BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Notice of	)	
Election of ALLTEL Missouri, Inc.	)	
To Be Price Cap Regulated Under	)	Case No. IO-2002-1083
Section 392.245, RSMo. 2000.	)	

APPLICATION FOR REHEARING
OF
SECOND REPORT AND ORDER

COMES NOW ALLTEL Missouri, Inc. ("ALLTEL"), pursuant to Section 386.500, RSMo 2000[1] and 4 CSR 240-2.160(1), and files its Application for Rehearing of the Missouri Public Service Commission ("Commission") Second Report and Order issued herein onOctober 5, 2004, with an effective date of October 15, 2004. In support of its Application for Rehearing, ALLTEL respectfully states to the Commission that the Second Report and Order is unlawful, unjust, unreasonable and unsupported by competent and substantial evidence in the following respects:

Introduction

1. The Syllabus of the Commission's Second Report and Order contains the identical recitation as that found in the July 20, 2004 Report and Order, to-wit: "This order finds that ALLTEL Missouri, Inc.'s notice of election to become a price cap-regulated carrier under Section 392.245.2, RSMo 2000, is invalid."[2] However, the Second Report and Order adds the following Preface Section at pages 1-2:

---

[1] All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

[2] Second Report and Order, page 1.

> After the Commission issued its Report and Order on July 20, 2004, ALLTEL filed an application for rehearing, pointing out what it believed were flaws in the Commission's decision. The Commission granted the application for rehearing, and now issues this Second Report and Order. In this order, the Commission reaches the same result as the July 20 order, but more fully develops its reasoning.

In attempting to discern the extent of such "development," it appears that the Second Report and Order contains additional text in the Findings of Fact Section at pages 3-6, addressing the applications and resulting certificates of service authority to provide basic local telecommunications service of both Missouri State Discount Telephone ("MSDT") and Universal Telecom, Inc. ("Universal"). Also, the Second Report and Order contains additional text in the Conclusions of Law Section at pages 10-11, wherein the majority now concludes that "Although the Commission has granted both MSDT and Universal certificates of service to provide basic local service in ALLTEL geographic service area, neither MSDT nor Universal is providing that service in ALLTEL's area in accordance with its certificate."[3] This reasoning leads the majority to add two sentences to the Conclusion Section of the Second Report and Order: "Furthermore, neither MSDT nor Universal is providing all the services it committed to provide in its application seeking certificates, nor is it complying with the conditions placed on the grant of service authority by the Commission. Therefore, neither is providing the service for which it was granted a basic local certificate."[4] Except for two additional Ordered Paragraphs in which the majority orders its Staff, in separate cases, to investigate whether MSDT and Universal are complying with the terms of the orders granting them certificates and to file a recommendation as to whether their certificates should be canceled, the remaining text

[3] *Id.*, page 10.
[4] *Id.*, page 16.

of the Second Report and Order is identical to that contained in the Commission's July 20, 2004 Report and Order.

Application for Rehearing

2. As set forth in the Discussion section of the Second Report and Order, "Because the parties stipulated to the facts of this case, the only issue for Commission determination is whether Missouri State Discount Telephone and Universal Telecom, Inc. are providing basic local telecommunications service in ALLTEL's service area."[5] Having recited the pertinent portions of Section 392.245.2 setting out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statue, the majority of the Commission erroneously determines that ALLTEL is ineligible to elect price cap status and that its price cap election is invalid.

> ALLTEL has provided written notice of its election to be regulated pursuant to the price cap statute on May 17, 2002. Thus, ALLTEL has shown all the required elements of Section 392.245.2 except that MSDT and Universal are *providing* basic local telecommunications service. Even though MSDT and Universal provide two-way switched voice service within a local calling scope and provide four of the services listed in Section 386.020(4), they are not providing basic local service in a manner as intended by the legislature that authorizes ALLTEL to elect price-cap regulation under Section 392.245.[6]

The Commission's decision is unlawful, unjust, unreasonable, and unsupported by competent and substantial evidence for the following reasons:

A. The Commission unlawfully imposes a nebulous competitive standard in contravention of the plain and unambiguous statutory language of Section 392.245.2.

