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**FILED**<sup>3</sup>  
APR 04 2003

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

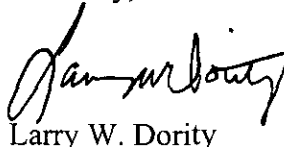
RE: In the Matter of BPS Telephone Company's Election to be Regulated under Price  
Cap Regulation as Provided in Section 392.245, RSMo 2000.  
**Case No. IO-2003-0012**

Dear Mr. Roberts:

Enclosed for filing in the above referenced case, please find the original and eight (8) copies of (1) ALLTEL Missouri, Inc.'s Petition for Leave to File Brief as an *Amicus Curiae* and (2) *Amicus Curiae* Brief of ALLTEL Missouri, Inc.

This filing has been served this date on all counsel of record. Thank you for your attention to this matter.

Sincerely,



Larry W. DORITY

Enclosures  
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>  
APR 04 2003

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

Missouri Public  
Service Commission

***AMICUS CURIAE BRIEF***  
**OF**  
**ALLTEL MISSOURI, INC.**

Comes now ALLTEL Missouri, Inc. ("ALLTEL"), pursuant to Commission Rule 4 CSR 240-2.075(6), ALLTEL's Petition for Leave to File Brief as an *Amicus Curiae* filed concurrently herewith, and the Commission's Order Granting Extension Of Time To File Briefs entered in this matter on March 19, 2003, and respectfully submits its *Amicus Curiae* Brief for the Commission's consideration in this proceeding.

The parties' Joint Issue List, Witness List, Order of Cross-Examination and Opening Statement filed in this proceeding identified three major issues to be addressed by the Commission, as follows:

**LIST OF ISSUES**

1. Is Missouri State Discount Telephone (MSDT) providing basic local telecommunications service in BPS's service area?
2. Would the type or level of competition that MSDT provides BPS Telephone Company (BPS) be a relevant consideration in determining whether BPS is subject to price cap regulation?
3. Does BPS qualify for price cap regulation under Section 392.245 RSMo 2000?

ALLTEL supports and adopts the Statement of Position of BPS Telephone Company relative to the above list of issues, as filed in this matter on January 24, 2003.

As noted by Counsel for BPS in the opening statements portion of the evidentiary hearing, “despite the efforts of the witnesses and the amount of prepared testimony that’s been filed . . . the real dispute is rather narrow and can be easily decided.” (Tr. 15). Indeed, upon reviewing the applicable statutory section governing the underlying issues addressed in this matter, the parties appear to be in agreement on the statute’s operative provisions, except for that provision identified as **Issue No. 1: Is Missouri State Discount Telephone (“MSDT”) providing basic local telecommunications service in BPS’s service area?**

BPS exercised its statutory right to elect to be price cap regulated under Section 392.245, RSMo 2000, by providing written notice to the Commission in conformance with Section 392.245(2), which states:

A large incumbent local exchange 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. 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. (*emphasis added.*)

An examination of the record of this proceeding relative to the above-stated statutory provision, reveals the following in regard to the conditions that a carrier must meet:

A. BPS is a small incumbent local exchange telecommunications company.

"It is my understanding that § 386.020(30), RSMo, defines a small local exchange company as a company with less than one hundred thousand access lines. BPS serves approximately 3900 access lines." (BPS Witness Carson, Ex. 1 at 3-4). "There seems to be no dispute that BPS Telephone Company is a small incumbent local exchange telecommunications company." (BPS Witness Schoonmaker, Ex. 2 at 4). "According to its most recent annual report (2001) on file with the Commission, BPS serves 3,890 exchange access lines in its three exchanges of Bernie, Parma and Steele, Missouri. Since BPS has less than 100,000 access lines, it is classified as a small carrier pursuant to Section 386.020(30) RSMo 2000." (Staff Witness Voight, Ex. 3 at 2) (Tr. 118).

B. BPS provided written notice of its election to the Commission. "BPS provided written notice of its election of price cap regulation to the Commission on March 13, 2002. On July 17, 2002, BPS renewed its notice of price cap election." (Carson, Ex. 1 at 4).

[Mr. England] Q. And would you agree with me that BPS has provided written notice to the Commission of its election to become subject to price cap regulation?

[Mr. Voight] A. Yes.

(Tr. 117-118).

C. An alternative local exchange carrier, in this case MSDT, has been certified to provide basic local telecommunications service in BPS's service area.

Missouri State Discount Telephone ("MSDT") received a certificate to provide basic local telecommunications service from the Commission on March 16, 2001, in Case No. TA-2001-334. The Commission granted MSDT "a certificate of service authority to provide basic local telecommunications services in the state of Missouri." MSDT's certificate of service authority included the service areas of small incumbent local

exchange companies including BPS. MSDT's initial tariff was approved by the Commission on June 26, 2001, effective July 2, 2001. MSDT filed a revised tariff sheet on May 21, 2002, to add several small company exchanges to its list of exchanges served, including the BPS exchanges, where MSDT had subsequently negotiated resale agreements. This tariff sheet became effective June 21, 2002. (Carson, Ex. 1 at 4).

