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-2004-0597

APPLICATION FOR REHEARING

Introduction

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 9, 2004. 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:

- **The Commission's Conclusion of Law that the alternative local exchange company ("ALEC") Missouri State Discount Telephone ("MSDT") is not providing basic local telecommunications service in the BPS service area in a manner that would allow BPS to elect price cap regulation because it is not "providing service" in accordance with its certificate is an unlawful and unreasonable interpretation of the price cap statute that only requires that the ALEC be "certified to provide basic local telecommunications service and is providing such service."**

- **The Commission's finding that MSDT is not providing basic local service in accordance with its certificate is an unlawful and unreasonable collateral attack on the MSDT's certificate of service authority issued in Case No. TA-2001-334 and the Order Approving Tariff and tariff approved in that case.**

- **The Commission's Conclusion of Law that MSDT is not providing basic local service because MSDT does not provide competition to BPS and that § 392.245 and § 392.185 must be read in conjunction and construed to find legislative intent to promote competition through price cap regulation despite there being no mention of competition in the price cap statute is an unlawful and unreasonable interpretation of the price cap statute.**

- **The Commission's Conclusion of Law that price cap regulation is a transitional status between traditional rate-of-return regulation and deregulated competition is unlawful, unreasonable and unsupported by competent and substantial evidence because price cap regulation is not dependent on competition to constrain pricing but rather replicates competition by placing a cap on rates, and competition is not a necessary element for a change in regulation to price cap status.**

- **The Commission's decision finding that BPS is ineligible to elect price cap status is a violation of the company's equal protection rights under both the U.S. and Missouri constitutions in that the Commission used different criteria for its consideration of the BPS election when interpreting the same statutory language used to determine that large local exchange companies, such as Southwestern Bell Telephone Company, were eligible for price cap regulation.**

In its Report and Order, the Commission finds that BPS has met all the required elements of Section 392.245.2 "except that MSDT is providing basic local telecommunications service." But the Commission goes on to state that even though MSDT is providing two-way switched voice service within a local calling scope and provides four (4) of the enumerated services listed in § 386.020(4), RSMo, "it is not providing basic local service in a manner that would allow BPS to elect price cap regulation." (Report and Order, p. 8) The Commission then embarks on an inappropriate and incorrect analysis to determine legislative intent despite the plain, unambiguous language of the statute at hand. The Commission's decision is in error in the following respects.

Argument

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 alternative local exchange company ("ALEC") Missouri State Discount Telephone ("MSDT") is not providing basic local

telecommunications service in the BPS service area in a manner that would allow BPS to elect price cap regulation. Although the Commission acknowledges that it has granted MSDT a certificate of service to provide basic local service in BPS's geographic service area, the Commission finds that MSDT is not providing that service "in accordance with its certificate." (Report and Order at p. 8) Section 392.245.2, RSMo 2000, does not state that the ALEC must be providing service "in accordance with its certificate," however. The statute merely states that the ALEC must be "certified to provide basic local telecommunications service and is providing such service." MSDT was granted a certificate to provide basic local telecommunications service in Case No. TA-2001-334 and is providing basic local telecommunications service in accordance with the definition of basic local telecommunications service found in § 386.020 (4), RSMo 2000. The price cap statute does not require anything more, and the Commission inquiry should be at an end.

The majority relies on the language found in MSDT's certificate to provide basic local service to find that MSDT must offer all of the essential telecommunications services as defined by the Missouri Universal Service rule[1] before it can be considered to provide basic local telecommunications service. Attempting to link the certificate language to the present proceeding, the majority offers the following "extra-record" conclusion: "When it granted a certificate to MSDT, the Commission was aware that this grant might allow the small ILECs to invoke the price cap statute." (Report and Order, p.9) Not only is this gratuitous statement unsupported by the record, it is inconsistent with the Commission's instant decision. If the

[1]4 CSR 240-31.010.

Commission was truly aware of BPS's future intention to invoke price cap status based on the existence of MSDT, then it should have been more diligent when awarding a basic local telecommunications certificate to MSDT. Had the Commission performed the same analysis then as it does now, no certificate would have issued.

