

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

In the Matter of the Investigation of the       )  
Status of Prepaid Local Service Providers       )  
As Alternative Local Exchange Competitors)       **Case No. CO-2002-1078**  
Under Section 392.245, RSMo.                       )

**ALLTEL MISSOURI, INC.'S  
SUGGESTIONS IN OPPOSITION  
TO THE OFFICE OF THE PUBLIC COUNSEL'S  
MOTION TO ESTABLISH A CASE AND TO  
CONDUCT AN INVESTIGATION**

COMES NOW ALLTEL Missouri, Inc. (ALLTEL), pursuant to the Missouri Public Service Commission's ("Commission") Notice Of Motion And Order Directing Response ("Order") entered in this matter on June 3, 2002, and for its Suggestions in Opposition to the Office of the Public Counsel's Motion to Establish Case and to Conduct an Investigation ("Motion"), respectfully states as follows:

1. On May 16, 2002, the Office of the Public Counsel ("Public Counsel") filed its Motion with the Commission, wherein it requests "the Commission to open a case to investigate and determine if the presence of an alternative local exchange telecommunications company providing prepaid local service is sufficient to satisfy the requirements of the price cap statute." ALLTEL opposes the establishment of such a case, as the "price cap statute," Section 392.245, RSMo 2000, is clear and unambiguous, and such an investigation would only serve to further Public Counsel's agenda of re-litigating issues that have been decided by the Commission and the Courts.<sup>1</sup>

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<sup>1</sup> *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.P.S.C. 3d 493 (September 1997) (hereinafter referred to as the "Southwestern Bell Price Cap Case"); 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, Order Denying*

2. Public Counsel alleges that “it is concerned that while prepaid providers operate under a certificate of authority for local basic service as do other competitive local exchange companies that the nature of the prepaid business and the method of operation may not provide the incumbent with a competitor as envisioned by the price cap statute.”<sup>2</sup> Yet the price cap statute, and the definitions of terms referenced therein, are very clear.

Section 392.245(2) states:

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.*)

Section 386.020(1) defines “Alternative local exchange telecommunications company” as “a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service or switched exchange access service, or any combination of such services, in a specific geographic area subsequent to December 31, 1995.”

The controlling definition of “basic local telecommunications service” is found in Section 386.020(4), where “basic local telecommunications service” is defined as:

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Rehearing and Granting Reconsideration (February 1999); and *State of Missouri ex rel. Public Counsel Martha S. Hogerty v. Public Service Commission of the State of Missouri et al.*, Cole County Circuit Court Case Nos. CV197-1795CC and CV197-1810CC (August 1998).

<sup>2</sup> Public Counsel Motion, p. 2.

(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;

(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.)

3. Public Counsel's alleged concerns now surface because of a small incumbent local exchange company's recent notice of election to be price cap regulated. However, the language of Section 392.245.2 regarding qualification for price cap regulation is the same for both large and small incumbent local exchange telecommunications companies, and it is very clear, to-wit: "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 or small] incumbent company's service area . . ." Public Counsel attempts to

advance its “new” policy concerns by utilizing strained statutory construction that essentially suggests “effective competition” must be interjected as a standard and that prepaid resellers are not providing basic local service. Yet the courts have held that where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.<sup>3</sup> 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.” 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.

4. The Commission fully addressed the issue of statutory construction of Section 392.245 in the first petition for price cap regulation filed by Southwestern Bell Telephone Company.<sup>4</sup> In the Southwestern Bell Price Cap Case, the Commission addressed the issue of whether competition sufficient to justify price cap regulation must be “effective competition,” and found that none of the parties had provided the Commission with persuasive legal argument in support of such a contention. It stated “the Commission finds nothing in either [Section 392.245.2 or Senate Bill 507] which would create an ambiguity in Section 392.245.2 . . .” The Commission further stated, “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. Thus, the parties’ attempt to create ambiguity where none exists must fail.”<sup>5</sup>

Indeed, it is easy to understand why the Public Counsel wishes to interject a new standard of “effective competition,” when one simply examines the moving target represented by the evolving definitions reflected in Public Counsel’s Motion: prepaid services are not

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<sup>3</sup> *Brownstein v. Rhomberg-Haglin and Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

<sup>4</sup> *Southwestern Bell Price Cap Case*. 6 Mo.P.S.C. 3d 493, 503 (1997).

<sup>5</sup> *Id.* at 506, citing *State ex rel. Doe Run v. Brown*, 918 S.W. 2d 303,306 (Mo. App. 1996).

“sufficiently good substitutes;” they do not “offer the full scope of basic local service at a price and under similar terms and conditions that are often offered by incumbent or other CLECs;” and finally, [prepaid service providers] “do not provide service in the **exact manner** as the traditional competitive local exchange company.” (Emphasis supplied.)<sup>6</sup>

5. In addition, whether the alternative local exchange telecommunications company is a reseller and provides prepaid local service is immaterial under the statute. All that is required by Section 392.245.2 is that the company hold a certificate to provide basic local telecommunications service and that it is providing service in the incumbent’s service area. The Commission has never made any distinction between facilities-based providers and resellers in the certificates of service authority granted to competitive local exchange telecommunications providers. Rather, the companies are consistently “granted a certificate of service authority to provide basic local telecommunications service in the state of Missouri . . . .” Indeed, in some of the Orders, the Commission has recited as a specific finding of fact that “[the company] proposes to provide prepaid basic local telecommunications service on a resold basis.”<sup>7</sup> ALLTEL would respectfully submit that none of the eighty-plus competitive local exchange telecommunications providers were 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.

In the Southwestern Bell Price Cap 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 parties argument that

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<sup>6</sup> Public Counsel Motion, pp. 4,6.

<sup>7</sup> See, Order Granting Certificate To Provide Basic Local Exchange Service, Case No. TA-2002-183, p. 3.

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.<sup>8</sup>

6. In conclusion, ALLTEL submits that the language of the Missouri price cap statute is clear, and the investigation requested by Public Counsel will serve no useful purpose.

WHEREFORE, for all of the above reasons, ALLTEL Missouri, Inc. respectfully requests the Commission to deny Public Counsel's Motion.

Respectfully submitted,

  
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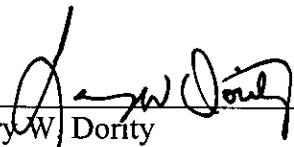
<sup>8</sup> Southwestern Bell Price Cap Case, 6 Mo. P.S.C. 3d at 505.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered or mailed, United States Mail, postage prepaid, this 24th day of June, 2002, to:

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