

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY

~~January 26, 1999~~

Feb 4th

CASE NO: TO-99-294

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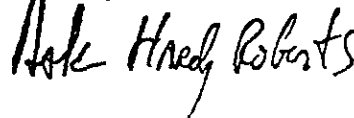
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Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

Uncertified Copy:

W.R. England, III  
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312 E. Capitol Ave., PO Box 456  
Jefferson City, MO 65102

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 4<sup>th</sup>  
day of February, 1999.

In the Matter of the Petition of GTE )  
Midwest Incorporated Regarding Price Cap ) CASE NO. TO-99-294  
Regulation Under RSMo Section 392.245 )  
(1996). )

**ORDER DENYING REHEARING**  
**AND GRANTING RECONSIDERATION**

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**I. Procedural History**

On January 26, 1999, the Commission issued its Order Approving Price Cap Application. This authority was granted pursuant to Section 392.245 of the Missouri Statutes.<sup>1</sup> Section 392.245(2) states, in pertinent part, that once the Commission has determined that an alternative local exchange telecommunications company has been certificated to provide basic

<sup>1</sup> All statutory references herein are to the Revised Statutes of Missouri cumulative supplement 1997 unless otherwise stated.

local telecommunications services and is providing such service in any part of a large incumbent local exchange telecommunication company's service area, the company shall be subject to price cap regulation. (Emphasis added.) The statute does not require notice to the public nor does it state that such determination may only be made after hearing. In fact, the statute does not require findings of fact and conclusions of law but, rather, only anticipates "a determination by the Commission" that such events have occurred.

On January 26, the Staff of the Missouri Public Service Commission (Staff) filed its Motion To Reconsider Order Approving Price Cap Application. On January 28, the Commission issued an order reducing the time within which any response to the Staff's Motion To Reconsider shall be filed. Also, on January 28, the Commission issued an Order Of Correction *Nunc Pro Tunc*. This order of correction noted that the section of the Commission's order referred to as "concurrences" was inadvertently omitted and it set out the vote of the five Commissioners. On January 29, the Office of the Public Counsel (Public Counsel) filed its Motion For Rehearing.

GTE filed its response to both the Staff's Motion For Reconsideration and Public Counsel's Motion For Rehearing on February 1 and along with those responses GTE filed the affidavit of M. Michael Foster which verified the contents of GTE's application as filed on January 7, 1999.

On February 2, AT&T Communications of the Southwest, Inc. (AT&T) filed its Motion For Rehearing Or Reconsideration. AT&T

was not a party to this case nor did it request intervention prior to or contemporaneous with its Application For Rehearing Or Reconsideration. However, the Commission has determined that it need not address this procedure, as it would not be dispositive to the outcome of this case. The Commission will rule upon AT&T's Motion For Rehearing Or Reconsideration along with the motions of Staff and Public Counsel.

## **II. Staff's Motion To Reconsider**

Many of the issues which were raised by Staff in its Motion To Reconsider are the same issues which were raised also by the Public Counsel in its motion. Rather than address those issues twice, the Commission will only address those which are particular to the Staff's pleading at this point.

Staff was served a copy of GTE's application on the date of filing, January 7, 1999. Staff noted that it could have filed a Motion To Intervene during the period between the initial filing and the Commission's Order Approving Price Cap Status. Staff specifically states that "[S]ome assumed the Commission would follow the same procedure in this case as it did in the previous price cap application of SWBT". Staff cites no authority for the proposition that the Commission must follow the same procedure in every case. Staff cites the first price cap case (TO-97-397), as the example which it "assumed" the Commission would follow. This fails to take into account the fact that Case No. TO-97-397 was a case of first impression and required substantially greater scrutiny than the Commission would intend to apply to subsequent applications. Further, Staff cites no authority for the

proposition that a party which has incorrectly "assumed" what procedure might be followed should be given a second chance so that it might rectify its assumption.

