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August 16, 2002

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

FILED³

AUG 16 2002

Re: TC-2002-1076

Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing on behalf of BPS Telephone Company ("BPS"), please find an original and eight (8) copies of a Motion to Dismiss Staff Excess Earnings Complaint Against BPS Telephone Company.

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: Cliff Snodgrass
Michael F. Dandino
Lisa Winberry

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

AUG 16 2002

Staff of the Missouri Public Service
Commission,

Missouri Public
Service Commission

Complainant,

Case No. TC-2002-1076

v.

BPS Telephone Company,

Respondent.

**MOTION TO DISMISS STAFF EXCESS EARNINGS
COMPLAINT AGAINST BPS TELEPHONE COMPANY**

Comes now BPS Telephone Company ("BPS") and for its Motion to Dismiss Staff Excess Earnings Complaint states to the Missouri Public Service Commission ("Commission") as follows:

Procedural History and 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 in which it acknowledged that the election to

price cap status, if valid, prevented Staff from asserting a traditional rate of return on rate base earnings complaint. Nevertheless, Staff listed two reasons why it believed that the election was not valid. The reasons alleged by Staff were: 1) that MSDT was 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 did not qualify as a legitimate criterion for the acquisition of price cap status.

3. On May 24, 2002, BPS filed Suggestions in Opposition to Staff's motion in which it fully addressed the allegations of invalidity raised by Staff and stated that its election of price cap status was lawful and valid until proven otherwise; and that since BPS was a price cap company, it could not be subject to earnings regulation. Therefore, Staff's motion should be denied.

4. On June 20, 2002, the Commission issued its Order Granting Authority to File an Excessive Earnings Complaint. In that Order, the Commission stated that the issue of whether the price cap election of BPS was valid could be considered within the context of the overearnings complaint case authorized by the Commission.

5. On June 28, 2002, BPS filed a Motion for Reconsideration in which it asked the Commission to reconsider its decision, and argued that the Commission could not authorize its Staff to file an overearnings complaint against BPS until the jurisdictional issue of whether BPS was a price cap company subject to price cap regulation had been addressed. BPS argued that its written notice of price cap election was all that was necessary for the company to be treated as a price cap company, and that BPS must be considered a price cap company until such time as there had been a hearing and evidentiary determination to the contrary. To date, the Commission has not ruled on this Motion for Reconsideration.

6. On July 17, 2002, BPS filed a second notice of price cap election. BPS stated that this second election was filed in order to address an issue raised by Staff alleging that MSDT was not lawfully providing service within the BPS service area because its tariff did not list the BPS exchanges. BPS stated that it did not believe that it was required to show that MSDT was lawfully providing service in order to make the price cap election, but it was filing the second election notice in order to remove any uncertainty.

7. On July 22, 2002, the Commission issued a Notice of Price Cap Election regarding this second election by BPS, and established Case No. IO-2003-0012. The Commission gave interested parties until August 12, 2002, to file responsive pleadings, and, on that date, the Office of Public Counsel filed a Response and Staff filed a Motion to Reject BPS's Price Cap Election and Motion to Consolidate with Case No. TC-2002-1076.

8. On August 6, 2002, the Staff filed an Excess Earnings Complaint against BPS seeking a reduction of its revenues. The Staff attached a copy of its Motion for Commission Authority to File an Excessive Earnings Complaint as Appendix A and reiterated its earlier allegation that BPS was not a price cap company.

Motion to Dismiss

9. The Staff's Complaint should be dismissed for the following reasons:

A. The Commission does not have subject matter jurisdiction to consider the Complaint

The Commission simply has no jurisdiction to authorize and/or hear an excess earnings

complaint at this time. Jurisdiction concerns the right, power and authority of a court to act.¹ Jurisdiction is defined by statutory provisions, and the letter of the law is the limit of power.² The Commission is a creature of statute and limited thereby.³ Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act is authorized by the statute.⁴ The only power the court, or the Commission acting in a quasi-judiciary capacity, has when it lacks jurisdiction is to dismiss the action; any other actions or proceedings are null and void.⁵ Until there has been a Commission determination that the price cap election lacks validity, the Commission cannot proceed to authorize and/or hear the complaint.

BPS is a price cap company and not subject to rate base/rate of return (i.e. earnings) regulation. Section 392.245.2 of the Missouri Revised Statutes sets out the procedure by which a small incumbent local exchange company⁶ may elect to be regulated by price cap regulation.

