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May 24, 2002

Mr. Dale Hardy Roberts
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: BPS Telephone Company

Dear Mr. Roberts:

Enclosed for filing on behalf of BPS Telephone Company ("BPS"), please find an original and eight (8) copies of Suggestions in Opposition to Staff Motion for Commission Authority to File an Excessive Earnings Complaint.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Sondra B. Morgan

SBM/lar
Enclosure

cc: Office of the Public Counsel
Cliff Snodgrass
Lisa Winberry

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

Staff of the Missouri Public Service Commission,)	
)	
Complainant,)	Case No.
v.)	
BPS Telephone Company,)	
Respondent.)	

**SUGGESTIONS IN OPPOSITION TO
STAFF MOTION FOR COMMISSION AUTHORITY
TO FILE AN EXCESSIVE EARNINGS COMPLAINT**

Comes now BPS Telephone Company ("BPS") and for its Suggestions in Opposition to Staff Motion for Commission Authority to File an Excessive Earnings Complaint states to the Missouri Public Service Commission ("Commission") as follows:

Summary

1. On March 13, 2002, BPS formally notified the Commission of its election of price cap regulation pursuant to § 392.245, RSMo 2000. BPS advised the Commission: 1) that it was a small incumbent telephone company serving less than 3900 lines; 2) that an alternative local telecommunications company (i.e. Missouri State Discount Telephone Company ("MSDT")) had been certified to provide basic local telecommunications service in the BPS service area; and 3) that MSDT was, in fact, providing service within the BPS service area. According to the relevant statute, this is all that was necessary for the company to be able to elect price cap regulation.

2. On May 15, 2002, the Staff of the Commission filed a Motion for Commission Authority to File an Excessive Earnings Complaint ("Motion") in which it acknowledged that the election to price cap status, if valid, prevents Staff from asserting a traditional rate of return on rate base earnings complaint, but listed two reasons why Staff believes that the election is not valid. The reasons alleged by Staff are 1) that MSDT is not providing service within the BPS service area and 2) that the existence of a reseller in an incumbent local exchange carrier's service area does not qualify as a legitimate criterion for the acquisition of price cap status.

3. As these Suggestions in Opposition will show, the election of price cap status by BPS is lawful and valid. Staff concedes', and past precedent supports', that if BPS is a price cap company, it is not subject to earnings regulation, and, therefore, Staff's motion should be denied. So the only issue to be determined is whether BPS is subject to price cap regulation. If BPS is now subject to price cap regulation, then Staff's Motion for Authority to File an Excessive Earnings Complaint must necessarily be dismissed.

Criteria/Qualifications for Price Cap Regulation

4. In attempting to show that BPS should not be considered a price cap company, the Staff adopts a "tortured" and incorrect interpretation of the applicable statute in order to avoid the plain

'Staff Motion, p.2, paragraph 5.

'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. P.S.C. 3d 493 (September 1997); In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation Under RSMo Section 392.245 (1996), Case No. TO-99-294, Order Denying Rehearing and Granting Reconsideration (February, 1999); and State of Missouri ex rel. Public Counsel Martha S. Hogerty v. Public Service Commission of the State of Missouri et al., Cole County Circuit Court Case Nos. CV 197-1795CC and CV197-1810CC (August 1998).

meaning of the statute. The language of § 392.245.2 regarding a small incumbent local exchange company's qualification for price cap status is very clear. It states:

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.

But using the interpretation advanced by Staff in its Motion, the statute would read:

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 *facilities-based* basic local telecommunications service and is providing *facilities-based* service pursuant to a lawful tariff and such service is sufficient to constitute effective competition in the small incumbent company's service area (Emphasis added.)

However, there is no ambiguity in the language which would require statutory construction and allow the Staff to interpret the language in the manner advanced in its Motion.

