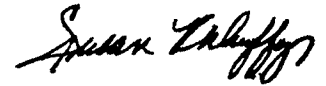


STATE CORPORATION COMMISSION

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

AUG 21 2009



|   |   |                            |
|---|---|----------------------------|
| In the Matter of the Application of       | ) |                            |
| Southwestern Bell Telephone Company       | ) |                            |
| for Price Deregulation of Residential and | ) |                            |
| Business Telecommunications               | ) | Docket No. 09-SWBT-936-PDR |
| Services in the Kinsley and Erie, Kansas  | ) |                            |
| Exchanges Pursuant of K.S.A. 2008         | ) |                            |
| Supp. 66-2005 (q) (1).                    | ) |                            |

**CURB’S RESPONSE TO SWBT’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 Reconsideration of Order Approving in Part and Denying in Part Application for Price Deregulation of Business and Residential Telecommunications Services in the Erie, Kansas Exchange (“Petition for Reconsideration”). In support of its response, CURB states and alleges as follows:

**I. Procedural History**

1. On June 5, 2009, Southwestern Bell Telephone Company (“AT&T”) filed an application for price deregulation of residential and business telecommunications services in the Kinsley and Erie, Kansas exchanges pursuant to K.S.A. 2008 Supp. 66-2005(q)(1)(C) and (D).

2. On June 12, 2009, the Commission granted CURB’s Petition to Intervene.

3. On June 24, 2009, 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 and single-line business service in the Kinsley and Erie, Kansas exchanges pursuant to K.S.A. 66-2005(q)(1)(C) and (D).

4. On June 25, 2009, CURB filed its response and opposition to Staff's Report and Recommendation, asserting AT&T had failed to provide substantial competent evidence sufficient to support granting price deregulation of single-line business service in the Erie exchange under K.S.A. 66-2005(q). Specifically, CURB argued that AT&T had failed to demonstrate that the alternative carriers identified by AT&T were providing local residential and business telephone service to more than one customer, as required by statute.

5. On June 26, 2009, the Commission issued its order approving AT&T's application for price deregulation of business and residential telecommunications services in the Kinsley, Kansas exchange. With respect to the Erie exchange, the Commission suspended AT&T's application for an additional 30 days to allow time for additional investigation of the application and consideration of Staff's Report and Recommendation and CURB's objection.<sup>1</sup>

6. On July 10, 2009, AT&T filed its response to the Commission's June 26<sup>th</sup> Order, providing evidence it believed demonstrated that ALLTEL provided local telephone service to business and residential customers.

7. On July 16, 2009, Staff filed a second Report and Recommendation, wherein Staff concluded that the requirements of K.S.A. 66-2005(q)(1)(C) had been satisfied in the Erie exchange by AT&T's July 10<sup>th</sup> filing and recommended that the Commission grant AT&T's request for price deregulation of business services in the Erie

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<sup>1</sup> June 26, 2009 Order, ¶ 15.

exchange. However, Staff was not able to verify that the requirements of K.S.A. 66-2005(q)(1)(D) had been satisfied in the Erie exchange by AT&T's July 10<sup>th</sup> filing and recommended that the Commission deny AT&T's request for price deregulation of residential services in the Erie exchange. Staff additionally recommended in its July 16<sup>th</sup> Report and Recommendation that AT&T provide copies of bill statements and/or verified statements from the subscribers and location documentation with its future applications in order for AT&T to "fully demonstrate that the requirements of the statute have been met."<sup>2</sup>

8. On July 24, 2009, the Commission issued its Order Approving in Part and Denying in Part Application for Price Deregulation of Business and Residential Telecommunications Services in the Erie, Kansas Exchange. In the July 24<sup>th</sup> Order, the Commission adopted Staff's Report and Recommendation, finding it to be thorough and reasonable. Consistent with Staff's recommendation, the Commission concluded that the request for price deregulation for business telecommunications services in the Erie exchange should be granted but that the request for price deregulation for residential telecommunications services in that exchange should be denied.<sup>3</sup>

## **II. Response to Summary Provided by AT&T**

9. In the "summary" contained in its Petition for Reconsideration, AT&T states that the Commission's suggestion that AT&T provide the documentation recommended by Staff in future price deregulation applications "effectively modifies the

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<sup>2</sup> Staff Report and Recommendation, July 16, 2009, p. 4.

