

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

June 29, 2004

FILED²

JUN 29 2004

**Missouri Public
Service Commission**

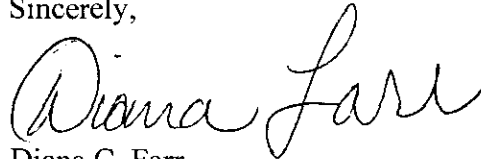
Mr. Dale Hardy Roberts, Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Case No. IO-2004-0597

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter, please find the original and eight copies of BPS Telephone Company's Response to Staff's Motion to Reject and Office of the Public Counsel's Objection. A copy of the attached is being provided to all parties of record. If you have any questions regarding this matter, you may contact me at the above number. Otherwise, I thank you in advance for your attention to and cooperation in this matter.

Sincerely,



Diana C. Farr

DCF/da
Enclosures
cc: Parties of Record

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

FILED²
JUN 29 2004

| | | |
|---|---|-----------------------|
| In the Matter of BPS Telephone |) | |
| Company's Election to be Regulated |) | |
| under Price Cap Regulation as |) | Case No. IO-2004-0597 |
| Provided in Section 392.245, RSMo 2000. |) | |
| |) | |

*Missouri Public
Service Commission*

**BPS TELEPHONE COMPANY'S RESPONSE TO
STAFF'S MOTION TO REJECT AND
OFFICE OF THE PUBLIC COUNSEL'S OBJECTION**

Comes now BPS Telephone Company ("BPS"), by and through its counsel, and for its Response to Staff's Motion to Reject BPS's Price Cap Election ("Staff's Motion") and Office of the Public Counsel's Objection to BPS Telephone Company's Price Cap Election ("OPC's Objection"), respectfully states to the Missouri Public Service Commission (the "Commission") as follows:

A. Response to Staff's Motion

In Staff's Motion, four grounds are asserted for rejecting BPS's price cap election, but each of these grounds fails as a matter of law.

- 1. A reseller of basic local telecommunications service in an ILEC's service area may be used as a basis for obtaining price cap regulated status under RSMo. 392.245.2.**

Staff argues that a reseller should not be used as a basis for price cap election. Staff does not point to any such prohibition in the price cap statute, but instead asks the Commission to use rules of statutory construction to manufacture such a prohibition from other statutes. Statutory construction, however, is not necessary in this case. The language of the price cap statute is clear and unambiguous and does not prohibit a reseller from qualifying as an alternative local exchange telecommunications company (ALEC).

The law is clear that, when language in a statute is unambiguous, "courts should not forage among the rules of statutory construction to look for or impose a meaning other than that which is plainly stated."¹ When ambiguity is not present, courts should "regard laws as meaning what they say; the General Assembly is presumed to have intended exactly what it states directly and unambiguously."² If the legislature had desired to prohibit a reseller from qualifying as an ALEC, the legislature could have included such a prohibition in the price cap statute.

As Staff asserted in the *Southwestern Bell* price cap case, there is no distinction in the definition of ALEC "between a facilities-based versus reseller provider, only that there be a certificate to provide 'basic or non-basic local telecommunications service.'"³ The Commission concurred and stated that "nowhere in Section 392.245 is there a requirement that the alternative local exchange telecommunications company be facilities-based rather than a reseller before price cap regulation can be employed."⁴ In fact, the Commission specifically refuted one of the arguments now asserted by Staff, stating that "(t)he parties argument that the language in Section 392.450.1 and 392.451.1 constitutes such an implication is not persuasive."⁵

¹*City of St. Joseph v. Preferred Family Healthcare*, 859 S.W.2d 723, 725 (Mo.App. W.D. 1993); *see also State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 446 (Mo. banc 1998) (courts cannot look to rules of construction if the statute contains no ambiguity); *see also Civil Service Commission v. Board of Aldermen of St. Louis*, 92 S.W.3d 785, 787 (Mo. banc 2003) (courts must give effect to a provision's plain meaning and must refrain from applying rules of construction unless ambiguity is present).

²*In re The Estate of Susie Thomas v. Bowling*, 743 S.W.2d 74, 76 (Mo. banc 1988).

³*In the Matter of the Petition of Southwestern Bell Telephone for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493, PSC Case No. TO-97-397, Initial Brief of Staff of the Missouri Public Service Commission, p. 4.

⁴*In the Matter of the Petition of Southwestern Bell Telephone for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493, PSC Case No. TO-97-397, *Report and Order*, p. 16, dated September 16, 1997 (emphasis added).

