object to use of the "CLEC Online Handbook". Thus, there is no longer any dispute regarding this issue and the Commission accepts Staff's recommendation to utilize the provisions of the "CLEC Online Handbook".

Issue 44: Should the Commission require a CLEC to include in its interconnection agreement language from SBC's 13-state agreement where the CLEC's agreement applies only to Missouri?

SWBT proposes to include language applicable to other states in various sections throughout the Agreement. WCOM opposes the inclusion of such language. Staff recommends exclusion of such language consistent with the Commission's decision in Case No. TO-2001-455. Staff notes that the 13-state language does not facilitate market entry or the spread of best practices as the FCC intended with the SBC/Ameritech order.¹⁸ Staff agrees with WCOM that the language is confusing and creates an administrative burden to the PSC. Including language that does not apply to Missouri hinders interpretation and administration of the Agreement.

Staff agrees with WCOM that the Agreement should be limited to terms and conditions that apply to Missouri only, and the Commission concurs. The Commission determines that a CLEC should not be required to include in its interconnection agreement language from SBC's 13-state agreement where the CLEC's agreement applies only to Missouri.

Issue 29: Is SWBT obligated to provide a retail intraLATA toll product to WCOM end-users?

WCOM argues that SWBT should be obligated to bill WCOM's intraLATA toll end-users who opt to obtain retail intraLATA service from SWBT. SWBT contends that this issue presumes that SWBT is obligated and has chosen to provide retail intraLATA toll services to WCOM end-users, but that SWBT has not and does not offer to provide IntraLATA toll to WCOM's local end-user customers. Staff concurs with SWBT's position on the basis that it is unaware of any federal or state statute obligating SWBT to provide a retail intraLATA toll product to WCOM's end-user. This

¹⁸ CC Docket No. 98-141, Memorandum Opinion and Order: In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 241 and 310(d) of the Communications Act and parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules. Page 160, paragraph 388.

11 Mo. P.S.C. 3d

Commission previously determined in Case No. TO-2001-455 that SWBT has no obligation to provide intraLATA toll services to a CLEC's end-user customers and makes the same finding here. The Commission supports SWBT's position on this issue.

Issue 30: What proposed contract language should be used for Alternately Billed Traffic (ABT) in the MCIIm agreement?

WCOM and SWBT have proposed competing versions of Attachment 27 to be used in the MCIImetro agreement (not the Brooks and MCI WorldCom agreements) to deal with Alternately Billed Traffic (ABT) exchanged between the parties when MCIImetro is operating as a reseller or using UNE-Platform.¹⁹ At the hearing, WCOM explained that ABT consists of intraLATA or local phone calls transported by one carrier but billed to the account of a customer served by another carrier, such as collect calls, third-party billed calls, and calling card calls. Thus, the originating carrier rates the call and forwards records to the other carrier for billing. WCOM explained in detail how such traffic is handled between carriers.

MCIImetro's proposed Attachment 27 describes in detail the settlement responsibilities and operational responsibilities for ABT that is billed by MCIImetro or SWBT. MCIImetro's proposed Attachment 27 is completely reciprocal, which is why Staff recommended that the Commission select it over the less balanced approach of SWBT. It also expressly addresses MCIImetro's current inability to include ABT charges on its direct invoices. Further, it fairly deals with the issue of all types of uncollectibles in the same manner as LEC/IXC agreements and SBC contract offers in other states so that the party that nets 98.7 percent of the revenues from the traffic bears the risk of nonpayment and the party that is simply providing a billing and collection service in good faith for a nominal fee does not unfairly bear that risk.²⁰

WCOM also identified shortcomings of SWBT's proposed Attachment 27 as contrasted with the MCIImetro proposal, as follows:

- (1) SWBT does not address MCIImetro's current inability to include ABT charges on its direct invoices;
- (2) SWBT does not clearly define or delineate ABT or the settlement process;
- (3) SWBT's proposed Attachment is one-sided and not reciprocal, failing to address ABT sent to SWBT by MCIImetro and MCIImetro liability and indemnification;
- (4) SWBT does not allow recourse for all types of uncollectibles to protect the billing company;
- (5) SWBT does not address responsibilities for taxes;
- (6) SWBT would not allow MCIImetro to follow its own procedures for customer service inquiries or treatment and collection;

¹⁹ Adoption of Attachments 1-5 did not foreclose WCOM from proposing additional provisions regarding ABT.

²⁰ In the alternative, in the absence of an Attachment 27, MCIImetro proposed language for Attachment 10, Section 8.3.1 to deal with the issue of uncollectibles.

- (7) SWBT does not address Truth In Billing legal requirements;
- (8) SWBT does not address lost data and traffic;
- (9) SWBT's proposal contains language that conflicts with other provisions of the Agreement;
- (10) SWBT would not allow the purchase of accounts receivable;
- (11) SWBT would allow itself to transmit stale records but require MCImetro to meet unattainable short time deadlines;
- (12) SWBT does not address audit rights;
- (13) SWBT does not address confidentiality or publicity;
- (14) SWBT does not address payment due dates;
- (15) SWBT proposes unreasonable and unilateral dispute resolution language;
- (16) SWBT demands unattainable unilateral performance levels;
- (17) SWBT would include higher risk prison traffic without adequate compensation;
- (18) SWBT would require MCImetro to block all ABT including that of other carriers when there is a problem only between SWBT and MCImetro;
- (19) SWBT would improperly include sweepstakes charges, credit card retail purchases, and cellular charges.

While SWBT indicated a willingness to address some of these issues in its rebuttal testimony, it did not propose a revised Attachment 27.

For the foregoing reasons, the Commission selects WCOM's proposed Attachment 27, except for sections 2.3.10, 5.3.1 and 6.5.2.4 based on Staff's recommendation to delete these sections as unfeasible.

Issues 18, 27, and 43: Should specific liability language be added to the Interconnection Agreement to address call related database information?

Should SWBT's additional limitation of liability language be adopted?

Should the Directory Listing Information (DLI) Appendix include specific Breach of Contract language?

SWBT proposes to utilize specific limitation of liability language in UNE Attachment 6 concerning call-related databases (i.e., LIDB database and associated CNAM information). SWBT's proposed language regarding liability is unnecessary.

As WCOM explained, the General Terms and Conditions of the Agreement, which WCOM adopted from the M2A and which will expressly apply to all parts of

11 Mo. P.S.C. 3d

the Agreement, already have very broad provisions (i.e., Sections 7.0 *et seq.*, 8.0 *et seq.*, 9.0 *et seq.*, 10.0 *et seq.*, 51.0, 51.1) that more than adequately cover the subjects of limitations on liability, indemnification and breach of contract, making SWBT's proposed changes unnecessary.

Staff agreed with WCOM on these issues and recommended that the Commission reject SWBT's proposed additional language consistent with decisions in prior arbitrations. Staff noted that 7.1.2 of the General Terms and Conditions addresses all instances of negligence or willful misconduct and adequately addresses the liability concerns of both parties. Staff agrees with WCOM that the disclaimer-of-warranty language in Section 7.1 "would also apply to the call-related database-information." Staff believes that Section 7.1 Limitation of Liability language, previously approved by the Commission as part of the M2A, gives SWBT the proper incentives to process accurate LIDB information. Staff further notes that Attachment DLI (Directory Listing Information) was previously sufficient, as approved in the M2A, without an accelerated breach clause such as SWBT now proposes.

SWBT has not presented convincing evidence indicating how the nature of the information has changed since approval of the M2A. Consistent with the M2A, breach of contract language in the General Terms and Conditions should apply to the whole of the agreements and specific breach of contract language is not needed in the DLI Appendix.

The Commission accepts Staff's recommendation, consistent with that of WCOM, not to include any additional language on these issues.

UNEs

Issue 2: Should SWBT be required to maintain characteristics of affected elements for WCOM when SWBT upgrades its network?

The Commission determines that SWBT should be required to maintain characteristics of affected elements for WCOM when SWBT upgrades its network. Contrary to SWBT's assertions that it would be required to maintain "obsolete equipment", WCOM is only asking that SWBT maintain the "characteristics" of affected unbundled network elements in those instances where SWBT upgrades its network. The language supported by WCOM and by Staff is not radical or novel; it is language that was also used in the M2A. More importantly, SWBT has the obligation under Section 256 of the Act to facilitate "effective and efficient interconnection" of networks.

WCOM needs to ensure that it will have the ability to continue utilizing certain characteristics of SWBT's network at the time its interconnection agreement is executed. If WCOM had no right to request that SWBT maintain the characteristics of the unbundled network elements throughout the term of the interconnection agreement, SWBT would be able to unilaterally change its network in ways that would effectively deny WCOM its right to lease such elements. The specific language of section 2.17.4 of Attachment 6 clarifies that SWBT's obligation to maintain these characteristics is limited to those circumstances in which "the

requested characteristics are specifically provided for in this Attachment [Attachment 6], Technical Publication or other written description.” The Commission finds that WCOM’s proposed language for this issue is appropriate.

Issue 3: Should SWBT be required to combine UNEs not previously combined in its network?

WCOM seeks inclusion of language from the M2A pursuant to which SWBT voluntarily agreed to perform combinations of UNEs that are not currently combined in SWBT’s network. SWBT opposes the inclusion of such language on the basis that, although it voluntarily made this offer in the M2A, it declines to make such a voluntary offer outside the M2A. SWBT further asserts that FCC Rules 51.315(c)-(f), which had required ILECs to perform such new combinations, has been declared to violate the Telecommunications Act of 1996 by the 8th Circuit Court of Appeals, which subsequently reaffirmed its vacature.

Staff opposes WCOM’s language on the basis that it is unlawful and contrary to the Commission’s decision in Case No. TO-99-227 that SWBT is not required to provide combinations of UNEs when they do not currently exist in SWBT’s network. Staff proposed additional language clarifying that SWBT is not to separate existing UNE combinations in its network except upon request, but confirmed that its language was consistent with SWBT’s position on this issue. Staff reiterates that the Commission has already addressed this issue in Case No. TO-99-227, where it found that SWBT’s only obligation is to provide access to its UNEs and existing UNE combinations.

SWBT points out that the issue stems from the FCC’s promulgation of Rule 47 C.F.R. 51.315(a)-(f). The first subsection of the rule restates the provisions of Section 251(c)(3) which expressly provides that the CLEC is to perform combinations. Subsection (b) provides that “except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.” Subsections (c)-(f) placed an affirmative obligation on ILECs to combine UNEs at the request of a CLEC. In *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (“IUB I”), the 8th Circuit vacated Rule 51.315(b)-(f). After the U.S. Supreme Court reversed the 8th Circuit on Rule 51.315(b), the FCC and various CLECs sought to persuade the 8th Circuit that Rule 51.315(c)-(f) should also be reinstated. In *Iowa Utilities Board v. FCC*, 219 F.3d 744, 758-759 (8th Cir. 2000) (“IUB II”), the 8th Circuit rejected that contention and continued its vacature of Subsections (c)-(f).

The combinations provisions of the M2A, which WCOM seeks to incorporate here, is a voluntary offering by SWBT that goes beyond the requirements of the federal Telecommunications Act of 1996 (Act).²¹ Staff’s proposed language properly reflects SWBT’s obligations under the Act regarding combining UNEs and, therefore, will be adopted by this Commission. Therefore, the Commission finds SWBT’s proposed language at 2.4 and 2.4.1 and at 1.1 – Appendix UNE Pricing, and 1.1, 1.2, 1.3 and b.1 at GT&C to be appropriate with the changes recommended by Staff in Staff’s Evaluation of the DPL.

²¹ Order Regarding Recommendation on 271 Application, Case No. TO-99-227, March 15, 2001, pp. 70-71.

11 Mo. P.S.C. 3d

Issue 5: Is SWBT required to provide stand-alone multiplexing as a UNE?

The FCC, in its *UNE Remand Order*,²² states that multiplexing is not a separate unbundled network element but is an example of attached electronics used to derive loop capacity. While WCOM agrees that stand-alone multiplexing is not a UNE, its proposed language would require SWBT to provide stand-alone multiplexing.

SWBT opposes such a requirement on the basis that WCOM's proposal is unlawful, as the FCC's *UNE Remand Order* clearly states that stand-alone multiplexing is not a separate UNE. SWBT explains that although it voluntarily offers stand-alone multiplexing in the M2A, it does not offer it outside the M2A. Staff concurs that WCOM's proposed language is inappropriate as contrary to the requirements of the Act as interpreted by the FCC.

The Commission agrees with Staff and SWBT that WCOM's proposed language is inappropriate and finds that Sections 8.2.1.5.1 and 8.2.1.5.2 proposed by WCOM are rejected. The Commission further finds that SWBT's proposed language properly reflects the FCC's determination and should be included in the interconnection agreement.

Issue 6: Should Unbundled Dedicated Transport be defined and provided as specified in the FCC Rules?

This issue involves the definition and application of Unbundled Dedicated Transport (UDT) as set forth in the FCC Rules. WCOM's proposed language would permit WCOM to order UDT between its switch and the switch of a third party. SWBT's proposed language provides that UDT is available between a SWBT wire center and a CLEC's wire center, or between switches owned by the same CLEC.

Staff recommended that the Commission modify and combine the language of the parties; Staff's proposed language does not require SWBT to provide UDT between two different CLECs' switches. Accordingly, Staff proposed to remove references concerning provision of UDT to third-party premises. SWBT indicates that it does not find Staff's proposed language for 8.0 and 8.2.1 to be objectionable. However, Staff also modifies Section 8.2.3.1 concerning physical diversity. SWBT argues that its language for Section 8.2.3.1 is more clear than Staff's language and should therefore be adopted even if the Commission otherwise adopts Staff's language in Sections 8.0 and 8.2.1.

The Commission finds that WCOM's proposed language exceeds the obligations of the Act as interpreted by the FCC. The Commission finds all of Staff's modifications to be appropriate and will adopt Staff's proposed language.

Issue 7: Is SWBT obligated to provide the items found in Section 14 of the M2A Agreement?

WCOM requests that the Commission require SWBT to provide the promotional offerings in Section 14 of the M2A. WCOM argues that SWBT should not be allowed

²² CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Revisions of the Telecommunications Act of 1996*, para. 175.

to strike their "promotional" offerings based on a CLEC not taking the M2A in toto. WCOM argues that it is adopting all of the legitimately related terms, conditions and attachments, as set forth in Attachment 26, that are legitimately related to the provisions listed above that WCOM has chosen to negotiate. SWBT argues that Section 14 of the M2A contains many provisions that benefit CLECs that are beyond the ability of the Commission to impose under the Act.

Staff asserts that Section 14 of the M2A is appropriate with certain exceptions. The exceptions include modifications to Section 14.2, and the deletion of 14.3, 14.4, 14.6, 14.7, and 14.8. Staff indicates that Section 14.5 should be included. The Commission accepts the recommendation of the Staff as being appropriate for this case.

Issue 45: Should SWBT be permitted to charge for Central Office Access?

This issue involves charges for SWBT to combine UNEs that are not currently combined in SWBT's network at WCOM's request. WCOM and SWBT appear to be in agreement on this issue, albeit for different reasons. SWBT believes it has no obligation to combine elements. WCOM believes SWBT does have that obligation; however, WCOM also believes that SWBT should not be allowed to assess this so-called "glue charge" of combining such elements because the nonrecurring charge for ordering such to-be-combined UNEs fully compensates SWBT.

The Commission finds that the parties agree that there should not be a Central Office Access charge. Therefore, the Commission finds this issue resolved.

Issue 8: Are CLECs impaired without access to local switching as a network element?

WCOM argues that CLECs are impaired without access to local switching as a network element. WCOM initially contended that provision of ULS would render it unable to provide service to residential customers, but subsequently conceded this was not the case as the exception would rarely, if ever, apply to residential customers. WCOM also contended that it would be impaired without access to ULS in the circumstances covered by the FCC's exception, but provided no evidence to support this position and conceded that it is currently using its own switches to provide service to business customers in St. Louis and Kansas City. SWBT, on the other hand, contends that it cannot be required to provide local switching as a UNE in the specific instances identified in the FCC's *UNE Remand Order*. Specifically, SWBT argues that in the *UNE Remand Order*, the FCC determined that ULS need not be provided (a) to customers with four or more lines, (b) served by central offices in density zone 1 in one of the top 50 Metropolitan Statistical Areas (MSAs) where (c) SWBT provides enhanced extended loops (EELs).

Staff states that the FCC provides a lengthy analysis of exceptions to the unbundling requirements in paragraphs 253 through 299 of the *UNE Remand Order*. Based on the FCC's analysis, Staff recommends that SWBT's language be incorporated into the Agreement except Staff recommends that the time frame for written notice to CLECs be modified to "not less than 180 days". Staff also

11 Mo. P.S.C. 3d

recommends that all references to multistate agreements be removed, consistent with the recommendation by Staff witness Peters.

The Commission finds that Staff's proposed language is appropriate for this case and should be adopted.

Issue 9: Should SWBT's proposed language for ULS be adopted?

This issue is whether SWBT's proposed language for unbundled local switching should be adopted, is closely related to Issue 29. WCOM opposes the inclusion of this language. As WCOM conceded at the hearing, Issue 9 is moot if the Commission determines under Issue 29 that SWBT is not required to provide intraLATA services to WCOM's local end-use customers. As SWBT discussed with regard to Issue 29, this Commission has previously determined that SWBT has no obligation to provide retail intraLATA toll services to customers of CLECs. Staff concurs with SWBT's analysis on this point and supports SWBT's position.

The Commission agrees with Staff and SWBT and finds that there is no obligation for SWBT to become a potential provider of intraLATA interexchange services to WCOM's end-users or that the Commission should impose such an obligation. Therefore, the Commission finds SWBT's language appropriate.

Issue 14: Should SWBT provide Digital Cross-Connect Systems (DCS) in accordance with the FCC's rules?

This issue centers around whether SWBT is required to provide Digital Cross-Connect Systems (DCS) as a UNE. WCOM argues that the answer is "yes", while SWBT alleges that pursuant to the terms of the FCC's *UNE Remand Order*, cross-connects are a means of interconnection and not a separate UNE. Staff states that the FCC concluded that ILECs must provide cross-connect facilities between an unbundled loop and a requesting carrier's collocated equipment. The FCC has defined the cross-connect as a means of interconnection, not as part of a UNE or as a separate UNE in and of itself. Staff recommends that the language of both parties should be combined and incorporated into the Agreement.

The Commission agrees with Staff's analysis and finds the language of both parties should be combined and incorporated in the Agreement as recommended by Staff.

Issue 21: Is SWBT required to provide WCOM access to proprietary AIN features developed by SWBT?

WCOM proposes language that requires SWBT to provide access to proprietary AIN features. SWBT's proposed language provides that WCOM may develop its own proprietary AIN features, but may not have access to SWBT's proprietary AIN features. Staff supports SWBT's position on the basis that the *UNE Remand Order* makes it clear that based on the "necessary" standard, ILECs are not required to provide unbundled access to the services created in the AIN platform and that such services do not qualify for proprietary treatment. Staff's position recommending inclusion of SWBT's language is described in the Staff Evaluation of the Joint DPL.

The Commission finds that Staff's analysis on this issue is correct. The FCC specifically addressed the ILECs' obligation to offer access to AIN software in the *UNE Remand Order*. The FCC found that access to the AIN platform is required,

but that ILEC service software in the AIN platform was proprietary and need not be unbundled.

Issue 22: Should SWBT be required to take responsibility for AIN CLEC service creations?

WCOM proposes language that obligates SWBT to provide information necessary for WCOM to utilize SWBT's service creation environment in the AIN software. Both parties agree to the language noted as WCOM's proposed language in its DPL position. The dispute arises over the additional language proposed by SWBT.

SWBT's proposed language provides that SWBT is not responsible for the development of WCOM's service creation in the AIN environment. SWBT notes that the FCC's *UNE Remand Orders* specifically requires ILECs to permit access to the service creation environment in the AIN platform, but places the duty on WCOM to create its own proprietary software.

Staff proposes language that modifies SWBT's additional proposed language to make it clear that SWBT must provide the technical information necessary for WCOM to utilize the service creation environment, but is not responsible to develop or assist in the development of services.

The Commission finds SWBT's additional language to be appropriate with the changes recommended by Staff. Staff's modification clarifies that it is not SWBT's responsibility to develop CLEC service creation. It is SWBT's responsibility to ensure that WCOM has the technical information necessary to utilize the service creation environment within the AIN platform.

Issue 28: Is SWBT required to collect, format and deliver paper copies and/or electronic copies of every emergency number in SWBT to WCOM?

WCOM does not want paper copies of this information and does not want to "put SWBT in a position where it would be required to 'collect, format, and deliver' paper copies of the emergency numbers in question." However, WCOM does want to "have SWBT sit down and discuss how the information could be provided periodically in an electronic feed so as to avoid the possibility of human and/or administrative error"

SWBT argued that it should not be required to collect and deliver paper and/or electronic copies of every emergency number to WCOM. SWBT noted several problems with WCOM's proposal, including (a) that SWBT does not have the means to ensure that the information it would be providing is accurate and/or current because it is up to the public agencies to ensure that their published information is accurate and current; (b) SWBT does not have any place where it stores emergency numbers in a group and it would, therefore, be required to research and prepare a document that does not currently exist; (c) emergency numbers are equally accessible to WCOM since SWBT provides WCOM with its DA listings and WCOM can look up this information just as readily as SWBT can; and (d) WCOM may seek paper copies from the public agencies themselves.

11 Mo. P.S.C. 3d

Staff originally recommended that if electronic transfer of emergency number information is not technically and/or financially prohibitive, Staff would support language allowing for the periodic electronic transfer of emergency information. SWBT contends that since it provides WCOM with electronic access to its DA listings, which contain the information, then SWBT has already and will continue to provide the emergency numbers. Furthermore, during the hearing Staff witness Peters agreed with SWBT that if this information is available through a public agency, SWBT should not be required to provide paper copies of this information. Mr. Peters further agreed that if WCOM is equally able to go the public agency and get the information electronically, that this "might be sufficient".²³

The Commission finds that SWBT shall not be required to collect, format and deliver paper copies and/or electronic copies of every emergency number to WCOM. Since the white pages listing information is electronically available to WCOM, the Commission finds this source acceptable.

Issue 35: Should SWBT be required to provide WCOM with Input/Output (I/O) ports?

The Commission determines that SWBT should be required to provide WCOM with Input/Output (I/O) ports. The I/O port is part of the features and functionalities of the switch. The FCC has defined local switching UNE as including all features, functions and capabilities of the switch. WCOM indicates that access to the I/O port is important for WCOM to deploy a centralized voice-mail capability for use in providing service to its customers served via UNE-P, but that capability would be meaningless without the ability to provide a notice to customers that they have messages waiting in the system. Typically, end-users are notified of messages in the form of a 'stutter dial tone,' or a dial tone that is interrupted briefly when the customer goes 'off hook.'" WCOM needs access to SWBT's I/O port in order to have the same opportunity to provide centralized voice-mail service as does SWBT's affiliate Southwestern Bell Messaging Service. Pursuant to the recommendation of Staff and WCOM, the Commission finds WCOM's language appropriate.

Issue 36: Should LVAS interfaces be offered for UNE switch ports?

The Commission determines that SWBT should offer LVAS interfaces for UNE switch ports. WCOM proposes the same language contained in the M2A. It appears that SWBT does not object to what WCOM proposes for section 9.4.4.4.1; however, SWBT proposes adding its generic so-called 13-state language, which contains references to Pacific Bell, Ameritech, and SNET. As previously discussed, such language is irrelevant to this Missouri proceeding and is rejected.²⁴

Issue 37: Should the Commission retain language in the contract that addresses interactive interfaces for SNET and Ameritech?

As in issue 36, WCOM proposes the same language for section 9.4.4.5.1 as is contained in the M2A. It appears that SWBT does not object to this specific

²³ Transcript, pp.1019-1020.

²⁴ See Issue 44.

language; however, as with issue 36, SWBT has inserted references to Pacific Bell, Ameritech, and SNET. Such additional language is irrelevant to the Missouri proceeding and is rejected.²⁵

Issue 38: Is SWBT required to treat CLEC loop test reports as its own?

WCOM argues that SWBT should be required to treat WCOM's loop test reports as its own. SWBT objects to the proposed language on the basis that utilization of WCOM test results could result in the unnecessary dispatch of SWBT technicians, with the result that other customers do not receive proper service and SWBT fails to meet applicable performance standards.

Staff concurs with SWBT that WCOM's language should not be included. Staff points out that in the 271 proceeding (TO-99-227), the Commission found that SWBT provides nondiscriminatory access to the to the OSS functionality as required by the FCC, and more specifically, the maintenance and repair functions of OSS. Therefore, WCOM's language proposing CLEC testing is unnecessary and should be rejected. Staff also suggests that the Commission reiterate its expectation that SWBT continue to provide nondiscriminatory access to all OSS.

The Commission finds that utilization of WCOM's test reports as recommended by WCOM is inappropriate. SWBT already provides nondiscriminatory access to the OSS functionality as required by the FCC, including the maintenance and repair functions of the OSS. WCOM's language on this issue is unnecessary and shall be rejected. The Commission reiterates the expectation that SWBT will provide nondiscriminatory access to all OSS functionality in this Agreement.

Issue 48: Should SWBT be required to provide points of interconnection that are not available?

The Commission determines that SWBT should be required to provide points of interconnection as required by FCC Rule 51.321(a). This rule provides that SWBT "shall provide on terms that are just, reasonable, and non-discriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier."²⁶ SWBT's proposal effectively eliminates the word "shall" in the FCC's rule, making SWBT the arbiter of what is technically feasible. SWBT's proposed language would require such access only where interconnection is technically feasible and facilities are available.

WCOM notes that the Commission rejected SWBT's proposal in the AT&T/SWBT arbitration, TO-2001-455. In that case, the Commission determined the nonrecurring costs of special construction related to establish a specific point of interconnection would be recovered based upon an equal split while the traffic sensitive costs of construction would be borne in direct proportion of the traffic carried by the newly constructed elements.

²⁵ See Issue 44.

²⁶ FCC Rule 51.321(a).

11 Mo. P.S.C. 3d

Staff states that the Act²⁷ and the FCC's rule²⁸ are clear: a requesting carrier may interconnect with an incumbent's network at any technically feasible point within the incumbent's network. Therefore, Staff recommends WCOM's language. The Commission agrees that WCOM's language should be adopted for this issue.

LIDB/CNAM

Issue 13: Should the Commission adopt SWBT's definition of LIDB?

LIDB stands for Line Information Database and is a call-related database used for validating calling card, collect call and third-party call information. CNAM is a call-related database that is used by exchange carriers to provide caller identification services (Caller ID).

WCOM argues that SWBT's definition improperly consolidates the two, independent databases into one definition. WCOM alleges that by combining CNAM into the definition of LIDB, SWBT attempts to blur and confuse the distinctive differences between the two databases and, most significantly, ignores that CNAM Service Query is already separately defined in Attachment 6 at paragraph 9.5.1.

Staff contends that most of WCOM's and SWBT's language is descriptive and is not absolutely definitive. Therefore, Staff proposes to include a modified version of both parties' language. Staff notes that SWBT's LIDB may be queried from any network components and not just those identified as unbundled; Staff proposes to remove SWBT's term "unbundled". The Commission will adopt the language recommended by Staff as an appropriate resolution in this case.

Issue 15: Is SWBT required to provide CNAM database to WCOM on a bulk basis?

WCOM argues that SWBT is required to provide CNAM database to it on a bulk basis; SWBT and Staff disagree. In the *Local Competition First Report and Order* (paragraph 484) and *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rule Making (UNE Remand Order, paragraph 402)*, the FCC determined that nondiscriminatory access to an incumbent local exchange carrier's call related databases is a UNE. The parties differ as to what is meant by "access".

WCOM appears to define access to SWBT's LIDB and CNAM as possessing a copy of the contents of SWBT's LIDB and CNAM in WCOM's own memory systems much as one business would sell its mailing lists to other companies. SWBT defines access more restrictively; SWBT considers access to be when the information contained in LIDB and CNAM is available on a per-call or usage basis.

Staff states that it is unaware of any federal or Missouri statutes, regulations, or orders that would impose a duty on SWBT to "sell" the contents of its databases in bulk. Staff contends that access to LIDB and/or CNAM should not be equated to possession of the contents of those databases. SWBT argues that access to

²⁷ 47 U.S.C. Sections 251(c)(2)(B) and (c)(3).

²⁸ 47 C.F.R.51.305(2).

LIDB or CNAM on a usage basis would not be discriminatory or unduly burdensome to WCOM.

Staff also notes that SWBT's proposed language in Sections 9.4.2.6.4, 9.5.2.4, 9.5.2.4.1, and 9.5.2.4.2 refer to activities outside of Missouri and not under the Commission's jurisdiction; Staff recommends the Commission disallow that language in the Agreement. Furthermore, Staff finds WCOM's language in 9.5.1.1.2 to be overly one-sided and recommends against its inclusion into the Agreement. Staff recommends that the Commission order SWBT's proposed language in Attachment 6, Sections 9.0, 9.4.2.6, 9.4.2.6.3, and WCOM's proposed language in Sections 9.3.1, 9.3.1.1, and 9.4.1.1 into this Agreement.

The Commission finds that Staff's position is appropriate and shall be adopted for this Agreement.

Issue 16: Should language be added to the Interconnection Agreement to address changes in LIDB and CNAM access?

This issue centers around whether the Commission should adopt language to address changes in LIDB and CNAM access. SWBT and WCOM disagree over the use of the terms "Data Owner" and "Account Owner". WCOM argues that the term "Data Owner" more effectively describes the owner of the information contained in the LIDB and CNAM databases. WCOM states that an "Account Owner" may or may not own the data; "Data Owner" more accurately describes the party in interest for purposes of these contract sections.

SWBT argues that the term "Data Owner" is obsolete. SWBT states that "Account Owner" encompasses all the data in LIDB, not just validation data and identifies company ownership at the telephone number level.

Staff states that since the agreements are negotiated/arbitrated agreements, applicable only to the parties to this Agreement and to any CLECs that choose to opt into the final agreements, Staff recommends that the language of the parties be combined as outlined in Staff's DPL/Findings of Fact and Conclusions of law document. Staff suggests that any language deemed inconsistent with industry standards only applies to these agreements and does not change common industry terminology. The Commission notes that Staff's proposal includes a definition for "Data Owner". The Commission accepts Staff's recommendation and will incorporate Staff's proposal into the Agreement.

Issue 17: Is SWBT required to provide nondiscriminatory access to its LIDB/CNAM databases, including removing the local use restriction? (Or, as worded by SWBT, are existing limits on proprietary information provided by call-related databases appropriate?)

Under 47 C.F.R. 51.309(b), a telecommunications carrier may purchase the use of UNEs from an incumbent exchange carrier to provide exchange access services to itself in order to provide interexchange services to its subscribers. Staff states that given that access to LIDB and CNAM are UNEs, Staff believes that SWBT must remove the local use restriction on these databases. Staff witness Cecil indicated that in this negotiation, the issues regard the exchange of local traffic by local exchange carriers (LEC) or the termination of interexchange traffic by a LEC.

11 Mo. P.S.C. 3d

Staff does not believe that an interconnection agreement is the proper venue for inclusion of language that allows an interexchange carrier (IXC) access to an ILEC's LIDB/CNAM databases. Staff recommends that the Commission find that SWBT's proposed language in Sections 9.4.2.6 and 9.4.2.6.3 is appropriate. Staff also notes that SWBT's proposed language in Sections 9.4.2.6.4, 9.5.2.4, 9.5.2.4.1, and 9.5.2.4.2 refers to activities outside of Missouri and should be stricken from the proposed Agreement. The Commission agrees with Staff's analysis and will adopt the language proposed by Staff.

Issue 33: Is WCOM allowed to access SWBT's LIDB and CNAM databases at TELRIC rates when acting as an IXC?

Staff indicates that it recognizes that WCOM is comprised of local and interexchange carrier-affiliates but believes an agreement between an IXC and a local carrier does not belong in a local interconnection agreement. Staff recommends that the Commission order that SWBT's proposed language in Attachment 6, Section 9.4.2.6.3, be incorporated into this Agreement. Staff states that its objection to Section 9.4.2.6.4 (from Issue 15) remains and recommends against that section's inclusion into the Agreement. The Commission finds Staff's recommendation to be a reasonable and directs that Staff's position be incorporated into the Agreement.

Issue 19: Should Local Service Request (LSR) language for LIDB database updates be added to the Interconnection Agreement to reflect network changes since the Commission approved the Missouri 271 Agreement?

SWBT agreed to create a Local Service Request (LSR) based interface in the process of creating the M2A. SWBT noted that since the M2A was completed before SWBT could complete development of the interface, the M2A could not contain all the terms and conditions regarding LSR and all parties agree that those terms and conditions should be incorporated into this Agreement. Staff supports SWBT's proposed language after the removal of the multistate references.

The Commission agrees with Staff that SWBT's proposed language is appropriate after the removal of all multistate references. If WCOM desires additional interfaces, WCOM should bear all costs of developing and maintaining those interfaces.

Issue 20: What obligations should WCOM have for the information it stores in SWBT's LIDB?

Staff points out that this issue is directly related to Issue 30, the appropriate contract language for alternatively billed traffic. In that issue, the Commission found that WCOM's Attachment 27 was the appropriate language. As recommended by Staff, the Commission finds that SWBT's language for Issue 20 is inconsistent with the Commission's findings regarding Issue 30 and should be removed from the Agreement.

DAL**Issue 24: Is SWBT's local use restriction for Directory Assistance Listings (DAL) reasonable?**

WCOM argues that SWBT's local use restriction for DAL is not reasonable. WCOM alleges that Section 1.5.1 contains language that is contrary to the language in SWBT's Accessible Letter CLEC01-065, which states that SWBT will comply with the FCC's DAL Provisioning Order.

SWBT disagrees, and argues that it offers a provision in its Directory Listing Information, Attachment 18, which specifically addresses whether SWBT will enforce any restrictions on the use of directory assistance listings (DAL). Specifically, SWBT has agreed that subject to any subsequent decision or order by the FCC or a court, the SBC telephone companies will comply with the FCC's Order and will not enforce any restrictions on the use of directory assistance listing information by any directory assistance provider that provides telephone exchange service or telephone toll service under section 251(b)(3) or by any directory assistance provider that acts as an agent or independent contractor for a qualifying entity under section 251(b)(3). SWBT notified WCOM of this position via Accessible Letter CLEC01-065 on March 21, 2001. SWBT contends that it removed all of the potential use restrictions from its proposed language.

Staff notes that in the *UNE Remand Order*, paragraph 442, and Section 251 (b) of the Act, incumbents are obligated to provide nondiscriminatory access to OS/DA. Staff states that with the proposed language revisions SWBT filed on January 9 2002, SWBT's language is acceptable and should be adopted. The Commission agrees with Staff's analysis and will adopt SWBT's language as revised.

Issue 26: Must SWBT deliver for WCOM at cost-based rates emergency messages to end-users that have nonpublished numbers? (Orig. WCOM issue #8)

SWBT Issue #26: (a) Should SWBT's process for delivering emergency messages to end-users with nonpublished numbers be utilized? (b) Must SWBT deliver emergency messages for WCOM to end-users that have nonpublished numbers at TELRIC rates?

This issue centers around whether SWBT's process for delivering emergency messages to end-users with nonpublished (NP) numbers should be utilized and if so, should such delivery occur at TELRIC rates. WCOM proposed a new notification procedure and argues that TELRIC rates should apply. SWBT alleges that it currently has the same procedures in place for both retail and wholesale customers, and SWBT operators handle NP emergency requests from all callers in the same manner regardless of the caller's LEC. SWBT, therefore, maintains that its procedures should continue as is and that market-based rates should apply.

Under SWBT's procedures, in an emergency, a supervisor of an operator can be enlisted to: (1) obtain the NP numbers by invoking a special security procedure; (2) relay a message to the NP subscriber to let him or her know that the caller is attempting to make contact; (3) provide the NP subscriber with the caller's call-back

11 Mo. P.S.C. 3d

telephone number; and (4) make two attempts over approximately a half-an-hour period if the first attempt to contact the NP subscriber is not successful. This procedure is posted on the CLEC website.

SWBT provides the same process, which can take as much as 45 minutes and involves both an operator and a supervisor, that SWBT uses for itself and all other carriers. SWBT, thus, provides operator services on a nondiscriminatory basis to all CLECs and their subscribers as required by Section 251(b)(3) and 271(C)(2)(b) of the Act.

Further, SWBT argues that the delivery of emergency messages to end users with NP numbers is not a UNE because operator and directory assistance services are not UNEs; thus, nondiscriminatory market-based rates must apply.²⁹

Staff agrees with SWBT's language at Section 3.2.1 in Attachment 18 DLI-MO. The Commission finds that all WCOM language should be removed from Section 3.2 of the Agreement, consistent with Staff's position on this issue. The Commission also agrees with Staff's position that SWBT must deliver emergency messages for WCOM at the same rate it delivers emergency messages for other carriers.

Issue 47: Must SWBT offer DAL rates at their forward-looking cost?

In the *UNE Remand Order*, the FCC determined that nondiscriminatory access to the ILEC's underlying databases used in the provision of OS/DA is required only under Section 251(b)(3) and not under Section 251(c)(3) of the Act.³⁰ Moreover, the FCC specifically declined to expand the definition of OS/DA to include an obligation to provide directory assistance listings (DAL) in daily electronic batch files.³¹ In other words, DAL is not an unbundled network element.

SWBT argues that it provides nondiscriminatory access to its DAL, pursuant to Section 251(b)(3) of the Act (and the relevant rules thereunder), in bulk, in Attachment DLI/DAL for those CLECs that wish to provide DA services of their own. As part of the 271 process, SWBT submitted "X2A" agreements in Arkansas, Kansas, Missouri, and Oklahoma as evidence that SWBT was complying with the FCC Orders and the Act's checklist requirements. The FCC approved all of SWBT's applications, including provisions permitting market-based pricing of DAL. SWBT states that the FCC's approval confirms that SWBT is not obligated to provide DAL as a UNE. Thus, SWBT argues that market-based rates apply.

Staff notes that the Commission has already approved a market-based rate in the M2A. Staff agrees with SWBT that market-based rates should apply. The Commission finds that the market-based rate approach advocated by SWBT and Staff is appropriate.

²⁹ *UNE Remand Order*, ¶441.

³⁰ *UNE Remand Order*, ¶44.

³¹ *UNE Remand Order*, ¶444.

OS/DA**Issue 49: What are SWBT's obligations with respect to OS/DA?**

On January 3, 2002, SWBT filed a Motion to Strike Issues 49 and 50 From WCOM's Revised Proposed Decision Point List. SWBT alleged that these two issues were neither contained in WCOM's Petition nor in SWBT's Response, and therefore, they are beyond the scope of the Act. On January 14, 2002, the Commission denied SWBT's Motion to Strike. Upon further review, the Commission determines that WCOM's Issue 49 should be stricken; this issue was not contained in either WCOM's Petition nor in SWBT's Response. Consequently, this issue is not an appropriate decision item for this case.

Rates Issues**Issue 10: Should the Commission reevaluate the forward-looking loop rates that apply to all two-wire analog loops, including loops used for UNE-P?**

WCOM argues that the Commission should reevaluate the forward-looking loop rates that apply to all two-wire analog loops, including loops used for UNE-P, and that the parties should be allowed to incorporate the results of a subsequent, generic proceeding into this Agreement. WCOM states that a generic proceeding would enable the Commission to implement the results of the anticipated Supreme Court decision on TELRIC. Once the generic cost proceeding is complete, WCOM contends that the Commission will have adjusted UNE cost studies on which it, SWBT, and all CLECs can rely. WCOM further argues that the FCC expressly expects the Commission to conduct such reexaminations.

SWBT opposes a generic reexamination of UNE loop costs and rates and argues that under the Act, price must be based on cost, which the FCC requires to be determined under the TELRIC standard. SWBT points out that it provided the only cost studies and testimony supporting its proposed UNE rates, and that its cost studies were developed utilizing a proper application of TELRIC principles and are appropriate for use in this proceeding. SWBT emphasizes that WCOM failed to provide any cost studies in this case, and contends that WCOM has provided no basis in the record in this case for the Commission to adopt any particular rates for UNE rates at issue. SWBT maintains that the M2A rates were developed utilizing the TELRIC methodology, but that adjustments and voluntary reductions were made that resulted in rates below the level required by the proper application of the TELRIC methodology.

Staff recommends that the Commission adopt the M2A rates as adjusted by the outcome of the Case No. TO-2001-438. Staff also recommends that the Commission open a new, generic case to reevaluate this issue, where all concerned parties could participate in a working group to review all relevant issues. Staff views the generic docket as a benchmark for future proceedings.

As in Case No. TO-2001-455, the Commission will not implement substantial increases in prices for basic UNEs based on the cost studies submitted in this case by SWBT, which have not been the subject of rigorous review by Staff, CLECs, and the Commission because of the strict time restraints on the arbitration case.

11 Mo. P.S.C. 3d

Instead, the Commission takes notice of the M2A, including the rates contained therein. The M2A was the product of a lengthy proceeding and close scrutiny. The Commission has already determined that it complies with all of the standards applicable to interconnection agreements, including the 14-point checklist in Section 271.³² Because it is known to be compliant with both the Act and the FCC's regulations, the Commission concludes that the M2A, with the adjustments from Case No. TO-2001-438, is appropriate as a resolution of the parties' dispute.

Issue 11: Should the Commission revise the local switching rates in the agreement to reflect a flat rate structure, with permanent rates based on current TELRIC costs?

As already discussed above, the Commission has rejected the use of interim prices. Likewise, as discussed above, UNE rates including switching prices may be reexamined in a subsequent proceeding, with the results used as a benchmark for further proceedings as suggested by Staff. However, the Commission again declines to open a generic case as part of the determination in this case.

As noted above, the Commission agrees with Staff that the M2A rates are appropriate. Staff also recommends that it would be appropriate to reevaluate this issue in a generic case. The Commission adopts Staff's recommendation for this issue.

Issue 12: Should the Commission delete the \$.003 per message charge for the daily usage feed (DUF)?

SWBT Issue #12: Is SWBT entitled to be compensated for providing daily usage feed (DUF) to WCOM at the existing rate of \$.003 per message approved in the 271 proceeding?

Under the M2A, SWBT does not currently charge CLECs for daily usage feed (DUF) records, which are records that allow a CLEC to bill its end-users. WCOM opposes any charge for the provision of these records. SWBT admits there is no such charge in the M2A, and no charge was proposed in Case No. TO-2001-438. WCOM's witness Mr. Turner contends that there are no new incremental costs to be recovered by such an additional charge. According to WCOM, all costs regarding these DUF records (that are used to identify calls made by customers using unbundled switching) are inherent to and will be recovered in switching and AIN query rates, as already determined by the Texas Commission based on admissions by SWBT witnesses.

Staff recommends that the M2A rates are appropriate for this Agreement. Staff notes that these rates have been previously approved by the Commission and have been determined to be TELRIC-based.

The Commission has previously determined that the M2A rates satisfy the criteria set forth in the Act³³ The Commission rejects SWBT's proposal to impose a new charge of \$0.003 for daily usage feeds (DUF) in connection with local switching, and finds Staff's recommendation to adopt the M2A rates to be reason-

³² 271 Report and Order, at 68.

³³ See Case No. TO-2001-455, p. 64.

able. The Commission declines to open a generic case as part of the determination in this case.

Issue 23: What is the appropriate rate structure for LIDB query access?

The Commission has previously established a rate structure for LIDB query access and neither party proposes a change in that rate structure. Hence, this issue is moot. To the extent that SWBT seeks to expand the issue to include a reconsideration of the rate itself, given that SWBT admits that it cannot determine from which state a query originates, the Commission rejects SWBT's efforts to establish a multistate rate in this Missouri arbitration.³⁴

Staff again recommends that the Commission find that the decision for this issue shall be consistent with the decision made in TO-2001-438. In that case, Staff recommended that rates for LIDB query access should be those set as permanent rates in Case No. TO-97-40. During the hearing in the present case, Staff witness Cecil noted that SWBT admits that it doesn't really know what price to charge here, but Staff feels that SWBT needs to charge a Missouri-specific price. Thus, Staff relies on the price set in TO-97-40, arguing that the price structure from TO-97-40 should remain. Staff also recommends that if the Commission opens a generic case to look at UNE rates, that it may be appropriate to address this issue at that time also.

The Commission finds that, based upon the limited evidence presented in this case, Staff's position is the appropriate resolution of this issue. However, the Commission declines to open a generic case as part of the determination in this case.

Issue 31: Should SWBT be allowed to recover the cost associated with call blocking in end offices where AIN is deployed?

The Commission rejects SWBT's proposal to delete language that would prohibit SWBT from imposing an additional charge, beyond the AIN query rate, for standard call blocking and screening functions in end offices where AIN has been deployed. WCOM witness Turner and Staff witness Dietrich explained that the AIN query rate already covers the costs of standard blocking and screening functions. The language prohibiting an additional charge in such end offices is in the M2A, has been required by the Texas Commission as well, and would not impact SWBT's ability to impose an additional charge in end offices where AIN has not been deployed. SWBT acknowledges that it would not incur additional line class code costs because "in an AIN-based office we could probably identify your [WCOM] traffic apart from ours and thus not have to create a unique line class code."³⁵

Staff recommends that the Commission find that WCOM's language is appropriate for this issue. Staff witness Dietrich notes that SWBT seems to object to the proposed language because SWBT should be allowed to charge for originating call blocking, often referred to as toll restriction. Staff states that the issue is not whether SWBT can charge for toll blocking, but rather whether SWBT can charge for call blocking *where AIN is deployed*. Staff indicates that since the purpose of AIN

³⁴ See also Issue 44 regarding the impropriety of multistate provisions.

³⁵ Tr. 573, 585, 592.

11 Mo. P.S.C. 3d

software is to provide the functionality for an end-user (in this case, presumably a WCOM end-user, not a SWBT end-user), to either accept or reject a call, the costs for rejecting that call would be inherent in the functionality of the AIN software and the language proposed by WCOM should be incorporated in the Agreement. The Commission agrees with Staff's analysis, and will adopt WCOM's language for this issue.

Issue 46: Should SWBT be permitted to charge for a change in CLEC's signaling point code?

This issue involves SWBT's proposed language that permits the imposition of a charge when a CLEC modifies an existing signaling point code. SWBT contends that the purpose of its language is not to set a charge for establishing a signaling point code, but is instead designed to recover a portion of the cost involved if a CLEC seeks to change an existing point code. Because changes to a signaling point code must typically be done after working hours in order to avoid customer disruption, the cost to change a signaling point code exceeds the cost of initial establishment of such a code. Although the costs are higher, SWBT seeks to recover only the same level of costs associated with establishing a signaling point code.

WCOM opposes this proposed language on the basis that charges to establish a signaling point code were previously established in Case No. TO-97-40. In its prefiled testimony, Staff initially concurred with WCOM's position. But at the hearing, Staff agreed that it is appropriate to assess a charge. On January 31, 2002, Staff filed a Modification to Substitute Sheets, noting that a signaling point code was set in Case No. TO-97-40. That rate, according to SWBT, is only intended for the initialization of service. Staff states that it does not believe that WCOM has refuted that argument. Therefore, Staff now suggests that a signaling point code change rate is appropriate, and recommends that SWBT's language should be included in the Agreement.³⁶

The Commission finds that SWBT is entitled to recover the costs of changing an existing signaling point code and that no other charge approved by the Commission includes these costs as a part of the applicable rate. Accordingly, the Commission approves the inclusion of the language proposed by SWBT and recommended by Staff.

Issue 50: Should the Commission delete the \$.08 per transaction charge for local account maintenance?

The Local Account Maintenance Charge is a per transaction charge for each working telephone number that disconnects from WCOM and switches to another local service provider. SWBT charges: (1) \$.08 for a Local Disconnect Report (LDR) via a 960-byte industry standard Customer Account Record Exchange format; and (2) \$.003 for the LDR via Electronic Data Interchange format. SWBT argues that it should be allowed to recover the costs associated with providing this service. WCOM argues that it should not. SWBT further argues that this Commission previously determined that SWBT should be allowed to recover for Local Account Maintenance in the AT&T Interconnection Agreement in 1997 and in the M2A. Staff

³⁶ Staff's Modification to Substitute Sheets, filed January 31, 2002.

recommends that the Commission adopt the M2A rate as the appropriate rate for this case,³⁷ with any associated adjustments from TO-2001-438; the Commission finds that Staff's recommendation is appropriate and shall be incorporated into the Agreement.

Conclusions of Law

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

Arbitration Under the Telecommunications Act of 1996

The Telecommunications Act of 1996 was enacted by Congress to bring competition to the telecommunications industry and thereby to reap such benefits as lower rates, more efficient service, and a quickened pace of technological innovation.³⁸ Key to the scheme created by the Act are various provisions requiring the incumbent local telephone companies – the ILECs – to share their networks with competitors. Thus every carrier, of whatever type, is required to interconnect, directly or indirectly, with other carriers.³⁹ All local carriers, whether old and entrenched or new and upstart, are obligated to permit competitors to resell their services, to provide number portability and dialing parity, to establish reciprocal compensation arrangements for the transport and termination of traffic, and to allow access to their poles, conduits and rights-of-way.⁴⁰ Most importantly, the ILECs are required to negotiate “in good faith” and to make agreements with competitors as to interconnection, access to network elements on an unbundled basis (UNEs), and the sale of telecommunications services at wholesale rates for resale by competitors.⁴¹ Finally, the Act imposes on ILECs, such as SWBT, the duty to provide for such physical collocation of facilities and equipment as is necessary for interconnection or access to UNEs.⁴²

The Act favors agreements reached voluntarily, by negotiation, and permits these to be made “without regard to the standards set forth in subsections (c) and (d) of section 251.”⁴³ Such voluntary agreements must be submitted to the state commission for approval and the state commission may only reject such a voluntary agreement on a finding that it discriminates against a nonparty carrier or that its implementation “is not consistent with the public interest, convenience, and necessity[.]”⁴⁴

³⁷ The Commission realizes that the M2A rate for this issue is currently set at zero.

³⁸ *Iowa Utilities Bd., et al. v. FCC, et al.*, 120 F.3d 753, 791-92 (8th Cir. 1997) (*Iowa Utilities Bd. I*), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999); “Congress sought ‘to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.’ Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56b (1996).”

³⁹ 47 U.S.C. Section 251(a)(1).

⁴⁰ 47 U.S.C. Section 251(b).

⁴¹ 47 U.S.C. Section 251(c), (2), (3) and (4).

⁴² 47 U.S.C. Section 251(c)(6).

⁴³ 47 U.S.C. Section 252(a)(1).

⁴⁴ 47 U.S.C. Section 252, (a)(1) and (e), (1) and (2)(A).

11 Mo. P.S.C. 3d

Congress recognized, however, that it would not always be possible for competing carriers to reach agreement through voluntary negotiation. Therefore, the Act creates a scheme of compulsory arbitration.⁴⁵ The state commission must resolve each open issue by “imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement[.]”⁴⁶ Arbitrated agreements must also be approved by the state commission, which may reject them if they do not meet the requirements of Section 251 of the Act, or the standards at Section 252(d) of the Act, or the requirements of the FCC’s regulations interpreting and implementing Section 251 of the Act.⁴⁷

Jurisdiction Under the Telecommunications Act of 1996

The Commission’s jurisdiction to arbitrate under the Act is conditioned upon proper invocation by the party seeking arbitration.⁴⁸

A party seeking compulsory arbitration must file its petition with the state commission “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[.]”⁴⁹ The parties agree that WCOM requested negotiations on June 1, 2001, and that the interval during which compulsory arbitration could be requested ran from October 14, 2001, through November 13, 2001. Therefore, the Commission concludes that WCOM’s petition for arbitration was timely filed on November 5, 2001.

Additionally, a party seeking compulsory arbitration must, simultaneously with its petition for arbitration, “provide [to] 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 issues discussed and resolved by the parties.”⁵⁰ Attached and/or incorporated by reference to WCOM’s petition were extensive exhibits, including matrices setting out the disputed issues, the parties’ positions on those issues (as known), and WCOM’s proposed successor interconnection agreement, divided into topical attachments. The Commission concludes that WCOM complied with Section 252(b)(2)(A) of the Act.

Finally, a party seeking compulsory arbitration must “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.”⁵¹ Attached to WorldCom’s petition was a certificate showing service by United States Mail upon SWBT as well as the General Counsel of the Commission and the Office of the Public Counsel, on November 5, 2001, the date on which the petition was filed with the Commission. The Commission concludes that WorldCom complied with Section 252(b)(2)(B) of the Act.

⁴⁵ 47 U.S.C. Section 252(b), *passim*.

⁴⁶ 47 U.S.C. Section 252(b)(4)(C).

⁴⁷ 47 U.S.C. Section 252(e), (1) and (2)(B).

⁴⁸ 47 U.S.C. Section 252(b)(1).

⁴⁹ *Id.*

⁵⁰ 47 U.S.C. Section 252(b)(2)(A).

⁵¹ 47 U.S.C. Section 252(b)(2)(B).

Because WCOM complied with all of the Act's prerequisites for compulsory arbitration by a state commission, the Commission concludes that it is authorized under the Act to arbitrate this dispute.

State Law Jurisdiction

SWBT, as a provider of local exchange and intraLATA long-distance telecommunications service, is a "telecommunications company" and a "public utility" within the intendments of Section 386.020, (32) and (42), and is therefore subject to the jurisdiction of the Commission under Chapters 386 and 392, RSMo. In the terms of the Act, SWBT is a Bell operating company (BOC) and an incumbent local exchange carrier (ILEC).⁵²

WCOM is also a "telecommunications company" and a "public utility" within the intendments of Section 386.020, (32) and (42), and is also therefore subject to the jurisdiction of this Commission pursuant to Chapters 386 and 392, RSMo.

Arbitration Standards

The Act provides:⁵³

In resolving by arbitration under subsection (b) 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 [FCC] pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
- (3) provide a schedule for implementation of the terms, and conditions by the parties to the agreement.

Arbitration Procedures

The Act does not specify any particular procedure for arbitrations by state commissions. This Commission has experimented with different procedural models in the past. The Commission is authorized by its organic law to arbitrate disputes.⁵⁴ However, that provision also does not specify any particular procedure, other than to require "due notice" and a hearing.

The FCC Arbitration Procedures

The Commission adopted for this case the arbitration procedures used by the FCC, 47 C.F.R. Section 51.807 (October 2000), as supplemented by the FCC's *Public Notice of the Establishment of Procedures for Arbitration of Interconnection Agreements Between Verizon Verizon and AT&T, Cox, and WorldCom*, (DA 01-270, Feb. 1, 2001). These procedures were modified to reflect the fact that the

⁵² 47 U.S.C. Sections 3(4)(A) and 251(h)(1).

⁵³ 47 U.S.C. Section 252(c), "Standards of Arbitration."

⁵⁴ Section 386.230.

11 Mo. P.S.C. 3d

petition and response had already been filed in this case and that a prehearing conference had been held.

The FCC rules are constructed around the concept of final offer arbitration, also referred to as "baseball" arbitration. In that model, each of the two contending parties must submit its final offer and all supporting evidence for consideration by the arbitrator. The arbitrator then selects from among the offers submitted by the parties. The Commission modified the FCC's final offer arbitration procedure by requiring that the Commission's Staff participate as a third party as discussed in more detail below.

The Role of the Commission's Staff

Given the highly technical nature of the matters at issue in this case and the Commission's obligation to safeguard and promote the public interest, as opposed to the private interests of the contending carriers who are the parties to this arbitration, the Commission determined that it required access to the neutral technical expertise of its Staff. Therefore, Staff was required to file Rebuttal Testimony in response to the Direct Testimony filed by the parties. Staff was also required to file an evaluation of each of the offers filed by the parties. In that evaluation, Staff was directed to consider the technical feasibility and public interest impact of each issue contained in each offer. Staff was directed to file with its evaluation all necessary supporting material. Finally, to the extent that the public interest so required, Staff was authorized to file a proposed resolution as to any issue within the scope of this arbitration.

The Scope of Arbitration

The Arbitration Timeline

In its petition, WCOM stated that it requested the Commission to conduct a two-phase arbitration such as this Commission and certain other state commissions have conducted in the past. WCOM took the position that, while the arbitration of various non-cost-related issues could be completed by the statutory deadline, the arbitration of the costs of certain UNEs (loops and switching) could not realistically be completed within the statutory timeframe, particularly as WCOM expected the development of this issue to require extensive discovery and access to SWBT's own highly confidential costing models. Therefore, WCOM proposed that the Commission arbitrate the non-cost-related issues by the statutory deadline and simply adopt as interim prices UNE prices contained in the M2A with final loop and switching prices to be set after the costs were fully litigated. WCOM relied upon the prior practice of this and other state commissions and certain paragraphs of the FCC's *Local Competition Order*, 11 F.C.C. Rcd. 154999, CC Docket No. 96-98 (released August 8, 1996).

SWBT, in turn, took the position that all issues, including final prices for UNEs, must be resolved by the Commission by the statutory deadline or the Commission would lose jurisdiction.

For this case, the Commission adopted the position urged by SWBT, in view of the express language of the Act providing that the state commission "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.”⁵⁵

Issues for Determination

The Act expressly limits the issues subject to resolution by the state commission to those framed by the petition for arbitration and the response to the petition.⁵⁶ As indicated, after the arbitration hearing, the parties jointly tendered a final DPL that has been admitted without objection as Exhibit 53.

Resolution of Open Issues

Costing and Pricing

In resolving by compulsory arbitration the open issues presented to it by the parties, the Commission must establish rates pursuant to the specific requirements of the Act.⁵⁷

(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 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to 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.

(2) Charges for transport and termination of traffic.—

(A) In general.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

⁵⁵ 47 U.S.C. Section 252(b)(4)(C).

⁵⁶ 47 U.S.C. Section 252(b)(4)(A).

⁵⁷ 47 U.S.C. Section 252(d).

11 Mo. P.S.C. 3d

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction.—This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services.—For the purposes of section 251(c)(4) of this title, 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.

Additionally, the United States Supreme Court has held that rates set by a state commission in a compulsory arbitration under the Act must also comply with the pricing regulations of the FCC.⁵⁸ These rules provide that “[a]n incumbent LEC’s rates for each element it offers shall comply with the rate structure rules set forth in Secs. 51.507 and 51.509, and shall be established. . . [p]ursuant to the forward-looking economic cost based pricing methodology set forth in Secs. 51.505 and 51.511[.]”⁵⁹ Also, the forward-looking economic cost of an element is defined as the sum of its total element long run incremental cost plus a reasonable allocation of forward-looking common costs.⁶⁰ The TELRIC of an element is “the

⁵⁸ *AT&T Corp. et al. v. Iowa Utilities Board, et al.*, 525 U.S. 366, 384-85, 119 S.Ct. 721, 732-33, 142 L.Ed.2d 835 (1999).

⁵⁹ 47 C.F.R. Section 51.503(b)(1).

⁶⁰ 47 C.F.R. Section 51.505(a). The total element long-run incremental cost method is referred to by the acronym “TELRIC.”

forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements."⁶¹ This is calculated based on a hypothetical network, using the most efficient technology available and the lowest cost network configuration imposed on the LEC's existing wire centers, and employing forward-looking costs of capital and economic depreciation rates.⁶²

The Commission concludes that the rates contained in the M2A meet all the requirements of the Act and the regulations of the FCC.

However, as noted above, the Commission has also concluded that it is appropriate to commence a new proceeding to reexamine SWBT's costs.

General Terms and Conditions

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the FCC.

Unbundled Network Elements (UNES) Terms and Conditions

The Act imposes on ILECs:⁶³

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory 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 of this title. 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.

The rules promulgated by the FCC define a "network element" as⁶⁴ a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

The FCC's rules further provide that:⁶⁵

- (a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network

⁶¹ 47 C.F.R. Section 51.505(b).

⁶² 47 C.F.R. Section 51.505(b), (1)-(3). The Eighth Circuit Court of Appeals invalidated 51.505(b)(1) in *Iowa Utilities Bd., II, Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 751 (8th Cir. 2000), but stayed its mandate pending appeal to the United States Supreme Court.

⁶³ 47 U.S.C. Section 251(c)(3).

⁶⁴ 47 C.F.R. Section 51.5.

⁶⁵ 47 C.F.R. Section 51.313, (a) and (b).

11 Mo. P.S.C. 3d

elements shall be offered equally to all requesting telecommunications carriers.

- (b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

The Commission concludes that its resolution of the open issues under this category meets all the requirements of the Act and the regulations of the FCC.

Network Interconnection and Architecture

The Act imposes on all carriers a duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]”⁶⁶ The Act additionally imposes on ILECs:⁶⁷

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier’s network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) 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 of this title.

The Commission concludes that its resolution of the open issues under this category meets all the requirements of the Act and the regulations of the FCC.

⁶⁶ 47 U.S.C. Section 251(a)(1).

⁶⁷ 47 U.S.C. Section 251(c)(2).

Operations Support Systems (OSS)

The FCC rules provide that:⁶⁸

An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

The Commission concludes that its resolution of the open issues under this category meets all the requirements of the Act and the regulations of the FCC.

IT IS THEREFORE ORDERED:

1. That MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc., and Southwestern Bell Telephone Company shall incorporate the Commission's resolution of each open issue as described in this Order into their interconnection agreement and provide a draft of their conformed interconnection agreement to the Staff of the Missouri Public Service Commission within 30 days following the effective date of this Order.
2. That the Staff of the Missouri Public Service Commission shall review the draft interconnection agreement of the parties and determine whether or not the agreement complies with this Order. In the event that Staff determines that the agreement tendered by the parties does not comply with this Order, Staff shall so advise the parties and they shall cooperate with Staff in amending the draft agreement to comply with this Order, modifying language in all sections of the agreement to avoid potentially contradictory provisions.
3. That the parties shall file the conformed interconnection agreement with the Commission for approval upon notification by Staff that the agreement is in compliance with this Order.
4. That Staff shall file a Memorandum advising the Commission that it has reviewed the agreement and determined that it complies with this Order no later than the seventh day following the filing of the agreement with the Commission. The Staff shall further advise the Commission in its Memorandum whether or not the Commission should reject the agreement pursuant to 47 U.S.C. Section 252(e)(2)(B).
5. That this Arbitration Order shall become effective on February 28, 2002.

Simmons, Ch., Lumpe, Gaw, and
Forbis, CC., concur.
Murray, C., dissents, with dissenting
opinion to follow.

⁶⁸ 47 C.F.R. Section 51.313(c).

11 Mo. P.S.C. 3d

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully dissent from the Arbitration Order of February 28, 2002. It is my opinion that the Commission acted beyond its authority in imposing rates from the M2A because there is no evidence that those rates are TELRIC based. The rates imposed are below those previously identified by this Commission as compliant with the TELRIC methodology, because SWBT voluntarily reduced those rates for the purpose of the M2A.⁶⁹ Therefore, the Commission has no evidence upon which to base the required determination that the rates are not, as SWBT claims, below the level required by a proper application of the TELRIC methodology.

Therefore, I dissent.

**In the Matter of Atmos Energy Corporation's Purchased Gas
Adjustment to be Reviewed in its 1999-2000 Actual Cost
Adjustment.**

*Case No. GR-2000-573
Decided February 28, 2002*

Rates § 108. The Commission accepted the settlement agreement between Atmos Energy Corporation and Associated Natural Gas Company. The Commission allowed Atmos to take over ANG's Actual Cost Adjustment without opening a new case for Atmos because ANG had discharged its obligations.

ORDER REQUIRING ADJUSTMENT OF ACA BALANCE

This case was opened for the purpose of receiving the 1999-2000 Actual Cost Adjustment (ACA) filing of Associated Natural Gas Company (ANG) for its Southeast Missouri District (SEMO), its Kirksville District, and its Butler District. On June 1, 2000, Atmos Energy Corporation (Atmos) became the owner and operator of these districts under a transaction approved by the Commission in Case No. GM-2000-312.

On November 2, 2001, the parties filed their First Amended Settlement Agreement and Release in this case. The agreement divides the 12-month review period into two time periods, one 9-month period relating to ANG's natural gas purchasing practices and operations in Missouri (September 1, 1999 to May 31, 2000) and one 3-month period relating to the natural gas purchasing practices and operations in Missouri of Atmos (June 1, 2000 to August 31, 2000). The agreement compromised and resolved the issues related to ANG. The Commission approved the agreement on November 27, 2001.

In their agreement the parties recommended that a new case be established to address the issues related to Atmos. However, in the intervening time period, the parties have been able to resolve all remaining issues and now agree that there is no need to open a new case if the Commission accepts and approves Staff's

⁶⁹The Arbitration Order of June 7, 2001, in Case No. TO-2001-455, is distinguishable because it was issued prior to SWBT's voluntary rate reduction for purposes of the M2A.

Revised Recommendations filed on February 15, 2002. (Joint Motion to Close Case, filed February 20, 2002) The parties further advise the Commission that ANG has discharged all its obligations under the agreement and that Atmos is processing and distributing refunds due to ANG customers from funds provided by ANG.

Staff filed its original recommendation regarding Atmos on November 1, 2001. Atmos responded on December 6, 2001. A prehearing and settlement conference was held on January 23, 2002. The parties indicated that Staff and Atmos had had extensive discussions to resolve their differences of the adjustments proposed by Staff. Staff was directed at the prehearing and in an order issued on January 24, 2002, to file a revised recommendation.

Staff filed its revised recommendation on February 15, 2002, addressing all of the remaining issues which are the adjustments relating to Atmos for (over)/under recovered ACA, transition cost and refund balances. In the February 20 Joint Motion to Close case, Atmos accepts Staff's adjustments and all the parties request that the Commission order approval of Staff's adjustments and recommendations and that this case be closed.

Staff has audited the billed revenues and actual gas costs for Atmos' 1999/2000 filing and proposed the following:

1. That Atmos reduce gas costs for firm sales ACA by \$83,778 and interruptible sales ACA by \$31,592, for a total reduction of \$115,370 to eliminate certain expenses for Liquefied Natural Gas services;
2. That Atmos include NGPL cash out credits totaling \$54,600 in adjustments to SEMO gas costs. This results in a reduction to SEMO gas costs for the firm sales ACA of \$47,682 and \$6,918 for the interruptible sales ACA;
3. That Atmos make adjustments related to a calculation error of the interest component of the Deferred Carrying Cost Balance. The correction results in a \$12,848 adjustment to the SEMO District's interruptible customer ACA balance; a \$1,289 adjustment to the Kirksville District's interruptible customer ACA balance; and a 1,543 adjustment to the Butler District's interruptible customer ACA balance.
4. Staff noted that it had previously requested and the Commission had previously ordered Atmos to submit to Staff information necessary to complete a reliability analysis. This information is due on February 28, 2002.

Staff recommended that the Commission issue an order approving and requiring the adjustments relating to Atmos for (over)/under recovered ACA, transition cost and refund balances.

The Commission has reviewed Staff's recommendations and the Parties Joint Motion to Close Case. The Commission concludes that ANG has discharged its obligations under the previously approved settlement agreement, that Staff's

11 Mo. P.S.C. 3d

recommendations should be implemented and this case should be closed.

IT IS THEREFORE ORDERED:

1. That Associated Natural Gas Company, a division of Arkansas Western Gas Company, has discharged its obligations under the First Amended Settlement Agreement and Release approved by the Commission on November 27, 2001.
2. That Atmos Energy Corporation shall make the adjustments approved in this order and adjust the ACA balances accordingly in its next ACA filing to reflect the adjustments proposed by the Staff of the Commission.
3. That this order shall become effective on March 10, 2002.
4. That this case may be closed on March 11, 2002.

Simmons, Ch., Murray, Lumpe, Gaw
and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Joint Application of Missouri-American Water Company, St. Louis County Water Company, d/b/a Missouri-American Water Company, and Jefferson City Water Works Company, d/b/a Missouri-American Water Company, for an Accounting Authority Order Relating to Security Costs.

*Case No. WO-2002-273
Decided March 12, 2002*

Water §27. The Commission granted a motion to modify a protective order, inserting additional language in the definition of Highly Confidential Information to account for the events of September 11, 2001.

**ORDER REGARDING MOTION TO DISMISS,
PROTECTIVE ORDER AND DISCOVERY**

On December 10, 2002, Missouri-American Water Company, St. Louis County Water Company and Jefferson City Water Works Company, the latter two doing business as Missouri-American Water Company,¹ filed their joint application for an accounting authority order relating to security costs incurred, the joint application states, as a direct result of the unexpected and extraordinary events of September 11, 2001.² The applicants seek an AAO so that they may attempt to recover some part of these costs in a later rate case.

¹On January 22, 2002, Missouri-American advised the Commission that St. Louis County Water Company and Jefferson City Water Works Company, both doing business as Missouri-American Water Company, had both merged into Missouri-American.

²An accounting authority order is universally referred to in the industry as an "AAO" and that acronym will be used here.

Motion to Dismiss:

On February 4, 2002, the Office of the Public Counsel filed its Motion to Dismiss, asserting therein that “MAWC has failed to file sufficient evidence in its direct testimony which would establish its claim for relief.” Public Counsel points out that, pursuant to Commission Regulation 4 CSR 240-2.130.7(A), MAWC’s prefiled Direct Testimony must “include all testimony and exhibits asserting and explaining [its] entire case-in-chief.” Public Counsel characterizes the testimony filed by MAWC as “consist[ing] primarily of reasons why MAWC chose not to provide information on which the Commission could rely in making a reasoned and appropriate determination in this case.” Public Counsel goes on to say, “Nothing in the pre-filed testimony . . . provides sufficient factual information on which this Commission may reasonably rely in making any findings of fact or conclusions of law in support of the requested AAO.” In support of its motion, Public Counsel cites Section 386.430, RSMo Supp. 2001, which provides:³

In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

Missouri-American responded to Public Counsel’s motion on February 14, providing a summary of the jurisprudence relating to AAOs drawn both from the reported decisions of Missouri Courts and the Commission’s own orders. As Missouri-American correctly points out, Section 393.140(8) authorizes the Commission, after hearing, to “prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited” as an exception to the uniform accounting procedures which the Commission is expressly authorized to adopt.⁴ Section 393.140(8) does not contain any express standard; consequently, the Commission may exercise this authority for good cause shown. As Missouri-American explains in its response, one purpose of an AAO is to treat some unexpected expense of significant size as a regulatory asset pending the company’s next rate case, during which the utility will attempt to recover the expense. Missouri-American reminds the Commission that it has said in the past that “the primary focus is on the uniqueness of the event, either through its occurrence or its size.”⁵

³All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), cumulative supplemental revision of 2001.

⁴Section 393.140(4); *and see* Commission Regulation 4 CSR 240-50.030.

⁵*In the Matter of Missouri Public Service*, Case No. EO-91-358 (*Report & Order*, iss’d December 20, 1991) at 12.

11 Mo. P.S.C. 3d

Having explored the Commission's authority for granting an AAO and the applicable standard, Missouri-American then summarizes the contents of the Highly Confidential testimony that it has filed. This testimony asserts that some millions of dollars have been expended by Missouri-American to upgrade the safety of the public water supply in its service area; that these expenditures were undertaken after, and as a direct result of, the events of September 11, 2001; that those events were extraordinary, unforeseen, and hopefully nonrecurring; that Missouri-American has received security advisories from various governmental agencies warning of terrorist threats to the public water supply; and that the particular measures adopted reflect the advice and input of state and federal agencies. Missouri-American contends that this testimony constitutes a *prima facie* case for an AAO.

Missouri-American is correct. The necessary *prima facie* showing for an order under Section 393.140(8) is that significant expenditures have been incurred due to the occurrence of a unique event. In determining a motion to dismiss for failure to state a claim, the Commission takes all of the allegations and testimony of the motion-defendant to be true.⁶ Contrary to the assertion of Public Counsel, Missouri-American has stated a *prima facie* case for an AAO.

The Motion to Dismiss is denied.

Motion to Modify Protective Order:

On January 23, 2002, simultaneously with Public Counsel's Motion to Compel Responses to Data Requests, Missouri-American filed its Motion to Modify Protective Order. Therein, Missouri-American proposed that the Commission's "standard" protective order, adopted in this case on December 12, 2001, be modified to include a provision allowing sensitive security-related information to be designated "Highly Confidential" and treated accordingly.⁷ Additionally, Missouri-American proposed that the protective order be further modified to apply Paragraph C, relating to access to Highly Confidential information, to Staff and the Public Counsel.⁸ Missouri-American further seeks to modify Paragraph W to limit access to sensitive security-related information by Staff's and Public Counsel's in-house technical experts on a "need to know" basis. Finally, Missouri-American proposes to further modify Paragraph C to require that persons seeking access to sensitive security information first undergo a criminal history check by the Missouri Highway Patrol and that access be restricted to United States citizens.

Public Counsel responded on January 30 and agreed to the modification of the Protective Order by the insertion of item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order; Public Counsel objected to all of the other modifications proposed by Missouri-American. Public Counsel

⁶*Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001).

⁷The proposed provision would be Item (6) of the definition of Highly Confidential information in Paragraph A of the Protective Order.

⁸Paragraph W presently provides that Paragraphs C, D, J, and L do not apply to Staff or the Public Counsel.

characterizes the other requested modifications as “alarmist, frivolous, [and] without foundation”; and also as “insulting, unprofessional and scurrilous.” Public Counsel suggests that these modifications will interfere with both Staff and Public Counsel in the discharge of their official duties. Public Counsel complains that being required to view the information in St. Louis would be a hardship on its small office in a time of tight state budgets. The criminal history check and restriction of access to American citizens has “no rational basis.” Public Counsel seeks an evidentiary hearing on the proposed Protective Order modifications.

Intervenors the City of Joplin and the St. Joseph Industrials take the same position as Public Counsel. While they do not object to the insertion of item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order, they object to the other proposed modifications on the same grounds raised by Public Counsel. Joplin characterizes these modifications as “unnecessary” and as “clearly and unreasonably intended to limit access to documentation to be relied upon by MAWC[.]” The St. Joseph Industrials expound at length on the shortcomings of the proposed modifications, including the lack of any provision to safeguard and hold confidential the results of the proposed criminal history checks. In general, the requested modifications are “overbroad and unnecessary.” The St. Joseph Industrials urge the Commission to view Missouri-American’s motion as a “rather inartful, crudely conceived and unbelievably arrogant attempt to use a terrorist attack . . . to scare the Commission into approval of its expenses without a rigorous investigation of these expenses through the judicial and administrative process.”

The Commission’s Staff, like Public Counsel, Joplin, and the St. Joseph Industrials, consents to the insertion of item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order and objects to all of the other modifications proposed by Missouri-American. Staff denounces the proposed modifications as “frivolous and . . . designed only to vex and harass the Staff and OPC in their duties[.]” Staff further states that the proposed modifications “are not supported by any legal authority or any information that would justify such extraordinary restrictions. Further, the proposed measures do not rationally enhance the security of sensitive information, are unduly restrictive, overly burdensome, unnecessary and are contrary to the Commission’s regulatory oversight responsibilities.”

The Commission has quoted samples of the strong language offered in opposition to the requested modifications in order to reflect the degree of emotion that seems to have charged this issue. In its Reply to Pleadings Concerning Discovery Matters, filed on February 14, Missouri-American stated that it was “shocked and amazed by the reaction and responses that have been filed concerning MAWC’s Motion to Modify.” Missouri-American further stated that, while it cannot show that the risk that sensitive information will be divulged is greater in this case than in any other case, it is “obvious . . . that the consequences of any such release in this case are monumentally greater.” The Commission convened a prehearing conference on February 22 and found the parties unable to reach a mutually acceptable compromise on these points. The parties are continuing to attempt to resolve discovery disputes.

11 Mo. P.S.C. 3d

The Commission does not need an evidentiary hearing to resolve Missouri-American's motion and Public Counsel's request for a hearing on Missouri-American's motion is denied. All of the parties are agreed that the Protective Order should be modified to permit sensitive security-related information to be designated Highly Confidential. This can be accomplished by the insertion of proposed item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order. The Commission is aware, in the wake of the events of September 11, of the need for heightened security with respect to the utilities upon which the people of Missouri depend. The attempt by persons still unknown, shortly after September 11, to disperse Anthrax through the public mail necessarily causes the Commission concern for the safety of the public water supply. For these reasons, the Commission agrees with Missouri-American that sensitive security-related information must be protected from disclosure.

While the Commission agrees that security information must be protected, the Commission does not believe that all of the measures proposed by Missouri-American are either necessary or desirable. The other parties object strenuously to the other modifications proposed by Missouri-American and the Company has not shown any convincing reason why they should be adopted. For example, the prisons of this state are full of American citizens and it follows that limitation of access to American citizens might add little to the protection of sensitive security-related information. Furthermore, any such restriction may itself be unlawful.⁹ It is also not clear that a criminal history check would make this information any more secure. What sort of offenses would be disqualification and who would decide? Missouri-American has not shown that such a background check would actually be effective in identifying those in league with foreign terrorists. Indeed, the recent arrest of a career counter-intelligence agent of the Federal Bureau of Investigation for espionage on behalf of the former Soviet Union suggests that a criminal history check might well be useless in identifying true security risks. The objecting parties have found both of these suggested modifications to be highly offensive.

Missouri-American explains that its proposal that access to security information be limited to its premises pursuant to Paragraph C of the Protective Order, even for Staff and the Public Counsel, is based upon the logical consideration that

⁹ "In *City of New Orleans v. Dukes*, 427 U.S. 297, ___, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511, ___ (1976), the United States Supreme Court said: 'Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.'" *Bethel v. Sunlight Janitor Service*, 551 S.W.2d 616, 621 (Mo. banc 1977). "The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, ___, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 440 (1985).

security is reduced by permitting multiple copies of sensitive information to exist in multiple locations. Public Counsel and Staff respond that such a restriction would interfere with their performance of their duties and would have a negative impact on their manpower. Technical staff would be required to travel several hours in order to review the necessary documents, preventing their performance of any other useful work. The Commission finds that this proposed modification is unnecessary.¹⁰ There is no evidence that either Staff or the Public Counsel has ever failed to adequately safeguard copies of sensitive documents in their offices. As the objecting parties point out, the Commission's Staff and the Public Counsel are bound by the criminal law to refrain from revealing information learned in the course of their duties.

For the reasons discussed, Missouri-American's Motion to Modify the Protective Order is granted in part in that proposed item (6) will be inserted into the definition of Highly Confidential information in Paragraph A of the Protective Order; in all other respects, the motion is denied. The Commission encourages the parties to continue their cooperative effort to access relevant material with attention to security.

Motion to Compel Responses to Data Requests:

On January 23, 2002, Public Counsel moved the Commission to order Missouri-American to respond to certain data requests. Public Counsel states that it served its Data Requests 1001 through 1009 on Missouri-American on December 20, 2001, and that Missouri-American, while not raising any valid objection, nonetheless refuses to divulge the requested information. The data requests in question seek various details of the security procedures implemented by Missouri-American.

Missouri-American responded on January 31, and denied that it had refused to provide the requested information. Rather, in Missouri-American's view, it had not been able to reach an agreement with Public Counsel on the form that access should take. Missouri-American denies that Public Counsel has any right to have its own copies of security-related information. Missouri-American further contends that Section 386.450, RSMo Supp. 2001, only requires that Missouri-American produce the requested documents; it says nothing about copies. Finally, Missouri-American urges the Commission to take up Public Counsel's motion to compel in conjunction with its motion to modify the protective order. Public Counsel, in its reply filed on February 6, agreed that the two motions be considered together.

On February 14, Missouri-American filed its further pleading, Reply to Pleadings Concerning Discovery Matters, in which it addressed both the Motion to Modify Protective Order and Public Counsel's Motion to Compel. With respect to the motion to compel, Missouri-American states that it should be denied and its own motion to modify granted. Public Counsel responded to this pleading on February 15 with its Supplemental Response Regarding Discovery Matters. Therein, Public Coun-

¹⁰ In a pleading filed on March 7, Public Counsel indicated that Missouri-American has agreed to make the information available at its Jefferson City office and has agreed to limited copying and note-taking. Both parties appear voluntarily to have made these adjustments to the method of access in order to move this case forward.

11 Mo. P.S.C. 3d

sel draws the Commission's attention to several national commentators who have opined that security concerns, however legitimate, not be permitted to deprive the public of access to information of public concern.

Public Counsel's Motion to Compel was also discussed at the prehearing conference on February 22. Several parties pointed out at that time that Missouri-American was in violation of the Commission's discovery rules and urged the presiding officer to grant Public Counsel's motion in peremptory fashion.

Counsel for Missouri-American wrote a letter to Public Counsel on December 31, 2001, acknowledging receipt of the data requests on December 20. That letter states that it "should be considered, to the extent necessary, an objection" However, the letter nowhere states any grounds for objection to Public Counsel's data requests and, in any event, the letter was not timely.¹¹ Since Missouri-American has failed to raise any objections to the discovery, the Commission will grant it unless it is improper on its face.

The Commission has considered these issues and, as stated elsewhere in this order, will modify the Protective Order in one respect so that security information will be entitled to designation and treatment as Highly Confidential information. In view of the resolution of the Protective Order issue and in view of Missouri-American's repeated protestations that it has not refused to comply with the data requests and that its only concern is the manner in which the information is accessed, the Commission will grant Public Counsel's motion.

The Commission will direct Missouri-American to respond to Public Counsel's data requests forthwith.

IT IS THEREFORE ORDERED:

1. That the Motion to Dismiss filed by the Public Counsel on February 4, 2002, is denied.
2. That the Motion to Modify Protective Order filed by Missouri-American Water Company on January 23, 2002, is granted in part and denied in part. The Protective Order previously adopted in this case is hereby modified by the insertion of the following language in Paragraph A, the definition of Highly Confidential information: "and (6) materials, documents, strategies and other information related to actual or planned modifications of the company's methods of ensuring physical security of its public utility facilities." In all other respects, the Motion to Modify Protective Order is denied.
3. That the Public Counsel's request for an evidentiary hearing on Missouri-American Water Company's Motion to Modify Protective Order is denied.
4. That the Motion to Compel Applicants to Respond to Data Requests of the Office of the Public Counsel, filed by the Public Counsel on January 23, 2002, is granted. Missouri-American Water Company will respond to Public Counsel's data requests no later than the effective date of this order.
5. That this order shall become effective on March 22, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

¹¹Objections to data requests must be raised within 10 days of receipt. Commission Rule 4 CSR 240-2.090(2).

**In the Matter of Missouri Gas Energy's Gas Cost Adjustment
Tariff Revisions to be Reviewed In its 1996-1997 Annual
Reconciliation Adjustment Account.***

*Case No. GR-96-450
Decided March 12, 2002*

Gas §17.1. Staff's proposal to disallow 3.5 million dollars in gas costs as imprudently incurred was rejected as unsupported by competent and substantial evidence

Evidence, Practice and Procedure §26. A utility's decision to incur a cost is presumed to be prudent unless some other party presents sufficient evidence to create a serious doubt as to the prudence of an expenditure, at which point the utility has the burden of proving that the cost was prudently incurred.

Evidence, Practice and Procedure §30. Normal rules of contract construction apply to interpretation of settlement agreements.

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*The Commission, in an order issued on _____, denied an application for rehearing. On May 21, 2002, this case was appealed to Cole County Circuit court (02CV324478). On July 18, 2003, this case was appealed to the Missouri Court of Appeals-Western District (WD63093).

11 Mo. P.S.C. 3d

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REGULATORY LAW JUDGE: **Morris L. Woodruff**

REPORT AND ORDER

SUMMARY

This Report and Order rejects Staff's proposal to disallow \$3,490,082.81 in natural gas costs incurred by Missouri Gas Energy in its 1996-1997 ACA period. The Commission finds that Staff's proposal is not supported by competent and substantial evidence. MGE had a contractual obligation to purchase natural gas from Mid-Kansas/Riverside under the Mid-Kansas II contract. Staff's argument that MGE's decision to enter into the Mid-Kansas II contract was imprudent is not supported by the facts.

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 in making this decision has considered the

positions and arguments of all of the parties. 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.

Procedural History

This case was established on June 25, 1996, for the purpose of tracking the over-recovery or under-recovery of Missouri Gas Energy's natural gas costs for the Annual Reconciliation Adjustment Account period from July 1, 1996, through June 30, 1997. Missouri Gas Energy is a division of Southern Union Company and is referred to by an acronym, MGE.

On July 10, 1996, the Commission issued an order and notice that invited interested parties to file an application to intervene no later than August 9, 1996. Williams Natural Gas Company filed an application to intervene on July 11, 1996, and the Commission granted that application on August 1, 1996. The City of Kansas City, Missouri, and Midwest Gas Users Association filed applications to intervene on August 9, 1996. The Commission permitted those parties to intervene by an order issued on August 30, 1996.

On December 27, 1996, Riverside Pipeline Company, L.P. and Mid-Kansas Partnership¹ filed an application for intervention. MGE opposed Mid-Kansas/Riverside's attempt to intervene, but on February 21, 1997, the Commission permitted Mid-Kansas/Riverside to intervene.

On June 1, 1998, the Staff of the Commission filed a memorandum indicating that it had reviewed MGE's 1996-1997 Actual Cost Adjustment filing. The memorandum indicates that Staff had examined MGE's gas purchasing practices to determine the prudence of MGE's purchasing decisions. Staff recommended two adjustments to MGE's 1996-1997 ACA recovery balance. First, Staff proposed an adjustment relating to MGE's gas supply and transportation contract with Mid-Kansas/Riverside. Staff indicated that during the 1996-1997 ACA period, MGE incurred \$34,940,234.47 in natural gas costs with respect to its gas supply and transportation contract with Mid-Kansas/Riverside. Staff alleged that the contractual services that MGE received from Mid-Kansas/Riverside could have been obtained from Williams Natural Gas, a competing pipeline company, for a total price of \$30,407,784.87. As a result, Staff proposed an adjustment that would reduce MGE's gas costs by \$4,532,449.60.² The second adjustment proposed by Staff concerns \$6,177.39 in overrun penalties assessed to MGE's end-user transportation customers. Staff proposed adding that amount to MGE's gas costs.

On June 30, 1998, a prehearing conference was held to consider a procedural schedule for this case. Staff filed a Motion to Establish Procedural Schedule on July 9, 1998, representing that all the parties attending the prehearing conference had agreed to the procedural schedule it proposed. On July 14, 1998, the Commission

¹ For convenience these two companies will be referred to as Mid-Kansas/Riverside.

² Staff subsequently modified its position and recognized that it had initially failed to include Williams Natural Gas' fuel costs in its calculations. Staff is now seeking a disallowance of \$3,490,082.81.

11 Mo. P.S.C. 3d

issued an order that established a procedural schedule leading to a hearing to be held beginning on March 1, 1999.

On July 31, 1998, Mid-Kansas/Riverside filed a Motion to Dismiss or Limit. That motion asked the Commission to determine that Staff's proposed 4.5 million dollar reduction of MGE's gas cost was forbidden by a stipulation and agreement that the Commission approved in Case Numbers GR-94-101 and GR-94-228. Mid-Kansas/Riverside argued that the stipulation and agreement specifically precludes any ACA prudence review of the sales agreement between MGE and Mid-Kansas, which forms the basis for Staff's proposed adjustment. On August 14, 1998, Staff filed a reply to Mid-Kansas/Riverside's Motion to Dismiss or Limit, arguing that the stipulation and agreement applied only to certain specified ACA periods, but not to the 1996-1997 period that is the subject of this case. Mid-Kansas-Riverside filed a response to Staff's reply on August 24, 1998. MGE filed a reply to Mid-Kansas/Riverside's response on September 1, 1998, in which MGE supported the position taken by Mid-Kansas/Riverside.

On August 27, 1998, Mid-Kansas/Riverside filed a Motion for Dismissal Based on Insufficiency of Staff's Direct Testimony. As can be understood from the title of the Motion, Mid-Kansas/Riverside argued that the direct testimony that Staff filed on August 3, 1998, was legally insufficient to support the adjustment proposed by Staff. On September 8, 1998, Staff filed a reply to Mid-Kansas/Riverside's Motion to Dismiss. Staff argued that MGE has the burden to proving that its proposed rates are just and reasonable, and that Staff did not need to file any testimony except to rebut the case put forward by MGE in support of its rates.

On September 29, 1998, the Commission issued an order that denied Mid-Kansas/Riverside's motion to dismiss or limit and found that the stipulation and agreement approved in Case Numbers GR-94-101 and GR-94-228 does not preclude Staff from "requesting an adjustment based upon the prudence of the expenditure." The Commission found that the factual issues that remain should be addressed in testimony and at hearing. On the same date, the Commission issued an order denying Mid-Kansas/Riverside's Motion for Dismissal Based on Insufficiency of Staff's Direct Testimony.

On October 8, 1998, Mid-Kansas/Riverside filed applications for rehearing regarding the Commission's September 29 orders. Before the Commission ruled on those requests for rehearing, Mid-Kansas/Riverside filed a petition for a writ of prohibition with the Circuit Court of Cole County. Mid-Kansas/Riverside sought a writ to prevent the Commission from proceeding further in this case. The Circuit Court issued a preliminary writ of prohibition on November 9, 1998, and heard arguments on the motion on November 23, 1998. On December 2, 1998, the Circuit Court issued a Judgment and Order in which it found that prohibition was not appropriate because Mid-Kansas/Riverside was not clearly entitled to dismissal of the underlying action. The Circuit Court quashed the preliminary writ and dismissed Mid-Kansas/Riverside's petition.

With the Circuit Court having quashed its preliminary writ of prohibition, the Commission, on December 22, 1998, issued an order denying Mid-Kansas/Riverside's applications for rehearing. In response, Mid-Kansas/Riverside returned to the Circuit Court of Cole County seeking a writ of review. Such a writ was

issued by the Circuit Court on January 15, 1999, and directed the Commission to refrain from any further action in Case No. GR-96-450 until further order of the court.

Upon review, the Circuit Court reversed the Commission's decision. However, the Circuit Court's order was subsequently appealed to the Missouri Court of Appeals for the Western District. On July 25, 2000, the Court of Appeal issued a decision finding that the Circuit Court did not have jurisdiction to review a non-final order of the Commission.³

The Court of Appeals remanded the case to the Circuit Court with directions to remand the case to the Commission for further proceedings. The Circuit Court of Cole County issued the required Order of Remand on October 26, 2000. On March 29, 2001, the Commission established a procedural schedule leading to a hearing beginning on September 17, 2001.

An evidentiary hearing was held on September 17, continuing through September 21, 2001. All parties appeared for the hearing, but counsel for the City of Kansas City and counsel for Williams Pipeline announced at the beginning of the hearing that they did not wish to present evidence or cross-examine witnesses, and requested that they be excused from further participation in the hearing. The Commission granted their requests. Staff, MGE, and Mid-Kansas/Riverside submitted initial briefs, and proposed findings of fact and conclusions of law on November 8, 2001, and reply briefs on December 4, 2001. Public Counsel and Midwest Gas Users Association participated in the hearing but chose not to submit post-hearing briefs.

Background of the Dispute:

To understand the issues that have been presented in this case it is necessary to go back to 1990. At that time, Western Resources, Inc. was the company that supplied natural gas to customers in Kansas City, Joplin, St. Joseph, and other areas of western Missouri. In January of 1990, Western Resources entered into a gas supply contract with Riverside and Mid-Kansas pipeline companies. Those contracts are referred to as Mid-Kansas I and Riverside/WR Transportation Agreement I. Western Resources was heavily dependent upon the Williams Natural Gas interstate pipeline for its gas supplies. By contracting with Mid-Kansas/Riverside, Western Resources hoped to be able to reduce its dependence upon Williams and obtain the benefits of some competition between its suppliers.

In October of 1991, Western Resources, and Mid-Kansas/Riverside agreed to amend their supply contract. The amended agreement removed a price cap that had limited the charges that Western Resources was required to pay and extended the term of the supply contract through 2009. The amended contract included a provision that required Mid-Kansas/Riverside to reimburse Western Resources if part of the charges imposed by Mid-Kansas/Riverside under the contract were later disallowed by a regulatory body.

In July of 1993, Western Resources decided to sell its Missouri natural gas properties to Southern Union Company. The Commission approved that transac-

³ *State ex rel. Riverside Pipeline Company v. Public Service Commission*, 26 S.W.3d 396 (Mo App. 2000).

11 Mo. P.S.C. 3d

tion on December 29, 1993, subject to the terms of a unanimous stipulation and agreement. MGE, as a division of Southern Union Company, began operations on February 1, 1994. Along with the other assets and liabilities of Western Resources, Mid-Kansas I and Riverside/WR Transportation Agreement I were assigned from Western Resources to Southern Union. On April 29, 1994, the Staff filed a recommendation in Case No. GR-93-140 (Western Resources' ACA case for the period of July 1, 1992 through June 30, 1993) asking the Commission to disallow 1.3 million dollars of Western Resources' gas costs because it alleged that the agreement to remove the price cap provisions of Mid-Kansas I and Riverside/WR Transportation Agreement I was imprudent. Ultimately, in a Report and Order issued on July 14, 1995, the Commission accepted Staff's recommendation and ordered the 1.3 million dollar disallowance.⁴ The Commission's decision was appealed.

On June 1, 1994, Southern Union filed a lawsuit against Riverside, Mid-Kansas, and other affiliated companies, known collectively as the Bishop Group. That lawsuit related, in part, to the Mid-Kansas I and Riverside/WR Transportation Agreement I contracts. As a result of its dispute over these contracts, Southern Union, in January and February of 1995, withheld payment of about 2.5 million dollars that was due under the Mid-Kansas I and Riverside/WR Transportation Agreement I contracts.

In order to settle the federal lawsuit and to end the withholding of payments, Southern Union and the Bishop Group entered into several new contracts to replace Mid-Kansas I and Riverside/WR Transportation Agreement I. That new package of contracts included Mid-Kansas II, Riverside I, and Riverside II. The new contracts took effect on June 1, 1995.

On May 2, 1996, Western Resources, MGE, Mid-Kansas, Riverside, Staff, and Public Counsel filed a unanimous stipulation and agreement in consolidated cases GR-94-101 and GR-94-228. Those cases had been established to consider Western Resources' and MGE's 1993-1994 ACA.⁵ Staff had recommended disallowances in those cases for the same reason that it had recommended a disallowance in Case No. GR-93-140, Western Resources' earlier ACA case. The unanimous stipulation and agreement also settled the appeal of GR-93-140, which was then pending in the Circuit Court of Cole County. In addition, the stipulation and agreement settled GR-95-82 and GR-96-78, which the Commission had established to consider the ACA periods of July 1, 1994 to June 30, 1995, and July 1, 1995 to June 30, 1996, respectively.

As consideration for the stipulation and agreement, MGE and Mid-Kansas/Riverside agreed to make a settlement payment totaling four million dollars, which was ultimately passed through to MGE's Missouri ratepayers. According to the stipulation and agreement, Mid-Kansas/Riverside's share of that settlement

⁴ *In the Matter of Tariffs filed by Western Resources, Inc., d/b/a Gas Service, a Western Resource Company, to Reflect Rate Changes to be Reviewed in the Company's 1992-1993 Actual Cost Adjustment* 3 Mo. P.S.C. 3d 480 (1995).

⁵ Two cases were established because of complexities introduced by Western Resources sale of assets to Southern Union during the ACA period.

payment was \$2,850,000, with Western Resources being responsible for the remaining \$1,150,000.

The Commission approved the May 2, 1996 stipulation and agreement in an order issued on June 11, 1996. That order became effective on June 21, 1996, and was not appealed by any party. This case was opened on June 25, 1996, for the purpose of considering possible adjustments for over-recovery or under-recovery of natural gas costs during MGE's 1996-1997 ACA period, which began on July 1, 1996. Therefore, this case was not in existence at the time the stipulation and agreement was executed and approved.

The Stipulation and Agreement:

The impact of the May 2, 1996 stipulation and agreement on Staff's proposed adjustment is central to this case and therefore the Commission has closely examined that agreement in its conclusions of law. The Commission concludes that the stipulation and agreement is ambiguous and that therefore it is necessary to consider parole evidence in interpreting the meaning of the agreement. However, that evidence is also inconclusive and does not provide a basis for choosing between the interpretation offered by the Staff and that offered by MGE and Mid-Kansas/Riverside.

Dennis Langley, former president of Kansas Pipeline Operating Company, testified that he negotiated the terms of the stipulation and agreement on behalf of Mid-Kansas/Riverside. Langley testified that he understood the stipulation and agreement to finally resolve the prudence of the Missouri Agreements so that Mid-Kansas/Riverside could avoid the cost of future litigation before the Commission. In response to a question about whether he believed that the stipulation and agreement forever settled the prudence of the Mid-Kansas II and Riverside Agreements, Langley testified that "there is simply no way I would have committed \$2,500,000.00 (Mid-Kansas' share of the \$4,000,000.00 Settlement Payment) to resolve the prudence of the 'Missouri Agreements' (which included the Mid-Kansas II Agreement), had I not believed the matter was settled forever."⁶ Langley also testified that the representative of Staff that negotiated the stipulation and agreement, Robert J. Hack, then general counsel for Staff, and now a vice-president of MGE, shared his understanding of the agreement.

Staff's witnesses countered that their understanding of the stipulation and agreement was that it would preclude a full prudence review only until the case associated with the audit period commencing July 1, 1996. However, Staff's witnesses, while knowledgeable about what Staff wanted going into the negotiations, did not have the authority to authorize the Staff's General Counsel to execute the stipulation and agreement. Furthermore, there was no testimony indicating that they were directly involved in the final negotiations that led to the execution of the stipulation and agreement. As a result, Staff's witnesses had no way of knowing the intent of Mr. Hack.

Staff's ability to establish the actual intent of its representatives who negotiated the stipulation and agreement was hampered by the fact that the person who served

⁶ Langley Rebuttal, Exhibit 5, Page 5, Lines 16-22.

11 Mo. P.S.C. 3d

as the Commission's General Counsel during the negotiations, the person who largely drafted the stipulation and agreement and handled negotiations on behalf of Staff, is now a vice-president of MGE. In addition, the attorney who appeared on behalf of Staff at the proceeding in which the Commission approved the stipulation and agreement represented Mid-Kansas/Riverside in this case.⁷

Given these circumstances, the Commission is unable to determine the meaning of the stipulation and agreement. However, the Commission will proceed to closely examine Staff's proposed disallowance. The Commission's determination regarding that proposed disallowance makes resolution of the disputed meaning of the stipulation and agreement unnecessary.

Staff's Proposed Disallowance

Staff filed its initial recommendation regarding MGE's 1996-1997 ACA filing on June 1, 1998. Staff's recommendation contains only one paragraph regarding the proposed adjustment. That paragraph is as follows:

During the 1996-1997 ACA period, MGE incurred \$34,940,234.47 in natural gas costs (fixed and variable transportation charges and gas supply costs) with respect to its gas supply and transportation contract with MKP/RPC [Mid-Kansas/Riverside]. Based on MGE's response to Staff Data Request No. 23 and Staff's review of gas supply costs on the WNG pipeline, Staff believes that the same contractual services which MGE received, during the 1996-1997 ACA period from MKP/RPC, could have been obtained from WNG for a total price of \$30,407,784.87. As a result, Staff proposes an adjustment which will reduce MGE's gas costs by \$4,532,449.60.

Staff, in the direct testimony of Michael J. Wallis, indicated that its proposed adjustment was based on its calculation of the difference between the gas transportation costs incurred by MGE in purchasing gas from Mid-Kansas/Riverside and the costs it would have incurred if it had purchased and transported the same amount of gas over the Williams Natural Gas Company's pipeline.⁸ Mid-Kansas/Riverside's witness, John B. Adger, Jr., pointed out in his rebuttal testimony⁹ that Staff had failed to recognize differences in the way that Williams and Mid-Kansas/Riverside account for pipeline fuel costs. In the surrebuttal testimony of Michael J. Wallis, Staff agreed with Mr. Adger and reduced its recommended adjustment by \$1,042,366.79.¹⁰ Thereafter, Staff proposed a revised adjustment of \$3,490,082.81.

When given an opportunity to defend its gas purchasing practices through its testimony, MGE and Mid-Kansas/Riverside quickly established that purchasing gas through Williams Natural Gas Company's pipeline was not the simple option suggested by Staff. The evidence established that during the time-period in

⁷ Exhibit 25.

⁸ Wallis Direct, Exhibit 11, page 2, lines 11-16.

⁹ Adger Rebuttal, Exhibit 9, page 18, footnote 26.

¹⁰ Wallis Surrebuttal, Exhibit 13, page 3, lines 1-13.

question, MGE was contractually bound, under the contract identified as Mid-Kansas II, to purchase a specified amount of capacity on the Mid-Kansas/Riverside pipeline.

Mid-Kansas II was a firm gas purchase agreement by which Mid-Kansas was responsible for acquiring natural gas in Oklahoma and delivering the gas to MGE's Riverside delivery point in Platte County, Missouri. By the terms of that agreement, MGE reserved 46,332 MMBtu's per day of capacity on the Mid-Kansas/Riverside Pipeline. As is common with this type of contract, most of the transportation charges under the Mid-Kansas II contract were in the form of reservation charges. Reservation charges must be paid even if no natural gas is moved through the pipeline. Therefore, even if MGE had chosen to purchase and transport gas through the Williams Pipeline to take advantage of allegedly lower transportation rates, as suggested by Staff, it still would have been obligated by contract to pay substantial sums to Mid-Kansas/Riverside for those reservation charges.

MGE could not simply walk away from, and thereby breach its contract with Mid-Kansas/Riverside. That contract was legally enforceable and was binding upon MGE through the year 2009. MGE might have attempted to buy-out the remaining term of the contract but the cost of such a buy-out would have been enormous. Testimony indicated that the net present value of the revenue from the Mid-Kansas I agreement and the Riverside Transportation Agreement would have exceeded \$100,000,000. Mid-Kansas/Riverside would certainly have demanded a very large sum for agreeing to permit MGE to buy its way out of the contract. Moreover, if MGE had bought its way out of the agreements with Mid-Kansas/Riverside it would still have had to contract with Williams to replace the capacity it had on the Mid-Kansas/Riverside pipeline. In effect, MGE would have been paying for the same capacity twice. The costs of extracting itself from its contractual obligations to Mid-Kansas/Riverside would have exceeded any savings that MGE might have realized from transporting more gas at lower rates on the Williams pipeline.

When faced with these facts, Staff, for the first time in its rebuttal testimony, argued that MGE was imprudent in entering into the Mid-Kansas II contract because it should have used its leverage in its negotiations with Mid-Kansas/Riverside to negotiate firm transportation rates that were more closely tied to Williams' firm transportation rates.

Assuming, without deciding, that Staff's argument was permitted under the stipulation and agreement, that argument is rebutted by the testimony presented by MGE and Mid-Kansas/Riverside. The evidence presented demonstrated that in renegotiating Mid-Kansas I and Riverside/WR Transportation Agreement I, MGE was able to make substantial improvements that benefited MGE and its ratepayers. Mid-Kansas II was an improvement over Mid-Kansas I in that it provided for a cheaper commodity cost for the natural gas brought to Kansas City, and MGE was able to enhance its flexibility in taking the gas off the pipeline.

Against the undenied fact that MGE improved the position of its ratepayers by negotiating Mid-Kansas II, Staff asserts that MGE could have gotten an even better deal if only it had tried harder. Staff did not offer any evidence to support that assertion. Staff's own witness, David Sommerer, when asked by a Commissioner

11 Mo. P.S.C. 3d

whether he believed that MGE had sufficient leverage to negotiate a better agreement than it did in Mid-Kansas II, replied that:

I don't know. I believe they had a substantial amount of leverage based upon the things that we've brought up, withholding of the payment and the District Court case civil litigation, but I really don't know if they would have had enough leverage, given that they were locked into a term through the year 2009, to bring the rates down any lower.¹¹

Beyond Staff's assertion about what should have been done, there simply is no evidence to show that MGE was imprudent when it executed Mid-Kansas II.

The evidence did show that MGE engaged in some rather serious negotiations with Mid-Kansas/Riverside in January and February of 1995. MGE gained leverage in those negotiations by withholding approximately 2.5 million dollars in payments to Mid-Kansas/Riverside for services provided under the Mid-Kansas I agreement and Riverside/WR Transportation Agreement I, creating cash flow problems for Mid-Kansas/Riverside. However, MGE's position was weakened by the fact that it was contractually bound to Mid-Kansas/Riverside until 2009. Testimony indicated that had MGE continued to withhold payment, Mid-Kansas/Riverside would likely have sued for breach of contract. Breaching that contract could have required MGE to pay substantial damages to Mid-Kansas/Riverside. Wendell C. Putman, an employee of Mid-Kansas/Riverside who was involved in the negotiations leading to the execution of Mid-Kansas II, testified that "the withholding of the payment was part of the reason that the negotiations began. The withholding of the payment was not sufficient to cause Mid-Kansas/Riverside to give away the farm."¹²

Staff's assertion that MGE should have used its leverage to negotiate firm transportation rates that were more closely tied to Williams' firm transportation rates is not supported by the evidence and cannot be the basis for a finding that MGE was imprudent.

Overrun Penalty Adjustment:

In its initial recommendation regarding MGE's 1996-1997 ACA filing, Staff proposed an overrun penalty adjustment that would increase MGE's total PGA revenue recovery by \$6,177.39. Staff indicated that the adjustment was necessary because MGE did not include in its ACA filing certain overrun penalties assessed to its end-user transportation customers. MGE filed testimony indicating that it agreed with this adjustment proposed by Staff¹³ and no further testimony or argument was offered regarding this adjustment.

CONCLUSIONS OF LAW

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

¹¹ Transcript. page 1084, lines 9-15.

¹² Transcript. page 611, lines 20-23.

¹³ Langston Direct, Exhibit 1, page 15, lines 3-8.

Jurisdiction:

MGE is a division of Southern Union Company, which is an investor-owned public utility engaged in the provision of natural gas service in the state of Missouri. Southern Union Company is, therefore, a "gas corporation" as defined in section 386.020(18), RSMo 2000. As a "gas corporation," Southern Union Company is subject to the jurisdiction of the Commission under Chapters 386 and 393, RSMo 2000.

Any decision of the Public Service Commission must be both lawful and reasonable.¹⁴ The lawfulness of a decision is determined from the statutory authority of the Commission.¹⁵ For a decision of the Commission to be reasonable, it must be supported by competent and substantial evidence on the whole record.¹⁶

Standards for Evaluation of the Stipulation and Agreement:

The parties disagree about the interpretation of the stipulation and agreement that the Commission approved on June 11, 1996. That stipulation and agreement is, in essence, a settlement agreement by which certain parties paid large sums of money to settle certain claims. Normal rules of contract construction apply to interpretation of settlement agreements,¹⁷ so the Commission will look to the standards appropriate for interpreting a contract when interpreting the meaning of the stipulation and agreement. The Commission emphasizes that it is merely interpreting the stipulation and agreement as it would a contract. A stipulation and agreement between the parties that is accepted by the Commission does not prevent the Commission from performing its statutory duty to regulate the conduct of Missouri's public utilities.¹⁸

Missouri's Court of Appeals has stated that when interpreting a contract the following standards are to be applied:

The terms of the contract are read as a whole to arrive at the intention of the parties. In that exercise, each term is construed to avoid an effect which renders other terms meaningless. A construction which attributes a reasonable meaning to all the provisions of the agreement is preferred to one which leaves some of the provisions without function or sense.¹⁹

The intent of the parties is crucial to the construction of the settlement agreement.²⁰ The intent of the parties is to be determined not by what they now say they intended, but by the document.²¹ If there is no ambiguity, then the intention of

¹⁴ *City of Oak Grove v. Pub. Serv. Com'n*, 769 S.W.2d 139, 141 (Mo. App. W.D. 1989).

¹⁵ *State ex rel. Intercon Gas. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1995).

¹⁶ *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n.*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997).

¹⁷ *Blackman v. Blackman*, 767 S.W.2d 54, 59 (Mo. App. W.D. 1989).

¹⁸ *State ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20 (Mo. 1975).

¹⁹ *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 717 (Mo. App. W.D. 1995) (citations omitted).

²⁰ *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. Banc 1995).

²¹ *Press Machinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984).

11 Mo. P.S.C. 3d

the parties is to be garnered from the four corners of the documents. If a contract is ambiguous, then the use of extrinsic evidence for interpretation is proper.²²

Missouri's courts have also provided guidance on when a contract is ambiguous:

A contract is ambiguous only if its terms are susceptible of more than one meaning so that reasonable men may fairly and honestly differ in their construction of the terms. A contract is not ambiguous merely because the parties disagree over its meaning. To determine whether a contract is ambiguous, we consider the whole instrument and give the words in the contract their natural and ordinary meaning. Whether a contract is ambiguous is a question of law.²³

Therefore, the Commission will interpret the stipulation and agreement as a question of law.

Interpretation of the Stipulation and Agreement:

With those standards in mind, the Commission will now examine the stipulation and agreement. Paragraph 4 of the stipulation and agreement refers to four separate agreements:

- Paragraph 4A refers to a contract dated January 15, 1990, and amended on October 3, 1991, between Western Resources and Mid-Kansas Partnership. In this case the parties have referred to this agreement as Mid-Kansas I;
- Paragraph 4B refers to a transportation agreement dated January 15, 1990, between Western Resources and Riverside. In this case the parties have referred to this agreement as Riverside/WR Transportation Agreement I;
- Paragraph 4C refers to a sales agreement dated February 24, 1995, between MGE and Mid-Kansas. In this case the parties have referred to this agreement as Mid-Kansas II; and
- Paragraph 4D refers to a transportation agreement dated February 24, 1995, between MGE and Riverside. In this case the parties have referred to this agreement as Riverside I.

The stipulation and agreement provides that the four agreements listed above are to be collectively referred to as the Missouri Agreements.

²² *Blackman v. Blackman*, at 59.

²³ *Blackman v. Blackman*, at 59.

Paragraph 5 of the stipulation and agreement is the heart of the agreement and is also the center of the disagreement between the parties. Because of its importance, the entire paragraph will be quoted, as follows (numbers have been added to aid in subsequent reference to the paragraph):

As a result of this Stipulation and Agreement, the Signatories agree that neither the execution of the MKP/WR Sales Agreement [Mid-Kansas I] and the Riverside/WR Transportation Agreement I, nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review. In addition, the Signatories agree that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be the subject of any further ACA prudence review until the case associated with the audit period commencing July 1, 1996, and ending June 30, 1997. The Missouri Agreements will be subject to the compliance and operational review (as described herein) of the Staff for all periods on and after July 1, 1994, and MGE's ACA balance may be subject to adjustment as a result of such review.¹ The intent of the Signatories by this Stipulation and Agreement is that the Commission, in adopting this Stipulation and Agreement, issue an order holding that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be disallowed by the Commission based on the reasons described above in this paragraph in Case Nos. GR-94-101, GR-94-227, GR-94-228, GR-95-82 and GR-96-78, and that the findings and conclusions regarding the prudence of the execution of the Missouri Agreements made by the Commission in Case No. GR-93-140 shall be compromised and settled as provided for herein. Although the prudence of entering into the MKP/WR Sales Agreement [Mid-Kansas I] and the Riverside/WR Transportation Agreement I is finally settled by this Stipulation, additional questions may arise regarding the administration of the contracts by MGE and WR in Staff's compliance and operational review for all periods on and after July 1, 1994, as described above. Therefore, this Stipulation is not designed to preclude the Staff from making proposed adjustments regarding issues involving the manner in which gas is actually taken under the contracts (e.g., gas which was available under the contract was not taken for some reason) or issues involving billing matters (e.g., MGE paid more than was required under the contract due to a billing or mathematical error.) Further, as a consequence of the Commission adopting this Stipulation as provided herein, WR, Riverside/MKP, and MGE agree to make the necessary filings with the Circuit Court of Cole County, Missouri to dismiss the appeals they have taken from Case No. GR-93-140. These dismissals

11 Mo. P.S.C. 3d

shall take place within ten days of the payments being made as scheduled in paragraph 7.A. As a consequence, WR and Riverside/MKP agree to pay the amounts which are owed due to Case No. GR-93-140 through the procedures described herein.

Nothing herein is to be construed as determining the rights, obligations, compliance or non-compliance with the terms and conditions of any contract between or among WR, MKP, Riverside, and MGE or any combination thereof. WR, MGE and Riverside/MKP agree that this Stipulation shall in no manner whatsoever be deemed to be admission of fault, responsibility or liability of any matter whatsoever by WR, MGE, Riverside and/or MKP. WR, MGE and Riverside/MKP agree that this Stipulation is purely and exclusively for the purpose of avoiding the cost of litigation and regulatory proceedings and is to be construed as that and nothing more.

¹ As a result of the Commission's decision in Case No. GO-94-318, MGE is scheduled to have new tariffs in operation under an incentive PGA commencing July 1, 1996. Since those tariffs have not been submitted to the Commission, it is difficult to state with any certainty how they may relate to the settlement being effected by this Stipulation. However, it is the intention of the Signatories that to the extent there are gas cost (non-transportation) issues involving any of the Missouri Agreements which are relevant to the time periods before July 1, 1996, those amounts will come under the Incentive PGA provisions as approved by the Commission. As a result, any issues related to gas costs associated with the Missouri Agreements will be subject to the provision that unless MGE's costs subject to the Incentive PGA provisions to be filed rise to the level where a prudence review is triggered, there will be no prudence review of the Missouri Agreements.

MGE and Mid-Kansas/Riverside argue that the explicit language of the first sentence of paragraph five (lines 1-5) precludes any further ACA prudence review of the specified contracts. That sentence indicates that neither the execution of Mid-Kansas I and Riverside/WR Transportation Agreement I, nor "the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review." As previously indicated, paragraph 4 of the stipulation and agreement states that the Mid-Kansas II contract is one of the Missouri Agreements that is the subject of this stipulation and agreement. Therefore, the first sentence would preclude any further ACA prudence review of the decisions associated with the execution of the Mid-Kansas II contract, as one of the Missouri Agreements.

Staff, however, argues that the clear language of the first sentence is modified by the second sentence of the stipulation and agreement (lines 5-9). That sentence provides that “[I]n addition, the Signatories agree that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be the subject of any further ACA prudence review until the case associated with the audit period commencing July 1, 1996, and ending June 30, 1997.” According to Staff, this sentence means that the prudence of MGE’s decision to enter into the Mid-Kansas II contract can be reviewed in this case, which deals with the audit period commencing July 1, 1996 and ending June 30, 1997.

The fourth sentence of the stipulation and agreement states that “transportation rates and gas costs charged pursuant to the Missouri Agreements” are not to be disallowed as imprudent in six specified cases that were established to consider MGE’s ACA periods before July 1, 1994 (lines 12-21). Staff argues that because the sentence specifically lists those six cases, it implies that the Commission can reexamine the prudence issue in subsequent cases. MGE and Mid-Kansas/Riverside counter that the stipulation and agreement specifically names only six cases because only those cases were in existence at that time. This case was not opened until after the stipulation and agreement was signed and approved. Therefore, it would be impossible for the parties to have specifically named this case. MGE and Mid-Kansas/Riverside deny that the listing of six specific cases should imply that the prudence issue could be reopened in subsequent cases.

The fifth and sixth sentences of stipulation and agreement state that the prudence of entering into the Mid-Kansas I and Riverside/WR Transportation Agreement I contracts is finally settled (lines 21-24) but permits the Staff to raise questions regarding the administration of those contracts by MGE and Western Resources in Staff’s compliance and operational review for all periods on and after July 1, 1994 (lines 24-26). The stipulation and agreement then further specifies that Staff is not precluded from making proposed adjustments regarding “issues involving the manner in which gas is actually taken under the contracts (e.g. gas which was available under the contract was not taken for some reason), or issues involving billing matters (e.g. MGE paid more than was required under the contract due to a billing or mathematical error).” (lines 26-32) MGE and Mid-Kansas/Riverside argue that the Staff is restricted to making only those limited adjustments in its prudence review of transportation rates and gas costs.

A close and careful reading of the stipulation and agreement, giving meaning to each provision, reveals that the contract is ambiguous. The first sentence precludes any future prudence disallowance based on the execution of the Mid-Kansas I and Riverside/WR Transportation Agreement I contracts. Therefore, the Commission cannot re-impose the disallowance for removing the price cap that it imposed in Case No. GR-93-140. This interpretation is supported by the statement in the fifth sentence that the prudence of entering into Mid-Kansas I and Riverside/WR Transportation Agreement I is finally settled.

However, the second clause of the first sentence treats the Missouri Agreements differently than it treats Mid-Kansas I and Riverside/WR Transportation Agreement I. For the Missouri Agreements, the stipulation and agreement provides that only the decisions associated with the execution of the agreements are to be

11 Mo. P.S.C. 3d

exempted from any further ACA prudence review. The limited nature of that exemption implies that other aspects of the Missouri Agreements are still subject to prudence review. The other aspects of the agreement that are subject to prudence review include transportation rates and gas costs, as revealed in the second sentence of the stipulation and agreement.

The second sentence does not modify the first sentence, instead it imposes an additional limitation on the prudence reviews to be considered by the Commission. The stipulation and agreement provides that the Commission will not review the prudence of transportation rates and gas costs charged pursuant to the Missouri Agreements until the audit period beginning July 1, 1996. This clearly implies that after July 1, 1996, the Commission can again review the prudence of those rates and costs.

The ambiguity in the stipulation and agreement arises from the language that permits prudence review of transportation rates and gas costs. The stipulation and agreement does not indicate what is meant by that phrase. MGE and Mid-Kansas/Riverside suggest that review of transportation rates and gas costs is limited to compliance and operational review regarding the administration of the contracts by MGE. The sixth sentence (lines 26-32) of paragraph 5 would define compliance and operational review as permitting Staff to propose adjustments "regarding issues involving the manner in which gas is actually taken under the contracts (e.g., gas which was available under the contract was not taken for some reason) or issues involving billing matters (e.g., MGE paid more than was required under the contract due to a billing or mathematical error." That interpretation of the stipulation and agreement is, however, overly restrictive. The third sentence of paragraph 5 (lines 9-12) state that the Missouri Agreements are to be subject to compliance and operational review on and after July 1, 1994. If prudence review of transportation rates and gas costs, as permitted for audit periods beginning after July 1, 1996 by the second sentence, means only "compliance and operational review," then the second sentence of paragraph 5 (lines 5-9) is rendered superfluous and meaningless. Therefore, the prudence review of transportation rates and gas costs permitted under the stipulation and agreement must mean something more than merely compliance and operational review.

The ambiguity of the stipulation and agreement is compounded by the fifth sentence of paragraph 5 (lines 21-26). That sentence states that the prudence of entering into Mid-Kansas I and Riverside/WR Transportation Agreement I is finally settled. It seemingly would have been easy for the parties to have simply stated that the prudence of entering into the Missouri Agreements was finally settled, rather than naming only two of the contracts. But they did not do so, leaving open the question of whether the Missouri Agreements that were not specifically named, Mid-Kansas II and Riverside I, were also finally settled.

Having found that the stipulation and agreement is ambiguous, the Commission has considered the parole evidence that was presented by the parties regarding the meaning of the stipulation and agreement. The Commission's findings of fact regarding that question are found at page 12 within the Findings of Fact section of this Report and Order. As indicated in its findings of fact, the Commission is unable to determine the intended meaning of the stipulation and agreement.

Burden of Proof:

Section 393.130.1, RSMo 2000, requires that all charges made or demanded by any gas corporation must be just and reasonable. Section 393.150.2, RSMo 2000, provides that in any hearing involving a rate increase, the gas corporation proposing such rate increase has the burden of proving that the proposed increased rate is just and reasonable. The Commission has also held that the gas corporation has the burden of showing that the gas costs that it proposes to pass on to ratepayers through operation of its PGA tariff are just and reasonable.²⁴

The Prudence Standard:

It is not, however, sufficient to state that MGE, as the gas corporation, has the burden of proving that its gas costs are just and reasonable. The fact that Staff is challenging the prudence of incurring some of those costs brings into effect an additional standard, the prudence standard. The Commission established its prudence standard in a 1985 case involving the costs incurred by Union Electric Company in constructing its Callaway nuclear plant.²⁵ In determining how much of those costs were to be included in Union Electric's rate base, the Commission adopted a standard for determining the prudence of costs that had been established by the United States Court of Appeals, District of Columbia, in a 1981 case.²⁶ The standard adopted by the Commission recognizes that a utility's costs are presumed to be prudently incurred, and that a utility need not demonstrate in its case-in-chief that all expenditures are prudent. "However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling those doubts and proving the questioned expenditures to have been prudent."²⁷

The Commission, in the Union Electric case, further established that the prudence standard was not based on hindsight, but upon a reasonableness standard. The Commission cited with approval a statement of the New York Public Service Commission that:

... the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people

²⁴ *In the Matter of Tariffs filed by Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, to Reflect Rate Changes to be Reviewed in the Company's 1992-1993 Actual Cost Adjustment*, 3 Mo. P.S.C. 3rd 480, 488 (1995).

²⁵ *In the Matter of the Determination of In-Service Criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway Rate Base and Related Issues. In the Matter of Union Electric Company of St. Louis, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, 27 Mo. P.S.C. (N.S.) 183, 192-193 (1985).

²⁶ *Anaheim, Riverside, Etc. v. Fed. Energy Reg. Com'n*, 669 F.2nd 799, 809 (D.C. Cir. 1981)

²⁷ *Union Electric*, 27 Mo. P.S.C. (N.S.) 183, 193 (1985).

11 Mo. P.S.C. 3d

would have performed the tasks that confronted the company.²⁸

Since its adoption, the Commission's prudence standard has been recognized by reviewing courts²⁹ and has been accepted by all parties as the standard to be applied in this case.

In the Union Electric case, the Commission found that the showing of two billion dollars in cost overruns associated with the building of the Callaway nuclear plant was sufficient to raise serious doubts about the prudence of Union Electric's expenditures, thus shifting the burden to Union Electric to show that its expenditures were prudent. In this case, Staff attempts to raise serious doubts about the prudence of MGE's expenditures for the purchase of natural gas by asserting that MGE could have saved \$3,490,082.81 during the review period by purchasing and transporting natural gas over the Williams Natural Gas pipeline, rather than purchasing and transporting the same amount of natural gas over the Mid-Kansas/Riverside pipeline. Staff's attempt to raise serious doubts is not successful.

Staff's attempt to draw a direct comparison between the transportation rates charged by Williams and Mid-Kansas/Riverside are overly simplistic. In effect, Staff is arguing that MGE was in the position of a motorist choosing whether to buy gasoline from one service station at \$1.10 per gallon, or from a second station at \$1.20 per gallon. Staff claims that MGE was imprudent because it purchased gasoline at \$1.20 per gallon, rather than \$1.10 per gallon. However, MGE is not in the same position as a motorist free to choose between competing service stations. As the Commission has previously found, the fact that MGE was contractually obligated to purchase natural gas from and through the Mid-Kansas/Riverside pipeline cannot be ignored. Therefore, it was not economically possible for MGE to purchase the extra natural gas from the Williams pipeline.

Furthermore, a direct comparison of the transportation rates charged by the competing pipeline companies simply is not possible and cannot be the basis for serious doubts about the prudence of MGE's expenditures. All of the transportation charges under the Mid-Kansas II Agreement are reflected in the reservation charges of the pipelines. However, all of Williams' charges to MGE are not reflected in its rates or reservation charges. Staff's witnesses admitted that Williams' costs to MGE included items that are not in Williams' rates (e.g. direct bill amounts), and that these charges are still paid by MGE and passed on to the ratepayers. As a result, the cost of acquiring transportation off the Williams pipeline is greater than just Williams' rates. In addition there was a great deal of testimony indicating that the quality of service that MGE obtained from Mid-Kansas/Riverside was not comparable to the type of service available from Williams.

Staff has not raised serious doubts about MGE's decision to purchase and transport natural gas over the Mid-Kansas/Riverside pipeline. Therefore, MGE's

²⁸ *Union Electric*, at 194, quoting *Consolidated Edison Company of New York, Inc.*, 45 P.U.R. 4th 331 (1982).

²⁹ *see. e.g. State ex rel. Associated Natural Gas Company v. Pub. Serv. Com'n*, 954 S.W.2d 520, 529 (Mo. App. W.D. 1997).

business decision to purchase that gas is presumed to be prudent and does not form the basis for a disallowance.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions:³⁰

1. Staff's proposal to disallow \$3,490,082.81 in natural gas costs incurred by MGE in its 1996-1997 ACA period is not supported by competent and substantial evidence. MGE had a contractual obligation to purchase natural gas from Mid-Kansas/Riverside under the Mid-Kansas II contract. Staff's argument that MGE's decision to enter into the Mid-Kansas II contract was imprudent is not supported by the facts presented in this case.

2. Staff's proposal to increase MGE's natural gas costs by \$6,177.39 for certain overrun penalties is agreed to by MGE and will be ordered.

IT IS THEREFORE ORDERED:

1. That Staff's proposal to disallow \$3,490,082.81 in natural gas costs incurred by Missouri Gas Energy in its 1996-1997 ACA period is rejected.

2. That Staff's proposal to increase Missouri Gas Energy's natural gas costs for its 1996-1997 ACA period by \$6,177.39 for certain overrun penalties is accepted.

3. That Missouri Gas Energy is authorized to file proposed tariff sheets in compliance with this order.

4. That any pending motions that the Commission has not specifically ruled upon are hereby denied.

5. That this Report and Order shall become effective on March 22, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw and Forbis, CC., certify compliance
with the provisions of Section 536.080, RSMo 2000.

³⁰ In the course of this case, the parties have raised various other arguments. The Commission need not address these issues in order to reach its decision.

In the Matter of an Investigation into Various Issues Related to the Missouri Universal Service Fund.

*Case No. TO-98-329
Decided March 21, 2002*

Telecommunications § 2. The Commission ruled that for a carrier to receive support under the state Lifeline program, the carrier must provide essential local telecommunications services. Low-income and disabled Missourians can get these services at a reduced cost. The carriers must pass the costs of the service on to their customers via an explicit charge to end-users, based on a uniform percentage amount.

**REPORT AND ORDER
ESTABLISHING LOW-INCOME/DISABLED FUND**

FINDINGS OF FACT: LOW-INCOME/DISABLED FUND

On January 25, 2001, the Staff of the Commission, on behalf of all the parties, filed a low-income/disabled proposal. Staff outlined a program to implement assistance to low-income and disabled customers for telecommunications services under the Lifeline and/or Link-up programs funded from the Federal Universal Service Fund and the Missouri Universal Service Fund. Staff stated that its proposal is designed to maximize Federal Universal Service support for services to low-income customers and disabled customers. Staff identified several rule changes and additional rules necessary to implement this proposal. There are no disputed issues between the parties regarding the need for and structure of a low-income/disabled fund.

A low-income customer is defined as

“Any customer who requests or receives residential essential telecommunication local services and who has been certified by the Department of Social services as economically disadvantaged by participation in Medicaid, food stamps, Supplementary Security Income, Federal public housing assistance or Section 8, or Low Income Home Energy Assistance Program (LIHEAP)¹.

Low-income ratepayers have historically had a lower penetration rate than the statewide average penetration rate for all Missouri households. Missouri households with incomes of \$9,999 or less had subscribership levels of just over 86 percent, as of March 2000. The overall average subscribership level at the same time was approximately 10 percent higher. Adoption of the proposed low-income/disabled fund will increase the level of penetration in households made up of low-income ratepayers and, possibly, households with disabled ratepayers. It will maximize the revenues available from federal universal service support programs for low-income and disabled persons.

¹ 4 CSR 240-31.010 (8). Unless otherwise noted, all statutory citations are to RSMo 2000.

The plan proposed by Staff would result in a fund of approximately \$4,800,000 which would provide support for a substantial number of low-income and disabled Missouri residents. The resulting assessment on Missouri telecommunication carriers would be approximately 0.27% (0.0027) of net jurisdictional revenue, excluding any fund administration costs. Further, the proposal is designed to support as many customers as possible and does not place undue burdens on qualifying customers seeking assistance.

Consistent with the low-income/disabled fund proposal, the Commission finds that all carriers except payphone providers, shared tenant service providers and carriers with annual net intrastate jurisdictional revenues of less than \$24,000 should be assessed. Although this proposal differs from the Commission's current rule requirement to assess all carriers, exempting these companies from assessment will assist the administration of the Missouri Universal Service Fund and significantly reduce the expense of administration.

The Commission concludes that it is in the public interest to adopt the low-income/disabled fund proposal of the parties. The proposal of the parties adopted by the Commission is as follows:

PURPOSE

The purpose of this proposal is to outline a program to implement assistance to low-income and disabled customers for telecommunications services under the Lifeline and/or Link-up programs funded from the Federal Universal Service Fund and the Missouri Universal Service Fund. One goal established by Missouri Public Service Commission (Commission) Rule 4 CSR 240-31.050(4) is to fashion a program so that the support amount provided by the Missouri Universal Service Fund for services to low-income customers and disabled customers is set at the level necessary to gain the maximum Federal Universal Service support for services to such customers.