<sup>3</sup> Order Approving in Part and Denying in Part Application for Price Deregulation of Business and Residential Telecommunications Services in the Erie, Kansas Exchange, ¶ 9.

process that has been used until now, i.e. AT&T provides exchange-specific collateral from wireless companies as evidence that wireless service *is available*.”<sup>4</sup>

10. It is true that in this and previous price deregulation applications filed by AT&T, AT&T merely provides nonspecific evidence regarding alternative carriers that *may be offering* wireless telephone service in the applicable exchange. However, Staff does not merely verify the *availability* of wireless services; in all of the recent price deregulation applications filed by AT&T, Staff has verified that the alternative carriers were *actually providing service to more than one customer*.

11. Because the evidence submitted in AT&T’s application is routinely insufficient to constitute substantial competent evidence upon which the Commission could approve price deregulation under K.S.A. 66-2005(q),<sup>5</sup> Staff has been placed in the untenable position of either recommending against approval of the application, or carrying AT&T’s burden of “demonstrating” the criteria required under K.S.A. 66-2005(q). While the burden of demonstrating that the alternative carriers provide local service to more than one customer should be AT&T’s burden as the “requesting local telecommunications carrier,”<sup>6</sup> Staff appears to have chosen to accept this burden and has developed data requests to obtain information sufficient to meet this burden. As a result, Staff has not simply verified that wireless service is simply *available*; Staff has carried

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<sup>4</sup> Southwestern Bell Telephone Company’s (“AT&T”) Petition for Reconsideration of Order Approving in Part and Denying in Part Application for Price Deregulation of Business and Residential Telecommunications Services in the Erie, Kansas Exchange (“Petition for Reconsideration”), ¶ 1.

<sup>5</sup> See discussion of AT&T’s burden under K.S.A. 66-2005(q) in Section III below.

<sup>6</sup> K.S.A. 66-2005(q)(1)(C): 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 business 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 business 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).

AT&T's burden of demonstrating that two or more carriers are actually *providing* local telephone service *to more than one customer* as required by K.S.A. 66-2005(q).

12. AT&T is statutorily required to meet this burden, and the evidence is easily obtainable through discovery upon the issuance of a protective order. As a result, the process that has been previously used *should be changed* – AT&T should be required to make the statutorily required demonstration that two or more carriers are *providing* local telephone service *to more than one customer*, not merely that alternative service is *available* to customers in the applicable exchange.

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

13. In its Petition for Reconsideration, AT&T curiously focuses on CURB and purported positions of CURB, rather than on the recommendation made by Staff that was adopted by this Commission. AT&T makes numerous unfounded allegations about CURB's position regarding price deregulation under K.S.A. 66-2005(q) in its Petition for Reconsideration:

- “CURB now seeks to have the Commission forget everything we know to be true about the most competitive segment of the telecommunications marketplace – wireless.”
- “CURB's position would have the Commission ignore the realities of what it takes financially to actually provide cellular or wireless service in Kansas' smaller communities and more rural exchanges, unlike certain of the CLEC models of competition.”
- “CURB's position would have the Commission ignore the fact that there are more wireless subscribers in Kansas today than there are traditional end-user switched access lines.”
- “CURB'S position would do all this simply because it fails to recognize that, as an industry, wireless telecommunications providers offer their services in a wildly competitive marketplace, without the trappings, burdens or definitions of archaic, legacy rate regulation.”<sup>7</sup>

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<sup>7</sup> Petition for Reconsideration, ¶ 13.

14. Contrary to AT&T's unfounded assertions, CURB's position in this and other price-deregulation dockets has nothing to do with "turning back the clock," "ignoring reality," or "archaic, legacy rate regulation." Moreover, the number of wireless subscribers throughout Kansas<sup>8</sup> is irrelevant to *this* proceeding; it is the number of wireless residential customers being *provided service in the Erie exchange* that is relevant here - and what AT&T has failed to demonstrate as required by K.S.A. 66-2005(q)(1)(D).

15. CURB does, however, support Staff's recommendation and the Commission's adoption of a "higher level of verification"<sup>9</sup> of the *provisioning* of alternative local telecommunications service. The Commission was both legally and factually correct in requiring AT&T to make the "demonstration" *required* under K.S.A. 66-2005(q), the price deregulation provisions AT&T aggressively lobbied the legislature to enact.

16. As CURB pointed out to the Commission in CURB's Response and Opposition to Staff's Report and Recommendation, K.S.A. 66-2005(q)(1)(C) and (D) require "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 [business/residential] *customers*." The plural use of the word "customers" indicates the nonaffiliated carriers must provide business or residential service to more than one customer.

17. AT&T takes issue with CURB's interpretation that the plural use of the word "customers," yet fails to acknowledge that Staff also shares this interpretation.