This section states in pertinent part:

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

¹*Heinle v. K & R Express Systems, Inc.*, 923 S.W.2d 461, 464 (Mo. App. E.D. 1996).

²*Wells v. Noldon*, 679 S.W.2d 889, 891 (Mo. App. E.D. 1984).

³*State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

⁴*State ex rel. Missouri Cable Telecommunications Association v. Missouri Public Service Commission*, 929 S.W.2d 769, 772 (Mo. App. W.D. 1996), citing *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923).

⁵*Heinle*, 923 S.W.2d at 464.

⁶Section 386.020 (30) defines "small local telecommunications company" as one with less than one hundred thousand lines in Missouri.

subject to regulation under this section after such election.

BPS sent written notice to the Commission of its election to price cap status on March 13, 2002 in accordance with Section 392.245.2. (See ¶ 1, p. 1) According to the statute, this written notice was all that was necessary for BPS to elect price cap regulation.

Thus, BPS is a price cap company until determined otherwise after an evidentiary hearing at which time competent and substantial evidence to the contrary is presented to the Commission. The Commission cannot proceed to treat BPS as a company subject to rate-base/rate-of-return regulation merely based on Staff's allegations that the election is invalid. Section 392.245 does not require that the Commission hold a hearing before a small local exchange company may elect to be regulated under the price cap statute, nor does it require the small local exchange company to present evidence to support its election. Section 392.245 simply states that the "small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission" when certain criteria are met. In contrast, the statute states that a large LEC shall be subject to price cap regulation only "upon a determination by the commission that it meets the established criteria."⁷ Thus, there was clearly a legislative intent to treat large and small companies differently, as the statute does not specify or require a Commission determination that it meets the established criteria in order for the small company to be considered a price cap company.⁸

⁷Section 392.245.2, RSMo 2000.

⁸It should be noted that in only one of the cases involving price cap election by a large incumbent telecommunications company under the same statutory provision, did the Staff or the Commission find that a hearing was necessary to determine the validity of the election. Additionally, Southwestern Bell Telephone Company, GTE Midwest Incorporated (Verizon), and United Telephone Company (Sprint) were all found to be subject to price cap regulation

In authorizing its Staff to file an earnings complaint and opening a case to consider that complaint, the Commission has put "the cart before the horse." The jurisdiction of the Commission to consider the complaint must be addressed first. If there is a challenge to the small company's election to be regulated under the price cap statute, such as in this case, the Commission may hold a hearing and consider the allegations of invalidity, but until the conclusion of that proceeding, the small company is subject to price cap regulation, and the Commission has no authority to entertain an earnings complaint. Thus, this complaint must be dismissed for lack of subject matter jurisdiction.

B. Another Action Pending Regarding the Same Cause

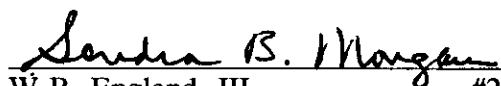
The Staff's Complaint should also be dismissed because the Commission has established another case to receive comment regarding BPS's second price cap election notice filed July 17, 2002. The Commission issued a Notice of Price Cap Election in Case No. IO-2003-0012 after BPS sent its second written notice of election, and gave parties wishing to respond until August 12 to file a pleading. As stated above, both the Office of Public Counsel and Staff have filed pleadings in that case. Thus, there is now a case established to consider whether BPS's election to price cap status is a valid election. It makes no sense for the Commission to entertain one proceeding where the validity of the price cap election is at issue, while simultaneously considering a complaint against BPS which necessarily presumes that BPS is subject to rate-

based on competition from *resellers*. See, *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 (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; and *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.

base/rate-of-return regulation. In addition to being an inefficient use of judicial resources and additional expense for both the Commission and the company, one would have to assume that the Commission has already predetermined the result of Case No. IO-2003-0012 if it allows this complaint case to proceed.

For all the reasons above, BPS respectfully requests that the Commission dismiss Staff's Excess Earnings Complaint.

Respectfully submitted,



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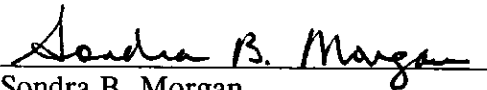
Attorneys for BPS Telephone Company

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 16th day of August, 2002, to the following parties:

Mr. Cliff Snodgrass
Senior Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

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P.O. Box 7800
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