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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 11th day of May, 1999.

In the Matter of Sprint Missouri, Inc.'s)
Application to Introduce Sprint Simply) Case No. TT-99-418
FiveSM Service IntraLATA toll service.) Tariff No. 9900679

ORDER DENYING REHEARING

On May 4, 1999, Sprint Missouri, Inc., doing business as Sprint (Sprint), filed its Application for Rehearing and, in the Alternative, Motion to Modify Order (Application). The application for rehearing will be denied for reasons discussed below.

Procedural History:

On March 12, 1999, Sprint filed proposed tariff sheets with an effective date of April 14, 1999, in order to introduce a new service, Sprint Simply FiveSM. The proposed Simply FiveSM service was described as an optional, intrastate, intraLATA, long distance service with flat rates that are not distance sensitive, available only to subscribers who have selected Sprint as their primary intraLATA long distance carrier. Sprint twice by letter extended the effective date of the proposed tariff sheets, that last extension, on April 14, 1999, to May 3, 1999.

On March 30, 1999, AT&T Communications of the Southwest (AT&T) filed its Motion to Reject or in the Alternative Suspend Tariff and Application to Intervene. AT&T alleged that Sprint's Simply FiveSM service is anti-competitive because it is "priced well-below Sprint's rates for

switched access" and, consequently, "will not recover its imputed access costs." AT&T further alleged that Sprint's total intraLATA toll offerings will not recover imputed access costs with the addition of the proposed Simply FiveSM service.

Sprint filed its Reply to AT&T on April 9, 1999, stating that AT&T's allegations are unsubstantiated and untrue. Sprint stated further that it had provided information to the Staff of the Missouri Public Service Commission (Staff) showing that both the Simply FiveSM service, standing alone, and its total intraLATA toll offerings including Simply FiveSM, meet the "imputation requirement."

The Staff filed its Memorandum on April 21, 1999. Staff agreed with Sprint and stated that "Sprint has provided highly confidential revenue analyses" which "indicate that the intraLATA toll margin with the addition of Sprint Simply Five will remain positive." Staff recommended that the proposed tariff sheets be approved.

The Commission, on April 29, 1999, issued its order suspending the proposed tariff sheets until August 31, 1999, granting AT&T's request to intervene, and setting a date for a prehearing conference and for the filing of a procedural schedule. On May 4, Sprint filed its Application which is the subject of the present order.

Discussion:

In its Application, Sprint first complains that it has been denied Due Process because the effective date of the Commission's order of April 29, 1999, was the very day of issue:

Since the effective date and issuance dates [sic] are identical, Sprint . . . has been provided no opportunity to file an Application for Rehearing prior to the

effective date of the Order. . . . no explanation is provided for this denial of Sprint's right to due process[.]”

Due Process refers to the guarantee, found in the Fourteenth Amendment to the Constitution of the United States and at Article I, Section 10, of the Constitution of Missouri, “nor shall any state deprive any person of life, liberty or property without due process of law[.]” Due process of law, in turn, requires notice and an opportunity to be heard. Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940); In re the Estate of Potashnick, 841 S.W.2d 714, 719 (Mo. App., E.D. 1992). No extended constitutional analysis is required to dispose of this point.¹ The Commission issued its order of April 29, 1999, upon consideration of Sprint's proposed tariff sheets, AT&T's motion, Sprint's response to AT&T's motion, and Staff's memorandum. Clearly, Sprint enjoyed both adequate notice and an opportunity to be heard.

Next, Sprint asserts that the order of April 29, 1999, was not interlocutory, and that the Commission, therefore, violated its own procedural rules in making the suspension order effective on the date of issue:

Although no explanation is provided for this denial of Sprint's right to due process, it must be the mistaken belief that such an order is merely “procedural and interlocutory” under 4 CSR 240-2.160. However, nothing could be further from the truth. The decision to allow a competitor of Sprint to delay Sprint's ability to timely offer a toll service in competition with that competitor on a mere unsubstantiated allegation—refuted by Sprint and by Staff—operates to deny Sprint's ability

¹An extended analysis would reach the question, for example, of whether Sprint has any cognizable property interest in a proposed tariff.

to compete and places Sprint at an unfair competitive disadvantage.

Interlocutory means: "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." Black's Law Dictionary 730 (5th ed. 1979). Under this definition, the Commission's order of April 29, 1999, is certainly interlocutory. Sprint's tariff was temporarily suspended thereby, not rejected, and the controversy remains to be decided. Because the order in question was interlocutory, it was appropriately made effective on the date of issue. This point, as well, is without merit.

Sprint next asserts that it refuted AT&T's allegations by providing a detailed analysis to the Staff. Staff, in turn, persuaded thereby, recommended that AT&T's motion be denied. Sprint apparently forgets that this Commission must act on the basis of a record containing competent and substantial evidence. Whatever data or analyses Sprint may have provided to Staff, those items are not contained in the record of this matter. The record contains only the pleadings discussed above in the recitation of the procedural history. Administrative tribunals make records by holding evidentiary hearings. The order of April 29, 1999, is intended to create an appropriate record in this matter as quickly as reasonably possible. A prehearing conference has been set and a proposed procedural order is required. The prompt accomplishment of those steps will see this matter well on its way to hearing.

In the absence of a record, the Commission cannot overlook AT&T's objections to Sprint's proposed tariff sheets. It may be that those objections will eventually be seen to be without substance, but that is a matter which the Commission cannot determine on the present record.

IT IS THEREFORE ORDERED:

1. That the Application for Rehearing and, in the Alternative, Motion to Modify Order filed by Sprint Missouri, Inc., doing business as Sprint, is denied with respect to the request for rehearing.

2. That the Application for Rehearing and, in the Alternative, Motion to Modify Order filed by Sprint Missouri, Inc., doing business as Sprint, is denied with respect to the alternative motion to modify the dates set by the Commission's order of April 29, 1999, for a prehearing conference and for the filing of a proposed procedural schedule.

3. That this order shall become effective on May 21, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

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

Thompson, Deputy Chief Regulatory Law Judge

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COMMISSIONER OF THE
PUBLIC SERVICE COMMISSION