

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Application of Sprint Nextel Corporation for )  
Approval of the Transfer of Control of Sprint )  
Missouri, Inc., Sprint Long Distance, Inc., and ) **Case No. IO-2006-0086**  
Sprint Payphone Services, Inc., from Sprint Nextel )  
Corporation to LTD Holding Company )

## OFFICE OF THE PUBLIC COUNSEL'S RESPONSE TO THE STAFF RECOMMENDATION

The Office of the Public Counsel makes the following comments to the Missouri Public Service Commission on the Staff's recommendation that the Sprint Nextel Corporation and LTD Holding Company be approved with certain conditions:

### **Detrimental to the Public Interest Standard**

The applicable case law under Section 392.300, RSMo 2000, provides that when the Commission considers the transfer of stock it shall approve the transfer unless the transfer would be detrimental to the public interest. *State ex rel. City of St. Louis v. Public Service. Commission*, 73 S.W.2d 393, 400 (Mo.banc 1934). The Commission's Rule 4 CSR 240-3.535(1)(C) incorporates this standard by requiring applications to include "reasons why the proposed acquisition of the stock of the public utility is not detrimental to the public interest."

Public Counsel views this standard as meaning that the transaction should not be detrimental to the goals for telecommunications set out in Section 392.185, RSMo,

including the provisions making the protection of the ratepayer and the public interest a paramount concern to the promotion of competition.

Section 392.185. The provisions of this chapter shall be construed 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 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;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

Public Counsel asks the Commission to look to the effect of the transaction action on the specific issues raised by the spinoff that may adversely affect the ratepayer and the public interest in light of these goals. The Staff and CWA have raised issues concerning the transaction and, in some instances, proposed conditions which may ameliorate the adverse effect.

### **Overview**

At this time, the Office of the Public Counsel cannot agree with the Staff that the transaction is not detrimental to the public interest. Public Counsel believes additional

discussion and information is needed with Sprint and the other parties and that the scheduled conference is a worthwhile next step to keep this case moving.

Public Counsel's concerns fall into these major areas:

Service Quality

Lawful and Reasonable Rates

Capital Structure

Provision of Advanced Services for Rural exchanges

Competitive Issues after Spinoff

The Public Service Commission is asked to take the Company's assurances that no harm will befall the consumer due to this transaction. However, the broad nature of the assurances make measuring fulfillment of these assurances difficult. It appears that the Staff relies heavily on these broad assurances made in the Company witness' testimony, but the Staff's recommendation is light on independent analysis to provide a yardstick for the underlying facts to show that the assurances have been met. The Staff witnesses raise some concerns, but then note the assurances made by Company witnesses as the reason to allay their concerns. On behalf of the customer, Public Counsel is not as dependent on faith and the Company's good faith and assurances as the Staff.

### **Quality Of Service**

Public Counsel has concerns about the transfer of control since there could be adverse effects on the provision of telecommunications services by the newly created entity (hereinafter referenced as "ReUnited"). Sprint/Nextel has prefiled testimony stating that services provided by ReUnited will continue unchanged and without loss in

quality and in a manner transparent to the customer, but Staff witness Larry Henderson's testimony raises questions.

Mr. Henderson indicates that past performance reports show that Sprint has met or exceeded the PSC service requirements. However, these are standards of service that the PSC has established as the minimum level for adequate service. Fall below these standards and the Company is required to correct the deficiencies. Since Sprint has near monopoly status under price cap regulation in most of its rural exchanges, compliance should be the floor level of service and not the target level of service. Consumers should expect a higher level of service from ReUnited than the base floor level, especially if Sprint had been providing that higher service level. For example, if Sprint has a very quick response rate for service outages and trouble calls, ReUnited's retrenchment to a minimum rate as an acceptable standard is not a transparent result.

Rather than focus on compliance and assurance that Sprint will meet the surveillance standards, the Commission should define and identify Sprint's current level of compliance and then require Sprint to maintain that level to ensure service quality. If Sprint maintains a high service quality, then ReUnited should maintain that same level and be willing to be measured against that performance.

Mr. Henderson states that he does not have concerns regarding Sprint's quality of service "at this time" based on the level provided today and in the last 30 months. This is a "faint praise" assessment in that it is based only on past performance and not on the plans for the future. He said he looks at two primary factors he looks at is (1) the number of employees who will continue to provide services and (2) the capital expenditures or amount budgeted for capital projects. (at p. 6).

