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January 26, 1999

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Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
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P. O. Box 360
Jefferson City, MO 65102

RE: Case No. TO-99-294

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of **STAFF'S MOTION TO RECONSIDER ORDER APPROVING PRICE CAP APPLICATION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Marc D. Poston
Assistant General Counsel
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MDP/slr
Enclosure
cc: Counsel of Record

FILED

JAN 26 1999

**Missouri Public
Service Commission**

FILED

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

JAN 26 1999

Missouri Public
Service Commission

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

Case No. TO-99-294

**STAFF'S MOTION TO RECONSIDER
ORDER APPROVING PRICE CAP APPLICATION**

COMES NOW, the Staff of the Missouri Public Service Commission ("Staff") and for its Motion to Reconsider Order Approving Price Cap Application states as follows:

1. On January 7, 1999, GTE Midwest Incorporated ("GTE") filed a Petition with the Commission regarding price cap regulation under Section 392.245 RSMo (Supp. 1998). In its Petition, GTE requests that the Commission make a determination "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 GTE's service area."
2. The Commission issued an *Order Approving Price Cap Application* ("Order") on January 26, 1999 with an effective date of February 5, 1999. Within the Commission's *Order*, the Commission indicated that "since no proper party filed an application to intervene and there are no outstanding requests for hearing, the Commission determines that an evidentiary hearing is not necessary and the Commission may base its decision upon the pleadings."¹
3. In the only previous application requesting price cap status,² the first action by the Commission was an Order in which the Commission required notice of Southwestern Bell Telephone Company's ("SWBT's") petition be sent to the "same companies that receive notice of applications for interexchange service authority, and that interested persons or entities be given

¹ *Order Approving Price Cap Application*, p. 2.

² Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996), Case No. TO-97-397.

an opportunity to intervene."³ The petition was filed by SWBT on March 21, 1997 and the Commission issued its *Order* requiring notice and setting an intervention date on April 18, 1997. The intervention deadline was set for May 2, 1997, approximately 43 days after SWBT filed its petition.

4. The Staff suggests that although parties could have filed Motions for Intervention prior to the Commission giving notice and setting intervention period, it is possible that some assumed the Commission would follow the same procedure in this case that it did in the previous price cap application case of SWBT.

5. The Commission Agenda posted for January 20, 1999 indicated only that Case No. TO-99-294 was to be discussed. The Commission Agenda for January 26, 1999 merely listed "Order Regarding Price Cap Application," giving Staff no further information that would have indicated the substance of the Order. These two Agendas are the only ones which indicated the Commission was considering any action in this case.

6. The Staff, although it was aware that the Commission had been discussing this case during its Agenda, was not aware that the "*Order*" was one that was substantive, nor one that would dispose of the docket completely. The Staff assumed that the "*Order*" being discussed would be procedural in nature, similar to the one issued by the Commission in Case No. TO-97-397 on April 18, 1997.

7. Although the Commission has correctly pointed out that *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*,⁴ permits it to make a decision based upon the pleadings in some situations, it is arguable that the authority doesn't extend to this situation.

³ *Order Giving Notice, Granting Intervention, and Establishing Procedural Schedule.*, April 19, 1997, p. 5.

⁴ 776 S.W.2d 494 (Mo. App. 1989).

8. Section 392.245.2 RSMo. (Supp. 1998) requires the Commission to make a finding that, not only is an alternative local exchange telecommunications company certified to provide basic local telecommunications service, but that it is actually providing that service and the record contains no evidence to support that finding.

9. The Staff respectfully requests the Commission reconsider its determination in this proceeding, order notice be given to the same companies that receive notice of applications for interexchange service authority, and set an intervention deadline.

10. Prior to the January 7, 1999 petition filed by GTE, the Staff had begun a preliminary investigation into the possible over-earnings of GTE. Pursuant to that investigation, the Staff is filing, jointly with this Motion to Reconsider Order Approving Price Cap Application, a Motion to Open Investigatory Docket to enable the Staff to continue its investigation as a docketed case. The Staff suspects that GTE is currently earning dollars in addition to those generated based upon its most recently approved return on common equity and believes that such over-earnings could have a direct impact upon consumers if the relief requested in GTE's January 7, 1999 petition becomes final prior to the Commission considering this information.

11. According to Section 392.245.3 RSMo (Supp. 1998), "the maximum allowable prices established for a company ... shall be those in effect on December thirty-first of the year preceding the year in which the company is first subject to regulation under this section." If the Commission first permits GTE to proceed with price cap regulation in 1999, the maximum allowable prices for GTE will be those prices in place on December 31, 1998. The Staff contends that on December 31, 1998, there was a genuine possibility that GTE was recovering revenues in excess of those necessary under its last Commission approved return on common equity. This contention is more fully explained and supported in the Motion to Open

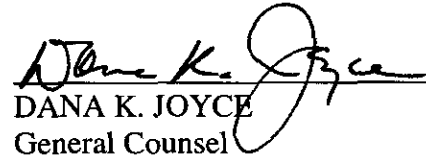
Investigatory Docket filed by the Staff and docketed as Case No. TO-99-314. For this reason, the Staff requests that the Commission reconsider its determination regarding GTE's price cap regulation and delay that determination until early next year, or until the Staff's preliminary audit results are known.

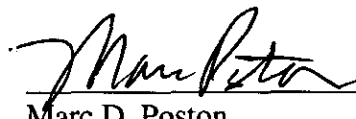
12. A one year stay of the Commission's decision in this case is consistent with Section 392.245 RSMo (Supp. 1998). That section does not explicitly establish any deadlines by which the PSC must make its determination as to whether the criteria specified therein has been met. However, once the Commission makes a determination that an alternative local exchange telecommunications company has been certified to provide service and is providing service in GTE's service area, the Commission loses its authority to examine the justness and reasonableness of GTE's rates, charges, tolls and rentals for telecommunications service. It is for this reason that it is imperative that the Commission reconsider its determination in this proceeding at least until the results of Staff's field audit are known. This does not suggest that the Commission should stay all action in this case for one year. The Staff is merely requesting that the Commission establish a procedural schedule that sets the date for a final determination by the Commission in January of 2000. The Staff believes that by January of 2000, the Commission will have made any determination necessary regarding the earnings of GTE.

13. Reconsideration of the Commission's *Order*, in light of this additional information, is in the interest of the ratepaying consumers of GTE. If the maximum allowable prices established for GTE under price cap regulation that are those rates, charges, tolls, and rentals for telecommunication services in effect on December 31, 1998, it is possible that GTE will be allowed to charge consumers rates under price cap regulation that are unjustly high. Beginning this new form of regulatory oversight with this possibility should be avoided if possible.

WHEREFORE, the Staff of the Missouri Public Service Commission hereby requests that the Commission reconsider the Order Approving Price Cap Application, until the preliminary results of the Staff's field audit are known.

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 26th day of January 1999.



Service List for
Case No.: TO-99-294
Revised: January 26, 1999

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