LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
BRIAN K. BOGARD
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

February 20, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Re: Case No. TT-99-428 et al.

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter, please find an original and eight copies of The Small Telephone Company Group's Reply to AT&T and Staff's Responses.

Please see that this filing is brought to the attention of the appropriate Commission personnel. Copies of the enclosed document are being provided to counsel of record. I thank you in advance for your cooperation in this matter.

Sincerely,

Brian T. McCartney

Brian T. McCartney

BTM/lar
Enclosure
cc: Mike Dandino
Marc Poston
Leo Bub
Larry Dority
Thomas Pulliam
Paul S. DeFord
Joseph Murphy
Lisa Creighton-Hendricks
Craig Johnson

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Mid-Missouri Group's Filing to Revise its Access Services Tariff, P.S.C. Mo. No. 2.	)))	CASE NO. TT-99-428 et al.

THE SMALL TELEPHONE COMPANY GROUP'S
REPLY TO AT&T AND STAFF'S *RESPONSES*

COMES NOW the STCG, pursuant to 4 CSR 240-2.080(16) and in reply to AT&T Wireless et al. and Staff's *Responses*, states as follows:

I. SUMMARY

1. AT&T and Staff argue that the Commission should simply "reenter new findings of fact" in this case without supplemental hearing, additional evidence, or proposed findings of fact and conclusions of law. These arguments ignore the record evidence in this case which shows that access rates can and do apply to intraMTA wireless traffic in Missouri. Likewise, neither AT&T nor Staff attempt to distinguish or even address the Commission's three prior decisions (and one subsequent decision) that access rates can apply. AT&T and Staff are also strangely silent regarding Sprint PCS' efforts to receive access compensation in Missouri's state courts, in Missouri's federal courts, and now before the FCC.

2. ***Missouri law prohibits the Commission from putting the cart before the horse by preparing belated findings of fact to support an earlier decision.***[1]

---

[1] See *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, 499 S.W.2d 798, 804[9] (Mo. 1973) (discussed *infra* in ¶8).

II. ARGUMENT

3. This pleading will not attempt to re-argue every point that the STCG has set out in its February 4, 2002 *Joint Motion* and its February 11, 2002 *Response to Order Directing Filing*. Rather, the STCG will simply incorporate the arguments contained in those pleadings by reference.

4. AT&T suggests that the Commission's initial decision lacked "only one fact,"[1] and AT&T urges the Commission to "simply make the appropriate editorial revision to its Report and Order."[2] This suggestion would fail to satisfy Missouri law. First, it would not explain the Commission's conflicting prior and subsequent decisions. Second, it would place the Commission (and its Staff) in the difficult and unenviable position of defending two conflicting decisions before the Court of Appeals at the same time. Third, it would appear to violate Section 536.083's requirement for a new law judge. Fourth, it would ignore subsequent legal developments such as the Missouri cases where Sprint PCS has argued that it is entitled to access charges for terminating traffic, including intraMTA traffic. Fifth, it ignores the requirement that the three new Commissioners must certify that they have either: (a) "read the full record including all of the evidence," or (b) "personally consider[ed] the portions of the record cited or referred to in the arguments or briefs" before issuing a new Report and Order.[3]

---

[1] AT&T Response, p. 1.

[2] AT&T Response, p. 5.

[3] Section 536.080 RSMo 2000; *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 30[8] (Mo. banc 1975)("[W]e do emphasize that it is a basic and fundamental rule of law that one making a decision be aware by some means

5. AT&T also argues that the STCG fails to mention "any conflicting issue of fact on which the Commission failed to make a finding."[1] However, the STCG's February 4, 2002 *Motion* cites three prior cases where the Commission has held that access does apply to intra-MTA traffic, and the STCG's February 11, 2002 *Response to Order Directing Filing* cites three examples in the record in this case where it is established that access rates apply to intraMTA traffic:

(1) When AT&T wireless delivers intra-MTA traffic over the facilities of AT&T Long Distance, access compensation is paid to the LECs.[2]

(2) SWBT's wireless interconnection tariff contains access-based rates that were initially based upon, and are now actually higher than, SWBT's access rates.[3]

(3) The Commission's Appellate Brief before the Western District admits that access does apply to intra-MTA wireless traffic delivered by an interexchange carrier (IXC). The Commission's Appellate Brief stated, "***If the intervening carrier is an IXC, the [small companies] are paid for terminating access.***"[4]

---

of what he is deciding.") In *Jackson County*, the Missouri Supreme Court gave a new PSC Commissioner ten days to certify that he had complied with the statute.