(1) Number of employees.

Mr. Henderson said that since the company plans to have all of the same employees transfer to the new local company, “I anticipate that the transaction should not negatively affect the quality of service...” (p. 7) Other than the count of the number of employees before and after the transaction, that measure does not provide a true indication of service quality. That analysis does not reach the important factors of the mix of the type and number of employees by job title and function. The number of line workers and customer service representatives versus the number on the sales staff may be an important consideration on the ability to maintain service quality. Whether the number of employees will continue and whether that staffing level in each job category or location will be maintained to provide the service is another important consideration.

Public Counsel is not suggesting a micro management of ReUnited where the Commission dictates the number, type, and location of employees. However, the record should reflect a sufficiently detailed statement of the plans on how ReUnited will deliver quality service and should include facts to evaluate these staffing issues rather than raw numbers of employees before and after the transaction.

(2) Capital expenditures or amount budgeted for capital projects

Mr. Henderson and Mr. Voight both observed that capital expenditures projections are only shown on a 18 state basis and not on a Missouri specific basis. (p.8) Mr. Henderson indicates that the projected aggregated amount is anticipated to decline in the next two years. (p. 7-8) If the Commission is called

upon to make a judgment on any potential for a detriment to the public interest on service quality impacts, then it should have specific capital expenditure plan information on Missouri. An aggregate total does not give the Commission sufficient information to make an informed decision or ability to evaluate where the expenditures are planned or not budgeted and the purposes for which the funds will be spent.

From the evidence relied upon by Staff, Public Counsel cannot agree with its assessment and recommendation on service quality. The submission of quality of service reports monthly during the first 4 quarters after the spin off does not appear to provide a meaningful and sufficient yardstick to demonstrate the continuation of the existing service quality since present reporting requirements records minimum floor levels. Any reporting should compare the current level of service with the service quality provided after the spinoff.

### **Lawful and Reasonable Rates**

#### **1) Local Basic Rates**

Public Counsel cannot support continuation of the current rates under the new entity as lawful and just and reasonable rates. Public Counsel has since 2001 challenged the lawfulness and reasonableness of two different rates that will be assumed by ReUnited.

In Case Nos. TR-2002-251;. IT-2003-0170 and in Case Nos. IT-2004-0134 and IT-2004-0135, Public Counsel contends that Sprint unlawfully rebalanced local rates under Section 392.245.9, RSMo. Prior to allowing a rebalancing, the PSC must conduct an investigation into the incremental costs of local basic service and intrastate switched

access service and to make certain findings on the relationship of these costs to the prices of these services. Under the statutory plan, if the PSC's investigation reveals that the cost of local service is equal to or more than its average price and that the cost of switched access service is less than its price, then there is statutory cost justification for rebalancing. (Section 392.245.9, RSMo). When a statute directs the Public Service Commission to make an investigation, the PSC must report the findings of its investigation. Section 386.420.2, RSMo 2000 requires the Commission to issue a written report of the conclusions of its investigation: "Whenever an investigation shall be made by the commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with the decision, order or requirement in the premises." The PSC must also include findings of fact in its written reports. *State ex rel. Rice v. PSC*, 220 S.W.2d 61, 65 (Mo. 1949). Since the Commission did not conduct the investigation under Section 392.245.9, RSMo, it did not make a written report of its investigation. The cases were originally reversed and remanded by the Court of Appeals in *State ex rel Coffman v. Public Service Commission*, 121 3<sup>d</sup> 534 (Mo App. 2003) and by the circuit court for the years 2002 and 2003 in Case Nos. 03CV323400 and 04CV323045. The Commission reapproved the rebalancing tariffs in 2005 and Public Counsel has taken a writ of review to the Circuit Court. The cases have been briefed and argued and await Judge Callahan's ruling. A ruling is expected soon.

As a result of the unlawful and unreasonable rebalancing, Sprint Missouri's approximate 249,000 local ratepayers have been overcharged \$26,892,000 over the last 3 years and \$4.50 per month per access line (for an estimated total of \$1,120,500/ month) for each month in the future. Public Counsel believes it is incumbent on the PSC to

ensure that ReUnited begins its operations based upon lawful, just and reasonable rates. In addition, Public Counsel does not want in any way to waive or relinquish any of its rights or position to continue to challenge the lawfulness and reasonableness of the rates or to in any way serve as a waiver or obstacle to its intent to seek refund of rates collected without lawful authority from the new entity providing local basic service. that this rate issue should be resolved prior to final PSC approval of the transaction.