5. The Commission fully addressed the issue of statutory construction of § 392.245 in the first petition for price cap regulation filed by Southwestern Bell Telephone Company wherein it stated, "the Commission finds nothing in either [§ 392.245.2 or Senate Bill 507] which would create an ambiguity in Section 392.245.2" The Commission further stated, "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

'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), 6 Mo. P.S.C. 3d 493, 503 (1997) (hereinafter "Southwestern Bell Price Cap Case").

language. Thus, the parties' attempt to create ambiguity where none exists must fail.'" The Staff is clearly trying to create ambiguity where none exists in its Motion. And, in fact, the cases cited by the Staff in its Motion belie its own argument. The Staff cites in paragraph 18 that "effect must be given from what the legislature said not what it may have intended or inadvertently failed to say." *Mo. Div. Of Employment Sec. V Labor and Industrial Relations Commission of Mo.*, 637 SW .2d 315, 318 (Mo. App. 1982). And, again, "the legislature is presumed to have intended what a statute says directly." *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. 1992). The legislature said what it intended to say in the plain language of the statute, and there is no need to apply any other meaning through statutory construction.

6. Therefore, the straightforward test is 1) has an alternative local exchange company been certified to provide basic local telecommunications service in BPS's service area, and 2) is it providing basic local telecommunications service in any part of BPS's service area. In this case there is no question that MSDT possesses a certificate of authority to provide basic local telecommunications service in the BPS service area. (See, Case No. TA-2001-334) The only question then is, is MSDT providing such service in any part of BPS's service area?

A. MSDT is providing service in BPS' service area.

7. Staff initially alleges that MSDT is not "lawfully" providing service within the BPS service area. While admitting that MSDT holds the appropriate certificate to provide basic local telecommunication service, Staff contends that the certificate was conditioned upon MSDT's filing of a tariff. However, MSDT did file a tariff to provide prepaid basic local telecommunications

'Southwestern Bell Price Cap Case, 6 Mo. P.S.C. 3d at 506, citing *State ex rel. Doe Run v. Brown*, 918 SW.2d 303, 306 (Mo. App. 1996).

service which was approved by the Commission in its Order Approving Tariff dated June 26, 2001. The Order Approving Tariff stated that the certificate of service authority granted to MSDT to provide basic local telecommunications services became effective on July 2, 2001.⁵ Thus, the "conditional" certificate issued by the Commission was made absolute by MSDT's filing, and the Commission's approval, of its tariff. Staff's only objection to the tariff is that it does not specifically identify the BPS exchanges as part of MSDT's service area. This requirement exalts form over substance. Since MSDT offers only prepaid service, the rates and terms offered are the same throughout all of the exchanges served, and the failure to list the specific exchanges served by BPS is purely ministerial and does not affect the service provided.⁶ Moreover, Staff was aware of the Resale Agreement between BPS and MSDT which was approved by the Commission in Case No. TO-2002-62, so the fact that MSDT is now providing service in BPS exchanges should not be a surprise to Staff.

8. Staff next contends that MSDT is not providing service in that the service MSDT provides does not constitute minimum basic local telecommunications service under Commission rules because the prepaid service provided by MSDT does not provide equal access to interexchange carriers, but instead provides for the blocking of toll access in the contract signed by its customers. Again, Staff is proposing a standard not consistent with the plain reading of the price cap statute and

In the Matter of the Application of Missouri State Discount Telephone (M-SDT) for a Certificate of Service Authority to Provide Basic Local Telecommunications Service and Long Distance Service in the State of Missouri and to Classify Said Services and Missouri State Discount Telephone as Competitive, Case No. TA-2001-334.

⁶In order to remedy this alleged oversight, MSDT filed a tariff revision on May 20, 2002, listing the additional exchanges where MSDT now has resale agreements approved by the Commission since the date of the original tariff filing.

the standard definition of "basic local telecommunications service." The Staff cites 4 CSR 240-32.200(1)(2)(G) for the definition of minimum basic local telecommunications service, but the controlling definition of "basic local telecommunications service" is found in § 386.020(4), RSMo 2000, where "basic local telecommunications service" is defined, 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:

- (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;
- (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 provides many of these services, and thus provides basic local telecommunications service under this definition.

