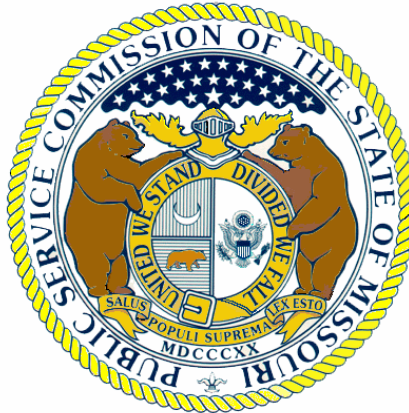


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

REPORT AND ORDER

Issue Date: November 13, 2003

Effective Date: November 24, 2003

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APPEARANCES

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Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Cliff E. Snodgrass, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Nancy Dippell, Senior Regulatory Law Judge.**

REPORT AND ORDER

Syllabus

This order finds that BPS Telephone Company's notice of election to become a price cap carrier under Section 392.245.2, RSMo 2000¹ is invalid.

Procedural History

By letter to the Commission on March 13, 2002, BPS Telephone Company notified the Commission that it was electing to be regulated under the "price cap" provisions of Section 392.245.2. BPS provided a second written notice of its intent to be regulated under the price cap statute on July 17, 2002. The Commission issued a Notice of Price Cap Election on July 22, 2002, and set a time for responses to the price cap election.

The Staff of the Missouri Public Service Commission filed a motion requesting that the Commission reject BPS's price cap election. The Office of Public Counsel also objected to BPS's election and requested that the Commission hold an evidentiary hearing.

Prior to BPS's price cap election notice, the Staff had informally been conducting an overearnings investigation. Staff also filed a formal request to conduct an overearnings investigation and to file a complaint.²

On January 24, 2003, the parties filed a joint issues list describing the issues to be resolved to by the Commission. On that same date, each of the parties filed a statement describing their position on each issue. An evidentiary hearing, with all the parties present, was held on February 7, 2003.

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

² *Staff of the Missouri Public Service Commission, Complainant, v. BPS Telephone Company, Respondent*, Case No. TC-2002-1076.

Initial briefs of the parties were filed on April 4, 2003, and reply briefs were submitted on April 24, 2003. Also on April 4, 2003, ALLTEL Missouri, Inc., filed a petition for leave to file its brief as *amicus curiae*. ALLTEL simultaneously filed its brief. The Commission granted the petition on April 15, 2003.

Discussion

The parties presented the Commission with the following issues for determination and stated the following positions³ on each issue:

1. Is Missouri State Discount Telephone providing basic local telecommunications service in BPS's service area?

BPS: Yes. MSDT provides basic local telecommunications service in BPS's service area in accordance with the definition of basic local telecommunications service found in Section 386.020(4), RSMo 2000.

Staff: No. MSDT is not providing the minimum standards for basic local telecommunications service established in Commission Rule 4 CSR 240-32.100. Section 386.020(4) only provides a general outline of what constitutes basic local telecommunications service. The statute defers to the Commission to determine such things as local calling scope, and whether or not touch tone, access to operator services, as well as other features are included as part of basic local telecommunications service.

Public Counsel: No. MSDT, as a prepaid provider, does not provide many of the services that are defined as basic local service.

2. Would the type or level of competition that MSDT provides BPS be a relevant consideration in determining whether BPS is subject to price cap regulation?

BPS: No. Section 392.245.2, sets out the requirements to be met by a small incumbent local exchange telecommunications company before it can elect to be regulated under price cap regulation. This statute does not reference any type or level of competition that must be met before the incumbent LEC is eligible to elect price cap regulation. The Commission previously rejected the "effective competition" argument in the

³ Each of the parties' positions was taken from their Statements of Position filed on January 24, 2003. ALLTEL in its Amicus Curiae Brief agrees with the position of BPS.

Southwestern Bell Telephone Company price cap case.⁴ Thus, competition, no matter what the level or type, is not a consideration.

Staff Position: Yes. The type of competition required for a valid election to price cap status is that an alternative local exchange carrier is certificated to provide basic local telecommunications service, and is, in fact, providing basic local telecommunications service in the service area of BPS.

Public Counsel: Yes. It would be absurd for the General Assembly to use the presence of an alternative local exchange telecommunications company certified and providing services in the ILECs exchanges as a price cap election trigger if the ALEC does not compete with the ILEC for customers. Competition is the essential reason for permitting price cap regulation as an alternative form of regulation from rate of return regulation. The provisions of the interconnection agreement amount to a pact not to compete and therefore MSDT cannot reasonably be said to be offering competitive services to BPS. MSDT as a prepaid company does not provide basic local service to compete with BPS even absent the interconnection agreement.

3. Does BPS qualify for price cap regulation under Section 392.245 RSMo 2000?

BPS: Yes. BPS has shown that it meets all of the statutory criteria for election of price cap regulation. BPS is a small incumbent local exchange company; it filed a written notice to the Commission of its election to be regulated under the price cap statute; MSDT is an alternative local exchange telecommunications company; MSDT holds a certificate of service authority to provide basic local telecommunications service in BPS's service area; and MSDT is providing basic local telecommunications service in BPS's service area.

