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April 4, 2003

**FILED<sup>2</sup>**

APR 04 2003

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 ("BPS"), please find an original and eight (8) copies of the Initial Brief of BPS Telephone Company.

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

SBM/lar

Enclosure

cc: Michael Dandino  
Cliff Snodgrass

**FILED<sup>2</sup>**

Missouri Public  
Service Commission

Case No. IO-2003-0012

### **Statement of Facts**

After this second notice of election, the Commission issued a Notice of Price Cap Election in which it established the instant case and directed that notice of the election be sent to all interexchange and local exchange telecommunications companies in the state. Parties wishing to respond to the notice were directed to do so no later than August 12, 2002. On August 12, the Staff filed a Motion to Reject BPS's Price Cap Election and Motion to Consolidate with Case No. TC-

2002-1076. On August 13, the Office of Public Counsel filed its Response in which it requested that the Commission set the matter for an evidentiary hearing. After testimony was filed by the parties, an evidentiary hearing was held before the Commission on February 7, 2003.

Certain relevant facts are not disputed and have been agreed to by all parties to the case. Those facts are: BPS Telephone Company is a small incumbent local exchange company serving approximately 3900 access lines in Missouri. (Exh. 1, pp. 3-4; Exh. 2, p. 4; Exh. 3, p.2; Tr. 118; 241) BPS provided written notice to the Commission of its intent to be regulated under § 392.245, the price cap statute. (Exh. 1, p. 4; Tr. 118; 242) MSDT is an alternative local exchange telecommunications company as that term is used in § 392.245 and defined in § 386.020 (1), RSMo. (Exh. 3, p. 7; Tr. 118; 242) MSDT was certified to provide basic local telecommunications service by the Commission in Case No. TA-2001-334, effective March 26, 2001. (Exh. 1, p. 4; Exh. 2, p. 12; Exh. 3, p. 7; Tr. 118; 241) MSDT's tariff for the provision of basic local telecommunications service was approved by the Commission on June 26, 2001. (Exh. 1, p. 4) BPS and MSDT entered into a Resale Agreement which agreement was approved by the Commission in Case No. TO-2002-62, effective October 26, 2001. (Exh. 1, p. 4-5; Exh. 6) MSDT is providing telecommunications service to customers within the BPS service area. (Exh. 1, p. 6; Exh. 3, p. 3)

## Argument

### **I. BPS has met the statutory requirements to be regulated as a price cap company pursuant to § 392.245, RSMo.**

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 . . . .

Missouri law states that it is presumed that the legislature intends what the law states directly.<sup>1</sup> 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.<sup>2</sup>

Taking the requirements in the order set out in the statute, the evidence in this case has shown that:

- 1) BPS is a small incumbent local exchange telecommunications company serving approximately 3900 access lines;
- 2) BPS provided written notice of its election to be regulated pursuant to the price cap statute on March 13, 2002, and again on July 17, 2002;

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<sup>1</sup> *Craven v. Premium Standard Farms, Inc.*, 19 S.W.3d 160, 167-68 (Mo. App. W.D. 2000).

<sup>2</sup> *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission*, 225 S.W.2d 792, 794 (Mo. App. 1949).

- 3) Missouri State Discount Telephone was certificated to provide basic local telecommunications by the Commission in Case No. TA-2001-334;
- 4) MSDT is an alternative local exchange telecommunications company as that term is defined in § 386.020(1), RSMo; and
- 5) MSDT is providing basic local telecommunications service to customers within the service area of BPS.

Neither Staff or Public Counsel disputes the facts set out in items 1-4 above. Nor do they dispute that MSDT is providing basic local telecommunications service if basic local telecommunications service is defined by § 386.020(4). (Tr. 123-24) What they do dispute is whether basic local telecommunications service is defined solely by statute, and whether the service provided by MSDT provides competition to BPS in order to allow BPS to elect price cap regulation. As will be shown below, the service provided by MSDT clearly fits within the statutory definition of basic local telecommunications service, and the price cap statute does not require the company electing the regulation to show that the alternative provider is providing any particular level of competition.

