

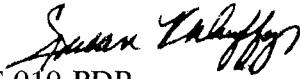
THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

SEP 24 2009

In the Matter of the Application of )  
Southwestern Bell Telephone Company )  
for Price Deregulation of Residential )  
Telecommunications Services in the )  
Abilene, Chanute, Clay Center, )  
Ellsworth, Emporia, Independence, )  
Minneapolis, Neodesha and Parsons, )  
Kansas Exchanges Pursuant to K.S.A. )  
2008 Supp. 66-2005(q)(1). )

Docket No. 10-SWBT-019-PDR



**CURB'S RESPONSE TO AT&T'S  
PETITION FOR RECONSIDERATION**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and files its response to Southwestern Bell Telephone Company's ("AT&T") Petition for Limited Reconsideration of Order Approving Application of Southwestern Bell Telephone Company for Price Deregulation of Residential Telecommunications Services in the Abilene, Chanute, Ellsworth, Emporia, Independence, Neodesha and Parsons, Kansas Exchanges and Denying Application in the Clay Center and Minneapolis, Kansas Exchanges ("petition for reconsideration"). In support of its response, CURB states and alleges as follows:

**I. Procedural History**

1. On July 6, 2009, AT&T filed an application for price deregulation of residential telecommunications services in the Abilene, Chanute, Clay Center, Ellsworth, Emporia, Independence, Minneapolis, Neodesha and Parsons, Kansas exchanges pursuant to K.S.A. 2008 Supp. 66-2005(q)(1)(D).

2. On July 10, 2009, the Commission granted CURB's petition to intervene and issued a protective order.

3. On July 17, 2009, the Commission issued an order suspending AT&T's application until August 26, 2009, pursuant to K.S.A. 66-2005(q)(4).

4. On August 19, 2009,<sup>1</sup> Staff filed its Report and Recommendation with the Commission in this docket. In its Report and Recommendation, Staff recommended the Commission grant AT&T's request for price deregulation of residential service in the Abilene, Chanute, Ellsworth, Emporia, Independence, Neodesha and Parsons, Kansas exchanges pursuant to K.S.A. 66-2005(q)(1)(D). However, Staff concluded that the statutory requirements had not been met with respect to the Clay Center and Minneapolis exchanges, and recommended denial of AT&T's application with respect to the Clay Center and Minneapolis exchanges:

Therefore, AT&T has not sufficiently demonstrated that there is a second provider providing telecommunications services in the Clay Center exchange to residential customers. As stated previously, wireless carriers do not typically distinguish between residential and business service, but Staff understands the statute requires the requesting telecommunications carrier to demonstrate that the requirements of the statute have been met, and this has not occurred.<sup>2</sup>

...

Therefore, AT&T has not sufficiently demonstrated that there is a second provider providing telecommunications services in the Minneapolis exchange to residential customers. As stated previously, wireless carriers do not typically distinguish between residential and business service, but Staff understands the statute requires the requesting telecommunications carrier to demonstrate that the requirements of the statute have been met, and this has not occurred.<sup>3</sup>

---

<sup>1</sup> AT&T's petition for reconsideration incorrectly indicates Staff's Report and Recommendation was filed on August 21, 2009.

<sup>2</sup> Staff Report and Recommendation, August 17, 2009, p. 6.

<sup>3</sup> *Id.*, at p. 11.

5. On August 26, 2009, the Commission issued its Order Approving Application of Southwestern Bell Telephone Company for Price Deregulation of Residential Telecommunications Services in the Abilene, Chanute, Ellsworth, Emporia, Independence, Neodesha and Parsons, Kansas Exchanges and Denying Application in the Clay Center and Minneapolis, Kansas Exchanges (“August 26<sup>th</sup> Order”). Specifically, the Commission determined that AT&T has sufficiently demonstrated with regard to the approved exchanges, that there is a facilities-based carrier not affiliated with AT&T *providing* residential telecommunications service to *more than one customer*, and that there is also a second carrier, that may be a CMRS provider not affiliated with AT&T *providing* residential telecommunications service to *more than one customer*.<sup>4</sup> However, with respect to the Clay Center and Minneapolis exchanges, the Commission determined that, “AT&T has not met the requirements of K.S.A 2008 Supp. 66-2005(q)(1)(D) in that AT&T *has not sufficiently demonstrated* that there is a second provider, other than Big River as the nonaffiliated facilities-based provider, *providing* telecommunications services to *more than one residential customer*.”<sup>5</sup>

