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VIA FEDERAL EXPRESS

Public Service Commission
Attention: Secretary of the Commissioner
State of Missouri
Governor Office Building, Suite 900
200 Madison Street, P.O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. IO-2003-0281

Dear Judge Roberts:

Enclosed please find eight copies of Exhibit 21 in connection with the above-captioned case which we indicated we would provide.

If we may be of further assistance, please do not hesitate to contact me.

Sincerely,

Lisa Creighton Hendricks

LCH/sly
enclosures
cc: Parties of Record

FILED⁴
JUL 21 2003
Missouri Public
Service Commission

LEXSEE 1992 MO. PSC LEXIS 23

In the matter of Southwestern Bell Telephone Company's application for classification of certain services as transitionally competitive. *

* The

Case No. TO-93-116

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

1992 Mo. PSC LEXIS 23; 144 P.U.R.4th 415; 1 Mo. P.S.C. 3d 479

December 21, 1992

APPEARANCES: *Joseph F. Jedlicka, III*, and *Ann E. Mueleman*, Attorneys, Southwestern Bell Telephone Company, 100 North Tucker Boulevard, Room 630, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

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Richard S. Brownlee, III, Hendren and Andrae, 235 East High Street, Post Office Box 1069, Jefferson City, Missouri 65102, for Competitive Telecommunications Association of Missouri and Digital Teleport, Inc.

William M. Barvick, Attorney at Law, 240 East High Street, Suite 202, Jefferson City, 65102, for Midwest Independent Coin Payphone Association.

Rich Kowalewski, Senior Attorney, Sprint Communications [*2] Corporation L.P., 8140 Ward Parkway, 5E, Kansas City, Missouri 64114, for Sprint Communications Company L.P.

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Edward J. Cadieux, Senior Attorney, MCI Telecommunications Corporation, 100 South Fourth Street, Suite 200, St. Louis, Missouri 63102, and

Carl J. Lumley, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation.

Gloria Salinas, Attorney, AT&T Communications of the Southwest, Inc., 8911 Capitol of Texas Highway, Suite 1100, Austin, Texas 78759, and

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Thomas A. Grimaldi, Senior Attorney, United Telephone Company of Missouri, 5454 West 110th Street, Overland Park, Kansas 66211, for United Telephone Company of Missouri.

James C. Stroo, Associate General Counsel, GTE Operations, 1000 GTE Drive, Wentzville, Missouri 63385, for GTE North Incorporated; Contel of Missouri, [*3] Inc., d/b/a GTE Missouri; The Kansas Telephone Company, d/b/a GTE of Eastern Missouri; and Contel Systems of Missouri, Inc., d/b/a GTE Systems of Missouri

Craig S. Johnson, Stockard, Andereck, Hauck, Sharp & Evans, 301 East McCarty Street, Third Floor, Post Office Box 1280, Jefferson City, Missouri 65102, for: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Green Hills Telephone Corporation, KLM Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc., Northeast Missouri Rural Telephone Company, Peace Valley Telephone Company, and Wheeling Telephone Company.

Martha S. Hogerty, Public Counsel, Office of Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of Public Counsel and the public.

Linda K. Gardner, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

PANEL: [*1] McClure, Chm., Rauch and Perkins, Mueller, Kincheloe, CC.

OPINION: REPORT AND ORDER

On September 24, 1992, Southwestern Bell Telephone Company (SWB) filed a petition to classify certain services as transitionally competitive pursuant to the provisions of Sections 392.370 and 392.490, [*4] R.S.Mo. (Supp. 1991). Specifically, SWB is seeking to classify its message toll service (MTS), its operator services, its 800 services, its Wide Area Telecommunications Service (WATS) service and its digital private line services as transitionally competitive, contending that the services meet the requirements of Section 392.370.1 in that they are the same, substitutable or equivalent to competitive services provided by other telecommunications companies within its service territory.

On October 2, 1992, the Commission established a procedural schedule in this matter so that a decision concerning the appropriate classification of these services could be effective within the 90 days prescribed by Section 392.490.2. Under this shortened procedural schedule, hearings were held November 30 and December 1, 1992. The parties agreed to file only an initial brief because of the time limitation for reaching a decision. Late-filed Exhibit 42HC was offered by Midwest Independent Coin Payphone Association (MICPA). The exhibit is Exhibit 6HC from Case No. TR-91-278. No objections were received concerning these exhibits and they will be received into the record.

Findings of Fact

The Missouri [*5] Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

This is a case of first impression before the Commission. Section 392.370 was enacted by the Legislature in 1987 as a part of the comprehensive amendments enacted that year. The regulatory authority of this Commission was broadened by these amendments to allow the Commission more flexibility in reducing regulatory requirements as competition entered the various telecommunications markets.

The general purposes of the amendments as stated in Section 392.530.1 are to:

- (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 services;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services; and
- (6) Allow full and fair competition to function as a substitute for [*6] regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.

To allow telecommunications companies to obtain pricing flexibility and reduced regulation, procedures were enacted which allowed a company to seek classification of its services or as a company to be either transitionally competitive (TC) or competitive (C). A service would be classified as TC or C if it could be shown that it is subject to sufficient competition to justify a lesser degree of regulation and that such lesser degree of regulation is consistent with the protection of ratepayers and promotes the public interest. The classification of a service as TC allows a company more pricing flexibility than a noncompetitive service but not as much as a competitive service, and fewer regulatory

requirements are waived since such a service had not demonstrated it was subject to sufficient competition to be competitive.

The regulatory scheme for seeking classification of a service as either transitionally competitive or competitive begins with Section 392.361. Under that section a company must show, based upon all relevant factors (those factors are required to be specifically [*7] delineated by the Commission), that the service is subject to sufficient competition to justify a lesser degree of regulation. There is no statutory time limit placed upon the Commission to reach a decision under this section.

Once a service is found to be competitive or transitionally competitive, Section 392.361 allows the Commission to classify the same telecommunications services of another company as transitionally competitive or competitive, if no new finding of fact is required, by relying upon the finding of fact made in the original hearing.

