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February 1, 1999

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

RE: *GTE Midwest Incorporated*
Case No. TO-99-294

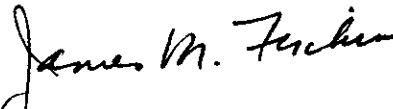
FILED
FEB 1 1999
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed are the original and fourteen (14) copies of Response of GTE Midwest Incorporated to the Office of the Public Counsel's Motion for Rehearing for filing in the above-referenced matter. A copy of the foregoing Response of GTE Midwest Incorporated to the Office of the Public Counsel's Motion for Rehearing has been hand-delivered or mailed this date to parties of record.

Thank you for your attention to this matter.

Sincerely,


James M. Fischer

/jr
Enclosures

cc: Office of the Public Counsel

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED
FEB 1 1999
Missouri Public
Service Commission

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

**RESPONSE OF GTE MIDWEST INCORPORATED
TO THE OFFICE OF THE PUBLIC COUNSEL'S
MOTION FOR REHEARING**

COMES NOW GTE Midwest Incorporated ("GTE"), by and through its counsel, and respectfully responds to the Office of the Public Counsel's ("Public Counsel") Motion for Rehearing filed on January 29, 1999, and in support of its Response states:

1. On January 26, 1999, the Commission issued its Order Approving Price Cap Application in which the Commission determined that GTE "has met the prerequisites of Section 392.245.2, RSMo (Cum. Supp. 1997), and may therefore convert from rate base/rate of return regulation to price cap regulation." (Order, pp. 5-6).

2. On or about January 29, 1999, the Public Counsel filed its Motion for Rehearing, requesting that the Commission set aside its order, issue a notice to all interested parties, establish an intervention deadline and procedural schedule, and hold an evidentiary hearing on the application.

3. In its Motion, the Public Counsel raises a long litany of procedural matters to support its position that a rehearing of the Commission's Order Approving Price Cap Application should be granted. When carefully reviewed, the Public Counsel's points of error are largely based upon Public Counsel's incorrect assertion that: "The Commission must hold a hearing to receive evidence to support the eligibility of GTE" for price cap regulation. (Motion at 4-5). As discussed below, this

fundamental assertion is not correct as a matter of law, and the other alleged “errors” raised by Public Counsel do not provide sufficient grounds for a rehearing.¹ The Commission should accordingly deny Public Counsel’s Motion for Rehearing.

4. Section 392.245(2), RSMo (Cum. Supp. 1997), is the controlling statutory provision for this proceeding. This statute states, in part:

A large incumbent local exchange telecommunications company shall be subject to [price cap] regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company’s service area. . . .

Section 392.245(2) does not include a requirement for “notice and hearing,” as argued by Public Counsel. Under Section 392.245(2), a large incumbent local exchange telecommunications company is subject to price cap regulation when the Commission makes two simple determinations: (1) that an alternative local exchange company has been certified to provide local exchange telecommunications service; and (2) an alternative local exchange telecommunications company is providing such service in any part of the large incumbent company’s service area. The controlling statute does not contain a requirement that these determinations must be made “after notice and hearing.” The absence of such “after notice and hearing” language from Section 392.245(2) is in stark contrast to the procedures mandated by the legislature for other actions and findings by the

¹The Public Counsel, however, correctly noted that GTE’s Petition did not contain a Verification. In order to remedy this technical oversight, GTE is supplementing the record with a Verification of M. Michael Foster, Regional President–GTE Midwest Incorporated attesting to the truth of the facts contained in the Petition, and would request leave to include it as part of its Petition.

Public Service Commission Law.² If the legislature had intended to require “notice and hearing,” as suggested by the Public Counsel, then it would have included those requirements in Section 392.245(2). Since the legislature did not include the “after notice and hearing” requirement in Section 392.245(2), this controlling statute should not be construed by the Commission to require additional notice or an evidentiary hearing in this proceeding.