---

[5] *Id.*, pages 2-3.
[6] *Id.*, pp. 9-10.

"When taken in the context of the entire Chapter 392, competition is a necessary element for the change in regulation to a lesser degree of oversight."[7]

The language of Section 392.245.2 regarding an incumbent local exchange company's qualification for price cap status is very clear, to-wit:

> A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the commission that 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 large incumbent company's service area. 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. *(emphasis added.)*

The statute simply states than an alternative local exchange telecommunications company must be certificated to provide service within the incumbent's service area and must 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 local exchange company 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 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 Section 392.245, while small companies are only required

[7] *Id.*, p. 13.

to provide written notice to the Commission of their election to be regulated pursuant to the price cap statute. Otherwise, the language and requirements are exactly the same, so the same analysis should apply.

As the Commission's records reveal, Missouri has four large incumbent local exchange carriers subject to price cap regulation under Section 392.245.[8] These carriers cover approximately 91 percent of the access lines in Missouri. There is no dispute that the Commission considered the same statutory language (Section 392.245.2) when it made the determination as to whether large incumbent local exchange telecommunications companies should be subject to price cap regulation. As the Commission's Second Report and Order appears to acknowledge, the Commission consistently held in those proceedings that competition was not a factor in its application of the price cap statute.

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] At the time Southwestern Bell was granted price cap status, its only competitor was Dial U.S. Dial U.S. was only providing service through resale in one of Southwestern Bell's 160 exchanges. Parties opposing Southwestern Bell's request argued that the level of competition provided by the alternative local exchange carrier ("ALEC"), Dial U.S., was "trivial," and that effective

---

[8] Southwestern Bell Telephone, L.P., d/b/a SBC Missouri; Sprint Missouri, Inc.; CenturyTel of Missouri, LLC; and Spectra Communications Group, LLC d/b/a CenturyTel.

[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*, Case No. TO-97-397, 6 Mo. P.S.C. 3d, 493, (1997). ("Southwestern Bell Price Cap Case").

competition did not exist in any of Southwestern Bell's exchanges. The Commission Staff, on the other hand, stated in its Initial Brief in that proceeding that, "The statute does not require a percentage of market share for the alternative provider, nor does it require that the alternative provider be creating real, substantial or effective competition." (Staff Initial Brief, Southwestern Bell Price Cap Case, pp. 4-5).

In its Report and Order in the Southwestern Bell Price Cap Case, 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 any given exchange, per Section 392.245.5.[10] (Emphasis added).
>
> 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 Foods and Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1966). "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.

[10] Southwestern Bell Price Cap Case, 6 Mo. PSC 3d 493, 505 (1997).

App. 1996). Thus, the parties' attempt to create ambiguity where none exists must fail.[11]

At Pages 14-15 of its Second Report and Order in this proceeding, the majority appears to attempt to distinguish the Southwestern Bell Price Cap Case by suggesting, "Also the focus of the findings in that order is on whether effective competition must exist. In this case, the Commission is not finding that 'effective competition' must exist before a company becomes price-cap regulated."

However, a review of the record in the Southwestern Bell Price Cap case shows that the Commission clearly rejected the argument concerning the need for any competitive standard, effective or otherwise. In its Order Denying Applications for Rehearing in the Southwestern Bell Price Cap Case, 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.'"[12]

Two years later, when GTE Midwest Incorporated ("GTE") requested and was granted price cap status, its only competitor was Mark Twain Communications Company, and Mark Twain was only providing service in three (3) GTE exchanges.[13] There was no hearing and no evidence regarding competition. There was no formal finding of

---

[11] *Id.* at 506.

[12] Southwestern Bell Price Cap Case, Order Denying Application for Rehearing, (November 18, 1997) (emphasis added).

