

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

State of Missouri, ex rel. Public Counsel
Martha S. Hogerty,

Relator,

vs.

The Public Service Commission of the
State of Missouri, a state agency, and its
members Sheila Lumpe, M. Dianne
Drainer, Harold Crumpton, Robert
Schemenauer and Connie Murray, in their
official capacity,

Respondents.

Cause No. CV199-282CC
Division II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The Court, having reviewed the record and the briefs presented, and having considered the oral arguments of the parties, makes these Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. GTE Midwest Incorporated (GTE) is a regulated telecommunications company pursuant to Section 386.020, RSMo Supp. 1998, and is therefore subject to the jurisdiction of the Missouri Public Service Commission (PSC). Further, GTE is an incumbent local exchange telecommunications company as defined in Section 386.020(22), RSMo Supp. 1998.

2. Respondent PSC is a governmental regulatory agency created and established by the State of Missouri under Chapter 386, and vested with jurisdiction of public utilities of Missouri, including telecommunications companies under Chapter 392.

3. The Office of the Public Counsel (OPC) was created by the Missouri Legislature to represent the public in proceedings before the Commission.

4. On January 7, 1999, GTE filed its Petition requesting the PSC to make the determinations required by Section 392.245(2), RSMo Supp. 1998, that an alternative local exchange telecommunications company had been certified to provide basic local exchange service and is providing such service in an area served by GTE, and therefore GTE was subject to price cap regulation. In its Petition, GTE asserted that Mark Twain Communications Corporation had been certified to provide basic local telecommunications service within the GTE exchanges in Missouri, and that Mark Twain was providing such service in a part of GTE's service area.

5. On January 26, 1999, the PSC issued its Order Approving Price Cap Application (Order) in the Petition of GTE for determination that it be subject to price cap regulation under Section 392.245, RSMo Supp. 1998, in Case No. TO-99-294, to which Relator was a party. In its Order, the Commission made the following determinations:

- a) GTE is a local exchange telecommunications company which has been authorized to provide and has provided basic local telecommunications services in a specific geographical area in the state of Missouri prior to December 31, 1995, and thus is an incumbent local exchange telecommunications company as defined in Section 386.020(22).
- b) GTE has at least 100,000 access lines in the state of Missouri, and thus is a large local exchange telecommunications company as defined in Section 386.020(30).
- c) Mark Twain received a certificate of service authority to provide basic local telecommunications service on May 19, 1998 in Case No. TA-98-305. That certificate became effective simultaneously with the effective date of Mark Twain's tariff, which was approved on July 23, 1998, to become effective for service on and after July 28, 1998.
- d) Mark Twain received its certificate of service authority to provide basic local telecommunications services subsequent to December 31, 1995, and thus is an alternative local exchange telecommunications company as defined in Section 386.020(1).

e) Mark Twain has been providing basic local telecommunications service on a resale basis to customers in the Lewiston and LaBelle exchanges for the period following July 28, 1998.

f) The Lewiston and LaBelle exchanges are part of GTE's service area.

6. Relator filed a Motion for Rehearing prior to the February 5, 1999, effective date of the PSC's Order. On February 4, 1999, the PSC issued its Order Denying Rehearing and Granting Reconsideration.

7. The Relator filed its Petition for Writ of Review within thirty (30) days of the PSC's Order Denying Rehearing and Granting Reconsideration. On April 8, 1999, the PSC filed its Return. Subsequently, briefs were submitted and an oral arguments was held.

8. The issue raised by OPC in this appeal is whether Section 392.245(2) requires that the PSC give notice and hold a hearing before it makes the determinations required by the statute. OPC has argued that a hearing is required, and the proceeding is therefore a "contested case" under Section 536.010(2) of the Administrative Procedures and Review Act.

7. The PSC and GTE have argued, on the other hand, that Section 392.245(2) does not require notice or a hearing, and that the proceeding is therefore not a "contested case." The PSC and GTE have asserted that since no hearing is required by Section 392.245(2), the proceeding is a "noncontested case."

8. Section 392.245(2), RSMo Supp. 1998, states that: "A large incumbent local telecommunications company shall be subject to regulation under this section upon a determination by the Commission that 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 large incumbent company's service area."

