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September 20, 1999

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

FILED 2
SEP 20 1999
Missouri Public Service Commission

Re: Case No. TO-2000-16

Dear Mr. Roberts:

Enclosed for filing with the Missouri Public Service Commission, please find an original and fourteen (14) copies of the Response of the Small Telephone Company Group to the Missouri Public Service Commission Staff Report of Investigation and Request for Evidentiary Hearing.

Please see that this filing is brought to the attention of the appropriate Commission personnel. If there are any questions regarding this filing, please feel free to give me a call at your convenience. Otherwise, I thank you in advance for your cooperation in this matter.

Sincerely,

W.R. England, III

WRE/da
Enclosure
cc: Parties of Record

FILED[2]

SEP 2 0 1999

Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Motion to Establish a Docket Investigating the IntraLATA Toll Service Provisioning Practices of Missouri Interexchange Carriers, Public Utility or Common Carrier Duties of Interexchange Carriers, Motion to Show Cause, Request for Emergency Hearing, and Alternative Petition for Suspension and Modification.	)	Case No. TO-2000-16

Response of the Small Telephone Company Group to the Missouri Public Service Commission Staff Report of Investigation and Request for Evidentiary Hearing

Comes now the Small Telephone Company Group (STCG)[1] and for its Reply to the Missouri Public Service Commission Staff (Staff) Report of Investigation states to the Missouri Public Service Commission (Commission) as follows:

1. On August 10, 1999, the Commission issued an Order Directing Notice, Directing Reports, and Requiring Record Collection in which it, among other things, directed Staff to investigate AT&T's refusal to serve customers in Secondary Carrier (SC) exchanges and to file a verified report of the results of its investigation. In addition, the Commission permitted parties to file replies to the Staff Report no later than September 20, 1999. Accordingly, the STCG takes this opportunity to submit the following response to the Staff Report filed on or about September 8, 1999. In addition, the STCG requests an evidentiary hearing on issues of fact which underlie many of the legal issues addressed in Staff's Report.

Introduction

2. Before addressing each of the enumerated issues in Staff's Report, the STCG initially

[1]Members of the STCG are listed on Exhibit 1 attached hereto.

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notes that it disagrees with virtually every major conclusion reached by Staff in its Report. Not only has Staff misconstrued the relevant law, it has reached an ultimate conclusion which, when taken in a broader sense, sets the notion of public utility service on its head. There is no dispute that AT&T Communications of the Southwest (AT&T) is a "public utility" as that term is defined by the Public Service Commission law.[2] A public utility is one which has dedicated its facilities for the public use, State ex rel. M.O. Danciger & Company v. Public Service Commission, 205 S.W.36, 40 (Mo. 1918) and State ex rel. Lohman Farmers Mutual Telephone Company v. Brown, 19 S.W.2d 1048 (Mo. 1929). Having dedicated its facilities to the public use, a public utility is thus subject to the jurisdiction, control and regulation of the Commission. §386.020(42) RSMo. Supp. 1998. The obligations of a public utility company are specifically set forth in the statutes and the case law that has developed interpreting such statutes.[3] Generally speaking, a public utility is obligated to provide service to all similarly situated customers (both existing and new) under the same rates, terms and conditions. While it is acknowledged that the notion of competition (particularly in the telecommunications industry) may be at odds with some of the traditional notions of public utility obligations, the fact of the matter is that even competitive companies must abide by these statutes, unless the Commission has specifically waived such statutory provision(s). (See §392.420 RSMo. 1994). It is significant to note that Staff cites no specific waiver of AT&T's obligation, as a public utility, to provide service to all those customers wherein AT&T professes to provide service. It is also important to remember

[2]Staff readily concedes this point at page 6 of its Report.

[3]For example, one need look no further than §392.200 RSMo. Supp. 1998 to find such obligations as providing safe and adequate service and prohibitions against discrimination.

that in construing the statutes, the Commission, among other things, must be concerned with the promotion of "universally available and widely affordable telecommunications service" as well as the promotion of "parity of urban and rural telecommunications services." (§392.185(1)(7) RSMo. Supp. 1998) In its Report, not only has Staff failed to keep these goals in mind, it has also failed to consider the ramifications of its conclusions upon public utility obligations generally.

Issue No. 1

Under the terms of AT&T's currently effective tariffs does AT&T have an obligation to provide 1+ intraLATA service to all customers who request service where AT&T has sufficient facilities in place?

