

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

In the Matter of BPS Telephone)	
Company's Election to be Regulated)	
under Price Cap Regulation as Provided)	Case No. IO-2004-0597
in Section 392.245, RSMo 2000.)	

REPLY BRIEF OF BPS TELEPHONE COMPANY

In a plethora of mixed metaphors, Staff accuses BPS Telephone Company ("BPS") of making "another attempt" to acquire price cap regulatory status and avoid an investigation into its earnings. Staff seems to be implying that BPS's election is somehow not in good faith, but rather a wild and desperate "swing" at a straightforward fast ball. Nothing could be farther from the facts of this case. BPS has made a good faith effort to comply with the Commission's Order in the first price cap case by removing the only obstacle the Commission found to invalidate BPS's first price cap election; i.e. a supposed covenant not to compete in the Resale Agreement between BPS and Missouri State Discount Telephone ("MSDT"). After the Resale Agreement between the companies had been amended to remove the only impediment found by the Commission in the first price cap case, BPS filed its second written election of price cap status with the Commission that is the subject of this proceeding. Now Staff and the Office of Public Counsel ("Public Counsel") state that amending the Resale Agreement is not sufficient and in their briefs cite the Commission's analysis and decision in the ALLTEL price cap case finding that ALLTEL did not qualify for price cap status because the ALECs providing service in its

territory were not providers of all of the essential services found in 4 CSR 240-31.010(5).¹ It is Staff (and a majority of this Commission) that keep changing their analysis (and throwing curve balls) in a transparent effort to avoid what they perceive as unpopular consequences of a plain reading of the statute. In other words, it is Staff, Public Counsel and the Commission who attempt to make the law what they want it to be and ignore the plain meaning of the statute as well as prior Commission decisions interpreting the statute.

1. BPS has met the statutory requirements to be regulated as a price cap company.

As was stated in its Initial Brief, but bears re-stating, certain relevant facts were not disputed and were agreed to by all parties to Case No. IO-2003-0012. Therefore, those facts can also be considered undisputed in this proceeding. Those facts are:

- **BPS Telephone Company is a small incumbent local exchange company serving approximately 3900 access lines in Missouri.** (Exh. 1, pp. 3-4; Exh. 2, p. 4; Exh. 3, p.2; Tr. 118; 241)
- **BPS provided written notice to the Commission of its intent to be regulated under § 392.245, the price cap statute.** (Stipulation of Facts, ¶ 4)
- **MSDT is an alternative local exchange telecommunications company ("ALEC") as**

¹*In the Matter of the Notice of Election of ALLTEL Missouri, Inc. to be Price-Cap-Regulated under Section 392.245, RSMo 2000*, Case No. IO-2002-1083. To the extent Staff and Public Counsel rely on the Commission's decision in the ALLTEL case, BPS disagrees with the reasoning put forth in that case. As was stated in the dissent, the plain meaning of the statute controls. Furthermore, MSDT is providing services under tariffs approved by the Commission after the certificate was granted, and those tariffs clearly set out the type of service provided by the prepaid company. At that point, the Commission was not concerned with whether MSDT provided all of the essential services listed in 4 CSR 240-31.010(5). To now say that MSDT is not "providing service" in a manner that allows ALLTEL and BPS to qualify for price cap status is unfair and unjust.

that term is used in § 392.245 and defined in § 386.020 (1), RSMo. (Exh. 3, p. 7; Tr. 118; 242)

- **MSDT was certified to provide basic local telecommunications service by the Commission in Case No. TA-2001-334, effective March 26, 2001.** (Exh. 1, p. 4; Exh. 2, p. 12; Exh. 3, p. 7; Tr. 118; 241)
- **MSDT's tariff for the provision of basic local telecommunications service was approved by the Commission on June 26, 2001.** (Exh. 1, p. 4)
- **MSDT is providing basic local telecommunications service as that term is defined in § 386.020, RSMo 2000, to customers within the BPS service area.** (Exh. 1, p. 6; Exh. 3, p. 3)

This is all that is required by a plain reading of § 392.245, RSMo 2000, the price cap statute. Yet Staff and Public Counsel have raised, and continue to raise, new objections to the election.

