

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Staff’s Review of the) File No. TW-2017-0078
Commission’s Chapter 31 Rules)

**COMMENTS OF THE
MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION**

The Missouri Cable Telecommunications Association (“MCTA”) submits the following comments to the Staff Request for Comment in the above-referenced case on its review of the Public Service Commission’s (“PSC”) Chapter 31 rules regarding the Missouri Universal Service Fund (“MoUSF”). The MCTA supports Staff’s proposed changes to Chapter 31 in order to align the rules with recent changes to the Federal Universal Service Fund. The MCTA, however, submits that the MoUSF cannot be expanded to support broadband-only service. For the reasons stated below, the statutorily defined term, “telecommunications service” cannot be construed to include broadband services (sometimes referred to as “broadband Internet access service”) and such a construction would be outside of the PSC’s jurisdiction over intrastate services. The decision in *United States Telecom Association, et al., v. Federal Communications Commission, et al*, by the United States Court of Appeals, D.C. Circuit, earlier this year (referred to in the Staff Request) addressed the limited question of whether the FCC’s decision to include broadband services within the federal statutory term of “telecommunications;” that decision did not construe the term “telecommunications services” generally or under Missouri law. Thus, that decision is inapposite here. Moreover, Federal law does not provide any independent authorization for the use of any MoUSF support for broadband services. Finally, federal law and Missouri statutes prohibit the Commission from regulating broadband.

Missouri law prohibits the PSC from regulating broadband

Missouri Revised Statute § 392.611.2 provides that broadband service or any other aspect of “Internet protocol-enabled services” “shall not be subject to regulation” under Chapters 392 or 386 (other than with respect to the limited purposes of § 392.550 RSMo (interconnected VoIP)). In other words, with very limited exceptions not applicable here, the legislature has expressly forbade the Commission from regulating such services. “As a creature of statute, the Commission only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable implication. . . . If a power is not granted to the Commission by Missouri statute, then the Commission does not have that power.” *Staff of Missouri Pub. Serv. Comm'n v. Consol. Pub. Water Supply Dist. C-1 of Jefferson Cty., Missouri*, 474 S.W.3d 643, 649 (Mo. Ct. App. 2015). To include broadband services within the definition of “telecommunications service” would necessarily constitute the “regulation” of broadband services. None of the exceptions in § 392.611.3 RSMo to the PSC’s lack of jurisdiction would apply to confer jurisdiction over broadband service. When § 386.020(54) RSMo is construed with § 392.611.2 RSMo, it is clear that the definition of “telecommunications service” cannot encompass broadband service. To hold otherwise would create an absurd and contradictory statutory construction; *i.e.*, that “broadband and other internet protocol-enabled services” are “telecommunications services” and, therefore, subject to Commission regulation even though § 392.611.2 RSMo, a more recent enactment than § 386.020(54) RSMo, specifically prohibits such regulation.

The decision in *United States Telecom* only addressed the limited question of whether the FCC’s decision to include broadband services within the federal statutory term of “telecommunications” was within the FCC’s delegation of authority from Congress and was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” The

Court’s decision was simply a limited review of an agency interpretation of federal law, not a declaration relating to the term “telecommunications services” generally or under Missouri law. The Court specifically said that it did not consider whether that decision is wise as a matter of policy – it was limited to its review under standards that apply to consideration of federal agency’s actions interpreting a federal statute and does not override the specific prohibition of PSC jurisdiction in Missouri law. *United States Telecom*, 825 F.3d 674, 696-697 (D.C. Cir. 2016).

Federal law does not independently authorize any use of MoUSF support for broadband services

By including broadband services in the definition of “essential telecommunications service,” and otherwise suggesting changes throughout the universal service rules to specifically reference broadband services, the RLECs propose to add broadband services as supported services for the lifeline and disabled services programs of the MoUSF, as well as for purposes of the high cost MoUSF program. While MCTA otherwise generally accepts the Staff’s efforts to revise the Missouri PSC’s lifeline regulations to be consistent with the FCC’s April 2016 Lifeline Modernization Order, Missouri law does not authorize any use of MoUSF support for broadband services.

As noted above, the PSC does not regulate and has no jurisdiction over broadband service or any other aspect of “Internet protocol enabled services” (other than with respect to the limited purposes of § 392.550 RSMo (interconnected VoIP)). The RLECs’ proposal to include broadband services as MoUSF supported services would necessarily constitute the “regulation” of the ETCs’ provision of such services.

