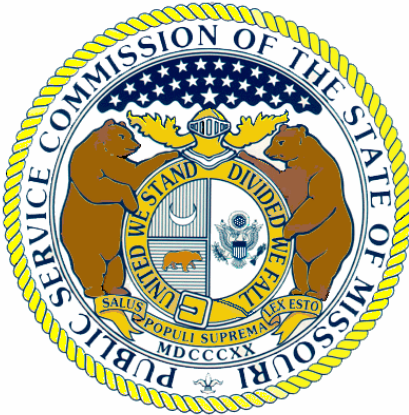


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of BPS Telephone Company's Election to)
be Regulated under Price Cap Regulation as Provided) **Case No. IO-2004-0597**
in Section 392.245, RSMo 2000.)

REPORT AND ORDER

Issue Date: November 9, 2004

Effective Date: November 19, 2004

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) **Case No. IO-2004-0597**
in Section 392.245, RSMo 2000.)

APPEARANCES

Sondra B. Morgan, BRYDON, SWEARENGEN & ENGLAND P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for BPS Telephone Company.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Cliff Snodgrass, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, 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 2000,¹ is invalid.

Procedural History

BPS previously notified the Commission of its election to be regulated as a price cap company in Commission Case No. IO-2003-0012. An evidentiary hearing was held

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

before the Commission on February 7, 2003. The Commission issued its Report and Order denying BPS's price cap election on November 14, 2003.

On January 20, 2004, BPS and Missouri State Discount Telephone filed an Application for Approval of Amendment to Resale Agreement Between BPS Telephone and Missouri State Discount Telephone Company. This amendment to the Resale Agreement removed the language found in Paragraph 6.1.1 which the Commission found to be noncompetitive.

On May 28, 2004, BPS notified the Commission that it was again electing to be regulated under the price cap provisions of Section 392.245.2. The Commission issued a Notice of Price Cap Election on June 4, 2004, 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 the Public Counsel also objected to BPS's election.

Prior to BPS's price cap election notice, the Staff filed a Complaint² alleging BPS had been overearning.

On September 2, 2004, the parties filed a Stipulation of Facts in which they adopt the complete record and transcript of Case No. IO-2003-0012. The parties also stipulated that "the Commission may take official notice of its rules, tariffs, orders and any other information contained in a document on file as a public record"³ so long as it is relevant.

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

³ Stipulation of Facts, para. 6.

Initial briefs of the parties were filed on October 8, 2004, and reply briefs were submitted on October 22, 2004.

Discussion

Because the parties stipulated to the facts of this case and adopted the record of the original BPS price cap case, the only issue for determination is whether BPS meets the qualifications for price cap election as set out in Section 392.245.2, RSMo.

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.

The Commission takes official notice of its official case files, tariffs and other orders cited herein. The Commission also adopts the record in Case No. IO-2003-0012. The Commission finds that the facts have not materially changed since the evidentiary hearing in Case No. IO-2003-0012 except as noted in this order.⁴

BPS is a small incumbent local exchange company serving approximately 3900 access lines in Missouri.⁵ BPS provides two-way switched voice service within a local calling scope as determined by the Commission including all the basic local services set out

⁴ Stipulation, para. 5.

⁵ Exh. 1, pp. 3-4; Exh. 2, p. 4; Exh. 3, p.2 ; Tr. 118; 241. (Cites to Exhibits and Transcripts are to those found in Case No. IO-2003-0012 unless otherwise noted.)

in Section 386.020(4).⁶ BPS provided written notice to the Commission of its intent to be regulated under the price cap statute⁷ on May 28, 2004.⁸

On November 29, 2000, MSDT filed an application for a certificate of service authority to provide basic local telecommunications service. MSDT stated that it would “provide all forms of basic local telecommunications service, including all options and features provided by all incumbent providers”⁹ In the same case, the parties¹⁰ filed a Unanimous Stipulation and Agreement in which MSDT committed to “comply with section 392.451 and provide the ‘essential local telecommunications services’ listed in 4 CSR 240-31.010(5).”¹¹ In its order granting MSDT a certificate, the Commission approved the Stipulation and Agreement, noted that MSDT agreed to provide all the essential services in 4 CSR 240-31.010(5), and found that MSDT met “the statutory requirements for [the] provision of basic local telecommunications services and has agreed to abide by those requirements in the future.”¹² Also, in the order granting MSDT a certificate, the Commission specifically made MSDT’s certificate subject to “the conditions of certification set out above and to all applicable statutes and Commission rules except as specified in this order.”¹³

⁶ BPS Telephone Company, PSC MO. NO. 1.

⁷ Section 392.245, RSMo.

⁸ Stipulation, para. 4.

⁹ Application for Certificate of Service Authority for Competitive Classification, Case No. TA-2001-334, filed Nov. 29, 2000, para. 4.

¹⁰ MSDT, the Office of the Public Counsel, the Staff of the Commission, the Missouri Independent Telephone Group, and the Small Telephone Company Group. The last two parties consist of substantially all of the small telephone companies in Missouri.

¹¹ Unanimous Stipulation and Agreement, Case No. TA-2001-334, filed Feb. 28 2001, para. 1.