2. Whether or not BPS is subject to competition is not a factor to be considered in the price cap analysis.

Staff and Public Counsel continue to insist that competition should play a role in obtaining price cap status. Staff has done an "about-face" on this issue, however, since 1997 when Southwestern Bell Telephone Company ("SBC") requested and was granted price cap status by the Commission.² In that case, Staff stated that the determination as to whether the ALEC was providing service was a "simple, straight-forward determination. The statute does not

²*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. PSC 3d 493 (1997).*

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."³ (Emphasis added.)

The Commission has also done an "about-face" on the competition issue since the time it granted price cap status to the large incumbent local exchange companies ("ILECs") when it stated, "The Commission . . . 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.'"⁴ Competition is not listed as a requirement in the statute in order to elect price cap status, and price cap regulation is not dependent on competition. While the statute could have been written to direct the Commission to consider competition, it is not. In fact, the statute states that an alternative local exchange company must be certified to provide service in the incumbent carrier's service area, not a competitive local exchange company. Moreover, if competition was a factor in the analysis, the legislature would not have limited the criteria to certificated carriers, but would have allowed other forms of competition, such as wireless carriers, to be considered which the Commission has determined is appropriate to consider when it determines whether there is "effective competition" in accordance with § 392.245.5.⁵

³Exh. 14, pp. 4-5.

⁴*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), Order Denying Application for Rehearing, Case No. TO-97-397 (November 18, 1997).*

⁵*See In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company, MoPSC Case No. TO-2002-467 (December 27, 2004) and In the Matter of the Investigation of the State of Competition in the Exchanges of Sprint, Missouri, Inc., MoPSC Case No. IO-2003-0281 (December 4, 2003). Competition from wireless*

Furthermore, Staff and Public Counsel are wrong to view price cap regulation as a mid-point on a continuum between rate base/return of return regulation (in a monopoly environment) and full pricing flexibility (in an effectively competitive market). In other words, price cap regulation is not dependent on any competition to constrain pricing. Price caps by their very nature constrain/limit upward pricing by implementing a “cap” on rates that cannot be exceeded, except under express circumstances set forth in the statute. Mr. Schoonmaker described the rationale for price cap regulation in his testimony as follows:

Another significant goal of price cap regulation is to encourage greater operating efficiency and productivity, by simulating some of the beneficial incentives of competition. This was the primary motivation for the FCC in adopting price cap regulation. The FCC summarized this as follows:

Price cap regulation seeks to replicate the beneficial incentives of competition in the provision of interstate access services while striking a reasonable balance between the interests of ratepayers and stockholders. Price cap regulation is intended to encourage growth in productivity by permitting incumbent LECs that increase their productivity to earn higher profits, while at the same time ensuring that interstate access customers share in the benefits of productivity growth in the form of lower rates. The price cap formula was designed to ensure that “[b]oth carriers and customers will be better off” under price cap regulation. (Citations omitted.)

(Exh. 2, pp. 10-11; emphasis added)

In other words, price cap regulation is not dependent on regulation in order to work, it works in the absence of competition (i.e., it “replicates” competition). To the extent Staff and Public Counsel (and a majority of Commissioners) believe some amount of competition is

carriers, while very real, is not a valid consideration in this case, because wireless carriers are not certificated by the Commission. Yet, competition from wireless carriers will place market constraints on BPS’s pricing flexibility under a price cap plan. (Exh. 2, pp. 9-10)

necessary to justify price cap regulation, it displays a fundamental misunderstanding of the issue.

To then rely on this misunderstanding and manufacture a legislative intent to require some amount of competition to justify price cap regulation is just plain wrong.

3. Denying price cap status to BPS will also be a denial of its equal protection rights under the federal and state constitutions as large carriers were granted price cap status using the same statutory criteria.

As was stated in BPS's Initial Brief, all persons are entitled to equal rights and opportunity under the law. Mo. Const. Art. 1, § 2. The Equal Protection Clause requires states to treat uniformly all who stand in the same relation to the statute at issue.⁶ 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.⁷

The criteria to be used by the Commission in determining whether BPS's price cap election is valid are exactly the same as those used by the Commission in determining that SBC, GTE Missouri, Inc. ("GTE") and Sprint Missouri, Inc. ("Sprint") qualified for price cap regulation. In the appeal of the SBC price cap case, Judge Brown stated, "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 have been met."⁸ Using these same criteria, the

⁶*Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).