[13] *In the Matter of the Petition of GTE Midwest Inc. Regarding Price Cap Regulation under RSMo Section 392.245 (1996)*, Case No. TO-99-294, ("GTE Price Cap Case").

sufficient competition. 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.[14] 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. None of these large ILEC cases even mention, let alone discuss, Section 392.185.

Finally, the specific requirements of Section 392.245 prevail over the general "policy" requirements of Section 392.185 and other sections "of the entire Chapter 392." Under Missouri law, when a statute specifically addresses a requirement, the language of the specific statute will prevail over the general statute.[15] Section 392.245 is acknowledged by all parties and the Commission to be the "Price Cap" section of the Missouri statutes. At Page 12 of the Second Report and Order, the majority states: "Section 392.245 contains no reference to competition." Actually, this statement is in error. While Section 392.245.2 contains no reference to "competition," Section 392.245.5 expressly refers to competition by utilizing the specific defined term "effective competition." The determinations to be made by the Commission under Section

---

[14] *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price Cap Regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-359, 8 Mo. P.S.C.3d 297 (1999) ("Sprint Price Cap Case").

[15] City of Kirkwood v. Leslie Allen, 399 S.W. 2d 30 (Mo. 1966); City of Springfield v. Forrest Smith, 125 S.W.2d 883 (1939).

392.245.5 are directly tied to the term effective competition, as defined under Section 386.020(13). Indeed, under that statutory definition, the Commission's determination of effective competition shall be based on factors that include references to Section 392.185, RSMo and "the purposes and policies of Chapter 392, RSMo."

Clearly, Section 392.245.2 contains no reference to competition, effective or otherwise. Nor is there any language from which such a requirement can reasonably be implied. The absence of such specific language demonstrates that the Legislature obviously did not intend to require a finding as to competition under Section 392.245.2, since Section 392.245.5 shows that it knows how to do so when it wants to. (See, *Jantz v. Brewer* , 30 S.W.3d 915, 918 (Mo.App. S.D. 2000), which provides that "the legislature is presumed to have intended what the law states directly, and to act intentionally when it includes language in one section of a statute but omits it from another." (internal citations omitted). *Jantz* also provides that "[a] disparate inclusion or exclusion of particular language in another section of the same act is 'powerful evidence' of legislative intent." *Id.*).

The majority's interjection of a new (and undefined) competitive standard under Section 392.245.2 is unlawful, unjust, unreasonable, arbitrary and capricious, and constitutes an abuse of discretion.

B. The Commission unlawfully ignores the plain and unambiguous language of the price cap statute in making its determination that "Even though MSDT and Universal provide two-way switched voice service within a local calling scope and provide four of the services listed in Section 386.020(4), they are not providing basic

local service in a manner as intended by the legislature that authorizes ALLTEL to elect price-cap regulation under Section 392.245." (Emphasis added).

The Commission's Second Report and Order confirms the undisputed facts that ALLTEL met each of the statutory requirements necessary to elect to be price cap regulated pursuant to Section 392.245.2:

(1) ALLTEL is a small incumbent local exchange telecommunications company. "ALLTEL is a telecommunications company and public utility. ALLTEL is also an incumbent local exchange telecommunications company and a small local exchange telecommunications company." (Second Report and Order, page 8, footnotes omitted);

(2) ALLTEL provided written notice of its election to the Commission. "ALLTEL has provided written notice of its election to be regulated pursuant to the price cap statute on May 17, 2002." (*Id.*, page 9);

(3) An alternative local exchange carrier, in this case both Universal and MSDT, has been certified to provide basic local telecommunications service in ALLTEL's service area. "An 'alternative local exchange telecommunications company' is defined as 'a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service . . . in a specific geographic area.' MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-332, effective March 26, 2001. Universal Telecom was certificated to provide basic local telecommunications service in Case No. TA-2002-183, effective March 31, 2001. Both MSDT

and Universal's tariffs specify that those companies will provide service in ALLTEL's service area. MSDT and Universal are alternative local exchange telecommunications companies." (*Id.*, footnotes omitted); and

