

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

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|------------------------------------------------------|----------|--------------------------------|
| <b>In the Matter of the Revised Tariff Filing of</b> | <b>)</b> | <b>File No. TR-2012-0299</b>   |
| <b>MoKan Dial, Inc.</b>                              | <b>)</b> | <b>Tariff No. JI-2012-0442</b> |

**MoKan Dial Inc. Suggestions in Opposition  
to OPC's Objection and Motion to Suspend**

Comes now MoKan Dial Inc. ("Company"), for its Suggestions in Opposition to Office of Public Counsel's (OPC) March 19, 2012 Amended Objection and Motion to Suspend Company's proposed tariffs, and states as follows:

**Introduction and Summary**

1. On March 21 the Company filed substitute sheets and extension letter that changed the proposed effective date of the tariffs at issue to July 1, 2012. The tariffs were filed March 14, 2012. There is adequate time for the Commission to evaluate the positions of the parties and make an informed decision as to suspending or allowing the tariffs to go into effect on or before July 1, 2012.

2. At the Agenda Session of January 25, 2012, Staff Counsel and OPC informed the Commission that the FCC Order of November 18, 2011 (FCC Order)<sup>1</sup> required Company to raise local rates by July 1, 2012 or lose federal Universal Service Funds. At the Agenda Session of February 22, 2012 the Company's counsel informed the Commission that tariffs raising local rates were forthcoming. The tariff filing at issue here is such a filing.

3. A Summary of Company's Opposition to OPC's Motion to Suspend is as follows:

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<sup>1</sup> FCC Report and Order, WC Docket No. 10-90., FCC 11-161.

- a. The FCC Order requires Company to charge minimum basic local rates or lose federal USF revenues. The FCC Order also capped and reduced Company's intrastate inter-carrier compensation rates (i.e. access and reciprocal compensation).
- b. Local and inter-carrier compensation revenues make up the vast majority of Company's intrastate revenues. The FCC Order effectively precluded this Commission's ability to determine the appropriate balance between Company's local rates and access rates while providing a reasonable return on intrastate services.
- c. After OPC indicated it would request suspension and an earnings review, the Company elected to waive intrastate rate of return regulation (ROR) found in §392.240.1 RSMo, as the FCC Order has rendered intrastate ROR of little or no value to the Commission or to the Company.
- d. As the Company is no longer subject to ROR, it is no longer subject to the earnings review that is the basis for OPC's request that the tariffs be suspended.
- e. OPC has requested the tariffs be suspended for 150 days beyond their proposed effective date, or until October 12, 2012. If the tariffs are suspended beyond July 1, 2012, the Company will lose federal USF funds, the avoidance of which is the very purpose of the proposed tariffs.

f. To the extent this Commission has jurisdiction to determine whether the proposed local rate increases are “just and reasonable”, the Commission can make that determination without suspension of the tariffs.<sup>2</sup>

g. The increase to a local rate level of \$10.00 is “just and reasonable” for the following reasons:

1. \$15.62 National Average Local Rate. The FCC has decided that RLEC local rates which are less than the urban rate floor urban customers pay do not meet the “reasonably comparable” standard of 47 USC 254(b). The FCC Order cites a 2008 national average local rate of \$15.62. The FCC adopted the \$10/\$14 rate floors to avoid USF subsidizing artificially low local rates, saying “We do not believe that Congress intended to create a regime in which universal service subsidizes artificially low local rates in urban areas” (¶235).

2. \$16.25 and \$19.95 Regional Rural Rates. The FCC, in setting the floor, relied upon \$16.25 rates in Kansas and \$19.95 rates in Nebraska in establishing the urban rate floor. (¶243)

3. \$17.11 Missouri Average Local Rate. In its January 28, 2011 Revised Report in TO-2011-0073, MoPSC Staff reported the state average residential local rate was \$17.11.

4. Company’s present local rate of \$5.25 is well below—approximately 1/3—of these national, regional, and Missouri averages. It

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<sup>2</sup> *State of Missouri ex rel. Acting Public Counsel v. PSC*, 121 SW3d 534, 538 (Mo App WD 2003), holding the Commission has discretion to either suspend or allow the tariff to become effective without a hearing.

is well below—approximately ½--of the July 1, 2012 \$10.00 floor established by the FCC. It is well below the rate that urban customers in St. Louis, Kansas City, and Springfield pay.