Although § 392.611.3 RSMo provides an exception to the PSC’s lack of jurisdiction of broadband service for “authority delegated to the state commission under federal statute, rule, or

order, including, but not limited to, universal service funds,” federal law does not delegate authority to the PSC to regulate broadband service for the purpose of administering the MoUSF. 47 USC § 254(f) authorizes states to “adopt regulations not inconsistent with the [FCC’s] rules to preserve and advance universal service.” This provision has been construed to generally authorize state commissions to adopt regulations related to ETC designations for federal universal service support, subject to the FCC’s ability to limit the scope of such regulations. (*E.g.*, in the FCC’s April 2016 Lifeline Modernization Order.) Section 254(f) also generally permits state regulations pertaining to state universal service programs, provided the regulations are not inconsistent with the FCC’s rules. However, section 254(f) does not authorize – nor could it authorize – a state commission to regulate services that the state’s legislature has determined are not subject to state regulation.

Because the General Assembly has determined that the PSC may not regulate broadband services, the PSC cannot rely on section 254 or any other section of federal law as a source of independent authority.

Federal law and Missouri statutes prohibit the Commission from regulating interstate services, which include broadband service

The Open Internet Order reaffirmed that broadband service is jurisdictionally *interstate* for regulatory purposes. *See, e.g.*, para. 431. Therefore, as is the case with interstate circuit-switched services, the PSC has no jurisdiction over broadband service. *See* § 386.030 RSMo (the PSC has no jurisdiction under Chapter 386 with respect to interstate commerce, except as permitted by federal law). *State ex rel. St. Louis-San Francisco Ry. Co. v. Pub. Serv. Comm’n*, 294 Mo. 364, 242 S.W. 938, 940 (1922)(PSC order to stop interstate trains was declared unconstitutional as a “hindrance of interstate traffic, and therefore an unlawful regulation and burden upon interstate commerce.) Further, § 392.190 RSMo provides “[T]he provisions of

sections 392.190 to 392.530 shall apply to telecommunications service **between one point and another within the state of Missouri** and to every telecommunications company.” (emphasis added).

The MoUSF enabling statute itself limits the Commission’s ability to expand the universal service fund to include interstate services such as broadband. The statute specifically requires that the Commission consider only “local” telecommunications services when promulgating MoUSF regulations. Section 392.248(6) RSMo states:

In determining whether, and to what extent, universal service fund funding is required to facilitate provision of essential **local** telecommunications service, the commission shall:

(1) Determine the definition of essential **local** telecommunications service no later than three months after the adoption of the essential local exchange telecommunications service definition for the federal Universal Service Fund....

(4) Establish a standard to determine whether and to what extent particular end-user customers, without regard to location within the state, may be eligible for assistance in paying for essential **local** telecommunications service. § 392.248(6) (emphasis added).

With respect to broadband services, the Open Internet Order exercised forbearance from most Title II obligations of common carriers, including forbearance of *ex ante* rate regulation.

Para. 441. The FCC made clear “that the states are bound by [the FCC’s] forbearance decisions today.” Para. 432. The FCC also announced its “firm intention” to exercise its preemption

authority, on a case-by-case basis, to “preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme” that the Order adopts.

Para. 433. The FCC specifically stated that *should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of broadband Internet access service through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.*” *Id.* (Emphasis added.)

Accordingly, the RLECs' proposal that "essential telecommunications service" and "essential local telecommunications service" include broadband service, which would necessitate, among other things, the PSC's regulation of the rates, terms and conditions of broadband service, would violate federal and state law. (*See* Attachment D to Staff Request (the RLECs' proposal).)

Missouri and Federal law prohibit the PSC from requiring broadband services to contribute to the MoUSF

Finally, and to the extent that the Staff or any parties propose to require broadband services to contribute to the MoUSF (*see* proposed 4 CSR 240-31.010(17)), the PSC has no authority to compel such contributions, for the reasons stated above and as stated in the Open Internet Order:

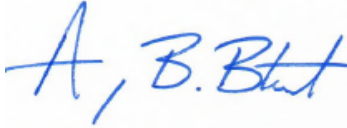
With respect to universal service, we conclude that the imposition of state-level contributions on broadband providers that do not presently contribute would be inconsistent with our decision at the present time to forbear from mandatory federal USF contributions, and therefore we preempt any state from imposing any new state USF contributions on broadband. Para. 433

Conclusion

While MCTA otherwise generally accepts the Staff's efforts to revise the Missouri PSC's lifeline regulations to be consistent with the FCC's April 2016 Lifeline Modernization Order, for all the reasons stated herein, the Commission must reject any proposal to expand the MoUSF to include broadband-only service. We appreciate the opportunity to provide these comments regarding the information and proposals provided in the Staff Request for Comment.

Respectfully submitted this 20th day of October, 2016.

MISSOURI CABLE TELECOMMUNICATIONS
ASSOCIATION

A handwritten signature in blue ink that reads "A. B. Blunt". The signature is written in a cursive style with a large initial "A" and a smaller "B".

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