

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

In the Matter of the Revisions of the)	
Commission's Rules Regarding)	File No. TX-2018-0120
Telecommunications)	File No. TX-2018-0188

**COMMENTS OF THE
MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION**

On April 12, 2018, the Missouri Public Service Commission ("PSC") issued a Notice of Rulemaking Hearing ("Notice") inviting comments to the proposed changes to certain telecommunications rules in Chapters 28, 29, 31, 34 and 37 of Title 4, Division 240 of the Missouri Code of State Regulations (the "Code"). The Missouri Cable Telecommunications Association ("MCTA") submits these comments related to this Notice on proposed rules in Chapters 28 & 31.

I. Background & Summary of Position

PSC Staff sought comments from interested stakeholders regarding proposed revisions to certain Chapter 31 rules regarding the administration of the Missouri Universal Service Fund ("MoUSF") in docket TW-2017-0078. MCTA submitted comments supporting changes to the PSC's rules resulting in alignment with the recent changes to the Federal Universal Service Fund.¹ However, MCTA opposed any PSC rule revisions expanding the MoUSF to support broadband service.² As MCTA has expressed in previously filed comments concerning the MoUSF, the PSC does not have the statutory authority to support broadband service.³ MCTA maintains the proposed Chapter 31 rule changes in this proceeding expanding MoUSF to support

¹ See Comments of the Missouri Cable Telecommunications Association, EFIS No. 37, October 20, 2016.

² Id.

³ See Comments of the Missouri Cable Telecommunications Association, File Nos. TW-2017-0078 and TW-2018-0098, EFIS Nos. 37, 47, 58, and 69 filed Oct. 20, 2016, Apr. 28, 2017, Jun. 14, 2017, and Oct. 23, 2017, respectively.

broadband service exceed the PSC's statutory authority under Missouri and federal law and therefore cannot be promulgated. The proposed rule changes are also duplicative of federal and state programs that are already funding the deployment of broadband in high-cost, unserved areas.

As for the other proposed rule changes in this proceeding, MCTA recommends revisions to the proposed rules in Chapter 28 regarding 1) annual reporting by companies authorized to provide telecommunications and/or IVOIP services, and 2) tariff maintenance.

II. *Broadband Internet Access Service is an Interstate Service to be Regulated by the Federal Communications Commission ("FCC")*

Regulating broadband, which is not a telecommunications service, exceeds the PSC's statutorily defined jurisdiction

The PSC's regulatory jurisdiction is limited by statute to telecommunications facilities, telecommunications services and telecommunications companies. *See* § 386.250(2) RSMo 2000.⁴ The Missouri statutes and federal law clearly demonstrate that broadband service does not fit within the definition of "telecommunications service" and therefore cannot be subject to the PSC's regulatory jurisdiction. Section 386.020(54) RSMo defines "telecommunications service" as "the transmission of information by wire, radio, optical cable, electric impulses, or other similar means."

Section 386.020(54) RSMo also includes a "carve out" definition for the term "information" which is defined as "knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds or other symbols." Through the "carve out," it is reasonable to conclude that "information" is not a form of "telecommunications service." Further evidence to support this conclusion can be found in the FCC's recent action to reclassify

⁴ All statutory references are to the Missouri Revised Statutes (2000), as amended.

broadband Internet access service as an “information service” rather than a Title II “telecommunications service.”⁵

Similarly, federal law defines “information service” as follows:

[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use or capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.⁶

Hence, an “information service,” such as broadband Internet access service, makes use of telecommunications but does not separately offer telecommunications service to the public on a stand-alone basis.⁷

Read together, the Missouri and federal laws demonstrate that broadband service is not a “telecommunications service” as defined in the Missouri statutes and is therefore not subject to the regulatory authority of the PSC pursuant to Section 386.250(2) RSMo.