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<sup>8</sup> Petition for Reconsideration, ¶ 13.

<sup>9</sup> Petition for Reconsideration, ¶ 15.

Staff data requests, utilized in all of AT&T's recent price deregulation applications, specifically request confirmation from each alternative carrier identified by AT&T that it is *providing service to more than one customer*:

Is ALLTEL *providing* a [residential] [single-line business] access line *to more than one customer* in the [SPECIFIED], KS exchange? If yes, please explain how ALLTEL is provisioning the service (e.g., resale, LWC, own facilities).<sup>10</sup>

18. CURB has difficulty understanding AT&T's objection to meeting the minimal 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 two 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, can meet this minimal burden.

19. Instead, AT&T would have this Commission conclude that evidence that a wireless carrier “*offers service in a specific area*”<sup>11</sup> or “*is available*”<sup>12</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).

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<sup>10</sup> Staff June 5, 2009, Information Request Nos. 1-4 to ALLTEL (emphasis added).

<sup>11</sup> Petition for Reconsideration, ¶ 2.

<sup>12</sup> Petition for Reconsideration, ¶ 1.

20. AT&T goes further in its twisted interpretation of the unambiguous language contained in K.S.A. 66-2005(q), by suggesting that the Commission should engage in speculation about whether there *may or may not* be any business or commercial wireless subscribers in the Erie, Kansas exchange.<sup>13</sup> The statute 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).

21. AT&T goes on to argue that its July 10, 2009 response to the Commission's June 26<sup>th</sup> Order "provided additional proof to the contrary" (that there may be no business or commercial wireless subscribers in the Erie, Kansas exchange). To the contrary, what AT&T's July 10, 2009 response to the Commission's June 26<sup>th</sup> Order proved is that AT&T *is able to meet its burden* under K.S.A. 66-2005(q) to demonstrate that two or more nonaffiliated telecommunications carriers are providing local telephone service to at least two business customers. Furthermore, AT&T could have met this burden shortly after filing its application much more easily through the use of data requests issued under the Commission's protective order.

22. AT&T's failure to meet its burden of demonstrating that two or more nonaffiliated carriers are providing local telephone service to at least two residential customers is either the result of its failure to issue data requests to the applicable carriers under the protective order to obtain the requisite evidence, or the absence of customers.

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<sup>13</sup> Petition for Reconsideration, ¶ 14.



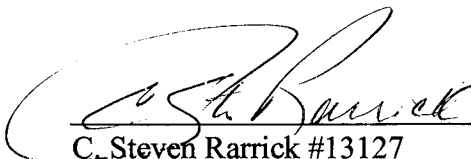
Requiring AT&T to meet the burden clearly and unambiguously contained in K.S.A. 66-2005(q)(1)(D) doesn't deny AT&T due process, it merely requires it to comply with the law for price deregulation.

#### **IV. Conclusion**

23. The Commission's July 24<sup>th</sup> Order denying AT&T's request for price deregulation for residential telecommunications services in the Erie exchange 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).

24. As a result, CURB respectfully requests that the Commission deny AT&T's Petition for Reconsideration.

Respectfully submitted,



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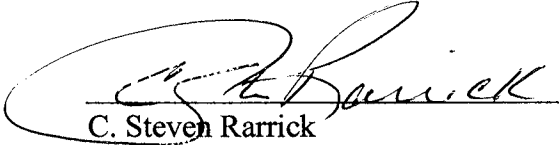
C. Steven Rarrick #13127  
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VERIFICATION

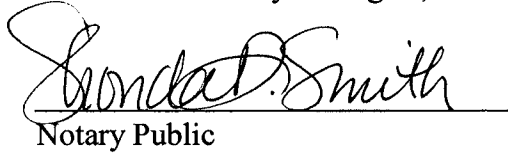
STATE OF KANSAS                    )  
COUNTY OF SHAWNEE            )     ss:

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

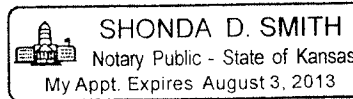
That he is an attorney for the Citizens' Utility Ratepayer Board, that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

  
C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of August, 2009.

  
Notary Public

My Commission expires: 08-13-2013.



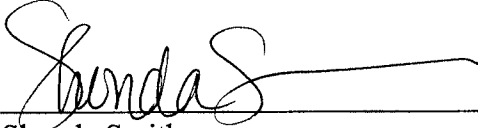
**CERTIFICATE OF SERVICE**

09-SWBT-936-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, or hand-delivered this 21<sup>st</sup> day of August, 2009, to the following:

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