

September 2, 2003

FILED

SEP 03 2003

Missouri Public
Service Commission

EVEREST

Hon. Dale Hardy Roberts
Secretary
Missouri Public Service Commission
Governor Office Bldg.
200 Madison Street
Jefferson City, MO 65102

VIA FEDERAL EXPRESS

RE: Case No. IO-2003-00281

Dear Mr. Roberts:

Enclosed please find an original and nine copies of both Proprietary and Public Versions of the **Brief of ExOp of Missouri, Inc. d/b/a Unite**. We request that you file stamp one copy of both the Proprietary and Public Versions of the Brief, and return to us in the enclosed self-addressed postage prepaid envelope.

Copies of the both the Non-Proprietary and Proprietary versions of the Brief are being provided to Commission Staff, the Office of Public Counsel and all counsel of record.

Sincerely,



Rachel Lipman Reiber
Vice President of Regulatory and Government Affairs

cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

In the Matter of the Investigation)
Of the State of Competition in the)
Exchanges of Sprint Missouri, Inc.)

Case No. IO-2003-0281

FILED⁴
SEP 03 2003
Missouri Public
Service Commission

**BRIEF OF EXOP OF MISSOURI, INC.
D/B/A UNITE**

ExOp of Missouri, Inc. d/b/a Unite opposes Sprint's request that it be found subject to effective competition in the residential and business markets in the Kearney and Platte City exchanges. Unite acknowledges that the Commission has a difficult decision to make with respect to Sprint's request for deregulation in Kearney. Platte City is a completely different story. Unite has only been providing service in Platte City since August 2002, and hence Sprint does not qualify for a designation of effective competition in that exchange.

Legal Standard

In order for the Commission to simply presume that effective competition exists in a particular exchange, the Commission would have to find that Sprint actually faced competition for a minimum of five years in the exchange in question as opposed to merely finding that an alternative competitive company was authorized to do business within that exchange. Section 392.245.5 of the Missouri Revised statutes provides:

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 for at least five years, **unless** the commission determine, after notice and a hearing that effective competition does not exist in the exchange for such service.

This is the second proceeding to determine whether an incumbent telephone company is subject to effective competition. In the previous case involving Southwestern Bell,¹ the Commission found that the burden of proof remains upon the party asserting the affirmative of the ultimate issue throughout a proceeding. In that case, the Commission found that Southwestern Bell was the only party advocating that it should be found subject to effective competition. The Commission concluded that Southwestern Bell had the burden to present competent and substantial evidence that it was subject to effective competition in each of the exchanges where it sought that designation. Sprint, as the party advocating that it should be found subject to effective competition, bears a similar burden of proof in this case.

The statutes do not define effective competition, but rather Section 386.020(13) lists the following factors that the Commission should consider in determining whether effective competition exists:

- (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;
- (c) The extent to which the purposes and policies of Chapter 392, RS Mo, including the reasonableness of rates, as set out in Section 392.185 RS Mo, 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.

The Commission, in the Southwestern Bell case, noted that neither Section 392.245.5 nor Section 386.020(13), require any quantitative market share loss test to determine whether effective competition exists. However, the Commission went on to state:

¹ Case No. TO-2001-467.

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.'"²

The Commission Should Reject Sprint's Suggestion that ETC Status Should Result In A Finding of Effective Competition

The Commission should not find that Sprint is subject to effective competition simply because Unite qualifies for universal service funding in the Kearney and Platte City exchanges. Sprint's witness, John Idoux, in his surrebuttal testimony, suggests that the Commission should find that Sprint is subject to effective competition in the Kearney and Platte City exchanges because Unite has requested and received a designation from this Commission that it be designated an eligible telecommunications carrier (ETC), qualifying it to receive universal service funds. However, as Unite witness Dennis Devoy stated, he applied for intrastate access support funds, but received a response that such funds were not available for the Kearney exchange. He has neither requested nor received any universal service funding for Platte City. (Tr. p. 354)

Sprint's theory is based on an interpretation of 47 U.S.C. 214 (e)(1) that has been rejected by the Federal Communications Commission.³ See, Exhibit 13. On August 10, 2000, the FCC issued a Declaratory ruling to "provide guidance to remove uncertainty and terminate controversy regarding whether section 214 (e)(1) of the Communications Act of 1934 as amended, requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier

² Id. at p. 12.

