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June 7, 2002

Mr. Dale Hardy Roberts  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

**Re:** TC-2002-1076

Dear Mr. Roberts:

Enclosed for filing on behalf of BPS Telephone Company ("BPS"), please find an original and eight (8) copies of a Reply of BPS Telephone Company to Staff Response and Amended Response to Suggestions in Opposition.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 

Sondra B. Morgan

SBM/lar  
Enclosure

cc: Cliff Snodgrass  
Michael F. Dandino  
Harry Thielepape  
Lisa Winberry

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

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

**REPLY OF BPS TELEPHONE COMPANY TO STAFF  
RESPONSE AND AMENDED RESPONSE TO SUGGESTIONS IN OPPOSITION**

Comes now BPS Telephone Company ("BPS") and for its Reply to Staff's Response and Amended Response to BPS' Suggestions in Opposition states to the Missouri Public Service Commission ("Commission") as follows:

1. On June 3, 2002, the Staff of the Missouri Public Service Commission ("Staff") filed a Response to the Suggestions in Opposition to Staff's Motion to File an Excessive Earnings Complaint in which it stated that it wanted to respond briefly to several arguments raised by BPS in its Suggestions. On June 6, 2002, Staff filed An Amended Staff Response. Since BPS feels that its arguments in the Suggestions were either misunderstood or mischaracterized by Staff in its Response and Amended Response, BPS files this brief Reply.

2. First, Staff takes issue with BPS's suggestion that Staff should be "estopped" from arguing that Missouri State Discount Telephone ("MSDT") is not properly certificated to provide basic local telecommunications service sufficient to qualify as an "alternative local exchange telecommunications company" under the price cap statute because Staff recommended issuance

of a certificate to provide basic local telecommunications service for MSDT. Staff cites legal precedent to the effect that the doctrine of estoppel should be applied sparingly against governmental bodies. Initially, BPS would note that it is doubtful that the Staff of the Missouri Public Service Commission would be considered a "governmental body" as used in these cases. In a proceeding such as this, the Staff is merely a party, like BPS. And secondly, in using the term "estopped," BPS is not espousing the formal doctrine of equitable estoppel so much as pointing out Staff's inconsistency in this matter and the inequity of Staff's change in position. Neither is BPS alleging "misconduct" by the Staff in its recommendation of approval of MSDT's certificate. However, BPS does not believe that Staff should be allowed to, on the one hand, recommend approval of the issuance of a certificate to MSDT to provide basic local telecommunications service, and, on the other hand, argue that the service provided by MSDT does not qualify as basic local telecommunications service for purposes of price cap regulation.

Staff's change in position seems to indicate that it believes that the Commission should be free to grant a certificate for basic local telecommunications service to a company, and then later decide in another context that the company does not have authority to provide basic local telecommunications service. Such a position would render the certification process meaningless.

3. Staff next takes issue with BPS's use of the word "disingenuous" to describe Staff's contradictory position regarding the distinction between a reseller and a facilities-based carrier in this proceeding as opposed to its position in the Southwestern Bell Price Cap case.<sup>1</sup> Again, BPS

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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 (1996), 6*

is simply pointing out that Staff in the Southwestern Bell Price Cap case took a position that was diametrically opposed to the position taken in this case, and that Staff's change in position in this proceeding seems to be a means to justify an end, namely the ability to invalidate BPS's price cap status and file an overearnings complaint.

In its Amended Staff Response, Staff cites the language of the Cole County Circuit Court in its *Revised Findings of Fact and Conclusions of Law and Judgment*<sup>2</sup> to the effect that there might be doubt that competition from one reseller would be sufficient for purposes of price cap determination and that it might be possible to distinguish a reseller from a facilities-based company for purposes of that determination. However, the Circuit Court affirmed the decision of the Commission granting price cap status to Southwestern Bell based on the existence of one reseller, and the Commission did not change its decision regarding Southwestern Bell's qualification for price cap status after the Circuit Court's decision, nor did the Commission adopt this position in either the Sprint or GTE price cap cases.<sup>3</sup> The Commission noted the language from the Circuit Court decision cited by Staff in the GTE decision, but found that GTE had met the prerequisites for price cap regulation through competition from one reseller.<sup>4</sup> BPS does not

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Mo. P.S.C. 3d 493 (1997).

<sup>2</sup>*State ex rel. Public Counsel Martha S. Hogerty v. Public Service Commission et al.*, Cole County Circuit Court Case Nos. CV197-1795CC and CV197-1810CC, *Revised Findings of Fact and Conclusions of Law and Judgment*, August 6, 1998.

<sup>3</sup>*In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation under RSMo Section 392.245 (1996) (GTE Price Cap Case)*, Case No. TO-99-294; *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 (Spring Price Cap Case).

<sup>4</sup>GTE Price Cap Case, TO-99-294 at pp. 3-4.

believe that Staff should be able to advocate a position in opposition to the position taken in previous proceedings without an explanation of its change of position.<sup>5</sup>

In all three of the cases cited above involving large telecommunications companies, the Commission interpreted the exact same language that is at issue here holding that it was not necessary for the alternative local exchange carrier to be a facilities-based carrier, nor was it necessary for the alternative company to be providing "effective competition." For Staff to argue differently in this first case involving a small local exchange company is arbitrary and discriminatory. Staff is trying to change the plain language of the statute through interpretation and reach a result directly contrary to that reached in the cases involving large companies. The language is the same for both large and small local exchange companies, and the statute should apply equally to both. Neither the Staff nor the Commission can change the plain meaning of the statutory language. The statute can only be changed by the legislature.

4. Finally, BPS will respond to Staff's statement that a reasonable interpretation of "providing service" would mean providing service to the public generally, not just a limited class of customers. Again, BPS would reiterate that Staff is reading qualifications and conditions into the statute that are simply not there. The statute says "providing service," not "providing service to the public generally." Nonetheless, it should be noted that the Resale Agreement between BPS and MSDT does not preclude MSDT from providing service to any BPS customer that

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<sup>5</sup>Although Staff filed a "Motion to Reconsider Order Approving Price Cap Application" in the GTE Price Cap Case, it did not contest the Order on the grounds that GTE's competition was provided by a reseller or that the competitor did not provide service to the "public generally." In point of fact, the majority of competitive local exchange companies do not provide service to the "public generally," but instead target business customers or customers in a certain geographic area.

requests its service. There is nothing in MSDT's tariffs nor in its Resale Agreement with BPS that precludes MSDT from providing service to anyone located in BPS's service territory.

Section 6.1.1 of the Resale Agreement only states that MSDT will not "target" BPS customers.

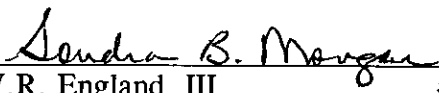
Further 6.1.1 of the Resale Agreement states that:

In the event a customer of Telephone Company requests service from Missouri State Discount prior to actual disconnection by Telephone Company, Telephone Company will process an appropriate service order from Missouri State Discount when it receives notification and verification from the customer that the customer intends to take service from Missouri State Discount.<sup>6</sup>

Thus, the Resale Agreement entered into by BPS and MSDT does not preclude MSDT from providing service to a current customer of BPS, and it is important to note that BPS has not and will not refuse to process any order for service from MSDT, whether or not the customer is a present customer of BPS.

BPS respectfully requests that the Commission consider these additional comments when ruling on Staff's Motion.

Respectfully submitted,

  
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<sup>6</sup>See, *BPS Telephone Company's Application for Approval of a Resale Agreement with Missouri State Discount Telephone*, Case No. TO-2001-62.