A second method of achieving a TC or C classification is available to noncompetitive and transitionally competitive companies under Section 392.370.1. Here, a company must show (1) that an order has been issued under 392.361 that finds a service has been classified as competitive or transitionally competitive; (2) that the service of the petitioning company is the same, substitutable or equivalent as the service classified either TC or C; and (3) that the competitive or transitionally competitive service is authorized to be provided in the petitioning company's service territory. When a petition for classification is sought under this [*8] section, the Commission has 90 days to reach a decision under 392.490.2 or the service becomes transitionally competitive automatically.

SWB, as a noncompetitive telecommunications company, has sought transitionally competitive classification of certain of its services under Section 392.370. To meet the first requirement of this section, SWB points to the Commission's decision in the interexchange carrier (IXC) classification case, Case No. TO-88-142, *Re: IXC Service Classification*, 39 Mo. P.S.C. (N.S.) 16 (September 1989). SWB also points out that subsequent to that order the Commission has granted competitive classification to IXCs and services under the "same service" provisions of Section 392.361. Since IXCs have received statewide authority to provide the services at issue, SWB contends the third criterion of Section 392.370 has been met. To support the second criterion of "same, substitutable or equivalent", SWB introduced testimony and evidence designed to show that its services were substitutable for services already classified as competitive or transitionally competitive.

Midwest Independent Coin Payphone Association (MICPA), as well as others, has challenged SWB's [*9] contention that the IXC classifications case satisfies the first requirement of Section 392.370. MICPA argues that the statute enacted in 1987 contemplated a review of the relevant market before a local exchange company (LEC), such as SWB, would be allowed reduced regulation and pricing flexibility for its services. The goal of the law, MICPA asserts, is "full and fair competition", not just to substitute competition for regulation. SWB, as an LEC, MICPA continues, can only have services granted transitionally competitive status after an all-relevant-factors examination under Section 392.361. The IXC classification case, MICPA argues, only dealt with interLATA competition and is not relevant to an inquiry concerning SWB services since SWB is only authorized to provide intraLATA services and not interLATA services. MICPA basically argues that the intraLATA market is separate from the interLATA market and so the IXC classification case does not meet the first requirement of Section 392.370. With regard to subsequent orders classifying IXCs and their services as competitive, MICPA asserts that these orders did not address the issue of the intraLATA market but only market entry [*10] of another competitive company.

A review of the Commission's decision in TO-88-142 is thus in order. There is no real argument that the decision in that case was based upon all relevant factors. The Commission delineated three main factors in reaching its decision to classify the services of the IXCs, except certain services of AT&T, as competitive. Those factors are: (a) availability of equal access; (b) market share, name recognition and financial strength of IXCs; and (c) conditions of entry, pricing policies and availability of competitive alternatives. Using these factors, the Commission also classified AT&T's MTS and operator services as TC. *IXC Classification* at 20.

The Commission considered the status of MTS, Outbound WATS and Inbound WATS (800 Service), Private Line, Custom Network Services, and ancillary or complementary MTS services, such as Directory Assistance, Operator and Calling Card services, in Case No. TO-88-142. The Commission found that all of the IXCs' services, except AT&T's MTS and operator services, were subject to sufficient competition among each other as well as from AT&T to warrant a lesser degree of regulation and classification as competitive. [*11] Based upon market share, financial resources, and name recognition and the lack of statewide equal access, the Commission found that AT&T's MTS and its ancillary and complementary services were only transitionally competitive. AT&T's other services, Inbound and Outbound WATS and Private Line services, were found to be competitive citing the fact that statewide equal access was available for

these services and business customers were more knowledgeable about competitive alternatives. *IXC Classification* at 21, 26.

Although the Commission's decision in TO-88-142 speaks largely in terms of interLATA service, it also addresses interexchange services and indicates there is a statewide market for the services. *IXC Classification* at 21. The certificates of service authority granted IXCs contain no interLATA or intraLATA restriction, and Section 392.440 does not distinguish between interLATA and intraLATA for certificates of service authority but only between local exchange and interexchange authority. The Commission in TO-88-142 was addressing a statewide market and authority granted IXCs included intraLATA authority. Many IXCs have even filed tariffs specifically offering [*12] intraLATA services which have been approved by this Commission.

Based upon its review of the decision in TO-88-142 and the statewide authority granted IXCs under their certificates of service authority, and the evidence concerning the offering of these services on a statewide, interLATA and intraLATA basis, the Commission finds that the first criterion of Section 392.370 has been met. The services for which SWB is seeking transitionally competitive classifications were addressed and found to be subject to sufficient competition to justify a lesser degree of regulation in an order in Case No. TO-88-142. The Commission had already found that intraLATA competition was in the public interest in Case No. TO-84-222, et. al., *Re: Investigation of WATS Resale, 28 Mo. P.S.C. (N.S.) 535 (July 1986)*, and so it was unnecessary to make a distinction between interLATA and intraLATA competitive services in TO-88-142.

This brings the Commission to the second criterion under Section 392.370 and the one which has generated the most controversy in this case. This criterion requires SWB to prove that the services for which it seeks transitionally competitive classifications are the same, substitutable [*13] or equivalent to the services classified as competitive in TO-88-142.

The three adjectives in this section have not been defined in either Chapter 386 or Chapter 392. Nor have they been interpreted before by this Commission. The first priority, then, is to provide some definition to these terms so the Commission can address the services involved in this case.

There are a variety of definitions offered by the parties to this case. MICPA suggests that "or" is really "and" and that the intent behind the three-word phrase is to restate the antidiscrimination language of Section 392.200. The Commission does not find this persuasive. Discrimination, in Section 392.200, is prohibited among or between a company's customers and does not address the situation where services of different companies are being compared. If MICPA's analysis were correct, a finding that a service is the same, substitutable or equivalent would require both companies to offer the service at the same price, a result neither logical nor intended by the statute.