¹² Order Granting Certificate, Case No. TA-2001-334, para. D.

¹³ Id., Ordered para. 2.

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, 2001.¹⁴ MSDT's original tariff did not specifically list that it would be providing service in any of BPS's exchanges. MSDT 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, 2001.¹⁵ BPS and MSDT have since amended their interconnection agreement to remove the language restricting MSDT from targeting BPS's customers.¹⁶ The Commission refers to Section 6.1.1 of the Resale Agreement as the "noncompete clause."

MSDT provides telecommunications service to a few customers within the BPS service area.¹⁷ 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.¹⁸ None of BPS's "customers, other than those disconnected for nonpayment, have migrated to MSDT since the removal of the

¹⁴ Exh. 1, p. 4.

¹⁵ Exh. I, p. 4-5 ; Exh. 6.

¹⁶ See, Tariff File No. VT-2004-0-034.

¹⁷ Exh. 1, p. 6; Exh. 3, p. 3; Tr. p. 51, ln. 4-9.

¹⁸ Missouri State Discount Telephone; P.S.C. No. 1, Original Sheet No. 17.

[noncompete clause].”¹⁹ There has also “been no material change in MSDT’s advertising,”²⁰ marketing, or business methods since the Commission heard the original BPS price cap case.

MSDT provides “two-way switched voice service within a local calling scope”²¹ comprised of the following services:²²

- (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 following services:²³

- (a) 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 or speech impaired.
- (b) Access to basic local operator services.
- (c) Access to basic local directory assistance.
- (d) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.
- (e) Equal access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (a.k.a. intraLATA and interLATA presubscription).

¹⁹ Stipulation, para. 5.

²⁰ Stipulation, para. 5.

²¹ Section 386.020(4), RSMo.

²² Exh. 5, pp. 12-13 ; Tr. pp. 119-21.

²³ *Id.*

MSDT requires a one-time activation fee of \$30 and a monthly recurring charge of \$50 per month.²⁴ For similar services from BPS the local service charge is \$7.00.²⁵ A customer subscribing to BPS basic local service, however, will also receive additional services (such as access to interexchange and operator services) and the total cost of those services is approximately \$20.²⁶

Conclusions of Law

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

BPS is a telecommunications company²⁷ and a public utility.²⁸ BPS is also an incumbent local exchange telecommunications company²⁹ and a small local exchange telecommunications company.³⁰ The Commission has jurisdiction over the services, activities, and rates of BPS under Chapters 386 and 392.

The Commission is authorized to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation."³¹ 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:

²⁴ Missouri State Discount Telephone, P.S.C. No. 1, Original Sheet 18.

²⁵ Tr. p. 42, ln. 2-5.; BPS Telephone Company, PSC No. 1, Section 4, 1st Revised Sheet 17.

²⁶ Tr. p. 67, ln. 1-9.

²⁷ Section 386.020(51).

²⁸ Section 386.020(42).

²⁹ Section 386.020(22).

³⁰ Section 386.020(30).

³¹ Section 392.245.1.

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 or nonbasic local telecommunications service . . . in a specific geographic area."³² 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.³³ 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 May 28, 2004

BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service. 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 that would allow BPS to elect price cap regulation.

Although the Commission has granted MSDT a certificate of service to provide basic local service in BPS's geographic service area, MSDT is not providing that service in BPS's area in accordance with its certificate. In its application seeking certification, MSDT

³² Section 386.020(1), RSMo.

³³ 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).

committed to provide those services required to qualify for state universal service fund support. The orders granting the certificate to MSDT noted those commitments, and thus MSDT is required by the terms of its certificate to provide all the essential services as set out in the Commission's rules.³⁴

(6) Essential local telecommunications services. – Two (2)-way switched voice residential service within a local calling scope as determined by the commission, comprised of the following services and their recurring charges:

- (A) Single line residential service, including Touch-Tone dialing, and any applicable mileage or zone charges;
- (B) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (C) Access to basic local operator services;
- (D) Access to basic local directory assistance;
- (E) Standard intercept service;
- (F) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission (FCC);
- (G) One (1) standard white pages directory listing; and
- (H) Toll blocking or toll control for qualifying low-income customers.

When it granted a certificate to MSDT, the Commission was aware that this grant might allow the small ILECs to invoke the price cap statute election. It is for that reason that the Commission demanded that the alternative local exchange carrier offer *all* of the “essential telecommunications services” as defined by the rule. Therefore, the Commission expressly made its grant of service authority to MSDT in the small ILEC territories subject to the condition that it would offer all the essential telecommunications services for universal service purposes. Because MSDT is not providing all of those services, it is not providing basic local services in accordance with the certificates granted by the Commission. Therefore, MSDT does not meet the requirements set out in Section 392.245 as

³⁴ 4 CSR 240-31.010.

being “certificated to provide basic local telecommunications service and . . . providing such service.”³⁵

In addition to MSDT failing to provide basic local service in accordance with its certificate, the Commission also concludes MSDT is not “providing such service” for the following reasons.