## **2) Long Distance Instate Access Recovery Surcharges**

Sprint Communications Company, L. P provides the long distance service for the Sprint family of companies. It established a \$1.99 monthly service charge known as an “In-State Access Recovery ” charge for all “Dial 1 Sprint” account customers who are presubscribed to Sprint for long distance toll service and do not have local service provided by “a Sprint company.” The Missouri Court of Appeals reversed and remanded this case. The parties have supplemented the evidentiary record and briefed the case and it is now pending decision on remand by the PSC. *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.)*

Public Counsel asked the Commission to reject the access recovery surcharge because the charges are unlawful and unreasonable and violate Section 392.200., RSMo 2000 as unjust and unreasonable and discriminatory rates. The record in the cases fails to provide adequate, competent and substantial evidence the disparate treatment of residential, low-volume toll, and rural customers and the exemption of business and local customers of Sprint is justified and reasonable. Since ReUnited will assume the ownership of the long distance operations performed by Sprint Communications



Company, L. P and the rate structure, Public Counsel views the transaction the continuation of a surcharge that is unjust, unreasonable, and discriminatory. Public Counsel does not waive or relinquish any of its rights or its position to continue to challenge the lawfulness and reasonableness of the rates or to in any way serve as a waiver or obstacle to its intent to seek refund of rates collected without lawful authority from the new entity providing long distance service.

### **Capital Structure**

It appears that the transaction and the resulting capital structure has a design to maximize shareholder value. In itself, that is not detrimental to the public interest unless as a result of the resulting capital structure ReUnited is placed at risk and is unable to provide adequate and high quality local service immediately after the transaction and in the long run. Sprint Nextel will have significant cash reserves and ReUnited appears to have significant cash flow to cover its debt and to continue to provide the same level of service. Based upon present information, Public Counsel does not dispute Staff's analysis and Staff's proposed conditions relating to the capital structure and financial matters.

### **Provision of Advanced Services for Rural exchanges**

ReUnited as the local service provider serves primarily rural areas in Missouri. A major concern is that rural areas have parity of service with urban areas, including deployment of advanced services and reasonable and affordable local calling scopes.

As Mr. Voight notes in his testimony, Sprint makes many assurances of the local focus and vision of ReUnited. However, Public Counsel would have more comfort and security in these assurances if they were accompanied by specific capital expenditure

plans (designated HC or Proprietary) that would give the Commission a clear picture of how these “assurances” will be carried out and what can the Commission and the customer expect in the provision of advanced and broadband services at parity with Missouri’s suburban and urban areas.

Mr. Voight correctly assesses the change in long distance provider issues and Public Counsel supports his notice conditions. Public Counsel would further suggest that after the transaction, any Sprint customers who change to a different provider during a reasonable period after notice be granted a waiver of the PIC charge for changing long distance providers. That seems a reasonable accommodation of the customers and is consistent with practice when IXC’s are acquired or merged.

#### **Competitive Issues after Spinoff**

Mr. Voight makes a valid point in highlighting Sprint’s identification of the competitive tension that has existed between Sprint Missouri’s local service operation and the Sprint Nextel wireless operation, especially with recent developments where Sprint is partnering with cable operators for terminating VOIP calls to the public switched network. Separation of the local wireline business from the wireless business may seem to give greater focus and direction to each resulting carrier in its own technology base. However, it also may place ReUnited at a technology disadvantage or market disadvantage if it no longer is directly teamed with the wireless company and may be viewed as strictly a wireline company rather than a full service company. Packaging services has been touted as the telecommunications and communications future, such as AT&T/SBC ability to offer a full range of packages that include all technology. Is ReUnited placed at a competitive disadvantage?

## **Conclusion**

Public Counsel is willing to further explore and discuss these issues and any other issues raised by the parties. It is also willing to continue to discuss resolution of Public Counsel's concerns with Sprint Nextel and to do so in a timely manner. Above all, Public Counsel believes that the Commission should have relevant and material information about the transaction and the consequences of the transaction as proposed or can reasonably expect to transpire. It is only then that the Commission can ensure that the transaction is not "detrimental to the public interest."

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed, emailed and/or hand delivered this 8th day of December, 2005 to the attorneys of record.

/s/ **Michael F. Dandino**

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