

2. The Commission improperly considered the evidentiary record in a proceeding that was held more than 12 years ago in a separate case that was heard before the adoption of Section 392.245, RSMo, 2000. The PSC said, “In making its determination of “effective competition,” the Commission *looks to the evidence provided in the transitionally competitive classification case, TO-93-116, and the current case, TO-2001-467.*” The PSC in effect opened the evidentiary record in TO-2001-467 and incorporated the evidentiary record of TO-93-116 into this record without notice to any party or an opportunity to object or to otherwise be heard or to adduce evidence to contest or respond to the facts presented in another proceedings record. Public Counsel was denied its rights to due process of law pursuant to Mo. Const. (1945) Art. I, sec 10 and the 14th Amendment, United States Constitution.

3. It was unlawful, unreasonable, and an abuse of discretion for the Commission to use the evidentiary record in a 12 year old proceeding TO-93-116 to decide current issues of effective competition under the price cap statute since the facts and the law have significantly changed since that evidence was adduced and the state of competition under prior law and over a decade ago is neither relevant nor substantial and competent evidence of existing competition. The evidence in that case does not reflect the facts now and is too remote to serve as probative evidence of the current status of effective competition. That case was tried and decided before the Federal Telecommunications Act of 1996 introduced local competition and SB 507 authorized local competition and price cap regulation.

4. The Commission's Report and Order is unlawful, unreasonable, and constitutes an abuse of discretion in that the PSC determined the competitive status of these services on an exchange by exchange basis without competent and substantial evidence in the record that these so called state-wide offered services were in fact subject to effective competition in each exchange as required by Section 392.245.5, the price cap statute. The Commission's specific finding that for each of the services which are the subject of this case on remand, effective competition existed in all exchanges for these services both when the Commission issued its *Report and Order* in this case and when the Court of Appeals issued its mandate lacks evidentiary support in this record. The PSC made a conclusion not supported by the record evidence: "Because each of the services was competitive on a statewide basis, they necessarily were competitive in each exchange." Section 392.245, RSMo does not provide for a statewide reclassification but establishes a process that examines the status of competition on an exchange-by-exchange basis. The new law is the law that must be applied, not the law that was in effect when the case was first heard. The conclusion that these services are competitive in all of AT&T Missouri's exchanges under the exchange-by-exchange requirement is unlawful and unreasonable.

5. The PSC's Report and Order on Remand is unlawful, unreasonable and an abuse of discretion in that it applies the wrong law and fails to follow the statutory process for reclassification now in effect and failed to make the findings of fact necessary under the existing law to grant competitive status. SB 237 extensively revised the method of reclassifying price cap regulated services and specifically

repealed a finding of “effective competition” as the necessary finding for reclassification. The Commission had to count to see if at least two specified type of competitors (facilities based, non-facilities based, wireless or cable firm) are providing some form of newly defined telecommunications service in AT&T’s local exchanges for basic local service for residential or business customers. The Report and Order does not make these necessary findings for all exchanges in AT&T service area. Case Nos. TO-2006-0093 and TO-2006-0102 addressed only specific exchanges and did not grant reclassification to all business services in all AT&T exchanges. This leaves a hole in the authority and evidence to base a statewide competitive classification for these services.

6. The PSC did not follow the statutory process: it must act within 30 days of the filing of a petition for reclassification under one provision, and in other instances within 60 days of the filing. In the 60 day petition process, the Commission must also find that the grant of the reclassification is not contrary to the public interest. Section 392.245.5, RSMO 2000 (revision 2005). That was not done in this reclassification case.

7. The present record in this case is a record that is not directed toward the findings that the Commission must make under the SB 237 changes. The evidence in support of reclassification of these services was focused more on the prior order of the PSC and the 1999 date for the “reclassification by operation of law.” Also, the present record does not conform to the time limits to act that must have a specific trigger date, i.e. the filing of the petition. The record lacks competent and substantial evidence to base a reclassification of these services to competitive

using the criteria under the current Section 392.245, RSMo (SB 237). AT&T should be directed to roll back the affected rates and this case closed. If AT&T wants to pursue reclassification it can file petitions under the existing price cap law.

8. The PSC's Report and Order on Remand is unlawful, unreasonable and an abuse of discretion because it rejects a return to the status of rates before the unlawful reclassification voided by the Court of Appeals and, therefore, denies relief to ratepayers. The ratepayers were subjected to changes in rates under competitive classification procedures when in fact and in law the rates of the services were still subject to price cap limitations. The PSC rejects this relief out of hand, noting the Court of Appeals did not address rates; this overlooks that classifications under price caps are instrumental in rates. It erroneously holds that since rates for the services that are the subject of this proceeding were changed in subsequent tariff filings over the last several years without appeal or request for stay for each such change, then AT&T need not adjust rates to correct the PSC's unlawful reclassification, as declared by the Court of Appeals. Any changes made to tariffs for these services after the Commission's decision were predicated on the unlawful reclassifications and not under the proper and lawful price cap provisions and limitations. By allowing the new prices to continue without "resetting" them for the unlawful reclassification, the PSC compounds the harm to ratepayers and allows AT&T to circumvent the outcome of the Court of Appeals decision. The PSC's Report & Order nullifies the Court's ruling by giving lawful status to unlawful reclassifications. Because AT&T is not ordered to reset the

rates and return to the status that existed prior to the PSC's unlawful decision, the ratepayers are deprived of their judicial remedy and deprived of the fruits of a successful outcome and decision from the Court of Appeals.

9. The PSC's Report and Order on Remand is unlawful, unreasonable, and is an abuse of discretion. The only lawful rates were price cap rates and subsequent rate changes were unlawful and cannot be made lawful when the very basis for those rates (competitive classification) was declared unlawful by the Court of Appeals. Since rates increases were not made under price cap allowances, the rates should return to those in effect at the time of the unlawful reclassification. Price cap rates for nonbasic services are not entitled to any time or annual price adjustment because increases not made are waived. *See, State ex rel. Sprint Missouri, Inc. v. PSC, 165 S.W.3d 160 (Mo banc 2005).*

10. The Commission's Report and Order on Remand fails to make adequate findings of fact and conclusions of law as required by *Noranda Aluminum, Inc. v. PSC, 24 S.W.3d 342, 245-6 (Mo. App. 2000)*. The order does not make the proper findings of fact required by Section 386.500 and Section 386.510, RSMo and MO. Const. (1945 as amended 1976) Article V section 18.

For the foregoing reasons, Public Counsel asks the Commission to set aside its Report and Order on Remand and to rehear the case and issue a new Report and Order based upon the competent and substantial evidence in this case and based upon the relevant law and for such further and additional relief as may be necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically transmitted, mailed or hand-delivered to all counsel of record on February 2, 2007.

/s/ Michael Dandino