(4) An alternative local exchange telecommunications company, in this case both Universal and MSDT, is providing such service in any part of ALLTEL's service area. "At the time ALLTEL notified the Commission of its election to be price-cap regulated, Universal provided telecommunications service to customers within the ALLTEL service area pursuant to its lawfully approved tariff. Universal also provided service under its Commission-approved Interconnection Agreement with ALLTEL. . . . At the time ALLTEL notified the Commission of its election to be price-cap regulated, MSDT provided telecommunications service to customers with the ALLTEL service area pursuant to its lawfully approved tariff. MSDT also provided service under its Commission-approved Interconnection Agreement with ALLTEL. . . . MSDT and Universal each provide two-way switched voice service within a local calling scope as determined by the Commission comprised of the following services: (a) Multi-party, 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; and (d) One standard white pages directory listing." (*Id.*, pages 5-7, footnotes omitted).

In *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. E.D. 1992), the court held that "the legislature is presumed to have intended what a statute says directly." Where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.[16] The legislature expressed its intent in the plain language of the statute, and there is no need to seek any other meaning through statutory construction.

As discussed in the Southwestern Bell Price Cap Case, *supra*, the Commission cited with approval the case of Wilson v. McNeal, 575 S.W.2d 802,809 (Mo. App. 1978): "[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).

The explicit term "basic local telecommunications service," specifically referenced in Section 392.245.2, is defined by the Legislature in Section 386.020(4):

> (4) "Basic local telecommunications service", 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 and speech impaired;

---

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

(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 regulations of the Federal Communications Commission;

(h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations; (Emphasis added).

As the Stipulated Facts and the Commission's own findings clearly establish, both MSDT and Universal are providing basic local telecommunications service as defined by Missouri statute.

However, the majority, under the guise of statutory construction as to what the Legislature "intended" by using the term "providing basic local telecommunications service," proceed in a manner contrary to the plain terms of the statute and attempt to interject: (i) additional criteria found in certification orders and Commission rules, (ii) distinctions between "providing basic local" and "the resale of basic local" found in other statutes, and (iii) the use of broad, policy principles set out in Section 392.185.

(i) At Page 13 of the Second Report and Order, the majority divines that "The legislature did not intend the presence of a provider of only a few basic local services to trigger price cap regulation." (Emphasis added). In attempting to buttress its competitive analysis, the Commission notes, "For instance, in order to receive a certificate to provide

basic local services, Section 392.451.1 requires a competitive company to show that it will 'offer *all* telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support.' The Commission has defined these essential services in two of its rules." (Second Report and Order, pages 13-14).

Attempting to link such certificate language to the instant proceeding, the majority now offers the following "extra-record" conclusion: "When it granted certificates to MSDT and Universal, the Commission was aware that this grant might allow the small ILECs to invoke the price cap statute election. It is for that reason that the Commission demanded that the ALEC offer *all* of the 'essential telecommunications services' as defined by the rule."[17] Since neither MSDT nor Universal provides "all" of such services, the majority reasons that neither company is offering basic local telecommunications services. Not only is this conclusion not supported by the record, it is not supported by the plain reading of the price cap statute which contains identical criteria for both large and small local exchange telecommunications companies.

Furthermore, such rationale belies the actual state of affairs that is currently sanctioned by this Commission (and clearly in place at the time of ALLTEL's notice of price cap election). As correctly noted by the Dissenting Opinion of Commissioner Connie Murray and Commissioner Jeff Davis:

---

[17] Second Report and Order, page 10. In its Notice of Election To Be Price Cap Regulated, ALLTEL attached as Exhibits the Order Granting Certificate to Provide Basic Local Telecommunications Services issued in Case No. TA-2002-183 and the Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service issued in Case No. TA-2001-334. **Neither Order contains any reference whatsoever to small ILECs invoking the price cap statute election.**

> Both Missouri State Discount and Universal, however, are operating under tariffs approved by this Commission *after* the certificates to provide basic local service were granted. Those tariffs clearly state that certain of the services listed in 4 CSR 240-31.010(5) are not offered. By its approval of the tariffs, the Commission has allowed the companies to offer basic local service consisting of fewer services than the complete list contained in its rule related to the state universal service fund. Therefore, even if the Commission's definition of basic local service were controlling, it is unclear what that definition is. We continue to believe, however, that the definition of basic local telecommunications service *for purposes of the price cap statute* must be the statutory definition of §386.020(4).