**II. The service provided by MSDT in the BPS service area is basic local telecommunications service as that term is defined in § 386.020(4), RSMo.**

MSDT provides prepaid telecommunications service. Staff contends that the prepaid service provided by MSDT is not basic local telecommunications, and thus BPS has not met one of the necessary requirements to elect to be regulated as a price cap company. Staff argues that in order to determine whether a company is providing basic local telecommunications service one must look at the company's tariff and the definitions of basic local telecommunications service found in both § 386.020(4) and the Commission's rule 4 CSR 240-32.100 (the Modernization Rule). (Tr. 123,

180) Staff concedes that MSDT holds a certificate of service authority to provide basic local telecommunications service granted by the Commission in Case No. TA-2001-334. (Tr. 118) Staff and Public Counsel also concede that MSDT is providing service in accordance with its tariff which was approved by the Commission. (Tr. 222; 259-60) Thus, the only grounds for Staff's contention that MSDT's service is not basic local telecommunications service is its contention that MSDT's service does not comply with the definition of basic local telecommunications services found in § 386.020(4) and Commission Rule 4 CSR 240-32.100.

MSDT's service is basic local telecommunications service, however, as it meets the statutory definition of basic local telecommunications found in § 386.020(4). This statute defines "basic local telecommunications service," in pertinent part, as:

two-way switched voice service within a local calling scope as determined by the commission comprised of *any* of the following services and their recurring and nonrecurring charges:

- (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
- (b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired;
- (c) Access to local emergency services including, but not limited to 911 service established by local authorities;
- (d) Access to basic local operator services;
- (e) Access to basic local directory assistance;
- (f) Standard intercept service;
- (g) Equal access to interexchange carriers consistent with rules and regulation of the Federal Communication Commission;

(h) One standard white pages directory listing.

(Emphasis added.)

MSDT's service easily falls within this definition as it provides two-way switched voice service within a local calling scope determined 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.

(d) Standard white pages directory listing.

(Exh. 5, pp. 12-13; Tr. pp. 119-21)

Section 386.020(4) states that basic local telecommunications service is two-way switched voice service comprised of *any* of the listed services, it does not say *all* of these services. Thus, MSDT's service clearly meets this definition as it provides at least four (4) of the listed services. In fact, Staff concedes that if the definition of basic local telecommunications service found in § 386.020(4) controls, MSDT is providing basic local telecommunications service. (Tr. 124)

Staff argues, however, that this is not sufficient and that MSDT's service must also meet the "minimum technologies and service features" set out in the Commission's Modernization Rule 4 CSR 240.32.100. Staff argues that § 386.020(4) provides only a "general" definition of basic local telecommunications service and that the Commission has authority to add to that definition through its rulemaking authority. However, Chapter 32 of the Commission's rules regarding Telecommunications Services itself states that basic local telecommunications service is "basic local

telecommunications service as defined in § 386.020(4). . . ." 4 CSR 240-32.020(4) and (5). This definition does not say as defined in § 386.020(4) and this rule. It simply says as defined in § 386.020(4).

It is also significant to note that in two other instances where the term "basic local telecommunications service" is used in the Commission's rules, the Commission defers to the statutory definition found in § 386.020(4) without any further clarification or qualification.<sup>3</sup> Apparently, the definition of basic local telecommunications service in § 386.020(4) is sufficiently clear, as the Commission has adopted it as its definition for purposes of these rules.

The Modernization rule is inconsistent with the statute, because the rule requires the provision of all enumerated services while the statute only requires the provision of any one. The well-established rule is that regulations may be promulgated only to the extent of and within the delegated authority of the statute involved. "When there is a direct conflict or inconsistency between a statute and a regulation, the statute which represents the true legislative intent must necessarily prevail."<sup>4</sup> Rules are void if they are beyond the scope of the legislative authority conferred upon the state agency or if they attempt to extend or modify the statutes.<sup>5</sup> Staff's argument that "basic local telecommunications service" must be defined by looking at both the statute and the rule when

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<sup>3</sup>See, Chapter 33, Service and Billing Practices for Telecommunications Companies, at 4 CSR 240-33.020(3), and Chapter 34, Emergency Telephone Service Standards, at 4 CSR 240-34.020(4).

<sup>4</sup> *Parmley v. Missouri Dental Board*, 719 S.W.2d 745, 755 (Mo. banc 1986).

<sup>5</sup> *Missouri Hospital Association v. Missouri Department of Consumer Affairs, Regulation and Licensing*, 731 S.W.2d 262, 264 (Mo. App. W.D. 1987). See also, *Brown v. Melahn*, 824 S.W.2d 930, 933 (Mo. App. E.D. 1992).



the rule contains additional requirements clearly attempts to expand or modify the definition of basic local telecommunications service found in § 386.020(4). When 4 CSR 240-32.100 is interpreted in such a way that it conflicts with the statutory definition of basic local telecommunications service or expands or modifies that definition, it clearly must fail.

