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

INITIAL BRIEF OF BPS TELEPHONE COMPANY

Statement of Facts

In addition to the immediate facts related to this case, it is also necessary to understand the facts and procedural history of the prior BPS Telephone Company ("BPS") price cap case.

Case No. IO-2003-0012

On March 13, 2002, BPS notified the Missouri Public Service Commission ("Commission") of its election to be regulated as a price cap company pursuant to § 392.245, RSMo 2000. (Exh. 1, Sched. DC1) BPS stated in its written notice of election that it was a small incumbent local exchange company, that an alternative local exchange telecommunications company, Missouri State Discount Telephone ("MSDT"), had been certified to provide basic local telecommunications service in the BPS service area, and that MSDT was, in fact, providing basic local telecommunications service in its service area. (Exh. 1, Sched. DC1) On July 17, 2002, BPS filed a second notice of election after certain questions raised by the Commission Staff had been resolved. (Exh. 1, Sched. DC2)

After this second notice of election, the Commission issued a Notice of Price Cap Election in which it established Case No. IO-2003-0012 and directed that notice of the election be sent to all

interexchange and local exchange telecommunications companies in the state. The Staff filed a Motion to Reject BPS's Price Cap Election and Motion to Consolidate with Case No. TC-2002-1076, and, the Office of Public Counsel ("Public Counsel") filed a 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.

On November 13, 2003, the Commission issued its Report and Order in Case No. IO-2003-0012 in which it found that BPS was ineligible to elect price cap status. The Commission first stated that "BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service in competition with BPS." (Report and Order, p, 9) In other words, the Commission found that 1) MSDT was an alternative local exchange carrier; 2) that it had a certificate to provide basic local telecommunications service; and 3) it was providing basic local telecommunications service as defined by the statute. However, in making its determination that the price cap election was invalid, the Commission found that language in the Resale Agreement between BPS and MSDT limited MSDT's ability to compete with BPS, and, since according to the Commission's interpretation of the Agreement, MSDT and BPS had agreed not to compete for customers, BPS should not be allowed to elect price cap status under this "completely noncompetitive circumstance." (Report and Order, p. 11) The Commission stated, "The legislature could not have intended such a noncompetitive situation to qualify as 'providing . . . [basic local telecommunications] service' under Chapter 392 . . . ." (Report and Order, p. 12)

Case No. IO-2004-0597

On January 20, 2004, BPS and MSDT filed an Application for Approval of Amendment to Resale Agreement Between BPS Telephone and Missouri State Discount Telephone Company. This

amendment to the Resale Agreement removed the language found in Paragraph 6.1.1 of the agreement that restricted MSDT from "targeting" current customers of BPS which the Commission found to be noncompetitive. (Stip. of Facts, ¶ 2 and Exh. A to Stip. of Facts) On January 28, 2004, BPS was notified by the Commission that the amendment was made effective, File No. VT-2004-0034. (Stip. of Facts, ¶ 3 and Exh. B to Stip. of Facts)

On May 28, 2004, BPS sent a new written notice of its election to be regulated under price cap regulation pursuant to § 392.245, RSMo 2000. BPS stated in its written election that 1) it was a small incumbent local exchange company; 2) an alternative local telecommunications company (i.e. Missouri State Discount Telephone Company) had been certified to provide basic local telecommunications service in the BPS service area; and 3) MSDT was providing basic local telecommunications service in the BPS service area. (Stip. of Facts, ¶ 4) On June 4, 2004, the Commission issued a Notice of Price Cap Election and established the present case. On June 21, 2004, the Staff filed a Motion to Reject BPS's Price Cap Election and Public Counsel filed an Objection to BPS's Price Cap Election. BPS filed a Response to these pleadings on June 29, 2004. On August 2, 2004, the parties appeared at a Scheduling Conference as directed by the Commission, and on August 16, 2004, the Commission issued its Order Adopting Proposed Procedural Schedule and Setting Oral Arguments. On September 2, 2004, the parties filed an agreed-to Stipulation of Facts which incorporated the complete record from Case No. IO-2003-0012.