⁷*Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S. Ct. 560 (1920).

⁸*State ex rel. Public Counsel v. Missouri Public Service Commission*, Cole County Circuit Court Revised Findings of Fact and Conclusions of Law and Judgment, Case No.

Commission did not find that there was insufficient competition in the exchanges served by SBC despite the fact that the ALEC only provided service in one exchange out of the 160 exchanges served by SBC. In fact, the Commission found that competition was not a factor even to be considered.⁹ When one reviews the Missouri Telecommunications Industry Association map of Missouri ILEC service areas, it is obvious that when SBC was granted price cap status, there were no ALECs providing any service (let alone prepaid services) in any of the "blue" SBC exchanges that completely surround the BPS service area. In subsequent cases, the Commission did not find that there was insufficient competition in the GTE or Sprint exchanges despite there being only one ALEC providing service in a limited number of exchanges. Neither Staff nor Public Counsel (or now the Commission) has explained why it is appropriate (and consistent with legislative intent) to allow SBC to become price cap regulated in its Malden, Sikeston and Cape Girardeau exchanges, where no ALEC existed (let alone provided service), and it is not appropriate to acknowledge BPS's price cap election for its similarly situated exchanges of Bernie, Parma and Steele.

Furthermore, the Commission did no analysis regarding whether the ALECs in those cases were "providing service" according to the criteria now being put forth by the Staff and Public Counsel in this case. (Tr. 142-48) In the cases involving SBC, GTE and Sprint, the Commission looked to see if the ALEC held a certificate to provide basic local telecommunications service and was, in fact, providing service in any of the large company's

CV197-1795CC (emphasis added).

⁹*Southwestern Bell, Order Denying Application for Rehearing*, Case No. TO-97-397.

exchanges. There was no further analysis of the type of service actually being provided by the ALEC, there was no application of the provisions of § 392.185, RSMo and no investigation to see if the ALECs in those cases were providing service consistent with their certificates. If the Commission had performed such an analysis, none of the large ILECs would have been granted price cap status. To hold the ALEC providing service in the BPS exchanges to a higher standard than was used in the cases involving the large companies would be an unlawful denial of BPS's equal protection rights under the federal and state constitutions.

The large ILECs were granted price cap status by the Commission applying the same statute that the Commission is now interpreting to deny price cap status to BPS. For the Commission to now deny price cap status to BPS based on its interpretation of legislative intent regarding competition and the provision of service is a violation of equal protection and is in direct contravention of the prohibition against intentional or purposeful discrimination created by the unequal application of a state statute.¹⁰

4. Section 392.451, RSMo 2000, the "certificate statute," and § 392.245, RSMo, the "price cap statute," cannot be read together to arrive at a decision regarding service because the statutes are inconsistent.

Staff and Public Counsel argue that the price cap statute must be read in *pari materia* with the other telecommunications regulatory statutes in Chapter 392. That is not a proper exercise where there is a "specific" statute, such as the price cap statute, that is clear and unambiguous. When ambiguity is not present, courts should "regard laws as meaning what they say; the General Assembly is presumed to have intended exactly what it states directly and

¹⁰See *Snowden v. Hughes*, 64 S. Ct. 397 (1944).

unambiguously."¹¹ The Missouri Supreme Court enunciated this principle as follows:

While many arguments can be made that these words should be construed with reference to other sections of the revenue statutes, and while many rules of statutory construction can be cited, the cardinal rule of statutory construction is to consider the words in their plain and ordinary meaning.¹²

The Court continued by stating that it would not force a particular construction of the statute by implication from language used in other sections of the statute.¹³ Moreover, in this case the certificate statutes and the price cap statute serve very different purposes, and the provisions of those statutes cannot be harmonized or reconciled. For these reasons, the statutes cannot be read together.

Section 392.451 places certain requirements on an applicant seeking a certificate to provide basic local telecommunications service in the service area of a small incumbent local exchange company. Subsection (1) of § 392.451 states that the applicant shall "*throughout the service area* of the incumbent local exchange telecommunications company, offer all telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support[.]" (Emphasis added.)

Section 392.245.2, on the other hand, states that a small incumbent local exchange telecommunications company may elect to be regulated as a price cap company if an ALEC "has been certified to provide basic local telecommunications service and is providing such service in

¹¹*In re The Estate of Susie Thomas v. Bowling*, 743 S.W.2d 74, 76 (Mo. banc 1988).