Moreover, Commission rule 4 CSR 240.32-100 is entitled "Provision of Basic Local and *Interexchange* Telecommunications Service." (Emphasis added.) Thus, from the very title it cannot be considered as defining basic local telecommunications service alone. The purpose of this rule is stated as prescribing "the minimum technologies and service features constituting basic local *and interexchange* telecommunications service as provided by basic local telecommunications companies." (Emphasis added.) Subsection (1) of the rules states, "Each basic local telecommunications company shall provide all the minimum elements necessary for basic local *interexchange* telecommunications service prescribed in this rule." (Emphasis added.) And further in subsection 2, the rule states, "The following technologies and service features shall constitute the minimum elements necessary for basic local *and interexchange* telecommunications service[.]" (Emphasis added.) It is certainly not clear from this language that the rule intends to define basic local telecommunications service alone; otherwise, it would not have contained all of the references to interexchange service as well. When considering this rule, it is not clear where the requirements for basic local telecommunications service stop and the requirements for basic interexchange service begin. But it is clear that nowhere in this rule does it specifically state that its definition or its minimum standards are to be used in determining whether an alternative local exchange carrier is providing basic local telecommunications service for price cap determinations. (Tr. pp. 190-91) Although it may not be exactly clear what this rule intends and what types of services it applies to,

when the rule attempts to expand or modify the statute, it must fail.

Staff contends that § 386.020(4) does not define basic local telecommunications service with sufficient clarity to determine what constitutes basic local telecommunications service. Rather, Staff contends that § 396.020(4) only provides a general outline and defers to the Commission to determine such things as local calling scope and whether or not access to operator services as well as other features are included as part of basic local telecommunications service. (Exh. 3, pp. 5-6; Exh. 4, p.3; Tr. 188) Further, Staff contends that Commission rule 4 CSR 240-32.100 is the rule that the Commission has implemented to further define basic local telecommunications service, although it admits that § 386.020(4) does not specifically direct the Commission to adopt rules to further define or clarify that statutory definition. Neither does the Modernization Rule refer to § 386.020(4) as the statutory authority for that rule. (Tr. 188, 190-91) Finally, Staff witness Voight admitted at hearing that nowhere in the Commission's rules does the Commission further define the elemental language used in the statute such as "two-way switched voice communication." (Tr. 218-19) It seems that if the Commission believed that the definition of basic local telecommunications service found in the statute was really unclear that it would have further defined those terms in a subsequent rulemaking. Yet the only rule that the Staff can point to as further defining basic local telecommunications service is the so-called Modernization Rule that lists minimum technologies for basic local and interexchange service and fails to define or clarify the terms that Staff claims are unclear.

Section 386.020(4) defines "basic local telecommunications service" as "two-way switched voice service within a local calling scope as determined by the commission comprised of any of the following services and their recurring and nonrecurring charges[.]" Staff argues that the phrase "as

determined by the commission" modifies the entire paragraph and gives the Commission authority to further define basic local telecommunications service. (Tr. 207) The phrase "as determined by the commission" as used in this section only refers to its immediate antecedent, however, giving the Commission authority to determine local calling scopes, not broad authority to further define basic local telecommunication service. Missouri courts have long recognized the "last antecedent rule" which instructs that "relative and qualifying words, phrases, or clauses are to be applied to the words or phrase immediately preceding and are not to be construed as extending to or including others more remote."<sup>6</sup> Thus, the phrase "as determined by the commission" only applies to qualify the phrase immediately preceding it which is "local calling scopes."