As discussed above, 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, Universal's and MSDT's services clearly meets this definition as they each provide at least four (4) of the listed services. MSDT and Universal both possess certificates of basic local telecommunications service authority, both have approved interconnection agreements with ALLTEL ("The Commission, under the provisions of Section 252(e) of the Act, has authority to approve an interconnection agreement negotiated between an incumbent local exchange company and *a new provider of basic local exchange service*." Order Approving Interconnection Agreement, Case No. TO-2000-469, p. 2), and both are providing basic local service pursuant to lawfully approved tariffs and in conformance with Section 386.020(4). Indeed, both companies' tariffs, in describing the scope of service offered, provide "The Tariff is for resale of services only on a prepaid basis, with said *basic local telecommunications services* being offered as a separate and distinct service from other services in accordance with §392.455 R.S.Mo." (Emphasis added).

These are the tariffs that the Commission Staff recommended for approval and, in fact, were subsequently approved by the Commission.

And while the majority arrives at a conclusion of law that MSDT and Universal "are not providing basic local services in accordance with the certificates granted by the Commission"[18] (in order to justify their denial of price cap status to ALLTEL), they simultaneously announce that "The Commission will order its Staff, in separate cases, to *investigate whether MSDT and Universal are complying with the terms of the orders granting them certificates* and to file a recommendation as to whether their certificates should be canceled." (Footnote 39, Second Report and Order, page 11, Emphasis added).

One of the rules referenced by the majority, Chapter 32, specifically refers to the above statutory definition for "basic local telecommunications service": 4 CSR 240-32.020 Definitions, (5) Basic local telecommunications service – basic local telecommunications service as defined in section 386.020(4), RSMo Supp. 1997 (Emphasis added; of course, the supplement has been updated to RSMo 2000).

Finally, by the above-described actions of the Commission in approving the tariffs of MSDT and Universal, the Commission has allowed those companies to offer basic local service consisting of fewer services than the complete lists contained in its rules found in Chapters 31 and 32, and such actions are totally inconsistent with the claims and position of the majority now asserted. ALLTEL relied on such actions in making its notice of price cap election and it will be injured as a result of the majority now contradicting those actions. Exceptional circumstances exist herein, where right or

[18] *Id.*, page 11.

justice, honesty and fair dealing, or the prevention of manifest injustice require that the doctrine of equitable estoppel be applied.

(ii) The majority appears to adopt a distinction between "providing basic local" and "the resale of basic local" (a position advocated by only the Staff in this proceeding)[19] as support for its erroneous conclusion that the basic local services provided by MSDT and Universal just don't add up to what the legislature intended. As recognized by the majority, such an approach directly contradicts all Commission precedent on this issue.[20]

In the Southwestern Bell Price Cap Case, parties opposing Southwestern Bell's request 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.[21] Staff opposed that argument and, in fact, in the briefs filed by the Staff in that proceeding, the Staff's position was completely opposite to the position now espoused. In the Initial Brief of Staff in Case No. TO-907-397, the Staff stated, "There is no distinction in this definition [Section 392.245.2] between a facilities-based versus reseller provider, only that there be a certificate to provide 'basic

---

[19]The Public Counsel does not advocate this position. In Case No. CO-2002-1078, Public Counsel only sought an investigation of the status of prepaid local service providers and, while agreeing to have the issue explored, specifically pointed out that it did not agree with Staff's position on the issue of whether any reseller of local basic service qualifies as an alternative local exchange competitor so that the incumbent company can elect price cap status under Section 392.245, RSMo. *See*, Motion of the Office of the Public Counsel To Expand Scope of Case filed in Case No. CO-2002-1078, *In the Matter of the Investigation of the Status of Prepaid Local Service Providers as Alternative Local Exchange Competitors Under Section 392.245, RSMo.*

[20] "The Commission previously rejected this second argument in the *Southwestern Bell* price cap case." (Second Report and Order, page 14, footnote omitted). This position is in stark contrast to previous positions of Staff on this issue as well.