⁵*Id.*

Clearly and unambiguously, section 392.245.2, RSMo. 2000,⁶ states that a company such as BPS may elect to be price cap regulated "if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area." Section 386.020(1) clearly and unambiguously defines an alternative local exchange telecommunications company as "a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service or switched exchange access service, or any combination of such services"

In its Motion to Reject BPS's Price Cap Election, Staff does not dispute that Missouri State Discount Telephone ("MSDT") was certified to provide basic local telecommunications service by the Commission and had a tariff for the provision of basic local telecommunications service approved by the Commission. There also has been no allegation that MSDT's certificate has been subject to suspension or revocation by the Commission. Furthermore, in BPS's first price cap proceeding, PSC Case No. IO-2003-0012, Staff admitted that MSDT "satisfies the Chapter 386.020(1) RSMo 2000 requirement as an alternative local exchange company."⁷ MSDT satisfies the statutory requirements of an alternative local exchange telecommunications company, and BPS thus satisfies the statutory requirements for price cap election.

⁶All statutory references are to RSMo 2000, unless otherwise noted.

⁷ Direct Testimony of William L. Voight, pages 6-7, prepared December 17, 2002; Transcript p. 118 (hearing of February 7, 2003).

2. MSDT is an alternative local exchange telecommunications company as that term is defined in §386.020(1) and is providing basic local telecommunications service to customers within the service area of BPS.

MSDT was certified to provide basic local telecommunications service by the Commission in Case No. TA-2001-334, effective March 26, 2001, and MSDT's tariff for the provision of basic local telecommunications service was approved by the Commission on June 26, 2001. This is all the price cap statute requires. Further, there has been no subsequent finding by the Commission that MSDT is not providing service pursuant to its lawfully approved tariff.

In Staff's Motion, however, Staff asserts that MSDT is not "providing" basic local telecommunications service because MSDT is not providing a certain level of service. Contrary to the plain meaning of the statute, Staff suggests that MSDT must be a forceful competitor in order to qualify as an ALEC under the price cap statute. As stated previously, Staff has already admitted that MSDT is an ALEC as defined by §386.020(1),⁸ and Staff has also admitted that MSDT is providing basic local telecommunications service as defined in §386.020(4) to customers within the service area of BPS.⁹

Again, Staff urges the Commission to look outside the price cap statute – a statute which simply states that the ALEC must be providing basic local telecommunications service. Staff encourages the Commission to insert the word "minimum" before "basic" and then look to 4 CSR 240-32.100(1)(2)(G). Staff cannot reasonably argue that the price cap statute is so flawed and ambiguous that the Commission needs to insert additional words. Instead, the pertinent definition may be found in §386.020(4). That statute defines "basic local telecommunications

⁸ Exh. 3, pp. 6-7; Tr. p. 118 (hearing of February 7, 2003).

⁹ Tr. p. 124 (hearing of February 7, 2003).

service" as "two-way switched voice service within a local calling scope as determined by the commission comprised of any" of the services listed in the following eight subparts. MSDT provides many of the listed services and thus provides "basic local telecommunications service" as required by the price cap statute.¹⁰

In another attempt to demonstrate that MSDT is not "providing" basic local telecommunications service, Staff urges the Commission to not only look outside the price cap statute but to also construct an entirely new meaning for two-way switched voice service. BPS is at a loss in how to respond to this assertion. Section 386.020(4) states that two-way switched voice service must be provided "within a local calling scope as determined by the commission." Staff would now lead the Commission to believe that, on a case by case basis, the Commission may also determine what constitutes two-way switched voice service.

As stated previously, there is no statutory ambiguity. Rules of construction are not necessary. And, in any event, BPS is unaware of any rule of statutory construction which would allow the Commission to use "as determined by the commission" to modify "two-way switched voice service" instead of "local calling scope." The Commission sets the applicable local calling scope when proceeding under §386.020(4). The Commission may not, on a case by case basis, look outside the statutory definition and fashion its own meaning of two-way switched voice service.

¹⁰ The uncontroverted evidence presented in Case No. IO-2003-0012 demonstrated that MSDT provides "two-way switched voice service within a local calling scope as defined by the Commission" comprised of the following services: (a) multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges; (b) access to local emergency services, including but not limited to, 911 service established by local authorities; (c) standard intercept service; and (d) standard white pages directory listing. Exhibit 5, pp. 12-13; Transcript pp. 119-21 (hearing of February 7, 2003).

MSDT is an alternative local exchange telecommunications company as that term is defined in §386.020(1) and is providing "basic local telecommunications service" to customers within the service area of BPS. The Commission may not require more. Contrary to Staff's urging, the Commission may not impose additional requirements by an unnecessary – and unlawful – construction of the applicable statutes.

3. The price cap statute contains no reference to "essential services," and BPS is not required to demonstrate that MSDT is providing particular "essential telecommunications services" in order to elect price cap regulation.