5. Company's present \$5.25 local rate has been in effect since January 1, 1983, over 28 years. During that time the Consumers Price Index for all items has more than doubled, going from 99.6 in 1983 to 226 in 2012.

6. The FCC, in mandating minimum local rate levels which must be charged in order to receive a full complement of federal USF, has effectively ruled that local rates below the \$10 minimum are not just and reasonable.

7. It is not in the public interest to keep Company's local rates below the \$10 FCC minimum level if the effect of doing so is for Missouri, Company customers, and Company to lose the benefits of full USF.

8. Company's tariffs propose offsetting MCA rate decreases to assure the Company will not have a revenue windfall, and to assure that Customers as a whole will receive MCA rate decreases that will offset the local revenue increases.

## **References**

4. Excerpts from the FCC Order pertinent to the local rate minimums discussed herein are attached hereto as Appendix A.

5. Company's calculation of the net impact of the local rate increase, and the offsetting MCA rate decrease, is attached hereto as Appendix B PROPRIETARY.

6. This Commission's Notice Acknowledging Company's Election of Waivers waiving rate of return regulation is attached hereto as Appendix C.

7. The Commission's prior Order in IT-2009-0368 is attached hereto as Appendix D.

8. The information requests OPC submitted to Company is attached hereto as Appendix E. Data requests submitted to Company by OPC are attached hereto as Appendix F.

### **Suggestions**

9. RLECs, including the Company, had a January 20, 2012 meeting with Staff and OPC to discuss the local rate increases.

10. The Company previewed the proposed tariffs with Staff and OPC on February 14, 2012.

11. A conference was conducted at OPC's office on February 27, 2012. At that time OPC stated its intention to request suspension and conduct an earnings review prior to the tariffs becoming effective. On February 27, 2012, OPC sent the Company a list of information requests, which included being provided with general ledger entries upon which to verify the other items requested. See Appendix D hereto.

12. The Company viewed the requests as a full-fledged earnings review that likely would not have occurred absent the FCC Report and Order, and which could not be concluded by July 1, the time frame the FCC made available. In addition the Company's existing earnings level will not be representative of the Company's future earnings due to the FCC reductions in inter-carrier compensation. The FCC Order requires Company to lower intrastate access rates

by ½ of their difference with interstate access rates by July 1, 2012; to reduce intrastate access rates by the rest of the difference to match interstates on July 1, 2013; to charge interstate rates on intrastate VoIP to PSTN traffic; and to reduce the Company's reciprocal compensation rates charged wireless carriers for terminating intraMTA traffic to \$0.00. Due to these reductions in inter-company compensation revenues, there is no representative test year to use in an earnings review. The Company should not be subjected to an intrastate earnings review simply because it is adhering to the FCC's directive to raise local rates or lose USF. OPC's request to conduct an earnings review for Company, which has only a few hundred customers, is unfair and unreasonable to both. The Costs of the case would be in the tens of thousands of dollars. The Company would be entitled to recover those costs from the customers, which costs could exceed to rate increases necessary to raise rates to the FCC-imposed minimum.

13. In 2008 the Missouri legislature passed HB 1997. Section 392.420 authorized Company to elect waiver of various statutes and Commission rules, including rate of return regulation provided for in 392.240.1 RSMo. Company elected waivers, but did not elect waiver of rate of return regulation, as ROR was perceived as possibly having value in the future.

14. After consideration of the FCC Order, and OPC's insistence that the Company undergo an earnings review before increasing local rates to the FCC minimums, the Company re-evaluated the merits of ROR. The FCC had imposed minimum local rate levels that had to be met in order to avoid losing federal USF. The FCC had set a cap on Company's intrastate inter-carrier compensation rates in effect December 31, 2011. The FCC required Company's intrastate switched access rates to be reduced to 50% of the difference with lower interstate switched access rates on July 1, 2012. The FCC required Company's intrastate switched access

rates to be reduced to a level equal to the Company's interstate switched access rates effective July 1, 2013. Thereafter the FCC Order set forth a schedule by which the Company's interstate and intrastate access rates would be reduced to zero (bill and keep) over the ensuing several years. In addition the FCC required Company to provide free termination of wireless carriers' intraMTA wireless traffic effective July 1, 2012. Finally, the FCC required Company to bill intrastate VOIP to PSTN traffic at interstate switched access rates.

