

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of AT&T Communications)	
of the Southwest, Inc.'s Proposed Tariff to)	Case No. TT-2002-129, <i>et al.</i>
Establish a Monthly Instate Connection)	(consolidated)
Fee and Surcharge)	

STAFF’S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through the General Counsel’s Office, and states:

In response to points raised by the other parties in this case, Staff provides the following discussion to more fully address them. On the remaining issues, Staff believes that they have already been fully addressed in Staff’s Initial Brief.

I. Should the Commission determine the justness and reasonableness of the Instate Access Recovery Fees?

As noted by the Office of the Public Counsel, the Court of Appeals in its decision remanding this case back to the Commission considered this point. The Court considered Section 392.361 RSMo. (2000)¹ as it addressed the Commission decision, and said:

Pursuant to § 392.361.1, (FN3) the Companies sought and received classification as "competitive telecommunication companies," which is not challenged on appeal. With respect to such companies, the Commission, pursuant to § 392.361.5:

may ... suspend or modify the application of its rules or the application of any statutory provision contained in sections 392.200 to 392.340, except as provided in section 392.390. The commission may suspend different requirements for different

¹ Despite other statutory modifications made during the 2005 legislative session, Section 392.361 remains unchanged and offers the Commission the choice of waiving the provisions of Sections 392.200 to 392.340; if those sections are not waived, then they must apply. The Commission has never waived the application of Section 392.200.1 to the companies’ rates at issue here, and thus that subsection may still apply to all rates of competitive companies under the terms of Section 392.361.5. This is the analysis conducted by the Court of Appeals in its initial review of this case (see *State ex rel. Acting Public Counsel Coffman v. Public Serv. Comm’n*, 150 S.W.3d 92, 99-100 (Mo.App. W.D. 2004). As noted below, however, the change in law does not impact the outcome of this case.

telecommunications companies, if such different treatment is reasonable and not detrimental to the public interest.

The use of the word "may" in § 392.361.5 indicates that the Commission has the discretion to choose whether to suspend the specified rules and statutes in a particular proceeding. *Pfefer v. Bd. of Police Comm'rs*, 654 S.W.2d 124, 128 (Mo.App.1983).

It is, of course, significant that § 392.390.5 omits any reference to § 392.200.1, which requires that all of a telecommunications company's charges must be "just and reasonable." The express mention of one thing in a statute implies exclusion of another. *Mo. Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 443 (Mo.App.1991). **Thus, it appears that the legislature intended that it was within the discretion of the Commission to decide whether to apply to a competitive telecommunication company, in a given proceeding, the requirements of § 392.200.1.**

(emphasis supplied, footnote omitted). *State ex rel. Acting Public Counsel Coffman v. Public Serv. Comm'n*, 150 S.W.3d 92, 99-100 (Mo.App. W.D. 2004). This discussion has now become the law of the case, under the doctrine of law that "a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Rodriguez v. Suzuki Motor Corp*, 996 S.W.2d 47, 61 (Mo.banc 1999). It is worthy to note that the law of the case doctrine does contain exceptions, and those exceptions include when a change in law has intervened between appeals. *State ex re. Alma v. Public Serv. Comm'n*, 40 S.W.3d 381, 388 (Mo.App. W.D. 2001). However, upon closer examination, that exception appears rooted in concepts of criminal law and is unlikely to apply here.²

Thus, it is appropriate for the Commission to conduct an analysis on whether the Instate Access Recovery Fees are just and reasonable. However, Staff maintains its recommendation

² Although the general exception is cited in the *Alma* decision cited above, for example, a review of the authority provided by the Court of Appeals in that case reveals that the change-of-law exception, in practice, was only applied in criminal matters. In a civil matter, for example in *Williams v. Ford Motor Company*, 454 S.W.2d 611, 614 (Mo.App. 1970) the court's list of exceptions to the law of the case doctrine omits the principle of a change of law.

that that analysis should result in a determination that the Instate Access Recovery Fees are just and reasonable, for the reasons set forth in Staff's Initial Brief.

II. May the Commission direct a refund of the amount collected under the Instate Access Recovery Fees if it determines that those Fees are unlawful?

As part of its request for relief, the Office of the Public Counsel asks the Commission to direct the companies to refund the fees they have obtained in the absence of a valid order approving the tariffs. To be able to grant such a request, the Commission must have the jurisdiction and authority to do so. Staff respectfully notes that the Commission has not been granted jurisdiction or authority to do so.

The Commission, as an administrative agency, only possesses those powers conferred by statute or necessarily implied by statute. "The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto. *Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.2d 134, 137 (Mo.App. W.D. 1979)." *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo.App. W.D. 2003).

The issues in this case involve the application of the Commission's statutes to tariff sheet filings, and the "regulation and fixing of rates or charges for public utilities, and the classification of the users or consumers to whom the rates are chargeable," so the Commission certainly has exclusive jurisdiction and the authority to make its determination in this matter. *Inter-City Beverage Co. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 877 (Mo.App. W.D. 1994). *See also State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1045 (Mo.banc 1943). However, "[t]he Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund." *DeMaranville, et al. v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo.App. 1978).

The Commission has no more authority than its statutes provide. Moreover, as the Commission is not a court, it cannot order a refund. That authority is limited to circuit court. In the end, however, as discussed in Staff's Initial Brief and in the testimony of William Voight, the Instate Access Recovery Fees are just and reasonable, and lawful, and the determination of a refund is moot.

WHEREFORE, the Staff renews its recommendation that the Commission overrule the Office of the Public Counsel's Motion and approve the tariff sheets before it for consideration in these cases.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 3rd day of November 2005.

/s/ David A. Meyer

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