MCI suggests the three-word phrase should be read as a single criterion, not as three separate standards. The Commission does not believe this interpretation [*14] is consistent with the recognized standards of statutory construction. Under those standards, each word should be given its plain and ordinary meaning where possible.

The Commission must then look at each word to determine its meaning to be able to then determine if SWB services come within one of these meanings. No party has argued that the SWB services for which transitionally competitive classification is sought are the same as those provided by the IXCs. The word "same" in its common meaning requires the services be "identical" or "alike in every respect" (*Webster's Dictionary Unabridged, Second Edition, 1979*) and even SWB recognizes its services are not identical to the IXCs' services.

The dictionary defines "equivalent" as "that which is equal in value, quantity, force, meaning, etc., to something else". *Ibid.* Although very close to "identical", "equivalent" does allow for a difference between the two items in question. SWB has not attempted to show that its services are equivalent to those offered by competitive IXCs.

The major burden thus falls on the word "substitutable" to bring clarity to the question of whether SWB's services should be classified as transitionally [*15] competitive. This word in its ordinary meaning is defined as "something acting or used in place of another". This ordinary meaning provides no real guidance other than to indicate that "substitutable" requires a lesser degree of identity between the services than does "same" or "equivalent".

SWB takes the position that "substitutable" should be given a broad meaning so that if one service can be regarded as a replacement for another, then it is substitutable. Other parties argue for a stricter standard which could be generally referred to as a "close substitute". The dispute, then, among the parties is how close a substitute must SWB's services be and what criterion should the Commission consider in determining what a "close substitute" is.

The following factors have been proposed by the parties for determining whether a service is "substitutable" or a "close substitute":

1. interchangeability;
2. the Department of Justice merger guidelines;
3. market share;
4. costs of providing the service;
5. pricing policies;
6. market dynamics;
7. dialing disparities;
8. equal access;
9. financial strength of the companies;
10. entry barriers;
11. embedded customer [*16] base;
12. market segmentation;
13. cross-elasticity analysis;
14. no features obviously different;
15. replacement;
16. quality of service;
17. compensatory price differentials;
18. movement of prices together;
19. control of access;
20. number of lines;
21. sales volumes;
22. essentially the same;
23. customer choice based solely on price;
24. effective restraint on market power;
25. public interest in Section 392.530;
26. consumer acceptance;
27. existence of suppliers;
28. willingness of customers to use other service; and
29. "I know it when I see it".

The Commission has reviewed the above criteria and finds that none is determinative of substitutability in all instances. The Commission finds that for each service for which a TC classification is sought the criteria that are particularly persuasive or relevant to that service will be determinative of how the service is classified. The Commission, though, in finding that different criteria may be given different weight for different services does not find that all of the criteria above must be addressed. This would mirror the requirement of Section 392.361. In addition, some of the criteria [*17] create too high a standard for substitutability and therefore are not appropriate. The Commission believes that "substitutability" is a noticeably lesser standard than "equivalent", just as "equivalent" is a noticeably lesser standard from "same". Where to draw the line may be, as the Competitive Telecommunications Association of Missouri (CompTel) suggests, in the eye of the beholder. The Commission, though, does not believe

substitutability is quite that flexible. There is a minimum of comparative evidence that must be achieved before the substitutability standard is met.

This minimum evidence will be more than the standard supported by SWB in this case. SWB's services must be shown to be more than just a replacement for the competitive service. Using SWB's criteria, WATS and 800 would meet the "substitutability" standard for MTS and the Commission believes this is clearly not the intent of Section 392.370. The Commission finds that substitutability must be considered separately for each service and for each noncompetitive company. Different criteria may be given greater weight when considering one service than another. This case-by-case consideration is necessary because [*18] of the different characteristics of each service and each company. Although the same basic criteria will be reviewed, the weight given those criteria may differ.

Message Toll Service (MTS)

MTS is toll service between exchanges. This service is provided by IXC's under tariffs filed with this Commission and has been classified as a competitive service for the IXC's. This competitive classification is for state-wide MTS service by the IXC's which includes intraLATA long distance.

SWB designates MTS in its tariffs as "Long Distance Telecommunications Service". SWB is authorized to provide this service only on an intraLATA basis as a result of the Modification of Final Judgment (MFJ) in the AT&T divestiture case. The focus of the inquiry of whether SWB's MTS is the same, substitutable or equivalent to the IXC's MTS, then, is limited to the intraLATA market.

IXC's, because of presubscription in the interLATA market, provide the same service as each other. This service is accessed by the end user by dialing 1+. For intraLATA calls, an end user wishing to use the MTS of an IXC must dial additional digits, or the IXC can provide an auto-dialer which dials these digits for the end user. [*19]

End users need only dial 1+ to access SWB's MTS. In addition, all calls made using 1+ for intraLATA calls are treated as SWB MTS calls. This distinction in dialing requirements is the primary criterion cited by those opposing TC classification for MTS to support their position.

The Commission finds that the mere existence of different dialing requirements between IXC MTS and SWB MTS is not determinative of the issue of substitutability. This difference in dialing patterns does render the services not the same and not equivalent. To rely on this criterion as determinative would, in the Commission's opinion, render the "substitutable" standard indistinguishable from the "equivalent" standard. The Commission believes other criteria must be weighed in determining whether IXC MTS and SWB MTS are substitutable.

As indicated earlier, IXC MTS and SWB MTS are clearly replacements for one another. Substitutability requires additional evidence. The Commission finds that the additional evidence addressed in this proceeding meets the substitutable standard of Section 392.370. That evidence will be discussed below.

There are at least seventy IXC's authorized to provide intraLATA MTS [*20] under their certificates of service authority. Twenty-two of these IXC's have filed tariffs that specify rates for intraLATA service. Even without specific tariffs, the remaining IXC's can and do handle intraLATA toll calling.