³ *Declaratory Ruling, In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for preemption of an Order of the South Dakota Public Utilities Commission, CC Docket No. 96-45, FCC 00-248, Rel. August 10, 2000.*

(ETC) that may receive federal universal service support.”⁴ The FCC specifically found that a competitive local exchange carrier applying for ETC status need not have built out the entire exchange at the time it applied to be an ETC. Instead the FCC suggested that state commissions should focus on whether the ETC applicant is “capable and committed” to providing facilities-based service throughout the exchange.⁵ The FCC order suggests that if, after a period of time, an ETC has not demonstrated its capability or commitment to provide local exchange service throughout an exchange, a state commission may revoke the ETC status and the CLEC’s ability to qualify for universal service funds.⁶

Even if a local exchange carrier has received designation as an ETC in a particular exchange, the ETC designation should not be taken into consideration when deciding whether the incumbent local exchange carrier is subject to effective competition in that exchange.

In the case of Unite, the ETC designations were acquired when Unite was in an expansion mode, building out new facilities. Clearly Aquila’s financial problems and Unite’s imminent change of ownership have materially affected the expansion plans Unite once had. (Tr. p. 361).

Mr. Idoux, in his surrebuttal testimony, attempts to minimize the relevance of Aquila’s financial situation by stating that Sprint, along with the entire telecom industry faces a tight capital market. (Surrebuttal Testimony of John Idoux, Ex. 2 at p. 19). Yet when probed on cross-examination, Mr. Idoux stated he did not know what Aquila’s stock price was, nor did he know what Aquila’s bond rating was (Tr. pp. 89-91). The

⁴ Id at p. 1.

⁵ Id. at ¶ 24.

⁶ Id. at ¶ 15.

Commission, on the other hand, is very knowledgeable about Aquila's current financial situation and is well aware that Aquila's debt has been classified as less than investment grade.⁷ In its current predicament, investment bankers are hesitant to loan Aquila money for its core gas and electric distribution lines of business; they are even less eager to loan Aquila money for its non-core communications subsidiaries. The pending sale of Unite is also something that the Commission must consider, because it is not known at this time whether the prospective purchaser of Unite will qualify for additional funding should the transaction be approved by the respective state commissions.

If the Commission believes that Unite is no longer capable or committed to providing facilities-based local exchange service throughout the Kearney and Platte City exchanges, it should issue an order to show cause why Unite's ETC designation should not be revoked. The Commission should not find that Sprint is subject to effective competition simply because Unite has received an ETC designation for the Kearney and Platte City exchanges.

Moreover, it is important to note that Sprint never sought to intervene in the cases in which Unite sought the ETC designation. At the time Unite sought ETC status, Sprint knew that Unite had barely commenced its build-out of the Kearney and Platte City exchanges. Sprint should not be allowed in this proceeding to relitigate whether Unite should have been granted ETC status. The whole issue of ETC designation is further rendered irrelevant by the fact that Unite has never received any universal service funds as the result of its ETC designation.

Unite's Issues in this Case

⁷ Case No. EF-2003-0465.

Unite has presented evidence concerning the following issues.

Issue 1: Section 392.245.5 RSMo allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its residence core access line services (i.e., local exchange service, local operating service, directory listing, extension service, extended area service, local measured service and PBX service) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's residence core access line services be classified as competitive?

Issue 2: Section 392.245.5 RSMo allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its residence access line-related services (i.e. Sprint Solutions, busy line verification service, customer calling services, express touch, network service packages) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's residence access line-related services be classified as competitive?