3. This question erroneously assumes that a public utility's obligation to serve is premised on its approved tariff. As noted previously, the fact that a public utility has devoted its facilities to the public use creates the obligations set forth in the statutes and the case law. This is not to say that a public utility cannot place restrictions upon its services through its lawfully approved tariffs. For example, a telecommunications company may limit the geographic area within which it proposes to offer service.[4]

4. Staff makes a cursory review of AT&T's tariff and concludes that it does "not claim to guarantee the company will provide 1+ intraLATA toll service to any requesting customer." However, Staff fails to state that AT&T's toll tariff does not restrict the provision of 1+

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[4]Although Fiber Four Corporation d/b/a Rock Port Long Distance possesses a certificate of service to provide intrastate interexchange telecommunications services, it has limited its offering to only those customers located in the local exchanges served by Rock Port Telephone Company.

intraLATA toll service to any geographic or market area. In other words, AT&T's tariff does not say that 1+ intraLATA toll service is not available. Staff also fails to note relevant portions from AT&T's tariff which makes it clear that it is a "statewide offering" of intraLATA message telecommunication service. AT&T's application of tariff sheet states as follows:

> This tariff applies to message telecommunication service furnished or made available by AT&T Communications of the Southwest, Inc., hereinafter referred to as the Company, or furnished jointly with other carriers to its authorized territories within the state of Missouri. (emphasis supplied) (PSC Mo. No. 15, Section 1, 1st Revised Sheet No. 1, effective November 17, 1993)

In defining the application of the tariff, AT&T goes on to say

> This tariff applies to message telecommunications service furnished or made available by AT&T Communications of the Southwest, Inc. over service components wholly or partly within the state of Missouri, between two or more points within the state of Missouri, both intraLATA and interLATA, where the respective rate centers of such points are also located in the Missouri. (PSC Mo. No. 15, Section 1, 3rd Revised Sheet No. 1, effective July 26, 1999) (emphasis added)

The STCG's review of AT&T's MTS tariff (at least the tariff that was effective as of July 12 of this year) revealed no "territorial" restriction on the availability of AT&T's 1+ intraLATA message toll telecommunications service. Accordingly, on its face, AT&T's tariff sets forth rates, terms and conditions for various toll services which are available throughout the state of Missouri. If AT&T seeks to restrict its services to a geographic or market area, then it must clearly state so in its tariff (and, of course, the Commission must approve such restriction). To date, AT&T has proposed no such restriction, nor has this Commission approved any such restriction.

Issue No. 2

Does AT&T have sufficient facilities in place throughout the state to be able to serve

1+ intraLATA customers?

5. This issue is significant because this is an area in which AT&T's tariff indicates a limitation on its ability to provide service. For example, in its general regulations under "availability of services," AT&T's tariff states as follows:

> Service is furnished subject to the availability of the service components required. The Company will (1) determine which of those components shall be used and (2) make modifications to those components at its option. (PSC Mo. No. 15, Section 1, 1st Revised Sheet 2, effective January 5, 1994)

This is obviously a "factual" determination which will require an evidentiary record before the Commission can make any such finding. Staff readily concedes that it "has been unable to obtain the data for such an analysis." (See Report, p. 5) If Staff's Report had concluded with this remark, the STCG would have little, if any, reply. However, undeterred by the lack of any factual information, Staff nevertheless concludes that "AT&T probably does not have sufficient facilities to provide such service." (See Report, p. 5) This conclusion, by Staff's own admission, is unsupported and ought to be summarily disregarded by the Commission. Before the Commission can make a determination on this issue it must have relevant and competent factual information. In that regard, it is AT&T's responsibility to bring forward evidence of the fact that it lacks the "service components" necessary to provide 1+ intraLATA service. AT&T has not even attempted to do so.

<u>Issue No. 3</u>

Does AT&T have an obligation as a common carrier or public utility to provide 1+ intraLATA service to customers who request it?

6. As previously noted, AT&T has an obligation as a public utility to provide service to

all customers (both existing and new) within its certificated area under the same rates, terms and conditions. As will be discussed under Issue No. 4 later, AT&T may not discriminate between customers or localities in the provision of its service unless it can demonstrate by clear and convincing evidence, and the Commission finds, that it is in the public interest to do so.

Staff is simply wrong when it states that "(a)lthough the term 'public utility' is defined by statute, the statute does not impose any specific obligation upon AT&T or any IXC as a 'public utility,' other than to state that public utilities are subject to the regulation by the Commission." (See Report, p. 5) As noted previously, public utilities have an obligation to provide service to the public on the same rates, terms and conditions. The obligations of a public utility are not only imposed by the statutes (which make up the Public Service Commission Law) but also by the case law which is developed as a result thereof. The statutes, as will be discussed in Issue No. 4 later, provide, among other things, that utilities will not discriminate among customers nor among localities. §392.200 RSMo. Supp. 1998.