Although these IXC's handle less than ten percent of the intraLATA traffic, their percentage of traffic has increased substantially over the last several years and that percentage will increase as the IXC's continue to market aggressively their intraLATA service by educating potential customers on how to access their MTS. This marketing consists of advertisements touting the lower rates of the IXC and indicating the appropriate code necessary to access that specific IXC. The IXC's also provide stickers to be placed on its presubscribed customers' telephones to remind the customer to use the code for intraLATA calling.

In addition, for several IXC's intraLATA calls make up a significant portion of their intrastate revenue. The specific companies and their percentages of intraLATA revenues is considered Highly Confidential, but a review of the information shows how well some of the IXC's have been able to penetrate the intraLATA markets. This evidence indicates [*21] high customer acceptance for these companies. Public Counsel's economist witness Thompson testified that customer perception was the most important criterion to consider in determining substitutability. Although he reached a different conclusion on these same statistics, the Commission agrees with him that this criterion is an important demonstration of substitutability.

Additional evidence of the substitutability of the services is the economic analysis provided by Staff economist Huttshell. Using the Department of Justice (DOJ) merger guidelines, Huttshell analyzed IXC MTS and SWB MTS to

determine whether they are substitutable by determining whether these alternative services satisfactorily constrain the exercise of market power. Under the merger guidelines, products are substitutable, and thereby belong in the same market, when the products represent practical alternative sources of supply for buyers.

The merger guidelines have two closely related dimensions: (1) product substitution, and (2) geographic substitution. Product substitution also has two dimensions: (1) substitution in demand, and (2) substitution in supply. Demand substitution would occur where customers considered [*22] services reasonably interchangeable in use taking into account price and quality, while supply substitution would occur when sellers can switch capacity to production of other products easily and cheaply. Geographic substitution is when customers divert their purchases to sellers whose facilities are located in other places based upon the practical ability of a customer to buy from either location.

Using the DOJ guidelines, Huttshell evaluated customer perception, seller perception, and other factors. To ensure his analysis arrived at what he considered to be a sufficiently close substitute standard, Huttshell then used a price evaluation test to ensure the services are substitutable. Based upon his analysis, Huttshell testified that IXC MTS is a sufficiently close substitute for SWB MTS to meet the statutory requirement of Section 392.370.

The Commission finds this analysis to be important for determining whether services are substitutable, but not determinative. Economic analysis can support a finding of substitutability, but the Commission finds that it would be impractical and not consistent with the intent of the statute to adopt economic analyses as the determinative criterion [*23] for substitutability.

Other factors relied upon by those taking the position that SWB's MTS is not substitutable are either limited or not particularly relevant. As stated earlier, the criterion supported by Public Counsel is an important criterion but the Commission believes that to require a reasonably large portion of users of similar services before a service is substitutable is too restrictive. The Commission believes the portion of the market held by the IXCs' MTS, when coupled with the evidence of growth in the IXCs' share of the market, is sufficient evidence that customers considers the services substitutable.

MCI's economist, Cornell, advocated a criterion of interchangeability in an economic sense. This interchangeability, according to Cornell, would have to be so closely identical that customers determine their preference of one over the other by price. Cornell proposes the use of cross-elasticity of demand studies to evaluate services under her criterion.

The Commission considers the criterion of MCI to be too restrictive. High cross-elasticity of demand would, of course, support a finding that services are substitutable, but it cannot be used as the sole criterion [*24] or the determinative criterion.

The evidence described above supports the Commission's decision that SWB MTS and IXC MTS are substitutable. Customer acceptance of one service for another as indicated by market share, customer perceptions that the services are substitutable, economic analysis of the markets, the number of providers in the market, the revenues generated by each provider, all provide important information. In this instance, none of the criteria individually is determinative, but when all are considered they indicate that IXC MTS and SWB MTS are substitutable services for purposes of complying with Section 392.370 and the Commission will grant SWB TC classification for its MTS service.

800 Service/Maximizer 800

800 service is an incoming service arrangement that allows calls to be placed to the 800 service customer without the end user being billed for the call. 800 service is a switched service routed over the same switches as MTS and carried over the same transmission network. The evidence indicates that the only difference between 800 service and MTS is that 800 calls must be momentarily suspended in order to perform carrier identification and address translation. [*25] Carrier identification means that the local exchange company, such as SWB, must identify which company is to carry the 800 call so that the call is routed to that carrier. Address number translation means that the 800 number is converted to an ordinary ten-digit telephone number so that the call can be routed to the proper destination.

Both interLATA and intraLATA 800 calls are routed to IXCs without additional dialing requirements. 800 calls are assigned to SWB only when the 800 number dialed is associated with SWB 800 services. Either the IXC or SWB may perform the necessary address translation.

SWB's 800 services are designated in SWB's tariff as "800 Service" and "Maximizer 800". Because of the MFJ restrictions on SWB, its 800 service must be provided jointly with an IXC for SWB to provide a statewide service. That

is, SWB provides the intraLATA service and an IXC provides the interLATA portion where the call is interLATA. Currently, SWB contracts with AT&T for its joint 800 service. AT&T provides the data base service for these calls.

As with MTS, the Commission considered the various criteria presented by the parties to determine whether SWB's 800 Service and Maximizer [*26] 800 are TC. Based upon that consideration the Commission finds that the 800 services are not the same as those offered by IXCs because of the intraLATA restriction placed on SWB. The Commission finds, additionally, that these restrictions prevent these SWB services from being equivalent to IXC 800 services. The Commission finds, though, that SWB's 800 Service and Maximizer 800 service are substitutable for the IXCs' 800 service even though SWB's services could be considered inferior services. The evidence indicates that without the MFJ restriction these services would be at least equivalent.

Thirty-eight IXCs provide 800 service using a common line while twenty-one IXCs offer 800 service using a dedicated facility. These 800 services have all been classified as competitive and are being provided within SWB's service territory.

