

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

<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. Opposition to OPC Application for Rehearing  
Of May 11, 2012 Order Denying OPC Motion to Suspend**

Comes now MoKan Dial Inc. (“Company”), for its Opposition to OPC’s May 10, 2012 Application for Rehearing of the Commission’s May 1, 2012 Order Denying OPC’s Motion to Suspend (“Order”), and in opposition to same states as follows:

1. OPC’s Rehearing Application cites three grounds:
  - A. The Commission’s Order is not based on substantial and competent evidence in the record;
  - B. The Commission’s determination that an earnings review was not necessary to determining whether the proposed rates were just and reasonable was an unlawful violation of 392.240.1 RSMo;
  - C. Denying OPC’s Motion to Compel discovery violated OPC’s statutory rights to discovery.

2. Each of these 3 contentions was addressed in the Order. The Commission considered and addressed these contentions. There is no sufficient reason to conclude the Order was unjust or unwarranted. §386.500 RSMo.

3. OPC’s Motion appears to assume the Commission was obligated to render a decision based upon findings of fact based upon competent and substantial evidence in the record. The Order, at page 5 and footnote 5, informed OPC and the parties that this proceeding was not a contested case, and the Commission need not make

findings of fact based on competent and substantial evidence. This aspect of the Order correctly set forth the law applicable here.

This proceeding involved a tariff, which the Commission could allow to become effective without suspension, without any Order. The third paragraph of the Order recognized the tariffs were of broad interest to other telephone companies, and explained the Order was being issued in order to explain the Commission's reasoning.

392.230.5 RSMo provides that the Commission may suspend the tariffs at issue for hearing, but is also allowed to let the tariffs become effective by not suspending them for hearing. *State ex rel. Public Counsel v Public Service Commission*, 210 SW3d 344, 354-356 (Mo App WD 2006), cited by the Order, instructs that (1) where, as here, the Commission is not required to hold a hearing the matter is not a "contested case"; (2) Commission decisions in non-contested cases are subject to review of only (a) whether the decision denying a hearing was an abuse of discretion, and (b) whether the order was lawful; and (3) the Commission's decision was not required to be based upon substantial and competent evidence, as the reasonableness of the decision is not subject to review.

OPC does not contend the Order's implicit denial of a hearing was an abuse of discretion.

OPC does not contend that the Order was not authorized by statute.

The spreadsheet Company provided was provided to OPC, Staff, and by Staff to the Commission. It confirmed that the tariffed rate increases met the minimum rate levels of the FCC Order, and established the Company was commensurately reducing other tariffed rates so there would be no windfall to the Company, and no increased burden on the customers collectively.

4. Given the teachings of *State ex rel Public Counsel*, OPC's first point—that the Order was not based upon substantial and competent evidence in the record—must fail. The Commission was not required to base the Order on substantial or competent evidence. The cases cited by OPC either involved contested cases where findings of fact were required to be based on evidence in the record, or were reversed by *State ex rel Public Counsel* to the extent they indicate order in non-contested cases must be based upon evidence in the record.

5. OPC's second point—the Commission's failure to require an earnings review before allowing the rates to become effective was unlawful—also fails. The Order quite clearly explained that, because the only statute specifically authorizing the Commission to conduct a review of the Company's earnings had been statutorily waived by the Company, it could not conduct an earnings review.

Even if that earnings review statute had not been waived, the Commission's decision not to suspend for an earnings review, and to allow the tariff to become effective, is not a contested case decision. It would not be subject to review for reasonableness. It would not be subject to reversal for lack of findings of fact.

6. OPC's final point—it was denied its statutory rights to discovery—is also without merit. When tariffs are concerned, the Commission decides, by suspending a tariff, that there will be a contested case hearing for which discovery can be conducted. If the Commission decides not to suspend, there will be no hearing. If there will be no hearing, discovery should not be conducted.

There may be situations where the Commission allows discovery to go forward limited to the suspension issue itself. However that is not the case here. As the Commission refused suspension, discovery will not be conducted.

As set forth in paragraphs 9-11 of Company's April 20, 2012 Reply to OPC's Motions to Suspend and to Compel, the cases OPC cites for broad discovery rights stem from contested rate cases for utilities subject to rate of return regulation. They do not apply here where the Company has elected waiver of rate of return regulation.

OPC's authority for engaging in discovery is controlled by §386.450. This statute requires OPC to state good cause for issuing earnings review discovery requests. Company is no longer subject to rate-of-return regulation. An earnings review is a protracted, resource-consuming effort, further complicated by the FCC's preemption of intrastate exchange access rates effecting normal rate case parameters. OPC has not stated any cause or reason to believe the result of any earnings analysis would provide meaning information, even if there were to be a hearing. An earnings review would be a waste of time and money, and produce no meaningful results.

WHEREFORE, the Company respectfully requests that the Commission deny OPC's Motion for Rehearing.

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 electronically mailed this 14th day of May, 2012 to PSC Staff, the Office of the Public Counsel, Larry Dority, WR England III, and to Brian McCartney.

/s/Craig S. Johnson  
Craig S. Johnson