

**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.)	

**RESPONSE OF BPS TELEPHONE COMPANY TO
ORDER DIRECTING FILING OF PROPOSED PROCEDURAL SCHEDULE
AND
MOTION TO DISMISS STAFF COMPLAINT
FOR LACK OF SUBJECT MATTER JURISDICTION**

Comes now BPS Telephone Company ("BPS") and for its Response to Order Directing Filing of Proposed Procedural Schedule and its Motion to Dismiss Staff Complaint for Lack of Subject Matter Jurisdiction respectfully states to the Missouri Public Service Commission ("Commission") as follows:

A. Response to Order Directing Filing of Proposed Procedural Schedule

1. On May 17, 2004, the Commission issued an Order Directing Filing of Proposed Procedural Schedule either jointly or separately no later than June 2, 2004. For the reasons set out below, BPS does not believe that it is appropriate to file a procedural schedule in this case.

2. This case has a long history which BPS will not repeat, but it is relevant to state that BPS has filed two previous letters pursuant to § 392.245.1, RSMo 2000, electing to be regulated pursuant to price cap regulation. After the second letter was filed on July 17, 2002, the Commission opened a case to consider whether BPS's written election was valid.¹ On November

¹*In the Matter of BPS Telephone Company's Election to be Regulated under Price Cap Regulation as Provided in Section 392.245, RSMo 2000*, Case No. IO-2003-0012. This case is

13, 2003, the Commission issued its Report and Order in Case No. IO-2003-0012 in which it found that BPS was not eligible to elect price cap regulation. This decision was based on the fact that the Resale Agreement between BPS and Missouri State Discount Telephone Company ("MSDT") contained a clause which stated that MSDT's target market "shall be individuals and entities which are not current customers of Telephone Company" Therefore, the Commission found that MSDT was not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status.

3. On January 20, 2004, BPS and MSDT filed an *Application for Approval of Amendment to Resale Agreement Between BPS Telephone Company and Missouri State Discount Telephone Company* in Case No. TO-2002-0062 in which it sought approval from the Commission for the amendment to the Resale Agreement that removed the text limiting MSDT's ability to market its services. On January 28, 2004, BPS was notified that the amendment was made effective, File No. VT-2004-0034.

4. On May 28, 2004, BPS filed a third written election of price cap status. BPS stated in this letter that because the language in the Resale Agreement that the Commission found prevented MSDT from providing basic local telecommunications service in a "manner that would allow BPS to elect price cap status" had been removed, BPS was filing a new letter of election in order to remove any uncertainty regarding the price cap status of BPS.

5. Because BPS believes that it should be considered a price cap company subject to the provisions of § 392.245, RSMo 2000, it does not believe the establishment of a procedural schedule in this complaint case is either necessary or appropriate. BPS does not believe that the

now under appeal in the Cole County Circuit Court, Case No. 04CV323251.

Commission has subject matter jurisdiction to proceed with the complaint case brought pursuant to rate of return regulation.

B. Motion to Dismiss

6. On April 1, 2004, the Commission issued its Order Granting Authority for Staff to Conduct Further Investigation and Setting Prehearing Conference in which it authorized the Staff to proceed with its supplemental earnings investigation. The Commission acknowledged that this proceeding had been held in abeyance after the Commission issued a Notice of Case Status indicating that the Commission would take no further actions until the issue regarding the price cap status of BPS was resolved in Case No. IO-2003-0012. Despite the parties in the complaint case filing pleadings agreeing that this complaint case should be held in abeyance until the appeal of IO-2003-0012 was completed, the Commission chose to authorize its Staff to conduct further investigation and proceed with its supplemental earnings investigation and to amend its Complaint as necessary.

7. The Commission simply has no jurisdiction to hear an overearnings complaint at this time. Jurisdiction concerns the right, power and authority of a court to act.² Jurisdiction is defined by statutory provisions, and the letter of the law is the limit of power.³ The Commission is a creature of statute and limited thereby.⁴ Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act is authorized by the

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

³*Wells v. Noldon*, 679 S.W.2d 889, 891 (Mo. App. E.D. 1984).

⁴*State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

statute.⁵ 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.⁶ Until there has been a Commission determination that the May 28, 2004 price cap election lacks validity, the Commission cannot proceed to hear the complaint.

8. 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 company⁷ 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 subject to regulation under this section after such election.

9. BPS sent written notice to the Commission of its election to price cap status on March 13, 2002. In this notice, BPS stated: 1) that it was a small incumbent telephone company serving less than 3900 lines; 2) that an alternative local telecommunications company (i.e. 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 statute, this letter was all that was necessary for BPS to elect price cap regulation. BPS again sent a

⁵*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).

⁶*Heinle*, 923 S.W.2d at 464.

⁷RSMo. Section 386.020 (30) defines "small local telecommunications company" as one with less than one hundred thousand lines in Missouri.

written letter of election to the Commission on July 17, 2003. As stated above, on May 28, 2004, BPS sent a third letter of election to the Commission 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.

10. Thus, despite the Commission's previous decision in Case No. IO-2003-0012, there is new price cap election that must be considered by the Commission before the Staff can continue with its investigation and complaint. 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. 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.⁸ 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

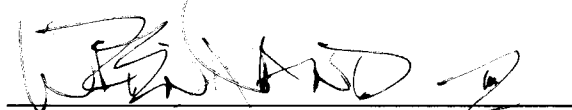
⁸It should be noted that in only one case involving price cap election by a large incumbent telecommunications company under the same statutory provision, did the Staff or the Commission find that a hearing was necessary to determine the validity of the election. Additionally, Southwestern Bell Telephone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

LEC shall be subject to price cap regulation only "upon a determination by the commission that it meets the established criteria."⁹

11. The Commission has again "put the cart before the horse" in authorizing its Staff to continue with its investigation and earnings complaint. 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, 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.

WHEREFORE, for all the reasons set forth herein, 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 for Lack of Subject Matter Jurisdiction.

Respectfully submitted,



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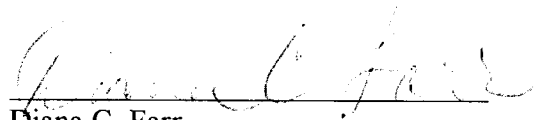
⁹Section 392.245.2, RSMo 2000.

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 2nd day of June, 2004, to the following parties:

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