¹²*Ex rel. The May Department Stores Co. v. Koupal*, 835 S.W.2d 318, 320 (Mo. banc 1992), citing *Union Electric Co. v. Director of Revenue*, 799 S.W. 2d 78, 79 (Mo. banc 1990).

¹³*Id.*

any part of the small incumbent company's service area." (Emphasis added.) Thus, in order to obtain a certificate to provide basic local telecommunications service, the applicant must agree to offer service throughout the service area of the incumbent, but the price cap statute only requires that the ALEC provide such service in any part of the small incumbent's service area. The price cap statute does not require that the ALEC provide all of the enumerated services in all parts of the small company service area. It only states that the ALEC must provide basic local telecommunications service in any part of the small company's service area. As admitted by Staff witness Voight, MSDT provides basic local telecommunications service according to the definition set forth in § 386.020(4) (Tr. 222) and does so in the BPS service area. The price cap statute does not say "providing basic local telecommunications service in accordance with the restrictions in the certificate." The requirements for certification and for price cap regulation are inconsistent and cannot be read in *pari materia* as they address different procedures and accomplish very different ends.

5. The fact that MSDT holds a certificate of authority to provide basic local telecommunications service and has an approved tariff should be conclusive as far as showing that a certificated ALEC is providing service in the BPS service area.

The facts in this case are undisputed that MSDT holds a certificate of authority to provide basic local telecommunications service issued by the Commission in Case No. TA-2001-334. In its Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service, the Commission stated, "The Commission finds that M-SDT meets the statutory requirements for provision of basic local telecommunications services and has

agreed to abide by those requirements in the future."¹⁴ The Commission was aware that MSDT intended to provide prepaid service and that its contract with its customers, which was made part of its tariff, stated that "long distance services will not be provided."¹⁵ In its Suggestions in Support of the Unanimous Stipulation and Agreement in Case No. TA-2001-334, the Staff stated that "Staff has reviewed the Applicant's services and has concluded that the Applicant satisfies the minimum standards established by the Commission." ¹⁶

MSDT's tariff to provide basic local telecommunications service was approved by the Commission in that same case, Tariff No. 200101121. In its Recommendation to approve the tariff, the Staff stated, "the Staff recommends the Commission approve M-SDT's P.S.C. Mo. Tariff No. 1 In Staff's opinion, the tariff is consistent with the Order granting M-SDT's certificate and is consistent with other Commission-approved tariffs for pre-pay local service providers."¹⁷ In its Order Approving Tariff, the Commission stated, "The Commission has reviewed the tariff sheets and Staff's recommendation and finds that the tariff sheets, as amended, conform to the Commission's Order of March 16."¹⁸

Thus, there can be no doubt that MSDT holds a certificate of service authority to provide

¹⁴*Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service*, MoPSC Case No. TA-2001-334, p. 8.

¹⁵MSDT P.S.C. No. 1, Original Sheet No. 17.

¹⁶*Suggestions in Support of Stipulation and Agreement*, MoPSC Case No. TA-2001-334, p. 4.

¹⁷*Staff Recommendation to Approve Tariff*, MoPSC Case No. TA-2001-334, Tariff File No. 200101121, p. 2 (emphasis added).

¹⁸*Order Approving Tariff*, MoPSC Case No. TA-2001-334, Tariff File No. 200101121, pp. 1-2 (emphasis added).

basic local telecommunications service from the Commission and that it has an approved tariff on file with the Commission. Yet now that BPS seeks to elect price cap regulation based on the service provided in its exchanges by that certificated ALEC, Staff and Public Counsel object that MSDT is not providing service in a manner sufficient to allow BPS to elect price cap status because MSDT's service is not consistent with the terms of its certificate. They should be estopped from questioning the service provided by MSDT. No one has asserted (much less proven) that MSDT is not providing service in accordance with its certificate or tariff. And, even if MSDT is not providing service in accordance with its certificate or tariff, that is not an issue that is properly raised or determined in this case. So long as MSDT has a certificate of authority and is providing service, BPS should be allowed to rely on those facts to obtain price cap status. It would be extremely unfair for the Commission to grant a certificate to an ALEC and allow it to start providing service in the BPS exchanges and, at a later date, not recognize (i.e. be bound by) that fact for purposes of price cap regulation.

