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November 21, 2003

FILED[2]
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Missouri Public Service Commission

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

Re: Case No. IO-2003-0012

Dear Mr. Roberts:

Enclosed for filing on behalf of BPS Telephone Company, please find an original and eight (8) copies of an Application for Rehearing.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: Sondra B. Morgan

Sondra B. Morgan

SBM/lar
Enclosure
cc: General Counsel
Office of the Public Counsel
Larry Dority

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of BPS Telephone Company's Election to be Regulated under Price Cap Regulation as Provided in Section 392.245, RSMo 2000.	))))	Case No. IO-2003-0012

APPLICATION FOR REHEARING

Comes now BPS Telephone Company ("BPS") and pursuant to Section 386.500, RSMo 2000, files this Application for Rehearing of the Missouri Public Service Commission ("Commission") Report and Order issued November 13, 2003. In support of its Application for Rehearing, BPS states to the Commission that the Report and Order is unlawful, unjust, unreasonable and unsupported by competent and substantial evidence in the following respects:

1. The Commission's Order is unlawful, unreasonable and unsupported by competent and substantial evidence when it finds that BPS is ineligible to elect price cap status. The Commission bases its decision on its finding that the Resale Agreement entered into by BPS and the alternative local exchange company providing service in the BPS exchange, Missouri State Discount Telephone ("MSDT"), is designed to prohibit competition between the companies. Thus, the Commission finds that BPS is not subject to any competition from MSDT. The Commission's decision is unlawful, unreasonable and unsupported by competent and substantial evidence for the following reasons:

A. First, in order to elect to be regulated as a price cap company, it was not necessary for BPS to show that it was subject to competition. As the Commission concedes at page 9 of its Report and Order, the plain language of § 392.245 does not contain any reference to competition.

The requirements for a small local exchange company to be able to elect to be regulated pursuant to price cap regulation are very straightforward and unambiguous. The relevant statutory language is set out in § 392.245.2 and reads as follows:

> 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 . . . .

The statute simply states that an alternative local exchange company must be certificated to provide service within the incumbent's service area and must, in fact, be providing basic local telecommunications service within that service area. The statute does not say that the alternative local exchange company must be providing effective competition in order for the incumbent LEC to qualify for price cap regulation, nor does it say that the alternative local exchange company must be providing competition of any description. It only says that the alternative local exchange company must be providing basic local telecommunications service.

The Commission considered this same language when it considered whether large incumbent local exchange telecommunications companies should be subject to price cap regulation. The first case involving a request by an incumbent local exchange company to be regulated under the price cap statute was Southwestern Bell Telephone Company's request for price cap determination.[1] In its Report and Order in that case, the Commission stated:

> With respect to the prerequisites of Section 392.245.2, the parties opposing SWBT's petition appear to want to imprint upon that statute requirements that are not there.

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[1] *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996, 6 Mo. PSC 3d 493 (1997).*

"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. 'We are guided by what the legislature says, and not by what we think it meant to say.'" Wilson v. McNeal, 575 S.W.2d 802, 809 (Mo. App. 1978) (citations omitted). As previously indicated, nowhere in Section 392.245 is there a requirement that "effective competition" precede price cap regulation. Conversely, such a requirement must be met before an incumbent can be classified as competitive in a given exchange, per Section 392.245.5.[2]

The Commission quoted further from *Wilson* when it stated:

"[C]ourts must construe a statute as it stands, and must give effect to it as it is written. [A] court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." *Id.* at 810 (citations omitted).

And, finally, the Commission stated:

A more natural reading of the statute's text must prevail over a mere suggestion to disregard or ignore duly enacted law by hinting at legislative inadvertence or oversight. United Food and Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1996). "The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." State ex rel. Doe Run v. Brown, 918 S.W.2d 303, 306 (Mo. App. 1996). Thus, the parties' attempt to create ambiguity where none exists must fail.[3]

Thus, in the first case to interpret the same statutory language as is at issue in this case, the Commission clearly and firmly stated that the language must be given its plain and unambiguous meaning and found that nowhere in the statute was there a requirement that a determination regarding competition precede price cap regulation. In its Order Denying Applications for Rehearing in that case, in response to a contention by the Office of Public Counsel that the Commission had mischaracterized its position as advocating an "effective

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[2] *Id.* at 505.

[3] *Id.* at 506.

competition" standard, the Commission stated, "[t]he Commission, however, made no finding that the presence of Dial U.S. in SWBT's territory constituted competition, effective or otherwise. Nor was the Commission required to make such a finding, since Section 392.245.2 contains no reference to 'competition.'"[4] This finding was consistent with Staff's position in that case where it stated that the statute does not require "that the alternative provider be creating real, substantial or effective competition." (Exh. 14, pp. 4-5)

Upon appeal of the Commission's decision in the SWBT case, the Cole County Circuit Court affirmed the Commission's Report and Order. In its Revised Findings of Fact and Conclusions of Law and Judgment, the Court stated, "There is no doubt that the competition envisioned by Section 392.245 will be met by the competition provided by a single reseller of telecommunications services, *although Section 392.245.2 does not specify that any designated level of competition be obtained before price cap regulation is applied.*"[5] (Emphasis added.) In a subsequent case where GTE Midwest Incorporated requested a Commission determination that it was subject to price cap regulation, the Commission cited with approval the circuit court's legal conclusion set out above.[6]

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[4]*In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo (1996),* Order Denying Application for Rehearing, (November 18, 1997).