The PSC cannot regulate Interstate services

Section 386.250(2) RSMo further limits the regulatory authority of the PSC to *intrastate* telecommunications services. The FCC recently affirmed in the *Internet Freedom Order* that broadband Internet service access is a jurisdictionally *interstate* service because a substantial amount of Internet traffic begins and ends across state lines.⁸

Section 392.190 RSMo states “the provisions of sections 392.190 to 392.530 shall apply to telecommunications service between one point and another within the state of Missouri”

The MoUSF enabling statute prevents the PSC from expanding the universal service fund to

⁵ See *In the matter of Restoring Internet Freedom, Declaratory Ruling, Report and Order and Order*, WC Docket No. 17-108, FCC 17-166 (released January 4, 2018) (the “*Internet Freedom Order*”).

⁶ 47 U.S.C. §153(24).

⁷ Id. at ¶52.

⁸ See *Internet Freedom Order* at ¶199.

include interstate services, including broadband. The statute expressly requires that the PSC consider only “local” telecommunications services when promulgating MoUSF regulations:

In determining whether, and to what extent, universal service fund funding is required to facilitate provision of essential **local** telecommunications service, the commission shall:

(1) Determine the definition of essential **local** telecommunications service . . .

(4) Establish a standard to determine whether and to what extent end-user customers . . . may be eligible for assistance in paying for essential **local** telecommunications service.

Section 392.248.6 RSMo (emphasis added).

As is the case with interstate circuit-switched services, the PSC has no jurisdiction over broadband service. The U.S. Congress delegated to the FCC the authority to regulate interstate wire and radio communications.⁹ Section 386.030 RSMo states that the PSC has no jurisdiction under Chapter 386 with respect to interstate commerce, except as permitted by federal law. Similarly, in *State ex rel. St. Louis-San Francisco Ry. Co. v. Pub. Serv. Comm’n*,¹⁰ the PSC’s order to stop interstate trains was declared unconstitutional as a “hindrance of interstate traffic, and therefore an unlawful regulation and burden upon interstate commerce.”

Since at least 2002, the FCC has classified broadband as an interstate service.¹¹ Where separating interstate service is impossible or impractical, the FCC has declared such service to be interstate in nature, in accordance with its “mixed use” doctrine.¹² The FCC has said that any effort by states to regulate Internet traffic would interfere with the federal regulatory scheme.¹³

⁹ See 47 U.S.C. § 152(b); see generally Federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 et seq.

¹⁰ 294 Mo. 364, 242 S.W. 938, 940 (1922).

¹¹ See *Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling et al.*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (“Cable Modem Order”).

¹² See *Internet Freedom Order* at ¶ 431.

¹³ Id. at ¶¶ 200 and 201.

Therefore, the PSC exceeds its statutory authority in this rulemaking through its efforts to regulate interstate broadband Internet service via expansion of MoUSF funding.

Regulation of broadband Internet access service is a matter for the FCC

The FCC concludes in the *Internet Freedom Order* that “regulation of broadband Internet access service should be governed by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.”¹⁴ Allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with separate and potentially conflicting requirements across all of the jurisdictions in which it operates.¹⁵ Further, the FCC said, “[n]othing in the [Federal Telecommunications] Act suggests that Congress intended for state . . . governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband . . . than that exercised by the federal government.”¹⁶ Subsequently, the FCC stated that it will exercise its authority to pre-empt any state or local requirements that are inconsistent with a federal deregulatory approach including any regulations that would impose more stringent requirements for any aspect of broadband service addressed in the *Internet Freedom Order*.¹⁷ This includes any “economic” or “public utility” type regulations.¹⁸ Therefore, the PSC’s proposed rules expanding MoUSF funding to broadband service, if adopted, would be subject to preemption by the FCC.

III. Proposed Rule Changes in Chapter 28 of the Code

MCTA requests changes to the proposed Annual Reporting rule

¹⁴ Id. at ¶194.

¹⁵ Id.

¹⁶ Id. at ¶204.

¹⁷ Id. at ¶195.

¹⁸ Id.

