

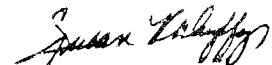
**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the matter of:)
)
Petition of Sprint Communications)
Company L.P., Sprint Spectrum L.P., and)
Nextel West Corp., d/b/a Sprint, to)
Conduct General Investigation into the)
Intrastate Access Charges of United)
Telephone Company of Kansas, United)
Telephone Company of Eastern Kansas,)
United Telephone Company of South)
Central Kansas, and United Telephone)
Company of Southeastern Kansas, d/b/a)
Embarq)

Docket No. 08-GIMIT-1023-GIT

STATE CORPORATION COMMISSION

JUN 24 2008

 Docket Room

OPPOSITION TO MOTION TO DISMISS

1. Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively, "Sprint") submit this Opposition to Embarq's June 11, 2008 Motion to Dismiss ("Motion to Dismiss") in the above-captioned case.

2. Embarq has failed to provide any policy justification for the Commission to ignore Sprint's request for a general investigation into Embarq's switched access rates. Furthermore, Embarq has not met its burden for a Motion to Dismiss. Embarq did not cite a rule under which it seeks dismissal of Sprint's Petition; however, the appropriate rule is K.S.A. 60-212(b)(6), which provides that where a motion to dismiss raises an issue concerning the legal sufficiency of a claim, the question must be decided on the well-pleaded facts of the petition. The question is whether, considering the Petition in the light most favorable to Sprint and resolving every doubt in Sprint's favor, the Petition states any valid claim for relief.¹ The Commission has adopted the Kansas Supreme Court's interpretation of the standard for a motion

¹ *Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210 (1996); *Bruggeman v. Schimke*, 239 Kan. 245, 247-48, 718 P.2d. 635 (1986); *Knight v. Neodesha Police Dept.*, 5 Kan.App.2d 472, 620 P.2d 837 (1980).

to dismiss under K.S.A. 60-212(b)(6).² Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim. In considering a motion to dismiss for failure of the complaint to state a claim for relief, the court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom.³ Under this standard, considering the Petition in the light most favorable to Sprint, Sprint has pled more than enough facts – for example, that Embarq's switched access rates are excessive and that excessive rates harm consumers – to state a claim for relief; i.e., for the Commission to open a general investigation. The Commission clearly has authority to grant Sprint's requested relief: K.S.A. 66-1,191 expressly allows the Commission, upon its own initiative, to investigate the rates of telecommunications public utilities.

3. Embarq asks the Commission, *without even the benefit of a proceeding to build a sufficient record*, to shield Embarq from any scrutiny whatsoever as to whether its rates are just and reasonable in the current environment, even though it has been seven years since those rates were last evaluated, and also asks the Commission to decline to even consider the public policy and pro-competitive benefits of reducing the implicit subsidies built into Embarq's high access rates. Further, Embarq asks the Commission to disregard its own express statement in the 082 docket that “[r]emoving implicit subsidies, and replacing them with explicit ones, is critical to a competitive infrastructure.”⁴

4. Remarkably, Embarq denies outright the negative competitive effects of high access charges and the impact they have on consumer prices for telecommunications services in

² *In the Matter of the Complaint Against Kansas Power and Light by Dennis L. Olds Concerning a Payment Arrangement Plan*, Docket No. 99-WSRE-092-COM, Order dated October 26, 1998, at para. 22.

³ *Id.*

⁴ Sprint Petition at 2, citing *In the Matter of a General Investigation into the Reformation of Intrastate Access Charges*, Docket No. 01-GIMT-082-GIT, Order Approving Stipulation and Agreement, Sept. 25, 2001 (“Order Approving Stipulation”) at p. 2.

Kansas. The Commission should reject Embarq's categorical denial of the real marketplace effects of high carrier access rates because Embarq's position defies common sense. As set forth in Sprint's petition, such high rates are input costs to the retail services other carriers provide and the higher the costs, the higher the retail prices must be to cover those costs. The lower the costs, the more likely the competitive provider is able to set prices that are acceptable as an alternative to Embarq's services to the consumers of Kansas. By reducing access rates, competition is enabled. When one competitor is subsidized by the others, the effect on the market and consumers is negative and the only sure winner is the recipient of the subsidy, Embarq.