BACKGROUND

In discussing the parameters for state Lifeline funding, the Technical Committee (or "Committee") reviewed and compiled information from the current Commission rules and other sources related to the provision of Lifeline service. The following items helped guide the Committee's recommendations in regard to Lifeline service:

Provider Participation

Under the FCC rules all eligible telecommunications carriers must offer Lifeline service. Pursuant to Section 392.248, RSMo Supp. 1999, only telecommunications companies that provide essential telecommunications service can receive support under the state Lifeline program. Neither the state statute nor the rules require such companies to participate; rather, they must apply to the administrator to receive funds. Companies choosing to participate in the Lifeline program shall comply with the requirements of this document.

11 Mo. P.S.C. 3d

Definitions and Qualification for Benefits under the Lifeline and Link-up programs

Under 4 CSR 240-31.010(3) a disabled customer is a customer who requests or receives residential essential local telecommunications service and meets the following definition of "disabled" in Section 660.100.2, RSMo 1994.

The term disabled shall mean totally and permanently disabled or blind and receiving federal social security disability benefits, federal supplemental security income benefits, veterans administration benefits, state blind pension pursuant to section 209.010 to 209.160, RSMo, state aid to blind persons pursuant to section 209.240 RSMo, or state supplemental payments pursuant to Section 208.030, RSMo. Section 660.100.2, RSMo 1994.

According to 4 CSR 240-31.010(8) a low-income customer is any customer who requests or receives residential essential local telecommunications service and who has been certified by the Department of Social Services (DSS) as economically disadvantaged by participation in Medicaid, food stamps, Supplementary Security Income (SSI), federal public housing assistance or Section 8, or the Low Income Home Energy Assistance Program (LIHEAP).

Eligible Services

4 CSR 240-31.010(5) defines "essential local telecommunications services" as follows:

Essential local telecommunications services - Two (2) way switched voice residential service within a local calling scope as determined by the commission, comprised of the following services and their recurring charges:

- (a) Single line residential service, including Touch-Tone dialing and any applicable mileage or zone charges;
- (b) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (c) Access to basic local operator services;
- (d) Access to basic local directory assistance;
- (e) Standard intercept service;
- (f) Equal access to Interexchange Carriers consistent with rules and regulations of the Federal Communications Commission (FCC);
- (g) One (1) standard white pages directory listing; and
- (h) Toll blocking or toll control for qualifying low-income customers.

Funding Assessments

According to 4 CSR 240-31.060 funding for the Missouri Universal Service Fund for low-income/disabled support will be from an assessment on the net jurisdictional revenues of each telecommunications company and other nondiscriminatory factors as determined by the Commission. The Committee has determined companies with minimal revenues should not pay into the fund. Specifically, any company with net jurisdictional revenues resulting in an assessment of less than \$1,200 per year should not be required to pay into the fund. This recommendation will simplify the collection of Missouri Universal Service Fund assessments without significantly affecting the size of the Missouri Universal Service Fund. Telecommunications companies with net jurisdictional revenues resulting in an assessment of at least \$1,200 per year will be required to pay into the fund. Rule Change #1 incorporates a proposed change in the Commission rules to implement this qualification.

Application for and Receipt of Funds

To receive funds from the Missouri Universal Service Fund, the telecommunications company must file a written application with the Fund Administrator and must comply with the requirements of 4 CSR 240-2.060 (1) (a)-(h) and 4 CSR 240-2.080. Applications for funds required to assist low-income and/or disabled customers in obtaining essential local telecommunications service shall include information that the company meets the terms defined by Section 3 86.020(5 1), RSMO Supp. 1999, and that the applicant provides service to the low-income and/or disabled customers as defined by Commission rule or procedures. As required by 4 CSR 240-31.050, [in] all requests for funds from the Missouri Universal Service Fund for reimbursement of the benefits provided to customers under these programs, the telecommunications company shall identify the number of low-income and disabled customers served in order to receive support from the Missouri USF and shall maintain records of these customers.

LIFELINE PROPOSAL

Major elements of the Lifeline proposal adopted by the Technical Committee are as follows:

Amount of Assistance under the Missouri Universal Service Fund's Low-Income/Disabled Program

Existing Commission rules require setting the amount of state support to maximize federal funding. This requirement establishes state support of \$3.50 per customer per month which would provide an additional \$1.75 in federal funding. However, the Committee recognizes in some circumstances this amount of support might be greater than the customer rates for those services. The Committee therefore recommends a limit be placed on the amount of support so it is not greater than the customer rates. Rule Change #2 incorporates a proposed change in the Commission rules to implement this limit. Currently, Federal Universal Service funding differs between price-cap and non-price-cap incumbent local exchange companies (ILECs) and between competitive local exchange companies (CLECs) which have been designated eligible telecommunications carriers (ETCs) as

11 Mo. P.S.C. 3d

compared to CLECs who have not received that designation. The table below illustrates the Lifeline support provided to low-income customers after implementation of the state Lifeline proposal under various circumstances. As indicated in the table, no Federal support is available to disabled customers. The Committee proposes that state funding for disabled customers be set at \$3.50 per customer per month:

	Non-Price-cap ILEC**	Price-cap ILEC	Non-ETC CLEC*	ETC*** ILEC
1. SLC	\$3.50	\$4.35	\$0	\$3.50-\$4.45
2. Additional Federal	\$1.75	\$1.75	\$0	\$1.75
3. Federal Currently Available	\$5.25	\$6.10	\$0	\$5.25
(Line 1 + Line 2)				-\$6.10
Potential Support (with implementation of Missouri Universal Service Fund):				
4. State-Missouri Universal Service Fund	\$3.50	\$3.50	\$3.50	\$3.50
5. Additional Federal	\$1.75	\$1.75	\$0	\$1.75
6. Potential Low-Income Total Support	\$10.50	\$11.35	\$3.50	\$10.50
(Line 3 + Line 4 + Line 5)				-\$11.35
7. Disabled Customer Total Support (No Federal Support)	\$3.50	\$3.50	\$3.50	\$3.50
Service Provided Upon Customer's Self Certification				

The Commission's rules currently contain general requirements for customers to meet in order to qualify for Lifeline or disabled support. The rules, however, do not currently give guidance on how customers will demonstrate that they meet the requirements. The Committee proposes qualification be accomplished by a self-certification process to be included in the rules. Rule Change #3 contains the proposed self-certification rule. The Committee has developed a sample application letter which is enclosed as Attachment # 1 [not included in this Report and Order].

The Committee also recommends customers have a maximum time period to submit an application from the date of service initiation and still receive applicable discounts from the service initiation date. The Committee has determined sixty days is a reasonable time period. On the other hand, any customer submitting an application after sixty days of service initiation will receive discounts only on a prospective or going-forward basis. Rule Change #4 contains a proposed rule regarding this provision.

Audit and Review of Customer Eligibility

The Committee had considerable discussion regarding the potential implications for error that could result from the self-certification rule and how those errors could be minimized. As a result of these discussions, the Committee developed both a proposed rule, and some administrative procedures that could effectively address this issue. The proposed rule contained in Rule Change #5 provides the necessary

authority for the Fund Administrator to conduct audits of customer eligibility. The administrative procedures developed by the Committee are contained in Administrative Procedure #1 and reflect the Committee's recommendation of how such procedures should be established by the Fund Administrator.

Disqualification of Customers; Procedure; Notice: Reapplication Requirements

If, as a result of the proposed audit of customer eligibility, the Fund Administrator identifies a customer may not be eligible for the Lifeline or disability support programs, the Committee recommends a procedure to notify customers and to allow them to verify their eligibility before being terminated from the support program. The administrative procedures to accomplish this disqualification process are reflected in Administrative Procedure #2.

Public Information and Outreach

If these telecommunications assistance programs are to accomplish the legislative goals, the customers who are eligible for the programs must be made aware that the programs exist and how to apply for the benefits. ETCs that receive federal funding for Lifeline and Link-up are required to advertise the availability of such services and the charges using media of general distribution. Since these materials may be company specific and targeted to the company's customers and service area, there is a need to develop and make generally available throughout Missouri information about the Missouri Lifeline and Link-up programs. The Committee recommends a rule change be implemented to require telephone companies to provide a prominent description of the availability of Lifeline and Link-up service as part of the statement of rights and responsibilities required under 4 CSR 240-33.060(3). Rule Change #6 contains the proposed rule. Attachment #2 [not included in this Report and Order] provides a sample of the information the Committee feels meets this requirement of prominent notification of the availability of Lifeline and Link-up services.

Developing and implementing a generic public information program designed to reach all Missouri residents should be a cooperative effort by the telecommunications companies with the assistance of the Fund Administrator, the Commission, Office of the Public Counsel (OPC), the Missouri Department of Social Services (DSS) and community based action agencies. The information plan should include a variety of information and media. Responsibilities for these efforts are proposed as follows:

1. The telecommunications industry, Commission Staff, OPC, and DSS should cooperatively develop informational materials for statewide distribution. These materials should include:

- a. A generic brochure describing the general availability and qualifications for Lifeline and Link-up service. This brochure would be made available to various state, county, local, and non-profit agencies that serve and support those individuals who could be eligible for the programs so these agencies can provide this information at the same time as they are in contact with clients regarding their services. The brochure could also be provided in DSS "welcome packages".

11 Mo. P.S.C. 3d

b. Non-company specific radio and television Public Service Announcements. OPC will work with the Department of Economic Development to produce and distribute these materials to reach a wide spectrum of Missouri residents.

c. Funding for the production of brochures should be reimbursed from the fund, once it is established.

d. Attachment #3 [not included in this Report and Order] contains sample informational materials.

2. OPC and the Commission will be responsible for publicizing the establishment of the Missouri Universal Service Fund. Initially it is vital to cast the information and public relations net wide to reach as many qualified customers as possible. It would be effective to "kick-off" the commencement of the program with a news event involving high-ranking state officials, legislators, and social service agencies.

3. The Fund Administrator will, on an annual basis, do a targeted mailing including information about and an application for Lifeline and Link-up service to the list of eligible households. To the extent practical, the list will exclude current Lifeline subscribers.

INITIAL ACTION ITEMS

Missouri Public Service Commission

1. Order resolving the issues related to assessments and method of recovery.
2. Order establishing low-income and disabled funding amounts (\$3.50).
3. Complete rulemaking to adopt proposed rule changes and additions.
4. Approval of company tariffs implementing Lifeline rate changes.

Missouri Universal Service Fund Board

1. Establish the following administrative procedures for a Fund Administrator:
 - a.) Administrative Procedure #1 (audits of self-certification)
 - b.) Administrative Procedure #2 (disqualification of customers)
2. Retain independent neutral fund administrator.
 - a.) Issue Request for Proposal
 - b.) Select a Fund Administrator
3. Establish initial assessment amount.

Fund Administrator

1. Gather data for initial estimate of assessment amount. (See Administrative Procedure #3)
2. Establish administrative procedures for accepting applications from companies.
3. Establish general administrative procedures for fund receipt and disbursement.
4. Establish procedures for data exchange for eligibility verification.

Telephone Companies

1. Apply for Missouri Universal Service Fund eligibility.
2. Develop and file tariffs to implement changes to Lifeline service. (See Attachment #4 [not included in this Report and Order] for sample tariff)
3. Develop and file tariffs to implement USF surcharge, if the Commission approves and a company implements recovery of its USF assessment directly from its customers.

4. Internal training of customer contact people as needed.

Other

1. Complete development of outreach materials and get them published.

PROPOSED RULE CHANGES

Rule Change #1 - Modify 4 CSR 240-31.060(5)(B) and 4 CSR 240-31.060(6)(A) as follows:

(B) The Fund Administrator shall submit to the board its determination of the funding requirements, along with its determination of the revenues upon which the assessment shall be made, and the percentage assessment to be made upon the appropriate revenues of each telecommunications company. The percentage assessment will be calculated to exclude the assessment for any company with a resulting assessment of less than \$100 per month or \$1,200 per year.

(A) Notices of assessment shall be sent by the Fund Administrator to every telecommunications company with a minimum assessment of \$100 per month. Such notices will inform the company of the assessment and the payment to be made.

Rule Change #2 - Modify 4 CSR 240.31.050(4) as follows:

(4) Determining Participation for Essential Telecommunications Service: The amount of support provided by the Missouri Universal Service Fund for services to low-income customers and disabled customers will be set at the level necessary pursuant to federal universal service fund rules to gain the maximum federal universal service funding for such customers. However, the amount of combined federal and state lifeline support for any customer will not exceed the sum of the federal Subscriber Line Charge (SLC) and the recurring charges for essential local telecommunications services (including the basic service rate, touch calling charge, extended area service additive, and mileage additives, if any).

Rule Change #3 - Add 4 CSR 240.31.050(3)(D) as follows:

(D) Customers who qualify for low-income or disabled support shall certify in writing on an application designed for that purpose that they are eligible for the programs. Such application shall require the applicant to certify under penalty of perjury that the consumer receives benefits from one of the qualifying programs and identify the program or programs from which that consumer receives benefits. On the same document, a qualifying low-income or disabled consumer also must agree to notify the carrier if that consumer ceases to participate in the program or programs. The companies shall rely upon this certification to provide the benefits under these programs until the customer advises the company that they are no longer qualified or until the company is advised by the Administrator that the customer may not be eligible.

Rule Change #4 - Add 4 CSR 240-31.050 (3)(E) as follows:

(E) Any eligible customer submitting an application within sixty days of initiating service will be entitled to the applicable low-income or disabled discounts from the date of service initiation. If applicable, the company may provide either a refund or credit, as determined by the company. Any eligible customer submitting an application after sixty days of initiating service will begin receiving the appropriate discounts on a prospective basis.

11 Mo. P.S.C. 3d

Rule Change #5 - Add 4 CSR 240.31.050(3)(F) as follows:

(F) The Fund Administrator shall be authorized by the Board to conduct audits of individual self-certification using records that can be lawfully made available from the administrators of qualifying programs. If as a result of these audits, the Administrator determines that a recipient may not be eligible for low-income or disabled support, the customer shall be required to verify his eligibility for continuing to receive support pursuant to administrative procedures established by the Fund Administrator and approved by the Board.

Rule Change #6 - Add 4 CSR 240.33.060(3)(J) as follows:

(J) Where provided, a prominent description of Lifeline and Link-up services.

PROPOSED ADMINISTRATIVE PROCEDURES

Administrative Procedure #1 – Audits of self-certification

The Fund Administrator shall cooperate with the Missouri Department of Social Services (DSS) to establish a data file containing information on individuals receiving low-income assistance through a qualifying program administered through DSS and procedures for an annual review of the eligibility of the low-income customers receiving benefits under this program. This review shall include audits of a company's customers receiving assistance compared to those persons receiving assistance under DSS administered programs. The Administrator will determine, with approval of the USF Board, the frequency and extent of these audits. Upon request of the Administrator, a company shall provide the Administrator with information necessary to conduct the audit. Upon completion of the audit the Administrator will advise the appropriate participating telecommunications carrier that a customer may not qualify for support. The participating telecommunication company may rely upon a customer's initial self-certification, the audit, and the following disqualification process in making its request for Missouri Universal Service Fund funds.

In the absence of an audit of all participating low-income/Lifeline customers, a participating company may annually, at its discretion, submit a list of its entire Lifeline customer data base to the Administrator for verification with the data provided by DSS. The Administrator shall complete the verification and notify the company of customers who appear from the verification to be ineligible for Lifeline service.

Any adjustments to customer billing and/or company funding levels resulting from these audit/verification procedures will be made on a prospective basis only.

The Fund Administrator shall have access to information and records pertaining to the low-income and disabled customers necessary to audit a company's funding request and to re-verify eligibility through the audit comparison with information provided by the DSS.

Administrative Procedure #2 - Disqualification of Customers

A customer is not required to provide evidence of continued eligibility under these programs to any telecommunications company unless the Administrator has advised the company that the customer may not be eligible. If a customer is receiving benefits and the Administrator notifies the company that the customer may not be eligible for the programs, the company shall send notification to the customer within thirty (30) days of receiving information from the Administrator. In this notice the company will notify customers in writing that unless the customer provides documentation to support its continued receipt of benefits under the program within 35 days, the assistance will be terminated. The termination date will be determined by the telephone company and may be consistent with the normal billing cycle of the telephone company. Attachment #5 [not included in this Report and Order] is an illustrative example of such a notification letter. No additional customer notice is required before termination of benefits. Customers will not be asked by their telephone company to verify their eligibility more frequently than once per year.

If a customer is terminated from the program by the company or advises the company that the customer is voluntarily leaving the program since the customer no longer qualifies, that customer must reapply for the program. A customer reapplying for the program who has been non-voluntarily terminated from the program or who has voluntarily terminated from the program after receiving a notice of termination requiring verification of eligibility within the previous three years may be required to provide verification of eligibility.

Administrative Procedure #3 - Fund Sizing

The Fund Administrator shall utilize carrier subscription information and the information provided by the DSS to estimate the initial number of eligible low-income and disabled customers in Missouri for purposes of-

- (1) sizing the fund;
- (2) calculating the initial assessment rate necessary to cover the estimated fund; and
- (3) maintaining the on-going requirements of the fund.

RULE CHANGES

The low-income/disabled fund proposed by the parties and adopted by the Commission identifies six necessary rule changes. The Commission will, in separate orders, find that each of these rule changes is necessary.

FINDINGS OF FACT: SURCHARGE

While there is no disagreement among the parties on the need for and structure of a low-income/disabled fund, there is some dissension on the question of how telecommunication carriers should recover their assessments from customers. Under the low-income/disabled fund established herein, the assessment on carriers would be approximately 0.27% (0.0027) of net jurisdictional revenue, excluding any fund administration costs. Based upon these findings of fact and the following conclusions of law, the Commission determines that eligible carriers

11 Mo. P.S.C. 3d

shall recover their assessments from the Missouri Universal Service Fund through an explicit surcharge on bills to end users.

In its determination of which method of recovery (bundled in rates or a surcharge) is appropriate, the Commission will examine two areas: whether the assessment is a normal cost of doing business or common cost; and which method will cause the least market distortion.

Unlike other costs of doing business, the Universal Service Fund assessment will remain constant despite a provider's efficiencies or productivity. A carrier can neither economize on its assessment, nor alter its technology to minimize its assessment. There is nothing a carrier can do that would raise or lower its assessment. It is, therefore, significantly different than normal costs of doing business, which are under the carrier's control to a much greater extent. Further, the assessment is not a common cost. A fundamental characteristic of common cost is the ability to spread the cost among all services. For price-cap companies, this cannot be done since no part of the assessment can be allocated to basic residential services². Therefore, for price-cap companies at least, the assessment is not a common cost.

If the Commission did not allow a surcharge, market distortions would result and implicit subsidies would be created. In the absence of such a surcharge, a multitude of advantages, disadvantages and preferences would be created. Three different types of companies (rate-of-return regulated, price-cap, and competitive) would all be treated differently.

First, under traditional rate-of-return regulation, non-price-cap companies will be able to recover all of their assessments as a prudent (in fact, mandatory) expenditure. Second, price-cap companies are allowed by statute to recover half of their assessment from any rates other than basic local residential service.³ Price-cap companies could recover this half of their assessment from the services they offer that are least competitive (such as switched access). Missouri statutes allow price-cap companies to request reimbursement of the other half from the Missouri Universal Service Fund. If a price-cap company does not get reimbursement from the Missouri Universal Service Fund, it may be unable to pass the cost onto consumers.

Third, competitive companies can theoretically place all of their assessment in any rate except switched access rates. But as a practical matter, a competitive company will be influenced by the need to attract customers and may not be able to pass through its assessment. It is common for a competitive company to price below incremental cost in an effort to expand the existing customer base for a single product or a bundle of products. Thus, competitive companies may be unable to pass their assessment onto the customers.

Because of these differences, any funding mechanism that is not based on a surcharge will necessarily create competitive advantages and disadvantages for different companies. Accordingly the Commission will mandate an explicit end-user surcharge.

² Sections 392.245.4 and 392.248.3

³ Section 392.248.3

The Commission next turns to the question of whether the surcharge will be billed as a uniform percentage or on a per-line basis, and concludes that it will be based on a uniform percentage amount.

Allowing carriers to pick and choose between a percentage basis and a per-line basis would raise a number of problems. First, it could lead to customer confusion regarding the surcharge. Second, the option of a per-line surcharge could also decrease the competitive neutrality of such a surcharge. Third, a per-line surcharge may appear inequitable if single-line residential customers must pay the same amount per line as large business users with high volumes of toll services. Finally, a per-line surcharge would probably require a different system of recovery to be used for local exchange carriers who could administer a per-line charge and interexchange carriers who could not. Thus, a percentage-based surcharge would be easier to administer and would ensure all companies apply the surcharge in the same manner. If the surcharge were based on a per-line basis, it would be more difficult to determine whether the surcharge was being collected correctly or whether costs were being improperly shifted from one consumer group to another.

Consistent with the Commission's promulgated rules,⁴ the surcharge will be based on revenues from the preceding year with the resulting percentage assessment applied to current revenues. The rules specify that assessments are to be based on "net jurisdictional revenues from the preceding calendar year or for some shorter time period as may be determined by the Commission."⁵ Using the preceding calendar year's revenue is more objective than using current revenues, because it uses a known amount. If current revenues were to be used, projections would be required, and projections are inherently less accurate and more easily manipulated than actual historic data. Furthermore, it will be administratively more simple to use the preceding year's revenues than current revenues.

Just as requiring all carriers to recover their assessments through a surcharge will ensure consistency among carriers, so too will requiring that all carriers consistently describe the surcharge on customers' bills. The Commission concludes that all companies should be consistent in describing the surcharge as the "Missouri Universal Service Fund."

Because there are rule changes needed, and because there are administrative matters that the Missouri Universal Service Fund Board needs to address, the Commission will establish in a later order the dates on which assessments are to begin, and on which carriers may begin adding the surcharge to customers' bills.

CONCLUSIONS OF LAW: SURCHARGE

In establishing the funding mechanism for the Missouri Universal Service Fund, the Commission is guided by two principles: that it not be inconsistent with federal statutes, administrative rules, or court decisions concerning provision of essential local telecommunications service⁶; and that it must be funded in a

⁴ 4 CSR 24-31.060(3)

⁵ *Id.*

⁶ Section 392.248.11, RSMo 2000

11 Mo. P.S.C. 3d

manner that does not grant a preference or competitive advantage, or cause prejudice or disadvantage, to any telecommunications company⁷.

With respect to the first principle, the United States Fifth District Court of Appeals has held that, for the federal Universal Service Fund, an explicit surcharge is the only permissible method of recovery:

We hold that permitting this method of cost recovery [i.e., recovery through access charges] countermands Congress's clear legislative directive, as we articulated in [earlier cases]....⁸

In response to this decision, the FCC rendered a Fifteenth Report and Order regarding Universal Service,⁹ and addressed the mandate from the Fifth Circuit Court of Appeals:

Consistent with the *Interstate Access Support Order*, we amend the Commission's rules to require that all incumbent LECs, including rate-of-return carriers, recover universal service contributions only through end user charges.

Pursuant to §254(f) of the Act, this Commission is prohibited from adopting regulations inconsistent with the FCC's rules to preserve and advance universal service. Section 254 is not solely directed to the FCC. In interpreting this section, and specifically the portion relating to support mechanisms, the FCC stated:

[R]ecognizing the vulnerability of implicit support to competition, Congress directed the Commission and the states to take the necessary steps to create universal service mechanisms that would be sustainable in a competitive environment. To achieve this end, Congress directed that universal service support "should be explicit and sufficient to achieve the purposes of [section 254]...."¹⁰

Adopting a mechanism for recovery other than an explicit surcharge on end user billings would be inconsistent with the Fifth Circuit's decisions, the Telecommunications Act of 1996, and the FCC's rules.

The second principle, again, is that funding the Missouri Universal Service Fund must be done in a manner that is competitively neutral. Section 392.248.2, RSMo 2000, states that:

⁷ Section 392.248.2, RSMo 2000

⁸ *Comsat Corp. v. F.C.C.*, 250 F.3d 931, at 939 (5th Cir. 2001).

⁹ In the matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price-cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers subject to Rate-of Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 00-256; CC Docket No 96-45; CC Docket No. 98-77; CC Docket No. 98-166 respectively, released November 8, 2001.

¹⁰ *Id.*, at 123

The Commission shall adopt and enforce rules to be implemented by the universal service board, governing the system of funding and disbursing funds from the universal service fund in a manner that does not grant a preference or competitive advantage to any telecommunications company or subject a telecommunications company to prejudice or disadvantage.

If the Commission did not allow a surcharge, market distortions would result and implicit subsidies would be created. The only manner in which the Commission can comply with this statute is to establish an end-user surcharge. In the absence of such a surcharge, a multitude of advantages, disadvantages and preferences are created.

Because the assessment is not a cost of doing business and cannot be treated as a common cost, allowing carriers to recover their assessments in their rates will result in market distortions. Customers will not base their decisions to purchase an optional service on the actual cost of that service, but rather on the cost of that service plus the portion of the Missouri Universal Service Fund assessment that that provider has added to the rate for that service. This is, by definition, a distortion of the market. A mandatory Missouri Universal Service Fund surcharge will be competitively neutral since all carriers would apply the same Missouri Universal Service Fund assessment rate in the same manner.

The application of a mandatory surcharge will also prevent the problems that could arise if the price-cap companies seek to recover part of their assessments from the fund itself. Section 392.248.3 states that a price-cap company may raise rates (except residential basic local telecommunications) to recover half of its Missouri Universal Service Fund assessment and “seek to have the remaining fifty percent of its assessment under this section included in its funding requirements under this section.” As discussed in the findings-of-fact section, it is possible that a price-cap company could raise its rates to recover half of its Missouri Universal Service Fund assessment and seek to draw the other half from the fund. As a result, Missouri’s competitive local exchange companies, interexchange carriers, and other non-price-cap companies could end up paying all of their own assessment plus half of the price-cap companies’ assessment. Implementation of a mandatory surcharge will avoid this unfair result. With a mandatory surcharge, the price-cap companies will receive full recovery of the Missouri Universal Service Fund assessment, thus eliminating the possibility that they may seek recovery for part of their assessment from the fund itself.

CONCLUSIONS OF LAW: LOW-INCOME/DISABLED FUND

The low-income/disabled fund proposal of the parties as adopted by the Commission is consistent with the Missouri Universal Service Fund statute¹¹ and with the Commission’s Missouri Universal Service Fund rules.¹² Specifically, funds for the Missouri Universal Service Fund can be used to assist low-income customers and disabled customers in obtaining affordable essential local ser-

¹¹ Sec. 392.248

¹² 4 CSR 240-31, as will be amended with the rule changes identified herein.

11 Mo. P.S.C. 3d

vices,¹³ and funds from the Missouri Universal Service Fund can be used to pay reasonable, audited costs of administering the Missouri Universal Service Fund.¹⁴

IT IS THEREFORE ORDERED:

1. That a Missouri Universal Service Fund is established to provide assistance to low-income customers and disabled customers as described herein.
2. That the Commission will establish in a later order the dates on which assessments are to be made, and on which carriers may begin adding the surcharge to customers' bills.
3. That this order shall become effective on March 31, 2002.

Simmons, Ch., concurs, concurrence to follow;
Murray, Lumpe and Forbis, CC., concur;
Gaw, C., dissents, dissent to follow; certify compliance
with the provisions of Section 536.080, RSMo 2000.

CONCURRING OPINION OF CHAIRMAN KELVIN L. SIMMONS

I agree with the decision of the majority to proceed with the implementation of the Missouri State Universal Service Fund as set forth by the Missouri General Assembly in Senate Bill 507. This fund will assist low income and disabled Missourians to receive basic telephone service and I agree the fund is needed in Missouri. I believe the majority reaches the right decision based on the intent of the legislature and is carrying out our statutory obligation. Although I concur with the decision of the majority I do have some reservations, which, while a concern, do not reach the level that, would cause me to dissent.

I am concerned that the statute that governs the collection of the surcharge (Section 392.248.3, RSMo 2000) may be somewhat ambiguous as to whether or not price cap companies should be assessed and not their customers. Here lies some confusion; the statute provides that a price cap company may raise any rate, except the rate for residential basic local telecommunications service, to recover half of its Missouri Universal Service Fund assessment. Raising the rate for basic local service to recover a portion of the fund assessment would create an implicit subsidy. It is not clear whether the legislature meant to preclude recovery from residential customers in any fashion, or whether it simply meant to preclude the creation of another implicit subsidy. The decision of the majority clearly does not run afoul of the plain wording of the statute because it does not allow a price cap company to raise basic local rates to recover its assessment. I do not know whether it runs afoul of the intent of the legislature because it allows recovery from residential basic local customers.

Secondly, I too am concerned about the Commission's decision as it relates to the high cost fund. I believe that the Commission will address this issue in future proceedings but for the purpose of today's decision we have not tackled the subject in this order.

I respectfully concur.

¹³ Sec. 392.248.2.2

¹⁴ Sec. 392.248.2.3

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I support the decision of the majority to implement a State Universal Service Fund for low income and disabled persons in this state. The parties to this proceeding have agreed that this fund is appropriate and necessary. However, I am very concerned with this Commission's decision regarding additional points. Since the tradition of the Commission prevents Commissioners from concurring in part and dissenting in part, I feel it necessary to dissent from the order of the majority for the following reasons.

The majority decision orders that monies for the Universal Service Fund be collected with a surcharge levied upon end-users. The Commission justifies this in part because of §254(f) of the Federal Telecommunications Act. In so doing, the decision ignores the explicit and implicit directives of §392.248.3, RSMo 2000. This section states in pertinent part:

The universal service fund shall be funded through assessments on all telecommunication companies in the state which shall be based on Missouri jurisdictional telecommunication services revenue and other nondiscriminatory factors as determined by the commission. Such assessments shall be paid to the universal service fund board. A telecommunication company regulated under §392.245 may, upon providing written notice to the commission, increase the maximum allowable prices for any or all of its telecommunication services except residential basic local telecommunication services above those maximum allowable prices otherwise established in §392.245 by an amount not to exceed the amount required to recover fifty percent of its assessment under this section. Any increases in the maximum allowable prices for exchange access and basic local telecommunication services other than residential basic local telecommunication services (emphasis added) shall be calculated to recover revenues in the same percentage as the revenues from such services bear to such company's total revenues for nonbasic, exchange access and basic local other than residential telecommunication services (emphasis added) for the preceding twelve months. A telecommunication company regulated under §392.245 may seek to have the remaining fifty percent of its assessment under this section included in its funding requirements under this section.

While this provision applies only to price cap companies it implies that the assessment should be on the company not the consumer. Furthermore, it specifically prohibits the cost being assessed to the residential consumer. The order of the Commission today is directly contrary to this stated and implied intent. While arguments certainly exist from a policy standpoint both in favor of and against the majority decision, this Commission should not ignore the statutory language on this subject in rendering its decision.

11 Mo. P.S.C. 3d

There may be confusion resulting from this decision about the oversight and collection of the fund. The order leaves questions to be answered about the calculation of the assessment on the consumer. It is unclear how this calculation is to be made – whether the percentage will vary from company to company and what if any amounts for administration costs might be kept by telecommunications companies. Additionally, there appears to be dual jurisdiction stated in the proposal quoted in the decision between the Commission and the fund administrator in complaints about the fund. This should be addressed either in the decision or in a subsequent order or rule.

The Commission's decision also does not deal with the issues tried before the Commission regarding the high cost fund. Much testimony was presented regarding this portion of the fund. It is my understanding that the Commission will further examine the need and the possible uses of the high cost fund in this state in a continuation of this case. The parties do not argue that rates for basic local service in Missouri were unreasonable. Furthermore, there is little if any evidence to show that prices for basic local service in Missouri are higher in rural areas than in urban and suburban regions today. There is an assumption that higher than average access rates among the small rural ILEC's help prevent significant increases in the local basic rates of customers of these rural telco's which might otherwise occur because of higher costs affiliated in servicing populations with low density. However, if this Commission acts to reduce such access rates in the future, the policy established by the Legislature of having just, reasonable and affordable local basic rates throughout the state may not be possible without the implementation of the high cost portion of the universal service fund. Since the Commission currently has a case investigating access rates it is important that the Commission continue to work on this portion of the fund in the event the fund is needed to carry out the intention of the Missouri General Assembly.

Substantial evidence was presented regarding the disparity between essential local telecommunications services in rural Missouri and metropolitan areas. Particularly disturbing is the great difference in calling scopes between rural regions and metropolitan regions, especially the differences in the number of individuals, businesses and essential services accessible without a toll call. The Legislature made it clear that this Commission was responsible to ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services throughout the state. In fact, the Legislature said it more than once. It is my hope that further proceedings regarding the universal service fund will provide an opportunity to provide more equitable access to comparable local basic telecommunications services in Missouri. I look forward to hearing more from the parties on this subject.

**In the Matter of the Application of Atmos Energy Corporation for
an Order Authorizing it to Merge with Mississippi Valley Gas
Company.**

*Case No. GM-2002-295
Decided March 26, 2002*

Gas § 6. The Commission approved Mississippi Valley Gas Company's merger into Atmos Energy Corporation. The Commission found the merger to be in the public interest, and that Missouri customers could only benefit from the merger.

Gas §37. The Commission ordered Atmos Energy Corporation to comply with its current tariffs or, in the alternative, file tariffs consolidating its' divisions' tariffs.

ORDER APPROVING MERGER

On December 30, 2001, Atmos Energy Corporation filed an application requesting approval of its merger with Mississippi Valley Gas Company. Atmos is a Texas corporation engaged in the distribution, transportation and sale of natural gas in Missouri and a number of other states. Atmos serves approximately 1.4 million customers. Mississippi Valley is a Mississippi corporation engaged in the transmission and distribution of natural gas in Mississippi, providing service to approximately 261,500 customers. Pursuant to the terms of an agreement between Atmos and Mississippi Valley, Mississippi Valley will merge with and into Atmos, with Atmos being the surviving corporation. The purchase price is \$150,000,000 (less certain adjustments), half cash and half Atmos common stock. Atmos has also agreed to assume approximately \$45,000,000 of Mississippi Valley's outstanding debt. The cash portion will be funded by permanent long-term debt financing with the exact amount, interest rate and maturity to be determined by market conditions at the time of issuance.

Atmos will operate the business formerly conducted by Mississippi Valley as one of its divisions. The manner of providing natural gas services to customers in Mississippi Valley's service area in Mississippi will remain largely unchanged. In addition, Atmos' various divisions in Missouri will remain unaffected by the transaction.

On February 8, the Staff of the Commission filed its recommendation, in which it recommended that the Commission grant the application, subject to the following conditions:

1. That Atmos be ordered to adhere to the customer service performance measures and reporting requirements outlined in this Staff Recommendation through the year 2004.
2. That Atmos be ordered to submit surveillance data reports on a stand alone basis for its Missouri operating units, which include United Cities Gas Company, Associated Natural Gas Company on a monthly basis and Greeley Gas Company on a quarterly basis. In addition,

11 Mo. P.S.C. 3d

- Atmos should be ordered to submit total company data on a consolidated basis monthly in conjunction with its separate submittals for UCG and ANG.
3. That Atmos be ordered to comply with the tariffs filed with the Missouri Public Service Commission, or in the alternative, immediately file with the Commission a request for approval to consolidate the tariffs of UCG, Greeley and, those of ANG adopted by Atmos.
 4. That nothing in the Commission's order shall be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the Commission reserves the right to consider the rate making treatment to be afforded this transaction in any subsequent proceeding.
 5. That the Commission's order shall not be deemed precedent for any future transaction even if the facts may be similar.
 6. That any adverse financial effects of this acquisition shall be borne by Atmos stockholders and not by Missouri ratepayers.
 7. That all records pertaining to these transactions shall be maintained at Atmos' headquarters and made available to the Staff as the Staff deems necessary.
 8. That no finding be rendered that would bind any party to any cost allocation or ratemaking principle in any future case.

Staff explained the reasons why several of these conditions are necessary. The condition has to do with customer service. In a Unanimous Stipulation and Agreement in Case No. GM-2000-312, Atmos agreed to certain customer service provisions and measurements.¹ In its recommendation in this case, Staff proposed that approval of the merger be conditioned on Atmos agreeing to continue with these provisions and measurements through calendar year 2004. Staff stated that it will continue to provide reports to Atmos through calendar year 2004.

The second condition has to do with surveillance data. Staff stated that it is important for Atmos to continue the submission of surveillance data reports for two reasons: (1) to allow Staff an opportunity to monitor the earnings of Atmos and its operating units to ensure protection of Missouri ratepayers from any possible over-earnings by the Company; and (2) to provide Staff with data helpful in making a preliminary assessment of the effects of the merger of Atmos and Mississippi Valley.

Staff recommended the third condition because it is concerned that Atmos is not following its tariffs and has not consolidated the tariffs for its Missouri properties.

¹Pages 2-7 of the Unanimous Stipulation and Agreement in Case No. GM-2000-312.

In Case No. GM-2000-312, Atmos indicated that it intended to file tariffs to consolidate the tariffs for the former Associated Natural Gas properties with the tariffs for the United Cities Gas division. Staff stated in its recommendation in this case that, to date, Atmos has not done so.

On February 28, Atmos filed its response to the Staff recommendation. Atmos proposed certain minor modifications and clarifications. Atmos pointed out that it does not have an "Associated Natural Gas division," but that the former Associated Natural Gas properties have been merged with Atmos, and that it intends to proceed expeditiously with tariff filings to consolidate all of Missouri operating divisions into a single set of tariffs. Atmos also noted that, for surveillance reporting purposes, it would have to allocate some costs that cannot be directly assigned to the former Associated Natural Gas properties, and requested that the separate reporting requirement be eliminated once all its divisions are providing service pursuant to the same tariff. No party responded to this filing.

The Commission finds that, with the conditions proposed by the Staff, the merger will not be detrimental to the public interest. The merger itself should have no impact on Missouri customers, and the conditions may benefit Missouri customers. The Commission finds that the proposed conditions, with the modifications and clarifications identified by Atmos in its February 28 pleading, are reasonable and will reflect them in the Ordered Paragraphs below.

IT IS THEREFORE ORDERED:

1. That the application of Atmos Energy Corporation for approval of its merger with Mississippi Valley Gas Company is granted, subject to the conditions set out below in Paragraphs 2 through 11, and that Atmos Energy Corporation is authorized to consummate the merger as described in the application.
2. That Atmos Energy Corporation shall, through the year 2004, adhere to the customer service performance measures and reporting requirements outlined in the Staff Recommendation filed on February 8, 2002.
3. That Atmos Energy Corporation shall submit to the Staff of the Commission monthly surveillance data on a stand-alone basis for its United Cities Gas Company operating division, and, to the extent possible, data that would be applicable to the service area formerly operated by Associated Natural Gas Company.
4. That Atmos Energy Corporation shall submit to the Staff of the Commission quarterly surveillance data on a stand-alone basis for Greeley Gas Company.
5. That Atmos Energy Corporation shall submit to the Staff of the Commission monthly total company data on a consolidated basis.
6. That Atmos Energy Corporation shall comply with its approved tariffs, or in the alternative, immediately file with the Commission tariffs that will consolidate the tariffs of United Cities Gas Company, the Atmos Energy Corporation tariffs that apply to the service area previously operated by Associated Natural Gas, and the Greeley Gas Company division tariffs.
7. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions herein involved.
8. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

11 Mo. P.S.C. 3d

9. That this order shall not be deemed precedent for any future transaction even if the facts may be similar.

10. That any adverse financial effects of this acquisition shall be borne by Atmos Energy Corporation stockholders and not by Missouri ratepayers.

11. That all records pertaining to these transactions shall be maintained at Atmos Energy Corporation's headquarters and made available to the Staff of the Commission as the Staff deems necessary.

12. That this order shall become effective on April 5, 2002.

13. That this case may be closed after April 6, 2002.

Simmons, Ch., Lumpe, Gaw and Forbis, CC., concur
Murray, C., absent

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of Union Electric Company d/b/a AmerenUE's
Filing of Tariff Sheets Containing Revisions to Its Pur-
chased Gas Adjustment Clause.**

*Case No. GT-2002-400
Decided March 28, 2002*

Gas §17.1. The Commission approved a tariff that revised a gas company's Purchased Gas Adjustment clause.

ORDER APPROVING TARIFF

On February 28, 2002, Union Electric Company d/b/a AmerenUE filed its tariff containing revisions to its Purchased Gas Adjustment Clause. The tariff bears an effective date of March 30, 2002.

On March 13, 2002, the Staff of the Commission filed a recommendation and memorandum. Staff states that the revised tariff would permit AmerenUE to make four PGA filings per year, rather than the three filings permitted by AmerenUE's current tariff. The revised tariff will also modify AmerenUE's Actual Cost Adjustment (ACA) accounting period from a twelve-month period ending in March, to a twelve-month period ending in August. Furthermore, the rate used to compute interest on the Deferred Carrying Cost-Balance will change from the prime bank-lending rate minus one percent, to the prime bank-lending rate minus two percent. Finally, the tariff will remove references to the Experimental Price Stabilization Fund and to the pilot project, Use of Financial Markets to Manage Gas Costs, because those programs have expired. Staff recommended that the Commission approve the submitted tariff.

The Commission was concerned about whether the tariff's change in the rate used to compute interest on the Deferred Carrying Cost Balance was necessary or appropriate. For that reason, the Commission ordered Staff to file a supplement to its recommendation no later than March 22. Staff complied with that order on March 20. Staff indicates that the changed interest rate more closely mirrors the short-term interest rates that AmerenUE actually pays to purchase gas. The change also makes AmerenUE's PGA tariff consistent with its PGA clause. No other party has filed a response to Staff's recommendations.

The Commission has reviewed the tariff filing, Staff's recommendation and memorandum, and its supplemental filing, and finds that AmerenUE's tariff should be approved to become effective on March 30, 2002.

IT IS THEREFORE ORDERED:

1. That the tariff sheets filed by Union Electric Company d/b/a AmerenUE, on February 28, 2002, and assigned tariff number 200200705, are approved to become effective on March 30, 2002. The tariff sheets approved are:

P.S.C. Mo. No. 2

Fourth Revised Sheet No. 22, Cancelling Third Revised Sheet No. 22
Fourth Revised Sheet No. 23, Cancelling Third Revised Sheet No. 23
Third Revised Sheet No. 24, Cancelling Second Revised Sheet No. 24
Fourth Revised Sheet No. 25, Cancelling Third Revised Sheet No. 25
Fourth Revised Sheet No. 26, Cancelling Third Revised Sheet No. 26
Fourth Revised Sheet No. 27, Cancelling Third Revised Sheet No. 27
Sixth Revised Sheet No. 28, Cancelling Fifth Revised Sheet No. 28
Seventh Revised Sheet No. 29, Cancelling Sixth Revised Sheet No. 29
Second Revised Sheet No. 29.1, Cancelling First Revised Sheet No. 29.1
First Revised Sheet No. 29.2, Cancelling Original Sheet No. 29.2
First Revised Sheet No. 29.3, Cancelling Original Sheet No. 29.3
Second Revised Sheet No. 29.4, Cancelling First Revised Sheet No. 29.4
Second Revised Sheet No. 29.9, Cancelling First Revised Sheet No. 29.9

2. That this order shall become effective on March 30, 2002.
3. That this case may be closed on March 31, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
 Gaw, C., absent

Woodruff, Senior Regulatory Law Judge

11 Mo. P.S.C. 3d

In the Matter of the Determination of Prices of Certain Unbundled Network Elements.*

*Case No. TO-2002-397**Decided March 14, 2002*

Telecommunications § 1. The Commission opened a generic case to review the unbundled network elements that were at issue in Case No. TO-2002-222. The Commission also noted that the scope of the case may also include all pricing issues that are not a part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issue the Commission determines to be appropriate. The Commission made Southwestern Bell Telephone Company, MCI Metro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., the Staff of the Commission, and the Office of the Public Counsel parties without the need for intervention. An intervention date was set for other interested parties to file applications to intervene.

Telecommunications § 46. The Commission opened a generic case to review the unbundled network elements that were at issue in Case No. TO-2002-222. The Commission also noted that the scope of the case may also include all pricing issues that are not a part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issue the Commission determines to be appropriate. The Commission made Southwestern Bell Telephone Company, MCI Metro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., the Staff of the Commission, and the Office of the Public Counsel parties without the need for intervention. An intervention date was set for other interested parties to file applications to intervene.

ORDER ESTABLISHING CASE AND DIRECTING NOTICE

In Case No. TO-2002-222, it was suggested by MCI Metro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. (collectively referred to as WCOM), and the Staff of the Commission that the Commission open a generic case for the purpose of reexamining Southwestern Bell Telephone Company's (now known as Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company) (SWBT) costs of providing unbundled network elements (UNEs). WCOM and Staff indicated that as the Commission has interpreted the timeline for arbitration cases to be very strict, it was not possible to conduct a thorough examination of UNE cost studies and rates in Case No. TO-2002-222. Staff and WCOM suggested that opening a generic case is an appropriate method for the Commission to conduct the necessary thorough examination of UNEs. Staff further noted that in the generic case, all concerned parties could participate in a working group to review the relevant issues regarding UNEs. Staff also suggested that the generic case be viewed as a benchmark for future proceedings. WCOM, however, argued that it

*The Commission issued a second order directing notice on May 17, 2002, which directed the Commission's Data Center to send a copy of the March 14, 2002, order which established the case and directed notice to all certificated Missouri competitive local exchange companies.

would be appropriate to allow the parties to incorporate the results of the generic case into the agreement authorized by Case No. TO-2002-222.

Because of the strict timeframes imposed in Case No. TO-2002-222, the Commission finds that the proposal to open a generic case has merit. The Commission will open a generic case to review the unbundled network elements at issue in Case No. TO-2002-222. However, this review may also include all pricing issues that are not part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issues the Commission determines to be appropriate. At this time, the Commission declines to determine how this generic case might affect any other case. By subsequent order or at the first prehearing conference, the Commission will direct the parties to brief the question of the appropriate scope and impact of this generic case.

The Commission determines that SWBT, WCOM, Staff, and the Office of the Public Counsel should be made parties to this case without the need for intervention. The Commission finds that other proper persons who wish to participate should be allowed 20 days from the issuance of this order to request intervention. The Commission finds that notice of this filing should be sent to all interexchange and local exchange telecommunications companies in Missouri.

The Commission also determines that a prehearing conference should be set to ensure the prompt resolution of this case. At the prehearing conference, the parties' representatives should be prepared to cooperate in developing a procedural schedule.

IT IS THEREFORE ORDERED:

1. That this case is established for the purpose of reviewing the unbundled network elements that were at issue in Case No. TO-2002-222; the scope of the case may also include all pricing issues that are not a part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issue the Commission determines to be appropriate.

2. That Southwestern Bell Telephone Company; MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc.; the Staff of the Missouri Public Service Commission; and the Office of the Public Counsel shall be made parties to this case without the need for intervention.

3. That any other parties wishing to intervene in this matter shall file an application to do so no later than April 3, 2002, with:

Dale Hardy Roberts, Secretary
Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102

and send copies to:

Paul G. Lane, General Counsel-Missouri
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, Missouri 63101-1976

Carl J. Lumley, Esq.
Curtis, Oetting, Heinz, Garrett & Soule, P.C.
130 South Bemiston, Suite 200
Clayton, Missouri 63105

11 Mo. P.S.C. 3d

Office of the Public Counsel
Post Office Box 7800
Jefferson City, Missouri 65102

4. That the Commission's Data Center shall send a copy of this order to all certificated Missouri local exchange and interexchange carriers.

5. That a prehearing conference shall be held on April 17, 2002, at 10:00 a.m., at the Commission's offices in the Governor Office Building, 200 Madison Street, Room 305, Jefferson City, Missouri. The Governor Office Building is a building that meets accessibility standards required by the Americans With Disabilities Act. If any person needs additional accommodations to participate in the prehearing conference, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the prehearing.

6. That this order shall become effective on March 24, 2002.

Simmons, Ch., Lumpe, Gaw, and Forbis, CC., concur.
Murray, C., dissents, with dissenting opinion attached.

Ruth, Senior Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

There are serious legal and policy issues raised by today's order. The Federal Telecommunications Act requires that interconnection terms and conditions are to be negotiated, and that bilateral arbitration is to be employed where negotiations fail. The strict arbitration timelines imposed by the Act provide certainty for the parties as to the prices, terms and conditions applicable to their interconnection agreements. The Act does not provide for determination of those prices, terms and conditions outside the negotiation or arbitration process.

Moreover, as SWBT argues, this generic case will be a waste of time and resources. If it is established that SWBT's costs are greater than the rates available in the M2A, CLECs will have the option of the M2A until March of 2005. SWBT will not obtain the benefits of rates consistent with its costs. Even if it is established that SWBT's costs are lower than the rates currently available, CLECs may continue to opt into the M2A in order to get the advantageous provisions that SWBT has voluntarily included in the M2A, such as performing UNE combinations.

Additionally, the Supreme Court is presently considering the lawfulness of the FCC's TELRIC standard for determining costs. If the Supreme Court does not affirm the FCC's TELRIC Rules in their entirety, new standards and new cost studies will be required.

Furthermore, the FCC is in the process of its first triennial review of the Commission's policies on UNEs, in which it will consider the circumstances under which ILECs must make parts of their networks available to requesting carriers on an unbundled basis pursuant to the Act.

In short, there is nothing to be accomplished by this generic case except a great expenditure of time and resources by this Commission and all interested telecommunications companies doing business in Missouri. More importantly, nothing is clear about the purpose, scope and impact of this case.

Therefore, I dissent.

**Office of the Public Counsel, an Agency of the State of Missouri,
Suite 650, 200 Madison Street, Jefferson City, Missouri
65102, Complainant, v. Comm South Companies, Inc., d/b/a
Missouri Comm South, Inc., Respondent.**

Case No. TC-2001-516

Decided April 2, 2002

Telecommunications § 26. The Commission found that the stipulation and agreement of the parties was reasonable in that it provided for the most beneficial outcome for Comm South customers by providing continued monitoring focused on specific areas of consumer complaints.

Telecommunications § 26. The Commission found that the stipulation and agreement of the parties was reasonable in that it provided for a credit to Comm South customers.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves the Unanimous Stipulation and Settlement Agreement of the parties and directs compliance with that agreement.

On March 28, 2001, the Office of the Public Counsel filed a complaint against Comm South Companies, Inc. d/b/a Missouri Comm South, Inc. The complaint alleged that Comm South violated Commission rules regarding quality of service. Public Counsel alleged 143 customer complaints.

The Commission set a procedural schedule that was suspended at the request of the parties. Over the course of many months, the parties negotiated a settlement and on February 15, 2002, the parties filed a Unanimous Stipulation and Settlement Agreement. On February 21, 2002, the Staff of the Missouri Public Service Commission filed its suggestions in support of the agreement.

The parties agree that the Unanimous Stipulation and Settlement Agreement resolves all issues in the case. The Unanimous Stipulation and Settlement Agreement provides that Comm South:

- a) will improve the level of service quality provided by Missouri Comm South by providing a regulatory and surveillance plan by which to review Company performance monthly for at least six months and quarterly for the next six months.
- b) will provide a systematic and documented Company complaint process which will enable the Company to better respond to consumer complaints and allow the Commission to measure service quality with Company records;

11 Mo. P.S.C. 3d

- c) will provide a refund via credit to current Missouri Comm South Missouri customers who are customers at the time of the issuance of the refund.

The Unanimous Stipulation and Settlement Agreement further provides that if Comm South successfully implements its newly developed Regulatory Compliance Process, provides reports to Staff and Public Counsel, and meets the quality of service standards of the Commission's rules 4 CSR 240-32.080(5)(A), (B), (I)(2), and (I)(3), then Public Counsel will dismiss this complaint. Public Counsel's dismissal shall occur 12 months after this order.

As noted, the Commission's Staff filed suggestions in support of the Unanimous Stipulation and Settlement Agreement. Therein, Staff explains that the settlement reflected in the Unanimous Stipulation and Settlement Agreement constitutes the most beneficial outcome for Comm South customers by providing for continued monitoring focused on the specific areas of customer complaints. The agreement is also beneficial to the customers in that it provides for a credit to each customer. The credit of \$26,520 is estimated to be approximately \$12 per customer.

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.¹ In reviewing the Unanimous Stipulation and Settlement Agreement submitted by the parties, the Commission notes that²

Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. 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.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Unanimous Stipulation and Settlement Agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Settlement Agreement filed on February 15, 2002, is approved as a resolution of all issues in this case. A copy of the Unanimous Stipulation and Settlement Agreement is attached as Attachment A.

¹ Section 536.060, RSMo Supp. 2001.

² Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

2. That Comm South Companies, Inc. d/b/a Missouri Comm South, Inc., is ordered to comply with the terms of the Unanimous Stipulation and Settlement Agreement.
3. That this case shall remain open pending the filing of reports in compliance with the Unanimous Stipulation and Settlement Agreement.
4. That if Comm South Companies, Inc. d/b/a Missouri Comm South, Inc., successfully meets the terms of the agreement, the Office of the Public Counsel shall dismiss this complaint no later than April 2, 2003, in accordance with the terms of the Unanimous Stipulation and Settlement Agreement. The Office of the Public Counsel shall accomplish the dismissal by filing a notice of dismissal with prejudice in this case.
5. That this order shall become effective on April 12, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Dippell, Senior 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 Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2. *

In the Matter of MoKan Dial, Inc.'s Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2.

In the Matter of Mid-Missouri Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2.

In the Matter of Choctaw Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 1.

In the Matter of Chariton Valley Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2.

In the Matter of Peace Valley Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2.

*The Commission, in an order issued on June 27, 2002, denied an application for rehearing in this case. On June 27, 2002, this case was appealed to Cole County Circuit Court (O2CV324810). On June 19, 2003, this case was appealed to the Missouri Court of Appeals-Western District (WD62961).

Case Nos. *TT-99-428, TT-99-429, TT-99-430, TT-99-431,*
TT-99-432 & TT-99-433
Decided April 9, 2002

Telecommunications §14. The Commission did not approve the request by local telephone companies to amend their tariffs to allow them to apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory.

APPEARANCES

Craig S. Johnson, Esq., Andereck, Evans, Milne, Peace & Baumhoer, 301 East McCarty Street, P.O. Box 1438, Jefferson City, Missouri 65102-1438, for Alma Telephone Company, et al.

W.R. England III, Esq., Brydon, Swearingen and England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri, 65101-0456, for the Small Telephone Company Group.

Paul S. DeFord, Esq., Lathrop & Gage, L.C., 2345 Grand Boulevard, Kansas City, Missouri 63131, for AT&T Wireless Services, Inc.

Paul Lane, Esq., Southwestern Bell Telephone Company, One Bell Telephone Center, Room 3518, Saint Louis, Missouri 63101, for Southwestern Bell Telephone Company.

Jeanne A. Fischer, Esq., Southwestern Bell Wireless, Inc., 13075 Manchester Road, 100N, Saint Louis, Missouri 63131, for Southwestern Bell Wireless, Inc.

Charles W. McKee, Esq., Sprint Spectrum L.P. d/b/a Sprint PCS, 4900 Main 12th Floor, Kansas City, Missouri 64112, for Sprint PCS.

Michael Dandino, Esq., Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102-7800, for the Office of the Public Counsel.

Marc Poston, Esq., Senior General Counsel, and *Julie Kardis, Esq.*, Assistant General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102-0360, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Bill Hopkins, Senior Regulatory Law Judge

AMENDED REPORT AND ORDER

I. PROCEDURAL HISTORY

All of the above-captioned cases involve proposed tariffs filed with the Missouri Public Service Commission (Commission) and suspended at the request of the

Staff of the Commission (Staff). Unless otherwise indicated by the context, all of the applicants who filed the proposed tariffs will be collectively referred to as “Alma”¹ or “Applicants.”

On March 9, 1999, Alma Telephone Company (Alma) filed a Second Revised Sheet No. 40.1, to replace the First Revised Sheet No. 40.1, for Alma, Missouri, in its P.S.C. Mo. tariff No. 2. The revised sheet had an issuance date of March 10, 1999, and an effective date of April 9, 1999.

On March 9, 1999, MoKan Dial Inc. (MoKan) filed a Fourth Revised Sheet No. 7, to replace the Third Revised Sheet No. 7, for Freeman, Missouri, in its P.S.C. Mo. tariff No. 2. The revised sheet had an issuance date of March 10, 1999, and an effective date of April 9, 1999.

On March 18, 1999, Mid-Missouri Telephone Company (Mid-Missouri) filed a Second Revised Sheet No. 5, to replace the First Revised Sheet No. 5, for all Missouri exchanges in its P.S.C. Mo. tariff No. 2. The revised sheet had an issuance date of March 22, 1999, and an effective date of April 21, 1999.

On March 11, 1999, Choctaw Telephone Company (Choctaw) filed a Second Revised Sheet No. 30, to replace the First Revised Sheet No. 30, Halltown, Missouri, in its P.S.C. Mo. tariff No. 1. The revised sheet had an issuance date of March 12, 1999, and an effective date of April 11, 1999.

On March 9, 1999, Chariton Telephone Company (Chariton) filed a Second Revised Sheet No. 14, to replace the First Revised Sheet No. 14, for all Missouri exchanges in its P.S.C. Mo. tariff No. 2. The revised sheet had an issuance date of March 10, 1999, and an effective date of April 9, 1999.

On March 9, 1999, Peace Valley Telephone Company (Peace Valley) filed a Second Revised Sheet No. 13, to replace the First Revised Sheet No. 13, for Peace Valley, Missouri, in its P.S.C. Mo. tariff No. 2. The revised sheet had an issuance date of March 10, 1999, and an effective date of April 9, 1999.

Motions to suspend the tariffs in all of these cases were filed by the Staff of the Missouri Public Service Commission on April 1, 1999. On April 8, 1999, the Commission granted all the motions, set the date of April 19, 1999, for the filing of a procedural schedule, and suspended the tariffs in each of the cases as follows: Alma—August 10, 1999; MoKan—August 10, 1999; Mid-Missouri—August 20, 1999; Choctaw—August 12, 1999; Chariton—August 12, 1999; Peace Valley—August 12, 1999.

¹ Although some of the pleadings in this case indicate they were filed on behalf of the “Mid-Missouri Group,” the Commission notes that no such group is a party to these cases. The companies whose proposed tariffs are the subject of these cases do sometimes intervene as a part of the “Mid-Missouri Group,” but did not so classify themselves in these cases. The Commission will treat any pleadings filed by the “Mid-Missouri Group” as though they were filed by Alma Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company, Choctaw Telephone Company, Chariton Valley Telephone Company, and Peace Valley Telephone Company, either individually or as a group, as the context requires. The Commission also acknowledges that a Notice of Group Name Change was filed by all the applicants on December 29, 1999, stating that “Mid-Missouri Group” has changed its name to “Missouri Independent Telephone Group.” To avoid further confusion, that term will not be used in this report and order.

11 Mo. P.S.C. 3d

On April 26, 1999, Sprint Spectrum L.P. d/b/a Sprint PCS (Sprint PCS) filed its application to intervene in all of the cases. On April 27, 1999, Southwestern Bell Telephone Company (SWBT) filed its application to intervene in all of the cases. On April 28, 1999, GTE Midwest Incorporated filed its application to intervene only in TT-99-433, and the following entities filed their applications to intervene in all of the cases: AT&T Wireless Services, Inc. (AWS);² Southwestern Bell Wireless, Inc. (SWBW); and the Small Telephone Company Group (STCG).

A prehearing conference was held on April 29, 1999. On May 11, 1999, the Commission entered its order consolidating all of the cases for hearing purposes, making TT-99-428 the lead case, and also extending the date for filing a procedural schedule until May 21, 1999. On June 16, 1999, the Commission entered its show cause order, stating that Alma had until June 26, 1999, to explain why it had not complied with the Commission's order to file a procedural schedule by May 21, 1999, or show cause why the cases should not be dismissed.

On June 21, 1999, Alma filed its response to the show cause order and stated, *inter alia*, that it had never received a copy of the May 11, 1999 order of the Commission. On June 30, 1999, the Commission entered its order granting intervention and granting participation without intervention to the parties as set forth above. On the same day, the Commission entered an order setting the date of July 20, 1999, for the filing of a procedural schedule. On July 15, 1999, Alma filed a proposed procedural schedule. On August 3, 1999, the Commission entered its order overruling the motion to establish a procedural schedule on the grounds that the dates in the motion would fall after the statutory deadlines placed on the Commission. On August 5, 1999, Alma filed its new proposed procedural schedule which offered two alternatives: 1) to extend the tariff date so that the first procedural schedule would be acceptable to the Commission, or 2) that a single prefiling brief and oral arguments thereon would be allowed which would enable the case to be concluded within the statutory time.

On August 9, 1999, Sprint PCS filed its objections to Alma's data requests.

On August 10, 1999, the Commission entered its order consolidating all of the cases for all purposes, acknowledging the extension of the effective dates of the tariffs until December 15, 1999, and establishing a procedural schedule with, *inter alia*, dates for the prefiling of testimony and the dates of October 12 and 13, 1999, for an evidentiary hearing.

On August 13, 1999, Alma filed a motion for a protective order for discovery purposes for all the parties. On August 26, 1999, the Commission entered its protective order.

On September 15, 1999, Alma filed its motion to compel responses from SWBT, AWS, and SWBW. On September 27, 1999, the counsel for Alma did not file a pleading but did file a letter stating that SWBT had provided Alma with data responses that satisfied its motion to compel and thus Alma was withdrawing its motion to compel responses from SWBT. On September 28, 1999, SWBW filed its response to Alma's motion to compel.

² AWS sometimes refers to itself in this case as AT&T Communications of the Southwest, Inc. However, this report and order will use AWS as its only reference.

The following parties filed position statements on October 4, 1999: Alma, STCG, SWBT, SWBW, AWS, Sprint PCS, Office of the Public Counsel (Public Counsel), and Staff.

On October 12, 1999, at the evidentiary hearing on this matter, SWBT filed and argued a motion to compel a response to its data requests. That motion was overruled by the Commission on the record on October 13, 1999.

On October 14, 1999, Alma filed its motion for approval of a post-hearing briefing schedule, which was approved by the Commission on October 26, 1999. Alma also noted in the same motion that it had extended its tariff effective date until February 15, 2000.

With the oral permission of the Commission granted at the evidentiary hearing, several parties filed written questions to be asked of one of AWS's witnesses in lieu of cross-examination because of the unavailability of that witness at the hearing.

On October 28, 1999, volume two of the transcript was filed and on November 1, 1999, volume three of the transcript was filed. On December 10, 1999, initial briefs were filed by all the parties. On January 3, 2000, Alma filed its reply brief. On January 4, 2000, reply briefs were filed by SWBW, Staff, STCG, AWS and SWBT. On January 4, 2000, Sprint PCS filed a motion to accept the late filing of its reply brief, which it also filed the same day. That motion will be granted.

II. ISSUES

At the prehearing conference, the parties attending agreed that there were no disputed facts and that the only issue in this case was whether the local telephone companies involved are allowed to amend their tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service (CMRS) that terminates in their territory. In their position statements filed, all of the parties agreed that the issue should be subdivided into two questions: (1) Is the tariff proposed by Alma lawful as applied to wireless or competitive local exchange company (CLEC) traffic? and, (2) If lawful, should the tariff proposed by Alma be approved?

As discussed below, the Commission has determined that: (1) the tariff proposed by Alma is not lawful as applied to wireless or CLEC traffic and, thus, (2) the tariff proposed by Alma should not be approved.

III. DISCUSSION

A. Is the tariff proposed by Alma lawful as applied to wireless or CLEC traffic?

In their position statements filed by the parties, Alma, Public Counsel, and STCG all agreed that the tariffs proposed by Alma were lawful both as applied to wireless traffic and CLEC traffic. In their position statements, Staff, AWS, SWBT, and Sprint PCS all agreed that the tariffs were unlawful both as applied to wireless traffic and CLEC traffic. SWBW stated that the tariffs were unlawful as applied to wireless traffic, but took no position concerning CLEC traffic.

The resolution of this issue clearly revolves around geography, not the number of carriers involved in a telephone call.

11 Mo. P.S.C. 3d

Alma filed this case to make the following addition to its access tariff:

APPLICABILITY OF THIS TARIFF

The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by another carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended.

Alma testified that its current tariff applies access rates to traffic which, for example, originates from a CLEC, transits SWBT's network and terminates in an Alma exchange. The proposed tariff language, however, would enable Alma to charge access rates to wireless carriers, as well as CLECs, that originate calls that ultimately terminate in an Alma exchange.

Alma has maintained throughout the proceedings that a telephone call that involves only two carriers should be billed by the reciprocal compensation method, but that when three carriers are involved, access charges apply. This, Alma maintains, is true whether the call is local or long distance. However, the emphasis on the number of carriers involved, instead of the jurisdictional nature of the call, is simply incorrect when determining the compensation obligations of the parties.

In its *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, August 8, 1996 (First Report and Order), the Federal Communications Commission (FCC) implemented, *inter alia*, the interconnection requirements of the Telecommunications Act of 1996 (the Act) as they pertained to local exchange carriers (LECs) and CMRS providers. The FCC explicitly determined that the LECs' reciprocal compensation obligations under Section 251(b)(5) of the Act apply to all local traffic transmitted between LECs and CMRS providers. The FCC's largest authorized CMRS provider territory is a Major Trading Area (MTA).³ Clarifying what traffic is considered "local," the FCC decided that the MTA serves as the most appropriate definition for a local service area for CMRS traffic when calculating reciprocal compensation under the Act.

In the First Report and Order, the FCC made it abundantly clear that access charges do not apply to local traffic exchanged between LECs and CMRS providers. Traffic to or from a CMRS provider's network, the FCC held, that originates and terminates in the same MTA is subject to transport and termination rates under the Act but is not subject to interstate or intrastate access charges. In the present case, if its tariffs were approved, Alma would be allowed to apply access charges to traffic exchanged with CMRS providers within the same MTA. Such an action would clearly violate both the Act and the First Report and Order.

³The FCC defines a "major trading area" as an area whose boundaries have been determined by Rand McNally. Rand McNally apparently determined the boundaries of these trading areas after studying such factors as physiography, population distribution, newspaper circulation, economic activities, highway facilities, railroad service, suburban transportation, and field reports of sales analysts.

Alma relies, in part, on the FCC's use in the First Report and Order of a "three carrier" example for access charges and a "two carrier" description for reciprocal compensation. The FCC, however, never made the simplistic rule that said that if two carriers were involved in a telephone call, that reciprocal compensation was required and three carriers required access charges. To the contrary, the FCC clearly explained its rationale:

We disagree with Frontier's contention that section 251(b)(5) entitles an IXC [interexchange carrier] to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three carriers — typically, the originating LEC, the IXC, and the terminating LEC — collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call.

None of the parties to this case dispute that an inter-MTA call is charged under the applicable access rate, because no party disputes that such a call is indeed a long distance call. However, Alma's contention that intra-MTA calls should also be charged under the access rate when three carriers are involved is not persuasive.

For these reasons, the Commission finds that the tariff proposed by Alma is not lawful as applied to either wireless or CLEC traffic.

B. If lawful, should the tariff proposed by Alma be approved?

In their position statements, Alma and Staff agreed that the tariffs proposed by Alma, if lawful, should be approved. Public Counsel and STCG agreed that the tariffs proposed by Alma, if lawful should be approved if modified. Public Counsel and STCG stated that the tariffs should be modified to clarify the scope of the tariff to exclude traffic exchanged under other approved agreements.

The Commission finds that this question is moot since the Commission is declining to approve the tariff proposed by Alma, after finding such tariffs unlawful.

IV. FINDINGS OF FACT

On October 30, 2001, the Missouri Court of Appeals (Western District) remanded this case to the Commission so that the Commission could make findings of fact, i.e., a factual basis for deciding this case. (The Supreme Court of Missouri denied transfer of this case on January 22, 2002.) The findings, the Court ordered, needed to be in compliance with Sections 386.240, which sets forth the technicalities of the hearing itself that the Commission must follow, and 536.090,

11 Mo. P.S.C. 3d

which requires a decision by the Commission to be in writing and to include a separate findings of fact.

The pertinent part of the latter statute states:

Every decision and order in a contested case shall be in writing, and...the decision...shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Thus, the Commission's view of the facts follows below.

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 Missouri Independent Telephone Group and the Small Telephone Carrier Group are incumbent local exchange companies providing telecommunications services in a number of Missouri exchanges.

AT&T Wireless, Sprint PCS, and Cingular are Commercial Mobile Radio Service providers operating in the state of Missouri under licenses granted by the Federal Communications Commission as wireless carriers.

The Missouri Independent Telephone Group proposes to add the following language to their access service tariffs: "The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, directly or indirectly, until and unless superseded by an agreement approved under the provisions of 47 U.S.C. 252, as may be amended." If approved, this tariff revision would mandate application of access charges to all traffic exchanged between the Missouri Independent Telephone Group and the wireless carriers in Missouri, unless superseded by an agreement.

For Commercial Mobile Radio Service traffic, the FCC has determined that calls that originate and terminate in a single major trading area are local calls.

Access rates are applicable to inter-MTA traffic and toll traffic terminated to the Missouri Independent Telephone Group and other local exchange companies.

The wireless carriers acknowledge that they originate intra-MTA traffic, which terminates in the Missouri Independent Telephone Group's service territories.

The Federal Telecommunications Act of 1996 prohibits the imposition of access charges for the termination of local traffic, because 47 U.S.C. 251(b)(5) states that all local exchange carriers have "[t]he duty to establish...reciprocal compensation arrangements for the transport and...termination of telecommunications [services]."

V. CONCLUSIONS OF LAW

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

1. Local traffic is not subject to switched access charges.
2. CMRS traffic to and from a wireless network that originates and terminates within the same MTA is local traffic, regardless of the number of carriers involved.
3. The proposed tariffs are not lawful and must be rejected because they would allow Applicants to charge switched access rates for local traffic.
4. The Federal Telecommunications Act of 1996 prohibits the imposition of access charges for the termination of local traffic, because 47 U.S.C. 251(b)(5) states that all local exchange carriers have "[t]he duty to establish...reciprocal compensation arrangements for the transport and...termination of telecommunications [services]."

IT IS THEREFORE ORDERED:

1. That Sprint Spectrum L.P. d/b/a Sprint PCS's motion to late file its reply brief is granted.
2. That any motions which have not been previously ruled upon, if any, are hereby denied.
3. That any objections which have not been previously ruled upon, if any, are hereby overruled.
4. That the proposed tariffs filed by Alma Telephone Company, MoKan Dial Inc., Mid-Missouri Telephone Company, Choctaw Telephone Company, Chariton Telephone Company, and Peace Valley Telephone Company, are rejected.
5. This Report and Order will become effective on April 19, 2002.
6. That this case may be closed on April 20, 2002.

Simmons, Ch., Lumpe and Forbis, CC.,
concur and certify compliance with the
provisions of Section 536.080, RSMo 2000.
Gaw, C., not participating
Murray, C., absent

11 Mo. P.S.C. 3d

In the Matter of the Application of IES Utilities, Inc. for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain Electric Transmission Facilities in Clark County, Missouri and Request for Waiver.

Case No. EA-2002-296
Decided April 18, 2002

Electric § 3. The Commission determined it was necessary and convenient for the public interest for IES Utilities, Inc. to construct and operate a transmission line. A portion of the line would be in Missouri, and would serve IES' Iowa customers.

Electric §9. The Commission had jurisdiction over IES Utilities Inc., and could require IES to obtain a certificate of convenience and necessity to build a transmission line through Missouri to serve its Iowa customers.

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

In this order, the Commission finds it is necessary and convenient for the public interest for IES Utilities, Inc. to construct and operate the transmission line as described in the application, and so grants IES a certificate of convenience and necessity.

On December 20, 2001, IES requested that the Commission issue it a certificate of convenience and necessity to construct and operate a transmission line in Clark County. Approximately nine miles of the proposed line would be in Missouri, but the line would not be used to serve any customers in Missouri. Rather, it would provide an alternate transmission source to serve the continued load growth in and around Keokuk, Iowa. IES stated that load studies have identified the need for additional transmission capacity to reliably serve its Iowa customers and it has concluded that this line is the best alternative. The proposed line would connect the Twin Rivers Substation in Keokuk, Iowa, to a new interconnection with an AmerenUE 161 kV transmission line near Wayland, Missouri.

On January 2, 2002, the Commission issued an order directing that notice be given to potentially interested entities, and allowing the opportunity to intervene. No entity requested intervention. 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.¹ Since no one has asked permission to intervene or requested a hearing, the Commission may grant the relief requested based on the application.

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

On March 28, the Staff of the Commission filed its recommendation. Staff thoroughly analyzed the applicable law and concluded that the Commission does indeed have authority to require that IES obtain a certificate of public convenience and necessity. The Commission agrees with Staff's analysis, and finds that IES must have Commission approval before constructing and operating the proposed transmission line. Staff recommended that the Commission grant the requested certificate:

This proposed addition to the transmission system is necessary to provide reliable electric service to IES customers in the Keokuk, Iowa area. The Iowa Utilities Board previously found the need for the construction of a second transmission line into the Keokuk area to serve the growing electric load. The addition of this 161 kV transmission line will help ensure reliable electric service to the IES customers in Iowa. IES states that no Missouri customers will be served from this line. A majority of the proposed route of the transmission line will utilize an abandoned railroad right-of-way to minimize the impact on property owners in the area. This route provides the most economic alternative to meet the electric and reliability needs of the IES customers.

The Commission finds it is necessary and convenient for the public interest for IES to construct and operate the transmission line as described in the application, and so will grant a certificate of convenience and necessity.

IT IS THEREFORE ORDERED:

1. That IES Utilities, Inc. is granted a certificate of public convenience and necessity to construct, own, operate and maintain a transmission line in Clark County as described in its application filed on December 20, 2001.
2. That this order shall become effective on April 28, 2002.
3. That this case may be closed after April 29, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., dissents

Mills, Deputy Chief Regulatory Law Judge

11 Mo. P.S.C. 3d

**In the Matter of the Annual Report of Osage Water Company for
the Calendar Year Ending December 31, 1999.**

Case No. WE-2002-240
Decided April 18, 2002

Water §1. The Commission granted Osage Water Company's motion for leave to file its delinquent 1999 annual report. The Commission directed the Commission's Data Center to attach a copy of Staff's January 11, 2002, letter to Greg Williams to the 1999 annual report. The letter addressed certain alleged discrepancies or deficiencies in the annual report. The Commission also directed Osage Water Company to either provide the missing information or a written explanation of why the information is not available or why the discrepancies cannot be corrected.

Water § 27. The Commission granted Osage Water Company's motion for leave to file its delinquent 1999 annual report. The Commission directed the Commission's Data Center to attach a copy of Staff's January 11, 2002, letter to Greg Williams to the 1999 annual report. The letter addressed certain alleged discrepancies or deficiencies in the annual report. The Commission also directed Osage Water Company to either provide the missing information or a written explanation of why the information is not available or why the discrepancies cannot be corrected.

**ORDER GRANTING LEAVE TO FILE
DELINQUENT ANNUAL REPORT**

This order grants Osage Water Company's motion for leave to file its delinquent 1999 Annual Report.

On November 28, 2001, Osage Water Company filed a motion for leave to file its delinquent 1999 Annual Report. On January 3, 2002, the Staff of the Missouri Public Service Commission filed a request for additional time, until January 15, 2002, in which to file its response. The Commission granted the request by Order issued January 9, 2002. Staff requested a second extension on January 14, 2002, citing the need to continue to work with Osage Water regarding certain discrepancies in the 1999 Annual Report. The Commission granted an extension until February 5, 2002, by order issued January 15, 2002.

Staff filed its Recommendation on February 5, 2002, indicating that there are certain discrepancies in the Osage Water's 1999 Annual Report when it is compared to the company's 1998 Annual Report. Staff noted that the discrepancies fall into four specified categories. Staff sent an electronic communication to Osage Water on January 11, 2002, requesting additional information, and counsel for Osage Water indicated that the company would not be able to provide any new information. Staff recommended that the Commission accept the 1999 Annual Report but attach the Staff's January 11, 2002, letter (Exhibit A) to the Annual Report so that the public would be on notice of the discrepancies and deficiencies. Staff further suggested that the Commission order Osage Water to provide either (1) the missing information, or (2) a written explanation of why the information is not available or why the discrepancies cannot be corrected.

On March 19, 2002, Hancock Construction Company filed an Application to Intervene and Consolidate. By order issued March 21, 2002, the Commission denied Hancock's request to intervene and denied its motion to consolidate.

The Commission scheduled a prehearing conference for March 20, 2002, to further address this matter. All parties appeared for the prehearing conference. During the conference, Osage Water indicated that it intends to hire a certified public accountant to assist it in preparing a revised 1999 Annual Report.

The Commission has reviewed Osage Water's motion, along with Staff's Recommendation and the official file. The Commission finds that there is good cause to accept the Annual Report out of time. The Commission will direct that the Data Center attach a copy of Staff's January 11, 2002, letter addressed to Greg Williams (Exhibit A to Staff's Recommendation) to the 1999 Annual Report. In addition, Osage Water will be directed to provide either (1) the missing information, or (2) a written explanation of why the information is not available or why the discrepancies cannot be corrected. If Osage Water does not comply with this directive within a reasonable time, Staff shall evaluate whether a complaint case should be filed.

IT IS THEREFORE ORDERED:

1. That the Motion for Leave to File Delinquent Annual Report, filed November 28, 2001, by Osage Water Company is granted.
2. That the Data Center shall attach a copy of Staff's January 11, 2002, letter addressed to Greg Williams (Exhibit A) to the 1999 Annual Report.
3. That, as directed in this order, Osage Water Company shall provide either (1) the missing information, or (2) a written explanation of why the information is not available or why the discrepancies cannot be corrected.
4. That this order shall become effective on April 28, 2002.

Simmons, Ch., Lumpe, and Forbis, CC., concur.
Murray, C., dissents.
Gaw, C., not participating.

Ruth, Senior Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

It is inappropriate to accept for filing the delinquent Annual Report containing the deficiencies and discrepancies noted by Staff.

In accordance with Section 393.140 RSMo, "it shall be the duty of every person and corporation to file with the commission an annual report When any such report is defective or believed to be erroneous, the commission shall notify the person or corporation making such report to amend the same within a time prescribed by the commission. Any such person or corporation which shall neglect to make any such report or which shall fail to correct any such report within the time prescribed by the commission shall be liable to a penalty of one hundred dollars

11 Mo. P.S.C. 3d

and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file or correct the same, to be sued for in the name of the State of Missouri. The amount recovered in any such action shall be paid to the public school fund of the state.”

It is important to note that the Annual Report at issue here was due on or before April 15, 2000, in accordance with 4 CSR 240-10.080. Therefore, the company could have been subjected to the statutory penalty from that date for the delinquent 1999 report, as well as to penalties for other delinquent and deficient reports.

One year and seven months after the 1999 report was due, the company filed its Motion for Leave to File Delinquent Annual Report for the year ending December 31, 1999. Staff notified the company of significant material discrepancies which fall into four major categories. Counsel for the company stated that no additional information would be forthcoming.

The Commission should not countenance such disregard for its rules and particularly should not permit a utility under its jurisdiction to continue to ignore its statutory obligations. The time for enforcement is long overdue.

In the Matter of the Application of UtiliCorp United Inc. for Authority to Acquire the Shares of Avon Energy Partners Holdings and to Take All Other Actions Reasonably Necessary to Effectuate Said Transaction.

Case No. EO-2002-215

Decided April 23, 2002

Electric § 4. The Commission approved a Purchase and Sale Agreement between Aquila Europe, Inc., and EI UK Holdings, Inc., which allows Aquila to acquire an interest in Avon Energy Partners Holdings from EI UK.

Electric § 4. The Commission determined that the acquisition by Aquila, Inc., would expand and diversify Aquila’s operations in the United Kingdom and the rest of Europe and would not adversely affect its investment grade credit rating or its ability to attract capital to fund its operations. Therefore, the Commission determined that approval of the application would benefit Aquila and would not be detrimental to the public interest.

ORDER APPROVING SECOND AMENDED APPLICATION

Syllabus

On March 18, 2002, Aquila, Inc., f/k/a UtiliCorp United Inc., filed a Second Amended Application requesting approval of a Purchase and Sale Agreement between Aquila Europe, Inc., a wholly owned Aquila, Inc. subsidiary, and EI UK Holdings, Inc.. The agreement, dated March 15, 2002, provides for Aquila, Inc. to acquire an interest in Avon Energy Partners Holdings from EI UK. This order approves the Second Amended Application and authorizes Aquila, Inc. to complete the transaction.

Procedural History

On December 18, 2001, the Commission issued an Order Approving Application in this case authorizing UtiliCorp to acquire the outstanding shares of Avon as provided in a Share Purchase and Sale Agreement between UtiliCorp and EI UK. The Commission's Order was subject to certain conditions set forth in the Order. Among those conditions was the following:

That the authority granted in this order is conditioned on the participation of a financial partner and the representations described in the application, particularly paragraphs 8 and 12. If UtiliCorp United Inc. determines to proceed differently, UtiliCorp shall file a new application.

On February 15, 2002, UtiliCorp filed its First Status Report pursuant to Ordered Paragraph 15 of the Commission's Order Approving Application. UtiliCorp advised the Commission that certain events had resulted in an arrangement under which UtiliCorp's partner in the acquisition of the shares of Avon was to be FirstEnergy Corp. instead of Deutsche Bank, as originally had been contemplated.

On February 28, 2002, the Commission issued an Order Directing Filing. The Order directed that the Staff of the Commission file a response to UtiliCorp's First Status Report. The primary purpose for Staff's response was to determine whether UtiliCorp's new proposal would require the filing of a new application. The Commission directed that the Staff file its response no later than March 15, 2002.

On March 15, 2002, UtiliCorp filed its Second Status Report, as required by Ordered Paragraph 15 of the Commission's Order Approving Application. The Second Status Report advised that the negotiations leading to the participation of FirstEnergy as UtiliCorp's financial partner in the acquisition and ownership of Avon were nearing completion. Also on March 15, 2002, the Staff of the Commission filed its Response to UtiliCorp's First Status Report. Staff's response updated the Commission on events that had occurred since the filing of UtiliCorp's First Status Report. Staff stated its understanding that UtiliCorp intended to make a formal filing with the Commission seeking additional approval through a motion for supplemental order or, alternatively, a second amended application as soon as the new financial partner arrangement was formalized. Staff requested that it have an opportunity to review the final documentation concerning the revised acquisition transaction and to make a further recommendation to the Commission regarding the transaction.

On March 18, 2002, UtiliCorp filed its Motion for Supplemental Order or Alternatively Second Amended Application. In doing so, UtiliCorp filed a copy of a Purchase and Sale Agreement dated March 15, 2002, an updated diagram of the acquisition structure, and updated *pro forma* financial information. UtiliCorp stated that its arrangement with FirstEnergy had been formalized, providing for a joint venture vehicle indirectly owned by UtiliCorp and FirstEnergy to hold 100% of the outstanding shares of Avon. UtiliCorp stated that it expected to acquire an indirect 79.9 percent economic interest in Avon, with FirstEnergy retaining a 20.1 percent economic interest. UtiliCorp stated that there would be no change from the original partnership arrangement with respect to voting rights, with UtiliCorp and its partner each having 50 percent control. UtiliCorp stated that the updated *pro forma*

11 Mo. P.S.C. 3d

financial statements reflected only very slight changes from the original partnership arrangement, having an insignificant impact on ratios relevant to its credit rating. UtiliCorp requested that the Commission issue an order stating that no further Commission authority was required for UtiliCorp to proceed in accordance with the terms of the new Purchase and Sale Agreement. Alternatively, UtiliCorp further amended its application and requested that the Commission issue an order approving its application, as further amended, and authorizing it to perform in accordance with the terms of the Purchase and Sale Agreement, providing for the new partnership arrangement, investment level and acquisition structure described in its pleading.

On March 26, 2002, the Commission issued an Order Denying Motion for Supplemental Order, Granting Request for Amended Application, and Directing Staff Recommendation. The Commission denied UtiliCorp's request for a supplemental order, but granted UtiliCorp's motion to further amend its application. The Commission directed its Staff to expeditiously review the amended application and to make its recommendation no later than April 20, 2002.

On March 27, 2002, Aquila, Inc., filed a Notice of Applicant Name Change. The Notice stated that UtiliCorp had completed the merger authorized by the Commission in its Case No. EM-2002-297, and that its name had been changed to Aquila, Inc. Consequently, any further references to the applicant in this case will be to the new name, Aquila, Inc., except where reference to its former name, UtiliCorp, is necessary for clarity.

On April 16, 2002, Staff filed a Staff Response. Staff recommended conditional approval of the Second Amended Application. On April 17, 2002, Aquila, Inc. filed a Response of Aquila, Inc., to Staff's Supplemental Recommendation in which it ratified its certification of corporate commitments and, also, stated that it had no objection to the conditions proposed by Staff. The Office of the Public Counsel filed its response on April 18, 2002. Public Counsel stated that it agreed with Staff's conditional recommendation.

Standard of Review

Aquila, Inc. has requested approval of its application, as amended, and proposed acquisition pursuant to Section 393.190, RSMo 2000, and 4 CSR 240-2.060(12). Section 393.190 requires an electrical corporation regulated by the Commission to obtain the Commission's approval to acquire the stock of any other corporation engaged in the same or similar business. The Commission must approve the application, as amended, absent a showing that the transaction is detrimental to the public interest.¹

The requirement of a hearing has been fulfilled when all those that have a desire to be heard are offered an opportunity to be heard. If no proper party is granted intervention and neither the Commission Staff nor the Office of the Public Counsel requests a hearing, the Commission may determine that a hearing is not necessary and that the applicant may submit evidence in support of the application by

¹ *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934).

verified statement.² No applications for intervention have been filed in this case. No proper party to the case has requested a hearing.

Staff Recommendation

In the Staff Response, Staff recommended approval of the Second Amended Application provided that the Commission include the conditions proposed by Staff and certain commitments previously made by UtiliCorp. Aquila, Inc.'s response to Staff's supplemental recommendation states that it has no objections to the conditions proposed in the Staff Response.

The Transaction and Its Impact

As noted in the Commission's earlier Order Approving Application, Avon owns and operates Midlands Electricity plc, which conducts a substantial electrical utility distribution business and related businesses based in the United Kingdom. Midlands is one of twelve regional electricity companies in the United Kingdom that came into existence as a result of the privatization of the United Kingdom electric industry in 1990. Midlands provides regulated distribution of electricity to approximately 2.3 million industrial, commercial and residential consumers in south central England. Midlands also has unregulated businesses in electrical contracting, metering services and related businesses and, through a subsidiary, owns minority interests in three generating plants in the United Kingdom and overseas.

Aquila, Inc. proposes to pay approximately \$285 million (U.S.) to acquire a 79.9 percent economic interest in Avon. FirstEnergy, the current owner of 100 percent of the outstanding shares of Avon, will retain a 20.1 percent economic interest in Avon. Aquila, Inc. and FirstEnergy will each control 50 percent of the voting power of Avon. Aquila, Inc.'s acquisition of Avon and the Midlands is intended to provide it with a base to expand and diversify its operations in the United Kingdom and the rest of Europe.

Following the acquisition, Avon and its subsidiaries will maintain significant debt related to operations. That debt will be nonrecourse to Aquila, Inc., meaning that creditors cannot demand payment from Aquila, Inc. Aquila, Inc. may, however, borrow moneys to fund its share of the acquisition of Avon. Aquila, Inc. expects eventually to structure its funding of the acquisition as 50 percent debt and 50 percent equity, but initially it will be 100 percent debt.

Staff calculated and evaluated the impact of the acquisition on the financial position of Aquila, Inc. based upon the "most conservative scenario" of 100 percent debt financing. Based upon Staff's review of current and pro forma financial data submitted by Aquila, Inc., the company's capital structure as of June 30, 2001, consisted of 44.50 percent long-term debt, 2.70 percent short-term debt, 6.30 percent preferred stock, and 46.50 percent common equity. If Aquila, Inc. incurs \$285 million of long-term debt to complete the transaction, its capital structure would consist of 47.20 percent long-term debt, 2.60 percent short-term debt, 6.00 percent preferred stock, and 44.20 percent common equity. The total debt of

² *State ex rel. Rex Deffenderfer Enterprises Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

11 Mo. P.S.C. 3d

the company would increase 1.80 percent from 47.20 percent to 49.80 percent of total capital.

According to Staff, a 49.80 percent debt ratio is consistent with credit ratings above BBB-rated electric utilities. Staff states that the other *pro forma* financial data concerning pre-tax interest coverage, funds from operations interest coverage, and funds from operations to total debt ratio is consistent with credit ratings above that of BBB-rated utilities. Staff further states that Aquila, Inc. currently has a BBB rating assigned by Standard & Poors. Staff concluded that the transaction will not result in problems with Aquila, Inc.'s future credit rating and its ability to attract capital.

Aquila, Inc. Commitments

Aquila, Inc. has represented in its application that it is committed to maintaining its investment-grade credit rating. Aquila, Inc. stated that cost allocations to Missouri jurisdictional operations will not increase as a result of the transaction and that it will reduce allocations where appropriate to reflect the effect of the transaction. Aquila, Inc. stated that any acquisition premium paid by Aquila, Inc. will be treated below the line for ratemaking purposes and that no recovery of any acquisition premium from this transaction will be sought in any future Missouri rate case. Aquila, Inc. stated that it will not seek an increase in cost of capital or request a risk premium as a result of the acquisition. Aquila, Inc. stated that it would provide the Staff and the Office of the Public Counsel with post-closure information about the transaction if it is approved and current credit agency reports, as available. Aquila, Inc. ratified those representations and commitments in its April 17, 2002, response to Staff's supplemental recommendation.

Staff Conditions

Staff has recommended approval of the application, as amended, subject to the following conditions:

- a) That nothing in the Commission's order be considered a finding by the Commission of the value of the transaction for ratemaking purposes and that the Commission reserves the right to consider the ratemaking treatment to be afforded the transaction in any subsequent proceeding;
- b) That the Commission's order shall not be deemed to be precedent for any future acquisition, even if the facts may be similar;
- c) That any adverse financial effects of this acquisition be borne by the shareholders of Aquila, Inc., and not by Missouri ratepayers;
- d) That all records pertaining to this transaction be maintained at Aquila, Inc.'s headquarters at 20 West Ninth Street, Kansas City, Missouri 64105-1704 and be made available to the Commission's Staff as Staff deems necessary;
- e) That Aquila, Inc. be prepared to provide documentation of proper cost allocations to nonregulated entities;

- f) That Aquila, Inc. include any costs borne by its Missouri Public Service and St. Joseph Light & Power divisions related to the nonregulated subsidiaries in monthly surveillance reports sent to the Commission's Staff; and
- g) That Aquila, Inc. shall not take any action that would cause the financial statements of Aquila Sterling Holdings LLC to become consolidated with those of Aquila, Inc. until it files and receives approval to do so from the Missouri Public Service Commission.

Decision

Aquila, Inc. has provided the Commission with a copy of its Purchase and Sale Agreement to acquire an interest in Avon and a copy of the Resolutions of its Board of Directors authorizing the transaction. Aquila, Inc.'s Second Amended Application and supplemental information and responses filed by the Staff demonstrate that the transaction is not detrimental to the public interest and offer conditions to protect the public interest. Thus, the application, as amended, satisfies all the requirements of Section 393.190, RSMo 2000, and 4 CSR 240-2.060(12).

The acquisition will permit Aquila, Inc. to expand and diversify its operations by extending and expanding its operations in the United Kingdom and the rest of Europe. The investment and any related debt will not adversely affect Aquila, Inc.'s investment-grade credit rating or its ability to attract capital to fund its operations. Therefore, approval of the application will benefit Aquila, Inc. with no detriment to the public interest.

In addition, commitments offered by Aquila, Inc. and Staff's recommended conditions provide further assurance that there will be no detriment to the public interest by the Commission's approval of the application.

The Commission finds that the transactions presented in Aquila, Inc.'s Second Amended Application are not detrimental to the public interest and may be approved subject to the commitments offered by Aquila, Inc. and the specific conditions recommended by Staff.

IT IS THEREFORE ORDERED:

1. That the Second Amended Application of Aquila, Inc., requesting the Commission to authorize Aquila, Inc.'s acquisition of an interest in Avon Energy Partners Holdings from, and in partnership with, FirstEnergy Corp. as provided in the Purchase and Sale Agreement between Aquila Europe, Inc. and El UK Holdings, Inc. is hereby approved.
2. That Aquila, Inc. may take the actions necessary and as authorized in this proceeding to carry out the transactions described in the Second Amended Application.
3. 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 the transaction in any subsequent proceeding.
4. That the Commission's order shall not be deemed to be precedent for any future acquisition, even if the facts are similar.
5. That any adverse financial effects of this acquisition are to be borne by the shareholders of Aquila, Inc.

11 Mo. P.S.C. 3d

6. That all records pertaining to this transaction shall be maintained at Aquila, Inc.'s headquarters and be made available for the Commission's Staff, as Staff deems necessary.

7. That Aquila, Inc. shall be prepared to provide documentation of the proper cost allocations to nonregulated entities.

8. That Aquila, Inc. shall include any costs borne by its Missouri Public Service and St. Joseph Power & Light divisions related to the non-regulated subsidiaries in monthly surveillance reports sent to the Commission's Staff.

9. That Aquila, Inc. shall not take any action that would cause the financial statements of Aquila Sterling Holdings LLC to become consolidated with those of Aquila, Inc. without the prior approval of the Commission.

10. That Aquila, Inc. shall exercise reasonable diligence and prudence to maintain its investment-grade credit rating.

11. That Aquila, Inc.'s cost allocations to its Missouri jurisdictional operations shall not increase as a result of the transaction and that Aquila, Inc. will reduce allocations, where appropriate, to reflect the effect of the transaction.

12. That Aquila, Inc. shall treat any acquisition premium from this transaction below the line for ratemaking purposes and that it shall not seek recovery from any acquisition premium resulting from the transaction in any future Missouri rate case.

13. That Aquila, Inc. shall not seek an increase in its cost of capital or request a risk premium as a result of the acquisition.

14. That Aquila, Inc. shall provide the Commission's Staff and the Office of the Public Counsel with post-closure information concerning the transaction no later than 30 days after the closing and shall provide current credit agency reports, as available.

15. That Aquila, Inc. shall continue to file status reports in this proceeding beginning June 24, 2002, and every 30 days thereafter until the transaction is completed.

16. That no later than ten days after the completion of the transaction, Aquila, Inc. shall file a notice indicating that this case may be closed.

17. That this Order shall become effective on May 3, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Dippell, Senior Regulatory Law Judge

In the Matter of Mid-Missouri Telephone Company's 6th
Revised Tariff Sheet No. 5.1

In the Matter of Chariton Valley Telephone Corporation's
5th Revised Tariff Sheet No. ~~14.1~~ _____

In the Matter of Northeast Missouri Rural Telephone
Company's 5th Revised Tariff _____
Sheet No. 12-3

Case Nos. TT-2002-310, TT-2002-311 & TT-2002-312
Decided April 25, 2002

Rates § 69. The Commission rejected proposed tariffs from three telephone companies that would lengthen the period of recovering costs from implementing their IntraLATA Dialing Parity Plans. The Commission found that the companies could recover the costs, but not during an interval so lengthy that it would drag the process out.

ORDER REJECTING TARIFFS

Syllabus:

11 Mo. P.S.C. 3d

The Commission concludes that its policy of allowing recovery of the costs of implementing IntraLATA Dialing Parity is still sound, and that completing that recovery within three years is also still in the public interest. The Commission therefore rejects Petitioners' proposed tariffs that would lengthen that recovery period.

Procedural History:

Petitioners separately filed, on August 27, 2001, revised tariffs with a Motion to Revise Tariff Pertaining to Recovery of Actual Costs to Implement the IntraLATA Toll Dialing Parity Plan under the respective case numbers assigned to their IntraLATA Toll Dialing Parity Implementation Plans. At Staff's request, Petitioners withdrew these tariff revisions on November 6, 2001. On November 6, 2001, each of the Petitioners separately filed a new revised tariff sheet to extend the duration of the surcharge for recovery of the cost of implementing the company's IntraLATA Toll Dialing Parity ("ILDPA") plan, without a motion. These revised tariffs were provided Case Nos. TT-2002-310, Tariff File No. 200200354 (for Mid-Missouri), Case No. TT-2002-311, Tariff File No. 200200353 (for Chariton Valley), and Case No. TT-2002-312, Tariff File No. 200200355 (for Northeast).

On November 16, 2001, Mid-Missouri and Chariton Valley filed letters consenting to an extension to January 11, 2002,

Company	Tariff Effective Date	Actual Costs	Projected MOUs	Tariff Rate
Mid-Missouri	July 16, 2000	\$30,181.04	31,111,182	\$.000978/min.
Chariton Valley	June 17, 2000	\$65,124.07	46,900,822	\$.001389/min.
Northeast	July 13, 2000	\$49,991.67	28,806,276	\$.00174/min.

extension to January 11, 2002, in order to give Staff adequate time to consider the tariff sheet.

Staff filed motions to suspend each of the three tariffs on January 2, 2002. On January 3, 2002, the Commission issued a Notice Setting Time for Response, ordering responses to Staff's motions to be filed no later than January 7, 2002, at 12:00 P.M.

Company	Update Period	MOUs thru date shown	MOU per month ¹	Costs Recovered to Date ²
Mid-Missouri	9/00 - 1/02	9,294,888	546,758	\$ 9,090.40
Chariton Valley	9/00 - 12/01	12,160,562	760,035	\$16,891.02
Northeast	9/00 - 1/02	9,857,956	579,880	\$17,152.84

Petitioners each filed on January 7, 2002, a timely Response to Staff's Motion to Suspend Tariff.

The Commission issued its Order Suspending Tariffs and Scheduling Prehearing Conference on January 10, 2002. All parties appeared at the prehearing conference held on January 16, 2002. The parties agreed to consolidate these cases, with Case No. TT-2002-310 being the lead case. The parties further

Company	Additional MOU Required ³	Additional Months Required for Recovery ⁴
Mid-Missouri	21,878,294	39.90
Chariton Valley	34,740,260	45.71
Northeast	18,948,320	32.68

¹ This amount is determined by dividing the amount in the third column of this table by the number of months reflected in the second column of this table.

² This amount is determined by multiplying the amount in the third column of this table by the tariff rate shown in Paragraph 7, above. This reflects a period from Jan. '02 (Chariton Valley) and Feb. '02 (Mid-Missouri and Northeast).

³ This amount is determined by subtracting the "MOUs thru date shown" (found in the table in Paragraph 8) from the "Projected MOUs" (found in the table in Paragraph 7).

⁴ This amount is determined by dividing the "Additional MOU Required" (from this table) by the "MOU per Month" (found in the table in Paragraph 8).

11 Mo. P.S.C. 3d

discussed entering a unanimous stipulation of facts and a proposed procedural schedule.

On January 23, 2002, an Order Consolidating Cases was entered, and the parties filed their proposed procedural sched-

Company	Additional MOU by 6/1/02 ⁵	Additional Recovery by 6/1/02 ⁶	Remainder to Recover ⁷	Additional MOU Expected ⁸	Rate Required ⁹
Chariton Valley	3,800,176	\$5.278	\$42,955	9,371,233	\$0.004584/min.
Northeast	2,319,519	\$4.036	\$28,803	4,149,917	\$0.004028/min.

ule in accordance with the Commission's January 10, 2002 Order. On January 25, 2002, the Commission ordered the parties to file a Joint Stipulation of Facts by February 6, 2002. On February 6, 2002, the parties filed a joint motion requesting that the time for filing the Joint Stipulation of Facts be extended to February 13, 2002.

Stipulated Facts:

⁵ This amount is determined by multiplying the "MOU per Month" (found in the fourth column of the table in Paragraph 8) by the number of months between the ending date shown in the second column of the table in Paragraph 8 and June 1, 2002.

⁶ This amount is determined by multiplying the "Addl. MOU by 6/1/02" (found in the second column of this table) by the rate shown in the table in Paragraph 7.

⁷ This amount is determined by subtracting the "Costs Recovered to Date" (found in the table in Paragraph 8) and the "Additional Recovery by 6/1/02" (found in this table) from the "Actual Costs" (found in the table in Paragraph 7).

⁸ This amount is determined by multiplying the "MOU per Month" (found in the table in Paragraph 8) by 12.33 months (the number of months between 6/1/02 and June 10, 2003, the end of the three-year period).

⁹ This rate is determined by dividing the "Remainder to Recover" (from this table) by the "Additional MOU Expected" (from this table).

The parties stipulated to the following facts, and the Commission accepts them for purposes of resolving this case.

On June 10, 1999, the Commission issued Reports and Orders in Case Nos. TO-99-527, TO-99-525, and TO-99-530, approving the Petitioners' proposed plans to recover the actual incremental costs of implementing IntraLATA Toll Dialing Parity ("ILDPA"), with modifications. The Petitioners' plans proposed "to recover the incremental costs of implementing the ILDPA over a three-year period as a surcharge on the Carrier Common Line (CCL) element for all originating access minutes." The Commission approved of this three-year period, but at the time that the Reports and Orders were filed, the Commission did not know what the actual costs were, or how many minutes of use ("MOU") would be available for recovery of these costs; only estimates were available. The Commission directed Petitioners to provide the Staff of the Commission with the actual costs when avail-

11 Mo. P.S.C. 3d

able. The Commission further directed Petitioners to provide the Staff with an annual accounting of the progress of their cost recovery, and to ensure that the temporary additive is ended as soon as the actual cost of implementation is recovered.

Petitioners provided to Staff supporting documentation of their actual incremental costs of implementing the ILDP plans and their projections for recovery at the time they filed their proposed tariffs, which became effective on the following dates and at the following rates:

Company Costs	Tariff Effective Date Projected MOUs	Actual Tariff Rate
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¹⁰The average of the three companies' total recovery period, assuming minutes of use continue to decline, is 5.16 years.

In the Matter of the Application of Laclede Gas Company for a Permanent Waiver from the Definition of "Main" in 4 CSR 240-40.030(1)(B)14 and 49 C.F.R. Part 192.3 Where the Piping Serves No More Than Two Adjacent Residences.

Case No. GE-2002-372

Decided April 25, 2002

Gas § 1. The Commission approved the request of Laclede Gas Company for a waiver from the definition of "main" at 4 CSR 240 40.030(1)(B)14 and the corresponding definition in the federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules.

Gas § §10, 12, 15. The Commission approved the request of Laclede Gas Company for a waiver from the definition of "main" at 4 CSR 240 40.030(1)(B)14 and the corresponding definition in the federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules. These provisions define a "gas main" as "a distribution line that serves as a common source of supply for more than one (1) service line." The facilities that Laclede requested be permanently exempted from this definition include any distribution line that extends onto private property and serves no more than two adjacent, private, single-family residences separated by a property line that terminates at an outside, aboveground meter set. The Commission granted Laclede's request that such facilities be treated as service lines and made subject to the requirements specified at 4 CSR 240 40.030(8)(G) and at 49 C.F.R. 192.361.

ORDER APPROVING WAIVER

This order approves the company's request for a waiver from the definition of "main" at 4 CSR 240 40.030(1)(B)14 and 49 C.F.R. Part 192.3.

On February 5, 2002, Laclede Gas Company filed an application for waiver from the definition of "main" at 4 CSR 240 40.030(1)(B)14, and the corresponding definition in federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules. Both of these rule provisions define a "gas main" as "a distribution line that serves as a common source of supply for more than one (1) service line." The facilities which Laclede requests be permanently exempted from this definition include any distribution line of Laclede which extends onto private property and serves no more than two adjacent, private, single-family residences separated by a property line that terminates at an outside, aboveground meter set. Instead of qualifying and being treated as "main" facilities, Laclede requests that such facilities be treated as service lines and made subject to the requirements specified at 4 CSR 240 40.030(8)(G) and at 49 C.F.R. 192.361, and all other applicable state and federal rules governing the construction, maintenance, and operation of service lines.

In support of its application, Laclede submits that the granting of its requested waiver will benefit ratepayers without any diminishment in public safety. Laclede also notes that the Missouri Public Service Commission granted a waiver of 49 C.F.R. Part 192.3 in accordance with 49 U.S.C. § 60118(d) for a similar situation

11 Mo. P.S.C. 3d

as a result of an application submitted by Missouri Gas Energy in 1996.¹ At that time the U.S. Department of Transportation - Research and Special Programs Administration was notified of the waiver and that agency did not object. In addition, Laclede listed seven waivers for similar situations that have been granted in other states and submitted for review by the Research and Special Programs Administration, and that agency replied to the state agencies that it did not object to the waivers.

The Staff of the Missouri Public Service Commission filed its recommendation on February 28, 2002. Staff reviewed the application for waiver and recommends that it be granted and that Laclede be allowed to designate as "service line" any distribution line that extends onto private property, serves no more than two adjacent, private, single-family dwellings separated by a property line, and terminates in an outside, aboveground meter set. Staff is of the opinion that good cause exists for waiver of the rule because the waiver applies to a limited number of distribution lines that serve only two customers and that these lines will be installed to the same depth and in the same manner as service lines are currently installed. Staff emphasizes that it does not believe that safe delivery of natural gas to Laclede's customers will be compromised in any way if the Commission grants this waiver. According to Laclede, safety may even be enhanced because fewer lines will be installed in the street right of way, decreasing the chance of excavation damage.

Staff points out that a waiver for the same situation was granted to Missouri Gas Energy in Case No. GO-96-346, and seven similar waivers have been granted in other states. Further, Staff notes that the U.S. Department of Transportation - Research and Special Programs Administration is responsible for the federal review of these waivers and has not objected to any of the eight previous waivers for similar situations. Staff states that 49 U.S.C. § 60118(d) provides that the Secretary of Transportation must receive written notice at least 60 days prior to the effective date of any waiver. Thus, if the Commission grants a waiver, Staff recommends that the effective date be set 75 days from the date the order is issued, as this will allow for adequate processing and mail time and will not detract from the 60 days required for review by the Research and Special Programs Administration. Staff also recommends that the notice sent to the Secretary of Transportation be transmitted by Federal Express, contain the application, Staff's memorandum and the Commission order, and be addressed to Stacey L. Gerard, Association Administrator for Pipeline Safety, U.S. Department of Transportation - RSPA/ Office of Pipeline Safety, 400 Seventh Street, S.W., Room 7128, Washington, DC 20590.

Upon review of Laclede's application, Staff's memorandum, and Commission regulations, the Commission finds that the requested waiver would not compromise public safety and should be approved. The waiver will apply to a limited number of distribution lines that serve only two customers and these lines will be installed to the same depth and in the same manner as service lines are currently installed. As fewer lines will be installed in the street right-of-way, the change of

¹ Case No. GO-96-336.

excavation damage will actually be decreased, which will possibly increase public safety.

IT IS THEREFORE ORDERED:

1. That Laclede Gas Company is hereby granted a waiver from the definition of "main" in 4 CSR 240 40.030(1)(B)14 and the corresponding definition in 49 C.F.R. Part 192.3 as contemplated by this order.
2. That the waiver granted in Ordered Paragraph 1 shall become effective on July 9, 2002.
3. That within ten days of the issuance of this order, a copy of this order and copies of the contents of the official file shall be sent by certified mail to:
Stacey L. Gerard
Associate Administrator for Pipeline Safety
U.S. Department of Transportation - RSPA/Office of Pipeline Safety
400 Seventh Street, S.W., Room 7128
Washington, DC 20590
4. That this order shall become effective on May 5, 2002.

Simmons, Ch., Murray, Lumpe,
and Forbis, CC., concur.
Gaw, C., not participating.

Ruth, Senior Regulatory Law Judge

**In the Matter of The Empire District Electric Company of Joplin,
Missouri, for Authority to File Interim Tariffs Increasing
Rates for Electric Service Provided to Customers in the
Missouri Service Area of the Company.**

*Case No. ER-2002-425
Decided May 9, 2002*

Electric §20. The Commission found that the proposed tariff failed to meet the traditional emergency standard for granting interim relief.

Rates § 1. The Commission held that it was not appropriate under the facts of this case to grant interim rate relief on an emergency basis.

Rates § 14. The Commission found that the facts of the case did not meet the emergency standard and therefore it was not appropriate to grant interim rate relief.

Rates § 114. The Commission found that the facts of the case did not meet the emergency standard and therefore it was not appropriate to grant interim rate relief.

11 Mo. P.S.C. 3d

ORDER REJECTING TARIFF AND GRANTING MOTION TO DISMISS

Syllabus: This order rejects the tariff of Empire District Electric Company and grants the motion to dismiss because Empire fails to meet the traditional emergency standard for granting interim relief.

Procedural History

On March 8, 2002, Empire filed proposed interim tariff sheets intended to "place a surcharge which will increase its Missouri jurisdictional electric revenues by \$3,562,983, exclusive of applicable fees and taxes" in the company's Missouri service area. The proposed tariff sheets bear a requested effective date of May 15, 2002. Together with its proposed tariff sheets and other minimum filing requirements, Empire also filed supporting Direct Testimony. Empire requested that the tariff become effective in less than thirty days, and that the Commission establish an early prehearing conference.

On March 12, 2002, Praxair, Inc., filed an Application for Intervention. The Commission granted intervention to Praxair on March 15, 2002.

On March 18, 2002, the Office of the Public Counsel filed a Motion to Dismiss and the Staff of the Missouri Public Service Commission filed its response to the interim tariff. Additional responses and suggestions were filed by the parties and were argued at the Early Prehearing Conference held on April 9, 2002. Since the Early Prehearing Conference the parties have been involved in settlement negotiations, but have not reached any voluntary resolution of the issues.

Request for Interim Rate Relief

Empire requests that the tariff sheets become effective on an interim basis to correct a mistake that was discovered after previous tariff revisions became effective on October 2, 2001. Those tariffs were approved by the Commission in Case No. ER-2001-299. Soon after the tariffs went into effect, Empire discovered an error in the tariffs. Empire filed additional tariff revisions requesting the Commission to correct the error, which the Commission determined was not appropriate in Case No. ET-2002-210. Empire now argues that the mistake in the calculation of the revenue requirement justifies the expedited implementation of this interim rate increase which would be subject to refund pending the outcome of its permanent rate increase in Case No. ER-2002-424.

The standards for interim rate relief have been previously determined by the Commission.¹ According to the Missouri Public Service case, to be eligible for interim rate relief a utility company must show that: (1) it needs the additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief. The Commission has, however, granted interim rate relief on a nonemergency basis² where the Commission found that particular circumstances necessitated such relief. The Western District Court of Appeals has also held that it is possible to grant interim rate relief on a nonemergency basis.³ The Commission has traditionally, however, followed the emergency standard.

¹ *In re Missouri Public Service Company*, Case No. 18,502, 20 Mo. P.S.C. (N.S.) 244 (1975).

² *In re Missouri Power & Light Company*, Case Nos. GR-81-355 and ER-81-356 (1981).

³ *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App. 1976).

Empire cites to several earlier Commission cases as authority for the Commission granting it interim relief without it showing an emergency exists. Based on the facts of those cases, however, the Commission still found emergency or near emergency financial circumstances existed. In the *Kansas City Power & Light* case,⁴ the Commission found that the company was in dire financial status and that the company's level of earnings was impairing its financial integrity. Also in both the *Missouri Power & Light* case⁵ and the *Missouri Public Service* case, the Commission found the companies' level of earnings to be inadequate.

The *Citizens Electric Corporation* case was a departure from the Commission's traditional emergency standard.⁶ That case is distinguishable, however, because interim relief was granted in part because of the unusual corporate structure of the company. Citizens Electric Corporation closely resembles a cooperative and has certain safeguards that other regulated companies do not have, because the company is actually owned by its customers.

Public Counsel and Staff both argue that the Commission should maintain its emergency standard as historically applied. Public Counsel argues that the present case should be dismissed or in the alternative, the tariff should be suspended. Staff and Public Counsel cite to a recent Empire request for interim relief in Case No. ER-2001-452⁷ where the Commission returned to its traditional emergency standard and found that:

The proper application of the [emergency] standard is that a utility must need an interim rate increase in order to meet the emergency or near emergency it faces. The Commission determines that, even viewing its testimony in the light most favorable to Empire, Empire has not demonstrated that it needs interim relief. Empire does not allege that it is not earning a positive return, or that its earnings will be negative in the period before new rates are determined in Case No. ER-2001-299. Neither does Empire allege any risk that its ability to provide safe and adequate service will be impaired in that period. Finally, Empire does not allege inability to finance its operations. The Commission will reject the proposed interim tariffs and grant Public Counsel's motion to dismiss.

In each of the cases cited by Empire, with the exception of Citizens Electric Corporation, the Commission found that the company had demonstrated an emergency or near emergency situation. In the Citizens Electric Corporation case, the corporate structure coupled with the financial situation of the company justified

⁴ *In Re Kansas City Power & Light Company*, 23 Mo. PSC 413 (1980).

⁵ *In Re Missouri Power & Light Company*, 22 Mo. PSC (N.S.) 257 (1978).

⁶ *In the matter of the Application of Citizens Electric Corporation for Approval of Interim Rates, Subject to Refund, and for a Permanent Rate Increase*, Case No. ER-2002-217, Order Approving Stipulation and Agreement, issued December 20, 2001.

⁷ *In the Matter of Tariff Revisions of The Empire District Electric Company Designed to Increase Rates on an Interim Basis for Electric Service to Customers in its Missouri Service Area*, Case No. ER-2001-452.

11 Mo. P.S.C. 3d

the granting of interim relief. Empire admits that its circumstances do not meet the emergency standard and Empire's corporate structure is not so unusual as to justify a lesser standard. The Commission has the authority, as Empire argues, to grant nonemergency relief by applying a case-by-case standard.⁸ Empire has not, however, demonstrated facts that justify the "good cause" standard, and the Commission determines that it shall continue to follow its historical emergency standard for interim rate relief.

Empire alleges that its "return on equity authorized by the Commission in Case No. ER-2001-299 is insufficient to meet the Company's ongoing obligations to its customers."⁹ Empire admits that its request does not meet the emergency standard of the Commission nor that its "financial integrity or ability to render safe and adequate service over the next several months will be jeopardized if the request is not granted."¹⁰ Therefore, the Commission finds that Empire has not met the emergency standard for granting interim rate relief. The Commission will reject the proposed interim tariffs and grant the Public Counsel's motion to dismiss.

Empire has requested an interim rate increase to cover the amount purported to be in error. Empire also made this request in its current general rate case¹¹ filed simultaneously with this interim rate case. Therefore, the issue of the purported error will be resolved in the context of that general rate case. The Commission notes, however, that by rejecting the proposed interim tariff, recovery for the time period prior to the effective date of the general rate increase tariffs will be precluded as retroactive ratemaking.¹²

IT IS THEREFORE ORDERED:

1. That the following tariff sheets filed by The Empire District Electric Company on March 8, 2002, and assigned Tariff File No. 200200744, are rejected:

P.S.C. Mo. No. 5

**Section A, 16th Revised Sheet No. 1, Canceling 15th Revised Sheet No. 1
Section 4, Original Sheet No. 21**

2. That the motion to dismiss filed by the Office of the Public Counsel on March 18, 2002, is granted and this case is hereby dismissed.

3. That all other motions not heretofore expressly ruled upon are hereby denied.

4. That this order shall become effective on May 15, 2002.

5. That this case may be closed on May 16, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Dippell, Senior Regulatory Law Judge

⁸ State ex rel. Arkansas Power & Light Company v. Public Service Commission, 736 S.W. 2d 457 (Mo. App. 1987).

⁹ Direct Testimony of W.L. Gipson, p. 4, ln. 9-11.

¹⁰ Id. at p. 5, ln. 3-5.

¹¹ ER-2002-424.

¹² State ex rel. Utility Consumers Council v. P.S.C., 585 S.W.2d 41 (Mo. banc 1979).

**In the Matter of Missouri Gas Energy's Application for a
Determination of Certain Matters Pertaining to its Safety
Line Replacement Program.**

Case No. GO-2002-48

Decided May 16, 2002

Gas §16. The Commission did not require Missouri Gas Energy to replace the service lines of Farm Tap customers as part of its Safety Line Replacement Program (SLRP).

Gas §16. The Commission approved Missouri Gas Energy's plan for replacement of distribution systems at master meter trailer parks as part of its Safety Line Replacement Program (SLRP).

ORDER APPROVING AMENDED APPLICATION

On July 30, 2001, Missouri Gas Energy (MGE), a division of Southern Union Company, filed an application asking the Commission to determine certain matters pertaining to MGE's Safety Line Replacement Program. Specifically the application relates to two aspects of the Safety Line Replacement Program, Farm Tap Service Lines, and Master Meter Trailer Parks. This order approves MGE's amended application.

MGE's Application, as filed on July 30, 2001, explains that since 1990, MGE (and its predecessor in interest) has been engaged in a substantial infrastructure replacement project known as the Safety Line Replacement Program (SLRP). The Application explains that two aspects of the implementation of the SLRP require the involvement of the Commission. The first relates to Farm Tap Service Lines.

The Application indicates that Farm Tap Service customers receive retail service directly off the interstate pipeline system. These customers are generally able to obtain this service because of the right-of-way agreements, under which the pipeline company laid transmission lines over the farm property. In other words, in return for allowing the pipeline company to construct the pipeline over the farmer's land, the farmer was allowed to tap into the pipeline to obtain natural gas service.

The farm tap customers are actually customers of the pipeline company. However, MGE provides billing service to approximately 600 farm tap customers, primarily off the Williams Pipeline Company's system. MGE owns the meter and odorant pot, the pipeline company owns the regulator, and the farm tap customer owns the service or yard line. MGE renders bills to the customers, fills the odorant pots, reads meters, responds to service calls, and leak surveys the service lines.

If the service lines of the farm tap customers must be replaced under MGE's SLRP, MGE estimates that it would cost approximately \$1.8 million. Most of the cost of replacing service lines would be borne by the farm tap customer. MGE indicates that complete replacement of these farm tap service lines is not necessary given the rural nature of the lines and because there have been few leaks on these service lines.

11 Mo. P.S.C. 3d

MGE proposes that the Commission find that the farm tap service lines need not be replaced as part of the SLRP. MGE would continue to leak survey these lines and repair or replace them as needed. In addition, MGE proposes measures that would formalize the relationship of MGE with the pipeline company and the farm tap customers.

The second aspect of the SLRP for which MGE seeks a modification relates to Master Meter Trailer Parks. The Application indicates that MGE and Staff have identified approximately sixteen trailer parks where a master meter is on the property and service is provided to individual premises through MGE-owned meters, but the balance of the distribution system on the trailer park grounds is not owned by MGE. The Application indicates that it is unclear what the Commission's rules require regarding replacement of these services and mains within the trailer parks. MGE does not want to purchase the existing distribution systems and the owners of the trailer parks have not requested that MGE re-pipe their distribution systems.

MGE proposes to replace these trailer park distribution systems as part of its SLRP with a deadline of June 30, 2006, for completion of the replacement work. Such replacement would be considered part of the SLRP and associated costs would be subject to deferral pursuant to any Accounting Authority Order (AAO) issued by the Commission for SLRP expenditures. The owners of the trailer parks might be billed for a part of the cost of replacement, as provided in MGE's tariffs. After replacement, MGE would own and operate the distribution systems.

The Commission issued an Order and Notice on August 1, giving notice of MGE's application to the County Commission of the counties in MGE's service territory, to the members of the general assembly who represent the counties in MGE's service territory, and to the newspapers that serve the counties in MGE's service territory. That order also directed that any person wishing to intervene should file an application to intervene no later than August 21. No applications to intervene were filed.

On April 12, 2002, the Staff of the Commission filed its Recommendation and Memorandum. Staff generally recommended approval of MGE's Application but recommended certain specific modifications to MGE's proposal. First, with regard to the Farm Tap Customers, Staff indicated that such customers are technically customers of Williams Pipeline Company and therefore, these service lines would not fall under the pipeline replacement program requirements of MGE's SLRP. Williams Pipeline Company is subject to federal pipeline safety requirements, which do not require that such service lines be replaced on a specific schedule.

Staff also indicated that MGE's service to these Williams Pipeline customers is not a regulated tariff service, but is instead a non-regulated customer contract service. Staff is concerned that MGE's regulated customers should not be subsidizing MGE's service to these farm tap customers. Staff recommended specific changes to MGE's proposal to address that concern.

Second, with regard to the Master Meter Trailer Parks, Staff generally agreed with MGE's proposal. However, Staff recommends that MGE provide written notice of its plans to owners and residents of Master Meter Trailer Parks.

On May 2, 2002, MGE filed a response to Staff's recommendation, accompanied by a First Amended Application. MGE's response indicates its agreement with Staff's recommendations, and the First Amended Application incorporates the changes recommended by Staff. On May 10, 2002, Staff filed a reply to MGE's response in which it indicates that MGE's First Amended Application fully complies with Staff's recommendation. Staff recommends that the Commission approve MGE's First Amended Application.

No other party has filed a response to MGE's First Amended Application and no party has requested a hearing regarding that Application. 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.¹ Since no one has asked permission to intervene, or requested a hearing, the Commission may grant the relief requested based on the application.

The Commission has considered MGE's First Amended Application, along with Staff's recommendations. The Commission concludes that MGE's First Amended Application should be approved.

IT IS THEREFORE ORDERED:

1. That the First Amended Application filed by Missouri Gas Energy, a division of Southern Union Company, on May 2, 2002, is approved.
2. That MGE shall handle the maintenance and replacement of the service lines of Farm Tap Customers in the following manner:
 - a. Williams Gas Pipelines-Central will provide MGE \$500,000 in exchange for which MGE will accept responsibility for providing retail service to these customers. MGE shall assume no responsibilities or obligations of any right-of-way agreements that may exist between these Farm Tap Customers and an interstate pipeline company. Nor shall MGE's acceptance of retail service responsibilities for these Farm Tap Customers impair any rights that may exist as a result of any right-of-way agreements between these Farm Tap Customers and an interstate pipeline company. Consistent with past practice, MGE's provision of retail service to these Farm Tap Customers shall be treated as an "incidental" service for accounting and ratemaking purposes. Inquiry may be made during future general rate proceedings as to whether these Farm Tap Customers are being subsidized by the balance of MGE's customer base. Adjustments to the revenue requirement may be proposed as a result of such inquiry but MGE does not acquiesce to the reasonableness of any such future adjustment, which will need to be assessed on the basis of the facts prevailing during such future proceeding.
 - b. The service lines of the Farm Tap Customers need not be replaced under the SLRP. MGE will continue to leak survey these lines annually. If a leak is found, MGE shall either replace the service line in its entirety or repair the leak on a permanent basis, at MGE's sole discretion. Such repair and replacement work need not be performed

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

11 Mo. P.S.C. 3d

by MGE so long as it is done by a qualified individual in a manner up to MGE standards. In the event the service line is replaced in its entirety, MGE shall thereafter leak survey that service line as prescribed by 4 CSR 240-40.030

c. In the event that repair or replacement of a Farm Tap service line is necessary, the customer shall be responsible for the associated costs. If the customer does not agree to pay such costs or have the work done by a qualified individual in a manner up to MGE standards, MGE shall not be required to replace the Farm Tap service line and shall discontinue service. MGE will coordinate with the affected customer repair and replacement work performed on the customer-owned portion of Farm Tap Service Lines and this work will be up to MGE standards. MGE will provide written notice to Farm Tap Customers of the nature and resolution of its Application through the letter appended to the First Amended Application as Attachment A.

3. That MGE shall handle Master Meter Trailer Parks in the following manner:

a. All services and mains in the Master Meter applications will be replaced by MGE by June 30, 2006. Any such replacement will be considered a part of the SLRP and the associated costs (e.g. depreciation expense, property taxes and carrying costs) will be subject to deferral pursuant to any Accounting Authority Order (AAO) issued by the Commission for SLRP expenditures, including the AAO granted by the Commission in Case No. GR-2001-292, in its order dated July 5, 2001. Commission approval of this paragraph shall not be construed as requiring the Commission to grant an AAO with respect to MGE's SLRP in the future, or to require subsequent rate recovery of SLRP costs deferred through issuance of an AAO. All MGE capital expenditures for this work shall be included in rate base, subject to review of the reasonableness of the associated costs.

b. Replacements will be prioritized with those distribution systems in the worst shape being replaced first.

c. Charges to the trailer park owner for the replacement of mains and services shall be in accordance with MGE's approved tariff provisions for main extensions and service replacements.

d. MGE shall not be required to replace services or mains at a given trailer park unless the trailer park owner provides an easement satisfactory to MGE for the purpose of installing the facilities in question.

e. In the event that the trailer park owner does not permit the replacement work to be done according to schedule (by refusing access to MGE, by refusing to pay the necessary charges, or by refusing to provide satisfactory easement), MGE shall disconnect service to that trailer park. Prior to such disconnection, MGE shall provide notice, by handtag or posting in a conspicuous place, to the trailer park owner and the residents of the trailer park. MGE will provide written notice to affected Master Meter Trailer Park owners and

residents of the nature and resolution of its Application through the letter appended to the Amended Application as Attachment B.

f. Until the distribution system is replaced, the current method of leak surveying and leak repair will continue for the Master Meter Trailer Parks.

4. That this order shall become effective on May 26, 2002.

Simmons, Ch., Murray and Lumpe, CC., concur Gaw, C., dissents
Forbis, C., absent

Woodruff, Senior Regulatory Law Judge

In the Matter of the Joint Application of GTE Midwest Incorporated, d/b/a Verizon Midwest, and CenturyTel of Missouri, LLC, for 1) Authority to Transfer and Acquire Part of Verizon Midwest's Franchise, Facilities or System Located in the State of Missouri; 2) for Issuance of Certificate of Service Authority to CenturyTel of Missouri, LLC; 3) to Designate CenturyTel of Missouri, LLC, as Subject to Regulation as a Price Cap Company; and 4) to Designate CenturyTel of Missouri, LLC, as a Telecommunications Carrier Eligible to Receive Federal Universal Service Support.

Case No. TM-2002-232

Decided May 21, 2002

Telecommunications §4. The Commission approved a stipulation and agreement whereby GTE Midwest, Inc., d/b/a Verizon Midwest sold certain of its Missouri facilities, including some 96 exchanges, to CenturyTel of Missouri, LLC.

Telecommunications §23. Under Commission Rule 4 CSR 240-2.115, failure of a party to file a timely objection or request for hearing regarding a stipulation and agreement rendered the Stipulation and Agreement unanimous.

APPEARANCES

W.R. England, III, Esq., and Sondra B. Morgan, Esq., Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for CenturyTel of Missouri, LLC.

James M. Fischer, Esq., and Larry W. Dority, Esq., Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for GTE Midwest, Inc., doing business as Verizon Midwest.

11 Mo. P.S.C. 3d

J. Steve Weber, Esq., AT&T Communications of the Southwest, Inc., 101 West McCarty Street, Suite 216, Jefferson City, Missouri 65101, for AT&T Communications of the Southwest, Inc., and TCG St. Louis, Inc.

Sheldon K. Stock, Esq., Greensfelder, Hemker & Gale, P.C., 200 Equitable Building, 10 South Broadway, St. Louis, Missouri 63102-1774, for Fidelity Communication Services II, Inc.

Paul G. Lane, General Counsel-Missouri, *Leo J. Bub*, Senior Counsel, *Anthony K. Conroy*, Senior Counsel, and *Mimi B. MacDonald*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., doing business as Southwestern Bell Telephone Company.

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

Marc D. Poston, Senior Counsel, Office of the 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: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

On November 28, 2001, GTE Midwest, Inc., doing business as Verizon Midwest, and CenturyTel of Missouri, LLC, filed their Joint Application seeking (1) authority for Verizon to sell, and for CenturyTel to purchase, certain of Verizon's Missouri facilities, including some 96 exchanges; (2) certificates of service authority authorizing CenturyTel to provide basic local and interexchange telecommunications services in Missouri in connection with the facilities and exchanges to be acquired from Verizon; (3) authorizing Verizon to cease providing telecommunications services in the exchanges transferred to CenturyTel; (4) designation of CenturyTel as a company subject to price cap regulation pursuant to Section 392.245, RSMo 2000¹; and (5) designation of CenturyTel as a carrier eligible to receive Universal Service Fund support. Together with their Joint Application, Verizon and CenturyTel also filed their Motion for Protective Order and Motion for Waiver of Commission Rule 4 CSR 240.080(8), which prescribes the number of copies that must be filed with the Commission. In support of the Joint Application, Verizon and CenturyTel filed over 2000 pages of documents and 200 pages of maps showing exchange boundaries.

On December 6, the Commission issued its Order and Notice, setting an intervention deadline of January 4, 2002. On December 7, the Commission adopted its standard protective order for this case. On January 3, 2002, the Office

¹All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

of the Public Counsel filed its request for an evidentiary hearing. On January 11, 2002, the Commission granted the timely intervention applications of Fidelity Communication Services II, Inc., Southwestern Bell Telephone Company, AT&T Communications of the Southwest, Inc., and TCG St. Louis, Inc. On the same day, the Commission set a prehearing conference for January 28.

