BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. TC-2002-1076
BPS Telephone Company,	)	
Respondent.	)	

BPS TELEPHONE COMPANY'S REPLY TO STAFF RESPONSE

Comes now BPS Telephone Company ("BPS"), by and through its counsel, and for its Reply to Staff Response to BPS's Motion to Dismiss Staff Complaint ("Staff's Response"), respectfully states to the Missouri Public Service Commission (the "Commission") as follows:

A. Introduction

Staff's Response states that BPS's Motion to Dismiss is premature because the Commission has "general supervisory authority" over BPS and because the Commission retains general authority to examine the books and records of a price cap company. With this complaint proceeding, however, the Commission is not exercising its "general supervisory authority." Instead, Staff, at the direction of the Commission, is proceeding with an earnings investigation.

Staff moved for Commission authority specifically to file an excessive earnings complaint, and the Commission issued its *Order Granting Authority to File an Excessive Earnings Complaint*.[1] Additionally, Staff has filed numerous data requests to elicit earnings information,

[1] *See* Staff's Motion for Commission Authority to File an Excessive Earnings Complaint filed herein on May 15, 2002, and the Commission's *Order* of June 20, 2002.

and Staff admits that a purpose of the complaint case is to reduce BPS's revenue.[2] This case does not represent the exercise of the Commission's general supervisory authority over a regulated utility. Quite to the contrary, Staff is pursuing an excessive earnings complaint at least in part pursuant to RSMo. §392.240.1[3] – a statutory provision which specifically does not apply to price cap companies.[4]

The Commission lacks subject matter jurisdiction to proceed with an excessive earnings complaint/investigation against BPS at this time. As Staff admits in its initial motion, it did not file its earnings complaint until after BPS's price cap election, and "(t)he election of price cap status, on its face, prevents Staff from asserting a traditional 'rate of return on rate base' earnings complaint against BPS . . ."[5]

The filing of a Motion to Dismiss is an appropriate means of remedying the improper act of Staff and the Commission proceeding with such a "rate of return on rate base" earnings complaint against BPS. With regard to Staff's allegation that BPS's Motion to Dismiss is premature, BPS asserts that it is appropriate to raise lack of subject matter jurisdiction at the earliest possible opportunity, so that the Commission and the parties involved do not needlessly waste their resources.

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[2] Staff's Response, p. 4.

[3] Staff's Motion for Commission Authority to File an Excessive Earnings Complaint, filed May 15, 2002, p. 8, para. 24.

[4] RSMo. §392.245.7.

[5] Staff's Motion for Commission Authority to File an Excessive Earnings Complaint, filed May 15, 2002, p. 2, para. 5.

B. Argument

I. The requirements of RSMo. §392.245.2 are clear and unambiguous, and BPS has satisfied those requirements and is now subject to price cap regulation unless and until the Commission finds, after hearing, that BPS's election was not valid.

Pursuant to RSMo. §392.245.2, BPS sent written notice to the Commission of its price cap election on March 13, 2002.[6] According to the statute, this letter was all that was necessary for BPS to elect price cap regulation. BPS again sent a written letter of election to the Commission on July 17, 2002. On May 28, 2004, BPS sent a third letter of election pointing out that the Resale Agreement between BPS and MSDT had been modified to remove the language that the Commission had interpreted as preventing MSDT from providing the necessary competition to BPS in its decision in IO-2003-0012. Thus, despite the Commission's previous decision in Case No. IO-2003-0012 (with which BPS does not agree and is on appeal at the Circuit Court), there is a new price cap election which must be considered by the Commission before Staff may continue with its investigation and complaint.

BPS is a price cap company until determined otherwise after an evidentiary hearing. 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. RSMo. §392.245.2 sets out the procedure for a company such as BPS to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

[6] In that letter, BPS stated: 1) that it was a small incumbent telephone company serving less than 3900 lines; 2) that an alternative local telecommunications 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.

> 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 . . . . (emphasis added)

In contrast, 392.245.2 states that a large ILEC shall be subject to price cap regulation only "upon a determination by the commission" that it meets the established criteria. As the Cole County Circuit Court explained in the Southwestern Bell case:

> The statutory requirements applicable to small local exchange telecommunication companies supports the view that the determination required under Section 392.245.2 must be made within a reasonable time [for a large ILEC]. 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.[7]

The Cole County Circuit Court thus recognized that a small ILEC may elect price cap regulation "upon simple written notice," while a large ILEC may become price cap regulated only upon a determination by the Commission.[8]

In Staff's Response, Staff attempts to negate the statute's striking distinction between small ILEC and large ILEC procedures by pointing to rules of statutory construction.[9] At the outset, it should be noted that rules of statutory construction are not needed here.[10] When language in a statute is unambiguous, "courts should not forage among the rules of statutory

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[7] *State ex rel. Public Counsel v. Public Service Commission*, Case Nos. CV197-1795CC and CV197-1810CC, *Revised Findings of Fact and Conclusions of Law*, dated August 8, 1998 (emphasis added).

[8] *Id.*

[9] Staff's Response, pp. 4-5.

[10] *City of St. Joseph v. Preferred Family Healthcare*, 859 S.W.2d 723, 725 (Mo.App. W.D. 1993)*; see also Civil Service Commission v. Board of Aldermen of St. Louis*, 92 S.W.3d 785, 787 (Mo. banc 2003) (Courts must give effect to a provision's plain meaning and must refrain from applying rules of construction unless ambiguity is present).

construction to look for or impose a meaning other than that which is plainly stated." The Commission, in fact, specifically and vehemently agreed with this position when previously reviewing the price cap statute in the three large ILEC price cap cases which have come before the Commission.