5. The Commission itself recognized the harms of high access rates and how reducing access rates comports with Kansas law. In the 082 docket, the Commission issued an Order on several issues including whether it had the authority to reduce intrastate access charges for price capped companies. Concluding that it unquestionably had the authority, the Commission referenced the Telecommunications Strategic Planning Committee (TPSC) report that the Kansas Legislature relied upon in enacting the Kansas Telecommunications Act in 1996 and stated:

The TPSC Final Report was premised on the assumption **that intrastate access was overpriced relative to interstate access and that intrastate access charges must be reduced to promote competition** in the intraLATA toll market. TPSC Final Report at 27. Without the implied authority to make further access reductions, the Commission would be powerless to change access charges, which may be necessary for a workable competitive framework, or to make implicit subsidies, explicit.

...

The Kansas Legislature determined how initial access charge reductions should occur for all companies. The Kansas Legislature did not intend to create a regulatory framework that would become unworkable following initial access charge reductions. The Commission cannot be expected to promote competition through its dockets if it is without the necessary power to ensure such an objective is attainable as costs, competitive circumstances and technologies change. **The Commission, therefore,**

concludes that it has the legal authority to require further access reductions for price cap companies.⁵

6. The Commission has found that it has the legal authority to require further access reductions. It also recognized that it must be equipped to deal with changes in the competitive environment. In other words, the 082 Legal Authority Order recognizes that the environment changes and the Commission's ability to reduce intrastate access charges is not limited to the initial rate rebalancings.

7. Sprint is well aware that the Commission in 2001 approved Embarq's access rates in the 082 docket. The Commission, however, did not state that the Order approving the Stipulation ended its review of intrastate access rates for all eternity. The Commission stated quite the opposite by recognizing that local rates are still being subsidized and the "Stipulation provides a transitional reform plan that **will necessitate further review at the end of the period covered by the Stipulation. Certainly the Commission will be in a position to continue to evaluate the level of access and local rates in other dockets.**"⁶ The Commission strongly signaled in the 082 Order that it will and must continue to evaluate intrastate access charges and that the Stipulation and Order in the 082 docket were not meant to obviate any further investigation into intrastate access charges.

8. Astonishingly, Embarq asserts that "nothing has changed" that would warrant a further reduction in intrastate access rates.⁷ Nothing could be further from the truth. In the seven years that have passed since the Commission last examined Embarq's access rates, Embarq has significantly expanded its non-regulated service offerings, including but not limited

⁵ *In the Matter of a General Investigation into the Reformation of Intrastate Access Charges*, Order, Docket No. 01-GIMT-082-GIT (May 18, 2001) ("082 Legal Authority Order") ¶¶ 14-15 (emphasis added).

⁶ *In the Matter of a General Investigation into the Reformation of Intrastate Access Charges*, Order Approving Stipulation, Docket No. 01-GIMT-082-GIT (September 25, 2001) ¶ 29 (emphasis added).

⁷ Motion to Dismiss at 4.

to high-speed internet access, undoubtedly enjoying increased revenues over and above their 2001 levels. Embarq has also enjoyed significantly increased revenues from bundled service offerings. In his Direct Testimony supporting the Stipulation in Docket No. 07-GIMT-782-MIS, Mr. John Idoux stated that Embarq is not subject to price caps for its bundled services and that a significant amount of its revenue is unregulated as a result of the application of Senate Bill 350, KSA Section 66-2005. Mr. Idoux stated: “Approximately 50 percent of Embarq’s Basket One and Basket Three revenue is derived from customers subscribing to a bundled offering that will not be affected by this Stipulation and Agreement, and that percentage is growing.”⁸ In addition, Embarq has sought and obtained competitive classification for several of its exchanges, freeing Embarq from price caps on its business local exchange service. Moreover, Embarq’s price cap formulas have changed over the years. Most recently, the Commission approved a Stipulation in Docket No. 07-GIMT-782-MIS under which Embarq’s Basket One prices are not reduced by a productivity factor and its Basket Three prices are allowed to be increased by the level of inflation without a productivity factor adjustment. Finally, Embarq supported and will reap the benefit of new legislation effective July 1, 2008 under which Embarq will be free to raise its prices for basic residential local service in exchanges that are deemed competitive. It is disingenuous for Embarq to suggest that “nothing has changed” in Embarq’s business over the past seven years that would mitigate Embarq’s need to retain its monopoly-era inflated access charges.