5. The procedures that were mandated by the legislature in Section 392.245(2) are more analogous to the procedures that have been traditionally followed by the Commission for applications involving transfers of assets, mergers and consolidations,³ financing cases,⁴ stock dividends,⁵ and private shared tenant service certificates.⁶ As the Commission is aware, these procedures do not include providing formal notice of the application to all telecommunications companies, establishing intervention dates, or holding formal evidentiary hearings. Typically, the

²In contrast to Section 392.245(2), RSMo (Cum. Supp. 1997), the following statutory provisions specifically require “notice and hearing” for other actions of the Commission: Section 392.210(2) (system of accounts); Section 392.220(6), (revocation of certificates); Sections 392.230(5) (changing rates for small telephone companies); Section 392.240(1) and (2) (changing rates for all telecommunications companies); Section 392.240(3) (ordering interconnections between companies); Section 392.250 (ordering repairs, improvements and changes to facilities); Section 392.280 (depreciation rates); Section 392.361.(2) (classification of telecommunications companies); Section 392.361(7) (rate complaints); Section 392.370(2) (extension or reinstatement of transitionally competitive status); Section 392.400(2) and (3) (procedures for noncompetitive companies); Section 392.410(5) (modification of certificates); Sections 392.440 and 392.450 (certificates of service authority); Sections 392.450 and 392.451 (certificates of local exchange service); Section 392.460 (abandonment of service); Section 392.490(2) (transitionally competitive company tariffs); Section 392.510(2) (modification of range of rates); and Section 392.515(2) (operator service rules).

³See Section 392.300.

⁴See Section 392.310.

⁵See Section 392.320.

⁶See Section 392.520.

initial pleadings are served on the Office of the Public Counsel, as required by Section 386.700.⁷

The Commission evaluates the merits of the application, based upon the information in the Application, and other supporting information provided by the Applicant and the Staff. In such proceedings, there is no statutory or other due process requirement for notice and hearing. As a result, the matters are often handled in a more informal manner.⁸

6. In the case at hand, the Commission made the determinations required by the statute when it made the following findings at pages 3-4 of its Order:

- a) GTE is a local exchange telecommunications company which has been authorized to provide and has provided basic local telecommunications services in a specific geographical area in the state of Missouri prior to December 31, 1995, and thus is an incumbent local exchange telecommunications company as defined in Section 386.020(22).
- b) GTE has at least 100,000 access lines in the state of Missouri, and thus is a large local exchange telecommunications company as defined in Section 386.020(30).
- c) Mark Twain received a certificate of service authority to provide basic local telecommunications service on May 19, 1998 in Case No. TA-98-305. That certificate became effective simultaneously with the effective date of Mark Twain's tariff, which was approved on July 23, 1998, to become effective for service on and after July 28, 1998.

⁷In this proceeding, GTE served the Office of the Public Counsel with its Petition on January 7, 1999, as required by Section 386.700(2). (See Certificate of Service attached to Petition). Prior to the filing of its Motion for Rehearing, the Public Counsel had previously never asserted an interest in the proceeding or requested the scheduling of an evidentiary hearing. As a result, Public Counsel should not now be heard to complain that it did not have notice and the opportunity to be heard.

⁸ Section 536.060 specifically authorizes summary action by state agencies when it states in part: "... [N]othing contained in Sections 536.060 to 536.095 [of the Administrative Procedures and Review Act] shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law. . .".

d) Mark Twain received its certificate of service authority to provide basic local telecommunications services subsequent to December 31, 1995, and thus is an alternative local exchange telecommunications company as defined in Section 386.020(1).

e) Mark Twain has been providing basic local telecommunications service on a resale basis to customers in the Lewiston and LaBelle exchanges for the period following July 28, 1998.

f) The Lewiston and LaBelle exchanges are part of GTE's service area.

7. In its Motion for Rehearing, the Public Counsel does not directly challenge the accuracy of any of the findings and determinations made by the Commission. However, the Public Counsel argues that the Commission did not follow the procedures of Section 536.070(5) relating to the taking of official notice. The Public Counsel's criticism is misplaced since Section 536.070, on its face, applies only to "any contested case." Section 536.010(2) defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Id. Since Section 392.245(2) does not require a hearing, this matter is not a "contested case" and none of the "contested case" provisions of the Administrative Procedures and Review Act would apply.⁹

8. Similarly, Public Counsel's criticisms that the Order was not based upon "competent and substantial evidence" are also in error. Since this matter is not a contested case, there is no requirement that the decision be based upon "competent and substantial evidence."¹⁰ As discussed

⁹For example, the following statutory provisions apply solely to "contested cases": Section 536.067 (Notice provisions); Section 536.070 (Right to call witnesses, cross-examine, etc.); Section 536.075 (Discovery); Section 536.077 (Subpoena issuance); Section 536.080 (Right to file briefs or orally argue).