Issue No. 4

Does AT&T's offering of 1+ intraLATA toll services to customers in some exchanges and only dial around intraLATA toll service in other exchanges violate any Missouri law, particularly §392.200, RSMo.?

7. While it is true that §392.200 RSMo. does not specifically reference "intraLATA toll services," it does provide a framework for the prohibition of discriminatory rates and practices by a telecommunications company acting as a public utility. Staff's "careful line by line analysis of the statutes" notwithstanding, AT&T's practice of providing 1+ service in some exchanges, but not in others, is, on its face, a clear violation of several of the provisions of this statute.

8. §392.200.1 RSMo. Supp. 1998 essentially requires telecommunications companies, such as AT&T, to furnish facilities that are adequate and, in all respects, just and reasonable. Staff says it is impossible to imagine that the Legislature in enacting this statute intended to require any company to provide any additional services or to serve any additional customers. (Staff Report, p. 7) Nothing could be further from the truth. If Staff's interpretation is correct, then a public utility would not be required to provide service to new customers in its existing certificated area. For example, would Staff reach the same conclusion if a small local exchange company (LEC) unilaterally told a new customer that it would not extend new service to that customer because it would be too costly to provide service? Of course not. If that new customer is willing to accept service under the same rate terms and conditions as other, existing customers, the small LEC is obligated to make service available to that new customer under the same rates, terms and conditions as are applicable to any of its other customers. This is what it means to be a public utility. Clearly that is the intent of the Legislature, and it is the state of public utility law. Again, public utilities have an obligation to provide safe and adequate facilities to all customers, both existing and new, who are willing to abide by the rates, terms and conditions of the public utility's approved tariffs. As noted at the outset of this response, Staff's attempt to draw a line between existing and new customers is fundamentally repugnant to the notion of utility regulation.

9. Subsection 392.200.2 generally prohibits rate discrimination. Again, Staff incredulously says this only applies to existing customers. The next logical step is for Staff to say that a utility can charge existing customers one rate and new customers another rate even though they are in all other respects similarly situated. This is clearly an unjust result. Perhaps

most distressing is Staff's statement at page 8 of its Report that "the question of whether 1+ intraLATA service and dial around intraLATA service are 'like and contemporaneous service(s) . . . under . . . substantially the same circumstances and conditions' has not been definitively resolved." Apparently Staff has forgotten the lengthy and contentious debate that has gone on since Divestiture regarding "equal access" and "dialing parity." The whole purpose of mandating dialing parity is that anything less than 1+ dialing is not equal. If the two services were the same, substitutable or equivalent, as Staff seems to suggest, then there would be no reason for the Telecommunications Act, the FCC and this Commission to require intraLATA dialing parity. For Staff to now suggest that these two services are the same is truly unbelievable. This is particularly so in light of AT&T's (and other IXCs) protestations to the contrary.

10. §392.200.3 specifically prohibits a telecommunications company from giving a preference or advantage to any person, corporation or locality. Staff's analysis focuses on the preference from one customer to another, but neglects to address the preference of one locality over another. Clearly, AT&T's proposal to provide 1+ intraLATA toll in some areas of the state but not in others is, on its face, a violation of this subsection of the statute. Staff also reaches the inexplicable conclusion that this subsection applies to discrimination between customers of AT&T, but does not compel AT&T to serve new customers at a loss. (Staff Report, p. 9) In the first place, Staff offers no evidence that serving new customers will result in a loss to AT&T.[5] However, even if that is the case, as a public utility, AT&T is still required to provide service to

[5]Indeed, the evidence in previous cases would suggest that AT&T loses no more money in providing intraLATA toll service to customers in SC exchanges than it would in providing such service to customers in GTE and Sprint exchanges because GTE and Sprint access rates are, in many instances, higher than those of the SCs.

new customers unless it files (and gains approval of) a tariff which allows AT&T to restrict or limit its service offerings. If AT&T seeks to discriminate between customers based on cost, then it is incumbent upon AT&T to demonstrate by clear and convincing evidence that the costs of serving one class of customers are different than the cost of serving another class. Even then the Commission must find that it is in the public interest to permit such rate discrimination.