As a result of the 800 services offered by the IXCs, SWB's portion of this market has been substantially reduced. SWB's 800 service has decreased since 1987 from 43,379 hours per month to 8,770 per month in 1991. SWB's lines in service have decreased from 4,328 in 1987 to 651 in 1991. SWB's revenues have decreased from \$ 879,515 per month in 1987 to [*27] \$ 125,512 per month in 1991. The Commission finds that these decreases in and of themselves are sufficient to show that IXCs' 800 service and SWB's 800 service are substitutable. Customer acceptance of IXCs' service as a substitute for SWB's is demonstrated by the dramatic decrease in SWB's revenues, lines and hours billed.

This evidence is especially probative since IXC 800 services have shown a reverse pattern. The actual figures are considered Highly Confidential but they demonstrate that SWB's loss in this market has been the IXCs' gain. SWB's market survey completed in October 1989 confirmed what is obvious from a comparison of the market shift between SWB and the IXCs. The research indicates that customers were dropping SWB for IXC 800 service. SWB's share of the market is declining while the size of the market is growing by five to seven percent a year. This evidence indicates that SWB's 800 services and the IXCs' are substitutable for each other and that because of SWB's restriction to intraLATA, SWB's 800 services could arguably be found to be an inferior product for those customers seeking a statewide 800 service. Based upon this evidence that SWB's 800 services [*28] are substitutable for IXCs' 800 service, the Commission will classify the two 800 services of SWB as TC.

Wide Area Telecommunications Service (WATS)

WATS is an outbound voice message service arrangement that allows customers to place long distance calls for volume or bulk discounted rates. These rates are not usually offered for ordinary MTS calling. WATS can be provided either by dedicated or common line. SWB and the IXCs price WATS either by declining block or by providing other discounts based upon volumes. Where WATS is provided over a common line, the same switching and transmission facilities are used for WATS traffic as MTS traffic. The only difference between WATS and MTS, then, is pricing, except when a dedicated line is required. SWB's WATS is provided over dedicated access lines.

Twenty-five IXCs have tariffs to provide WATS using dedicated access lines. Thirty-five IXCs have tariffs for WATS using ordinary or common telephone lines. These IXC WATS services have been classified as competitive and are provided both intraLATA and interLATA. SWB's WATS services, because of the MFJ restriction, are tariffed as "Jointly Provided WATS" and "IntraLATA WATS".

The Commission [*29] finds that because of the MFJ restriction, SWB's WATS and IXCs' WATS are not the "same" or "equivalent". The Commission, though, finds that SWB WATS and IXC WATS are substitutable. This restriction in reality makes SWB WATS an inferior service to IXC WATS.

The probative evidence on this issue is the same as that which supported a finding of substitutability for SWB's 800 services. For WATS, SWB's hours have decreased from 22,957 per month in 1987 to 5,917 per month. SWB's lines in service have decreased since 1987 from 1,332 to 286. SWB's revenues for WATS have decreased since 1987 from \$ 408,692 to \$ 64,706. During the same time period IXC volumes have increased significantly and the WATS market has expanded substantially.

This evidence is sufficient to find that SWB WATS and IXC WATS are substitutable. Customer acceptance of the IXC services as a suitable alternative to SWB WATS is demonstrated by the decrease in hours, lines and revenue of SWB while IXCs' volumes have increased and the market has expanded. The Commission will therefore classify SWB WATS as TC.

Digital Private Lines and Special Access

Digital private line service is characterized by the transmission [*30] of digital electronic signals along circuits dedicated exclusively to the subscriber. Digital signals may carry voice, data, text, graphics or images. SWB offers dedicated services as MegaLink II, MegaLink III, MegaLink Data Service and High Capacity Service. SWB's two types of dedicated service offerings, private lines and special access, are different only in the user restriction. Private line offerings are tariffed to be utilized by end users while special access services are tariffed to be utilized by IXC's.

MegaLink II and III are dedicated digital private line facilities that are available to a customer on a full-time basis. MegaLink II can either be point to point or point to multiple points for intraLATA connections. MegaLink II is marketed to medium and large customers with a high degree of accuracy and reliability of data communication requirements.

MegaLink III is a high speed point-to-point dedicated private line service. This service is marketed to medium and large business customers for bulk data transmission, video, or multivoice element transmission between two locations.

The evidence is that private line service by IXC's is provided in exactly the same manner [*31] as SWB's digital private lines and "that the technical similarity renders such offerings functionally equivalent and completely interchangeable in use."

The private line services and virtual private networks (VPNs) of IXC's, including those IXC's considered competitive access providers (CAPs), have been classified as competitive by the Commission. CAPs provide interstate access arrangements and private line services for their customers, including premise to premise service, premise to point of presence (POP) service, and POP to POP service. These services are marketed and provided to the same Missouri customers targeted by the other IXC's and SWB. Business customers subscribe to the CAP services to obtain a direct connection to an IXC.

Based upon the evidence concerning how the IXC private line services function, both technically and from the end user perspective, in comparison with SWB's private line and special access services, the Commission finds that the services are "equivalent" services under Section 392.370. As stated earlier, equivalent services must be equal in value, quantity, quality and force and meaning, as well as other factors. This definition can be related to [*32] telecommunications services by requiring services to be technically equal, and equal in functioning and provisioning, in end user requirements and perceptions, and in quality and quantity.

The evidence in this case is that private line services, whether IXC or SWB, are technically equal in function, the way they are provided, how they are utilized by the end user, how the end user perceives their use, in their quality and in their quantity. The private line services would be found to be the same if there were not differences with technology used. In addition, some IXC's are providing VPNs, which appear to the end user as private lines but are switched services.

The Commission finds that services which are functionally equivalent and completely interchangeable in use are equivalent under the statute. Once services are found to be equivalent, the Commission does not believe additional evidence is needed to support the classification as TC.