6. On September 14, 2009, AT&T filed its petition for reconsideration.

## **II. Response to Petition for Reconsideration**

7. In the “summary” contained in its petition for reconsideration, AT&T states that the Commission’s determination in this proceeding implicitly requires that verified or other unspecified, but detailed, consumer-specific information be scrutinized and provided as part of the application process in order to confirm that wireless services

---

<sup>4</sup> August 26<sup>th</sup> Order, ¶ 46 (emphasis added).

<sup>5</sup> *Id.*, at ¶ 47 (emphasis added).

is *available* to customers in a specific exchange.”<sup>6</sup> AT&T further argues that the Commission’s determination is unreasonable, arbitrary, and capricious and fails the test for Commission orders enunciated by the Kansas Supreme Court.<sup>7</sup> AT&T’s argument is without merit.

8. Contrary to AT&T’s misrepresentation, nothing in the statute states or implies that the requesting carrier must merely demonstrate that residential telephone service is *available* from two unaffiliated carriers. As correctly determined by the Commission,

AT&T has not met the requirements of K.S.A 2008 Supp. 66-2005(q)(1)(D) in that AT&T *has not sufficiently demonstrated* that there is a second provider, other than Big River as the nonaffiliated facilities-based provider, *providing* telecommunications services *to more than one residential customer.*”<sup>8</sup>

9. The Commission’s decision clearly and correctly determines that K.S.A. 66-2005(q)(1)(D) requires AT&T, the requesting carrier, to make a *demonstration* that the second carrier, other than the nonaffiliated facilities-based provider, is *providing* local telephone service *to more than one residential customer.*”

10. The Commission has merely applied the statutory requirement that AT&T demonstrate that there are two carriers, nonaffiliated with AT&T, that are *providing* local telephone service to residential customers in the identified exchanges. The Commission correctly determined that AT&T failed to make the required demonstration.

11. While AT&T may *wish* the statute only required that AT&T provide nonspecific evidence regarding alternative carriers that *may be offering* wireless telephone service in the applicable exchange, the statute does not require AT&T to

---

<sup>6</sup> Petition for reconsideration, ¶ 1.

<sup>7</sup> *Id.*, at ¶ 2.

<sup>8</sup> August 26<sup>th</sup> Order, at ¶ 47 (emphasis added).

demonstrate that the alternative carriers *may be offering* local telephone service, but instead requires AT&T to demonstrate that the alternative carriers *are providing* local telephone service to residential customers.

12. The burden of demonstrating that the alternative carriers provide local service to more than one customer is clearly AT&T's burden as the "requesting local telecommunications carrier,"<sup>9</sup> AT&T is statutorily required to meet this burden, and the evidence is easily obtainable through discovery upon the issuance of a protective order.

13. In its petition for reconsideration, AT&T cites statistics showing there are more wireless customers in Kansas than landline customers,<sup>10</sup> and then makes the illogical conclusion that "it is not a prudent use of anyone's resources to presume that there may be no residential wireless subscribers in either the Clay Center or Minneapolis, Kansas exchanges."<sup>11</sup> Simply because wireless subscribers may outnumber wireline subscribers in Kansas has no rational relationship with the number of wireless subscribers for a particular carrier in a specified rural Kansas exchange. The number of wireless subscribers throughout Kansas is irrelevant to *this* proceeding; it is the number of wireless residential customers being *provided service in the Clay Center and Minneapolis exchanges* by the identified alternative carriers that is relevant here - and what AT&T has failed to demonstrate as required by K.S.A. 66-2005(q)(1)(D).

---

<sup>9</sup> K.S.A. 66-2005(q)(1)(D): in any exchange in which there are fewer than 75,000 local exchange access lines served by all providers, the commission shall price deregulate all residential telecommunication services *upon a demonstration by the requesting local telecommunications carrier* that there are two or more nonaffiliated telecommunications carriers or other entities, that are nonaffiliated with the local exchange carrier, providing local telecommunications service to residential *customers*, regardless of whether the entity provides local service in conjunction with other services in that exchange area. One of such nonaffiliated carriers or entities shall be required to be a facilities-based carrier or entity and not more than one of such nonaffiliated carriers or entities shall be a provider of commercial mobile radio services in that exchange; (emphasis added).