Issue 3: Section 392.245.5 RSMo allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its business core access line services (i.e., local exchange service, local operating service, directory listing, extension service, extended area service, local measured service and PBX service) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's business core access line services be classified as competitive?

Issue 4: Section 392.245.5 RSMo allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its business access line-related services (i.e. Sprint Solutions, busy line verification service, customer calling services, express touch, network service packages) offered in the Kearney, Norborne, Rolla, Platte City and St. Robert exchanges be classified as competitive. In which of these Sprint Missouri, Inc. exchanges, if any, should Sprint's business access line-related services be classified as competitive?

Issue 5: Section 392.245.5 RSMo allows the Commission to classify services of a Price Cap Company as competitive. Sprint Missouri, Inc., a Price Cap Company, has requested that its high capacity exchange access line services be classified as competitive. In which Sprint Missouri, Inc. exchanges, if any, should Sprint's high capacity exchange access line services be classified as competitive?

Kearney – Issues 1-5

Unite offers voice, video and data services over its own facilities. The conventional wisdom has been that no competitive local exchange carrier could be financially viable with a full facilities overbuild. Unite's success to date in the residential market in Kearney can be attributed to the fact that Unite provides a bundle of services, including local exchange service, cable service and high-speed Internet service. There is no doubt that Unite's cable offering has been a key component to its success in attracting residential customers in the Kearney exchange. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 6)

Unite does not deny that it has achieved significant market share in the Kearney exchange. However, the Commission has found in Case No. TO-2001-467, that even in exchanges where market share is substantial, market share alone is not sufficient for the Commission to find that effective competition exists.⁸ To date, Unite has not constructed facilities in certain areas within the city of Kearney itself as well as areas outside the city limits, which are considered part the Kearney exchange. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 3). Unite does not anticipate constructing any new facilities in the near future. Unite has ruled out providing local exchange service using Sprint UNEs, because it does not believe that it could maintain its current pricing and remain profitable. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 3).

⁸ Report and Order, issued December 27, 2001, at p. 14.

Thus, a substantial number of business and residential customers within the Kearney exchange do not currently have Unite as a competitive alternative to Sprint for local exchange telephone service, nor is it likely that they will have a facilities-based alternative to Sprint for local service. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 3).

Sprint and Staff clarified that under their understanding of the price cap statute, a finding of effective competition would not permit an incumbent to engage in individual case basis pricing. (Surrebuttal of John Idoux, Ex. 2, p.38). However, there is nothing that would prevent the incumbent from engaging in promotional offers targeted only at Unite customers or to customers that reside within areas where Unite has constructed its facilities.

Platte City – Issues 1-5

Unite does not have a cable franchise in Platte City nor does it have any plans to obtain a cable franchise from Platte City in the near future. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 6; Tr. p. 360). On January 16, 2003, the governing body of Platte City enacted an ordinance that applies to all present and future providers of cable service. *See*, Exhibit 24. The ordinance requires any potential franchisee to employ its best efforts build-out the entire city in 36 months with a build-out deadline for the entire city of 42 months⁹. The franchise also contains a penalty provision that assesses a \$500 per day fine for failure to meet that build-out schedule.¹⁰ This 42 month build-out requirement, coupled with the hefty fines for noncompliance, represent an obligation that Unite is not willing to take on at this point in time. (Tr. p. 360).

⁹ *See*, Exhibit 24, p. 23.

¹⁰ *See*, Exhibit 24, p. 41.

While Unite will continue to market its services in areas where it has existing facilities, Unite will not be expanding its build-out into new areas for the foreseeable future. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 3; Tr. p. 361). Unite's parent company, Aquila, will not be providing any further funding or support for Unite's expansion in the Kearney exchange or elsewhere. As the Commission was informed during the hearing, an agreement was signed on July 9, 2003, which, pending regulatory approvals, will result in the sale of Unite to a group of investors headed by its former general manager, Ron Reckrodt. (Tr. pp. 351; 361). An application for approval of this purchase has been filed at the Commission.¹¹ It is not known at this time whether the new purchaser, if approved, will operate the business utilizing its current facilities or whether the business will be able to attract capital to build new facilities. (Tr. p. 361).