The prehearing conference was held on January 28, as scheduled. On February 6, Verizon reported on the status of settlement negotiations and requested that the Commission establish a procedural schedule. The Commission adopted a procedural schedule by order issued on February 20. The Joint Applicants filed Direct Testimony on February 21, proposed issues, and proposed findings of fact and conclusions of law on February 28. On March 7, the Intervenor filed responses to the Joint Application. On March 14, Charter Fiberlink-Missouri, LLC, sought leave to intervene out-of-time. On March 21, a nonunanimous stipulation and agreement was filed. Verizon, CenturyTel, the Commission's Staff, Public Counsel, and AT&T and TCG St. Louis signed the nonunanimous stipulation and agreement. On March 22, Southwestern Bell responded to the nonunanimous stipulation and agreement, indicating that it had no objection to it. On March 26, Fidelity Communications requested the Commission to approve a Memorandum of Understanding between it and CenturyTel, thereby resolving all issues between them. Fidelity advised the Commission that it would have no objection to the Stipulation and Agreement so long as its Memorandum of Understanding was approved.

The Commission convened an evidentiary hearing on April 25, 2002. All parties were represented at the evidentiary hearing.

Discussion

The Joint Application:

Verizon and CenturyTel filed a Joint Application seeking (1) authority for Verizon to sell, and for CenturyTel to purchase, Verizon's Missouri system, including 96 local exchanges; (2) certificates of service authority authorizing CenturyTel to provide basic local and interexchange telecommunications services in Missouri in connection with the facilities and exchanges to be acquired from Verizon; (3) authorizing Verizon to cease providing telecommunications services in the exchanges transferred to CenturyTel; (4) designation of CenturyTel as a company subject to price cap regulation pursuant to Section 392.245; and (5) designation of CenturyTel as a carrier eligible to receive Universal Service Fund support.

The Stipulation and Agreement:

Six of the eight parties herein filed a nonunanimous Stipulation and Agreement on March 21, 2002. By Commission rule, the failure of either of the remaining two parties to file a timely objection or request for hearing rendered the Stipulation and Agreement unanimous.² The Stipulation and Agreement is made part of this Report and Order and is attached hereto as Attachment 1. The Stipulation and Agreement provides as follows:

² Commission Rule 4 CSR 240-2.115, (1) and (3).

11 Mo. P.S.C. 3d

The parties stipulate and agree that CenturyTel possesses adequate managerial, engineering and financial skills and resources sufficient to operate Verizon's Missouri system at the same level of quality as Verizon. CenturyTel will retain all of Verizon's current employees and contemplates no immediate change in rates, terms and conditions of service. The parties urge the Commission to approve the proposed transaction as described in the Joint Application and the Asset Purchase Agreement.

The parties stipulate and agree that CenturyTel possesses adequate managerial, engineering and financial skills and resources sufficient to provide basic local and interexchange telecommunications services in Missouri. The parties urge the Commission to grant the requested certificates, effective on the date of the closing of the transaction, and to cancel Verizon's certificates upon receipt of notice that the contemplated transaction has in fact closed.

The parties stipulate and agree that CenturyTel shall, within 30 days of the issuance of a Commission order approving the proposed transaction, file tariffs with a minimum 45 day effective date stating the services it will offer, as well as the rates, rules and conditions of service. CenturyTel shall simultaneously file a pleading in this case stating that the tariffs have been filed. The parties urge the Commission to cancel Verizon's tariffs on the effective date of CenturyTel's tariffs, which date shall be the closing date of the proposed transaction.

The parties stipulate and agree that, as of the closing date of the contemplated transaction, CenturyTel shall have met all requirements for price cap status. The parties urge the Commission to find that CenturyTel is subject to price cap status as of the closing date of the transaction.

The parties stipulate and agree that CenturyTel has met all requirements necessary for designation as a carrier eligible for federal universal service fund support. CenturyTel stipulates that it will offer all of the supported services and that it will advertise their availability and the charges therefor in media of general circulation within its service area. The parties urge the Commission to designate CenturyTel as an eligible carrier.

The parties further stipulate and agree that the authorizations, certificates and approvals granted by the Commission shall include the following conditions:

CenturyTel shall use the same rates, terms and conditions of service as Verizon on the date of the closing of the transaction. CenturyTel shall, in good faith, negotiate interconnection agreements with all carriers who currently have interconnection agreements with Verizon and who desire to interconnect with CenturyTel. Where technically feasible, the new agreement will have the same rates, terms and conditions as did the agreement with Verizon. These agreements will differ from the Verizon agreements only with respect to technical differences to reflect the way CenturyTel interfaces with the interconnecting carrier. In cases in which services are being provided under these interconnection agreements, CenturyTel will cooperate with the interconnecting carriers to secure expeditious approval of a replacement interconnection agreement and to ensure continuity of service for their customers. CenturyTel shall provide local interconnection services as set out in the interconnection agreement between Verizon and Intervenor AT&T, and adopted by Intervenor Fidelity, for a period of one year following the closing of the proposed

transaction. Any interconnection agreement not replaced within one year shall continue in force on a month-to-month basis until replaced.

CenturyTel agrees to submit monthly surveillance data reports to the Commission's Financial Analysis Department until ordered otherwise. Verizon agrees to provide three monthly quality of service reports to the Public Counsel and the Commission's Staff, beginning 90 days before the close of the contemplated transaction. For every service objective not met, Verizon will submit a separate report explaining the reason the objective was not met and the steps taken to improve service quality. CenturyTel shall submit monthly quality of service reports, with separate explanatory reports as necessary, until all quality of service objectives have been met for each of six consecutive months. CenturyTel and Verizon will provide a detailed transition timeline to Staff and the Public Counsel.

CenturyTel agrees to utilize the same depreciation rates as Verizon. Verizon will provide all necessary data in electronic form to CenturyTel at the transfer of assets and CenturyTel will maintain and update this data. CenturyTel will submit the data received from Verizon to Staff within 45 days of receipt.

Finally, in the event that the Commission approves the Stipulation and Agreement, the parties stipulate and agree that they will waive their rights to present testimony, to cross-examine witnesses, to submit briefs or make oral arguments, to require that the Commissioners read the record, and to seek judicial review.

Staff's Supporting Suggestions:

Staff filed Suggestions in Support of the Stipulation and Agreement on April 8. Staff urges the Commission to approve the proposed transaction as not detrimental to the public interest. Staff states that it is satisfied that CenturyTel possesses the expertise and financial resources necessary to operate the exchanges at an acceptable quality level. Staff states that CenturyTel's stated intentions, which include retaining all of Verizon's employees and essentially adopting Verizon's tariffs, pose no threat of public detriment. Staff states, it "has found no evidence to suggest that the transfer of assets is detrimental to the public interest."

Staff also recommends that the Commission grant the certificates of service authority sought by CenturyTel. The Commission may grant such certificates when the statutory requirements are met and the grant is in the public interest. Staff asserts that, as in the case of the transfer of assets, the grant is in the public interest because CenturyTel has the requisite technical and managerial expertise and adequate financing.

Staff further advises the Commission to find that CenturyTel is subject to price cap regulation. Section 392.245 conditions this finding upon a finding that an alternative local exchange carrier has been certificated to provide basic local service within the service area of a large ILEC and is actually providing such service. Staff suggests that, upon the closing of the proposed transaction, CenturyTel will be a large ILEC and that Intervenor TCG St. Louis is a facilities-based alternative local exchange carrier that is duly certificated and actually providing basic local telecommunications service within CenturyTel's service area.

Staff also urges the Commission to designate CenturyTel as a carrier eligible to receive federal universal service fund support, based upon certain stipulations made by CenturyTel.

11 Mo. P.S.C. 3d

Finally, Staff counsels the Commission to condition these authorities, certificates and approvals upon the several specific conditions set out in the Stipulation and Agreement and agreed to by all of the parties.

The Memorandum of Understanding:

On March 26, CenturyTel and Fidelity filed their Memorandum of Understanding and moved the Commission to approve it, advising the Commission that, in the event of its approval, Fidelity would have no objection to the nonunanimous stipulation and agreement filed on March 21.

The provisions of the Memorandum of Understanding, while not identical, are largely similar to the provisions of Paragraph 6.B of the Stipulation and Agreement. In summary, the Memorandum of Understanding provides that CenturyTel will honor Fidelity's existing interconnection agreement with Verizon until it expires and that CenturyTel will then negotiate, in good faith, a new interconnection agreement. Meanwhile, the existing one will remain in force month-by-month until replaced. The Memorandum of Understanding also describes the ordering system by which Fidelity will deliver orders to CenturyTel. The underlying principle is that CenturyTel will work cooperatively with Fidelity to avoid any service interruptions for Fidelity's customers.

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 in making this decision has considered the positions and arguments of all of the parties. 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 Parties:

GTE Midwest, Inc., does business as Verizon Midwest. Verizon is a Delaware corporation and is duly authorized to do business in Missouri under its registered fictitious name. Verizon provides interexchange and basic local telecommunications services to approximately 369,000 access lines in numerous local exchanges in the state of Missouri, pursuant to authority granted by this Commission in Case Nos. TA-88-43, TA-88-78 and TA-88-81. Verizon's principal place of business is located at 601 Monroe Street, Suite 304, Jefferson City, Missouri.

CenturyTel of Missouri, LLC, is a Louisiana limited liability corporation that is duly authorized to do business in Missouri. CenturyTel's principal place of business is located at 100 CenturyTel Drive, Monroe, Louisiana. CenturyTel is a new corporation, formed for the purpose of acquiring and conducting Verizon's telecommunications business in the state of Missouri. CenturyTel is a subsidiary of CenturyTel, Inc., which provides telecommunications services to over three million customers in 21 states. CenturyTel, Inc., concentrates on the provision of communications services in rural exchanges. CenturyTel, Inc.'s affiliate, CenturyTel of Northwest Arkansas, provides telecommunications services in two Missouri exchanges. CenturyTel, Inc., is also an owner of Spectra Communications Group,

LLC, which does business in Missouri as CenturyTel and which operates 107 rural Missouri exchanges previously purchased from Verizon.

Several parties were permitted to intervene in this matter. AT&T Communications of the Southwest, Inc., is a competitive interstate and intrastate interexchange telecommunications carrier that also provides local exchange and basic local exchange services in parts of Missouri. TCG St. Louis, Inc., is a facilities-based alternative local exchange carrier which provides basic local telecommunications service in St. Louis, Missouri. TCG is an affiliate of AT&T. Southwestern Bell Telephone, L.P., does business as Southwestern Bell Telephone Company. Bell is a large incumbent local exchange carrier. Fidelity is a telecommunications company that is seeking authority to provide local exchange telecommunications services in Verizon's Missouri exchanges.

The Sale of System Assets by Verizon:

Verizon and CenturyTel entered into an Asset Purchase Agreement dated October 22, 2001. Under this agreement, Verizon will sell certain of its Missouri assets to CenturyTel, including 96 local exchanges. Upon the closing of the transaction, Verizon will cease providing telecommunications services in the transferred exchanges. CenturyTel, if granted the certificates sought in this proceeding, will become the service provider in the transferred exchanges. CenturyTel plans to retain all of Verizon's employees. CenturyTel also plans to provide services at the same rates, terms and conditions as Verizon. CenturyTel plans to adopt Verizon's tariffs as of the closing date of the proposed transaction. The proposed transaction will not affect the tax revenues of any Missouri political subdivision.

Requirements of Certification:

The Commission may grant an application for a certificate of service authority to provide basic local telecommunications service upon a showing (1) that the applicant has met the statutory requirements,³ and (2) that the grant of authority is in the public interest.⁴ The applicant must also comply with the Commission's procedural rules.⁵ The Commission may grant an application for a certificate of service authority to provide interexchange telecommunications service upon a showing that the grant is in the public interest.⁶

A. Requirements of the Commission's Rules:

Commission Rule 4 CSR 240-2.060, at subsections (1) and (6), requires an entity seeking certification to provide basic local telecommunications services to provide various items of information to the Commission in its application. These include a description of the business organization of the applicant, supported by the certificate of the Missouri Secretary of State; names and addresses for contact

³ See Sections 392.450 and 392.455.

⁴ Sections 392.430 and 392.440.

⁵ See Chapter 2, 4 CSR 240.

⁶ Sections 392.430 and 392.440.

11 Mo. P.S.C. 3d

purposes; a disclosure of any pending or final judgments or decisions against it from any state or federal agency or court involving customer service or rates; a verified statement that there are no outstanding annual reports or assessment fees owed to this Commission; a request to be classified as a competitive telecommunications company, if applicable, and a description of the types of service the applicant intends to provide; the exchanges in which service is to be offered; and a proposed tariff with an effective date which is not fewer than 45 days after its issue date.

Having reviewed the application and supporting materials filed by the Joint Applicants, the Commission finds that CenturyTel has complied with each of these requirements except for the proposed tariff. CenturyTel requests a temporary waiver of 4 CSR 240-2.060(4)(H) until the Commission has approved the transfer of assets and the closing date of that transaction is known. CenturyTel will then submit to the Commission for approval an adoption notice, adopting Verizon's tariffs as of the date of the closing of the transfer.

B. Requirements of Section 392.450:

Section 392.450.1 provides that the Commission may grant a basic local certificate only upon a finding, after notice and a hearing, that the applicant has complied with the certification process established under Section 392.455. Thus, an applicant's satisfaction of the requirements of the Commission's regulations and of Section 392.455 also satisfies Section 392.450.1. As explained below, the Commission does find that CenturyTel has satisfied the requirements of the Commission's regulations and of Section 392.455, and consequently finds that CenturyTel has complied with the certification process established by the Commission in satisfaction of Section 392.450.1.

Section 392.450.2 provides that an applicant for a basic local certificate must (1) file and maintain tariffs with the Commission in the same manner as the incumbent local exchange carriers and (2) meet the minimum service standards, including quality of service and billing standards, that the Commission requires of incumbent local exchange carriers.⁷ CenturyTel did not file a proposed tariff in support of its application. However, CenturyTel states that it will comply with all applicable Commission rules and that it will adopt Verizon's existing tariffs. Thereby, CenturyTel has agreed to provide services that will meet the minimum basic local service standards required by the Commission, including quality of service and billing standards. The parties stipulate and agree that the certificate be granted. Having reviewed CenturyTel's application and supporting materials, as well as the Stipulation and Agreement and Staff's supporting suggestions, the Commission finds that Century-Tel has met the requirements of Section 392.450.2.

C. Requirements of Section 392.455:

Section 392.455 authorizes the Commission to establish a process to grant basic local certification to new entrants and to grant certificates to new entrants to

⁷ "Incumbent local exchange carrier," or "ILEC," is a term of art in the telecommunications industry which refers to a telephone company authorized to provide local telephone service in a specific geographic area as of December 31, 1995. See Section 386.010(22).

provide basic local telecommunications service on a common carriage basis. That section further requires that a new entrant (1) possess sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service; (2) demonstrate that the services it proposes to offer satisfy the minimum standards established by the Commission; (3) set forth the geographic area in which it proposes to offer service and demonstrate that such area follows the exchange boundaries of the incumbent local exchange telecommunications company and is no smaller than an exchange; and (4) offer basic local telecommunications service as a separate and distinct service. Finally, that section also requires that the Commission give due consideration to equitable access for all Missourians to affordable telecommunications services, regardless of where they live or their income.

CenturyTel is not a typical new entrant. CenturyTel seeks to step into Verizon's place as an incumbent local exchange carrier, operating a system including 96 local exchanges. Thereby, CenturyTel will become a major provider of telecommunications services in Missouri. In support of its application, CenturyTel filed a pro forma balance sheet and income statement showing the effect of the transaction upon CenturyTel (Exhibit 6). Based on its review of this information, Staff concludes that CenturyTel has sufficient financial resources and recommends that the application be granted.⁸

In its verified Joint Application, CenturyTel asserts that it "possesses the managerial, engineering and financial expertise necessary to continue to provide the quality of service that Verizon currently provides to its customers in the enumerated exchanges." CenturyTel, Inc., CenturyTel's corporate parent, is a major telecommunications carrier, providing services to more than 3,000,000 customers in 21 states. Related corporations already operate in Missouri. An affiliate, CenturyTel of Northwest Arkansas, provides local exchange services in two Missouri exchanges. Spectra Communications Group, LLC, which does business as CenturyTel, operates 107 rural Missouri exchanges previously purchased from Verizon. CenturyTel, Inc., is one of the owners of Spectra. The parties agree, and the Commission finds, that CenturyTel has met the requirements of Section 392.455(1) in that it has shown that it possesses sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service.

As noted previously, CenturyTel has stated that it will provide services at the same level of quality as Verizon in the transferred exchanges. CenturyTel will use Verizon's existing infrastructure and personnel to operate the purchased exchanges and will also use Verizon's existing tariffs, including rates, services and access rates. The transition will be "seamless" from the customer's point of view. Based on these considerations, the Commission finds that CenturyTel has

⁸In analyzing an applicant's resources, Staff applies two tests: First, does the applicant have a total debt-to-capital ratio not exceeding 62 percent and pretax interest coverage of at least 2.3x? Second, does the applicant have a cash balance equal to four months operating expenses, including interest expense and taxes? The applicant need only meet one of these two tests.

11 Mo. P.S.C. 3d

demonstrated that the services it proposes to offer satisfy the minimum standards established by the Commission, in satisfaction of Section 392.455(2).

In the Joint Application, CenturyTel seeks certification in some 96 Missouri exchanges operated by Verizon. The Joint Application contains a list of these exchanges and is supported by maps showing the boundaries of each of these exchanges. The parties agree, and the Commission finds, that CenturyTel has met the requirements of Section 392.455(3) in that it has set forth the geographic areas in which it proposes to offer service and has demonstrated that each such area follows the exchange boundaries of the incumbent local exchange telecommunications company and is no smaller than an exchange.

In the Joint Application, CenturyTel states that it will offer basic service as a separate and distinct service. Based on this statement, the Commission finds that CenturyTel has met the requirements of Section 392.455(4), that all providers offer basic local telecommunications service as a separate and distinct service.

In the Joint Application CenturyTel states that it will give consideration to equitable access for all Missourians, regardless of where they reside or their income, to affordable telecommunications service. In fact, it is the Commission that the statute directs to consider this matter, not the applicant. CenturyTel's services are intended for the general public in each of the 96 exchanges it is acquiring from Verizon. Therefore, granting the requested certificate will further the goal announced by the Legislature.

D. The Public Interest:

Section 392.430 provides that the Commission shall approve an application for a certificate of service authority to provide either interexchange telecommunications service or basic local telecommunications service upon a finding that the grant of service authority is in the public interest.

CenturyTel is a member of a corporate family that constitutes a major provider of telecommunications services in the United States. At least two related entities --CenturyTel of Northwest Arkansas and Spectra Communications Group, LLC, d/b/a CenturyTel -- already provide telecommunications services in Missouri at an acceptable level of quality. CenturyTel possesses the experience, skills and financial resources to operate a 96 exchange incumbent local exchange company. Verizon desires to sell 96 local exchanges and to be relieved of its obligation to provide services with respect to those exchanges; CenturyTel desires to acquire those 96 exchanges and to assume the service obligations previously imposed upon Verizon.

Withdrawal of Verizon from the Transferred Exchanges:

The Joint Application contains a prayer by Verizon to be relieved, if the proposed transaction is approved, from any obligation to provide telecommunications services in the transferred exchanges after the day the sale closes. That prayer will be granted. Verizon must file proposed amended tariff sheets which delete all references to the transferred exchanges and which make any other appropriate changes consequent to this transaction.

Price-cap Regulation:

In order to qualify for price cap regulation under Section 392.245.2, CenturyTel must show: (1) that an alternative local exchange company is properly certificated to provide local exchange telecommunications services in the Applicant's service area, and (2) that the alternative local exchange carrier is, in fact, providing such services in any part of the Applicant's service area.

The Commission finds, after consideration of the Joint Application and supporting materials, the Stipulation and Agreement and Staff's Suggestions, that Intervenor TCG St. Louis is a facilities-based, alternative local exchange carrier that is duly certificated and actually providing basic local telecommunications service within CenturyTel's service area. The Commission further finds that, upon the closing of the proposed transaction, CenturyTel will be a large ILEC within the intendments of Section 392.245.2 in that it will operate in excess of 100,000 access lines.

Eligibility of CenturyTel for Universal Service Fund Support:

The parties stipulated and agreed that CenturyTel has met all requirements necessary for designation as a carrier eligible for federal universal service fund support. CenturyTel, further, stipulated and agreed that it will offer all of the supported services and that it will advertise their availability and the charges therefor in media of general circulation within its service area. The parties urged the Commission to designate CenturyTel as an eligible carrier.

Based on the record presently before it, the Commission finds that as of the date of this Report and Order, CenturyTel does not offer or provide any of the supported services within a Missouri service area. Likewise, CenturyTel does not advertise either their availability or the charges therefor in media of general circulation within a Missouri service area.

Conclusions of Law

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

Jurisdiction:

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Verizon pursuant to Section 386.250 and Chapter 392. The Commission likewise has jurisdiction over CenturyTel, as the prospective purchaser of a portion of Verizon's Missouri network and as an applicant for Missouri certification.

The Stipulation and Agreement:

This case has been resolved by the filing of a nonunanimous stipulation and agreement. The Commission's practice rules provide that, upon the filing of a nonunanimous stipulation and agreement, the non-joining parties have seven days within which to file a request for a hearing.⁹ No party filed a timely request for a hearing and the nonunanimous stipulation and agreement thus became

⁹ Commission Rule 4 CSR 240-2.115(3).

11 Mo. P.S.C. 3d

unanimous by operation of law.¹⁰ The Commission has the legal authority to accept a stipulation and agreement in resolution of the issues raised in this case.¹¹

The Memorandum of Understanding:

CenturyTel and Fidelity jointly moved the Commission to approve their Memorandum of Understanding. The Memorandum of Understanding, in turn, is an agreement between those parties relating to the existing interconnection agreement between Verizon and Fidelity. The Memorandum of Understanding "settles the outstanding issues between [Verizon and Fidelity] with respect to this proceeding." Its provisions, summarized elsewhere in this Report and Order, are for the most part a restatement of the pertinent part of the Stipulation and Agreement.

The joint movants did not, in their Motion, cite the Commission to any source of authority that empowers the Commission to approve private agreements such as the Memorandum of Understanding. The Commission has reviewed the Memorandum of Understanding and concludes that approval or other action by the Commission is not necessary.

The Sale of System Assets by Verizon:

"No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do."¹² The statute does not contain a standard to guide the Commission in the exercise of its discretion. That is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."¹³ Referring to a statute applicable to water corporations, the Missouri Court of Appeals stated, "The obvious purpose of [the statute] is to ensure the continuation of adequate service to the public served by the utility."¹⁴ To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently.¹⁵

The parties herein agree that CenturyTel has adequate experience, skills and financing to operate an incumbent local exchange company in 96 local exchanges. The record shows that CenturyTel is part of a corporate family that provides telecommunications services to millions of customers in some 21 states. There is no evidence in the record suggesting that the acquisition will unduly burden CenturyTel's finances or indicating a history of service quality problems. Verizon

¹⁰ Commission Rule 4 CSR 240-2.115, (1) and (3).

¹¹ Section 536.060.

¹² Section 392.300.

¹³ Commission Rule 4 CSR 240-2.060(5)(D).

¹⁴ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

¹⁵ See *In the matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

desires to sell the system and to be relieved of the obligations that go with it; CenturyTel desires to buy the system and to undertake the associated obligations. Based on the record before it, the Commission concludes that the transaction is not detrimental to the public interest and should be approved.

The Commission has reviewed and carefully considered the Stipulation and Agreement and the conditions contained therein. The parties conditioned their support of the Joint Application upon that agreement. Therefore, the Commission will approve CenturyTel's acquisition of Verizon's exchanges subject to the conditions contained in the Stipulation and Agreement.

Certificates of Service Authority:

Having found that CenturyTel has met all of the requirements for certification to provide basic local and interexchange telecommunications services as a common carrier, it remains to determine whether it is in the public interest to grant the requested certificates. The public interest is found in the

positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.¹⁶

"[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation."¹⁷

In consideration of the foregoing, and based upon the findings of fact made herein, including its finding that CenturyTel has met all of the requirements for the requested certifications, the Commission concludes that granting the requested certifications is in the public interest.

Withdrawal of Verizon from the Transferred Exchanges:

The joint application contains a prayer by Verizon to be relieved, if the proposed transaction is approved, from any obligation to provide telecommunications services in the transferred exchanges after the day the sale closes. That prayer will be granted. Verizon must file any necessary amended tariff sheets to delete all references to the transferred exchanges and to make any other appropriate changes consequent to this transaction.

Waiver of the "Slamming" Rule:

Commission Rule 4 CSR 240-33.150 requires customer verification of carrier-initiated changes of a customer's designated telecommunications service provider. This rule was adopted to prevent the practice of "slamming," the changing of a customer's telecommunications service provider without the customer's

¹⁶ *In re Rahn's Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (1926), *cert. den'd*, 274 U.S. 745, 47 S.Ct. 591, 71 L.Ed. 1325.

¹⁷ *Moorshead v. Railways Co.*, 203 Mo. 121, 165, 96 S.W. 261, 271 (banc 1907).

11 Mo. P.S.C. 3d

knowledge or consent. Upon the closing of the transfer herein approved, all of Verizon's customers in the transferred exchanges will become CenturyTel's customers. This transfer is not "slamming" and Rule 4 CSR 240-33.150 shall therefore be waived.

Price-cap Regulation:

A "large incumbent local telecommunications company shall be subject to regulation under this section upon a determination by the commission that an alternative local telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area."¹⁸ The record shows that, upon the closing of the proposed transfer of assets, CenturyTel will meet the conditions contained in Section 392.245.2, and thus will be subject to price cap regulation.

Section 392.245.3 provides that the maximum allowable rates for a company subject to price cap regulation are those in effect on December 31 of the year preceding the year in which the company is first subject to price cap regulation, except as otherwise provided in the statute. Therefore, the Commission determines that the initial maximum allowable prices that CenturyTel may charge for its telecommunications services are the prices that were in effect in the 96 exchanges on December 31, 2001.

Eligibility of CenturyTel for Universal Service Fund Support:

Section 254 of the Telecommunications Act of 1996, provides for Universal Service.¹⁹ Universal Service is a principal component of federal telecommunications policy and seeks to ensure access to telecommunications services for all Americans. One aspect of Universal Service is the availability of subsidies from the Universal Service Fund created by the Act. Only carriers designated as eligible carriers pursuant to Section 214(e) of the Act may receive such subsidies.²⁰

Section 214(e) provides that the Commission

Upon request and consistent with the public interest, convenience, and necessity . . . [the State Commission] may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State Commission, so long as each additional requesting carrier meets the requirements of paragraph (1).²¹

Section 214(e)(1), in turn, provides:

¹⁸ Section 392.245.2.

¹⁹ Codified at 47 U.S.C. Section 254.

²⁰ 47 U.S.C. Section 254(e).

²¹ 47 U.S.C. Section 214(e)(2).

A common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received-

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefore using media of general distribution.²²

Section 214(e)(1) of the Act requires that a designated carrier both offer and advertise the eligible services throughout the designated service area. The Commission has previously concluded that the statutory language is not a meaningless formality and that the Act requires that a carrier both offer and advertise the services in question throughout its designated service area upon designation.²³ CenturyTel is not presently either offering or advertising the services in question.

However, the present case differs significantly from those cited in Note 23, above. Verizon is an eligible carrier and both offers and advertises all of the eligible services in its exchanges. On the date that the transfer approved elsewhere in this Report and Order closes, CenturyTel will step into the shoes of Verizon in 96 exchanges. CenturyTel will offer all of the eligible services from that moment at the same rates and under the same regulations and conditions as does Verizon. This is a far different case from that of a fledgling CLEC that seeks designation for services it has never either offered or advertised. CenturyTel is taking over a going concern that is already designated.

The Commission finds, based upon the Joint Application, the Stipulation and Agreement, and Staff's Suggestions, that CenturyTel meets the requirements set out in 47 U.S.C. Section 214(e)(1) and that the requested designation is consistent with the public interest, convenience and necessity. The record does not show that any of the exchanges in question are served by a rural telephone company.²⁴ Therefore, the Commission must grant the requested designation for each of the 96 exchanges.

²² The FCC's implementing regulation at 47 CFR Section 54.201 repeats the language of the Act.

²³ *In the Matter of the Application of Fidelity Communication Services I*, Case No. TA-2002-122 (*Order Granting Designation as an Eligible Carrier*, issued November 6, 2001) at 4; *In the Matter of the Application of ExOp of Missouri, Inc.*, Case No. TA-2001-251 (*Order Granting Designation as an Eligible Carrier*, issued May 15, 2001) at 9.

²⁴ 47 U.S.C. Section 214(e)(2).

11 Mo. P.S.C. 3d

IT IS THEREFORE ORDERED:

1. That all pending motions not already ruled herein are denied.
2. That the Stipulation and Agreement filed herein on March 21, 2002, is approved. The various grants of authority and certificates of service authority to CenturyTel of Missouri, LLC, contained in this Report and Order are subject to the conditions contained in the Stipulation and Agreement filed herein on March 21, 2002, a copy of which is attached hereto as Attachment 1. CenturyTel of Missouri, LLC, is ordered to comply with those conditions.
3. That, as of the date of the closing of the transaction approved in Ordered Paragraph 4, below, GTE Midwest, Inc., doing business as Verizon Midwest, is relieved from any obligation to provide telecommunications services in any of the exchanges sold to CenturyTel of Missouri, LLC.
4. That GTE Midwest Inc., doing business as Verizon Midwest, is authorized to transfer and sell to CenturyTel of Missouri, LLC, subject to the conditions referred to in Ordered Paragraph 2, above, all of its telecommunications facilities, assets and equipment located in the several exchanges described in Exhibit 3 of the Joint Application filed herein on November 28, 2001, a copy of which is attached hereto as Attachment 2, pursuant to the Asset Purchase Agreement set out in Exhibit 2 (proprietary) of the Joint Application, and to take all other lawful actions necessary to consummate this transaction.
5. That nothing in this Report and Order is intended to alter the terms of any existing interconnection agreement without the assent of the parties.
6. That CenturyTel of Missouri, LLC, 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 and subject to the conditions referred to in Ordered Paragraph 2, above. The certificate of service authority shall become effective when the company's tariff becomes effective.
7. That CenturyTel of Missouri, LLC, is granted a certificate of service authority to provide basic local exchange telecommunications services in the state of Missouri, subject to all applicable statutes and Commission rules and subject to the conditions referred to in Ordered Paragraph 2, above. The certificate of service authority shall become effective when the company's tariff becomes effective.
8. That the request for waiver of the filing requirements of 4 CSR 240-2.060(4)(H), which requires the filing of a 45 day tariff, is granted. CenturyTel of Missouri, LLC, is hereby ordered to file its tariff not less than 45 days prior to the closing date of the transaction authorized in Ordered Paragraph 4, above. Any such tariff shall adopt in all material respects the tariffs of GTE Midwest, Inc., doing business as Verizon, as of the closing date of the transaction authorized in Ordered Paragraph 4, above. CenturyTel of Missouri, LLC, shall simultaneously file a pleading in this case advising the Commission that the tariffs have been filed.
9. That the request for waiver of Commission Rule 4 CSR 240-33.150 is granted.
10. That CenturyTel of Missouri, LLC, shall be subject to price cap regulation pursuant to Section 392.245.2, RSMo 2000.
11. That CenturyTel of Missouri, LLC, shall not charge prices in excess of those effective in the transferred exchanges on December 31, 2001, except as otherwise allowed by Section 392.245, RSMo 2000.
12. That CenturyTel of Missouri, LLC, is hereby designated as an eligible carrier to receive federal Universal Service Fund support in each of the exchanges transferred from GTE Midwest, Inc., doing business as Verizon Midwest.

13. That GTE Midwest, Inc., doing business as Verizon Midwest, shall, within ten days of the closing of the transaction herein approved, file in this case its motion requesting that its tariffs be canceled, specifying with particularity each sheet to be canceled, and advising the Commission that the transaction has closed.

14. That this Report and Order shall become effective on May 31, 2002.

Simmons, Ch., Murray, Lumpe, Gaw,
and Forbis, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo 2000.

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 Tariff Revisions Respecting the Interim
Energy Charge of The Empire District Electric Company.**

*Case No. ER-2002-1074
Decided June 4, 2002*

Electric § 20. The Commission approved the parties' unanimous stipulation and agreement regarding an alleged "error" in Case No. ER-2001-299, the company's most recent rate case. The stipulation and agreement provided for an immediate reduction of the company's Interim Energy Charge. The Commission also approved the proposed tariff sheet that was designed to implement the proposed reduction to the Interim Energy Charge.

Rates § 81. The Commission approved the parties' unanimous stipulation and agreement regarding an alleged "error" in Case No. ER-2001-299, the company's most recent rate case. The stipulation and agreement provided for an immediate reduction of the company's Interim Energy Charge. The Commission also approved the proposed tariff sheet that was designed to implement the proposed reduction to the Interim Energy Charge.

Rates § 104. The Commission approved the parties' unanimous stipulation and agreement, which provided for a reduction of the Interim Energy Charge. The Commission also approved The Empire District Electric Company's proposed tariff that implemented the reduction in the Interim Energy Charge.

**ORDER APPROVING UNANIMOUS
STIPULATION AND AGREEMENT AND APPROVING TARIFF**

Syllabus:

This order approves the Unanimous Stipulation and Agreement filed by the parties, grants the motion for expedited treatment, and approves the company's proposed tariff.

11 Mo. P.S.C. 3d

Background:

On March 8, 2002, The Empire District Electric Company filed proposed tariff sheets with the Commission, in what became Case No. ER-2002-425. The Company's filing constituted a request for interim rate relief and was submitted concurrent with its filing for a permanent rate increase in Case No. ER-2002-424. Empire's proposed interim tariff sheets were designed to increase the Company's Missouri jurisdictional revenues by \$3,552,983, exclusive of fees and applicable taxes. The tariff sheet proposed implementation of the interim increase as a surcharge to customers, which would be subject to refund pending the Commission's decision in Case No. ER-2002-424, wherein the Company is requesting a permanent general rate increase of \$19,779,916. On May 9, 2002, the Commission issued an order rejecting Empire's proposed interim tariff sheets and granting Public Counsel's motion to dismiss Case No. ER-2002-425. On May 17, 2002, Empire filed an application for rehearing of that decision.

On May 14, 2002, Empire, the Staff of the Commission, and the Office of the Public Counsel, and Praxair, Inc., filed a Unanimous Stipulation and Agreement Regarding "Error" in Case No. ER-2001-299 and an Immediate Reduction of the Interim Energy Charge. This filing created the current case, ER-2002-1074. Empire filed a tariff sheet (the Rider CIEC) designed to implement the proposed reduction to the Interim Energy Charge (IEC) on May 15, 2002.

On May 16, 2002, the parties filed a Motion for Expedited Treatment, seeking approval of the Stipulation and Agreement and Rider CIEC (tariff) on an expedited basis. The parties request that the Commission issue an order approving the Stipulation and Agreement and the Rider CIEC (tariff) to become effective ten days after issuance. For an order to comply with the request for expedited treatment, the order must be issued on or before Tuesday, June 4, 2002, as the Rider CIEC has a proposed effective date of June 14, 2002.

Discussion:

The Stipulation and Agreement notes that the Commission issued its Report and Order in Empire's recent electric rate case (Case No. ER-2001-299), on September 20, 2001. In that order, the Commission approved, among other things, a Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expenses and Class Cost of Service and Rate Design (Fuel Stipulation and Agreement). All parties in ER-2001-299 entered into the Fuel Stipulation and Agreement, and those parties are the same parties to the instant Agreement.

One of the subjects of the Fuel Stipulation and Agreement concerns an Interim Energy Charge (IEC) to be implemented by Empire. Paragraph 10 of that document provides in part as follows:

Subsequent to the expiration of the IEC, a true-up audit will commence ("the IEC true-up audit") in which the Staff and the Public Counsel will have the opportunity to audit Empire's actual fuel costs for the period during which the IEC was in effect under the same terms and conditions that apply to audits in general rate cases before the Commission. If the IEC true-up audit determines that all or a portion of the revenue collected

by Empire pursuant to the IEC exceeds Empire's actual and prudently incurred costs for fuel and purchase power (as recorded in the FERC accounts 501, 547 and 555) on a retail Missouri jurisdictional basis during the IEC period, Empire will refund the excess above the greater of the actual or the Base, plus interest, pursuant to the terms of this Agreement. No refund will be made if Empire's actual and prudently incurred costs for fuel and purchase power during the IEC period equal or exceed the Forecast amount.

In order to reduce the potential for problems associated with this audit, the parties entered into the pending Stipulation and Agreement. The Stipulation and Agreement includes, but is not limited to, the following provisions:

- Clarifying language, in paragraphs 4 and 5, regarding how the actual fuel-related costs are to be treated for purposes of the true up audit.
- An acknowledgement by Empire that it has an opportunity to recover the approximately \$3.6 million "error" that was at issue in the interim case, Case No. ER-2002-425, through the Fuel Stipulation and Agreement.
- A reduction in the IEC charges to its customers (to be implemented through the proposed tariff).
- The parties agree that Empire will not receive any interim rate relief through this Stipulation and Agreement.
- An agreement that if the Commission approves the Stipulation and Agreement, Empire will forego its right to appeal the Commission's May 9, 2002, decision in Empire's interim rate case (Case No. ER-2002-425), as well as any Commission decision respecting any application for rehearing that Empire may file in that interim rate case.

On May 28, 2002, Staff filed its suggestions in support of the Stipulation and Agreement. Staff recommends that the Commission issue an order approving the Unanimous Stipulation and Agreement and approving the Rider CIEC. Staff notes that during the course of negotiations in Case No. ER-2002-425, it became clear that, notwithstanding the Commission's action in the interim case (ER-2002-425) rejecting Empire's proposed interim tariff sheets, Empire is interested in: (a) reducing the amount of the company's IEC currently in effect as a result of the Fuel Stipulation and Agreement from Case No. ER-2001-299; and (b) clarifying some of the language in the Fuel Stipulation and Agreement. Upon further review, Staff determined that its revenue requirement calculation "error", for which Empire has twice sought relief from the Commission, would not likely prevent Empire from recovering its prudently incurred cost of off system sales and fuel adders. As a result of these developments, the parties to this case, which are the same parties in Case No. ER-2001-299, ER-2002-424, and ER-2002-425, filed the pending Unanimous Stipulation and Agreement.

11 Mo. P.S.C. 3d

On May 31, 2002, Public Counsel filed a notice that it would not file a pleading in response to the Staff's Suggestions in Support of the Stipulation and Agreement. On the same date, Empire filed its responsive suggestions, urging the Commission to approve the Stipulation and Agreement and the proposed tariff (Rider CIEC). On June 3, 2002, Praxair file a notice indicating that it would not file a responsive pleading.

Staff filed its recommendation regarding the proposed tariff (Rider CIEC), on May 31, 2002. Staff recommends that the Commission, in an order approving the Stipulation and Agreement, also approve the proposed tariff sheet (Rider CIEC), to become effective on the effective date of the order.

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.¹ In reviewing the Unanimous Stipulation and Agreement submitted by the parties, the Commission notes that²

[e]very decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. 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.³ Since the parties waived their rights to a hearing as part of the stipulation and agreement, the Commission may grant the relief requested based on the Unanimous Stipulation and Agreement.

The Commission has reviewed the Stipulation and Agreement, the tariff, and the various pleadings, and has determined that the Stipulation and Agreement and the tariff should be approved. The Commission also finds that there is good cause to permit the proposed tariff to become effective on less than 30 days notice, and will grant the Motion for Expedited Treatment.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement Regarding "Error" In Case No. ER-2001-299 and An Immediate Reduction of the Interim Energy Charge, filed on May 14, 2002, is approved.
2. That the Motion for Expedited Treatment is granted.
3. That the proposed tariff (tariff file no. 200200972), filed on May 15, 2002, is approved to become effective on June 14, 2002.

¹ Section 536.060, RSMo Supp. 2001.

² Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Associaton v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

4. That this order shall become effective on June 14, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Ruth, Senior 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 United Cities Gas Company's Tariff Filing to
Revise Its PGA Clause.**

*Case No. GT-2002-361
Decided June 4, 2002*

Gas §17.1. The Commission found that the stipulation and agreement which allowed United Cities Gas Company to make up to four purchased gas adjustment clause filings per year was reasonable.

Gas §17.1. The Commission found that the stipulation and agreement which allowed the company to make certain optional purchased gas adjustment clause filings when the company determined that elements had changed significantly from the factor currently in effect was reasonable.

Gas §17.1. The Commission found that the limitation in the stipulation and agreement that optional purchased gas adjustment clause tariff filings could not become effective in two consecutive months unless ordered by the Commission was reasonable.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement of the parties and directs United Cities Gas Company, a division of Atmos Energy Corporation, to submit tariff sheets in compliance with the order.

On January 25, 2002, United Cities Gas Company, a division of Atmos Energy Corporation, submitted proposed revised tariff sheets. The proposed tariff sheets would: (1) increase the number of permissible purchased gas adjustment (PGA) clause filings per year; (2) eliminate price caps from the estimation formula of PGA rates; (3) include hedging costs in the PGA calculation; and (4) eliminate the Deferred Carrying Cost Balance (DCCB) and its associated threshold levels relating to the computation of interest. The proposed tariff sheets were suspended on March 26, 2002.

On May 9, 2002, after meeting for a prehearing conference and having other negotiations, United Cities, the Staff of the Commission, and the Office of the Public Counsel filed a stipulation and agreement. The signatories have agreed that United Cities should be allowed make up to four PGA filings each year. The four

11 Mo. P.S.C. 3d

filings would include a required Winter PGA and three Optional PGA filings. The parties agree that the "Optional PGA filings shall be filed when the Company determines that elements have changed significantly from the currently effective factor." In addition, the parties agreed that the Optional PGA filings would "not become effective in two consecutive months unless specifically . . . ordered by the Commission." The parties included illustrative tariff sheets with their agreement. Finally, the signatories agreed that the other tariff issues of this cases would be resolved in Commission Case No. GO-2002-452.¹

On May 23, 2002, Staff filed suggestions in support of the stipulation and agreement. Staff stated that in its opinion the settlement is appropriate because it will reduce the amount of overcollection or undercollection of gas costs from customers. Staff also stated that this agreement is consistent with tariffs recently approved in Case No. GT-2002-387.² Staff stated that the agreement is also consistent with the recommendations of the Commission's Natural Gas Task Force.

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.³ In reviewing the Unanimous Stipulation and Agreement submitted by the parties, the Commission notes that⁴

[e]very decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.

Consequently, the Commission need not make either findings of fact or conclusions of law in this order. 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.⁵ Since the parties waived their rights to a hearing as part of the stipulation and agreement, the Commission may grant the relief requested based on the Unanimous Stipulation and Agreement.

The Commission has reviewed the stipulation and agreement and has determined that the stipulation and agreement should be approved. The Commission will direct United Cities to file tariff sheets in compliance with the terms of the stipulation and agreement.

¹ *In the Matter of the Review of the Purchased Gas Adjustment Clauses in the Tariffs of Local Distribution Companies.*

² *In the Matter of Laclede Gas Company's Filing to Revise Its Purchased Gas Adjustment/Actual Cost Adjustment Tariff Sheet.*

³ Section 536.060, RSMo Supp. 2001.

⁴ Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

⁵ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on May 9, 2002, by United Cities Gas Company, a division of Atmos Energy Corporation, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, is approved. (See Attachment 1).
2. That United Cities Gas Company, a division of Atmos Energy Corporation, shall file tariff sheets in compliance with the terms of the Unanimous Stipulation and Agreement no later than June 24, 2002.
3. That this order shall become effective on June 14, 2002.

Simmons, Ch., Murray, Lumpe, Gaw,
and Forbis, CC., concur.

Dippell, Senior 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.

Computechology, Inc., Petitioner, vs. Spectra Communications Group, L.L.C., CenturyTel, Inc., and GTE Midwest, Inc., doing business as Verizon Midwest, Respondents.

Case No. TC-2002-1100

Decided June 6, 2002

Service §6. Because the failure to grant temporary relief would have the effect of rendering a final judgment for injunctive relief ineffectual, the Commission directed Respondents to restore the discontinued service to Complainant pending the resolution of the underlying complaint case.

ORDER DIRECTING SERVICE RESTORATION

On May 31, 2002, Petitioner Computechology, Inc., filed its Complaint against Respondents Spectra Communications Group, L.L.C., CenturyTel, Inc., and GTE Midwest, Inc., doing business as Verizon Midwest. Computechology is an Internet Service Provider¹ and purchases telecommunications services from one or more - perhaps all - of the Respondents.² Computechology alleges numerous billing irregularities and other service inadequacies in its Complaint. Furthermore, Computechology alleges that ISPs affiliated with the Respondents do not suffer these problems. Services to Computechology have recently been discontinued due to its refusal to pay disputed amounts billed to it by the Respondents.

¹ Internet Service Providers are generally referred to in the industry as "ISPs" and will be so referenced here.

² The Complaint is unclear on this point and notes that Spectra and CenturyTel have recently received Commission approval to purchase the assets of Verizon. Perhaps Petitioner is unsure which Respondent is and will be responsible for its service as this matter proceeds.

11 Mo. P.S.C. 3d

Computechology prays that the Commission will order that service be restored and maintained pending the outcome of this proceeding.

On June 4, Spectra Communications Group, L.L.C., doing business as CenturyTel, filed its Suggestions in Opposition to Petitioner's Motion for Expedited Treatment. Spectra urges the Commission to refuse Petitioner's request for an order to restore and maintain service because Computechology owed, as of the disconnection date, some \$9,543.14 on its two T-1 lines. Further, Spectra asserts that Computechology has not made a payment since March 2002.

The Commission is an administrative tribunal and possesses those powers enumerated in Chapters 386 and 392, RSMo, and also those other powers "necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter."³ One power specified in Chapter 386 is the power to hear and determine complaints brought by any corporation or person against a public utility.⁴ This power would be rendered useless were the Commission not able to require that utility service be restored and maintained while the dispute is pending. Elsewhere, the Commission is granted general supervisory authority over public utilities, including the manner in which their business is conducted and their general compliance with the laws.⁵ Those laws, in turn, require that all facilities be adequate, that all charges be just and reasonable, and that no customer be subjected to either undue discrimination or undue favoritism.⁶ This power, too, would be meaningless were the utility to be permitted to compel the surrender of its opponent by withholding necessary services. Therefore, it follows that the Commission's authority necessarily extends to and includes the power to require that services be restored and maintained pending the resolution of a dispute between the utility and its customer.

Under what circumstances should the Commission exercise this power? There are no reported cases in Missouri dealing with the Commission's exercise of this authority. However, there are cases in which a utility customer has sought by injunction to compel the restoration and maintenance of service.⁷ The standard that the Commission has applied in such cases in the past is that of "good cause shown."⁸ "'Good cause' depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which the decision is committed."⁹

The Complaint includes an allegation that the termination of service has caused Computechology to lose customers and that it will soon force

³ Section 386.040, RSMo 2000. All statutory references herein, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁴ Section 386.390.1.

⁵ Section 386.320.1, RSMo Supp. 2001.

⁶ Section 392.200, 1, 2 and 3, RSMo Supp. 2001.

⁷ See *State ex rel. Imperial Utility Corp. v. Borgmann*, 664 S.W.2d 215, 218 (Mo. App., W.D. 1983).

⁸ See *Christup v. Hoffschneider d/b/a Cape Fair Mobile Home Park*, Case No. WC-97-248 (*Order Directing Restoration of Service*, issued Dec. 31, 1996).

⁹ *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo. 1963).

Computechology to cease operations altogether. This allegation constitutes good cause and is sufficient, in and of itself, to support an order to restore and maintain service because "the failure to grant [temporary relief] would have the effect of rendering a final judgment for injunctive relief ineffectual."¹⁰ In other words, because the cessation of service will destroy Computechology as a going concern, the Respondents would prevail in their dispute, regardless of the merits, if the cessation of service is permitted to continue. Thus, the Commission finds that Computechology has shown good cause such as supports an order to restore and maintain service while this case is pending.

It is true that the Commission generally requires that all amounts not in dispute be paid while an order to restore and maintain service is in force.¹¹ However, in the present case, neither Petitioner nor Respondent has informed the Commission what amount is in dispute and what amount is not in dispute. Consequently, that is a matter that must wait for an evidentiary hearing.

How quickly can the Commission act? "Temporary restraining orders, of course, are emergency measures, often issued *ex parte*, where there is a need to protect an applicant from immediate and irreparable injury which may result to the applicant before a formal contested hearing can be scheduled."¹² Of course, the Commission is not a court and cannot grant equitable relief. Nonetheless, there are circumstances in which immediate action is required in the field of utility regulation and the Commission is authorized to grant immediate relief, on an *ex parte* basis if necessary, in appropriate cases: "The commission may waive the requirements for notice and hearing and provide for expeditious issuance of an order in any case in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property, provided that the commission shall include in such an order an opportunity for hearing as soon as practicable after the issuance of such order."¹³

Taking as true the allegations set out in Petitioner's Complaint and accompanying Motion for Expedited Treatment, the Commission finds that immediate, temporary relief is warranted here. Computechology is the property of its shareholders. The termination of telecommunications service to Computechology prevents it from operating and poses an imminent danger to its existence as a going concern. The serious nature of this threat outweighs Respondent's interest in collecting an overdue account. Therefore, the Commission will order the immediate restoration and maintenance of services pending the opportunity for an evidentiary hearing. The Commission will also set a hearing on an expedited basis so that the parties may be heard on the issue of the restoration and maintenance of service as soon as reasonably possible.

¹⁰ *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 648 (Mo. App., W.D. 1995)

¹¹ See *e.g.* Commission Rules 4 CSR 240-13.045(5), (6) and 4 CSR 240-13.050(5). Note that these provisions apply only to disputes involving residential customers.

¹² *Id.*, at 646.

¹³ Section 386.310.1. Of course, this case is not *ex parte* as Respondents have been heard from.

11 Mo. P.S.C. 3d

IT IS THEREFORE ORDERED:

1. That Respondents Spectra Communications Group, L.L.C., CenturyTel, Inc., and GTE Midwest, Inc., doing business as Verizon Midwest, shall immediately restore services to Petitioner Computechology, Inc., upon payment by Computechology of \$9,543.14. Respondents shall maintain such services to Petitioner pending the further order of this Commission, provided, however, that Computechology shall promptly pay in full all bills rendered to it for services provided by Respondents.

2. That Respondents Spectra Communications Group, L.L.C., CenturyTel, Inc., and GTE Midwest, Inc., doing business as Verizon Midwest, shall receive all amounts referred to in Ordered Paragraph 1, above, subject to refund and shall return all or part of such amounts to Petitioner as the Commission may order.

3. That a hearing shall be held on June 21, 2002, beginning at 1:00 p.m. The hearing shall be limited to the issue of the restoration and maintenance of service, and the conditions under which service should be restored and maintained, pending the final resolution of this case. The hearing shall be held at the Commission's offices at the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, Room 310. The Governor Office Building is a facility that meets the accessibility requirements of the Americans with Disabilities Act. Any person who needs additional accommodations to participate in the hearing should call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the hearing.

4. That this Order shall become effective on June 6, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Kevin A. Thompson, Deputy Chief

In the Matter of the Application of Quail Run Water and Land Company to Sell Its Stock and Transfer Assets to the Public Funding Corporation of the City of Ozark, Missouri.

Case No. WM-2002-394

Decided June 11, 2002

Water § 4. The Commission approved the sale of Quail Run Water and Land Company's stock and transfer of its assets to the Public Funding Corporation of the City of Ozark, Missouri.

ORDER APPROVING SALE OF ASSETS

On February 26, 2002, Quail Run Water and Land Company and the Public Funding Corporation of the City of Ozark, Missouri, filed their Joint Application seeking authority for Quail Run to sell its stock and system to Public Funding and, upon completion of the transaction, for Quail Run to quit the business. The Joint Applicants state further that, if the transaction is approved, upon acquisition of the

shares and system of Quail Run, Public Funding will immediately enter into a lease/purchase agreement with the City of Ozark, Missouri, for the purpose of transferring the system to that city. The City of Ozark will operate Quail Run's system and will do so as an unregulated municipal utility. The Joint Applicants state that the proposed transaction is not detrimental to the public interest in that the service provided will not change. Quail Run's customers will continue to receive water service at existing rates.

On April 4, 2002, the Commission issued its Order Directing Filing, directing its Staff to file a pleading, on or before April 19, advising the Commission of the date on which it would file its memorandum and recommendation in this case. On April 25, Staff advised the Commission that it would file its memorandum and recommendation on or before May 24. Staff filed its Memorandum and Recommendation on May 24 as promised.

In its Memorandum and Recommendation, Staff states that the Commission may approve a transaction such as that proposed here upon a finding that it is not detrimental to the public interest. Staff states further that it has reviewed the proposed transaction and has concluded that it is not detrimental to the public interest and should be approved. Staff further explains that a Missouri municipality may sell water to nonresidents as a matter of voluntary contract, free from regulation by this Commission.¹ Staff advises the Commission to approve the transaction, to direct Public Funding to notify the Commission immediately upon execution of the lease/purchase agreement with the City of Ozark, and to cancel Quail Run's certificate of convenience and necessity and its tariff, effective upon Public Funding's execution of the lease/purchase agreement with the City of Ozark.

In its Memorandum, Staff states that its subject matter experts have reviewed the provisions of the Joint Application, the provisions of the sale/purchase agreement between Quail Run and Public Funding, the provisions of the lease/purchase agreement between Public Funding and the City of Ozark, as well as the responses provided to various data requests and information gained during informal conversations with representatives of Public Funding and the City of Ozark. The proposed transaction will transfer the stock of Quail Run to Public Funding. It will also transfer the assets of Quail Run to Public Funding and then, via a lease/purchase agreement, immediately retransfer the assets to the City of Ozark. The City of Ozark will operate the assets and provide water service to Quail Run's customers. Quail Run will cease the business of providing water service and will eventually dissolve. The City of Ozark, in its operation of the water system, will not be subject to regulation by this Commission. Staff further states in its Memorandum that the proposed purchase price for the shares and system is \$335,000. Staff notes that Quail Run's rate base is approximately \$55,000. The City of Ozark has operated a municipal water system for many years. In the past, it has acquired other Commission-regulated water systems through Public Funding and now operates them as part of its municipal water utility. The City of Ozark also provides wholesale water service to another regulated utility. Staff states that Quail Run has provided notice of the

¹ Section 91.050, RSMo 2000; *Forest City v. City of Oregon*, 569 S.W.2d 330, 333 (1978); *AG Processing v. South St. Joseph Sewer*, 937 S.W.2d 319, 323 (Mo. App., W.D. 1996).

11 Mo. P.S.C. 3d

proposed transaction to its customers. In response to that notice, Staff states it has received correspondence from one individual who opposes the sale. That individual did not provide any reason for opposition to the sale. Recently, Staff has also received a complaint about water pressure from one of Quail Run's customers; this issue has been resolved.

In its Memorandum, Staff notes that in a prior case involving the City of Ozark, the Commission retained jurisdiction over the City's provision of water service to customers located in an area previously served by a regulated utility. Staff states that that situation constitutes an exception to the Commission's normal practice. Because of the bad relationship between the City of Ozark and the customers of the former Finley Valley Water Company, the Commission required the City to file a tariff with the Commission as a condition of its approval of the transaction. Staff points out that the present proposed transaction does not include circumstances such as existed in the Finley Valley case. The Memorandum repeats Staff's recommendations that the Commission approve the proposed transaction, relieve Quail Run of its obligation to provide water service within its service area, and cancel Quail Run's certificate and tariff.

In the present case, Quail Run proposes to transfer its entire system. Section 393.190 requires the approval of this Commission in order for a regulated utility to dispose of all or any part of its system. The statute does not contain a standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."² A court has said of Section 393.190, "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."³ To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently.⁴

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.⁵ No person or other entity has requested a hearing in this matter; therefore, the Commission may grant the requested relief based upon the verified application and other material of record. The Commission has reviewed the Joint Application and Staff's Memorandum and Recommendation. Based on these materials, the Commission has determined that the proposed transaction is not detrimental to the public interest and should be approved. The City of Ozark is already in the business of providing public water service and is capable of operating Quail Run's

² Commission Rule 4 CSR 240-2.060(7)(D).

³ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

⁴ See *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220.

⁵ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

system. Because the City is an unregulated municipality, the Commission need not consider the effect of the transaction on the City's financial health. Staff supports the proposed transaction and no party opposes it. There is little opposition to the proposed transaction from Quail Run's customers. "The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."⁶ No detriment to the public interest appears on the present record; therefore, the Commission will approve the proposed transaction.

In order to provide for as orderly a transfer as possible, the Commission will not cancel Quail Run's certificate and tariff, nor relieve Quail Run of its obligation to provide public water service in its designated service area, until the parties have notified the Commission that the transaction is complete.

IT IS THEREFORE ORDERED:

1. That the Joint Application filed on February 26, 2002, by Quail Run Water and Land Company and Public Funding Corporation of the City of Ozark, Missouri, is approved.
2. That the Public Funding Corporation of the City of Ozark, Missouri, and Quail Run Water and Land Company shall advise the Commission when the transaction approved above has been closed by filing a pleading in this case. At that time, the Commission will relieve Quail Run Water and Land Company of its obligation to provide water service to the public in its assigned service area and will cancel the certificate and tariff of Quail Run Water and Land Company.
3. That this order shall become effective on June 21, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

⁶ *Fee Fee Trunk Sewer*, 596 S.W.2d at 468.

11 Mo. P.S.C. 3d

**In the Matter of the Application of Missouri Gas Energy, a
Division of Southern Union Company, for an Accounting
Authority Order Relating to Commission Rule 4 CSR 240-
13.055(13).**

Case No. GA-2002-377

Decided June 13, 2002

Gas §34. The Commission approved a stipulation and agreement whereby Missouri Gas Energy was granted an accounting authority order relating to its expenses incurred in complying with 4 CSR 240-13.055(13), the emergency cold weather rule.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

This order approves a unanimous stipulation and agreement regarding an accounting authority order requested by Missouri Gas Energy.

On February 8, 2002, Missouri Gas Energy (MGE), a division of Southern Union Company, filed an application for an accounting authority order relating to the Commission's emergency rule modifying the cold-weather rule for the 2001-2002 winter heating season. MGE also filed a motion requesting that the Commission expedite its consideration of the application so as to issue the requested accounting authority order no later than February 19, 2002.

Staff filed its initial recommendation on February 19. Staff indicated that the AAO requested by MGE was inconsistent with past Commission practice in that MGE asked the Commission make rate determinations in the AAO. Staff also indicated that MGE sought authority to defer costs that are not in any way incrementally associated with the emergency amendment to the cold-weather rule. Staff recommended that the Commission either deny MGE's application, or set the matter for an evidentiary hearing.

The Office of the Public Counsel also filed a response to MGE's application on February 19. Public Counsel opposed MGE's request for an AAO for the same reasons cited by Staff. Public Counsel urged the Commission to either reject MGE's application, or set the matter for hearing.

In addition to the responses filed by Staff and Public Counsel, Midwest Gas Users' Association and the County of Jackson, Missouri, filed separate applications to intervene. Midwest Gas Users' Association and Jackson County opposed MGE's application and requested that the Commission schedule a hearing.

On February 26, before the Commission could act upon its application, MGE filed an amended request for accounting authority order. MGE indicated that it would voluntarily begin to implement provisions of the Commission's emergency cold-weather rule on February 27. Furthermore, MGE amended its application to request an AAO that is substantially similar to the AAO granted to UtiliCorp United Inc. in Case No. GA-2002-285.

Given MGE's modification of its position, the Commission issued an order on February 27 that directed Staff, Public Counsel, Midwest Gas Users' Association, and Jackson County to file a recommendation regarding MGE's amended request

no later than March 8. Public Counsel filed a response on March 6, indicating that it did not object to MGE's amended request for an AAO. Midwest Gas Users' Association filed its response on March 8 and agreed with the position taken by Public Counsel. Jackson County did not file a response.

On March 8, Staff filed a memorandum and recommendation advising the Commission to approve MGE's amended request. Staff recommended that the Commission's approval contain similar language to that incorporated in the Commission's order in Case No. GO-2002-285, with certain specified modifications. MGE responded to Staff's recommendation on March 12, agreeing to some of Staff's modifications but disagreeing with others and proposing further modifications.

On April 2, the Commission issued an order directing Staff to file a response to MGE's latest proposal not later than April 8. The order also indicated that if Public Counsel, Midwest Gas Users' Association, and Jackson County wished to do so, they could file a response by April 8. Staff filed its response on April 8, and proposed further modifications to address MGE's disagreements. Public Counsel, Midwest Gas Users' Association, and Jackson County also filed responses on April 8. Public Counsel indicated its support for Staff's position. Midwest Gas Users' Association and Jackson County indicated that they had no additional response to MGE's proposal.

Because the parties continued to disagree, the Commission issued an order on April 9 that granted the requests to intervene of Midwest Gas Users' Association and Jackson County. That order also scheduled a prehearing conference for May 1 and directed the parties to prepare a proposed procedural schedule. Later on April 9, MGE filed a pleading indicating its agreement with Staff's recommendation of April 8. MGE asked the Commission to issue an AAO consistent with that recommendation. On April 18, the Commission canceled the prehearing conference in response to a joint motion filed by Staff, Public Counsel, and MGE.

The Commission continued to have questions about the AAO proposed by MGE and was not ready to act on MGE's application and Staff's recommendation until it was able to obtain further information from the parties. To that end, the Commission issued an order on April 29 that rescheduled a prehearing conference for May 20, and directed the parties to file a proposed procedural schedule no later than May 28. The prehearing conference was held on May 20. In May 28, instead of filing a proposed procedural schedule, the parties filed a unanimous stipulation and agreement.

The stipulation and agreement clarifies the purpose and scope of the AAO requested by MGE, and explains why an AAO is appropriate. It also specifies the terms of the requested AAO. In addition, the stipulation and agreement provides that the AAO will not permit deferral of legal fees or other incremental costs MGE incurred in seeking legal review of the emergency rule. MGE also agrees that once the Commission's approval of the stipulation and agreement becomes final, it will dismiss, with prejudice, its circuit court case challenging the emergency rule. On June 6, Staff filed suggestions in support of the stipulation and agreement.

In the stipulation and agreement, contingent upon the Commission's acceptance of the stipulation and agreement, the parties waive their rights to cross

11 Mo. P.S.C. 3d

examine witnesses, to present oral argument or briefs, to have the transcript read by the Commission, and to judicial review. 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 2000.

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. Since no one has requested a hearing, the Commission may grant the relief requested based on the stipulation and agreement.

After reviewing the unanimous stipulation and agreement of the parties and Staff's suggestions in support of that stipulation and agreement, the Commission finds that the unanimous stipulation and agreement filed on May 28 should be approved. Accounting authority orders such as the one described in the stipulation and agreement are expressly authorized by 4 CSR 240-13.055(13)(F). Granting MGE the AAO described in the unanimous stipulation and agreement is consistent with the emergency amendment, and will not be detrimental to the public interest.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on May 28, 2002, is approved.
2. That the application for an Accounting Authority Order filed by Missouri Gas Energy on February 8, 2002, as revised on February 26, 2002, is granted, and Missouri Gas Energy is authorized to maintain on its books a regulatory asset. The regulatory asset will include all prudently incurred incremental expenses and incremental revenues that are caused by MGE's reinstatement of customers or assistance to customers threatened by disconnection, on or after February 27, 2002, in compliance with certain provisions of 4 CSR 240-13.055(13) between February 27, 2002 and March 31, 2002, and all prudently incurred incremental expenses caused by other tasks associated with preparing to comply with the amended rule between the effective date of 4 CSR 240 13.055(13) and March 31, 2002. Deferral of incremental expense and revenue impacts associated with this regulatory asset may be booked through a period ending no later than September 30, 2003.
3. That the regulatory asset authorized in Ordered Paragraph 2 may remain on the books of Missouri Gas Energy until the effective date of a Report and Order in its next general rate case.
4. That any amounts deferred pursuant to the authority granted herein are subject to review in subsequent rate proceedings for prudence and verification of the incremental nature of the costs in question.
5. That this order shall become effective on June 23, 2002.
6. That this case may be closed on June 24, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC.,
concur Gaw, C., dissents

Woodruff, Senior 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.

CONCURRING OPINION OF COMMISSIONER KELVIN SIMMONS

I join in the decision of the Commission only because I believe that 4 CSR 240-13.055(13)(F) requires the Commission to grant an Accounting Authority Order (AAO) to Missouri Gas Energy. I write separately to express my displeasure at MGE's decision to oppose the application of the emergency rule throughout most of the winter heating season. By its opposition and delay, MGE deprived its customers, who were hard hit by high natural gas prices last year, of the benefits of the emergency cold weather rule.

MGE seems to almost attempt to hold this Commission hostage by suggesting the granting of the AAO would give MGE a reason to drop its appeal of the Commission's promulgation of an emergency amendment to the Cold Weather Rule. This is a *quid pro quo* that I frown upon.

I believe that the Commission does indeed have authority to promulgate a rule such as the emergency amendment to the Cold Weather Rule that MGE is contesting. By approving the stipulation and agreement in this case, we will not settle the question that MGE has raised about our authority.

In the Matter of the Tariff Filing of Missouri State Discount Telephone to Add Exchanges for BPS Telephone Company, Chariton Valley Telephone Corporation, and Mid Missouri Telephone Company to Reflect Newly Authorized Exchanges as per Recently Approved Interconnection Agreements.

Case No. TT-2002-1097

Decided June 18, 2002

Telecommunications §8. The Commission denied the Office of the Public Counsel's motion to suspend a tariff and for evidentiary hearing and approved the tariff where the tariff, filed by Missouri State Discount Telephone, proposed to add additional exchanges to its area of operation.

ORDER CONCERNING MOTION TO SUSPEND TARIFF

On May 30, 2002, the Office of the Public Counsel filed its Motion to Suspend Tariff and Request for Evidentiary Hearing directed at a tariff filed by Missouri State Discount Telephone in order to add additional exchanges to area of operation. Public Counsel asserts that Discount Telephone's tariff amendment of its authorized service area is "in effect an application for a modification and amendment to its certificate of service authority under Section 392.410.5, RSMo, to include additional geographic areas and exchanges of a different incumbent local exchange company."

Public Counsel's motion in this case relates to another case now before this Commission: In March, 2002, BPS Telephone Company filed a notice of its election of price cap regulation status under Section 392.245.2, RSMo; BPS may elect this status under the law if at least one alternative local service provider is certificated to operate within its service area and is actually providing such service. Public

11 Mo. P.S.C. 3d

Counsel devotes most of its motion in this case to its discussion of the relationship between the tariff under consideration here and the notice referred to above. BPS cites the certification and operation of Discount Telephone within its service area as justification for its election of price cap regulation status.

Public Counsel states:

It now appears from the proposed tariff that Missouri State Discount was not certified to provide service in BPS exchanges. If such service was actually being provided, Missouri State Discount Telephone was unlawfully operating in exchanges for which it had no Commission authority to operate and was not certified to provide service. Since the certification and operation of Missouri State Discount Telephone in BPS exchanges served as the triggering event for BPS's election for price cap regulation, the Commission should suspend the tariff and investigate the facts and Missouri State Discount Telephone's non-compliance with law.

On June 4, Missouri State Discount Telephone filed its Suggestions in Opposition to Public Counsel's Motion to Suspend Tariff. Therein, Discount Telephone states that its purpose in filing the proposed amended tariff sheets is simply to note the exchanges of three companies with whom Discount Telephone has recently obtained Commission-approved interconnection agreements. By adding them to its tariff, Discount Telephone will be legally authorized to operate in those service areas. Discount Telephone points out that Public Counsel's interest in the price cap regulation status of BPS Telephone Company has nothing to do with the tariffs under consideration in this case. Discount Telephone further points out that the concerns stated by Public Counsel are now the subject of a separate contested case proceeding. In the past, Discount Telephone has amended its tariffs to reflect interconnection agreements reached with various carriers and it avers that it is simply doing the same thing now. Discount Telephone further points out that Public Counsel makes no complaint regarding the format, purpose, or content of the tariff at issue in this case. Because there is no defect on the face of the tariff at issue in this case, Discount Telephone asserts it has a right to receive approval by this Commission of the tariff.

On June 7, 2002, the Staff of the Missouri Public Service Commission filed its Recommendation and Memorandum in this matter. Staff states that the Commission granted a certificate to Discount Telephone on March 16, 2001, in Case No. TA-2001-334. That certificate authorized Discount Telephone to provide basic local telecommunications services throughout the state of Missouri. The certificate became effective, Staff states, on July 2, 2001, when Discount Telephone's tariff became effective. That initial tariff authorized Discount Telephone to provide services in listed exchanges of Southwestern Bell Telephone Company, ALLTEL Missouri, Inc., and GTE Midwest Incorporated. Staff states further that it disagrees with Public Counsel's characterization of the tariff herein at issue as a request for new certification. Staff advises the Commission to approve the tariff and to deny Public Counsel's Motion to Suspend.

In its Memorandum, also filed on June 7, 2002, Staff states that the proposed tariff sheets meet the requirements of all applicable statutes and Commission rules; consequently, Staff states, they should be approved. Staff further states that the matters raised by Public Counsel should be addressed in a separate proceeding.

On June 12, Public Counsel filed its reply. Public Counsel states that, "[b]y suspending the tariff, the Commission can freeze the status quo and allow [sic] it to address the issues." The issues Public Counsel refers to consist primarily of "a significant allegation of overearnings against BPS Telephone Company." By electing price cap status, BPS will escape Commission scrutiny of its earnings and its allegedly inflated rates would be beyond review. Public Counsel states, "[t]he PSC may foreclose its ability to investigate the alleged overearnings of BPS by allowing this tariff to become effective."

The Commission has considered the motion filed by the Office of the Public Counsel, the response filed by Discount Telephone, Staff's Memorandum and Recommendation, and Public Counsel's reply. The Commission has determined that Public Counsel has not raised concerns which require that this tariff be suspended and an evidentiary proceeding conducted. Public Counsel makes no complaint about the form, content or purpose of the tariff. Rather, Public Counsel's concerns clearly relate only to matters which are already the subject of one or more other pending proceedings. For these reasons, the Commission determines that Public Counsel's Motion should be denied and the tariff sheets approved.

IT IS THEREFORE ORDERED:

1. That the Motion to Suspend Tariff and Request for Evidentiary Hearing filed by the Office of the Public Counsel on May 30, 2002, is denied.
2. That the proposed amended tariff sheets filed by Missouri State Discount Telephone, Tariff File No. 200200981, are approved for service rendered on and after June 21, 2002. The specific tariff sheets approved are:

P.S.C. Mo. No. 1

**2nd Revised Sheet No. 11, Canceling 1st Revised Sheet No. 11
2nd Revised Sheet No. 12, Canceling 1st Revised Sheet No. 12**

3. That this order shall become effective on June 21, 2002.
4. That this case may be closed on June 22, 2002.

Murray, Lumpe, Gaw, and Forbis,
CC., concur.
Simmons, Ch., not participating.

Thompson, Deputy Chief Regulatory Law Judge

11 Mo. P.S.C. 3d

**In the Matter of the Application of Citizens Electric Corporation
for Approval of Interim Rates, Subject to Refund, and for a
Permanent Rate Increase.**

*Case No. ER-2002-217
Decided June 18, 2002*

Electric §20. The Commission found that in its totality, the stipulation and agreement of the parties was reasonable in that it provided for just and reasonable rates.

Rates § 1. The Commission held that it had authority to accept a stipulation and agreement as a resolution of the issues.

Rates §8. The Commission found that in its totality, the stipulation and agreement of the parties was reasonable in that it provided for just and reasonable rates.

REPORT AND ORDER APPROVING STIPULATION AND AGREEMENT

SYLLABUS: This order approves a stipulation and agreement submitted by the parties regarding a rate increase for Citizens Electric Corporation. The order also authorizes Citizens to file tariff sheets and to comply with the terms of the Unanimous Stipulation and Agreement.

On November 1, 2001, Citizens filed with the Commission proposed permanent tariff sheets designed to increase revenues 13.9 percent, or \$6,548,804 annually. Citizens stated that the increase was necessary to offset a January 1, 2002, increase in its costs for wholesale power by \$4,665,565 annually, and increases in other costs by \$1,883,240 annually. Citizens' tariff bore an effective date of December 1, 2001. The general rate increase tariff was suspended by the Commission until September 30, 2002.

Citizens is a public utility engaged in providing electric service to approximately 24,000 customers in Ste. Genevieve, Perry, northern Cape Girardeau, and St. Francois Counties in Missouri. The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Citizens pursuant to Section 386.250 and Chapter 393, RSMo.

Citizens Electric Corporation is a uniquely situated entity. Like most of the utilities that come before the Commission, it is a corporation established under Chapter 351, RSMo. Unlike other corporate entities regulated by the Commission, however, Citizens is structured such that it operates on a business plan similar to a cooperative electric corporation. Citizens' stockholders are also the consumers of the power that Citizens sells. Citizens refers to these consumers as members. Under Citizens' business plan, all revenues in excess of costs are returned to its members in the form of capital credits. Because of its business plan, Citizens has many of the same characteristics of a rural electric cooperative.

Citizens does not generate any power. Citizens purchases all of its power under contracts in the wholesale energy market. Citizens recently completed negotiations for a new purchased power agreement that increased the costs of its wholesale power by 15 percent beginning January 1, 2002. The parties reached

a unanimous agreement with regard to the interim rate increase, and the Commission issued its Order Approving Stipulation and Agreement on December 20, 2001.

On May 30, 2002, the parties jointly filed a unanimous stipulation and agreement regarding the general rate increase. Staff filed suggestions in support of the stipulation and agreement on June 7, 2002. On June 11, 2002, the Commission held a hearing regarding the stipulation and agreement.

The parties agreed to the resolution of all issues and set forth the following specific resolutions:

A. That the Commission should approve revised electric tariff sheets for Citizens that reflect an overall revenue increase of \$6,274,255 on an annual basis exclusive of gross receipts and franchise taxes.

B. That beginning January 1, 2003, the rate of interest to be paid on customer deposits will be equal to the prime lending rate plus one percentage point as published in the Wall Street Journal for the last business day of the preceding calendar year, except when the Commission's rules require otherwise.

C. That Citizens should be authorized to file tariff sheets with an effective date of October 1, 2002, in conformance with the tariff sheets attached as Exhibit 1 to the Unanimous Stipulation and Agreement within ten days of this order.

D. That the Commission should authorize Citizens to implement the rate increase on a billing month basis commencing with the first billing cycle on or after November 1, 2002.

E. That Citizens has incurred no refund obligation for the interim rate increase.

F. That the Commission should direct Citizens to implement, for Missouri financial reporting purposes only, effective January 1, 2003, the depreciation rates contained in the document attached to the Unanimous Stipulation and Agreement as Exhibit 2.

G. That Citizens will continue to keep its accounting records regarding depreciation expense and accumulated provision for depreciation in accordance with the Rural Utilities Service (RUS) accounting guidelines. However, Citizens will use the depreciation rates in Exhibit 2, attached to the Unanimous Stipulation and Agreement, for Missouri financial reporting purposes (i.e., the Annual Report Citizens files with the Commission). Citizens will maintain these records by applying the depreciation rates to the month-end plant balances and total the resulting monthly amounts in order to determine the Missouri regulatory depreciation expense for the reporting period. To determine the net salvage/cost of removal separate expense item, Citizens will total the annual salvage cost and subtract the total annual cost of removal. An annual reconciliation will be made on the Annual Report Citizens files each April with the Commission. In addition, Citizens will disaggregate the year end accumulated provision for depreciation balance into reserve balances that correspond to the plant cost accounts. The annual disaggregation will be determined by an allocation method based upon year-end gross plant balances weighted by their depreciation rates shown in Exhibit 2. Citizens will attach this disaggregation annually to the Annual Report it submits to the Commission.

11 Mo. P.S.C. 3d

H. That Citizens will contact the Commission's Energy Department Manager by letter when material events occur in Citizens' progress toward developing its power supply portfolio to address the expiration of its 2003 bulk power and 2006 full requirements contracts. Citizens will provide RFP information to the Staff in advance of the issuance of the RFP.

I. That Citizens will provide to Staff by April 1st of each year its peak demand and energy forecasts, capacity plans and transmission and distribution plans. Citizens and Staff agree to meet annually, either in person or via teleconference, to discuss these plans and forecasts. The first annual meeting will be held in April of 2003.

J. That Citizens will continue to submit monthly surveillance data reports with the Staff of the Commission's Financial Analysis Department. Citizens' monthly surveillance data reports will continue to reflect RUS' accounting methods with a footnote that an annual reconciliation will be made for Missouri financial reporting of depreciation methods.

K. That the rate design for the proposed permanent rates were previously agreed to and approved by the Commission in its Order Approving Stipulation and Agreement issued December 20, 2001.

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.¹ 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.² In the Unanimous Stipulation and Agreement, the parties specifically waived their rights to present testimony, to cross-examine witnesses, to present oral argument or briefs, to cross-examine witnesses, to have the transcript read by the Commission, and to judicial review. Therefore, the Commission may grant the relief requested based on the agreement.

The Commission has reviewed the verified application, the unanimous agreement, Staff's suggestions in support of the agreement, and the sworn testimony presented at the stipulation hearing. The Commission finds that in its totality, the agreement is reasonable in that it provides for just and reasonable rates. The Commission is adopting these methods of recovery and associated rates because they are part of the settlement as agreed by all the parties. These rates and methods should not be considered precedent for any future findings by this Commission. The facts of each case will determine the rates and methods in future cases.

The Commission will authorize Citizens to file revised tariff sheets for the Commission's approval consistent with the agreement and in substantial conformance with the illustrative tariff sheets attached as Exhibit 1 to the Unanimous Stipulation and Agreement. The Commission will also direct its Staff to file a recommendation stating whether or not the tariff sheets, if filed, comply with the Commission's order.

¹ Section 536.060, RSMo Supp. 2001.

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on May 30, 2002, by Citizens Electric Corporation, Mississippi Lime Company, the Staff of the Public Service Commission, and the Office of the Public Counsel is hereby approved. The agreement is attached to this order as Attachment 1.
2. That the tariff sheets filed by Citizens Electric Corporation on November 1, 2001, (Tariff No. 200200512) are rejected.
3. That Citizens Electric Corporation is authorized to file revised tariff sheets in conformance with the illustrative tariff sheets attached as Exhibit 1 to the Unanimous Stipulation and Agreement, with an effective date of October 1, 2002.
4. That if tariffs have been filed, the Staff of the Missouri Public Service Commission shall file a recommendation stating whether or not the tariffs are in compliance with the Commission's order and should be approved. Staff shall file its recommendation no later than July 29, 2002.
5. That Citizens Electric Corporation is authorized to implement its rate increase on a billing month basis as agreed by the parties in the Unanimous Stipulation and Agreement.
6. That Citizens Electric Corporation shall utilize the depreciation rates as set out in Exhibit 2 of the Unanimous Stipulation and Agreement and as agreed by the parties in the Unanimous Stipulation and Agreement.
7. That Citizens Electric Corporation shall comply with the other provisions of the Unanimous Stipulation and Agreement, including system planning reporting and surveillance reports.
8. That the procedural schedule, including the hearing set to begin July 1, 2002, is canceled.
9. That this order shall become effective on June 28, 2002.

Simmons, Ch., Lumpe and Forbis,
CC., concur.

Murray, C., concurs, with concurring opinion attached.

Gaw, C., dissents, with dissenting opinion attached.

Dippell, Senior 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.

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

I do not believe it would serve a public purpose to delay Citizens' rate increase by rejecting the Stipulation and Agreement. I do, however, have serious concerns about the treatment of the depreciation issue in the Agreement.

At the hearing on the Stipulation and Agreement, the Company witness indicated that, for over fifty years, this company and all other cooperatives in the nation have captured depreciation expense and accumulated depreciation in

11 Mo. P.S.C. 3d

accordance with RUS guidelines. She indicated that she did not understand the purpose of Staff's requirement to treat net salvage differently for Missouri regulatory purposes only, but that the company felt that it was an area it was willing to compromise for purposes of settlement. She stated that Citizens has never retired major assets, so that the issue does not hold the same significance as it would for larger utilities retiring major assets.

Staff witness, Adam, admitted that Staff's position requiring expensing of net salvage is in opposition to Commission Rule 4 CSR 240-20.030. He further admitted that he is not aware of any proceeding to change the rule. Mr. Adam indicated that he spent a disproportionate amount of time on this issue in this case which, even at the time of filing his written testimony, he believed would settle. He admitted that he used this case to promote his position on depreciation, even though it was not that important to this particular case.

I am concerned that Staff has cited to other Commission-approved Stipulations and Agreements to support Staff's position as to the depreciation issue. Mr. Adam agreed at the hearing that he would not attempt to use this Stipulation and Agreement to establish precedent. It is only with the express understanding that approval of a Stipulation and Agreement makes no statement as to Commission policy on any issue that I concur in the order to approve the Stipulation and Agreement.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

I respectfully dissent from this Report and Order Approving Stipulation and Agreement principally because it reaffirms the granting of an order authorizing interim rates without the finding of an emergency. It does so by finding that customers are not entitled to a refund during the interim period.

While not relevant to my decision, certain aspects of this case are worthy of note surrounding the increase in generating costs to Citizens Electric Corporation (Citizens) and to its customers. In the past, Citizens has chosen not to invest in generation capacity. This decision leaves Citizen's customers completely subject to the swings of the wholesale market. Citizen's management testified to the need to examine other options for the future to avoid being placed at such risk. Meanwhile Citizens has attempted to minimize this risk by electing to enter into a 5-year contract with an unregulated subsidiary of Ameren Corporation³.

This new generation contract causes the majority of the increase in the new rates. Hopefully, for the benefit of ratepayers, Citizens will find a less expensive and long term way to secure generation capacity in the future.

³ It is interesting to note that according to Citizen's witness Ameren's regulated subsidiary, AmerenUE, refused to bid on providing generation to Citizens even though it had done so for many years at a significantly lower cost.

In the Matter of Osage Water Company's Request for a Rate Increase for Water Service Pursuant to the Public Service Commission's Small Company Rate Increase Procedure.*

Case No. WR-2000-557

Decided June 20, 2002

Rates § 111. The Commission accepted the settlement agreement between Osage Water Company and the Staff of the Commission. Osage began charging customers higher rates before the Commission had granted Osage authority. The Commission closed the case after Osage refunded overcharged amounts to all the customers it could find. For the one customer Osage could not find, the Commission allowed Osage to apply the refund to its costs of administering the other refunds.

ORDER MAKING INTERIM RATES PERMANENT AND CLOSING CASE

Syllabus: The Commission makes Osage Water Company's interim rate increase permanent, and closes the case.

Interim Rates: In the Report and Order issued March 29, 2001, that allowed Osage Water Company to raise its rates, the Commission determined that those rates should be interim until Osage resolved certain issues that were noted in the Disposition Agreement between Osage and the Staff of the Commission. A number of reports have been filed on the status of the resolution of those issues, both by Osage and by the Staff. On May 17, 2002, the Staff filed a report in which it concluded:

that the Company now complies with all provisions of the Disposition Agreement. The Staff therefore recommends that the Commission allow the Company to remove the "condition statements" from its rate tariff sheet, thereby making permanent the interim rate increase that the Commission approved on March 29, 2001.

Overcharges: In an order issued November 6, 2001, the Commission found that Osage Water Company began charging its customers higher rates before it was authorized to do so and ordered Osage to lower its rates to the previously-authorized level for a period of time in order to make customers whole for the unlawful overcharges. In response to a request by Osage, the Commission allowed Osage to make refunds to customers that were overcharged.

Both the Staff and Osage have filed a number of reports about this issue. On May 15, Staff filed a report in which it concluded that the refunds had been accomplished in compliance with the Commission's order, with the following exception:

* See pages 000 and 000, Volume 10, MPSC 3d for other orders in this case.

11 Mo. P.S.C. 3d

Paragraphs 1 and 2 of the Second Report are silent on the issue of what will be done with the refund monies that the Company is not able to refund to its former customers. As a result, the Staff recommends that the Commission order the Company to submit to the Commission a plan for the disposition of such refund monies.

The Staff also takes issue with allowing a particular former customer, Pizza Hut, to waive its refund in lieu of paying for alleged damage to Osage's water system. Staff has a concern that Osage and the customer reached this agreement orally. Staff is also concerned that it does not know whether the amount of the refund is comparable to the cost of the damage to Osage's system. Because Osage and the customer have reached an agreement, the Commission is satisfied with the resolution of this issue.

On June 3, Osage filed a report that outlined the way in which it treated refunds to customers that it has been unable to locate. Osage stated that it has only been unable to locate one customer, who is due a refund of approximately \$50. Osage suggested that it be allowed to cease efforts to locate that customer, and apply that money to the cost of administering the refund procedure. Osage also asks that this case be closed since all issues have been resolved.

No party objected to Osage's proposed treatment of the one remaining refund, or to its request that the case be closed. Since refunds have been made to the majority of customers, and only one customer has not received his refund, and that refund is relatively small, the Commission will accept Osage's proposal. There are no remaining issues, and this case may be closed.

IT IS THEREFORE ORDERED:

1. That the interim rate increase that the Commission approved on March 29, 2001, is made permanent.
2. That Osage Water Company shall file new tariff sheets that show that the rates are permanent and not interim.
3. That this order shall become effective on June 30, 2002.
4. That this case may be closed on July 1, 2002.

Simmons, Ch., Lumpe, and Forbis, CC., concur.

Murray, C., dissents.

Gaw, C., not participating.

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of GTE Midwest Incorporated,
d/b/a Verizon Midwest, for Review and Reversal of North
American Number Plan Administrator's Decision to Withhold
Numbering Resources.**

*Case No. TO-2002-481
Decided June 20, 2002*

Telecommunications §7. Determining that GTE Midwest Incorporated, d/b/a Verizon Midwest demonstrated "verifiable need" need for additional numbering resources and that Verizon "had exhausted all other available remedies", the Commission overrode the determination of the North American Number Plan Administrator to deny such additional numbering resource.

ORDER GRANTING ADDITIONAL NUMBERING RESOURCES

On April 8, 2002, GTE Midwest Incorporated, doing business as Verizon Midwest, filed its Application and Motion for Expedited Treatment, seeking an Order of the Commission reversing the decision of the North American Number Plan Administrator to deny Verizon's request for additional numbering resources. Verizon sought these resources in order to meet the needs of its customer, Kanakuk Kamps, for 2,000 numbers in four sequential blocks. In its application, Verizon states that it submitted a Central Office Code (NXX) Assignment Request to the Administrator on March 14, 2002. Verizon notes that this request was somewhat unusual because all of the numbers must be available within a single central office and none can begin with either a "1" or a "0."

Verizon states that it submitted the request as required by the Administrator and included all necessary supporting documentation. Nonetheless, on March 27, 2002, the Administrator denied Verizon's request on the grounds that Verizon had not met the rate-center-based months-to-exhaust criteria set out in the Central Office Code Guidelines. Verizon asserts that the Commission has authority to override the decision of the Administrator pursuant to the decision of the Federal Communications Commission in its Number Resource Optimization Docket, issued on March 31, 2000.¹

On April 23, 2002, the Commission issued its Order Directing Notice, setting an intervention deadline of May 9, 2002. No requests for intervention were received.

Meanwhile, on April 26, 2002, the Staff of the Missouri Public Service Commission filed its Recommendation and Memorandum. Therein, Staff states that the Commission should grant Verizon's request and enter its Order overriding the decision of the North American Number Plan Administrator. Staff states further that Verizon has currently exhausted about 89 percent of its numbering resources

¹ *Number Resource Optimization*, Report and Order, CC Docket No. 99-200, FCC No. 00-104, at Appendix A; see also 47 C.F.R. 52.15(g)(3)(iv)(Attachment D).

11 Mo. P.S.C. 3d

compared to the threshold federal standard for requesting additional resources of 60 percent. Furthermore, Staff states that the 6,212 codes currently available to Verizon are not sequential as requested by their customer, Kanakuk Kamps. Without additional number resources, Verizon cannot meet the needs of its customer, Kanakuk Kamps.

No requests for intervention have been received and 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. Since no one has requested a hearing, the Commission may grant the relief requested based on the verified application.²

The Code of Federal Regulations provides, in pertinent part:³

The NANPA shall withhold numbering resources from any U.S. carrier that fails to comply with the reporting and numbering resource application requirements established in this part. * * * The carrier may challenge the NANPA's decision to the appropriate state regulatory commission. The state commission may affirm, or may overturn, the NANPA's decision to withhold numbering resources from the carrier based on its determination that the carrier has complied with the reporting and numbering resource application requirements herein. The state commission also may overturn the NANPA's decision to withhold numbering resources from the carrier based on its determination that the carrier has demonstrated a verifiable need for numbering resources and has exhausted all other available remedies.

On June 12, 2002, the Commission issued its Order Directing Filing, requesting its Staff to provide additional explanation as to one aspect of its recommendation in this case, that the requested number resources take the form of two blocks of 1,000 sequential numbers rather than four blocks of 500. Staff filed its response on June 19, explaining that the change is necessary to conserve numbers. Beginning in calendar year 2003, when number conservation is initiated in the 419 area code, providers will be required to surrender unused blocks of 1,000 numbers. By assigning numbers to Verizon in four blocks of 500, as many as 4,000 numbers will be lost as carriers are not required to surrender unused numbers in any partially used- or "contaminated" -- thousand-number block. Thus, assignment in the form of two blocks of 1,000 will potentially conserve as many as 2,000 numbers.

The Commission has reviewed the verified Application and Staff's two Recommendations and Memoranda. The Commission has determined that Verizon has demonstrated a "verifiable need" for the numbering resources in question and that it has "exhausted all other available remedies." The record shows that the

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

³ Regulation 47 C.F.R. Section 52.15(g)(4). "NANPA" is North American Number Plan Administrator.

numbering resources available to Verizon are insufficient to meet the needs of its customer, Kanakuk Kamps. For these reasons, the Commission will override the determination of the North American Number Plan Administrator. The Commission will, as directed by Staff, order Verizon to assign the numbers in two sequential blocks of 1,000.

IT IS THEREFORE ORDERED:

1. That the Application and Motion for Expedited Treatment filed on April 8, 2002, by GTE Midwest Incorporated, doing business as Verizon Midwest, is granted.
2. That the North American Number Plan Administrator shall provide numbering resources to GTE Midwest Incorporated, doing business as Verizon Midwest, in two blocks of 1,000 sequential numbers.
3. That GTE Midwest Incorporated, doing business as Verizon Midwest, shall assign telephone numbers to its customer Kanakuk Kamps in two blocks of 1,000 sequential telephone numbers.
4. That this Order shall become effective on June 30, 2002.
5. That this case may be closed on July 1, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

TXU Energy Services, Inc., and Schreiber Foods, Inc., Petitioners, v. Missouri Gas Energy, a Division of Southern Union Company, Respondent.

Case No. GC-2001-593

Decided June 27, 2002

Gas §33. The Commission dismissed a complaint moving the Commission to invalidate an unauthorized use charge imposed by Missouri Gas Energy on Schreiber Foods and to require that Missouri Gas Energy issue an adjustment to Schreiber.

APPEARANCES

Donald C. Otto, Jr., Attorney at Law, 901 Missouri Boulevard, Jefferson City, Missouri 65101, for Petitioners TXU Energy Services, Inc., and Schreiber Foods, Inc.

Gary W. Duffy, Esq., Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for Respondent Missouri Gas Energy, a Division of Southern Union Company.

Lera L. Shemwell, Associate 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: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

Petitioners TXU Energy Services, Inc., and Schreiber Foods, Inc., filed their Complaint on April 20, 2001, and the Commission issued its Notice of Complaint on May 9. Respondent Missouri Gas Energy, a division of Southern Union Company, timely answered on June 7; Petitioners replied on June 27.

Following a prehearing conference on July 9, the Commission, on July 31, adopted the procedural schedule proposed by the parties. The Commission also adopted its standard protective order on that date. According to the Commission's usual practice, the parties pre-filed written testimony for each witness. The parties also filed an agreed list of issues for determination by the Commission and each party filed a statement of its position on each issue.

Pursuant to the procedural schedule, the Commission convened an evidentiary hearing on February 19, 2002. All parties were represented at the evidentiary hearing. At the hearing, the parties waived their right to cross-examine witnesses and submitted the case on the prefiled testimony. The Commission established a schedule for post-hearing briefs and the last brief was filed on March 26. The parties also filed proposed findings of fact and conclusions of law by April 3, 2002.

Discussion

The parties jointly submitted a list of issues for determination by the Commission. Each party also submitted a statement of its position on each issue. Only Staff provided any explanation of its position. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

1. Should Schreiber Foods be required to pay an unauthorized use charge for gas used in July 2000?

Petitioners urge the Commission to determine this question in the negative, while Respondent takes the affirmative. The Commission's Staff also suggests an affirmative answer to this question.

2. Did Missouri Gas Energy do what was required by its tariff?

Again, Petitioners urge the negative and Respondent urges the affirmative. Staff also takes the affirmative on this question.

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.

Schreiber Foods, Inc., is a manufacturer of cheese products and frozen entrees headquartered in Green Bay, Wisconsin. Among several others, Schreiber operates a plant in Mt. Vernon, Missouri, where the natural gas service in question was provided. Schreiber has four plants in Missouri, out of a total of 12 plants. Dairy plants such as Schreiber's Mt. Vernon facility are intensive energy users. Schreiber uses heat to pasteurize raw milk. Schreiber uses additional energy to process the pasteurized milk into cheese and to process milk into such products as powdered milk. Schreiber consumes a large volume of natural gas each month.

TXU Energy Services, Inc., a Texas corporation, is a wholly owned subsidiary of TXU Corporation of Dallas, Texas. TXU Corporation is the ninth largest energy services company in the world, with annual revenues of \$22 billion and assets of \$45 billion. TXU has approximately 11 million customers world-wide and generates 30,000 megavolts of electricity annually. Its natural-gas-marketing operation serves 8,500 customers nationwide, including 75 utilities. Schreiber is one of TXU Energy's natural gas customers.

Missouri Gas Energy is a fictitious name under which Southern Union Company conducts business in Missouri as a retailer of natural gas. Missouri Gas Energy has both regular or "system sales" customers and transportation customers. Missouri Gas Energy does not sell gas to its transportation customers; rather, it delivers gas to them via its pipeline and distribution facilities. The transportation customers buy the gas elsewhere. Schreiber is one of Missouri Gas Energy's 403

11 Mo. P.S.C. 3d

transportation customers. Schreiber is neither the largest nor the smallest of Missouri Gas Energy's transportation customers. Missouri Gas Energy bills Schreiber monthly for transportation services.

TXU Energy Services provides natural gas service to Schreiber under a contract, using pipelines operated by Williams Gas Pipelines Central, Inc. (Williams), and by Respondent Missouri Gas Energy. Under its contract with Schreiber, TXU purchases natural gas from wholesalers and ships it to Schreiber via the third-party pipelines. TXU also advises the pipelines of the volume of gas that will be supplied to Schreiber each month. This process is referred to as "nomination." Specifically, TXU sends the nomination to Williams Pipeline each month by computer. Missouri Gas Energy, in turn, learns of the nomination from Williams. The nomination for a given month can be made as late as the last day of the month. Where a nomination is not made and gas is delivered, unauthorized use charges apply. The purpose of nomination is to allocate the available gas transport volume. The purpose of unauthorized use charges is to penalize customers who use more than their allocated share of gas. This issue is particularly important during periods of high demand for gas, such as the winter heating season.

Williams posts the nominations it receives on its electronic bulletin board. Missouri Gas Energy can access this electronic bulletin board and uses this method to learn of nominations that affect it. Although Schreiber was and is a transportation customer of Missouri Gas Energy, TXU never made nominations on Schreiber's behalf directly with Missouri Gas Energy. TXU only made nominations on Schreiber's behalf with Williams. Missouri Gas Energy's business practice, then and now, was to accept nominations made with Williams as nominations made with Missouri Gas Energy.

Missouri Gas Energy did not receive or otherwise learn of a nomination for Schreiber for the month of July, 2000. The reason the nomination process failed that month is not known. Because a volume of gas was delivered to Schreiber over Missouri Gas Energy's pipeline that month, although no nomination had been received, Missouri Gas Energy billed Schreiber \$58,851.47 in unauthorized usage charges.¹ Schreiber has never paid that bill. Unlike Missouri Gas Energy, Williams Pipeline has agreed to waive any charges and penalties. Williams also offered to allow TXU to make a retroactive nomination, but Missouri Gas Energy refused. Missouri Gas Energy is currently still providing transportation services to Schreiber. Missouri Gas Energy has billed other transportation customers for unauthorized usage charges.

Missouri Gas Energy generates a list of transportation customers for whom no nomination has been received each month at mid-month. An employee of Missouri Gas Energy then attempts to contact each such customer by telephone, using a contacts list provided by the customer. The purpose of the contact is to warn the customer of the possibility of unauthorized use charges. Teresa Villanueva, a

¹ Staff treats this figure as Highly Confidential in its prepared testimony. However, the figure appears in the nonconfidential testimony of witnesses for Petitioners and Respondent. Thus, the figure is part of the public record and the Commission need not treat it as Highly Confidential in this Report and Order.

transportation specialist employed by Missouri Gas Energy, telephoned Schreiber in mid July, 2000, when she discovered that no nomination had been made for Schreiber for the month. However, neither of the contact persons provided by Schreiber were still employed there at the time of Villanueva's call. Consequently, Villanueva left a message concerning the potential unauthorized usage charges. Villanueva also spoke by telephone to Ralph McClury, a Schreiber employee, concerning the lack of a nomination for July 2000. Villanueva also spoke by telephone to Evan Moore, an employee of TXU Energy, and advised him that unauthorized usage charges would result if a nomination were not made for Schreiber for July 2000. Moore was one of two TXU Energy employees responsible for making the monthly nominations for Schreiber.

Petitioners admit that an attempt was made by some employee of Missouri Gas Energy via telephone to warn Schreiber prior to the last day of July 2000 of the lack of nomination and the potential unauthorized use charge. However, Petitioners deny that any attempt was made by Missouri Gas Energy to contact TXU Energy in time to avoid the charges. Petitioners presented the testimony of Mark Wolf, an employee of TXU Energy, which contradicts the testimony of Teresa Villanueva as to her telephone call to Evan Moore at TXU Energy. Petitioners did not present the testimony of Mr. Moore. On this point, having considered the testimony in question, the Commission finds the testimony of Ms. Villanueva to be more credible than that of Mr. Wolf. Ms. Villanueva, after all, testified about her own actions, while Mr. Wolf only repeated what he believes he has been told.

Missouri Gas Energy does not make nominations for any of its transportation customers and, indeed, is unable to do so. Missouri Gas Energy does nominate the gas that it purchases and transports for resale to its regular customers. The point of resale for such gas is the meter of the individual customer.

The nominations are made by accessing an electronic bulletin board maintained by Williams. Each entity with nomination authority has a separate password. E-mails exchanged by Evan Moore and Mark Wolf of TXU Energy show that they were experiencing difficulty in July 2000 with Williams' electronic bulletin board nomination system. On July 5, Moore stated to Wolf as follows in an e-mail:²

Evan Moore

07/05/2000 04:11 PM

To: Mark Wolf/Marketing/Kansas City/EES/US@EESINC

cc:

Subject: williams

markus

sorry it took so long but here is your confirmation for the williams retail nominations. i will provide you with the exact breakdown [sic] by contract in the next day or so.

² Spelling and capitalization as in the original.

11 Mo. P.S.C. 3d

i nomed all retail customers at the volumes that you specified in you *[sic]* first of the month spreadsheet except the two i have listed below.

i will check with williams but perhaps you might want to get involoved *[sic]* as well. two retails were not tied to the billing locations i had for them or had some other problem. they are:

customer location # cust.# daily vol

1.) hillshire 012746 09447 564/d i know this is a new customer so that could be the problem.

2.) schreiber 017456 06279a 104/d we spoke of this one as well but it (the system) still does not like it.

if you have any questions, please call.

(Exhibit 5, Schedule MN-4, page 7, no. 16.)

Wolf replied to Moore, "We need to get these noms in. So try this, if it doesn't work calls *[sic]* WNG.³ Please keep me posted." (Ex. 5, Sch. MN-4, page 7, no. 15). On July 10, 2000, Evan Moore sent the following e-mail to Mark Wolf:

Evan Moore

07/10/2000 08:18 AM

To: Mark Wolf/Marketing/Kansas City/EES/US@EESINC

cc:

Subject: Re: williams

mark

schreiber *[sic]* and hillshire are in, hillshire got in today for flow started on 07/11. i grossed up the volume to 832/d. $564 * 31 = 17,484$ $17,484 / 21 = 832.5/d$.

i found that schreiber was already in at 111/d.

thank you for your patientience *[sic]* in this matter.

evan

(Exhibit 5, Schedule MN-4, page 5, no. 12.)

³ "WNG" is Williams Natural Gas.

Michael R. Noack of Missouri Gas Energy went on to testify, "There was a problem that TXUES knew about on July 5, 2000, the essence of which is that the nominations were not being accepted by the Williams electronic process, and as a result, Williams delivered no gas to MGE for Schreiber's account." (Ex. 5, page 12, lines 1-4).⁴ Based on Noack's testimony and the exhibits sponsored by Noack, the Commission finds that Evan Moore attempted to make a nomination for Schreiber on July 5, 2002, using Williams' electronic bulletin board and that, for unknown reasons, the bulletin board malfunctioned and did not accept the nomination.

Pursuant to its tariff, Missouri Gas Energy places all money received as unauthorized usage charges into its Purchased Gas Adjustment fund. Thus, such funds serve to reduce gas costs for Missouri Gas Energy's system sales customers. These funds do not benefit transportation customers in any way.

Conclusions of Law

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

Jurisdiction:

Missouri Gas Energy, a division of the Southern Union Company, is a "gas corporation" and a "public utility" within the intendments of the Missouri Public Service Commission Law.⁵ The Missouri Public Service Commission, therefore, has jurisdiction over the services, activities and rates of Missouri Gas Energy.⁶ The Commission is authorized to hear and determine complaints made by "any corporation or person" concerning "any act or thing done or omitted to be done by any corporation, person or public utility."⁷

The Complaint:

Petitioners complain that Missouri Gas Energy has violated Missouri law, Commission regulations, and its own tariffs, as follows:

1. That Missouri Gas Energy violated its duty of "reasonable diligence," found in Paragraph 8 of the Sale or Transportation of Natural Gas contract form at Sheet 53 of Missouri Gas Energy's tariff, by failing to advise the appropriate person at Schreiber or TXU of the lack of any nomination for July 2000 and by failing to warn Schreiber of the potential financial consequences.

2. That Missouri Gas Energy has allowed prior period adjustments to other customers but denied such an adjustment to Schreiber and TXU, thereby violating Section 393.130, 2 and 3, which provisions prohibit discriminatory treatment of customers by gas corporations.

3. That Missouri Gas Energy did not bill Schreiber on a daily basis, thereby violating the provisions of its tariff, sheet 61.3.

⁴ "TXUES" is TXU Energy Services. "MGE" is Missouri Gas Energy.

⁵ Section 386.020, (18) and (42), RSMo Supp. 2001. Section 386.010 states that Chapter 386 shall be known as the "Missouri Public Service Commission Law."

⁶ Sections 386.020(42) and 386.250(1), RSMo Supp. 2001.

⁷ Section 386.390.1, RSMo 2000.

11 Mo. P.S.C. 3d

4. That Missouri Gas Energy has violated Section 393.130.1 by its conduct in this matter in that its actions have not been "just and reasonable."

5. That the actions and penalty charges in this matter are not supported by Missouri Gas Energy's tariffs on file with the Commission at the time of the occurrences.

Petitioners pray that the Commission will invalidate the unauthorized use charge imposed by Missouri Gas Energy on Schreiber Foods and require that Missouri Gas Energy issue a prior period adjustment or other appropriate adjustment to Schreiber. Petitioners also seek an order prohibiting Missouri Gas Energy from ceasing gas deliveries to Schreiber.

Burden of Proof:

The Petitioner bears the burden of proof in a case, such as this one, in which the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions.⁸ Thus, Schreiber and TXU must establish all facts necessary to support the relief they seek by a preponderance of the credible evidence.

Affirmative Defenses:

In answer to the Complaint, Missouri Gas Energy raises certain affirmative defenses:

1. That the Complaint fails to state "facts or a cause of action" upon which relief can be granted.

2. That the Complaint, to the extent that it asserts that Missouri Gas Energy's rates or charges are unreasonable, is not perfected as required by Section 386.390 and Regulation 4 CSR 240 2.070.

3. That TXU "lacks the legal capacity to sue or bring this Complaint" because it is not a customer of Missouri Gas Energy and has no contractual relationship with Missouri Gas Energy.

4. That the Commission lacks subject matter jurisdiction over the subject matter of this Complaint.

5. That Missouri Gas Energy has acted in compliance with its approved tariffs.

An affirmative defense "seeks to defeat or avoid the plaintiff's cause of action, and avers that even if the allegations of the petition are taken as true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid the legal responsibility alleged."⁹ However, these additional facts must be stated with particularity in the defending party's answer or other responsive pleading:

When a party asserts an affirmative defense, the pleading "shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Because the purpose of Rule 55.08 is to provide notice to the

⁸ *Ahlstrom v. Empire District Electric Company*, 4 Mo. P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company*, 30 Mo.P.S.C. (N.S.) 517, 523 (1991).

⁹ *Mobley v. Baker*, 2002 WL 522691 (Mo. App., W.D., April 9, 2002) at *4.

plaintiff, . . . the facts supporting a defense must be pled in the same manner as they would be with claims. Mere conclusory allegations constitute inadequate pleadings.¹⁰

Pleadings in Commission practice are not held to the same standard as are pleadings under Supreme Court Rule 55.08.¹¹ Nonetheless, as a matter of fundamental fairness amounting to due process of law, a party asserting an affirmative defense in a proceeding before the Commission must allege the specific facts outside the complaint upon which it relies and as to which it has the burden of proof. Otherwise, the responding party cannot know what facts it must contest.

Discussion:

This case is straightforward. Schreiber Foods, a transportation customer of Missouri Gas Energy, incurred an unauthorized use charge under Missouri Gas Energy's tariff because it failed to make a nomination prior to the end of the month of July, 2000. The tariff in question, P.S.C. Mo. No. 1, Original Sheet 61.3, effective September 2, 1998, provides:

UNAUTHORIZED USE CHARGES

Unauthorized use charges will be assessed to transportation customers for all natural gas volumes taken in excess of customer's authorized gas volumes delivered to a Company's delivery location, for the customer's account, plus any Contract Demand level. Unauthorized use charges will be assessed to transportation customers on a daily basis:

during times of an MGE curtailment, and/or

during times of an interstate pipeline interruption or curtailment; and/or

in the event no nomination exists for such customer (zero nomination).

The Company will bill unauthorized use charges to transportation customers on a daily basis pursuant to this rate schedule, in addition to any upstream penalties assessed directly to the customer by the delivering pipeline, and/or penalties assessed to the Company by the delivering pipeline, which can be directly attributed to unauthorized use by such customer(s).

¹⁰ *Business Men's Assurance Co. of America v. Graham*, 891 S.W.2d 438, 448 (Mo. App., W.D. 1994).

¹¹ "[A] complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient." *State ex rel. Kansas City Terminal Ry. Co. v. Public Service Commission*, 272 S.W. 957, 308 Mo. 359 (Mo. 1925).

11 Mo. P.S.C. 3d

Unauthorized Use Charges

1. \$1.50 for each Ccf of unauthorized use, plus
2. 125% (one-hundred and twenty-five percent) of the currently effective Purchased Gas Adjustment rate, excluding the refund factor, if any, plus
3. all interstate pipeline penalties and other charges incurred by the Company which are attributable to a customer's unauthorized use.

All interstate penalties and other charges shall be attributed and assigned to unauthorized use by specific transportation customers.

(Exhibit 3, Schedule 2).

Consequently, all of the natural gas that Schreiber used in July, 2000, was in excess of its nominated amount. Schreiber requested that Missouri Gas Energy permit it to make a late nomination, and thus avoid the charge; Williams apparently allowed this with respect to the interstate portion of the gas transportation. Missouri Gas Energy refused, however, correctly pointing out that it is bound by its Commission-approved tariff. Now Schreiber and TXU, with whom Schreiber deals in purchasing natural gas, seek relief from the Commission. To that end, Schreiber and TXU advance five different theories.

First, Petitioners argue that Missouri Gas Energy violated its duty of "reasonable diligence," found in Paragraph 8 of the Sale or Transportation of Natural Gas contract form at Sheet 52 of Missouri Gas Energy's tariff, by failing to advise the appropriate person at Schreiber or TXU of the lack of any nomination for July 2000 and by failing to warn Schreiber of the potential financial consequences. Paragraph 8 provides:

8. Company shall use reasonable diligence to provide a regular supply of natural gas subject to the priority of service provisions and other terms of Company's filed tariffs, but does not guarantee such supply. Company does not assume responsibility for interruption of service, whether caused by inadequacy of supply, equipment, facilities or because of uncontrollable forces, except when such interruption is the result of reckless, willful or wanton acts of Company, its agents or employees.

The language Petitioners rely on, by its plain terms, applies only to the provision of a regular supply of natural gas. There is no complaint in this record that Missouri Gas Energy failed to provide a regular supply of natural gas to Schreiber; indeed, the record shows that Missouri Gas Energy supplied gas to Schreiber despite Schreiber's failure to make a timely nomination. The Commission does not agree that this language imposes any duty on Missouri Gas Energy to warn Schreiber of the financial effect of its failure to make a timely nomination. And, in any event, the record shows that Missouri Gas Energy did deliver a timely warning to Schreiber.

Second, Petitioners contend that Missouri Gas Energy has allowed prior period adjustments to other customers but nevertheless denied such an adjustment to Schreiber and TXU, thereby violating Section 393.130, 2 and 3, which provisions prohibit discriminatory treatment of customers by gas corporations. This argument must fail because Petitioners failed to adduce any evidence that Missouri Gas Energy has allowed such a "prior period adjustment" to any other customer.

Third, Petitioner argues that Missouri Gas Energy did not bill Schreiber on a daily basis, thereby violating the provisions of its tariff, Sheet 61.3. This is the theory upon which Petitioners principally rely. Petitioners state, "MGE's tariffs require it to bill a customer on a daily basis for unauthorized use charges. This did not take place. There was, rather than a daily bill, one single bill for the entire month of July 2000 sent to Schreiber Foods[.]" Petitioners insist that the word "bill" means to present a statement of charges to a customer.

This theory fails because, even if Petitioner's interpretation of Missouri Gas Energy's tariff were adopted, Petitioners do not explain why that would result in cancellation of the unauthorized use charge. Schreiber did not make a timely nomination and so must suffer the consequences set out in Missouri Gas Energy's tariff. If Missouri Gas Energy were shown to have violated its tariff, then appropriate consequences would be imposed on Missouri Gas Energy. These consequences would not include cancellation of the unauthorized use charge.

In any event, the Petitioners have not shown that their construction of Missouri Gas Energy's tariff is the only correct one. "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature."¹² A tariff is subject to the same rules of construction as statutes.¹³ When interpreting a statute, the primary goal is to determine "the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning."¹⁴ The ordinary meaning of a word is usually derived from the dictionary.¹⁵ The verb "bill" can mean either "to present a statement of costs or charges" or "to enter on a statement of costs."¹⁶ Thus, both Petitioners' interpretation and Respondent's interpretation are permissible constructions of the tariff. The result is that Petitioners have failed to show that Missouri Gas Energy acted in violation of its tariff.

Fourth, Petitioners argue that Missouri Gas Energy has violated Section 393.130.1 by its conduct in this matter in that its actions have not been "just and reasonable." This argument, too, must fail. The Commission approved this tariff as just and reasonable when it was first presented for consideration. Petitioners

¹² *A.C. Jacobs and Co., Inc. v. Union Electric Co.*, 17 S.W.3d 579, 582 (Mo. App., W.D. 2000); quoting *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App., E.D. 1997).

¹³ *A.C. Jacobs*, *supra*, 17 S.W.3d at 584.

¹⁴ *Loneragan v. May*, 53 S.W.3d 122, 126 (Mo. App., W.D. 2001); quoting *Farmers' & Laborers' Cooperative Insurance Association v. Director of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987).

¹⁵ *Preston v. State*, 33 S.W.3d 574, 578 (Mo. App., W.D. 2000).

¹⁶ *American Heritage Dictionary* 178 (1982).

11 Mo. P.S.C. 3d

have shown nothing to suggest that the Commission's initial approval of this tariff was a mistake. The penalty is entirely the result of Petitioners' own action or inaction.

Fifth, and finally, Petitioners argue that the actions and penalty charges in this matter are not supported by Missouri Gas Energy's tariffs on file with the Commission at the time of the occurrences. The Commission has already quoted the relevant sheet, P.S.C. Mo. No. 1, Original Sheet 61.3, effective September 2, 1998, at length above. The record shows that Missouri Gas Energy has acted in all respects in conformance with its Commission-approved tariff.

For these reasons, the Commission determines that Missouri Gas Energy appropriately imposed an unauthorized use charge on Schreiber and that the Complaint herein is without merit and should be dismissed.

IT IS THEREFORE ORDERED:

1. That the Complaint filed on April 20, 2001, by TXU Energy Services, Inc., and Schreiber Foods, Inc., is found after full hearing and briefing to be without merit and is therefore dismissed.
2. That this Report and Order shall become effective on July 7, 2002.

Simmons, Ch., Murray, Lumpe, Gaw,
and Forbis, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo 2000.

In the Matter of Southwestern Bell Telephone Company's Proposed Revisions to PSC Mo. No. 26, Long Distance Message Telecommunications Service Tariff.*

In the Matter of MCImetro Access Transmission Services, LLC's Local NationwideOne Promotion.

In the Matter of NuVox Communications of Missouri, Inc.'s "Free Month" Promotion for New Customers.

In the Matter of American Communication Services of Kansas City, Inc.'s Tariff Filing to Introduce New Product Packages for Basic Local Service Business Customers.

In the Matter of MCImetro Access Transmission Services, LLC's Proposed Revisions to Its Local Exchange Service Tariff, MO P.S.C. Tariff No. 1.

In the Matter of MCI WorldCom Communications, Inc.'s Proposed Revisions to Its MO P.S.C. Tariff No. 4.

In the Matter of Brooks Fiber Communications of Missouri, Inc.'s Proposed Revisions to Its P.S.C. Tariff No. 2, General Exchange Services.

In the Matter of TCG St. Louis' Proposed Revisions to Its P.S.C. Tariff No. 2, Local Exchange Services.

In the Matter of TCG Kansas City's Proposed Revisions to Its P.S.C. Tariff No. 1, Local Exchange Services.

Case Nos. TT-2002-227, TT-2002-235, TT-2002-274, TT-2002-294, TT-2002-304, TT-2002-305, TT-2002-306, TT-2002-308 & TT-2002-309

Decided June 27, 2002

Telecommunications §45. The Commission rejected a tariff proposed by Southwestern Bell because the term discount plan, exceeding one year in length, that would have been created by the tariff would have an adverse effect on competition in the basic local exchange service market.

*See pages 69, 73, 117, 150, 409, 429 & 432 Volume 10 MPSC 3d and page 181 Volume 9 MPSC 3d for other orders in this case

11 Mo. P.S.C. 3d

Telecommunications §45. The Commission rejected the tariffs proposed by various Competitive Local Exchange Carriers because the term discount offers, exceeding one year in length, that would have been created by the tariffs would have an adverse effect on competition in the basic local exchange service market.

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REGULATORY LAW JUDGE: **Morris L. Woodruff**

REPORT AND ORDER

SUMMARY

In this Report and Order, the Commission rejects tariffs offered by Southwestern Bell and various competitive companies that would offer discounted rates in exchange for term commitments that exceed one year. The Commission finds that term commitments that exceed one year are detrimental to the health and development of competition in Missouri's local exchange telecommunications market.

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 in making this decision has considered the positions and arguments of all of the parties. 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.

Procedural History

This series of cases began on November 13, 2001, when the Staff of the Commission filed a motion in Case No. TT-2002-227, asking the Commission to suspend a tariff filed by Southwestern Bell Telephone Company. Southwestern Bell's tariff would implement a promotion for CompleteLink Basic and would offer a discount for entering into a term contract for local exchange service. At the time that Staff filed its motion, the Commission had pending before it Case Nos. TT-2002-108/TT-2002-130, in which it was considering the question of whether term discounts adversely affected the competitive local exchange market. On November 15, the Commission issued an order in TT-2002-227 suspending Southwestern Bell's tariff until December 20, 2001, to allow the Commission time to issue a decision in TT-2002-108/TT-2002-130.

Thereafter, on November 19, 2001, Southwestern Bell filed a motion asking the Commission to suspend a tariff filed by MCI Metro Access Transmission Services, LLP. Southwestern Bell indicated that MCI Metro's tariff contained a promotion that offered a discount for entering into a term contract for local exchange service. Southwestern Bell argued that if its term-discount tariff was suspended, then the Commission should also suspend a similar tariff offered by one of its competitors. On November 29, the Commission issued an order in Case No. TT-2002-235 suspending MCI Metro's tariff until December 20, 2001.

11 Mo. P.S.C. 3d

On December 10, 2001, Southwestern Bell filed a motion asking the Commission to suspend a tariff filed by NuVox Communications of Missouri, Inc. Again, Southwestern Bell indicated that NuVox's tariff contained a promotion offering a discount for entering into a term contract for local exchange service. On December 11, the Commission issued an order in Case No. TT-2002-274 suspending NuVox's tariff until December 20, 2001.

On December 18, 2001, the Commission issued a report and order in Case Nos. TT-2002-108/TT-2002-130, rejecting Southwestern Bell's proposed tariffs that would offer rate discounts for long-term contracts. The Commission rejected those tariffs because it found that such term agreements would adversely affect competition in the local exchange market.

On December 18, 2001, the Commission issued an Order Further Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference in Case Nos. TT-2002-227, TT-2002-235, and TT-2002-274. In that order, the Commission directed its records department to send notice of the tariff suspension to all telecommunications companies certificated to do business in Missouri. The Commission also directed that any proper person or entity desiring to intervene should submit an application to intervene no later than January 7, 2002. Qwest Communications Corporation filed a timely application to intervene in Case Nos. TT-2002-227, TT-2002-235, TT-2002-274. That application to intervene was granted on January 11, 2002.

On December 19, 2001, Southwestern Bell filed a motion asking the Commission to suspend a tariff filed by American Communication Services of Kansas City, Inc. (e.spire) Again, Southwestern Bell indicated that e.spire's tariff offered a discount for entering into a term contract for local exchange service. On December 27, in Case No. TT-2002-294, the Commission issued an Order Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference. The Commission suspended e.spire's tariff until April 27, 2002. On January 14, 2002, the Commission granted Southwestern Bell's Application to Intervene in Case No. TT-2002-294.

On December 26, 2001, Southwestern Bell filed a motion asking the Commission to suspend a tariff filed by MCI Metro Access Transmission Services. That tariff contained a discount for entering into a term contract for local exchange service. On January 3, 2002, in Case No. TT-2002-304, the Commission issued an Order Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference. The Commission suspended MCI metro's tariff until May 7, 2002. On January 22, 2002, the Commission granted Southwestern Bell's Application to Intervene in Case No. TT-2002-304.

On December 26, 2001, Southwestern Bell filed a motion asking the Commission to suspend a tariff filed by MCI WorldCom. That tariff contained a discount for entering into a term contract for local exchange service. On January 3, 2002, in Case No. TT-2002-305, the Commission issued an Order Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference. The Commission suspended MCI WorldCom's tariff until May 7, 2002. On January 22, 2002, the Commission granted Southwestern Bell's application to intervene in Case No. TT-2002-305.

On December 26, 2001, Southwestern Bell filed a motion asking the Commission to suspend a tariff filed by Brooks Fiber Communications of Missouri, Inc. That tariff contained a discount for entering into a term contract for local exchange service. On January 3, 2002, in Case No. TT-2002-306, the Commission issued an Order Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference. The Commission suspended Brooks Fiber's tariff until May 7, 2002. On January 22, 2002, the Commission granted Southwestern Bell's application to intervene in Case No. TT-2002-306.

On December 31, 2001, in Case No. TT-2002-308, the Commission, acting on its own motion, issued an Order Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference. The Commission suspended TCG St. Louis' tariff until May 1, 2002. On January 22, 2002, the Commission granted Southwestern Bell's application to intervene in Case No. TT-2002-308.

On December 31, 2001, in Case No. TT-2002-309, the Commission, acting on its own motion, issued an Order Suspending Tariff, Directing Notice and Scheduling a Prehearing Conference. The Commission suspended TCG Kansas City's tariff until May 1, 2002. On January 22, 2002, the Commission granted Southwestern Bell's application to intervene in Case No. TT-2002-309.

Prehearing conferences were held on January 11, 2002, in Case Nos. TT-2002-227, TT-2002-235, TT-2002-274, and TT-2002-294. Prehearing conferences were held on January 24, 2002, in Case Nos. TT-2002-294, TT-2002-304, TT-2002-305, TT-2002-306, TT-2002-308, and TT-2002-309. As a result of discussions among the parties at those prehearing conferences, Staff filed a Motion to Consolidate in each of these cases. The motion indicated that all parties agreed to the proposed consolidation. On January 30, 2002, the Commission issued an order consolidating all of the cases, and designating TT-2002-227 as the lead case.

In its January 30 order, the Commission also established a procedural schedule leading to a hearing beginning on April 17, 2002. On February 5, 2002, the Commission issued an order that further suspended each of the tariffs until July 3, 2002.

The parties submitted prefiled direct, rebuttal and surrebuttal testimony and the consolidated cases proceeded to hearing on April 17 and 18, 2002. Southwestern Bell, Staff, and a group of companies consisting of NuVox, MCI WorldCom, Brooks Fiber, MCI metro, TCG St. Louis, and TCG Kansas City, filed initial briefs on May 23, 2002. The same parties filed reply briefs on June 7.

The Parties:

Southwestern Bell is an incumbent local exchange carrier (ILEC). That means that before the passage of the Telecommunications Act of 1996, Southwestern Bell was a regulated monopoly provider of local exchange service within its exchanges. In other words, before the advent of competition, all local service customers within Southwestern Bell's exchanges were customers of Southwestern Bell.

The other companies that have had tariffs suspended are competitive local exchange carriers, generally referred to by the acronym, CLEC. The Telecommunications Act of 1996 permitted additional telephone carriers, the CLECs, to enter into local exchanges to compete with the incumbent, monopoly carrier. All of the

11 Mo. P.S.C. 3d

CLECs that have had tariffs suspended are attempting to compete in Southwestern Bell's exchanges. Each is classified as a competitive company, providing competitive services.

The Tariffs:

The Commission has suspended a tariff filed by Southwestern Bell, as well as several tariffs filed by various CLECs. All of the tariffs were suspended for the same reason; to permit the Commission an opportunity to consider whether the term discount plans offered by the companies have an adverse effect on competition in the basic local exchange service market.

The Tariff Proposed by Southwestern Bell

Southwestern Bell's suspended tariff is described as a CompleteLink-Basic promotion. That promotion allows a business customer to purchase intraLATA toll service at a rate of \$0.12 per minute when the customer also enters into an Access Line Term Pricing Plan, as described in a separate Southwestern Bell tariff. The promotion was previously in effect from October 11, 2000, through October 10, 2001. Southwestern Bell's tariff would extend the promotion for one more year.¹ The Commission suspended the tariff in Case No. TT-2002-227.

Southwestern Bell's promotional tariff does not directly establish a term discount plan. It does, however, promote an existing discount plan, the Access Line Term Pricing Plan, an optional term discount plan that is currently in effect. Under that pricing plan, customers who execute a 24-month term agreement are eligible for a four percent discount; customers who execute a 36-month term agreement are eligible for a six percent discount; customers who execute a 48-month term agreement are eligible for an eight percent discount; and customers who execute a 60-month term agreement are eligible for a ten percent discount.² The tariff that authorizes the Access Line Term Pricing Plan is not currently before the Commission for consideration.

The Tariff Proposed by NuVox

NuVox's suspended tariff contains a promotion that would give a discount to new customers signing new service contracts. Such customers would receive a credit equal to a free month of service for each year of the applicable term of the service contract signed by that customer. In other words, the customer would receive a one-month free service credit for a one-year service contract, a two-months free service credit for a two-year service contract, and a three-months free service credit for a three-year service contract. The promotion was intended to run from December 14, 2001 through March 1, 2002.³ The Commission suspended NuVox's tariff in Case No. TT-2002-274.

¹ Getz Direct, Exhibit 4, Pages 3-4.

² P.S.C. Mo. - No. 24, Local Exchange Tariff, 1st Revised Sheet 2.03, Section 1.2.2.A.1, as described in Southwestern Bell Telephone, L.P.'s Initial Brief, Page 9.

³ Cadieux Direct, Exhibit 10, Page 2.

The Tariffs Proposed by the WorldCom Companies

MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Missouri, Inc., are all subsidiaries of WorldCom. For convenience, they will be referred to as the WorldCom companies. Each of the WorldCom companies filed a tariff to introduce the Local NationwideOne promotion. New or existing business customers who choose to subscribe to, or renew, a term plan of at least one year for a new T-1, a digital transmission link, under existing tariffs, would be eligible for discounted rates. The promotion was intended to run from December 1, 2001, through February 28, 2002.

MCImetro also filed a proposed tariff that would create several promotional offers for new or existing business customers who would choose to subscribe to at least a one-year term commitment between January and March 2002. The specific promotions would waive local service install charges; provide credits for certain recurring digital trunk charges; provide credits for certain non-recurring equipment and facility costs; and discount recurring charges.⁴ The Commission suspended the WorldCom companies' tariffs in Case Nos. TT-2002-235, TT-2002-304, TT-2002-305, and TT-2002-306.

The Tariffs Proposed by the TCG Companies

TCG Kansas City, Inc., and TCG St. Louis, Inc. are subsidiaries of AT&T Communications of the Southwest, Inc., and provide local exchange service to business customers in the Kansas City and St. Louis metropolitan areas. For convenience, they will be referred to as the TCG companies. Both TCG companies filed a single tariff that would establish two promotions. The first is known as the DS1 Promotional Recurring Charge Waiver. This promotion would give a business customer a waiver of one month of Monthly Recurring Charges if it orders designated DS1 services between January 1, 2002 and December 31, 2002, and commit to generate \$500 in combined Local, IntraLATA, and Monthly Recurring Charges over a 12-month period. The second promotion is known as the Vendor Equipment and Service Credits. Under these promotions, the business customer would receive a \$1000 Vendor Equipment and Services credit for designated DS1 services when they commit to a three-year term plan for Local, IntraLATA, and Monthly Recurring Charges.⁵ The Commission suspended the TCG companies' tariffs in Case Nos. TT-2002-308 and TT-2002-309.

The Tariff Proposed by e.spire

American Communications Services of Kansas City, Inc. d/b/a e.spire, is an operating subsidiary of e.spire Communications, Inc. e.spire filed a tariff that would offer what it refers to as a VIP package. The VIP customer would receive a total package product consisting of Local, Long Distance, and Toll Free services with optional custom calling features and Integrated 256 kb Internet. The VIP package is available under one-, two-, or three-year term agreements.⁶ The Commission suspended e.spire's tariff in Case No. TT-2002-294.

⁴ Morris Direct, Exhibit 11, Page 3-5.

⁵ Kohly Direct, Exhibit 13, Page 3, and Schedule RMK-1.

⁶ Kaufman Direct, Exhibit 17, Page 4.

The Effect of Southwestern Bell's Tariff on Competition

In a Report and Order issued on December 18, 2001, in consolidated Case Nos. TT-2002-108 and TT-2002-130, the Commission rejected two tariffs submitted by Southwestern Bell. The Commission rejected those tariffs after finding that term contracts that extend for more than one year are likely to be detrimental to the health and development of competition in Missouri's local exchange market.

Part of the basis for the Commission's decision in that case to reject the tariffs offered by Southwestern Bell was a finding that Southwestern Bell continues to dominate the local exchange market in its exchanges. The evidence presented in this case confirms that Southwestern Bell's position in the local exchange marketplace has not changed in the six months since the Commission issued its decision in TT-2002-108/TT-2002-130. Southwestern Bell faces very little competition in the residential local exchange market. Even in the business local exchange market, where it does face some effective competition, Southwestern Bell continues to control approximately 70 percent of the business access lines in use in its exchanges.⁷ Furthermore, the 30 percent of the business market that is controlled by the CLECs is spread among many competing CLECs, so that none is in a position to match the strength of Southwestern Bell.⁸

Southwestern Bell attempts to counter the argument that it is in a position to dominate the local exchange market through the use of term contracts by suggesting that the percentage of lines served by CLECs has continued to grow despite its having offered term contracts to its customers for several years.⁹ However, two of Southwestern Bell's witnesses conceded that they have not done any studies to try to determine whether the growth of service by CLECs might have been greater if not for the use of term contracts by Southwestern Bell.¹⁰ Indeed, they concede that it would be very difficult to make such a determination about the competitive market.¹¹

It is, however, easy to determine that the state of competition in the local exchange market is currently in a critical position. Because of the condition of the capital markets for telecommunications companies, many CLECs are in dire financial condition.¹² The difficulties currently facing the CLECs were well explained by Edward J. Cadieux, Executive Director, Regulatory and Public Affairs for NuVox, one of the competitors struggling to survive in the marketplace.¹³ If potential customers are locked up and kept away from competitors through the use of term agreements, any possibility of healthy competition in the local exchange market may vanish along with most of the competitors.