<sup>10</sup> Petition for reconsideration, ¶18.

<sup>11</sup> *Id.*

14. The statute does not allow any “presumption” for or against a finding that customers are being *provided* local telephone service by alternative carriers who are not affiliated with AT&T. AT&T has failed to acknowledge that the price deregulation provisions require AT&T, the requesting carrier, to *demonstrate* that there are “two or more nonaffiliated telecommunications *carriers* or other entities, that are nonaffiliated with the local exchange carrier, *providing* local telecommunications service to residential *customers*.” It is AT&T’s failure to recognize this burden that underlies its entire argument and failure to obtain price deregulation in certain exchanges.

15. Requiring AT&T to make the statutorily required demonstration, that the two alternative carriers are *providing* service to residential *customers* in the Clay Center and Minneapolis exchanges, has nothing to do with “turning back the clock on the 2006 legislative rewrite of the price deregulation provisions of K.S.A. 66-2005(q),” “ignoring reality,” or “archaic, legacy rate regulation.”<sup>12</sup> The Commission’s decision in this and prior price deregulation dockets merely requires AT&T to make the *demonstration* that is *required* by K.S.A. 66-2005(q).

16. AT&T takes issue with CURB’s interpretation of the plural use of the word “customers” in K.S.A. 66-2005(q)(1)(D), yet fails to acknowledge that Staff also shares this interpretation. Staff data requests, utilized in all of AT&T’s recent price deregulation applications, specifically requested confirmation from each alternative carrier identified by AT&T that it is *providing* service to *more than one customer*.<sup>13</sup> In addition, the Commission itself cited this requirement in its August 26<sup>th</sup> Order:

---

<sup>12</sup> *Id.*, at ¶16, 18.

<sup>13</sup> Staff Report and Recommendation, pp. 3-12 (“Staff additionally queried the companies named as competitive carriers in AT&T’s application. The request for information asked each carrier if it provides a residential access line to *more than one customer* in the [specified] exchange.”).

AT&T has not met the requirements of K.S.A. 2008 Supp. 66-2005(q)(1)(D) in that AT&T *has not sufficiently demonstrated* that there is a second provider, other than Big River as the nonaffiliated facilities-based provider, *providing* telecommunications services *to more than one residential customer.*<sup>14</sup>

17. It is difficult to understand AT&T's objection to meeting the de minimis statutory criteria to obtain price deregulation. All AT&T must do is demonstrate that there *are* two or more nonaffiliated telecommunications carriers that *provide* local telephone service to more than one customer (customers). This certainly isn't a high hurdle to clear in order to obtain price deregulation in a specified exchange. AT&T has been absolved of its prior burden of proving that *actual competition exists* – it now must merely demonstrate that there are two other nonaffiliated carriers that actually provide local service to *only two* customers in the exchange. Surely AT&T, with all its resources, is able to meet this minimal burden. The fact that AT&T has failed to issue any data requests to any of the identified alternative carriers in any of the price deregulation dockets it has filed indicates AT&T is not expending much effort to meet its statutory burden.

18. Instead, AT&T would have this Commission conclude that evidence that a wireless carrier “*offers service in a specific area*”<sup>15</sup> or “*is available*”<sup>16</sup> meets its statutory burden under K.S.A. 66-2005(q). AT&T's proposition that it must merely identify wireless carriers that *offer* local service or that wireless service *is available* in the applicable exchange is without merit and contrary to the plain language contained in K.S.A. 66-2005(q).

---

<sup>14</sup> August 26<sup>th</sup> Order, at ¶ 47 (emphasis added).

<sup>15</sup> Petition for reconsideration, ¶ 17.

<sup>16</sup> *Id.*, at ¶¶ 1, 13, 18.