[5]*State ex rel. Public Counsel Martha S. Hogerty, et al. vs. Public Service Commission of the State of Missouri,* Case Nos. CV197-1795CC and CV197-1810CC, Revised Findings of Fact and Conclusions of Law and Judgment, (August 6, 1998).

[6]*In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation Under RSMo Section 392.245 (1996),* Order Approving Price Cap Application, MoPSC Case No. TO-99-294; Order Denying Rehearing and Granting Reconsideration, 8 Mo. P.S.C. 3d 71 (1999).

Thus, the Commission has not only reached an unlawful and unreasonable conclusion regarding BPS' price cap election, it has also ignored Commission precedent to the contrary.

B. The Commission's Report and Order is unlawful, unreasonable and unsupported by competent and substantial evidence when it finds that it is clear that the legislature intended to promote competition through price cap regulation, despite there being no mention of competition in the price cap statute,.

First, Missouri law states that it is presumed that the legislature intends what the law states directly.[7] The Commission cannot, under the guise of construction of a statute, proceed in a manner contrary to the plain terms of a statute. Where the language of the statute is clear and unambiguous, it is not subject to any other construction.[8] The Commission cannot change the meaning of the statute to add the requirement of competition by construing the plain and unambiguous language of the price cap statute using the broad, policy principles set out in § 392.185, RSMo. Because the language of the statute is clear and unambiguous, no construction is needed or required.

Secondly, the first sentence of § 392.245.1 states that, "The commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." Thus, when the small incumbent local exchange company electing price cap regulation meets the requirements set out in the

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[7] *Craven v. Premium Standard Farms, Inc.,* 19 S.W.3d 160, 167-68 (Mo. App. W.D. 2000).

[8] *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission,* 225 S.W.2d 792, 794 (Mo. App. 1949).

statute, its rates, charges and tolls are, by law, just and reasonable. Price cap regulation and the rates set using this regulation were not meant to be "a transitional status between traditional rate-of-return regulation and deregulated competition" as stated by the Commission.

The Commission cannot engraft onto this statute requirements that are not there. It cannot find that the legislature "intended" to promote competition through price cap regulation and deny BPS price cap status because the alternative local exchange company providing service in its service area does not meet criteria that the Commission divines from its unlawful construction of the statute. In the Report and Order, the Commission states that if BPS is allowed to elect price cap regulation, neither competition nor the Commission would regulate the prices charged by BPS. That is not true, however, as the Commission would regulate BPS pursuant to price cap regulation under § 392.245, the same as it does the large incumbent local exchange companies in the state.

C. The Commission's Report and Order denying the election to price cap regulation of BPS is unlawful, unreasonable and unsupported by competent and substantial evidence, because the Commission's denial of price cap status for BPS, a small local exchange telecommunications company, when it has previously granted price cap status to large local exchange telecommunications companies in Missouri pursuant to the same statute is a violation of BPS's equal protection rights under both the Fourteenth Amendment to the United States Constitution and Mo. Const. Art. I, § 2. The Commission's orders must be determined with due regard to the due process and equal protection clauses of both the federal and state constitution as well as

applicable statutes.[9] All persons are entitled to equal rights and opportunity under the law. Mo. Const. Art. 1, § 2. The Equal Protection Clause requires states to treat uniformly all who stand in the same relation to the statute at issue.[10] Any classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[11]

The Commission granted price cap status to Southwestern Bell Telephone Company in 1997 after hearing. Although the question of the level of competition afforded Southwestern Bell by the one alternative carrier providing service in one exchange of Southwestern Bell was an issue in the case, the Commission ultimately decided that the statute must be given its plain and unambiguous meaning and that nowhere in the statute was there a requirement that a determination regarding competition precede price cap regulation.[12] That case was appealed to the Cole County Circuit Court where the court upheld the Commission's decision and stated, "Section 392.245.2 does not specify that any designated level of competition be obtained before price cap regulation is applied."[13]

Two years later, when GTE Midwest Incorporated ("GTE") was granted price cap status

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[9]*State ex rel. Missouri Water Company v. Public Service Commission,* 308 S.W.2d 704, 714 (Mo. 1957).

[10]*Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362 (1964).

[11]*Royster Guano Co. v. Virginia,* 253 U.S. 412, 40 S. Ct. 560 (1920).

[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 Supp. 1996, 6 Mo. P.S.C. 3d 493, (1997).*

[13]*State ex rel. Public Counsel, CV197-1795CC and CV197-1810CC.*

there was no hearing and no evidence regarding competition.[14] In fact, the Commission did not issue a notice regarding the application, and the Commission issued its Order Approving Price Cap Application within three (3) weeks of the filing of the application. There was no formal finding of sufficient competition. There was no investigation into whether the alternative local exchange company was "providing basic local telecommunications services in a manner that would allow . . . price cap status" as there was in this case. (Report and Order, p. 11)

The large local exchange telecommunications companies were granted price cap status by the Commission applying the same statute that the Commission is now interpreting to deny price cap status to BPS. In the Southwestern Bell case the Commission explicitly stated that competition was not a factor in the analysis. For the Commission to now deny price cap status to BPS based on its interpretation of legislative intent regarding competition is a violation of equal protection under both the United States and Missouri constitutions.