⁷ Transcript, Page 331.

⁸ Exhibit 23.

⁹ Getz Direct, Exhibit 4, Page 10.

¹⁰ Transcript, Pages 89 and 122-123.

¹¹ Transcript, Pages 90 and 122-123.

¹² Transcript, Page 216.

¹³ Transcript, Pages 211-221.

The Effect of the CLECs' Tariffs on Competition

The CLECs frequently sign their customers to term agreements. Indeed, the evidence indicates that nearly all of the local exchange customers of the CLECs whose tariffs have been suspended are locked in to those CLECs by term agreements. The exact figures are a highly confidential number, but the witnesses for NuVox,¹⁴ the WorldCom companies,¹⁵ and the TCG companies,¹⁶ testified that the vast majority of their companies' customers are bound by term agreements.

The CLECs argue that their tariffs should be treated differently than those of Southwestern Bell because they are in a different position in the marketplace. Obviously, as the Commission has previously found, the CLECs are not in a position to dominate the marketplace for local exchange telecommunications services. Nevertheless, a customer locked up by a term contract with a CLEC is just as securely removed from the marketplace as that customer would be if it signed a term contract offered by Southwestern Bell.¹⁷ In fact, because the percentage of CLEC customers signed to term agreements is much greater than the percentage of Southwestern Bell customers signed to term agreements, there are more customer lines out of the market because they are tied to a CLEC's contract than because they are tied to a Southwestern Bell contract.

The Commission finds that the market for local exchange telecommunications services will operate most efficiently if potential customers are not locked into contracts extending for more than one year. That finding applies equally to long-term contracts created by the tariffs offered by the CLECs as it does to the long-term contracts created by Southwestern Bell's tariff. Therefore, the tariffs submitted by the CLECs must also be rejected.

CONCLUSIONS OF LAW

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

Southwestern Bell, NuVox Communications of Missouri, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCI Metro Access Transmission Services, TCG St. Louis, TCG Kansas City, and American Communications Services of Kansas City, Inc., are "telecommunications companies" as that term is defined in Section 386.020(51), RSMo 2000, and are subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Southwestern Bell is an "incumbent local exchange telecommunications company" as that term is defined in Section 386.020(22), RSMo 2000.

NuVox Communications of Missouri, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., MCI Metro Access Transmission Services, TCG St. Louis, TCG Kansas City, and American Communications

¹⁴ Transcript, Page 193.

¹⁵ Transcript, Pages 239-240.

¹⁶ Transcript, Page 312.

¹⁷ Transcript, Page 177.

11 Mo. P.S.C. 3d

Services of Kansas City, Inc., are "competitive telecommunications companies" as that term is defined in Section 386.020(9), RSMo 2000.

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company. That same section authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days, plus an additional six months if the hearing regarding such suspension cannot be concluded within 120 days.

Section 536.041, RSMo 2000, permits any person to petition an agency requesting the adoption, amendment, or repeal of any rule. 4 CSR 240-2.180(3) establishes the procedure to be followed when petitioning the Commission regarding the adoption, amendment, or repeal of any rule.

In 1996, the Missouri General Assembly passed legislation aimed at promoting competition in Missouri's telecommunications industry. Section 392.185, RSMo 2000, which establishes the purpose of that legislation, states that:

The provisions of this chapter shall be construed to: ... (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri; ... (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest."

Therefore, the Public Service Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition.

Section 392.200.2, RSMo 2000, provides in pertinent part as follows:

No telecommunications company shall directly or indirectly or by a special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. *Promotional programs for telecommunications services may be offered by telecommunications companies for periods of time so long as the offer is otherwise consistent with the provisions of this chapter and approved by the commission. ... (emphasis added)*

This statute means that the Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition.

Section 392.200.3, RSMo 2000, provides as follows:

No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.

This statute has been interpreted to "forbid discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions."¹⁸ Rate differences are permitted only if there is any "reasonable and fair difference in condition which equitably and logically justifies a different rate."¹⁹

The Commission has previously found, as a matter of fact, that the tariffs proposed by Southwestern Bell and the CLECs will be detrimental to the health and development of competition in Missouri's local exchange market. Those tariffs are therefore unjust and unreasonable. In keeping with the Commission's obligation under Section 393.200, RSMo 2000, the Commission must reject each of those tariffs.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1. Should the Missouri Public Service Commission approve Southwestern Bell Telephone L.P., d/b/a Southwestern Bell Telephone Company's CompleteLink Basic Promotion, which offers business customers, who sign an Access Term Pricing Plan, postalized IntraLATA toll for \$0.12 per minute?

The tariff proposed by Southwestern Bell promotes a plan that offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

2. Should the Missouri Public Service Commission approve MCImetro's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?

The tariff proposed by MCImetro offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

¹⁸ *State ex rel. DePaul Hospital v. PSC*, 464 S.W.2d 737, 738 (Mo. App. 1970).

¹⁹ *Id.* at 740.

11 Mo. P.S.C. 3d

3. Should the Missouri Public Service Commission approve NuVox's "Free Month" promotion tariff revision, which contains discounts for term commitments that can exceed one year?

The tariff proposed by NuVox offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

4. Should the Missouri Public Service Commission approve MCImetro's proposed revisions to its Local Exchange Service tariff, MO PSC Tariff No. 1, which contains promotional discounts for term commitments that can exceed one year?

The tariff proposed by MCImetro offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

5. Should the Missouri Public Service Commission approve MCI WorldCom's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?

The tariff proposed by MCI WorldCom offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

6. Should the Missouri Public Service Commission approve Brooks Fiber's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?

The tariff proposed by Brooks Fiber offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

7. Should the Missouri Public Service Commission approve TCG St. Louis' proposed revisions to its Local Exchange Services Tariff, MO PSC Tariff No. 2, which contain discounts both for term commitments of one year and for other term commitments for more than one year?

The tariff proposed by TCG St. Louis offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

8. Should the Missouri Public Service Commission approve TCG Kansas City's proposed revisions to its Local Exchange Services Tariff, MO PSC Tariff No. 1, which contain discounts both for term commitments of one year and for other term commitments for more than one year?

The tariff proposed by TCG Kansas City offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

9. Should the Missouri Public Service Commission approve American Communications Services of Kansas City, Inc. d/b/a e.spire's Voice Internet Pack ("VIP") proposed tariff revision that would offer local, long distance, toll free services, custom calling, and integrated 256 kb internet multi-year commitments with discounts?

The tariff proposed by e.spire offers discounted rates in exchange for term commitments that exceed one year. As such, the Commission has found it to be detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariff will be rejected.

Having rejected all of the submitted tariffs, the Commission is faced with the question of whether to institute a rulemaking procedure to promulgate a rule setting down the policy that has guided the Commission's decision regarding these tariffs. The Commission will not institute a rulemaking at this time.

The shape of competition in Missouri's local exchange market is constantly evolving. Any attempt to construct a rule that would govern that competition in all circumstances would be difficult. Furthermore, the creation of a rule could solidify into law a solution that is appropriate now, but might be completely inappropriate a year from now, when conditions in the market have changed. Therefore, the Commission will not establish a rulemaking in this order. If any person believes that a rulemaking is appropriate, they may petition the Commission as permitted by Section 536.041, RSMo 2000, and 4 CSR 240-2.180(3).

Existing tariffs that contain term agreements exceeding one year are not currently before the Commission. The Commission will deal with those tariffs on an individual basis if they are brought to the Commission's attention.

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that tariffs that offer discounted rates in exchange for term commitments that exceed one year are detrimental to the health and development of competition in Missouri's local exchange market. Therefore, the tariffs before the Commission will be rejected.

IT IS THEREFORE ORDERED:

1. That the tariff sheet issued on October 19, 2001, by Southwestern Bell Telephone Company, and assigned Tariff No. 200200300, previously suspended by the Commission, is rejected. The tariff sheet rejected is:

P.S.C. Mo. - No 26

Long Distance Message Telecommunications Service Tariff
1st Revised Sheet 22.04, Replacing Original Sheet 22.04

2. That the tariff sheet issued on November 1, 2001, by MCImetro Access Transmission Services, LLC and assigned Tariff No. 200200338, previously suspended by the Commission, is rejected. The tariff sheet rejected is:

P.S.C. Tariff No 1

Original Page No. 64.15

3. That the tariff sheet issued on December 6, 2001, by NuVox Communications of Missouri, Inc. and assigned Tariff No. 200200453, previously suspended by the Commission, is rejected. The tariff sheet rejected is:

11 Mo. P.S.C. 3d

P.S.C. MO Tariff No 1

11th Revised Page 71, Replacing 10th Revised Page 71

4. That the tariff sheets issued on November 9, 2001, by American Communication Services of Kansas City, Inc. and assigned Tariff No. 200200364, previously suspended by the Commission, are rejected. The tariff sheets rejected are:

MO PSC No 1

Original Sheet Page 77.10
 Original Sheet Page 77.11
 Original Sheet Page 98.2
 Original Sheet Page 98.3
 Original Sheet Page 98.4
 Original Sheet Page 98.5

5. That the tariff sheets issued on November 19, 2001, by MCImetro Access Transmission Services, LLC, and assigned Tariff No. 200200395, previously suspended by the Commission, are rejected. The tariff sheets rejected are:

Missouri PSC Tariff No. 1

5th Revised Page No. 64, Cancels 4th Revised Page No. 64
 3rd Revised Page No. 64.2, Cancels 2nd Revised Page No. 64.2
 3rd Revised Page No. 64.3, Cancels 2nd Revised Page No. 64.3
 1st Revised Page No. 64.6, Cancels Original Page No. 64.6
 1st Revised Page No. 64.14, Cancels Original Page No. 64.14

6. That the tariff sheets issued on November 19, 2001, by MCI WorldCom Communications, Inc., and assigned Tariff No. 200200394, previously suspended by the Commission, are rejected. The tariff sheets rejected are:

MO PSC Tariff No. 4

4th Revised Page No. 218, Cancels 3rd Revised Page No. 218
 3rd Revised Page No. 221.1, Cancels 2nd Revised Page No. 221.1
 3rd Revised Page No. 221.3, Cancels 2nd Revised Page No. 221.3
 1st Revised Page No. 221.11, Cancels Original Page No. 221.11
 Original Page No. 221.22

7. That the tariff sheets issued on November 19, 2001, by Brooks Fiber Communications of Missouri, Inc., and assigned Tariff No. 200200396, previously suspended by the Commission, are rejected. The tariff sheets rejected are:

PSC Tariff No. 2

5th Revised Page No. 13.5, Cancels 4th Revised Page No. 13.5
 3rd Revised Page No. 13.7, Cancels 2nd Revised Page No. 13.7
 3rd Revised Page No. 13.8, Cancels 2nd Revised Page No. 13.8
 1st Revised Page No. 13.12, Cancels Original Page No. 13.12
 1st Revised Page No. 13.21, Cancels Original Page No. 13.21

8. That the tariff sheets issued on December 21, 2001, by TCG St. Louis, and assigned Tariff No. 200200515, previously suspended by the Commission, are rejected. The tariff sheets rejected are:

PSC Tariff No. 2

Third Revised Sheet No. 3.1, Cancels Second Revised Sheet No. 3.1
 Original Sheet No. 137
 Original Sheet No. 138

9. That the tariff sheets issued on December 21, 2001, by TCG Kansas City, and assigned Tariff No. 200200516, previously suspended by the Commission, are rejected. The tariff sheets rejected are:

PSC Tariff No. 1

Third Revised Sheet No. 3.1, Cancels Second Revised Sheet No. 3.1

Original Sheet No. 143

Original Sheet No. 144

10. That this Report and Order shall become effective on July 3, 2002.

Simmons, Ch., Lumpe and Gaw, CC., concur;
Murray and Forbis, CC., dissent with dissenting
opinions attached; certify compliance with the
provisions of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully disagree with the majority's decision to deprive Missouri customers of term commitment offerings in excess of one year. Such offerings have been tariffed in Missouri for years with absolutely no evidence of adverse impact.

As I stated in my Dissenting Opinion in TT-2002-108 and TT-2002-130, there is no reason to find that term commitment tariffs are unjust and unreasonable in today's market, which admittedly is more competitive than the market that existed when similar tariffs were found by this Commission to be just and reasonable. Like the decision in TT-2002-108 and TT-2002-130, today's decision unnecessarily denies Missouri customers many of the benefits of competition.

I respectfully dissent.

DISSENTING OPINION OF COMMISSIONER BRYAN FORBIS

I disagree with the Commission's decision to reject tariffs offered by Southwestern Bell and various CLECs that would offer discounted rates in return for term commitments that exceed one year.

No evidence was presented to show that term agreement tariffs offered by CLECs could adversely affect the local exchange market. Clearly there is no chance that any of these individual CLECs, with their share of the market, will be able to "lock-up" enough customers to be able to harm competition.

However, numerous parties testified that this decision would deprive the CLECs of the best tool they have to try to establish their position in the competitive marketplace. The CLECs need long-term agreements to ensure that they retain their new customers long enough to justify the cost of establishing the necessary network connections to serve those customers. In addition, term agreements facilitate their efforts to access critical capital markets. Rather than preserving competition, therefore, this decision may instead make it harder for CLECs to compete.

11 Mo. P.S.C. 3d

Southwestern Bell presented clear evidence to establish that its tariff will not harm competition in the local exchange market. Voluntary term agreements affect only a small proportion of Southwestern Bell's customers and there is limited danger that Southwestern Bell will be able to "lock-up" the local exchange market using such term agreements. I believe that a competitive balance should provide the same opportunity to Southwestern Bell as to the CLECs.

All parties noted that term discounts are desired by a segment of the consumer market. To ensure that this market remains robust, and provides equal competitive opportunities for all, I support limiting these agreements to three years so that roughly one-third of enrolled term customers in any given year would be re-entering the marketplace.

Furthermore, this decision does not clearly establish what will happen to existing term agreement tariffs that have not been brought to the attention of the Commission. For now, those tariffs are in effect and will remain in effect until the Commission takes some action against them. That means that some ILECs and CLECs will continue to be able to offer term agreements that exceed one year in length. Those most effected by this decision may be those CLECs that wish to enter the Missouri market for the first time and which will need to file entirely new tariffs. If the Commission follows the standard established in this decision and rejects those new tariffs, the new entrant will be placed at a competitive disadvantage, and may choose not to attempt to enter the market for local exchange service.

For these reasons, I dissent.

**In the Matter of the Application of Environmental Utilities, LLC,
for Permission, Approval, and a Certificate of Convenience
and Necessity Authorizing It to Construct, Install, Own,
Operate, Control, Manage and Maintain a Water System for
the Public Located in Unincorporated Portions of Camden
County, Missouri (Golden Glade Subdivision).**

*Case No. WA-2002-65
Decided June 27, 2002*

Water §§2, 21. When considering whether to grant an application for a certificate of convenience and necessity, the Commission will consider the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.

Water §2. Certificate of convenience and necessity §34. Where the owners of the applicant water company are also the owners of the subdivision to be served, and control the subdivision's homeowners association, the operation of the water system by a regulated utility is preferable to operation by the unregulated homeowners association.

Water §2. Certificate of convenience and necessity §22. The Commission indicated that it would grant applicant water company a certificate of convenience and necessity but would not issue the certificate, or allow it to become effective until the applicant presented proof to the Commission establishing that it had entered into a wholesale agreement to provide water to a neighboring subdivision, where such wholesale agreement was necessary to make the applicant financially viable.

APPEARANCES

Gregory D. Williams, Attorney at Law, Highway 5 at 5-33, Post Office Box 431, Sunrise Beach, Missouri 65079, for Environmental Utilities, LLC.

Thomas E. Loraine, Attorney at Law, Loraine and Associates, 4075 Highway 54, Suite 300, Osage Beach, Missouri 65065, for Hancock Construction Company.

M. Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Victoria Kizito, Assistant General Counsel, and *Keith R. Krueger*, Deputy 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: Morris L. Woodruff

REPORT AND ORDER**SUMMARY**

Environmental Utilities, LLC, has applied for a certificate of convenience and necessity authorizing it to provide water service to a developing subdivision in Camden County, Missouri. The Commission concludes that Environmental Utilities' application should be granted, but only after it has established to the Commission's satisfaction the arrangements it has made to provide wholesale water to Osage Water Company for the use of Osage Water's customers in the Eagle Woods subdivision.

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 in making this decision has considered the positions and arguments of all of the parties. 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.

Procedural History

On August 6, 2001, Environmental Utilities, LLC, filed an application for a certificate of convenience and necessity to construct and operate a water system to serve the Golden Glade subdivision in an unincorporated portion of Camden County, Missouri. In response to the application, the Commission, on August 13, issued an order directing that notice of the application be sent to the County Commission of Camden County, to the Missouri Department of Natural Resources, to the members of the General Assembly who represent Camden County, and to the newspapers that serve Camden County. The Commission directed that any proper persons wishing to intervene should file an application to intervene no later than September 4, 2001.

No party requested to intervene before September 4. However, on August 29, the Office of the Public Counsel, which by statute is a party to all cases before the Commission¹, requested a hearing. On September 5, the Commission issued an order scheduling a prehearing conference and directing the parties to file a proposed procedural schedule no later than September 26. A prehearing conference was held on September 19 and, on September 26, the parties filed a proposed procedural schedule that requested a hearing on December 14, 2001. The Commission established a procedural schedule in an order issued on October 4. The requested hearing date was not available on the Commission's calendar so the hearing was scheduled for January 7, 2002.

On November 1, 2001, Hancock Construction Company filed an application to intervene out of time. No party indicated any opposition to Hancock's request to intervene within the ten days allowed by the Commission's procedural rule,² and

¹ Section 386.710. RSMo 2000.

² 4 CSR 240-2.080(15).

on November 16, the Commission issued an order permitting Hancock to intervene out of time.

On November 21, Environmental Utilities filed a pleading indicating its opposition to Hancock's intervention. Environmental Utilities indicated that Hancock had failed to serve a copy of its Application to Intervene on Environmental Utilities and that as a result, Environmental Utilities did not become aware of Hancock's Application until it was placed on the Commission's agenda on November 15. Thereafter, on November 26, Environmental Utilities filed a Motion to Set Aside Order Granting Application of Hancock Construction Company to Intervene Out of Time.

At a prehearing conference held on November 26, 2001, counsel for Hancock indicated that its Application to Intervene had not been properly served on either Environmental Utilities, Staff, or Public Counsel.³ On December 6, the Commission issued an order that granted Environmental Utilities' request for reconsideration of the order granting Hancock's request to intervene. However, upon reconsideration, the Commission again granted Hancock's application to intervene out of time.

On December 12, 2001, the Staff, acting on behalf of all the parties, filed a proposed list of issues to be considered by the Commission. Along with the agreed-upon list of issues, Staff also submitted a list of additional issues proposed by Hancock. On December 19, Staff and Public Counsel filed statements indicating their positions on the issues. Environmental Utilities filed its position statement on December 21. Hancock did not file a position statement.

The hearing commenced on January 7, 2002, but was not completed on that date. After requesting conflict dates from counsel for all parties, the Commission, on January 14, issued an order scheduling a second day of hearings on March 4, 2002. On January 23, Hancock filed a motion asking that the second day of hearings be rescheduled because its witnesses would not be available on March 4. On February 14, the Commission rescheduled the second day of hearing for March 25, 2002.

The hearing reconvened on March 25, 2002, and was completed on that date. Initial Briefs and Proposed Findings of Fact and Conclusions of Law were filed on April 30, 2002, and Reply Briefs were filed on May 14, 2002.

The Applicant

Environmental Utilities is a recently formed Missouri Limited Liability Company. It does not yet provide any regulated services to the public. While Environmental Utilities does not currently provide regulated service to the public, it is inextricably linked, if not legally, then certainly factually, to an existing regulated water and sewer utility company, Osage Water Company. One of the owners of Environmental Utilities, its attorney, Gregory W. Williams, is a shareholder of Osage Water Company. The other owner of Environmental Utilities is Debra J. Williams, wife of Greg Williams. Debra Williams is not a shareholder in Osage Water Company, but she is currently serving as a director and as the manager of Osage Water Company.⁴

³ Transcript, Pages 13-24.

⁴ Williams Direct, Exhibit 1, Page 2.

11 Mo. P.S.C. 3d

Environmental Utilities' application seeks authority to provide water service to the Golden Glade subdivision, located in the Lake of the Ozarks area. Golden Glade is a new development that is not currently served by a regulated utility. Greg and Debra Williams, the owners of Environmental Utilities, are also the owners of the Golden Glade development.

The Golden Glade subdivision is designed to contain approximately 100 lots.⁵ Currently the development contains 11 single-family houses and 19 vacant lots. Six of the existing houses are currently served by shared single-family wells. All other houses are served by the central water system. The subdivision restrictions for the development require that all houses be connected to the central water system, and prohibit the use of single-family wells.⁶

A central water system for Golden Glade already exists. It was constructed by Greg and Debra Williams, acting as the developers of the subdivision. If Environmental Utilities' application is approved, Greg and Debra Williams intend to convey the water system to Environmental Utilities as a contribution in aid of construction,⁷ at a total cost of \$11,139.82.⁸ In addition, Greg and Debra Williams have constructed a water well with which to provide water for the water distribution system for Golden Glade. Debra Williams testified that the total cost of the water well was \$76,115.48. That amount includes a general contractors fee of ten percent to Greg and Debra Williams that Environmental Utilities requests be included in its rate base.⁹

If Environmental Utilities' application is approved, Greg and Debra Williams will sell that water well to Environmental Utilities. If Environmental Utilities' application is not approved, Greg and Debra Williams intend to retain ownership of the water well and the water system and lease them to the Golden Glade Land Owners Association, Inc.¹⁰ The homeowners association would then be responsible for operating and maintaining the water system.

The Golden Glade Land Owners Association is a not-for-profit homeowners association that is established in the Declaration of Restrictions for the Golden Glade Subdivision. Section III of Declaration of Restrictions provides for the formation of the homeowners association. That section also indicates that the developers, meaning Greg and Debra Williams, are entitled to 66 2/3 percent of all votes in the homeowners association until the earliest of the following events: all lots in the development are sold; January 1, 2010; or the developers voluntarily relinquish the right to control those votes.¹¹ In effect, that means that Greg and Debra Williams, as developers, will control the water distribution system for the Golden Glade subdivision through their control over the homeowners association, if that control is not exercised by Environmental Utilities.

⁵ Williams Direct, Exhibit 1, Page 14.

⁶ Williams Direct, Exhibit 1, Pages 10-11.

⁷ Williams Direct, Exhibit 1, Page 16.

⁸ Williams Surrebuttal, Exhibit 2, Page 3.

⁹ Williams Direct, Exhibit 1, Page 16.

¹⁰ Williams Direct, Exhibit 1, Page 12.

¹¹ Declaration of Restrictions for Golden Glade Subdivision, Exhibit 13. See *a/so*, Transcript, Pages 78-82.

The Relationship of Environmental Utilities to Osage Water

As previously indicated, Environmental Utilities is closely linked to Osage Water Company, so it is necessary to have some understanding of the history and current condition of Osage Water Company. Osage Water provides regulated water and sewer service in various locations in the Lake of the Ozarks area. Osage Water is currently certificated to provide sewer service to the Golden Glade subdivision. It also holds a certificate to provide sewer and water service to the Eagle Woods subdivision, which adjoins Golden Glade.

Greg Williams became involved with Osage Water in 1991, serving as president of that company from 1996-2000.¹² Debra Williams has been a director of Osage Water since 1996.¹³ The other primary shareholder of Osage Water is William P. (Pat) Mitchell. In addition, David Hancock, owner of Hancock Construction, a party in this case, served as vice president of Osage Water from 1992 to 1996,¹⁴ and still owns some preferred stock in Osage Water.¹⁵ Hancock also holds a \$240,000 debenture issued by Osage Water in settlement of a lawsuit in 1998.¹⁶

Before July 7, 2001, Pat Mitchell had general control of the day-to-day operations of Osage Water. On that date, Mitchell turned over the financial records of Osage Water to Mr. and Mrs. Williams by leaving them in boxes on their doorstep.¹⁷ Thereafter, Debra Williams took over as manager of Osage Water. Mitchell continues to serve as president of Osage Water.

By all accounts, Osage Water is currently in very poor financial condition and is unable to obtain additional financing.¹⁸ It still owes a substantial sum to David Hancock on the debenture he holds.¹⁹ At a shareholder meeting on January 8, 2002, Osage Water resolved to sell portions of its water and sewer systems to Greg Williams and Pat Mitchell as individuals in exchange for cancellation of debts for services owned to those shareholders.²⁰ Those transactions have not yet come before the Commission for approval.

As previously indicated, Osage Water has a certificate of authority to provide water to the Eagle Woods subdivision. When Osage Water received that certificate, it represented that it would provide water to Eagle Woods by means of a well to be drilled at a location within the Golden Glade subdivision.²¹ That well was drilled, but it was paid for by Greg and Debra Williams as individuals, rather than by Osage Water as a corporate entity. Greg and Debra Williams now want to disassociate themselves from Osage Water. Osage Water does not have enough money to pay

¹² Transcript, Page 70, Lines 3-6.

¹³ Williams Direct, Exhibit 1, Page 2. See also, Transcript, Page 69, Lines 1-3.

¹⁴ Williams Surrebuttal, Exhibit 2, Page 14.

¹⁵ Transcript, Page 578, Lines 19-20.

¹⁶ Transcript, Page 101, Lines 5-8, 22-25.

¹⁷ Transcript, Pages 221-222 and Exhibit 19.

¹⁸ Transcript Page 220.

¹⁹ Hancock Rebuttal, Exhibit 9, Schedule 7.

²⁰ Exhibit 28.

²¹ Hummel Rebuttal, Exhibit 5, Page 4, Lines 6-14.

11 Mo. P.S.C. 3d

Greg and Debra Williams for the well and they are not willing to give it to Osage Water.²² Thus, Greg and Debra Williams have formed Environmental Utilities for the purpose of operating the new well and providing service to their Golden Glade subdivision.

That leaves the problem of how to provide water service to the Eagle Woods subdivision. As indicated, the well in Golden Glade was originally intended to provide water to Eagle Woods. Environmental Utilities proposes to solve that problem by supplying water from its well to Osage Water on a wholesale basis. Osage Water would then distribute the water to its retail customers in Eagle Woods.²³ At some future time, Environmental Utilities may also provide water from its well to the Harbour Ridge subdivision, which also adjoins Golden Glade.²⁴

The Tartan Energy Standard

As explained more fully in the Commission's conclusions of law, the Commission applies what is known as the Tartan Energy standard when it determines whether to grant a utility's application for a certificate of service authority. That standard contains five criteria, which will be examined in turn.

1. There must be a need for the proposed service.

There clearly is a need for a central water system to serve the Golden Glade subdivision. That subdivision is a large residential development that may someday contain 100 homes. Most of those homes will not have any source of water unless a central water distribution system is developed. Furthermore, the Declarations of Restrictions for Golden Glade Subdivision requires homeowners in the development to connect to the central water system.²⁵ James A. Merciel, a Utility Regulatory Engineering Supervisor in the Water and Sewer Department of the Staff of the Commission, testified that he agreed that there was a need for water service in Golden Glade.²⁶ While some parties questioned whether it was appropriate for Environmental Utilities to provide that water service, no party raised serious doubts about the need for the service.

2. The applicant must be qualified to provide the proposed service.

Greg and Debra Williams have been engaged in the water business for about ten years through their involvement in Osage Water.²⁷ In most circumstances, Greg and Debra Williams' involvement with a regulated water utility would enhance their qualifications to operate Environmental Utilities. However, their involvement with Osage Water does not necessarily speak well for Greg and Debra Williams.

Unfortunately, Osage Water has not always complied with the Commission's regulatory requirements. A great deal of evidence was presented to establish that Osage Water has not complied with the Commission's record keeping requirements. Osage Water has not filed annual reports for 2000 and 2001²⁸ and those

²² Transcript, Page 144.

²³ Williams Direct, Page 13.

²⁴ Williams Direct, Page 13.

²⁵ Exhibit 13, VI Land Use Restrictions, Section 28.

²⁶ Transcript, Page 331, Lines 7-9.

²⁷ Transcript, Pages 93-94, Lines 21-25, 1.

²⁸ Transcript, Page 96-97, Lines 22-25, 1-2.

reports are now delinquent. It filed its 1999 annual report some eighteen months late and when it was filed it was not complete. Osage Water has also failed to keep its books in compliance with NARUC accounting standards as required by the Commission.

This failure makes it difficult for the Commission to properly oversee the operations of the utility. Dale Johansen, Manager of the Water and Sewer Department for the Commission, testified that if a utility's books and records are not maintained in accordance with NARUC standards, the Staff's accountants must go out and reconstruct a company's books and records to determine what a company may be allowed to recover in its rates for expenses and investments.²⁹ Johansen described Osage Water's history of record keeping in compliance with NARUC standards as "dismal."³⁰

Hancock Construction offered testimony that made many other accusations of mismanagement and misconduct against Greg Williams and the management of Osage Water.³¹ However, that testimony consists largely of hearsay and speculation. The Commission does not find it to be credible.

Nevertheless, Osage Water's long-standing problems in complying with the Commission's record keeping requirements are a matter of concern for the Commission. That concern is alleviated somewhat by the fact that until July of 2001, Pat Mitchell was directly responsible for Osage Water's record keeping. Mr. Mitchell will not be keeping the books for Environmental Utilities and is no longer responsible for Osage Water's record keeping. Debra Williams now maintains the records for Osage Water and will have that responsibility for Environmental Utilities.

James Russo, a Regulatory Auditor for the Commission, testified that he has reviewed the financial records maintained by Debra Williams regarding the water well at Golden Glade and found them to be sufficient to meet the requirements of the Commission.³² Russo also testified that office operations at Osage Water have improved since Debra Williams began managing the company in July 2001, particularly in the area of dealing with customer complaints.³³

Staff initially was concerned that Environmental Utilities did not have a licensed operator in place to operate the water system. However, while the application has been pending, Environmental Utilities has acquired the services of a licensed operator. As a result, Staff is no longer concerned about the availability of a licensed operator.³⁴

While the Commission continues to have some concerns, the evidence presented to the Commission indicates that Greg and Debra Williams are qualified to operate Environmental Utilities as a water utility.

²⁹ Transcript, Page 421, Lines 4-11.

³⁰ Transcript, Page 423, Lines 2-7.

³¹ See, Hancock Rebuttal, Exhibit 9, Cochran Rebuttal, Exhibit 10, and Cochran Surrebuttal, Exhibit 11.

³² Transcript, Page 257, Lines 1-15.

³³ Transcript, Pages 257-258.

³⁴ Transcript, Page 331, Lines 10-20.

11 Mo. P.S.C. 3d

3. The Applicant must have the financial ability to provide the service.

The greatest financial requirement facing Environmental Utilities is the cost of procuring a supply of water and delivering the water to its customers. The well and delivery system that will be used to provide water to Golden Glade is in place and has been paid for by Greg and Debra Williams. That fact was confirmed by Staff's witness, James Russo.³⁵ Russo also confirmed that Environmental Utilities has no need for additional financing at this time.³⁶ Staff does, however, continue to have some concerns about the ability of Environmental Utilities to obtain financing if it becomes necessary to make repairs to the water system.³⁷ That would, of course, be a concern with any small utility and neither Staff, nor any other party raised any specific concerns about Environmental Utilities' financial ability to provide water service to Golden Glade. With the well and delivery system in place, there is no reason to doubt Environmental Utilities financial ability to provide the water service it proposes to provide.

4. The Applicant's proposal must be economically feasible.

Economic feasibility requires more than that the well and delivery system be paid for and in place. It also requires that the proposed water system be economically viable in the longer term. Environmental Utilities presented a feasibility study as part of its application. In its feasibility study, Environmental Utilities assumed that all residents of Golden Glade will connect with the central water system. The study also assumed that Environmental Utilities would cooperate with Osage Water in the sharing of equipment and personnel, thereby reducing its cost of operations. Most importantly, the study assumes that Environmental Utilities will enter into an arrangement with Osage Water to provide water to Osage Water's retail customers in Eagle Woods.

James Merciel, witness for the Staff, testified that Environmental Utilities' operation would be economically viable if it is able to provide services to the anticipated number of customers, including those customers of Osage Water living in Eagle Woods.³⁸ However, Staff indicates that the operation would not be economically viable unless Environmental Utilities is able to provide water on a wholesale basis for Osage Water's customers in Eagle Woods. For that reason, Staff proposes that the Commission require Environmental Utilities to provide proof of the existence of such a wholesale arrangement before it grants Environmental Utilities its requested certificate.

If such a wholesale arrangement is established, Environmental Utilities' proposed water system will be economically feasible.

5. The service must promote the public interest.

Generally, the Commission has taken the view that a finding that an applicant has satisfied the first four criteria of the Tartan Energy standard will lead to a conclusion that the applicant has also satisfied the public interest.³⁹ In this case,

³⁵ Transcript, Page 253, Lines 3-12.

³⁶ Transcript, Page 260, Lines 6-13.

³⁷ Transcript, Page 277-278, Lines 16-25, 1-7.

³⁸ Merciel Rebuttal, Exhibit 7, Page 5, Lines 18-22. *See also*, Transcript, Page 399, Lines 10-15.

³⁹ *In the Matter of the Application of Tartan Energy Company*, 3 Mo. P.S.C. 3d 173, 189 (1994).

the parties have indicated another means by which this application will impact the public interest. As previously indicated, if Environmental Utilities' application for a certificate is not approved, Greg and Debra Williams intend to retain ownership of the water well and lease it to the Golden Glade homeowners association, which would then operate the system. James Merciel, witness for the Staff, indicated that homeowners associations generally are not preferred as operators of water systems because they have a hard time finding people willing to take on the difficult and thankless task of serving as a director, responsible for managing the water system. As a result, homeowners associations are not run as well as they should be.⁴⁰

In this particular case, there is another problem with allowing the homeowners association to operate the water system. As the developers of the subdivision, Greg and Debra Williams currently have nearly total control over the homeowners association and will likely continue to exercise that control until all the lots in the development are sold or until 2010. That means that even if Environmental Utilities' application is denied, Greg and Debra Williams will operate the water system for Golden Glade. They would, however, do so without any regulatory oversight from this Commission.

Aside from the residents of Golden Glade who would not receive regulated water service, a decision denying Environmental Utilities' application would also have a deleterious impact on the residents of Eagle Woods. If the Golden Glade water well is operated by the Golden Glade homeowners association, there would be no means by which the homeowners association could legally supply water to Eagle Woods, unless the homeowners association becomes a certificated utility, subject to regulation by the Commission. Therefore, the residents of Eagle Woods, who are served by Osage Water, would have no means to receive a supply of water.

Of course, as Hancock Construction points out, these complications could be avoided if Osage Water owned and operated the water well and if it were Osage Water, not Environmental Utilities, that was applying for a certificate to supply water to the residents of Golden Glade. However, Osage Water has not applied for such authority and the evidence indicates that it is unlikely to make such an application in the future. Certainly, the Commission has no authority to order Osage Water to apply for a certificate, nor can the Commission order Greg and Debra Williams to give the water well that they constructed with their own money to Osage Water. The Commission must choose from the alternatives available to it.

Under the circumstances, granting the certificate requested by Environmental Utilities will promote the public interest.

Other Contested Issues:

What is the Amount of the Investment in the Water Plant and Certificate Costs that will be Included in the Applicant's Rate Base if the Certificate is Granted?

Environmental Utilities requests that the Commission decide in this case the amount that will be included in Environmental Utilities' rate base for the purpose of establishing rates. Environmental Utilities argues that its rate base should

⁴⁰ Transcript, Page 334, Lines 16-25.

11 Mo. P.S.C. 3d

include a total cost of \$76,115.48 for construction of the water well. It also argues that organizational costs of \$605 should be included in rate base under Account 301, and that the itemized legal expenses incurred in this proceeding be allowed in rate base under Account 302.⁴¹

Staff and Public Counsel do not object to the Commission making a determination in this case about the inclusion of various items in rate base. They do, however, object to the inclusion of a ten percent contractor's fee as part of the cost of construction of the water well and they do dispute the amounts that Environmental Utilities would include as legal fees relating to this proceeding.

The Commission concludes that it is not appropriate to consider rate base in this case. The purpose of this case is solely to consider Environmental Utilities' application for a certificate of convenience and necessity. The determination of the amounts to be included in rate base is properly an issue for a rate case where the Commission can consider all evidence regarding the rates that Environmental Utilities will be permitted to charge its customers. The Commission will make no determinations regarding rates or rate base in this case.

If a Certificate is Granted, Should Conditions be Imposed on the Applicant?

Both Staff and Public Counsel suggest that certain conditions be imposed upon any certificate granted to Environmental Utilities. Staff initially requested that the Commission impose five conditions on the granting of a certificate to Environmental Utilities. Staff would require Environmental Utilities to (1) show that it has obtained the services of a licensed operator that meets the applicable Missouri Department of Natural Resources (MDNR) requirements, (2) show that it has entered into an agreement to provide wholesale water service to Osage Water for its Eagle Woods service area, (3) show that the facilities necessary to serve Osage Water as a wholesale customer have been installed, (4) show that all necessary MDNR permits or approvals related to the construction of the supply and distribution system have been received, and (5) show that Environmental Utilities has applied for the required MDNR permit to dispense.⁴²

At the hearing, Staff witness, Dale Johansen, testified that Environmental Utilities has met all of those conditions, except the requirement for a wholesale sales agreement with Osage Water.⁴³ Johansen also indicated that he was not aware of the status of Environmental Utilities' application to the MDNR for a permit to dispense. However, later in the hearing, Staff witness Martin Hummel conceded that Environmental Utilities could not obtain a permit to dispense from MDNR until after it had a certificate from this Commission.⁴⁴ There is no reason to believe that Environmental Utilities will not apply for a permit to dispense when it is appropriate to do so.

⁴¹ Williams Surrebuttal, Exhibit 2, Pages 3-4. Environmental Utilities offered a post-hearing exhibit itemizing the legal expenses it incurred in this proceeding. However, on June 11, the Commission sustained various objections to the admission of that exhibit and it was not admitted into evidence.

⁴² Transcript, Page 415, Lines 1-17.

⁴³ Transcript, Pages 415-416, Lines 19-25, 1-14.

⁴⁴ Transcript, Page 550, Lines 8-17.

In addition to the conditions recommended by Staff, Public Counsel also proposed various conditions to be imposed on Environmental Utilities. In her rebuttal testimony, Public Counsel's witness, Kimberly Bolin, recommended that the Commission impose the following conditions before granting a certificate:

1. Create a separate customer advances account.
2. Create a separate contributions in aid of construction (CIAC) account.
3. Record plant on balance sheet at original cost based on MPSC-approved USOA guidelines.
4. Record accumulated depreciation reserve associated with MPSC original cost plant balances on balance sheet.
5. Create a plant held for future use account.
6. Create separate revenue sub-accounts within the income water billing account for each class of water customer (i.e. wholesale, residential, and commercial).
7. Create separate revenue account to record miscellaneous or other revenues.
8. Develop a continuing property records system to control and monitor tangible properties.
9. Develop a cost allocation system based on reasonable standards to distribute shared or common costs among the Williams' various businesses and companies.
10. Develop a log sheet to track, charge, and record personal use of company owned equipment by employees and owners and use of company owned equipment by other entities.
11. Develop a log to track, charge, and record time spent working for Environmental Utilities, Osage Water Company, and any other entity.
12. Balances for Account 301, Organization and Account 302, Franchises and Consents must be reviewed by Staff and Public Counsel before the certificate can be granted.⁴⁵

Public Counsel also proposed additional conditions that would be imposed upon Environmental Utilities after it received its certificate. Those conditions are as follows:

1. Track all costs for every capital project. This recommendation inherently includes the premise that Environmental Utilities should develop criteria (threshold dollar levels and qualitative job standards) in accordance with the Uniform System of Accounts to determine whether a cost is to be recorded as an expense item or whether it requires capitalization.
2. Record each journal entry entered in the financial records with a full description of the service and service provider, invoice number, payment check number, and amount. If an item is in an allocation, paid by an entity other than the utility, include a descriptive notation identifying as such.
3. The Company will ensure that service to condominium developments in the future will be predicated upon the installation of meters for each individual condominium unit in such developments.

⁴⁵ Bolin Rebuttal, Exhibit 3, Schedule KKB-2.

11 Mo. P.S.C. 3d

4. Bills for services that the Company provides under contract management agreements in systems not regulated by the Commission will not be rendered under the name "Environmental Utilities".⁴⁶

Staff concurred that the conditions proposed by Public Counsel in its rebuttal testimony would be appropriate.⁴⁷ Indeed, Environmental Utilities indicated at the hearing that it did not object to the inclusion of any of those conditions.⁴⁸

The Commission agrees that these conditions are reasonable. However, aside from the Staff's condition requiring Environmental Utilities to demonstrate that it has made arrangements to provide wholesale water to Osage Water for delivery to its customers in Eagle Woods, the Commission will not require Environmental Utilities to demonstrate compliance with those conditions before granting Environmental Utilities a certificate.

Public Counsel's conditions are useful in that they clearly set out the bookkeeping and accounting standards that the Commission will expect Environmental Utilities to meet after it begins operations. While Environmental Utilities can set up its books in a certain manner, there is really no way by which the Commission can determine whether the company will comply with those standards before it grants a certificate, and Environmental Utilities begins operation. Only then will it be possible to determine whether Environmental Utilities is actually keeping its books in an appropriate manner. Imposing those conditions as a requirement before granting a certificate would require the Commission to reopen this case for the taking of additional evidence about how Environmental Utilities has set up its accounting system. Such a requirement would merely delay the granting of a certificate, while not providing any real benefit for the public. For that reason, the Commission will require Environmental Utilities to comply with the conditions set out in Public Counsel's rebuttal testimony but will not require demonstration of that compliance before granting the requested certificate.

The Commission will, however, require Environmental Utilities to demonstrate compliance with one proposed condition before it grants the requested certificate of convenience and necessity. That single condition is that Environmental Utilities demonstrate that it has arranged to provide wholesale water to Osage Water for delivery to its customers in Eagle Woods.

The testimony of Staff's expert witnesses demonstrated that an arrangement whereby Environmental Utilities would provide wholesale water to Osage Water for the Eagle Woods development is essential to the long-term economic viability of Environmental Utilities. Without such a wholesale sales arrangement, Environmental Utilities would not be able to provide service to the limited number of available customers in Golden Glade at a reasonable rate and could become the owner of a non-viable small water system.⁴⁹

Environmental Utilities indicated in its application and repeatedly stated at hearing that it intends to enter into a wholesale arrangement for delivery of water to Osage Water. However, in its Reply Brief, Environmental Utilities, for the first time

⁴⁶ Bolin Rebuttal, Exhibit 3, Schedule KKB-3.

⁴⁷ Transcript, Page 414, Lines 22-25.

⁴⁸ Transcript, Page 249, Lines 14-22.

⁴⁹ Merciel Rebuttal, Exhibit 7, Page 5, Lines 3-10.

argues that its certificate should not be conditioned upon a requirement that it enter into a written agreement with Osage Water for provision of water. Given the uncertain future of Osage Water and the fact that Environmental Utilities cannot be an economically viable utility unless it provides wholesale water to Eagle Woods, it is imperative that Environmental Utilities establish that it will in fact be receiving the revenue associated with providing wholesale water to the customers of Osage Water in the Eagle Woods development. The Commission will need to be assured of that fact before it grants a certificate to Environmental Utilities. Therefore, Environmental Utilities will be required to file a pleading providing evidence of the arrangements that it has made to provide wholesale water to Osage Water for the use of Osage Water's customers in Eagle Woods before the Commission will issue Environmental Utilities a certificate of convenience and necessity.

In addition to the conditions listed in its rebuttal testimony, Public Counsel proposed seven more conditions in its initial brief.⁵⁰ Environmental Utilities, in its reply brief, opposed each of those new conditions as an unwarranted intrusion into the management and day-to-day operation of the utility. The Commission agrees with Environmental Utilities. The evidence presented at the hearing does not provide a basis for the imposition of any of the additional conditions proposed in Public Counsel's Initial Brief.

Should Any Proposed Tariffs be Withdrawn?

As part of its application, Environmental Utilities filed a proposed tariff that it indicates was based on a model water tariff prepared by Staff.⁵¹ Staff witness, James Merciel, suggested several areas of the tariff that should be modified.⁵² However, he also indicated that if Environmental Utilities is granted a certificate, then he expected that the parties would be able to work out any differences regarding the tariffs. The only one of Mr. Merciel's suggestions that was specifically addressed at the hearing concerned Staff's contention that the flat rate proposed to be charged to unmetered customers was too high. Staff did not, however, indicate what the rate should be. Environmental Utilities replied that the unmetered rate needed to be high to discourage persons from making illegal, unauthorized connections to the system.

This issue is not yet ripe for decision. The Commission cannot order Environmental Utilities to withdraw any proposed tariffs because no such tariff has yet been issued. While Environmental Utilities included a proposed tariff as part of its application, it has not actually issued a tariff in that the proposed tariff does not contain an issue date or an effective date. Therefore, any consideration of the proposed tariff attached to the application is premature. When Environmental Utilities has a certificate of convenience and necessity, it must issue a tariff before it can serve any customers. Staff and any other interested person will have an opportunity to review that tariff and may choose to file a motion asking the Commission to suspend that tariff. Until that time, the Commission will not make any decisions about Environmental Utilities' proposed tariff.

⁵⁰ Initial Brief of the Office of the Public Counsel, Pages 24-25.

⁵¹ Williams Surrebuttal, Exhibit 2, Page 7.

⁵² Merciel Rebuttal, Exhibit 7, Page 7, Line 17 to Page 10, Line 11.

11 Mo. P.S.C. 3d

Hancock Construction Company's Proposed Issues

Hancock proposed four additional issues for consideration by the Commission. The other parties do not agree that these issues are appropriate for consideration in this case. The issues are as follows:

a. Whether there has been a Transfer of Equipment and Systems from Osage Water Company to Environmental Utilities?

Hancock contends that the water well located in the Golden Glade subdivision properly belongs to Osage Water because Osage Water proposed to build that well when it applied for, and was granted, a certificate of convenience and necessity to serve the Eagle Woods subdivision. However, the evidence established that Greg and Debra Williams constructed and paid for that well as individuals.⁵³ Therefore, the well does not belong to Osage Water.

Hancock also contends that two pieces of equipment, a mini-excavator and a bobcat, were improperly transferred from Osage Water to Environmental Utilities. Debra Williams testified that that equipment once had been leased by Osage Water but had been repossessed. Greg and Debra Williams then purchased the equipment as individuals.⁵⁴ Staff's witness, James Russo, testified that he reviewed the Williams' documents relating to the equipment, and confirmed their account of how they came to possess the equipment.⁵⁵ Hancock did not present any evidence that would contradict the Williams' explanation. Therefore, the Commission concludes that there is no evidence to establish that any improper transfers of systems or equipment have occurred.

b. Whether Environmental Utilities and its Principals by Seeking a Certificate of Convenience and Necessity as requested in its Application will contribute to the non-profitability of Osage Water Company, thereby causing Osage Water Company to be less capable of paying its valid debts (Hancock Debenture) as authorized in prior rate cases?

Hancock's argument is premised on the idea that Osage Water should be allowed to provide water service to the Golden Glade subdivision. However, Osage Water has not applied for a certificate to provide such service and, given the current condition of Osage Water, it is unlikely that it will ever make such application. Any hypothetical lost opportunity for profit by Osage Water cannot be the basis for denying Environmental Utilities' application.

c. Whether Osage Water Company as a regulated utility has a public interest that is being harmed by allowing its assets to be used by a competing utility company?

Osage Water is not a party to this case and it is not in competition with Environmental Utilities. They will serve adjoining subdivision and will not compete for customers. There was no evidence presented by which the Commission could conclude that Environmental Utilities was improperly using any assets of Osage Water. Indeed, the evidence indicated that the sharing of assets by the two companies, when that use is properly allocated between the companies, will spread costs more broadly and can only benefit both companies.

⁵³ Transcript, Page 253, Lines 3-12, Page 256, Lines 21-25.

⁵⁴ Transcript, Pages 162-163, Lines 12-25, 1-11.

⁵⁵ Transcript, Pages 260-261, Lines 22-25, 1-17.

d. Whether the customers of Osage Water Company are being properly served by allowing its assets to be used by a competing utility serving an adjacent area?

Again, Osage Water and Environmental Utilities are not competing utilities. As previously indicated, the sharing of assets may actually benefit the customers of both companies.

CONCLUSIONS OF LAW

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

Environmental Utilities is a Missouri Limited Liability Company. Upon the granting of its Application for a Certificate of Convenience and Necessity, it will be a public utility and a water corporation as those terms are defined in Section 386.020(42) and (58), RSMo 2000. As such, Environmental Utilities will be subject to the Commission's jurisdiction pursuant to Section 386.250(3), RSMo 2000.

Section 393.170, RSMo 2000, gives the Commission the authority to grant a certificate of convenience and necessity to a water corporation. Section 393.170(3), RSMo 2000, gives the Commission authority to impose any condition or conditions on that certificate that it deems reasonable and necessary.

In considering the Commission's authority to grant a certificate of convenience and necessity, the Missouri Court of Appeals has indicated that:

[t]he PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service." §393.170.3. The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost. *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219, (Mo. App. 1973). Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. *State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n*, 600 S.W.2d 147, 154 (Mo. App. 1980). The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience, as are the relative experience and reliability of competing suppliers. *State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n*, 527 S.W.2d 390, 394 (Mo. App. 1975). Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate. *Id.* at 392.⁵⁶

⁵⁶ *State ex rel. Intercon Gas, Inc. v. Public Service Comm'n*, 848 S.W.2d 593, 597-598 (Mo. App. W.D. 1993)

11 Mo. P.S.C. 3d

The criteria by which the Commission determines whether to approve an application for a certificate of convenience and necessity are set forth in *In Re the Application of Tartan Energy Company*.⁵⁷ The Tartan Energy criteria are also sometimes referred to as the Intercon criteria because they were first collected in *In Re Intercon Gas, Inc.*⁵⁸ *Tartan Energy* and *Intercon* indicate that the Commission will consider the following criteria when deciding whether to grant an application for a certificate of convenience and necessity: "(1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest."⁵⁹

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties:

1. There is a need for regulated water service in the Golden Glade development;
2. Environmental Utilities is qualified to provide the proposed service.
3. Environmental Utilities has the financial ability to provide the proposed service.
4. The service proposed by Environmental Utilities is economically feasible if Environmental Utilities is able to establish arrangements to sell wholesale water to Osage Water Company for the use of Osage Water's customers in the Eagle Woods subdivision.
5. The service proposed by Environmental Utilities will promote the public interest.
6. The Commission will make no determinations in this case regarding Environmental Utilities' rate base.
7. The Commission will require Environmental Utilities to adhere to the conditions recommended by Public Counsel in its rebuttal testimony, but it will not require Environmental Utilities to demonstrate compliance with those conditions before granting a certificate. The Commission will require Environmental Utilities to establish arrangements to sell wholesale water to Osage Water Company for the use of Osage Water's customers in the Eagle Woods subdivision before granting a certificate.
8. The Commission will make no determinations in this case regarding any tariffs that Environmental Utilities may issue in the future.
9. There is no evidence to establish that there has been any improper transfers of systems or equipment between Osage Water Company and Environmental Utilities.

⁵⁷ 3 Mo. P.S.C. 3d 173 (1994).

⁵⁸ 30 Mo. P.S.C. (N.S.) 554 (1991).

⁵⁹ *In Re Tartan Energy*, 3 Mo. P.S.C. 3d, 173, 177 (1994).

10. Any hypothetical lost opportunity for profit by Osage Water Company cannot be the basis for denying Environmental Utilities' application for a certificate of convenience and necessity.

11. The sharing of assets by Osage Water Company and Environmental Utilities, when costs are properly allocated between the companies, will benefit both companies.

12. The sharing of assets by Osage Water Company and Environmental Utilities, when costs are properly allocated between the companies, will benefit the customers of both companies.

IT IS THEREFORE ORDERED:

1. That Environmental Utilities, LLC, will be granted a certificate of convenience and necessity to provide water service to the Golden Glade subdivision, as requested in its Application filed on August 6, 2001. Provided, however, that the certificate of convenience and necessity will not be issued, nor will it become effective until Environmental Utilities files a pleading proving to the satisfaction of the Commission that it has made arrangements to provide wholesale water to Osage Water Company for the use of Osage Water Company's customers in Eagle Woods

2. That Environmental Utilities, LLC, shall comply with each of the following conditions in its operation under the certificate of convenience and necessity:

- a. Create a separate customer advances account;
- b. Create a separate contributions in aid of construction (CIAC) account;
- c. Record plant on balance sheet at original cost based on Missouri Public Service Commission approved Uniform System Of Accounts guidelines;
- d. Record accumulated depreciation reserve associated with Missouri Public Service Commission original cost plant balances on balance sheet;
- e. Create a plant held for future use account;
- f. Create separate revenue sub accounts within the income water billing account for each class of water customer (i.e., wholesale, residential, and commercial);
- g. Create a separate revenue account to record miscellaneous or other revenues;
- h. Develop a continuing property records system to control and monitor tangible properties;
- i. Develop a cost allocation system based on reasonable standards to distribute shared or common costs among the Williams' various businesses and companies;
- j. Develop a log sheet to track, charge, and record personal use of company owned equipment by employees and owners and use of company owned equipment by other entities;
- k. Develop a log to track, charge, and record time spent working for Environmental Utilities, Osage Water Company, and any other entity;
- l. Permit Staff and Public Counsel to review balances for Account 301, Organization and Account 302, Franchises and Consents;
- m. Track all costs for every capital project. Develop criteria (threshold dollar levels and qualitative job standards) in accordance with the Uniform System of Accounts to determine whether a cost is to be recorded as an expense item or whether it requires capitalization;

11 Mo. P.S.C. 3d

- n. Record each journal entry entered in the financial records with a full description of the service and service provider, invoice number, payment check number, and amount. If an item is in an allocation, paid by an entity other than the utility, include a descriptive notation identifying it as such;
 - o. Ensure that service to condominium developments in the future will be predicated upon the installation of meters for each individual condominium unit in such developments; and
 - p. Ensure that bills for services that the Company provides under contract management agreements in systems not regulated by the Commission will not be rendered under the name "Environmental Utilities".
3. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions herein involved.
 4. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.
 5. That this Report and Order shall become effective on July 7, 2002.

Simmons, Ch., Lumpe and Forbis, CC., concur;
Murray, C., dissents with dissenting opinion attached;
certify compliance with the provisions of
Section 536.080, RSMo 2000.
Gaw, C., not participating.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

The reason for my dissent can be summarized by a quote from the Initial Brief of the Office of the Public Counsel; "It may not be in the public interest for the Commission to allow owners of regulated utilities to create multiple business entities in order to circumvent internal management issues or Commission oversight, as it appears was done in this case."⁶⁰ I have no doubt that it disserves the public interest for the Commission to lend the appearance of legitimacy to such entities by granting certificates of convenience and necessity.

Applicant asserts the need for Environmental Utilities, Inc. to supply water at wholesale to Osage Water Company (OWC) for the Eagle Woods Development. Gregory D. Williams acted as counsel for Applicant in this case, as well as counsel for Applicant in WA-99-437, in which OWC sought a certificate of convenience and necessity to supply water service to the Eagle Woods Development. In each case Mr. Williams was both Applicant and counsel for Applicant.

The brief filed by Applicant on January 20, 2000, in WA-99-437, stated "...OWC does have the financial ability to provide the service, in that the necessary systems to provide service are in place as a result of contributions by the Eagle Woods developer to OWC."⁶¹ The Commission granted OWC a certificate of convenience and necessity on December 26, 2000,⁶² to provide water service to the Eagle Woods

⁶⁰ Initial Brief at pp. 17, 18

⁶¹ Reply Brief of Osage Water Company, p. 9

⁶² See my Dissenting Opinion

Development, even though the application was opposed by the City of Osage Beach, the Staff of the Commission and the Office of the Public Counsel.

Now, the Applicant is telling the Commission that, unless we grant this certificate of convenience and necessity, the customers of the Eagle Woods Development will not have water. The reason for the apparent dilemma is that OWC, which was alleged to be financially viable in the year 2000, is now unable or unwilling to provide service to the customers at Eagle Woods. OWC did not tell the Commission in WA-99-437 that it would only be able to provide service to its new customers in Eagle Woods if the Commission later granted a certificate to a separate entity owned by Mr. and Mrs. Williams for the Golden Glade Subdivision. There appears to be much that Applicant has not told this Commission. Furthermore, much of what the Commission has been told does nothing more than obfuscate and highlight inconsistencies from one case to the next. The public interest is not served by allowing such tactics to succeed.

The Commission should deny this Application and instead exercise its general power with respect to water services by investigating and ascertaining the methods employed by OWC in supplying and distributing water to the customers for which it is certificated to provide service in the Eagle Woods Development. The Commission's statutory powers allow it "to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such ... water ... system, and ... to order reasonable improvements and extensions of the ... property of ... water corporations."⁶³

The evidence presented in this case about OWC is certainly sufficient to raise the Commission's curiosity about whether OWC "is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners ..."⁶⁴ If a Commission investigation resulted in such a determination, the appropriate remedy would be to "petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver."⁶⁵ Indeed, such action may be necessary to prevent transfer of OWC assets to shareholders as individuals as resolved at the January 8, 2002 OWC shareholder meeting.

I understand that the Staff, the Office of the Public Counsel and the Commission are attempting to choose the least detrimental of the Hobson's Choices provided by the Applicant in granting this certificate of convenience and necessity. I am convinced, however, that today's decision will serve only the interests of the Applicant and the principals of OWC.

Consequently, I dissent.

⁶³ 393.140(2) RSMo

⁶⁴ 393.145 RSMo

⁶⁵ *Id.*

In the Matter of the Investigation into Certification for Federal Universal Service Funds.

Case No. TO-2002-347

Decided July 9, 2002

Telecommunications § 7. The Commission ordered that telecommunications companies that want to be certified as eligible for universal service funds must file an affidavit and accompanying information with the Commission.

ORDER ESTABLISHING CERTIFICATION PROCEDURE

In a pleading filed in Case No. TO-98-329, the Staff of the Commission suggested that a new case should be established to address the issue of federal certification for federal universal service funds. Staff stated that Case No. TO-98-329 deals with issues concerning the Missouri universal service fund, and that it would be appropriate to deal with the issues concerning the federal universal service fund in a new case. The Commission agreed and established this case. On February 28, 2002, the Commission granted intervention to interested telecommunications companies.

On March 1, Staff filed its Report and Recommendation. Staff recommended that each eligible telecommunications carrier file with the Commission by September 1 in 2002 and future years both an affidavit and supporting documentation applicable to the eligible carrier's specific circumstances. Staff's recommendation listed in considerable detail the contents of the affidavit and supporting documentation that each eligible carrier should be required to file. No party responded to the Staff recommendation.

The Commission will adopt Staff's recommendation and require each eligible telecommunications carrier to file the following information:

A. Affidavit

Each carrier shall provide to the Commission's Telecommunications Department staff an affidavit at the National Exchange Carrier Association study area code level, executed by an officer of the carrier, attesting that the federal high-cost support received by the carrier has been (and will be) used only for the provision, maintenance and upgrading of facilities and services for which such support is intended.

B. Documentation**1. Documentation – Rural "Cost" Incumbent Local Exchange Companies**

If the eligible carrier is a rural "cost" incumbent local exchange company, it shall provide a statement similar to the following:

The Company serves the _____ part of the State in the county (ies) of _____ with _____ access lines. The Company has experienced an (increase/decrease)

of access lines over the last year. High cost loop support and local switching support are calculated based on investments and expenses already incurred. For example, 2003 high cost loop support is calculated based on December 31, 2001 data and 2003 local switching support is calculated based on the average of 2002 and 2003 investment data and 2003 expense data. By virtue of high cost loop support and local switching support algorithm calculations, support received from these mechanisms already has been used for the purpose intended. By virtue of the safety net and safety valve calculations, this support is also used for the purpose for which it was intended.

As indicated in the financial document filed with this letter, the company maintains substantial investment in distribution plant and switching plant, investments made over a number of years, to provide the supported services required by the Federal Communications Commission. The company also expended substantial funds in the maintenance of these facilities to provide service at appropriate levels and to respond to requests for repair of these facilities as necessary. Further, the company has made investments necessary to respond to customer requests for service at new locations, to replace plant as needed to maintain quality service, and to enhance switching capabilities to meet regulatory requirements and customers' demands for service. [Provide brief description of specific projects undertaken in enhancing distribution plant or switching investment.] [Provide a brief description of any abnormal or extraordinary maintenance activities undertaken during the year.]¹

If the eligible carrier is a rural "cost" incumbent local exchange company, in addition to the foregoing statement, it shall provide the following documentation:

- a) A copy of the National Exchange Carrier Association's Universal Service Fund Data Collection Form submitted and high cost loop support algorithm submitted in the current calendar year. [The form should include a statement similar to the following:

The high cost loop support algorithm has been completed using the latest available estimate of the national average loop cost of \$xxx.xx. While this provides an estimate of the high cost loop support for the coming year, it should be noted that the national average loop cost upon which payments will actually be made will be calculated and submitted to the Federal

¹ The bracketed sentences indicate areas where companies would provide descriptions of major projects and/or abnormal or extraordinary maintenance, if appropriate to the company circumstances. If not appropriate, these statements would be omitted.

11 Mo. P.S.C. 3d

Communications Commission by the National Exchange Carrier Association on September 30, 200X and will likely be different from the estimate used in the attached submission. This means that the actual high cost loop support received in the coming year will likely differ from the estimate currently provided and shown on Page 9, Line 35 of this attachment.]²

- b) A copy of the rural incumbent local exchange company's local switching support algorithm for estimated local switching support to be received in the current or coming year.³
- c) A copy of documentation regarding Safety Net and Safety Valve amounts to be received in 2003, if the company will receive such funds.

C. Documentation – Rural “Average Schedule” Incumbent Local Exchange Companies

If the eligible carrier is a rural “average schedule” incumbent local exchange company, it shall provide a statement similar to the following:

The Company serves the _____ part of the State in the county (ies) of _____ with _____ access lines. The Company has experienced an (increase/decrease) of access lines over the last year. Average schedule formulas for High Cost Loop Support and Local Switching Support are developed by the National Exchange Carrier Association annually and submitted to the Federal Communications Commission for approval based on analysis of a national sample of cost study companies. Thus the average schedule formulas for high cost loop support and local switching support are calculated based on investments and expenses already incurred. Therefore, by virtue of high cost loop support and local switching support algorithm calculations, support received from these mechanisms already has been used for the purpose intended. Likewise, safety net and safety valve support is only received after a rural Incumbent Local Exchange Company has incurred additional investment and/or expense. Therefore, by virtue of the safety net and safety valve calculations, the support is also used for the purpose for which it was intended.

² The form submitted in July 2002 will be based upon 2001 data, for anticipated high cost loop support to be received in 2003.

³ The initial estimate of local switching support for the coming year may not be prepared and submitted to USAC in time to be included with the filing to the Commission. Thus, it may be necessary to use the estimate for the current year in this filing.

The company maintains substantial investment in distribution plant and switching plant, investments made over a number of years, to provide the supported services required by the Federal Communications Commission. The company also expended substantial funds in the maintenance of these facilities to provide service at appropriate levels and to respond to requests for repair of these facilities as necessary. Further, the company has made investments necessary to respond to customer requests for service at new locations, to replace plant as needed to maintain quality service, and to enhance switching capabilities to meet regulatory requirements and customers' demands for service. [Provide brief description of specific projects undertaken in enhancing distribution plant or switching investment.] [Provide a brief description of any abnormal or extraordinary maintenance activities undertaken during the year.]⁴

If the eligible carrier is a rural "average schedule" incumbent local exchange company, in addition to the foregoing statement, it shall provide the following documentation:

- a) A copy of the latest available National Exchange Carrier Association Average Schedule Universal Service Support Projections for estimated high cost loop support and estimated local switching support.⁵
- b) A copy of documentation regarding Safety Net and Safety Valve amounts to be received in 2003 if the company will receive such funds.

D. Documentation – Non-Rural Incumbent Local Exchange Companies

If the eligible carrier is a non-rural incumbent local exchange company, it shall provide a statement similar to the following:

The Company serves the _____ part of the State in the county (ies) of _____ with _____ access lines. The Company has experienced an (increase/decrease) of access lines over the last year. The Company is currently receiving interim hold harmless support pursuant to applicable Federal Communications Commission rules. Interim hold harmless support is calculated based on investments and

⁴ The bracketed sentences indicate areas where companies would provide descriptions of major projects and/or abnormal or extraordinary maintenance, if appropriate to the company circumstances. If not appropriate, these statements would be omitted.

⁵ National Exchange Carrier Association provides average schedule companies high cost loop support and local switching support projections for the following year's estimated support during October or November of the current year, thus the latest documentation available at the time of this certification filing is the estimated amounts for the current year. Normally, the changes in support for average schedules companies from year to year are relatively minor.

11 Mo. P.S.C. 3d

expenses already incurred. For example, 2003 interim hold harmless support is calculated based on December 31, 2001 data. Therefore, by virtue of the interim hold harmless algorithm calculations, it has already been used for the purpose intended.

As indicated in the financial document filed with this letter, the company maintains substantial investment in distribution plant and switching plant, investments made over a number of years, to provide the supported services required by the Federal Communications Commission. The company also expended substantial funds in the maintenance of these facilities to provide service at appropriate levels and to respond to requests for repair of these facilities as necessary. Further, the company has made investments necessary to respond to customer requests for service at new locations, to replace plant as needed to maintain quality service, and to enhance switching capabilities to meet regulatory requirements and customers' demands for service. [Provide brief description of specific projects undertaken in enhancing distribution plant or switching investment.] [Provide a brief description of any abnormal or extraordinary maintenance activities undertaken during the year.]⁶

If the eligible carrier is a non-rural incumbent local exchange company, in addition to the foregoing statement, it shall provide a copy of the current National Exchange Carrier Association Universal Service Fund Data Collection Form and high cost loop support algorithm. [The form should include a statement similar to the following:

The high cost loop support algorithm has been completed using the latest available estimate of the national average loop cost of \$xxx.xx. While this provides an estimate of the high cost loop support for the coming year, it should be noted that the national average loop cost upon which payments will actually be made will be calculated and submitted to the Federal Communications Commission by the National Exchange Carrier Association on September 30, 200X and will likely be different from the estimate used in the attached submission. This means that the actual high cost loop support received in the coming year will likely differ from the estimate currently provided.⁷

⁶ The bracketed sentences indicate areas where companies would provide descriptions of major projects and/or abnormal or extraordinary maintenance, if appropriate to the company circumstances. If not appropriate, these statements would be omitted.

⁷ The form submitted in July, 2002 will be based upon 2001 data, for anticipated high cost loop support to be received in 2003.

E. Documentation – Other Eligible Telecommunications Carriers

If the eligible carrier is a not an incumbent local exchange company, it shall provide a statement similar to the following:

The Company serves the _____ part of the State in the county (ies) of _____ with _____ access lines in competition with the incumbent local exchange carrier _____. The Company has experienced an (increase/decrease) of access lines over the last year.

If the eligible carrier is not an incumbent local exchange company, in addition to the foregoing statement, it shall provide:

- a) A copy of the information filed with the Universal Service Administrative Company to receive federal support during the past year.
- b) A statement of the major activities undertaken during the past year or, if desired, projected for the coming year, using federal Universal Service Fund funds to provision, maintain and upgrade the facilities used for the supported services.
- c) A report on the major investments and expenses for the prior year related to the area for which the company has been designated as an eligible telecommunications carrier.

Staff also recommended that it review the affidavits and accompanying information, and prepare the appropriate letter for submission in accordance with federal requirements. Upon receiving approval from the Commission, Staff would file the letter with the Federal Communications Commission and the Universal Service Administrative Company prior to October 1 of each year certifying that the companies are eligible to receive federal high cost loop support and local switching support as appropriate. The Commission adopts this portion of Staff's recommendation as well.

IT IS THEREFORE ORDERED:

1. That telecommunications companies that desire certification as eligible telecommunications carriers from this Commission shall request certification according to the procedures set out herein.
2. That the Data Center shall send notice of this order to each certificated telecommunications company by sending a copy of this order.
3. That the Staff of the Commission shall review the affidavits and accompanying information submitted in accordance with Ordered Paragraph 1, and prepare the appropriate letter for submission in accordance with federal requirements. Upon receiving approval from the Commission, Staff shall file the letter with the Federal Communications Commission and the Universal Service Administrative Company prior to October 1 of each year certifying that the companies are eligible to receive federal high cost loop support and local switching support as appropriate.
4. That this order shall become effective on July 19, 2002.

11 Mo. P.S.C. 3d

5. That this case may be closed after July 20, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Tariff Filing of Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, Introducing Two New Block-of-Time Plans.

Case No. IT-2002-1165

Decided July 9, 2002

Telecommunications §8. The Commission denied the Office of the Public Counsel's motion to suspend a tariff and for evidentiary hearing and approved the tariff where the tariff, filed by Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company, introduced two new Block-of-Time plans as substitutes for Local Plus service and Designated Number option Calling Plan service.

ORDER REGARDING TARIFF

On or about June 6, 2002, Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, filed its proposed revised tariff sheets.¹ These sheets are intended to withdraw Bell's Local Plus® and Designated Number services and to introduce two new block-of-time plans – also known as “Toll Saver” plans — as a substitute for Local Plus service and the Designated Number Optional Calling Plan service.² The proposed sheets bear issue dates of June 10, 2002, and effective dates of July 10, 2002. The Commission assigned Tariff File Nos. 200201060 and 200201061 to the proposed revised sheets.

On June 27, 2002, the Office of the Public Counsel filed its Motion to Suspend, requesting that the Commission suspend the proposed revised sheets in order to permit further investigation and consideration of them. Additionally, Public Counsel requests that the Commission convene an evidentiary hearing. In support

¹ The specific sheets are: P.S.C. Mo. No. 26 (Long Distance Message Telecommunications Service Tariff), 4th Revised Sheet 45, 4th Revised Sheet 45.01, 6th Revised Sheet 46, 5th Revised Sheet 47, Original Sheet 47.01, Original Sheet 47.02, 8th Revised Sheet 48, 3rd Revised Sheet 48.01, 9th Revised Sheet 49, Original Sheet 49.01, 8th Revised Sheet 50, and 8th Revised Sheet 51; P.S.C. Mo. No. 35 (General Exchange Tariff), 3rd Revised Sheet 1 (replacing 2nd Revised Sheet 1, 5th Revised Sheet 2, 4th Revised Sheet 3, 5th Revised Sheet 4, 3rd Revised Sheet 5, 4th Revised Sheet 6, 1st Revised Sheet 7, and Original Sheet 7.1).

² Marketed as “1+ Saver Direct.”

of its motion, Public Counsel states that the block-of-time plans cost more than Local Plus and provide less service in that Local Plus was unlimited and the block-of-time plans are capped at 1,000 minutes. Public Counsel states that this is necessarily a rate increase and that it is not clear that the increase is confined to the 8 percent per annum allowed by the Price Cap Statute, Section 392.245, RSMo Supp. 2001.³ Public Counsel pointed out that, for a customer using the internet 83 minutes daily, telephone service costs would increase from \$35.00 monthly to \$167.95. Business customers would be impacted to a lesser degree, but would still experience a price increase in excess of 100 percent.

Public Counsel further contends that the proposed tariff sheets are not in the public interest. According to the Public Counsel, Local Plus and the Designated Number plan were both introduced by Bell in the wake of the discontinuance of the Community Optional Service (COS) plan in order to mitigate, to some degree, the effect of that discontinuance on rural subscribers. The unlimited minutes of use available under these plans were key features, Public Counsel states. Public Counsel suggests that Bell's attempt to replace Local Plus and Designated Number with lower-value alternatives should be investigated by the Commission in terms of their impact upon rural subscribers' access to the Internet and to other advanced technology. In general, Public Counsel characterizes Bell's proposal as a "step backwards." "Once again," complains Public Counsel, "consumers do not reap the benefit of competition. *** Once again, competition means higher prices for a lesser quality and a lesser quantity of service."

In view of the brief interval remaining before the proposed sheets became effective by operation of law, on July 1 the Commission directed interested parties to respond to Public Counsel's motion by July 5. On July 3, Bell moved for entry of the Commission's standard protective order, advising the Commission that no party opposed this request. The Commission adopted the Protective Order on July 3.

The Commission's Staff timely responded to Public Counsel's motion on July 5. Therein, Staff states that the Commission granted competitive status to Bell's intraLATA toll services on January 6, 2002.⁴ Staff further states that the sheets in question concern competitive intraLATA toll services⁵ that are not subject to price-cap regulation: "[i]f the commission determines that effective competition exists in the exchange, the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate in this competitive environment."⁶ While Local Plus remains subject to the Price-Cap Statute, Staff states, nothing in that statute prohibits Bell from discontinuing the service. Indeed, Staff specifically opines that the discontinuance

³ All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁴ *Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, Case No. TO-2001-467, (*Report and Order*, issued January 6, 2002) at 35-37.

⁵ Defined as "telecommunication between points in different local service areas within the same LATA," *id.* at 35.

⁶ Section 392.245.5, RSMo Supp. 2001.

11 Mo. P.S.C. 3d

is in the public interest: "Staff believes that discontinuing Local Plus, in light of the predatory pricing risk cited to by the Commission in Case No. TO-2002-467, is not detrimental to the public interest." Staff further states that the public interest is best served by permitting flexibility to carriers with respect to plans offering expanded calling scope.

Bell also responded to Public Counsel on July 5. Bell states that the Local Plus and Designated Number plans are simply not financially viable because the actual usage patterns for these services did not match Bell's predictions. Bell asserts that the Toll Saver plans will result in a rate decrease for most of its customers. Bell states, "Only those currently using Local Plus far in excess of original expectations will potentially experience an increase." Like Staff, Bell asserts that the proposed plans are competitive services not subject to the Price-Cap Statute, stating "Southwestern Bell's intraLATA toll services 'became classified as competitive on January 10, 1999, by operation of law.'" ⁷ Bell points to the Commission's further statement, "Given the extensive nature of competition for intraLATA toll services and the prior determinations of competitive status, the Commission finds that it should confirm competitive classification for Southwestern Bell's intraLATA toll services in all of its Missouri exchanges." ⁸ As an alternative theory, Bell argues that the Price-Cap Statute itself, at Section 392.245.11, RSMo Supp. 2001, permits an incumbent to propose new services at new prices.

Having considered the proposed tariff sheets and the arguments of the parties, the Commission finds that the proposed new plans are competitive intraLATA services not subject to price-cap regulation. Consequently, Public Counsel's concern that the rates for these services exceed those permitted by the Price-Cap Statute are irrelevant. The Commission agrees with Staff that flexibility in the design and provision of expanded calling scope plans serve the public interest. Public Counsel has not pointed to any authority that prevents Bell from withdrawing its Local Plus and Designated Number services. Therefore, the Commission will deny Public Counsel's motion.

IT IS THEREFORE ORDERED:

1. That the Motion to Suspend filed by the Office of the Public Counsel on June 27, 2002, is denied.
2. That the request for evidentiary hearing contained in Public Counsel's motion referred to above is denied.
3. That the proposed tariff sheets filed by Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, on or about June 6, 2002, and given Tariff File Number 200201060, are approved for service rendered on and after July 10, 2002. The specific sheets approved are:

⁷ Bell's response, quoting *Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, Case No. TO-2001-467, (*Report and Order*, issued January 6, 2002) at 37-38.

⁸ *Id.*

P.S.C. Mo. No. 26

4th Revised Sheet 35, Replacing 3rd Revised Sheet 35
4th Revised Sheet 45.01, Replacing 3rd Revised Sheet 45.01
6th Revised Sheet 46, Replacing 5th Revised Sheet 46
5th Revised Sheet 47, Replacing 4th Revised Sheet 47
Original Sheet 47.01
Original Sheet 47.02
8th Revised Sheet 48, Replacing 7th Revised Sheet 48
3rd Revised Sheet 48.01, Replacing 2nd Revised Sheet 48.01
9th Revised Sheet 49, Replacing 8th Revised Sheet 49
Original Sheet 49.01
8th Revised Sheet 50, Replacing 7th Revised Sheet 50
8th Revised Sheet 51, Replacing 7th Revised Sheet 51

4. That the proposed tariff sheets filed by Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, on or about June 6, 2002, and given Tariff File Number 200201061, are approved for service rendered on and after August 10, 2002. The specific sheets approved are:

P.S.C. Mo. No. 35

3rd Revised Sheet 1, Replacing 2nd Revised Sheet 1
Replacing 5th Revised Sheet 2
Replacing 4th Revised Sheet 3
Replacing 5th Revised Sheet 4
Replacing 3rd Revised Sheet 5
Replacing 4th Revised Sheet 6
Replacing 1st Revised Sheet 7, and
Replacing Original Sheet 7.1

5. That this Order shall become effective on July 10, 2002.
6. That this case may be closed on July 11, 2002.

Murray, Lumpe, and Forbis, CC., concur.
 Gaw, C., dissents, with dissenting opinion attached.
 Simmons, Ch., not participating.

Thompson, Deputy Chief Regulatory Law Judge.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

Today the Commission takes one more step on its journey to diminish access of rural Missourians to telecommunications services. Beginning with the termination of Community Optional Service, the Commission has ignored the directive of the Missouri General Assembly to have comparable services in Missouri for people in rural and metropolitan areas. It has not stopped there. The Commission only recently instructed Staff to argue before the Federal Communications Commission that AT&T should be allowed to charge higher rates in rural Missouri despite clear federal and state policy directives against different pricing in rural and urban areas.

While the Commission has reduced access for those in rural areas it continues to consider further expansion of the calling scopes for those living in suburban areas. Expanded calling scopes can be very good consumer options and such

11 Mo. P.S.C. 3d

expansion should be considered. Yet the Commission somehow finds that it is possible and positive for expanded calling scopes to exist in more populated areas – but impossible in the age of competition in rural Missouri.

Both Congress and the Missouri General Assembly foresaw that opening markets for competition could incite companies to vie for customers in heavily populated areas where the cost of providing service was lower and the profits higher. At the same time, disincentives to investment existed in areas that were more sparsely populated. Without oversight, rural parts of the United States would likely see less service and higher prices than prior to the Telecommunications Act. That is why policies against geographic de-averaging, language about comparable service and universal service were set forth.

Despite these clear policy directives to the contrary, this Commission continues down the path of moving people in rural communities into second-class status. It is not clear from the filings that this tariff should not be suspended. At least the Commission should take the time to hear Public Counsel's argument about the appropriateness of this tariff and the death of 1+ dialing.

For these reasons, I dissent.

In the Matter of the Joint Application of Union Electric Company and Callaway Electric Cooperative for an Order Approving the Change in Electric Supplier for Certain Customers for Reasons in the Public Interest; Authorizing the Sale, Transfer, and Assignment of Certain Electric Distribution Facilities and Easements from Union Electric Company to Callaway Electric Cooperative; and Approving the Territorial Agreement between Union Electric Company and Callaway Electric Cooperative in Audrain, Boone, Callaway, Montgomery, and Warren Counties.

Case No. EO-2002-458

Decided July 18, 2002

Electric§ 6. The Commission approved a territorial agreement between Union Electric Company and Callaway Electric Cooperative. The Commission also approved of transfers of assets and customers between Union Electric and Callaway Electric. The agreement and transfers resulted in Callaway Electric serving some of Union Electric's former rural customers. Callaway Electric can serve those customers more easily and efficiently.

**ORDER APPROVING APPLICATION
AND APPROVING STIPULATION AND AGREEMENT**

On March 25, 2002, Union Electric Company d/b/a AmerenUE and Callaway Electric Cooperative, Inc. filed a verified joint application requesting that the Commission: 1) approve a change of supplier for approximately 800 structures in Audrain, Boone, Callaway, Montgomery, and Warren counties from AmerenUE to the Cooperative; 2) approve a change of supplier for approximately 600 structures in the same counties from the Cooperative to AmerenUE; 3) approve the sale of certain of AmerenUE's assets that were used to serve the transferred customers; 4) approve a territorial agreement between them; 5) approve a waiver of certain provisions of the Utility Billing Practices Rule;¹ 6) grant AmerenUE a certificate of convenience and necessity for certain portions of Audrain and Callaway counties; and 7) establish a protective order.

Section 394.312, RSMo 2000, requires both notice and an evidentiary hearing before the Commission may approve the proposed agreement. The Commission provided notice to potentially interested entities on April 2. No applications to intervene were filed. An evidentiary hearing was held on July 2.

On June 21, the Applicants and the Staff filed a Stipulation and Agreement (Attachment A hereto). On June 24, the Office of the Public Counsel filed a pleading in which it stated that it did not request a hearing. Pursuant to 4 CSR 240-2.115, the Commission will treat the agreement as unanimous. On June 28, the Staff of the Commission filed suggestions in support of the agreement.

The agreement essentially provides that the signatories support granting the Application with certain minor modifications to the language of the illustrative tariffs attached. In its suggestions, Staff stated that it supports the application and is of the opinion that approval of the change of electric supplier is in the public interest even though there is rate differential. Staff stated that Callaway's distribution facilities can provide better and more reliable service than the AmerenUE facilities. Staff also stated that Callaway's distribution facilities are better suited to serve the customers subject to transfer because most of the customers subject to transfer are in rural areas where Callaway has established distribution substations and facilities to provide reliable electric service. Staff stated that the agreement will result in just one supplier for the designated areas and prevent the duplication of facilities, as well as allowing Callaway and AmerenUE to make long-range plans for their designated territory. Staff noted that:

The existing AmerenUE distribution facilities are concentrated among the larger communities. Rural AmerenUE customers in the area to be transferred to Callaway are served from long radial circuits that are more difficult to maintain. AmerenUE facilities are currently concentrated in the Holts Summit area and along Highway 54 through portions of Callaway County and another section McKittrick. It is quite common that rural

¹ 4 CSR 240-13

11 Mo. P.S.C. 3d

customers are served from facilities that are distant from the distribution substations and therefore, there is little opportunity for alternate supply if problems arise. The customers subject to transfer to AmerenUE will be concentrated in areas that AmerenUE is most capable of providing good service quality.

The Commission has reviewed the Application, the Stipulation and Agreement and the suggestions supporting it, and the evidence of record in this matter and finds the Application and the Stipulation and Agreement to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Joint Application filed on March 25, 2002, as modified by the Stipulation and Agreement, Attachment A to this order, is hereby approved.
2. That the Stipulation and Agreement, Attachment A to this order, is hereby approved.
3. That Union Electric Company d/b/a AmerenUE is authorized to sell, transfer and assign part of its franchise, works or system to Callaway Electric Cooperative as set forth in the Joint Application filed March 25, 2002.
4. That Union Electric Company d/b/a AmerenUE is granted a Certificate of Convenience and Necessity to own, control, manage, and maintain an electric power system in certain portions of Audrain and Callaway counties as set forth in the Joint Application filed March 25, 2002, as modified by the Stipulation and Agreement, Attachment A to this order.
5. That Union Electric Company d/b/a AmerenUE and Callaway Electric Cooperative are authorized to change electric suppliers for certain of their customers as set forth in the Joint Application filed March 25, 2002.
6. That the Territorial Agreement between Union Electric Company d/b/a AmerenUE and Callaway Electric Cooperative dated March 22, 2002, is approved.
7. That the waiver of certain provisions of the Utility Billing and Practices Rule 4 CSR 240-13.010 et. seq. pursuant to 4 CSR 240-2.060(14) as set forth in the Joint Application filed March 25, 2002, is granted.
8. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties herein involved. Furthermore, the Commission reserves the right to consider the ratemaking treatment to be afforded this transaction in any later proceeding.
9. That this order shall become effective on July 28, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., not participating

Mills, 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 Application of Kansas City Power & Light Company, a Missouri Corporation, for Authority to Enter into Interest Rate Management Products.

Case No. EF-2002-1094

Decided July 22, 2002

Electric §38. The Commission approved the company's request for a three-year extension of authority to enter into interest rate management products. The interest rate management products authorized are interest rate "swap," "cap," and "collar" agreements. The Commission authorized the company to have outstanding at any one time \$250 million of interest rate management products, with an effective interest rate of ten percent or less on fixed rate transactions, and an initial rate of not more than ten percent on variable rate transactions.

ORDER APPROVING FINANCING

Syllabus: This order approves Kansas City Power & Light Company's May 29, 2002, request for an extension of authority to enter into interest rate management techniques.

History

By order issued April 1, 1988, in Case No. EF-88-213, the Commission authorized Kansas City Power & Light Company to fix the interest rate on up to \$150 million of its variable rate debt by entering into interest rate agreements. On June 20, 1989, the Commission extended this authorization for an additional 24 months in Case No. EF-89-229. On June 19, 1991, in Case No. EF-91-383, the authorization was again extended 24 months. On June 10, 1993, in Case No. EF-93-328, this authorization was extended for another 36 months. On June 30, 1995, the authorization was extended to July 31, 1999, in Case No. EF-95-397. In addition, the amount of the authorized interest rate management products was increased to \$250 million. Finally, on July 29, 1999, in Case No. EF-2000-8, the authorization was extended for an additional 36 months (August 1, 1999, to July 31, 2002).

On May 29, 2002, KCPL filed an application requesting an extension of authority to fix the interest rate on up to \$250 million of its variable rate debt by entering into interest rate management transactions.

Company's Application

KCPL is a Missouri corporation with its principal office and place of business located at 1201 Walnut, Kansas City, Missouri 64106. KCPL is engaged in the generation, transmission, distribution and sale of electric energy. Electric energy is distributed and sold to the public in KCPL's certified areas in Missouri and Kansas. KCPL is a "public utility" subject to the jurisdiction, supervision and control of the Commission under Chapters 386 and 393, RSMo.

11 Mo. P.S.C. 3d

KCPL states that its objective is to maintain a low cost of debt while managing the interest rate risk on portions of its variable rate debt. In order to maintain its relatively low cost of debt position, KCPL seeks a three-year extension of authority to manage its interest rate risk by utilizing a combination of \$250 million of interest rate management products. These interest rate management products are interest rate "swap", "cap", and "collar" agreements. KCPL requests that it continue to have authority for up to \$250 million of interest rate management products outstanding at any one time, with an effective interest rate of ten percent or less on fixed rate transactions and an initial interest rate of not more than ten percent on variable rate transactions. The Company also requests authorization to enter into all documents necessary for these transactions, and requests that the Commission issue an order in this matter by July 30, 2002.

KCPL indicates that it will continue to notify the Commission's office of financial analysis of terms and conditions of interest rate management products entered into and will submit quarterly reports regarding the performance of such interest rate management products.

Staff Analysis

On July 11, 2002, the Staff of the Commission filed its recommendation. On the same date, Staff filed an amended recommendation correcting two typographical errors. Staff states that in its opinion, the interest rate management transactions KCPL proposes to enter into are acceptable. Accordingly, Staff recommends approval of KCPL's request, subject to certain conditions. Specifically, Staff recommends that nothing in the Commission's order may be considered a finding by the Commission that would preclude the right to consider the ratemaking treatment to be afforded these or any future expenditures by the Company in any later proceeding.

Staff notes that KCPL has successfully used interest rate management products over the last 14 years. In support of its position, Staff refers to a February 7, 2001, credit rate analysis by Standard & Poor's, which states that: "[i]n the past several years, KCPL has refinanced substantial amounts of high-coupon, fixed-rate securities with a mixture of lower-cost, medium-term notes and variable-rate pollution control bonds, saving the company millions of dollars in interest payments and bringing the embedded cost of long-term debt down to a very low 6.3%." Staff states that if KCPL were not allowed to use interest rate management products to hedge the risk of possible rising variable interest rates, it might not be able to take advantage of lower variable interest rates without subjecting itself to increased credit risk. Staff concurs with KCPL's claim that it is in the public interest to manage the interest on its debt through the use of interest rate management techniques.

Findings and Conclusions

Based upon consideration of the verified application, and the recommendation of its Staff, the Commission determines that the Company's request is reasonable and not detrimental to the public interest. Accordingly, the Commission will approve the application. Because market conditions for these interest rate management alternatives are transitory, KCPL must be able to execute a transaction when the opportunity arises to obtain the most competitive pricing. Requiring regulatory

approval of each individual transaction would likely foreclose the opportunity for these transactions due to the inherent time constraints of the approval process. Approval of the application will aid the Company in its objective of maintaining a low cost of debt while managing the interest rate on portions of its variable rate debt.

IT IS THEREFORE ORDERED:

1. That the authorization granted to Kansas City Power & Light Company in Case No. EF-2000-8 is extended for a period of three additional years, from August 1, 2002, to July 31, 2005.
2. That Kansas City Power & Light Company is authorized to have outstanding at any one time \$250 million of interest rate management products, with an effective interest rate of ten (10) percent or less on fixed rate transactions, and an initial rate of not more than ten (10) percent on variable rate transactions.
3. That Kansas City Power & Light Company is authorized to execute, deliver and perform the necessary agreements or documents relative to the use of interest rate management products authorized in this order.
4. That Kansas City Power & Light Company is authorized to do all things not contrary to law or to the rules and regulations of the Commission necessary to the performance of the acts specifically authorized in this order, including the execution of such other agreements and documents as are reasonably necessary to the furtherance of the use of interest rate management authorized in this order.
5. That Kansas City Power & Light Company is directed to submit to the Financial Analysis Department of the Commission a statement of the final terms and conditions of interest rate management products entered into on a timely basis as this information becomes available.
6. That Kansas City Power & Light Company is directed to submit to the Financial Analysis Department of the Commission quarterly reports regarding the performance of the interest rate management products entered into.
7. That the time period referenced in Ordered Paragraph No. 1 above refers to the period of time during which That Kansas City Power & Light Company may enter into interest rate management agreements, but does not limit the length of time those agreements may run.
8. That nothing in this order shall be considered a finding of the Commission that would preclude the right to consider the ratemaking treatment to be afforded these or any future expenditures by the Company in any later proceeding.
9. That this order shall become effective on July 30, 2002.

Vicky Ruth, Senior Regulatory Law
Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

11 Mo. P.S.C. 3d

**Staff of the Missouri Public Service Commission, Petitioner,
vs. St. Louis County Water Company, doing business as
Missouri-American Water Company, Respondent.**

Case No. WC-2002-146

Decided July 23, 2002

Water §31. Section 66.405, RSMo 2000, authorizes a tax upon residential water service customers. The Commission determined that a complaint was without merit where the complaint alleged that a tariff sheet was unauthorized and unlawful because it purported to add a surcharge of \$1.00 monthly, or \$3.00 quarterly, to the bill of each residential customer residing in a structure containing four or fewer units for the purpose of service line repair.

APPEARANCES

Keith R. Krueger, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for Petitioner the Staff of the Missouri Public Service Commission.

Richard T. Ciottone, of Counsel, Brydon, Swearingen & England, P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Respondent Missouri-American Water Company.

David P. Abernathy, Vice-President, General Counsel and Secretary, Missouri-American Water Company, 535 North New Ballas Road, St. Louis, Missouri 63141-6875, for Respondent Missouri-American Water Company.

Robert H. Grant, Deputy County Counselor, Office of the County Counselor, St. Louis County Government Center, 41 South Central, Clayton, Missouri 63105, for St. Louis County, Missouri.

Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

The Staff of the Missouri Public Service Commission filed its Complaint on September 13, 2001, against St. Louis County Water Company, doing business as Missouri-American Water Company, stating that tariff sheet P.S.C. Mo. No. 6, Original Revised Sheet No. RT 17.0, is unauthorized and unlawful because it purports to add a surcharge of \$1.00 monthly, or \$3.00 quarterly, to the bill of each residential customer residing in a structure containing four or fewer units for the purpose of service line repair whereas the statute and ordinance authorizing the surcharge impose it upon each service line, that is, upon the owner or owners of each such service line. Staff states that Company's residential service customers are not, in every case, the owners of the service lines that serve them. Staff further

complains that Company's contract with the County of St. Louis makes no provision for the payment of Company's administrative costs from the collected funds and that Company is thus diverting ratepayer-supplied funds for an imprudent purpose. Staff further complains that the language of the above-referenced tariff sheet is misleading and confusing to ratepayers. Finally, Staff complains that the above-referenced tariff sheet was only permitted to become effective by operation of law because Staff relied upon Company's promise to withdraw the sheet prior to its effective date, a promise that Missouri-American did not keep. Staff states that it has conveyed its concerns to Company and that Company refuses to withdraw the tariff sheet. Staff prays that the Commission will order Company to stop collecting the surcharge, to refund all amounts already collected, and to rescind the above-referenced tariff sheet.

In response to the Commission's Notice of Complaint of September 19, Missouri-American timely filed its Answer on October 15. Therein, Missouri-American states that it is willing to prospectively revise the tariff sheet however the Commission desires. Missouri-American denies that it ever agreed to withdraw the sheet prior to its effective date; Missouri-American also denies Staff's insinuation that it obtained approval of the tariff through improper means. Company further denies that the language of the statute and ordinance require that the surcharge be collected from the owners of residential properties rather than from the occupants. Company further denies that the tariff sheet at issue is unauthorized or unlawful. Company also denies that its collection of the surcharge constitutes an imprudent use of funds derived from ratepayers. Missouri-American also denies that the language of the tariff is misleading or confusing. Company admits that it has refused Staff's request to withdraw the tariff. Finally, among certain further responses, Company advises the Commission that the amounts already collected pursuant to the tariff are unrecoverable under Missouri law.

The Commission, on October 25, set a prehearing conference for November 2 and directed that a proposed procedural schedule be filed by November 9. On November 2, the prehearing conference was held as scheduled. At that time, St. Louis County, Missouri, moved to intervene. As no party objected, the presiding officer granted this motion at the prehearing conference. On November 6, the Commission directed Intervenor St. Louis County to file a responsive pleading by November 19. On November 8, the Commission adopted the proposed procedural schedule filed jointly by the parties on November 7.

On November 19, Intervenor St. Louis County timely filed its Answer. In its Answer, St. Louis County denies that the language of the statute and ordinance require that the surcharge be collected from the owners of residential properties rather than from the occupants. St. Louis County also denies that the language of the tariff is misleading or confusing. Finally, among certain further responses, St. Louis County advises the Commission that the surcharge is popular among Company's customers and that nearly \$700,000 has already been spent from the collected funds to repair over 300 service lines.

Pursuant to the procedural schedule, the parties filed prepared testimony, an agreed list of issues, proposed findings of fact and conclusions of law, and statements of their positions on the issues. As scheduled, the Commission

11 Mo. P.S.C. 3d

convened an evidentiary hearing on February 21, 2002. All of the parties were represented at the hearing. At the opening of the hearing, the parties advised the presiding officer that they had agreed to waive opening statements and cross-examination and to submit the case on the prefilled testimony. All of the prepared testimony was received into the record without objection. The presiding officer set a briefing schedule and those parties who desired to do so filed written briefs: Staff and Missouri-American filed initial briefs on March 22, and March 21, respectively; they filed reply briefs on April 5 and April 3, respectively.

Discussion

The parties submitted the following issues for determination. While all parties agreed on Issue 1, Staff suggests that Issue 2 is not a proper issue for determination.

1. Is the Company's tariff sheet P.S.C. MO No. 6 Original Revised SHEET No. RT 17.0 unjust, unreasonable, or more than allowed by law or by order or decision of the Commission, and, if so, what changes to the tariff would be proper?

2. Does Commission approval of a tariff also constitute approval of a contract that is filed with the tariff and on which the tariff is based?

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.

St. Louis County Water Company, doing business as Missouri-American Water Company, is a Missouri corporation that provides water service to the public in St. Louis County, Missouri. After this case was filed, Missouri-American notified the Commission that St. Louis County Water Company has merged into Missouri-American Water Company.

In 1999, the Missouri legislature enacted a statute—Section 66.405, RSMo 2000 — which permits the collection of a surcharge intended to defray the cost of water service line repairs:¹

1. If approved by a majority of the voters voting on the proposal, a county of the first classification having a population of over nine hundred thousand inhabitants may, by ordinance, levy and impose annually, upon water service lines providing water service to residential property having four or fewer dwelling units, on a countywide basis, including both the incorporated and unincorporated areas of such county, a fee not to exceed one dollar per month or an equivalent rate collected at some other interval.

¹*Laws of Missouri* 1999, H.B. No. 450, § B, effective June 29, 1999; *Laws of Missouri* 1999, S.B. Nos. 160 & 82, § B, effective June 14, 1999.

2. The ballot of submission shall be in substantially the following form:

For the purpose of repair or replacement of water lines extending from the water main to a residential dwelling due to failure of the line or for road relocation, shall County be authorized to impose a fee not to exceed one dollar per month or an equivalent rate collected at some other interval upon all water service lines providing water service within the county to residential property having four or fewer dwelling units for the purpose of paying for the costs of necessary water service line repairs, replacements or relocations caused by improvements to public right-of-way?

Yes No

3. For the purpose of this section, a water service line may be defined by local ordinance, but may not include the water meter or exceed that portion of water piping and related valves and connectors which extends from the water mains owned by the utility or municipality distributing public water supply to the first opportunity for a connection or joint beyond the point of entry into the premises receiving water service, and may not include facilities owned by the utility or municipality distributing public water supply. For purposes of this section, repair may be defined and limited by local ordinance, and may include replacement, repairs or relocation when made necessary by improvements to public right-of-way.

4. If a majority of the voters voting thereon approve the proposal authorized in subsection 1 of this section, the governing body of the county may enact an ordinance for the collection of such fee. The funds collected pursuant to such ordinance shall be deposited in a special account to be used solely for the purpose of paying for the reasonable costs associated with and necessary to administer and carry out the water service line repairs as defined in the ordinance and, if sufficient revenues are available, to reimburse the necessary costs of water service line repair, replacement or relocation made necessary by public right-of-way improvements.

5. The county may contract with any provider of water service in the county to bill and collect such fees along with bills for water service and to pursue collection of such amounts through discontinuance of service as may be directed by the county. The county may establish, as provided in the ordinance, regulations necessary for the administration of

11 Mo. P.S.C. 3d

collections, claims, repairs, relocations, replacements and all other activities necessary and convenient for the implementation of any ordinance adopted and approved pursuant to this section. The county may administer the program or may contract with one or more persons, through a competitive process, to provide for administration of any portion of implementation activities of any ordinance adopted and approved pursuant to this section, and reasonable costs of administering the program may be paid from the special account established pursuant to this section.

As permitted by Section 66.405, the matter was placed on the ballot and approved by a majority of the voters of St. Louis County on November 7, 2000. St. Louis County thereupon enacted a local ordinance, Section 502.195, to permit its residents to enjoy the benefits of the program authorized by the statute:²

A fee of One Dollar (\$1.00) per month is imposed upon all water service lines providing water service within the county to residential property having four or fewer dwelling units, to provide funds to pay for repair or replacement commencing July 1, 2001, of water lines extending from the water main to a residential dwelling due to failure of the line or for road relocation.

As authorized by Section 66.405.5, RSMo 2000, Missouri-American on January 19, 2001, entered into a contract with St. Louis County providing that, in exchange for a single payment of one dollar, Missouri-American would bill and collect the line repair surcharge from its residential customers in St. Louis County. Collection under the contract began on March 1, 2001. The contract provided that collected funds would be remitted to the county on a monthly basis. The contract also provided that uncollected funds would be pursued by Missouri-American in the normal course of its business, including service disconnection for nonpayment, if necessary. Missouri-American provided the contract to the Commission, requesting the Commission to approve it if approval is necessary.

On January 25, 2001, Missouri-American filed with this Commission a proposed tariff sheet, P.S.C. Mo. No. 6, Original Sheet No. RT 17.0, effective February 26, 2001, providing that Missouri-American would collect the surcharge from its customers on behalf of the County:

ST. LOUIS COUNTY SERVICE LINE

REPAIR PROGRAM

AVAILABILITY – This rate is applicable from and after March 1, 2001 to residential customers in St. Louis County having four or fewer dwelling units, and only to the extent such charge shall

² Ordinance 20,299, amending Chapter 502, Title V, SLCRO 1974.

continue to be authorized by and provided for in Chapter 502, Section 502.195, Title V of the St. Louis County Revised Ordinances 1974 as amended, and Section 66.405 RSMo 2000, and a contract between the Company and St. Louis County, Missouri heretofore filed with the Commission which governs the payment of amounts collected for St. Louis County for its Water Service Line Repair program.

RATE – One dollar (\$1.00) per month or three dollars (\$3.00) per quarter (and not pro-rata for periods of time less than one month or one quarter whichever is applicable) during which service is provided, to be billed and collected monthly, quarterly or otherwise in the due course of approved billing practices applicable to the customer. This tariff authorizes a reduction in this rate if and to the extent authorized by lawful actions of St. Louis County, but this tariff shall not authorize any increase without further filing with and approval by the Commission. (1)

PAYMENT TERMS – Bills are due and payable in the manner and at times applicable to bills for water service as provided in the Company's approved Rules and Regulations and 4 CSR-240-13, and discontinuance for non-payment shall be enforced to the extent and in the manner provided by such Rules.

(1) Exclusive of every tax or payment imposed upon the Company by political subdivisions of the State of Missouri, for the right to do business in such political subdivision. See tariff sheet No. RT 11.0.

This proposed tariff sheet became effective by its terms on February 26, 2001.

At some time prior to February 26, 2001, Wendell Hubbs of the Commission's Water and Sewer Department discussed the proposed sheet with Missouri-American's attorney, Richard Ciottone. Hubbs told Ciottone that the Commission's Staff would seek suspension of the proposed sheet. Hubbs testified that later on the same day, Missouri-American's Treasurer, Jim Jenkins, advised Hubbs' supervisor, Dale Johansen, that Missouri-American would withdraw the proposed sheet. In fact, Missouri-American did not withdraw it and Staff never asked the Commission to suspend it. The proposed sheet became effective by operation of law on February 26, 2001. When Hubbs reminded Jenkins of his promise to withdraw the proposed sheet, Jenkins stated that he did not remember making such a promise. Although Hubbs requested that Missouri-American withdraw the sheet after it had become effective, the Company refused to do so.

Hubbs testified that Staff's concern with the tariff centers on who is to pay the surcharge. Hubbs testified that Staff's attorneys interpret Section 66.405, RSMo 2000, and Ordinance 502.195, SLCRO 1974 (as amended), as imposing the surcharge upon residential water service lines, that is, upon the *owners* of such lines. Missouri-American's tariff, on the other hand, imposes the surcharge upon

11 Mo. P.S.C. 3d

the customer billed with respect to each residential water service line, whether or not that customer owns the line. Staff takes the position that the tariff and collection contract are inconsistent with Section 66.405, RSMo 2000, and Ordinance 502.195, SLCRO 1974 (as amended). Because Staff believes that Missouri-American must collect the surcharge from water service line owners, the collection contract will impose potentially costly administrative obligations upon Missouri-American.

Hubbs testified that Staff also had other concerns with the proposed sheet. First, Staff questioned whether a tariff sheet was necessary at all in view of Missouri-American's general pass-through tariff for taxes, P.S.C. Mo. No. 6, Original Sheet No. RT 11.0. Second, Staff disliked some of the wording used on the proposed sheet. The title "St. Louis County Service Line Repair Program" made it appear to be a Commission-approved program, which it is not. The first paragraph is headed "Availability," whereas the surcharge is imposed on certain persons as a tax. The second paragraph is headed "Rate," but the surcharge is a county-imposed tax, not a Commission-approved rate. A provision in the second paragraph that purports to permit a reduction without further Commission action could lead to the amount of the tax being misstated in the tariff. Additionally, Staff believed that the Commission should not approve the collection contract between Missouri-American and St. Louis County.

Jenkins, Missouri-American's Treasurer, had a different memory of his conversations concerning the proposed sheet. Jenkins testified that he never agreed to withdraw the sheet. Jenkins also testified that Hubbs' concern at the time centered on his belief that no tariff was necessary. Jenkins further testified that the Company believed that it could not withdraw the tariff now "because that would retroactively invalidate the prior collections." Despite Hubbs' insistence to the contrary, Jenkins testified that Missouri-American believed a tariff was necessary for several reasons. First, sums collected pursuant to an approved tariff cannot be refunded. Second, an approved tariff renders the surcharge a "condition of service" and permits service disconnection for nonpayment. Third, primary jurisdiction over disputes arising from the surcharge would lie with the Commission rather than the courts. Finally, Missouri-American uses tariffs with respect to all "pass-through" fees and taxes in order to require that any questions of "cost allocations" be resolved in a general rate case.

In general, a water service line replacement program is very beneficial to property owners, who might otherwise find themselves responsible for extremely costly repairs. The program at issue in this case is modeled after that of the City of St. Louis, which program "is a huge success." Jenkins testified that requiring Missouri-American to collect the surcharge from property owners only "would effectively kill the program." In addition to the difficulty of determining who the owner of any given piece of property is, Missouri-American would lose the threat of service disconnection as an enforcement method. Jenkins testified that Missouri-American believes that the surcharge is imposed on service line *users*, not on service line *owners*. Jenkins testified that the surcharge is fair and equitable in its present form because it is, after all, the *occupants* of each residential property who benefit directly from the water service line.

Jenkins further testified that Staff's position in this case is inconsistent with its position in other recent cases. In both Jefferson City and St. Joseph, two other service areas of Missouri-American, Staff insisted that the Company shoulder the burden of water service line repairs, with the costs to be defrayed from water service revenue rather than through a surcharge as in the present case. Staff expressed no concern for renters in those cases, Jenkins testified. Jenkins further testified that Missouri-American's standing policy, as expressed in Rule R19.1 on P.S.C. Mo. No. 6, First Revised Sheet No. R19.1, is that service line repair and maintenance is the responsibility of the "owner or customer."

Missouri-American also presented the testimony of State Senator Wayne Goode. Senator Goode sponsored the bill that was eventually enacted as Section 66.405, RSMo 2000. Senator Goode testified that most persons are shocked, upon failure of their water service line, to discover that repair is their responsibility. The repairs are "significant" and "a real financial hardship." Senator Goode testified that it was always intended that funding for the water service line repair program come from residential ratepayers, without regard to whether they owned or rented. The bill was intended to take advantage of the existing water service billing mechanism. Senator Goode expressed surprise that the Commission's Staff was concerned about who paid the surcharge. Senator Goode explained that, because the legislature authorized the charge and St. Louis County imposed it, pursuant to a vote of the people, the Commission has no role. In any event, the ultimate liability for the surcharge, the Senator suggested, is a matter for negotiation between landlord and tenant in those cases in which the occupant of a residence is not the owner. The intended beneficiaries of the program include local government, the water company, and the owners and occupants of residences: "This legislation is a WIN-WIN for everyone." Senator Goode noted that he has not received even a single complaint about the surcharge since it went into effect.

Conclusions of Law

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

Jurisdiction:

St. Louis County Water Company, doing business as Missouri-American Water Company, and its successor, Missouri-American Water Company, are each a "water corporation" and a "public utility" within the intendments of Chapters 386 and 393, RSMo 2000, and are subject to the jurisdiction of the Missouri Public Service Commission.

Burden of Proof:

Staff's burden in a case, such as this one, in which it alleges that a tariff approved by the Commission is unreasonable or unlawful, is to establish its position by "clear and satisfactory evidence."³

³ Section 386.430, RSMo 2000.

11 Mo. P.S.C. 3d

The Tariff:

Missouri-American's proposed tariff sheet, P.S.C. Mo. No. 6, Original Sheet No. RT 17.0, became effective by operation of law on February 26, 2001, 30 days after it was filed with the Commission.⁴ Whatever concerns Staff may have had about the wording of the proposed sheet were waived when Staff failed to take any action to bring those concerns to the attention of the Commission prior to the sheet's effective date. Once effective, the tariff became the law of the land as though enacted by the legislature.⁵

Is the Tariff Lawful?

Staff insists that the tariff herein at issue is unlawful because it collects from residential tenants a tax imposed by county ordinance on owners. Staff concludes that the surcharge is a tax, not a fee, and that as a tax on property, the party liable for payment is necessarily the owner of that property. Staff relies in its analysis entirely upon principles drawn from the *Taxation* article in the *Corpus Juris Secundus*. Staff urges the Commission to order Missouri-American to rescind the tariff. Staff takes this step with regret, stating that it "recognizes that it would be impractical to collect the taxes as prescribed by the ordinance" and "Staff also believes that the ordinance has a good purpose and that it is a reasonable solution to a significant problem." Staff suggests that amendment of both Section 66.405, RSMo 2000, and Ordinance 502.195, SLCRO 1974 (as amended), would be required to legalize the water service line repair program contained in Missouri-American's tariff. "But the issue is not what is expedient; the issue is what is lawful."

Missouri-American's brief expresses amazement that the Commission's Staff would attempt to thwart the will of the people, as expressed at the ballot box by the voters of St. Louis County in November 2000, as well as the will of the Missouri General Assembly and the St. Louis County Council. Missouri-American states that everyone is pleased with the St. Louis County Water Service Line Replacement Program except, unaccountably, the Commission's Staff. Missouri-American asserts that no prospective change in the tariff is necessary because it is consistent with state statute and county ordinance, it is in the public interest, and it correctly implements both legislative intent and public policy.

Staff, in reply, states that Missouri-American must collect the tax actually imposed by the St. Louis County ordinance and that tax, Staff asserts, is unambiguously imposed upon the owners of residential water service lines. "The question . . . is not whether the company's objective is commendable, or whether the collection of this charge would serve a good and useful purpose. The question is whether the Company is collecting the tax the St. Louis County ordinance imposes."

Although Staff insists that the meaning of Section 66.405, RSMo 2000, is irrelevant to this case, the Commission believes a review of that statute would be helpful. Turning to Section 66.405, RSMo 2000, the Commission notes that

⁴ Section 393.140(11), RSMo 2000; Regulation 4 CSR 240-50.010, (6) and (7).

⁵ *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 114, 57 S.Ct. 345, 347, 81 L.Ed. 540, ___ (1937).

subsection 1 authorizes the imposition “upon water service lines providing water service to residential property having four or fewer dwelling units . . . [of] a fee not to exceed one dollar per month or an equivalent rate collected at some other interval.” Although denominated a “fee” rather than a tax in the statute, Staff is correct that this surcharge is “a tax denominated as a fee.”⁶ However, that does not end the analysis.

Section 66.405, RSMo 2000, has five subsections. All of these subsections were enacted at the same time and all are part of the original enactment. “Statutory provisions relating to the same subject matter are considered *in parimateria*”⁷ “[S]tatutes *in pari materia* are intended to be read consistently and harmoniously.”⁸ Likewise, the provisions of a single legislative act must be considered together and, if possible, all provisions must be harmonized and every clause given some meaning.⁹ Provisions enacted in the same legislative act must be construed together.¹⁰ Thus, our understanding of the tax authorized by subsection 1 of Section 66.405, RSMo 2000, must be guided by the fact that subsection 5 authorizes an enacting county to contract with a local water utility to “bill and collect such fees along with bills for water service and to pursue collection of such amounts through discontinuance of service as may be directed by the county.” When viewed in context, the Commission determines that, contrary to Staff’s position, Section 66.405, RSMo 2000, authorizes a tax upon residential water service customers.

Staff insists, as noted above, that Section 66.405, RSMo 2000, is irrelevant to this proceeding. Missouri-American, Staff asserts, can only collect the tax imposed by the County ordinance. The County ordinance, Section 501.195, SLCRO 1974 (as amended), enacts a tax upon residential water service lines, using essentially the same language as Section 66.405.1, RSMo 2000. Unlike the state statute, Ordinance 501.195, SLCRO 1974 (as amended) contains no provision authorizing collection of the tax along with bills for water service.¹¹ However, the title of the enacting ordinance, No. 20,299, 2000, includes these words: “and authorizing the County Executive to enter into contracts with water service providers for collection of the fee.” The text of the ordinance included in the present record, however, conspicuously lacks any such provision. It is a rule of construction that “[h]eadings or titles of a section that appear in the original act as passed by the legislature are

⁶ *Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506, 510 (Mo. App., E.D. 1998). See the five factors drawn from *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 303 n. 10 (Mo. banc 1991).

⁷ *EBG Health Care III, Inc. v. Mo. Health Facilities Review Comm’n*, 12 S.W.3d 354, 360 (Mo. App., W.D. 2000).

⁸ *Id.*

⁹ *Wollard v. City of Kansas City*, 831 S.W.2d 200, 202 (Mo. banc 1992).

¹⁰ *Cronin v. State Farm Fire & Casualty Co.*, 958 S.W.2d 583, 584 (Mo. App., W.D. 1997)

¹¹ It is not clear whether Schedule 3-1 to Exhibit 1, the Testimony of Wendell Hubbs, in fact includes the entire text of the ordinance.

11 Mo. P.S.C. 3d

‘considered as part of that act and [are] weighed when construing the act.’¹² The title of the enacting ordinance thus supplies a provision similar to subsection 5 of Section 66.405, RSMo 2000, in that it demonstrates that the enacting body intended to collect the tax from water service customers along with their bill for water service. As Staff has eloquently argued, such a collection mechanism simply does not work if the intention is to collect the tax from property owners. The inclusion in the enactment of this highly specific collection device is sufficient, consequently, to show that the tax is *not* imposed on property owners. The Commission determines that the county ordinance, like the state statute that authorized it, imposes a tax upon certain residential water service customers.

Based upon the foregoing analysis, the Commission concludes that the tariff herein at issue accurately reflects the intention of St. Louis County, and of the legislature, that the tax be imposed upon certain residential water service customers. Nonetheless, the Commission must direct Missouri-American to withdraw the tariff because of the following defects. First, the tariff does not specify that, where multiple water service customers are served by a single service line, each such customer will be billed only a *pro rata* share of the surcharge. Second, the tariff, as well as the contract between Missouri-American and St. Louis County, does not provide for reimbursement to the Company of its additional collection costs referable to collection of the surcharge, whatever those additional costs may be. Any such costs shall not be charged to Missouri-American ratepayers and any reimbursement of such costs shall be pursuant to Section 66.405.4, RSMo 2000.¹³

As to the question concerning the contract entered into between Missouri-American and St. Louis County, the Commission agrees with Missouri-American that it need not determine that question. The contract certainly does not require Commission approval — it is specifically authorized by statute. The issue of the prudence of the contract’s terms necessarily remains for consideration in Missouri-American’s next general rate case.

IT IS THEREFORE ORDERED:

1. That the Complaint filed on September 13, 2001, by the Staff of the Missouri Public Service Commission is found after full hearing and briefing to be without merit and is therefore dismissed.

¹² *State ex rel. Atmos Energy Corporation v. Public Service Commission*, 2001 WL 1806001 (Mo. App., W.D. 2001) at *6.

¹³ The Commission is also concerned, but makes no determination, about a possible defect in both Section 66.405, RSMo 2000, and Ordinance 502.195, SLCRO 1974 (as amended), which is the diversion of public funds for a private purpose. Because the water service line repair surcharge is a tax, the proceeds are public funds. Yet, the funds are used under the program to repair private property, that is, the water service lines belonging to the owners of residential property. The Missouri Constitution prohibits counties, such as St. Louis County, from “grant[ing] public money or property to any private individual[.]” Mo. Const., Art VI, Sec. 25. For example, it was not permissible under this provision, upon annexation of a public water supply district by a city, to distribute the proceeds derived from the purchase of the system assets by the city to the landowners within the former district. See *State ex rel. Public Water Supply District No. 7, Jackson County, v. James*, 361 Mo. 814, 822, 237 S.W.2d 113, 118 (banc 1951).

2. That St. Louis County Water Company, doing business as Missouri-American Water Company, shall nonetheless withdraw the tariff at issue in this case, P.S.C. Mo. No. 6, Original Sheet No. RT 17.0, "St. Louis County Service Line Repair Program," for the reasons discussed above.

3. That St. Louis County Water Company, doing business as Missouri-American Water Company, may submit a proposed tariff in compliance with this Report and Order for Commission approval.

4. This Report and Order shall become effective on August 2, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur and
certify compliance with the provisions
of Section 536.080, RSMo 2000.

In the Matter of Sprint Communications Company, L.P.'s Proposed Tariff to Introduce an In-state Access Recovery Charge and Make Miscellaneous Text Changes.*

Case No. TT-2002-1136
Decided July 23, 2002

Telecommunications § 14. The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.

Telecommunications § 31. The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.

Telecommunications § 40. The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.

Rates § 17. The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.

*The Commission, in an order issued on August 13, 2002, denied an application for rehearing in this case. On September 10, 2002, this case was appealed to Cole County Circuit Court (02CV325337). On July 26, 2003, this case was appealed to the Missouri Court of Appeals-Western District (WD63133; consolidated with WD63134 & WD63135).

11 Mo. P.S.C. 3d

Telecommunications § 14. The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.

Telecommunications § 40. The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.

Rates § 21. The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.

Telecommunications § 14. The Commission denied the motion for suspension of the tariff where it determined that the company should not be treated differently than similarly situated companies.

Rates § 110. The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.

Rates § 110. The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.

ORDER APPROVING TARIFF

Syllabus: This order approves the proposed tariff sheets filed by Sprint Communications Company, L.P., and denies the Office of the Public Counsel's Motion to Suspend Tariff and for Evidentiary and Public Hearings.

On May 31, 2002, Sprint submitted proposed tariff sheets.¹ The proposed tariff sheets were designed, according to the cover letter, to introduce an "In-State Access Recovery Charge" and to "make miscellaneous text changes." A copy of the notice Sprint sent to its customers was attached. Sprint requested that the tariff become effective on July 1, 2002.

On June 13, 2002, the Office of the Public Counsel filed its motion to suspend the proposed tariff sheets. In addition, the Public Counsel requested that the Commission hold both an evidentiary hearing and set the matter for local public hearings. The motion made several allegations that the tariff revision was not "just and reasonable" and that the proposed new charge would be discriminatory. Public Counsel stated that the proposed tariff is similar to the tariff filed by AT&T Communications of the Southwest, Inc., in Case No. TT-2002-129.²

On June 18, 2002, the Commission ordered that any party wishing to respond to Public Counsel's motion should do so no later than June 21, 2002. On June 21, 2002, Sprint and the Staff of the Missouri Public Service Commission each filed a response.

¹ Tariff No. 200201020.

² *In the Matter of AT&T Communications of the Southwest, Inc.'s Proposed Tariff to Establish a Monthly Instate Connection Fee and Surcharge.*

Staff recommended that the Commission approve the tariff. Staff argues that as a competitive company, Sprint must comply with Section 392.500(2), RSMo, which authorizes rate increases with a tariff filing and notice to customers at least ten days prior to the increase. Staff stated that, in its opinion, Sprint has complied with Section 392.500(2). Staff also stated its opinion that the statutes permit the Commission to give less scrutiny³ to the treatment of competitive companies than it does to fully regulated entities because the statutes provide for "full and fair competition to function as a substitute for regulation . . ."⁴ Staff states that in its opinion, it is not necessary for the Commission to impose additional regulation for this particular charge.

In addition, Staff states that more than 500 companies hold certificates to provide long distance service in Missouri. Thus, Staff points out that Sprint's customers may choose to switch long distance carriers and, thereby, allow the competitive marketplace to regulate the charges.

Finally, Staff argues that Sprint's tariff filing is similar to AT&T's tariff approved by the Commission.⁵ Staff observes that monthly-recurring charges and surcharges are common in the industry, and Staff suggests that Sprint should not have different treatment based on this tariff filing.

Sprint filed its response on June 21, 2002. In its response, Sprint argues that it has complied with the requirements of Section 392.500(2) in that it filed the proposed tariff and gave the appropriate notice to its customers. Sprint argues that its tariff should be approved for the same reasons that the AT&T tariff was approved in Case No. TT-2002-129. Sprint states that none of the exceptions to Section 392.500(2) apply and therefore, the Commission should approve its tariff and deny Public Counsel's motion. Sprint notes that it has proposed a promotional tariff that exempts "zero volume users."⁶

The Commission, seeking additional information, suspended the tariff until July 31, 2002, and directed its Staff to answer certain questions. On July 12, 2002, Staff filed responses to the Commission questions. On that same date, Sprint also filed answers to the Commission's questions. Public Counsel filed a reply on July 19, 2002.

Sprint and Staff explained the differences between Sprint's proposed tariff and that of AT&T in case No. TT-2002-129. The major differences are that AT&T's tariff exempts customers from the charge where those customers are being billed less than one dollar for the month. Sprint's tariff, by comparison, exempts customers who have no charges for long distance usage in a month. This exemption is accomplished by the promotional tariff and will only remain in effect until December 31, 2002, unless extended. The promotional tariffs filed by Sprint would also exempt its New and Existing Sprint Standard Weekends® and Sprint Standard Weekends® Option B customers. Finally, AT&T's monthly charge is \$1.95, while Sprint's monthly charge is \$1.99.

³ Section 392.185, RSMo 2000.

⁴ Section 392.185.5, RSMo 2000.

⁵ Case No. TT-2002-129.

⁶ Tariff No. 200201106, proposed effective date July 1, 2002.

11 Mo. P.S.C. 3d

The Commission granted Sprint competitive status as a provider of competitive telecommunications service in Case No. TO-88-142.⁷ A proposed tariff that increases rates or charges of a competitive telecommunications company is governed by Section 392.500(2). The statute allows the proposed tariff increasing rates or charges to go into effect only after the proposed tariff has been filed with the Commission and the affected customers are given at least ten days' notice. The Commission finds that Sprint has complied with the technical requirements of Section 392.500(2).

Public Counsel relies on the argument that Section 392.200 also governs the setting of rates, even for a competitive company. Section 392.200 provides that: (1) a proposed tariff be just and reasonable; (2) except for promotions and where otherwise authorized, prices should not be discriminatory; (3) undue or unreasonable preference or advantage may not be given to any customer; (4) geographic deaveraging of rates may not occur; and (5) the company may not violate its duty to transmit without delay the messages of other telephone companies. Public Counsel argues that the proposed rate is not just and reasonable and that it is discriminatory by giving preference to customers who subscribe to both Sprint's local and long distance services.

In interpreting the various provisions of Chapter 392, the Commission turns to the purposes of the chapter as specified in Section 392.185. That section states in part:

The provisions of this chapter shall be construed to:

* * *

- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

* * *

It is the Commission's task to balance these purposes.

The Commission has reviewed all the relevant factors surrounding this proposed charge including Sprint's tariff submission, the motion to suspend, Staff's recommendation, and the various other responsive pleadings. Because Sprint's proposed rate increase of \$1.99 applies only to a competitive service, consumers are free to obtain service from an alternative provider if they object to the rate. Considering the competitive climate in which this service is offered, the

⁷ *In the Matter of the Investigation for the Purpose of Determining the Classification of the Services Provided by Interexchange Telecommunications Companies Within the State of Missouri*, 30 Mo. P.S.C. (N.S.) 16 (Sept. 15, 1989).

Commission finds that the allowing full and fair competition to substitute as regulation will ensure that consumers pay only reasonable rates. Staff stated that it found Sprint's exemption of the charge for Sprint's local service customers to be a concern, however, Staff did not believe Sprint should be treated differently than other carriers similarly situated. Staff also noted that monthly recurring charges and surcharges are common in the telecommunications industry. Sprint cites several instances where "the Commission has routinely approved . . . [or allowed to become effective] interexchange tariffs that offer discounts or that waive various charges to customers who purchase local service from the same company."⁸ Thus, the Commission finds that this charge does not provide any "undue or unreasonable preference or advantage" to any customer.

It is unusual for the Commission to scrutinize the rate structure of competitive long distance service providers other than to determine compliance with Section 392.500. The statutes clearly set out that competition should act as a substitute for regulation. Customers are free to switch providers if they find the access charge unreasonable. Even Public Counsel states, "[t]he competitive marketplace determines to what extent the carrier will seek to recover all or any part of . . . [access charges] in its rates."⁹ The Commission finds that Sprint should not be treated any differently than other carriers similarly situated. The Commission determines that the proposed tariff is just and reasonable and should be approved. Therefore, the Commission will deny the motion for suspension and approve the tariff sheets.

IT IS THEREFORE ORDERED:

1. That the motion filed by the Office of the Public Counsel on June 13, 2002, to suspend the tariff filed by Sprint Communication Company, L.P., on May 31, 2002, is denied.
2. That the tariff filed by Sprint Communication Company, L.P., on May 31, 2002, is approved, to become effective on July 31, 2002. The approved tariff sheets are:

P.S.C. Mo. Tariff No. 2

1st Revised Page 68.12, Cancels Original Page 68.12
3rd Revised Page A-44.6, Cancels 2nd Revised Page A-44.6
2nd Revised Page A-44.9, Cancels 1st Revised Page A-44.9
Original Page A-44.9.1
3rd Revised Page A-44.10, Cancels 2nd Revised Page A-44.10
1st Revised Page A-44.10.1, Cancels Original Page A-44.10.1
1st Revised Page A-44.10.2, Cancels Original Page A-44.10.2
1st Revised Page A-44.10.3, Cancels Original Page A-44.10.3
1st Revised Page A-44.11, Cancels Original Page A-44.11
1st Revised Page A-44.12, Cancels Original Page A-44.12
2nd Revised Page A-44.13, Cancels 1st Revised Page A-44.13
2nd Revised Page A-44.14, Cancels 1st Revised Page A-44.14
3rd Revised Page A-44.15, Cancels 2nd Revised Page A-44.15
Original Page A-44.16

⁸ Sprint Communications Company, L.P.'s Response to Order Directing Filing, filed July 12, 2002, page 4.

⁹ Office of the Public Counsel's Motion to Suspend Tariff and for Evidentiary and Public Hearings, filed June 13, 2002, page 5.

11 Mo. P.S.C. 3d

3. That this order will become effective on July 31, 2002.

Simmons, Ch., Murray, Lumpe, and Forbis, CC., concur.
Gaw, C., dissents.

Dippell, Senior Regulatory Law Judge

**Staff of the Missouri Public Service Commission, Complainant,
v. Union Electric Company, d/b/a AmerenUE, Respondent.**

*Case No. EC-2002-1
Decided July 25, 2002*

Electric § 7. The Commission approved a Stipulation and Agreement among the parties that resulted in a refund to AmerenUE's customers. One of the reasons the Commission approved the agreement is that the agreement did not restrict the Commission's powers in any way.

Electric § 21. The Commission approved a Stipulation and Agreement that resulted in AmerenUE giving its customers a one-time credit of \$40 million.

Evidence, Practice and Procedure § 8. The Commission approved a Stipulation and Agreement to resolve a complaint the Staff of the Commission filed against AmerenUE. The Stipulation and Agreement included terms requiring AmerenUE to reduce its rates, give customers a one-time credit, invest in infrastructure, and invest in the communities AmerenUE serves. The Commission found the Stipulation and Agreement to be in the public interest because parties with diametrically opposed interests entered into the agreement. These parties included parties such as small residential customers, large industrial customers, and other utilities.

REPORT AND ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves a settlement reached by the parties that, *inter alia*, requires Union Electric Company d/b/a AmerenUE to reduce rates by \$110 million over three years, and provide a one-time credit of \$40 million to its customers.

The evidentiary hearing in this case began on July 11, 2002. On July 12, the parties informed the Commission that they had reached an agreement in principle that would resolve all issues. The Commission recessed the hearing to allow the parties the opportunity to finalize the agreement and reduce it to writing. On July 16, most of the parties filed a Stipulation and Agreement that resolves all outstanding issues for the purpose of this case. Later that day, the only two parties that did not join in the agreement (Kansas City Power and Light Company and Laclede Gas Company) each filed a pleading in which each stated that it did not oppose the stipulation and waived a hearing. Pursuant to 4 CSR 240-2.115, the Commission will treat the agreement as unanimous.

The agreement is somewhat complex, and its salient points will be discussed here. The agreement itself is attached to this order.

The first portion of the agreement deals with rate reductions and credits. AmerenUE agrees to make a one-time credit to its Missouri retail electric customers of \$40 million. This credit is in settlement of Case Nos. EM-96-149, EC-2002-1025, and EC-2002-1059, all of which relate to the now-expired Experimental Alternative Regulation Plan. AmerenUE will reduce rates as of April 1, 2002, by \$50 million. A credit reflecting the reduction in rates for the period between April 1 and the effective date of this order will be made to all customers. AmerenUE will again reduce rates on April 1, 2003, by \$30 million, and again on April 1, 2004, by \$30 million. The parties agree that none of them¹ shall file a case to institute a general rate increase or decrease before January 1, 2006.