And, Staff's position is entirely inconsistent with the Commission's earlier decision granting a certificate of service authority to provide basic local telecommunications service to MSDT, after review of the application and its proposed service, which clearly indicated that the prepaid service

provided to its customers would include toll blocking.' Thus, Staff is "estopped" from raising the issue in this proceeding after recommending that the Commission approve the certificate in Case No. TA-2001-334, and its Motion is an impermissible collateral attack on the Commission's decision in the certificate case.\$

9. The third part of Staff's contention regarding the provision of service by MSDT is its argument that MSDT is not truly providing service because it is targeting customers whose service has been disconnected by the incumbent local exchange company ("ILEC"). This is in essence an "effective competition" argument, but again it is contrary to the plain language of the price cap statute which does not contain an "effective competition" clause, but merely states that the alternative local exchange telecommunications company must be "providing such service in any part of the small incumbent company's service area." The Commission addressed the issue of whether competition sufficient to justify price cap regulation must be "effective competition" in the *Southwestern Bell Telephone Company Price Cap Case*, TO-97-397. In that case, the parties argued that the level of competition provided by the competitor, Dial U.S., was "trivial," because Dial U.S. was not an active, facilities-based competitor but merely resold Southwestern Bell's services.' However, the Commission stated that after a thorough review of the record it found that none of the

'It should be noted that customers of MSDT are not prevented from making 911, 800 or calling card calls.

8Additionally, Commission rule 4 CSR 240-33.070(3) states that a company may place *global* toll-blocking on a customer's account when the customer has failed to pay delinquent charges for services other than basic local telecommunications service. If the Commission believed that a local exchange company was no longer providing basic local telecommunications service when it instituted toll blocking, it would not have promulgated a rule to that effect.

'Southwestern Bell Telephone Company Price Cap Case, 6 Mo. P.S.C. 3d at 502.

parties had provided the Commission with persuasive legal argument in support of this contention. The Commission 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, as it did in Section 392.245.5."¹⁰

The Commission further addressed the statutory construction of this provision and the definition of "effective competition" in the Southwestern Bell Telephone Company Price Cap case when it 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 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."

The primary market of all prepaid companies that have been granted certificates by the Commission are customers who are no longer able to qualify for service from the ILEC. Any customer eligible to receive service from the ILEC would do so, because of the disparity in the cost of service between the two providers. Prepaid providers such as MSDT offer an option to those customers who are no longer able to obtain service from the incumbent. MSDT is thus, "providing service" to customers within the service area of BPS sufficient to meet the statutory requirement, and the Staff should not be allowed to argue that this service is not "effective competition."

"Southwestern Bell Telephone Company Price Cap Case, 6 Mo. P.S.C. 3d at 503. The Commission's decision in Case No. TO-97-397 was upheld by the Cole County Circuit Court in Case No.CV 197-1795CC and CV 197-181000.

"Southwestern Bell Telephone Company Price Cap Case, 6 Mo. P.S.C. 3d at 505.

B. Reseller as basis for price cap regulation.

10. Staff's second reason for denying the validity of price cap status for BPS is an argument that a "reseller" of basic local telecommunications service does not qualify as an alternative local exchange telecommunications company for purposes of making the price cap determination. Again, Staff ignores the plain language and plain meaning of the statute and attempts a tortured statutory construction completely contrary to the plain meaning of the statute. Where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.² As was stated above, there is no need for statutory construction of the language in § 392.245.2, because its meaning is plain and unambiguous.

Staff argues that, because § 392.450.1 refers to a certificate of local exchange authority "to provide basic local telecommunications service or for the resale of basic local telecommunications service," there are two types of certificates. However, the Commission has never made any distinction between facilities-based providers and resellers in the certificates of service authority granted to competitive local exchange telecommunications providers. Indeed, the certificate granted to MSDT in Case No. TA-2001-334 merely states that "Missouri State Discount Telephone is granted a certificate of service authority to provide basic local telecommunications services in the State of Missouri" It does not state that MSDT is granted a certificate to provide "resold" or even "prepaid" telecommunications service.