9. Sprint does not deny that a valid economic cost study should take into account Embarq’s legitimate costs to provide service in high-cost areas of Kansas. However, only Embarq is in a position to provide specific information with regard to its costs of providing

⁸ Direct Testimony of John R. Idoux III on Behalf of Embarq, *In the Matter of a General Investigation into the Price Cap Formula in Compliance with K.S.A. 2000 Supp. 66-2005(g)*, Docket No. 07-GIMT-782-GIT (dated

service in Kansas, and it should be required to do so in this case. The Commission should not allow Embarq to dodge scrutiny of its rates simply by hiding behind a seven-year-old stipulation that was based on assumptions that are no longer valid.

10. The Commission should also scrutinize Embarq's vague assertions that it would have to significantly increase its prices to consumers to make up for decreased access revenues. As pointed out above, Embarq has significant revenue from non-regulated and bundled services, as well as higher prices for business local exchange service in exchanges that are no longer price-regulated. In addition, Embarq soon will have flexibility to raise prices on basic residential service in competitive exchanges. Therefore, it should not simply be assumed, with no evidence to support it, that Embarq could not make up for decreased access revenues from other sources within its business. Certainly, there can be no argument that the need to introduce such evidence prevents the Commission from dismissing the investigation at this stage in the proceeding.

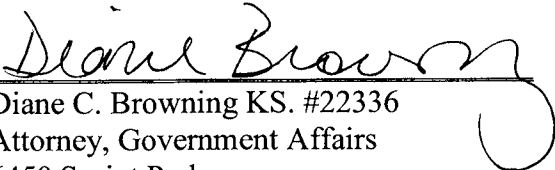
11. Moreover, Embarq's vague assertions that access reductions would lead to violation of an affordable price principle are not appropriate at the motion to dismiss stage. The Commission cannot rule without accepting evidence that Embarq's local rates would not be "affordable" if they are increased to offset access reductions.

12. Furthermore, as Embarq points out, to the extent any rate rebalancing is insufficient to satisfy the revenue-neutrality requirement in the statute, Embarq can seek to recover the deficiency from the KUSF. While Sprint supports minimizing the size of the KUSF, Sprint believes explicit subsidies are more appropriate than the implicit subsidies Embarq collects directly from its competitors through access rates.

13. Embarq should be required to demonstrate its costs to provide service and justify its access rates, and the Commission should disregard Embarq's once-and-for-all argument that the 2001 stipulation obviates the need for any future scrutiny. Sprint notes that on June 20, 2008, the Commission opened Docket No. 08-GIMT-1112-GIT to address the reduction of intrastate switched access rates of the rural local exchange carriers (RLECs) to interstate levels in accordance with K.S.A. 2007 Supp. 66-2005(c). The Commission scrutinizes RLEC rates every two years and, if appropriate, makes adjustments; while Embarq's access rates have not been examined in seven years. There is no basis for Embarq to expect the 2001 stipulation to be binding indefinitely, when other LECs do not enjoy a similar position.

14. WHEREFORE, Sprint respectfully requests the Commission to deny Embarq's Motion to Dismiss, and conduct a general investigation into the intrastate switched access rates of Embarq in accordance with K.S.A. 66-2005(c) as set forth in Sprint's Petition.

Respectfully submitted,


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VERIFICATION

I, Diane C. Browning, being of lawful age duly sworn, state that I have read the above and foregoing Opposition to Motion to Dismiss of Sprint Communications Company, L.P., Sprint Spectrum, L.P., and Nextel West Corp. and verify the statements contained herein to be true and correct to the best of my knowledge and belief.

Diane Browning

Subscribed and sworn to before me this 24th day of June, 2008.

Rhame Glade
Notary Public



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of June, 2008, a copy of the foregoing Sprint Opposition to Motion to Dismiss was served via U.S. Mail, postage prepaid, on each of the following:

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