Staff also raises the fact that the Commission Agenda<sup>2</sup> indicated only that Case No. TO-99-294 was to be discussed on January 20, and the Commission Agenda for January 26 "merely listed 'Order Regarding Price Cap Application' giving Staff no further information that would have indicated the substance of the order". Staff has failed to cite any authority for the proposition that the Commission is obligated to give Staff or any other party additional information concerning the issues to be taken up at the Commission's Agenda. Until the Commission convenes its public meeting, meets as a body, and records a vote, it cannot publish the outcome of its meeting nor can it anticipate whether any given order will grant or deny the action requested by the parties. To do so would border between speculation and precognition. Furthermore, the "Sunshine Law" as found at Chapter 610.020 requires only that public governmental bodies give notice of the time, date, place of each meeting and its tentative Agenda. The Commission exceeds the statutory requirements by providing that additional detail which it publishes within its Agenda document.

Lastly, Staff addresses an allegation that GTE may be over-earning. Staff alleges that it had begun a preliminary investigation into the possible over-earnings of GTE, however,

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<sup>2</sup>The Commission Agenda, when referred to as a document, is that document which the Commission publishes at least one business day in advance to give public notice of the issues to be taken up at the next Commission Agenda meeting.

the record indicates that that investigation, or at least the data requests which would initiate an investigation, were not sent until January 12, five days after GTE filed its price cap application.

### **III. Public Counsel's Motion for Rehearing**

Public Counsel alleged numerous procedural irregularities in its Motion For Rehearing. However, there is no citation within its ten-page motion to the only two issues which are pertinent to a price cap determination. As set out in Section 392.245.2, the Commission is only required to make two determinations:

(1) that an alternative local exchange telecommunications company has been certificated to provide basic local telecommunications services...in any part of the large incumbent company's service area...and

(2) that the aforementioned competitor "is providing such service in any part of the large incumbent company's service area..."

The plain language of the statute neither requires nor permits the Commission to investigate the various types of issues which Public Counsel has enumerated in its motion. The Commission's conclusion on this matter has been reviewed and upheld by the Cole County Circuit Court.<sup>3</sup> This case, which was brought by the Public Counsel on the Commission's previous price cap determination, resulted in an order from Judge Thomas J. Brown which found that the delay necessary for a complaint

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<sup>3</sup> See State ex. rel. Public Counsel v Public Service Commission, Circuit Court, Cole County, Missouri Case No. CV197-1795CC (August 6, 1998).

proceeding "would be unreasonable and not consistent with the legislature's intent."<sup>4</sup>

While the Staff, Public Counsel, and AT&T may wish for a result which is different from the one which the Commission is mandated to reach, the motions of Staff, Public Counsel, and AT&T to initiate an investigation into GTE's earnings are too late. To quote the Commission's finding in the Southwestern Bell Telephone Company price cap case, "If Staff or OPC believed that SWBT was over-earning, either could have filed a complaint at an earlier point in time."<sup>5</sup> Although the parties had the benefit of the Commission's finding on this very issue in September 1997, they declined to act for the remainder of 1997, for the entirety of 1998, and not until after GTE filed its Application For Price Cap Status in January 1999.

In paragraph two of Public Counsel's Motion, it alleges that the Commission erred as a matter of law when it issued an order approving GTE's application without docketing this petition for hearing, without notifying the public and the industry, without allowing intervention of any interested parties...without giving any party, including the Office of the Public Counsel, an opportunity to be heard...". Public Counsel alleges that the Commission has not notified the public. However, it is the Public Counsel's statutory duty to represent the public<sup>6</sup> and Public Counsel has not denied the fact that it was served with a

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<sup>4</sup> At 5-6.

<sup>5</sup> In re the petition of Southwestern Bell Telephone Company for a determination that it is subject to price cap regulation under Section 392.245, RSMo Supp. 1996, Case No. TO-97-397, Report And Order, page 20, issued September 16, 1997.

<sup>6</sup> Section 386.710

copy of GTE's petition on January 7. Public Counsel not only had constructive knowledge of the application, but it had actual knowledge of the application on the date the application was filed. Public Counsel alleges that the Commission did not allow intervention, however, at no time has the Public Counsel or any other party requested intervention. Similarly, neither the Staff nor the Public Counsel, both of whom had actual notice, moved for a hearing prior to the issuance of the Commission's order.