Moreover, the Commission's current reasoning is contrary to the established precedent of the Commission. As noted in the Dissenting Opinion of Commissioner Murray and Commissioner Davis in the ALLTEL price cap proceeding:

> Both Missouri State Discount and Universal, however, are operating under tariffs approved by this Commission *after* the certificates to provide basic local service were granted. Those tariffs clearly state that certain of the services listed in 4 CSR 240-31.010(5) are not offered. By its approval of the tariffs, the Commission has allowed the companies to offer basic local service consisting of fewer services than the complete list contained in its rule related to the state universal service fund. Therefore, even if the Commission's definition of basic local service were controlling, it is unclear what that definition is. We continue to believe, however, that the definition of basic local telecommunications service *for purposes of the price cap statute* must be the statutory definition of § 386.020(4).[2]

MSDT is providing basic local service pursuant to a lawfully approved tariff in conformance with the definition of basic local telecommunications service found in § 386.020(4), RSMo, and the Commission's decision to the contrary is unlawful, unreasonable and unsupported by competent and substantial evidence.

The majority also lists a conclusion of law to the effect that there is a distinction between "providing basic local" and the "resale of basic local" in the certification statutes and concludes that because MSDT only provides service through resale it is not providing service sufficient to

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[2]*In the Matter of the Notice of Election of ALLTEL Missouri, Inc. to be Price Cap Regulated Under Section 392.245, RSMo. 2000,* MoPSC Case No. IO-2002-1083, Dissenting Opinion of Commissioner Connie Murray and Commissioner Jeff Davis.

justify BPS's election to price cap status. (Report and Order, p. 12) This finding is irrelevant. The Commission admits that it rejected this argument in the Southwestern Bell price cap case. And consistent with the other eighty-plus competitive local exchange telecommunications provider certificates, MSDT was not granted a certificate of service authority to provide "resold" or "prepaid" telecommunications service. Rather it was granted a certificate of service authority to provide basic local telecommunications in the State of Missouri. As long as MSDT holds a valid certificate to provide basic local service, BPS should be allowed to rely on that certificate and the service provided by MSDT to elect price cap regulation.

2. The Commission's decision is unlawful, unreasonable and unsupported by competent and substantial evidence because it is an unlawful collateral attack on the Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service to MSDT and the Order Approving Tariff in Case No. TA-2001-334. Section 386.550, RSMo 2000, states that "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." The Order Granting Certificate in Case No. TA-2002-334 became effective on March 26, 2001, and the Order Approving Tariff and MSDT's tariff became effective July 2, 2001. The Commission's conclusion in this collateral proceeding that MSDT was not providing service in accordance with its certificate is an impermissible collateral attack on those conclusive orders.

Additionally, the Commission should be estopped from preventing BPS from relying on the fact that MSDT has a certificate of service authority to provide basic local telecommunications service and that MSDT is providing basic local service in accordance with the statutory definition of basic local telecommunications service in order to elect price cap

regulation. MSDT was granted a certificate of service authority to provide basic local telecommunications service and its tariff was approved by the Commission even though the Commission knew at that time that MSDT intended to provide resold, prepaid service and that its tariff clearly stated that it would not offer all of the services listed in 4 CSR 240-010(5). The Commission's conclusion in this case that MSDT is not providing service in accordance with its certificate is both an impermissible collateral attack on conclusive Commission orders and an unlawful and unreasonable restriction of BPS's reliance on those orders.

3. The Commission's decision is unlawful, unreasonable and unsupported by competent and substantial evidence because in order for BPS to elect to be regulated as a price cap company, it was not necessary to show that it was subject to competition. The plain language of § 392.245.2 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, and the incumbent company shall remain subject to regulation under this section after such election.

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.[3] 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 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)

In its Report and Order, the Commission attempts to distinguish the Southwestern Bell

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[3]*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).*

[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).

price cap case on its facts because, the Commission states, the ALEC was providing different basic local services than MSDT. There is no evidence in the record to support this finding. In fact, it was established at hearing that the Staff did no investigation into the type of services provided by the ALEC (i.e. Dial US) in the Southwestern Bell case, or in the price cap cases involving GTE or Sprint. (Tr. 142-148) Thus, the type of service provided by the ALEC was not an issue in those proceedings as the Commission only considered whether the ALEC had a certificate to provide basic local telecommunications service and was providing such service. The type of service provided was never an issue as indeed there is no reason that it should be. It is only in this case, and the ALLTEL case, that the Commission has decided to draw a distinction between the types of service provided by the companies it has certificated to provide basic local telecommunications service. The Commission even admits in its Report and Order that in the GTE price cap case, "no party alleged that the alternative carrier was not providing service." (R&O at 13) Thus, it seems, since no party alleged that the alternative carrier was not providing service, it was not necessary for the Commission to consider whether or not the ALEC was providing service "as the statute intends."[5] This is an unfair and discriminatory result that will be addressed in Paragraph 5 following.