“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.”³⁶ Section 392.245.2 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.³⁷ Section 392.185 states:

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;

³⁵ In Case No. IO-2002-1083, the Commission ordered its Staff to investigate whether MSDT is complying with the terms of the order granting it a certificate. Case No. TO-2005-0128 has been opened for the purpose of receiving Staff’s recommendation.

³⁶ *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 386 -387 (Mo. banc 1987). (citations omitted)

³⁷ Section 392.185, RSMo.

(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."³⁸ Price cap regulation, a transitional status between traditional rate-of-return regulation and deregulated competition, 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. The Commission

³⁸ Section 392.185(5).

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 legislature did not intend the presence of a provider of only a few basic local services to trigger price cap regulation. When taken in the context of the entire Chapter 392, competition is a necessary element for the change in regulation to a lesser degree of oversight. For instance, in order to receive a certificate to provide basic local services, Section 392.451.1 requires a competitive company to show that it will “offer *all* telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support.”³⁹ The Commission has defined these essential services in its rules.⁴⁰

The Commission is also supported in this interpretation by the statutory distinction between “providing basic local” and “the resale of basic local” found in the certification statutes.⁴¹ Those statutes provide the standards for granting a “certificate of local exchange service authority *to provide* basic local telecommunications service *or for the resale* of basic local telecommunications service.”⁴²

The Commission previously rejected this second argument in the *Southwestern Bell* price cap case.⁴³ Southwestern Bell was the first large incumbent local exchange

³⁹ (emphasis added).

⁴⁰ 4 CSR 240-30.010(6), CSR 240-31.010(6) and 4 CSR 240-32.100.

⁴¹ Section 392.450 and 392.451.

⁴² Section 392.450. (emphasis added).

⁴³ *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.

carrier to request price cap status. The *Southwestern Bell* case was appealed to the Circuit Court of Cole County. The Circuit Court affirmed the Commission's decision to grant price cap status but agreed that "it is a possible interpretation" that resellers can be distinguished from facilities-based providers.⁴⁴

Furthermore, a distinction on the facts can be made between the current case and the large ILEC cases. The facts of the *Southwestern Bell* case may be distinguished because the alternative carrier in that case was providing different basic local services including equal access to interexchange services. Also, the focus of the findings in that order is on whether effective competition must exist. In this case, the Commission is not finding that "effective competition" must exist before a company becomes price cap regulated. Instead, the Commission is finding that MSDT does not "provide basic local service" as the statute intends and, therefore, BPS does not meet the statutory requirements to be price cap regulated.

The other large ILEC cases that the Commission has determined can also be distinguished. In the Sprint price cap case,⁴⁵ the alternative carrier was a facilities-based provider. In the only other large ILEC price cap case,⁴⁶ no party alleged that the alternative carrier was not providing service.

MSDT provides only a few basic local services. MSDT is not providing all the essential services and minimum service features required in the Commission rules. They

⁴⁴ *State of Missouri ex rel. Public Counsel v. Public Service Commission, et al.*, Case No. CV197-1795CC, Revised Findings of Fact and Conclusions of Law and Judgment (issued August 6, 1998).

⁴⁵ *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.

⁴⁶ *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.

do not provide such basic services as access to local operator services, directory assistance, equal access to interexchange carriers, or assistance programs for economically disadvantaged or disabled customers. At rates that are more than two-and-a-half times the cost of similar residential service from BPS and much more restricted, the services offered by MSDT are in no way a substitute or competitive service to BPS's customers. The Commission previously found that BPS was "not subject to any competition from MSDT"⁴⁷ and BPS has stipulated that the facts have not materially changed since that decision.

The Commission concludes that to allow BPS to elect price cap status under these circumstances, where prepaid providers offer such minimal services at such a high cost, "would lead to an illogical result defeating the purpose of the legislature"⁴⁸ and would not be "consistent with the public interest."⁴⁹ 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.

Conclusion

The parties have stipulated to the facts and the only issue for Commission decision is whether the alternative local exchange carrier is providing basic local telecommunication service. The legislature stated that Chapter 392 "shall be construed" so that "full and fair competition . . . [may] substitute for regulation when consistent with the

⁴⁷ Case No. IO-2003-0012, Report and Order (issued Nov. 13, 2003), p.8.

⁴⁸ *State ex rel. Maryland Heights Fire Protection Dist.*, supra.

⁴⁹ Section 392.185(6), RSMo.

protection of ratepayers and otherwise consistent with the public interest.”⁵⁰ The types of services that MSDT provides are not what the legislature intended as basic local services necessary to invoke a lesser degree of regulation for small incumbent local exchange carriers. Furthermore, MSDT is not providing all the services it committed to provide in its application seeking certificates, nor is it complying with the conditions placed on the grant of service authority by the Commission. Therefore, it is not providing the service for which it was granted a basic local certificate. 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.
3. That this Report and Order shall become effective on November 19, 2004.

BY THE COMMISSION

(S E A L)

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Gaw, Ch., and Appling, C., concur;
Clayton, C., concurs, with separate
concurring opinion to follow;
Murray and Davis, CC., dissent.

Dated at Jefferson City, Missouri,
on this 9th day of November, 2004.

⁵⁰ *Id.*