Although the plain and unambiguous language of Section 392.245 does not require any necessity for notice and/or hearing as may be found in many other sections within Chapter 392<sup>7</sup>. In a perfect world, the Commission would prefer to give notice even when none is required, and in light of the statutory review of this topic as set out in GTE's response it is clear that the Commission has an exemplary record of giving notice when none is required. As in all cases, the Commission must weigh the burden versus the benefit of these procedures just as a court would do. In any event, as indicated in the pleadings and as stated herein, the Commission has in the past offered more notice than was legally required and will endeavor to continue to do so in the future.

The only evidence which could possibly prevent GTE from being granted price cap status would be either that there is no competitive telecommunications company certificated to offer service in GTE's service area or that such company, although

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<sup>7</sup> The Commission will not enumerate these examples as GTE has already done a thorough job of this on page 2 of its response to Public Counsel's motion for rehearing.



certificated, was not actually offering the requisite service. Although Staff, Public Counsel, and AT&T have each offered lengthy motions within which they argue for rehearing, none of them has been able to submit any evidence to dispute the fact that GTE has met the statutory requirement by which it *shall* be granted price cap status. In fact, it is noteworthy that Staff, Public Counsel, and AT&T were each completely silent on this issue in spite of the fact that this is the only issue which is of legal significance in the determination required by Section 392.245.2.

In paragraph O. of Public Counsel's motion, it raises a concern regarding the possible sale of the Lewistown and LaBelle exchanges. The Commission has already addressed this issue and will, in this order, further address the procedure by which the Commission will review any such sale.

Lastly, in paragraph P. of Public Counsel's motion, the Public Counsel alleges that the Commission's order fails to consider any evidence of the justness and reasonableness of the rates subject to price caps. Although Public Counsel goes on to state "There is a real issue of fact in this case as to the appropriateness of capping rates which are in excess of GTE's lawful authority..." the Commission must again remind the parties of the determination of the Cole County Circuit Court on this same issue in the Southwestern Bell Telephone Company's price cap case.

2. Under Section 392.245.2 RSMo Supp. 1997, the application of price cap regulation is mandatory upon the PSC's determination that an alternative local

exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service anywhere in a large incumbent telecommunication company's service area.

3. Once the PSC makes a determination that the criteria specified in Section 392.245.2 RSMo Supp. 1997 has been met, it loses the authority to examine the justness and reasonableness of SWBT's rates, charges, tolls and rentals for telecommunications service.

4. Section 392.245.2 RSMo Supp. 1997 does not explicitly establish any deadlines by which the PSC must make its determination as to whether the criteria specified therein have been met. The statute implicitly requires, however, that the determination be made in a reasonable time.

5. The statutory requirements applicable to small local exchange telecommunication companies supports the view that the determination required under Section 392.245.2 must be made within a reasonable time. Under that section, a small incumbent local exchange telecommunications company may opt into price cap regulation upon simple written notice to the PSC, if the same criteria which makes price cap regulation mandatory for a large incumbent telecommunications company had been met. It would be unreasonable to interpret the statute to permit small incumbent telecommunications companies to opt into price cap regulation upon simple written notice to the PSC, but permit the PSC to unreasonably delay the determination which would make price cap regulation mandatory for large incumbent telecommunications companies.<sup>8</sup>

Rather than continue to respond to Public Counsel's arguments on a point-by-point basis, the Commission would merely note that those arguments are not and could not be dispositive of the outcome of this case and would therefore refer the parties to

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<sup>8</sup> See State ex. rel. Public Counsel v Public Service Commission, Circuit Court, Cole County, Missouri Case No. CV197-1795CC (August 6, 1998). Revised Findings of Fact And Conclusions of Law and Judgment, p. 4-5.

the responsive pleadings by GTE in which each of these arguments has received an appropriate response or clarification.

#### **IV. AT&T's Motion**

AT&T has filed a Motion For Rehearing Or Reconsideration in which it addressed the same basic issues as those contained in the motions of Staff and Public Counsel. AT&T has made the same claim of Staff and Public Counsel in that it argues that fundamental due process concepts as well as long-established Commission practice require both notice and an opportunity to be heard. However, AT&T has not cited any statutory authority for this and AT&T should be aware that previous Commission actions have no precedential value. Assuming for the sake of AT&T's argument, that the Commission was bound by its own precedents, the notice which is specifically and statutorily required in other cases is not relevant in a price cap case where notice is not required. Although AT&T has made a point of citing those procedures in which the Commission routinely gives notice, it has failed to cite other procedures in which the Commission routinely does not issue notice.