It is also significant that Staff could not cite any other proceeding where it had required that a company to comply with the Modernization Rule in addition to the statutory definition either in order to obtain a certificate of service authority to provide basic local telecommunications services or to allow a company to qualify for price cap regulation under § 392.245. (Tr. 124) In fact, in the other price cap cases involving large local exchange companies, Staff could not cite to anything in the record of those cases where it conducted an investigation to determine whether the alternative local exchange company was providing service in accordance with the requirements of the Modernization Rule. (Tr. 147, 155) And, even more troubling, is the fact that Staff would not concede that if MSDT was found to comply with all of the requirements of 4 CSR 240-32.100 it would be providing basic local telecommunications service sufficient to allow BPS to qualify for price cap regulation. (Tr. 226) Thus, the definition of basic local telecommunications services

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<sup>6</sup>*Rothschild v. State Tax Commission of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988); *Citizens Bank and Trust Co. v. Director of Revenue*, 639 S.W.2d 833, 835 (Mo. banc 1982).

seems to be a moving target, and, one fears, it is whatever the Staff wants it to be for a particular case. (Tr. 226) BPS believes that the correct definition is the statutory definition, and that MSDT is providing basic local telecommunications service as contemplated by the price cap statute.

In its strained interpretation of the statutes, Staff contends that MSDT, as a prepaid provider, is not providing basic local telecommunications service, but instead is providing local exchange telecommunications service. Staff admits that MSDT was granted a certificate of authority to provide basic local telecommunications service from the Commission, but contends that the service provided by MSDT is something less than basic local telecommunications service.<sup>7</sup> Yet the Commission has granted approximately 33 certificates of service authority to provide basic local telecommunications service to companies that provide prepaid service. (Exh. 16; Tr. 177-78) In each of these certificate cases the Staff issued a recommendation supporting the application and stating that these companies met the minimum statutory requirements for obtaining a certificate of basic local telecommunications service. (Tr. 185) At the time the certificates were granted, Staff knew the restrictive nature of the prepaid providers' service and that these companies could not meet the minimum requirements found in 4 CSR 240-32.100. (Tr. 185-86) Yet in this case where an ILEC in whose service area the certificated prepaid company is providing service pursuant to its certificate seeks to qualify for price cap regulation, Staff contends that it is not possible for a prepaid company to provide basic local telecommunications service without complying with the Commission's minimum standards as expressed in 4 CSR 240-32.100. (Tr. 184)

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<sup>7</sup>Ironically, the only service that Staff states that MSDT does not provide pursuant to the Modernization rule is equal access to interexchange carriers (Exh. 3, p.7), and MSDT's customers have impliedly, if not explicitly, agreed to this restriction by subscribing to its service.

To explain this obvious inconsistency, Staff states that, despite their certificates, prepaid providers only provide a lesser service. As support for this argument, Staff cites a Commission Order Denying Motion to Suspend Tariff in a case involving AT&T Communications of the Southwest, Inc. ("AT&T").<sup>8</sup> In this case, AT&T had filed tariff sheets proposing to introduce a Direct Inward Dial service for its Digital Link Service. Staff filed a motion to suspend the tariff stating that the service would allow AT&T to provide two-way switched voice service within a local calling scope, yet AT&T would not conform to other standards required of other LECs that provided basic local telecommunications service. AT&T responded by stating that the proposed service offering was not a basic local service offering, and in fact, the tariff required the Digital Link customers to retain basic local service from an incumbent or competitive LEC as a condition of purchasing the Digital Link Service. The Commission denied Staff's Motion to Suspend Tariff Filing stating only that it found the proposed tariff sheets "reasonable." (Exh. 3, Sched. 5)

The Staff's reliance on this decision is misplaced, however, as the case involved a tariff filing, not an application for a certificate of authority or price cap regulation. Indeed, there is no discussion in the order of § 386.020(4) or 4 CSR 240-32.100. (Tr. 125-26) Neither is there any reference in Staff's Motion to Suspend Tariff Filing in Case No. TT-99-237 to either the statutory definition of basic local telecommunications service or the Commission Modernization Rule. (Tr. 127, 130) Yet Mr. Voight states in his testimony that, "Just as the Staff argued in Case No. TT-99-237 that the statute must be relied upon as the sole source for the definition of basic local

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<sup>8</sup>*In the Matter of AT&T Communications of the Southwest, Inc., Tariff Filing Proposing Direct Inward Dial for Digital Link Service*, MoPSC Case No. TT-99-237, Tariff No. 9900352 (December 10, 1998).

telecommunications service, BPS now argues that the Commission must only rely on that very same statute. Just as the Staff failed to prevail in Case No. TT-99-237, BPS must not be allowed to prevail in the instant case." (Exh. 3, p. 9; Tr. 127) The statutory definition of basic local telecommunications service was not at issue in this case, however, as AT&T never proposed or intended to provide basic local service. The Commission denied Staff's motion to suspend the tariff because it did not consider it necessary to determine whether the service proposed conformed to any definition of basic local telecommunications service. Thus, this decision does not provide any support for Staff's contention that basic local telecommunications service is defined by the Modernization Rule and not by the statute.