The agreement also provides that AmerenUE will make necessary infrastructure investments during the period of time covered by the agreement. These investments include 700 megawatts of new capacity, upratings of existing plants of 270 megawatts, and new transmission lines and upgrades to existing transmission lines that will increase import capability by 1300 megawatts. These investments will total \$2.25 to 2.75 billion.

AmerenUE, as part of the agreement, also commits to make certain investments in the communities it serves. It will make an initial \$5 million contribution to its Dollar More Program on September 1, 2002, and will contribute \$1 million more each year for the next four years. It will create a weatherization fund for its low-income customers, and initially fund it with \$2 million on September 1, 2002, and will contribute an additional \$500,000 each year for the next four years. AmerenUE will also create a community development corporation and fund it with \$5 million on September 1, 2002, and an additional \$1 million each year for the next four years. Finally, AmerenUE will create a residential and commercial energy efficiency fund and fund it with \$2 million on September 1, 2002, and an additional \$500,000 each year for the next four years. All of these investments will be recorded below the line, and not treated as a regulated expense. The details for several of the programs will be worked out through the collaborative efforts of interested entities.

The agreement also contains a number of miscellaneous provisions. For example, AmerenUE will modify the way it calculated its dismantling costs and/or service lines for certain assets with the result that it will decrease its depreciation expense by approximately \$20 million annually. AmerenUE also commits to provide to the signatories a cost of service study by January 1, 2006, covering the twelve months ending June 30, 2005. Collaborative efforts will also be used to design and implement a residential time-of-use pilot project, and to increase the amount of demand-response options (including interruptible load).

On July 19, 2002, the Staff of the Commission filed a memorandum in support of the agreement, as required by paragraph 15a of the agreement. Staff explains

¹ The agreement specifically exempts the Office of the Attorney General from this moratorium. While the question of the authority of the Attorney General's Office to file a case to change the rates resulting from this agreement has not been briefed, the reason for the exemption appears to be the Office of the Attorney General's desire to not concede its statutory or constitutional authority.

11 Mo. P.S.C. 3d

its rationale for entering into the agreement, and explains in some detail why the agreement is in the public interest. Staff tried to anticipate the questions the Commission might have regarding the agreement, and gave its answers to those questions.

On July 24, 2002, the Missouri Industrial Energy Consumers (MIEC), a group of AmerenUE's industrial customers, filed a response to the Staff memorandum. The MIEC explained that it supports the agreement for some of the same reasons as the Staff, but disagreed with others of the Staff's reasons. Also on July 24, the Staff filed an addendum to its memorandum, and a revised version of the attachment to the agreement. The addendum addresses and explains the provisions in the agreement about the decommissioning of the Callaway nuclear power plant, and raises an issue about the proper treatment of credits that would be due to AmerenUE customers that have been transferred to an electric cooperative pursuant to a Commission order. The revised attachment simply refines the calculations in the original attachment, resulting in a change of \$.001 to one rate element in the second year of the moratorium period, and another change of the same amount to a rate element in the third year. Any party that objects to the revisions to the attachment must file a pleading raising its objection as soon as possible, and will be ordered to do so.

The Commission re-convened the hearing on July 24, 2002, for the purpose of asking questions of the parties and of the parties' witnesses. At that hearing, all parties who had not already filed a response to the Staff's memorandum waived their right to do so. The Missouri Energy Group, a group of AmerenUE's industrial customers, concurred with the response to the Staff memorandum filed by the MIEC. The parties affirmed their support for the agreement, and explained why it is in the public interest. The Commission admitted into the record all of the prefiled testimony that had not already been admitted.

Pursuant to Section 536.060, RSMo 2000, the Commission may accept the agreement as a resolution of the issues in this case. The most compelling evidence supporting the conclusion that the agreement is in the public interest is the broad range of interests that entered into it. The parties include representatives of the spectrum of AmerenUE customers, from the small residential customers to the largest industrial customers. The parties also include other utilities and the Missouri Department of Natural Resources. For such a diversity of interests to be able to reach a comprehensive resolution of the 47 separate issues that were in dispute at the beginning of the hearing, the agreement must necessarily be in the public interest. The responses of the parties to Commission questions at the hearing on July 24 confirm this conclusion.

Another important consideration in the Commission's conclusion that the agreement is in the public interest is that it does not restrict the Commission's powers in any way. The Commission has the right under Section 386.390, RSMo 2000, to institute a complaint about the reasonableness of AmerenUE's rates, and that right is not affected by the agreement. Although the parties (see footnote 1) have agreed to give up some of their rights, the Commission does not, by approving the agreement, give up any of its rights. Furthermore, the Commission has broad oversight over AmerenUE in addition to its right to institute a rate complaint, and the agreement does not limit the Commission's oversight.

The Commission has reviewed the agreement, the memorandum in support of it and the responses to that memorandum, the testimony filed and admitted into the record, and finds the agreement to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on July 16, 2002, is approved, and all parties shall be bound by its terms.
2. That any party that objects to the revisions, filed by the Staff of the Commission on July 24, 2002, to Attachment A to the Stipulation and Agreement must file a pleading raising its objection no later than July 30, 2002.
3. That this order shall become effective on August 4, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., concurs, concurrence to follow

Mills, 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.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I concur in the decision of the majority to accept the unanimous Stipulation and Agreement (Stipulation) of the parties in this case primarily because all of the parties were clear that they believed this settlement was in their best interest and, from these participants' vantage point, the best interest of the public. What is not clear today is whether this view will be as evident four years from now.

AmerenUE and Ameren Corporation, its parent, gain two important things among others in this settlement – certainty in income from ratepayers and no regulatory cap on AmerenUE's rate of return. The rates charged customers are set and known under this agreement. The potential for another complaint case is minimized through 2006. Whether off-system sales will be shared with ratepayers, the appropriateness of energy transactions between AmerenUE and its affiliates, and other issues will not be as important during the period of this settlement because they cannot impact rates under this agreement.

AmerenUE is free to earn as much as it is able. There is no limit on its rate of return from the Stipulation's standpoint. Thus approving this settlement means putting complete confidence in the investigation by the Staff, Public Counsel, and other parties of the details of the earnings and earning capacity of AmerenUE. Only with thoroughness can an evaluation be made as to whether this agreement is in the public interest. Staff, Public Counsel, the Attorney General's office, and various industry groups all represented to the Commission that they believe this settlement to be so. In fact, Public Counsel and Staff stated that they believed the settlement was within a range of the appropriate rate of return for AmerenUE based upon their particular viewpoints and calculations.

11 Mo. P.S.C. 3d

The importance of that representation to this Commission cannot, in my estimation, be over-emphasized. Ameren alone is in full possession of its plans for the next four years. While some details of those plans have been disclosed, a myriad of detail remains within Ameren's knowledge alone. Staff and Public Counsel have agreed, barring changes of circumstances of sufficient magnitude under the Stipulation and Agreement to warrant an end to the moratorium on rate adjustments, to give the company significantly "free rein". Having a resolution of AmerenUE's case rids Ameren Corporation of a substantial unknown and allows it to focus in other arenas. With Ameren Corporation's capital to debt ratio it may be in a position to expand in the future in an industry containing highly leveraged companies with a need to sell assets. The impact of such an expansion of AmerenUE is not clear nor is it evident that this possibility was considered in the settlement.

Staff, Public Counsel, and the other parties received known and reduced rates for ratepayers by this Stipulation. Had the Commission ordered an incentive plan it is possible that customers would receive greater benefits. It is possible too, that a commission order might have produced lower rates than are achieved in this settlement under traditional ratemaking principles.

In both instances the certainty gained by this Stipulation would be lessened or even nonexistent. Ratepayers ride to a limited extent more or less with the company's success under incentive plans. Furthermore, even after it is clear that success has occurred, calculations of the amount of ratepayer share of past incentive plans of AmerenUE have been the subject of litigation and delay. Traditional ratemaking, without a moratorium on rates, leaves timing of future rate adjustments unpredictable.

On the other hand, a moratorium on rate adjustment is a significant concession from all parties. Indeed, if this moratorium extended beyond the 3½ years proposed it would be difficult to accept under any circumstances. In some ways the company gives up less in this moratorium than do the others. No outside entity can know the earnings potential or expense reduction possibilities better than Ameren. No matter how thorough the investigation, none of the other parties can possibly have access to the same insight as company leadership. Company decisions are after all made by the company. While uncertainty exists for Ameren in the market – that uncertainty is present without this Stipulation. Staff and Public Counsel risk the possibility that their insight was insufficient, that their assumptions were incorrect. They may later find prior to 2006 they would have brought a case to further lower rates if not barred by the Stipulation's moratorium. My comfort level in approving this Stipulation was greatly increased as a result of the parties acknowledgement that despite the parties concession to the moratorium, the Commission is not prevented from ordering inquiry into the appropriateness of rates prior to the termination of the term of the Stipulation. By approving the Stipulation, the Commission does nothing (nor likely could it) to diminish its responsibility to the people of Missouri or its authority to oversee regulated utilities.

The parties have agreed to an investment plan for Ameren, which will improve its ability to serve native load with owned generation. This is a continuation of the traditional philosophy that ratepayers should have reliability of service by receiving

electricity generated from the regulated company's own assets. Such planning served this country for many years. This type of approach, however, runs against a backdrop of current policies and trends in Washington and the push for deregulation and forced sale of generation assets in some states where emphasis is placed on encouraging purchase of generation on the wholesale market. Arguments can be made that this plan is at cross purposes with these movements. It is indeed probable that at times market rates of wholesale generation will allow purchase of electricity at a lower rate than ratepayers will be paying for the cost of the regulated utility's owned generation. There will also be times when such rates are higher. However, this stipulation is in line with Missouri statute directives on serving native load, a policy that ensures greater reliability of service. Furthermore, it protects Missouri customers of Ameren from the up and down ride of the unregulated market even as it is cast against a national momentum away from this goal.

Part of the need for this generation and undoubtedly Ameren's calculations for making it pay off are dependent on customer numbers and anticipated usage. Several large industrials are signatories to this Stipulation. Successful efforts by some in this group to seek legislative avenues to allow the purchase of electricity from other sources could reduce revenues for AmerenUE. This Stipulation assumes a continuation of the large industrials in Ameren's customer base. If choice is introduced to Missouri the rates under this Stipulation might need reevaluation.

Depreciation issues were resolved in this case in an awkward manner. While no rate of return was agreed upon, the parties structured a hybrid policy/monetary agreement on depreciation. The effect of this upon ratepayers should strike at the earliest, at the end of the settlement period. This Commission has made some significant statements about depreciation and particularly negative net salvage of late. This Stipulation could create less, not more, guidance regarding the appropriate treatment of negative net salvage in Missouri. It should be clear that the resolution of depreciation in this Order is accepted by the Commission because of the approval of the entirety of the settlement and not as any indication of a policy shift of this Commission. We should set consistency as a goal in future cases and make it clear when negative net salvage will be allowed and disallowed.

This case is monetarily one of the largest cases in recent memory for the Commission. The parties' efforts to obtain a reasonable settlement in this case are to be commended. It would have perhaps been better, from a policy standpoint, had this Commission resolved the nearly 50 issues in controversy. But the parties have represented that for the immediate future this settlement is in the public interest. Only time will verify this wisdom. Since this Commission is not blessed with such foresight and without significant reason evident to the contrary today, the insight (of a unanimous Stipulation and Agreement) of all the parties and their representation of its benefit to Missouri must serve as surrogate.²

² Acceptance of this settlement is based upon an assumption that Ameren has been forthcoming with the Commission about its future plans and its anticipated revenues and expenses in the foreseeable future, about which there was significant inquiry and discussion in the settlement presentation.

11 Mo. P.S.C. 3d

In the Matter of Laclede Gas Company's Application for Variance from the Provisions of Certain Commission Rules to Offer Electronic Billing.

Case No. GE-2002-1159

Decided July 25, 2002

Gas §33. The Commission approved a variance from Commission Rules 4 CSR 240-13.015(1)(A), 13.015(1)(R), 13.050(5) and 13.055(3), allowing Laclede Gas Company to bill, and receive payment from, its customer over the Internet.

ORDER GRANTING APPLICATION FOR VARIANCE AND APPROVING TARIFF

Syllabus:

This order grants Laclede Gas Company's application for a variance to Commission Rules 4 CSR 240-13.015(1)(A), 13.015(1)(R), 13.050(5) and 13.055(3). These rules require Laclede to bill its customers in writing, either through the mail or by hand delivery, and to provide written notice of disconnection. Laclede proposes to provide its customers with the option of receiving bills electronically, through the Internet. Customers who choose electronic billing will initially be notified of disconnection through the Internet.

Discussion:

On June 26, 2002, Laclede Gas Company filed an Application for Variance, requesting approval for a variance from certain Commission rules. Laclede seeks a variance in order to be able to promote a program by which it can electronically (over the Internet) bill and receive payment from customers. With its application, Laclede also filed a tariff (tariff file No. 200201125), delineating its electronic billing program. The tariff has an effective date of July 27, 2002.

Laclede requests a variance from Commission Rules 4 CSR 240-13.015(1)(A), 13.015(1)(R), 13.050(5) and 13.055(3). Rule 13.015(1)(A) defines a "bill" as a "written demand for payment for service" Rule 13.015(1)(R) defines "rendition of a bill" as "mailing or hand delivery of a bill" Rule 13.050(5) describes the process a utility company must go through in order to discontinue residential service. Generally, this rule requires written or hand-delivery notice prior to disconnection. Rule 13.055(3) requires written notice and other steps a utility company must take prior to disconnection, during the period of November 1 through March 31 (the cold weather rule).

Laclede seeks to include in the definition of a "bill," electronic demand for payment. Similarly, it proposes to include in the definition of "rendition of a bill," delivery through the Internet. Pursuant to Commission Rule 4 CSR 240-13.065, applicants for a variance must give reasons for the proposed variance and show good cause. Laclede asserts that there is good cause for offering customers an option of conducting business through the Internet in that it would increase

customers' options for billing and payment, would reduce cost to the company, and is convenient and reliable. Laclede asserts that savings resulting from electronic billing would be passed on to all of its customers. Also, in support of its application, Laclede points out that under Commission Rules 4 CSR 240-33.020(4) and (21), applicable to telecommunications companies, a "bill" is defined as written or electronic. Rendition of a bill is defined as the date it is "mailed, posted electronically or otherwise sent to a customer." Laclede asserts that customers should have the same options with respect to gas service. With respect to disconnection notices, Laclede further states that the first notice of disconnection would be delivered electronically, with the bill that follows the unpaid bill. Subsequent notices of discontinuance of service would be communicated according to Commission rules. Specifically, the second notice would be sent though the mail; the third, through reasonable efforts to personally contact the customer.

On July 17, 2002, Staff of the Missouri Public Service Commission filed a recommendation, asserting that Laclede has shown good cause for a variance and suggests that the Commission approve Laclede's application and tariff. In an attached memorandum, Staff notes that the changes to Laclede's tariff (implementing electronic billing, payment and notice procedures) "would provide increased customer choice for billing and payment, cost savings, convenience, and reliability."

On July 23, 2002, the Commission issued an Order Directing Filing, ordering Laclede to indicate (by filing) whether and how customers, upon enrolling in the program, will be made aware that the initial disconnection notice will be sent electronically. Laclede responded on July 24, 2002. In its response, Laclede notes that its current computer enrollment form does not explicitly advise customers that initial disconnection notices will be sent electronically. However, Laclede affirms that it will modify the text on the computer enrollment form to specifically inform customers that disconnection notices will be sent electronically.

Upon review of Laclede's application and response to the Commission's concerns, the Commission rules and Staff's recommendation, the Commission finds that Laclede has shown good cause in its request for a variance. With electronic billing, payment and notice, customer choices are increased, the company cuts its expenses and convenience is better afforded.

IT IS THEREFORE ORDERED:

1. That Laclede Gas Company's request for a variance is granted.
2. That the following tariff sheets, effective July 27, 2002, are approved:

P.S.C. MO. No 5 Consolidated

Third Revised Sheet No. R-3, Cancelling Second Revised Sheet No. R-3
First Revised Sheet No. R-3-a, Cancelling Original Sheet No. R-3-a
First Revised Sheet No. R-3-b, Cancelling Original Sheet No. R-3-b
First Revised Sheet No. R-6-b, Cancelling Original Sheet No. R-6-b
First Revised Sheet No. R-6-c, Cancelling Original Sheet No. R-6-c
First Revised Sheet No. R-12-b, Cancelling Original Sheet No. R-12-b
First Revised Sheet No. R-26, Cancelling Original Sheet No. R-26
First Revised Sheet No. R-32, Cancelling Original Sheet No. R-32

11 Mo. P.S.C. 3d

3. That Laclede Gas Company shall specifically inform customers enrolling in the electronic billing program that initial notices of disconnection will be sent electronically.
4. That this order shall become effective on August 4, 2002.
5. That this case may be closed on August 5, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Jones, Regulatory Law Judge

**In the Matter of the Application of Kansas City Power & Light
Company for an Accounting Authority Order Regarding
Accounting for Extraordinary Cost Relating to Storm Dam-
age.**

*Case No. EU-2002-1048
Decided July 30, 2002*

Accounting § 42. The Commission granted an Accounting Authority Order to KCP&L. KCP&L suffered extraordinary damage from an ice storm, and sought permission to defer the costs of repair to Account 182.3, Other Regulatory Assets. The Commission allowed KCP&L to do so, but made no finding as to the reasonableness of the deferred expenses, and reserved the right to disallow those expenses in any future rate case.

ORDER GRANTING ACCOUNTING AUTHORITY ORDER

On April 24, 2002, Kansas City Power & Light Company (KCPL) filed an application for an accounting authority order to defer costs caused by an ice storm in January 2002. KCPL stated that, on January 30 and 31, a severe ice storm hit KCPL's system, depositing up to two inches of ice on trees, lines and equipment and causing unprecedented damage and destruction to KCPL's facilities. KCPL stated that over 305,000 of KCPL's approximate 450,000 customers lost electric service and almost 200 of KCPL's 550 metro circuits were completely out at some point in the storm. In order to restore service as quickly as practicable, KCPL used 447 outside utility and contractor crews and 314 outside tree crews, in addition to the 200 KCPL and local contract crews. Personnel from eleven utilities and ten contractors from sixteen states were used in the restoration efforts.

KCPL asserted that the ice storm threatens financial hardship to KCPL because rates in Missouri are set on a prospective basis, and no allowance is included for the possibility of unusual expenses related to a natural disaster such as this storm. In its application, KCPL asked that the Commission permit incremental costs directly related to the ice storm be deferred to Account 182.3, Other Regulatory Assets. KCPL stated that it plans to seek recovery of the unamortized portion of these deferred costs in future rate proceedings. KCPL also requested that the deferrals be amortized for financial reporting beginning with

receipt of the Commission's Accounting Authority Order and continue over a five-year period.

On May 30, the Office of the Public Counsel responded to KCPL's application with two alternative recommendations: that the Commission grant the accounting authority order subject to certain conditions, or that the Commission set this case for hearing.

On June 10, the Staff of the Commission filed a response to Public Counsel's recommendations. Staff suggests that the Commission grant the application subject to the conditions proposed by Public Counsel (with a minor change), or set the case for hearing.

Staff recommended that the five-year amortization period should begin February 1, 2002, (immediately after the two-day ice storm) rather than upon receipt of a Commission order granting the accounting authority order as Public Counsel suggested.

The Commission convened a prehearing conference on June 28. At the prehearing conference, the parties stated that they believed that they could resolve any issues among them, and on July 19, filed a joint recommendation.

The joint recommendation largely follows Public Counsel's recommendations. It does not incorporate the change in the beginning of the amortization proposed by the Staff, because KCPL had made representations to the financial community (based on KCPL's understanding of past Commission practice) that the amortization would begin after the effective date of a Commission order granting accounting authority. The conditions in the joint recommendation are:

- a. That KCPL is authorized to defer actual incremental operation and maintenance expenses incurred as a direct result of the January 2002 ice storm to USOA (Uniform System of Accounts) Account 182.3. Such expenses shall be in accordance with USOA definitions of operation and maintenance expense and shall exclude any costs of or related to expenditures relating to plant-in-service (i.e., capital costs).
- b. That any insurance claim proceeds, if applicable, first be used to offset the amount of the incremental expenses deferred. Any insurance proceeds in excess of the actual incremental expense (to the extent any insurance proceeds exist) shall be used to offset capital additions directly resulting from the ice storm.
- c. That KCPL is authorized to begin ratably amortizing the amount deferred, net of applicable insurance credits, to Account 182.3 over a period beginning on the first day of the first calendar month following the effective date of the Commission's order authorizing the AAO and ending on January 31, 2007. If actual expenses, net of insurance credits, are not fully known at that time, the Company may begin amortizing a reasonable estimate thereof. Thereafter, at such time as the net actual

11 Mo. P.S.C. 3d

expenses are known, the Company shall promptly book a correcting amortization entry so that the revised monthly amortization amount will, on a going-forward basis, be the same as if the net actual expenses had been amortized from the commencement of the amortization. KCPL may make this adjustment without having either to seek Commission approval or to notify the other parties to this case.

d. That KCPL shall maintain adequate records supporting the incremental expenses deferred. Such records shall include, but not be limited to, detailing of outside contractors, food and lodging costs, labor and material costs, procedures and verification for expense versus capitalization determinations, and determination of incremental levels of such costs versus normal on-going levels of costs. Such records shall be available for Public Counsel and the Commission Staff to review.

e. That in granting the requested AAO, the Commission makes no findings as to whether deferred expenses are reasonable, whether other factors contributed to the damage to the system and the resulting repair/replacement costs incurred, or whether KCPL would have suffered financial harm (*i.e.* earnings during the period were inadequate to compensate KCPL for the costs incurred) absent deferral. The Commission reserves the right to consider in a future rate case the ratemaking treatment of the costs deferred, as well as any assertions, including the appropriate amortization period, made by parties thereto.

Since the parties are all in agreement that KCPL should be granted an accounting authority order, and are in agreement as to the conditions that should attach to the granting of the authority, the Commission concludes that granting it will not be detrimental to the public interest. The Commission will grant the requested accounting authority, subject to the agreed upon conditions.

IT IS THEREFORE ORDERED:

1. That the application for an accounting authority order filed by Kansas City Power & Light Company on April 24, 2002, is granted, and Kansas City Power & Light Company is authorized to defer and record, in the Uniform System of Accounts, account 182.3, the incremental operating expenses incurred as a result of the ice storm, subject to the conditions listed in this order.

2. That this order shall become effective on August 9, 2002.

3. That this case may be closed on August 10, 2002.

Simmons, Ch., Lumpe and Gaw, CC., concur Murray and Forbis, CC., absent Mills, Deputy Chief Regulatory Law Judge

In re: Eastern Missouri Utilities Co., Inc. and City of Foristell.

Case No. SM-2002-1062

Decided: July 18, 2002

Sewer §4. The Commission approved the transfer of assets from Eastern Missouri Utilities Co., Inc. to the City of Foristell.

ORDER APPROVING TRANSFER OF ASSETS

Syllabus: This order approves the transfer of assets from Eastern Missouri Utilities Co., Inc. to the City of Foristell, Missouri.

On May 9, 2002, the City of Foristell, Missouri, filed an application for the approval of the transfer of the assets of Eastern Missouri Utilities Co., Inc., to Foristell. Foristell stated that it intended to dissolve Eastern Missouri subsequent to the transfer. A first amended application was filed by Foristell on June 3, 2002. The Staff of the Commission filed its recommendation on June 25, 2002.

The Staff noted that Eastern Missouri is a Commission-regulated sewer utility, all of whose outstanding shares were purchased by Foristell in May 2000. Staff's opinion is that Foristell's purchase of Eastern Missouri's stock was not a transaction that required Commission approval under Section 393.190.2¹ because a municipal corporation rather than a stock corporation purchased the stock. (The current transaction is governed by Section 393.190.1.) According to Staff, Eastern Missouri provides service to six commercial customers within Foristell's corporate limits. Foristell will continue to provide sewer service to Eastern Missouri's customers. Eastern Missouri will no longer be subject to Commission jurisdiction once its assets are transferred to Foristell.

Foristell, in the opinion of the Staff, has the necessary capabilities to provide good service to Eastern Missouri's customers and will be in a better position to operate the system and make necessary capital improvements in the long-term. The proposed transfer, in Staff's opinion, would not be detrimental to the public interest.

Staff noted two problems: Eastern Missouri's assessment of \$747.07 for the Commission's fiscal year of 2001 has not been paid and the annual reports for calendar years 2000 and 2001 have not been filed. As far as the annual reports are concerned, Staff stated that it is not necessary that approval be conditioned on the filing of the delinquent annual reports because (1) Foristell has been operating Eastern Missouri for most of the last two years and thus it has the operating information that would normally be provided by a company in an annual report; and (2) once Eastern Missouri's assets are transferred to Foristell, Eastern Missouri will no longer be subject to the Commission's jurisdiction.

¹ All citations to statutory authority are to the year 2000 Revised Statutes of Missouri, as currently supplemented, unless otherwise indicated.

11 Mo. P.S.C. 3d

In conclusion, Staff recommended that the Commission:

- 1) Approve the application and grant authority for Eastern Missouri's assets to be transferred to Foristell, conditioned on payment of Eastern Missouri's past due assessments;
- 2) Direct Foristell to notify the Commission immediately after the transfer of Eastern Missouri's assets to Foristell has been completed;
- 3) Direct Foristell to notify the Commission immediately after the dissolution of Eastern Missouri has been completed; and
- 4) Recognize that the Certificate of Convenience and Necessity held by Eastern Missouri, and Eastern Missouri's sewer tariff, will need to be canceled after the transfer of Eastern Missouri's assets to Foristell has been completed.

The Commission has reviewed the application and the Staff's memorandum and recommendation and finds that approval of the transfer under Section 393.190.1 is not detrimental to the public interest and the authority requested should be conditionally granted.²

IT IS THEREFORE ORDERED:

1. That the application for approval of transfer filed on May 9, 2002, as amended by a first amended application filed on June 3, 2002, by the City of Foristell, Missouri, is conditionally approved and that it is authorized to take all actions necessary to effect the transaction authorized by this order.
2. That before the transaction is finally approved, the overdue assessment owed by Eastern Missouri Utilities, Inc. to the Missouri Public Service Commission in the amount of \$747.07 must be paid.
3. That the City of Foristell, Missouri, must file a statement by July 28, 2002, as to what, if any, impact the transaction will have on the tax revenues of the various political subdivisions (other than the City of Foristell, Missouri) in which structures, facilities, or equipment of Eastern Missouri Utilities Co., Inc. are located.
4. That the City of Foristell, Missouri, must report to the Missouri Public Service Commission within ten business days of the completion of the approved transaction (including the dissolution of Eastern Missouri Utilities, Inc.) that the transaction has been accomplished.
5. That the Certificate of Convenience and Necessity currently held by Eastern Missouri Utilities, Inc. will be canceled after the Missouri Public Service Commission is notified that the proposed transaction has occurred.

²The Commission notes that Article 6, Section 23 of the Missouri Constitution, prohibits a city from owning stock in any corporation. The Missouri Supreme Court, in *City of Springfield v Monday* (Sup. 1945) 185 S.W.2d 788, 353 Mo. 981, held that a city ordinance authorizing the purchase of all the capital stock of a corporation for the sole purpose of acquiring its physical utility properties and providing for the immediate dissolution of the corporation does not violate this section. The Commission further notes that it makes no ruling on the propriety of Foristell purchasing the stock of Eastern Missouri in the year 2000, then dissolving the corporation and transferring its assets more than two years later.

6. That this order will become effective on July 28, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Hopkins, Senior Law Judge

In the Matter of the Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements.*

*Case No. TO-2001-438
Decided August 6, 2002*

Telecommunications §§36, 45. After deciding 356 issues relating to the cost studies proposed by Southwestern Bell, the Commission directed Southwestern Bell to submit revised rates for unbundled network elements after rerunning its cost studies in compliance with the Commission's decision.

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*The Commission, in an order issued on June 27, 2003, denied an application for rehearing in this case. On July 16, 2003, this case was appealed to the United States District Court (034148CVCNKL).

11 Mo. P.S.C. 3d

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REGULATORY LAW JUDGE: **Morris L. Woodruff**

REPORT AND ORDER

SUMMARY

This Report and Order makes specific findings about the factors used by Southwestern Bell Telephone Company to prepare its cost studies used to determine the prices that it will charge Competitive Local Exchange Companies for the use of unbundled network elements. The order directs Southwestern Bell Telephone Company to rerun its cost studies, incorporating the changes ordered by the Commission, and to prepare revised prices for the Commission's consideration.

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 in making this decision has considered the positions and arguments of all of the parties. 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.

Procedural History

This case has its origins in Case Number TO-99-227, which was the case established by the Commission to consider Southwestern Bell Telephone Company's (SWBT) application for authority to provide in-region interLATA toll service pursuant to Section 271 of the federal Telecommunications Act of 1996,¹ that is, SWBT was seeking authority to compete in the long distance telephone market. As part of its decision in TO-99-227, the Commission determined that SWBT should offer competitive local exchange carriers (CLECs) a standardized interconnection agreement that would comply with all of the Telecommunications Act's requirements for permitting SWBT to offer in-region interLATA toll service. SWBT has done so, and the resulting standard agreement is known as the Missouri 271 Agreement, usually referred to as the M2A.

¹ 47 U.S.C. Sec. 271.

11 Mo. P.S.C. 3d

The M2A sets out the prices that SWBT will charge connecting carriers for the use of unbundled network elements (UNEs). UNEs are discrete portions of SWBT's existing telecommunications network that, under the Telecommunications Act of 1996, must be offered for lease to competing CLECs for their use in provisioning services to the CLECs' customers. SWBT is permitted to charge its competitors a reasonable fee for the use of its UNEs.

The Commission has the authority to determine the rates that SWBT may charge its competitors for the use of UNEs under guidelines established by the Telecommunications Act of 1996, and implementing regulations and standards established by the Federal Communications Commission (FCC).

The Commission previously established final rates for certain UNEs in the first AT&T/SWBT arbitration, Case No. TO-97-40. Final rates for those UNEs were incorporated into the M2A. In a second arbitration case, TO-98-115,² the Commission established interim rates for certain other UNEs. Finally, in TO-99-227, the Commission identified other UNEs for which no rate, permanent or interim, had been established.

Rather than delay making a recommendation to the FCC regarding SWBT's 271 application, the Commission, on February 15, 2001, issued an order that established this case to "determine the recurring and nonrecurring rates for the unbundled network elements (UNEs) including dedicated local transport, identified by the Staff of the Missouri Public Service Commission in TO-99-227 that have not been reviewed by the Commission for conformance with the FCC's pricing standards."³ In its February 15th order, the Commission allowed its Staff ten days in which to file a list of recurring and nonrecurring rates that should be considered in this case. On February 23, Staff complied with the Commission's order by filing a list of 210 UNEs.

The Commission's order creating this case made SWBT a party and directed that any party wishing to intervene should file an application to intervene no later than March 7, 2001. Timely applications to intervene were received from Z-Tel Communications, Inc.; MCImetro Access Transmission Services, LLC; Brooks Fiber Communications of Missouri, Inc.; MCI WorldCom Communications, Inc.; Mpower Communications Central Corporation; NuVox Communications of Missouri, Inc., f/k/a Gabriel Communications of Missouri, Inc.; Sprint Missouri, Inc.; Sprint Communications Company L.P.; Fidelity Communication Services III, Inc.; Allegiance Telecom of Missouri, Inc.; McLeodUSA Telecommunications Services, Inc.; IP Communications Corporation; AT&T Communications of the Southwest, Inc.; and Birch Telecom of Missouri, Inc. The Commission issued an order granting those applications for intervention on March 12. Subsequently, on March 21, the Commission issued an order granting the late-filed application to intervene of AccuTel of Texas, Inc.

² *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*, 7 Mo. P.S.C. 3d 54 (1997).

³ At the same time, the Commission established Case No. TO-2001-439 to consider prices, terms and conditions for xDSL capable loops, and Case No. TO-2001-440 to consider prices, terms and conditions of line splitting and line sharing.

Following a prehearing conference held on March 19, 2001, the parties submitted competing proposed procedural schedules. SWBT proposed a procedural schedule that would lead to a hearing beginning on July 23, 2001. All other parties proposed a procedural schedule leading to a hearing beginning on November 26, 2001. On April 10, the Commission issued an Order Establishing Procedural Schedule that set this case for hearing beginning on December 3, 2001.

During the course of the procedural schedule, the Commission granted XO Missouri, Inc. permission to intervene out of time. In addition, AccuTel of Texas, Inc. was granted leave to withdraw as a party.

On September 28, 2001, the Staff filed a motion asking that the Commission amend the procedural schedule in this case to provide for a hearing beginning on January 14, 2002. AT&T strongly supported Staff's motion because it asserted that it required more time to review SWBT's cost studies before preparing its own testimony. SWBT was equally as strong in its opposition to any continuance. On October 9, the Commission issued an order denying Staff's motion to amend the procedural schedule.

On October 29, 2001, the Commission granted Sprint Communications Company's request to withdraw as a party. The remaining parties filed proposed lists of issues on November 19. SWBT, Staff, and Public Counsel proposed a list of twenty, broad issues. A group of CLECs, comprised of AT&T, the WorldCom Companies (MCI metro Access Transmission Services, LLC; Brooks Fiber Communications of Missouri, Inc.; and MCI WorldCom Communications, Inc.); Birch Telecom of Missouri, Inc.; XO Missouri, Inc.; NuVox Communications of Missouri, Inc.; McLeodUSA Telecommunications, Inc.; TCG of Kansas City, Inc.; and TCG of St. Louis, Inc.,⁴ collectively referring to themselves as the Joint Sponsors, filed a proposed list of issues that identified 356 issues. The Commission issued an order on November 20, accepting the list of issues proposed by the Joint Sponsors and directing all parties to respond to those issues. The Joint Sponsors, SWBT, and Staff filed position statements on November 28.

An evidentiary hearing was held beginning on December 3 and continuing through December 6, 2001. The Joint Sponsors, Staff, and SWBT filed initial briefs on January 25, 2002. The Joint Sponsors and SWBT filed reply briefs on February 19. The Joint Sponsors, SWBT, and Staff also filed proposed findings of fact and conclusions of law on February 19.

The Issues

The Joint Sponsors proposed, and the Commission accepted, a list of 356 issues regarding the various cost studies prepared by SWBT to support the prices that it proposes to charge CLECs for the use of the UNEs that are at issue. Some of the same issues arose regarding more than one cost study and, as a result, those issues appear more than once on the list of issues. So that its decision can be as understandable as possible, the Commission will address each issue in order. Where an issue is repeated, the Commission will refer back to the decision reached when the issue was first addressed.

⁴ TCG of Kansas City, Inc. and TCG of St. Louis, Inc., companies affiliated with AT&T, purport to be included among the Joint Sponsors. However, neither company applied to intervene and neither has been made a party to this case.

11 Mo. P.S.C. 3d

1. Should the cross-connect rate elements priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modifications in Case No. TO-2001-438?

In the order establishing this case, the Commission indicated that it intended to determine the appropriate recurring and nonrecurring rates for those UNEs that have not yet been reviewed by the Commission for conformance with the FCC's pricing standards. In addition, the Commission stated that it would address the recurring and nonrecurring rates found in the Commission's Report and Order in TO-98-115 that have been set as interim in TO-99-227. So that it might determine precisely which UNEs it would consider, the Commission directed its Staff to file a list of all recurring and nonrecurring rates that the Commission should consider in this case. On February 23, 2001, Staff filed a list of 210 UNEs for which Staff believed the Commission needed to establish permanent recurring or nonrecurring rates. The Commission did not wish to reconsider the rates that it had previously established as permanent in TO-97-40.

No party challenged the principle that rates established as permanent in TO-97-40 are not to be reviewed in this case. However, the Joint Sponsors contend that SWBT has, in effect, proposed new rates for UNEs for which permanent rates were established in TO-97-40. Joint Sponsors argue that several UNEs for which new rates have been proposed are functionally equivalent to UNEs for which permanent rates have already been established. They urge the Commission to refuse to reconsider the rates for those UNEs.

SWBT agrees that the Commission should not re-price UNEs that have permanent rates in place but contends that the UNEs for which it is proposing rates are different because they require multiplexing or terminate at a different point than the UNEs for which permanent rates have been established. SWBT also points out that the UNEs in question were identified by Staff as being at issue in its list of UNEs filed at the beginning of this case.

This issue can best be resolved through strict adherence to the UNEs-at-issue list filed by Staff at the beginning of this case. There is nothing magical, or infallible, about Staff's listing of UNEs. It is certainly possible that Staff may have erroneously included, or excluded, some UNEs. However, that list was the basis for the cost studies and direct testimony prepared and presented by SWBT, as well as the rebuttal testimony submitted by all parties except the Joint Sponsors. No challenge to the UNEs included on the list was made until the Joint Sponsors filed the rebuttal testimony of Steven E. Turner on October 26, 2001.⁵ To now alter Staff's UNEs-at-issue list would be fundamentally unfair to the parties and would introduce an additional level of confusion into an already complex case.

Therefore, the Commission holds that, unless otherwise agreed by the parties, it will address all of those UNEs listed by Staff in its list filed on February 23, 2001. The Commission will not address any UNEs not listed by Staff in its list filed on February 23, 2001.

⁵ Turner Rebuttal, Exhibit. 27, Pages 13-14.

2. Should the STP Port rate elements (STP Port, STP Port Termination, Signaling Point Code, and Global Title Translation) priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modifications in Case No. TO-2001-438?

All parties agree that the Commission established permanent rates for these UNEs in TO-97-40 and that those rates should continue to be used. Therefore, the Commission finds that the appropriate rates for these elements are the permanent prices that the Commission established in its Final Arbitration Order in TO-97-40.

3. Should the SS7 Transport rate element priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modifications in Case No. TO-2001-438?

All parties agree that the Commission established permanent rates for these UNEs in TO-97-40 and that those rates should continue to be used. Therefore, the Commission finds that the appropriate rates for these elements are the permanent prices that the Commission established in its Final Arbitration Order in TO-97-40.

4. Should the LIDB Validation Query rate element priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modification in Case No. TO-2001-438?

The Joint Sponsors contend that the Commission set a permanent rate for this UNE in TO-97-40. Therefore, they argue that the Commission should not address that UNE in this case. SWBT agrees that a permanent rate was set for this element in TO-97-40, but it contends that the Commission needs to revisit this rate because the original rate does not include costs for the use of SWBT's Service Management System (SMS) and its fraud detection system known as SLEUTH. SWBT points out that Staff included this element among its list of elements to be reviewed in this case. The Joint Sponsors respond that SWBT should not be permitted to correct mistakes in selected previously established rates unless the Commission wants to conduct a general review of all such rates.

In fact, the Commission has now established Case No. TO-2002-397 to conduct a general review of all the TO-97-40 rates. As a result, the Joint Sponsors will not be harmed if the Commission chooses to review this rate in this case.

As indicated in issue 1, the Commission will review all rates included by Staff in its UNEs-at-issue list. This UNE is in Staff's list and, therefore, the Commission finds that it should be reviewed in this case.

5. Should the CNAM Service Query rate element priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modification in Case No. TO-2001-438?

The dispute in this issue is similar to that presented in issue 4. The Commission set a rate for this rate element in TO-97-40. However, SWBT contends that the price set in TO-97-40 did not include forward-looking costs for the use of SWBT's Service Management System (SMS) functionality. Again, the Joint Sponsors argue that the Commission should not review any of the prices established in TO-97-40 unless it will review all of those prices.

This rate element was included in Staff's UNEs-at-issue list. As indicated in issue 1, the Commission will review all rates included by Staff in its UNEs-at-issue list. This UNE is in Staff's list and, therefore, the Commission finds that it should be reviewed in this case.

11 Mo. P.S.C. 3d

6. Should the LIDB Service Order Charge rate element priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modification in Case No. TO-2001-438?

All parties agree that the Commission established permanent rates for these UNEs in TO-97-40, and that those rates should continue to be used. Therefore, the Commission finds that the appropriate rates for these elements are the permanent prices that the Commission established in its Final Arbitration Order in TO-97-40.

7. Did Southwestern Bell fail to provide a Standard Features Centrex Like Offering cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

8. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study.

The Joint Sponsors contend that SWBT failed to provide a specific cost study to support a rate for the Standard Features Centrex Like Offering. For that reason, the Joint Sponsors argue that the Commission should adopt the rates for those services that were proposed by Staff in TO-98-115.

SWBT replies that these costs were set out in SWBT's Missouri Cost Study for Simple and Complex UNE Features (2001-2003), which was appended as Schedule 6 to the Direct Testimony of Thomas Makarewicz.⁶ SWBT's witness, David J. Barch, testified that "the cost for feature activation rates associated with Complex Centrex features on an ISDN BRI port is the same as the cost for Complex Centrex feature activation for an analog port."⁷ Staff concurs with SWBT's position on this issue.

The Commission finds that the testimony of SWBT's witness is credible. SWBT has produced a cost study sufficient to support the price it has proposed for its Standard Features Centrex Like Offering. Because it has found that SWBT has produced an appropriate cost study, the Commission need not address issue 8.

9. Did SWBT fail to provide a Dark Fiber Records Research cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

10. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Joint Sponsors argue that this rate element was listed in the Staff Costing and Pricing Report from TO-98-115 and that, therefore, a rate should be set for that element. The Joint Sponsors suggest that the Commission adopt the rates proposed by Staff in TO-98-115. SWBT contends that Dark Fiber Records Research is not an issue in this case because the M2A did not contain interim pricing for this element and it was not included in Staff's list of elements that needed to be addressed in this case. Staff confirms that it did not include this element as an issue to be resolved in this case because it was not included as an interim price in the M2A.

⁶ Makarewicz Direct, Exhibit 12, Schedule 6.

⁷ Barch Surrebuttal, Exhibit 14, page 13.

SWBT did not provide a cost study for Dark Fiber Records Research because Dark Fiber Records Research was not included as an issue in Staff's UNEs-at-issue list, which established the rate elements that would be examined in this case. As the Commission indicated in issue 1, it would be fundamentally unfair to alter the established list of elements at issue. Therefore, the Commission finds that SWBT has not failed to provide a cost study for Dark Fiber Records Research because no such cost study is required.

Because it has found that SWBT was not required to produce a cost study for Dark Fiber Records Research, the Commission need not address issue 10.

11. Did SWBT fail to provide a Branding cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

12. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Joint Sponsors contend that no permanent rate has been set for this rate element and suggest that the Commission use the rates proposed by SWBT in TO-98-115. SWBT argues that the Commission approved a permanent, market-based rate for this element when it approved the M2A in TO-99-227. This element was not included in Staff's list of elements that needed to be addressed in this case. Staff confirms that it did not include this element as an issue to be resolved in this case because it was not included as an interim price in the M2A.

SWBT did not provide a cost study for Branding because Branding was not included as an issue in Staff's UNEs-at-issue list that established the rate elements that would be examined in this case. As the Commission indicated in issue 1, it would be fundamentally unfair to alter the established list of elements at issue. Therefore, the Commission finds that SWBT has not failed to provide a cost study for Branding because no such cost study is required.

This finding resolves the issue presented, and the Commission need not address the question of whether the Commission approved a permanent rate for this element by approving the M2A.

Because it has found that SWBT was not required to produce a cost study for Branding, the Commission need not address issue 12.

13. Did SWBT fail to provide a Rating cost study to establish permanent prices for the elements that had earlier been studied in Case. No TO-98-115?

14. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Joint Sponsors contend that no permanent rate has been set for this rate element and suggest that the Commission use the rates established in the Texas counterpart to the M2A, the T2A. SWBT argues that the Commission approved a permanent, market-based rate for this element when it approved the M2A in TO-99-227. This element was not included in Staff's list of elements that needed to be addressed in this case. Staff confirms that it did not include this element as an issue to be resolved in this case because it was not included as an interim price in the M2A.

SWBT did not provide a cost study for Rating because Rating was not included as an issue in Staff's UNEs-at-issue list that established the rate elements that would be examined in this case. As the Commission indicated in issue 1, it would

11 Mo. P.S.C. 3d

be fundamentally unfair to alter the established list of elements. Therefore, the Commission finds that SWBT has not failed to provide a cost study for Rating because no such cost study is required.

This finding resolves the issue presented, and the Commission need not address the question of whether the Commission approved a permanent rate for this element by approving the M2A.

Because it has found that SWBT was not required to produce a cost study for Rating, the Commission need not address issue 14.

15. Did SWBT fail to provide a White Pages cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

16. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Joint Sponsors contend that no permanent rate has been set for White Pages delivery and suggest that the Commission use the rates proposed by SWBT in TO-98-115. SWBT argues that the rate it charges CLECs for distribution of its White Pages directories is not a UNE and is appropriately treated as a market-based price. SWBT contends that the Commission approved a permanent, market-based rate for this element when it approved the M2A in TO-99-227. SWBT, however, concedes that this rate was erroneously listed as interim in the M2A.

This element was not included in Staff's list of elements that needed to be addressed in this case. As the Commission indicated in issue 1, it would be fundamentally unfair to alter the established list of elements at issue. Therefore, the Commission finds that SWBT has not failed to provide a cost study for White Pages because no such cost study is required.

This finding resolves the issue presented, and the Commission need not address the question of whether the Commission approved a permanent rate for this element by approving the M2A.

Because it has found that SWBT was not required to produce a cost study for White Pages, the Commission need not address issue 16.

17. Did SWBT fail to provide a Directory Assistance Listing cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

18. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Joint Sponsors contend that no permanent rate has been set for this rate element and suggest that the Commission use the rates proposed by SWBT in TO-98-115. SWBT argues that the Commission approved a permanent rate for this element when it approved the M2A in TO-99-227. This element was not included in Staff's list of elements that needed to be addressed in this case. Staff confirms that it did not include this element as an issue to be resolved in this case because it was not included as an interim price in the M2A.

SWBT did not provide a cost study for Directory Assistance Listings because Directory Assistance Listings was not included as an issue in Staff's UNES-at-issue list that established the rate elements that would be examined in this case. As the Commission indicated in issue 1, it would be fundamentally unfair to alter

the established list of elements at issue. Therefore, the Commission finds that SWBT has not failed to provide a cost study for Directory Assistance Listings because no such cost study is required.

This finding resolves the issue presented, and the Commission need not address the question of whether the Commission approved a permanent rate for this element by approving the M2A.

Because it has found that SWBT was not required to produce a cost study for Directory Assistance Listings, the Commission need not address issue 18.

19. Did SWBT fail to provide an LSP Emergency Contact for Non-Published Service cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

20. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Joint Sponsors contend that no permanent rate has been set for this rate element and suggest that the Commission use the rates proposed by SWBT in TO-98-115. SWBT argues that the Commission approved a permanent rate for this element when it approved the M2A in TO-99-227. This element was not included in Staff's list of elements that needed to be addressed in this case. Staff confirms that it did not include this element as an issue to be resolved in this case because it was not included as an interim price in the M2A.

SWBT did not provide a cost study for LSP Emergency Contact for Non-Published Service because LSP Emergency Contact for Non-Published Service was not included as an issue in Staff's UNEs-at-issue list that established the rate elements that would be examined in this case. As the Commission indicated in issue 1, it would be fundamentally unfair to alter the established list of elements at issue. Therefore, the Commission finds that SWBT has not failed to provide a cost study for LSP Emergency Contact for Non-Published Service because no such cost study is required.

This finding resolves the issue presented, and the Commission need not address the question of whether the Commission approved a permanent rate for this element by approving the M2A.

Because it has found that SWBT was not required to produce a cost study for LSP Emergency Contact for Non-Published Service, the Commission need not address issue 20.

21. Did SWBT fail to provide an LSP Complex Service Conversion – Resale cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

22. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

SWBT concedes that it failed to produce the necessary cost study and agrees that the price proposed by the Joint Sponsors in their rebuttal testimony is appropriate. Therefore, the Commission finds that the appropriate permanent rate for Complex Resale Conversion Orders is \$54.29.

23. Did SWBT fail to provide an LSP Simple Service Conversion – Resale cost study to establish permanent prices for the elements that had earlier been studied in Case No. TO-98-115?

24. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

SWBT concedes that it failed to produce the necessary cost study and agrees that the price proposed by the Joint Sponsors in their rebuttal testimony is appropriate. Therefore, the Commission finds that the appropriate permanent rate for Simple Resale Conversion Orders is \$5.00.

25. Did SWBT fail to provide an Access to Directory Assistance Database cost study to establish permanent prices for the elements that had earlier been studied in Case. No. TO-98-115?

26. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study?

The Commission approved Individual Case Basis pricing in the M2A for this element. Those prices were not listed as interim in the M2A and Staff did not include this element in its UNEs-at-issue list that established the rate elements that would be examined in this case. The Joint Sponsors concede that this element may be priced on an Individual Case Basis.

SWBT did not provide a cost study for Access to Directory Assistance Database because Access to Directory Assistance Database was not included as an issue in Staff's UNEs-at-issue list that established the rate elements that would be examined in this case. As the Commission indicated in issue 1, it would be fundamentally unfair to alter the established list of elements at issue. Therefore, the Commission finds that SWBT has not failed to provide a cost study for Access to Directory Assistance Database because no such cost study is required.

Because it has found that SWBT was not required to produce a cost study for Access to Directory Assistance Database, the Commission need not address issue 26.

27. Should SWBT be permitted to use a 2-Wire Analog Trunk Port (DID) cost study as the basis for DID Number Block Assignment (10-Numbers or 100-Numbers) on Analog DID Trunk Ports?

28. If the answer above is negative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study for DID number assignment?

SWBT offered a cost study relating to provisioning of a 2-Wire Analog Trunk Port (DID) as the basis for its proposed rates for Direct Inward Dial (DID) number block assignments. Under this element, blocks of numbers can be established and assigned to a trunk port in groups of 10 numbers or 100 numbers. This work is necessary to activate the telephone numbers a CLEC needs in order to provision telephone service to its customers.

Steven E. Turner, expert cost witness for the Joint Sponsors, testified that there is "absolutely no relationship from a cost standpoint between the cost of provisioning a 2-Wire Analog Trunk Port and then assigning DID Numbers (10 or 100) to the trunk ports."⁸ Turner asserts that SWBT simply made a mistake in attempting to use an inappropriate cost study to support its proposed rates. The expert witness

⁸ Turner Rebuttal, Exhibit 27, Page 23, lines 12-14.

testifying on behalf of Staff, Dr. Ben Johnson, agreed that the trunk port cost study offered by SWBT did not support the rates for assigning numbers to those trunk ports.⁹

The only testimony offered by SWBT to support the use to which it put the Trunk Port cost study was offered by Deborah D. Fuentes. In response to a question from counsel for the Joint Sponsors, Ms. Fuentes stated that she did not question the use of the costs of provisioning the trunk port for establishing the rate for assigning numbers to that trunk port because “you can’t get number assignments without having the trunk. You can’t have a trunk without having number assignments.”¹⁰ It must be noted that Ms. Fuentes was not offered as a cost expert. She testified that her role was to take costs developed by other persons and apply shared and common cost factors to derive the rates to charge CLECs for the use of UNEs.

In its initial brief, SWBT further explained that the non-recurring costs that its cost study identified consist primarily of labor expenses incurred by SWBT employees to perform translations to establish these trunk ports. SWBT offered its trunk port cost study to estimate the cost of establishing blocks of DID numbers for DID trunk ports because the labor costs of performing these activities are similar.¹¹

SWBT’s explanation may be reasonable, but SWBT’s brief is not evidence. SWBT has failed to provide any explanation in the record that would justify the use of a DID trunk port cost study for the purpose of establishing rates for assigning numbers to that DID trunk port. Credible expert witnesses for the Joint Sponsors and for Staff testified that such a use of the DID trunk port cost study was not appropriate. Based on the testimony of those witnesses, the Commission concludes that SWBT has failed to produce an appropriate cost study to support the rates it proposed for DID Number Block Assignments.

Having made that determination, the Commission must decide what would be an appropriate rate for SWBT to charge for DID Number Block Assignments. The interim rate established in the M2A for that UNE is \$0.00. While SWBT has not been able to establish what the rate for that element should be, it is fair to assume that it should not be \$0.00. The Joint Sponsors recommend that the Commission adopt the rates that were used in the T2A. Joint Sponsors reason that those rates were thoroughly examined by the Public Utility Commission of Texas and found to be TELRIC compliant. Joint Sponsor’s witness, Mr. Turner, indicated that there are not significant cost differences between Texas and Missouri for this rate element.¹²

In the absence of any other evidence, the Joint Sponsor’s recommendation that the Commission adopt the rate approved in Texas is reasonable. Therefore, the Commission finds that the permanent rate for DID Number Block Assignment (10-Numbers or 100-Numbers) on Analog DID Trunk Ports shall be the rate established in the T2A.

29. Should the 2-Wire Analog Trunk Port (DID) rate element priced in Case No. TO-97-40 be used in lieu of SWBT’s proposed modification in Case No. TO-2001-438?

⁹ Transcript, Pages 1089-1090.

¹⁰ Transcript, Page 555.

¹¹ Initial Brief of Southwestern Bell Telephone Company, Page 32.

¹² Turner Rebuttal, Exhibit 27, Pages 26-27.

11 Mo. P.S.C. 3d

The parties agree that a final rate was established for this rate element in TO-97-40. They also agree that SWBT is not proposing to modify that rate. Therefore, this issue need not be addressed.

30. Should SWBT be permitted to use a Digital DS1 Trunk Port (DID) cost study as the basis for DID Number Block Assignment (10-Numbers or 100-Numbers) on Digital DS1 DID Trunk Ports?

31. If the answer above is negative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study for DID number assignment?

This is the same issue as that addressed by the Commission in issues 27 and 28 except that this issue applies to number assignments on digital trunk ports rather than analog trunk ports. For the reasons offered in its consideration of those issues, the Commission will order that the permanent rate for DID Number Block Assignment (10-Numbers or 100-Numbers) on Digital DS1 DID Trunk Ports shall be the rate established in the T2A.

32. Should the Digital DS1 Trunk Port (DID) rate element priced in Case No. TO-97-40 be used in lieu of SWBT's proposed modification in Case No. TO-2001-438?

The parties agree that a final rate was established for this rate element in TO-97-40. They also agree that SWBT is not proposing to modify that rate. Therefore, this issue need not be addressed.

33. Should SWBT be required to offer 1-Number DID Number Block assignments?

34. If the answer to the above is affirmative, what rates should the Commission order in lieu of SWBT's failure to produce a cost study for 1-Number DID Number Block assignments?

The Joint Sponsor's witness, Steven E. Turner, argued in his rebuttal testimony that SWBT should be required to offer a rate for the provision of a 1-Number DID number block. He indicates that when an end user customer makes a decision to move to DID trunks as opposed to regular business lines, the customer will often have a number that the customer wishes to retain. In those situations, SWBT should permit the CLEC that wishes to provide service to that customer to obtain that single number as a 1-number DID number block. He asks the Commission to order SWBT to provide that element in Missouri at the same rate that SWBT uses in Texas.¹³

SWBT indicates in its brief that it is willing to provide 1-number DID number blocks but that no CLEC in Missouri has ever requested such a service. If a CLEC does ask for such an element, SWBT argues that the rate for that element would be determined on an individual case basis pursuant to the Bona Fide Request process. SWBT also points out that a rate for a 1-number DID number block was never included in the UNEs-at-issue list filed by Staff at the beginning of this case.

¹² Turner Rebuttal, Exhibit 27, Pages 26-27.

¹³ Turner Rebuttal, Exhibit 27, Page 27.

The Commission agrees. Since SWBT did not have notice that this element would be addressed in this case, it would be unfair to expect SWBT to have produced a cost study to support a proposed rate for this element. As the Commission indicated in its discussion of issue 1, it will strictly adhere to the UNEs-at-issue list prepared by Staff. As 1-number DID number block assignments was not included in the UNEs-at-issue list, the Commission will not establish a rate for that UNE.

35. Should SWBT be required to offer an OLNS rate element?

An Originating Line Number Screening (OLNS) query identifies the screening profile of an originating line by querying the Service Control Point (SCP) to determine what restrictions are on the originating line. An example of where OLNS might be used is a line inside a prison that is permitted to place collect calls only. SWBT's original testimony did not include a rate for OLNS because it was not included in Staff's UNEs-at-issue list. When the Joint Sponsors raised this issue, SWBT included a specific rate for OLNS in its surrebuttal testimony. Joint Sponsors concede that this specific issue is now moot. The Commission agrees that this issue is moot and does not require resolution by the Commission.

36. What labor rates should be adopted for use in this case?

In this issue, continuing through issue 44, the Commission will be considering the labor rates that SWBT has applied to its cost studies. SWBT determines the cost of individual functions by applying loaded labor rates to the length of time it takes a worker, or group of workers, to perform that function. The expression "loaded labor rate" means that the labor rate includes more than just the straight wage or salary paid to the worker. A loaded labor rate will also include all direct expenses for retaining and employing workers. Testimony presented by SWBT indicated that additional costs loaded into labor rates include the following categories: Break time; Paid Absence; Special Payment; Wage Increase; Social Security and Pensions; Benefits; Other Expenses; Support Assets; Clerical Support; and Supervision.¹⁴ The question of what additional costs may appropriately be loaded in to the labor rates is the basis for the identified labor rates issues.

The Joint Sponsors and Staff point out several problems with the assumptions that SWBT has used to calculate its labor rates. They do not propose specific revised labor rates but instead ask the Commission to make findings about certain matters related to labor rates and then order SWBT to recalculate its labor rates using the assumptions established by the Commission. SWBT contends that the labor rates that it has used are appropriate and should not be changed.

The Commission will address the specific questions raised regarding SWBT's labor rates in subsequent issues. It will not attempt to establish specific labor rates but will instead require SWBT to redevelop and resubmit its labor rates incorporating the revisions ordered by the Commission in its ruling on subsequent issues 37-44.

37. Should SWBT's loaded labor rates include amounts for termination or severance pay or other force reduction expenses?

¹⁴ Ries Direct, Exhibit 15, Pages 25-27.

The loaded labor rates that SWBT used to determine its labor costs include amounts for termination or severance pay benefits that may be paid to its employees if they are terminated from employment with SWBT. SWBT contends that these amounts are appropriately included in the labor rates because they are a direct cost of providing labor. If labor costs were removed, these expenses would disappear.

The Joint Sponsors contend that severance pay and similar expenses are, by definition, used for labor resources that are not performing any current or future activities that will benefit a CLEC that is purchasing a UNE from SWBT. Therefore, the Joint Sponsors assert that such costs are not a forward-looking cost that should be included in SWBT's rates under TELRIC standards. However, aside from a bare assertion by the Joint Sponsor's witness that these costs are "obviously" not forward-looking,¹⁵ Joint Sponsors have not provided any testimony or other evidence to support their position.

The Commission agrees with SWBT that the costs associated with potentially terminating an employee are costs that must be incurred by any employer when engaging the services of that employee. As such, those costs are appropriately apportioned over all productive hours of that worker and are appropriately included in rates. The Commission finds in favor of SWBT.

38. Should SWBT's labor rates include amounts for electric power?

SWBT contends that certain labor activities result in the use of above background amounts of electricity. In such situations, SWBT includes the cost of the extra electricity used in its rates for that labor activity. As an example, SWBT refers to employees working in a computer group, whose computers are housed in a special environmentally protected and separately identifiable room. Those employees would have additional power requirements over and above those of the general building. SWBT asserts that these additional electricity costs are appropriately included in labor rates because the power costs would go away if employees in the computer group were eliminated and the work was not performed.¹⁶

The Joint Sponsors contend that the electric power use is not appropriately included in labor rates. The Joint Sponsors further allege that these power expenses are also counted in SWBT's support asset factors. By including them in labor rates, the Joint Sponsors argue that SWBT is double counting those expenses.

The Commission agrees with the Joint Sponsors. SWBT has not presented sufficient evidence to justify incorporating electric power costs into its labor rates. SWBT's argument that these electricity costs are labor costs because they would be eliminated if the labor was eliminated is unsound. If SWBT eliminated all of its employees, it would also eliminate many, if not all of the costs of operating its business. That does not turn all of the hypothetically eliminated costs into labor costs. Furthermore, the Joint Sponsors' concern that including electric power costs

¹⁵ Rhinehart Rebuttal, Exhibit 28, Page 23, Line 27.

¹⁶ Transcript pages 513-514.

in labor rates could result in double counting of those costs is well founded, as electric power costs are also a component in SWBT's support asset factor. The Commission finds that SWBT must not include electric power costs in its labor rates.

39. Should SWBT's labor rates include amounts for purchases from affiliates?

SWBT includes the cost of engineering and other services obtained from its affiliates in some of its labor rates. SWBT contends that these costs are a legitimate part of its cost of doing business and should be included in labor rates for SWBT employees who worked in the same area, for example, engineering, when the cost was incurred. The Joint Sponsors contend that such costs are not directly related to labor costs and, further, that such costs may be double counted in other cost studies.

The Commission agrees with the Joint Sponsors. SWBT has not presented sufficient evidence to justify incorporating purchase of services from affiliates into its labor rates. Furthermore, the Joint Sponsors' concern that including purchase of services from affiliates in labor rates could result in double counting of those costs is well founded, as SWBT has failed to demonstrate that purchase of services from an affiliate is not also a component in SWBT's maintenance, support asset, or common cost factors. The Commission finds that SWBT must not include the cost of purchasing services from affiliates in its labor rates.

40. Should SWBT's labor rates include amounts for collection agent commissions?

SWBT includes amounts for collection agent commissions in its labor rates. SWBT defends this practice by arguing that such commissions are costs that all firms must incur to pursue uncollectibles in the ordinary course of business. The Joint Sponsors reply that including costs for collection agent commissions in TELRIC rates inappropriately includes SWBT's retail costs in rates to be used for sale of UNEs at wholesale.

The Commission agrees with the Joint Sponsors. These costs appear to be retail costs that should not be part of the cost of providing a UNE on a wholesale basis. Furthermore, SWBT has not demonstrated that these costs are, in fact, related in any way to labor costs. The Commission finds that SWBT must not include the cost of collection agent commissions in its labor rates.

41. Should SWBT's labor rates include amounts for consultant fees?

SWBT treats consultant fees incurred for hiring consultants to assist SWBT's employees to perform various tasks as a cost of business and includes those costs in its labor rates. The Joint Sponsors argue that such costs are not directly related to labor costs and, further, that such costs may be double counted in other cost studies.

The Commission agrees with the Joint Sponsors. SWBT has not presented sufficient evidence to justify incorporating the cost of hiring consultants into its labor rates. Furthermore, the Joint Sponsors' concern that including the cost of hiring consultants in labor rates could result in double counting of those costs is well founded, as SWBT has failed to demonstrate that the cost of hiring consultants is not also a component in SWBT's maintenance, support asset, or common cost

11 Mo. P.S.C. 3d

factors. The Commission finds that SWBT must not include the cost of hiring consultants in its labor rates.

42. Should SWBT include annualized costs of contracts with Bell Communications Research and/or other vendors in the development of labor rates and then also base the labor rate development on less than a full year's worth of productive hours?

SWBT includes the costs of contracts with Bell Communications Research and other vendors in its labor rates as a cost that SWBT incurs in maintaining various systems used to provide UNEs and its other services. The Joint Sponsors argue that such costs are not directly related to labor costs and, further, that such costs may be double counted in other cost studies.

The Commission agrees with the Joint Sponsors. SWBT has not presented sufficient evidence to justify incorporating the cost of contracts with Bell Communications Research and other vendors into its labor rates. Furthermore, the Joint Sponsors' concern that including the cost of contracts with Bell Communications Research and other vendors in labor rates could result in double counting of those costs is well founded, as SWBT has failed to demonstrate that such costs are not also a component in SWBT's maintenance, support asset, or common cost factors. The Commission finds that SWBT must not include the cost of contracts with Bell Communications Research and other vendors in its labor rates.

43. Should any changes in Support Asset factors be incorporated into the development of loaded labor rates?

The Joint Sponsors presented evidence that SWBT made input errors in calculating the Support Asset factor incorporated in loaded labor rates. SWBT admitted the errors but claimed that they are only minor errors and that their correction would not have a significant impact on any cost study.

The Commission finds that SWBT must make the correction to its Support Asset factor. While the correction of the error may not have a significant impact on the Support Asset factor itself, the accumulation of minor errors may be magnified as that factor is applied throughout various cost studies. In any event, SWBT will already be required to recalculate its labor rates as a result of the previous decisions of the Commission. Therefore, SWBT will not be unduly burdened by correcting what it acknowledges to be a mistake.

44. Has SWBT used the correct Support Assets factors in operator services labor rate development?

The Joint Sponsors' expert witness, Daniel P. Rhinehart, testified that SWBT used incorrect support assets factors for operator services personnel. Rhinehart testified that based on his prior experience with SWBT's labor rate development, he believed that wages reported as operator wages in the development of support asset factors include the wages of not only operators but also their supervisors and support clerical personnel. Therefore, the operator services support assets factor should be applied to all wage titles in the operator services organization. SWBT's failure to do so will result in excessive non-operator labor rates and cost recovery for SWBT wherever operator services organization personnel are used in the delivery of service to CLECs.¹⁷

¹⁷ Rhinehart Rebuttal, Exhibit 28, Page 24, Lines 9-17.

SWBT denied Rhinehart's allegation and claimed that operator service labor rates are not at issue in this proceeding.¹⁸ But the Joint Sponsors point out that related - non-operator - operator services personnel costs are at issue in this case as part of the development of certain recurring and non-recurring costs. As these labor costs are dependent upon the operator service support asset factor, that support asset factor is at issue. In their reply brief, the Joint Sponsors specifically indicate that failure to properly apply the operator services support assets factor will inflate the labor rates used in the calculation of NXX migration non-recurring charges, which are at issue in this case.¹⁹

The Commission finds that the Joint Sponsors are correct; proper application of the operator services support assets factor is an issue in this case. The Commission further finds that the explanation of the proper application of that support assets factor offered by the Joint Sponsor's witness is credible. Consistent with the methods used to develop the support asset factors, the operator services support asset factor should be applied to all operator services personnel, regardless of function.

Capital Cost Factors.

45. Should CAPS (SWBT's Capital Cost Program) be run with a longer planning period?

SWBT develops its capital cost factors using an application called the Capital Cost System (CAPCS). CAPCS calculates the depreciation, cost of money, and income taxes required to reimburse SWBT for its investment in the placement of the assets required to provide products and services.²⁰ The planning period that SWBT utilized for the CAPCS program was 40 years for all accounts except 2111 Land, which used a one-year planning period.

The Joint Sponsors contend that SWBT should have used the 99-year planning period that was used in the cost studies submitted in previous cases before this Commission. The Joint Sponsors acknowledge that the shorter planning period will have a minimal effect on final results, but contend that for assets with long lives, such as buildings, poles, conduit, and numerous cable accounts, there are measurable differences.²¹

SWBT defended these planning periods by asserting that they are reasonable and that they were used without objection in the cost studies prepared for use in TO-2001-455, the most recent arbitration between SWBT and AT&T. In reply, the Joint Sponsors pointed out that the Commission declined to rely on SWBT's cost studies in that arbitration.

The Commission finds that the expert testimony of the Joint Sponsors' witness is persuasive. SWBT shall use a 99-year planning period when running its CAPCS program.

46. Should SWBT use the latest FCC-approved asset lives?

¹⁸ Ries Surrebuttal, Exhibit 17, Page 41, Lines 14-20.

¹⁹ Joint Sponsors Post-Hearing Reply Brief, Page 27.

²⁰ Ries Direct, Exhibit 15, Page 23, Lines 6-9.

²¹ Rhinehart Rebuttal, Exhibit 28, Page 5-6, Lines 25-29, 1.

11 Mo. P.S.C. 3d

47. Should SWBT use the latest FCC-approved depreciation parameters?

48. Should SWBT use the latest FCC-approved future net salvage values?

These three issues concern SWBT's depreciation expenses. Depreciation expense represents the annual charge to recover a telephone company's capital investment in plant, equipment, and other facilities required to create an integrated telephone network over the life of those capital items.²² Generally, a longer service life will result in lower depreciation rates and will yield a lower annual depreciation expense. In other words, the longer an asset's service life, the smaller amount of depreciation expenses that is recognized each year, all other things being equal. Lower depreciation rates equal lower rates charged to CLECs for the purchase of UNEs.²³

SWBT utilizes depreciation figures that allow it to recover its forward-looking cost of providing services. SWBT indicates that the economic lives it uses for depreciating its assets are not static. They must change to recognize the changes in technology and competition that can render a piece of equipment obsolete and worthless long before it will ever physically wear out.²⁴

The Joint Sponsors assert that SWBT should be required to utilize the asset lives, depreciation parameters, and future net salvage values established by the FCC for purposes of establishing interstate rates. SWBT replies that the values it has used are reasonable and that they correctly capture forward-looking costs for TELRIC UNE studies. It further cautions that the FCC-approved values are not necessarily reliable because they are based on assumptions that predate the advent of competition in 1996. SWBT also points out that the FCC has not mandated the use of FCC-approved depreciation values in establishing UNE rates.

The Commission agrees with the expert testimony offered by the Joint Sponsors' witness, Daniel P. Rhinehart. For the reasons explained by Mr. Rhinehart on pages 6-10 of his rebuttal testimony, the Commission concludes that the depreciation lives and parameters prescribed by the FCC represent a fair and reasonable basis for developing UNE rates. Although the FCC's depreciation lives and parameters may be based on older assumptions, the FCC has continued to use those lives and parameters for its own purposes. It may, therefore, be assumed that the FCC considers those depreciation lives and parameters to be reasonable. Furthermore, SWBT continues to use FCC-prescribed depreciation curve, gross salvage, and cost of removal parameters in its cost studies.²⁵ Adoption of the Joint Sponsors' position will simply require SWBT to consistently use all aspects of the FCC-approved depreciation lives and parameters. Finally, the reliability of the depreciation assumptions used by SWBT is called into question by the fact that SWBT does not use those assumptions for financial reporting purposes.²⁶

For the foregoing reasons, SWBT shall use FCC-approved asset lives and depreciation parameters in its CAPCS runs.

²² Naughton Surrebuttal, Exhibit 3, Page 2, Lines 10-12.

²³ Naughton Surrebuttal, Exhibit 3, Page 2-3, Lines 20-23, 1-2.

²⁴ Transcript, Pages 181, 186-187.

²⁵ Rhinehart Rebuttal, Exhibit 28, Page 10, lines 13-19 and Transcript, Page 180.

²⁶ Rhinehart Rebuttal, Exhibit 28, Page 7, and Transcript, Page 180.

Support Asset Factors.**49. What Support Asset Factors should be adopted?**

Support assets are those assets that are required to permit employees to perform the specific work functions being analyzed in TELRIC cost studies.²⁷ SWBT's witness, Thomas G. Ries, illustrates the nature of support assets with the following example:

When technicians install or repair a service, they consume a number of support assets. A portion of the motor vehicle they drive, their PC, land and building, and office equipment are all investments and expenses required to enable technicians to provision UNEs or services. If the installation or repair were not needed, the technician, his motor vehicle, and his computer would not be needed. Additionally, building space, land, furniture, and office equipment would no longer be needed at the garage. These are all costs that are avoided as the labor resource is avoided.²⁸

SWBT recovers the cost of these support assets in its cost studies by developing a Support Asset Ratio, based on salaries and wages for those activities that contribute toward the consumption of the supporting assets.

The Joint Sponsors do not take issue with the principles underlying SWBT's Support Asset factor development but do recommend changes in certain inputs specifically listed in subsequent issues. Staff's expert witness, Dr. Ben Johnson, argues that SWBT includes 100 percent of the cost of its administrative and network support buildings in support assets costs. To the extent that these buildings are used to provide retail services, Johnson argues that they should not be included in the calculations used for UNE pricing purposes. Johnson suggests that assets that support the activities involved in providing SWBT's retail services should be completely excluded from SWBT's cost studies.²⁹

The Commission will address the specific issues raised by the Joint Sponsors in subsequent issues. The Commission will have more difficulty in dealing with the issue raised by Staff. The Commission agrees that CLECs looking to purchase UNEs should not be required to pay for that portion of SWBT's assets that are used to support SWBT's retail services. Unfortunately, Staff does not provide any indication of how that goal can be accomplished. Therefore, the Commission is unable to order SWBT to make any particular adjustment to its costs studies in response to Staff's concern.

50. Did SWBT make errors in its inputs for Accounts 2111 and 2116 in the Support Asset factor development?

The Joint Sponsors' expert witness, Daniel Rhinehart, testified that he had identified two input errors in SWBT's development of support assets factors. He indicated that the input for total land investment, account 2111, was overstated by

²⁷ Ries Surrebuttal, Exhibit 17, Page 6, Lines 17-19.

²⁸ Ries Surrebuttal, Exhibit 17, Page 7, Lines 14-21.

²⁹ Johnson Rebuttal, Exhibit 24, Page 79, Lines 3-11.

11 Mo. P.S.C. 3d

\$100 million, and there was a \$100 thousand input error in the "Small Value Items" column of Other Work Equipment, account 2116.³⁰ SWBT admits the errors but contends that their impact on rates is insignificant and should not require correction.

The Commission finds that SWBT must make the correction to its Support Asset factor. While the correction of the error may not have a significant impact on the Support Asset factor itself, the accumulation of minor errors may be magnified as that factor is applied throughout various cost studies. In any event, SWBT will already be required to recalculate its factors because of the previous decisions of the Commission. Therefore, SWBT will not be unduly burdened by correcting what it acknowledges to be a mistake.

51. Did SWBT use incorrect current cost to book cost ratios for buildings investment in its Support Assets factor development?

The current cost to book cost ratio (CC/BC ratio) is used to convert the gross book cost of all existing investments to the value that would be invested if all assets in that account were to be replaced at current costs for provision of service in the future. Since buildings are investments that are periodically replaced or expanded, SWBT contends that the book cost of network buildings should be adjusted by applying the CC/BC ratio.³¹

The Joint Sponsors and Staff contend that SWBT's use of the CC/BC ratio regarding building investments overstates the replacement cost of buildings because it ignores the additional efficiencies and space reductions that could be achieved if SWBT designed new buildings of the optimal size.³² The Joint Sponsors and Staff would preclude SWBT from using the CC/BC ratio to adjust its building investment while permitting its use in other investment accounts. This would mean that for its building investment SWBT would be allowed to recover only the embedded cost of the existing buildings. The Joint Sponsors and Staff point out that the Commission took this course in TO-97-40.

The Commission concludes that the Joint Sponsors and Staff are correct. Many of the buildings used to house SWBT's telephone network were originally designed and built many years ago when the technology required to operate the network was much different than the technology in use today, and in the future. To simply assume that those buildings would be replaced brick for brick in a forward-looking network is not reasonable.

Ideally, the building requirements of a forward-looking network could be ascertained by determining the exact amount of space required for each piece of equipment and then determining the minimum cost of housing that equipment. Unfortunately, but not surprisingly given the limited time and resource available to the parties, no such study is in evidence. The Commission will, therefore, use the same approach that it used in TO-97-40, and direct that SWBT not apply the CC/BC ratio to its buildings investment. SWBT may apply the CC/BC ratio to all other investments.

³⁰ Rhinehart Rebuttal, Exhibit 28, Page 12, Lines 17-19.

³¹ Ries Surrebuttal, Exhibit 17, Pages 17-18, Lines 21-22, 1-4.

³² Rhinehart Rebuttal, Exhibit 28, Page 17, and Johnson Rebuttal, Exhibit 24, Pages 63-68.

52. Did SWBT incorrectly distribute “TBO” expense reductions in its Support Assets factor development?

The Joint Sponsors and Staff contend that SWBT incorrectly distributed Transitional Benefit Obligation - “TBO” - expense reductions in its Support Asset factor development.³³ SWBT admits the error but contends that its impact on rates is insignificant and should not require correction.³⁴

The Commission finds that SWBT must make the correction to its Support Asset factor. While the correction of the error may not have a significant impact on the Support Asset factor itself, the accumulation of minor errors may be magnified as that factor is applied throughout various cost studies. In any event, SWBT will already be required to recalculate its factors because of the previous decisions of the Commission. Therefore, SWBT will not be unduly burdened by correcting what it acknowledges to be a mistake.

53. Has SWBT double counted certain computer assets in its Support Asset factors and certain cost studies?

SWBT acknowledged this error and corrected for it in its surrebuttal testimony. The correct results are reflected in the revised list of prices that SWBT presented at the hearing. There is no need for the Commission to further address this issue.

Maintenance Factors Issues.

54. What Maintenance and Other Expense Factors should be adopted?

Maintenance factors represent the direct costs associated with repairing and maintaining telephone plant. Maintenance factors are calculated by dividing recently booked direct repair and maintenance expenses by replacement costs of the equipment maintained.³⁵ The ratio determines the relationship between expenses and investment and is used as an indicator of the future level of expenses to be applied to forward-looking investments. By applying the ratio to its forward-looking investments, SWBT indicates that it will identify the forward-looking cost of operating that investment.³⁶

The Joint Sponsors and Staff recommend specific modifications to the maintenance factors in subsequent issues. The Commission will address the proposed modifications in those issues.

55. Do SWBT’s Missouri maintenance factors incorrectly include costs attributable to other SWBT states?

The Joint Sponsors allege that the inputs SWBT applies to its maintenance factors include expenses for Missouri that exceed the expenses that SWBT has reported to the FCC as Missouri expenses. The Joint Sponsors’ witness indicated that his review of SWBT’s work papers indicated that the cause of the discrepancy was SWBT’s failure to recognize that some maintenance costs were originally incurred and booked in Missouri but later transferred to other SWBT states. The

³³ Rhinehart Rebuttal, Exhibit 28, Page 12, Lines 23-25, and Johnson Rebuttal, Exhibit 24, Pages 78, Lines 16-20.

³⁴ Ries Rebuttal, Exhibit 17, Page 9, Lines 8-9.

³⁵ Rhinehart Rebuttal, Exhibit 28, Page 14, Lines 1-5.

³⁶ Ries Direct, Exhibit 15, Page 11, Lines 10-16.

11 Mo. P.S.C. 3d

witness indicated that this error tended to cause an overstatement in Missouri-based maintenance factors.³⁷

SWBT's witness denied that SWBT has transferred any maintenance costs to other states and contends that its inputs are correct. In support of its contention, SWBT's witness cited to supporting documentation that is not in evidence.³⁸

The gist of this issue is that the Joint Sponsors allege that something is wrong with the expenses used by SWBT in calculating its maintenance factors because the expenses used by SWBT do not match the expenses that it reports to the FCC. The Joint Sponsors offered a possible explanation for that mismatch and SWBT denied that the Joint Sponsors' explanation was correct. SWBT did not, however, offer any other explanation for the mismatch, except to cite to a document that was not placed in evidence. SWBT has not met its burden of proof. The Commission finds that the inputs for Missouri expenses used to determine the maintenance factor used in setting UNE rates should be modified to reflect the amount of expenses for Missouri that SWBT reports to the FCC.

56. Are Account 6534 wages overstated in the maintenance factor computations?

The Joint Sponsors contend that SWBT improperly failed to exclude supervision costs found in account 6534, Plant Operations Administration, from its maintenance factor computations.³⁹ In his surrebuttal testimony, SWBT's witness, Thomas Ries, testified that he had rerun his calculations and that there was no error.⁴⁰ However, in cross-examination at the hearing, Mr. Ries testified that the error identified by the Joint Sponsors was, in fact, present in SWBT's study. He did, however, contend that the error would have the effect of slightly understating, rather than overstating SWBT's costs.⁴¹

Given the admission of SWBT's witness during cross-examination, the Commission concludes that the error identified by Joint Sponsors does exist. It is not clear whether that error results in an overstatement or understatement of SWBT's costs. Whether costs are overstated or understated, the error must be corrected when SWBT reruns its cost studies.

57. Should various computational errors identified by AT&T in SWBT's maintenance factor development be corrected?

In testifying about SWBT maintenance factor computations, the Joint Sponsors' witness, Daniel P. Rhinehart, testified that:

I found a number of other computational errors in various places in SWBT's spreadsheet and noted the corrections in the spreadsheet. For example, facilities testing expense was not correctly apportioned among accounts and a distribution formula for building maintenance expense was incorrect.⁴²

³⁷ Rhinehart Rebuttal, Exhibit 28, Page 14, Lines 22-27.

³⁸ Ries Surrebuttal, Exhibit 17, Page 15, Lines 8-15.

³⁹ Rhinehart Rebuttal, Exhibit 28, Page 14-15, Lines 29, 1-8.

⁴⁰ Ries Surrebuttal, Exhibit 17, Page 16-17, Lines 16-21, 1-2.

⁴¹ Transcript, Pages 444-445.

⁴² Rhinehart Rebuttal, Exhibit 28, Page 15, Lines 5-8.

SWBT conceded only one error in the study; the Support Assets portion of the maintenance factor neglected to remove the portion of support assets that are recovered through the non-recurring charges. SWBT indicated that the impact of this error was a slight overstatement of maintenance costs.⁴³ SWBT denied any other errors.

The Joint Sponsors' witness testified that he had found other computational errors in SWBT's spreadsheet and indicates that he noted those corrections in the spreadsheet. Unfortunately, the witness' corrections to SWBT's spreadsheet are not in evidence. Therefore, the Commission has no way of judging whether SWBT has made the alleged errors. SWBT generally has the burden of proving the appropriateness of its proposed rates. But in this situation, the Joint Sponsors have failed to present any evidence by which the Commission can find in their favor. With no evidence to guide its decision, the Commission finds that SWBT must correct the error that it concedes, but need not correct the other errors that the Joint Sponsors have failed to identify for the Commission.

58. Should the buildings maintenance factor be modified to reflect the use of book costs of network buildings in the development of the buildings investment factor?

The Commission previously addressed this issue in issue 51. In that issue, the Commission found that it was inappropriate to apply the CC/BC ratio to the buildings factor, in effect using the book cost of network buildings in the development of the buildings investment factor. The buildings maintenance factor should also be modified to reflect that decision.

Building Factors Issues.

59. Should the network investment factor be based on booked investment as previously required in Case No. TO-97-40?

The Commission previously addressed this issue in issue 51. In that issue, the Commission found that it was inappropriate to apply the CC/BC ratio to the buildings factor, in effect using the book cost of network buildings in the development of the buildings investment factor. The network investment factor should also be modified to reflect that decision.

Transitional Benefit Obligation Issues.

60. Is the so-called "Transitional Benefit Obligation" (TBO) a forward-looking cost?

The Transitional Benefit Obligation, referred to as the TBO, is a catch-up accounting cost that reflects SWBT's previously unaccrued liability for post-retirement benefits other than pensions. SWBT was required to recognize that unaccrued liability for accounting purposes by Financial Accounting Standard (FAS) 106. Before adopting FAS 106 in 1993, SWBT, like all other utilities, booked the cost of post-retirement benefits on a pay-as-you-go basis. For example, when a SWBT retiree visited a doctor, SWBT paid the bill and recorded the expense on its books at the time it made the payment.

⁴³ Ries Direct, Exhibit 15, Page 13-14, Lines 19-23, 1-3.

11 Mo. P.S.C. 3d

FAS 106 changed that procedure by requiring all companies to report their post-retirement liability on an accrual basis. Under FAS 106, SWBT records the current present value of the cost of post-retirement benefits at the time the employee accrues the benefit, based on actuarial projections of the cost of those benefits.⁴⁴ In other words, SWBT is recording a cost today for an obligation that it will not pay until a current employee retires in the future. In effect, SWBT in 2002 may record as a cost the current present value of a retired employee's visit to a doctor in 2020.

When FAS 106 was adopted, SWBT was obligated to restate its books as if it had been using accrual accounting all along. In restating its books, SWBT was obligated to recognize a large amount of costs for anticipated future benefits already earned by its current employees and retirees. That amount of costs is the TBO. Rather than requiring SWBT to recognize the entire TBO at one time, the FCC permitted SWBT, and other utilities, to amortize the TBO expense over the remaining service life of employees. For SWBT that was a period of 16 years.⁴⁵

SWBT contends that it should be permitted to recover the TBO by including it as a factor in its cost studies. SWBT argues that the TBO is a current cost of business, representing SWBT's obligation to pay future benefits to retirees. SWBT's payments toward the TBO will continue in the future, so SWBT claims that it should be able to recover those forward-looking costs.

The Joint Sponsors and Staff contend that the TBO is the amortization of a backward-looking cost associated with past work activities rather than forward-looking activities. As a backward-looking, embedded cost, TBO should not be recovered under TELRIC principles.⁴⁶ The Joint Sponsors also point out that although SWBT was permitted to amortize the TBO on its regulatory books, it wrote off these costs from its financial books years ago.

The Commission finds that the positions espoused by the Joint Sponsors and Staff are correct. The Joint Sponsors' witness, Daniel P. Rhinehart, is correct in his assessment that "the TBO represents the amortization of an historic, but unrecovered, embedded cost and by definition is not a forward looking long run incremental cost."⁴⁷ SWBT has, in fact, already written off these embedded costs on its financial books and its shareholders absorbed those costs at the time SWBT adopted FAS 106.⁴⁸ The fact that SWBT continues to amortize that cost on its regulatory books is merely a means by which it recovers an embedded cost. It is not a forward-looking expense for purposes of TELRIC.

61. Should TBO expenses be removed from Southwestern Bell's TELRIC studies?

Having found in issue 60 that TBO expenses are not a forward-looking cost for purposes of TELRIC, the Commission concludes that those expenses must be removed from SWBT's TELRIC studies.

⁴⁴ Ries Direct, Exhibit 15, Page 15-16, Lines 14-21, 1-8.

⁴⁵ Ries Direct, Exhibit 15, Page 16, Lines 19-20.

⁴⁶ Rhinehart Rebuttal, Exhibit 28, Page 18, Lines 15-16, and Johnson Rebuttal, Exhibit 24, Page 78-79, Lines 20-22, 1-2.

⁴⁷ Rhinehart Rebuttal, Exhibit 28, Page 18, Lines 15-16.

⁴⁸ Transcript, Pages 1079-1081.

62. Should capitalized TBO amounts be removed from SWBT's TELRIC studies?

In their briefs, both the Joint Sponsors and SWBT treat this issue as being essentially identical to issues 60 and 61. Both assume that a finding that TBO expenses should, or should not be removed from SWBT's TELRIC studies requires an identical finding regarding capitalized TBO amounts from SWBT's TELRIC studies. However, the Joint Sponsor's witness, Daniel P. Rhinehart, testified that while he would like to find a way to accurately eliminate capitalized TBO amounts from SWBT's studies, he concluded that "the complexity and lack of adequate data suggest that no further changes can reasonably be made."⁴⁹ Since the Joint Sponsors' witness concludes that SWBT cannot reasonably be expected to remove capitalized TBO expenses from its costs studies, the Commission will not order SWBT to do the unreasonable. SWBT will not be required to remove capitalized TBO expenses from its TELRIC studies.

63. Do SWBT's cost studies reflect productivity improvements to be expected in the study period?

64. Should SWBT's studies include inflation adjustments?

Issues 63 and 64 are linked together and will be considered together. SWBT explicitly adjusts its cost studies to account for anticipated inflation. The Joint Sponsors and Staff do not object to SWBT's consideration of inflation when preparing cost studies, but they contend that SWBT's cost studies are not balanced because they do not explicitly reflect expected productivity improvements. As Staff's witness, Dr. Ben Johnson, indicates:

any such consideration [of the impact of inflation] should be accomplished in a balanced manner, to ensure that the final cost results are not biased or skewed upward. In developing forward-looking costs, the treatment of inflation should be consistent with the treatment of technological improvements, productivity enhancements, increasing economies of scale and other factors which tend to offset inflation and drive costs downward.⁵⁰

Joint Sponsors and Staff argue that expected productivity improvements will likely balance expected future inflation. Since the cost studies do not reflect expected productivity improvements, they contend that SWBT should not be permitted to include expected future-inflation factors in its cost studies.⁵¹

SWBT counters that its cost studies do implicitly incorporate expected productivity improvements. SWBT's witness, Thomas G. Ries, cites four specific ways in which SWBT's cost studies take productivity gains into account:

(1) through the use of forward-looking efficient technology, (2) through the application of CC/BC [current cost to book cost] ratios in the development of the cost factors, (3) through the

⁴⁹ Rhinehart Rebuttal, Exhibit 28, Page 19, Lines 18-19.

⁵⁰ Johnson Rebuttal, Exhibit 24, Page 50, Lines 17-21.

⁵¹ Rhinehart Rebuttal, Exhibit 28, Page 19, Lines 25-29.

11 Mo. P.S.C. 3d

application of TPI [Telephone Plant Index]-based 'inflation' factors that reflect price decreases in equipment – particularly digital switching equipment – and (4) through use of forward-looking time estimates for non-recurring activities that incorporate known and planned process improvements.⁵²

SWBT argues that because its studies consider improved productivity, it should be able to incorporate specific inflation factors into its cost studies.

The Commission concludes that the Joint Sponsors and Staff are correct. SWBT's cost studies do not sufficiently account for productivity gains. SWBT's argument that productivity is included in its cost studies in four ways is successfully refuted by the Joint Sponsors. First, SWBT claims that use of forward-looking efficient technology will include productivity gains. But the Commission agrees with the Joint Sponsors witness, Daniel P. Rhinehart, who testified that some times technological substitution increases, rather than decreases the costs included in a cost study.⁵³ Therefore, technology substitution is not always going to reflect productivity gains or cost savings.⁵⁴

Second, SWBT claims that its use of CC/BC ratios captures productivity gains. The Joint Sponsors also successfully refuted that claim. The CC/BC ratio simply converts the gross book cost of all existing investments to the value that would be invested if all assets in that account were to be replaced today, for providing service tomorrow.⁵⁵ This means that the CC/BC ratio reveals only what it would cost today to replace the same equipment that SWBT had purchased previously. That does not reflect any productivity gain.⁵⁶

SWBT's third rationale, that it considers TPI inflation factors in its cost studies and that sometimes the TPI reflects the falling cost of technology, suffers the same fate as its second rationale. The TPI and the CC/BC ratios do not reflect the increased functionality that leads to increased productivity. Instead, those ratios merely measure how much it would cost today to buy existing equipment. They do not measure productivity gains.⁵⁷

SWBT's fourth rationale, the claim that it used some forward-looking time estimates for non-recurring activities, is also insufficient to support its position. While SWBT's cost studies may recognize selected productivity gains, it is not apparent that all process improvements are captured in those cost studies.

Finally, SWBT's forward-looking cost studies are based on technology being deployed today, and cost factors are based on current cost experience. Therefore, unless there are overt prospective productivity adjustments to SWBT's cost factors, the level of productivity inherent in SWBT's cost studies is fixed as of the date of the

⁵² Ries Direct, Exhibit 15, Page 22, Lines 15-21.

⁵³ Rhinehart Rebuttal, Exhibit 28, Page 20, Lines 3-15.

⁵⁴ Transcript, Page 1077, Lines 1-4.

⁵⁵ Ries Direct, Exhibit 15, Page 8, Lines 14-16.

⁵⁶ Transcript, Page 1077, Lines 11-18.

⁵⁷ Transcript, Page 1077, Lines 15-18.

study.⁵⁸ On the other hand, SWBT does include overt inflation factors in its cost studies so that inflation will not be fixed at the time of the study. As a result, SWBT's cost studies will tend to overstate actual costs.

This problem could be solved by requiring SWBT to incorporate overt prospective productivity adjustments into its cost studies but no party has proposed a formula that would permit the easy development of such adjustments. However, the expert witnesses for both Staff and the Joint Sponsors indicate that productivity factors would roughly balance out the inflation factors and that if productivity factors are not used, then inflation factors should also be excluded. For that reason, the Commission will order SWBT to exclude overt inflation factors from its cost studies.

65. Has SWBT correctly "levelized" inflation measures where it has used them?

The Commission would need to address this issue only if it had decided that SWBT would be permitted to use overt inflation factors in its cost studies. The Commission has decided in issues 63 and 64 that SWBT will not be permitted to use those inflation factors. Therefore, this issue is moot and need not be further addressed.

Shared and Common Cost Issues.

66. What Common Cost factor should be adopted in this case?

SWBT uses the shared and common cost factor to assign costs it incurs to provide UNEs that cannot be directly attributed to an individual UNE.⁵⁹ The factor represents the ratio of shared and common costs to direct costs. In other words, for every dollar of direct cost, an amount representing shared and common cost will be added. That amount will be determined by a percentage factor. The factor is determined by the following equation: Shared and Common Factor = Shared and Common Costs / TELRIC Direct Costs. The shared and common factor is then applied in the following manner: Shared and Common Cost = TELRIC x (1 + Shared and Common Factor).⁶⁰

SWBT, the Joint Sponsors, and Staff, each propose a different shared and common cost factor. The exact factors proposed by the parties are highly confidential numbers, so they will not be repeated in this order. However, the Commission notes that the factor proposed by SWBT is substantially larger than the factors proposed by Staff and the Joint Sponsors. The final factor that the Commission will direct SWBT to use when it reruns its cost studies will be determined based on the decisions reached regarding subsequent issues.

67. Should the Common Cost factor computation be determined using revenues in the development of the denominator?

As indicated in the discussion in issue 66, the shared and common cost factor is the ratio of shared and common costs to total direct costs. Shared and Common Costs are thus in the denominator of the equation. Instead of using shared and common costs as the denominator, the Joint Sponsors recommend that the

⁵⁸ Rhinehart Rebuttal, Exhibit 28, Page 20-21, Lines 27-29, 1-2.

⁵⁹ Ries Direct, Exhibit 15, Page 27, Lines 20-21.

⁶⁰ Ries Direct, Exhibit 15, Page 29, Lines 3-5.

11 Mo. P.S.C. 3d

Commission use SWBT's total revenue less common costs.⁶¹ In support of this variation of the equation, the Joint Sponsors argue that total TELRIC costs for SWBT plus common costs are nearly identical to SWBT's reported revenues.⁶² The Joint Sponsors also point out that this variation on the equation was accepted in Texas.⁶³

SWBT replies that revenues are not a surrogate for total TELRIC direct costs because they include investor-required return (i.e. cost of capital) and contribution to the firm's common costs and economic profit. Using revenues in the denominator would inappropriately increase the denominator by adding contribution and economic profit to total TELRIC costs, thus underestimating the shared and common cost factor and decreasing TELRIC prices.⁶⁴ SWBT argues that use of the formula proposed by the Joint Sponsors would have the effect of requiring SWBT to share any actual profits it earns with the CLECs through operation of the common cost factor.⁶⁵

The Commission finds that SWBT is correct. The formula proposed by the Joint Sponsors would not comply with TELRIC principles in that it would inappropriately add contribution and economic profit to total TELRIC costs. Furthermore, the Joint Sponsors were unable to establish any basis for a conclusion that the use of SWBT's revenue in the denominator of the common cost factor calculation would improve the accuracy of that calculation. Instead, the formula proposed by the Joint Sponsors simply adds a layer of confusion on top of an already complicated calculation. SWBT will not be required to use revenues in the development of the denominator for the common cost factor calculation.

68. Should TBO be excluded from Common Costs?

The Commission previously addressed this issue in issues 60-62. The Commission concluded that TBOs should be excluded from common costs. There is no need to further discuss this issue.

69. Has SWBT correctly used Support Asset factors in its Common Cost factor development?

The Joint Sponsors' witness, Daniel P. Rhinehart, testified that the common cost factor proposed by SWBT is fundamentally flawed because it "inappropriately applies wage-based support asset factors to assets to identify supposed support asset costs."⁶⁶ The Joint Sponsors indicate that the support asset factors should be applied only to wages and salary dollars. SWBT's witness, Thomas G. Ries, when cross-examined at the hearing, seemed to agree when he indicated that "[t]he support asset factor should only be applied to salary dollars."⁶⁷

In its brief, SWBT asserts that it has correctly applied support asset factors in developing its common cost factor and then explains why support asset costs are a legitimate component of the common cost factor. However, SWBT never

⁶¹ Rhinehart Rebuttal, Exhibit 28, Page 28, Lines 10-23, and Schedule DPR6.

⁶² Transcript, Pages 1058-1059.

⁶³ Rhinehart Rebuttal, Exhibit 28, Page 28, Lines 26-27.

⁶⁴ Ries Surrebuttal, Exhibit 17, Page 51, Lines 4-10.

⁶⁵ Ries Surrebuttal, Exhibit 17, Page 52, Lines 2-4.

⁶⁶ Rhinehart Rebuttal, Exhibit 28, Page 25, Lines 13-14.

⁶⁷ Transcript, Page 442, Lines 19-20.

addresses the issue raised by the Joint Sponsors. SWBT does not indicate whether it applies wage-based support asset factors to assets to identify supposed support asset costs. It does not deny that the support asset factor should be applied only to wages and salary dollars.

The Commission concludes that the expert opinion offered by the Joint Sponsors' witness is correct. SWBT will not be permitted to apply wage-based support asset factors to assets to identify supposed support asset costs.

70. Has SWBT correctly reflected corrections to ARMIS data reported to the FCC for accounts 6612 and 6722?

In preparing its common cost computations, SWBT used ARMIS data reported to the FCC. The data SWBT used was correct at the time it performed its study but updated data decreased the account balance for account 6722, External Relations. SWBT argues that using the updated balance in account 6722 would decrease the factor by only .02 percent and that, therefore, it is not necessary to make the adjustment. The Joint Sponsors argue that SWBT should make the correction no matter how small.

The Commission finds that SWBT must make the correction to use the most current data available. While the correction may not have a significant impact on the common cost computations, the accumulation of minor errors may be magnified as that factor is applied throughout various cost studies. In any event, SWBT will already be required to recalculate its factors because of the previous decisions of the Commission. Therefore, SWBT will not be unduly burdened by rerunning its studies using the more current data.

71. Has SWBT correctly applied the Commission Assessment factor in its Common Cost development?

The Joint Sponsors' witness, Daniel P. Rhinehart, testified that SWBT incorrectly applied the Commission assessment factor in developing its common cost factor.⁶⁸ SWBT agrees that the Commission Assessment factor used in the study filed with its direct testimony was understated.⁶⁹ It indicates that the correct factor was applied in the replacement study filed with its supplemental direct testimony.⁷⁰ The Joint Sponsors do not present any evidence or argument that the assessment factor used by SWBT in its supplemental direct testimony is incorrect. However, they argue that the Commission cannot be sure that SWBT is using the correct assessment factor because SWBT has not placed its cost studies, or other supporting evidence into the record. Joint Sponsors suggest that SWBT be directed to demonstrate in its compliance filing that it has used the correct Commission Assessment factor.

The Commission has no evidence before it but has only SWBT's assertion that it is using the correct assessment factor, and the Joint Sponsors' intimations that perhaps SWBT is in error. The Commission makes no finding about the appro-

⁶⁸ Rhinehart Rebuttal, Exhibit 28, Page 25, Lines 17-18.

⁶⁹ SWBT did not file a study with its direct testimony. Instead, it relied on the study from TO-97-40, until its revised study was filed with its supplemental direct.

⁷⁰ Initial Brief of Southwestern Bell Telephone Company, Pages 67-68. *see also* Reis, Surrebuttal, Exhibit 17, Page 48, Lines 17-20.

11 Mo. P.S.C. 3d

priateness of the assessment factor used by SWBT but directs SWBT to demonstrate in its compliance filing that it has used the correct Commission Assessment factor.

72. Is it appropriate for SWBT to base the Common Cost factor on year 2000 data when its cost studies are based on 1999 data?

SWBT utilized 2000 data in developing its shared and common cost factor. The rest of its cost studies were based on 1999 data. SWBT indicates that it simply used the most current data available and that the use of 2000 data is appropriate.⁷¹ The Joint Sponsors disagree. Their witness stated that 1999 data should be used. He explained that 1999 data is more appropriate because between 1999 and 2000 SWBT transferred ownership of major computer assets to an SBC subsidiary and began leasing them back. That change creates the possibility of double counting of related expenses in different cost studies.⁷²

In most situations, the most current available data should be used. However, the Commission agrees with the Joint Sponsors that the transfer of ownership of major computer assets between 1999 and 2000 does create the possibility that certain costs could appear in one area in 1999 and in a different area in 2000. That possibility might result in a CLEC being double charged for that cost. SWBT is directed to use 1999 data in preparing its common cost factor.

73. Is it appropriate to include inflation in Southwestern Bell's computation of Common Costs?

The Commission previously addressed this issue in issues 63-64. The Commission concluded that SWBT would not be permitted to utilize overt inflation factors in computing its common costs. There is no need to further discuss this issue.

74. If inflation is determined to be appropriately included in the determination of Common Costs, is SWBT's use of non-levelized inflation factors correct?

The Commission would need to address this issue only if it had decided that SWBT would be permitted to use overt inflation factors in its cost studies. The Commission has decided in issues 63 and 64 that SWBT will not be permitted to use those inflation factors. Therefore, this issue is moot and need not be further addressed.

75. What amount of Executive and Planning and General and Administrative costs should be considered avoided in determining the Common Cost Factor?

Executive and Planning, and General and Administrative costs are overhead or common costs. SWBT argues that these costs are attributable to its entire operation and cannot be avoided so long as the company is in business. It does not believe that any adjustment to remove retail related costs from those costs would be appropriate.⁷³ Staff and Joint Sponsors argue that a portion of those costs must be attributed to SWBT's retail operations. If they are related to retail

⁷¹ Ries Surrebuttal, Exhibit 17, Page 49, Lines 3-13.

⁷² Rhinehart Rebuttal, Exhibit 28, Page 26, Lines 1-8.

⁷³ Southwestern Bell Telephone Company, Initial Brief, Page 69.

operations, then those costs can be avoided when a UNE is provided wholesale to a CLEC. A CLEC should not be required to pay for such avoided costs.

Staff would remove 35 percent of those costs as a “reasonable estimate” of the percentage of costs that would be avoided in the wholesale market. That percentage is based on calculations performed by Staff’s witness, Dr. Ben Johnson.⁷⁴ The Joint Sponsors agree that a portion of these costs would be avoided for wholesale UNE sales. The Joint Sponsors would exclude 15.67 percent of those costs, with certain exceptions, using the Indirect Factor established by the Commission in TO-97-40.⁷⁵

The Commission finds that SWBT’s position is not reasonable. It is apparent that some percentage of these costs is related solely to retail services and should be excluded from wholesale costs. However, the testimony presented to the Commission on this issue is very sparse. SWBT’s brief does not point to any testimony or other evidence on this issue and the testimony offered by the witnesses for the Joint Sponsors and for Staff is more conclusory than enlightening. In the absence of better information, the Commission finds that the position espoused by the Joint Sponsors is most reasonable in that it is based on the findings previously made by this Commission in TO-97-40 and the expert opinion of the Joint Sponsors’ witness.

76. What amount of Network Operations – General Supervision costs should be considered avoided in determining the Common Costs Factor?

SWBT indicates in its brief that its shared and common cost study classifies Network Operations – General Supervision expenses (account 6534) as direct costs. It denies that any of these costs should be treated as avoided direct expenses.⁷⁶ However, SWBT’s witness, Thomas G. Ries, when cross-examined at the hearing, testified that he had made a mistake in the cost study and that these costs should have been included in the Common Costs factor.⁷⁷ The omission of the costs results in a slight understatement of SWBT’s costs. The Joint Sponsors argue that, nevertheless, the proper adjustment should be made, including an avoided cost adjustment of 15.67 percent, the Indirect Factor it proposed in issue 75.

The Commission agrees with the Joint Sponsors. SWBT will be required to correct what its witness acknowledged to be an error.

77. What amount of uncollectibles expense should be considered avoided in determining the Common Cost Factor?

SWBT claims in its brief that it only included uncollectible expenses relating to wholesale services in its Common Cost Factor. All retail uncollectible expenses were excluded from the cost study so there is no need for any further adjustment. However, SWBT does not cite any evidence to support that assertion.⁷⁸

⁷⁴ Johnson Rebuttal, Exhibit 24, Page 89, Lines 1-25.

⁷⁵ Rhinehart Rebuttal, Exhibit 28, Page 29-30, Lines 24-28, 3-10.

⁷⁶ Southwestern Bell Telephone Company, Initial Brief, Page 70.

⁷⁷ Transcript, Page 444-445, Lines 20-25, 1-15.

⁷⁸ Southwestern Bell Telephone Company Initial Brief, Page 70.

11 Mo. P.S.C. 3d

In their brief, the Joint Sponsors urge the Commission to again use the Indirect Factor of 15.67 percent to reduce these uncollectible expenses. However, the Joint Sponsors also fail to cite any evidence to support their position that these expenses need to be adjusted.⁷⁹

The Commission is faced with a complete lack of evidence upon which to resolve this issue. If SWBT's assertion is correct, then there would be no need to adjust SWBT's uncollectible expenses. If SWBT has not already excluded retail uncollectibles from its cost study, then it would be appropriate to use the indirect factor that the Commission approved in issue 75 to reduce that cost. SWBT has the burden of proving that its cost studies are reasonable but the Commission is not willing to order SWBT to adjust its cost study without some evidence in the record to support such an adjustment. Faced with this complete lack of evidence the Commission has no choice but to make no finding on this issue. This will have the effect of leaving this aspect of SWBT's cost study unchanged.

78. What amount of marketing costs should be considered avoided in determining the Common Cost Factor?

The Commission concludes that 10 percent of marketing costs are attributable to wholesale services. Therefore, 90 percent of marketing costs are to be considered avoided. The basis for the Commission's conclusion is explained in the Commission's Conclusions of Law, later in this Report and Order.

79. What amount of Customer Operations (call completion and number services) costs should be considered avoided in determining the Common Cost Factor?

The Joint Sponsors and SWBT agree that these costs are 100 percent direct costs that are included in other cost studies. Therefore, they should be excluded entirely from the common cost factor. Given the agreement of the parties, the Commission need not further address this issue.

80. What amount of Customer Services costs should be considered avoided in determining the Common Cost Factor?

The Joint Sponsors and SWBT agree that these costs are 100 percent direct costs that are included in other cost studies. Therefore, they should be excluded entirely from the common cost factor. Given the agreement of the parties, the Commission need not further address this issue.

81. Should the Common Cost Factor be applied to non-recurring rates?

The Joint Sponsors contend that non-recurring costs should be excluded from the common cost factor and that therefore the common cost factor should not apply to non-recurring rates. SWBT replies that common costs apply equally to non-recurring costs and that the common cost factor should be applied to those rates. SWBT also points out that not applying common costs to non-recurring costs would result in higher recurring costs, as a greater percentage of the common costs would need to be recovered from the recurring costs.⁸⁰

⁷⁹ Joint Sponsors Reply Brief, Page 47.

⁸⁰ Ries Surrebuttal, Exhibit 17, Page 54, Lines 9-18.

SWBT's position on this issue is sensible. Not applying common costs to non-recurring costs would only shift more costs onto the recurring costs. The Joint Sponsors have not established a reason to shift those costs. The Commission concludes that common costs should be applied to non-recurring rates.

Cost of Capital Issues.

The original cost of capital issues, 82-102, 109, 138, 152, 180, 188, 208, 215, 228, 236, 243, 261, 265, 273, 280, 292, 301, 307, and 312, have been reduced to the following four questions:

82. What is the weighted average cost of capital that should be used in this case?

In order to determine SWBT's forward-looking economic costs to provide UNEs in Missouri, the Commission must estimate SWBT's weighted average cost of capital for the business of providing UNEs. The weighted average cost of capital is derived from the following formula: (forward-looking cost of debt multiplied by the percentage of debt in capital structure) plus (forward-looking cost of equity multiplied by the percentage of equity in capital structure) equals the weighted average cost of capital.⁸¹ In order to solve this equation, three inputs must be determined: the cost of equity, the cost of debt and the target capital structure.

The parties propose that the Commission utilize the following weighted average cost of capital:

SWBT:	12.19%
Joint Sponsors:	9.38%
Staff:	9.8%

These percentages are derived, mechanically, from the inputs into the formula previously described. Therefore, those inputs must be determined before a weighted average cost of capital can be established. The next three issues determine those inputs.

For reasons explained in the discussion of issues 83, 84 and 85, the Commission determines that the cost of equity is 13 percent, the cost of debt is 7.18 percent, and the target capital structure is 46 percent debt and 54 percent equity. When those amounts are inserted into the weighted average cost of capital formula, the result is a weighted average cost of capital of 10.32 percent.⁸²

83. What is the cost of equity?

The return on common equity serves to compensate shareholders for the use of their capital to finance the plant and equipment necessary to provide services. Shareholders are willing to invest their money in the stock of a company only if they believe that they can earn a rate of return commensurate with the rate of return they can earn from an alternative investment having comparable risks. In order to induce an investor to purchase equity in a company that is perceived to be more risky, that company must offer a higher rate of return.

⁸¹ Hirshleifer Rebuttal, Exhibit 29, Page 6, Lines 5-11.

⁸² (Cost of debt x percent of debt in capital structure) + (cost of equity x percent of equity in capital structure) = weighted cost of capital. (.0718 x .46) + (.13 x .54) = .1032. .0330 + .0702 = .1032 or 10.32%.

11 Mo. P.S.C. 3d

All three parties offered the opinions of expert witnesses to support their estimates of the cost of equity. Dr. William E. Avera testified on behalf of SWBT. To estimate the cost of equity for SWBT, Dr. Avera employed a five-year, constant growth, discounted cash flow (DCF) analysis, separately using growth projections published by Value Line Investment Services and by Institutional Brokers Estimate Systems (I/B/E/S). Dr. Avera also employed two different applications of the risk expectational cost of equity: the realized rate of return approach, and the expectational cost of equity approach. Through his calculations, Dr. Avera arrived at an estimated cost of equity of 13 percent.

Dr. Ben Johnson testified on behalf of Staff. For his calculations, he used 12 percent as the estimated cost of equity. However, Dr. Johnson admitted that the 12 percent figure was based only on what he believed to be a reasonable judgment and was not supported by any specific calculations.⁸³

John I. Hirshleifer testified on behalf of the Joint Sponsors that 10.27 percent is an appropriate cost of equity. In arriving at his estimate of the cost of equity, Hirshleifer employed many of the same formulas as did SWBT's expert witness. However, a significant difference arose from Hirshleifer's use of a three-stage DCF model instead of the simplified constant growth DCF model employed by Dr. Avera. Hirshleifer contends that the constant growth model is too simple and naïve and that a variable, multi-stage growth model is more accurate.

Essentially, the three-stage DCF model used by Hirshleifer has the effect of reducing the expected future long-term growth rate of the evaluated company to what Hirshleifer contends is a more realistic, sustainable growth rate. Dr. Avera replies that the constant growth rate that he employs has the advantage of actually being used by most investors. He also argues that real investors base their investment decisions on short-term growth rates. Dr. Johnson agreed that if he had performed calculations to determine an appropriate cost of equity, he would also use the constant growth discounted cash flow method employed by Dr. Avera.⁸⁴

The Commission finds that Dr. Avera's constant growth discounted cash flow model most closely matches the actual expectations of potential investors. Dr. Avera's testimony clearly explained the application of that model and was quite credible. Dr. Hirshleifer's three-stage DCF model, while promising greater accuracy, is actually based on a great deal of speculation about the future. The Commission rejected the use of that model in TO-97-40 and will do so again. The Commission will accept the 13 percent cost of equity proposed by SWBT.

84. What is the cost of debt?

The next element in the weighted cost of capital is the cost of debt. The cost of debt is a measurement of what it would cost to raise new debt funds in the marketplace. Dr. Avera, SWBT's witness, testified that the appropriate cost of debt is 7.18 percent. He arrived at that figure by averaging Moody's reported 7.11 percent yield on Aa bonds with the 7.26 percent yield on A bonds.⁸⁵ Dr. Johnson, Staff's

⁸³ Transcript, Page 991, Lines 8-9.

⁸⁴ Transcript, Page 991, Lines 10-14.

⁸⁵ Avera Direct, Exhibit 1, Schedule 2, Page 39.

expert witness, also used a 7.18 percent cost of debt in his calculation of the overall cost of capital.⁸⁶ Mr. Hirshleifer, the witness for the Joint Sponsors, proposed a slightly higher cost of debt, 7.70 percent, based on the weighted average cost of the outstanding debt issues of SBC and its subsidiaries.⁸⁷

The cost of debt proposed by SWBT's witness appears to be reasonable. The Commission will accept 7.18 percent as the cost of debt.

85. What target capital structure should be used for the UNE leasing business?

The final element in the weighted cost of capital is the target capital structure. SWBT, like most businesses, is financed by a combination of equity (common stock) and debt (including bonds and bank loans). The fraction of debt and equity used to finance a business is referred to as its capital structure. A company's capital structure will vary depending upon the nature of the company's business and the perception of investors regarding the risks associated with that business.

There are two sources of risk for a company, operating risk and financial risk. Operating risk results from the operation of the business. It is affected by factors such as competition, technological change, customer acceptance of a company's products, and variation in the costs of producing the company's products.⁸⁸ Financial risk is determined by the amount of debt in a company's capital structure. A company heavily financed with debt is perceived by lenders to be more financially risky than a company financed with equity. Debt must be serviced on a prescribed schedule; whereas, a company has much more flexibility in determining the amount of dividends that it will pay to its equity holders. Taking on more debt increases the risk that a company will not be able to meet its fixed obligation to service its debts; thus increasing the financial risk of the company.

In deciding whether to invest in either the debt or equity of a company, investors will consider the total risk – both operating and financial – associated with the company. Therefore, a company with low operating risk may be able to take on greater financial risk and still have a favorable total risk, attractive to investors. That means that a company operating in a relatively stable business environment will be able to finance more of its costs through cheap, but higher risk debt. A company subject to greater business risks must finance a greater percentage of its costs through higher priced, but safer equity. The question then becomes what is the appropriate ratio of debt to equity to be ascribed to SWBT when it sells wholesale UNEs to the CLECs.

Dr. Avera, testifying on behalf of SWBT, indicated that at the time he did his study, SBC had an actual capital structure of approximately 88 percent equity, 11 percent debt, and 1 percent other sources.⁸⁹ However, it is not appropriate to simply use the actual capital structure of SBC. Determining the appropriate capital structure is more difficult because under TELRIC standards, the CLECs that purchase UNEs should not be required to pay for risks associated with other aspects of SWBT's

⁸⁶ Johnson Rebuttal, Exhibit 24, Page 82, Line 9.

⁸⁷ Hirshleifer Rebuttal, Exhibit 29, Pages 10-11.

⁸⁸ Hirshleifer Rebuttal, Exhibit 29, Page 7, Lines 14-18.

⁸⁹ Avera Direct, Exhibit 1, Schedule 2, Page 22.

11 Mo. P.S.C. 3d

business. The Commission is therefore required to determine the cost of capital for a hypothetical company that is only in the business of selling UNEs to CLECs at wholesale.

Obviously, no such company exists so the parties have attempted to determine what such a company would look like. SWBT models its theoretical company on other telephone holding companies that own existing LECs. This comparison group has an average capital structure of 86 percent equity and 14 percent debt.⁹⁰ SWBT contends that the risks associated with leasing UNEs to CLECs is comparable to the overall risk of a LEC so that it is appropriate to use the actual capital structure of the LEC holding companies for the hypothetical capital structure of the hypothetical UNE wholesaler.

The Joint Sponsors and Staff contend that leasing UNEs in the wholesale market is much less risky than some other business ventures of the LECs and that therefore a capital structure using greater amounts of relatively cheap debt should be utilized for the hypothetical UNE wholesaler. Mr. Hirshleifer explained that while other SBC business units that provide local telephone service are faced with new competitors, increasing the level of operating risk, the unit involved in leasing the network by providing UNEs to CLECs has no competition, because it owns the only available network. Therefore, it faces lower operating risk than do other SBC business operating units.⁹¹ As a result, the hypothetical UNE wholesaler should be able to incorporate more low cost debt into its capital structure.

Staff's witness, Dr. Ben Johnson, testified that an appropriate capital structure for the hypothetical UNE wholesale provider could best be determined by using book value rather than market value for SBC's equity. This has the advantage of measuring the value of the equity that has actually been invested in SBC's telephone network rather than more recent market fluctuations.⁹² The use of a book value capital structure permits the approximation of a capital structure that more closely reflects the monopolistic wholesale provisioning of UNEs rather than the riskier business undertaken by telephone holding companies in the modern competitive environment.⁹³ Using this method, Johnson arrived at a 46 percent debt to 54 percent equity ratio.

The Commission concludes that the use of the 46 percent debt to 54 percent equity ratio advocated by Staff is appropriate. As indicated, any target capital structure that the Commission chooses to adopt will be hypothetical. There is no way to know exactly what a company providing only wholesale UNEs to CLECs would look like. However, it is reasonable to believe that such a company, operating in a heavily regulated, virtually monopolistic environment, would look a lot like SWBT would have looked before the coming of retail competition and the recent run-up of stock prices. The hypothetical target capital structure advocated by Staff most closely approximates the capital structure of that hypothetical company and will be adopted.

⁹⁰ Avera Direct, Exhibit 1, Schedule 2, Page 22.

⁹¹ Hirshleifer Rebuttal, Exhibit 29, Page 40, Lines 16-19.

⁹² Johnson Direct, Exhibit 24, Page 80.

⁹³ Hirshleifer Rebuttal, Exhibit 29, Page 77.

86-102.

These issues related to cost of capital and were eliminated when the parties consolidated them into issues 82-85.

UNE sub-loop cross-connects TELRIC study recurring, 2001-2003, March 2001.**103. Should the recurring cost contain an in-place factor for optical jumpers?**

Joint Sponsors and SWBT agree that an in-place factor, representing the installation costs, for an optical jumper should not be included in the recurring costs for a cross-connect if the installation cost is already recovered in the non-recurring charge for that or another cross-connect. They also agree that the in-place factor should be removed from the recurring cost studies for the dark fiber sub-loop cross-connect, and the OC3 and OC12 Unbundled Dedicated Transport Cross-connects because the cost identified by this factor are captured in the non-recurring dark fiber sub-loop cost study. SWBT indicates that it has already made those corrections in its surrebuttal testimony. The Staff has not taken a position on this issue.

Given the agreement of the parties, the Commission will order that the in-place factor be removed from the recurring cost studies for the dark fiber sub-loop cross-connect, and the OC3 and OC12 Unbundled Dedicated Transport Cross-connects, because the cost identified by this factor are captured in the non-recurring dark fiber sub-loop cost study. If SWBT has already made this modification to its cost studies, it need not take any further action.

104. Cost Factors.

Cost factors are specifically addressed under issues 45-81 and need not be addressed again.

Sub-loop cross-connects (TELRIC) cost study, 2001-2003, June 2001.**105. Are all of the charges for sub-loop cross-connects already contained in the sub-loop charge?**

SWBT contends that the costs of placing sub-loop cross-connects in the field are recovered in the sub-loop non-recurring charge, but that the cost of placing cross-connects within the central office are not recovered in the non-recurring charge. SWBT is proposing the same new prices for central office loop and sub-loop cross-connects. SWBT contends that the Commission needs to establish a permanent rate for a sub-loop cross-connect, but that the permanent rate should be the same as the permanent rate for an in-office loop cross-connect that was established in TO-97-40.

The Joint Sponsors do not oppose the application of the loop cross-connect recurring charges to the sub-loop cross-connects, but they do oppose the application of any non-recurring charge to sub-loop cross-connects because they contend that those charges are already recovered in the non-recurring charge for the sub-loop itself. They contend that SWBT has never responded on this point.

Unfortunately, this issue, as presented by the Joint Sponsors, is completely incomprehensible to the Commission. The only evidence that the Joint Sponsors cite regarding this issue is a statement by the Joint Sponsors' witness, Steven Turner, indicating that he was modifying SWBT's sub-loop cross-connects non-recurring cost study to show that the probability of the functions occurring is 0.00

11 Mo. P.S.C. 3d

percent given that the activities are recovered in the sub-loop nonrecurring charge.⁹⁴ But the testimony also indicates that Turner is proposing a modification to a cost study that SWBT has withdrawn as being unnecessary because permanent nonrecurring rates were established in TO-97-40.⁹⁵ The Joint Sponsors are proposing modifications to a cost study that is no longer at issue in this case. There is, therefore, no reason to order SWBT to take any action with regard to this issue.

UNE Dark Fiber Cross-connects to Collocation Cage Non-recurring (TELRIC) Case Study; 2001-2003, June 2001.

106. Should full disconnect cost be paid at the time the connection is made?

The nonrecurring charges proposed by SWBT would charge a CLEC the full cost of disconnecting a UNE at the time it orders the connection. SWBT contends that this is necessary because collecting the cost of disconnect upfront is a common practice on the retail side of the telephone industry.⁹⁶ By collecting the cost of disconnect at the time of connection, SWBT avoids the risk that it will not be paid at the time of disconnect. SWBT is particularly concerned about collecting disconnect charges when a CLEC goes out of business.⁹⁷

The Joint Sponsors and Staff contend that SWBT's collection of the costs of disconnect at the time of connection will result in over-recovery. The Joint Sponsors would permit SWBT to collect disconnect charges at the time of connection, but would reduce SWBT's upfront recovery to its present value in order to recognize the time-value of money. The Joint Sponsors would discount the disconnect charges by the weighted average cost of capital for 5 years.⁹⁸

Staff would go further than the Joint Sponsors and require SWBT to recover the cost of disconnection only at the time of disconnection. Dr. Johnson, testifying for Staff, convincingly explained that while the practice of collecting the cost of disconnect was common on the retail side of the telephone industry, it was not necessary or appropriate in the wholesale UNE market.⁹⁹

It is apparent that by charging a CLEC for disconnect charges at the time of connection, SWBT is over collecting its costs. That practice does not recognize the time-value of money. In effect, SWBT would be collecting an interest-free loan from its CLEC wholesale customers, lasting as long as the UNE connection remains in service. This situation would be partially corrected if the disconnect charges were discounted by the time-value of money as proposed by the Joint Sponsors. In effect, that solution would require SWBT to pay interest on the loan.

However, that solution carries its own set of problems. The Commission would still need to speculate about the average amount of time that would pass between connection and disconnection. In addition, under this solution, CLECs that have a stable customer base and seldom need to have UNEs disconnected would be required to subsidize those CLECs that frequently require disconnection services.¹⁰⁰

⁹⁴ Turner Rebuttal, Exhibit 27, Page 35, Lines 1-15.

⁹⁵ Cass Errata to Direct, Exhibit 9, Pages 1-2.

⁹⁶ Transcript, Page 564, Lines 17-23.

⁹⁷ Transcript, Pages 725-726, Lines 23-25, 1-8.

⁹⁸ Turner Rebuttal, Page 36, Lines 14-21.

⁹⁹ Johnson Rebuttal, Exhibit 24, Page 109.

¹⁰⁰ Johnson Rebuttal, Exhibit 24, Page 109, Lines 12-19.

In a wholesale situation, it is more appropriate to require SWBT to wait to collect the cost of disconnection at the time a disconnect is ordered. This solution will not deprive SWBT of the ability to collect its costs because of the difference between the retail and wholesale markets. A retail customer might object to the idea of paying a separate fee to have a service disconnected. Furthermore, retail customers may move away, making it hard for the phone company to track them down to collect a disconnect charge. But in the wholesale market, SWBT will be dealing with sophisticated CLECs that understand the need to pay for the costs of disconnection when they seek to disconnect a UNE. Furthermore, while in some circumstances a UNE purchased by a CLEC may be disconnected because the CLEC is going out of business, in most cases the CLEC will be disconnecting the UNE because its customer no longer needs the connection. In that circumstance the CLEC will continue to need a business relationship with SWBT, and SWBT is unlikely to encounter difficulty in collecting the disconnect charges.

The Commission concludes that Staff is correct; SWBT should not be permitted to charge a CLEC for the cost of disconnection until a disconnection is ordered.

107. What is the appropriate installation time for Fiber optic Cross-connects?

SWBT's cost studies assume an average installation time of seven and a half minutes for running fiber optic cross-connects. That assumption includes 15 minutes for the first cross-connect and 5 minutes for each subsequent cross-connect with an average of four cross-connects per order. The Joint Sponsors' witness, Mr. Turner, contends that SWBT should be allowed only one minute per cross-connect. Turner testified that fiber optic cross-connects can be completed quickly because they utilize pre-connectorized quick connect jumpers. Those quick connect jumpers allow a technician to complete the connection by simply inserting the fiber optic cable into a connectorized plug in either end of the fiber distribution frame, and then placing the fiber into the raceway around the fiber distribution frame.¹⁰¹ Turner also challenges SWBT's assumptions about the time required to make the fiber optic cross-connect by pointing out that other SWBT cost studies assume that a 2-wire copper cross-connect takes five minutes, while the fiber cross-connect takes seven and a half minutes. Turner contends that a copper cross-connect must take longer because it is not pre-connectorized.¹⁰² Turner concedes that his estimate of one-minute completion time is based on his personal experience and not on any one else's expertise.¹⁰³

In response to Mr. Turner's criticisms, SWBT presented the testimony of Mark Schilling. Mr. Schilling described in detail the work functions that must be performed when a technician runs a fiber jumper.¹⁰⁴ Schilling concluded that the work times contained in SWBT's cost studies were probably understated.

The Commission concludes that SWBT's time estimates are somewhat inflated but not to the extent asserted by the Joint Sponsors' witness. The

¹⁰¹ Turner Rebuttal, Exhibit 27, Page 37, Lines 11-18.

¹⁰² Turner Rebuttal, Exhibit 27, Page 37, Footnote 28.

¹⁰³ Transcript, Page 852, Lines 3-8.

¹⁰⁴ Schilling Surrebuttal, Exhibit 6, Pages 4-8.

11 Mo. P.S.C. 3d

Commission will reduce the time for installing fiber optic jumpers to match the time allotted for installing a 2-wire copper cross-connect. SWBT's cost studies shall assume an average installation time of five minutes for running fiber optic cross-connects.

108. Inflation Factor.

Inflation factors are specifically addressed under issues 63-65 and need not be addressed again.

109. Cost of Capital.

Cost of Capital is addressed at issues 82-102 and need not be addressed again.

110. Labor Rates.

Labor rates are addressed at issues 36-44 and need not be addressed again.

UNE Loop Cross-connects TELRIC Study Recurring, 2001-2003, March 2001.

111. Should multiplexing equipment be included in the recurring cost for the cross-connects in this study?

The Joint Sponsors' witness, Steven Turner, testified that SWBT included unnecessary multiplexing in its costs for certain cross-connects. Specifically, Turner contended that SWBT had already included this multiplexing investment in the cost for the DS0 ports in its DCS cost studies.¹⁰⁵ SWBT's witness, Chris Cass, testified that SWBT's cost study was correct because the signal at issue must be multiplexed twice in order to be usable. Therefore, he contended that it was appropriate to include the multiplexing equipment in both the recurring cost study for the DS0 loop cross-connects and the recurring cost study for the DCS DS0 Port.¹⁰⁶ Mr. Cass was extensively cross-examined on this issue,¹⁰⁷ as was Mr. Turner.¹⁰⁸

Mr. Turner testified that the multiple multiplexing proposed by SWBT for these cross-connects was an engineering impossibility. Under cross-examination, he drew a diagram showing the impossibility of the proposed multiplexing.¹⁰⁹ Mr. Cass was equally adamant that the multiplexing was necessary and should be included in the cost of providing the cross-connect.

The Commission finds that Mr. Turner's testimony was more credible and convincing. Multiple multiplexing in the situation described by the witnesses is not reasonable. Therefore, SWBT should be able to recover the cost of multiplexing equipment only once. The Commission finds that multiplexing equipment costs should not be included in the recurring costs for loop to DCS cross-connects.

112. Should IDF equipment be included?

A Main Distribution Frame (MDF) is a sort of rack used to hold the wires used to make interconnections. Intermediate Distribution Frames (IDFs) are an adjunct to the MDF. When an MDF starts to become overcrowded, SWBT may set up an IDF

¹⁰⁵ Turner Rebuttal, Exhibit 27, Page 42.

¹⁰⁶ Cass Surrebuttal, Exhibit 11, Page 24, Lines 6-21.

¹⁰⁷ Transcript, Pages 352-354.

¹⁰⁸ Transcript, Pages 909-912, 935-942.

¹⁰⁹ Exhibit 37.

back-to-back with the MDF to relieve some of the stress and utilization on the MDF.¹¹⁰ According to SWBT's witness, proper frame design employs IDFs to better utilize the valuable MDF space.¹¹¹

The Joint Sponsors' witness, Steven Turner, argued that the use of IDFs introduces unnecessary back-to-back manual cross-connects, additional points of failure in a circuit, and additional costs that serve no effective purpose.¹¹² The Joint Sponsors argue that TELRIC principles require that SWBT properly size their MDFs to avoid the need for IDFs.

The Commission finds that IDFs are an appropriate, forward-looking technology used to extend the life of an MDF. It is certainly more efficient to utilize an IDF to extend an MDF than to tear out an existing MDF with thousands of jumpers already in place in order to resize the MDF.¹¹³ The testimony of SWBT's witness is more persuasive in this matter. The Commission concludes that the use of an IDF is a forward-looking design and that it is appropriate for SWBT to include costs for the use of IDFs in its cost study.