15. In the Company's view these FCC-imposed changes rendered Missouri ROR meaningless. Company's two significant intrastate revenues are basic local service revenues and intrastate inter-carrier compensation revenues. If the Company needed additional revenues, they could only come from basic local rate increases. Such increases are not feasible, as even at the current local rate levels the Company has lost customers to wireless carriers. The MoPSC could not allow increases in intrastate access rates or reciprocal compensation rates without violating the ceilings imposed by the FCC. If the Company needed to reduce its intrastate revenues, reducing local rates would cause additional federal USF losses beyond the local rate reductions. Reducing access rates below the FCC capped levels would only benefit interexchange carriers, not Company customers.

16. Given these conclusions, and given OPC's insistence upon an earnings review, Company elected waiver of rate or return regulation on March 12, 2012. Appendix C. Thereafter, on March 14, 2012, the Company filed the proposed tariffs at issue.

17. In its Amended Objection and Motion to Suspend OPC relies upon 392.200.1 RSMo, which requires charges for service to be "just and reasonable". OPC goes on to say that

waiver of 392.200.1 is not available. OPC also claims that, as Company's tariffs are not filed in connection with the issuance or modification of a certificate, 392.420 is not applicable.

18. Company disagrees with OPC's reading of 392.240 RSMo. While the first two sentences of that section do deal with the issuance or modifications of certificates, the following sentences make it clear that Company was entitled to waive any or all statutes set forth in 392.240:

“ Notwithstanding any other provision of law in this chapter and chapter 386, where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company's authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. In addition, where an interconnected voice over Internet protocol service provider is registered to provide service in an incumbent local exchange telecommunications company's authorized service area under section 392.550, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected.”

It was these sentences that authorized Company to make the elections made in IE-2009-0158, which the Commission acknowledged receipt by Order of November 19, 2008, and also the additional elections made in TE-2012-0073 that are set forth in Appendix C. Neither of those occurred in the context of issuance or modifications of certificates, and neither were required to.

19. Company does agree with OPC that 392.420 RSMo did not list 392.200.1 RSMo as a statute the Company could not waive. However, Company disagrees with OPC that the inability to waive the requirement that charges be “just and reasonable” means the tariffs can or should be suspended for the earnings review OPC requests.

20. Company believes that the statute giving the Commission jurisdiction to regulate Company pursuant to rate of return regulation is 392.240.1 RSMo. This statute authorizes the Commission, if it is of the opinion that the Company's rates are unjust, unreasonable, unjustly discriminatory, unduly preferential, or insufficient to yield reasonable compensation for services rendered, to set just and reasonable rates with due regard to a reasonable average return upon the value of property used by the Company in public service. Company believes the statutory requirement that the Commission give due regard "to a reasonable average return upon the value of the property actually used in the public service" are the words that create rate of return regulation (as opposed to price cap regulation or competitive classification).

21. Company has elected to waive 392.240.1 RSMo. Company believes that, after March 12, 2012, it is no longer subject to rate of return regulation. OPC's Motion to Suspend, as well as its data requests to Company, are both premised upon the notion the Commission still has jurisdiction to engage in a 392.240.1 RSMo rate of return earnings review. As this is no longer the case, Company respectfully suggests that the Commission is not permitted to suspend the tariffs for a rate of return based earnings review.

22. This leaves the question of what meaning the words "just and reasonable" set forth in 392.200.1 RSMo continues to impart. The Company believes the general language of 392.200.1 RSMo is subject to the more specific refinements of the terms "just and reasonable" set forth in the waived Section 392.240.1 RSMo.

23. This same question arose in IT-2009-0368. The Company had elected waiver of the Commission rule pertaining to the due date of a local subscriber's payment for service. The Company filed tariffs proposing to shorten the time frame required by the waived rule. In that

case Staff, as OPC does here, posited that the general terms “just and reasonable” set forth in 392.200.1 RSMo, gave the Commission the authority to deny the waiver authorized by 392.420 RSMo. The Commission, by Order of April 14, 2009, attached hereto as Appendix D, disagreed. The Commission held that it no longer had jurisdiction to utilize the words “just and reasonable” of 392.200.1 to impose the rule upon the Company.