19. AT&T goes further in its twisted interpretation of K.S.A. 66-2005(q), to suggest that the Commission should engage in speculation about whether there *may or may not* be any business or commercial wireless subscribers in the Clay Center and Minneapolis, Kansas exchanges.<sup>17</sup> Ignoring the unsubstantiated data submitted by AT&T regarding the costs and economics of providing wireless service,<sup>18</sup> K.S.A. 66-2005(q) contains no language suggesting the Commission should speculate, assume, or estimate the number of wireless subscribers that *may or may not* be in an exchange. To the contrary, the statute clearly and unambiguously states that the carrier requesting price deregulation must make a *demonstration* that there *are* (as opposed to *may*) two or more nonaffiliated telecommunications carriers that *provide* local telephone service to business *customers* (plural).

20. AT&T's failure to meet its burden of demonstrating that two or more carriers are providing local telephone service to at least two residential customers is the direct result of its failure to issue data requests to the applicable carriers under the protective order to obtain the requisite evidence. Requiring AT&T to meet the burden clearly and unambiguously contained in K.S.A. 66-2005(q)(1)(D) doesn't deny AT&T due process,<sup>19</sup> it merely requires AT&T to comply with the statutory requirement to obtain price deregulation.

### **III. Response to Additional Competitive Information Provided by AT&T in its Petition for Reconsideration**

21. AT&T has included "additional information" in its petition for reconsideration which it believes supports its application for price deregulation in both

---

<sup>17</sup> *Id.*, at ¶ 17.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, at ¶ 21.



the Clay Center and Minneapolis exchanges. While CURB does not dispute that this additional information appears to demonstrate that Alltel serves more than one residential customer (two) in both the Clay Center and Minneapolis exchanges, the Commission has recently refused to consider such additional evidence in a petition for reconsideration in similar circumstances.

22. In KCPL's most recent rate case, KCC Docket No. 09-KCPE-246-RTS ("246 Docket"), CURB filed a motion with the Commission requesting the Commission issue an Order removing the confidential designation on KCPL's actual and projected capital expenditures contained in KCPL's responses to a data request issued by CURB. This additional information was stricken from the record by the Commission, *on its own motion*, as *extra-record evidence*:

On our own motion, the Commission strikes those items referenced in ¶¶'s 9, 10, 11 & 12. The Commission *deems them to be extra-record evidence*, not submitted prior to the first Order issued April 7, 2009, not of record in the March 3, 2009 hearing on the motion, and never admitted into the record thereafter. *See K.S.A. 77-532 (a) & (e)* (defining administrative record). CURB has never sought to re-open, or otherwise move these items into the record. Especially as to those items which existed since February 11, 2009, it could have done so at the March 3, 2009 hearing on its motion. Concerning that item which is referenced in 12 and generated on April 8-9<sup>th</sup>, after the April 7th Order, CURB has not sought leave to supplement or reopen the record, or to take administrative notice.

23. Here, like in the 246 Docket, AT&T has not "sought to re-open, or otherwise move these items into the record,"<sup>20</sup> All of the additional information submitted by AT&T in its petition for reconsideration existed and could have been

---

<sup>20</sup> *See, Order Denying CURB's Petition For Reconsideration Filed April 23, 2009 Concerning Only KCPL's Confidential Designation Of Certain Projected Capital Expenditures*, ¶ 17, May 22, 2009, KCC Docket No. 09-KCPE-246-RTS.

obtained and provided to the Commission prior to the Commission's August 26, 2009 Order. AT&T has not sought leave to supplement or reopen the record.

24. If the Commission decides to consistently rule on additional evidence submitted in petitions for reconsideration, then the Commission should, on its own motion, strike the additional evidence submitted by AT&T in its petition for reconsideration.

25. The additional information submitted by AT&T in its petition for reconsideration existed and could have been obtained by AT&T from Alltel much earlier under the protective order issued by the Commission on July 10, 2009. To the best of CURB's knowledge and belief, AT&T has never issued any data requests from any of the competitive carriers in this or any other price deregulation application it has filed under K.S.A. 66-2005(q).

26. It is difficult to imagine how the Commission could rationally decide to treat AT&T's submission of additional evidence in its petition for reconsideration in this docket differently than it treated CURB's submission of additional evidence in its petition for reconsideration in the 246 Docket. However, should the Commission suddenly disavow the rationale used in the 246 docket, then without waiving, compromising, or conceding CURB's position on all other issues raised in AT&T's petition for reconsideration, paragraphs 1-22, CURB believes the additional evidence sufficiently demonstrates that "there is a second provider, other than Big River as the nonaffiliated facilities-based provider, *providing* telecommunications services to more than one residential customer"<sup>21</sup> in the Clay Center and Minneapolis exchanges.