"Although Ms. Meisenheimer does not discuss the issue, Mr. Voight acknowledges that MSDT has such a certificate and includes the Commission's order granting the certificate as Schedule 7 to his testimony." (Schoonmaker, Ex. 2 at 12).

State Discount satisfies the Chapter 386.020(1) RSMo 2000 requirement as an alternative local exchange company. A local exchange company is one who provides service between points within an exchange as contemplated in Section 386.020(31) RSMo 2000. State Discount satisfies that criteria. State Discount is an alternative local exchange carrier pursuant to Section 386.020(1) RSMo 2000 because it received *certification* to provide basic local telecommunications service within a specific geographic area subsequent to December 31, 1995. (Voight, Ex. 3 at 7).

Thus, as BPS Counsel again points out, "I submit to you that the only issue to be decided is whether MSDT is providing basic local telecommunications service in BPS's service area. And that issue can be further narrowed to whether or not the definition of basic local telecommunications service is as set forth in Missouri statute, Section 386.020(4) or if basic local telecommunications service is defined for purposes of the price cap statute as Commission Rule 4 CSR 240-32.100." (Tr. 16-17). "The crux of the issue is whether or not State Discount is providing basic local telephone service." (Voight, Tr. 121).

Staff essentially contends in this proceeding that BPS's price cap election is invalid because MSDT is not providing basic local service, in that the service the carrier provides does not constitute minimum basic local telecommunications service under

Commission rules. Staff asserts that because the company's tariffs are toll restricted (tariffs that had to have a positive Staff Recommendation to obtain approval), there is not equal access to interexchange carriers.

When asked in prefiled testimony -- " . . . is State Discount providing basic local telecommunications service?" -- Staff Witness Voight responds:

No. State Discount fails on this standard. State Discount does not satisfy the minimum standards established by the Commission for the provisioning of basic local telecommunications service. Those minimum standards are contained within 4 CSR 240-32.100, the so-called "Modernization Rule." Specifically, State Discount does not provide equal access to interexchange carriers (that is to say, State Discount does not provide One Plus equal access dialing for long distance). This gap in its service offerings is reason enough, in my opinion, for the Commission to conclude that State Discount is not providing basic local telecommunications service. This void in State Discount's service offerings is also reason enough, in my opinion, for the Commission to conclude that BPS does not qualify for price cap regulation because there is no alternative carrier *providing basic local telecommunications service* in any portion of BPS's exchange area. (Voight, Ex. 3 at 7).

However, Staff is proposing a standard not consistent with the plain reading of the price cap statute and the standard definition of "basic local telecommunications service." The Staff cites 4 CSR 240-32.100(2)(G) for the proposition of what constitutes minimum basic local telecommunications service; but the controlling definition of "basic local telecommunications service" is found in Section 386.020(4), where "basic local telecommunications service" is defined as:

(4) "Basic local telecommunications service", 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 and speech 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 regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations;

(Emphasis added.) Indeed, the very Chapter of the Commission's Rules that the Staff cites, Chapter 32, specifically refers to the above statutory definition for "basic local telecommunications service": 4 CSR 240-32.020 Definitions, (5) Basic local telecommunications service – basic local telecommunications service **as defined in section 386.020(4)**, RSMo Supp. 1997 (Emphasis added; of course, the supplement has been updated to RSMo 2000). As the record established in this proceeding reveals, MSDT provides many of these services, and thus provides basic local telecommunications service under the applicable statutory definition.

As noted by BPS Witness Schoonmaker:

Mr. Carson and Ms. Meisenheimer [OPC Witness] both cite § 386.020(4), the statutory definition of “basic local telecommunications service” in addressing the issue of whether MSDT is providing this service. Ms. Meisenheimer’s discussion on pages 12 and 13 of her testimony [Exhibit 5] concludes that of the eight specific services listed in the statute, MSDT provides four of them. . . . Based on Ms. Meisenheimer’s own analysis, MSDT provides four of the eight specific services, thus clearly falling within the minimum requirements of the statute.” (Schoonmaker, Ex. 2 at 13-14).

In addition, even Staff Witness Voight concurs that MSDT meets the statutory definition of basic local service as set forth in § 386.020(4):

[Mr. England] Q. You understand our position is that 386.020(4) standing alone is the sole source or defining term, if you will, of basic local telecommunications service, do you not?

[Mr. Voight] A. I believe I understand your position, yes.

Q. Okay. Now, then I’ll ask you a hypothetical. Assuming we’re right, would you agree with me that MSDT is providing basic local telecommunications service as strictly defined by statute?

A. Yes.

Q. Thank you.

(Tr. 123-124).

Q. Would you agree with me that Section 386.020(4) does not specifically direct the PSC to adopt rules to further define or clarify that statutory def – definition?

A. Yes, I agree with that.

(Tr. 190).