[1] AT&T's Response, p. 2.

[2] AT&T pays access. The evidence in this case demonstrates that AT&T pays access compensation on intra-MTA traffic delivered to the small companies. (Tr. 245) Access is also paid on some of Sprint PCS' intra-MTA traffic. (Tr. 345)

[3] SWBT has access-based rates. The evidence in this case demonstrates that SWBT receives access-based compensation on intra-MTA wireless traffic under its wireless interconnection tariff. (Tr. 377; 381-82; 391-92; *see also* Ex. 16)

[4] Missouri Public Service Commission's Initial Brief, p. 10 (emphasis added).

Thus, the STCG has cited essential facts which the Commission's initial *Report and Order* failed to address. AT&T's pleading completely ignores these facts, and AT&T urges the Commission to make the same mistake by ignoring the record evidence in this case.

6. Although Staff recognizes that the Commission may rehear this case, Staff suggests that the Commission should simply "reenter new findings of fact and conclusions of law."[1] Staff's proposal is circular and ultimately flawed. First of all, the Commission cannot "reenter new findings of fact" without reopening the record to accept those "new" findings. For example, the Commission has ordered the parties to file stipulated facts. If the Commission is to review these stipulated facts, then it necessarily must re-open the record to do so. It is also illogical for Staff to advocate "reentering" findings that have been deemed insufficient by the Circuit Court and the Court of Appeals.

7. Neither AT&T nor Staff address the fact that the Commission's initial decision in this case conflicts with the Commission's prior decisions in the *Chariton Valley*, *Mid-Missouri*, and *United* cases. The Commission's initial decision in this case also conflicts with the Commission's subsequent decision in the *Mark Twain Rural Telephone Company* case. When administrative agencies depart from their prior holdings, they must provide some rationale for doing so.[2] None was offered in this

---

[1] Staff Response, p. 2.

[2] *Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 93 S. Ct. 2367 (1973) (Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done

case. In the *Mark Twain* case, the Commission held that access-based rates were appropriate in the absence of an interconnection agreement. The *Mark Twain* case was affirmed by the Cole County Circuit Court, and it is now before the Court of Appeals. Curiously, the Commission does not appear to be troubled by the prospect of defending two inconsistent decisions before the Court of Appeals at the same time.

8. In this case, the Commission issued a decision without proper findings of fact or conclusions of law. Both the Circuit Court and the Court of Appeals found that the Commission's findings were inadequate. The Commission cannot now place the cart before the horse by preparing belated findings of fact to support its earlier decision. In *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, the Missouri Supreme Court explained:

> An agency's determination of findings is not a separate function from its decision in a case. The agency's findings of fact and conclusions of law are an essential part of and are the basis for its decision. ***The two cannot be separated, nor can the agency put the cart before the horse, as was done in this case, by making a decision and then later making findings of fact and conclusions of law which will support that decision.***[1]

---

so in this case; *Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.")

[1] *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, 499 S.W.2d 798, 804[9] (Mo 1973).