For the second argument section of Staff's Motion to Reject BPS's Price Cap Election, Staff urged the Commission to look to 4 CSR 240-32.100. For its third argument section, Staff urges the Commission to look outside the price cap statute and rely on the definition of "essential local telecommunications services" found in 4 CSR 240-31.010, the definitions section for the Missouri Universal Service Fund Chapter. In arguing for the rejection of BPS's price cap election, Staff appears to be arguing that the Commission should not have issued a certificate to MSDT in Case No. TA-2001-334 and should not have approved MSDT's tariff for the provision of basic local telecommunications service on June 26, 2001. This argument, however, has no relevance here.

Pursuant to the clear and unambiguous language of §392.245.2, BPS may elect to be price cap regulated by providing written notice to the Commission if an ALEC (1) has been certified to provide basic local telecommunications service and (2) is providing such service in any part of BPS's service area. The statute does not contain a reference to "essential services" and does not require a showing that the ALEC in question is providing service in accordance with its certificate.

In addition to the statutory requirements, is Staff suggesting that BPS must prove that the Commission's decision in Case No. TA-2001-334 was lawful and reasonable? If Staff wanted to challenge the issuance of the certificate to MSDT or the approval of its tariff, Staff could have done so. Instead, Staff was agreeable to a competitor entering BPS's service area, and the Commission approved MSDT's tariff pursuant to Staff's Recommendation and Memorandum of June 21, 2001.¹¹ If Staff wants to initiate a complaint proceeding against MSDT, Staff may apply to the Commission to do so. The fact that Staff has not initiated such a complaint belies Staff's implication that MSDT is violating the terms of its certificate. However, regardless of Staff's beliefs in this regard, Staff should not be allowed to litigate these issues at this time. The price cap statute is clear and unambiguous, and there is no reference to "essential services."

4. It is not necessary to show that the service provided by MSDT provides any particular level of competition to BPS, as competition is not a prerequisite for price cap regulation.

Staff alleges that RSMo. §392.185(6) requires that there be "full and fair competition" between MSDT and BPS. This, however, is a feigned reading of the statute, as the statute simply states that Chapter 392 shall be interpreted to allow full and fair competition to function as a substitute for regulation. The language of §392.245 is plain and unambiguous. By its terms, BPS may elect to be price cap regulated by providing written notice to the Commission if: (a) an ALEC has been certified to provide basic local telecommunications service; and (b) that ALEC is providing such service in any part of the small incumbent company's service area. There is no additional competition requirement. As the Commission once stated, "The Commission has

¹¹ See *In the Matter of the Application of M-SDT for a Certificate of Service Authority*, Case No. TA-2001-334, Tariff No. 200101121, *Order Approving Tariff*, dated June 26, 2001.

reviewed Section 392.245.2, and finds the language to be clear and unambiguous. Where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply."¹² The Commission continued by stating:

‘Provisions not plainly written in the law, or necessarily implied from what is written, should not be added by a court under the guise of construction to accomplish an end that the court deems beneficial.’ . . . (N)owhere in Section 392.245 is there a requirement that ‘effective competition’ precede price cap regulation.¹³

The Commission cannot look to rules of construction when the statute contains no ambiguity.¹⁴ In the *Southwestern Bell* price cap case, the Commission ultimately decided that the price cap statute must be given its plain and unambiguous meaning and that nowhere in the statute is there a requirement that a determination regarding competition precede price cap regulation.¹⁵ OPC, opposing Southwestern Bell’s request, argued that the level of competition provided by the ALEC was "trivial," and that "effective competition" did not exist in any of Bell’s exchanges.¹⁶ The Commission, however, stated that there is no ambiguity in §392.245.2.¹⁷ The Commission continued by saying that if the legislature "had intended the conversion to price cap regulation to be contingent on the existence of ‘effective competition,’ it could have included

¹² *In the Matter of the Petition of Southwestern Bell Telephone for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493, PSC Case No. TO-97-397, *Report and Order*, p. 13, dated September 16, 1997 (internal citations omitted).

¹³ *Id.* at 16 (internal citations omitted) (emphasis added).

¹⁴ *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 446 (Mo. banc 1998); *see also Civil Service Commission v. Board of Aldermen of St. Louis*, 92 S.W.3d 785, 787 (Mo. banc 2003).

¹⁵ *In the Matter of the Petition of Southwestern Bell Telephone for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493 (September 16, 1997).

¹⁶ *Id.*

¹⁷ *Id.*

such language" in the statute.¹⁸ The Commission stated that the parties were attempting to create an ambiguity where one did not exist.¹⁹

When GTE Midwest Incorporated was granted price cap status, there was no hearing, no evidence presented regarding competition, and no formal finding of sufficient competition.²⁰ When the Commission determined that Sprint Missouri, Inc. had met the prerequisites of §392.245 and could convert from rate of return regulation to price cap regulation, the Commission did not mention competition.²¹ The Commission simply found that the ALEC in question was certificated to provide basic local telecommunications service and was providing basic local telecommunications service to customers in two exchanges of Sprint. There was no Commission finding regarding the level of competition.²²

The Commission may not now look outside the statute in order to manufacture a competition requirement. As the Commission previously acknowledged, provisions not plainly written in the law should not be added by a court – or this Commission – under the guise of statutory construction simply to accomplish an end that the Commission deems beneficial.²³ If the legislature had wished to include a particular level of competition as a price cap requirement,

¹⁸*Id.*

¹⁹*Id.*

²⁰*In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation Under RSMo Section 392.245 (1996)*, 8 Mo. P.S.C. 3d 71 (1999).

