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June 28, 2002

Secretary
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P. O. Box 360
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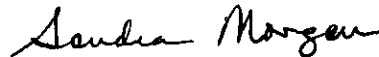
Re: Case No. TC-2002-1076

Dear Mr. Roberts:

Enclosed for filing on behalf of BPS Telephone Company, please find an original and eight copies of a Motion for Reconsideration.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel. I thank you in advance for your attention to and cooperation in this matter.

Sincerely,



Sondra B. Morgan

SBM/da
Enclosures
cc: Parties of Record

**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.)	

MOTION FOR RECONSIDERATION

Comes now BPS Telephone Company ("BPS") and for its Motion for Reconsideration of the Missouri Public Service Commission's ("Commission") Order Granting Authority to File an Excessive Earnings Complaint ("Order") in the above-referenced case states to the Commission as follows:

1. On March 13, 2002, BPS sent a letter to the Secretary of the Commission notifying the Commission that it was electing to be regulated pursuant to price cap regulation under § 392.245, RSMo 2002. BPS stated in the letter 1) that it was a small incumbent telecommunications company serving approximately 3900 lines; 2) that an alternative local exchange provider, Missouri State Discount Telephone Company ("MSDT"), had been certificated to provide service in its service area in Case No. TA-2002-334; and 3) that MSDT was, in fact, providing service in its service area. BPS cited the language of § 392.245.2 which states that a small incumbent local exchange telecommunications company "may elect to be regulated under this section upon providing written notice to the Commission" BPS considered its letter to the Commission

sufficient written notice and now considers itself to be subject to price cap regulation.

2. On May 15, 2002, the Staff of the Commission filed a Motion for Commission Authority to File an Excessive Earnings Complaint ("Motion") against BPS alleging that the price cap election of BPS was invalid, because MSDT was not lawfully providing service within the BPS service area and because the existence of a reseller could not be used as a criterion to determine whether an incumbent qualified for price cap regulation. (Motion, ¶6) BPS filed Suggestions in Opposition to Staff's Motion, and on June 20, 2002, the Commission issued its Order in which it granted Staff's Motion and authorized the Staff to file an excessive earnings complaint against BPS.

3. In its Order, the Commission seems to have assumed, and in fact even states in its Order, that the issue of whether the price cap election of BPS is valid can be considered within the context of the overearnings complaint case authorized by the Commission. The Order suggests that BPS can raise its arguments regarding price cap status as a defense to Staff's complaint. If BPS is interpreting the Commission's Order correctly, the Commission does not intend to address the issue of whether BPS is a price cap company and therefore not subject to rate base rate-of-return regulation until the complaint has been filed and litigated.

4. As was previously stated by BPS, the Commission's jurisdiction to authorize the complaint is the first issue which must be addressed. The Commission cannot postpone a determination of its jurisdiction to hear the complaint until after it has heard the complaint. The determination of jurisdiction must come before any further action is taken. After its election, BPS became a price cap company not subject to rate of return regulation. If there is a "factual issue that will have to be determined after the presentation of evidence to the Commission"

regarding the qualifications of BPS for price cap status as stated in the Commission's Order, then that factual issue must be addressed before the Commission can authorize its Staff to file an overearnings complaint. BPS respectfully suggests that in any such proceeding to determine the validity of its price cap election, the party challenging the election will have the burden of proof. So long as BPS has complied with the statutory requirements and notified the Commission of its election, it is a price cap company until determined otherwise. The Commission simply has no jurisdiction to authorize its Staff to file an overearnings complaint at this time. The Commission is a creature of statute and limited thereby.¹ Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act is authorized by the statute.² Subject matter jurisdiction exists only when the tribunal "has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed."³ The Commission simply does not have jurisdiction to authorize its Staff to file a complaint at this time.

5. In its Order, the Commission cites several statutes in support of its general jurisdiction to hear a complaint. BPS does not dispute the Commission's assertion of such authority when the company being regulated is a rate-of-return company. As was explained above, BPS has

¹*State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

²*State ex rel. Missouri Cable Telecommunications Association v. Missouri Public Service Commission*, 929 S.W.2d 769, 772 (Mo. App. W.D. 1996), citing *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923).

³*State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 72 (Mo. banc 1982), citing *Cantrell v. City of Caruthersville*, 359 Mo. 282, 290, 221 S.W.2d 471, 476 (1949).

made a lawful statutory price cap election, and until proved otherwise, BPS is a price cap company whose rates are subject to regulation only pursuant to the provisions of § 392.245, RSMo. Until such time as Staff has proved its allegations of invalidity, the Commission must accept BPS's election as a price cap regulated company. The Commission even states in its Order that "whether Missouri State Discount Telephone has been providing service in BPS' service area is a factual issue that will have to be determined after the presentation of evidence to the Commission." (Order at p. 2) The Commission then goes on, however, to indicate that that factual finding will be made in the context of the overearnings complaint case. BPS disagrees with this premise, however, as it does not believe it should have to defend a complaint case only later to find that the Commission never had jurisdiction to hear the complaint in the first place.

6. Jurisdiction concerns the right, power and authority of a court to act.⁴ Jurisdiction is defined by statutory provisions, and the letter of the law is the limit of power.⁵ The only power the court, or the Commission acting in a quasi-judiciary capacity, has when it lacks jurisdiction is to dismiss the action; any other actions or proceedings are null and void.⁶ For these reasons, BPS believes that the Commission must deny Staff's Motion, or in the alternative, open a proceeding to determine if the Staff's allegations regarding the invalidity of the price cap election has a basis in fact. But, until there has been a Commission determination that the price cap

⁴*Heinle v. K & R Express Systems, Inc.*, 923 S.W.2d 461, 464 (Mo. App. E.D. 1996).

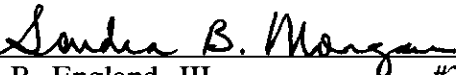
⁵*Wells v. Noldon*, 679 S.W.2d 889, 891 (Mo. App. E.D. 1984).

⁶*Heinle*, 923 S.W.2d at 464.

election lacks validity⁷, the Commission should not authorize its Staff to proceed with the complaint.

BPS Telephone Company thus respectfully requests that the Commission reconsider its Order Granting Authority to File an Excessive Earnings Complaint and deny the Staff's Motion to File an Excessive Earnings Complaint for lack of jurisdiction to consider an earnings complaint against a price cap regulated company.

Respectfully submitted,


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⁷It should be noted that in only one case involving price cap election by a large incumbent telecommunications company under the same statutory provision, did the Staff or the Commission find that a hearing was necessary to determine the validity of the election. Additionally, Southwestern Bell Telephone Company, GTE Midwest Incorporated (Verizon), and United Telephone Company (Sprint) were all found to be subject to price cap regulation based on competition from *resellers*. See, *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 Mo. P.S.C. 3d 493 (1997); *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; and *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.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 28th day of June, 2002, to the following parties:

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