Likewise, in *Brown v. Alberda*, the Court of Appeals stated:

> In conclusion, we again note that ***findings of fact and conclusions of law should be prepared at the time the administrative agency makes its decision, not at some later time when prompted by a petition for review.***[1]

In *Meadowbrook Country Club v. State Tax Comm'n*,[2] the State Tax Commission conceded that it had failed to make proper findings of fact and conclusions of law concurrently with its decision, but Missouri Supreme Court ***rejected*** the Commission's request to simply "have the case remanded to the Commission so that it could hand down findings of fact and conclusions of law as required by Section 536.090."[3] The *Meadowbrook* court held that under the *Stephen* case, ***a remand for failure to issue findings of fact and conclusions of law in conjunction with a decision required the Commission to consider all relevant factors in the record.***[4]

In *Hughes v. Board of Education*,[5] the Court of Appeals held that the board's failure to make findings of fact and conclusions of law to support its decision required reversal and remand. The *Hughes* court advised:

---

[1] *Brown v. Alberda*, 579 S.W.2d 718, 721[4] (Mo. Ct. App. ED 1979).

[2] *Meadowbrook Country Club v. State Tax Comm'n*, 538 S.W.2d 310 (Mo. banc 1976).

[3] *Id.* at p. 311[1].

[4] *Id.*

[5] *Hughes v. Board of Education*, 599 S.W.2d 254 (Mo. Ct. App. SD 1980).

> Since the case must be reversed and remanded, ***we remind that the board may not put the cart before the horse by making belated findings of fact and conclusions of law to support its earlier decision.***[1]

Accordingly, the *Hughes* court instructed the board to reopen the hearing, hear additional evidence if appropriate, and "make findings of fact and conclusions of law supporting ***any subsequent decision*** that the board may make in this case."[2] Thus, the Commission should issue a procedural schedule for supplemental hearing, additional briefing, and proposed findings of fact and conclusions of law.

9. AT&T claims that "there is no need or basis to assign a new regulatory law judge," but AT&T ignores the fact that the Commission's decision has been reversed and remanded. In *Lightfoot v. Springfield*, the Missouri Supreme Court explained:

> Our courts may only review and affirm or set aside or ***reverse and remand*** the Commission's rate-fixing orders.[3]

For the same language, see *State ex rel. GTE North v. Missouri Public Service Comm'n.*[4] Therefore, the Commission should: (a) assign this case to a new judge; and (b) establish a procedural schedule for supplemental hearings, additional briefing, and proposed findings of fact and conclusion of law.

---

[1] *Id.* at 256[3] (emphasis added).

[2] *Id.* (emphasis added).

[3] *Lightfoot v. Springfield*, 236 S.W.2d 348, 353[7] (Mo. 1951) (emphasis added).

[4] *State ex rel. GTE North v. Missouri Public Service Comm'n*, 835 S.W.2d 356, 361[5] (Mo. Ct. App. WD 1992).

III. CONCLUSION

WHEREFORE, the STCG respectfully requests that the Commission issue an order: (a) assigning this case to a new law judge; and (b) establishing a procedural schedule for supplemental hearing, additional briefing, and proposed findings of fact and conclusions of law.

RESPECTFULLY SUBMITTED,

Brian T. McCartney

W.R. England, III Mo. Bar 23975
Brian T. McCartney Mo. Bar 47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
Jefferson City, MO 65102
trip@brydonlaw.com
brian@brydonlaw.com

Counsel for the STCG

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed or hand-delivered, this 20th day of February, 2002, to:

Mike Dandino
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Marc Poston
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Leo Bub
Southwestern Bell Telephone Company
One Bell Center, Room 3518
St. Louis, MO 63101

Paul S. DeFord
Lathrop and Gage
2345 Grand Blvd
Kansas City, MO 64108

Larry Dority
Fischer and Dority P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101

Joseph Murphy
Meyer Capel P.C.
306 W. Church Street
Champaign, Illinois 61820

Thomas Pulliam
Ottsen, Mauze, Leggat & Belz, L.C.
112 S. Hanley
St. Louis, MO 63105

Lisa Creighton-Hendricks
Sprint Missouri, Inc.
5454 W. 110th Street
Overland Park, KS 66211

Craig Johnson
Andereck, Evans, Milne, Peace & Johnson
700 E. Capitol Ave
P.O. Box 1438
Jefferson City, MO 65102

Brian T. McCartney

W.R. England, III/Brian T. McCartney