²¹*In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price Cap Regulation Under RSMo Section 392.245 (1996)*, 8 Mo. P.S.C.3d 297 (1999).

²² *Id.*

²³ *In the Matter of the Petition of Southwestern Bell Telephone for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996)*, 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493 (September 16, 1997).

it could have done so. "Courts should not forage among the rules of statutory construction to look for or impose a meaning other than that which is plainly stated."²⁴

B. Response to OPC's Objection

The crux of OPC's Objection to BPS's price cap election is that MSDT does not provide a "competitive alternative" to BPS's basic local services. As detailed above, §386.020.2 does not contain a competition requirement – and it most certainly does not require that MSDT be a particularly worthy competitor. Section 392.245.2 clearly and unambiguously sets out the procedure by which a company such as BPS may elect to be price cap regulated. This section states in pertinent part:

A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area, and the incumbent company shall remain subject to regulation under this section after such election.

By letter of May 28, 2004, BPS elected to be price cap regulated. In that letter, BPS explained that the Resale Agreement between BPS and MSDT had been modified to remove the language that the Commission had interpreted as preventing MSDT from providing the necessary competition to BPS in its decision in IO-2003-0012. BPS also stated: 1) that it was a small incumbent telephone company serving less than 3900 lines; 2) that an alternative local telecommunications company (i.e. MSDT) had been certified to provide basic local telecommunications service in the BPS service area; and 3) that MSDT was, in fact, providing

²⁴*City of St. Joseph v. Preferred Family Healthcare*, 859 S.W.2d 723, 725 (Mo.App. W.D. 1993).

service within the BPS service area.²⁵ According to the price cap statute, this letter was all that was necessary for BPS to elect price cap regulation.

OPC does not appear to dispute that MSDT is certified to provide basic local telecommunications service in the BPS service area, nor that MSDT is providing service in that area. Instead, OPC argues that MSDT is providing inferior service. If OPC believes MSDT is not providing service pursuant to its certificate or tariff, OPC should take action against MSDT.

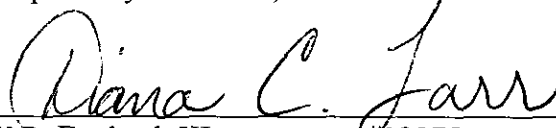
MSDT is an "alternative local exchange telecommunications company" as defined in §386.020(1), MSDT is certified to provide basic local telecommunications service in BPS's service area, and MSDT is providing such service in at least part of BPS's service area. The requirements of the price cap statute have thus been met, and OPC may not require more. As the Cole County Circuit Court explained in the *Southwestern Bell* case, " . . . a small incumbent local exchange telecommunications company may opt into price cap regulation upon simple written notice to the PSC . . ." if the specific statutory criteria are met.²⁶

WHEREFORE, for the reasons set forth herein, BPS respectfully requests that the Commission deny Staff's Motion to Reject BPS's Price Cap Election, overrule the Office of the Public Counsel's Objection to BPS Telephone Company's Price Cap Election, and allow BPS's price cap election to stand.

²⁵ BPS originally sent written notice to the Commission of its election to price cap status on March 13, 2002. BPS sent a second written letter of election to the Commission on July 17, 2002.

²⁶ *State ex rel. Public Counsel v. Public Service Commission*, Case Nos. CV197-1795CC and CV197-1810CC, *Revised Findings of Fact and Conclusions of Law*, dated August 8, 1998.

Respectfully submitted,



W.R. England, III #23975

Sondra B. Morgan #35482

Diana C. Farr #50527

BRYDON, SWEARENGEN & ENGLAND P.C.

P.O. Box 456

Jefferson City, MO 65102-0456

(573) 635-7166

(573) 635-0427 (fax)

dfarr@brydonlaw.com (email)

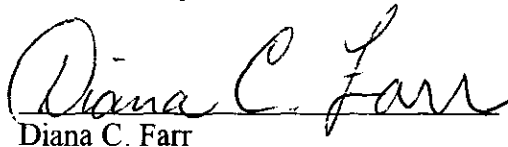
Attorneys for BPS Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, hand-delivered, or sent by electronic transmission on this 29th day of June, 2004, to the following parties:

Mr. Cliff Snodgrass
Senior Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael F. Dandino
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102


Diana C. Farr