In this case additional evidence was provided which showed that there are private line networks in existence, under construction or contemplated by CAPs within SWB's service territory as well as the private line facilities of IXC's and those IXC's [*33] which subscribe to SWB special access services for resale. These services can be provided both on an interexchange basis and on a local exchange basis where an IXC has obtained a local exchange service authority certificate. The Commission has granted at least three local exchange service authority certificates to companies. Bypass data also indicates that private line connection has been made by IXC's between end users and IXC POPs. This evidence would be used to support a classification as TC based upon the substitutable standard, but is not necessarily required where the services have been found to be equivalent.

Based upon the finding that the dedicated private line services of IXC's and SWB's dedicated private line services and special access service are equivalent, the Commission will classify these SWB services as TC.

Operator Services

Operator services are a complementary service to MTS which assist an end user in completing a call or billing a call. Operator services can be provided either through an automated system or through a live operator. SWB's tariffed operator services consist of "Station to Station", "Person to Person", "Calling Card", "Busy Line Verify", [*34] "Busy

Line Interrupt" and "Directory Assistance". SWB is only seeking TC classification for the first three tariffed services, "Station to Station", "Person to Person" and "Calling Card".

There are eight IXCs which offer only credit card billing and there are thirty-one IXCs which offer station to station, person to person, and credit card billing. End users access either the IXCs' operator services or SWB's operator services for the same purpose. That purpose is to complete a call in a different manner than a straight MTS call. Operator services, both IXC and SWB, provide operator-dialed, customer-dialed, and customer-dialed operator-assisted completion of calls; and third party billed, collect reversal of charges, and credit card billing for calls.

End users can use operator services of IXCs or SWB if they choose or may use the operator services of an aggregator from whose telephone the end user is making the call. For intraLATA operator service calls, an end user who dials 0+ will get SWB. For the end user to get an IXC operator service, the end user will either dial a specific access code for a specific IXC or "00" to get the presubscribed interLATA IXC operator services [*35] which can then aid the end user in placing an intraLATA call.

End users making 0+ dialed calls from a traffic aggregator's telephone will get the operator services contracted for by the aggregator. To reach another company's operator service, IXC or SWB, the end user is required to dial additional digits. Aggregators which choose an IXC operator service provider route calls to that IXC with technology which automatically translates the "0" dialed by the end user into an access code, or by the use of dedicated facilities which directly connect the larger customers to the IXC.

The primary evidence addressed concerning differences between IXCs' operator services and SWB's is that dialing restrictions prevent end users from accessing their preferred IXC operator service provider for intraLATA calls unless the end user dials access codes consisting of additional digits. This evidence is similar to that presented to show that SWB's MTS service and IXCs' MTS are not substitutable.

IXCs which provide operator services have certificates of interexchange service authority to provide operator services on a statewide basis. No geographical restrictions are placed on IXC operator services. [*36] The operator services of IXCs, except for AT&T, have been classified as C. AT&T's operator services have been classified as TC.

The evidence is clear that SWB operator services and IXC operator services are not the same or equivalent. IntraLATA restrictions, the necessity of using different dialing patterns to access the different services, demonstrate these services are not the same or equivalent.

The Commission, though, as with MTS, finds that the existence of the dialing disparities between IXC operator services and SWB operator services does not prevent these services from being substitutable. End users can learn to use access codes to reach their desired operator service provider. Private pay phone providers employ Smart Phones to redial the number to access a contracted-for operator service, as do traffic aggregators. The evidence is that an end user wishing to dial SWB operator services or a specific IXC operator service from a private pay phone or from a telephone of an aggregator must dial access codes. This additional element in operator service calls provides additional support for the Commission's finding that dialing disparities between IXC and SWB services are [*37] not determinative of whether the services are substitutable.

The Commission finds that the evidence demonstrates that IXC operator services and SWB operator services are substitutable. The evidence demonstrates that all full operator services providers fulfil the same calling requirements of the end user. The way in which a call is completed and the way in which a call is billed will be the same. 0+ dialing can be utilized for intraLATA calls at traffic aggregator telephones as well as private pay phones by the use of additional technology. A simple dialing of "00" will access the presubscribed interLATA IXCs' operator services.

Customer perception that the services are substitutable is evidenced by the use of traffic aggregators of IXC operator services. There is even a niche in the market for credit-card-only operator service providers. The substitutability of the service is also demonstrated by the decrease in market share of SWB. From 1988 to 1991 SWB operator-assisted billed message volumes decreased by 20 percent even though overall operator-assisted minutes were increasing on the whole.

The IXC operator services providers market their products as substitutable for [*38] SWB's services. Their advertisements, mass mailings and consumer education promote the use of their operator services. The charging of rates different for intraLATA service than for interLATA service by some IXC providers also demonstrates the direct substitutability of their services for SWB's intraLATA service.

The evidence of Staff witness Starkey also supports the substitutability of these services. Starkey applied the DOJ merger guidelines as described by Staff witness Huttshell to analyze the operator services market. Starkey's analysis demonstrates that product substitution exists for these services.

MICPA raised the issue of local operator-assisted calls and the unwillingness of some IXC providers to provide local operator service or seek to enter that portion of the market. The primary factor with regard to the reluctance of IXC providers to actively compete for the local operator service market is the 25-cent cap on charges for local calls. The issue of the 25-cent cap is not relevant to this docket as to the issue of substitutability and can be raised in an appropriate docket. The evidence also indicated that 38 percent of local operator-assisted calls are handled [*39] by IXC providers. This evidence appears to counter MICPA's contention that the traffic is not sought.

Based upon the criterion discussed above which demonstrates that IXC operator services and SWB operator services (Station to Station, Person to Person and Calling Card) are substitutable, the Commission will classify these services as TC.