113. Should DSX equipment be included in the DS3 cross-connect?

SWBT and the Joint Sponsors agree that this issue has been withdrawn because a final rate for this element was set in TO-97-40. Specifically, the rates established for the Unbundled Dedicated Transport (UDT) DS3 cross-connect should also apply to the DS3 cross-connect element. The Commission need not further address this issue.

114. Cost Factors.

Cost Factors are addressed at issues 45-81 and need not be addressed again.

UNE Loop Cross-connects Non-recurring (TELRIC) Cost Study, 2001-2003, June 2001.

115. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

116. Probability of disconnect occurrence from loop to switch port.

SWBT's cost study assumes that every time a customer discontinues service, the cross-connect serving that customer will be disconnected. The Joint Sponsors argue that in most cases the discontinuation of service will not result in the cross-connect being disconnected. If the customer is merely switching service providers, then the cross-connect would remain in place to serve that customer. Even if the customer is vacating the premises, someone else is likely to quickly move in, want phone service, and utilize the same cross-connect. Therefore, SWBT would be most efficient by leaving the cross-connect in place 95 percent of the time. For that reason, the CLECs should only have to pay for 5 percent of the cost of a disconnection.¹¹⁴

SWBT's witness testified that SWBT actually disconnects the cross-connect in 95 percent of the cases. SWBT contends that Main Distribution Frames operate at 97 percent capacity and that they simply cannot leave available switch ports

¹¹⁰ Transcript, Page 256, Lines 1-8.

¹¹¹ Schilling Surrebuttal, Exhibit 6, Page 12, Lines 11-12.

¹¹² Turner Rebuttal, Exhibit 27, Page 43, Lines 9-11.

¹¹³ Transcript, Page 257.

¹¹⁴ Turner Rebuttal, Exhibit 27, Page 50.

11 Mo. P.S.C. 3d

occupied but unused. SWBT contends that freeing switch port capacity is forward-looking and complies with TELRIC standards.¹¹⁵

To an extent, this issue is no longer relevant because the Commission has held, in issue 106, that SWBT would not be permitted to charge a CLEC for the cost of disconnection until disconnection is actually requested. But this issue is not entirely resolved because the fact that a disconnection order is placed does not mean that SWBT will actually perform the disconnection work. SWBT's witness testified that SWBT only disconnects the cross-connect 95 percent of the time. The other five percent of the time, SWBT would be paid for disconnection work that it does not actually perform.

The Joint Sponsors' witness argued that if SWBT were truly operating on a forward-looking, efficient basis, it would only disconnect a cross-connect five percent of the time. That assertion is supported only by speculation, and not by any facts. While many lines may ultimately be reconnected by a subsequent customer, it is not reasonable to believe that SWBT could leave that many unused cross-connects in place while waiting to see if a line is going to be reused. To do so would not be an efficient use of resources.

The Commission accepts SWBT's assertion that it will actually disconnect a cross-connect 95 percent of the time. That means that five percent of the time that SWBT receives a disconnect order from a CLEC it will not actually perform the work of disconnection. Therefore, SWBT's charges to the CLECs for that disconnection work must be reduced by five percent.

117. Dispatch time to unmanned central offices, and order completion.

SWBT's cost studies assume that dispatch time for non-recurring rates for cross-connects at unmanned central offices should be 30 minutes and that one cross-connect would be performed on each dispatch.¹¹⁶ The Joint Sponsors' witness contended that, based on his experience and conversations with people who have managed field personnel, 20 minutes is the appropriate average time for dispatch. Furthermore, he contended that it should be assumed that the dispatched technician would perform four cross-connections per dispatch.¹¹⁷

SWBT responded that 30 minutes per trip is very conservative, the actual times would likely be much longer.¹¹⁸ SWBT's witness also indicated that technicians assigned to complete a cross-connect for a CLEC would most likely perform only one cross-connect per visit because SWBT wants to provision the service for the CLEC as quickly as possible. Therefore, SWBT would dispatch a technician immediately rather than wait for additional CLEC orders to accumulate.¹¹⁹

The Commission finds that the 20 minutes of travel time estimated by the Joint Sponsors' witness is not reasonable. That would allow a technician only 10 minutes of travel time in each direction to travel to an unmanned central office. It

¹¹⁵ Schilling Surrebuttal, Exhibit 6, Page 11.

¹¹⁶ Schilling Surrebuttal, Exhibit 6, Page 9, Lines 19-20.

¹¹⁷ Turner Rebuttal, Exhibit 27, Page 48, Lines 6-8.

¹¹⁸ Schilling Surrebuttal, Exhibit 6, Page 9, Lines 5-9.

¹¹⁹ Transcript, Page 244, Lines 5-9.

is unlikely that a technician would be able to navigate through traffic to make a trip anywhere in just 10 minutes.

The Commission does, however, does find that a technician dispatched to an unmanned central office is likely to perform more than one task per visit. There may be more than one CLEC order to be handled at the same time. Or, as SWBT's witness testified, if something else were to "pop up" while they are at the unmanned central office, the technician is told to go ahead and complete that work.¹²⁰ In those circumstances, the Joint Sponsors' assertion that four cross-connections will be performed per dispatch is reasonable.

The Commission finds that the average dispatch time is 30 minutes and that four cross-connects will be performed per dispatch.

118. Procurement activities time.

SWBT's cost studies for certain cross-connects include costs related to ordering, storage, shipping, etc. of plug-in units used in the multiplexer. The Joint Sponsors' expert witness agreed that SWBT should recover for those costs but contended that it should not include the costs in this cost study for three reasons:

(1) all plug-in nonrecurring cost has been captured in the multiplexing or DCS cost studies;

(2) plug-in administration does not occur with each request for a circuit because the plug-in can handle multiple circuits for DS1 and above bandwidths; and

(3) the recurring cost for the multiplexer or DCS is already included in the installation cost for the plug-ins through a plug-in in-place factor.

As a result, the Joint Sponsors contend that SWBT recovers the plug-in costs in other cost studies and that to allow them to recover again in this cost study would result in a double recovery.¹²¹

SWBT did not effectively respond to the Joint Sponsor's argument in its surrebuttal testimony.¹²² However, during cross-examination, SWBT's witness explained that two kinds of plug-ins are involved, common cards and drop cards. Common cards allow the multiplexer to function, are installed at the time the multiplexer is constructed, and are included in those cost studies. Drop cards are installed only when an order is received. SWBT's witness contends that the cost of procuring drop cards is not included in any other cost study and is appropriately recovered in this cost study.¹²³

The Joint Sponsors were not able to present any testimony to counter SWBT's explanation but claim that SWBT failed to support its cost study in that it did not offer its explanation until the hearing. That means that the Joint Sponsors' expert witness did not have an opportunity to examine the cost studies, which are not in evidence, to verify the explanation offered by SWBT.

¹²⁰ Transcript, Page 243, Lines 3-5.

¹²¹ Turner Rebuttal, Exhibit 27, Page 51, Lines 3-14.

¹²² Cass Surrebuttal, Exhibit 11, Pages 8-9, Lines 19-22, 1-9.

¹²³ Transcript, Page 356, Lines 7-21.

11 Mo. P.S.C. 3d

The two expert witnesses present the Commission with conflicting explanations. However, SWBT's witness did not present his explanation until he was being cross-examined at the hearing. At that time, the other parties no longer had an effective opportunity to test his explanation by having their own experts examine the supporting cost studies. Therefore, the Commission finds the explanation offered by the Joint Sponsors' witness to be more credible. SWBT's cost study should include no time associated with procurement activities for loop to DCS and loop to multiplexer cross-connect non-recurring charges.

119. Login and Completeness Check Times.

SWBT's cost study assumes that the "Log-in and Completeness Check" activity requires a greater amount of time for DS1 and DS3 cross-connects than for DS0 cross-connects. The Joint Sponsors contend that the tasks that SWBT has identified for this activity – administrative time, developing work schedules, filing by work activity data, time to review order for completeness – do not vary with the capacity of the cross-connect being performed. The Joint Sponsors propose that the times required for these activities relating to DS1 and DS3 cross-connects be set at the same length of time that SWBT reports for a DS0 level cross-connect.¹²⁴ SWBT replies that there are differences in the way that such cross-connects are provisioned and cites the physical differences in the way the cross-connects are made.¹²⁵

SWBT misses the point raised by the Joint Sponsors. The point is not that there are physical differences in the way that the various cross-connects are provisioned. Rather, the Joint Sponsor's point is that the specific tasks included in this activity are administrative tasks that should not vary with the capacity of the circuit. The Joint Sponsors' position is reasonable and has not been effectively addressed by SWBT. The Commission concludes that the time assumed for the "Log-in and Completeness Check" activity for establishing DS1 and DS3 cross-connects should be the same as the time assumed for the "Log-in and Completeness Check" activity for establishing a DS0 cross-connect.

120. Establish Circuit Cross-Connect Times.

This issue concerns a disagreement about the length of time required to install various cross-connects. There are several sub-issues within this issue. First, the Joint Sponsors point out that SWBT's cost study assumes that a first 4-wire cross-connect requires five minutes to complete, and that completion of each additional 4-wire cross-connect also takes five minutes. However, SWBT assumes that the first 2-wire cross-connect takes five minutes while each additional 2-wire cross-connect takes three minutes.

The Joint Sponsors argue that a 2-wire cross-connect should take less time than a 4-wire cross connect and would cut the time for an initial 2-wire cross-connect to three minutes, to match the time allowed for subsequent cross-connects.¹²⁶ SWBT replies that establishing the first connection can take more time because of the effort required to locate the correct termination points. Additional

¹²⁴ Turner Rebuttal, Exhibit 27, Pages 51-52, Lines 15-22, 1-2.

¹²⁵ Schilling Surrebutal, Exhibit 6, Pages 13-14, Lines 22-23, 1-8.

¹²⁶ Turner Rebuttal, Exhibit 27, Page 52, Lines 3-15.

cross-connects may require less time to establish because many CLEC DS0 termination blocks are located sequentially and may be located more easily.¹²⁷

SWBT does not explain why the first 4-wire cross-connect does not take longer than subsequent 4-wire cross-connects, and it does not explain why the 2-wire cross-connect should not take less time to complete than a 4-wire cross-connect. The Commission finds that the Joint Sponsors' position is more reasonable. SWBT's cost study shall assume that an initial 2-wire cross-connect will take three minutes to complete and that additional 2-wire cross-connects also will be completed in three minutes.

In the second sub-issue, the Joint Sponsors point out that SWBT has assumed longer times to implement digital 2-wire and 4-wire cross-connects as compared to analog 2-wire and 4-wire cross-connects. The Joint Sponsors argue that there is no difference in the work required to install an analog or a digital cross-connect and would apply the lower analog rate to digital cross-connects.¹²⁸ SWBT did not provide an explanation for the use of different installation times for analog and digital cross-connects.

The Joint Sponsors' position is reasonable and is supported by the testimony of Mr. Turner. The Commission finds that SWBT's cost study shall assume that the time required to install a digital cross-connect is the same as the time utilized in the study for the installation of an analog cross-connect.

In the third sub-issue, the Joint Sponsors point out that SWBT assumes longer times to install DS1 and DS3 cross-connects than it assumes for installing copper jumpers for DS0 connections. The Joint Sponsors argue that DS1 and DS3 cross-connects are made using quick-connect jumpers that use simple jacks that clip onto ports rather than using twisted copper wire. Thus, the time for this activity should be less than the time required to install copper jumpers.¹²⁹ A 2-wire DS0 cross-connect takes three minutes to complete, the Joint Sponsors would reduce that time to two minutes for DS1 and DS3 cross-connects.

SWBT's witness testified that, contrary to the assertion made by the Joint Sponsors' witness, DS1 cross-connects use twisted copper pair cable rather than quick-connect jumpers.¹³⁰ SWBT's witness does not indicate the type of cable used to make a DS3 cross-connect.

SWBT's witness is more persuasive on this sub-issue. The Joint Sponsors presume that SWBT's silence about DS3 connections is an admission that DS3 connections do use quick-connect jumpers. Since, they claim it would not make sense for DS1 and DS3 connections onto a DSX frame to use different jumpers, the Joint Sponsors would assume that both DS1 and DS3 connections utilize quick-connect jumpers. Of course, that argument can easily be turned around to establish that DS3 connections must also use twisted copper pair cable. Furthermore, the Joint Sponsors do not provide any basis for their claim that the appropriate time is two minutes, aside from their assertion that the time should be less than three

¹²⁷ Schilling Surrebuttal, Exhibit 6, Page 14, Lines 21-24.

¹²⁸ Turner Rebuttal, Exhibit 27, Pages 52-53, Lines 15-22, 1-2.

¹²⁹ Turner Rebuttal, Exhibit 27, Page 53, Lines 2-17.

¹³⁰ Schilling Surrebuttal, Exhibit 6, Page 15, Lines 4-10.

11 Mo. P.S.C. 3d

minutes. SWBT's position is reasonable and is not called into question by the evidence presented by the Joint Sponsors. SWBT will not be required to modify the installation times it assumes for DS1 and DS3 connections.

121. Plug-in activities times.

This is essentially the same issue as that addressed by the Commission in issue 118 except that this issue concerns installation tasks associated with plug-ins rather than the procurement activities addressed in issue 118. The arguments of the parties are the same in both issues. Having decided in issue 118 that SWBT's cost study should include no time associated with procurement activities for loop to DCS and loop to multiplexer cross-connect non-recurring charges, the Commission concludes that SWBT's cost study also should not include installation tasks associated with plug-ins.

122. Cross Office Testing Times.

The Joint Sponsors contend that there are two problems with SWBT's testing times. First, the Joint Sponsors argue that SWBT is recovering for special services center (SSC) and local operation center (LOC) testing both for the cross-connect and in charges for the loop, thus resulting in double recovery. Second, the Joint Sponsors contend that the testing times used by SWBT are excessive because they assume the use of more extensive testing than the simple test that is required to test only the cross-connect.¹³¹

SWBT responded with testimony indicating that that it does not recover its costs for SSC and LOC in charges for the loop. Instead, it recovers the cost of those testing activities in the cross-connect elements. SWBT's witness explained that it is more appropriate to recover these costs through the cross-connect rather than through the loop element because the test procedure required will vary, depending upon what is being connected. For example, a 2-wire analog loop will have a different testing procedure if it is cross-connected to a switch port than it will if it is cross-connected to a CLEC collocation area. Including the testing cost in the cross-connect rate element helps ensure that the rates charged reflect the actual testing procedures for each type of circuit.¹³² Another SWBT witness, Mr. Schilling, confirmed that inclusion of the testing cost in the cross-connect rate element is a sound approach from a network and costing perspective.¹³³

SWBT's explanation of why it recovers these testing costs through charges for the cross-connect is reasonable. There is no evidence that SWBT is double recovering for those costs. Since SWBT is recovering all of these testing costs through its charges for the cross-connect, the Joint Sponsors' argument that the time allowed for testing is excessive is also refuted. SWBT is performing, and charging the CLECs for, only one test. It is not separately testing only the cross-connect, as alleged by the Joint Sponsors. Therefore, there is nothing to indicate that the time allowed for that testing is excessive.

The Commission finds in favor of SWBT on this issue.

¹³¹ Turner Rebuttal, Exhibit 27, Page 54, Lines 5-9.

¹³² Cass Surrebuttal, Exhibit 11, Pages 11-12, Lines 20-22, 1-10.

¹³³ Schilling Surrebuttal, Exhibit 6, Page 10, Lines 14-20.

123. Circuit Completion and Order Closeout Additional Times.

SWBT's cost study assumes that there is first and additional time required for the Circuit Completion and Order Close-Out function. The Joint Sponsors contend that the "additional" time for this task should be set to zero because this task relates to an "order" and not the number of cross-connects on the order. In other words, the task consists of administrative functions that will be done only once no matter how many cross-connects are ordered.¹³⁴

SWBT did not specifically respond to the Joint Sponsors' argument in testimony, although in its brief it asserts that additional cross-connects would increase the time required for the "order closeout" activity because more information must be included in the report if multiple elements are provisioned.¹³⁵ SWBT does not cite any evidence to support that statement.

The Joint Sponsors' position is reasonable and is not effectively challenged by SWBT. The Commission finds that the "additional" time for the Circuit Completion and Order Close-Out function should be set to zero because this task relates to an order and not the number of cross-connects on the order.

124. Circuit Order and Administrative Time for Disconnect Additional Time.

In his rebuttal testimony, Joint Sponsor's witness, Steven Turner, indicated that for the Digital Loop to DCS 2-Wire Cross-Connect, SWBT incorrectly linked back to the DS1 time for "Circuit Order and Administration" rather than the 2-wire digital DS0 time.¹³⁶ SWBT acknowledged the error and corrected it in its surrebuttal testimony.¹³⁷

There is no remaining dispute.

125. Remove Plug-in.

This issue was addressed at issue 121 and need not be addressed again.

126. Disconnect Cross-Wire Times.

Joint Sponsors contend that the appropriate time for disconnection of the cross-connect should be no more than the time for installation of that cross-connect.¹³⁸ In its brief SWBT argues that disconnect times might exceed installation times because of the extreme care the technician must take to ensure that the correct cross-connect is disconnected.¹³⁹

SWBT makes this argument for the first time in its brief and does not cite to any testimony to support its position. The cites to evidence contained in SWBT's brief only make general reference to the complexity of making a cross-connect. They do not explain why it would take longer to disconnect a cross-connect than it would take to establish that cross-connect. There is very little evidence for either position on this issue. However, intuitively, it appears that it should not take more time to disconnect a cross-connect than it would to establish that cross-connect. The amount of time required to locate the ends of cross-connect should be the same

¹³⁴ Turner Rebuttal, Exhibit 27, Pages 54-55, Lines 10-18, 1-2.

¹³⁵ Initial Brief of Southwestern Bell Telephone Company, Page 100.

¹³⁶ Turner Rebuttal, Exhibit 27, Page 50, Lines 3-6.

¹³⁷ Cass Surrebuttal, Exhibit 11, Page 27, Lines 9-16.

¹³⁸ Turner Rebuttal, Exhibit 27, Page 55, Lines 3-6.

¹³⁹ Initial Brief of Southwestern Bell Telephone Company, Pages 101-102.

11 Mo. P.S.C. 3d

for either task. The only difference would seem to be the additional care required to lay the wires into the proper channels while establishing the cross-connect. That would mean that establishing the cross-connect should take more, not less, time than disconnecting the cross-connect. The Commission finds that the appropriate times for disconnection of a cross-connect should be no greater than the installation times for that cross-connect.

127. MLT Testing Times, All Activities.

SWBT has included time for mechanized loop testing (MLT) in its non-recurring costs for 2-wire and 4-wire loop to switch port cross-connects. The Joint Sponsors contend that these tests are not done for the cross-connect alone and that the cost of such testing would be recovered in the switch port nonrecurring cost. To allow SWBT to recover them again would result in double recovery.¹⁴⁰ SWBT denies that there is any double recovery and contends that the most consistent and accurate method of recovering the costs of circuit testing activities is to recover them in the cross-connect rate elements.¹⁴¹

This issue is closely related to the issue that the Commission resolved in favor of SWBT in issue 122. In its discussion of that issue, the Commission found that circuit testing costs are properly included in the cross-connect elements. The same finding applies to the MLT testing costs at issue here. Given SWBT's adherence to the principle that circuit testing costs are to be recovered as part of the cross-connect element, its assertion that there is no double recovery of MLT testing costs gains credibility. On the other hand, the Joint Sponsors assertion that circuit-testing costs are recovered in the switch port nonrecurring cost are really just speculation about how testing costs might be recovered. The Commission rejected that assertion and found in favor of SWBT on issue 122. For the same reason, the Commission finds in favor of SWBT on this issue.

128. Capacity (HC) Circuit Log-in and Completeness Check Times.

This issue was addressed at issue 119 and need not be addressed again.

129. HC Install Times for HC Cross-connects.

This issue was addressed at issue 120 and need not be addressed again.

130. HC Plug-in Times.

This issue was addressed at issue 121 and need not be addressed again.

131. HC Cross-office Testing Times.

This issue was addressed at issue 122 and need not be addressed again.

132. HC Circuit Completion and Order Closeout Additional Times.

This issue was addressed at issue 123 and need not be addressed again.

133. HC Remove Plug-in Times.

This issue was addressed at issue 121 and need not be addressed again.

134. HC Disconnect Cross Wire Times.

This issue was addressed at issue 126 and need not be addressed again.

135. Local Operations Center (LOC) Activities Times.

This issue was addressed at issue 127 and need not be addressed again.

¹⁴⁰ Turner Rebuttal, Exhibit 27, Page 55, Lines 7-14.

¹⁴¹ Cass Surrebuttal, Exhibit 11, Page 28-29, Lines 22, 1-4.

136. Special Services Center (SSC) Testing.

SWBT's cost study includes costs for the Special Services Center (SSC) to conduct circuit testing for many cross-connects. The Joint Sponsors contend that the cost of this testing is recovered in the cost of the loop being connected and that to recover it in the cross-connect rate is double recovery.¹⁴² SWBT contends that the cost of testing is not recovered in the loop elements and should be recovered in the cross-connect rate.

These are the same arguments that were presented to the Commission in issues 122 and 127. For the reasons explained in its discussion of those issues, the Commission finds in favor of SWBT.

137. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

138. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

139. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

140. Fiber Fill Factor.

SWBT's cost studies use a fill factor of 40 percent, for fiber investment to be used in interoffice facilities. The fill factor is simply a measurement of the extra capacity available in SWBT's fiber plant.¹⁴³ A 40 percent fill factor means that 60 percent of the fiber is presumed to be unused. The Joint Sponsors propose a fill factor of 90 percent.¹⁴⁴ The higher fill factor would result in lower per line costs for CLECs seeking to lease the lines.

SWBT claims that 40 percent is an appropriate fill factor because that factor has been accepted for distribution facilities by Texas, Massachusetts and the FCC.¹⁴⁵ SWBT's witness also claimed that this Commission had established a 40 percent fill factor in TO-97-40. However, under cross-examination, Mr. Schilling conceded that the 40 percent fill factor that this Commission established in TO-97-40 was for distribution facility, not for interoffice transport.¹⁴⁶ In fact, this Commission, in TO-97-40, established a 90 percent fill factor for interoffice transport.¹⁴⁷

SWBT does not indicate any technical reason why interoffice transport fiber could not have a 100 percent fill factor. Rather, SWBT points out that there is currently an oversupply of available fiber and that it would be unrealistic to believe that SWBT would ever be able to utilize (or lease) anything like 90 percent of the available fiber.¹⁴⁸ SWBT may be correct in describing an oversupply of available fiber for interoffice transport. However, that does not mean that a 40 percent fill factor is appropriate. Under TELRIC principles, an efficiently operated telecommunica-

¹⁴² Turner Rebuttal, Exhibit 27, Page 49, Lines 9-21.

¹⁴³ Transcript Page 258, Lines 3-6.

¹⁴⁴ Turner Rebuttal, Exhibit 27, Page 57-58, Lines 5-26, 1-7.

¹⁴⁵ Schilling Surrebuttal, Exhibit 6, Pages 15-16, Lines 14-25, 1-8.

¹⁴⁶ Transcript, Pages 271-272.

¹⁴⁷ Transcript, Page 272, Lines 19-25.

¹⁴⁸ Transcript, Page 267, Lines 3-13.

11 Mo. P.S.C. 3d

tions provider would not overbuild its fiber supply for interoffice transport by 60 percent.

The Commission rejected SWBT's position in TO-97-40 and will do so again. For purposes of its cost studies, SWBT shall utilize a fill factor for interoffice transport fiber of 90 percent.

LSP to SS7 Links Cross-connects and Interoffice Facilities for Voice Grade DS0 and DS1 Links Recurring 2001-2003, March 2001.

141. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

LSP to SS7 Links Cross-connects and Interoffice Facilities for Voice Grade DS0 and DS1 Non-recurring (TELRIC) Cost Study, 2001-2003, June 2001.

142. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

143 . Dispatch to STP Central Offices.

This issue concerns the percentage of times that a technician would need to be dispatched to an unmanned central office to complete an STP connection. The Joint Sponsors sought to set this percentage at zero because SWBT admitted in discovery that it has no STPs in unmanned central offices.¹⁴⁹ In its surrebuttal testimony, SWBT explained that even though STPs are not located in unmanned central offices, technicians might still need to be dispatched to an unmanned central office to establish SS7 link continuity between a central office switch and an STP.¹⁵⁰ The Joint Sponsors never challenged SWBT's explanation at the hearing and they ignored this issue in their briefs.

SWBT's explanation about the need for dispatching a technician to an unmanned central office to complete an STP connection is reasonable, and is not challenged by any other party. The Commission finds in favor of SWBT on this issue.

144. Provision IDST A Link.

An A Link is an SS-7 signaling link established between an End Office Switch and a Signal Transfer Point (STP). Signaling allows communication between the originating end office and the SS-7 network via the STP.¹⁵¹ SWBT's cost study indicates that it takes two hours to provision an initial and an additional IDST A link. The Joint Sponsors' witness claims that SWBT did not provide documentation in its cost study to support that time. He indicates that he has performed this task along with SWBT technicians and that in his experience it took one hour to complete the task. He then proposes to allow 25 minutes for the first link and 10 minutes for the second, with no explanation of why he does not allow for a full hour.¹⁵² SWBT responded by criticizing Mr. Turner's assumptions but did not provide any further explanation or documentation for its use of two hours for provisioning the IDST A links.¹⁵³

¹⁴⁹ Turner Rebuttal, Exhibit 27, Pages 59-60, Lines 19-22, 1-3.

¹⁵⁰ Schilling Surrebuttal, Exhibit 6, Page 13, Lines 5-11.

¹⁵¹ Schilling Surrebuttal, Exhibit 6, Page 16, Lines 12-14.

¹⁵² Turner Rebuttal, Exhibit 27, Page 60, Lines 4-13.

¹⁵³ Cass Surrebuttal, Exhibit 11, Page 30, Lines 13-21.

The parties have not provided the Commission with much evidence by which to decide this issue. Southwestern Bell has the burden of supporting the reasonableness of its cost studies. By not providing documentation to establish how its time estimate was derived, SWBT has failed to support its cost study on this issue. However, the Joint Sponsors' testimony is perplexing. While Mr. Turner indicates that, in his experience, the task of provisioning two links would take one hour, he would allow only 35 minutes - 25 minutes for the initial and 10 for the additional - for the provisioning of those links. The Commission concludes that the proper time required for provisioning two IDST A links is one hour. SWBT's cost studies shall utilize that length of time for that task.

145. Fallout percentage for orders.

For some processes, the percentage of orders that can be completed electronically is less than 100 percent because a certain number of orders will fall out and require human intervention. Human intervention increases costs and, therefore, a higher fallout percentage results in higher costs, and increased charges to a CLEC purchasing a UNE.

Fallout percentages are established in some of SWBT's cost studies. But, according to the Joint Sponsors, SWBT has failed to provide support for those fallout percentages.¹⁵⁴ Because SWBT has failed to properly support its fallout percentages, the Joint Sponsors propose that the fallout rate for all processes be set at five percent, which is the best fallout rate found in any of SWBT's studies. SWBT did not present any additional evidence to support its fallout percentages in response to the Joint Sponsors' criticism. SWBT's only response was to point out that the fallout percentages proposed by the Joint Sponsors were also unsupported.¹⁵⁵

SWBT has the burden of supporting the reasonableness of its cost studies. SWBT could have filed back-up documentation with its surrebuttal testimony, or its surrebuttal testimony could have included an explanation for why fallout percentages were set where they were. SWBT did not do so. Therefore, the Commission concludes that SWBT has failed to support the reasonableness of its fallout percentages.

In order to run its cost studies, SWBT must utilize a fallout percentage. The five percent fallout rate proposed by the Joint Sponsors, while not ideal, is logically based on the best fallout rate achieved by SWBT for these order activities. If SWBT can currently achieve a five percent fallout rate on one order activity, it is reasonable to assume that a forward-looking, well-run utility will be able to achieve that fallout rate on its other order activities as well. SWBT shall use a five percent fallout rate for order activities when running its cost studies.

146. Establish Circuit Cross-Connect Times.

This issue was addressed at issue 120 and need not be addressed again.

147. Cross-Office Testing Time.

This issue was addressed at issue 122 and need not be addressed again.

¹⁵⁴ Turner Rebuttal, Exhibit 27, Pages 60-61, Lines 14-19, 1-8.

¹⁵⁵ Cass Surrebuttal, Exhibit 11, Page 31, Line 3.

11 Mo. P.S.C. 3d

148. Circuit Completion and Order Closeout Additional Times.

This issue was addressed at issue 123 and need not be addressed again.

149. Coordinate/Conduct Preservice Tests.

SWBT's cost studies indicate that it takes a certain amount of time – the exact time is considered confidential – to perform these tests. The Joint Sponsors' witness, Steven Turner, claims that these tests can be performed in ten minutes because the testing is not done sequentially. The technician can start the test and then move on to other things while the test continues to run.¹⁵⁶ SWBT did not specifically respond to the Joint Sponsors' claim, except to assert that the times in its studies were developed by knowledgeable subject matter experts who have performed the functions in question.

As the Commission has stated several times, SWBT has the burden of supporting the reasonableness of its cost studies. SWBT's time estimates are obtained from subject matter experts who are involved in the performance of these activities.¹⁵⁷ While those time estimates are certainly not conclusive, the Commission will accord them some respect unless there is a reason to doubt their reliability.

For this issue, the Joint Sponsors' have not established any lack of documentation or other shortcoming in SWBT's cost study. Instead, they simply assert that the testing time should be only ten minutes. In the absence of some evidence casting doubt on the reliability of SWBT's time estimates, the Commission will accept those time estimates. The Commission finds in favor of SWBT on this issue.

150. Coordinate/Conduct CKL Tests – Times.

This is the same issue as in issue 149, applied to a different test. Again, the Joint Sponsors would substantially reduce the amount of time that SWBT indicates is required to perform these test. For the reasons explained in issue 149, the Commission finds in favor of SWBT.

151. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

152. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

153. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Unbundled Dedicated Transport Cross-connects, Digital Cross-connect System (DCS) and Multiplexing TELRIC Study Recurring 2001-2003, March 2001.

154. DS-1 Port Pro-rata Share on DS0 Port.

In his rebuttal testimony, the Joint Sponsors' witness pointed out that SWBT forgot to include the pro-rata share of the cost of the DS1 Port on the DCS.¹⁵⁸ In its surrebuttal testimony, SWBT agreed that it had forgotten to include this cost and adjusted its cost accordingly. This had the effect of slightly increasing SWBT's cost.¹⁵⁹

The Commission need not further address this issue.

¹⁵⁶ Turner Rebuttal, Exhibit 27, Page 62, Lines 3-8.

¹⁵⁷ Cass Surrebuttal, Exhibit 11, Page 9, Lines 13-16.

¹⁵⁸ Turner Rebuttal, Exhibit 27, Page 64, Lines 17-20.

¹⁵⁹ Cass Surrebuttal, Exhibit 11, Page 31, Lines 12-14.

155. DS-1 to Voice Grade Circuit Equipment Utilization Factor.

SWBT proposes a fill factor of somewhat less than 100 percent – the exact percentage is considered confidential – for plug-ins used for DS1 to Voice Grade Multiplexing and DS3-DS1 Multiplexing. The Joint Sponsors insist that the fill factor should be 100 percent because when a CLEC purchases DS1 to DS0, or DS3-DS1 multiplexing it is purchasing the entire capacity of the higher-level signal. For example, one DS1 signal can be stepped down to 24 DS0 signals. So one incoming DS1 signal effectively occupies all DS0 signals leaving that unit of the multiplexer, even if the CLEC actually only needs three DS0 signals. Because the CLEC is already purchasing all 24 available DS0 signals, there are no unsold DS1 signals and therefore the fill factor should be 100 percent. The Joint Sponsors claim that SWBT agreed to this position in Texas.¹⁶⁰

SWBT replies that the Joint Sponsors have missed the point. The fill factor is not concerned with unused DS0 signals, rather it relates to SWBT's inventory of unused, but available for use, plug-in units. SWBT says that it must have an inventory of such units and that the fill factor is appropriate for that inventory. If SWBT does not keep any extra plug-in units on hand, it would have to place an order to the manufacturer each time a service or element requires a plug-in unit.¹⁶¹ SWBT denies that it agreed to the Joint Sponsors' position in Texas.¹⁶²

The Commission agrees with SWBT. TELRIC principles permit SWBT to account for the costs of maintaining extra capacity and inventory in its network through a fill factor. Contrary to the Joint Sponsors' assertion, the extra capacity and inventory for which SWBT is utilizing a fill factor relates to unused plug-in units, not unused DS0 signals. As a result, the Joint Sponsors arguments against the fill factor miss the point. The Commission finds in favor of SWBT on this issue.

156. DS-3 to DS1 Circuit Equipment Utilization Factor.

This issue was addressed at issue 155 and need not be addressed again.

157. Should DSX equipment be included in the DS3 Cross-connect?

This issue was addressed at issue 113 and need not be addressed again.

158. Should Multiplexing equipment be included in the recurring cost for the cross-connects in this study?

This issue was addressed at issue 111 and need not be addressed again.

159. Should Intermediate Distribution Frame (IDF) equipment be included?

This issue was addressed at issue 112 and need not be addressed again.

160. Should the recurring cost contain an in-place factor for optical jumpers?

This issue was addressed at issue 103 and need not be addressed again.

161. Cost Factors.

This issue was addressed at issues 45-62 and need not be addressed again.

Unbundled Dedicated Transport Cross-connects, Digital Cross-connect System (DCS), and Multiplexing Non-recurring (TELRIC) Cost Study, 2001-2003, June 2001.

¹⁶⁰ Turner Rebuttal, Exhibit 27, Page 65, Lines 3-15.

¹⁶¹ Cass Surrebuttal, Exhibit 11, Pages 31-32, Lines 21-23, 1-6.

¹⁶² Cass Surrebuttal, Exhibit 11, Page 33, Line 19.

11 Mo. P.S.C. 3d

162. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

163. Dispatch Time to Unmanned Central Offices, and Order Completion.

This issue was addressed at issue 117 and need not be addressed again.

164. Special Services Center (SSC) Testing.

This issue was addressed at issue 136 and need not be addressed again.

165. Network Operations Center (NOC) Software Mapping.

The Joint Sponsors would not allow any time for this activity in this cost study for the cross-connect because they allege that the activity is done for the dedicated transport circuit and should be included in the cost study for that element. To include it in this cost study would result in a double recovery.¹⁶³ SWBT denies that the activity is included in the dedicated transport circuit cost study and claims that recovery should be allowed in this cost study.¹⁶⁴

This issue is very similar to the issues that the Commission addressed in issues 127 and 122. As the Commission indicated in its discussion of those issues, SWBT has consistently taken the position that testing costs that affect both the cross-connect and the loop should be recovered as a cost for the cross-connect. The Joint Sponsors hold the opposite view. But so long as SWBT recovers these costs as part of the cost for the cross-connect or for the loop, but not both, there is no double recovery and SWBT will receive a fair price for its UNE. The Joint Sponsors contend that SWBT should recover these testing costs in another manner but they do not present any basis for believing that SWBT is making a double recovery. SWBT's testimony and position is more persuasive. The Commission finds in favor of SWBT on this issue.

166. Acceptance Testing Times.

This is the same issue as in 165. For the reasons set forth in its discussion of that issue, the Commission finds in favor of SWBT.

167. Cross-office testing times.

This issue was addressed at issue 122 and need not be addressed again.

168. Coordinate with Customer Time.

SWBT's cost study would allow a certain number of hours – the exact number is considered confidential – for coordination with the customer for the establishment of an initial DCS arrangement. The Joint Sponsors do not quarrel with the time allowed for an initial DCS arrangement. However, they do dispute the inclusion of the same number of hours for each additional DCS arrangement. The Joint Sponsors contend that consultation time would be required for the overall project, but would not need to be repeated for each additional DCS service requested by the customer.¹⁶⁵ SWBT did not respond to this argument with any testimony or other evidence, but does argue in its brief that separate consultations are required because different DCS application orders may require the use of different network architecture.¹⁶⁶

¹⁶³ Turner Rebuttal, Exhibit 27, Page 70, Lines 13-21.

¹⁶⁴ Cass Surrebuttal, Exhibit 11, Page 35-36, Lines 15-23, 1-2.

¹⁶⁵ Turner Rebuttal, Exhibit 27, Page 75, Line 1-8.

¹⁶⁶ Initial Brief of Southwestern Bell Telephone Company, Page 117-118.

The arguments in SWBT's briefs are not, of course, evidence. SWBT has failed to provide any evidence that would rebut the evidence presented by the Joint Sponsors. The testimony of Steven Turner is reasonable and will be accepted by the Commission. The Commission finds in favor of the position advocated by the Joint Sponsors. The coordinate with customer time for additional DCS arrangements shall be set at zero.

169. Coordinate with Network Time.

SWBT has included time in its cost study for a design consultant to coordinate with the network, and separate time for the consultant to coordinate with the customer. The precise times for both meetings are considered confidential. The Joint Sponsors argue that it would be much more efficient for the consultant to coordinate with the network and the customer at the same time. The Joint Sponsors would eliminate the shorter time, and allow the longer time, for a single meeting between consultant, network, and the customer.¹⁶⁷ SWBT makes no specific response to the Joint Sponsors' argument other than to defend the general accuracy of its time estimates.

The Commission finds that the position advocated by the Joint Sponsors is reasonable and will be adopted.

170. Coordinate with Market Time.

SWBT included a specific amount of time – the exact time is considered confidential – for SWBT personnel to “coordinate with marketing” in establishing DCS functionality for the CLEC. The Joint Sponsors argue that because the purchase of a UNE by a CLEC is a wholesale activity, not retail, there should be no need for the CLEC to pay for any coordination with marketing.¹⁶⁸ SWBT does not respond to the allegation that this is a wholesale activity for which there is no need to coordinate with marketing.

The position advocated by the Joint Sponsors is reasonable. Given the lack of response by SWBT to refute the allegations of the Joint Sponsors, the Commission can only conclude that the time allowed in SWBT's cost studies for coordination with marketing should not be included in the costs allotted to the wholesale activity of providing a UNE to a CLEC. The Commission finds in favor of the Joint Sponsors.

171. Administration Log-in Order Completion.

SWBT included a function called “Administration login order completion” in its cost study. The Joint Sponsors allege that SWBT failed to provide any support for this task, contrary to the way in which it normally supports such functions in its cost studies. Because of the lack of support, the Joint Sponsors ask the Commission to remove this activity from the cost study.¹⁶⁹ SWBT did not provide any evidence to rebut the Joint Sponsors' evidence. In its brief, SWBT indicated that everyone knows that orders need to be completed and that SWBT should be allowed to recover for those costs. SWBT does not attempt to explain why there was no documentation in the cost study for that function. Instead, SWBT states that “[t]he

¹⁶⁷ Turner Rebuttal, Exhibit 27, Page 75, Lines 9-16.

¹⁶⁸ Turner Rebuttal, Exhibit 27, Page 71, Lines 6-11.

¹⁶⁹ Turner Rebuttal, Exhibit 27, Page 71, Lines 12-16.

11 Mo. P.S.C. 3d

fact that they did not see the back-up documentation has no bearing on whether the cost of this activity should be included in the cost study”.¹⁷⁰

Despite its view that back-up documentation does not matter, SWBT does have the burden of proving that its cost studies are reasonable. A complete lack of back-up documentation means that SWBT is asking the CLECs and the Commission to simply assume that the costs it has claimed are reasonable. The Commission is not willing to make that assumption. The Commission finds for the Joint Sponsors. SWBT shall remove all costs associated with “Administration login order completion” from its cost study.

172. Dispatch for Multiplexing.

SWBT includes dispatch cost in both the multiplexing nonrecurring cost and in the dedicated transport to multiplexing cross-connect nonrecurring cost. The Joint Sponsors argue that a technician will not need to be dispatched twice to perform two activities that will always be ordered together.¹⁷¹ According to the Joint Sponsors, a CLEC would never order multiplexing and the cross-connect to the multiplexer separately. Therefore, to include dispatch costs in both cost studies would result in double-recovery. SWBT did not present any evidence on this issue but in its brief argued that these are separate UNEs that can be ordered on separate service orders. There is no guarantee that a CLEC will order both UNEs on the same service order. For that reason, SWBT contends that it should be allowed to recover the cost of dispatch in both cost studies.¹⁷²

The Commission finds the Joint Sponsors’ argument to be more persuasive. Even though they are separate UNEs, the Commission cannot conceive of an occasion when a CLEC would order multiplexing and a cross-connect to the multiplexer separately. One UNE is of no use without the other. Therefore, a technician would never need to be dispatched twice to provision these UNEs. To permit SWBT to recover the cost of dispatching for both UNEs would result in double recovery. The Commission finds that the probability of having a dispatch for the multiplexing nonrecurring costs should be set to zero.

173. Cross-connects in Multiplexing Costs.

The Joint Sponsors again allege double-recovery by SWBT. Joint Sponsors allege that SWBT has duplicated the cross-connect costs in both the cross-connect rate element for dedicated transport and in the multiplexing rate element. Joint Sponsors would end the double recovery by removing the cross-connect cost for the multiplexing rate element.¹⁷³ At the hearing, SWBT’s witness explained that this cross-connect cost is related to the cost of connecting the multiplexer to the CLEC’s collocation cage. The recurring charge for that connection is included in the charge to the CLEC for operating the collocation cage. However, SWBT indicated that the non-recurring charge for establishing the connection – the cost of placing the jump

¹⁷⁰ Initial Brief of Southwestern Bell Telephone Company, Pages 120-121.

¹⁷¹ Turner Rebuttal, Exhibit 27, Page 72, Lines 5-9.

¹⁷² Initial Brief of Southwestern Bell Telephone Company, Page 121.

¹⁷³ Turner Rebuttal, Exhibit 27, Page 72, Lines 10-17.

wire from the multiplexer to the connection spot on the frame that takes the cable back to the CLEC collocation area is not captured in the collocation agreement, and should be recovered in the manner proposed by SWBT.¹⁷⁴

The explanation offered by SWBT's witness is reasonable and effectively refutes the conclusions reached by the Joint Sponsor's witness in his testimony. The Commission finds in favor of SWBT.

174. Plug-in Activities Times.

This issue was addressed at issue 121 and need not be addressed again.

175. Log-in and Completeness Check Times.

This issue was addressed at issue 119 and need not be addressed again.

176. Establish Circuit Cross-Connect Times.

This issue was addressed at issue 120 and need not be addressed again.

177. Circuit Completion and Order Closeout Additional Times.

This issue was addressed at issue 123 and need not be addressed again.

178. DCS Training Times.

The Joint Sponsors' witness identified two areas of concern regarding this issue. First, SWBT includes a specified length of time—the exact time is considered confidential—of training for the CLEC with each initial DCS establishment, and an identical time for training for the CLEC with each additional DCS ordered. The Joint Sponsors allege that initial training is all that is required and that the cost of training for each additional DCS should be eliminated.¹⁷⁵ SWBT did not present any evidence to specifically respond to this argument. But in its brief, SWBT pointed out that additional training may be needed each time a CLEC orders a DCS if the CLEC does not use the same personnel to make adjustments to each of the DCS systems purchased as a UNE. Furthermore, additional training may be required if the DCS is used in an additional location, or if a different provisioning procedure is established.¹⁷⁶

As the Commission has stated several times, SWBT has the burden of supporting the reasonableness of its cost studies. SWBT's time estimates are obtained from subject matter experts who are involved in the performance of these activities.¹⁷⁷ While those time estimates are certainly not conclusive, the Commission will accord them some respect unless there is a reason to doubt their reliability.

For this issue, the Joint Sponsors have not established any lack of documentation or other shortcoming in SWBT's cost study. Instead, they simply assert that additional training is not required. In the absence of some evidence casting doubt on the reliability of SWBT's time estimates, the Commission will accept those time estimates. The Commission finds in favor of SWBT on this issue.

The Joint Sponsors' second area of concern regards SWBT's use of loaded labor rates that already account for paid absence time such that less than 100 percent of a work-day is available for work. From that, Joint Sponsors argue that

¹⁷⁴ Transcript, Pages 366-367, Lines 16-25, 1.

¹⁷⁵ Turner Rebuttal, Exhibit 27, Page 75, Lines 17-20.

¹⁷⁶ Initial Brief of Southwestern Bell Telephone Company, Page 123.

¹⁷⁷ Cass Surrebuttal, Exhibit 11, Page 9, Lines 13-16.

11 Mo. P.S.C. 3d

SWBT should not be permitted to charge the loaded labor rate for 100 percent of the training time when the loaded labor rate assumes that less than 100 percent of the workday is used. The Joint Sponsors would apply the loaded labor rate, but for less than 100 percent of the workday.

The Joint Sponsors argument is inconsistent with the concept of a loaded labor rate and would deny SWBT an opportunity to recover its legitimate costs. The Commission finds in favor of SWBT on this issue.

179. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

180. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

181. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Unbundled Dedicated Transport Interoffice Facilities for DS0, OC3, and OC12 Recurring 2001-2003, March 2001.

182. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

183. Fiber Fill Factor.

This issue was addressed at issue 140 and need not be addressed again.

184. Is SWBT's sample size for Interoffice Facilities Circuits reasonable?

The Joint Sponsors argue that SWBT improperly excluded most, if not all high capacity circuits, such as OC3 and OC12 circuits from its cost study regarding interoffice circuits. According to the Joint Sponsors witness, if SWBT's study had considered all its circuits, the resulting costs might have been lower.¹⁷⁸ Joint Sponsors are not able to identify which circuits were improperly excluded.

SWBT's witness testified that the cost study included all interoffice circuits, except private line circuits. SWBT contends that private line circuits are a relatively small component and their inclusion would not have altered the study.¹⁷⁹ Specifically, SWBT's witness testified that nearly all 56 Kbps Special Service Circuits are included in the study sample, and that the only such circuits excluded are private line circuits. However, the inclusion or exclusion of private line circuits is not the problem identified by the Joint Sponsors. The Joint Sponsors contend that 56 Kbps circuits are a voice grade circuit and that, therefore, SWBT has not responded to its argument that high capacity interoffice circuits have been improperly excluded from SWBT's study.¹⁸⁰

SWBT's testimony does not clearly indicate whether it has included all high capacity interoffice circuits in its cost study sample. Failure to include those high capacity circuits may make SWBT's cost study sample unreliable. If it has not included high capacity interoffice circuits in its cost study sample, SWBT shall do so.

¹⁷⁸ Turner Rebuttal, Exhibit 27, Pages 78-79, Lines 23-25, 1-17.

¹⁷⁹ Cass Surrebuttal, Pages 37-38, Lines 14-22, 1-7.

¹⁸⁰ Joint Sponsors' Proposed Findings of Fact and Conclusions of Law, Page 96.

185. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

186. Fallout percentage for Orders.

This issue was addressed at issue 145 and need not be addressed again.

187. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

188. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

189. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Unbundled Dedicated Transport Entrance Facilities DS3, OC3, and OC12 TELRIC Recurring Study, 2001-2003, April 2001.**190. Fiber Fill Factor.**

This issue was addressed at issue 140 and need not be addressed again.

191. Cost Factor.

This issue was addressed at issues 45-81 and need not be addressed again.

Unbundled Dedicated Transport Entrance Facilities DS3, OC3, and OC12 TELRIC Recurring Study, 2001-2003, April 2001.**192. Fiber Fill Factor.**

This issue was addressed at issue 140 and need not be addressed again.

193. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

Unbundled Dedication Transport Entrance Facilities DS1, DS3, OC3 and OC12 Nonrecurring (TELRIC) Cost Study, 2001-2003, June 2001.**194. Should full disconnect cost be paid at the time the connection is made?**

This issue was addressed at issue 106 and need not be addressed again.

195. Should SSC Testing be included in the Entrance Facilities Study?

SWBT has placed the cost of SSC testing partially in the cross-connect and partially in the entrance facility element. If, as the Joint Sponsors want, the Commission were to determine that SSC Testing should be excluded from the cross-connect costs, then these costs would have to be attributed solely to the entrance facility element. However, as the Joint Sponsors indicate, a decision on this issue is necessary only if the Commission found in favor of the Joint Sponsors on issue 136. The Commission found in favor of SWBT on issue 136 and did not exclude SSC testing from the cross-connect. Therefore, this issue is moot and need not be further addressed.

196. Time for Log, Sort, Match, Distribute Ordering Tasks.

The Joint Sponsors' witness argues that this task is largely administrative and would not vary with the number of entrance facilities being ordered. Therefore, Joint Sponsors would set the order time for "additional" entrance facilities at zero. In addition, Joint Sponsors witness indicates that the initial time should also be set at zero because these orders are handled electronically and are actually performed under another element, order analysis.¹⁸¹ SWBT did not provide any evidence in response to the first part of the argument regarding "additional" entrance facilities.

¹⁸¹ Turner Rebuttal, Exhibit 27, Pages 85-86, Lines 11-19, 1-4.

11 Mo. P.S.C. 3d

SWBT also failed to offer any evidence to rebut the second half of the argument, but argues in its brief that, although the orders are sent to work groups electronically, the task at issue relates to the time required to sort and distribute the work within the work group. SWBT claims that task is not performed electronically.¹⁸²

The argument presented in the testimony of the Joint Sponsors' witness is reasonable. SWBT failed to provide any evidence to rebut that argument. While the argument contained in SWBT's brief is plausible, it is, of course, not evidence. The Commission finds in favor of the Joint Sponsors. The times for both the initial and the additional Log, Sort, Match, Distribute Ordering Tasks are set at zero.

197. Order Analysis Times.

The Joint Sponsors argue that the time required for analysis of "additional" facilities within an order is largely accounted for in the initial element ordered and would limit the time allowed for analysis of "additional" element to 0.5 minutes. The Joint Sponsors' witness indicates that this length of time is sufficient because most of the required decision-making relates to the order, not the additional elements.¹⁸³ SWBT did not present any evidence in response to the Joint Sponsors' argument. However, in its brief, SWBT argues that a SWBT technician would have to review each requested element for necessary termination points and that, as a result, additional time would be required for each additional element.

The argument presented in the testimony of the Joint Sponsors' witness is reasonable, and SWBT failed to provide any evidence to rebut that argument. While the argument contained in SWBT's brief is plausible, it is, of course, not evidence. The Commission finds in favor of the Joint Sponsors. The time for additional Order Analysis is set at 0.5 minutes per each additional entrance facility.

198. Dispatch time to Unmanned Central Offices, and Order completion.

The Joint Sponsors point out that the time SWBT allots for dispatching a technician to a customer's premises to provision an entrance facility in this cost study is longer than the time allotted for the same task in SWBT's sub-loop cross-connect nonrecurring cost study. The Joint Sponsors would allow the lesser time for both tasks.¹⁸⁴ SWBT did not present any evidence about this issue. Instead, SWBT stated that this issue was withdrawn by the Joint Sponsors and did not further address it in its briefs.¹⁸⁵

In their reply brief, the Joint Sponsors indicate that this issue was shown as withdrawn in its initial position matrix filed on November 28, 2001, but state that the position matrix was corrected before the hearing. The record indicates that the Joint Sponsors filed a letter on December 3, 2001, the first day of hearing, in which they explained that they were not withdrawing this issue. SWBT filed its surrebuttal testimony on November 15, 2001, before the Joint Sponsors' position matrix was filed, or corrected. Therefore, SWBT could not have relied on the Joint Sponsors' mistake in preparing its surrebuttal testimony. The Commission concludes that this issue has not been withdrawn.

¹⁸² Initial Brief of Southwestern Bell Telephone Company, Page 127.

¹⁸³ Turner Rebuttal, Exhibit 27, Page 86, Lines 5-13.

¹⁸⁴ Turner Rebuttal, Exhibit 27, Page 86, Lines 14-19.

¹⁸⁵ Initial Brief of Southwestern Bell Telephone Company, Pages 128-129.

The argument presented in the testimony of the Joint Sponsors' witness is reasonable, and SWBT failed to provide any evidence to rebut that argument. The Commission finds in favor of the Joint Sponsors. The time that SWBT allots in this cost study for dispatching a technician to a customer's premises to provision an entrance facility, is reduced to match the time allotted for the same task in SWBT's sub-loop cross-connect nonrecurring cost study.

199. Plug-in Activities Times.

This issue was addressed at issue 121 and need not be addressed again.

200. Log-in and Completeness Check Times.

SWBT and the Joint Sponsors agree that this issue has been withdrawn. Therefore, it need not be further addressed by the Commission.

201. Establish Circuit Cross-connect Times.

This issue was addressed at issue 120 and need not be addressed again.

202. Circuit Order completion and order closeout additional times.

This issue was addressed at issue 123 and need not be addressed again.

203. Disconnect cross wire times.

This issue was addressed at issue 126 and need not be addressed again.

204. Coordinate/Conduct Preservices Tests Low Speed.

SWBT's cost studies indicate that it takes a certain amount of time – the exact time is considered confidential – to perform these tests. The Joint Sponsors' witness, Steven Turner, claims that these tests can be performed in ten minutes because the testing is not done sequentially. The technician can start the test and then move on to other things while the test continues to run.¹⁸⁶ SWBT did not specifically respond to the Joint Sponsors' claim, except to assert that the times in its studies were developed by knowledgeable subject matter experts who have performed the functions in question.

As the Commission has stated several times, SWBT has the burden of supporting the reasonableness of its cost studies. SWBT's time estimates are obtained from subject matter experts who are involved in the performance of these activities.¹⁸⁷ While those time estimates are certainly not conclusive, the Commission will accord them some respect unless there is a reason to doubt their reliability.

For this issue, the Joint Sponsors have not established any lack of documentation or other shortcoming in SWBT's cost study. Instead, they simply assert that the testing time should be only ten minutes. In the absence of some evidence casting doubt on the reliability of SWBT's time estimates, the Commission will accept those time estimates. The Commission finds in favor of SWBT on this issue.

205. Coordinate/Conduct Preservice Tests High Speed.

SWBT's cost studies indicate that it takes a certain amount of time – the exact time is considered confidential – to perform these tests. The Joint Sponsors' witness, Steven Turner, claims that these tests can be performed in five minutes because the testing is not done sequentially. The technician can start the test and

¹⁸⁶ Turner Rebuttal, Exhibit 27, Pages 87-88 , Lines 16-20, 1.

¹⁸⁷ Cass Surrebuttal, Exhibit 11, Page 9, Lines 13-16.

11 Mo. P.S.C. 3d

then move on to other things while the test continues to run.¹⁸⁸ SWBT did not specifically respond to the Joint Sponsors' claim, except to assert that the times in its studies were developed by knowledgeable subject matter experts who have performed the functions in question.

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For this issue, the Joint Sponsors have not established any lack of documentation or other shortcoming in SWBT's cost study. Instead, they simply assert that the testing time should be only ten minutes. In the absence of some evidence casting doubt on the reliability of SWBT's time estimates, the Commission will accept those time estimates. The Commission finds in favor of SWBT on this issue.

206. Fallout percentage for probabilities <100%.

This issue was addressed at issue 145 and need not be addressed again.

207. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

208. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

209. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Unbundled 2-Wire Analog Trunk Port Non-recurring TELRIC Cost Study, April 2001.

210. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

211. Prepare the Route Index for Record Keeping Regarding the Trunk Group.

This issue relates to a cost study used by SWBT to set rates for a DID number block assignment. In its discussion of issues 27-28, the Commission found that SWBT could not use a DID Trunk Port cost study to set rates for a DID number block assignment. Instead, the Commission ordered SWBT to use the rates established in the T2A. Because the Commission has decided that SWBT may not use this cost study, the Commission need not further address this issue.

212. Load the Trunk Group Information Into the Mechanized Translations System.

SWBT and the Joint Sponsors agree that this issue is simply a duplication of issue 211. The Commission need not further address this issue.

213. Implementation Time for First Trunk Group.

This issue relates to a cost study used by SWBT to set rates for a DID number block assignment. In its discussion of issues 27-28, the Commission found that SWBT could not use a DID Trunk Port cost study to set rates for a DID number block

¹⁸⁸ Turner Rebuttal, Exhibit 27, Page 88 , Lines 1-5.

¹⁸⁹ Cass Surrebuttal, Exhibit 11, Page 9, Lines 13-16.

assignment. Instead, the Commission ordered SWBT to use the rates established in the T2A. Because the Commission has decided that SWBT may not use this cost study, the Commission need not further address this issue.

214. Implementation Time for Additional Trunk Groups.

This issue relates to a cost study used by SWBT to set rates for a DID number block assignment. In its discussion of issues 27-28, the Commission found that SWBT could not use a DID Trunk Port cost study to set rates for a DID number block assignment. Instead, the Commission ordered SWBT to use the rates established in the T2A. Because the Commission has decided that SWBT may not use this cost study, the Commission need not further address this issue.

215. Should the cost structure for this rate element be for an individual trunk?

This issue relates to a cost study used by SWBT to set rates for a DID number block assignment. In its discussion of issues 27-28, the Commission found that SWBT could not use a DID Trunk Port cost study to set rates for a DID number block assignment. Instead, the Commission ordered SWBT to use the rates established in the T2A. Because the Commission has decided that SWBT may not use this cost study, the Commission need not further address this issue.

216. Should the preparations and implementation times for DMS100 translations be the same as for 5ESS?

SWBT's cost study has allowed different times for the translations or programming times of the DMS100 and 5ESS switches for various UNEs and services. Joint Sponsors' witness claims, based on his experience, that the programming time for the two switches should be the same and suggests that if the programming times were not similar, the switch requiring the longer programming time would not be in use. The Joint Sponsors argue that the Commission should set the programming time for both switches at the shorter of the two times offered by SWBT.¹⁹⁰ SWBT replies that there are, in fact, differences in the programming time for the switches and that such differences are normal and are to be expected.¹⁹¹

The Commission finds that SWBT's explanation of the different programming times for the two types of switches is persuasive. It is reasonable to believe that two different technologies, both appropriately forward-looking, would require different programming times. Contrary to the assertion by the Joint Sponsors' witness, the fact that one of the switches may require more programming time would not drive it out of the market. Programming time is only one small factor in a company's decision about what switch should be purchased.¹⁹² The Commission finds in favor of SWBT.

217. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

218. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

¹⁹⁰ Turner Rebuttal, Exhibit 27, Page 96, Lines 1-4.

¹⁹¹ Barch Surrebuttal, Exhibit 14, Pages 11-12, Lines 23, 1-8.

¹⁹² Barch Surrebuttal, Exhibit 14, Page 12, Lines 13-21.

11 Mo. P.S.C. 3d

219. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Unbundled Digital DS1 Trunk Port Non-recurring TELRIC Cost Study, April 2001.

220. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

221. Prepare the route index for record keeping regarding the trunk group.

This issue was addressed at issue 211 and need not be addressed again.

222. Load the trunk group information into the Mechanized Translations System.

This issue is a duplicate of 221. It was addressed at issue 211 and need not be addressed again.

223. Implementation Time for first trunk group.

This issue was addressed at issue 213 and need not be addressed again.

224. Implementation Time for additional trunk groups.

This issue was addressed at issue 214 and need not be addressed again.

225. Should the cost structure for this rate element be for an individual trunk?

This issue was addressed at issue 215 and need not be addressed again.

226. Should the preparation and implementation times for DMS100 translations be the same as for 5ESS?

This issue was addressed at issue 216 and need not be addressed again.

227. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

228. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

229. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

230. STP Link Utilization.

For reasons explained in its Conclusions of Law, the Commission finds that the fill factor for STP links should be set at 40 percent, or 80 percent for a mated pair.

231. STP Utilization.

This issue is closely related to issue 230. Steven Turner, witness for the Joint Sponsors, explains that the investment and cost established in issue 230 are investments during the busy hour, which lead to costs during the busy hour. SWBT will, however, bill for those investments and related costs whenever the OLSN Query (or other related signaling element) occurs. Therefore, the investment and cost must be converted to annualized expected queries. One of the inputs that SWBT uses to make this conversion calculation is the STP utilization. Turner indicates that for purposes of this calculation, the STP utilization rate should be 80 percent of the 40 percent Engineered Capacity of the STP, in other words, 32 percent.¹⁹³

¹⁹³ Turner Rebuttal, Exhibit 27, Pages 100-101, Lines 14-18, 1-12.

SWBT did not specifically respond to Turner's variation of the STP utilization rate except to again argue that STP utilization factors should be based on actual usage trended forward for likely usage in the future.¹⁹⁴ The Commission rejected that argument in issue 230, and for the same reason rejects it here. The Commission finds that SWBT's calculations should be based on 32 percent STP utilization during the busy hour in a forward-looking TELRIC cost study.

232. Expenses for NETPILOT and ACCESS7 Software, is it double counted?

The NETPILOT and ACCESS7 software is used by SWBT to manage the signaling network. The Joint Sponsors contend that the annual expenses for those software systems are already recovered in the cost factors that are applied to investments. To include it again in this cost study would result in double recovery.¹⁹⁵ SWBT's witness, David Barch, testified that the costs in question are direct costs of the elements being studied and are not captured in other cost factors. He denied that there is any double recovery.¹⁹⁶

SWBT's explanation of how these costs are recovered is reasonable and persuasive. There is no indication that these costs are double recovered. The Commission finds in favor of SWBT.

233. CCSCIS Equipment Vendor Discount.

This issue concerns the discount off list price that SWBT receives when it purchases switching equipment. The Joint Sponsors allege that SWBT has not included any discount and has instead included list prices when running its calculations. The Joint Sponsors assert that Texas ordered SWBT to utilize a 40 percent discount and urge Missouri to impose the same discount percentage.¹⁹⁷ Staff's witness agreed that substantial discounts are available to SWBT but he did not quantify an appropriate discount. He explained that manufacturers may offer varying discounts to purchasers depending upon what equipment is being purchased. The exact discounts offered by a manufacturer are usually kept secret, presumably to prevent customers from comparing prices.¹⁹⁸

SWBT replied, in its brief, that the prices it utilized are not list prices but instead are the actual prices it pays for equipment and thus would already incorporate the discounts that it actually receives.¹⁹⁹ SWBT does not, however, cite to any evidence to support that argument.

The argument presented in the testimony of Mr. Turner and Mr. Johnson is reasonable, and SWBT failed to provide any evidence to rebut that argument. While the argument contained in SWBT's brief is plausible, it is, of course, not evidence. The Commission finds that the 40 percent discount from list price established in Texas is reasonable and is adopted.

¹⁹⁴ Initial Brief of Southwestern Bell Telephone Company, Page 139.

¹⁹⁵ Turner Rebuttal, Exhibit 27, Page 101, Lines 13-19.

¹⁹⁶ Barch Surrebuttal, Exhibit 14, Pages 21-22, Lines 21-23, 1-2.

¹⁹⁷ Turner Rebuttal, Exhibit 27, Page 102, Lines 1-8.

¹⁹⁸ Johnson Rebuttal, Exhibit 24, Page 125, Lines 14-23.

¹⁹⁹ Initial Brief of Southwestern Bell Telephone Company, Page 140.

11 Mo. P.S.C. 3d

234. What is the correct Marginal CCS per channel in order to size material investment?

The marginal CCS per channel is the number of seconds that are available for use during a busy hour. 36 CCS would be equal 3600 seconds, or 60 minutes times 60 seconds. This would represent full use of every available second during the hour. SWBT's cost study incorporated a CCS of slightly less than 36 – the exact number is considered confidential. The Joint Sponsors' witness testified that in his experience, in most cost studies, the CCS is set at 36. He asserted that use of a lower value simply adds another layer of fill to the calculations that is not consistent with efficient engineering practice.²⁰⁰

SWBT's witness replied that SWBT properly used a lower CCS value to take into account the fact that even in the busy hour, not all 36 CCS are readily available for use. He indicates that the value used by SWBT is supported by the user guide published by the creator of the CCSCIS program.²⁰¹

The testimony of SWBT's witness is more persuasive. It is reasonable to believe that not every second of any hour will be available for use. The testimony of the Joint Sponsors' witness, by contrast, appears to be based on little more than speculation about what is done in "most" cost studies that he has seen. That is not a solid enough basis for the Commission to decide in favor of the Joint Sponsors' argument. The Commission finds in favor of SWBT.

235. Cost Factor.

This issue was addressed at issues 45-81 and need not be addressed again.

236. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

SS7 Transport TELRIC Cost Study, April 2001.

237. STP Link Utilization.

This issue was addressed at issue 230 and need not be addressed again.

238. STP Utilization.

This issue was addressed at issue 231 and need not be addressed again.

239. Expenses for NETPILOT and ACCESS7 Software, it is double counted?

This issue was addressed at issue 232 and need not be addressed again.

240. CCSCIS Equipment Vendor Discount.

This issue was addressed at issue 233 and need not be addressed again.

241. What is the correct Marginal CCS per Channel in order to size material investment?

This issue was addressed at issue 234 and need not be addressed again.

242. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

243. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

SS7 LIDB Validation Query TELRIC Cost Study, April 2001.

²⁰⁰ Turner Rebuttal, Exhibit 27, Page 102, Lines 9-16.

²⁰¹ Barch Surrebuttal, Exhibit 14, Page 22, Lines 12-16.

244. STP Link Utilization.

This issue was addressed at issue 230 and need not be addressed again.

245. STP Utilization.

This issue was addressed at issue 231 and need not be addressed again.

246. Expenses for NETPILOT and ACCESS7 Software, is it double counted?

This issue was addressed at issue 232 and need not be addressed again.

247. CCSCIS Equipment Vendor Discount.

This issue was addressed at issue 233 and need not be addressed again.

248. Average Number of SS1 Clerks.

The Joint Sponsors offer two arguments regarding this issue. First, the Joint Sponsors point out that SWBT's cost studies indicate that it has a specific number of SS1 clerks in Missouri that work on SLEUTH queries. The exact number of clerks is confidential. SWBT also has a specific number of SS1 clerks in Missouri that work on SMS queries. That exact number is also confidential. The Joint Sponsors indicate that the total of SS1 clerks in Missouri that work on SLEUTH queries, plus the total of SS1 clerks in Missouri that work on SMS queries, adds up to more than the total number of SS1 clerks in Missouri, as established in SWBT's labor rate documentation.²⁰² The Joint Sponsors presume that this means that there is some overlap in the work assignments of the SS1 clerks. The Joint Sponsors would address this overlap by leaving in place the SS1 clerks that are assigned to SMS queries, while reducing the number of clerks assigned to SLEUTH queries, so that the total number of SS1 clerks assigned to SMS queries and SLEUTH queries would match the total number of SS1 clerks.

This aspect of the Joint Sponsors' argument is reasonable and persuasive. It is not rebutted by SWBT in either testimony or argument. The Commission finds in favor of the Joint Sponsors on this portion of their argument.

The Joint Sponsors also have a second argument regarding this issue. They point out that SWBT's cost study assumes that the number of SLEUTH queries is declining over the 2001-2003 period. This has the effect of increasing the cost per query. The Joint Sponsors propose that if the number of queries is declining, then the number of SS1 clerks required to handle those queries should also decline by a like percentage.²⁰³ SWBT did not present any testimony or other evidence to specifically refute this argument but does respond in its brief by pointing out that its estimates for the number of SS1 clerks are forward looking and not based on embedded, existing costs. SWBT also asserts that the number of staff handling these claims does not vary with the number of claims processed.²⁰⁴

Although SWBT has not effectively refuted the Joint Sponsors' second argument, the Commission does not find that argument to be reasonable. That argument does not address the question of whether SS1 clerks no longer needed for reduced numbers of SLEUTH queries would simply be reassigned to work on SMS queries, for which, according to Mr. Turner, the number of queries is

²⁰² Turner Rebuttal, Exhibit 27, Page 111, Lines 5-10.

²⁰³ Turner Rebuttal, Exhibit 27, Pages 111-112, Lines 13-19, 1-2.

²⁰⁴ Initial Brief of Southwestern Bell Telephone Company, Page 143.

increasing.²⁰⁵ In the first part of this issue, the Joint Sponsors assumed that there would be an overlap in the work assignments of SS1 clerks. The Commission agreed with that assumption at that time, and it is still a reasonable assumption to make for this half of the issue. Because SS1 clerk positions assigned to SLEUTH queries are likely to be reassigned to SMS queries rather than eliminated, the Commission finds that the number of such positions should not be further reduced with the reduction in number of SLEUTH queries. The Commission finds in favor of SWBT on this portion of this issue.

249. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

250. X.25 Links (Transport) Investment.

SWBT's cost study assumes that X.25 Links require an investment of a specific amount of dollars per pair of links. The specific amount is confidential. In another cost study SWBT indicated that a DS0 Dedicated Transport Link required an investment of a specific amount of dollars per pair. Again, the specific amount is confidential. Although the exact amounts are confidential, the reported investment in the X.25 Links is 57 times greater than the reported investment in a DS0 Dedicated Transport Line. The difference in reported investment amounts to many thousands of dollars.

The Joint Sponsors' witness argues that an X.25 Link is effectively a DS0 Dedicated Transport Link, and that there is no reasonable basis for the vast difference in the reported investment in the two, similar links. The Joint Sponsors would, therefore, reduce the level of investment in the X.25 Links to match that of the DS0 Dedicated Transport Link.²⁰⁶

SWBT's response to the Joint Sponsors argument, in its entirety is that "X.25 links have a unique protocol, thus differing from DS0 links. Therefore, the two are not considered proxies for one another in the development of this cost."²⁰⁷ SWBT does not explain why the investment required for an X.25 Link is 57 times, and many thousand dollars, greater than the investment required for a DS0 Dedicated Transport Link.

There may be some differences between an X.25 Link and a DS0 Dedicated Transport Link such that they are not considered proxies for one another. However, the investment cost that SWBT has assumed for a pair of X.25 Links is so outrageously high, when compared to the investment cost of a pair of DS0 Dedicated Transport Links, that it must be rejected. Under the circumstances, the Joint Sponsors' suggestion that the Commission use the investment cost of a pair of DS0 Dedicated Transport Links as a stand-in is reasonable. The Commission finds that the investment cost for a pair of X.25 Links shall be assumed to be equal to the investment cost for a pair of DS0 Dedicated Transport Links.

251. SLEUTH System Vendor Maintenance Expense.

The Joint Sponsors' witness testified that these expenses are already recovered via support asset factors and should not be directly recovered through this cost

²⁰⁵ Turner Rebuttal, Exhibit 27, Page 111, Lines 10-11.

²⁰⁶ Turner Rebuttal, Exhibit 27, Page 112, Lines 10-16.

²⁰⁷ Barch Surrebuttal, Exhibit 14, Page 23, Lines 22-23.

study.²⁰⁸ SWBT acknowledged that the Joint Sponsors' position was correct, corrected the cost study, and presented the results in its surrebuttal testimony.²⁰⁹ The Commission need not further address this issue.

252. Number Sun Workstations to Upgrade.

This issue is tied to issue 248. SWBT proposes to upgrade a number of Sun Workstations for use by its SS1 clerks. The exact number is confidential. The Joint Sponsors argue that, with the reduction of SS1 clerks resulting from the Commission's decision on issue 248, there should be a similar reduction in the number of workstations that would otherwise be provided for those clerks.²¹⁰ SWBT did not specifically respond to the Joint Sponsors' testimony, except to state that there is no reason to reduce the number of SS1 clerks assigned to operate the SLEUTH system.²¹¹

The parties have provided the Commission with very little basis for making a decision on this issue. No one has explained what a Sun Workstation is, and whether the number of workstations to be upgraded is, in any way, linked to the number of SS1 clerks assigned to the SLEUTH system. The Commission notes that Mr. Turner's testimony indicates that SWBT intended to upgrade more workstations than it had clerks, indicating that perhaps there is no such linkage. On that basis, the Commission finds in favor of SWBT.

253. Should expenses to upgrade the Sun Workstation be expenses every year?

SWBT capitalized the cost of upgrading the Sun Workstations, but it expensed the installation cost of the system upgrade each year. The Joint Sponsors argue that SWBT should also be required to capitalize the one-time cost of installing the system upgrade rather than expense it every year. According to the Joint Sponsors' witness, SWBT's method of handling these installation costs would require the CLECs to bear the cost of this one-time expense year after year, prorated across the SLEUTH queries.²¹² SWBT's reply indicates only that it has "expressed these costs in a consistent manner with how it expects to incur them."²¹³

The Commission finds that the expert testimony of the Joint Sponsors' witness is persuasive on this issue. The CLECs should not be required to bear the one-time installation costs year after year. The Commission finds in favor of the position advocated by the Joint Sponsors. The installation expenses relating to the Sun Workstations must be capitalized.

254. Should loaded labor rates be used within this cost study?

The title that the parties chose for this issue is misleading. The question raised by the Joint Sponsors is not whether loaded labor rates should be used, rather the

²⁰⁸ Turner Rebuttal, Exhibit 27, Page 112-113, Lines 18-22, 1-2.

²⁰⁹ Barch Surrebuttal, Exhibit 14, Page 25, Lines 5-15.

²¹⁰ Turner Rebuttal, Exhibit 27, Page 113, Lines 3-8.

²¹¹ Initial Brief of Southwestern Bell Telephone Company, Page 144.

²¹² Turner Rebuttal, Exhibit 27, Page 113, Lines 9-14.

²¹³ Barch Surrebuttal, Exhibit 14, Page 24, Line 7.

11 Mo. P.S.C. 3d

question is to how many hours should those rates be applied? The Joint Sponsors allege that SWBT misapplied its loaded labor rates by applying them to all hours in the year, effectively assuming that an employee works every minute of every day of the year. In order to correct this problem, the Joint Sponsors' witness stated that the number of hours should be adjusted to capture only working hours.²¹⁴ SWBT replies that its loaded labor rates are applied only to actual activity times and do not include breaks or holiday time.²¹⁵

The Joint Sponsors' argument states a requirement to which SWBT readily agrees; loaded labor rates should be applied only to actual hours worked. SWBT complies with that requirement by instructing its subject matter experts, who determine work-times used in the cost studies, not to include break or waiting times in their determination of how long it takes to perform a particular task.²¹⁶

The Commission agrees with the Joint Sponsors and SWBT that loaded labor rates should be applied only to actual hours worked. The Joint Sponsors allege that SWBT has misapplied loaded labor rates but they do not offer any specifics to support that allegation. As a result, the Commission is unable to direct SWBT to make any specific corrections to its cost studies. The Commission finds in favor of SWBT.

255. Area Manager's Allocation to the SLEUTH Function.

SWBT's LIDB cost study includes the cost of an Area Manager in the costs of the SLEUTH function. The Joint Sponsors argue that SWBT's cost studies indicate that this area manager directly supervises only one-half of a manager. The Joint Sponsors assume that this area manager must have other duties and would allow only 12.5 percent of the area manager's time and cost to be allocated to the SLEUTH function.²¹⁷ SWBT's witness replied that SWBT's management structure is as it is, and that Joint Sponsors have presented no evidence to show that SWBT's management structure is not forward-looking and efficient.²¹⁸ In its brief, SWBT adds that SWBT's area managers may also directly supervise several General Clerks and states that the number of general clerks supervised by this area manager is revealed in the back-up binders, which were not offered into evidence.²¹⁹

The Joint Sponsors have raised a serious concern about SWBT's cost study. It is unlikely that SWBT's organizational chart would contain an area manager that supervised only one half of a manager. The Joint Sponsors assumption that the area manager must have other duties, aside from responsibility for SLEUTH is reasonable. That assumption has not been refuted by any testimony or other evidence offered by SWBT. The description of its management structure that SWBT offered in its brief is interesting. But SWBT's brief is not evidence and cannot be the basis for the Commission's decision. The Commission finds in favor of the

²¹⁴ Turner Rebuttal, Exhibit 27, Pages 113-114, Lines 15-20, 1-7.

²¹⁵ Barch Surrebuttal, Exhibit 15, Pages 9-10, Lines 22-23, 1-3.

²¹⁶ Barch Surrebuttal, Exhibit 14, Page 10, Lines 1-3.

²¹⁷ Turner Rebuttal, Exhibit 27, Page 114, Lines 8-13.

²¹⁸ Barch Surrebuttal, Exhibit 14, Page 23, Lines 10-18.

²¹⁹ Initial Brief of Southwestern Bell Telephone Company, Page 146.

Joint Sponsors. The area manager's allocation to the SLEUTH function will be 12.5 percent of the Area Manager's time and cost.

256. Number of Managers for SLEUTH and SMS.

SWBT assumes that a specific number of managers are needed to manage SLEUTH and SMS. The exact number of managers is confidential. Joint Sponsors point out that SWBT's labor rate support documentation indicates that SWBT had one fewer manager in 1999. Joint Sponsors argue that given decreasing numbers of queries to SLEUTH and SMS, there is no need to assume that an additional manager will be needed in the future. Therefore, the Joint Sponsors would allow for only the lower number of managers in the cost study.²²⁰ SWBT replies that its staffing rates are based on forward-looking estimates, not embedded labor patterns. It contends that those staffing rates are appropriate.²²¹

The Joint Sponsors have raised a serious concern about SWBT's cost study. Given SWBT's own evidence that SLEUTH and SMS queries are decreasing rather than increasing, there is little reason to believe that an additional manager will be required in the future. SWBT presented no evidence that would refute that view. The Commission finds the testimony of the Joint Sponsors' witness to be credible. The Commission finds in favor of the position advocated by the Joint Sponsors. The number of managers in the job function codes associated with SLEUTH and SMS shall be limited to the number proposed by the Joint Sponsors.

257. Number SS7 Clerks.

This issue is the same as that in issue 256, except that this time the Joint Sponsors' argument is applied to SS7 clerks.²²² The Joint Sponsors would reduce the number of SS7 clerks to match the number supported by SWBT's labor rate support documentation. The exact number is confidential.

For the reasons described in issue 256, the Commission finds in favor of the Joint Sponsors. The number of SS7 clerks shall be reduced to the number supported by SWBT's labor rate support documentation and set out in the Joint Sponsors' testimony.

258. Software License and Support Inflation Factor.

SWBT's cost study includes a substantial inflation factor relating to its purchase of software licenses and software support. The exact amount of the inflation factor is confidential. Joint Sponsors argue that the proposed inflation factor was improperly derived from a factor approved in Ohio and has no application to Missouri. They further argue that there is no need for inclusion of any inflation factor for software because the cost of software is generally declining rather than increasing.²²³ SWBT responded by denying that the inflation factor was derived from the Ohio factor, but did not respond to the argument that no inflation factor is appropriate in an area where costs are declining.²²⁴

²²⁰ Turner Rebuttal, Exhibit 27, Pages 114-115, Lines 14-21, 1-2.

²²¹ Barch Surrebuttal, Exhibit 14, Page 23, Lines 10-13.

²²² Turner Rebuttal, Exhibit 27, Page 115, Lines 3-6.

²²³ Turner Rebuttal, Exhibit 27, Page 115, Lines 7-12.

²²⁴ Barch Surrebuttal, Exhibit 14, Page 24, Lines 20-23.

11 Mo. P.S.C. 3d

The Joint Sponsors have raised a serious concern about the validity of SWBT's cost report. SWBT has failed to rebut that concern and has failed to establish the need for its cost report to assume an inflation factor for software licenses and software support. In addition, in issues 63-64, the Commission found in general that SWBT's cost studies should not include inflation factors. The Commission finds in favor of the Joint Sponsors. SWBT's cost report shall not include an inflation factor for software licenses and software support.

259. Was the present value calculation within the study done correctly?

The Joint Sponsors' witness testified that SWBT had incorrectly performed present value calculations in its cost study.²²⁵ SWBT agreed that the calculations were initially done incorrectly and corrected them in its surrebuttal testimony.²²⁶ The Commission need not further address this issue.

260. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

261. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

262. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Signal Transfer Points (STP) Port TELRIC Cost Study, April 2001.

263. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

264. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

265. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

266. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

SS7 CNAM Query TELRIC Cost Study, April 2001.

267. STP Link Utilization.

This issue was addressed at issue 230 and need not be addressed again.

268. STP Utilization.

This issue was addressed at issue 230 and need not be addressed again.

269. Expenses for NETPILOT and ACCESS Software, is it double counted?

This issue was addressed at issue 232 and need not be addressed again.

270. CCSCIS Equipment Vendor Discount.

This issue was addressed at issue 233 and need not be addressed again.

271. What is the correct Marginal CCS per channel in order to size material investment?

This issue was addressed at issue 234 and need not be addressed again.

272. Cost Factor.

This issue was addressed at issues 45-81 and need not be addressed again.

273. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

²²⁵ Turner Rebuttal, Exhibit 27, Pages 115-116, Lines 13-17, 1-22.

²²⁶ Barch Surrebuttal, Exhibit 14, Page 25, Lines 12-13.

Customized Routing – Resale TELRIC Cost Study, April 2001.

The Joint Sponsors propose that the Commission adopt the rates for customized routing that SWBT volunteered in Texas because SWBT uses a region-wide platform for customized routing and the costs should be the same in Missouri as in Texas.²²⁷ The Joint Sponsors repeat this argument in their briefs.²²⁸

The Joint Sponsors point out that SWBT has never responded to this argument. But, as the Joint Sponsors' proposal was never listed as an issue, it is understandable that SWBT did not respond to it. The Commission is not willing to address issues not included in the list of issues that it accepted on November 20, 2001. For that reason the Commission will not address the Joint Sponsors' proposal to adopt the rates for customized routing utilized in Texas.

274. STP Link Utilization.

This issue was addressed at issue 230 and need not be addressed again.

275. STP Utilization.

This issue was addressed at issue 231 and need not be addressed again.

276. Expenses for NETPILOT and ACCESS7 software, is it double counted?

This issue was addressed at issue 232 and need not be addressed again.

277. CCSCIS Equipment Vendor Discount.

This issue was addressed at issue 233 and need not be addressed again.

278. What is the correct Marginal CCS per Channel in order to size material investment?

This issue was addressed at issue 234 and need not be addressed again.

279. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

280. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

281. Link Utilization with Study Tabs.

This issue was addressed at issue 231 and need not be addressed again.

282. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

283. Should the Preparation and Implementation times for DMS100 transactions be the same as for 5ESS?

This issue was addressed at issue 216 and need not be addressed again.

284. Inflation Factor.

This issue was addressed at issues 36-44 and need not be addressed again.

285. Should customized routing-resale be charged per query or per line?

SWBT charges for customized routing – resale on a per query basis. The Joint Sponsors argue that rather than charging on a per query basis, SWBT should resell this service by charging a monthly, per line fee. The Joint Sponsors indicate that SWBT resells this service on that basis in Texas and that it should be able to offer the same deal in Missouri, because SWBT uses the same customized routing

²²⁷ Turner Rebuttal, Exhibit 27, Page 123-124, Lines 1-22, 1-6.

²²⁸ Joint Sponsors' Initial Post Hearing Brief, Page 106.

11 Mo. P.S.C. 3d

platform in Missouri that it does in Texas.²²⁹ In its brief, SWBT replies that per line charges would require infrequent users to subsidize the queries of frequent users. SWBT argues that each user should be responsible for bearing the cost of its own usage.

The Commission agrees with the argument presented by SWBT. Each user should be responsible for bearing the cost of its own usage. The fact that SWBT has used a different method of charging for these services in Texas does not require it to offer the same deal in Missouri. The Commission finds in favor of SWBT.

286. STP Link Utilization.

This issue was addressed at issue 230 and need not be addressed again.

287. STP Utilization.

This issue was addressed at issue 231 and need not be addressed again.

288. Expenses for NETPILOT and ACCESS7 Software, is it double counted?

This issue was addressed at issue 232 and need not be addressed again.

289. CCSCIS Equipment Vendor Discount.

This issue was addressed at issue 233 and need not be addressed again.

290. What is the correct marginal CCS per channel in order to size material investment?

This issue was addressed at issue 234 and need not be addressed again.

291. Cost Factors.

This issue was addressed at issues 45-81 and need not be addressed again.

292. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

293. Link Utilization with Study Tabs.

This issue was addressed at issue 231 and need not be addressed again.

294. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

295. Should the preparation and implementation of DMS100 translations be the same as for 5ESS?

This issue was addressed at issue 216 and need not be addressed again.

296. Inflation Factor.

This issue was addressed at issues 36-44 and need not be addressed again.

297. Should customized routing-UNE be charged per query or per line?

This issue was addressed at issue 285 and need not be addressed again.

298. Input and Translations of Line Class Codes for Connect and Disconnect?

The Joint Sponsors took a position on this issue in their position statement and state that there is support for the position within their cost studies. However, the Joint Sponsors recognize that their costs studies, like SWBT's cost studies, were never entered into evidence. Unless the Commission considers those cost studies, which are not in the record, Joint Sponsors admit that they have failed to support their position on this issue and agree that the issue may be withdrawn.²³⁰

²²⁹ Turner Rebuttal, Exhibit 27, Pages 121-122, Lines 17-23, 1-11.

²³⁰ Joint Sponsors' Proposed Findings of Fact and Conclusions of Law, Page 123.

The Commission is not able to consider evidence that is not in the record. Therefore, this issue is unsupported by any evidence in the record and the Commission considers it to have been withdrawn.

299. Should the preparation and implementation times for DMS100 transactions be the same as for 5ESS?

This issue was addressed at issue 216 and need not be addressed again.

300. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

301. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

302. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

303. Expenses for NETPILOT and ACCESS7 Software, is it double counted?

This issue was addressed at issue 232 and need not be addressed again.

Unbundled Call Trace TELRIC Cost Study, April 2001.

304. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

305. Fallout Rate for Automated Systems.

Flow through is the percentage of orders that an incumbent LEC processes electronically through its gateway and accepts into its back office systems without manual intervention. Fallout is the opposite of flow through and is the percentage of orders that require human intervention to be processed. A higher fallout rate means that more orders require human intervention, thus increasing labor costs.

The Joint Sponsors would limit all of SWBT's fallout rates for "simple" electronic orders to two percent. The Joint Sponsors argue that such a limit is appropriate because SWBT's most efficient ordering system, the Easy Access Sales Environment (EASE) system, has a fallout rate of only one percent. If SWBT is able to create and operate the EASE system at that fallout rate, the Joint Sponsors argue that it should, in the long run, be able to develop similar systems for simple CLEC orders. For those processes that should be highly automated, such as feature activations in the local switch, service order processing, and similar processes, the Joint Sponsors would apply a fallout rate of two percent.²³¹

SWBT replies that the EASE system is used only for relatively simple retail customer orders and is not used, and never will be used for more complex CLEC UNE orders. Different electronic systems are used for handling CLEC orders and the fallout rates for those systems are higher. SWBT also points out that its fallout rates for handling CLEC orders are comparable to the fallout rates SWBT experiences when it processes its own orders.²³²

The Commission finds the testimony of the Joint Sponsors' expert witness to be more persuasive. There is no question that some CLEC orders are more complex and will have a higher fallout rate. The Commission will discuss those

²³¹ Turner Rebuttal, Exhibit 27, Pages 124-126.

²³² McNiel Surrebuttal, Exhibit 5, Pages 4-5, Lines 13-15, 1-7.

11 Mo. P.S.C. 3d

more complex orders in issue 328. However, the Joint Sponsors are proposing a two percent fallout rate only for more simple CLEC orders. Similarly, the Joint Sponsors recognize that the EASE system is not used for CLEC orders, and they are not advocating its use for those orders. Their argument is rather, that in the long run, SWBT should be able to operate an electronic ordering system for simple CLEC orders at a fallout rate approaching that attained by the EASE system. The Commission agrees. For that reason, TELRIC principles require the Commission to assume the existence of such a system when determining SWBT's cost in providing such a system for resale to the CLECs. The Commission finds in favor of the position advocated by the Joint Sponsors. For those processes that should be highly automated, such as feature activations in the local switch, service order processing, and similar processes, SWBT shall utilize a fallout rate of two percent.

306. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

307. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

308. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Centrex System TELRIC Cost Study.

309. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

310. Should the preparation and implementation times for DMS100 translations be the same as for 5ESS?

This issue was addressed at issue 216 and need not be addressed again.

311. Inflation Factors.

This issue was addressed at issues 63-65 and need not be addressed again.

312. Cost of Capital.

This issue was addressed at issues 82-85 and need not be addressed again.

313. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Simple and Complex UNE Feature Non-recurring Cost 2001-2003, May 2001.

314. Should rounding be used in translating time from hours to minutes?

The Joint Sponsors argue that SWBT should not be permitted, in this cost study, to round time estimates that were made in minutes to two digits after converting them to hours. By eliminating rounding, the Joint Sponsors indicate that they produced a lower rate than resulted using rounding. The Joint Sponsors' witness gives this example: If a task takes 1 minute to complete, SWBT would convert that to hours by dividing it into 60 minutes. One divided by 60 equals 0.0166666666666667 on an Excel spreadsheet. SWBT would then round that number to 0.02, which would, in effect, increase the time allotted for that task by 20 percent. The Joint Sponsors argue that given the sensitivity of these nonrecurring costs to small variations in time, it is important that the time estimates not be rounded.²³³ SWBT responds by stating that rounding is simply a commonly used

²³³ Turner Rebuttal, Exhibit 27, Pages 128-129, Lines 14-23, 1-3.

convention that should have no overall effect, in either direction, on the lengths of time reported.²³⁴

While rounding is certainly a common convention, the Joint Sponsors have demonstrated that for purposes of this cost study, the use of that convention is inappropriate. The Commission finds in favor of the position advocated by the Joint Sponsors. For the purposes of this cost study, SWBT may not use rounding.

315. Inflation Factors.

This issue was addressed at issues 63-65 and need not be addressed again.

316. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

317. Probability of Occurrences for Verifying a Feature.

The arguments presented by the parties are the same as those presented in issue 305, which dealt with fallout rates. The Commission's decision in that issue also applies to this issue.

318. Probability of Occurrence for Verifying a Feature.

This is a duplication of issue 317 and need not be addressed

319. Should supplements be charged per feature?

This issue is not well described by its title. SWBT's cost study assumes that for every order it receives it will have to handle a supplemental order a specified percentage of the time. The exact percentage is confidential. The Joint Sponsors express bewilderment at why SWBT would build a supplement factor into its nonrecurring charge for simple and complex orders. The Joint Sponsors suggest that if an order is supplemented it should simply be treated as a new order. Therefore, the Joint Sponsors would set this factor at zero.²³⁵

SWBT explains that a supplemental order is a second, corrected, order, sent by a CLEC, after SWBT has rejected an initial order for some reason. SWBT contends that such supplemental orders are frequently received and they should be compensated for processing them.²³⁶

The parties talk about this cost as a means by which SWBT can be compensated for supplemental orders. But the cost that SWBT is recovering is really the cost associated with initial orders that are rejected. A certain percentage of CLEC orders are deficient and must be rejected. SWBT is not compensated for those rejected orders and thus has no way of collecting the cost of evaluating, and rejecting, the initial order. This factor is a means by which SWBT can be compensated for the cost of evaluating and rejecting the initial order. The Joint Sponsors' proposed solution of simply treating the supplemental order as a new order would not permit SWBT to recover its costs for evaluating, and rejecting the initial order. The Commission finds in favor of SWBT.

320. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

321. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

²³⁴ Initial Brief of Southwestern Bell Telephone Company, Page 158.

²³⁵ Turner Rebuttal, Exhibit 27, Page 129, Lines 7-15.

²³⁶ Barch Surrebuttal, Exhibit 14, Page 13-14, Lines 17-23, 1-3.

11 Mo. P.S.C. 3d

322. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

323. Should the preparation and implementation times for DMS100 translations be the same as for 5ESS?

This issue was addressed at issue 216 and need not be addressed again.

324. Preparation and Implementation Time for Inputting Backup D Channel Trunk Group into MTS.

Joint Sponsors argue that this work activity would be done when a PRI (Primary Rate Interface) is provisioned. SWBT would recover the cost of the work activity at that time. The work would not be repeated when a Backup D Channel is established. Therefore, Joint Sponsors would remove this cost from the cost study to prevent double recovery by SWBT.²³⁷ In its brief, SWBT claims that the activities it includes in the development of a backup D channel UNE are not included in the initial provisioning of a PRI port.²³⁸ SWBT does not, however, cite any evidence to support that assertion.

The Joint Sponsors have raised a reasonable concern about whether SWBT's cost study would result in a double recovery of SWBT's costs. SWBT has not presented any evidence to rebut that concern. SWBT's brief is, of course, not evidence. The Commission finds in favor of the Joint Sponsors. SWBT must remove this cost from its cost study.

325. Should full disconnect cost be paid at the time the connection is made?

This issue was addressed at issue 106 and need not be addressed again.

326. Inflation Factors.

This issue was addressed at issues 63-65 and need not be addressed again.

327. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Electronic UNE Service Order Cost, 2001-2003, May 2001.

328. Fallout for Complex Orders.

This issue is similar to that which the Commission addressed in issue 305. However, this issue concerns the fallout rate for complex orders. SWBT's testimony indicates that complex orders are those for UNEs such as "Digital Loops, Cross Connects, Local Switching with Centrex-Like Application, Centrex and Complex Features, Dedicated Transport, SONET, Dark Fiber, Subloop, Digital Cross Connect Service and DS1 Facility. SWBT's definition also indicates that "[c]oordination between the LSC and other departments ... is required to provide these Network Elements."²³⁹ SWBT indicates that the service order design on a complex service request requires "manual input of individual elements, including unique Field Identifiers ("FIDs") and Universal Service Order Codes ("USOCs") for the complex service(s) being provisioned."²⁴⁰ According to the Joint Sponsors' witness, SWBT's cost study assumes that a substantial percentage of complex orders will fall out of the electronic system and require human intervention. The exact percentage is considered confidential.

²³⁷ Turner Rebuttal, Exhibit 27, Page 130, Lines 13-20.

²³⁸ Southwestern Bell Telephone Company Initial Brief, Page 161.

²³⁹ Makarewicz Direct, Exhibit 12, Schedule 18, Page 1.

²⁴⁰ Noland Surrebuttal, Exhibit 4, Page 9, Lines 14-17.

Joint Sponsors' witness testified that the fallout rate set by SWBT for complex orders was too high and proposed reducing that fallout rate by 80 percent.²⁴¹ Staff's witness also testified that SWBT's fallout rate was too high. He proposed a fallout rate that was half of that proposed by the Joint Sponsors.²⁴² Neither witness provided any basis for their numbers.

This issue is clouded by SWBT's contention, in its brief, that it employed a 100 percent fallout percentage in its cost studies.²⁴³ In other words, all such orders are processed manually because they are so complex that they cannot be processed without human intervention. The contention that SWBT uses a 100 percent fallout rate for complex orders is not supported by any cited testimony by SWBT's witnesses, and is inconsistent with the testimony of the Joint Sponsors' witness. The actual cost studies that would verify the fallout percentages used are not in evidence. The issue is further clouded by the testimony of Staff's witness, who indicates that for some cost studies SWBT uses a fallout rate less than 100 percent, while for others it uses a 100 percent fallout rate. Staff's witness does not, however, indicate which studies use which fallout rate.²⁴⁴ In the absence of any better evidence, the Commission will assume that the fallout rate for this particular cost study is the fallout rate identified by the Joint Sponsors' witness.

SWBT has established that complex orders should be treated differently than simple orders. No electronic system capable of handling all complex orders currently exists. The very low fallout rates proposed by the Joint Sponsors witness, and by Staff's witness are arbitrary numbers pulled out of the air, not supported by any reasoned testimony. The fallout rates proposed by SWBT are based on SWBT's experience in handling orders for UNEs. That experience must be accorded some respect in the absence of any evidence to the contrary. The Commission finds in favor of SWBT. The fallout rates for complex orders that SWBT utilized in its cost studies need not be altered.

329. Should rounding be used in translating time from hours to minutes?

This issue was addressed at issue 314 and need not be addressed again.

330. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

331. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

Manual UNE Service Order Cost, 2001-2003.

332. Should rounding be used in translating time from hours to minutes?

This issue was addressed at issue 314 and need not be addressed again.

333. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

334. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

²⁴¹ Turner Rebuttal, Exhibit 27, Page 132, Lines 12-13.

²⁴² Johnson Rebuttal, Exhibit 24, Page 112, Lines 11-14.

²⁴³ Initial Brief of Southwestern Bell Telephone Company, Page 155.

²⁴⁴ Johnson Rebuttal, Exhibit 24, Page 112, Line 12.

11 Mo. P.S.C. 3d

335. Workflow Manager Fallout Time for all Simple Order Types.

The Joint Sponsors' witness testified that SWBT has unreasonably assumed that the Work Flow Manager Fallout time will be the same for both complex and simple orders. He assumes that it will certainly take longer to evaluate a complex order to determine why it has fallen out, and therefore reduces the time for handling a simple order that has fallen out to two minutes. He does not provide a basis for that time.²⁴⁵ In response, SWBT's witness testified that for this particular function there is no difference between handling a complex order and handling a simple order. He explained that Work Flow Manager is an electronic system that replaces manual work activity commonly associated with retrieval, log, and distribution. These activities are the same whether an order is simple or complex. SWBT indicates that there is no basis for changing the times in its study.²⁴⁶

The Joint Sponsors' argument is based upon an assumption about SWBT's Work Flow Manager program. SWBT's testimony demonstrated that the Joint Sponsors' assumption is incorrect. There is no reason to believe that for this system the fallout rate for simple orders is any different than the fallout rate for complex orders. The Commission finds in favor of SWBT.

Electronic UNE Service Order Type Study Non-recurring Cost Study 2001-2003.

336. Should rounding be used in translating time from hours to minutes?

This issue was addressed at issue 314 and need not be addressed again.

337. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

338. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

339. LSR Processing by Service Representatives on all Simple Order Types Except Expedite.

The Joint Sponsors' witness testified that when he compared two similar cost studies, he found that SWBT had used longer times for certain activities in one study than it had used for what he believed to be similar activities in the other study. The Joint Sponsors argue that the longer time in one study should be reduced to match the shorter time in the other study. Furthermore, the Joint Sponsors' witness argued that the times for certain other tasks should be further reduced because he believed that they could be performed more quickly than other tasks for which SWBT's cost studies had assumed the same length of time.²⁴⁷

SWBT did not specifically respond to the Joint Sponsors' testimony except to explain in its brief that the activities in the two studies have different times because they are different activities that require different amounts of time to complete.

SWBT's failure to present evidence in direct response to the Joint Sponsors' testimony does not automatically mean that the Commission must find in favor of the Joint Sponsors. SWBT's time estimates were developed by subject matter

²⁴⁵ Turner Rebuttal, Exhibit 27, Page 133, Lines 9-13.

²⁴⁶ Barch Surrebuttal, Exhibit 14, Page 30-31, Lines 16-23, 1-3.

²⁴⁷ Turner Rebuttal, Exhibit 27, Page 134-135, Lines 4-19, 1-7.

experts experienced in performing the activities they evaluated.²⁴⁸ The time estimates offered by the Joint Sponsors' witness were based on nothing more than his speculation about the relative times required to perform certain activities. The time estimates contained in SWBT's cost studies are more credible than the speculations of the Joint Sponsors' witness. The Commission finds in favor of SWBT.

340. Should processing time for complex suspend and restore activities be the same for simple activities in this study?

The Joint Sponsors' witness argues that the processing time for complex and simple suspend and restore activities are the same and would reduce the complex time to match the simple time.²⁴⁹ In its brief, SWBT offers an explanation of why the complex suspend and restore activity will take five minutes and the simple only three minutes. But SWBT does not cite any testimony or other evidence to support that argument, or otherwise refute the Joint Sponsors' argument.²⁵⁰

The Joint Sponsors have raised a reasonable concern about the accuracy of SWBT's cost study. SWBT has not refuted the Joint Sponsors' testimony with any evidence. The argument in SWBT's brief is interesting, but it is not evidence. The Commission finds in favor of the Joint Sponsors.

341. Should rounding be used in translating time from hours to minutes?

This issue was addressed at issue 314 and need not be addressed again.

342. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

343. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

344. LSR Processing by Service Representatives on all Simple Order Types Except Expedite.

This issue was addressed at issue 339 and need not be addressed again.

345. Should processing time for complex suspend and restore activities be the same as for simple activities in this study?

This issue was addressed at issue 340 and need not be addressed again.

UNE-P Migration Service Order and Provisioning Cost Non-recurring Cost Study 2001-2003.

346. Should rounding be used in translating time from hours to minutes?

This issue was addressed at issue 314 and need not be addressed again.

347. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

348. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

349. RC MAC Fallout Percentage.

This issue was addressed at issue 305 and need not be addressed again.

²⁴⁸ Cass Surrebuttal, Exhibit 11, Page 9, Lines 13-16.

²⁴⁹ Turner Rebuttal, Exhibit 27, Page 135, Lines 8-12 and Page 137, Lines 7-11.

²⁵⁰ Initial Brief of Southwestern Bell Telephone Company, Page 166.

11 Mo. P.S.C. 3d

NXX Migration TELRIC Cost Study, April 2001.

350. Inflation Factor.

This issue was addressed at issues 63-65 and need not be addressed again.

351. Labor Rates.

This issue was addressed at issues 36-44 and need not be addressed again.

352. Coordinating with Marketing Times.

SWBT's cost study includes a specific length of time for coordination of the NXX migration with the marketing account manager. The exact time is confidential. Joint Sponsors argue that there is no need for a marketing account manager in a wholesale environment and that therefore the cost study should not include any time for coordination with marketing.²⁵¹ In its brief, SWBT replies that the coordination time at issue is not for the purpose of marketing but rather is required for code administration.²⁵²

In support of that argument, SWBT cites the testimony of its witness, David Barch. When asked whether he agreed with Mr. Turner's proposal to disallow the time for coordination with the marketing account manager, Mr. Barch testified as follows:

No. The cost study appropriately does not include any time for the marketing account manager. However, it does identify coordination time with such a position that the network operations center incurs per migration. The network operations center is required for code administration. Cost causation is the guiding principle for inclusion.²⁵³

This testimony does not support SWBT's argument. Mr. Barch explains that the network operations center is required for code administration, but he says nothing about why the network operations center must coordinate with the marketing manager.

The Joint Sponsors have raised a reasonable concern about SWBT's cost study. SWBT has not refuted that concern and has not offered any reasonable explanation for why time for coordination with the marketing account manager is required. The Commission finds in favor of the position advocated by the Joint Sponsors. The time estimate for this activity shall be set at zero.

353. White Pages Activities.

SWBT's cost study includes a specific number of hours – the exact number is confidential – for meetings with Directory White Pages personnel. The Joint Sponsors argue that there should be no need for the involvement of Directory White Pages personnel in an NXX migration because the whole point of an NXX migration is that the customers' numbers do not change.²⁵⁴ SWBT replies that, even though a customer's number does not change, White Pages personnel are responsible for performing activities related to the NXX migration.²⁵⁵

²⁵¹ Turner Rebuttal, Exhibit 27, Page 138, Lines 17-20.

²⁵² Initial Brief of Southwestern Bell Telephone Company, Page 168-169.

²⁵³ Barch Surrebuttal, Exhibit 14, Page 16, Lines 7-10.

²⁵⁴ Turner Rebuttal, Exhibit 27, Pages 138-139, Lines 21-23, 1-3.

²⁵⁵ Barch Surrebuttal, Exhibit 14, Pages 16-17, Lines 16-23, 1.

The Commission finds the testimony of the Joint Sponsors' witness to be more persuasive. SWBT has failed to demonstrate that the time for coordination with White Pages personnel is necessary for provision of this UNE service to a CLEC. The Commission finds in favor of the position advocated by the Joint Sponsors.

354. Redundant Activities for LVAS.

SWBT's cost study assumes that it will take two people, a Senior Technical Architect and a Technical Architect, to perform the database unload and database load on LVAS. Joint Sponsors argue that it is unreasonable to believe that two people will perform the same function on the same database, and would eliminate the cost of the Technical Architect.²⁵⁶ SWBT replies that there is no reason to exclude the cost of a function simply because it is performed by two persons. If the Commission were to exclude a cost simply on that basis, it could also exclude thousands of operators who perform the same, or functionally similar, tasks.²⁵⁷

The Commission finds the testimony of the Joint Sponsors' witness to be more persuasive. SWBT has failed to demonstrate that both a senior technical architect and a technical architect are necessary for provision of this UNE service to a CLEC. The Commission finds in favor of the position advocated by the Joint Sponsors.

355. Communications Consultant and Service Representative Coordination Activities.

For reasons explained in its Conclusions of Law, the Commission finds that all trunking related costs associated with NXX migration should be apportioned between SWBT and the requesting CLEC according to the provisions of their interconnection agreement for sharing of interconnection expenses.

356. Coordination Meetings Times.

The Joint Sponsors indicate that SWBT has included a specific length of time – the exact time is confidential – for two managers to sit in on overall coordination meetings for the NXX migration. Elsewhere, SWBT has included a substantially longer length of time – again the exact time is confidential – for a manager to function as overall coordinator for the NXX migration. Joint Sponsors argue that the two times are redundant and would eliminate the shorter time.²⁵⁸ SWBT replies that its cost studies use the appropriate times and denies that the hours in question are redundant.²⁵⁹

The Commission finds the testimony of the Joint Sponsors' witness to be more persuasive. SWBT has failed to demonstrate that the additional coordination time is needed. The Commission finds in favor of the position advocated by the Joint Sponsors.

CONCLUSIONS OF LAW

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

²⁵⁶ Turner Rebuttal, Exhibit 27, Page 139, Lines 4-9.

²⁵⁷ Barch Surrebuttal, Exhibit 14, Page 17, Lines 10-17.

²⁵⁸ Turner Rebuttal, Exhibit 27, Page 139-140, Lines 16-18, 1-2.

²⁵⁹ Barch Surrebuttal, Exhibit 14, Pages 18-19, Lines 19-23, 1-2.

11 Mo. P.S.C. 3d

1. The Commission has jurisdiction over this matter pursuant to Section 252 of the federal Telecommunications Act of 1996,²⁶⁰ which authorizes states to set rates for unbundled network elements that must be provided by certain incumbent local exchange companies including Southwestern Bell Telephone Company.

2. SWBT, as a provider of local exchange and intraLATA long-distance telecommunications service, is a “telecommunications company,” as defined by Section 386.020(51), RSMo 2000, and a “public utility”, as defined by Section 386.020(42), RSMo 2000. SWBT is therefore subject to the jurisdiction of the Commission under Section 386.250(2), RSMo 2000. In the terms of the Telecommunications Act of 1996, SWBT is a Bell operating company (BOC)²⁶¹ and an incumbent local exchange carrier (ILEC).²⁶²

3. Each of the other telecommunications carriers that are parties to this proceeding is also a “public utility” and a “telecommunications company” as defined by Sections 386.020, (42) and (51), RSMo 2000, and is subject to the jurisdiction of this Commission under Section 386.250(2), RSMo 2000.

4. The pricing standard for the rates at issue in this case is established by the FCC in 47 C.F.R. Section 51.505.²⁶³ That regulation requires that rates for unbundled network elements be based upon forward-looking economic costs. The FCC’s rules prescribe a forward-looking cost methodology known as “total element long-run incremental costs” (“TELRIC”). “TELRIC” is defined in that regulation as:

(b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC’s provision of other elements.

(1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC’s wire centers.

(2) *Forward-looking cost of capital.* The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

²⁶⁰ 47 U.S.C. 252.

²⁶¹ 47 U.S.C. 3(4)(A)

²⁶² 47 U.S.C. 251(h)(1).

²⁶³ A copy of this regulation was admitted into evidence as Exhibit 22.

(3) *Depreciation rates.* The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

5. 47 C.F.R. Section 51.505(c) defines a “reasonable allocation of forward-looking common costs” as:

(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation.* (i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC’s total network, so as to provide all the elements and services offered.

6. 47 C.F.R. Section 51.505(d) sets out the factors that may not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs.* Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC’s books of accounts;

(2) *Retail costs.* Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in §51.609;

(3) *Opportunity costs.* Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and

(4) *Revenues to subsidize other services.* Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

11 Mo. P.S.C. 3d

7. 47 C.F.R. §51.505(e) provides that:

An incumbent LEC must prove to the State Commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and §51.511.

This regulation means that SWBT, as the incumbent LEC, has both the burden of production and the burden of persuasion on the issue of whether its proposed rates comply with the forward-looking TELRIC methodology prescribed by the FCC. The regulation further requires that SWBT meet its burden through the use of a cost study.

SWBT performed cost studies, as required by the regulation, but it did not offer the actual cost studies and supporting work papers into evidence. Instead, SWBT offered summarized results of the cost studies into evidence in prefiled testimony. The actual cost studies and supporting work papers were provided to all other parties and were available to them in preparing their own testimony and in cross-examining SWBT's witnesses at the hearing.²⁶⁴

At the beginning of the hearing, the Joint Sponsors moved the admission of all of SWBT's and AT&T's cost studies and supporting work papers into evidence.²⁶⁵ SWBT opposed the admission of these documents because they are extremely voluminous – many thousands of pages – and because to admit them at the hearing would permit the Joint Sponsors to improperly supplement their prefiled rebuttal testimony.²⁶⁶ The Commission deferred making a ruling on the Joint Sponsor's motion and asked the parties to submit a memorandum on the question later in the hearing.²⁶⁷ Only SWBT submitted such a memorandum and the Joint Sponsors subsequently withdrew their motion.²⁶⁸ As a result, the Commission never ruled on the motion to admit the cost studies and supporting documents into evidence.

In its brief, Staff points out that 47 CFR Section 51.505(e)(2) requires that "[t]he record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study." Staff argues that SWBT's failure to place its cost studies and supporting documentation into evidence leaves the Commission with an incomplete record by which to evaluate the rates that SWBT proposes.²⁶⁹

The Commission believes that it does have an adequate record upon which to base its decision. Dumping many thousands of pages of highly technical data into the record at the hearing would not have helped the Commission in reaching this decision. In any event, SWBT has the burden of production and the burden of

²⁶⁴ Transcript, Pages 64-65.

²⁶⁵ Transcript, Pages 56-58.

²⁶⁶ Transcript, Pages 58-61.

²⁶⁷ Transcript, Page 64.

²⁶⁸ Transcript, Page 607.

²⁶⁹ Initial Brief of Staff, Page 9.

proof. It is up to SWBT to produce the evidence required to support the rates it proposes. To the extent that SWBT has failed to produce adequate documentation to support its rates, the Commission will reject those rates.

8. Any decision of the Public Service Commission must be both lawful and reasonable.²⁷⁰ The lawfulness of a decision is determined from the statutory authority of the Commission.²⁷¹ For a decision of the Commission to be reasonable, it must be supported by competent and substantial evidence on the whole record.²⁷²

The Issues:

Most of the 356 individual issues raised by the parties are factually based, and can be resolved without separate conclusions of law. Those issues that do require separate conclusions of law are addressed as follows:

78. What amount of marketing costs should be considered avoided in determining the Common Cost Factor?

The Joint Sponsors and SWBT agree that 10 percent of marketing costs are attributable to wholesale services. Therefore, they agree that 90 percent of marketing costs are to be considered avoided. The basis for their agreement is the FCC's First Report and Order. Paragraph 928 of that order indicates that "ten percent of costs in accounts 6611 [product management], 6612 [sales], 6613 [product advertising], and 6623 [customer services] are not avoided by selling services at wholesale."²⁷³ The Joint Sponsors and SWBT take that statement to mean that 10 percent of the costs in those accounts are attributable to wholesale services and may be included in SWBT's cost studies.

Staff's witness interprets the FCC's order differently. Dr. Ben Johnson testified that, in his opinion, the FCC order found that 90 percent of marketing costs are related to just retail and the other 10 percent are related to both wholesale and retail. Therefore, he argues that the 10 percent related to both wholesale and retail should be reduced by another 35 percent to remove the portion related to retail.²⁷⁴

The Commission finds that the interpretation of the FCC's order offered by the Joint Sponsors and SWBT is more reasonable. When the FCC's statement is read in the context of the entire paragraph, it is apparent that the FCC was attempting to resolve differences among the various state public utility commissions about how much of an incumbent's marketing costs are related to wholesale. The FCC chose the 10 percent wholesale figure in order to resolve that question. The interpretation offered by Staff would not finally resolve the disagreements between the states because they could still disagree about how best to divide up the 10

²⁷⁰ *City of Oak Grove v. Pub. Serv. Com'n*, 769 S.W.2d 139, 141 (Mo. App. W.D. 1989).

²⁷¹ *State ex rel. Intercon Gas. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1995).

²⁷² *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n.*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997).

²⁷³ *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, et al., First Report and Order, released August 8, 1996, Paragraph 928.

²⁷⁴ Johnson Rebuttal, Exhibit 24, Page 86-87, Lines 13-25, 1-9.

11 Mo. P.S.C. 3d

percent of costs that would be related to both retail and wholesale. The Commission concludes that that 10 percent of marketing costs are appropriately attributable to wholesale services.

230. STP Link Utilization.

STPs are used in the SS7 Signaling network. STPs are always deployed as linked pairs so that they can provide backup service to each other. The engineering maximum for loading a single STP is 40 percent of the expected demand so that if one STP fails, the other can take up its load and still have 20 percent of its capacity available to handle any surge in demand.²⁷⁵ If 40 percent of the capacity of each of the paired STPs is used, a fill factor of 80 percent for the pair results.

SWBT has utilized fill factors for use of STPs based on actual usage of the STP. The exact numbers are considered confidential, but they are much less than 40 percent.²⁷⁶ Staff and the Joint Sponsors argue that SWBT's fill factors are too low and urge the use of a fill factor of 80 percent for the pair. Staff and Joint Sponsors argue that this fill factor would be utilized in an efficient, forward-looking network.²⁷⁷ Joint Sponsors also point out that Texas utilized an 80 percent fill factor for STPs in its UNE cost proceeding.²⁷⁸

SWBT argues that STP fill factors should be based on actual usage trended forward for likely usage in the future. SWBT contends that it is highly unlikely that actual usage of the STPs will ever approach the engineering maximum of 40 percent, (80 percent for the mated pair).²⁷⁹

This issue can only be resolved through reference to TELRIC principles. 47 C.F.R. §51.505(b)(1) requires that "[t]he total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." That means that the costs of providing a UNE are to be based on an efficient telecommunications network, not on a network that is currently overbuilt.

The Commission believes that in the long-run planning horizon mandated by those TELRIC principles, SWBT can do a better job of matching capacity to its actual needs and thereby achieve a greater STP fill factor. Therefore, the Commission finds that the fill factor for STP links should be set at 40 percent, or 80 percent for a mated pair.

355. Communications Consultant and Service Representative Coordination Activities.

SWBT's cost study includes a specific number of hours – the exact number is confidential – for Communications Consultants and Service Representatives to handle trunking issues that arise from the NXX migration. The Joint Sponsors

²⁷⁵ Barch Surrebuttal, Exhibit 14, Page 19, Footnote 3.

²⁷⁶ Turner Rebuttal, Exhibit 27, Page 99, Lines 7-8.

²⁷⁷ Turner Rebuttal, Exhibit 27, Page 100, Lines 10-13. Johnson Rebuttal, Exhibit 24, Page 76, Lines 1-5.

²⁷⁸ Turner Rebuttal, Exhibit 27, Page 100, Lines 8-10.

²⁷⁹ Barch Surrebuttal, Exhibit 14, Page 19, Lines 8-11.

argue that this activity relates to trunking issues. Trunking issues are interconnection issues, and as interconnection issues, their cost should be shared between SWBT and the requesting CLEC according to the terms of their interconnection agreement.²⁸⁰ The Joint Sponsors cite an FCC decision for the proposition that the interconnecting CLEC and ILEC are required to share the cost of trunking.²⁸¹ SWBT replies that these trunking costs result from the CLEC's request for NXX migration. As the cost causer, the CLEC should be responsible for paying the cost.²⁸²

The Commission agrees with the Joint Sponsors. The FCC has clearly indicated that trunking costs are to be shared between the interconnecting parties. There is no need for an exception when the trunking costs originate with a request for NXX migration. As the Joint Sponsors explain, by the logic of SWBT's cost causing argument, any CLEC requesting interconnection with SWBT would be the cost causer and would be responsible for all costs of interconnection. Such a result would be contrary to the FCC's requirements and will not be adopted by this Commission. The Commission finds in favor of the position advocated by the Joint Sponsors. All trunking related costs associated with NXX migration should be apportioned between SWBT and the requesting CLEC according to the provisions of their interconnection agreement for sharing of interconnection expenses.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions:

The Commission has reached many decisions about the individual elements that comprise cost studies supporting the UNE rates proposed by SWBT. Those specific decisions are described in the Commission's findings of fact and conclusions of law. Some of those decisions have supported SWBT's cost studies, and others have determined that SWBT must make changes to those cost studies. Because changes to the cost studies will be required, it is impossible for the Commission to determine, at this time, the rates at which SWBT must offer individual UNEs for sale. Therefore, SWBT will be ordered to rerun its cost studies in compliance with the decisions set forth by the Commission in this report and order. Once SWBT has filed the results of its revised cost studies and the UNE prices that result from those revised studies, the other parties will be given an opportunity to respond so that they may indicate whether SWBT's revised cost studies and resulting prices comply with this order.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company shall rerun its cost studies in compliance with the decisions set forth by the Commission in this report and order.
2. That no later than September 20, 2002, Southwestern Bell Telephone Company shall file the results of its revised cost studies and the UNE prices that result from those revised studies.

²⁸⁰ Turner Rebuttal, Exhibit 27, Page 139, Lines 10-15.

²⁸¹ *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, et al. First Report and Order, released August 8, 1996, Paragraph 1062.

²⁸² Barch Surrebuttal, Exhibit 14, Page 18, Lines 4-10.

11 Mo. P.S.C. 3d

3. That any party that wishes to file a response to Southwestern Bell Telephone Company's filing pursuant the previous paragraph shall do so not later than November 4, 2002.
4. That any pending motions that the Commission has not specifically ruled upon are hereby denied.
5. That this report and order shall become effective on August 16, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC.,
concur and certify compliance with the provisions of
Section 536.080, RSMo 2000.

**In the Matter of Missouri Gas Energy and Its Accounting for
Unrecognized Net Gain/Loss Amounts Related to Pension
and Non-pension Post-retirement Benefits.**

*Case No. GO-2003-0019
Decided August 15, 2002*

Accounting §§9, 36. Gas §24. Having found it to be in the public interest, the Commission approved a stipulation and agreement, the effect of which will be to distribute the unrecognized net loss caused by falling stock prices over five years.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND CLOSING CASE**

This case arises out of Case No. GR-2001-292, Missouri Gas Energy's most recent general rate case. The parties explain that a provision of the Second Revised Stipulation and Agreement by which Case No. GR-2001-292 was resolved has now had unexpected and negative effects. The parties have entered into a new Stipulation and Agreement, filed on July 25, 2002, which will modify a portion of the Second Revised Stipulation and Agreement and thereby rectify the problem. The Staff of the Missouri Public Service Commission filed its Suggestions on August 8, 2002, urging the Commission to approve the new Stipulation and Agreement.

Staff explains that the third paragraph of the Second Revised Stipulation and Agreement included this sentence:

The Staff, Public Counsel, and MGE also agree that in the event that in any given year the amount of 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 or FAS 106.

The sentence was added at the request of Missouri Gas Energy's actuary. At the time, this language was not expected to conflict with the parties' intent to amortize gains and losses under FAS 87 and FAS 106 by determining a five-year average of the Unrecognized Net Gain/Loss Balance and then amortizing that balance over five years for Gain/Loss recognition under FAS 87 and FAS 106. However, Missouri Gas Energy's actuary has now indicated that the quoted language will require the use of a "beginning of the year" balance of Unrecognized Net Gain/Loss rather than the intended five-year average balance, thereby defeating the parties' intention to reduce volatility in the calculation of annual expense. Staff further explains that Missouri Gas Energy has experienced a significant reduction in the market value of its pension fund assets as a result of reduced stock prices in 2001 and 2002. If the unexpected effect of the quoted language is not remedied, Missouri Gas Energy will experience pension and other employee benefit expenses that are significantly higher than the parties anticipated when they settled Case No. GR-2001-292. For these reasons, Staff recommends that the Commission approve the new Stipulation and Agreement.

As a remedy to the problem outlined above, the parties have agreed as follows:

The Staff, Public Counsel, and MGE agree, and MGUA and JACOMO/Riverside agree not to oppose, that, commencing during the fiscal year which began July 1, 1998, and continuing at least through the effective date of the new rates resulting from MGE's next general 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 report purposes. This paragraph concerns costs associated with post-retirement benefits, including pension and non-pension benefits (FAS 87 and FAS 106), and reflects MGE's continued willingness to agree to the recommendation made by Staff witness Williams at page 28, line 17 through page 29, line 4 of his direct testimony in Case No. GR-98-140, et al., regarding the financial reporting of unrecognized net gains/losses.

Staff explains that the effect of the new stipulation and agreement will be to specify the use of a five-year average balance, just as the parties originally intended in resolving Case No. GR-2001-292. The effect will be to distribute the unrecognized net loss caused by falling stock prices over five years. In the new Stipulation and Agreement, the parties explain that they have, in effect, eliminated the problematic sentence from the third paragraph of the Second Revised Stipulation and Agreement. In all other respects, the Second Revised Stipulation and Agreement will remain in force.

The Commission has reviewed the Stipulation and Agreement of the parties and Staff's supporting suggestions. The Commission finds the Stipulation and Agreement is in the public interest and should be approved.

11 Mo. P.S.C. 3d

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on July 25, 2002, is approved.
2. That the parties shall no longer follow the last sentence of the third paragraph of the Second Revised Stipulation and Agreement approved on July 5, 2001, in Case No. GR-2001-292.
3. That this order shall become effective on August 25, 2002.
4. That this case may be closed on August 26, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

In the Matter of an Investigation into the Effects of the Bankruptcy of Telecommunications Carriers in the State of Missouri.

*Case No. TW-2003-0053
Decided August 15, 2002*

Telecommunications §7. The Commission established a case to monitor the bankruptcies of telecommunications carriers operating in Missouri and to determine what actions, if any, the Commission should take to protect the public interest with respect to such bankruptcy.

ORDER ESTABLISHING CASE

The Missouri Public Service Commission is aware of an increasing number of bankruptcy filings by certificated telecommunications carriers operating in the state of Missouri. As the culmination of this trend, on July 21, 2002, WorldCom, Inc., and almost all of its active, domestic subsidiaries sought the protection of Chapter 11 of Title 11 United States Code, the Bankruptcy Act.¹ This was reported at the time as the largest single bankruptcy filing in the history of the United States.

The Commission is authorized and required to inform itself as to the general condition of telephone corporations operating in Missouri, including the adequacy of their service.² The telecommunications bankruptcies referred to above raise questions as to the ability of these carriers to continue to provide safe, adequate

¹ Eight of WorldCom, Inc.'s subsidiaries seeking bankruptcy protection — Intermedia Communications, Inc., TTI National, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WORLDCOM Communications, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, LLC, Metropolitan Fiber Systems of St. Louis, Inc., and Teleconnect Long Distance Services & Systems Co., — are certificated to provide telecommunications services in the state of Missouri. Metropolitan Fiber Systems of Kansas City, Missouri, Inc., another WorldCom, Inc., subsidiary that is certificated to provide telecommunications service in the state of Missouri, is not listed in bankruptcy documents.

² Section 386.320, RSMo 2000.

and nondiscriminatory services to customers at just and reasonable rates and as to the impact upon other telecommunications carriers operating in Missouri. Together with the bankruptcies, the Commission has seen an increase in expedited requests for additional and expanded certifications by carriers desirous of purchasing the assets and customer base of defunct carriers.

For these reasons, the Commission will open this case to monitor the status of bankrupt telecommunications carriers, including WorldCom and its subsidiaries. The Commission will examine the impact of the bankruptcies upon Missouri consumers and upon other Missouri telecommunications carriers. The Commission may further inquire into other related matters as may appear appropriate. The Commission will charge its Staff with the principal responsibility for this matter.

IT IS THEREFORE ORDERED:

1. That this case is established to monitor the bankruptcies of telecommunications carriers operating in Missouri as discussed above and to determine what actions, if any, this Commission should take to protect the public interest with respect to such bankruptcies.

2. That the Commission's Staff shall compile and maintain a list of those telecommunications carriers operating in Missouri that are currently in bankruptcy. For each such carrier, Staff shall indicate the date of the bankruptcy filing, the court in which the bankruptcy was filed, the case number assigned to the bankruptcy filing, and whether the carrier is presently providing services to customers in Missouri. For each such carrier that is not presently providing services, Staff shall identify the carrier or carriers that are presently serving the bankrupt carrier's customers and shall state the number and date of the Commission's order approving the transfer of customers. Staff shall file a copy of this list in this case no later than September 13, 2002, and shall update it as needed, but not more often than once monthly.

3. That WorldCom, Inc., Intermedia Communications, Inc., TTI National, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WORLD COM Communications, Inc., MCI WORLD COM Network Services, Inc., MCI metro Access Transmission Services, LLC, Metropolitan Fiber Systems of St. Louis, Inc., and Teleconnect Long Distance Services & Systems Co., are hereby made parties to this case.

4. That the Commission's Staff, or other interested entities, may from time-to-time advise the Commission as to any other entities that should be made parties to this case and should be required to file quarterly status reports as discussed below.

5. That WorldCom, Inc., Intermedia Communications, Inc., TTI National, Inc., Brooks Fiber Communications of Missouri, Inc., MCI WORLD COM Communications, Inc., MCI WORLD COM Network Services, Inc., MCI metro Access Transmission Services, LLC, Metropolitan Fiber Systems of St. Louis, Inc., and Teleconnect Long Distance Services & Systems Co. shall jointly make an on-the-record presentation to the Commission on Thursday, September 19, 2002, beginning at 2:00 p.m. concerning the status of the bankruptcy, and its expected impact on Missouri customers and on other telephone corporations operating in Missouri. The on-the-record presentation will be held at the Commission's offices in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, Room 310, a facility which meets the accessibility standards of the Americans with Disabilities Act (ADA). If any person needs additional accommodations to participate in the on-the-record presentation, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the on-the-record presentation.

6. That the Commission's Staff, or other interested entities, may from time-to-time advise the Commission as to any other entities that should be requested to make an on-the-record presentation to the Commission regarding any matter related to this case.

11 Mo. P.S.C. 3d

7. That the WorldCom, Inc., Intermedia Communications, Inc., TTI National, Inc., Brooks Fiber Communications of Missouri, Inc., MCIWORLDCOM Communications, Inc., MCIWORLDCOM Network Services, Inc., MCImetro Access Transmission Services, LLC, Metropolitan Fiber Systems of St. Louis, Inc., and Teleconnect Long Distance Services & Systems Co. shall jointly file quarterly status reports with the Commission beginning September 1, 2002, and quarterly thereafter until and including a final report after the bankruptcy is closed. These reports shall describe the current status of the bankruptcy and shall address the impact of the bankruptcy on Missouri customers and upon other telephone corporations providing service in Missouri.

8. That the Commission's Staff and the Office of the Public Counsel may file responses, in their discretion, within 20 days after each such status report is filed.

9. That the Commission's Staff shall, and the Office of the Public Counsel may, within 60 days after the final status report is filed by WorldCom, Inc., and its subsidiaries, file a pleading advising the Commission of recommendations, if any, for proposed Commission procedures in future telephone corporation bankruptcies. The Staff and the Office of the Public Counsel may also file such a pleading at any time during this case.

10. That this order shall become effective on August 25, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of Atmos Energy Corporation for
a Variance from the Provisions of Section 19 of 4 CSR 240-
10.030 Regarding the Testing of Meters.**

*Case No. GE-2003-0007
Decided August 20, 2002*

Gas § 29. The Commission granted Atmos a variance from a rule that requires gas corporations to test their meters every 120 months. The variance will save Atmos approximately \$104,000 per year without compromising Atmos' ability to measure meter safety and accuracy.

Gas § 71. The Commission granted Atmos a variance from a rule that requires gas corporations to test their meters every 120 months. If Atmos discovers a meter lot that does not meet its accuracy standard, then Atmos will remove all the meters within the lot over a four-year period. Atmos will repair or replace those meters.

Gas § 47. The Commission granted Atmos a variance from a rule that requires gas corporations to test their meters every 120 months. Despite the variance, Atmos still has the duty to keep its meters accurate and safe.

ORDER GRANTING VARIANCE

Syllabus: This order grants Atmos Energy Corporation a variance from Commission Rule 4 CSR 240-10.030(19).

Atmos does business in Missouri through its divisions United Cities Gas Company and Greeley Gas Company. On July 9, 2002, Atmos Energy Corporation filed its Application for Variance from Commission Rule 4 CSR 240-10.030. On August 12, 2002, the Staff of the Missouri Public Service Commission filed its Memorandum and Recommendation, advising the Commission to grant Atmos' request.

Atmos seeks a variance from Commission Rule 4 CSR 240-10.030(19). That rule requires that gas corporations test each of their gas meters for accuracy every one hundred twenty (120) months. Instead of having to test each meter, Atmos requests that the Commission allow Atmos to implement a meter-sampling program. Atmos estimates the program would save it approximately \$104,000 per year, without compromising its ability to measure meter accuracy or to keep its pipelines safe.