9. Section 392.245 does not include an explicit or implicit requirement for "notice and hearing," as argued by OPC. Under Section 392.245(2), a large incumbent local exchange telecommunications company is subject to price cap regulation when the Commission makes two determinations which are perfunctory in nature: (1) that an alternative local exchange company has been certified by the Commission to provide local exchange telecommunications service; and (2) an alternative local exchange telecommunications company is providing such service in any part of the large incumbent company's service area. The controlling statute does not contain an explicit requirement that these determinations must be made "after notice and hearing." Nor would it be proper to construe the statute to find an implicit requirement for notice and hearing. The determinations required by the legislature in Section 392.245(2) are straightforward and perfunctory in nature, and may be made based upon the information contained in the verified Application filed by the incumbent local exchange company. If the legislature had intended to require "notice and hearing," as suggested by the OPC, then it would have included those requirements in Section 392.245(2). Since the legislature did not include the "after notice and hearing" requirement in Section 392.245(2), this controlling statute will not be construed by the Court to require notice or an evidentiary hearing.

10. Section 536.010(2) defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties **are required by law to be determined after hearing.**" (emphasis added) The hearing requirement is the key to classification of contested and non-contested cases, and the requirement must be found in a statute, constitutional provision, municipal charter or ordinance. Cade v. State, No. WD 55427, 1999 WL 55825, at *5 (Mo.App. W.D. Feb. 9, 1999); State ex rel. Valentine v. Board of Police Commissioners, 813 S.W. 2d 955 (Mo. App. 1991); Franklin v. Board of Directors, School District of Kansas City, 772 S.W.2d 873

(Mo.App. 1989); Kopper Kettle Restaurants, Inc. v. City of St. Robert, 439 S.W.2d 1 (Mo.App. 1969); State ex rel. Leggett v. Jensen, 318 S.W.2d 353 (Mo. banc 1958). Conversely, the courts have construed the term "non-contested case" to mean an agency determination of the legal rights, duties or privileges of any person rendered without hearing before final decision. (emphasis added) Farmer's Bank of Antonia v. Kostman, 577 S.W.2d 915, 921, n.7 (Mo.App. 1979); State ex rel. Tax Commission v. Walsh, 315 S.W.2d 830, 834 (Mo. banc 1958). Since the Court has found that Section 392.245 does not require notice or hearing, the Court concludes that this proceeding was not a contested case. Instead, the proceeding is a noncontested case and the PSC acted lawfully and reasonably by using the procedures appropriate for a noncontested case.

11. The PSC made its determination pursuant to Section 392.245(2), RSMo Supp. 1998, that GTE meets the statutory requirements and thus is subject to price cap regulation. Based upon the Court review of the record, the briefs, and the oral argument held herein, the Court has determined that the Missouri Public Service Commission's January 26, 1999, Order in Case No. TO-99-294 was not unconstitutional, unlawful, arbitrary, capricious or an abuse of discretion. Therefore, the Court will therefore affirm the Commission's Order.

CONCLUSIONS OF LAW

1. Under Section 392.245(2), RSMo Supp. 1998, the application of price cap regulation is mandatory upon the PSC's determination that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service anywhere in a large incumbent telecommunications company's service area.

2. Section 392.245(2), RSMo Supp. 1998, does not require notice and a hearing prior to the determination of the PSC that a large local exchange telecommunications company is subject

to price cap regulation. As a result, this matter was properly treated by the PSC as a noncontested case.

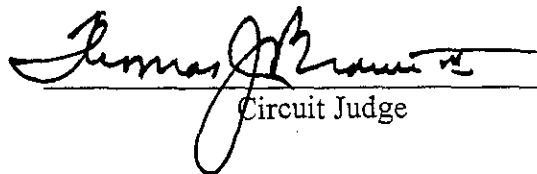
3. Typically, in noncontested cases before administrative agencies, the Court would conduct a de novo review of the administrative agency's decision. *See Cade, supra*. However, Section 386.510, which specifically applies to the judicial review of PSC orders, states: "No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified by it." The Court has therefore concluded that it may rule upon this matter without further proceedings.

The Court further concludes that the PSC's Order is not unconstitutional, unlawful, arbitrary, capricious, or an abuse of discretion.

JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the Court affirms the Missouri Public Service Commission's January 26, 1999, Order in Case No. TO-99-294.

SO ORDERED this 27 day of July, 1999.



Circuit Judge