[21]Southwestern Bell Price Cap Case, 6 Mo. P.S.C. 3d, 493, 502 (1997).

or non-basic local telecommunications service'".[22] 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 party's 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.[23]

The Commission affirmed this position in the Sprint and GTE price cap cases.[24]

Consistent with the other eighty-plus competitive local exchange telecommunications provider certificates, neither Universal nor MSDT was granted a certificate to provide "resold" or even "prepaid" telecommunications service; rather, they were granted certificates of service authority to provide basic local telecommunications services in the state of Missouri.

The majority appears to suggest that dicta contained in the Circuit Court decision affirming the Commission's decision to grant price cap status to Southwestern Bell would

---

[22] 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.

[23] Southwestern Bell Price Cap Case, 6 Mo. P.S.C. 3d at 505.

[24] GTE Price Cap Case; *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price Cap Regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-359, ("Sprint Price Cap Case"), 8 Mo. P.S.C.3d 297 (1999).

support its break from precedent here. "The Circuit Court affirmed the Commission's decision to grant price cap status but agreed that 'it is a possible interpretation' that resellers can be distinguished from facilities-based providers." However, the Circuit Court affirmed the decision of the Commission granting price cap status to Southwestern Bell based on the existence of one reseller, and the Commission did not change its decision regarding Southwestern Bell's qualification for price cap status after the Circuit Court's decision, nor did the Commission adopt this position in either the Sprint or GTE price cap cases. The Commission noted the above language from the Circuit Court decision in the GTE decision, but found that GTE had met the prerequisites for price cap regulation through competition from one reseller.[25]

The majority purports to rationalize this new position by suggesting that, "Furthermore, a distinction on the facts can be made between the current case and the large ILEC cases." (Second Report and Order, page 14). However, the suggestion that the alternative local exchange carrier in the *Southwestern Bell* case may have been providing "different basic local services" (*Id.*,) – there is no finding or suggestion that the ALEC in that case provided all such services – does not alter, but rather supports, the statutory definition of basic local telecommunications services set forth in Section 386.020(4). The only other distinctions offered for the "other large ILEC cases" are: "In the Sprint price cap case, the alternative carrier was a facilities-based provider. In the only other large ILEC price cap case, no party alleged that the alternative carrier was not providing service." (Second Report and Order, page 15, footnotes omitted). However, as

[25] GTE Price Cap Case, at pp. 3-4.

discussed above, the Commission did not change its position or the bases for its holdings in either the Sprint or GTE price cap cases.

(iii) The majority erroneously concludes that "The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in its construction and application of the price cap statute." (Second Report and Order, page 12). However, the Commission cannot change the meaning of the statute to introduce new requirements by construing the plain and unambiguous language of the price cap statute using broad, policy principles set out in Section 392.185. Because the language of the statute is clear and unambiguous, no construction is needed or required. The majority concludes, nevertheless, that "the Commission is finding that MSDT and Universal Telecom do not 'provide basic local service' as the statute intends and, therefore, ALLTEL does not meet the statutory requirements to be price-cap regulated." (*Id.*, page 15, emphasis added). 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.[26]

The Commission cannot engraft onto Section 392.245 requirements that are not there, and the majority's attempt to do so is unlawful, unjust, unreasonable, arbitrary and capricious, constitutes an abuse of discretion, and barred by the doctrine of equitable estoppel.