11. Subsection 392.200.4 generally prohibits a telecommunications company from defining a telecommunications service as a different service based on the geographic area or other market segmentation within which the service is offered or provided. This prohibition may be overcome where a telecommunications company can demonstrate that the definition of such service (based on geographic or market area) is reasonably necessary to promote the public interest and the purposes and policies of the Public Service Commission Law. Again, AT&T has not offered any evidence (let alone clear and convincing evidence) that its proposal to offer 1+ intraLATA service in some parts of the state and not in others is reasonably necessary to promote the public interest and the purposes and policies of the Public Service Commission law. Staff's conclusion that AT&T's practices do not violate this subsection of the statute is erroneously based on the notion that AT&T's refusal to provide 1+ intraLATA service is not based on geographic or other market segmentation but rather upon the costs that AT&T must incur to provide this service. Staff confuses a rationale for geographic/market segmentation (such as cost) with the end result. The fact of the matter is that AT&T does offer a service in one part of the state that it doesn't offer in other parts of the state which has resulted in geographic or market segmentation of AT&T's 1+ intraLATA toll service. Staff seems to accept on faith that this is geographic segmentation permissible because the costs are different. Again, not only is Staff's

assumption unsupported by any evidence, but it does not explain why AT&T continues to offer 1+ intraLATA toll service in GTE and Sprint exchanges where the costs to AT&T are similar if not higher than they are in SC exchanges.

Issue No. 5

Did the Commission order AT&T to provide 1+ intraLATA toll service?

12. This is a new issue framed by the Staff and not posed by the Commission. The problem with this issue is that it assumes that a Commission order is required to impose "public utility obligations" upon a public utility. As previously stated, once an entity devotes its facilities to the public use, as AT&T has done, certain obligations attach by virtue of the statutes and case law of this state. While the Commission may not have "ordered" AT&T to provide 1+ intraLATA toll service, AT&T has, nevertheless, undertaken to provide 1+ intraLATA toll service and, to date, it has not specifically requested permission, either through an application or a tariff filing, to limit or restrict the availability of that service.

Issue No. 6

Does AT&T have an obligation as a carrier of last resort to provide 1+ intraLATA toll service?

13. Again this is an issue framed by the Staff not posed by the Commission. The STCG would agree that AT&T does not have an obligation as a "carrier of last resort" to provide 1+ intraLATA toll service. However, once AT&T has professed to offer that service on a statewide, unrestricted basis, it may not discriminately withhold that service without obtaining specific Commission approval to do so.

Request for Evidentiary Hearing

14. As previously indicated in this response, there are a number of factual issues which the Commission must consider before it can make a determination as to whether or not AT&T is living up to its public utility obligations. For example, the Commission must determine whether AT&T has professed to offer statewide toll service (including intraLATA 1+ toll). This can only be determined from AT&T's actions and representations. In addition, if AT&T is desirous of limiting its service in the state, then it must follow the mandates of the statutes regarding rate and geographic discrimination and demonstrate, by clear and convincing evidence, that any such discrimination is not undue. The Commission must also find that such discrimination is consistent with the public interest and the purposes of the Public Service Commission Law. The United States Supreme Court has indicated in a 1942 case involving the Interstate Commerce Commission that the issue of whether a preference or advantage or discrimination is undue, unreasonable or unjust is a "question of fact" and best left to the judgment and discretion of the Commission, Board of Trade of Kansas City Mo et al. v. United States et. al., 314 U.S. 534 at 546. Thus, in order to make the necessary findings in this particular case, the Missouri Commission will need to hold evidentiary hearings.

Conclusion

The STCG is, to say the least, disappointed with Staff's analysis of the law with respect to AT&T's obligation as a public utility. The Commission needs to consider very carefully the implications and ramifications of Staff's analysis upon other public utilities (not just telecommunications carriers). For example, the notion that public utilities are not required to provide service under the same rates, terms and conditions to new customers that they do to existing customers is dangerous precedent which the STCG does not believe this Commission wants to set. Taken to its logical extent, this would mean that public utilities such as electric, gas, water and sewer utilities are no longer obligated to provide service to new customers who request it and are willing to abide by the terms of the utility's approved tariffs. Furthermore, the STCG does not believe that the Commission has an adequate factual basis upon which to make any final determination at this point in this proceeding regarding whether AT&T's proposed discriminatory treatment of customers in SC exchanges is lawful, reasonable or in the public interest. At the very least, the Commission needs to hold evidentiary hearings to identify the extent of AT&T's profession of service, the availability and adequacy of those facilities and the reasons why the proposed discrimination between customers and/or localities is in the public interest and consistent with the Public Service Commission Law.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 20th day of September, 1999.

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September 20, 1999

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SMALL TELEPHONE COMPANY GROUP (STCG)

Alltel Missouri Inc.
BPS Telephone Company
Cass County Telephone Company
Citizens Telephone Company of Higginsville, Missouri, Inc.
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corporation
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
Mark Twain Rural Telephone Company
McDonald County Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Co.
Ozark Telephone Company
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Exchange, Inc.
Stoutland Telephone Company

Exhibit 1