The Commission has never made any distinction in the certificates granted to providers, and for the Staff to argue differently is disingenuous. In fact, in the briefs filed by the Staff in the

²*"Brownstein v. Rhomberg-Haglin and Associates, Inc.,* 824 S. W.2d 13, 15 (Mo. banc 1992).

Southwestern Bell Telephone Company Price Cap Case, the Staffs position was completely opposite to the position taken in this Motion. In the Initial Brief of the Staff in Case No. TO-97-397, the Staff stated, "There is no distinction in this definition [§ 392.245.2] between a facilities-based versus reseller provider, only that there be a certificate to provide `basic or non-basic local telecommunications service'". In its Report and Order in that case, the Commission stated:

[N]owhere in Section 392.245 is there a requirement that the alternative local exchange telecommunications company be facilities-based rather than a reseller before price cap regulation can be employed. "[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." The parties argument that the language in Section 392.450.1 and 392.451.1 constitutes such an implication is not persuasive. These sections describe the certification process for the provision of basic local telecommunications service. Significantly, the statutes make no distinction in the requirements for facilities-based competitors and resellers. More importantly, Section 386.020(46) defines the resale of telecommunications service as "the offering *or providing* of telecommunications service primarily through the use of services or facilities owned or provided by a separate telecommunications company Thus, there is nothing to suggest that a reseller does not *provide* service to its customers. "¹⁴ (Citations and footnotes omitted, emphasis in original.)

Thus, this issue has been fully-considered and decided by the Commission. And, in the GTE Midwest Incorporated petition for price cap regulation, the Commission stated that, "The Circuit Court of Cole County has held `there is no doubt that the competition envisioned by 392.245 would 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

14 Initial Brief of Staff of the Missouri Public Service Commission, Case No. TO-97-397, p. 4. See also, Reply Brief of the Staff of the Missouri Public Service Commission, Case No. TO-97-397, pp. 1-2.

"Southwestern Bell Telephone Company Price Cap Case, 6 Mo. P.S.C. 3d at 505.

cap regulation is applied.""" Staff correctly notes that its present interpretation of § 392.245 was not applied by the Commission in the GTE Midwest Incorporated price cap petition, Case No. TO-99-294, and the fact that Staff is raising the issue in this proceeding, and did not do so in the GTE case, belies the merit of such an argument.

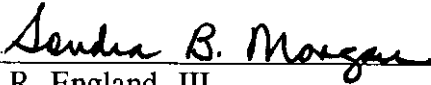
Despite Staff's argument to the contrary, the issue of whether a reseller qualifies as an alternative carrier has already been addressed and decided in each of the petitions for price cap determination to reach the Commission. In each case before the Commission (and upon review of the Southwestern Bell Price Cap Case in Cole County Circuit Court), it was found that the statute makes no distinction between resellers and facilities-based providers. While it is true as Staff states that the statute does not specify the existence of a reseller to be a criterion for an election to price cap status, neither does the statute state that in order for an ILEC to qualify for price cap status, the alternative company must be a facilities-based provider.

Staff should not be allowed to manipulate the plain meaning of the statute to serve its purposes in this case, especially when that interpretation is contrary to the Staff's prior position in other price cap cases as well as the decisions of the Commission and the Cole County Circuit Court.

"In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation under RSMo Section 392.245 (1996), Case No. TO-99-294, pp. 3-4.

For all the reasons above, BPS respectfully requests that the Commission deny Staff's Motion.

Respectfully submitted,


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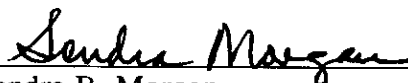
Attorneys for BPS Telephone Company

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 24th day of May, 2002, to the following parties:

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