Certain relevant facts were not disputed and were agreed to by all parties to Case No. IO-2003-0012. Therefore, those facts can also be considered agreed-to in this proceeding. 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. (Stip.of Facts, ¶ 4)

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 and BPS filed an amendment to the Resale Agreement removing the "noncompetitive" language that was accepted by the Commission in Case No. VT-2004-0034. (Stip. of Facts, ¶ ¶ 2 and 3, Exhibits A and B)

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 , and the incumbent company shall remain subject to regulation under this section after such election.

Missouri law states that it is presumed that the legislature intends what the law states directly.[1] 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.[2]

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

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

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

statute on May 28, 2004;

3) MSDT 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 sufficient 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 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) Staff also concedes that MSDT "satisfies the Chapter 386.020(1), RSM0 2000 requirement as an alternative local exchange company." (Exh. 3, pp. 6-7; Trs. 118) Staff also concedes that MSDT is providing basic local telecommunications service as that term is defined in § 386.020(4). (Tr. 124) 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 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:
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> (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
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> (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) And, the

Commission admitted as much in the Report and Order in Case No. IO-2003-0012 when it stated, "BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service in competition with BPS. (Report and Order, p. 9)

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.[4] 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

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[4]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).

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."[5] 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.[6] Staff's argument that "basic local telecommunications service" must be defined by looking at both the statute and the rule when 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

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[5] *Parmley v. Missouri Dental Board,* 719 S.W.2d 745, 755 (Mo. banc 1986).

[6] *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).

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."[7] 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

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[7]*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).

a company 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 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.[8] Yet the Commission has granted approximately 33 certificates of service authority to provide basic local

[8]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.

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)

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.[9] 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.[10] The Commission Staff, on the other hand, stated in its Initial Brief that, "The statute does not require a percentage of market share

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[9]*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).*

[10]*Id.* at 502.

for the alternative provider, nor does it require that the alternative provider be creating real, 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.[11]

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.[12]

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

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[11] *Id.* at 505.

[12] *Id.* at 506.

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 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.'"[13] 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 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."[14] In a subsequent case where GTE Midwest Incorporated requested a Commission determination that it was subject to price cap regulation, the Commission

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[13]*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).

[14]*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).

cited with approval the circuit court's legal conclusion set out above.[15]

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.

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[15] *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).

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 the cases cited therein clearly hold that the plain language of the statute controls, and nowhere in the language of the statute is there any mention of competition. Certainly there is no prerequisite that the incumbent show that the ALEC is providing competition before it can qualify for price cap regulation. The type or level of competition provided by MSDT is simply not relevant to whether or not BPS qualifies as a price cap company.

IV. BPS has removed the "non-compete" language from the Resale Agreement with MSDT that the Commission relied on when denying the price cap election in Case No. IO-2003-0012.

In the prior price cap election case before the Commission, the Commission found that the price cap election was invalid primarily because of the language in the Resale Agreement stating that MSDT would not target current or new customers of BPS when marketing its services. The Commission found that the agreement limited MSDT's ability to compete with BPS. Although BPS does not agree that competition of any sort is one of the elements that must be shown in order for BPS to qualify for price cap regulation, after the Commission issued its Report and Order in IO-2003-0012, BPS and MSDT amended the Resale Agreement to remove the language cited by the Commission in its Order. The Resale Agreement between the two companies does not now contain any sort of restriction on MSDT's offering of service in the BPS exchanges. After this amendment had been accepted by the Commission (Stip. of Facts, ¶2, Exh. A to Stip. of Facts), BPS filed a new written notice of price cap election. Since the Commission had relied on this lack of competition as the basis to find the previous election invalid and specifically stated that "BPS has shown all the required elements of Section 392.245.2," BPS believed that removing that language from the Resale

Agreement would clear the way for its subsequent election to be accepted by the Commission.