Ratemaking Treatment

Section 392.400 requires the Commission to decide at the time a service of a noncompetitive telecommunications company is classified as transitionally competitive whether that service, and its associated costs and revenues, should be taken below the line and not thereafter be considered in future determinations of a company's revenue requirement. In this case no party has proposed that any of the services classified as TC by the Commission be taken below the line. The Commission agrees with the position that it should not move one of the services addressed in this case below the line. The Commission therefore need not decide whether the cost accounting procedures (CAP) studies provided by SWB comply with the Commission's order in Case No. TO-89-56 and the Commission need not establish additional hearings for determination [*40] of the amount of indirect costs that should be shared by these services. The Commission expects, in a proceeding to determine whether the CAP studies comply with the Commission order in TO-89-56, that SWB would present the testimony of a qualified witness to attest that the CAP studies have been modified to meet the attestation standards included in the American Institute of Certified Public Accountants' Statements on Standards for Attestation Engagements.

In addition, SWB did not provide a discounted cash flow (DCF) analysis for Maximizer 800, which is a new service. In TO-89-56 the Commission recognized that for a new service a CAP study would not be appropriate and so ordered SWB to provide a DCF analysis if TC or C classification were sought for a new service pursuant to Section 392.220. Since this is not a proceeding pursuant to Section 392.220, SWB may be technically in compliance with the Commission's order in TO-89-56 but it has not complied with the intent of the order. By agreeing to provide the DCF study for Maximizer 800 service, SWB at least recognizes the necessity of providing the study.

Conclusions of Law

The Missouri Public Service Commission has arrived at [*41] the following conclusions of law.

The Commission has jurisdiction over SWB's petition under Section 392.370 to classify certain of its services as transitionally competitive. Under that section SWB has sought TC classification for its MTS service, three of its operator services, its 800 services, its WATS services and its digital private line services, contending that these services are the same, substitutable or equivalent to services already classified as competitive by the Commission and which are provided in SWB's service territory.

The Commission has addressed the interpretation of the "same, substitutable or equivalent" standard at the beginning of this order and will not repeat that analysis here. The interpretation of that standard, in the Commission's opinion, follows accepted statutory construction precedent. The Commission has utilized the ordinary meaning of words for the terms "same" and "equivalent" and has addressed appropriate criteria for the term "substitutable" without establishing specific requirements. The Commission believes that the "substitutable" standard is best addressed on a case-by-case basis.

Some parties have raised the issue of the ability of [*42] SWB to petition for classification of services under Section 392.370. The Commission concludes that there is no statutory impediment to SWB's petition. SWB, as any other noncompetitive company, may seek such classification pursuant to Section 392.370.

Parties have also questioned the limited time period established by Section 392.490 for addressing classification under 392.370. The Commission, though, can find no reasonable interpretation of these two statutes other than that

adopted for this proceeding. The General Assembly established the time limit in Section 392.490 as it did the classification method under 392.370 and the statutory purposes under 392.530. The Commission does not feel it has the authority to ignore these sections even if it might consider them onerous.

The Commission has found that the services for which SWB has sought TC classification in this case have met the criteria of Section 392.370. The Commission concludes that a grant of transitionally competitive classification to these services is consistent with the statute.

Some parties have raised other issues in this proceeding which the Commission has not addressed. Those issues have been considered [*43] by the Commission and found not to be relevant to reaching a decision concerning classification of SWB services.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company's message toll service, "Long Distance Telecommunications Service", be hereby classified as a transitionally competitive service.
2. That Southwestern Bell Telephone Company's "Station to Station", "Person to Person" and "Calling Card" services be hereby classified as transitionally competitive services.
3. That Southwestern Bell Telephone Company's "800 Service" and "Maximizer 800" services be hereby classified as transitionally competitive services.
4. That Southwestern Bell Telephone Company's "Jointly Provided WATS" and "IntraLATA WATS" services be hereby classified as transitionally competitive services.
5. That Southwestern Bell Telephone Company's "MegaLink II", "MegaLink III", "MegaLink Data Service" and "High Capacity Service" private line and special access services be hereby classified as transitionally competitive services.
6. That for ratemaking purposes, the services classified as transitionally competitive by this Report And Order shall be considered above the line.
7. That [*44] late-filed Exhibit 42HC be hereby received into the record.
8. That this Report And Order shall become effective on the 31st day of December, 1992.

McClure, Chm., Rauch and Perkins, CC., concur; Mueller and Kincheloe, CC., dissent, with separate opinions; certify compliance with the provisions of Section 536.080, R.S.Mo. 1986.

DISSENTBY: MUELLER, KINCHELOE

DISSENTING OPINION OF COMMISSIONER ALLAN G. MUELLER

CASE NO. TO-93-116

I respectfully dissent from the majority's decision that there is sufficient evidence in this record to find that Southwestern Bell Telephone Company's (SWB) MTS and that of the IXCs are substitutable. I believe that the majority's interpretation of the substitutable standard is too broad and I would find that the dialing disparities between the IXC's MTS and SWB's MTS demonstrate that the services are not substitutable. The evidence relied upon by the majority is not sufficiently compelling to overcome the fact that a large percentage of customers do not understand LATA boundaries and do not consider the services substitutable. Mark Sievers of Sprint Communications testified that in Florida, only nineteen percent of the residential customers have ever heard of [*45] a LATA, and only forty-two percent of them could correctly describe it. Although limited to handling intraLATA MTS calls, SWB is adequately protected by being allowed to "strip" all 1+ intraLATA calls. Until the MFJ restrictions are lifted and intraLATA presubscription is ordered IXCs, MTS will not be substitutable for SWB's MTS.

Therefore, I would reject SWB's request to classify MTS as transitionally competitive.

Respectfully submitted,

Allan G. Mueller, Commissioner

DISSENTING OPINION OF COMMISSIONER DUNCAN E. KINCHELOE

Southwestern Bell Telephone Company

Case No. TO-93-116

Appropriately or not, the show tune "I Can't Do the Sum" from Babes in Toyland leaps to mind in considering some of the conclusions the majority draws from the evidence in this case. The first verse of the song includes the following lyrics:

"If a steamship weighed ten thousand tons and sailed five thousand miles, With cargo large of overshoes and carving knives and files, If the mates were almost six feet high, and the bos'n near the same, Would you subtract or multiply to find the captain's name?"