At year-end 2001, Unite served 22 residential lines in Platte City, including Ferrelview, that are considered part of the Platte City exchange. This is compared to the 2852 residential access lines served by Sprint, according to its 2001 annual report. At year-end 2002, Unite served 55 residential lines in the Platte City exchange. As of year end 2002, Sprint served *****Start Proprietary*****End Proprietary***** residential access lines in the Platte City exchange, a net increase of *****Start Proprietary*****End Proprietary***** residential access lines. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 7).

Unite did not serve any business customers in Platte City as of year-end 2001. By year-end 2002, Unite served 148 business access lines in Platte City. According to the annual reports Sprint filed at the Commission, Sprint served 1337 business access lines at

¹¹ See, Docket No. LM-2004-0063.

the end of 2001 and ****Start Proprietary*****End Proprietary business access lines as of December 31, 2002. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 7)

Mr. Idoux, in his rebuttal testimony, claims that Sprint has lost an additional 116 access lines in the Platte City exchange between January 1 and July 1, 2003. Although he does not specify whether these lost lines are business or residential, he claims this represents a six percent annualized decrease in access lines for that exchange – three times the annualized access line decrease of the nearby Sprint exchanges. Mr. Idoux goes on to state that “Sprint fully anticipates [th]is decrease to accelerate.” (Surrebuttal Testimony of John Idoux, Ex. 2, p. 17).

But, staff witness Adam McKinnie correctly points out, Section 392.245.5 RSMo states the Commission should determine “...whether effective competition exists [emphasis added] in the exchange for various services of the incumbent local exchange telecommunications company. The verb tense of the word ‘exists’ is present, hence the statute directs the Commission to look at what currently is present within the exchange.” (Rebuttal Testimony of Adam McKinnie, Ex. 6, p. 24). The Commission should not base its decision on what may happen in the future. Applying the statutory definition to the facts, the Commission cannot make a supportable finding that effective competition exists today in the Platte City exchange for either business or residential services.

General Policy Considerations

This docket is critical to the Commission’s legacy in the transition of the telecommunications marketplace from a highly regulated monopoly environment to an environment where competition takes the place of regulation. The key to making this transition work and to ensuring that consumers have choices over the long term is not by

finding that the incumbent is subject to effective competition when it can still exercise its monopoly power. This decision is made more difficult, because while competitive local exchange companies have made significant inroads in penetrating the incumbent's customer base in three of its exchanges, Kearney, Norborne and Rolla, (Rebuttal Testimony of Adam McKinnie, Ex. 6, p. 27), Sprint faces little, if any, competition the other 80 exchanges where it operates in Missouri. The price cap statute permits companies to raise rates annually, in accordance with the statutory formula that takes into consideration the increases in the cost of living. If this effective competition petition is granted in its entirety or in part, there is no doubt that Sprint will likely continue to raise prices annually, up to the amounts permissible under the price cap, in the 80 exchanges where it faces little or no competition. Sprint will no doubt lower prices to meet or beat the competition in the few exchanges where the commission has decided to free it from regulation.

Exhibit 16 provides evidence of price increases Sprint has implemented since it became subject to price cap regulation. If Sprint's requests for effective competition are granted, Sprint will suffer little or no overall revenue loss from its Missouri local exchange operations because it will be able to fund the discounts it offers in the exchanges where it faces effective competition with the price increases it is able to impose on customers in the exchanges where it faces little or no competition. (Rebuttal Testimony of Dennis Devoy, Ex. 11, p. 5).