Staff: No. BPS does not qualify for price cap regulatory status because MSDT is not providing basic local telecommunications service as required by Commission Rule 4 CSR 240-32.100 and as is required by the election provisions of this statute.

Public Counsel: No. Allowing BPS to elect price cap regulation under the facts here would be inconsistent and contrary to the clear intent and purpose of Section 392.245, RSMo and Chapter 392. MSDT does not offer many of the basic local telecommunications services defined by Section 386.020(4). Also, MSDT and BPS have entered into a non-compete pact as part of their interconnection agreement. To allow price cap

⁴ *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), Case No. TO-97-397.*

regulation election under these circumstances is contrary to the intent and purpose of the law to have competition as a substitute for regulation and to provide just and reasonable prices for services.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

BPS is a small incumbent local exchange company serving approximately 3900 access lines in Missouri.⁵ BPS first provided written notice to the Commission of its intent to be regulated under the price cap statute⁶ on March 13, 2002.⁷ BPS provided a second written notice of its intent to be regulated under the price cap statute on July 17, 2002.⁸

MSDT was certified to provide basic local telecommunications service by the Commission in Case No. TA-2001-334, effective March 26, 2001.⁹ MSDT's tariff for the provision of basic local telecommunications service was approved by the Commission on June 26, 2001, and became effective on July 2, 2001.¹⁰ MSDT's original tariff did not specifically list that it would be providing service in any of BPS's exchanges. MSDT

⁵ Exh. 1, pp. 3-4; Exh. 2, p. 4; Exh. 3, p.2 ; Tr. 118; 241.

⁶ Section 392.245, RSMo.

⁷ Exh. 1, p. 4 ; Sched. DC I ; Tr. 118; 242.

⁸ Exh. 1, p.4; Sched. DC 2.

⁹ Exh. 1, p. 4; Exh. 2, p. 12; Exh. 3, p. 7 ; Tr. 118; 241.

¹⁰ Exh. 1, p. 4.

amended its tariff effective June 21, 2002, to include the service territory of several small company exchanges including BPS.

MSDT resells the telecommunications service of BPS. BPS and MSDT entered into a Resale Agreement that was approved by the Commission in Case No. TO-2002-62, effective October 26, 2001.¹¹ That agreement included the following restriction on service to be provided by MSDT:

6.1 Restrictions.

6.1.1 The resale of services under this Agreement shall be limited to users and uses conforming to class of service restrictions. All services provided under this Agreement shall be toll restricted, so that the services cannot be used to incur direct dial toll charges. . . . Missouri State Discount shall not target Telephone Company's current customers or new customers to Telephone Company's service area, for services to be resold by Missouri State Discount. Missouri State Discount's target market shall be individuals and entities which are not current customers of Telephone Company and have been disconnected for nonpayment of Telephone Company's telecommunication charges. . . .¹²

MSDT provides telecommunications service to a few customers within the BPS service area.¹³ MSDT provides service by reselling through its interconnection agreement, the services of BPS. The type of service offered by MSDT is often referred to as "prepaid" service. This term is derived from the fact that in order to receive service, the customer must pay in full for the month of service. In addition, consumers of "prepaid" service usually are limited to basic local services and have no access to toll or fee services. MSDT's customers are restricted in this manner.

¹¹ Exh. I, p. 4-5 ; Exh. 6.

¹² Exh. 6, p. 6.

¹³ Exh. 1, p. 6; Exh. 3, p. 3; Tr. p. 51, ln. 4-9.

MSDT provides "two-way switched voice service within a local calling scope"¹⁴ comprised of the following services:¹⁵

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges;
- (b) Access to local emergency services including 911 service, if available;
- (c) Standard intercept service; and
- (d) Standard white pages directory listings.

MSDT does not provide the other services as listed in Section 386.020(4) including assistance programs such as lifeline, link-up, and dual-party relay services; access to basic local operator services; access to basic local directory assistance; and equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.¹⁶ The current price for service from MSDT is \$50 per month and for similar services from BPS the charge is approximately \$20.¹⁷

The current agreement between BPS and MSDT limits MSDT's ability to compete with BPS. The testimony of David Carson corroborated this fact. Mr. Carson testified that even though a BPS customer could request service from MSDT, under the terms of the agreement, MSDT could do very little to try to gain those customers until they have their service disconnected from BPS.¹⁸ It is at that point that the agreement allows MSDT to seek BPS's customers. Based on its review of the agreement, Mr. Carson's testimony cited above, and Mr. Carson's confidential testimony during the *in camera* session of the

¹⁴ Section 386.020(4), RSMo.

¹⁵ Exh. 5, pp. 12-13 ; Tr. pp. 119-21.

¹⁶ Exh. 5, pp. 12-13.

¹⁷ Tr. p. 67, ln. 1-9.