**III. It is not necessary for the Commission to determine if the service provided by MSDT is "competition."**

Both Staff and Public Counsel contend that in order for BPS to be able to elect to be regulated under the price cap statute, the alternative local exchange carrier providing service in BPS's service area must be shown to be providing competition. Staff and Public Counsel believe that the prepaid services offered by MSDT do not provide sufficient competition to BPS to allow it to qualify for price cap regulation. (Exh. 4, p. 2; Exh. 5, p.13; Tr. 170) However, both Staff and Public Counsel admit that the word "competition" is not found in the statute. 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 issue of whether the ALEC must provide effective competition in order for the ILEC to qualify for price cap regulation was thoroughly argued and decided in the cases where large companies requested a determination from the Commission regarding price cap status. The only difference in the statutory language for price cap determination for small companies versus large companies is that the Commission must make a determination that the large companies have met the requirements of § 392.245. Otherwise, the language is exactly the same, so the same analysis should apply.

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.<sup>9</sup> Parties opposing Southwestern Bell's request argued that the level of competition provided by the ALEC, Dial U.S., was "trivial," and that effective competition did not exist in any of Southwestern Bell's exchanges. Further, the parties argued that Dial U.S. was not an active, facilities-based competitor but merely resold Southwestern Bell's services, and a reseller could not be considered as providing basic local telecommunications service.<sup>10</sup> The Commission Staff, on the other hand, stated in its Initial Brief that, "The statute does not require a percentage of market share for the alternative provider, nor does it require that the alternative provider be creating real,

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<sup>9</sup>*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).*

<sup>10</sup>*Id.* at 502.

substantial or effective competition." (Exh. 14, pp. 4-5)

In its Report and Order, 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. "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.<sup>11</sup>

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.<sup>12</sup>

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

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<sup>11</sup>*Id.* at 505.

<sup>12</sup>*Id.* at 506.



regarding competition precede price cap regulation. In its Order Denying Applications for Rehearing, 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.'"<sup>13</sup> 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 this 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."<sup>14</sup> 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.<sup>15</sup>

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<sup>13</sup>*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).*

<sup>14</sup>*State ex rel. Public Counsel Martha S. Hogerty, et al. vs. Public Service Commission of the State of Missouri, Case Nos. CV197-1795CC and DV197-1810CC, Revised Findings of Fact and Conclusions of Law and Judgment, (August 6, 1998).*

<sup>15</sup>*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,*

Public Counsel and Staff in this case try to distinguish between "effective competition," which they admit is not the standard, and some other nebulous level of competition which they feel is necessary before an incumbent can qualify for price cap regulation. (Exh. 4, p.2; Tr. 170, 228) Public Counsel witness Meisenheimer states in her Rebuttal testimony that, "It would be harmful for Missouri consumers for the PSC to revoke this [rate of return] safeguard absent market conditions that ensure the development of effective competition by prematurely prescribing price cap regulation." (Exh. 5, p. 10) She explains her testimony as not requiring that effective competition exist at the time the company receives price cap status, but instead requiring that conditions be present that would make it likely that effective competition will develop. (Tr. 254) This seems to be a distinction without a difference. How can the Commission determine that conditions for the development of effective competition are present short of a finding that effective competition exists?

If the legislature had intended for competition to be a requirement for price cap regulation, it would have included that requirement in the statutory language. As stated by BPS witness Schoonmaker, BPS is subject to substantial competition from wireless carriers, yet that competition cannot be considered in the price cap proceeding because the wireless carriers are not "certificated" or regulated by the Commission. (Exh. 2, p.9-10) If competition is to be a requirement for price cap regulation, all types of competition should be considered.

BPS believes, however, that the issue of whether competition of any type is a consideration has been fully addressed by the Commission in the Southwestern Bell price cap case. The order and

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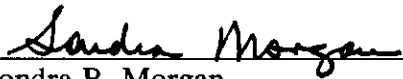
MoPSC Case No. TO-99-294; Order Denying Rehearing and Granting Reconsideration, 8 Mo. P.S.C. 3d 71 (1999).

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 4<sup>th</sup> day of April , 2003, to the following parties:

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