Proposed rule 4 CSR 240-28.012 specifies the annual reporting and assessment requirements for companies authorized to provide telecommunications and/or IVOIP services. This proposed rule replaces rule 4 CSR 240-28.040. MCTA requests that the PSC incorporate certain provisions of the current rule into the proposed rule. Specifically, MCTA urges the PSC to incorporate provisions allowing companies to request 1) extensions of time to file annual reports; and 2) confidential treatment of annual reports, as necessary and appropriate.

MCTA requests changes to the proposed tariff maintenance rule

Proposed rule 4 CSR 240-28.013 identifies guidelines for maintaining tariffs. Tariff requirements for telecommunications companies are currently set forth in 4 CSR 240-28.070. The current rule requires a telecommunications company to maintain a tariff for any commission-regulated wholesale service. The rule also makes the maintenance of tariffs discretionary for any company offering telecommunications service to residential or business retail customers. As an alternative to maintaining a tariff, a company offering service to residential or business retail customers may maintain a publicly accessible website identifying its retail prices. The proposed rule allows a company providing retail telecommunications services to maintain a tariff at its discretion, but is silent as to any tariff maintenance obligations a wholesale provider may have. MCTA requests that the tariff filing obligations of wholesale service providers in the current rule be extended to wholesale service providers in the proposed rule.

IV. Proposed Rule Changes in Chapter 31 of the Code

The proposed rules expanding MoUSF's Lifeline and Disabled program to include broadband services exceed the PSC's statutory authority

The proposed revision to the definition of “Essential local telecommunications service” in 4 CSR 240-31.010(5) paves the way for the PSC to expand the MoUSF to support broadband service. The revised definition proposes that “Essential local telecommunications service” be defined as “Voice telephone service which provides voice grade access to the public switched network including access to 911-related emergency services to the extent implemented by a local government *and/or retail broadband service.*”¹⁹ By incorporating this definition in proposed rule 4 CSR 240-31.014(6), the PSC would authorize Lifeline or Disabled program participants to receive discounted “retail broadband service” as an “essential local telecommunications service” under the MoUSF. The PSC, however, lacks the authority to expand the definition of “Essential local telecommunications service” under the MoUSF. State law is clear that “[I]f a power is not granted to the Commission (PSC) by Missouri Statute, then the Commission does not have that power.”²⁰

First, the PSC does not have the authority to expand the definition of “Essential local telecommunications services” to include retail broadband services because the state statute specifically limits the MoUSF to voice services. Section 392.611.1(1) RSMo plainly states that telecommunications companies shall “receive, as appropriate, funds disbursed from the universal service fund, which may be used to support the *provision of local voice service.*” (Emphasis added.) Broadband services and local voice services are not synonymous or interchangeable terms. They are distinct services. State law allows MoUSF support for only voice service. The PSC simply does not have the statutory authority to unilaterally change this statutory restriction to include broadband service.

¹⁹ See proposed rule 4 CSR 240-31.010(5) (emphasis added).

²⁰ *Pub. Serv. Comm’n v. Consol. Pub Water Supply Dist. C-1*, 474 S.W.3d 643, 649 (Mo. App. W.D. 2015).

Moreover, the PSC is expressly prohibited from adding broadband to the definition of “Essential local telecommunications services” by Section 392.611.2 RSMo which provides that “broadband and other internet protocol-enabled services shall not be subject to regulation” by the PSC under Chapters 386 or 392 of the statutes. The express language of these two statutes demonstrates that the General Assembly did not grant nor intend for the PSC to fund retail broadband services through the MoUSF Lifeline and Disabled programs. Therefore, the PSC lacks authority to make the proposed change to 4 CSR 240-31.010(5).