---

<sup>21</sup> August 26<sup>th</sup> Order, ¶ 47 (emphasis added).

#### IV. Conclusion

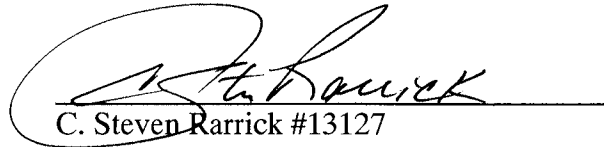
27. The Commission's August 26<sup>th</sup> Order denying AT&T's request for price deregulation for residential telecommunications services in the Clay Center and Minneapolis exchanges is reasonable and consistent with the requirements of K.S.A. 66-2005(q). The burden of demonstrating two or more nonaffiliated telecommunications carriers are providing local telephone service to residential customers is AT&T's burden, not Staff's burden. AT&T should be required to meet this burden in each application for price deregulation it chooses to file under K.S.A. 66-2005(q).

28. As a result, CURB respectfully requests that the Commission deny AT&T's petition for reconsideration on the grounds cited in paragraphs 1-22 of its petition for reconsideration. The Commission has previously stricken, on its own motion, similar additional evidence submitted in a petition for reconsideration. Unless the Commission disavows the rationale used in the 246 docket to strike such additional evidence, the additional evidence cited by AT&T should be stricken from the record as extra-record evidence. Should the Commission disavow its prior rationale, then without waiving, compromising, or conceding CURB's position on all other issues raised in AT&T's petition for reconsideration, paragraphs 1-22, CURB believes the additional evidence sufficiently demonstrates that "there is a second provider, other than Big River as the nonaffiliated facilities-based provider, *providing* telecommunications services *to more than one residential customer*"<sup>22</sup> in the Clay Center and Minneapolis exchanges.

---

<sup>22</sup> August 26<sup>th</sup> Order, ¶ 47 (emphasis added).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Steven Rarrick", is written over a solid horizontal line. The signature is fluid and cursive, with a large loop at the beginning.

C. Steven Rarrick #13127

Citizens' Utility Ratepayer Board

1500 S.W. Arrowhead Road

Topeka, KS 66604

Telephone: (785) 271-3200

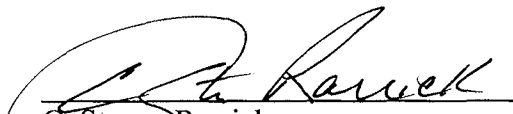
Facsimile: (785) 271-3116

VERIFICATION

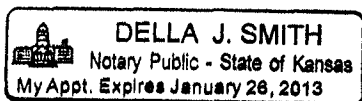
STATE OF KANSAS                    )  
COUNTY OF SHAWNEE            )     ss:

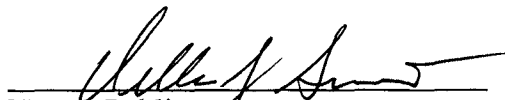
I, C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for the Citizens' Utility Ratepayer Board, that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

  
C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 24<sup>th</sup> day of September, 2009.



  
Notary Public

My Commission expires: 01-26-2013.

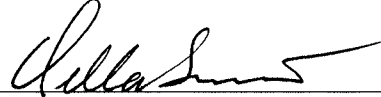
CERTIFICATE OF SERVICE

10-SWBT-019-PDR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, e-mailed or hand-delivered this 24th day of September, 2009, to the following:

\* COLLEEN HARRELL, LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD ROAD  
TOPEKA, KS 66604-4027  
Fax: 785-271-3354  
c.harrell@kcc.ks.gov  
\*\*\*\* Hand Deliver \*\*\*\*

\* BRUCE A NEY, ATTORNEY, ROOM 515  
SOUTHWESTERN BELL TELEPHONE CO.  
D/B/A AT&T  
220 EAST SIXTH STREET  
TOPEKA, KS 66603  
Fax: 785-276-1948  
bruce.ney@att.com



\_\_\_\_\_  
Della Smith

\* Denotes those receiving the Confidential version