The proposed meter-sampling program will classify gas meters with a capacity of under four hundred fifty cubic feet per hour (450 ft.³/hr) into five groups by manufacturer. In turn, each manufacturer group is further divided into lots by model number.

Atmos' goal is to ensure that not more than six and one-half percent (6.5%) of meters tested per lot will deviate from its standard, which is one hundred percent (100%) accuracy, plus or minus two percent (2%). If a lot meets that standard, Atmos will adjust the sampled meters to an accuracy rate of one hundred percent (100%) plus or minus one-half percent (0.5%). If a lot fails to meet that standard, Atmos will remove all meters within that lot over a four-year period, and repair or replace them. If, however, Atmos can trace the problem to a particular sub-lot, Atmos reserves the right to correct only the problem in the sub-lot, and not the entire lot.

To avoid testing during winter, Atmos' proposed test year is from April 1 to March 31. Atmos also plans to submit an annual report to Staff by May 31. In addition, Atmos agrees to file revised tariffs with the Commission for itself, as well as for Greeley and United Cities.

The proposed meter-sampling program is similar to other programs the Commission has approved. In particular, Atmos' proposed program is similar to one the Commission approved for Associated Natural Gas Company in Case No. GO-98-567. Atmos bought Associated, and assumed Associated's meter-sampling program. That program expired on December 31, 2001, and Atmos now seeks a permanent variance from Commission Rule 4 CSR 240-10.030(19). The Commission has approved similar permanent variances for Union Electric Company, Laclede Gas Company and Missouri Gas Energy.

In its Memorandum and Recommendation filed on August 12, 2002, Staff recommends the Commission grant the variance. Staff states that Atmos' proposed meter-sampling program conforms to industry standards and is similar to other variances the Commission has granted to other Missouri gas corporations.

11 Mo. P.S.C. 3d

Commission Rule 4 CSR 240-2.060(14)(B) allows the Commission to grant a variance to its rules if the applicant states a complete justification setting out the good cause for granting the variance. Based on Atmos' application and Staff's Recommendation the Commission finds that Atmos has stated a complete justification setting out the good cause for granting the variance.

IT IS THEREFORE ORDERED:

1. That the Application filed on July 9, 2002, by Atmos Energy Corporation, doing business in Missouri through its divisions United Cities Gas Company and Greeley Gas Company, is granted.
2. That Atmos Energy Corporation, doing business in Missouri through its divisions United Cities Gas Company and Greeley Gas Company, is hereby granted a variance from Commission Rule 4 CSR 240-10.030(19).
3. That Atmos Energy Corporation, doing business in Missouri through its divisions United Cities Gas Company and Greeley Gas Company, shall file revised tariff sheets to include the variance granted herein no later than September 19, 2002.
4. That Atmos Energy Corporation shall file an annual meter-testing report with the Staff of the Public Service Commission no later than May 31 of each year.
5. That nothing in this Order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.
6. That this Order shall become effective on August 20, 2002.

Simmons, Ch., Murray, Lumpe,
and Forbis, CC., concur.
Gaw, C., dissents.

Pridgin, Regulatory Law Judge

In the Matter of MCI WorldCom Communications, Inc.'s Proposed Tariff to Add An In-State Access Recovery Charge and Make Miscellaneous Text Changes.

Case No. XT-2003-0047
Decided August 27, 2002

Telecommunications §14. The Commission denied a motion to suspend and approved a tariff offered by a competitive intrastate, interexchange carrier that permitted the carrier to impose a \$1.95 per month fee on its residential accounts.

Telecommunications §34, Rates §17. The Commission did not reject a tariff instituting a monthly service charge of \$1.95 because the service charge would apply only to competitive services and consumers are free to obtain service from an alternative provider if they object to paying the charge.

ORDER DENYING SUSPENSION AND APPROVING TARIFF

This order approves the proposed tariff sheets filed by MCI WorldCom Communications Inc., and denies the Office of the Public Counsel's Motion to Suspend Tariff and for Evidentiary and Public Hearings.

On August 2, 2002, MCI WorldCom issued a tariff sheet designed to add an Instate Recovery Fee to the Rules and Regulations section of the tariff. The tariff revision would permit MCI WorldCom to assess a monthly fee of \$1.95 per account, per month, on residential customers. MCI WorldCom requested that the tariff become effective on September 3, 2002.

On August 8, 2002, the Office of the Public Counsel filed a motion asking the Commission to suspend MCI WorldCom's proposed tariff. In addition, the Public Counsel requested that the Commission hold both an evidentiary hearing and set the matter for local public hearings. The motion made several allegations that the tariff revision was not "just and reasonable" and that the proposed new charge would be discriminatory. Public Counsel stated that the proposed tariff is similar to the tariffs filed by AT&T Communications of the Southwest, Inc., which the Commission approved in case number TT-2002-129, and by Sprint, which the Commission approved in case number TT-2002-1136.

On August 19, 2002, MCI WorldCom and the Staff of the Missouri Public Service Commission filed responses to Public Counsel's motion. MCI WorldCom indicates that its tariffs are similar to the AT&T and Sprint tariffs that the Commission has already approved. MCI WorldCom argues that it should not be treated any differently than those two companies. MCI WorldCom also points out that these tariffs apply to competitive services, do not unreasonably discriminate between customers, and comply with Section 392.500, RSMo 2000. MCI WorldCom asks the Commission to reject Public Counsel's motion and to approve the tariff.

Staff argues that as a competitive company, MCI WorldCom must comply with Section 392.500(2), RSMo, which authorizes rate increases with a tariff filing and notice to customers at least ten days before the increase. Staff states that MCI WorldCom has complied with Section 392.500(2). Staff also states that the

11 Mo. P.S.C. 3d

Commission does not typically scrutinize the rate structure of competitive long distance service providers, except to determine compliance with a few limited rate requirements identified in Missouri statutes. Staff claims that this approach is consistent with Section 392.185(5), RSMo 2000, which permits “flexible regulation of competitive telecommunications companies and competitive telecommunications services,” and with Section 392.185(6), RSMo 2000, which permits “full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.” Staff indicates that MCI WorldCom’s proposed service charges would not warrant Commission intervention to regulate the charging and billing structure of a competitive company.

In addition, Staff states that more than 500 companies hold certificates to provide long distance service in Missouri. MCI WorldCom’s customers may choose to switch long distance carriers, thereby allowing the competitive marketplace to regulate the charges.

Finally, Staff points out that MCI WorldCom’s tariff is similar to the tariffs issued by AT&T and Sprint that the Commission has approved. Staff observes that monthly-recurring charges and surcharges are common in the industry, and suggests that MCI WorldCom should not be singled out for special treatment based on this tariff. Staff recommends that the Commission approve MCI WorldCom’s tariff.

MCI WorldCom is a competitive company providing competitive telecommunications services. A proposed tariff that increases rates or charges of a competitive telecommunications company is governed by Section 392.500(2). That statute allows a proposed tariff increasing rates or charges to go into effect after the proposed tariff has been filed with the Commission and the affected customers are given at least ten days’ notice. The Commission finds that MCI WorldCom has complied with the technical requirements of Section 392.500(2).

In interpreting the various provisions of Chapter 392, the Commission turns to the purposes of the chapter as specified in Section 392.185. That section states in part:

The provisions of this chapter shall be construed to:

* * *

- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

* * *

It is the Commission’s task to balance these purposes.

Because MCI WorldCom's proposed monthly service charge of \$1.95 applies only to a competitive service, consumers are free to obtain service from an alternative provider if they object to the charge. Considering the competitive climate in which this service is offered, the Commission finds that the allowing full and fair competition to substitute for regulation will ensure that consumers pay only reasonable rates. As Staff noted, monthly recurring charges and surcharges are common in the telecommunications industry and MCI WorldCom should not be treated differently than other similarly situated telecommunications companies. The Commission determines that the proposed tariff is just and reasonable and should be approved. Therefore, the Commission will deny the motion to suspend and will approve the tariff sheet.

IT IS THEREFORE ORDERED:

1. That the Office of the Public Counsel's Motion to Suspend Tariff and for Evidentiary and Public Hearings is denied.
2. That the tariff filed by MCI WorldCom Communications, Inc., on August 2, 2002, is approved, to become effective on September 3, 2002. The approved tariff sheet is:

MO PSC Tariff No. 1

Original Page No. 40.2

3. That this order will become effective on September 3, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur Gaw, C., dissents

Woodruff, Senior Regulatory Law Judge

**In the Matter of the Application of Environmental Utilities, LLC
to Acquire by Foreclosure the Franchise, Water Works, and
Sewer Systems of Osage Water Company.**

*Case No. WM-2003-0065
Decided September 5, 2002*

Certificates § 21. The Commission rejected Environmental Utilities' application for a certificate of convenience and necessity. Environmental failed to comply with the Commission's rules in pleading the necessary elements for a certificate. Environmental also acquired a promissory note and corresponding deed of trust that was void because the Commission did not permit Osage Water to execute the note and deed of trust.

Certificates § 60. The Commission refused to cancel Osage Water Company's certificate solely on the basis of Environmental Utilities' assertion that it was trying to buy Osage Water's assets and service territory.

11 Mo. P.S.C. 3d

Water § 2. The Commission rejected Environmental Utilities' application for a certificate of convenience and necessity because it failed to plead the necessary elements for obtaining a certificate. Environmental also acquired a promissory note and corresponding deed of trust that was void because the Commission did not permit Osage Water to execute the note and deed of trust.

**ORDER DENYING APPLICATION IN PART AND REJECTING
APPLICATION IN PART**

Syllabus: The Commission denies an application by Environmental Utilities, LLC, to acquire by foreclosure the assets of Osage Water Company, and dismisses an application by Environmental Utilities, LLC, for a certificate of convenience and necessity.

On August 23, 2002, Environmental filed an application requesting that the Commission: 1) approve its foreclosure on the assets of Osage Water and the transfer of Osage Water's assets to Environmental; 2) grant certificates of convenience and necessity to Environmental, authorizing Environmental to provide water and sewer service within Osage Water's current certificated service areas; and 3) terminate Osage Water's certificates of convenience and necessity.

Environmental stated that it proposes to acquire by foreclosure the franchise, water works, and sewer systems presently owned and operated by Osage Water Company and necessary or useful to provide water and/or sewer utility service to its customers in the certificated service areas of Osage Water Company. Environmental stated that William P. Mitchell, as president of and on behalf of Osage Water, executed a promissory note with a current principal balance of \$500,000 issued by Osage Water to secure payment of balances due from Osage Water to Gregory D. Williams for legal services rendered. The note is secured by a "Future Advance Deed of Trust & Security Agreement." Environmental claimed that Osage Water is in default for failing to pay any of the principal or interest installments due under the note, and that Environmental recently acquired the note and the Future Advance Deed of Trust by assignment.¹

On September 3, the Office of the Public Counsel filed a verified response to Environmental's application. Public Counsel opposes Environmental's application on a number of grounds. Most importantly, it cites Section 393.190.1, RSMo 2000, for the proposition that:

No ... water corporation ... shall ... 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, merge or consolidate such works or system,

¹ Since the Commission is denying Environmental the authority to proceed with the acquisition, it will not address the application's requests to cancel Osage Water's certificate and to grant Environmental a certificate. Furthermore, the Commission could not address the issue of Environmental's application for a certificate because Environmental has not complied with the Commission's rules (4 CSR 240-2.060 (4)) on what must be contained in such an application, and will dismiss the application because of the failure to comply. Finally, the Commission will not cancel the certificate of a regulated utility merely on the basis of a request by a company that is trying to take over the assets and service territory of the utility.

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 so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

Public Counsel also points out the close ties between the ownership and management of Osage Water and the ownership and management of Environmental, and questioned whether the issuance of the promissory note and subsequent proposed foreclosure are legitimate arm's-length transactions.

Also on September 3, the Staff of the Commission filed a response opposing the application. The Staff raised many of the same points as did Public Counsel. Staff also asserted that it is unlikely that Environmental will ever be able to demonstrate that the Commission should grant it a certificate of convenience and necessity. Staff argued that Section 393.190.1 makes the deed of trust void.

In addition to relying on the verified responses of Staff and Public Counsel that state that Osage Water did not receive Commission approval to issue the promissory note and deed of trust, the Commission takes official notice of its own records and finds that the encumbrance was not made in accordance with any Commission order, and is therefore void pursuant to Section 393.190.1. Because the encumbrance itself is void, there can be no foreclosure based upon it. Environmental's application must be denied, and Environmental will be ordered not to proceed with its proposed acquisition.

IT IS THEREFORE ORDERED:

1. That the application by Environmental Utilities, LLC to acquire by foreclosure the assets of Osage Water Company is denied.
2. That Environmental Utilities, LLC shall not proceed with the acquisition by foreclosure of the assets of Osage Water Company.
3. That the Future Advance Deed of Trust & Security Agreement issued by Osage Water Company on February 15, 2001, is void.
4. That the application of Environmental Utilities, LLC for a certificate of convenience and necessity is dismissed for failure to comply with 4 CSR 240-2.060 (4).
5. That this order shall become effective on September 12, 2002.

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., not participating

Mills, Deputy Chief Regulatory Law Judge

11 Mo. P.S.C. 3d

**In the Matter of the Tariff of Spectra Communications Group,
LLC, PSC MO. No. 2, Facilities for Intrastate Access.**

Case No. TT-2003-0043
Decided September 5, 2002

Telecommunications §36. The Commission suspended a tariff offered by an incumbent local exchange carrier that would have imposed an additional deposit requirement on connecting carriers that encounter financial difficulties that may increase the risk that they will default on payments to the ILEC for interconnection services.

**ORDER FURTHER SUSPENDING TARIFF, DIRECTING NOTICE, AND
SCHEDULING A PREHEARING CONFERENCE**

On July 12, 2002, Spectra Communications Group, LLC, issued a tariff to revise its intrastate access tariff provisions relating to when Spectra can demand a security deposit from other telecommunications carriers. That tariff originally carried an effective date of August 11, 2002. MCI WorldCom Communications, Inc. filed a motion on August 7, asking the Commission to suspend Spectra's proposed tariff. On August 8, the Commission issued an order suspending Spectra's tariff until September 10, to allow the Commission an opportunity to further consider the tariff and WorldCom's objections to it.

On August 21, the Commission issued an order directing that any party wishing to submit a pleading addressing the issue of whether the Commission should further suspend Spectra's tariff, should do so not later than August 28. The Staff of the Commission filed a Recommendation and Memorandum on August 27, in which it recommends that the Commission approve Spectra's tariff. Spectra filed a pleading on August 28, arguing that its tariff should be approved. WorldCom filed a pleading on August 28, again asking that the Commission reject or suspend Spectra's tariff.

The Commission is mindful of Spectra's desire to protect itself against the risk of incurring bad debt. However, the Commission must balance Spectra's interest against the risk that permitting an ILEC to impose a deposit requirement might be detrimental to the continued existence of competition in the telecommunications market in Missouri. The Commission is not able to determine the appropriate balance without hearing further evidence. Therefore, Spectra's tariff will be further suspended to allow time to conduct a hearing.

Spectra's tariff has already been suspended for 30 days. It will therefore be suspended for an additional 90 days, for a total suspension of 120 days.¹

Proper parties should be given notice and an opportunity to intervene. The Commission's Data Center will be directed to send a copy of this order to all telecommunications companies certificated to do business in the state of Mis-

¹ Section 392.230.3, RSMo 2000, allows for a 120-day period of suspension, but permits the Commission to suspend a tariff for an additional six months if it is not able to conclude its hearing regarding the tariff within the 120-day initial suspension.

souri. Furthermore, the Commission will schedule a prehearing conference at which the parties may prepare a proposed procedural schedule.

IT IS THEREFORE ORDERED:

1. That the tariff sheets issued on July 12, 2002, by Spectra Communications Group, LLC, and assigned Tariff No. 200300034, previously suspended until September 10, 2002, are further suspended for a period of 90 days beyond September 10, 2002, to December 9, 2002, or until otherwise ordered by this Commission. The tariff sheets suspended are:

P.S.C. Mo. – No. 2

Section 2

1st Revised Sheet 16, Cancels Original Sheet 16

Original Sheet 16.1

2. That the Data Center of the Commission shall send a copy of this order to all telecommunications companies certificated to do business in the state of Missouri.

3. That any proper person or entity desiring to intervene shall, no later than September 25, 2002, submit an application to intervene to:

Secretary of the Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102-0360

Copies of the application to intervene should be sent to:

W.R. England, III
Sondra B. Morgan
Brydon, Swearngen & England, P.C.
P.O. Box 456
Jefferson City, Missouri 65102-0456

Attorneys for Spectra Communications Group, LLC d/b/a CenturyTel

and

Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102-7800

4. That a prehearing conference shall be held on September 30, 2002, beginning at 10:00 a.m. The prehearing conference will be held at the Commission's offices at the Governor Office Building, 200 Madison Street, Jefferson City, Missouri. This hearing will be held in a building that meets accessibility standards required by the Americans with Disabilities Act. If you need additional accommodations to participate in this hearing, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the hearing.

5. That the parties shall file a proposed procedural schedule no later than October 7, 2002. The procedural schedule must include dates for the filing of testimony and for a hearing.

6. That this order shall become effective on September 15, 2002.

Simmons, Ch, Lumpe and Gaw, CC., concur
Murray, C., dissents, dissenting opinion attached
Forbis, C., dissents

Woodruff, Senior Regulatory Law Judge

11 Mo. P.S.C. 3d

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I would approve the tariff sheets, as substituted, without further delay.

Staff's August 20 Memorandum recommending approval points out that the tariff is not only just and reasonable, but also *necessary*. Staff states that a higher level of protection against nonpayment is necessary for an incumbent because the incumbent, unlike a competitive carrier, is obligated to serve its local exchange customers. An incumbent's ability to fulfill this statutory obligation to its customers could be adversely affected by large payment defaults by telecommunications carriers.

The current financial environment in the telecommunications industry places incumbents at risk for significant levels of bad debt. Further suspension of this tariff will unnecessarily prolong that risk. This tariff would allow Spectra to require adequate security from telecommunications carriers as a guarantee of payment in order to limit its exposure to losses which could jeopardize its service to local exchange customers. Immediate approval of the tariff would be in the interest of Missouri's local exchange customers.

I respectfully dissent.

**In the Matter of the Application of Mark Twain Communications
Company for Expansion of Present Certificate of Service to
Provide Basic Service Within the State of Missouri.**

*Case No. TA-2002-446
Decided September 17, 2002*

Certificates §46.3. The Commission expanded the area in which Mark Twain Communications Company provides basic local exchange service. The Commission applied the same standard for the certificate expansion as it applies for granting original certificates.

Certificates §51. When the Commission granted an expansion of an area in which Mark Twain Communications Company provides basic local exchange service, the Commission applied the same standard as it applies for granting original certificates.

Telecommunications § 3.3. The Commission granted an expansion of the area in which Mark Twain Communications Company provides basic local exchange service. The Commission applied the same standard for the certificate expansion as it applies for granting original certificates.

**ORDER APPROVING EXPANSION OF
CERTIFICATE OF SERVICE AUTHORITY**

Syllabus: This order expands Mark Twain Communications Company's certificate of service authority to provide basic local telecommunications services, classifies those services and the company as competitive, and waives certain statutes and regulations.

Procedural History

Mark Twain applied to the Missouri Public Service Commission on March 20, 2002, for permission to expand its certificate of service authority to provide basic local exchange telecommunications services in Missouri. Mark Twain also sought to remain classified as a competitive company, and asked the Commission to grant the standard waivers. Also, Mark Twain asked the Commission to temporarily waive 4 CSR 240-2.060(6)(B) and (C) to allow it time to obtain interconnection agreements with Southwestern Bell Telephone Company and Sprint Missouri, Inc.

The Commission granted Mark Twain's current certificate in Case No. TA-98-305. The certificate permits Mark Twain to serve customers in the exchanges of GTE Midwest, Inc. In that same case, the Commission granted Mark Twain competitive classification and the standard waivers.

On April 2, 2002, the Commission issued a Schedule of Applicants for Basic Local and Nonswitched Local Exchange Service Authority and Opportunity to Intervene. The notice told parties who wished to intervene to file their requests by May 2, 2002. No parties responded to the notice.

On April 8, 2002, the Commission ordered Mark Twain to supplement its pleading. Mark Twain's original application was deficient because it did not cite to authority that would allow the Commission to grant the requested relief. It also did not have a certificate of service. Mark Twain corrected those deficiencies by supplementing its pleading on April 9, 2002.

Mark Twain amended its application on July 23, 2002. The original application asked the Commission to allow Mark Twain to serve customers in the service areas of Mark Twain Rural Telephone Company, Southwestern Bell Telephone Company, and Sprint Missouri, Inc. Mark Twain's amended application asked the Commission to delete the request to serve customers in Mark Twain Rural Telephone Company's area.

The Staff of the Missouri Public Service Commission filed its Recommendation on July 29, 2002. Staff recommended that the Commission expand Mark Twain's current certificate, grant competitive classification and grant the standard waivers. Staff also recommended the Commission waive Commission Rule 4 CSR 240-2.060(6)(C).

On August 27, 2002, the Commission entered an Order Denying Waiver of Commission Rule 4 CSR 240-2.060(6)(B) because waiving that rule would conflict with Section 392.455(3).

On August 28, 2002, Mark Twain amended its application, removing its request that the Commission waive 4 CSR 240-2.060(6)(B) and requesting that it be granted authority to serve all the exchanges of Southwestern Bell and Sprint. Staff responded on September 5, 2002. Staff recommended that the Commission grant Mark Twain's application as amended.

Discussion

Mark Twain asks the Commission to expand its certificate to allow it to serve customers in the exchange boundaries of Southwestern Bell Telephone Company and Sprint Missouri, Inc. The areas Mark Twain would like to serve are no smaller than an exchange.

11 Mo. P.S.C. 3d

The Commission may grant an application for a certificate of service authority to provide basic local telecommunications service upon a showing (1) that the applicant has met the statutory requirements,¹ and (2) that the grant of authority is in the public interest.² The applicant must also comply with the Commission's procedural rules.³

Mark Twain also requests that it and its basic local services be classified as competitive. The Commission may classify a telecommunications service as competitive if the Commission determines that it is subject to a sufficient degree of competition to justify a lesser degree of regulation.⁴ The Commission may only classify a telecommunications carrier as competitive if all of its services are so classified.⁵

In addition, Mark Twain asks the Commission to waive certain statutes and Commission rules. Along with the "standard waivers" it requests, Mark Twain also asks the Commission to temporarily waive 4 CSR 240-2.060(6)(C). The Commission may waive the application of certain statutes and of its rules to a competitive carrier if it determines that such waiver is consistent with the purposes of Chapter 392.⁶

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. Requirements of the Commission's Rules:

Commission Rule 4 CSR 240-2.060, at subsections (1) and (6), requires an entity seeking certification to provide basic local telecommunications services to provide various items of information to the Commission in its application. These include a description of the business organization of the applicant, supported by the certificate of the Missouri Secretary of State; names and addresses for contact purposes; a disclosure of any pending or final judgments or decisions against it from any state or federal agency or court involving customer service or rates; a verified statement that there are no outstanding annual reports or assessment fees owed to this Commission; a request to be classified as a competitive telecommunications company, if applicable, and a description of the types of service the applicant intends to provide; the exchanges in which service is to be offered; and

¹ See Sections 392.450 and 392.455, RSMo 2000. All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

² Sections 392.430 and 392.440.

³ See Chapter 2, 4 CSR 240.

⁴ Section 392.361.2.

⁵ Section 392.361.3.

⁶ See Sections 392.185, 392.361.3 and 392.420.

a proposed tariff with an effective date which is not fewer than 45 days after its issue date.

The Commission finds that Mark Twain has complied with each of these requirements except for the proposed tariff. Mark Twain requests a temporary waiver of 4 CSR 240-2.060(6)(C) until it has entered into interconnection agreements with the incumbent LECs and those agreements have been approved by the Commission. The Commission finds that a temporary waiver of 4 CSR 240-2.060(6)(C) is consistent with the purposes of Chapter 392, and the Commission will waive 4 CSR 240-2.060(6)(C).

B. Requirements of Section 392.450:

Section 392.450.1 provides that the Commission may grant a basic local certificate only upon a finding, after notice and a hearing, that the applicant has complied with the certification process established under Section 392.455. Thus, an applicant's satisfaction of the requirements of the Commission's regulations and of Section 392.455 also satisfies Section 392.450.1. As explained below, the Commission finds that Mark Twain has satisfied the requirements of the Commission's regulations and of Section 392.455, and consequently finds that Mark Twain has complied with the certification process established by the Commission in satisfaction of Section 392.450.1.

Section 392.450.2 provides that an applicant for a basic local certificate must (1) file and maintain tariffs with the Commission in the same manner as the incumbent local exchange carriers and (2) meet the minimum service standards, including quality of service and billing standards, that the Commission requires of the competing incumbent local exchange carriers.⁷

Mark Twain did not file a proposed tariff in support of its application. However, Mark Twain states that it will comply with all applicable Commission rules except those expressly waived by the Commission. Thereby, Mark Twain has agreed to provide services that will meet the minimum basic local service standards required by the Commission, including quality of service and billing standards. Staff recommends that the Commission grant the certificate. The Commission finds that Mark Twain has met the requirements of Section 392.450.2.

C. Requirements of Section 392.455:

Section 392.455 authorizes the Commission to establish a process to grant basic local certification to new entrants and to grant certificates to new entrants to provide basic local telecommunications service on a common carriage basis. That section further requires that a new entrant (1) possess sufficient technical, financial and managerial resources and abilities to provide basic local telecommunications service; (2) demonstrate that the services it proposes to offer satisfy the minimum standards established by the Commission; (3) set forth the geographic area in which it proposes to offer service and demonstrate that such area follows the exchange boundaries of the incumbent local exchange telecommunications company and is no smaller than an exchange; and (4) offer basic local telecommunications service as a separate and distinct service. Finally, that section also

⁷ "Incumbent local exchange carrier," or "ILEC," is a term of art in the telecommunications industry which refers to a telephone company authorized to provide local telephone service in a specific geographic area as of December 31, 1995. See Section 386.010(22).

11 Mo. P.S.C. 3d

requires that the Commission give due consideration to equitable access for all Missourians to affordable telecommunications services, regardless of where they live or their income.

Mark Twain stated in its application that it has sufficient technical, financial and managerial resources to provide service in these additional areas. Because the Commission has already approved of Mark Twain's certificate in Case No. TA-98-305, and because of the Staff's recommendation, the Commission finds that Mark Twain has sufficient technical, financial and managerial resources.

As noted previously, Mark Twain has stated that it will comply with all applicable Commission rules except those expressly waived by the Commission. Based on this statement, the Commission finds that Mark Twain has demonstrated that the services it proposes to offer satisfy the minimum standards established by the Commission, in satisfaction of Section 392.455(2).

Mark Twain seeks certification throughout all exchanges currently served by the incumbent local exchange telecommunications companies of Southwestern Bell and Sprint, as set forth in the list of exchanges attached to the amended application. Staff agrees that Mark Twain has sufficiently identified the exchanges in which it seeks certification and recommends that the application be approved. Having reviewed Mark Twain's application and supporting materials, as well as Staff's Memorandum and Recommendation, the Commission finds that Mark Twain has met the requirements of Section 392.455(3) in that it has set forth the geographic area in which it proposes to offer service and has demonstrated that such area follows the exchange boundaries of the incumbent local exchange telecommunications companies and is no smaller than an exchange.

In its verified application, Mark Twain states that it will offer basic service as a separate and distinct service. Based on this statement, the Commission finds that Mark Twain has met the requirements of Section 392.455(4), that all providers offer basic local telecommunications service as a separate and distinct service.

In its verified application, Mark Twain states that it will give consideration to equitable access for all Missourians, regardless of where they reside or their income, to affordable telecommunications service. Therefore, granting the requested certificate will further the goal announced by the Legislature.

D. Requirements for Competitive Classification:

If the Commission grants Mark Twain competitive classification, Mark Twain will compete with an incumbent local exchange carrier in each exchange in which it provides basic local telecommunications service. The Commission finds that Mark Twain will thus be subject to a sufficient level of competition to justify a lesser degree of regulation. Furthermore, all of the services Mark Twain will offer are thus qualified for classification as competitive services.

Conclusions of Law

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

Jurisdiction:

The Commission is authorized to create a process by which to certify new entrants to provide local exchange telecommunications services in Missouri as

common carriers, and is further authorized to grant such certificates where it is in the public interest.⁸ The Commission is also authorized to classify services and companies as competitive or transitionally competitive and to waive certain statutory provisions and Commission rules.⁹ The Commission may also impose any reasonable and necessary condition or conditions upon telecommunications service providers if such conditions are in the public interest and consistent with the provisions and purposes of this chapter.¹⁰

The Public Interest:

Having found that Mark Twain has met all of the requirements for certification to provide basic local telecommunications service as a common carrier, the Commission must determine whether it is in the public interest to grant the requested certificate. The public interest is found in the

positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.¹¹

“[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.”¹²

The Commission notes that the General Assembly has expressly provided that “[t]he provisions of this chapter shall be construed to . . . [p]romote diversity in the supply of telecommunications services and products throughout the state of Missouri; [and to] . . . [a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest[.]”¹³ In consideration of the foregoing, and based upon its finding that Mark Twain has met all of the requirements for certification, the Commission concludes that granting the expansion of Mark Twain’s certificate is in the public interest.

Competitive Classification:

Mark Twain has previously been found to be a competitive company and the Commission has found that Mark Twain will be subject to sufficient competition to justify a lesser degree of regulation. The Commission has further found that all of

⁸Sections 392.430, 392.450 and 392.455.

⁹Section 392.361.

¹⁰Section 392.470.1.

¹¹ *In re Rahn’s Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (1926), *cert. den’d*, 274 U.S. 745, 47 S.Ct. 591, 71 L.Ed. 1325.

¹² *Moorshead v. Railways Co.*, 203 Mo. 121, 165, 96 S. W. 261, 271 (banc 1907).

¹³ Section 392.185.

11 Mo. P.S.C. 3d

Mark Twain's services will be entitled to classification as competitive services. In consideration of these findings and of the public interest as announced by the General Assembly, the Commission concludes that granting competitive classification to Mark Twain is consistent with the protection of ratepayers and promotes the public interest. Mark Twain shall continue to be classified as a competitive company.

Waivers:

The Commission may waive certain statutes and administrative rules for competitively classified carriers, "if such waiver or modification is otherwise consistent with the other provisions of sections 392.361 to 392.520 and the purposes of this chapter."¹⁴ The Commission has developed a standard list of statutes and regulations that it waives for competitive local exchange carriers. The Commission will waive these provisions for Mark Twain because to do so furthers the purpose of Chapter 392 to foster and encourage the development of competition in the telecommunications industry.

The Commission may also "require a telecommunications company to comply with any conditions reasonably made necessary to protect the public interest by the suspension of the statutory requirement."¹⁵ Staff recommends that Mark Twain's application be granted subject to the following conditions:

- A. Mark Twain's originating and terminating access rates will be no greater than the lowest Commission-approved corresponding access rates in effect for each ILEC within whose service area Mark Twain seeks authority to provide service, unless authorized by the Commission pursuant to Sections 392.220 and 392.230, RSMo.
- B. The certificate and service classification for switched exchange access is granted conditioned on the continued applicability of Section 392.200 RSMo, and the requirement that any increases in switched access service rates above the maximum switched access service rates set forth herein shall be made pursuant to Sections 392.220 and 392.230 RSMo, and not Sections 392.500 and 392.510 RSMo.
- C. If the directly competing ILEC, in whose service area Mark Twain is operating, decreases its originating and/or terminating access service rates, Mark Twain shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates in the directly competing ILEC's service area within 30 days of the directly competing ILEC's reduction of its originating and/or terminating access rates in order to maintain the cap.

¹⁴ Sections 392.361.5 and 392.420.

¹⁵ Section 392.361.6.

The Commission has considered the conditions proposed by Staff and concludes that they are reasonably necessary to protect the public interest and should be adopted.

The Commission reminds Mark Twain that prior to providing telecommunications service, a party shall possess the following: (1) an interconnection agreement approved by the Commission; (2) except for wireless providers, a certificate of service authority from the Commission to provide interexchange or basic local telecommunications services; and (3) except for wireless providers, a tariff approved by the Commission.

IT IS THEREFORE ORDERED:

1. That Mark Twain Communications Company is granted an expansion of its certificate of service authority to provide basic local telecommunications services.
2. That Mark Twain Communications Company's certificate of service authority to provide basic local telecommunications services in the state of Missouri shall include the exchanges of Southwestern Bell Telephone Company and Sprint Missouri, Inc. as listed in paragraph 9 of its Amended Restated Applications for Expansion of Service Authority filed August 28, 2002, subject to the conditions of certification set out above and to all applicable statutes and Commission rules except as specified in this order.
3. That Mark Twain Communications Company will remain classified as a competitive telecommunications company.
4. That Mark Twain Communications Company's certification and competitive status are expressly conditioned upon the continued applicability of Section 392.200, RSMo 2000, and on the requirement that any increases in switched access service rates above the maximum switched access service rates set forth in the agreement must be cost-justified under Sections 392.220, RSMo 2000, and 392.230, rather than Sections 392.500 and 392.510.
5. That Mark Twain Communications Company's originating and terminating access rates will be no greater than the lowest Commission-approved corresponding access rates in effect for each ILEC within whose service area Mark Twain seeks authority to provide service, unless authorized by the Commission pursuant to Sections 392.220 and 392.230, RSMo 2000.
6. That the certificate and competitive service classification for switched exchange access is granted conditioned on the continued applicability of Section 392.200, RSMo 2000, and the requirement that any increases in switched access service rates above the maximum switched access service rates set forth herein shall be made pursuant to Sections 392.220 and 392.230, RSMo 2000, and not Sections 392.500 and 392.510, RSMo 2000.
7. That if the directly competing ILEC, in whose service area Mark Twain Communications Company is operating, decreases its originating and/or terminating access service rates, Mark Twain shall file an appropriate tariff amendment to reduce its originating and/or terminating access rates in the directly competing ILEC's service area within 30 days of the directly competing ILEC's reduction of its originating and/or terminating access rates in order to maintain the cap.

11 Mo. P.S.C. 3d

8. That application of the following statutes and Commission regulations is waived:

Statutes

- 392.210.2 - uniform system of accounts
- 392.240(1) - just and reasonable rates
- 392.270 - valuation of property (ratemaking)
- 392.280 - depreciation accounts
- 392.290 - issuance of securities
- 392.300.2 - acquisition of stock
- 392.310 - stock and debt issuance
- 392.320 - stock dividend payment
- 392.330 - issuance of securities, debts and notes
- 392.340 - reorganization(s)

Commission Rules

- 4 CSR 240-10.020 - depreciation fund income
- 4 CSR 240-30.010(2)(C) - posting of tariffs
- 4 CSR 240-30.040 - uniform system of accounts
- 4 CSR 240-32.030(4)(C) - exchange boundary maps
- 4 CSR 240-33.030 - minimum charges
- 4 CSR 240-35 - reporting of bypass and customer-specific arrangements

9. That Commission Rule 4 CSR 240-2.060(6)(C) is waived. Mark Twain Communications Company may not operate in the service areas of Southwestern Bell Telephone Company and Sprint Missouri, Inc. until it has submitted its tariffs to the Commission and the Commission approves of them.

10. That this order and Mark Twain Communications Company's certificate expansion shall become effective on September 27, 2002.

11. That this case may be closed on September 28, 2002.

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Pridgin, Regulatory Law Judge

In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules.*

*Case No. GR-2002-356
Decided October 3, 2002*

Gas §18. The Commission approved a stipulation and agreement whereby Laclede Gas Company was allowed a general rate increase for natural gas service, increasing its revenue requirement by \$14,000,000, impacting the average residential customer in the amount of \$1.80 per month.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus:

This order approves the settlement by the parties of Laclede Gas Company's general rate case.

Procedural History:

On January 25, 2002, Laclede Gas Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for natural gas service provided to customers in the Missouri service area of the Company. The proposed rate increase was designed to produce an annual increase of \$36.092 million in the Company's revenues, exclusive of Gross Receipts Taxes, or a 6.3 percent increase. The proposed tariff sheets included a requested effective date of February 25, 2002. On January 31, 2002, the Commission suspended Laclede's proposed tariff sheets for 120 days plus six months, until December 25, 2002.

On March 19, the Commission granted the unopposed applications to intervene of Union Electric Company, doing business as AmerenUE, the Missouri Industrial Energy Consumers,¹ the Missouri Energy Group,² and Local 5-6 of the Paper, Allied-Industrial, Chemical, and Energy Workers, AFL-CIO. On the same day, the Commission set the test year, adopted a procedural schedule and adopted a protective order to protect highly confidential and proprietary information. On August 13 and 14, 2002, the Commission held Local Public Hearings in St. Charles, the city of St. Louis, and Clayton, Missouri.

*See page 000 for another order in this case.

¹ The Missouri Industrial Energy Consumers, or MIEC, is an unincorporated association of 13 industrial customers of Laclede, including: Adam's Mark Hotel, Alcoa Foil Products, Anheuser-Busch, The Boeing Company, DaimlerChrysler, Ford Motor, General Motors, Hussmann Refrigeration, Monsanto, Procter & Gamble Manufacturing, Nestle Purina PetCare, Solutia, and Tyco Healthcare.

² The Missouri Energy Group, or MEG, is an unincorporated association of four large-scale customers of Laclede, including: Barnes-Jewish Hospital, Emerson Electric Company, SSM HealthCare, and St. John's Mercy Health Care.

11 Mo. P.S.C. 3d

On August 20, the parties filed a Partial Stipulation and Agreement resolving several contested issues and requested a change to the procedural schedule, which the Commission granted that same day. On August 22, AmerenUE filed its response to the Partial Stipulation and Agreement, as did the Missouri Energy Group on August 23, stating that the filing party neither opposes nor supports the proposed stipulation and agreement and waives its right to a hearing on the matters resolved by the proposed stipulation and agreement. On August 28, the Commission's Staff filed Suggestions in Support of the Partial Stipulation and Agreement.

Also on August 28, Laclede, together with the Staff and the Office of the Public Counsel, advised the presiding officer that a settlement had been reached with respect those issues scheduled for hearing on August 29 and 30. The remaining contested issue was set for hearing the week of September 1. On August 29, the parties filed their First Amended Partial Stipulation and Agreement, reflecting the additional settled issues. Staff filed Suggestions in Support of the First Amended Partial Stipulation and Agreement on September 3. AmerenUE filed a response to the First Amended Partial Stipulation and Agreement on September 5, as did the Missouri Energy Group on September 12, again stating that the filing party neither opposes nor supports the proposed stipulation and agreement and waiving its right to a hearing on the matters resolved by the proposed stipulation and agreement.

The following week, the parties advised the presiding officer that the remaining issue had been settled and that no contested case hearing was necessary. A Second Amended Stipulation and Agreement was filed on September 5. Intervenor Local 5-6 filed a response to it on September 9 and Staff filed Suggestions supporting it on September 10. Local 5-6's response stated that it neither opposes nor supports the proposed stipulation and agreement and that it waives its right to a hearing on the matters resolved by the proposed stipulation and agreement. An on-the-record presentation was set for September 16 and was held that day as scheduled. All of the prefiled testimony was received into the record at that time, without objection, and all of the parties waived their right to cross-examination. Laclede, Staff and the Public Counsel filed their Clarification of On-the-Record Presentation Comments on September 18. The transcript of the on-the-record presentation was filed on September 26.

Discussion:

As described above, the parties have presented their settlement agreement to the Commission in the form of four separate documents. Three of these are stipulations and agreements. None of these stipulations and agreements were executed by all of the parties to this case. However, under its practice rules, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement if no party requests a hearing within seven days of the filing of the stipulation and agreement.³ No party in this case responded to the filing of a stipulation and agreement with a request for hearing and several parties, at various

³ Commission Rule 4 CSR 240-2.115.

times, filed responses stating the absence of any objection. In any event, the parties were afforded ample opportunity to either express objections or request a hearing at the on-the-record presentation held on September 16. None did; and the Commission will deem the proposed settlement to be unanimous.

The Partial Stipulation and Agreement

The Partial Stipulation and Agreement filed on August 20 addressed (1) revenue requirement, (2) certain tariff modifications, (3) the regulatory treatment for pensions and other post-retirement benefits, (4) the Emergency Cold Weather Rule, (5) depreciation, (6) accounting authority orders, (7) off-system sales and capacity release revenues, (8) the number of heating degree days to be used to determine normal weather, (9) the provision of information to the Staff, Public Counsel, and the intervenors, (10) Laclede Energy Resources, and (11) Laclede's request for an additional accounting authority order to address weather-related lost revenues in Case No. GA-2002-429. A copy of the Partial Stipulation and Agreement is attached hereto as Attachment A.

The Partial Stipulation and Agreement also contained various standard provisions commonly included in stipulations and agreements filed with the Commission, including the parties' reservation of the right to take contradictory positions in other cases; an assertion of the interdependence of all of the terms and consequent vacation of the agreement if modified by the Commission; the parties' waiver of their rights, contingent on Commission approval of the agreement, to present testimony, to cross-examine witnesses, to present oral argument or written briefs, to a reading of the full transcript by the members of the Commission, and to seek judicial review; that prefiled testimony relating to issues resolved by the agreement shall be received into the record; that Staff shall prepare and file supporting suggestions; and that Staff may provide oral explanations of the agreement as requested by the Commission at an Agenda session.

Revenue Requirement:

The parties agreed to a revenue requirement increase of \$14,000,000. The signatory parties agree that this increase is just and reasonable and no party has objected to it or requested a hearing. At the on-the-record presentation, Staff's expert explained that most of the increase was attributable to additions to plant.

Staff's increased revenue requirement of \$13,250,000 was increased by \$750,000 for the recovery of any possible incremental bad-debt expense associated with the Emergency Cold Weather Rule Amendment as a result of the negotiations. The actual incremental level of bad debts incurred by Laclede associated with the Emergency Cold Weather Rule will be subject to a future true-up. The increased revenue requirement will impact the average residential customer in the amount of \$1.80 per month.

Tariff Changes:

Laclede has agreed to modify its tariff language to facilitate access to customers' premises for the purpose of making safety inspections. In particular, the words "or failure" shall be inserted into Rule No. 14(1)(E) on 2nd Revised Sheet No. R-12, P.S.C. Mo. No. 5 Consolidated, to make clear that a failure to permit mandated

11 Mo. P.S.C. 3d

safety inspections after reasonable notice, as well as a refusal to do so, shall be grounds for discontinuance of service. Such inspections are mandated by the Commission's pipeline safety rules. Staff states it does not expect that a disconnection for this reason alone would occur in the winter months.

Pensions and Other Post-Retirement Employee Benefits:

Laclede has agreed to use the ERISA Minimum Contribution of zero for determining pension expense for purposes of establishing rates in the future. Staff believes this change better recognizes the actual current cost to the Company and captures the associated actual cash outlay to the fund, if any. In determining the revenue requirement and contributions for other post-retirement benefits, the Staff's current method will be modified to allow for the use of market-related value. This modification should help smooth the effect on the return component of benefit expense resulting from dramatic fluctuations in the stock market, as have been recently experienced. For financial reporting purposes, expenses related to pensions and benefits will be calculated in accordance with Financial Accounting Standards (FAS) 87, 88 and 106.

Emergency Cold Weather Rule Bad Debt Expense:

As noted above, the agreement contains a \$750,000 increase in revenue requirement for the recovery of any incremental bad-debt expense related to the implementation of the Emergency Cold Weather Rule Amendment approved by the Commission in Case No. AX-2002-203. The difference between this amount and any incremental bad debts incurred as a result of the Emergency Amendment shall be trued-up and the disposition of the difference will be included in rates.

Depreciation:

The parties settled several depreciation issues. Starting July 1, 2002, Laclede's depreciation reserve will be amortized at an annual rate of \$3,400,000 by booking an annual negative amortization of \$2,400,000 to the reserve for account 376.01 (Steel Mains) and a negative annual amortization of \$1,000,000 to the reserve for account 380.02 (Plastic and Copper Services). This amortization will reduce the depreciation reserve, which Staff believes has become excessive due to the inclusion in depreciation rates of large negative net salvage percentages.

The depreciation rates included in the Partial Stipulation and Agreement eliminate the net salvage component from depreciation rates and include it as an annual expense in the income statement. The agreement also increases the depreciation rate associated with personal and other computer systems. The shorter lives reflected in this rate recognizes Laclede's current technology plans for its computer-based equipment.

The parties also agreed that, should Laclede begin the dismantling of any of its natural gas holders prior to its next general rate case proceeding, that the reasonable and prudent costs incurred by Laclede in connection with the dismantling will be debited to the depreciation reserve. To provide an initially sufficient reserve for dismantling costs, Laclede is authorized to make an initial transfer on January 1, 2003, of \$5,000,000 to the reserve for account 362.00 (Gas Holders) from the reserve for account 380.01 (Steel Services).

Accounting Authority Orders:

Laclede will be permitted to defer certain expenses related to the Commission-mandated replacement of plant, including: the replacement of unprotected, bare steel service and yard lines and the associated resetting of meters; the replacement or protection of steel mains and the associated transfer of services from old mains to new mains; the replacement of cast iron mains and associated transfer of services; and the replacement, renewal or relaying of direct buried copper service lines. This treatment of costs related to the Safety Replacement Program and Copper Service Line Replacement Program is consistent with the filed position of the Staff and prior orders of the Commission. Staff's calculation of revenue requirement reflects expense associated with an amortization of the amounts deferred through August 1, 2002, and inclusion in rate base of the deferred taxes, depreciation and carrying costs associated with the unamortized deferred balances. As of August 1, 2002, a regulatory asset of \$321,657 shall be established; a tenth of this amount is included in the cost of service recognized in this case and a further tenth will be amortized annually over the next nine years.

Off-system Sales and Capacity Release:

The rates recommended herein reflect an imputed level of revenue in the amount of \$3,800,000 for the release of pipeline capacity and off-system sales. In exchange for this imputation, Laclede will retain 100 percent of any revenues realized from such transactions during the period the rates established in this proceeding are in effect. Laclede has agreed to provide an explanation to Staff and the Public Counsel whenever it makes an off-system sale of gas that utilizes gas supplies with a commodity cost that is lower than the highest commodity cost of gas available and purchased by it for system supply on any pipeline on the day the sale is made. Laclede has further agreed to modify its off-system sales tariff to reflect this agreement.

Staff's position in filed testimony was to incorporate reasonable levels of off-system sales margins and capacity release credits in the non-gas cost rates developed in the general rate case. Staff agreed to a level of \$3,800,000 for off-system sales and capacity release as a reasonable compromise of its filed position of \$4,300,000. The agreement also requires Laclede to provide additional documentation regarding off-system sales and capacity releases to allow Staff to better monitor these transactions.

Heating Degree Days For Normal Weather:

The parties agreed that an annual heating degree day level of 4,718 shall be used to calculate the billing determinants for all rate design purposes.

The Staff agreed to settle on the same level of normal heating degree days for Lambert Field as was agreed to in the previous Laclede rate case. This agreement increased the Staff's revenue requirement by approximately \$0.6 million. This level of heating degree days gives some recognition to Laclede's claims that continued urbanization in its service territory has affected the normal level of heating degree days.

11 Mo. P.S.C. 3d

Provision of Additional Information:

Laclede has agreed to provide additional information and studies regarding water heating usage and class cost of service. This data should provide more accurate allocation of costs for designing rates in the future.

Laclede Energy Services:

The agreement eliminates the allocation of costs to Laclede Energy Services from the cost of service in this case. These cost allocations and Laclede's decision to establish a separate subsidiary for the gas procurement function will be examined as part of the Staff's investigation in Case No. GO-2002-1099.

Weather-related Lost Revenues Accounting Authority Order:

Laclede agreed, upon approval of the settlement agreement, to withdraw its request for an accounting authority order now pending in Case No. GA-2002-429. This agreement thus avoids the potential future recovery from ratepayers of lost revenues associated with the reduction in gas sales during the 2001–2002 winter season.

Customer Notification:

Under the agreement, Laclede will, by December 1, 2002, notify each of its customers who could potentially benefit from switching to a different rate.

Effective Date:

The parties agreed that the revenue increase granted to Laclede may become effective for service rendered on and after November 1, 2002. In relation to this agreement, Laclede stated at the on-the-record presentation that it intended to file compliance tariffs no later than October 15.

The First Amended Partial Stipulation and Agreement

Negotiations continued following the filing of the Partial Stipulation and Agreement on August 20, resulting in the First Amended Partial Stipulation and Agreement filed on August 29. This stipulation and agreement includes resolution of the issues of: (1) weather mitigation rate design, (2) a gas supply incentive program, (3) return on equity determinations in future cases, and (4) a rate moratorium. A copy of the First Amended Partial Stipulation and Agreement is attached hereto as Attachment B. The First Amended Partial Stipulation and Agreement specifically adopted and incorporated by reference the contents of the Partial Stipulation and Agreement except as expressly modified by the First Amended Partial Stipulation and Agreement.

Weather Mitigation Rate Design:

The parties have agreed to a Weather Mitigation Rate Design that is intended to allow Laclede to more consistently recover its fixed costs during the winter months without changing a residential customer's bundled rate for both non-gas and gas costs. The new rate design is not expected to have any impact on a customer's total bill during normal weather. The principal feature of the new design is the shifting of distribution costs from the second block to the first block, which is much less weather sensitive. A corresponding change is made to the Purchased

Gas Adjustment in order to avoid significant customer impact. Thus, the rate paid by the customer remains the same but the potential impact of weather fluctuations is mitigated.

In order to apply this new rate design successfully, the General Service-Commercial and Industrial Class, which has approximately 40,000 customers that are both small and large users of gas, will be divided into three classes based on usage characteristics. These three classes will allow for customer impacts to be minimized and will allow rates to be designed that reflect the characteristics of these three diverse groups of customers. Implementation of the rate design for the Commercial and Industrial Class customers is contingent on the availability of satisfactory billing determinants that Laclede will provide to the Staff and agreement among the parties concerning these billing determinants. Finally, the parties agreed to meet and exchange information to facilitate ongoing evaluation and monitoring of the Weather Mitigation Rate Design.

Staff supports the revised Weather Mitigation Rate Design and maintains that it is an innovative method for recovering fixed costs while avoiding detrimental impacts to customers. When coupled with the other components of this stipulation, Staff maintains that the proposed rate design will be of significant benefit to both consumers and to Laclede.

Gas Supply Incentive Program:

The agreement includes a Gas Supply Incentive Program, or GSIP, based on the delivered cost of the natural gas commodity. The proposed GSIP provides for three gas cost tiers and incentives to Laclede to keep costs below the highest tier. Manipulation is avoided by preserving a broad Commission review authority. The incentive consists of ten percent of any cost reductions, up to a \$5,000,000 cap. Thereafter, the incentive drops to one percent of any cost reductions.

While Staff is generally in support of programs that work to mitigate the impact of upward volatility in gas prices, Staff initially opposed this particular GSIP. Staff's concerns included the lack of specificity regarding prudence reviews of Laclede's activities, the timing of such review, and the prohibition on prudence reviews in certain circumstances. The agreement resolves these concerns by providing that prudence reviews are applicable in all circumstances.

Staff states that the ability to conduct a prudence review and propose adjustments based upon the prudence standard ensures the ability to identify transactions that may be imprudent and assure that the program is working to the benefit of customers. The agreement also meets Staff's other concerns by adding further enhancements to the GSIP by requiring periodic submission of monitoring and reliability reports. The filing of monitoring reports will simplify Actual Cost Adjustment audits and provides the Staff with more timely information regarding results of the incentive plan.

Return on Equity Determinations in Future Cases:

This section of the agreement is intended to recognize that the adoption of a weather mitigation plan is designed to reduce Laclede's risk of under-recovery of its costs due to the vagaries of weather. This rate design, therefore, reduces

11 Mo. P.S.C. 3d

Laclede's weather-related business risk and that reduction in risk is one factor that should be considered in determining the just and reasonable return on equity for Laclede in future rate cases.

The agreement can be supported by accepted financial theory, which assumes that investors base their perceptions of risk on all information that is publicly available to them in making investment decisions. Therefore, Staff believes it is reasonable to consider any reduction in weather-related business risk in determining an appropriate return on equity for Laclede in the context of future rate cases. Staff also believes it is reasonable to provide all parties, including Laclede, the freedom to recommend a return on equity they believe appropriately reflects all the risks faced by Laclede at the time of such case, together with any other consideration that a party deems appropriate to the determination of a fair and reasonable return on equity.

Rate Moratorium:

As part of the settlement in this case, Laclede has agreed to a sixteen-month moratorium on rate increase requests. Laclede has agreed that it will not file a general rate case before March 1, 2004. There are certain standard exceptions, but Staff expects that this moratorium will benefit customers by stabilizing their rates, particularly when considered together with the stabilization of upward volatility of gas costs under the GSIP.

The Second Amended Stipulation and Agreement

Negotiations among the parties continued after the filing of the First Amended Partial Stipulation and Agreement on August 29. The Second Amended Stipulation and Agreement was filed on September 5. This agreement resolved the issue of Class Cost of Service, which was the only contested issue remaining for hearing. A copy of the Second Amended Stipulation and Agreement is attached hereto as Attachment C. The Second Amended Stipulation and Agreement specifically adopted and incorporated by reference the contents of the Partial Stipulation and Agreement and the First Amended Stipulation and Agreement except as expressly modified by the Second Amended Stipulation and Agreement.

Class Cost of Service:

The increased revenue requirement will be collected equally from each customer class on a percentage basis, except for a reallocation of \$200,000 associated with the split of the Commercial and Industrial Class into three new classes. Laclede has various classes of customers ranging from residential households to the largest industrial customers. In making a recommendation concerning the responsibility of each customer class for Laclede's cost of providing service, Staff considers the various costs that providing service to each class actually causes. Laclede incurs such costs in providing service as costs for mains and meters, accounting and billing, and operations and maintenance. Where costs cannot be directly attributed to customer classes, Staff uses reasonable methods to allocate these costs among the various customer classes.

In this case, Staff took the position that any increase in revenue requirement be collected from the various classes using the percentage currently attributed to each

class and that there be no shift between classes. Under the rate blocking proposal to help alleviate Laclede's undercollection of revenues due to weather, the agreement generally achieves that goal: it includes only a small revenue shift between the General Service—Commercial and Industrial Class and the Large Volume Sales and Transportation Class. This shift of approximately \$100,000 is less than one percent of the agreed \$14 million revenue requirement increase and is less than 0.05 percent of the current amount of non-gas revenue collected by Laclede. Further, all customer classes will contribute a revenue increase of between 5.3 percent and 6.5 percent. The average increase per class is 6.3 percent; the Residential Class is receiving the average percent increase. The overall increase in Laclede's revenues, including gas cost, is 2.45 percent.

In addition, Laclede has agreed to provide information to enable Staff to complete new class cost of service studies so that costs may be allocated with greater accuracy in the next general rate case. Staff's information concerning costs caused by the various customer classes is becoming outdated. For this reason, Staff has sought in this case to minimize cost shifts between classes.

Another consideration is that the agreed weather mitigation rate design is a significant change in rate design. Staff needs an opportunity to evaluate how that rate design change will affect Laclede's customers. The use of the current allocations with minimal class revenue shifts will permit Staff to better evaluate the effect of the rate design change. The small shift contemplated within the General Service—Commercial and Industrial Class will enable rates to be designed that meet the weather mitigation goals of the agreement while maintaining rate continuity. Rate continuity is valuable because a customer with usage patterns that permit the customer to take service under two different rates would receive the same total bill from either rate. This is especially important with the proposed creation of three subclasses in the General Service—Commercial and Industrial Class.

The Clarification of On-the-Record Presentation Comments

As noted, an on-the-record presentation was held on September 16 and the transcript was filed on September 26. Thereafter, Laclede, Staff and the Public Counsel filed a Clarification of On-the-Record Presentation Comments. A copy of the Clarification of On-the-Record Presentation Comments is attached hereto as Attachment D.

Expiration of the Gas Supply Incentive Plan or GSIP:

The filing parties noted that, during the on-the-record presentation, several questions were raised regarding the legal effect of not having an explicit termination date for the Gas Supply Incentive Plan or GSIP included in the agreement. To allay those concerns, Laclede, Staff and Public Counsel state that in the event that the Commission approves the settlement reached by the parties in this case, the tariffs filed by Laclede in compliance with that settlement will provide that the GSIP will end no later than September 30, 2005, unless otherwise ordered by the Commission:

11 Mo. P.S.C. 3d

Subject to the market-out clause of this tariff, the GSIP shall remain in effect until the conclusion of the ACA period (September 30) following the effective date of new gas rates for the Company ordered in the Company's subsequent rate case to Case No. GR-2002-356, but in any event no later than September 30, 2005, unless extended by Order of the Commission.

The parties urge the Commission to approve the settlement contained in the several documents herein described. 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.⁴ In reviewing the various stipulations submitted by the parties, the Commission notes that⁵

Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The Commission has considered the settlement agreement of the parties as contained in the various documents filed herein, together with Staff's suggestions and the comments made at the on-the-record presentation, and concludes that the settlement agreement is just and reasonable and should be approved.

IT IS THEREFORE ORDERED:

1. That the settlement reached by the parties, as contained in the Partial Stipulation and Agreement filed on August 20, 2002 (Attachment A), the First Amended Partial Stipulation and Agreement filed on August 29, 2002 (Attachment B), the Second Amended Stipulation and Agreement filed on September 5, 2002 (Attachment C), and the Clarification of On-the-Record Presentation Comments filed on September 18, 2002 (Attachment D), is hereby approved as a resolution of all issues in this case.

2. That Laclede Gas Company is ordered to comply with the terms of the settlement agreement of the parties as contained in the Partial Stipulation and Agreement filed on August 20, 2002 (Attachment A), the First Amended Partial Stipulation and Agreement filed on August 29, 2002 (Attachment B), the Second Amended Stipulation and Agreement filed on September 5, 2002 (Attachment C), and the Clarification of On-the-Record Presentation Comments filed on September 18, 2002 (Attachment D).

3. That the proposed natural gas service tariff sheets (File No. 200200602) filed on January 25, 2002, by Laclede Gas Company for the purpose of increasing rates for natural gas service to retail customers are hereby rejected. The specific sheets rejected are:

PSC Mo. No. 5 Consolidated

**5th Revised Sheet No. 1-a, Canceling 4th Revised Sheet No. 1-a
14th Revised Sheet No. 2, Canceling 13th Revised Sheet No. 2**

⁴ Section 536.060, RSMo Supp. 2001.

⁵ Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

Original Sheet No. 2-a, Canceling All Previous Schedules
10th Revised Sheet No. 3, Canceling 9th Revised Sheet No. 3
13th Revised Sheet No. 4, Canceling 12th Revised Sheet No. 4
2nd Revised Sheet No. 4-a, Canceling 1st Revised Sheet No. 4-a
14th Revised Sheet No. 5, Canceling 13th Revised Sheet No. 5
13th Revised Sheet No. 7, Canceling 12th Revised Sheet No. 7
15th Revised Sheet No. 8, Canceling 14th Revised Sheet No. 8
13th Revised Sheet No. 9, Canceling 12th Revised Sheet No. 9
7th Revised Sheet No. 11, Canceling 6th Revised Sheet No. 11
7th Revised Sheet No. 15, Canceling 6th Revised Sheet No. 15
7th Revised Sheet No. 17, Canceling 6th Revised Sheet No. 17
Original Sheet No. 28-h, Canceling All Previous Schedules
9th Revised Sheet No. 34, Canceling 8th Revised Sheet No. 34
2nd Revised Sheet No. 34-a, Canceling 1st Revised Sheet No. 34-a
Original Sheet No. 41, Canceling All Previous Schedules
Original Sheet No. 42, Canceling All Previous Schedules
Original Sheet No. 43, Canceling All Previous Schedules
Original Sheet No. 44, Canceling All Previous Schedules

4. That Laclede Gas Company shall file as soon as practicable, but in no case later than the 30th day after the effective date of this Order, proposed tariff sheets in compliance with the settlement agreement of the parties approved herein.
5. That this order shall become effective on October 13, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

**Office of the Public Counsel, Complainant, v. Warren County
Water and Sewer Company and Gary L. Smith, Respondents.**

Case No. WC-2002-155
Decided October 8, 2002

Certificates § 26. The Commission removed Warren County Water and Sewer Company's authority to do business in Missouri because Warren County Water could not or would not safely serve its customers. The service was unsafe for such reasons as: inadequate water pressure, inadequate water capacity, unlocked and unsecure fencing, and numerous customer complaints about water quality.

Certificates § 61. The Commission removed Warren County Water and Sewer Company's authority to do business, and authorized the Commission to seek a receiver to run the business, after finding the company could not or would not safely serve its customers. The service was unsafe for such reasons as inadequate water pressure, inadequate water capacity, unlocked and unsecure fencing, and numerous customer complaints about water quality. The company's owner also verbally abused his customers, reacted violently toward Commission staff that tried to assist him, and had been convicted of violating the federal Clean Water Act.

11 Mo. P.S.C. 3d

Certificates § 62. The Commission determined it should seek a circuit court order appointing a receiver to run Warren County Water and Sewer Company to ensure its customers receive safe and adequate service.

Service § 4. The Commission determined Warren County Water and Sewer Company could not or would not safely and adequately serve its customers. The service was unsafe for such reasons as: inadequate water pressure, inadequate water capacity, unlocked and unsecure fencing, and numerous customer complaints about water quality. The company's owner also verbally abused his customers, reacted violently toward Commission staff that tried to assist him, and had been convicted of violating the federal Clean Water Act.

Service § 35. The Commission found that Warren County Water and Sewer Company's business practices were inadequate. Some of Warren County Water and Sewer's misconduct included: failing to pay electric bills, assessments, and taxes, failing to get Commission approval before selling assets, and failing to keep adequate records of its transactions.

Water § 10. The Commission found it necessary to seek a receiver to run Warren County Water and Sewer Company after finding its current owner could not or would not safely and adequately serve its customers. The Commission determined it would ask the circuit court to appoint a receiver with the power to run the company and to eventually sell the company to a buyer that will properly serve the customers.

REPORT AND ORDER

Syllabus: The Commission determines that Warren County Water and Sewer is unwilling or unable to provide safe and adequate service, and directs its General Counsel to seek the appointment of a receiver to operate the utility and liquidate its assets.

FINDINGS OF FACT

Brief Procedural History:

On September 26, 2001, the Office of the Public Counsel filed two complaints against Warren County Water and Sewer Company and Gary L. Smith, one concerning water operations and one concerning sewer operations. Mr. Smith is the sole owner of Warren County Water and Sewer Company,¹ which has approximately 325 customers, and certainly less than 1000 customers. The Commission consolidated the two cases.

The complaints alleged that the Company is not providing safe and adequate service to its customers, and for relief, requested that the Commission petition for the appointment of a receiver, pursuant to Section 393.145, RSMo 2000.

Pursuant to an order of the Commission, the Staff of the Commission filed a list of issues on May 7. Staff and Public Counsel timely filed their statements of positions on these issues; the Company failed to do so. An evidentiary hearing was held on June 3 and 4, and was reconvened on July 26. Staff and Public Counsel timely filed briefs, but the Company did not file any briefs.

¹ In their Answer to the complaint, Respondents deny that the Company is owned and operated by Mr. Smith. But at the evidentiary hearing, when asked about his relation to Warren County Water and Sewer, Mr. Smith testified, "I'm the owner."

Water and Sewer Service Quality:

The Company has a history of frequent violations of the Missouri Department of Natural Resources (DNR) regulations. It has received at least ten notices of violations from the DNR in the last few years, and the rate has increased of late. The Company received several notices of violation during the pendency of this case. The notices of violations involve both sewage treatment plants.

Mr. Smith is slow to respond to customer complaints, slow to take corrective action, and slow to let customers know that any action has been taken. Mr. Smith has reacted violently toward Commission Staff members trying to help him, and has been verbally abusive to his customers.

Drinking water systems must maintain a minimum pressure of at least 20 pounds per square inch in the distribution system at all times during normal operating pressures. Some of the houses in Incline Village that are nearest the standpipe, in terms of elevation, do not maintain the minimum pressure of 20 pounds per square inch (psi). Staff witness Steve Loethen installed pressure recorders on the system and obtained readings of less than 20 psi. Mr. Loethen also noted that the well pump cycles more often than it should because of the inadequate storage capacity.

Although the system was designed originally to provide 20 psi of pressure at all points in the system, the combination of customer growth and the resulting higher demand has resulted in pressure problems.

The DNR Public Drinking Water Program recommends storage volume equal to or greater than the average daily demand in the system. The average daily demand in the Company's system is currently about 66,000 gallons. The existing standpipe has a capacity of only 30,500 gallons – less than half of the system's current average daily demand. Additional storage capacity is therefore necessary.

In Case Number WA-96-449, the Company agreed that additional storage was needed. The Stipulation and Agreement in that case, to which the Company was a signatory, provided that:

The construction of an elevated 100,000 gallon water tower and storage tank (the 'Water Tower') is necessary for the health, safety and welfare of the public in the *present* service area, including the residents of the Incline Village subdivision.

On June 18, 1998, the Commission approved the Stipulation and Agreement.

Despite the recognition of all involved—including the Company—that a storage tank is urgently needed, and has been urgently needed for years, the Company has made no progress on installing one. In fact, the significant growth that has occurred in the area makes the need for additional storage even more pressing, and the Company's failure to install it an even more significant failure in the provision of safe and adequate service.

During an inspection of the system, Public Counsel witness Meisenheimer discovered that the warning indicator was not working properly at one of the sewage treatment plants, and that the cover of the lift station pit was not locked. She also discovered that the electrical boxes at the treatment plants were unlocked, and that the fences and gates were in poor repair. Although a later inspection by Ms.

11 Mo. P.S.C. 3d

Meisenheimer revealed that some of the problems with fencing and gates had been addressed, many problems remained. In fact, the fence at the second sewage treatment plant was actually in worse condition on Ms. Meisenheimer's second and third visits than it had been on her first visit.

Staff witness Loethen also made a number of inspections of the Company's facilities. He noted that both sewage treatment plants had only one blower motor operational at each plant until February 2002 when the second blower motor at the first treatment plant was operational. Mr. Loethen testified that over the course of all his visits to the Company's system, he never saw all four lift stations working at the same time. Mr. Loethen also observed the problems with fences and gates that Public Counsel witness Meisenheimer detailed. The Commission finds Mr. Loethen's testimony credible and accurate.

Customer complaints are numerous relative to most other regulated utilities. These complaints concern water quality (odor and taste), water pressure, customer service, and sewer smells, among others.

Mr. Smith, the owner of the Company, was convicted of a felony for violating the Clean Water Act.² Upon conviction, Mr. Smith was placed on probation. A similar violation occurred later, and Mr. Smith was found to have violated the terms of his probation.

Despite offers of assistance from the DNR, the effluent from the sewage plants has degraded in the last year.

Business Practices:

The Company's business and accounting practices, while not a direct threat to the safety of the customers, indicate a general inability or unwillingness to comply with applicable standards. The Company routinely fails to pay its electric bills, risking discontinuation of its electric service and the resulting inability to run its water and sewer plants. The Company has been administratively dissolved by the Missouri Secretary of State's office for failing to pay its assessments. The Company has been delinquent on its assessments from this Commission. The Company has been delinquent in paying property tax on some of its real property, and owes about \$20,000. Mr. Smith illegally attempted to sell the assets of the Company without prior Commission approval. It is unclear where that transaction stands today. The Company's records are so poorly documented, and Mr. Smith's other business so closely related, that it is impossible to conduct a thorough audit. The Company has been charging customers in some instances for those things which he should not be charging. The Company has not paid its primacy fees to the DNR for years, despite having collected those fees from its customers.

The Company, late in these proceedings, argued that the Commission should not proceed with the appointment of a receiver because it was attempting to sell the utility. The Company committed to let the Commission know how discussions with prospective purchasers were progressing, but has not done so.

As noted above, the Company attempted to transfer certain utility assets from the utility to a non-regulated corporation also owned by Mr. Smith, despite not having

² 33 U.S.C. Sec. 1251 *et seq.*

the Commission approval necessary under Section 393.190. The Company also failed to pay necessary fees to the Secretary of State, and became administratively dissolved. The Company committed to let the Commission know when it had recorded deeds that transfer the utility property back to the utility, and when it had filed with the Secretary of State to become reinstated as a corporation. The Company has not filed anything with the Commission on either of these items.

CONCLUSIONS OF LAW

Section 393.145 reads, in pertinent part:

1. If the commission shall determine that any sewer or water corporation having one thousand or fewer customers is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners ... the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver.

...

4. The receiver shall give bond, and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment. The receiver shall operate the utility so as to preserve the assets of the utility and to serve the best interests of its customers. The receiver shall be compensated from the assets of the utility in an amount to be determined by the court.

5. Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interest of its customers, be returned to the owners. If the court determines after hearing that control of and responsibility for the utility should not, in the best interests of its customers, be returned to the owners, the receiver shall proceed to liquidate the assets of the utility in the manner provided by law.

The conclusion that the Company is unable or unwilling to provide safe and adequate service is inescapable. The record is full of un-rebutted examples.

Many of the problems discussed in the Findings of Fact section constitute violations of Missouri rules and statutes. For example, 10 CSR 20-8.020(13)(B) requires duplicate blowers and motors for the Company's treatment plants; the Company has routinely violated this regulation. The Company also has routinely violated 10 CSR 20-8.130(4)(C) which requires that lift stations have duplicate pumps.

During the pendency of this case, in January 2002, the Company violated Sections 644.051.1(2) and 644.076.1, RSMo 2000, 10 CSR 20-7.031(3)(A), 10 CSR 20-7.031(3)(B), and 10 CSR 20-7.031(3)(C), as well as 10 CSR 20-7.015(9)(E)1

and 10 CSR 20-7.015(9)(E)2 when it discharged untreated wastewater from the Shady Oaks lift station. The lack of adequate warning signs on treatment facilities is unsafe and is a violation of 10 CSR 20-8.020. Many of the issues related to the lack of adequate fencing and lack of adequate alarm systems are violations of the same rule.

The Company, late in these proceedings, argued that the Commission should not proceed with the appointment of a receiver because it was attempting to sell the utility. The Company committed to let the Commission know how discussions with prospective purchasers were progressing, but has not done so. Either there has been no progress, or the Company simply did not bother to keep its commitment to the Commission. Regardless of which is the case, this is simply more evidence that the Company is unable or unwilling to live up to its responsibilities as a regulated public utility.

The Company committed to let the Commission know when it had recorded deeds that transfer the utility property back to the utility, and when it had made the filing with the Secretary of State to become reinstated as a corporation. The Company has not filed anything with the Commission on either of these items. Either it has not taken action to rectify these problems, or it has ignored its commitment to the Commission. These failures to follow through on commitments are more indications that the Company has no intention of taking seriously its responsibilities as a public utility.

When the current owner displays a complete disregard for customers, routinely flaunts Commission authority, and regularly fails to comply with applicable statutes and rules, with no indication that a turn-around is possible, the only real solution is the appointment of a receiver. The Commission, based on the evidence before it and the Findings of Fact herein, determines that the Company is unable or unwilling to provide safe and adequate water and sewer service to its customers. The Commission will therefore direct its General Counsel to seek the appointment of a receiver.

Public Counsel urges the Commission to take the next step contemplated by Section 393.145: having the court find that the utility should not be returned to the owner but rather liquidated by the receiver. The Commission agrees with Public Counsel. The quality of service provided by the Company has historically been poor, and appears to be getting worse. The Commission has determined that the Company is unable or unwilling to provide safe and adequate service. There is absolutely no credible evidence in the record to suggest that things would be better if the utility was returned to the owners after being in the hands of a receiver.

The duties of a receiver pursuant to Section 393.145 have not been the subject of much discussion by Missouri courts. Because the appointment of a receiver is pursuant to the Public Service Commission law, and because the protection of the public interest is the guiding principle of the Public Service Commission, it is no great leap to conclude that one of the duties of a receiver should be to protect the public interest. Indeed, the whole reason to appoint a receiver is to ensure the continuation of safe and adequate service to the utility customers when it appears that the utility itself is unable to do so. Section 393.145 uses the phrase "best interests of the customers" twice. It would be contrary to the best interests of the

customers to allow a receiver to liquidate the assets of a utility in a manner that would prevent customers from continuing to receive utility service. Thus, it would be inconsistent to interpret the statute to allow the receiver to liquidate the assets in a fashion that would prevent them from being used to serve the customers, for example, by selling a pump to one entity, the real estate to another, etc. The situation here is not like a corporate dissolution where the primary duty of the receiver is to get as much as possible for the owners and creditors of the corporation. A receiver appointed to operate and liquidate a public utility must have the protection of the public at least as much at heart as the protection of the owner. The Commission will therefore ask the court to instruct the receiver to liquidate the assets of the company on terms that protect the interest of the customers of the utility, and allows them to continue to receive utility service from the assets put in place to serve them. As a practical matter, this will very likely require that the entire system be sold as a piece to a buyer willing to operate it – and improve it – to serve the customers.

In *Deutsch v. Wolff*, the court stated that “a receiver is not an assignee but an agent of the court having only such powers, rights, duties, and functions as are conferred upon him or her by statutes, orders, or decrees of the appointing court.”³ The relevant statutes (Section 393.145, and by reference Section 521.300 et seq.) provide very broad authority. Section 393.145 allows a receiver to operate the utility in the interests of the customers and to liquidate the assets. Under this statutory scheme, it appears clear that a court has the authority to order that liquidation should be structured to “serve the best interests of the customers.” Indeed, it appears clear that this is the only sort of liquidation that a court should order.

The applicable statute, Section 393.145, states that the receiver shall “have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment.” In the law providing for suits by attachment, Chapter 521, a receiver may be granted broad powers, provided that the circuit court in the order grants such authority. It has long been held in Missouri that, when a court appoints a receiver, it is acting in equity,⁴ and the court may grant to the receiver such powers as are reasonable in the circumstances. In this case, the receiver should be granted the power to liquidate the assets of the utility in a manner that serves the best interests of the customers.

IT IS THEREFORE ORDERED:

1. That the General Counsel of the Commission shall, on behalf of the Commission pursuant to Section 393.145, petition the circuit court for an order attaching the assets of Warren County Water and Sewer Company and placing the utility under the control and responsibility of a receiver.
2. That the General Counsel of the Commission shall, on behalf of the Commission pursuant to Section 393.145, seek a determination from the circuit court that Warren County Water and Sewer Company should not be returned to the owners but rather liquidated by the receiver as discussed herein.

³ 7 S.W.3d 460, *Deutsch v. Wolff*, (Mo.App. E.D. 1999), at 464.

⁴ 300 S.W. 1054, *State ex rel. Bromschwig v. Hartman*, (Mo.App. 1928).

11 Mo. P.S.C. 3d

3. That this order shall become effective on October 18, 2002.

Murray, Lumpe, Gaw and Forbis, CC., concur
and certify compliance with the provisions of
Section 563.080, RSMo 2000.
Simmons, Ch., absent

Deputy Chief Regulatory Law Judge Lewis R. Mills, Jr.

In the Matter of the Tariff Filing of Atmos Energy Corporation.

Case No. GT-2003-0037
Decided October 15, 2002

Gas §18, Rates §108. The Commission approved the stipulation and agreement of the parties and directed Atmos Energy Corporation to submit gas aggregation tariff sheets in compliance with the order.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement of the parties and directs Atmos Energy Corporation to submit tariff sheets in compliance with the order.

Procedural History

On August 1, 2002, Atmos filed its proposed gas aggregation tariff for approval by the Missouri Public Service Commission under Section 393.190.1 et seq., RSMo 2000,¹ as currently supplemented. The proposed tariff effective date is November 1, 2002.

On August 22, 2002, the Missouri School Boards' Association was granted permission to intervene. After a prehearing conference and other negotiations, the parties filed a Unanimous Stipulation and Agreement. Attached to the agreement were proposed tariffs that bore an effective date of November 1, 2002.

House Bill No. 1402

House Bill No. 1402 includes the creation of Section 393.310, RSMo. This section requires Missouri gas corporations to file tariffs allowing school districts to purchase natural gas and pipeline transportation in the aggregate. Atmos filed such tariffs.

¹ All subsequent statutory references are to the Missouri Revised Statutes 2000 as currently supplemented.

Subsection 393.310.4 of the new law requires that the tariffs “at a minimum”:

- (A) Allow school associations to negotiate, for eligible schools, aggregate contracts for the purchase “of natural gas supplies and pipeline transportation services”;²
- (B) Allow “for the resale of natural gas supplies, including related transportation service costs, to the eligible school entities at the gas corporation’s cost of purchasing . . . plus all applicable distribution costs . . . [and] an aggregation and balancing fee to be determined by the commission not to exceed four-tenths of one cent per therm delivered during the first year;”³
- (C) “Not require telemetry or special metering, except for individual school meters measuring over one hundred thousand therms annually.”⁴

The Commission must approve the tariffs if it finds that:

[I]mplementation of the aggregation program . . . will not have any negative financial impact on the gas corporation, its other customers or local taxing authorities and that the aggregation charge is sufficient to generate revenue at least equal to all incremental costs caused by the experimental aggregation program.⁵

The Agreement

The parties included illustrative tariff sheets with their agreement. The parties have agreed that the Commission should approve the illustrative tariff sheets and authorize Atmos to file identical tariff sheets. The agreement contains the following major provisions:

- A. The tariff is proposed to become effective on November 1, 2002.
- B. The program will expire on June 30, 2005, which coordinates with the expiration of the statute.⁶
- C. The tariff provides for eligible school entities at multiple meter locations and exempt schools that use less than 100,000 therms annually from mandatory telemetry as required by the statute.

² Section 393.310.4(1).

³ Section 393.310.4(2).

⁴ Section 393.310.4(3).

⁵ Section 393.310.5.

⁶ Section 393.310.7.

11 Mo. P.S.C. 3d

- D. The tariff will not result in a *material* change to the revenue requirement of the company.
- E. The company will report its *actual* incremental costs of the program by June 1 of each year, so that the Commission can make a determination by November 1 as to whether there has been an over recovery or under recovery of those costs.
- F. The schools will be required to pay local taxes or similar fees, in the same amount as they would have had to pay if they were not using the program.
- G. The proposed tariff sheets have also been designed to prevent material financial impacts on other customers of Atmos. This design includes purchased gas adjustment credits as part of the balancing fees under the program.
- H. The parties will not cause any unreasonable delays in implementing changes to the program and will not oppose a reasonable request for expedited treatment if changes are necessary.
- I. All the pending issues are resolved and that the stipulations are sufficient for the Commission to make its necessary findings under Section 393.310.
- J. The parties have waived their rights with regard to a hearing and to cross-examination and request that the written testimony submitted by Staff, the company, and the Missouri School Boards' Association be admitted into the record.

On September 25, 2002, Staff filed suggestions in support of the stipulation and agreement. Staff stated that in its opinion the settlement is appropriate because it is designed to meet the reasonable interpretation of the requirements in Section 393.310 and it will allow the Commission to make its necessary findings under that law. Staff further suggests that the Commission require the Missouri School Boards' Association to report the amount of tax payments made by the aggregator so that Staff and Public Counsel can determine if the amount of taxes paid changes.

Decision

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.⁷ The Commission has reviewed the Unanimous Stipulation and Agreement, including

⁷ Section 536.060.

the proposed tariff sheets, the written testimony, and the suggestions in support. Based on its review, the Commission finds that the aggregation fee of \$.004 per therm for the first year of the program as proposed in the tariff is appropriate.

The Commission finds that the proposed tariff allows school associations to negotiate, on behalf of eligible schools, aggregate contracts for the purchase natural gas supplies and transportation services. The Commission further finds that the tariff allows “for the resale of natural gas supplies, including related transportation service costs, to the eligible school entities at the gas corporation’s cost of purchasing . . . plus all applicable distribution costs . . . [and] an aggregation and balancing fee . . .”⁸ which does not “exceed four-tenths of one cent per therm delivered during the first year.”⁹ And, the Commission finds that the proposed tariff does “[n]ot require telemetry or special metering, except for individual school meters measuring over one hundred thousand therms annually.”¹⁰

The Commission recognizes, as did the parties in their agreement, that arguably the statute contains certain inconsistencies. Specifically, the statute requires the Commission to approve the tariff only after a finding that the aggregation and balancing fee “is sufficient to generate revenue at least equal to all incremental costs caused by the experimental aggregation program”¹¹; however, the fee is capped for the first year of the program. The parties have stipulated that by including an aggregation and balancing fee, the proposed tariff sheets are “designed to preclude negative, material financial impacts. . .” to Atmos. The company has agreed to report its actual expenses and revenues so that any adjustment in aggregation or balancing fees deemed appropriate to comply with Section 393.310 may be made in the subsequent years of the program. The statute provides that the Commission may, no later than November 1st of each year of the experimental program, implement any adjustments in aggregation or balancing fees deemed appropriate to comply with Section 393.310. Based on this stipulation, the Commission finds that the proposed tariff sheets meet the requirements for approval.

Because of the provisions in the proposed tariff, the Commission further finds that the aggregation program will not have any negative financial impact on Atmos, its customers not in the program, or any local taxing authorities. The Commission finds that Staff’s request for reports regarding taxes is appropriate and it will direct the Missouri School Boards’ Association to make such reports.

The Commission determines that the stipulation and agreement should be approved. The Commission also determines that the proposed tariff attached to the agreement should be approved. The Commission will direct Atmos to file tariff sheets in compliance with the agreement.

⁸ Section 393.310.4(3).

⁹ Section 393.310.4(2).

¹⁰ Section 393.310.4(3).

¹¹ Section 393.310.5

11 Mo. P.S.C. 3d

IT IS THEREFORE ORDERED:

1. That the tariff filed on August 1, 2002, tariff number JG-2003-0044, is rejected.
2. That the Unanimous Stipulation and Agreement filed on September 18, 2002, by Atmos Energy Corporation, the Staff of the Missouri Public Service Commission, the Missouri School Boards' Association, and the Office of the Public Counsel, is approved. (See Attachment 1)
3. That Atmos Energy Corporation shall file tariff sheets in compliance with the terms of the Unanimous Stipulation and Agreement no later than October 17, 2002, to become effective on November 1, 2002.
4. That the Staff of the Missouri Public Service Commission shall file a recommendation for approval or rejection of the tariff no later than October 21, 2002.
5. That any other responses to the tariffs shall be filed no later than October 21, 2002.
6. That the parties shall comply with the provisions of the Unanimous Stipulation and Agreement.
7. That the Missouri School Boards' Association shall report to the Staff of the Missouri Public Service Commission and to the Office of the Public Counsel, no later than June 1 of each year of the program, the amount of tax payments made by the aggregator under the agreement.
8. That the written testimony filed by the Staff of the Missouri Public Service Commission, Atmos Energy Corporation and the Missouri School Boards' Association is admitted into evidence.
9. That this order shall become effective on October 17, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Hopkins, Senior 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 Tariff Filing of Laclede Gas Company

Case No. GT-2003-0032
Decided October 17, 2002

Rates § 15. The Commission approved a Stipulation and Agreement that allowed school districts to negotiate contracts to purchase natural gas and pipeline transportation in the aggregate. Section 393.310.4 RSMo requires gas corporations to file tariffs allowing the school districts to negotiate on behalf of its schools.

Rates § 108. The Commission approved a Stipulation and Agreement that allowed gas corporations to file tariffs that permit school districts to negotiate the purchase of natural gas and pipeline transportation on behalf of its schools.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: This order approves the stipulation and agreement of the parties and approves the tariffs filed by Laclede Gas Company in conformance with the agreement.

Procedural History

On August 1, 2002, Laclede Gas Company filed its proposed gas aggregation tariff for approval by the Missouri Public Service Commission under Section 393.190.1 *et seq.*, RSMo 2000, as currently supplemented. The proposed tariff effective date is November 1.

On August 22, the Missouri School Boards' Association was granted permission to intervene. On September 23, the Board of Education of the City of St. Louis was granted intervention. After a prehearing conference and other negotiations, the parties filed a Unanimous Stipulation and Agreement on October 11. Attached to the agreement were illustrative tariff sheets, and on October 15, Laclede filed substitute sheets that conform to the agreement and the illustrative tariffs.

House Bill No. 1402

House Bill No. 1402 includes the creation of Section 393.310, RSMo. This section requires Missouri gas corporations to file tariffs allowing school districts to purchase natural gas and pipeline transportation in the aggregate. Laclede filed such tariffs.

Subsection 393.310.4 of the new law requires that the tariffs "at a minimum":

- (A) Allow school associations to negotiate, for eligible schools, aggregate contracts for the purchase "of natural gas supplies and pipeline transportation services";¹
- (B) Allow "for the resale of natural gas supplies, including related transportation service costs, to the eligible

¹ Section 393.310.4(1).

11 Mo. P.S.C. 3d

school entities at the gas corporation's cost of purchasing . . . plus all applicable distribution costs . . . [and] an aggregation and balancing fee to be determined by the commission not to exceed four-tenths of one cent per therm delivered during the first year;"²

- (C) "Not require telemetry or special metering, except for individual school meters measuring over one hundred thousand therms annually."³

The Commission must approve the tariffs if it finds that:

[I]mplementation of the aggregation program . . . will not have any negative financial impact on the gas corporation, its other customers or local taxing authorities and that the aggregation charge is sufficient to generate revenue at least equal to all incremental costs caused by the experimental aggregation program.⁴

The Agreement

The parties included illustrative tariff sheets with their agreement, and on October 15, Laclede filed substitute sheets identical to the illustrative sheets. The agreement contains the following major provisions:

- A. The tariff is proposed to become effective on November 1, 2002.
- B. The tariff will expire on June 30, 2005, which coordinates with the expiration of the statute.⁵
- C. The tariff does not require telemetry or special metering and is consistent with the statute in that respect.⁶
- D. The parties agree that the tariff has been designed to preclude negative financial impacts on local taxing authorities by ensuring that local taxes or similar fees will continue to be collected and paid in a manner similar to the way such taxes are collected and levied on sales customers.
- E. The parties agree that the tariff has been designed to preclude negative financial impacts on Laclede by including new aggregation and balancing fees and by

² Section 393.310.4(2).

³ Section 393.310.4(3).

⁴ Section 393.310.5.

⁵ Section 393.310.7.

⁶ Section 393.310.4.(3)

making provision for future adjustments to program charges to collect potential under-recoveries of incremental costs caused by the program.

- F. The parties agree that the tariff has been designed to preclude negative financial impacts on the other customers of Laclede, since no changes to the tariffs of other Laclede customer classes are being proposed at this time and provision has been made for future adjustments to program charges to collect potential under-recoveries of incremental costs caused by the program. The parties agree that, within 60 days of the effective date of the tariff establishing the experimental program, the Company, Staff, Office of the Public Counsel and the association representing the schools shall meet to determine if they can reach a mutually acceptable recommendation for revising the treatment of capacity costs or other program provisions subsequent to May 31, 2003. Such parties shall file either their joint recommendation or, if an agreement is not reached, their individual recommendations regarding such matters, by March 17, 2003 together with testimony explaining why such revisions are appropriate and consistent with the requirements of §393.310. The parties will request that the Commission issue its decision to be effective June 1, 2003. The parties agree that eligible school entities participating in the first year of the program will continue to participate through, at a minimum, the end of the first Aggregation Year, which is October 31, 2003, as set forth in Section C of the tariff. The parties further agree that any true-up of capacity revenues and costs will be consistent with the Commission's decision on the treatment of capacity as set forth in this paragraph.
- G. The company will provide certain information about the program by March 31 and June 1 of the first year, and by June 1 of each year thereafter. Such information shall be categorized in sufficient detail to show the revenues generated and expenses incurred as a result of this experimental program so as to permit a determination of whether an adjustment to the charges under the experimental program is necessary.
- H. The parties will not cause any unreasonable delays in implementing changes to the program and will not oppose a reasonable request for expedited treatment if changes are necessary.

11 Mo. P.S.C. 3d

- I. All the pending issues are resolved and that the stipulations are sufficient for the Commission to make its necessary findings under Section 393.310.
- J. The parties have waived their rights with regard to a hearing and to cross-examination and request that the written testimony submitted by Staff, the company, and the Missouri School Boards' Association be admitted into the record.

Decision

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.⁷ The Commission has reviewed the Unanimous Stipulation and Agreement, including the proposed tariff sheets, the written testimony, and the suggestions in support. Based on its review, the Commission finds that the fee of \$.004 per therm aggregation and balancing fee for the first year of the program as proposed in the tariff is appropriate.

The Commission finds that the proposed tariff allows school associations to negotiate, on behalf of eligible schools, aggregate contracts for the purchase of natural gas supplies and transportation services. The Commission further finds that the tariff allows "for the resale of natural gas supplies, including related transportation service costs, to the eligible school entities at the gas corporation's cost of purchasing . . . plus all applicable distribution costs . . . [and] an aggregation and balancing fee . . ."⁸ which does not "exceed four-tenths of one cent per therm delivered during the first year."⁹ And, the Commission finds that the proposed tariff does "[n]ot require telemetry or special metering, except for individual school meters measuring over one hundred thousand therms annually."¹⁰

The Commission recognizes, as did the parties in their agreement, that arguably the statute contains certain inconsistencies. Specifically, the statute requires the Commission to approve the tariff only after a finding that the aggregation and balancing fee "is sufficient to generate revenue at least equal to all incremental costs caused by the experimental aggregation program";¹¹ however, the fee is capped for the first year of the program. The parties have stipulated that by including an aggregation and balancing fee, the proposed tariff sheets are "designed to preclude negative financial impacts . . ." to Laclede. The company has agreed to report its actual expenses and revenues so that any adjustment in aggregation or balancing fees deemed appropriate to comply with Section 393.310 may be made in the subsequent years of the program. The statute provides that the Commission may, no later than November 1st of each year of the experimental

⁷ Section 536.060, RSMo Supp. 2001.

⁸ Section 393.310.4(3).

⁹ Section 393.310.4(2).

¹⁰ Section 393.310.4(3).

¹¹ Section 393.310.5.

program, implement any adjustments in aggregation or balancing fees deemed appropriate to comply with Section 393.310. Based on this stipulation, the Commission finds that the proposed tariff sheets meet the requirements for approval.

Because of the provisions in the proposed tariff, the Commission further finds that the aggregation program will not have any negative financial impact on Laclede, its customers not in the program, or any local taxing authorities.

The Commission determines that the stipulation and agreement should be approved. The Commission also determines that the proposed tariff, as substituted by Laclede on October 15, should be approved.

IT IS THEREFORE ORDERED:

1. That the following tariffs filed on August 1, 2002, and assigned tariff number JG-2003-0048, as substituted on October 15, 2002, are approved for service on and after November 1, 2002:

P.S.C. MO. No. 5 Consolidated

5th Revised Sheet No. 1-a cancelling 4th Revised Sheet No. 1-a

Original Sheet No. 41

Original Sheet No. 42

Original Sheet No. 43

Original Sheet No. 44

Original Sheet No. 45

2. That the Unanimous Stipulation and Agreement filed on October 11, 2002, is approved. (See Attachment 1)

3. That the parties shall comply with the provisions of the Unanimous Stipulation and Agreement.

4. That the prefiled written testimony filed by the parties is admitted into evidence.

5. That this order shall become effective on November 1, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Mills, Deputy Chief Regulatory Law Judge

11 Mo. P.S.C. 3d

In the Matter of The Empire District Electric Company's Proposed Changes to Extension Rules and Charges to New Customers.

Case No. ET-2002-1058
Decided October 15, 2002

Electric §35. The Commission approved the unanimous stipulation and agreement among the parties including a proposal for revised line extension policy.

Electric §35. The Commission approved a unanimous stipulation and agreement where the parties agreed that the new line extension policy would not result in any material change to the company's revenue requirement and therefore would not require a revenue adjustment in the company's pending general rate case.

Rates § 104. The Commission approved a unanimous stipulation and agreement where the parties agreed that the new line extension policy would not result in any material change to the company's revenue requirement and therefore would not require a revenue adjustment in the company's pending general rate case.

ORDER APPROVING STIPULATION AND AGREEMENT

SYLLABUS: This order approves a unanimous stipulation and agreement regarding tariffs that modify the electric line extension rules of The Empire District Electric Company. The order also authorizes Empire to file tariff sheets and to comply with the terms of the Unanimous Stipulation and Agreement.

On April 17, 2002, Empire filed proposed tariff sheets designed to modify its electric line extension rules. Empire's tariff bore an effective date of May 17, 2002. The tariff was suspended by the Commission until March 14, 2003. On May 13, 2002, the Staff of the Missouri Public Service Commission filed a motion to consolidate this case with Empire's general rate case.¹

On August 22, 2002, the parties jointly filed a unanimous stipulation and agreement regarding the line extension policy. Staff filed suggestions in support of the stipulation and agreement on September 6, 2002.

Empire is a public utility engaged in providing electric service in Missouri. The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Empire pursuant to Section 386.250 and Chapter 393, RSMo.

The parties agreed to the resolution of all issues and set forth the following specific resolutions:

A. That the Commission should approve the revised line extension policy contained in the illustrative tariff sheets attached to the agreement.

B. That the new line extension policy will take effect on February 1, 2003.

C. That if the Commission approves the agreement, Empire will withdraw its pending tariff sheets and the Office of the Public Counsel and Staff will withdraw their motions to suspend the tariff sheets.

¹ Case No. ER-2002-424, *In the Matter of The Empire District Electric Company of Joplin, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company.*

D. That the changes to Empire's line extension policy will not result in any material change to Empire's revenue requirement and therefore will not require a revenue requirement adjustment in the pending general rate case.

Staff supports the agreed-to changes to Empire's line extension policy because the changes do not affect individual customers, either residential or nonresidential. Staff also states that the agreed-to tariff sheets are not as confusing or restrictive as the original tariff sheets. Staff supports the change in the line extension policy which would require developers in some instances to make a contribution in aid of construction when an extension is for an apartment building or mobile home park. Staff also says that it supports the change to Empire's policy that requires developers to pay, in advance, the entire cost of construction to residential subdivisions, with a portion of the cost being refunded when the new dwelling is occupied.

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.² In the Unanimous Stipulation and Agreement, the parties specifically waived their rights to present testimony, to cross-examine witnesses, to present oral argument or briefs, to cross-examine witnesses, to have the transcript read by the Commission, and to judicial review. The Commission may grant the relief requested based on the agreement.

The Commission has reviewed the unanimous agreement and Staff's suggestions in support of the agreement and determines that it should be approved. The Commission will authorize Empire to file revised tariff sheets for the Commission's approval consistent with the agreement and in substantial conformance with the illustrative tariff sheets attached as Appendix A to the Unanimous Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on August 22, 2002, by The Empire District Electric Company, the Staff of the Public Service Commission, and the Office of the Public Counsel is hereby approved. The agreement is attached to this order as Attachment 1.
2. That the tariff sheets filed by The Empire District Electric Company on May 6, 2002, (Tariff No. 200200888) are rejected.
3. That The Empire District Electric Company is authorized to file revised tariff sheets in conformance with the illustrative tariff sheets attached as Appendix A to the Unanimous Stipulation and Agreement.
4. That this order shall become effective on October 25, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Dippell, Senior Regulatory Law Judge

² Section 536.060, RSMo Supp. 2001.

11 Mo. P.S.C. 3d

In the Matter of Missouri Gas Energy's Purchased Gas Adjustment Tariff Revisions to be Reviewed in its 2000-2001 Actual Cost Adjustment.*

In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Factors to be Reviewed in its 1999-2000 Actual Cost Adjustment.

In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Factors to be Reviewed in its 1998-1999 Actual Cost Adjustment.

In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Tariff Revisions to be Reviewed in its 1997-1998 Actual Cost Adjustment.

*Case Nos. GR-2001-382, GR-2000-425, GR-99-304 & GR-98-167
Decided October 17, 2002*

Gas §17.1. The Commission denied a request for reconsideration and affirmed its decision to hear a consolidated PGA case using a bifurcated hearing schedule.

**ORDER DENYING APPLICATIONS FOR RECONSIDERATION OR
REHEARING BUT CLARIFYING THE COMMISSION'S PREVIOUS
ORDER**

**ORDER DIRECTING THE PARTIES TO FILE A PROPOSED PROCE-
DURAL SCHEDULE**

These four cases concern Missouri Gas Energy's (MGE's) Purchased Gas Adjustment/Actual Cost Adjustment (PGA/ACA) filings for the years 1997-1998, 1998-1999, 1999-2000, and 2000-2001. On September 10, 2002, the Commission issued an Order Consolidating Cases, Finding Jurisdiction to Proceed, and Directing the Parties to File a Proposed Procedural Schedule. That order directed the parties to prepare a procedural schedule that would bifurcate the hearing, proceeding first on the issues not previously addressed in GR-96-450, and waiting until after a judicial resolution of the GR-96-450 appeal before considering the GR-96-450 issues, which relate to the Staff's allegation that MGE's contract with Mid-Kansas Pipeline Company and Riverside Pipeline Company is imprudent.

On September 19, 2002, MGE filed an Application for Rehearing and Motion for Reconsideration. On the same day, Riverside Pipeline Company, L.P., Mid-

*See page 000, Volume 10 MPSC 3d for another order in this case.

Kansas Partnership, and Kansas Pipeline Company – collectively referred to in this order as the Pipeline Companies – filed a separate Application for Rehearing, Reconsideration and/or Clarification. Both MGE and the Pipeline Companies ask the Commission to reconsider that portion of its order that discusses the filed-rate doctrine.

Both applicants express concern that the Commission's order might be a substantive ruling affecting their ability to present evidence about the lack of alternatives available to MGE in honoring its transport contract with the Pipeline Companies. MGE and the Pipeline Companies point out that such a substantive ruling would be made without a basis in evidence because no evidence has yet been presented.

In response to the concerns expressed by MGE and the Pipeline Companies, the Commission will clarify that its ruling held only that the Commission has jurisdiction to hear evidence regarding Staff's proposed prudence adjustment. No evidence has yet been presented from which the Commission could make any further determination. No party is precluded by the Commission's order from presenting evidence on the question of whether the filed-rate doctrine is a defense against Staff's allegation of imprudence. With this clarification, no further reconsideration or rehearing is necessary.

MGE's Application for Rehearing and Motion for Reconsideration also asks the Commission to reconsider its decision to proceed with a bifurcated hearing schedule. MGE indicates that it has changed its previous position supporting bifurcation and instead advocates one hearing on all issues.

The Commission's Staff continues to support the single hearing approach now advocated by MGE. But the Pipeline Companies oppose a single hearing and support the bifurcated hearing process that the Commission has established. The Office of the Public Counsel filed a response supporting the Commission's order and advocating that the Commission deny the applications for rehearing.

As it found in its September 10 order, the Commission believes that these cases can be most efficiently handled through a bifurcated hearing process. MGE's changed position has not altered that belief. MGE has not provided sufficient reason to grant its Application for Rehearing and Motion for Reconsideration, and it will be denied.

In its September 10 order, the Commission ordered the parties to file a proposed procedural schedule no later than October 1. On September 20, after MGE and the Pipeline Companies filed their Applications for Rehearing and Motions for Reconsideration, the Commission issued an order suspending the requirement to file a procedural schedule so that it would have time to consider the motions. With the denial of those motions, the Commission will again require the parties to submit a proposed procedural schedule.

IT IS THEREFORE ORDERED:

1. That the Order Consolidating Cases, Finding Jurisdiction to Proceed, and Directing the Parties to File a Proposed Procedural Schedule issued on September 10, 2002, is clarified as described in this order.
2. That Missouri Gas Energy's Application for Rehearing and Motion for Reconsideration is denied.

11 Mo. P.S.C. 3d

3. That Application for Rehearing, Reconsideration and/or Clarification filed by Riverside Pipeline Company, L.P., Mid-Kansas Partnership, and Kansas Pipeline Company, is denied, except to the extent that the Commission's previous order is clarified by this order.

4. That the parties shall file, no later than October 31, 2002, a proposed procedural schedule that leads to an initial hearing on the issues concerning Staff's proposed adjustment based on imputing income to MGE for the release of capacity on the Kansas Pipeline, and its proposed disallowance based on MGE's purchasing practices related to hedging and use of storage capacity, as well as the issue relating to Staff's request for a Peak Day Requirements Study.

5. That this order shall become effective on October 27, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Woodruff, Senior Regulatory Law Judge

**In the Matter of the Tariff Filing of Sprint Missouri, Inc., d/b/a
Sprint, to Increase the Residential and Business Monthly
Rate for the Metropolitan Calling Area (MCA) Plan.***

*Case No. TT-2002-447
Decided October 17, 2002*

Telecommunications §14. The Commission rejected the company's proposed tariff, which was designed to increase the residential and business monthly rate for the optional Metropolitan Calling Area Plan for Tiers 3, 4, and 5. The Commission found that the proposed increase exceeds the increase authorized in Section 392.245.11, RSMo 2000.

The Commission found that under Section 392.245(11), RSMo 2000, if an incumbent local exchange company increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent – and any part of the eight percent annual increase that is not used is lost. Thus, the statute provides a "use it or lose it" price cap mechanism and the maximum allowable price increase for the following year is still limited to eight percent. Therefore, the Commission determined that the company's attempt to "bank" increases violates the price cap statute, Section 392.245, RSMo 2000, and rejected the proposed tariff.

Rates §110. The Commission rejected the company's proposed tariff, which was designed to increase the residential and business monthly rate for the optional Metropolitan Calling Area Plan for Tiers 3, 4, and 5. The Commission found that the proposed increase exceeds the increase authorized in Section 392.245.11, RSMo 2000.

*The Commission, in an order issued on , denied an application for rehearing in this case. On February 3, 2003, this case was appealed to Cole County Circuit Court (03CV323021). On December 12, 2003, this case was appealed to the Missouri Court of Appeals-Western District (WD63580).

The Commission found that under the price cap statute, Section 392.245, RSMo 2000, if an incumbent local exchange company increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent – and any part of the eight percent annual increase that is not used is lost.

APPEARANCES

Lisa Creighton Hendricks and Kenneth A. Schiffman, Sprint Communications Company, 6450 Sprint Parkway, Overland Park, Kansas 66251, for Sprint Missouri, Inc., d/b/a Sprint.

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.

David A. Meyer, Associate 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: **Vicky Ruth, Senior Regulatory Law Judge.**

REPORT AND ORDER

Syllabus: This order rejects the proposed tariff (tariff file no. 200200766) filed by Sprint Missouri, Inc. d/b/a Sprint. The proposed tariff was designed to increase the residential and business monthly rate for the optional Metropolitan Calling Area (MCA) Plan for Tiers 3, 4, and 5. The Commission finds that the proposed tariff exceeds the increase authorized in Section 392.245.11, RSMo 2000.¹

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 issue in this case is one of statutory interpretation: that is, does Sprint's proposed tariff comply with the Price Cap Statute, Section 392.245? Although the facts are not in dispute, a brief discussion of the procedural history and of the tariff itself is in order.

Procedural History:

On March 13, 2002, Sprint filed a revised tariff page designed to increase the residential and business monthly rate for the optional Metropolitan Calling Area Plan for Tiers 3, 4, and 5. Sprint's revised tariff sheet, originally bearing an effective

¹ Unless otherwise noted, all statutory citations are to RSMo 2000.

11 Mo. P.S.C. 3d

date of May 1, 2002, seeks to increase the rates it charges customers for optional MCA services. On March 20, 2002, the Office of the Public Counsel filed a motion to reject the proposed tariff sheets, and this case was opened. Public Counsel argued that the proposed rate increases exceed the annual percentage allowed by law, and urged the Commission to reject the revised tariff or, in the alternative, to suspend the tariff and schedule an evidentiary hearing and public hearings.

Sprint filed a response in opposition to Public Counsel's motion on March 29, 2002. Sprint argued that its tariff revision increases rates to amounts at or below the "maximum allowable prices" previously approved by the Commission, and therefore, Commission approval is required under Section 392.245. Staff filed a response on April 1, 2002, agreeing with Sprint's statutory interpretation and recommending that the Commission approve the proposed tariff sheets.

On April 11, 2002, the Commission issued an order suspending the tariff and scheduling a prehearing conference. On April 17, 2002, Sprint filed a motion for reconsideration of the Commission's order suspending the tariff and a request for expedited treatment. On April 22, 2002, Public Counsel filed its response in opposition to Sprint's motion for reconsideration and request for expedited treatment. All parties appeared for the prehearing conference on April 23, 2002. Staff filed a supplemental brief on April 29, 2002, followed by additional comments from Public Counsel and Sprint on May 2, 2002.

On July 25, 2002, the Commission issued an order further suspending the tariff and scheduling an on-the-record presentation for August 12, 2002. All parties appeared at the on-the-record presentation. Staff and Sprint filed posthearing briefs on August 20, 2002. Public Counsel filed its posthearing brief on September 27, 2002. Sprint responded to Public Counsel's brief on October 1, 2002.

By order issued October 17, 2002, the Commission further suspended the proposed tariff's effective date to October 28, 2002.

The Tariff:

Before reviewing Sprint's proposed tariff, one must be familiar with the basic structure of Sprint's current tariff. The Commission, on December 11, 2001, approved revisions to P.S.C. MO. No. 22. Although Sprint's 2001 tariff purported to set "maximum allowable prices," Sprint did not raise the "actual rates" charged to those "maximum allowable prices" (see below):

Sprint's December 11, 2001 Tariff and the Actual Rates Charged

	Maximum Allowable Price	Actual Rate
MCA-3 Exchanges:		
Residential:	\$14.39	\$12.35
Business:	\$28.92	\$24.80
MCA-4 Exchanges:		
Residential:	\$25.13	\$21.55
Business:	\$54.52	\$46.75
MCA-5 Exchanges:		
Residential:	\$37.90	\$32.50
Business:	\$82.45	\$70.70

No party filed an objection to Sprint's 2001 tariff.

Now Sprint has filed revisions to its tariff page that are designed to increase the residential and business monthly rate (the actual rate) for the optional MCA Plan for Tiers 3, 4, and 5. Sprint argues that its tariff revision now raises the actual rates to levels that are either at or below the 2001 approved "maximum allowable prices", as noted below:

<u>Sprint's Proposed Tariff</u>		
	Actual Rate	Proposed Increase
MCA-3 Exchanges:		
Residential:	From \$12.35 to \$14.00	Increase of \$1.65 (13.4%)
Business:	From \$24.80 to \$28.92	Increase of \$4.12 (16.6%)
MCA-4 Exchanges:		
Residential:	From \$21.55 to \$25.00	Increase of \$3.45 (16.0%)
Business:	From \$46.75 to \$54.52	Increase of \$7.77 (16.6%)
MCA-5 Exchanges:		
Residential:	From \$32.50 to \$35.00	Increase of \$2.50 (7.7%)
Business:	From \$70.70 to \$72.70	Increase of \$2.00 (2.8%)

For example, Sprint contends that it may raise the actual rate for MCA-3 Residential service from the current rate of \$12.35 to \$14.00, an increase of 13.4 percent, because \$14.00 is still below the maximum allowable price of \$14.39 found in Sprint's 2001 tariff. In other words, for the past two years Sprint has attempted to use the "maximum allowable price" as a means to "bank" increases without raising its actual rates. Consequently, the first issue is whether the Price Cap Statute permits such "banking." If it does not, the proposed tariff must be rejected.

Conclusions of Law

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

The optional MCA Plan is a nonbasic telecommunications service as defined by Section 386.020(34).

Sprint is a "telecommunications company" as that term is defined in Section 386.020(51), and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2).

Sprint is a large incumbent local exchange telecommunications company (ILEC) as defined by Sections 386.020(22) and (30). The Commission granted Sprint status as a price cap regulated company in its Order Approving Price Cap Regulation in Case No. TO-99-359 (August 19, 1999). As a price cap company, Sprint is subject to the provisions of Section 392.245, and as such, is subject to the following requirements:

An incumbent local exchange company may change the rates for its services, . . . but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable prices established for such services under this section.

11 Mo. P.S.C. 3d

Section 392.245(11) regulates the amount that a local exchange telecommunications company may increase its rates and maximum allowable prices for nonbasic telecommunications services. This section states in pertinent part that:

[T]he maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges **at such maximum allowable prices**. . . . An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established by such service under this section. [Emphasis added.]

Staff and Sprint disagree with Public Counsel as to the level to which a price cap company may increase its rates for nonbasic services. Public Counsel argues that a price cap company may increase the rate for a nonbasic service by a maximum eight percent per year, and that if the price cap company does not raise its actual rates to the “maximum allowable price,” the potential (unused) increase is lost. That is, Public Counsel contends that a price cap company may not “bank” all or part of an increase in “maximum allowable prices” for future use. In addition, Public Counsel suggests that the Price Cap Statute does not restrict the Commission’s authority to determine whether the rates are “just and reasonable” under Section 392.200(1). Public Counsel also argues that the MCA caps set in Case Nos. TO-92-306 and affirmed in TO-99-483 still control.

Staff and Sprint, however, contend that a price cap company may annually increase by up to eight percent the “maximum allowable price” (the price cap or ceiling) for a nonbasic service, and then set the “actual rate” to be charged at an amount up to but not in excess of that “maximum allowable price” (ceiling) and preserve the full amount of the increase for future use (i.e., banking the increase). Sprint and Staff disagree with Public Counsel’s claim that Section 392.200(1) applies to price cap companies. Both also disagree with Public Counsel’s arguments regarding Case Nos. TO-92-306 and TO-99-483.

As noted above, Section 392.245(11) provides that “maximum allowable prices” (the price cap) may be increased by “up to eight percent” each year, by “providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges **at such maximum allowable prices**. . . . [Emphasis added.] The Commission finds that the phrase “at such maximum allowable prices” means just that; the maximum allowable price (or price cap) may be raised no more than eight percent annually by establishing the rates **at** such maximum allowable prices. If an ILEC increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent – and any

part of the eight percent annual increase that is not used is lost. Thus, the statute provides a “use it or lose it” price cap mechanism and the maximum allowable price increase for the following year is still limited to eight percent. Therefore, Sprint’s attempt to “bank” increases violates the Price Cap Statute and the proposed tariff must be rejected.

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company. That section also authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days plus an additional six months. Neither this section nor the price Cap Statute contains any specific exemption from this suspension provision. Price cap regulation does not strip the Commission of its authority to investigate whether or not a proposed tariff is lawful. The Commission finds that it retains authority to suspend a proposed tariff filed by price-cap regulated companies, and if necessary, conduct a hearing regarding the proposed tariff.

The Commission cautions that this Report and Order does not address whether a price cap company is *entitled* to increase its maximum allowable prices by up to eight percent a year. The first sentence of the Price Cap Statute provides that “[t]he commission shall have the authority to ensure that rates . . . are just, reasonable and lawful by employing price cap regulation.” This sentence is ambiguous. It could mean that price-cap regulated rates are, by definition, “just, reasonable and lawful.” Or, it could simply serve to introduce the subject matter and purpose of the Price Cap Statute. The Commission, however, need not answer this question in order find that Sprint’s proposed tariff violates Section 392.245(11), as noted above, and should be rejected. In addition, it is not necessary for the Commission to address the question of whether the decision in TO-99-483 set a “permanent” cap on the rates that companies may charge for MCA service.

IT IS THEREFORE ORDERED:

1. That the proposed tariff filed by Sprint Missouri, Inc. d/b/a Sprint, on March 13, 2002, tariff file number 200200766, is rejected.
2. That the Motion for Expedited Treatment, filed by Sprint Missouri, Inc. d/b/a Sprint, is denied.
3. That all motions not previously ruled upon by the Commission in this case are hereby denied.
4. That this order shall become effective on October 27, 2002.

Simmons, Ch., Lumpe, and Gaw, CC.,
concur.
Murray and Forbis, CC., dissent, with
separate dissenting opinions attached.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I would approve the proposed tariff.

When the Commission granted Sprint price cap status, Sprint became subject to the requirements of Section 392.245.5, RSMo 2000, as follows:

An incumbent local exchange company may change the rates for its services ... but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable prices established for such services under this section.

Section 392.245.11 regulates the amount that a local exchange telecommunications company may increase its rates and maximum allowable prices for nonbasic telecommunications services. This section states in pertinent part that:

[T]he maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established by such service under this section.

The applicable law provides that a price cap company may increase its rates for nonbasic services up to the maximum allowable price. As Staff notes, Section 392.245.11 uses two distinct terms: "maximum allowable prices" and "rates". The statute allows maximum allowable prices to be increased annually by up to eight percent and allows a change in rates not to exceed the maximum allowable prices by a thirty-day tariff filing. Thus, the statute allows a price cap company to annually increase by up to eight percent the maximum allowable price, or ceiling, for a nonbasic service, and then allows the price cap company to set the actual rate to be charged at an amount up to but not in excess of that ceiling. Sprint's proposed tariff sets its new rates at amounts at or below the "maximum allowable prices" in conformity with Section 392.245.

The legislature gave price cap companies the option to set their actual rates *below* the maximum allowable price and still maintain the upper limits of the maximum allowable price. Consumer interest is protected by not forcing providers to increase their rates by a full 8% per year in order to preserve the maximum allowable price.

Furthermore, Sprint's proposed rates are "just and reasonable" within the provisions of Section 392.200. Section 392.200.1 provides, among other things,

that “[a]ll charges made and demanded by any telecommunications company for any service rendered or to be rendered...shall be just and reasonable” The just and reasonable requirement of Section 392.200.1 does not, however, impact Commission decisions under the Price Cap Statute as that statute explicitly addresses just and reasonable rates. Section 392.245.1 states that “[t]he commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful **by employing price cap regulation.**” (Emphasis added.) In applying the price cap statute, the Commission satisfies its obligation to ensure that rates are just and reasonable.

Additionally, the Commission’s decision in Case No. TO-99-483 should not impact the Commission’s determinations in this case. The decision in TO-99-483 was intended to address the impact of competitive local exchange companies’ participation in the MCA Plan. While the Commission discussed caps for MCA services, it explicitly found that “...it is in the public interest to allow ILECs to exercise the full pricing flexibility that they are statutorily entitled to have.” The Commission held that “[p]ricing flexibility for price cap companies is subject to maximum allowable prices under Section 392.245, RSMo Supp. 1999.” It follows that the Commission could not have intended any cap set in TO-99-483 to apply to companies regulated under the Price Cap Statute.

I believe the tariff should be approved and therefore dissent from the Report and Order rejecting the tariff.

DISSENTING OPINION OF COMMISSIONER BRYAN FORBIS

I join Commissioner Murray in her dissent. While I support the majority in finding the price cap statute to be ambiguous, I agree with Commissioner Murray that the intent of the General Assembly was to define a “just and reasonable” rate as that provided under 392.245. As a result, today’s ruling may prompt price cap telecommunication companies to submit annual tariffs for the maximum 8% increase without Commission review or adjustment. Given the time value of money, I believe it is better to allow for the option of smaller annual increments such as those possible through the “banking” concept, - for example, a 5% increase one year and an 11% increase the next – which would let Missouri consumers keep that extra 3% in their pockets for an additional 12 months.

11 Mo. P.S.C. 3d

In the Matter of the Joint Application of Northeast Missouri Rural Telephone Company and Modern Telecommunications Company for Approval to Merge Modern Telecommunications Company and Northeast Missouri Rural Telephone Company.

*Case No. TM-2002-465
Decided October 22, 2002*

Telecommunications §1. The Commission approved a stipulation and agreement, merging Northeast Missouri Rural Telephone Company and Modern Telecommunications Company.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus:

This order approves the settlement by the parties of the Northeast Missouri Rural Telephone Company and Modern Telecommunications Company merger case and authorizes the applicants to effect the proposed merger under the conditions contained in the parties' agreement.

Procedural History:

On March 27, 2002, Northeast Missouri Rural Telephone Company and Modern Telecommunications Company filed their Joint Application seeking authority for Modern to merge into Northeast. According to their application, both applicants are Missouri corporations in good standing and telecommunications carriers providing both basic local and exchange access services in north-central Missouri. Northeast, a cooperative, serves 11 exchanges; Modern, a wholly-owned subsidiary of Northeast, serves three exchanges. The applicants state that the merger is designed to be revenue-neutral, both to the applicants and to the applicants' customers. The Joint Applicants assert that the proposed transaction is not detrimental to the public interest and should be approved. The applicants suggest that the proposed transaction will benefit the public, in part by permitting Modern's customers to become members of Northeast. On April 11, the Joint Applicants amended their application to add some attachments inadvertently omitted.

On April 9, the Commission issued its Order Directing Notice, setting an intervention deadline of April 29. On April 24, AT&T Communications of the Southwest, Inc., filed its Comments, stating its opposition to the proposed merger. In particular, AT&T pointed out that the Joint Applicants proposed to increase Modern's average intrastate originating access rate from 7.5 cents per minute to 10 cents per minute; and to increase Modern's average intrastate terminating access rate from 11.6 cents per minute to 15 cents per minute. AT&T stated that the proposal also included decreases to Northeast's access rates to the same 10 cents and 15 cents levels. The result, AT&T asserted, would be 25 cents per minute in access charges to an interexchange carrier for carrying a call between two of Northeast's exchanges. Northeast's interstate access rates, by contrast, are under

4 cents per minute and are likely to be reduced still farther in the near future. AT&T argues that the proposed transaction is detrimental to the public interest in that it would create an incentive for toll carriers to refuse to serve Northeast's exchanges. On May 2, the Joint Applicants responded to AT&T's Comments, stating that AT&T's concerns would be better addressed elsewhere.

On April 26, Southwestern Bell Telephone Company filed its Application to Intervene. Bell did not state its position with respect to the proposed merger in its application. The Joint Applicants did not oppose Bell's application for intervention.

On June 4, the Commission granted Bell's application and also made AT&T a party in view of its Comments described above. The Commission also permitted the Joint Applicants to amend their application and set a prehearing conference.

The prehearing conference was held on June 21. On July 3, the Commission adopted the procedural schedule proposed by the parties. Thereafter, the parties filed testimony, a list of issues and witnesses, with a proposed order of cross and of opening statements, and position statements, in preparation for an evidentiary hearing set for October 10 and 11. However, on September 24, the Commission set a second prehearing conference upon learning that no real dispute existed between the parties. At that prehearing conference, held on October 4, the parties announced that a settlement agreement would soon be filed. The Stipulation was filed on October 7.

The Joint Applicants, the Commission's Staff and the Office of the Public Counsel executed the Stipulation. On October 8, Bell filed its pleading stating that it had no objection to the Stipulation, as did AT&T on October 9. On October 9, the Commission canceled the evidentiary hearing. On October 11, Staff filed its Suggestions in Support of the Stipulation.

In its Suggestions, Staff states that its position throughout this proceeding was intended to avoid any detriment to the public from the proposed merger. Staff states that Modern, a subsidiary of Northeast, has no employees and that Northeast's employees actually conduct all of Modern's operations. The three Modern exchanges were acquired from GTE; Staff states that Northeast has agreed to honor Modern's promise to not seek to recover the acquisition premium from its members.¹ Northeast has also agreed to forego recovery of any incremental costs of the proposed merger in future rate cases.² Northeast has also agreed to continue use of the income tax offset used by Modern with respect to the three exchanges acquired from GTE and to forego recovery of the membership fee contribution paid by Modern so that its customers could become members of Northeast. Northeast will use its depreciation rates for the assets acquired from Modern. Northeast will maintain the existing intrastate exchange access rates in each exchange until at least January 1, 2004. On that date, if no other rate proceeding has been initiated, Northeast will file a revenue-neutral rate design proceeding.

¹ An acquisition premium is the amount, if any, by which the price paid for an asset exceeds its book value.

² Northeast is a cooperative and the Commission regulates only its intrastate exchange access rates.

11 Mo. P.S.C. 3d

Discussion:

"No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do."³ The statute does not contain a standard to guide the Commission in the exercise of its discretion. That is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."⁴ Referring to a statute applicable to water corporations, the Missouri Court of Appeals stated, "The obvious purpose of [the statute] is to ensure the continuation of adequate service to the public served by the utility."⁵ To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently.⁶

As described above, the parties have presented their settlement agreement to the Commission in the form of a Stipulation. The Stipulation was not executed by all of the parties to this case. However, under its practice rules, the Commission may treat a stipulation and agreement as unanimous if no party requests a hearing within seven days of the filing of the stipulation and agreement.⁷ The two nonsignatory parties filed responses stating the absence of any objection to the Stipulation. Consequently, the Commission may deem the proposed settlement to be unanimous.

The Stipulation

The Stipulation filed on October 7 addressed (1) Modern's acquisition premium for acquiring three exchanges from GTE, (2) incremental merger costs, (3) tracking of merger costs, (4) the income tax offset related to Modern's acquisition of three exchanges from GTE, (5) the membership fee paid by Modern to Northeast, (6) the depreciation study ordered in Case No. TM 95 142, (7) intrastate exchange access rates and the filing of a revenue-neutral rate design proceeding by January 1, 2004, and (8) depreciation rates as ordered in Case Nos. TR 2001 344 and TA 2002 61. A copy of the Stipulation is attached hereto as Attachment A and incorporated herein by reference.

The Stipulation also contained various standard provisions commonly included in stipulations and agreements filed with the Commission, including the parties' reservation of the right to take contradictory positions in other cases; an

³ Section 392.300.

⁴ Commission Rule 4 CSR 240-2.060(5)(D).

⁵ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 56 S.W.2d 466, 468 (Mo. App., E.D. 1980).

⁶ See *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

⁷ Commission Rule 4 CSR 240-2.115.

assertion of the interdependence of all of the terms and consequent vacation of the agreement if modified by the Commission; the parties' waiver of their rights, contingent on Commission approval of the agreement, to present testimony, to cross examine witnesses, to present oral argument or written briefs, to a reading of the full transcript by the members of the Commission, and to seek judicial review; that Staff shall prepare and file supporting suggestions; and that Staff may provide oral explanations of the agreement as requested by the Commission at an Agenda session.

The parties urge the Commission to approve the settlement herein described and agree, that if the Commission approves the Stipulation as presented, then the merger will not be detrimental to the public interest. 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.⁸ In reviewing the various stipulations submitted by the parties, the Commission notes that⁹

Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The Commission has considered the settlement agreement of the parties as contained in the Stipulation filed herein, together with Staff's suggestions, and concludes that the settlement agreement is just and reasonable and should be approved. The Commission further concludes that, as conditioned by the provisions of the Stipulation of the parties, the proposed transaction is not detrimental to the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the settlement reached by the parties, as contained in the Stipulation filed on October 7 (Attachment A), is hereby approved as a resolution of all issues in this case.
2. That Northeast Missouri Rural Telephone Company and Modern Telecommunications Company are ordered to comply with the terms of the settlement agreement of the parties as contained in the Stipulation filed herein on October 7, 2002 (Attachment A).
3. That the transaction proposed in the Joint Application filed on March 27, 2002, and amended on April 11, 2002, is approved as modified by the Stipulation filed on October 7, 2002. Northeast Missouri Rural Telephone Company and Modern Telecommunications Company are hereby authorized to take all lawful actions necessary to complete the transaction herein approved.

⁸ Section 536.060, RSMo Supp. 2001.

⁹ Section 536.090, RSMo Supp. 2001. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

11 Mo. P.S.C. 3d

4. That nothing in this Order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

5. That Northeast Missouri Rural Telephone Company shall file appropriate revised tariff sheets to reflect the transaction approved above not later than the 30th day prior to the closing date of the merger. Northeast Missouri Rural Telephone Company shall file a pleading in this case advising the Commission that the tariffs have been filed.

6. That upon the closing of the transaction herein approved, Northeast Missouri Rural Telephone Company shall file in this case a pleading advising the Commission that the transaction herein approved has closed and enumerating the certificates and tariff sheets of Modern Telecommunications Company that the Commission should consequently cancel.

7. That this order shall become effective on November 1, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules.*

*Case No. GR-2002-356
Decided November 8, 2002*

Rates §108. The Commission rejected tariff sheets relating to the Purchased Gas Adjustment filed by Laclede Gas Company for the purpose of increasing rates for natural gas service to retail customers.

APPEARANCES

Michael C. Pendergast, Esq., and Rick E. Zucker, Esq., Laclede Gas Company, 720 Olive Street, St. Louis, Missouri 62101, for Laclede Gas Company.

James C. Swearingen, Esq., Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Laclede Gas Company.

Thomas M. Byrne, Esq., Union Electric Company, doing business as AmerenUE, 1901 Choteau Avenue, Post Office Box 66149, St. Louis, Missouri, for Union Electric Company, doing business as AmerenUE.

*See page 000 for another order in this case.

Diana M. Vuylsteke, Esq., Bryan Cave, 211 North Broadway, Suite 3600, St. Louis, Missouri, for the Missouri Industrial Energy Consumers.

Lisa C. Langeneckert, Esq., Blackwell Sanders Peper Martin, 720 Olive Street, 24th Floor, St. Louis, Missouri, for the Missouri Energy Group.

Jan Bond, Esq., 7730 Carondelet Avenue, Suite 200, St. Louis, Missouri, for Local 5-6 of the Paper, Allied-Industrial, Chemical, and Energy Workers, AFL CIO.

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

Thomas R. Schwarz, Jr., Deputy General Counsel, and *Lera L. Shemwell*, Associate General Counsel, Office of the 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: **Kevin A. Thompson, Deputy Chief.**

REPORT AND ORDER

Procedural History

On January 25, 2002, Laclede Gas Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for natural gas service provided to customers in the Missouri service area of the Company. The proposed rate increase was designed to produce an annual increase of \$36.092 million in the Company's revenues, exclusive of Gross Receipts Taxes, or a 6.3 percent increase. The proposed tariff sheets included a requested effective date of February 25, 2002. On January 31, 2002, the Commission suspended Laclede's proposed tariff sheets for 120 days plus six months, until December 25, 2002.

On March 19, the Commission granted the unopposed applications to intervene of Union Electric Company, doing business as AmerenUE, the Missouri Industrial Energy Consumers,¹ the Missouri Energy Group,² and Local 5-6 of the Paper, Allied-Industrial, Chemical, and Energy Workers, AFL-CIO. On the same day, the Commission set the test year, adopted a procedural schedule and adopted a protective order to protect highly confidential and proprietary information.

¹ The Missouri Industrial Energy Consumers, or MIEC, is an unincorporated association of 13 industrial customers of Laclede, including: Adam's Mark Hotel, Alcoa Foil Products, Anheuser-Busch, The Boeing Company, DaimlerChrysler, Ford Motor, General Motors, Hussmann Refrigeration, Monsanto, Procter & Gamble Manufacturing, Nestle Purina PetCare, Solutia, and Tyco Healthcare.

² The Missouri Energy Group, or MEG, is an unincorporated association of four large-scale customers of Laclede, including: Barnes-Jewish Hospital, Emerson Electric Company, SSM Healthcare, and St. John's Mercy Health Care.

11 Mo. P.S.C. 3d

On August 13 and 14, 2002, the Commission held Local Public Hearings in St. Charles, the city of St. Louis, and Clayton, Missouri.

On August 20, the parties filed a Partial Stipulation and Agreement resolving several contested issues and requested a change to the procedural schedule, which the Commission granted that same day. On August 22, AmerenUE filed its response to the Partial Stipulation and Agreement, as did the Missouri Energy Group on August 23, stating in each case that the filing party neither opposed nor supported the proposed stipulation and agreement and waived its right to a hearing on the matters thereby resolved. On August 28, the Commission's Staff filed Suggestions in Support of the Partial Stipulation and Agreement.

Also on August 28, Laclede, together with the Staff and the Office of the Public Counsel, advised the presiding officer that a settlement had been reached with respect to those issues scheduled for hearing on August 29 and 30. The remaining contested issue was set for hearing the week of September 1. On August 29, the parties filed their First Amended Partial Stipulation and Agreement, reflecting the additional settled issues. Staff filed Suggestions in Support of the First Amended Partial Stipulation and Agreement on September 3. AmerenUE filed a response to the First Amended Partial Stipulation and Agreement on September 5, as did the Missouri Energy Group on September 12, each again stating that the filing party neither opposed nor supported the proposed stipulation and agreement and waived its right to a hearing on the matters thereby resolved.

The following week, the parties advised the presiding officer that the remaining issue had been settled and that no contested case hearing was necessary. A Second Amended Stipulation and Agreement was filed on September 5. Intervenor Local 5 6 filed a response to it on September 9 and Staff filed Suggestions supporting it on September 10. Local 5 6's response stated that it neither opposed nor supported the proposed stipulation and agreement and that it waived its right to a hearing on the matters resolved thereby. An on-the-record presentation was set for September 16 and was held that day as scheduled. All of the prefiled testimony was received into the record at that time, without objection, and all of the parties waived their right to cross examination.³ Laclede, Staff and the Public Counsel filed their Clarification of On-the-Record Presentation Comments on September 18. The transcript of the on-the-record presentation was filed on September 26.