Unite, on the other hand, cannot lower its prices, if Sprint chooses to price below Unite, because Kearney and Platte City are the only two exchanges where Unite does

business. Unite does not have the ability to fund discounts in the areas where it faces competition with monopoly profits from areas where it does not face competition.

CONCLUSION

If the Commission decides that Sprint is subject to effective competition in the Kearney exchange, Unite will have become a victim of its own success. The Commission should continue to monitor the Kearney situation closely to ensure that competition continues to evolve, particularly in light of Unite's somewhat uncertain future as a stand-alone company, apart from its current parent, Aquila. The Commission should reject Sprint's attempt to have the Platte City exchange declared subject to effective competition. Unite has been providing residential service in the exchange for approximately two years. This alone is not sufficient to meet the statutory requirement. Moreover, Unite has acquired only handful of residential customers. Unite has only been providing service to business customers since August 2002. Despite some market share loss, Sprint continues to dominate the market for business customers. The fact that Unite has received an ETC designation from the Commission, qualifying it to receive universal service funds, should not be considered in determining whether a company is subject to effective competition within a particular exchange.

Respectfully submitted,

ExOp of Missouri, Inc. d/b/a Unite

By: Rachel Lipman Reiber

Rachel Lipman Reiber
Attorney for ExOp of Missouri
d/b/a Unite
9647 Lackman Road

PUBLIC VERSION

Lenexa, KS 66219
(913) 322-9624 Voice
(913) 322-9729 FAX

VERIFICATION

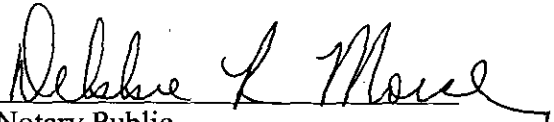
State of Kansas)
) ss
County of Johnson)

I, Rachel Lipman Reiber, of lawful age, being duly sworn, state that I am the attorney for ExOp of Missouri, Inc. d/b/a Unite. I have read the foregoing Brief and verify that the statements allegations and matters contained therein are true and correct according to my knowledge and belief.



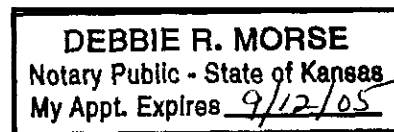
Rachel Lipman Reiber

Subscribed and sworn before me this 2nd day of September, 2003.



Notary Public

My appointment expires:



CERTIFICATE OF SERVICE

I hereby certify that I have deposited in the U.S. Mail, postage prepaid, copies of the foregoing Proprietary and Public versions of the **Brief of ExOp of Missouri, Inc. d/b/a Unite**, this 3rd day of September 2003 to the following individuals:

Mr. William K. Haas
Deputy General Counsel
200 Madison Street
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Ms. Lisa Creighton-Hendricks
Sprint Missouri, Inc.
6450 Sprint Parkway
Overland Park, KS 66251

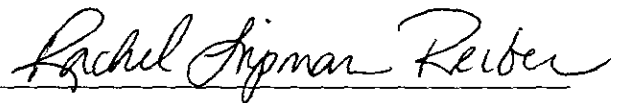
Mr. Jason L. Ross
Mr. Sheldon K. Stock
Greensfelder, Hemker & Gale
10 South Broadway, Suite 2000
St. Louis, MO 63102-1174

Mr. Anthony Conroy
SBC Missouri
One SBC Center, Room 3516
St. Louis, MO 63101

Mr. Michael Dandino
Office of Public Counsel
200 Madison Street, Suite 650
P. O. Box 7800
Jefferson City, MO 65102

Ms. Sondra Morgan
Mr. W. R. England III
Brydon, Swearengen & England P.C.
312 East Capital Street
P. O. Box 456
Jefferson City, MO 65102-0456

Mr. Charles Brent Stewart
Stewart & Keevil, LLC
1001 Cherry Street, Suite 302
Columbia, MO 65201



Rachel Lipman Reiber