¹⁰See State ex rel. Beaufort Transfer Company v. Public Service Commission, 593 S.W.2d 241 (Mo.App. W.D. 1979)(In those cases where no hearing is required and none is held,

in GTE's Response to the Staff's Motion to Reconsider Order Approving Price Cap Application being filed simultaneously herewith, the Commission's findings and determinations are supported by the Commission's own regulatory orders, information contained in other records of the agency, and the Petition itself. If the Commission desires to address any of Public Counsel's criticisms of its findings, it could merely be more explicit regarding the sources of the information relied upon by the Commission. Clearly, all the information necessary to make the appropriate determinations are contained in the records of the Commission and the Petition itself.

9. The Public Counsel also criticizes the Commission's failure "to demonstrate on the face of the order that it was adopted by the Commission, that it was adopted by a majority of the Commissioners, and fails to disclose the vote." (Motion at 8). On January 28, 1999, the Commission corrected this technical oversight with its Order Of Correction Nunc Pro Tunc.

10. Public Counsel also suggests that a future sale of the Lewistown and LaBelle exchanges could affect the price cap status of GTE. The Commission's Order has already addressed this contingency, and it does not need to be further addressed at this time. In any event, with the rapid pace of the emerging competition for basic local exchange service in Missouri, this topic is likely to be academic or otherwise moot in the near future.

11. Finally, Public Counsel argues that "The Commission's order fails to consider any evidence of the justness and reasonableness of the rates subject to price caps." (Motion at 9). This argument is clearly misplaced from a public policy perspective, and is legally in error. As explained in GTE's Response to a similar argument by the Staff, there is no statutory requirement for an earnings audit under Section 392.245, and the courts have already determined that it is unreasonable

there is no requirement that the Commission's decision be supported by evidence.)

to delay a price cap determination to conduct an earnings audit. In State ex rel. Public Counsel v. Public Service Commission, Circuit Court, Cole County, Missouri, Case No. CV197-1795CC (August 6, 1998), (attached to GTE Response to Staff's Motion for Reconsideration of Order Approving Price Cap Application), involving the price cap determination of Southwestern Bell Telephone Company, the Circuit Court of Cole County, Missouri, specifically held that it was unreasonable to delay a price cap determination while an earnings review was completed. Judge Thomas J. Brown observed:

If the Commission had initiated a rate complaint proceeding before making the determination under Section 392.245.2, the results of such a proceeding would not have impacted the initial maximum allowable prices under price cap regulation unless the Commission unreasonably delayed the required determination. Since a rate complaint proceeding would not have been completed until late 1997 or, more likely, in 1998, the Commission would have been required to delay price cap determination until at least 1998, and more likely 1999, in order to make any new rates established in a rate complaint proceeding the initial maximum allowable rates under price cap regulation. Such a delay would be unreasonable and not consistent with the legislature's intent.

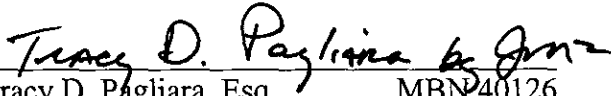
Revised Findings of Fact and Conclusions of Law and Judgment at 5-6.

It would also be unreasonable and not consistent with the legislature's intent for the Commission to conduct a traditional rate proceeding, as suggested by Public Counsel, prior to making the price cap determination required in Section 392.245(2). Such an earnings review will likely take at least one year and unnecessarily consume the scarce regulatory resources of the Commission, Staff, and GTE.

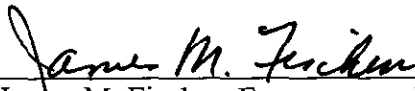
WHEREFORE, having fully responded to the Public Counsel's Motion for Rehearing, GTE Midwest Incorporated respectfully requests that, for the above-stated reasons, the Commission

deny the Public Counsel's Motion and permit the Order Approving Price Cap Application to become effective on February 5, 1999, as ordered by the Commission.

Respectfully submitted,


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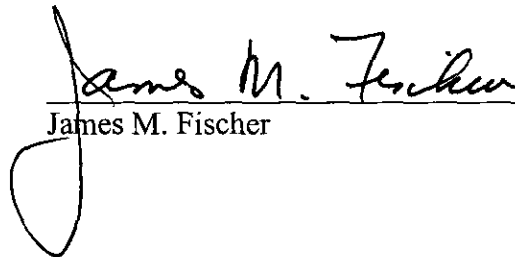

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Attorneys for GTE Midwest Incorporated

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered or mailed, postage prepaid, this 1st day of February, 1999, to:

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



James M. Fischer