4. 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 in the price

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[5]If the Commission must read the price cap statute in context with Section 392.185, then regardless of whether a party raises the issue, it should undertake (as it did here) its own analysis of the services offered by the ALEC. The Commission did not do this in the price cap determinations involving large ILECs.

cap statute of competition being a condition precedent to the election of price cap status.

First, Missouri law states that it is presumed that the legislature intends what the law states directly.[6] 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.[7] 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.

Second, the majority erroneously concludes that "The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in the construction and application of the price cap statute." (Report and Order, p. 11) Because the language of the statute is clear and unambiguous, no construction is needed or required. The majority concludes, nevertheless, that the legislature "intended to promote competition" and concludes that "MSDT is not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status." (Report and Order, pp. 11-12) The Commission cannot engraft requirements onto § 392.245.2 that are not there, and the majority's attempt to do so is unlawful and unreasonable.

Furthermore, the first sentence of § 392.245.1 states that, "The commission shall have the

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

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

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 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.

In short, price cap regulation is not a transitional status between traditional rate-of-return regulation and deregulated competition as stated by the Commission in its Report and Order. Price cap regulation is not dependent on any competition to constrain pricing. Price caps by their very nature constrain/limit upward pricing by implementing a "cap" on rates that cannot be exceeded, except under express circumstances set forth in the statute. To the extent the Commission believes some amount of competition is necessary to justify price cap regulation, it displays a fundamental misunderstanding of the issue. The Commission then furthers this misunderstanding by finding a legislative intent to require competition in order to justify price cap regulation.

In a recent opinion, the Missouri Court of Appeals, Western District, found that the statutory scheme that allows a company to be classified as "transitionally competitive"[8] is "directly inconsistent" with the price cap statute and that the statute allowing a company to be classified as transitionally competitive no longer applies to a company subject to price cap

[8]Section 392.361, RSMo 2000.

regulation.[9] Thus, price cap regulation is not a transitional step between rate-of-return regulation and competition but is *sui generis* and is a different type of regulation which stands on its own.

5. 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.[10] 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.[11] 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.[12]

The criteria to be used by the Commission in determining whether BPS's price cap election is valid are exactly the same as those used by the Commission in determining that SBC,

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[9]*State of Missouri ex rel. John Coffman et al. v. Missouri Public Service Commission,* W.D. Case Nos. 63075, 63092 and 63096, *slip opinion* issued September 28, 2004, p. 6.

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

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

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

GTE Missouri, Inc. ("GTE") and Sprint Missouri, Inc. ("Sprint") qualified for price cap regulation. In the appeal of the SBC price cap case, Judge Brown stated, "a small incumbent local exchange telecommunications company may opt into price cap regulation upon simple written notice to the PSC, if the **same criteria** which makes price cap regulation mandatory for a large incumbent telecommunications company have been met."[13] Using these same criteria, the Commission did not find that there was insufficient competition in the exchanges served by SBC despite the fact that the ALEC only provided service in one exchange out of the 160 exchanges served by SBC. Based on service in that one exchange, SBC was granted price cap status in all of its 160 exchanges, even in exchanges where there was no competition at all. To grant SBC price cap status in exchanges where there was no competition and yet refuse to grant BPS price cap status in its exchanges based on insufficient competition is a violation of its equal protection rights. In fact, the Commission found in the SBC case that competition was not a factor even to be considered.[14]

Furthermore, the Commission did no analysis regarding whether the ALECs in those cases were "providing service" according to the criteria used by the Commission in this case. (Tr. 142-48) In the cases involving SBC, GTE and Sprint, the Commission looked to see if the ALEC held a certificate to provide basic local telecommunications service and was, in fact, providing service in any of the large company's exchanges. There was no further analysis of the

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[13]*State ex rel. Public Counsel v. Missouri Public Service Commission,* Cole County Circuit Court *Revised Findings of Fact and Conclusions of Law and Judgment*, Case No. CV197-1795CC (emphasis added).

[14]*Southwestern Bell, Order Denying Application for Rehearing,* Case No. TO-97-397.

type of service actually being provided by the ALEC, there was no application of the provisions of § 392.185, RSMo and no investigation to see if the ALECs in those cases were providing service consistent with their certificates. If the Commission had performed such an analysis, none of the large ILECs would have been granted price cap status. To hold the ALEC providing service in the BPS exchanges to a higher standard than was used in the cases involving the large companies would be an unlawful denial of BPS's equal protection rights under the federal and state constitutions.

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.

Conclusion

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.

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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 18th day of November, 2004,to the following parties:

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