In any event, neither procedure is binding precedent as the Commission's mandate is to follow the provisions of the controlling statute. AT&T has alleged that the Commission has relied upon GTE's unverified petition and has erred in doing so without the benefit of any competent and substantial evidence. Prior to the filing of AT&T's motion, GTE has supplied the necessary, and previously omitted, affidavit for its verified

petition. AT&T's argument on this point seems to suggest that the Commission has not and cannot consider its own records.

AT&T's remaining arguments have to do with GTE's hope to sell some of its exchanges, possibly including the exchanges in which it now has competition, and also upon the possibility that GTE is only selling its high-cost exchanges. These issues have been addressed, to some extent, previously in this order and will be finally addressed in the Commission's conclusion.

## **V. Conclusion**

The Commission has thoroughly reviewed the entire record including the pleadings of the Staff, Public Counsel, and AT&T, and has in particular reviewed Section 392.245. Having done so, the Commission finds that none of the applicants for rehearing have provided the Commission with persuasive legal argument demonstrating that the Commission's initial determination is incorrect. The Commission has determined here, just as it determined in the Southwestern Bell Telephone Company price cap case, that in reviewing Section 392.245 in its entirety, the Commission finds nothing in it which would create any ambiguity or which would authorize an earnings investigation of GTE in this context. Much to the contrary, a reading of Section 392.245 in its entirety suggests otherwise.

If the legislature had intended the conversion to price cap regulation to be contingent on the existence of "effective competition," it could have included such language in Section 392.245.2, as it did in Section 392.245.5. Similarly, if the legislature had intended to either require or to allow the

Commission discretion to conduct "one final rate case" in order to rebalance rates prior to conversion to price cap regulation, it could have included such a provision as part of Section 392.245.2. The concept of "over-earnings" is peculiar to rate-base/rate-of-return regulation and has no relevance to price cap regulation. Both regulatory schemes have advantages and disadvantages, and the Commission finds that the legislature chose to require the use of price cap regulation for large incumbent local exchange telecommunications companies upon the occurrence of certain events. Section 392.245.2 contains the mandatory imperative "shall". See Citizens for Rural Preservation v. Robinett, 648 S.W.2d 117, 132 (Mo.App. 1982) (holding that use of the word "shall" generally imposes a mandatory duty upon those entrusted with the implementation of a statute, particularly where the use of the word "shall" is contrasted with use of the word "may" in the same statutory section). Thus, the Commission's discretion to set maximum allowable prices for price cap regulation under Section 392.245 is limited.

Lengthy stays, as required by a rate investigation at this time, are not contemplated by Section 392.245, as Section 392.245.4 provides that except under certain circumstances, the maximum allowable prices of a large incumbent local exchange telecommunications company for basic local telecommunications service and exchange access service shall not be changed prior to January 1, 2000. This provision could not be given realistic effect given the time required for a full-rate proceeding, and is

further suggestive that "one final rate case" was not contemplated by the legislature.

In the Southwestern Bell Telephone Company price cap case, the Commission stated:

While the Commission may be willing to stay a proceeding in an appropriate case, this is not such a case because a rate case was not timely filed. Nevertheless, the Commission will not speculate as to whether it would or could have stayed SWBT's petition in the event that a major rate proceeding was underway but uncompleted at the time the petition was filed.<sup>9</sup>

Finally, the Commission stresses that the application of price cap regulation under Section 392.245.2 will not exempt a company so regulated from the "Commission's jurisdiction over quality and conditions of service or to relieve telecommunications companies from the obligation to comply with Commission rules relating to minimum basic local and interexchange telecommunications service." 392.245.6 Price cap regulation is a method of regulating the maximum prices charged by a company. See §392.245.1.

The Commission has repeatedly committed itself to actively pursuing instances where Missouri's utility customers are receiving substandard or inferior service. The Commission will, in a separate case, encourage Staff, Public Counsel, and any other interested party to pursue allegations of questionable quality of service, and the Commission remains ready to convene hearings and to adduce evidence on those issues.

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<sup>9</sup>Case No. TO-97-397, Report And Order, page 20. (September 16, 1997).