If rules of statutory construction are applied, the auxiliary rule of statutory construction, expressio unius est exclusio alterius – the expression of one thing is the exclusion of another, or omissions should be understood as exclusions – appears to be applicable in this instance.[11] In fact, in its initial motion, Staff cites to this very rule and stresses to the Commission that "the legislature's use of different terms in different subsections of the same statute is presumed to be intentional and for a particular purpose."[12] The price cap statute provides a compelling indication of the legislative intent to distinguish between the price cap election procedure for small ILECs and the price cap regulation procedure for large ILECs. The Commission cannot render the distinction meaningless.

As Staff correctly stated, the legislature is not presumed to enact meaningless provisions. The legislature made a distinction between price cap election for small ILECs and price cap regulation for large ILECs, and rules of statutory construction require the Commission to make note of this distinction. Surely Staff is not attempting to argue that the legislature may not

[11] *See Angoff v. M&M Management Corporation*, 897 S.W.2d 649 (Mo.App. W.D. 1995); *see also Keane v. Strodtman*, 18 S.W.2d 896 (Mo. banc 1929); *City of Springfield v. Brechbuhler*, 895 S.W.2d 583 (Mo. banc 1995).

[12] *See* Staff's Motion for Commission Authority to File an Excessive Earnings Complaint, p. 6, para. 18. It should be noted, however, that Staff points to this rule of construction with regard to the issue of resellers and competition.

provide for a so-called automatic election, as numerous statutes contain such "notice of election" provisions.[13]

If there is a challenge to the small company's election to be regulated under the price cap statute, the Commission may hold a hearing and consider the allegations of invalidity. This is where the Commission's "public interest" duty comes into play. 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. Certainly, a complaint case to reduce BPS's revenue far exceeds the Commission's general authority to examine books and records.

II. The concept of 'overearnings' has no relevance to price cap regulation.

In Southwestern Bell's price cap case, the Commission stated, "(t)he concept of 'overearnings' is peculiar to rate base/rate of return regulation and has no relevance to price cap regulation."[14] In that case, the Commission thus recognized that a complaint hinging on allegations of overearnings under rate of return regulation is not cognizable following price cap election.[15]

The Commission reached the same conclusion in GTE Midwest Incorporated's price cap case.[16] Staff asserted that it had begun a preliminary investigation into the earnings of GTE before the Commission approved GTE's price cap application, although the record showed that

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[13] *See* RSMo. §57.961 (Membership in system–certain cities and counties may join), RSMo. §374.270 (Department may elect workers' compensation coverage, RSMo. §141.230 (Operation under law), RSMo. §380.221 (Missouri mutual companies may elect to come under this law), RSMo. §287.090 (Exempt employers and occupations–election to accept).

[14] *In the Matter of the Petition of Southwestern Bell Telephone for a Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996),* 1997 Mo. PSC Lexis 248, 6 Mo. P.S.C. 3d 493 (September 16, 1997).

[15] *Id.*

[16] *In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation Under RSMo Section 392.245 (1996), 1999 Mo.* PSC Lexis 178, 8 Mo. P.S.C. 3d 71 (February 4, 1999).

the actual investigation did not begin until after GTE filed its application.[17] Staff and OPC wanted to continue with the earnings investigation, but the Commission said the opposing parties were too late. The Commission noted that the opposing parties – as in the instant case – did not take action regarding the overearnings allegations until after GTE had filed its price cap application.[18] The Commission again stated that overearnings is peculiar to rate base/rate of return regulation and has no relevance to price cap regulation.[19]

III. The Commission lacks subject matter jurisdiction to proceed with an earnings investigation/complaint, and proceeding at this time would be unlawful and unreasonable.

Jurisdiction concerns the right, power and authority of a court to act.[20] The only power the Commission has when it lacks jurisdiction is to dismiss the action.[21] Until there has been a Commission determination that BPS's May 28, 2004 price cap election lacks validity, the Commission cannot proceed to hear the complaint. BPS is a price cap company and is not subject to rate base/rate of return (i.e. earnings) regulation. RSMo. §392.245.7 specifically states that a price cap company "shall not be subject to regulation under subsection 1 of section 392.240." 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.[22] Surely Staff would not have BPS (and the other parties to this case) expend substantial time and resources when no lawful or meaningful purpose will be served by proceeding with this case.

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[17] *Id.*

[18] *Id.*

[19] *Id.*

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

[21] *Id.*

[22] *Id.*

C. Conclusion

BPS is a price cap company subject to the provisions of RSMo. §392.245. Therefore, proceeding with the complaint case at this time (including establishing a procedural schedule) would be unlawful and unreasonable. Again, the only power the court – or the Commission acting in a quasi-judiciary capacity – has when it lacks jurisdiction is to dismiss the action; all other actions are null and void.[23]

WHEREFORE, for the reasons set forth herein, and for the reasons set forth in BPS's Motion to Dismiss and Response to Order Directing Filing, BPS respectfully requests that the Commission accept its Response to Order Directing Filing of Proposed Procedural Schedule and grant its Motion to Dismiss Staff Complaint.

Respectfully submitted,

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[23] *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic transmission on this 23rd day of June, 2004, to the following parties:

Mr. Cliff Snodgrass	Michael F. Dandino
Missouri Public Service Commission	Office of Public Counsel

/s/ Diana C. Farr
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