The language of Section 392.245.2 regarding a small incumbent local exchange company’s qualification for price cap status is very clear, to-wit: “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 . . .” Where the language of the statutory provision is



clear and unambiguous, the rules of statutory construction do not apply.<sup>1</sup> In *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. E.D. 1992), the court held that “the legislature is presumed to have intended what a statute says directly.” The legislature expressed its intent in the plain language of the statute, and there is no need to seek any other meaning through statutory construction. Indeed, as this Commission has previously held in construing Section 392.245.2, “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. Thus, the parties’ attempt to create ambiguity where none exists must fail.”<sup>2</sup>

The record evidence in this proceeding clearly supports the position of BPS that MSDT provides basic local telecommunications service in BPS’s service area in accordance with the definition of basic local telecommunications service found in Section 386.020(4), RSMo 2000.

**Issue No. 2: Would the type or level of competition that MSDT provides BPS Telephone Company (“BPS”) be a relevant consideration in determining whether BPS is subject to price cap regulation?**

This issue has been addressed previously by this Commission and the clear answer is “No.” As discussed above, Section 392.245.2, RSMo 2000, sets out the requirements to be met by a small incumbent local exchange company before it can elect

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<sup>1</sup> *Brownstein v. Rhomberg-Haglin and Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

<sup>2</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*, Case No. TO-97-397, (“Southwestern Bell Price Cap Case”), 6 Mo.P.S.C. 3d 493, at 506, citing *State ex rel. Doe Run v. Brown*, 918 S.W. 2d 303,306 (Mo. App. 1996).

to be regulated under price cap regulation. This statute does not reference any type or level of competition that must be met before the incumbent LEC is eligible to elect price cap regulation. BPS Witness Schoonmaker, in responding generally to the testimony of Staff Witness Voight and OPC Witness Meisenheimer, observes:

Much of their discussion and argument to the Commission for denying BPS's election of price cap status is centered around the question of whether there is effective competition from Missouri State Discount telephone ("MSDT") in the BPS operating area. While this discussion may be interesting from an economic viewpoint, it is simply not relevant to the statutory test for election of price cap status. The statute does not impose an "effective competition" test for electing price cap status. . . . Therefore, I find much of their discussion related to effective competition or the economic rationale for price cap regulation to address what they apparently believe the statute should have said, rather than what it actually says. (Schoonmaker, Ex. 2 at 3-4).

The Commission addressed the issue of "effective competition" in the Southwestern Bell Price Cap Case<sup>3</sup> where it stated, "If the legislature had intended the conversion to price cap regulation to be contingent on the existence of 'effective competition,' it could have included such language in Section 392.245.2 . . . ." And as Mr. Schoonmaker pointed out in the course of the hearing, there is no distinction or difference in the criteria to be applied to a large versus small ILEC under that statutory section.

[Mr. England] Q. For purposes of applying the price cap statute, 392.245.2, is there, in your opinion, any distinction in the criteria to be applied to a large – or for a large ILEC seeking to be price cap regulated or a small ILEC seeking to be price cap regulated?

[Mr. Schoonmaker] A. There is no difference in the criteria in the statute. In fact, the only difference that I can recall is that a large carrier has to have the Commission make a determination be—before they become subject to the price cap statute, whereas the small company can elect and notify the Commission that they're doing that.

(Tr. 112-113).

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<sup>3</sup> *Id.*

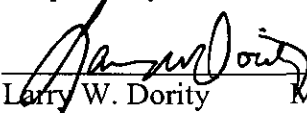
Thus, competition, no matter what the level or type, is simply not a consideration.

**Issue No. 3. Does BPS qualify for price cap regulation under Section 392.245, RSMo 2000?**

Yes, as fully set forth in the discussion of Issue No. 1, *supra*, BPS has shown that it meets all of the statutory criteria for election of price cap regulation. BPS is a small incumbent local exchange company (Ex. 1 at 3-4, Ex. 2 at 4, Ex. 3 at 2, Tr. 118); it filed a written notice to the Commission of its election to be regulated under the price cap statute (Ex. 1 at 4, Tr. 117-118); MSDT is an alternative local exchange telecommunications company (Ex. 3 at 7); MSDT holds a certificate of service authority to provide basic local telecommunications service in BPS's service area (Ex. 1 at 4, Ex. 2 at 12, Ex. 3 at 7); and MSDT is providing basic local telecommunications service in BPS's service area (Section 386.020(4), Ex. 2 at 13-14, Ex. 5 at 12-13, Tr. 123-124, 190).

In conclusion, ALLTEL respectfully submits that this Commission should deny the relief requested in Staff's Motion to Reject BPS's Price Cap Election and the Office of the Public Counsel's Response, and acknowledge that BPS is price cap regulated, having lawfully exercised its statutory right to elect to be so regulated under, and in conformance with, Section 392.245, RSMo 2000.

Respectfully submitted,



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## CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered, e-mailed or mailed, United States Mail, postage prepaid, this 4th day of April, 2003, to:

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