The Commission approved the parties' settlement on October 3, 2002, directed Laclede to comply with that settlement, rejected the tariffs filed on January 25, and further directed Laclede to "file as soon as practicable, but in no case later than the 30th day after the effective date of this Order, proposed tariff sheets in compliance with the settlement agreement of the parties approved herein." The effective date of the order was October 13 and Laclede's compliance tariffs were due, consequently, no later than November 12, 30 days later.

Laclede filed compliance tariffs on October 18, together with a motion requesting that the Commission approve the tariffs

³ Received at that time were Exhibits 1-78.

effective November 1. On October 22, Laclede withdrew the sheets filed on October 18 and filed other sheets, again requesting approval effective November 1. On October 24, the Commission's Staff moved the Commission to deny Laclede's request for expedited treatment and to suspend the proposed compliance tariffs on the grounds that they were not in compliance with the settlement approved by the Commission. Specifically, Staff advised the Commission that "[t]here is disagreement between Laclede and the Staff concerning the correct methodology to be used to establish billing units and the calculation of revenues that result from those billing units." Staff went on to state that "[t]he detriment to Laclede's customers if the tariff sheets are not suspended is that under rates proposed by Laclede customers will pay more for fixed costs and less for gas costs, requiring higher ACA rates than under the rate design agreed upon by the parties to mitigate Laclede's weather risk."

Laclede responded late on October 25, stating, "Based on Staff's apparent assumption that its methodology is the only one that can be used for allocating therms between rate blocks, it concludes that the Company's tariffs do not comply with the Commission's Order because, when viewed through the prism of Staff's methodology, it produces more revenue than what the Commission authorized for Laclede." Laclede explained that it had indeed used a different methodology than Staff in allocating therms between block one and block two of its residential rates, but denied that the difference would result in additional revenue of \$1 million.

On October 29, the Commission set an on-the-record presentation for the morning of November 4. Also on October 29, Staff filed its reply to Laclede's response of October 25. In its reply, Staff suggested that Laclede was acting in bad faith. Staff further moved for a hearing, stating "[t]he inability to agree on the correct billing units has raised an issue that is not covered by Stipulations. . . . Because the Parties cannot agree on the proper allocation, this remaining issue is a contested matter that will need to be determined by the Commission, so Staff asks that the Commission set the matter for hearing."

On the same day, Laclede filed its Point of Clarification in order to direct the Commission's attention to that part of the settlement agreement in which the parties agreed that Laclede's compliance tariffs could be approved for service rendered on and after November 1.

Thereafter, again on the same day, Staff filed a Supplement to its response filed earlier on October 29. The purpose of this Supplement was to provide in readable form a spreadsheet received by Staff from Laclede on September 13.

On October 30, Laclede filed its response to Staff's reply of October 29. Therein, Laclede asserted that its rate calculation was based on information provided in timely fashion to Staff, contrary to Staff's claim, and that its rate calculation was necessary both to comply fully with all aspects of the parties' settlement agreement and to produce the level of weather protection sought by Laclede and agreed upon by the parties.

11 Mo. P.S.C. 3d

On October 31, Staff filed its reply to Laclede's response filed on October 30. On October 31, the Commission issued its Order Directing Filing, requiring its Staff to provide answers to certain questions; Staff filed its answers on November 1.

On November 4, Laclede filed the Affidavit of Michael T. Cline. Also on November 4, the Office of the Public Counsel filed the Affidavit of Hong Hu. Also on November 4, the Commission convened its on-the-record presentation. In the statements of counsel, Laclede, Staff and the Public Counsel all advised the Commission that the settlement reached by the parties did not specify how rates were to be calculated under the agreed weather mitigation rate design. Upon receiving this advice, the Commission immediately convened the evidentiary hearing requested by its Staff on October 29. Although duly notified, only one of the several intervenors appeared.⁴ The MIEC appeared by counsel, but left soon after the commencement of the hearing. The Commission heard testimony from five witnesses and received seven exhibits in addition to the 78 exhibits already received.⁵

On November 6, the Commission heard closing arguments.

Discussion

The issues were framed by the pleadings and arguments of the parties. The dispute arose when Laclede filed compliance tariffs and the Commission's Staff moved to suspend them as not in compliance with the settlement agreement of the parties as approved by the Commission on October 3. Thus, there are two questions before the Commission:

First, are the proposed tariff sheets filed by Laclede on October 22 in compliance with the Commission's Order of October 3? If so, then those sheets should be approved.

If the proposed tariff sheets filed by Laclede on October 22 are not in compliance with the Commission's Order of October 3, then those sheets should be rejected and the Commission should direct Laclede to file compliant sheets. This gives rise to the second question:

Second, in what respect must the proposed tariff sheets filed by Laclede on October 22 be modified in order to comply with the Commission's Order of October 3?

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 in making this decision has considered the

⁴ Counsel for the MEG and for Local 5-6 requested to be excused. Nothing was heard from Intervenor AmerenUE.

⁵ These exhibits were: Ex. 79, Cline's Weather Protection Chart; Ex. 80, Beck's Chart Showing Staff's Calculation method; Ex. 81, Beck's Chart Showing Laclede's Calculation Method; Ex. 82, Beck's Verified Statement and Attachments; Ex. 83, Staff's Verified Statement and Attachments; Ex. 84, Affidavit of Hong Hu; and Ex. 85, Affidavit of Michael Cline. All of these exhibits were originally erroneously numbered at the hearing as Exhibits 76 through 82, respectively. They will be referred to here by their correct numbers.

positions and arguments of all of the parties. 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 Parties:

Laclede Gas Company is a subsidiary of The Laclede Group. Laclede Gas Company is a natural gas local distribution company that serves some 630,000 customers in St. Louis City and nine Missouri counties, including Butler, Franklin, Iron, Jefferson, Madison, St. Charles, St. Francois, Ste. Genevieve, and St. Louis.

The Staff of the Commission is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]" Section 386.071, RSMo 2000.⁶

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]" Sections 386.700 and 386.710.

Several parties were permitted to intervene in this matter. Union Electric Company, doing business as AmerenUE, is itself a regulated utility. Ameren is a large-scale customer of Laclede and uses natural gas in the generation of electricity for retail sale in Missouri. The Missouri Industrial Energy Consumers, or MIEC, is an unincorporated association of 13 industrial customers of Laclede, including Adam's Mark Hotel, Alcoa Foil Products, Anheuser Busch, The Boeing Company, DaimlerChrysler, Ford Motor, General Motors, Hussmann Refrigeration, Monsanto, Procter & Gamble Manufacturing, Nestle Purina PetCare, Solutia, and Tyco Healthcare. The Missouri Energy Group, or MEG, is an unincorporated association of four large-scale customers of Laclede, including Barnes Jewish Hospital, Emerson Electric Company, SSM HealthCare, and St. John's Mercy Health Care. Finally, Local 56 of the Paper, Allied-Industrial, Chemical, and Energy Workers, AFL CIO, is a labor union to which many of Laclede's employees belong.

The Settlement Agreement:

The Commission approved four different documents that together embodied the settlement agreement of the parties. Because the present dispute concerns the implementation of that agreement, the agreement itself is the proper starting point for the Commission's consideration.

The parties agreed to a revenue requirement increase of \$14,000,000.⁷ The signatory parties agreed that this increase is just and reasonable and no party objected to it or requested a hearing. At the on the record presentation, Staff's expert explained that most of the increase was attributable to additions to plant. The present dispute centers on Staff's claim that Laclede's method of calculating residential winter rates will result in increased revenue in excess of the \$14,000,000 granted by the settlement agreement.

⁶ Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 1994.

⁷ Ex. 84, pg. 3.

11 Mo. P.S.C. 3d

The parties also agreed that an annual heating degree day (HDD) level of 4,718 would be used to calculate the billing determinants for all rate design purposes.⁸ This level of heating degree days gave some recognition to Laclede's claims that continued urbanization in its service territory has affected the normal level of heating degree days. A heating degree day is the difference of actual temperature on any given day from 65, if the temperature for that day drops below 65.⁹

The parties also agreed to a weather mitigation rate design intended to allow Laclede to more consistently recover its fixed costs during the winter months without changing a residential customer's bundled rate for both non gas and gas costs. The principal feature of the new design is the shifting of distribution costs from the second block to the first block, which is much less weather sensitive. A corresponding change is made to the Purchased Gas Adjustment in order to avoid significant customer impact. Thus, the rate paid by the customer remains the same but the potential impact of weather fluctuations is mitigated.

Staff advised the Commission that it supported the weather mitigation rate design as an innovative method for recovering fixed costs while avoiding detrimental impacts to customers. Staff informed the Commission that the proposed rate design will be of significant benefit to both consumers and to Laclede.

Laclede's Need for Weather Mitigation:

Laclede faces a difficult financial situation due to several factors, including limited annual growth in its customer base and a high rate of migration of existing customers from urban locations to suburban locations within Laclede's service area.¹⁰ These factors leave Laclede with a reduced cash flow and, consequently, make Laclede particularly sensitive to weather-based revenue fluctuations.¹¹ Thus, for example, approximately one-third of the \$15 million revenue increase granted Laclede in December 2001 was offset by the impact of abnormally warm weather in the last three months of that year.¹² Faced with "a persistent and increasingly serious under-recovery . . . of its actual costs of providing service," Laclede filed the present case.¹³ Chief among Laclede's goals in the present case was weather mitigation: "First and foremost, I believe it is imperative that the Commission approve our proposals for mitigating the impact of weather on both the Company and its customers."¹⁴

Gas distribution companies are well-known to be weather-sensitive with respect to sales, revenues and gas costs.¹⁵ However, Laclede is more weather-sensitive than most because an unusually large percentage of its gas sales are

⁸ Ex. 84, pg. 3.

⁹ Tr. 304.

¹⁰ Ex. 1, pg. 2.

¹¹ Ex. 1, pg. 5.

¹² Ex 1, pp. 5, 10; Ex. 3, pg. 16.

¹³ Ex. 1, ppg. 1-2.

¹⁴ Ex. 1, pg. 8. Testimony of Douglas H. Yaeger, Laclede's CEO.

¹⁵ Ex. 18, pg. 8.

for heating.¹⁶ About 98 percent of Laclede's residential customers use natural gas as their primary heat source.¹⁷ Except for the cost of gas, most of Laclede's operating costs are fixed and do not vary with fluctuations in the weather.¹⁸ Thus, since Laclede has used a volumetric rate to recover over one-half of its non-gas costs in the past, weather that is warmer than normal causes Laclede to underrecover its costs while weather that is cooler than normal causes Laclede to over recover its costs.¹⁹

Laclede's customers have also suffered from weather-related fluctuations. The impact on customers in times of unusually cold weather is sharply higher bills because traditional rate designs have resulted in charges to customers that exceed Laclede's actual costs incurred in providing heating service.²⁰ When the weather is unusually cold, a volumetric rate design, such as Laclede has used in the past, will require customers to pay more at the same time that the cost of gas is also rising.²¹ Laclede seeks to mitigate this "bill volatility" for its customers as well as to mitigate weather-related underrecovery of costs for itself.²²

Weather Normalization:

The Commission's Staff normalizes for weather by using a thirty-year average.²³ However, Laclede's experience is that "traditional 30 year normals are unreliable in approximating expected degree days, even over a span of a number of years."²⁴ In fact, the St. Louis area has experienced predominantly warmer-than-normal weather since 1985, causing Laclede's sales to fall short of the levels predicted by 30 year averages of historical weather data.²⁵ Since Laclede's rates have been set based upon these sales predictions, the result has been consistent underrecovery of costs.²⁶ This warming trend is reflective of both increased urbanization in Laclede's service area and climatic warming trends observed around the world.²⁷ If the level of normal heating degree days used in setting Laclede's rates is consistently set too high, Laclede will eventually suffer adverse economic consequences.²⁸ Laclede normalized for weather based on variations of actual usage levels from 65 therms.²⁹

¹⁶ Ex. 18, pg. 8.

¹⁷ Ex. 18, pg. 8-9.

¹⁸ Ex. 3, pg. 7.

¹⁹ Ex. 3, pp. 6-7.

²⁰ Ex. 1, pp. 9-10. ²¹ Ex. 3, pg. 8.

²² Ex. 3, pg. 8.

²³ Ex. 18, pg. 10; TR. 285, 349.

²⁴ Ex. 18, pg. 10. Testimony of Patricia S. Krieger.

²⁵ Ex. 18, pg. 10. For the 17 years between 1985 and 2001, inclusive, actual heating degree days were less than the predicted heating degree days for 12 of them. Ex. 18, pg. 11.

²⁶ *Id.*

²⁷ Ex. 18, pg. 12.

²⁸ Ex. 18, pg. 13.

²⁹ Tr. 436.

11 Mo. P.S.C. 3d

Laclede's experience is that the effects of weather do not wash out over time.³⁰ And, even if they did, it is poor regulatory policy to require customers in one year to pay more than their service costs in order to subsidize customers in another year.³¹ Such a rate design is "logically bankrupt."³²

The Weather Mitigation Rate Design:

The weather mitigation rate design was intended to collect sufficient revenue to cover Laclede's fixed costs from the customer charge and block one.³³ The customer charge alone accounted for almost half of the necessary revenue from the residential class.³⁴ Staff's expert witness, Dan Beck, testified that the correct procedure for calculating rates was to first determine normalized block one billing determinants and then to adjust the rate until the appropriate revenue figure was reached.³⁵ The billing determinants were normalized by applying appropriate adjustments to the actual test year billing determinants.³⁶ Billing determinants refer to such figures as number of customers, number of bills, and number of therms.³⁷ Under Laclede's old rate design, a shift of two million therms from one block to another would not produce a material effect. However, the opposite is the case with the weather mitigation rate design.³⁸

Staff and Laclede have always used different methodologies and each of them used its traditional methodology in this case.³⁹ In the past, the different approaches have produced similar results.⁴⁰ Under the new weather mitigation rate design, however, the different approaches produced significantly different results.⁴¹ However, the method used by Krieger to adjust Staff's November first block winter therms had never been used before.⁴²

Staff determines the split between first and second block sales based on a regression analysis of nine months of the year; the three summer months are excluded because they are essentially non-weather-sensitive.⁴³ This analysis

³⁰ Ex. 1, pp. 10-11.

³¹ Ex. 1, pp. 10-11.

³² Ex. 1, pg. 10.

³³ Tr. 274.

³⁴ Tr. 298.

³⁵ Tr. 274-75.

³⁶ *Id.*

³⁷ Tr. 275-76.

³⁸ Tr. 422.

³⁹ Tr. 442-43.

⁴⁰ Tr. 443.

⁴¹ Tr. 443.

⁴² Tr. 465.

⁴³ Ex. 82, pg. 3. Ex. 82 is the Verified Statement of Dan Beck, filed by Staff on October 29, 2002, as Attachment A to its Reply to Laclede's Response to the Staff and Request for Hearing. This item was originally erroneously designated as Ex. 79 at the hearing.

determines the curve that best fits these points, and that curve is used to adjust the amount of first and second block therms.⁴⁴ The curve demonstrates that, as the weather gets colder, the first block therms per customer increase.⁴⁵ Staff used this method for each month.⁴⁶ Staff also used regression analyses to determine total therms and therms per customer usage.⁴⁷ Staff's witness, Beck, testified that if there is a problem with one of the months, the data should be corrected before the regression is run, not after.⁴⁸ Because 65 therms was the boundary between block one and block two, the regression analysis applied to block one could never exceed 65.⁴⁹

Laclede used a different technique to determine block one therms. First, the weather adjustment was calculated.⁵⁰ These therms were then assigned incrementally to either block one or block two based on actual customer usage.⁵¹

Laclede's November Adjustment:

Beck testified that, in its work papers filed in support of the proposed compliance tariffs on October 22, Laclede used Staff's billing determinants for all months except November.⁵² For November, Laclede started with Staff's figures, but made an additional adjustment.⁵³ This adjustment was a reduction in winter first block residential sales from 58.2 therms per customer to 54.0 therms per customer, resulting in a total reduction of 2,520,000 therms to block one sales and a corresponding increase of 2,520,000 therms to block two sales.⁵⁴ According to Beck, this adjustment necessarily affected the rate for all of the winter months.⁵⁵ Beck believed that Laclede adjusted the November figures because it believed that Staff's method resulted in a figure for that month that was too high in terms of therms used per customer.⁵⁶

Beck testified that Laclede made an additional adjustment to the November figures by a linear interpolation of historical data for six years.⁵⁷ Having thereby derived a therms-per-customer figure of 54.0, Laclede subtracted it from Staff's therms-per-customer figure of 58.2 and then multiplied the difference by 600,000 customers to produce the adjustment of 2,520,000.⁵⁸ Beck testified that the number

⁴⁴ *Id.*

⁴⁵ Tr. 303-304.

⁴⁶ Tr. 257.

⁴⁷ Tr. 401.

⁴⁸ *Id.*

⁴⁹ Tr. 307, 512.

⁵⁰ Tr. 451.

⁵¹ Tr. 451-52.

⁵² Tr. 250, 256, 316.

⁵³ Tr. 250-51.

⁵⁴ Ex. 83, pg. 1. Ex. 83 is the Verified Statement of the Staff, filed by Staff on November 1, 2002, as Attachment A to its Motion to Accept Staff's Response to the Commission's October 31 Order Directing Filing. This item was originally erroneously designated as Ex. 80 at the hearing.

⁵⁵ Tr. 287.

⁵⁷ Tr. 290, 313-14.

⁵⁸ Tr. 290-91. 58.2 minus 54.0 is 4.2; 4.2 times 600,000 is 2,520,000.

11 Mo. P.S.C. 3d

of 600,000 customers used by Laclede was also incorrect and that the correct number was 593,253.⁵⁹ Beck criticized the linear interpolation method that he believed Laclede had used.⁶⁰ First, a straight line between two points did not reflect the regression curve.⁶¹ Second, you could use any two points you wanted from among the six points present.⁶² "[W]e can calculate all 15 of them and pick whichever value suits your fancy I guess."⁶³ Beck testified that Laclede did not use this method in its direct testimony.⁶⁴

Laclede's witness, Cline, denied that Laclede ever made any additional adjustment to the November figures in its compliance filing.⁶⁵ Instead, Cline testified, Laclede simply used the figure of 212,988,388 first block winter therms that it had provided to Staff by e mail on September 11 and September 13.⁶⁶ However, Laclede's witness Krieger testified that she believed that Staff's calculation of November first block therms was flawed in that it was too high.⁶⁷ Staff's November figure simply was not a realistic prediction of volumes in the first block under normal weather conditions.⁶⁸

Krieger believed the flaw in Staff's method was the result of using a linear regression analysis in an environment that was arbitrarily capped at 65.⁶⁹ In Krieger's opinion, the cap produced a distorted result when a regression analysis was used within block one.⁷⁰ Krieger testified that November was the critical month because per usage generally reached the 65 therm block boundary in the other winter months.⁷¹ Krieger further testified that Laclede had used historical data to test the reasonableness of the normalized figure produced by Staff for November.⁷² She was concerned that the new rate design would not produce the agreed upon level of revenue.⁷³ Krieger admitted that she performed an extrapolation based on just two data points.⁷⁴ She chose those points because they were the most recent and because they were close to Staff's normalized value.⁷⁵ Even using all six historical points, Krieger produced a value of approximately 55 to 56 therms per

⁵⁹ Tr. 291, 321.

⁶⁰ Tr. 314.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Tr. 321.

⁶⁵ Ex. 85, pg. 2; Tr. 267.

⁶⁶ *Id.*

⁶⁸ Tr. 402.

⁶⁹ Tr. 402, 437-38.

⁷⁰ Tr. 441, 448.

⁷¹ Tr. 402

⁷² Tr. 403, 419-20, 454.

⁷³ Tr. 423.

⁷⁴ Tr. 403.

⁷⁵ Tr. 403.

customer, significantly less than Staff's figure of 58.2.⁷⁶ Krieger tested Staff's figures for all of the winter months against historical figures and found that Staff's were reasonable for all months except November.⁷⁷

Public Counsel's expert, Hong Hu, criticized Laclede's methodology in several respects. First, she suggested that usage reductions should be allocated to the second block rather than to the first block.⁷⁸ Second, she testified that Laclede had manipulated its adjustment of Staff's November figure to produce a result favorable to the Company.⁷⁹ Laclede used historical data rather than test year data.⁸⁰ They used only two of six data points and selected the two they did use to produce a favorable result.⁸¹

Staff's Figures for November:

Staff's figures for the November billing cycle predicted a normal weather usage figure of 58.2 therms per residential customer.⁸² This figure was not based on historical data but on test year data.⁸³ Laclede preferred a figure of 54.0 therms.⁸⁴ While 58.2 was not the highest usage historically, it was on the high end.⁸⁵ Beck admitted that a normal figure would more likely be at the midpoint rather than at the high end.⁸⁶ Historically, Laclede has not seen average per customer usage in November at a level of 58 therms since 1997, a significantly colder year when November included 600 heating degree days compared to the normalized figure of 482 November heating degree days in this case.⁸⁷

Laclede's witness, Michael Cline, did not believe that 215,754,690 first block residential winter therms was a realistic figure in normal weather conditions.⁸⁸ Assuming that only 213,079,611 therms were realized, Laclede would experience a revenue shortfall of approximately \$1 million and its weather mitigation protection would be reduced from 87 percent to 80 percent.⁸⁹

November of 2001, the test year, was not a normal winter month.⁹⁰ Actual usage figures were 5,027 heating degree days for the year ending November 2001, a figure exceeding the ten-year average of 4,444 by 583.⁹¹ Beck testified that the actual

⁷⁶ Tr. 403-404.

⁷⁷ Tr. 473.

⁷⁸ Ex. 84, pp. 5-6.

⁷⁹ Ex. 84, pg. 7.

⁸⁰ Tr. 366, 385.

⁸¹ Tr. 366, 385.

⁸² Tr. 272.

⁸³ Tr. 272, 285.

⁸⁴ Tr. 284.

⁸⁵ Tr. 291.

⁸⁶ Tr. 292.

⁸⁷ Tr. 474.

⁸⁸ Tr. 477.

⁸⁹ Tr. 477.

⁹⁰ Tr. 293.

⁹¹ Ex. 18, pg. 17.

11 Mo. P.S.C. 3d

usage figure for November 2001 had to be normalized by plotting the test year figures and then fitting a curve to the data by a regression analysis.⁹² In the present case, Staff made a weather normalization adjustment of 8.1 therms per customer, adding 8.1 to 50.1 to reach 58.2.⁹³ This figure was derived by multiplying the test year figure by the slope of the curve produced by the regression analysis.⁹⁴ Staff used historical data in calculating the weather normalization adjustment.⁹⁵ The figure of 58.2 was first provided to Laclede in work papers when Staff filed its direct testimony in June.⁹⁶

Use of Different Billing Determinants:

Differences in the billing determinants used by Staff and by Laclede existed from the outset.⁹⁷ In July, Staff was using a figure of 215,599,611 and Laclede was using 210,846,057 for winter first block residential therms.⁹⁸ In August, Laclede provided the figure of 209,503,334 to Public Counsel.⁹⁹ While the settlement agreement included the concept of the weather mitigation rate design, it did not specify the actual rates or any particular level of weather mitigation protection.¹⁰⁰ Hong Hu, of the Office of the Public Counsel, expected that final rates would be developed based upon a mutually agreed upon set of billing determinants.¹⁰¹ The actual level of weather mitigation protection achieved would be a by-product of the agreement as to billing determinants.¹⁰² On September 13, Laclede provided a set of work papers using the figure 212,988,388 for residential first block therms.¹⁰³ No explanation was provided for the change from the figures used by Laclede earlier.¹⁰⁴ Hu first became aware of a dispute over residential billing determinants on October 18.¹⁰⁵

Hu testified that Laclede developed the billing determinants used in its compliance tariffs by making adjustments to Staff's July figures.¹⁰⁶ One adjustment was a reduction of 4,200,000 therms to reflect a change from Staff's July figure of 4,753 heating degree days to the agreed figure of 4,718.¹⁰⁷ Laclede allocated

⁹² Tr. 293.

⁹³ Tr. 293, 294.

⁹⁴ Tr. 319.

⁹⁵ Tr. 391.

⁹⁶ Tr. 357, 412.

⁹⁷ Ex. 84, pg. 1.

⁹⁸ *Id.*

⁹⁹ Ex. 84, pg. 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Ex. 84, pg. 4.

¹⁰⁴ Ex. 84, pg. 4.

¹⁰⁵ *Id.*

¹⁰⁶ Ex. 84, pg. 5.

¹⁰⁷ *Id.*

2,520,000 of these therms to the residential winter first block, 336,000 to the residential winter second block, and 1,344,000 to the commercial and industrial winter second block.¹⁰⁸

Staff - specifically, Dan Beck -- knew that the billing determinants used by Laclede to support Cline's rebuttal testimony filed in August would have to change because they were not based on the agreed figure of 4,718 heating degree days.¹⁰⁹ Additionally, the agreed upon weather adjustment, growth adjustment and low change adjustments would be likely to require changes to almost every figure.¹¹⁰ Beck admitted that he knew that the billing determinants would have to be recalculated based on the settlement agreement.¹¹¹ Staff first produced billing determinants reflecting all of the agreed-upon changes on October 15.¹¹²

Beck, and therefore Staff, was also aware that Laclede was not using Staff's methodology to determine billing determinants in August.¹¹³ In fact, Beck admitted that Laclede had never filed anything using Staff's figure of 215 million therms for block one.¹¹⁴ Beck testified that the settlement agreement included Laclede's agreement to use Staff's figure for first block winter therms; however, when pressed, he was unable to point to any provision of the various stipulations that so provided.¹¹⁵ Pat Krieger of Laclede testified that there was never an agreement as to which set of billing determinants would be used.¹¹⁶ Beck admitted that Staff's billing determinants figure had never been presented in testimony.¹¹⁷

Beck expected that Staff and Laclede would separately make changes to their figures to reflect the settlement agreement and then discuss them.¹¹⁸ Beck testified that he reviewed Laclede's figures to ensure that Laclede had made the necessary changes to reflect the settlement agreement.¹¹⁹ Beck stated, "looking at that total number, it was extremely close to where Staff was at the time. When I say extremely, it's my recollection that it was within about 100,000 therms, which is a very small amount."¹²⁰ However, Beck did not bother to review Laclede's distribution of therms between block one and block two.¹²¹ In fact, Beck testified that he made only a cursory review of Laclede's figures because his attention was absorbed in preparation for the on-the-record presentation on September 16.¹²²

¹⁰⁸ *Id.*

¹⁰⁹ Tr. 251 (testimony of Dan Beck).

¹¹⁰ Tr. 267 (testimony of Dan Beck).

¹¹¹ Tr. 276, 278.

¹¹² Tr. 268.

¹¹³ *Id.*

¹¹⁴ Tr. 273.

¹¹⁵ Tr. 297-98.

¹¹⁶ Tr. 428.

¹¹⁷ Tr. 356.

¹¹⁸ Tr. 282.

¹¹⁹ Tr. 252-53.

¹²⁰ Tr. 253.

¹²¹ Tr. 253-54.

¹²² Tr. 279.

11 Mo. P.S.C. 3d

Attached to Krieger's e mail of September 11 was a sheet showing changes.¹²³ This sheet did not indicate any change by Laclede to the block one billing determinants.¹²⁴ Beck did not become aware of Laclede's adjustment to the November block one billing determinants until October 16.¹²⁵ Krieger admitted that she did not include the November billing determinant adjustment on the adjustment summary sheet sent to Staff on September 11.¹²⁶ She explained that she had expected further discussions to occur with Staff on the billing determinants and adjustments.¹²⁷ She also testified that such an adjustment would not have had a material effect under Laclede's old rate design.¹²⁸

Conclusions of Law

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

Jurisdiction:

The Missouri Public Service Commission has jurisdiction over Laclede's services, activities, and rates pursuant to Section 386.250 and Chapter 393, RSMo.

Burden of Proof:

Section 393.150.2 provides in part, "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Applicable Statutes and Legal Standards:

The Missouri Public Service Commission was created by the General Assembly in 1913.¹²⁹ The General Assembly delegated to the Commission the police power to establish utility rates, subject to judicial review of the question of reasonableness.¹³⁰ The Commission's purpose is to protect the consumer

¹²³ Attachment 1, Page 3, to Laclede's Response to Staff's Reply and Request for Hearing, filed on October 30.

¹²⁴ Tr. 254-55, 260-61, 407-408.

¹²⁵ Tr. 260, 261.

¹²⁶ Tr. 407-408.

¹²⁷ Tr. 408.

¹²⁸ Tr. 431-32.

¹²⁹ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

¹³⁰ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). 130 *State ex rel. City of Harrisonville v. Public Service Commission of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Public Service Commission*, 275 Mo. 67, 204 S.W. 386 (1918), error dis'd 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Public Service Commission of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Public Service Commission of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), error dis'd 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

against the natural monopoly of the public utility, generally the sole provider of a public necessity.¹³¹ While "the dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental,"¹³² the Commission must also permit the utility an opportunity to recover a "just and reasonable" return on the assets it has devoted to the public service.¹³³ "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."¹³⁴

In 1925, the Missouri Supreme Court stated:

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very lifeblood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.¹³⁵

The Public Service Commission has exclusive jurisdiction to establish public utility rates.¹³⁶ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been established by the Public Service Commission;¹³⁷ neither can a public utility change its rates without first seeking authority from the Commission.¹³⁸ A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications that it believes are just and reasonable.¹³⁹

¹³¹ *Id.*; *May Dep't Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

¹³² *State ex rel. Crown Coach Co. v. Public Service Commission*, 238 Mo. App. 287, ___, 179 S.W.2d 123, 126 (1944).

¹³³ *Utility Consumers' Council*, 585 S.W.2d at 49.

¹³⁴ *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).

¹³⁵ *State ex rel. Washington University et al. v. Public Service Commission et al.*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (en banc).

¹³⁶ *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, ___, 107 S.W.2d 41, 57 (1937).

¹³⁷ *Id.*

¹³⁸ *Deaconess Manor Association v. Public Service Commission*, 994 S.W.2d 602, 610 (Mo. App., W.D. 1999).

¹³⁹ *May Department Stores*, *supra*, 341 Mo. at ___, 107 S.W.2d at 50.

11 Mo. P.S.C. 3d

Section 393.130, in pertinent part, requires a utility company's charges to be just and reasonable and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine just and reasonable rates. A "just and reasonable" rate is one that is just and reasonable to both the utility and its customers.¹⁴⁰ A just and reasonable rate is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."¹⁴¹

Section 393.150, in pertinent part, authorizes the Commission to suspend for a period of time any schedule stating new rates, charges, rules, regulations, or practices, and to hold "a hearing concerning the propriety of such rate, charge, . . . rule, regulation or practice." Section 393.270.4 provides that in determining the price to be charged, "the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question" The courts have held that this statute means that the Commission's determination of the proper rate must be based on consideration of all relevant factors.¹⁴² Section 393.230.1 authorizes the Commission to value the property of natural gas utilities in Missouri. Finally, Section 393.270.2 authorizes the Commission:

After a hearing and after such investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas . . . service not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or supply of gas . . . or in the methods employed by such persons or corporation as will in its judgment be adequate, just and reasonable.

Do Laclede's Proposed Tariffs Comply with the Commission's Order?

The parties dispute the method by which to calculate residential rates within the framework of the weather mitigation rate design agreed upon by the parties. Specifically, Laclede uses a figure of 212,988,388 first block therms while Staff uses a figure of 215,508,388. The difference between the two figures is 2,520,000, which is about one percent of Staff's figure. However, according to Staff's calculations, this variance will result in additional revenues to Laclede of \$932,060, which is about 6.6 percent of the \$14 million revenue increase allowed to Laclede by the parties' settlement agreement. The Commission finds that Laclede never agreed to use Staff's billing determinants.

At hearing, Staff showed that it relied upon a particular method of calculation in this case that it applies in every case. Staff further showed that Laclede had deviated from Staff's method with respect to the November billing cycle only, resulting in the variance discussed above of 2,520,000 therms. Laclede, in

¹⁴⁰ *State ex rel. Valley Sewage Co. v. Public Service Commission*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

¹⁴¹ *State ex rel. Washington University, supra*.

¹⁴² *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998); *State ex rel. Office of Public Counsel v. Public Service Commission of Missouri*, 858 S.W.2d 806 (Mo. App., W.D. 1993).

response, explained that it did not believe that the therms per customer average usage figure relied upon by Staff of 58.2 would actually be reached in normal weather conditions and that, in fact, it has not been reached since 1997. Laclede suggests that a lower figure, 54.0 therms per customer, is more accurate historically. Laclede's witnesses admitted that they had "tweaked" the November figures, using a unique and ad hoc methodology based upon historical figures. During cross examination, in the face of criticism of Laclede's methodology, Laclede's witness testified that use of all six historical data points resulted in 55 to 56 therms rather than 54 or 58.2.

Laclede's concern, as throughout this proceeding, is mitigation of the effects of unexpectedly warm weather. For a gas company like Laclede, whose revenue requirement is based on an assumption of a certain level of annual sales, unexpectedly warm weather means less sales and less revenue. While Laclede's adjustment of the November figure is methodologically problematic, it appears to be reasonable based upon this record. Staff's expert, Dan Beck, conceded that 58.2 is at the high end of Laclede's historical experience and that a normal figure would more likely be at the midpoint rather than at the high end.

The Commission has considered the evidence adduced by the parties and finds that the proposed compliance tariffs filed by Laclede on October 22 do not comply with the Commission's Order of October 3. Therefore, the Commission will reject Laclede's proposed compliance tariffs and direct Laclede to file new tariffs on an expedited basis. As to the calculation of those tariffs, the Commission concludes that a figure between the extremes espoused by the parties is appropriate.

The Commission will also direct its Staff to review those new tariffs on an expedited basis. The Commission takes this unusual step because the present dispute is depriving Laclede of a revenue stream which all of the parties have agreed is just and reasonable and depriving Laclede's customers of the potential benefits of the weather mitigation rate design. The Commission has reached this resolution solely in order to dispose of this case. The Commission does not intend thereby to reject either the current methodology used by Staff or the current methodology used by Laclede. The Commission invites the parties to develop a new method for rate calculation that may be better suited for use in the context of a weather mitigation rate design like that adopted by the parties in this case.

Because the Commission is rejecting Laclede's compliance tariffs, Staff's Motion to Suspend is moot and will be denied.

IT IS THEREFORE ORDERED:

1. That the Motion to Suspend Tariff, to Deny Laclede's Request for Expedited Treatment and for Expedited Treatment, filed by the Staff of the Missouri Public Service Commission on October 24, 2002, is denied.

2. That the proposed natural gas service tariff sheets (File No. JG-2003 0902) filed on October 22, 2002, by Laclede Gas Company for the purpose of increasing rates for natural gas service to retail customers are hereby rejected as of November 8, 2002. The specific sheets rejected are:

11 Mo. P.S.C. 3d

PSC Mo. No. 5 Consolidated

5th Revised Sheet No. 1-a, Canceling 4th Revised Sheet No. 1-a
14th Revised Sheet No. 2, Canceling 13th Revised Sheet No. 2
10th Revised Sheet No. 3, Canceling 9th Revised Sheet No. 3
Original Sheet No. 3-a, Canceling All Previous Schedules
Original Sheet No. 3-b, Canceling All Previous Schedules
13th Revised Sheet No. 4, Canceling 12th Revised Sheet No. 4
2nd Revised Sheet No. 4-a, Canceling 1st Revised Sheet No. 4-a
14th Revised Sheet No. 5, Canceling 13th Revised Sheet No. 5
13th Revised Sheet No. 7, Canceling 12th Revised Sheet No. 7
15th Revised Sheet No. 8, Canceling 14th Revised Sheet No. 8
13th Revised Sheet No. 9, Canceling 12th Revised Sheet No. 9
8th Revised Sheet No. 11, Canceling 7th Revised Sheet No. 11
8th Revised Sheet No. 18, Canceling 10th Revised Sheet No. 18
2nd Revised Sheet No. 18-a, Canceling 1st Revised Sheet No. 18-a
Original Sheet No. 18-b, Canceling All Previous Schedules
Original Sheet No. 18-c, Canceling All Previous Schedules
Original Sheet No. 28-b.1, Canceling All Previous Schedules
Original Sheet No. 28-b.2, Canceling All Previous Schedules
Original Sheet No. 28-b.3, Canceling All Previous Schedules
2nd Revised Sheet No. 28-c.1, Canceling 1st Revised Sheet No. 28-c.1
192nd Revised Sheet No. 29, Canceling 191st Revised Sheet No. 29
9th Revised Sheet No. 34, Canceling 8th Revised Sheet No. 34
3rd Revised Sheet No. R-12, Canceling 2nd Revised Sheet No. R-12
1st Revised Sheet No. R-43, Canceling Original Sheet No. R-43

3. That Laclede Gas Company shall file as soon as practicable, but in no case later than 12:00 Noon on Friday, November 8, 2002, proposed tariff sheets in compliance with the settlement agreement of the parties approved herein and in compliance with this order. The residential general service winter rates therein shall be calculated on the basis of 214,308,388 first block therms.

4. That the Staff of the Missouri Public Service Commission shall, as soon as practicable, but in no case later than 4:00 p.m. on Friday, November 8, 2002, review the proposed tariff sheets referred to in Ordered Paragraph No. 3, above, and file its Recommendation and Memorandum advising the Commission whether or not the proposed tariff sheets are in compliance with the settlement agreement of the parties approved by the Commission's Order of October 3, 2002, and in compliance with this Order, and, particularly, whether the residential general service winter rates therein have been calculated on the basis of 214,308,388 first block therms.

5. That, except for Ordered Paragraph No. 2, this order shall become effective on November 18, 2002.

Simmons, Ch., Murray, and Forbis, CC., concur;
 Lumpe, C., concurs, with separate concurring
 opinion to follow;
 Gaw, C., dissents; certify compliance with the
 provisions of Section 536.080, RSMo 2000.

CONCURRENCE OF COMMISSIONER SHEILA LUMPE

Although I have some disagreement with the result reached by the Commission in this case, I write to explain why I nonetheless voted for it. Faced with two Commissioners opposed to Laclede, two in favor of Laclede and one undecided, I voted to avoid the impasse of Commission non-action, which in this case would have allowed Laclede's proposed tariffs to become effective by operation of law, thereby imposing an even steeper rate increase upon Laclede's residential ratepayers.

I am unable to totally support Laclede in this case because I am concerned about the last-minute, unannounced and unexplained adjustment made by Laclede to the November terms per customer usage figure. I do not accept Patricia Krieger's testimony that she was not aware that the adjustment she made resulted in almost a million dollars of additional revenue to Laclede. I do not believe that Krieger made the adjustment in question without knowledge of its effect. That she may have done so in a sincere belief that Laclede would otherwise experience an under-recovery of that amount in the November billing cycle does not, and cannot, excuse the underhanded manner in which the adjustment was made.

I am also unconvinced that the new weather mitigation rate design will result in any benefit to Laclede's residential ratepayers. According to testimony, the ratepayers may only experience a slight benefit from the new weather mitigation rate design. I understand that it will benefit Laclede. In Laclede's next rate case, I would hope that detailed information be provided regarding the actual experience of residential customers with the new rate design.

In the Matter of Missouri Public Service and St. Joseph Light and Power, Divisions of UtiliCorp United Inc., for Recognition of Uncollectibles Expense under the Terms of 4 CSR 240-13.055(10)1.

*Case No. GO-2002-175
Decided November 14, 2002*

Gas § 34. The Commission denied UtiliCorp's request for an Accounting Authority Order that would allow UtiliCorp to defer uncollectibles expense. The test for an Accounting Authority Order is whether the expense is extraordinary and not recurring. The Commission found that UtiliCorp failed to prove their uncollectibles expense from the 2000-2001 heating season was extraordinary.

Gas § 85. The Commission denied UtiliCorp's request to defer its uncollectibles expenses. UtiliCorp alleged some of its uncollectibles were due to extremely cold weather. UtiliCorp argued the cold weather was so extraordinary that the Commission should allow UtiliCorp to defer the uncollectibles from the 2000-2001 winter heating season. The Commission found that UtiliCorp failed to prove a correlation between weather and its uncollectibles, and denied UtiliCorp's request for deferral.

REPORT AND ORDER

Syllabus: UtiliCorp United Inc., now known as Aquila, Inc., sought permission from the Commission for authority to defer certain bad-debt expenses. The Commission determines that the expenses are not extraordinary and denies the request to defer them.

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.

On October 9, 2001, Missouri Public Service and St. Joseph Light and Power, divisions of UtiliCorp United Inc., now known as Aquila, Inc.,¹ together with all the other Missouri regulated local distribution gas companies, filed an application requesting that the Commission grant them Accounting Authority Orders and approve certain proposed tariff sheets. All the gas companies other than Aquila later dismissed their applications, and Aquila withdrew its proposed tariffs.

On December 12, the Commission allowed the Midwest Gas Users Association to intervene.

On March 13, 2002, and again on May 13, Aquila amended its application. In its application, as amended, Aquila asserted that it was experiencing or would experience extraordinarily high levels of uncollectibles expense that significantly exceed operating expense levels included in Aquila's revenue requirements, as a consequence of the 2000-2001 heating season and the accommodations it made to its customers under the Cold Weather Rule.

Aquila asked the Commission to issue an Accounting Authority Order that would permit Aquila to defer the levels of non-gas-cost-related uncollectibles expense that exceed the levels of such costs allegedly reflected in Aquila's current Missouri gas rates. Aquila proposed that the deferral would continue until the end of the test year in its next rate case. Aquila requested authority to defer approximately \$1 million of uncollectible expense.

No SJLP customers entered into Cold Weather Rule agreements for the 2000-2001 winter heating season, and only MPS 262 customers entered into such agreements. Aquila did not track the number of gas customers who failed to comply with the Cold Weather Rule agreements for the 2000-2001 winter heating season, and did not quantify any costs that Aquila incurred as a result of complying with the Cold Weather Rule.

Uncollectible expenses are a normal ongoing cost of doing business. Both MPS and SJLP have a level of uncollectible expenses built into their respective rate

¹ This order will refer to the company as "Aquila," and to its operating divisions, when they are considered separately, as "MPS" and "SJLP."

structures. Uncollectible expenses are routinely considered in evaluation of Aquila's ordinary business operations during a general rate case. The Uniform System of Accounts provides for uncollectible expenses to be placed in Account 904.

SJLP experienced weather that was 9.92% colder than normal, and MPS experienced weather that was 7.7% colder than normal. The evidence established that SJLP had a decrease in uncollectible expenses from the level of uncollectible expenses allegedly built into SJLP's rates.

Aquila performed no study to determine the amount of uncollectible expenses which were the result of cold weather or increased gas costs. Uncollectible expenses arise from other factors such as general economic conditions. Public Counsel's analysis of uncollectible expense and their relationship to weather and natural gas prices did not show a consistent correlation between the two factors. The evidence does not demonstrate a correlation between weather and uncollectible expenses.

Aquila has not provided any information to quantify any of the costs that Aquila incurred for complying with the Cold Weather Rule. Aquila failed to provide any studies and had not looked at any data that supported its claim that the Cold Weather Rule tends to increase arrearages and reduce opportunities to collect such arrearages. The costs of Aquila's compliance with the Cold Weather Rule were considered in the last rate case proceedings for SJLP and MPS. The cost to administer the Cold Weather Rule is already built into Aquila's rates. The cost to comply with the Commission's Cold Weather Rule is ongoing normal business expenses that are considered on a regular basis in Aquila's general rate cases. SJLP had no customers enter into cold weather rule agreements, therefore, there can be no costs related to those agreements. Aquila failed to track how many MPS customers did not follow through on their cold weather rule agreements.

Aquila has failed to establish that the uncollectible expenses it experienced are directly related to the colder than normal weather experienced during the winter of 2000-2001. The evidence does not demonstrate a correlation between weather and uncollectible expenses.

Conclusions of Law

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

Aquila is a Delaware corporation providing gas service to the public in a number of counties in Missouri. Aquila is a "gas corporation" and a "public utility" pursuant to the Missouri Public Service Commission Law. The Missouri Public Service Commission has jurisdiction over the services, activities and rates of Aquila.

The test that the Commission has used, and continues to use here, for determining whether or not to grant an AAO is whether the expense to be deferred is extraordinary and not recurring:

The deferral of costs from one period to another period for the development of a revenue requirement violates the traditional method of setting rates. Rates are usually established based upon a historical test year which focuses on four

11 Mo. P.S.C. 3d

factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. State ex rel. Union Electric Company v. PSC, (UE), 765 S.W.2d 618, 622 (Mo. App. 1988).

Allowable operating expenses are those which recur in the normal operations of a company, and a company's rates are set for the future based upon its past experience for a test year with adjustments for annualizations, normalizations and known and measurable changes. Under historical test year ratemaking, costs are rarely considered from earlier than the test year to determine what is a reasonable revenue requirement for the future. Deferral of costs from one period to a subsequent rate case causes this consideration and should be allowed only on a limited basis.

This limited basis is when events occur during a period which are extraordinary, unusual and unique and not recurring. These types of events generate costs which require special consideration.

In the Matter of Missouri Public Service, 1 MPSC 3d 200, 205 (1991).

The Commission's initial inquiry is whether the costs sought to be deferred are indeed extraordinary. If they are not, the inquiry is at an end, and the other questions are moot. Because the Commission concludes that the costs Aquila seeks to defer are not extraordinary, it will not address the other issues identified by the parties.

In this case, Aquila's theory is that the level of uncollectible expense is extraordinary because it allegedly arises from the cold weather and high gas costs of the winter of 2000-2001. Aquila's main point is not that the level of uncollectibles is so high that it is intrinsically extraordinary, but rather it asserts that the level of uncollectibles was caused by events that were extraordinary. But Aquila has proved neither that these events caused the levels of uncollectibles sought to be deferred, nor that these events - in this context - are extraordinary.

In fact, Aquila's argument fails on a number of accounts. First, it has wholly failed to prove that the cold weather and high gas costs of the early part of the 2000-2001 winter caused an increase in uncollectibles. Some of the evidence (concerning SJLP) suggests just the opposite - SJLP's level of uncollectibles during the period in question was lower than that established in its last rate case. Second, it has failed to prove that the level of uncollectible expense is intrinsically extraordinary. Third, it has failed to prove that, in this context, the cold weather and high gas costs of the early part of the 2000-2001 winter were extraordinary.

Aquila makes much of the fact that the Commission, in another context, found the combination of very cold weather and very high gas prices in the early winter of 2000-2001 to be extraordinary. The combination was extraordinary from the perspective of customers who had large arrearages and faced potentially life-threatening disconnection. It is not extraordinary from the perspective of a natural

gas distribution company whose main business is buying gas on the market, reselling it to customers, and collecting money from those customers. Furthermore, the company has completely failed to establish a causal link between cold weather and high gas costs on the one hand, and bad debts on the other. The Commission cannot conclude that MPS is the norm and SJLP is the exception; from the scant data presented, it could be the other way around.

Aquila's uncollectible expenses resulting from the winter of 2000-2001 were not "extraordinary, unusual, unique, and non-recurring," and the Commission will deny Aquila's application for an accounting authority order.

IT IS THEREFORE ORDERED:

1. That the application for an accounting authority order filed by UtiliCorp United Inc., now known as Aquila, Inc. on October 9, 2001, is denied.
2. That this order shall become effective on November 24, 2002.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC.,
concur and certify compliance with the provisions of
Section 536.080, RSMo 2000.

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of The Empire District Electric Company of Joplin,
Missouri, for Authority to File Tariffs Increasing Rates for
Electric Service Provided to Customers in the Missouri
Service Area of the Company.***

*Case No. ER-2002-424
Decided November 14, 2002*

Electric §1. The Commission found that the stipulation and agreement, which provided for an increase in the company's gross annual electric rates of \$11,000,000, exclusive of applicable fees and taxes, was just and reasonable and should be approved.

The stipulation and agreement approved by the Commission also provided that the company's Interim Energy Charge, which was authorized by the Commission in the company's previous general rate case and subsequently modified, would terminate at 12:01 of the Commission-ordered effective date of the new rates that were the subject of the stipulation and agreement. The company also agreed to refund moneys collected under the Interim Energy Charge.

*The Commission, in an order issued on April 24, 2003, approved a tariff designed to implement an Experimental Low-Income Program.

11 Mo. P.S.C. 3d

Electric §18. The depreciation rates agreed to by the parties as part of the stipulation and agreement did not include a provision for net salvage. Instead, net salvage was included in the income statement in determining cost of service based upon the company's actual historical experience.

Electric §20. The Commission approved the parties' stipulation and agreement, which provided for an \$11,000,000 increase, exclusive of applicable fees and taxes, in the company's gross annual electric rates.

Depreciation §22. The depreciation rates agreed to by the parties as part of the stipulation and agreement did not include a provision for net salvage. Instead, net salvage was included in the income statement in determining cost of service based upon the company's actual historical experience.

Rates §62. As part of the stipulation and agreement approved by the Commission, the parties agreed that before September 1, 2003, the company will not file any tariff or pleading with the Commission, or encourage or assist in the filing of any tariff or pleading with the Commission, that seeks a general increase or decrease in the retail electric rates of the company. This moratorium includes an exception for emergency rate relief in certain situations.

Rates §104. The Commission approved a stipulation and agreement that provided for an increase of \$11,000,000, exclusive of applicable fees and taxes, in the company's gross annual electric rates.

Rates §119. The stipulation and agreement approved by the Commission provides that the increase in the company's revenue requirement shall be allocated to each rate schedule on an equal-percent-of-current-revenue basis. The charges within each nonresidential rate schedule shall receive an equal percentage increase (subject to rounding) to produce the increase allocated to each rate schedule. The stipulation and agreement provides that the increase to the residential class shall reflect an adjustment to the summer-winter differential. The stipulation and agreement approved by the Commission provides that the company will implement an Experimental Low-Income Program generally consistent with the program proposed by the company. The agreement also provides that ratepayer funding of the experimental low-income program will be matched dollar-for-dollar by the company.

APPEARANCES

James C. Swearngen, Dean L. Cooper, and Gary W. Duffy, Brydon Swearngen & England P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for The Empire District Electric Company.

Stuart W. Conrad, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Praxair, Inc.

John B. Coffman, Acting 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.

Keith R. Krueger, Deputy General Counsel, Dennis L. Frey, Senior Counsel, Bruce H. Bates, David A. Meyer, Robert V. Franson, Robert S. Berlin, Associates General Counsel, Nathan Williams, and Eric Anderson, Legal 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:

Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER**Syllabus:**

This order approves the settlement by the parties of The Empire District Electric Company's general rate case.

Procedural History:

On March 8, 2002, The Empire District Electric Company filed with the Missouri Public Service Commission proposed tariff sheets bearing an effective date of May 15, 2002. The tariff sheets were designed to increase permanent rates for electric service provided to retail customers in Empire's Missouri service area in order to produce an annual increase of approximately \$19,779,916 (8.51 percent) in the Company's gross annual electric revenues, exclusive of applicable fees and taxes.

On March 12, 2002, Praxair, Inc., filed a motion to intervene, which the Commission granted by order issued March 15, 2002. The Commission issued an order granting a protective order on April 1, 2002.

On April 2, 2002, the Commission issued its Suspension Order and Notice, suspending the proposed tariff until March 12, 2002, setting the test year, and adopting a procedural schedule. The order scheduled the evidentiary hearing for October 28, 2002, through November 8, 2002.

On June 7, 2002, the Commission issued an order scheduling a local public hearing in Joplin, Missouri, on September 17, 2002. The local public hearing was conducted on September 17, 2002, as scheduled.

On August 19, 2002, the Commission issued an order changing some procedural dates as requested by the parties.

On October 28, 2002, the parties filed their Unanimous Stipulation and Agreement in settlement of all issues in this case. Staff filed its Suggestions in Support of the Unanimous Stipulation and Agreement on October 31, 2002.

An on the record presentation was set for November 5, 2002, and was held that day as scheduled. All of the prefiled testimony was received into the record at that time, without objection, and all of the parties waived their right to cross examination. The transcript of the on the record presentation was filed on November 7, 2002.

Discussion:

As described above, the parties have presented their settlement agreement to the Commission in the form of the Unanimous Stipulation and Agreement filed on October 28, 2002.

The Unanimous Stipulation and Agreement

The Unanimous Stipulation and Agreement addresses the revenue requirement, the Interim Energy Charge, Depreciation Issues, Rate Design, the Experimental Low Income Program, interest on customer deposits, an outstanding Data Request, and a rate moratorium. A copy of the Agreement is attached hereto as Attachment A.

The Agreement also contains various standard provisions commonly included in stipulations and agreements filed with the Commission, including the parties' reservation of the right to take contradictory positions in other cases; an assertion

11 Mo. P.S.C. 3d

of the interdependence of all of the terms and consequent vacation of the agreement if modified by the Commission; the parties' waiver of their rights, contingent on Commission approval of the agreement, to present testimony, to cross examine witnesses, to present oral argument or written briefs, to a reading of the full transcript by the members of the Commission, and to seek judicial review; that prefiled testimony relating to issues resolved by the agreement shall be received into the record; that Staff shall prepare and file supporting suggestions; and that Staff may provide oral explanations of the agreement as requested by the Commission at an Agenda session.

Revenue Requirement:

The parties agreed to a revenue requirement increase of \$11,000,000 in gross annual electric revenues, exclusive of applicable fees and taxes, with the rates to be effective for service rendered on and after December 1, 2002. The parties agree that this increase is just and reasonable and no party has objected to it or requested a hearing.

The parties state that they believe that a December 1, 2002, effective date is reasonably achievable and recognize that from Empire's standpoint this effective date was a key inducement to enter into the Agreement. The parties agree that the Commission, in its order approving the Agreement, should authorize Empire to file tariff sheets in conformance with the illustrative tariff sheets attached to the Unanimous Stipulation and Agreement. The parties also agree that the Commission should authorize the tariff sheets to have an effective date of December 1, 2002, which is less than 30 days from the filing date, without the necessity of Empire filing a separate motion seeking such authorization.

Interim Energy Charge:

The parties agree that the Interim Energy Charge (IEC), which was authorized by the Commission in Empire's previous general electric rate case (Case No. ER-2001-299) and subsequently modified in Case No. ER-2002-1074, shall terminate at 12:01 a.m. of the Commission-ordered effective date of the new rates that are the subject of this Agreement. Empire agrees that all moneys collected as a result of the IEC, up to and including the Commission-ordered effective date of the new rates, shall be refunded to the Company's customers, with interest in accordance with the agreements filed in said Case Nos. ER-2001-299 and ER-2002-1074. Because Empire will refund all amounts it has collected under the IEC (plus interest) to the customers paying such amounts, the true up audit of Empire's fuel costs following the termination of the IEC as was specified both in the Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Class Cost of Service and Rate Design (299 Stipulation), filed in Case No. ER-2001-299 on June 4, 2001, and in the supporting Unanimous Stipulation and Agreement Regarding "Error" in Case No. ER-2001-299 and an Immediate Reduction of the Interim Energy Charge, filed in Case No. ER-2002-1074 on May 14, 2002, will be unnecessary. The parties agree that the amount of the refund, including interest, to be credited to each of Empire's customers will be calculated in accordance with the procedures set forth in those agreements, and Empire

agrees to submit satisfactory and sufficient data to verify the calculation of the aggregate amount to be refunded. Empire agrees that the refunds shall be credited no later than March 15, 2003. The disposition of any residual amounts, resulting from an inability to locate former Empire customers, will be as specified in the 299 Stipulation.

Depreciation and FAS 87:

a) Pension Cost: The parties state that Pension Cost has been determined based upon the Employee Retirement Income Security Act (ERISA) minimum contribution. This calculation reflects a Staff policy change from Financial Accounting Standard 87 (FAS 87) and is intended to reduce annual volatility in pension cost for ratemaking purposes, and to match the Company's actual cash funding requirements under ERISA. The parties agree that the Prepaid Pension Asset, resulting from the use of FAS 87 in determining pension cost for ratemaking purposes in prior cases, will be amortized over a seven-year period. The amortized balance of \$12,925,650 as of the date of the Agreement will be included in rate base for ratemaking purposes during the seven-year amortization period.

b) Cost of Removal/Salvage: The depreciation rates agreed to by the parties do not include a provision for net salvage. Instead, net salvage has been included in the income statement in determining cost of service based upon the Company's actual historical experience.

Rate Design:

The Agreement provides that the increase in the Company's revenue requirement shall be allocated to each rate schedule on an equal-percent-of-current-revenues basis. The charges within each nonresidential rate schedule shall receive an equal percentage increase (subject to rounding) to produce the increase allocated to each rate schedule. The increase to the residential class shall reflect an adjustment to the summer-winter differential. The resulting charges for each rate schedule were shown on Exhibit B to the Unanimous Stipulation and Agreement. The parties also agree that the illustrative tariff sheets attached to the Agreement as Exhibit A incorporate the agreed-to rate design.

Experimental Low-Income Program:

The Agreement provides that the Company will implement an Experimental Low Income Program (ELIP), generally consistent with the program proposed by the Company. Program details shall be developed by a collaborative committee of the interested parties and will be presented to the Commission for approval no later than April 1, 2003. The parties agree that any disagreement over the program design among the interested parties shall be brought to the Commission for resolution as quickly as possible.

The Agreement provides that ratepayer funding of the ELIP will be at the level proposed by the Company; however, ratepayer funding will be matched dollar-for-dollar by Empire. Empire agrees not to seek recovery of its dollar-for-dollar match in any future ratemaking proceeding. The sum of the ratepayer funding and the Empire dollar-for-dollar match shall be considered "program funds." The Agreement provides that inasmuch as ratepayer funding for this program is included in

11 Mo. P.S.C. 3d

the agreed-to increase in the Company's revenues and incorporated in the agreed to rate design, there will be no surcharge applied to customers' bills. The benefits of continuing the experiment may be evaluated in the Company's next rate or complaint case, but in any event, an evaluation of the first two years of this experiment shall be initiated no later than thirty months from the date that the tariff sheets implementing this program are approved by the Commission or otherwise allowed to become effective. The effectiveness of the ELIP shall be evaluated by an independent third party hired by the Company and mutually agreed to by the parties, and any other interested party, at a cost not to exceed \$10,000, to be paid through program funds. The Agreement notes that Empire agrees that the program developed by the collaborative may contain the following provisions:

- a) The Company will assist ELIP participants in completing LIHEAP (Low Income Home Energy Assistance Program) applications so that participants have improved opportunities to receive further assistance in paying their Empire electric bills; and
- b) The Company will retain the services of an outside contractor experienced in the design and implementation of low-income rates and who is mutually agreed upon by Empire, Staff, and Public Counsel, to assist the collaborative committee in developing program details at a cost not to exceed \$5,000, to be paid through program funds.

Interest on Customer Deposits:

The Agreement provides that Empire shall file tariff sheets to change the interest rate the Company pays on customer deposits, effective January 1, 2003, to one percentage point above the prime rate published in the Wall Street Journal as being in effect on the last business day of December of the prior year, except as otherwise required by Commission rule.

Outstanding Data Request:

Empire agrees to provide to Staff, within ten days after the effective date of the Commission's order approving the Agreement, all analysts' documents requested in Staff Data Request No. 3808, including, but not limited to, all A.G. Edwards research reports from April 2000 through June 2001, or a written statement from A.G. Edwards that such documents do not exist or are not available. In the latter case, Empire will request a written explanation from A.G. Edwards as to why the documents do not exist or why they are not available, and will furnish the response of A.G. Edwards to that request to the parties.

Moratorium:

Each of the parties agree that before September 1, 2003, it will not file any tariff or pleading with the Commission, or encourage or assist in the filing of any tariff or pleading with the Commission, that seeks a general increase or decrease in the retail electric rates of Empire, unless there is the occurrence of a significant, unusual event, such as an act of God, a significant change in federal or state tax law, a significant change in federal or state utility law or regulation, or an extended outage or shutdown of a major generating unit(s) that has a major effect on Empire,

in which case the Company may seek what is commonly referred to as "emergency" rate relief. The Agreement provides that by approving the Agreement, the Commission does not waive the right to determine whether Empire qualifies for "emergency" rate relief, and none of the parties waive their right to contest whether Empire should receive such relief nor agree to any changes in the standards applicable to such determination.

In Conclusion:

The parties urge the Commission to approve the Unanimous Stipulation and Agreement. 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. The Commission has considered the settlement agreement of the parties, together with Staff's suggestions and the comments made at the on the record presentation, and concludes that the settlement agreement is just and reasonable and should be approved.

IT IS THEREFORE ORDERED:

1. That the settlement reached by the parties, as contained in the Unanimous Stipulation and Agreement filed on October 28, 2002 (Attachment A), is hereby approved as a resolution of all issues in this case.
2. That The Empire District Electric Company is ordered to comply with the terms of the settlement agreement of the parties as contained in the Unanimous Stipulation and Agreement filed on October 28, 2002 (Attachment A).
3. That the proposed tariff sheets (File No. 200200743) filed on March 8, 2002, by The Empire District Electric Company for the purpose of increasing permanent rates for electric service provided to retail customers in Empire's Missouri service area are hereby rejected. The specific sheets rejected are:

Schedule of Rates for Electricity, PSC Mo. No. 5

Section A, 16th Revised Sheet No. 1, Canceling Section A, 15th Revised Sheet No. 1
 Section 1, 11th Revised Sheet No. 1, Canceling Section 1, 10th Revised Sheet No. 1
 Section 2, 10th Revised Sheet No. 1, Canceling Section 2, 9th Revised Sheet No. 1
 Section 2, 10th Revised Sheet No. 2, Canceling Section 2, 9th Revised Sheet No. 2
 Section 2, 10th Revised Sheet No. 3, Canceling Section 2, 9th Revised Sheet No. 3
 Section 2, 11th Revised Sheet No. 4, Canceling Section 2, 10th Revised Sheet No. 4
 Section 2, 10th Revised Sheet No. 5, Canceling Section 2, 9th Revised Sheet No. 5
 Section 2, 10th Revised Sheet No. 6, Canceling Section 2, 9th Revised Sheet No. 6
 Section 2, 10th Revised Sheet No. 7, Canceling Section 2, 9th Revised Sheet No. 7
 Section 2, 6th Revised Sheet No. 9, Canceling Section 2, 5th Revised Sheet No. 9
 Section 2, 5th Revised Sheet No. 13, Canceling Section 2, 4th Revised Sheet No. 13
 Section 3, 11th Revised Sheet No. 1, Canceling Section 3, 10th Revised Sheet No. 1
 Section 3, 15th Revised Sheet No. 2, Canceling Section 3, 14th Revised Sheet No. 2
 Section 3, 10th Revised Sheet No. 3, Canceling Section 3, 9th Revised Sheet No. 3
 Section 3, 10th Revised Sheet No. 4, Canceling Section 3, 9th Revised Sheet No. 4
 Section 3, 2nd Revised Sheet No. 5, Canceling Section 3, 1st Revised Sheet No. 5
 Section 4, 8th Revised Sheet No. 2, Canceling Section 4, 7th Revised Sheet No. 2
 Section 4, 7th Revised Sheet No. 3, Canceling Section 4, 6th Revised Sheet No. 3
 Section 4, 3rd Revised Sheet No. 9, Canceling Section 4, 2nd Revised Sheet No. 9
 Section 4, 2nd Revised Sheet No. 10, Canceling Section 4, 1st Revised Sheet 10

11 Mo. P.S.C. 3d

4. That The Empire District Electric Company shall file as soon as practicable, but preferably no later than 12:00 p.m. on November 18, 2002, proposed tariff sheets in compliance with the settlement agreement of the parties approved herein. The proposed tariff sheets shall have either 1) a 30 day effective date and be accompanied by a motion requesting expedited treatment, or 2) an effective date of no earlier than December 1, 2002, and be accompanied by a brief explaining why an effective date of less than 30 days is lawful and proper.

5. That once The Empire District Electric Company files its proposed tariff sheets in compliance with this order, the Staff of the Commission shall file its Memorandum and Recommendation regarding the tariff sheets within one business day. If Staff is unable to comply with this deadline, Staff shall instead file a Status Report informing the Commission of the date certain when Staff will file its Memorandum and Recommendation.

6. That this Report and Order shall become effective on November 24, 2002.

Simmons, Ch., Murray, Lumpe, Gaw, and Forbis, CC., concur.

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

LIST OF DIGEST TOPICS

	PAGE
Accounting	5
Certificates	7
Depreciation	11
Discrimination	12
Electric	14
Evidence, Practice, and Procedure	20
Expense	22
Gas	24
Manufactured Housing	31
Public Utilities	32
Rates	34
Security Issues	42
Service	45
Sewer	47
Steam	48
Telecommunications	50
Valuation	60
Water	62

ACCOUNTING**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Jurisdiction and powers of the Federal Commissions
- §4. Jurisdiction and powers of the State Commission
- §5. Reports, records and statements
- §6. Vouchers and receipts

II. DUTY TO KEEP PROPER ACCOUNTS

- §7. Duty to keep proper accounts generally
- §8. Uniform accounts and rules
- §9. Methods of accounting generally

III. PARTICULAR ITEMS

- §10. Additions, retirements and replacements
- §11. Abandoned property
- §12. Capital account
- §13. Contributions by utility
- §14. Customers account
- §15. Deficits
- §16. Deposits by patrons
- §17. Depreciation reserve account
- §18. Financing costs
- §19. Fixed assets
- §20. Franchise cost
- §21. Incomplete construction
- §22. Interest
- §23. Labor cost
- §23.1. Employee compensation
- §24. Liabilities
- §25. Maintenance, repairs and depreciation
- §26. Notes
- §27. Plant adjustment account
- §28. Premiums on bonds
- §29. Property not used
- §30. Purchase price or original cost
- §31. Acquisition of property expenses
- §32. Rentals
- §33. Retirement account
- §34. Retirement of securities
- §35. Sinking fund
- §36. Securities

ACCOUNTING

- §37. Supervision and engineering
- §38. Taxes
- §38.1. Book/tax timing differences
- §39. Welfare and pensions
- §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

ACCOUNTING
II. DUTY TO KEEP PROPER ACCOUNTS**§9. Methods of accounting generally**

Having found it to be in the public interest, the Commission approved a stipulation and agreement, the effect of which will be to distribute the unrecognized net loss caused by falling stock prices over five years.—Missouri Gas Energy 11 MPSC 3d 515.

III. PARTICULAR ITEMS**§36. Securities**

Having found it to be in the public interest, the Commission approved a stipulation and agreement, the effect of which will be to distribute the unrecognized net loss caused by falling stock prices over five years.—Missouri Gas Energy 11 MPSC 3d 515.

§42. Accounting Authority Orders

The Commission granted an Accounting Authority Order to KCP&L. KCP&L suffered extraordinary damage from an ice storm, and sought permission to defer the costs of repair to Account 182.3, Other Regulatory Assets. The Commission allowed KCP&L to do so, but made no finding as to the reasonableness of the deferred expenses, and reserved the right to disallow those expenses in any future rate case.—Kansas City Power & Light 11 MPSC 3d 419.

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
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of local authorities
- §8. Jurisdiction and powers over interstate operations
- §9. Jurisdiction and powers over operations in municipalities
- §10. Jurisdiction and powers over the organizations existing prior to the Public Service Commission law

III. WHEN A CERTIFICATE IS REQUIRED

- §11. When a certificate is required generally
- §12. Certificate from federal commissions
- §13. Extension and changes
- §14. Incidental services or operations
- §15. Municipal limits
- §16. Use of streets or public places
- §17. Resumption after service discontinuance
- §18. Substitution or replacement of facilities
- §19. Effect of general laws, franchises and licenses
- §20. Certificate as a matter of right

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS

- §21. Grant or refusal of certificate generally
 - §21.1. Public interest
 - §21.2. Technical qualifications of applicant
 - §21.3. Financial ability of applicant
 - §21.4. Economic feasibility of proposed service
- §22. Restrictions and conditions
- §23. Who may possess
- §24. Validity of certificate
- §25. Ability and prospects of success
- §26. Public safety
- §27. Charters and franchises
- §28. Contracts
- §29. Unauthorized operation or construction

CERTIFICATES

- §30. Municipal or county action
- §31. Rate proposals
- §32. Competition or injury to competitor
- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

V. PREFERENCE BETWEEN RIVAL APPLICANTS - FACTORS

- §36. Preference between rival applicants generally
- §37. Ability and responsibility
- §38. Existing or past service
- §39. Priority of applications
- §40. Priority in occupying territory
- §41. Rate proposals

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority
- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

VII. OPERATION UNDER TERMS OF THE CERTIFICATE

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

VIII. TRANSFER, MORTGAGE OR LEASE

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
- §54. Dissolution
- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
- §59. Sale of certificate rights

IX. REVOCATION, CANCELLATION AND FORFEITURE

- §60. Revocation, cancellation and forfeiture generally**
 - §61. Acts or omissions justifying revocation or forfeiture**
 - §62. Necessity of action by the Commission**
 - §63. Penalties**
-

CERTIFICATES**IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS****§21. Grant or refusal of certificate generally**

The Commission rejected Environmental Utilities' application for a certificate of convenience and necessity. Environmental failed to comply with the Commission's rules in pleading the necessary elements for a certificate. Environmental also acquired a promissory note and corresponding deed of trust that was void because the Commission did not permit Osage Water to execute the note and deed of trust.—Environmental Utilities 11 MPSC 3d 524.

§22. Restrictions and conditions

The Commission indicated that it would grant applicant water company a certificate of convenience and necessity but would not issue the certificate, or allow it to become effective until the applicant presented proof to the Commission establishing that it had entered into a wholesale agreement to provide water to a neighboring subdivision, where such wholesale agreement was necessary to make the applicant financially viable.—Environmental Utilities, LLC 11 MPSC 3d 360.

§26. Public safety

The Commission removed Warren County Water and Sewer Company's authority to do business in Missouri because Warren County Water could not or would not safely serve its customers. The service was unsafe for such reasons as: inadequate water pressure, inadequate water capacity, unlocked and unsecure fencing, and numerous customer complaints about water quality.—Office of the Public Counsel v. Warren County Water & Sewer 11 MPSC 3d 548.

§34. Public convenience and necessity or public benefit

Where the owners of the applicant water company are also the owners of the subdivision to be served, and control the subdivision's homeowners association, the operation of the water system by a regulated utility is preferable to operation by the unregulated homeowners association.—Environmental Utilities, LLC 11 MPSC 3d 360.

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES**§46.3. Certificate of basic local exchange service authority**

The Commission expanded the area in which Mark Twain Communications Company provides basic local exchange service. The Commission applied the same standard for the certificate expansion as it applies for granting original certificates.—Mark Twain Communications 11 MPSC 3d 529.

VII. OPERATION UNDER TERMS OF THE CERTIFICATE**§51. Modification and amendment of certificate generally**

When the Commission granted an expansion of an area in which Mark Twain Communications Company provides basic local exchange service, the Commission applied the same standard as it applies for granting original certificates.—Mark Twain Communications 11 MPSC 3d 529.

IX. REVOCATION, CANCELLATION AND FORFEITURE**§60. Revocation, cancellation and forfeiture generally**

The Commission refused to cancel Osage Water Company's certificate solely on the basis of Environmental Utilities' assertion that it was trying to buy Osage Water's assets and service territory.—Environmental Utilities 11 MPSC 3d 524.

§61. Acts or omissions justifying revocation or forfeiture

The Commission removed Warren County Water and Sewer Company's authority to do business, and authorized the Commission to seek a receiver to run the business, after finding the company could not or would not safely serve its customers. The service was unsafe for such reasons as inadequate water pressure, inadequate water capacity, unlocked and unsecure fencing, and numerous customer complaints about water quality. The company's owner also verbally abused his customers, reacted violently toward Commission staff that tried to assist him, and had been convicted of violating the federal Clean Water Act.—Office of the Public Counsel v. Warren County Water & Sewer 11 MPSC 3d 548.

§62. Necessity of action by the Commission

The Commission determined it should seek a circuit court order appointing a receiver to run Warren County Water and Sewer Company to ensure its customers receive safe and adequate service.—Office of the Public Counsel v. Warren County Water & Sewer 11 MPSC 3d 548.

DEPRECIATION

I. IN GENERAL

- §1. Generally
- §2. Right to allowance for depreciation
- §3. Reports, records and statements
- §4. Obligation of the utility

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commission
- §8. Jurisdiction and powers of local authorities

III. BASIS FOR CALCULATION

- §9. Generally
- §10. Cost or value
- §11. Property subject to depreciation
- §12. Methods of calculation
- §13. Depreciation rates to be allowed
- §14. Rates or charges for service

IV. FACTORS AFFECTING ANNUAL ALLOWANCE

- §15. Factors affecting annual allowance generally
- §16. Life of enterprise
- §17. Life of property
- §18. Past depreciation
- §19. Charges to maintenance and other accounts
- §20. Particular methods and theories
- §21. Experience
- §22. Life of property and salvage
- §23. Sinking fund and straight line
- §24. Combination of methods

V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
- §29. Investment and use
- §30. Earnings on reserve

VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
- §32. Gas
- §33. Heating
- §34. Telecommunications
- §35. Water

DEPRECIATION**III. BASIS FOR CALCULATION****§22. Life of property and salvage**

The depreciation rates agreed to by the parties as part of the stipulation and agreement did not include a provision for net salvage. Instead, net salvage was included in the income statement in determining cost of service based upon the company's actual historical experience.—The Empire District Electric Company 11 MPSC 3d 604.

DISCRIMINATION**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Recovery of damages for discrimination
- §4. Recovery of discriminatory undercharge
- §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
- §8. Jurisdiction and powers of the local authorities

III. RATES

- §9. Competitor's right to equal treatment
- §10. Free service
- §11. Inequality of rates
- §12. Methods of eliminating discrimination
- §13. Optional rates

- §14. Rebates
- §15. Service charge, meter rental or minimum charge
- §16. Special rates
- §17. Rates between localities
- §18. Concessions

IV. RATES BETWEEN CLASSES

- §19. Bases for classification and differences
- §20. Right of the utility to classify
- §21. Reasonableness of classification

V. RATES AND CHARGES OF PARTICULAR UTILITIES

- §22. Electric and power
- §23. Gas
- §24. Heating
- §25. Telecommunications
- §26. Sewer
- §27. Water

VI. SERVICE IN GENERAL

- §28. Service generally
- §29. Abandonment and discontinuance
- §30. Discrimination against competitor
- §31. Equipment, meters and instruments
- §32. Extensions
- §33. Preference during shortage of supply
- §34. Preferences to particular classes or persons

VII. SERVICE BY PARTICULAR UTILITIES

- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

DISCRIMINATION

No headnotes in this volume involved the question of discrimination.

ELECTRIC**I. IN GENERAL**

- §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

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions

- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

ELECTRIC

I. IN GENERAL

§1. Generally

The Commission found that the stipulation and agreement, which provided for an increase in the company's gross annual electric rates of \$11,000,000, exclusive of applicable fees and taxes, was just and reasonable and should be approved.—The Empire District Electric Company 11 MPSC 3d 604.

The stipulation and agreement approved by the Commission also provided that the company's Interim Energy Charge, which was authorized by the Commission in the company's previous general rate case and subsequently modified, would terminate at 12:01 of the Commission-ordered effective date of the new rates that were the subject of the stipulation and agreement. The company also agreed to refund moneys collected under the Interim Energy Charge.—The Empire District Electric Company 11 MPSC 3d 604.

§3. Certificate of convenience and necessity

The Commission granted Union Electric Company a certificate of convenience and necessity to construct a new transmission line. Union Electric's existing line did not supply enough electricity to meet customer demand, and building the proposed line was the most efficient way to meet that demand. The line would be built parallel and close to the

existing line, which would minimize the width of the required right-of-way.—Union Electric 11 MPSC 3d 108.

The Commission determined it was necessary and convenient for the public interest for IES Utilities, Inc. to construct and operate a transmission line. A portion of the line would be in Missouri, and would serve IES' Iowa customers.—IES Utilities 11 MPSC 3d 261.

§4. Transfer, lease and sale

The Commission authorized UtiliCorp United Inc. to acquire all the outstanding shares of Avon Energy Partners Holdings from EI UK Holdings, Inc.—UtiliCorp United 11 MPSC 3d 25.

The Commission determined that the acquisition by UtiliCorp United Inc. of all the outstanding shares of Avon Energy Partners Holdings would expand and diversify UtiliCorp's operations in the United Kingdom and the rest of Europe and would not adversely affect its investment grade credit rating or its ability to attract capital to fund its operations. Therefore, the Commission determined that approval of the application would benefit UtiliCorp and would not be detrimental to the public interest.—UtiliCorp United 11 MPSC 3d 25.

The Commission approved a Unanimous Stipulation and Agreement that allowed Empire to sell software to an unregulated subsidiary.—Empire District Electric 11 MPSC 3d 80.

The Commission found that the amendment to the agreement, which modified the designated boundaries in Camden and Miller Counties, transferred structures and assets, and changed the supplier for certain customers was not detrimental to the public interest.—Union Electric 11 MPSC 3d 98.

The Commission approved the proposed acquisition of the electrical facilities, as set out in detail in the application of UtiliCorp United Inc., subject to the five conditions set out in the recommendation of the Staff filed on February 4, 2002.—UtiliCorp United 11 MPSC 3d 115.

The Commission approved a Purchase and Sale Agreement between Aquila Europe, Inc., and EI UK Holdings, Inc., which allows Aquila to acquire an interest in Avon Energy Partners Holdings from EI UK.—UtiliCorp United Inc. 11 MPSC 3d 265.

The Commission determined that the acquisition by Aquila, Inc., would expand and diversify Aquila's operations in the United Kingdom and the rest of Europe and would not adversely affect its investment grade credit rating or its ability to attract capital to fund its operations. Therefore, the Commission determined that approval of the application would benefit

Aquila and would not be detrimental to the public interest.—UtiliCorp United Inc. 11 MPSC 3d 265.

§4.1. Change of suppliers

The Commission found that the amendment to the agreement, which modified the designated boundaries in Camden and Miller Counties, transferred structures and assets, and changed the supplier for certain customers was not detrimental to the public interest.—Union Electric 11 MPSC 3d 98.

The Commission approved an application filed by the Union Electric Company d/b/a AmerenUE and by the Lewis County Rural Electric Cooperative, requesting approval of a change of electrical supplier affecting about 550 structures and approval of the sale and transfer of assets related to supplying electricity to these structures with the change and transfer from UE to Co-op.—Union Electric Company 11 MPSC 3d 111.

§6. Territorial agreements

The Commission found that the amendment to the agreement, which modified the designated boundaries in Camden and Miller Counties, transferred structures and assets, and changed the supplier for certain customers was not detrimental to the public interest.—Union Electric 11 MPSC 3d 98.

The Commission approved a territorial agreement between Union Electric Company and Callaway Electric Cooperative. The Commission also approved of transfers of assets and customers between Union Electric and Callaway Electric. The agreement and transfers resulted in Callaway Electric serving some of Union Electric's former rural customers. Callaway Electric can serve those customers more easily and efficiently.—Union Electric Company 11 MPSC 3d 389.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers generally

The Commission approved a Stipulation and Agreement among the parties that resulted in a refund to AmerenUE's customers. One of the reasons the Commission approved the agreement is that the agreement did not restrict the Commission's powers in any way.—PSC Staff v. Union Electric 11 MPSC 3d 411.

§9. Jurisdiction and powers of the State Commission

The Commission had jurisdiction over IES Utilities Inc., and could require IES to obtain a certificate of convenience and necessity to build a transmission line through Missouri to serve its Iowa customers.—IES Utilities 11 MPSC 3d 261.

§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, RSMo.—Union Electric 11 MPSC 3d 98.

III. OPERATIONS**§18. Depreciation**

The depreciation rates agreed to by the parties as part of the stipulation and agreement did not include a provision for net salvage. Instead, net salvage was included in the income statement in determining cost of service based upon the company's actual historical experience.—The Empire District Electric Company 11 MPSC 3d 604.

§20. Rates

The Commission found that the stipulation and agreement of the parties was reasonable in that it provided for just and reasonable rates to be set in the ongoing permanent rate case and allowed Citizens Electric Corporation to recover in the interim, subject to refund, the increased costs of its new purchased power agreement, therefore allowing Citizens to provide safe, adequate, and reliable service without incurring additional debt or impairing its financial stability.—Citizens Electric 11 MPSC 3d 30.

The Commission approved a stipulation and agreement that provided for allocation of a rate decrease as an equal percentage decrease to all nonresidential classes, with the residential class receiving 50 percent of the percentage decrease allocated to the nonresidential classes.—Missouri Public Service 11 MPSC 3d 120.

The Commission found that the proposed tariff failed to meet the traditional emergency standard for granting interim relief.—The Empire District Electric Company 11 MPSC 3d 280.

The Commission approved the parties' unanimous stipulation and agreement regarding an alleged "error" in Case No. ER-2001-299, the company's most recent rate case. The stipulation and agreement provided for an immediate reduction of the company's Interim Energy Charge. The Commission also approved the proposed tariff sheet that was designed to implement the proposed reduction to the Interim Energy Charge.—The Empire District Electric Company 11 MPSC 3d 304.

The Commission found that in its totality, the stipulation and agreement of the parties was reasonable in that it provided for just and reasonable rates.—Citizens Electric 11 MPSC 3d 323.

The Commission approved the parties' stipulation and agreement, which provided for an \$11,000,000 increase, exclusive of applicable fees and taxes, in the company's gross annual electric rates.—The Empire District Electric Company 11 MPSC 3d 604.

§21. Refunds

The Commission approved a Stipulation and Agreement that resulted in AmerenUE giving its customers a one-time credit of \$40 million.—PSC Staff v. Union Electric 11 MPSC 3d 411.

§22. Revenue

The Commission approved a stipulation and agreement that provided for a revenue decrease of \$4,250,000, approximately 1.43 percent, for UtiliCorp's Missouri Public Service division.—Missouri Public Service 11 MPSC 3d 120.

§35. Extensions

The Commission approved the unanimous stipulation and agreement among the parties including a proposal for revised line extension policy.—The Empire District Electric Company 11 MPSC 3d 565.

The Commission approved a unanimous stipulation and agreement where the parties agreed that the new line extension policy would not result in any material change to the company's revenue requirement and therefore would not require a revenue adjustment in the company's pending general rate case.—The Empire District Electric Company 11 MPSC 3d 565.

§38. Financing practices

The Commission approved the company's request for a three-year extension of authority to enter into interest rate management products. The interest rate management products authorized are interest rate "swap," "cap," and "collar" agreements. The Commission authorized the company to have outstanding at any one time \$250 million of interest rate management products, with an effective interest rate of ten percent or less on fixed rate transactions, and an initial rate of not more than ten percent on variable rate transactions.—Kansas City Power & Light 11 MPSC 3d 392.

§41. Billing practices

The Commission approved a unanimous stipulation and agreement between the Office of the Public Counsel and AmerenUE wherein Ameren ceased its practice of assessing late payment charges upon the entire unpaid balances of gas and electric service customers who have entered into deferred payment agreements.—OPC v. Union Electric 11 MPSC 3d 127.

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

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§4. Presumption and burden of proof

The Commission found that in the first sentence of Section 392.245.5, RSMo, the presumption of competition controls only where a competitor of Southwestern Bell has been both certified and has been providing service for at least five years.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission found that in the second sentence of Section 392.245.5, RSMo, there is no presumption of competition and therefore the Commission can only make an affirmative finding of effective competition based on competent and substantial evidence.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission found that generally the party seeking relief bears the burden of proof.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission found that the burden of proof remains upon the party asserting the affirmative of the ultimate issue throughout a proceeding.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

§8. Stipulation

The Commission approved a stipulation and agreement that provided that financial issues, including any issue relating to adjustments for capacity release and put and call options, would be addressed in an existing but separate proceeding.—UtiliCorp United 11 MPSC 3d 117.

The Commission approved a Stipulation and Agreement to resolve a complaint the Staff of the Commission filed against AmerenUE. The Stipulation and Agreement included terms requiring AmerenUE to reduce its rates, give customers a one-time credit, invest in infrastructure, and invest in the communities AmerenUE serves. The Commission found the Stipulation and Agreement to be in the public interest because parties with diametrically opposed interests entered into the agreement. These parties included parties such as small residential customers, large industrial customers, and other utilities.—PSC Staff v. Union Electric 11 MPSC 3d 411.

III. PRACTICE AND PROCEDURE

§24. Procedures, evidence and proof

The Commission adopted the parties' proposed procedural schedule. The Commission is hesitant to grant a procedural schedule that delays

resolution of the case. However, AmerenUE's tariff will make a potential rate reduction retroactive. Therefore, Missouri ratepayers are protected, and the Commission will allow the parties ample time to conduct discovery and file testimony.—PSC Staff v. AmerenUE 11 MPSC 3d 74.

§26. Burden of Proof

A utility's decision to incur a cost is presumed to be prudent unless some other party presents sufficient evidence to create a serious doubt as to the prudence of an expenditure, at which point the utility has the burden of proving that the cost was prudently incurred.—Missouri Gas Energy 11 MPSC 3d 206.

§30. Settlement procedures

Normal rules of contract construction apply to interpretation of settlement agreements.—Missouri Gas Energy 11 MPSC 3d 206.

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

EXPENSE

VI. PARTICULAR KIND OF EXPENSE

§34. Collection fees

The Commission granted MGE a variance from the rule that sets hours MGE could disconnect its customers. This variance allows MGE to minimize the number of disconnected customers and to increase its collections. The additional hours MGE can disconnect also makes it more likely a customer would be at home and would make arrangements with MGE to avoid disconnection.—Missouri Gas Energy 11 MPSC 3d 38.

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. Depreciation
- §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

GAS

I. IN GENERAL

§1. Generally

The Commission approved the request of Laclede Gas Company for a waiver from the definition of “main” at 4 CSR 240-40.030(1)(B)14 and the corresponding definition in the federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules.—Laclede Gas Company 11 MPSC 3d 278.

§6. Transfer, lease and sale

The Commission approved Mississippi Valley Gas Company’s merger into Atmos Energy Corporation. The Commission found the merger to be in the public interest, and that Missouri customers could only benefit from the merger.—Atmos Energy Corporation 11 MPSC 3d 242.

III. CONSTRUCTION AND EQUIPMENT

§10. Construction and equipment generally

The Commission approved the request of Laclede Gas Company for a waiver from the definition of “main” at 4 CSR 240-40.030(1)(B)14 and the corresponding definition in the federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules. These provisions define a “gas main” as “a distribution line that serves as a common source of supply for more than one (1) service line.” The facilities that Laclede requested be permanently exempted from this definition include any distribution line that extends onto private property and serves no more than two adjacent, private, single-family residences separated by a property line that terminates at an outside, aboveground meter set. The Commission granted Laclede’s request that such facilities be treated as service lines and made subject to the requirements specified at 4 CSR 240-40.030(8)(G) and at 49 C.F.R. 192.361.—Laclede Gas Company 11 MPSC 3d 278.

§12. Location

The Commission approved the request of Laclede Gas Company for a waiver from the definition of “main” at 4 CSR 240-40.030(1)(B)14 and the corresponding definition in the federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules. These provisions define a “gas main” as “a distribution line that serves as a common source of supply for more than one (1) service line.” The facilities that Laclede requested be permanently exempted from this definition include any distribution line that extends onto private property and serves no more than two adjacent, private, single-family residences separated by a property line that terminates at an outside, aboveground meter set. The Commission granted Laclede’s request that such facilities be treated as service lines and made subject to the requirements specified at 4 CSR 240-40.030(8)(G) and at 49 C.F.R. 192.361.—Laclede Gas Company 11 MPSC 3d 278.

§15. Maintenance

The Commission approved the request of Laclede Gas Company for a waiver from the definition of “main” at 4 CSR 240-40.030(1)(B)14 and the corresponding definition in the federal regulations, 49 C.F.R. Part 192.3 of the Federal Pipeline Safety Rules. These provisions define a “gas main” as “a distribution line that serves as a common source of supply for more than one (1) service line.” The facilities that Laclede requested be permanently exempted from this definition include any distribution line that extends onto private property and serves no more than two adjacent, private, single-family residences separated by a property line that terminates at an outside, aboveground meter set. The Commission granted Laclede’s request that such facilities be treated as service lines and made subject to the requirements specified at 4 CSR 240-40.030(8)(G) and at 49 C.F.R. 192.361.—Laclede Gas Company 11 MPSC 3d 278.

§16. Safety

The Commission did not require Missouri Gas Energy to replace the service lines of Farm Tap customers as part of its Safety Line Replacement Program (SLRP).—Missouri Gas Energy 11 MPSC 3d 284.

The Commission approved Missouri Gas Energy’s plan for replacement of distribution systems at master meter trailer parks as part of its Safety Line Replacement Program (SLRP).—Missouri Gas Energy 11 MPSC 3d 284.

IV. OPERATION**§17.1. Purchased Gas Adjustment (PGA)**

The Commission approved a tariff that revised a gas company’s Purchased Gas Adjustment clause.—Union Electric Company 11 MPSC 3d 245.

Staff's proposal to disallow 3.5 million dollars in gas costs as imprudently incurred was rejected as unsupported by competent and substantial evidence.—Missouri Gas Energy 11 MPSC 3d 206.

The Commission approved a unanimous stipulation and agreement, and accompanying tariff, that revised a gas company's Purchased Gas Adjustment / Actual Cost Adjustment tariff.—Laclede Gas Company 11 MPSC 3d 129.

The Commission found that the stipulation and agreement which allowed United Cities Gas Company to make up to four purchased gas adjustment clause filings per year was reasonable.—United Cities Gas 11 MPSC 3d 308.

The Commission found that the stipulation and agreement which allowed the company to make certain optional purchased gas adjustment clause filings when the company determined that elements had changed significantly from the factor currently in effect was reasonable.—United Cities Gas 11 MPSC 3d 308.

The Commission found that the limitation in the stipulation and agreement that optional purchased gas adjustment clause tariff filings could not become effective in two consecutive months unless ordered by the Commission was reasonable.—United Cities Gas 11 MPSC 3d 308.

The Commission denied a request for reconsideration and affirmed its decision to hear a consolidated PGA case using a bifurcated hearing schedule.—Missouri Gas Energy 11 MPSC 3d 567.

§18. Rates

The Commission approved a stipulation and agreement whereby Laclede Gas Company was allowed a general rate increase for natural gas service, increasing its revenue requirement by \$14,000,000, impacting the average residential customer in the amount of \$1.80 per month.—Laclede Gas Company 11 MPSC 3d 538.

The Commission approved the stipulation and agreement of the parties and directed Atmos Energy Corporation to submit gas aggregation tariff sheets in compliance with the order.—Atmos Energy Corporation 11 MPSC 3d 555.

§24. Accounting

Having found it to be in the public interest, the Commission approved a stipulation and agreement, the effect of which will be to distribute the unrecognized net loss caused by falling stock prices over five years.—Missouri Gas Energy 11 MPSC 3d 515.

§29. Costs and expenses

The Commission granted Atmos a variance from a rule that requires gas corporations to test their meters every 120 months. The variance will save Atmos approximately \$104,000 per year without compromising Atmos' ability to measure meter safety and accuracy.—Atmos Energy Corporation 11 MPSC 3d 519.

§33. Billing practices

The Commission approved a unanimous stipulation and agreement between the Office of the Public Counsel and AmerenUE wherein Ameren ceased its practice of assessing late payment charges upon the entire unpaid balances of gas and electric service customers who have entered into deferred payment agreements.—OPC v. Union Electric 11 MPSC 3d 127.

The Commission dismissed a complaint moving the Commission to invalidate an unauthorized use charge imposed by Missouri Gas Energy on Schreiber Foods and to require that Missouri Gas Energy issue an adjustment to Schreiber.—TXU Energy Services, Inc. & Schreiber Foods, Inc. v. Missouri Gas Energy 11 MPSC 3d 333.

The Commission approved a variance from Commission Rules 4 CSR 240-13.015(1)(A), 13.015(1)(R), 13.050(5) and 13.055(3), allowing Laclede Gas Company to bill, and receive payment from, its customer over the Internet.—Laclede Gas Company 11 MPSC 3d 417.

§34. Accounting Authority Orders

The Commission granted UtiliCorp's request for an Accounting Authority Order that would allow UtiliCorp to defer costs of complying with the emergency amendments to the Cold Weather Rule. UtiliCorp has the burden of proving it should recover those costs in rates. That burden gives UtiliCorp incentive to gather evidence that proves those costs actually are incremental costs of complying with the emergency amendment.—UtiliCorp United 11 MPSC 3d 78.

The Commission approved a stipulation and agreement whereby Missouri Gas Energy was granted an accounting authority order relating to its expenses incurred in complying with 4 CSR 240-13.055(13), the emergency cold weather rule.—Missouri Gas Energy 11 MPSC 3d 317.

The Commission denied UtiliCorp's request for an Accounting Authority Order that would allow UtiliCorp to defer uncollectibles expense. The test for an Accounting Authority Order is whether the expense is extraordinary and not recurring. The Commission found that UtiliCorp failed to prove their uncollectibles expense from the 2000-2001 heating season was extraordinary.—Missouri Public Service & St. Joseph Light & Power 11 MPSC 3d 600.

V. JOINT OPERATIONS**§37. Division of revenue**

The Commission ordered Atmos Energy Corporation to comply with its current tariffs or, in the alternative, file tariffs consolidating its' divisions' tariffs.—Atmos Energy Corporation 11 MPSC 3d 242.

VI. PARTICULAR KIND OF EXPENSES**§47. Auditing and bookkeeping**

The Commission granted Atmos a variance from a rule that requires gas corporations to test their meters every 120 months. Despite the variance, Atmos still has the duty to keep its meters accurate and safe.—Atmos Energy Corporation 11 MPSC 3d 519.

§71. Maintenance and depreciation; repairs and replacements

The Commission granted Atmos a variance from a rule that requires gas corporations to test their meters every 120 months. If Atmos discovers a meter lot that does not meet its accuracy standard, then Atmos will remove all the meters within the lot over a four-year period. Atmos will repair or replace those meters.—Atmos Energy Corporation 11 MPSC 3d 519.

§85. Uncollectible accounts

The Commission denied UtiliCorp's request to defer its uncollectibles expenses. UtiliCorp alleged some of its uncollectibles were due to extremely cold weather. UtiliCorp argued the cold weather was so extraordinary that the Commission should allow UtiliCorp to defer the uncollectibles from the 2000-2001 winter heating season. The Commission found that UtiliCorp failed to prove a correlation between weather and its uncollectibles, and denied UtiliCorp's request for deferral.—Missouri Public Service & St. Joseph Light & Power 11 MPSC 3d 600.

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
IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §16. **Revocation, cancellation and forfeiture generally**
The Commission approved a stipulation and agreement wherein a mobile home dealer agreed to arrange for inspection of the manufactured home, and subsequent repairs thereto, in accordance with standards set by the Design Approval Primary Inspection Agency.—PSC Staff v. Wightman Enterprises 11 MPSC 3d 125.

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

PUBLIC UTILITIES**I. IN GENERAL****§1. Generally**

The Commission accepted Staff's report summarizing the findings of its survey concerning the preparedness of Missouri utilities for disaster and emergency situations.—Investigation-Public Utility Emergency Preparedness 11 MPSC 3d 96.

RATES

The Commission added to the record the Utility Committee Final Report for the Missouri Security Panel. The Commission was represented on the Utility Committee and participated in the preparation of the report. The Commission found that adding the report to the record would assist the Commission, the Staff, and Missouri utilities in identifying the practices, issues or matters that present the highest priority to mitigate or deter threats to public utility operations and services presented by terrorist activities.—Investigation-Public Utility Emergency Preparedness 11 MPSC 3d 110.

II. JURISDICTION AND POWERS**§7. Jurisdiction and powers of the State Commission**

The Commission determined that it had no jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company.—Missouri-American Water Company 11 MPSC 3d 3.

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

RATES
I. JURISDICTION AND POWERS**§1. Jurisdiction and powers generally**

The Commission held that it is appropriate under the facts of this case to grant interim rate relief on a nonemergency basis.—Citizens Electric 11 MPSC 3d 30.

The Commission held that it was not appropriate under the facts of this case to grant interim rate relief on an emergency basis.—The Empire District Electric Company 11 MPSC 3d 280.

The Commission held that it had authority to accept a stipulation and agreement as a resolution of the issues.—Citizens Electric 11 MPSC 3d 323.

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

§8. Reasonableness generally

The Commission found that in its totality, the stipulation and agreement of the parties was reasonable in that it provided for just and reasonable rates.—Citizens Electric 11 MPSC 3d 323.

§14. Temporary or emergency

Where the parties all agreed that interim rate relief was appropriate, the Commission found that Citizens Electric Corporation was so similar to a rural electric cooperative, and so different than other electrical corporations regulated by the Commission, that it was appropriate to grant interim rate relief on a nonemergency standard to recover additional costs from a wholesale power agreement.—Citizens Electric 11 MPSC 3d 30.

The Commission found that the facts of the case did not meet the emergency standard and therefore it was not appropriate to grant interim rate relief.—The Empire District Electric Company 11 MPSC 3d 280.

§15. Classification of customers

The Commission approved a Stipulation and Agreement that allowed school districts to negotiate contracts to purchase natural gas and pipeline transportation in the aggregate. Section 393.310.4 RSMo requires gas corporations to file tariffs allowing the school districts to negotiate on behalf of its schools.—Laclede Gas Company 11 MPSC 3d 560.

§17. Competition

The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.—Sprint Communications Company 11 MPSC 3d 406.

The Commission did not reject a tariff instituting a monthly service charge of \$1.95 because the service charge would apply only to competitive services and consumers are free to obtain service from an alternative provider if they object to paying the charge.—MCI WorldCom Communications 11 MPSC 3d 522.

§21. Discrimination, partiality, or unfairness

The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.—Sprint Communications Company LP 11 MPSC 3d 406.

IV. SCHEDULE, FORMALITIES AND PROCEDURE RELATING TO**§62. Initiation of rates and rate changes**

As part of the stipulation and agreement approved by the Commission, the parties agreed that before September 1, 2003, the company will not file any tariff or pleading with the Commission, or encourage or assist in the filing of any tariff or pleading with the Commission, that seeks a general increase or decrease in the retail electric rates of the company. This moratorium includes an exception for emergency rate relief in certain situations.—The Empire District Electric Company 11 MPSC 3d 604.

§69. Approval or rejection by the Commission

The Commission rejected proposed tariffs from three telephone companies that would lengthen the period of recovering costs from implementing their IntraLATA Dialing Parity Plans. The Commission found that the companies could recover the costs, but not during an interval so lengthy that it would drag the process out.—Mid-Missouri Telephone 11 MPSC 3d 272.

V. KINDS AND FORMS OF RATES AND CHARGES**§81. Surcharges**

The Commission approved the parties' unanimous stipulation and agreement regarding an alleged "error" in Case No. ER-2001-299, the company's most recent rate case. The stipulation and agreement provided for an immediate reduction of the company's Interim Energy Charge. The Commission also approved the proposed tariff sheet that was designed to implement the proposed reduction to the Interim Energy Charge.—The Empire District Electric Company 11 MPSC 3d 304.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES**§104. Electric and power**

The Commission approved the parties' unanimous stipulation and agreement, which provided for a reduction of the Interim Energy Charge. The Commission also approved The Empire District Electric Company's proposed tariff that implemented the reduction in the Interim Energy Charge.—The Empire District Electric Company 11 MPSC 3d 304.

The Commission approved a unanimous stipulation and agreement where the parties agreed that the new line extension policy would not result in any material change to the company's revenue requirement and therefore would not require a revenue adjustment in the company's pending general rate case.—The Empire District Electric Company 11 MPSC 3d 565.

The Commission approved a stipulation and agreement that provided for an increase of \$11,000,000, exclusive of applicable fees and taxes, in the company's gross annual electric rates.—The Empire District Electric Company 11 MPSC 3d 604.

§108. Gas

The Commission accepted the settlement agreement between Atmos Energy Corporation and Associated Natural Gas Company. The Commission allowed Atmos to take over ANG's Actual Cost Adjustment without opening a new case for Atmos because ANG had discharged its obligations.—Associated Natural Gas 11 MPSC 3d 197.

The Commission approved the stipulation and agreement of the parties and directed Atmos Energy Corporation to submit gas aggregation tariff sheets in compliance with the order.—Atmos Energy Corporation 11 MPSC 3d 555.

The Commission approved a Stipulation and Agreement that allowed gas corporations to file tariffs that permit school districts to negotiate the purchase of natural gas and pipeline transportation on behalf of its schools.—Laclede Gas Company 11 MPSC 3d 560.

The Commission rejected tariff sheets relating to the Purchased Gas Adjustment filed by Laclede Gas Company for the purpose of increasing rates for natural gas service to retail customers.—Laclede Gas Company 11 MPSC 3d 581.

§110. Telecommunications

The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.—Sprint Communications Company LP 11 MPSC 3d 406.

The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.—Sprint Communications Company LP 11 MPSC 3d 406.

The Commission rejected the company's proposed tariff, which was designed to increase the residential and business monthly rate for the optional Metropolitan Calling Area Plan for Tiers 3, 4, and 5. The Commission found that the proposed increase exceeds the increase authorized in Section 392.245.11, RSMo 2000.

The Commission found that under the price cap statute, Section 392.245, RSMo 2000, if an incumbent local exchange company increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent – and any part of the eight percent annual increase that is not used is lost.—Sprint Missouri 11 MPSC 3d 569.

§111. Water

The Commission accepted the settlement agreement between Osage Water Company and the Staff of the Commission. Osage began charging customers higher rates before the Commission had granted Osage authority. The Commission closed the case after Osage refunded overcharged amounts to all the customers it could find. For the one customer Osage could not find, the Commission allowed Osage to apply the refund to its costs of administering the other refunds.—Osage Water Company 11 MPSC 3d 328.

VII. EMERGENCY AND TEMPORARY RATES

§114. Emergency and temporary rates generally

Where the parties all agreed that interim rate relief was appropriate, the Commission found that Citizens Electric Corporation was so similar to a rural electric cooperative, and so different than other electrical corporations regulated by the Commission, that it was appropriate to grant interim rate relief on a nonemergency standard to recover additional costs from a wholesale power agreement.—Citizens Electric 11 MPSC 3d 30.

The Commission approved Southwestern Bell's emergency promotion to be offered to customers affected by an ice storm. The Commission allowed Bell to revise its tariff to allow Bell to waive installation charges and one month of monthly charges for various call forwarding services.—Southwestern Bell Telephone Company 11 MPSC 3d 106.

The Commission found that the facts of the case did not meet the emergency standard and therefore it was not appropriate to grant interim rate relief.—The Empire District Electric Company 11 MPSC 3d 280.

VIII. RATE DESIGN, CLASS COST OF SERVICE

§119. Rate design, class cost of service for electric utilities

The stipulation and agreement approved by the Commission provides that the increase in the company's revenue requirement shall be allocated to each rate schedule on an equal-percent-of-current-revenue basis. The charges within each nonresidential rate schedule shall receive an equal percentage increase (subject to rounding) to produce the increase allocated to each rate schedule. The stipulation and

SECURITY ISSUES

agreement provides that the increase to the residential class shall reflect an adjustment to the summer-winter differential. The stipulation and agreement approved by the Commission provides that the company will implement an Experimental Low-Income Program generally consistent with the program proposed by the company. The agreement also provides that ratepayer funding of the experimental low-income program will be matched dollar-for-dollar by the company.—The Empire District Electric Company 11 MPSC 3d 604.

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

V. PURPOSES AND SUBJECTS OF CAPITALIZATION

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

VI. KINDS AND PROPORTIONS

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

VII. SALE PRICE AND INTEREST RATES

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

VIII. FINANCING METHODS AND PRACTICES

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

IX. PARTICULAR UTILITIES

- §76. Telecommunications
- §77. Electric and power
- §78. Gas
- §79. Sewer
- §80. Water
- §81. Miscellaneous

SECURITY ISSUES
I. IN GENERAL**§1. Generally**

The Commission accepted Staff's report summarizing the findings of its survey concerning the preparedness of Missouri utilities for disaster and emergency situations.—Investigation-Public Utility Emergency Preparedness 11 MPSC 3d 96.

The Commission added to the record the Utility Committee Final Report for the Missouri Security Panel. The Commission was represented on the Utility Committee and participated in the preparation of the report. The Commission found that adding the report to the record would assist the Commission, the Staff, and Missouri utilities in identifying the practices, issues or matters that present the highest priority to mitigate or deter threats to public utility operations and services presented by terrorist activities.—Investigation-Public Utility Emergency Preparedness 11 MPSC 3d 110.

SERVICE**I. IN GENERAL**

- §1. Generally
- §2. What constitutes adequate service
- §3. Obligation of the utility
- §4. Abandonment, discontinuance and refusal of service
- §5. Contract, charter, franchise and ordinance provisions
- §6. Restoration or continuation of service
- §7. Substitution of service
- §7.1. Change of supplier
- §8. Discrimination

II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally
- §10. Jurisdiction and powers of the Federal Commissions
- §11. Jurisdiction and powers of the State Commission
- §12. Jurisdiction and powers over service outside of the state
- §13. Jurisdiction and powers of the courts
- §14. Jurisdiction and powers of local authorities
- §15. Limitations on jurisdiction
- §16. Enforcement of duty to serve

III. DUTY TO SERVE

- §17. Duty to serve in general
- §18. Duty to render adequate service
- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property

- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

SERVICE

I. IN GENERAL

- §4. **Abandonment, discontinuance and refusal of service**
The Commission determined Warren County Water and Sewer Company could not or would not safely and adequately serve its customers. The service was unsafe for such reasons as: inadequate water pressure, inadequate water capacity, unlocked and unsecure fencing, and numerous customer complaints about water quality. The company's owner also verbally abused his customers, reacted violently toward Commission staff that tried to assist him, and had been convicted of violating the federal Clean Water Act.—Office of the Public Counsel v. Warren County Water & Sewer 11 MPSC 3d 548.
- §6. **Restoration or continuance of service**
Because the failure to grant temporary relief would have the effect of rendering a final judgment for injunctive relief ineffectual, the Commission directed Respondents to restore the discontinued service to Complainant pending the resolution of the underlying complaint case.—Computechnology, Inc. v. Verizon Midwest 11 MPSC 3d 310.

IV. OPERATIONS**§ 35. Management and operation**

The Commission found that Warren County Water and Sewer Company's business practices were inadequate. Some of Warren County Water and Sewer's misconduct included: failing to pay electric bills, assessments, and taxes, failing to get Commission approval before selling assets, and failing to keep adequate records of its transactions.—Office of the Public Counsel v. Warren County Water & Sewer 11 MPSC 3d 548.

SEWER**I. IN GENERAL**

- §1. Generally**
- §2. Certificate of convenience and necessity**
- §3. Obligation of the utility**
- §4. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the Federal Commissions**
- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of local authorities**
- §9. Territorial agreements**

III. OPERATIONS

- §10. Operation generally**
- §11. Construction and equipment**
- §12. Maintenance**
- §13. Additions and betterments**
- §14. Rates and revenues**
- §15. Return**
- §16. Costs and expenses**
- §17. Service**
- §18. Depreciation**
- §19. Discrimination**
- §20. Apportionment**
- §21. Accounting**
- §22. Valuation**
- §23. Extensions**

STEAM

- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues
- §28. Rules and regulations
- §29. Billing practices
- §30. Eminent domain
- §31. Accounting Authority orders

SEWER
I. IN GENERAL**§4. Transfer, lease and sale**

The Commission approved the transfer of assets from Eastern Missouri Utilities Co., Inc. to the City of Foristell.—Eastern Missouri Utilities Co. 11 MPSC 3d 422.

STEAM
I. IN GENERAL

- §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

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations

- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

STEAM

No headnotes in this volume involved the question of steam.

TELECOMMUNICATIONS**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices

- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally , or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated

TELECOMMUNICATIONS

I. IN GENERAL

§1. Generally

The Commission opened a generic case to review the unbundled network elements that were at issue in Case No. TO-2002-222. The Commission also noted that the scope of the case may also include all pricing issues that are not a part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issue the Commission determines to be appropriate. The Commission made Southwestern Bell Telephone Company, MCI Metro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., the Staff of the Commission, and the Office of the Public Counsel parties without the need for intervention. An intervention date was set for other interested parties to file applications to intervene.—Southwestern Bell Telephone Company 11 MPSC 3d 247.

The Commission granted its Staff's request for reconsideration and restated the cost allocation methodology by deleting the phrase "state specific basis."—Area Codes 11 MPSC 3d 76.

The Commission approved a stipulation and agreement, merging Northeast Missouri Rural Telephone Company and Modern Telecommunications Company.—Modern Telecommunications 11 MPSC 3d 577.

§2. Obligation of the utility

The Commission ruled that for a carrier to receive support under the state Lifeline program, the carrier must provide essential local telecommunications services. Low-income and disabled Missourians can get these services at a reduced cost. The carriers must pass the costs of the service on to their customers via an explicit charge to end-users, based on a uniform percentage amount.—Missouri Universal Service Fund 11 MPSC 3d 225.

§3.3. Certificate of basic local exchange service authority

The Commission granted an expansion of the area in which Mark Twain Communications Company provides basic local exchange service. The Commission applied the same standard for the certificate expansion as it applies for granting original certificates.—Mark Twain Communications 11 MPSC 3d 529.

§4. Transfer, lease and sale

The Commission approved the transfer of advanced data services assets from Verizon Advanced Data Inc. to GTE Midwest Incorporated, d/b/a Verizon Midwest. The same assets had been transferred to Verizon Advanced Data Inc. from its affiliate, Verizon Midwest, by request of the parties because of an FCC condition for a merger by GTE. However, when the United States Court of Appeals for the District of Columbia overturned a similar requirement, Verizon Midwest and Verizon Advanced Data Inc. requested that the Commission reverse the transfer. —Verizon Advanced Data, Inc. 11 MPSC 3d 1.

Southwestern Bell Telephone Company, a Missouri corporation regulated as a telephone corporation by this Commission, requested authority to reorganize as a Texas limited partnership. The Commission determined that there would be no effect on customers or on tax revenues, the reorganization would not be detrimental to the public interest, and the Commission approved the application.—Southwestern Bell Telephone Company 11 MPSC 3d 35.

The Commission approved a stipulation and agreement whereby GTE Midwest, Inc., d/b/a Verizon Midwest sold certain of its Missouri facilities, including some 96 exchanges, to CenturyTel of Missouri, LLC.—Verizon Midwest 11 MPSC 3d 288.

II. JURISDICTION AND POWERS**§7. Jurisdiction and powers of the State Commission**

The Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition. —Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition.—Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission investigated under Section 392.245.5, RSMo, and made a determination as to whether “effective competition” existed in each of Southwestern Bell Telephone Company’s Missouri exchanges.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission determined that it had jurisdiction under the Telecommunications Act of 1996 to arbitrate the dispute between the parties.—Southwestern Bell Telephone Company 11 MPSC 3d 162.

Determining that GTE Midwest Incorporated, d/b/a Verizon Midwest demonstrated “verifiable need” need for additional numbering resources and that Verizon “had exhausted all other available remedies”, the Commission overrode the determination of the North American Number Plan Administrator to deny such additional numbering resource.—Verizon Midwest 11 MPSC 3d 330.

The Commission ordered that telecommunications companies that want to be certified as eligible for universal service funds must file an affidavit and accompanying information with the Commission.—Investigation-Certification for Federal USF 11 MPSC 3d 379.

The Commission established a case to monitor the bankruptcies of telecommunications carriers operating in Missouri and to determine what actions, if any, the Commission should take to protect the public interest with respect to such bankruptcy.—Investigation-Telco Bankruptcies 11 MPSC 3d 517.

III. OPERATIONS

§8. Operations generally

The Commission denied the Office of the Public Counsel’s motion to suspend a tariff and for evidentiary hearing and approved the tariff where the tariff, filed by Missouri State Discount Telephone, proposed to add additional exchanges to its area of operation.—Missouri State Discount Telephone 11 MPSC 3d 320.

The Commission denied the Office of the Public Counsel’s motion to suspend a tariff and for evidentiary hearing and approved the tariff where the tariff, filed by Southwestern Bell Telephone Company, L.P., d/b/a

Southwestern Bell Telephone Company, introduced two new Block-of-Time plans as substitutes for Local Plus service and Designated Number Option Calling Plan service.—Southwestern Bell Telephone Company 11 MPSC 3d 385.

§12. Discrimination

The Commission determined that Southwestern Bell must give access to its network to telecommunications carriers in a nondiscriminatory manner. The Telecommunications Act of 1996 requires local exchange companies to give access to carriers under rates, terms and conditions that are just, reasonable and nondiscriminatory.—Investigation-xDSL 11 MPSC 3d 131.

§13. Costs and expenses

Under the authority of *In the Matter of Numbering Resources Optimization*, Federal Communications Docket CC Docket Nos. 99-200 and 96-98, the Commission ordered that its Staff and the telephone industry must allocate costs for costs associated with state number pooling trials and also ordered a deadline for the industry to file its proposed cost recovery plan as well as a deadline for a Staff report and for replies. The Commission further ordered that the cost allocation must be done according to the national Local Numbering Portability cost recovery model, based on a state specific basis with a pro rata allocation to all carriers in the state in proportion to each carrier's interstate, intrastate, and international telecommunications revenues irrespective of whether carriers are participating in the pooling trial.—Area Codes 11 MPSC 3d 22.

The Commission determined that Southwestern Bell incurs significant costs to remove inhibitors, such as load coils, excessive bridged taps and repeaters, from its network. Southwestern Bell may pass most of these costs onto the telecommunications carriers who wish to access Bell's network to give digital quality services to their customers.—Investigation-xDSL 11 MPSC 3d 131.

The Commission granted its Staff's request for reconsideration and restated the cost allocation methodology by deleting the phrase "state specific basis."—Area Codes 11 MPSC 3d 76.

§14. Rates

Without a hearing, the Commission approved the request by AT&T to amend its tariffs to allow them to collect an in state connection fee. Sections 392.200 and 392.500 RSMo do not require the Commission to conduct an evidentiary hearing, even if requested by an adverse party.—AT&T 11 MPSC 3d 5.

The Commission ruled that Southwestern Bell must charge just, reasonable and nondiscriminatory rates to carriers who wish to access its network. These rates will apply to all telecommunications carriers, not just parties to the M2A standardized interconnection agreement.—Investigation-xDSL 11 MPSC 3d 131.

The Commission did not approve the request by local telephone companies to amend their tariffs to allow them to apply their switched access rates to traffic originating on a commercial mobile radio service that terminates in their territory.—Alma Telephone 11 MPSC 3d 253.

The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.—Sprint Communications Company LP 11 MPSC 3d 406.

The Commission denied the motion for suspension of the tariff where it determined that the company should not be treated differently than similarly situated companies.—Sprint Communications Company LP 11 MPSC 3d 406.

The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.—Sprint Communications Company LP 11 MPSC 3d 406.

The Commission denied a motion to suspend and approved a tariff offered by a competitive intrastate, interexchange carrier that permitted the carrier to impose a \$1.95 per month fee on its residential accounts.—MCI WorldCom Communications 11 MPSC 3d 522.

The Commission rejected the company's proposed tariff, which was designed to increase the residential and business monthly rate for the optional Metropolitan Calling Area Plan for Tiers 3, 4, and 5. The Commission found that the proposed increase exceeds the increase authorized in Section 392.245.11, RSMo 2000. The Commission found that under Section 392.245(11), RSMo 2000, if an incumbent local exchange company increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent—and any part of the eight percent annual increase that is not used is lost. Thus, the statute provides a "use it or lose it" price cap mechanism and the maximum allowable price increase for the following year is still limited to eight percent. Therefore, the Commission determined that the

company's attempt to "bank" increases violates the price cap statute, Section 392.245, RSMo 2000, and rejected the proposed tariff.—Sprint Missouri 11 MPSC 3d 569.

§23. Rules and regulations

Under Commission Rule 4 CSR 240-2.115, failure of a party to file a timely objection or request for hearing regarding a stipulation and agreement rendered the Stipulation and Agreement unanimous.—Verizon Midwest 11 MPSC 3d 288.

§25. Additions and betterments

The Commission ruled that carriers that request digital functionality must compensate Southwestern Bell for the loop conditioning Bell must perform to make the loops able to carry a digital signal.—Investigation-xDSL 11 MPSC 3d 131.

§26. Service generally

The Commission found that the stipulation and agreement of the parties was reasonable in that it provided for the most beneficial outcome for Comm South customers by providing continued monitoring focused on specific areas of consumer complaints.—Office of the Public Counsel v. Missouri Comm South 11 MPSC 3d 250.

The Commission found that the stipulation and agreement of the parties was reasonable in that it provided for a credit to Comm South customers.—Office of the Public Counsel v. Missouri Comm South 11 MPSC 3d 250.

§31. Long distance service

The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates. —Sprint Communications Company LP 11 MPSC 3d 406.

§32. Reports, records and statements

The Commission clarified its previous order by stating that it did not intend to require detailed data reporting to the Staff, or extensive Staff review or calculations.—Area Codes 11 MPSC 3d 76.

§34. Pricing policies

The Commission did not reject a tariff instituting a monthly service charge of \$1.95 because the service charge would apply only to competitive services and consumers are free to obtain service from an alternative provider if they object to paying the charge.—MCI WorldCom Communications 11 MPSC 3d 522.

IV. RELATIONS BETWEEN CONNECTING COMPANIES

§36. Relations between connecting companies generally

The Commission resolved disputed issues presented in a petition for arbitration of an interconnection agreement between MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI World Com Communications, Inc., and Southwestern Bell Telephone Company.—Southwestern Bell Telephone Company 11 MPSC 3d 162.

After deciding 356 issues relating to the cost studies proposed by Southwestern Bell, the Commission directed Southwestern Bell to submit revised rates for unbundled network elements after rerunning its cost studies in compliance with the Commission's decision.—UNE 11 MPSC 3d 424.

The Commission suspended a tariff offered by an incumbent local exchange carrier that would have imposed an additional deposit requirement on connecting carriers that encounter financial difficulties that may increase the risk that they will default on payments to the ILEC for interconnection services.—Spectra Communications Group 11 MPSC 3d 527.

V. ALTERNATIVE REGULATION AND COMPETITION

§40. Classification of company or service as noncompetitive, transitionally, or competitive

The Commission concluded that certain services that had been declared transitionally competitive in Case No. TO-93-116, had become competitive services in accordance with Section 392.370, RSMo 2000, in all of Southwestern Bell's Missouri exchanges.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission determined that because the company's proposed rate increase of \$1.99 applied only to a competitive service, and consumers are thus free to obtain service from an alternative provider, competition will function as a substitute for regulation and ensure that customers pay only reasonable rates.—Sprint Communications Company LP 11 MPSC 3d 406.

The Commission found that because similar tariffs had been approved which waived fees or provided discounts to customers who purchased several services from one company, the proposed charge did not provide any undue or unreasonable preference or advantage to any customer.—Sprint Communications Company LP 11 MPSC 3d 406.

§45. Local exchange competition

The Commission rejected as harmful to competition, two tariffs submitted by an incumbent local exchange carrier that would have offered rate discounts to business customers that signed term contracts that would discourage those customers from switching to an alternative telecommunications services provider. —Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission rejected as harmful to competition, a tariff submitted by an incumbent local exchange carrier that would have offered rate discounts to business customers that rejected a competitor's offer of service to return to, or remain with, the incumbent carrier. —Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission found that the use of long-term contracts, or save and winback contracts, by an incumbent local exchange carrier would threaten the existence of competition in the local services market. —Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission has a duty to regulate Missouri's telecommunications industry in such a way as to promote the development of full and fair competition. —Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission has an obligation to review promotional offers made by telecommunications companies to ensure that those offers are consistent with the provisions of statute, including the obligation to ensure the development and preservation of full and fair competition. —Southwestern Bell Telephone Company 11 MPSC 3d 8.

The Commission found that in Section 392.245.5, RSMo, the presumption of competition controls only where a competitor of Southwestern Bell has been both certified and has been providing service for at least five years.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission found that effective competition exists: (1) in the Kansas City and St. Louis exchanges for core business switched services, business line-related services, directory assistance services for business customers, and the operator services of Busy Line Verification and Busy Line Interrupt for business customers; (2) in the Harvester and St. Charles exchanges for residential access line services, residential access line-related services, Optional Metropolitan Calling Area service, directory assistance services for residential customers, and Busy Line Verification and Busy Line Interrupt for residential customers; and (3) in all of Southwestern Bell's exchanges for Common Channel Signaling/Signaling System 7 (SS7) and Line Information Database (LIDB) services.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission found that determining what constitutes effective competition must include an analysis of all relevant factors.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission determined that Section 392.200.8, authorized Southwestern Bell to price high capacity exchange access line services and Plexar services on an individual customer basis.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission determined that Local Plus and switched access services were not subject to effective competition.—Southwestern Bell Telephone Company 11 MPSC 3d 42.

The Commission rejected a tariff proposed by Southwestern Bell because the term discount plan, exceeding one year in length, that would have been created by the tariff would have an adverse effect on competition in the basic local exchange service market.—Southwestern Bell Telephone Company 11 MPSC 3d 344.

The Commission rejected the tariffs proposed by various Competitive Local Exchange Carriers because the term discount offers, exceeding one year in length, that would have been created by the tariffs would have an adverse effect on competition in the basic local exchange service market.—Southwestern Bell Telephone Company 11 MPSC 3d 344.

After deciding 356 issues relating to the cost studies proposed by Southwestern Bell, the Commission directed Southwestern Bell to submit revised rates for unbundled network elements after rerunning its cost studies in compliance with the Commission's decision.—UNE 11 MPSC 3d 424.

§46. Interconnection Agreements

The Commission opened a generic case to review the unbundled network elements that were at issue in Case No. TO-2002-222. The Commission also noted that the scope of the case may also include all pricing issues that are not a part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issue the Commission determines to be appropriate. The Commission made Southwestern Bell Telephone Company, MCIMetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., the Staff of the Commission, and the Office of the Public Counsel parties without the need for intervention. An intervention date was set for other interested parties to file applications to intervene.—Southwestern Bell Telephone Company 11 MPSC 3d 247.

§46.1. Interconnection Agreements-Arbitrated

The Commission resolved disputed issues presented in a petition for arbitration of an interconnection agreement between MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI World Com Communications, Inc., and Southwestern Bell Telephone Company.—Southwestern Bell Telephone Company 11 MPSC 3d 162.

VALUATION
I. IN GENERAL

- §1. Generally
- §2. Constitutional limitations
- §3. Necessity for
- §4. Obligation of the utility

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of local authorities

III. METHODS OR THEORIES OF VALUATION

- §9. Methods or theories generally
- §10. Purpose of valuation as a factor
- §11. Rule, formula or judgment as a guide
- §12. Permanent and tentative valuation

IV. ASCERTAINMENT OF VALUE

- §13. Ascertainment of value generally
- §14. For rate making purposes
- §15. Purchase or sale price
- §16. For issuing securities

V. FACTORS AFFECTING VALUE OR COST

- §17. Factors affecting value or cost generally
- §18. Contributions from customers
- §19. Appreciation
- §20. Apportionment of investment or costs
- §21. Experimental or testing cost
- §22. Financing costs

- §23. Intercorporate relationships
- §24. Organization and promotion costs
- §25. Discounts on securities
- §26. Property not used or useful
- §27. Overheads in general
- §28. Direct labor
- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
- §36. Contingencies and omissions
- §37. Contractor's profit and loss
- §38. Administrative expense
- §39. Legal expense
- §40. Promotion expense
- §41. Miscellaneous

VI. VALUATION OF TANGIBLE PROPERTY

- §42. Buildings and structures
- §43. Equipment and facilities
- §44. Land
- §45. Materials and supplies
- §46. Second-hand property
- §47. Property not used and useful

VII. VALUATION OF INTANGIBLE PROPERTY

- §48. Good will
- §49. Going value
- §50. Contracts
- §51. Equity of redemption
- §52. Franchises
- §53. Leases and leaseholds
- §54. Certificates and permits
- §55. Rights of way and easements
- §56. Water rights

VIII. WORKING CAPITAL

- §57. Working capital generally
- §58. Necessity of allowance
- §59. Factors affecting allowance
- §60. Billing and payment for service

- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
- §65. Materials and supplies
- §66. Amount to be allowed
- §67. Property not used or useful

IX. DEPRECIATION

- §68. Deprecation generally
- §69. Necessity of deduction for depreciation
- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
- §73. Deduction or addition of funds or reserve

X. VALUATION OF PARTICULAR UTILITIES

- §74. Electric and power
- §75. Gas
- §76. Heating
- §77. Telecommunications
- §78. Water
- §79. Sewer

VALUATION

No headnotes in this volume involved the question of valuation.

WATER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale
- §5. Joint Municipal Utility Commissions

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the State Commission
- §9. Jurisdiction and powers of local authorities

- §10. Receivership
- §11. Territorial Agreements

III. OPERATIONS

- §12. Operation generally
- §13. Construction and equipment
- §14. Maintenance
- §15. Additions and betterments
- §16. Rates and revenues
- §17. Return
- §18. Costs and expenses
- §19. Service
- §20. Depreciation
- §21. Discrimination
- §22. Apportionment
- §23. Accounting
- §24. Valuation
- §25. Extensions
- §26. Abandonment or discontinuance
- §27. Reports, records and statements
- §28. Financing practices
- §29. Security issues
- §30. Rules and regulations
- §31. Billing practices
- §32. Accounting Authority orders

WATER

I. IN GENERAL

§1. Generally

The Commission granted Osage Water Company's motion for leave to file its delinquent 1999 annual report. The Commission directed the Commission's Data Center to attach a copy of Staff's January 11, 2002, letter to Greg Williams to the 1999 annual report. The letter addressed certain alleged discrepancies or deficiencies in the annual report. The Commission also directed Osage Water Company to either provide the missing information or a written explanation of why the information is not available or why the discrepancies cannot be corrected.—Osage Water Company 11 MPSC 3d 263.

§2. Certificate of convenience and necessity

The Commission approved a settlement agreement and granted St. Louis County Water Company, d/b/a Missouri-American Water Company, Certificates of Convenience and Necessity for Florissant and Webster Groves.—Missouri-American Water Company 11 MPSC 3d 84.

When considering whether to grant an application for a certificate of convenience and necessity, the Commission will consider the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.—Environmental Utilities, LLC 11 MPSC 3d 360.

Where the owners of the applicant water company are also the owners of the subdivision to be served, and control the subdivision's homeowners association, the operation of the water system by a regulated utility is preferable to operation by the unregulated homeowners association.—Environmental Utilities, LLC 11 MPSC 3d 360.

The Commission indicated that it would grant applicant water company a certificate of convenience and necessity but would not issue the certificate, or allow it to become effective until the applicant presented proof to the Commission establishing that it had entered into a wholesale agreement to provide water to a neighboring subdivision, where such wholesale agreement was necessary to make the applicant financially viable.—Environmental Utilities, LLC 11 MPSC 3d 360.

The Commission rejected Environmental Utilities' application for a certificate of convenience and necessity because it failed to plead the necessary elements for obtaining a certificate. Environmental also acquired a promissory note and corresponding deed of trust that was void because the Commission did not permit Osage Water to execute the note and deed of trust.—Environmental Utilities 11 MPSC 3d 524.

§4. Transfer, lease and sale

The Commission approved the sale of Quail Run Water and Land Company's stock and transfer of its assets to the Public Funding Corporation of the City of Ozark, Missouri.—Quail Run Water and Land Company 11 MPSC 3d 313.

II. JURISDICTION AND POWERS**§10. Receivership**

The Commission found it necessary to seek a receiver to run Warren County Water and Sewer Company after finding its current owner could

not or would not safely and adequately serve its customers. The Commission determined it would ask the circuit court to appoint a receiver with the power to run the company and to eventually sell the company to a buyer that will properly serve the customers.—Office of the Public Counsel v. Warren County Water & Sewer 11 MPSC 3d 548.

III. OPERATIONS

§21. Discrimination

When considering whether to grant an application for a certificate of convenience and necessity, the Commission will consider the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.—Environmental Utilities, LLC 11 MPSC 3d 360.

§27. Reports, records and statements

The Commission granted a motion to modify a protective order, inserting additional language in the definition of Highly Confidential Information to account for the events of September 11, 2001.—Missouri-American Water Company 11 MPSC 3d 199.

The Commission granted Osage Water Company's motion for leave to file its delinquent 1999 annual report. The Commission directed the Commission's Data Center to attach a copy of Staff's January 11, 2002, letter to Greg Williams to the 1999 annual report. The letter addressed certain alleged discrepancies or deficiencies in the annual report. The Commission also directed Osage Water Company to either provide the missing information or a written explanation of why the information is not available or why the discrepancies cannot be corrected.—Osage Water Company 11 MPSC 3d 263.

§31. Billing practices

Section 66.405, RSMo 2000, authorizes a tax upon residential water service customers. The Commission determined that a complaint was without merit where the complaint alleged that a tariff sheet was unauthorized and unlawful because it purported to add a surcharge of \$1.00 monthly, or \$3.00 quarterly, to the bill of each residential customer residing in a structure containing four or fewer units for the purpose of service line repair.—PSC Staff v. St. Louis County Water 11 MPSC 3d 395.