Likewise, the Commission has previously noted its concerns regarding the possibility that GTE may request permission to sell the Lewiston and LaBelle exchanges or for that matter any of its exchanges. Prior to permitting such a sale and transfer to take place, the Commission is committed to ensuring that those exchanges are receiving and will continue to receive adequate service. In addition, prior to authorizing any such sale, the Commission has previously announced its intent to review whether or not such a sale would remove from the effected company the only exchanges in which it has competition.

Should such a sale occur, the Commission would have at least two options. First, the Commission could revoke the price cap status of the applicant or, if it were to be found that the Commission did not have the jurisdiction to revoke price cap status, the Commission may well find that it would not be in the public interest to allow those exchanges to be sold. On these commitments, the Commission has not and will not waiver.

Where the parties have alleged that the Commission relied upon an unverified petition, that alleged irregularity has since been corrected and, in part, forms the basis of this reconsideration. Where the parties have alleged that the Commission took official notice of Commission records without allowing adequate notice to the parties, the Commission first notes the argument of GTE's counsel that at the point at which those actions took place, this case may well have been in a posture which did not require such notice. However, the

Commission is without jurisdiction to make a constitutional determination as to what is or is not a contested case.

Irrespective of that argument, the Commission allowed a ten-day effective date on that order which provided the parties the requisite ten days in which to respond to the information upon which the Commission was acting. The parties have responded and, as indicated above, have alleged error in every other matter except the matter which is of most legal significance, to wit: neither Staff nor Public Counsel has made any allegation that Mark Twain Telecommunications Company is not providing the requisite service within the Lewiston and LaBelle exchanges of GTE's service territory. Having failed to make such an allegation, the determination required of the Commission pursuant to Section 392.245.2 remains unchallenged.

If the Commission were to grant rehearing in this matter, the rule of law would prohibit the parties from raising any new issues in the rehearing which were not raised in the Request For Rehearing. For that reason, the parties would be forbidden to raise the issue of Mark Twain's competition and service in the Lewiston and LaBelle areas and for that reason the parties would be forbidden, by law, to raise the only two issues which are relevant to the Commission's statutory determination. Therefore, the Commission has granted the motion(s) for reconsideration in an effort to address the concerns raised in both the motions for a rehearing and for reconsideration.



## **VI. Ordered Paragraphs**

### **IT IS THEREFORE ORDERED:**

1. That the Staff's Motion For Reconsideration is granted as set out within this order.

2. That the Office of the Public Counsel's Motion For A Rehearing is denied.

3. That the Motion of AT&T Communications of the Southwest, Inc. for Rehearing Or Reconsideration is denied as to the rehearing and granted as to the reconsideration.

4. That the verification filed by G.T.E. Midwest, Inc. is accepted in the record.

5. That all motions or requests not specifically addressed in this order are denied.

6. That this order shall be effective on February 4, 1999.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

(S E A L)

Lumpe, Ch., Crumpton,  
and Drainer, CC., Concur.  
Schemenauer, C., Dissents.  
Murray, C., Absent.

Roberts, Chief Regulatory Law Judge

U/Sec'y. Roberts/Hridgman  
2-3-99 10-99-294  
Date Circulated                      CASE NO.                     

                      
Lumpkin, Chair  
                      
Crumpton, Commissioner  
                      
Murray, Commissioner  
                      
Schemenauer, Commissioner  
                      
Drainer, Vice-Chair

2-4-99  
Agenda Date

Action taken: 3-1 AA

Must Vote Not Later Than                     

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

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson  
City,

Missouri, this 4TH day of FEBRUARY, 1999.



Dale Hardy Roberts

**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

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

In the Matter of the Petition of GTE                    )  
Midwest Incorporated Regarding Price Cap            )  
Regulation Under RSMo Section 392.245            )  
(1996).    )

**TO-99-294**

**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of the Commissioners on granting price cap regulation status to GTE Midwest Incorporated (GTE) without a hearing.

The issues raised by Staff and The Office of Public Counsel should have been examined and evaluated through the hearing process. This would not have unduly delayed the granting of price cap regulation status to GTE and may have moved the Commission to require some operational adjustments on the part of GTE prior to granting price cap regulation status.

Respectfully Submitted,



Robert G. Schemenauer  
Commissioner

Dated at Jefferson City, Missouri,  
On this 4<sup>th</sup> day of February, 1999.