The proposed rules expanding the MoUSF to include high cost support exceeds the PSC’s statutory authority and violates the statutes governing MoUSF funding

Although authorized by statute since 1996 to create a high cost support fund for voice services, the Commission has chosen not to, and has itself proposed repealing the existing state high-cost rules on at least one occasion.²¹ Instead of repealing these arguably unnecessary rules, it appears the PSC is instead proposing to repurpose the MoUSF high cost program to be a broadband deployment fund. In doing so, the proposed rules unlawfully ignore the stated purpose of the MoUSF high cost support and the clearly stated statutory guidelines for the disbursement of MoUSF high cost support. Furthermore, proposed rule 4 CSR 240-31.013 would allow companies to apply for and receive high cost support from the MoUSF to “deploy facilities to provide retail broadband service to unserved areas.” Per this proposed rule, the PSC may consider requests for broadband support on a “case-by-case basis.”

Similar to the creation of broadband support fund for the Lifeline and Disabled programs, the PSC would *regulate* broadband because it would determine market entry and exit, in addition to service quality (e.g., speed, latency, and the manner in which broadband is provided) and

²¹ See Docket No. TW-2013-0324.

carrier eligibility to receive such support. Such regulation of broadband service is expressly prohibited by Section 392.611.2 RSMo.

In addition, proposed rule 4 CSR 240-31.31013 fails to establish a clear process for awarding funds to requesting carriers, which raises additional issues like whether such standards are technology-neutral, duplicative of federal funding, or the accountability of recipients or the fund administrator.

Proposed rule 4 CSR 240-31.013(2) provides no objective standards or guidance for determining whether an applicant is eligible to receive high cost support for providing retail broadband services to unserved areas. Rather, the proposed rule establishes a subjective standard (*i.e.*, “a case-by-case basis”) for awarding MoUSF funding. High cost support funding to provide broadband service awarded subjectively by the PSC could lead to claims from competitors or the public that “preferences or competitive advantages” resulted from a disbursement in violation of Section 392.248.2 RSMo. Such claims could cause regulatory uncertainty and further delay broadband deployment in unserved areas of Missouri.

Furthermore, proposed rule 4 CSR 240-31.013(2) ignores the General Assembly’s stated purpose for the high cost fund, which is to provide for “reasonably comparable essential ***local telecommunications service***, as that definition may be updated by Commission by rule, throughout the State including high-cost areas, at just, reasonable and affordable rates.”²² Moreover, the proposed rule overlooks the statutory criteria for receiving high cost support in Section 392.248.4(1)(a) RSMo, which states:

A telecommunications company’s eligibility to receive support for high-cost areas from the universal service fund shall be conditioned upon [t]he telecommunications company offering essential local telecommunications service, using its own facilities, in whole or in part, throughout an entire high-cost area and ***having carrier of last resort (“COLR”) obligations in that high-cost area.*** . .

²² Section 392.284.2(1) RSMo

(Emphasis added.) The current rule related to MoUSF funding in high cost areas conforms with Section 392.248.4(1)(a) RSMo as it places COLR obligations on the funding recipient.²³ As proposed, 4 CSR 240-31.013 (1)(A) eliminates the COLR obligation as part of the criteria to obtain high cost support.

Despite the clear language in the statute, the proposed changes to 4 CSR 240-31.013 would allow MoUSF to fund high cost support to companies that may not be COLRs or even “telecommunications companies” to build services that are not “essential local telecommunications service.” Again, the PSC clearly lacks the statutory authority to promulgate the high cost support program it proposed to do in these rules.

Expanding MoUSF Support for Broadband Service is unnecessary and duplicative of federal and state programs

Even if the PSC had the authority to expand the MoUSF to provide funding for broadband deployment, such a program would be duplicative of both federal and state programs that currently provide for funding for high-cost area deployment. As the MCTA has stated in previous filings, price cap carriers in the state were offered model-based support for locations lacking broadband service in an amount that totaled \$130,166,581 annually.²⁴ The price cap carriers accepted \$93,728,312. In addition, rate-of-return carriers in the state were offered model-based support for locations lacking broadband service in an amount that totaled \$36,485,209.²⁵ The rate-of-return carriers have accepted approximately \$22 million. At this time, both price cap and rate-of-return carriers operating in Missouri have accepted support to fund deployment to

²³ See 4 CSR 240-31.040(1)(B).

