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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 31st
day of January, 1995.

In the matter of the Joint Application)
of GTE Midwest Incorporated and BPS)
Telephone Company for authority to transfer)
and acquire part of GTE Midwest Incor-)
porated's Missouri franchise, facilities or)
system located in the state of Missouri.)

Case No. TM-95-135

ORDER GRANTING RECONSIDERATION

On December 28, 1994, the Commission issued its Order Concerning Application regarding the Application which initiated this docket. The purpose of that order was to place the parties on notice that absent a Certificate of Service Authority, BPS Telecommunications Company (BPS) could not lawfully provide telecommunications services in the state of Missouri. See §392.410 RSMo, 1994.

On January 13, 1995, GTE Midwest Incorporated (GTE) and BPS (Applicants) filed their Motion for Reconsideration. The Applicants argue the Commission's conclusion is inconsistent with Commission precedent and with sections of Chapter 392. The Applicants have made a prima facie case for reconsideration and it shall be granted as set out below.

The Commission will first address the reference to precedent. The Commission is not bound by the doctrines of res judicata and collateral estoppel. *In re: Kansas City Power and Light Co.*, 28 Mo. PSC (N.S.) 228, 376 (April 23, 1986). Therefore, citation to prior Commission decisions is not binding authority. The Commission has "transferred" certificates in limited instances. For example, in a case involving Interexchange

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Carriers (IXCs) a transfer may be granted based upon the fact that an IXC is a telecommunications company which has been granted competitive status and as such is subjected only to rather moderate regulatory oversight. Customers are able to move among the various IXCs almost on a moment's notice.

By contrast, the application in this docket concerns a local exchange company. It is not a competitive company and the customers of this service are virtually bound to contract with the local exchange or do without. The level of regulatory scrutiny which is exerted over the application for this type of certificate must be greater.

The Commission has reviewed the specific cases which the Applicants cite for the proposition that the certificate may be transferred. The Applicants cited Commission Case No. TA-88-87 and a review of this case reflects that this case dealt with a company (United Telephone Company) which was already certificated to provide telecommunications services in Missouri. The Applicants also cite Case No. TM-89-145 and this case specifically dealt with two (2) entities which were also already certificated to provide telecommunications services. Lastly, the parties cite Case No. TM-93-1. This case dealt with five joint applicants, four of whom were already certificated and the one non-certificated entity was a wholly owned, newly formed subsidiary for the purpose of company consolidation. Inasmuch as this was simply a corporate restructuring and not a sale or transfer this case too fails to be instructive. The Commission finds a distinction between transferring a certificate to a utility which already possesses a certificate and transferring a certificate to a utility which has never undergone the application and approval process. None of the cases cited by the Applicants are on point with the facts of the application and none of them

provide authority for the transfer of a certificate of service authority to an entity which has never been certificated to provide telecommunication services.

In support of their argument regarding statutory authority, the Applicants cite §392.410, RSMo Supp. 1993 (sic) (§392.410, RSMo 1994). The Commission has reviewed the statutory section cited by the applicants and finds nothing therein which addresses the transfer of a certificate of service authority. On page 3 of their motion the Applicants also cite §392.300, RSMo Supp. 1993 (sic) (§392.300, RSMo 1994) as authority which ". . . still permits the transfer of all or part of a company's franchise (which would include "certificates)." The Applicants suggest that the transfer of a franchise would be the same as, or would include the transfer of, the certificates.

The Commission concludes, as a matter of law, that this is not correct. The Commission finds no text in the statute cited which allows the transfer of a certificate to an uncertificated entity. Nor does the Commission find rationale for treating the certificate which is granted to a utility by the Commission the same as if it were the franchise which is granted to a utility by a municipality. These terms are neither synonymous nor interchangeable. In fact, the Missouri statutes contain numerous instances which seem to make clear the fact that a "franchise" and a "certificate" are distinctly different. For example, before the Commission will grant an application for a certificate the applicant must submit its franchise. See, 4 CSR 240-2.060(10)(A). If a franchise must be held before a certificate may be granted it would seem the two are different. These grants to utilities from municipalities are discussed at §71.520, et seq., RSMo. 1994. The Commission further concludes that where §295.180(2) Utility strike-Power of Governor states that ". . . it shall thereupon be

the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of necessity." the statute is addressing those two as separate and distinct documents.

The Commission has reviewed the Application, the contents of the file and the Motion for Reconsideration and makes the following findings. The Commission finds that the statutory sections which are relevant to this transaction, to wit §392.300 and §392.410, RSMo 1994 do not contain any reference or authority for the transfer of a certificate to a non-certificated entity.

The Commission finds that the cases cited by the Applicant are not on point and therefore could not be controlling on this issue. The Commission finds that prior to being granted a certificate of service authority a local exchange company must comply with the application standards which are contained at 4 CSR 240-2.060(2). This review process ensures a thorough and public review of the Applicant so that interested parties will have notice and an opportunity to respond to the Application. The end result is to ensure that any certificate of service authority granted is in the public interest. Lastly, the Commission finds that it would not be in the public interest to transfer a certificate to a company which has not undergone the review provided for in the application process.

The Commission concludes, as a matter of law, that the common law, statutory and Code of State Regulations citations raised by the Applicants do not provide specific authority for the transfer of a certificate of service authority to an entity which is not already certificated in the state of Missouri.

Having granted the Motion for Reconsideration, the Commission finds that the Applicants have failed to cite authority for the transfer

of a certificate, as requested in the Application in this case. The Commission further finds, upon reconsideration, that its Order Concerning Application which was issued on December 28, 1994 in this case shall be reaffirmed and that BPS shall file, either separately or in this docket, an application or request for a certificate of service authority describing the type of service it seeks to offer and it shall comply with 4 CSR 240-2.060(2) or, in the alternative, show cause why the Application in this case should not be dismissed.

Lastly, Applicants have argued that there are sections of the application process with which they cannot comply. Where the requirements of 4 CSR 240-2.060(2) apply to a new application but not to a transfer the applicant may move for a waiver or an appropriate modification of the requirement.

IT IS THEREFORE ORDERED:

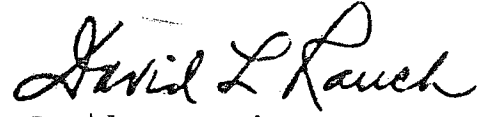
1. That the Joint Motion for Reconsideration filed by GTE Midwest Incorporated and BPS Telephone Company on January 13, 1995, is hereby granted as specified herein.

2. That the Order Concerning Application issued on December 28, 1994, is hereby reaffirmed.

3. That BPS Telephone Company shall comply with the directives of this order and of the Order Concerning Application within sixty (60) days from the effective date of this order.

4. That this order shall become effective on the date hereof.

BY THE COMMISSION

A handwritten signature in cursive script that reads "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
Kincheloe and Crumpton, CC., Concur.