D. The Report and Order of the Commission is unlawful, unreasonable and unsupported by competent and substantial evidence in that the Report and Order finds that the agreement between BPS and MSDT is designed to prohibit competition between the companies, but fails to consider evidence in the record that is contrary to this finding. In his filed testimony and at the hearing, BPS witness, Mr. David Carson, stated that nothing in the Resale Agreement between BPS and MSDT would preclude MSDT from providing service to anyone located in the BPS service territory. Mr. Carson explained that Section 6.1.1 of the Resale Agreement only stated that MSDT would not "target" BPS customers. Mr. Carson testified that, "BPS has not and will

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[14]*GTE Midwest,* 8 Mo. P.S.C. 3d 71 (1999).

not refuse to process any order for service from MSDT, whether or not the customer is a present customer of BPS."[15] Mr. Carson's testimony is directly contrary to the Commission's finding that, "BPS and MSDT have agreed that MSDT will not compete for BPS's customers." Although MSDT was not represented at the hearing, it was explored during questioning of the witness at hearing that the customers of prepaid providers such as MSDT are generally customers who cannot otherwise obtain telephone service. These prepaid providers do provide alternative local telecommunications service, however, and the Commission's finding that, "MSDT is not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status" without considering the testimony of Mr. Carson to the contrary is unlawful, unreasonable and unsupported by competent and substantial evidence.

2. The Commission's Report and Order is unlawful, unreasonable and unsupported by competent and substantial evidence in that the Commission fails to provide sufficient findings of fact, conclusions of law or rationale to support the Commission's decision. The Commission's decision is inconsistent with, and contrary to, prior Commission orders regarding price cap status. Yet, in its Report and Order, the Commission fails to discuss or consider its prior decisions involving the determination of price cap status for large incumbent local exchange companies, even though the Commission considered those cases using the same statutory language as was used to deny BPS price cap status. In its prior cases involving large LECs referenced above, the Commission did not examine the manner in which the alternative local exchange carrier was providing basic local service, and its finding that MSDT "is not providing

[15]Ex. 1, pp. 7-8; Tr. 63; In. 52-53.

basic local service in a manner as intended by the legislature" is directly contrary to Commission precedent. When administrative agencies depart from their prior holdings, they must provide some rationale for doing so.[16] Such an extreme change in position by the Commission in its interpretation of this statutory provision must be explained, and the Commission's failure to even discuss these previous cases and holdings before issuing its Report and Order makes its findings of fact and conclusions of law insufficient to support its decision.

3. The Commission's Order is unlawful and unreasonable and a violation of procedural Due Process guaranteed by Mo. Const. Art. 1, § 10 in that the issue date of the Report and Order is November 13, 2003, yet the Report and Order was not available to BPS, nor was it entered into the Commission's Electronic Filing and Information System ("EFIS"), until 1:15 p.m. on November 14, 2003. The effective date of the Report and Order is Monday, November 24, 2003, which theoretically gives BPS ten (10) days to prepare its Application for Rehearing. According to § 386.500.2, RSMo 2000, an application for rehearing must be filed "before the effective date of such order or decision." In order to comply with the statute, BPS must file its

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[16] *Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade,* 412 U.S. 800, 93 S. Ct. 2367 (1973) ("Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case"); *Greater Boston Television Corp. v. Federal Communications Comm'n,* 444 F.2d 842, 852 (D.C. Cir.), *cert. denied,* 403 U.S. 93 (1971) ('[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

Application on Friday, November 21, 2003. Since the Order was not available to BPS until the afternoon of November 14, this gives BPS only a little more than five (5) working days to prepare and file its Application for Rehearing. By effectively limiting the time for filing in this case, the Report and Order is unlawful in that it has deprived BPS of a reasonable opportunity to prepare and file an application for rehearing. *State ex rel. St. Louis County v. Public Service Commission,* 228 S.W.2d 1, 2 (Mo. 1950). Missouri courts have found that a Commission order effective ten days after its issuance is lawful, *State ex rel. Kansas City, Independence & Fairmount Stage Lines Co. v. Public Service Commission,* 63 S.W.2d 88, 93 (Mo. 1933), but in this case the Commission has effectively shortened the ten (10) days by its failure to release the order on the date it was issued and by setting the effective date so that four (4) of the ten days are not working days. Thus, the Commission's action deprives BPS of procedural due process in violation of Mo. Const. Art. 1, § 10.

Wherefore, in light of the foregoing, BPS respectfully requests that the Commission issue its order granting rehearing in the above-referenced matter and for such other orders as are appropriate in the circumstances.

Respectfully submitted,

Sondra B. Morgan

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 21st day of November, 2003,to the following parties:

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