C. The Commission's Report and Order denying the election to price cap regulation of ALLTEL is unlawful, unreasonable, unjust and unsupported by competent and substantial evidence, because the Commission's denial of price cap status for

[26] State ex rel. Doe Run Co. v. Brown, 918 S.W. 2d 303, 306 (Mo. App. 1996).

ALLTEL, a small local exchange telecommunications company, when it has previously granted price cap status to large local exchange telecommunications companies in Missouri pursuant to the same statute is a violation of ALLTEL'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 constitutions as well as applicable statutes.[27] All persons are entitled to equal rights and opportunity under the law. Mo. Const. Art. I, §2. The Equal Protection Clause requires states to treat uniformly all who stand in the same relation to the statute at issue.[28] Any classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[29]

As fully discussed, *supra*, the Commission granted price cap status to the large incumbent local exchange telecommunications companies by applying the same statute that the Commission is now interpreting to deny price cap status to ALLTEL, and those decisions did not even mention Section 392.185. In discussing the need for making the requisite determinations for large companies under Section 392.245.2 within a reasonable time, the Cole County Circuit Court (in the Southwestern Bell Price Cap Case appeal) specifically addressed the "same criteria" which both large and small companies must meet.

---

[27] *State ex rel. Missouri Water Company v. Public Service Commission*, 308 S.W.2d 704, 714 (Mo 1957).
[28] *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).
[29] *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S. Ct. 560 (1920).

> 5. The statutory requirements applicable to small local exchange telecommunications companies supports the view that the determination required under Section 392.245.2 must be made within a reasonable time. Under that section, a small incumbent local exchange telecommunications company may opt into price cap regulation upon simple written notice to the PSC, **if the same criteria which makes price cap regulation mandatory for a large incumbent telecommunications company had been met**. It would be unreasonable to interpret the statute to permit small incumbent telecommunications companies to opt into price cap regulation upon simple written notice to the PSC, but permit the PSC to unreasonably delay the determination which would make price cap regulation mandatory for large incumbent telecommunications companies.[30]

Furthermore, in those large company proceedings, the Commission explicitly rejected, to the extent they were raised, the very factors now being adopted by this Commission. For the Commission to now deny price cap status to ALLTEL based on its interpretation of legislative intent regarding those issues is a violation of equal protection under both the United States and Missouri Constitutions.

3. The Commission's Second Report and Order is unlawful, unjust and unreasonable and unsupported by competent and substantial evidence in that the Commission fails to provide sufficient findings of fact, conclusions of law or rationale to support the Commission's decision. Moreover, the conclusory Findings of Fact and Conclusions of Law are wholly inadequate to permit the Commission's decision to be adequately reviewed on appeal. The majority decision abandons well-established precedent, and while the Commission purports to draw "distinctions" with the large ILEC cases, there is no basis upon which a reviewing court could reconcile the Commission's decision in this case with its decisions in the previous large ILEC price cap cases.

---

[30] *See State ex rel. Public Counsel v. Public Service Commission*, Circuit Court Cole County, Missouri Case No. CV197-1795CC (August 6, 1998). Revised Findings of Fact and Conclusions of Law and Judgment, pp. 4-5.

WHEREFORE, for all the foregoing reasons, ALLTEL Missouri, Inc. respectfully requests that the Commission issue its order granting rehearing in the above-referenced matter, and for such other orders as are appropriate in the circumstances.

Respectfully submitted,

/s/ Larry W. Dority

Larry W. Dority MBN 25617
FISCHER & DORITY, P.C.
101 Madison Street, Suite 400
Jefferson City, Missouri 65101
Tel.: (573) 636-6758
Fax: (573) 636-0383
Email: lwdority@sprintmail.com

Attorneys for ALLTEL Missouri, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered, e-mailed or mailed, United States Mail, postage prepaid, this 14th day of October, 2004, to:

Michael Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Dana K. Joyce, General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

William K. Haas
Deputy General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

/s/ Larry W. Dority

Larry W. Dority