¹⁸ Tr. p.62-65; Tr. p. 69, ln. 10-14.

hearing,¹⁹ the Commission finds that the agreement is designed to prohibit competition between the companies. The Commission also finds that BPS is not subject to any competition from MSDT.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

BPS is a telecommunications company and public utility as defined in Sections 386.020(51) and 386.020(42). The Commission has jurisdiction over the services, activities, and rates of BPS under Chapters 386 and 392. BPS is also an incumbent local exchange telecommunications company as defined in Section 386.020(22), and a small local exchange telecommunications company as defined in Section 386.020(30).

Section 392.245 authorizes the Commission to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

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

An "alternative local exchange telecommunications company" is defined as "a local exchange telecommunications company certified by the commission to provide basic

¹⁹ Tr. p. 51.

or nonbasic local telecommunications service. . .in a specific geographic area.”²⁰ MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-334, effective March 26, 2001. A telecommunications company is required to specify in which exchanges it will provide service.²¹ As of June 21, 2002, MSDT’s tariff specified that it would provide service in BPS’s service area. BPS also has provided written notice of its election to be regulated pursuant to the price cap statute on March 13, 2002, and again on July 17, 2002.

Thus, BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service in competition with BPS. Even though MSDT provides two-way switched voice service within a local calling scope and provides four of the services listed in Section 386.020(4), it is not providing basic local service in a manner as intended by the legislature that would allow BPS to elect price cap regulation.

“It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.”²² Section 392.245 contains no reference to competition; however, the legislature has mandated that every provision in Chapter 392, whether ambiguous or not, be construed with certain principles in mind.²³ Section 392.185 states:

²⁰ Section 386.020(1), RSMo.

²¹ Section 392.220.1, RSMo. *See also*, 4 CSR 240-3.545(12)(C) (this rule was formerly 4 CSR 240-30.010(12)(C) but was relocated within the Code of State Regulations effective April 30, 2003).

²² *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 386 -387 (Mo. banc 1987). (citations omitted)

²³ Section 392.185, RSMo.

The provisions of this chapter shall be construed to:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

The nine provisions of Section 392.185 are mandatory and necessarily must guide the Commission in the construction and application of the Price Cap Statute. Section 392.185(6) states that one public policy to be implemented through the construction of Chapter 392 is to "[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest." Another is "flexible regulation of competitive telecommunications companies and competitive telecommunications services."²⁴ Price cap regulation, a transitional status between traditional rate-of-return regulation and deregulated competition,

²⁴ Section 392.185(5).

permits ratemaking without the traditional oversight and regulation of the Commission. This is the principal benefit that the legislature intended to confer on qualifying carriers through the Price Cap Statute.

The Commission has examined the Price Cap Statute in the context of the principles set out by the legislature and the entire deregulation scheme put forth in Chapter 392 to implement the federal Telecommunications Act of 1996. It is clear from the statutes that the legislature intended to promote competition while maintaining protection for the ratepayers by allowing competition to substitute for regulation. BPS and MSDT have agreed that MSDT will not compete for BPS's customers. Therefore, to find that MSDT is providing competitive pressure on BPS that will substitute for regulation, would be to leave the ratepayers with inadequate protections to ensure that the rates they pay are reasonable. Neither competition nor the Commission would regulate the prices charged by BPS. The Commission agrees with the Office of the Public Counsel that allowing BPS to elect price cap status under this completely noncompetitive circumstance would be an absurd result that the legislature did not intend and would not be "consistent with the public interest."²⁵

The Commission concludes that MSDT is not providing basic local telecommunications services in a manner that would allow BPS to elect price cap status. The Commission further concludes that BPS's price cap election is invalid, and that BPS maintains its status as a traditional rate-of-return regulated company.

The Commission need not address the issue of what level of competition is necessary for price cap election because BPS is not subject to *any* competition from

²⁵ Section 392.185(6), RSMo.

MSDT. The Commission also does not reach the issue of whether a prepaid service provider can be considered to be providing basic local telecommunications service under Section 386.020(4). It is not necessary to decide this issue because BPS does not qualify for price cap status for the reasons stated above.

Conclusion

The legislature stated that Chapter 392 “shall be construed” so that “full and fair competition . . . [may] substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.”²⁶ MSDT and BPS have entered into a contract by which MSDT agrees not to compete with BPS and BPS is not subject to any competition from MSDT. The legislature could not have intended such a noncompetitive situation to qualify as “providing . . . [basic local telecommunications] service” under Chapter 392 and thereby allow the small incumbent local exchange carrier to reap the benefits of a competitive environment and a lesser degree of regulation. For these reasons, the Commission determines that BPS is not eligible for price cap status and that its price cap election is invalid.

IT IS THEREFORE ORDERED:

1. That BPS Telephone Company is ineligible to elect price cap status.
2. That any motion not ruled on is denied and that any objection not ruled on is overruled.

²⁶ *Id.*

3. That this Report and Order shall become effective on November 24, 2003.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Gaw, Ch., Murray, Simmons,
Forbis, and Clayton, CC., concur
and certify compliance with the
provisions of Section 536.080,
RSMo 2000.

Dated at Jefferson City, Missouri,
on this 13th day of November, 2003.