²⁴ See Connect America Fund Cost Model Final Results Report: Offer by Carrier and by State, CAF II – Final Adopted Model for Offer of Model-Based Support to Price Cap Carriers – CAM 4.3, FCC (Apr. 29, 2015).

²⁵ See Alternative Connect America Cost Model Offer of Support: CAF A-CAM Version 2.3.1, Report Version 8.0, Results: Offer by Carrier, FCC (Aug. 15, 2016).

approximately 70% of the number of locations eligible for such support. Even for those carriers not accepting model-based support, “frozen” Phase I support and legacy-based federal support have provided considerable assistance.

Furthermore, in the last legislative session the General Assembly passed, and the Governor signed, a bill that created a state fund that will support the deployment of broadband in high cost areas. This bill establishes a grant program within the Department of Economic Development to expand broadband Internet access to unserved and under-served portions of Missouri. Awards are to fund the acquisition and installation of middle mile and last mile infrastructure.

In light of the foregoing, it appears that the FCC’s and the State of Missouri’s programs supporting broadband deployment will prove to be effective in addressing those unserved areas in the state. Because the FCC and state likely will disburse even more funds (e.g., through the auction process and grant programs) that will support both voice and broadband in unserved high-cost areas, this PSC should provide some analysis on the effectiveness of these existing programs before it acts to support broadband.

Regulation of broadband service may stifle investment in broadband networks

The PSC’s desire to regulate broadband service may cause outcomes contrary to the federal and state policies regarding the provision of reliable broadband services to all citizens of Missouri and the United States. To further pursue these policies, the FCC has abandoned the public utility approach to the regulation of broadband Internet service access. The FCC’s first significant step toward this end is to reclassify broadband Internet access service from a Title II “telecommunications service” to a Title I “information service.” Such a “classification will facilitate critical broadband investment and innovation by removing regulatory uncertainty and

lowering compliance costs.”²⁶ The FCC’s prior Title II classification of broadband service as a telecommunications service “reduced ISP investment in broadband networks, as well as hampered innovation, because of regulatory uncertainty”.²⁷ The FCC was especially concerned that the Title II regulations had “deleterious effects on small ISPs and the communities they serve, which are often rural and/or lower income.”²⁸ These “deleterious effects” result from the fact that such ISPs “lacked the extensive resources necessary to comply with burdensome regulation” and had to “divert significant resources to legal compliance”²⁹ from “planned broadband service and network upgrades.”³⁰ In a regulated environment, profits can be depressed below the competitive rate of return.³¹ A reduction in the expected return reduces the incentive to invest.³² This results in reduced broadband network growth and inadequate service levels. This is not what the PSC and the citizens of Missouri are expecting for broadband service.

V. Conclusion

The proposed rules in this proceeding relating to the expansion of the MoUSF to fund broadband services are contrary to both state and federal law. This being the case, MCTA requests that the PSC not promulgate these rules as they will lead to legal challenges, and furthermore are unnecessary and duplicative of federal and state programs that are already funding support of broadband services in Missouri.

Respectfully submitted this 2nd day of July 2018.

²⁶ See *Internet Freedom Order* at ¶20.

²⁷ Id. at ¶88.

²⁸ Id. at ¶103.

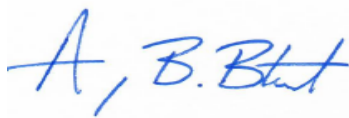
²⁹ Id. at ¶103.

³⁰ Id. at ¶104.

³¹ Id. at ¶89.

³² Id.

MISSOURI CABLE TELECOMMUNICATIONS
ASSOCIATION

A handwritten signature in blue ink, reading "A. B. Blunt". The signature is written in a cursive, flowing style with a large initial "A" and a stylized "B".

Andrew B. Blunt
Executive Director
P.O. Box 1185
Jefferson City, Missouri 65102
(573) 680-6966