24. Applying the reasoning of the Order in IT-2009-0368 to this issue, the Commission would no longer have the authority to suspend the tariffs in question in order to grant OPC’s request for a suspension in which to conduct a rate of return earnings review.

25. If the Commission believes the language of 392.200.1 RSMO requiring “just and reasonable rates” still retains significance, the Commission can make that determination without suspension of the tariffs. In this regard, the FCC’s Report and Order should be considered. In that Report and Order the FCC has made certain determinations that impact what local rate levels can be considered just and reasonable.

26. The FCC has decided that RLEC local rates which are less than the urban rate floor urban customers pay do not meet the “reasonably comparable” standard of 47 USC 254(b).<sup>3</sup> 47 USC 254(b) provides for the establishment of principles to assure access to advanced telecommunications and information services that are provided in all areas of the nation in reasonably comparable, both in terms of the services themselves and in terms of reasonably comparable prices, both urban and rural high cost areas.<sup>4</sup> In moving the federal universal service fund from supporting only telecommunications services to one that also promotes and supports the universal availability of broadband services, the FCC has set minimum local service rates

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<sup>3</sup> See Appendix A, paragraphs 234-245.

<sup>4</sup> 47 USC 254(b) is similar in intent to 392.185 RSMo.

that must be met in order to continue receipt of a full complement of USF funds. The FCC's decision with respect to minimum local rates is certainly entitled some consideration, if not complete deference, in determining what level of local rates is reasonable.

27. The FCC has calculated a nation average rate of \$15.62.<sup>5</sup> The FCC adopted the \$10/\$14 minimums as part of a transition process to prevent USF from subsidizing artificially low local rates.<sup>6</sup> If as a matter of national policy rates below \$10/\$14 are going to be considered "artificially low", and justifying a loss of USF receipts, this certainly mitigates in favor of considering rate below these minimums as being unreasonably low.

28. Company's present local rate of \$5.25 is well below the national average of \$15.62, and well below the July 1, 2012 \$10.00 floor established by the FCC. It is well below the rate that urban customers in St. Louis, Kansas City, and Springfield pay. As the FCC has decided that the national average is to be considered for purpose of continued USF receipts, that national average can be considered strong evidence of rate levels that are now just and reasonable.

29. Company's present \$5.25 local rate has been in effect since January 1, 1983, over 28 years. During this 28 year period, federal USF receipts have allowed the Company to remain viable while maintaining a low local rate. The Company is not aware of any other service or commodity that has not increased in price during this period.

30. The FCC, in mandating minimum local rate levels which must be charged in order to receive a full complement of federal USF, has effectively ruled that local rates below the \$10/\$14 minimums are no longer just or reasonable.

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<sup>5</sup> Appendix A, paragraph 236.

<sup>6</sup> Appendix A, paragraph 235.

31. It is not in the public interest to keep Company's local rates below the \$10/\$14 FCC minimum levels if the effect of doing so is for Missouri, Company customers, and Company to lose the benefit of moneys supporting universal service and high cost of service in rural areas that federal USF receipts provide.

32. Company's tariffs propose both local rate increases and MCA rate decreases. The majority of Company's local subscribers also subscribe to option MCA service. The Company has proposed reducing its Customers' additive rate for optional MCA that will offset the local rate increases. See Company's Appendix B Proprietary attached hereto.<sup>7</sup>

33. The above factors all suggest that the local rate level set forth in the Company's proposed tariffs is just and reasonable.

WHEREFORE, the Company respectfully requests that the Commission overrule OPC's Objection to the proposed tariffs, deny OPC's Motion to Suspend, and permit the tariffs to become effective on July 1, 2012.

Respectfully submitted,

/s/Craig S. Johnson  
Craig S. Johnson  
Mo Bar # 28179  
Johnson & Sporleder, LLP

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<sup>7</sup> The Company has submitted substitute tariff sheets changing the effective dates of the rate changes to the dates prescribed by the FCC, instead of earlier dates.

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was electronically mailed this 29th day of March, 2012 to PSC Staff and the Office of the Public Counsel.

/s/Craig S. Johnson  
Craig S. Johnson