6. Whether MSDT provides basic local telecommunications service through its own facilities or through resale is not an issue.

Staff argues in its Initial Brief that the resale of telecommunications service does not amount to "providing basic local telecommunications service for purposes of qualifying for price cap regulatory status." (Brief at 15) This opinion is not shared by Public Counsel, however. Staff cites §§ 392.450 and 302.451 as support for its position because both these statutes state that the Commission may grant a certificate of local exchange telecommunications service or for the resale of basic local telecommunications service. Staff does not mention that in its grants of authority to applicants since the passage of Senate Bill 507 the Commission has never

distinguished between a certificate of service authority granted to a facilities-based competitive local exchange company and a certificate of service authority granted to an applicant who sought to provide service through the resale of another carrier's service. These applicants have merely been granted certificates of authority to provide basic local telecommunications service. Mr. Voight stated at hearing that for purposes of granting the certificate he would not draw a distinction between a resale certificate to provide basic local and a straight certificate to provide basic local. (Tr. 183) It is only in the context of the price cap election cases that the Staff, and the Commission in the ALLTEL case, has sought to show a distinction between the "providing" of basic local telecommunications service and the resale of basic local telecommunications service.

In his testimony in the Staff complaint case, Staff witness Voight stated that it was Staff's position that the existence of a competitive local exchange carrier solely providing resold basic local telecommunications service did not qualify an incumbent for price cap status. (Tr. 148-49) However, at hearing Mr. Voight stated that, "It is not an issue in this case." (Tr. 153) More importantly, the Commission did not hold this view when considering the price cap case of SBC. The Commission stated, "Likewise, nowhere 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."¹⁹ (Emphasis added.) In the SBC case, the Commission further stated, "Section 386.020(46) defines the resale of telecommunications service as 'the offering *or providing* of telecommunications service primarily through the use of

¹⁹*Southwestern Bell*, 6 Mo. P.S.C. 3d at 505.

services or facilities owned or provided by a separate telecommunications company”²⁰

(Emphasis in original.) If no distinction has ever been drawn between facilities-based and resale applicants in the granting of certificates of authority to provide basic local telecommunications service or the prior price cap considerations involving the large ILECs, the Commission is estopped from taking a contrary position in this case, and, to do so, would be a violation of BPS’s constitutional right to equal protection under the law.

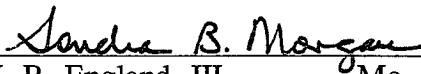
Conclusion

Staff and Public Counsel have been opposed to BPS’s price cap election from the outset, and in both the first price cap case and this proceeding have been seeking a theory to justify that opposition. They first argued that MSDT was not providing basic local telecommunications service, but only local exchange telecommunications service. They then raised the issue of insufficient competition, although a plain reading of the price cap statute clearly shows that competition is not a criterion to be used when acquiring price cap status. Staff has argued that a reseller cannot be considered a provider of services under the price cap statute, although the Commission clearly held to the contrary in the SBC price cap case. In Case No. IO-2003-0012, Staff argued that the definition of basic local telecommunications service must include the services listed in 4 CSR 240-32.100, although that interpretation was clearly inconsistent with the statutory definition in § 386.020(4), RSMo. In this proceeding, Staff and Public Counsel argue that the ALEC MSDT is not providing service because it does not provide the essential services listed in 4 CSR 240-31.010(5). Yet MSDT has a certificate to provide basic local

²⁰*Id.*

telecommunications service in Missouri and continues to provide service in the state for all other purposes. This is merely the latest in a long line of legal theories put forth to prevent BPS from electing to be regulated as a price cap company. Staff speculates about BPS's reason for electing price cap regulation, but BPS's reason for electing price cap regulation is immaterial. BPS could just as easily speculate about the Staff's reasons for objecting to the filing. The law controls this election, not any party's subjective reasons. Using a plain reading of the relevant statutory provision, BPS has met all the qualifications necessary to be a price cap company, and its election to be regulated pursuant to § 392.245 should be found to be valid.

Respectfully submitted,


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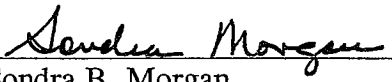
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 21st day of October, 2004, to the following parties:

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