The majority draws from all similarly relevant factors to calculate that the captain's name is [*46] "Substitutable."

Although I agree generally with the majority's interpretation of the terms "same" and "equivalent" in Section 392.370, I cannot join in the interpretation they have applied to the term "substitutable." I believe that under the statute a substitutable service may be functionally and technically different from the competitive service to which it is compared but to meet the intent of Section 392.370 it must be demonstrated either that 1) the quality of the service to which an applicant compares its allegedly substitutable service is equal or superior in every quality dimension to the service of the proposed substitute or 2) a reasonable cross section of the market or a reasonably large percentage of customers accept the service as an interchangeable alternative. I believe these criteria should be determinative of the question of substitutability.

Except in circumstances in which the services are the same or equivalent or the competitive-transitionally competitive service is fully equal in quality, the only firm and reliable guide as to whether a service is truly substitutable is to look to whether it is in fact being accepted as a substitute by customers. To demonstrate [*47] that acceptance, an applicant should be required to show that customers who treat the services as substitutable do not represent some narrow niche of the subject market. Evidence of adequate customer acceptance by either a representative cross section of the market or a reasonably large percentage of overall customers in the market would provide this showing.

Without articulated criteria based upon a demonstrable condition, the question of substitutability will be determined largely on an "I know it when I see it" basis. This is the standard I believe the majority adopts. Even though the majority states that it does not believe the statute would allow a finding that WATS is substitutable for MTS, I believe that the Commission could, in the future, fairly apply the current majority's substitutability standard to make such a finding. In fact there is credible evidence from expert witnesses that WATS, 800 service and MTS are substitutable.

The interpretation of substitutability that I support requires that the services be "close substitutes." This, I believe, is consistent with the intent of the statute and would allow sufficient consideration within the ninety day time limit of [*48] Section 392.490. The majority standard seems to ignore the stated purpose of the sections of the statute established in 1987, that purpose being to foster full and fair competition while protecting ratepayers and the public interest. In order for the statutory arrangement to honor that purpose, the service alleged to be substitutable for an applicant's service must have a clear potential for eventual equivalent impact on the market, even if it is similar in no other respect. Moreover, in order for the statute to make any sort of reasonable sense, that potential for competitiveness must be apparent without resort to consideration of "all relevant factors" -- or the General Assembly would not have provided for the separate, truncated procedure of Section 392.370 as an alternative to a proceeding under Section 392.361. Unless substitutability is understood to require close substitutes, it will not be possible for the Commission to assure itself of the prospect of full and fair competition without looking to all factors relevant to that issue.

In adopting a standard that accepts more substantial disparity among substitutes, the majority implicitly accepts this necessity of considering [*49] all factors relevant to competitiveness in any case in which substitutes are not especially close nor substitutability fully obvious. The Commission majority "finds that for each service for which a TC classification is sought the criteria that are particularly persuasive or relevant to that service will be determinative of how the service is classified." This language apparently signals a willingness to entertain consideration of virtually any factor that any party considers relevant. In fact, the list of twenty-nine potential factors recited in the Order in this case appears more expansive than the factors previously held relevant in cases filed under Section 392.361. Despite its denial, by considering such a wide range of factors the majority has, in practical effect, made the evidentiary case and findings required under Section 392.370 equivalent to rather than merely substitutable for those of Section 392.361.

It is forced to this patently unintended result because its broad, or loose, interpretation of substitutability is otherwise dangerously inconsistent with the assured development of full and fair competition, even if in this case that interpretation may produce a harmless [*50] result that might properly have been achieved under Section 392.361. The standard I propose would not allow reduced regulation for a local exchange company service until the market has clearly revealed strong prospects for full and fair competition -- unless the applicant company permits the Commission to consider all relevant factors pursuant to Section 392.361.

Applying the interpretation I believe to be appropriate for the term "substitutable," I conclude that Southwestern Bell has failed to demonstrate that its service and that of the IXC's are substitutable, at least with regard to MTS. The difference in dialing requirements causes it to fail the first test, which would require that IXC service offer quality at least fully equal to that of Southwestern Bell's. Nor does the evidence satisfy the alternative criteria that a reasonable cross section of the intraLATA market or a reasonably large percentage of customers in the market accepts the IXC MTS service as a substitute for SWB's MTS.

What the evidence does show is that the interexchange carriers' services constitute only 7.28 percent of the market expressed in minutes rather than in customers. Southwestern Bell does not [*51] demonstrate that this limited penetration of the market represents vulnerability of the bulk of the market rather than the service's acceptance as a substitute by only a relatively few high-volume or sophisticated customers.

Instead of requiring evidence relevant to this issue, the majority chooses to look at its mix of factors that should be considered doubtfully relevant or determinative, even taken collectively. It is impressed with the number of IXCs authorized to provide intraLATA MTS even though this adds nothing to the evidence regarding market share and no carrier enters business to provide this service alone. It is struck by the growth of the IXCs' intraLATA traffic, without examining whether this growth rate will come to an abrupt halt when a peculiarly situated niche of the overall market is saturated. It finds probative the observation that some IXCs generate a significant portion of their intrastate revenue from intraLATA traffic, despite the fact that taken collectively this amounts to nothing more than a reformulation of the evidence that these carriers constitute something less than ten percent of the market.

It looks to economic analysis largely sourced in hypotheses, [*52] theory and assumptions rather than facts in evidence. And it permits this analysis to be applied to determine "whether these alternative services satisfactorily constrain the exercise of market power" instead of looking to direct evidence of whether customers accept the services as substitutes.

This evidence does not permit me to reach the conclusions drawn by the majority despite the fact that the majority's interpretation of "substitutable" would permit anyone to reach virtually any conclusion in these cases. "I Can't Do the Sum" nor join the majority in saluting their version of Captain Substitutable and, therefore, respectfully dissent.

Respectfully submitted,

Duncan E. Kincheloe, Commissioner

Dated at Jefferson City, Missouri, on this 21st day of December, 1992.