Yet both Staff and the Office of Public Counsel filed objections to the latest written election repeating the same arguments that were put forth in the first case, including the argument that MSDT cannot qualify as an ALEC for purposes of price cap election because it is a reseller. Staff cites references in Chapter 392 to a certificate of service authority for the resale of local exchange service, yet the Commission has never distinguished between facilities-based and resale when issuing certificates of service authority to provide basic local exchange service. Other resellers and prepaid providers, like MSDT, have been granted certificates of service authority that are identical in their grant of authority to those of facilities-based applicants. Staff admitted at the hearing in Case No. IO-2003-0012 that MSDT qualified as an ALEC pursuant to the definition found in § 386.020(1), RSMo. (Exh. 3, pp. 6-7; Trs. 118) In fact, Staff has asserted in the *Southwestern Bell* price cap case that there is no distinction in the definition of ALEC "between a facilities-based versus reseller provider, only that there be a certificate to provide 'basic or non-basic local telecommunications service.'"[16]

Section 392.245 does not state that the ALEC must be providing basic local telecommunications service according to Staff's interpretation. As was set out above, MSDT clearly provides basic local telecommunications service according to the statutory definition in § 386.020(4), the only definition that is relevant.

Both Staff and Public Counsel state that it is impossible for a prepaid provider such as MSDT

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[16]*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 (1996),* 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493, Case No. TO-97-397, Initial Brief of Staff of the Missouri Public Service Commission, p. 4.

to provide sufficient competition to allow BPS to elect price cap status. As was argued above, showing that there is "full and fair" competition between the ALEC and the small incumbent carrier is not a requirement for finding that the incumbent may elect price cap regulation. The Commission should not look outside the plain language of the statute in order to manufacture a competition requirement under the guise of statutory construction as Staff and Public Counsel urge. If the legislature had wanted to include a particular level of competition as a requirement for price cap election, it could have done so. Since it did not do so, the Commission should not "forage among the rules of statutory construction to look for or impose a meaning other than that which is plainly stated."[17]

V. The Commission must consider the price cap election of BPS using the same analysis as was used for the large incumbent telephone companies, because to reach a different result using the same statutory language would be 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.[18] 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.[19] Any classification must be reasonable, not arbitrary, and must rest upon some ground of

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[17]*City of St. Joseph v. Preferred Family Healthcare,* 859 S.W.2d 723, 725 (Mo. App. W.D. 1993).

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

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

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[20]

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 Southwestern Bell exchange out of more than 160 Southwestern Bell exchanges 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.[21] 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."[22]

Two years later, when GTE Midwest Incorporated ("GTE") was granted price cap status there was no hearing and no evidence regarding competition.[23] 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

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

[21]*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, 505 (1997).

[22]*State ex rel. Public Counsel, CV197-1795CC and CV197-1810CC,* para. 8, p. 6.

[23]*In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation Under RSMo Section 392.245 (1996),* 8 Mo. P.S.C. 3d 71 (1999).

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)

And later in 1999, the Commission determined that Sprint Missouri, Inc. ("Sprint") had met the prerequisites of Section 392.245 and could convert from rate base/rate-of-return regulation to price cap regulation.[24] This determination was made on the basis of a verified petition, and in making the determination, the Commission did not mention competition. It simply found that the ALEC in question, ExOp of Missouri Incorporated, was certificated to provide basic local telecommunications service and that it was providing basic local telecommunications service to customers in two exchanges of Sprint. There was no Commission finding regarding competition.

The large local exchange telecommunications companies were granted price cap status by the Commission applying the same statute that the Commission has now interpreted 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 would be a violation of BPS's equal protection rights under both the United States and Missouri constitutions.

Conclusion

For all the reasons stated above, BPS respectfully requests that the Commission issue its order confirming that BPS has made a valid election to be regulated as a price cap company pursuant to § 392.245, RSMo 2000.

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[24] *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price Cap Regulation Under RSMo Section 392.245 (1996),* 8 Mo. P.S.C.3d 297 (1999).

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 sent by U.S. Mail, postage prepaid, or hand-delivered on this 8th day of October, 2004,to the following parties:

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