BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the tariff filing of Sprint	**)**	
Missouri, Inc. d/b/a Sprint to increase the	**) Case No.**	**TT-2002-447**
Residential and business monthly rate for	**) Tariff No.**	**200200766**
The Metropolitan Calling Area (MCA) Plan.	**)**	

SUPPLEMENTAL SPRINT MISSOURI, INC. BRIEF

COMES NOW Sprint Missouri, Inc. d/b/a Sprint ("Sprint") and for its supplemental brief in this case states as follows:

INTRODUCTION

This case focuses on Sprint's intention to raise its actual prices for its Metropolitan Calling Area ("MCA") plans to levels that are equal to, or less than, the maximum allowable price previously approved by the Commission. While the core issues in this case have been extensively briefed, at the on-the-record question-and-answer session held August 12, 2002, there were several questions and issues that were raised by the Commissioners that deserve additional briefing. At the heart of each one of these questions, was the need to understand *how the price cap statute impacts the Commission's general authority to establish just and reasonable rates.* Sprint will further address this issue in this supplemental brief.

JUST AND REASONABLE PRICES FOR PRICE CAP COMPANIES ARE SET ACCORDING TO THE AUTHORITY FOUND IN § 392.245 RSMO

Section 392.245 RSMo[1] controls the manner in which just and reasonable rates are established for price cap companies. The Price Cap Statute builds upon the Commission's work in setting just and reasonable rates prior to a company entering a price cap. According to the Statute, existing rates serve as the initial cap, and from there the companies are allowed

[1] Hereinafter also referred to as the "Price Cap Statute"

predictable pricing flexibility for non-basic services while limiting a price cap company's opportunity to raise basic rates. In doing this, the Legislators provided a pricing structure for the Commission to apply that continues to provide just and reasonable rates.

As stated in Sprint's brief filed April 29, 2002, the language in the Price Cap Statute takes price cap companies out of the general provisions of the Missouri statutes addressing just and reasonable rates -- specifically, the general provisions of Section 392.200.1 RSMo. Missouri case law clearly establishes that when a statute specifically addresses a requirement, the language of that specific statute will prevail over the general statute. *City of Kirkwood v. Leslie Allen*, 399 S.W 2d 30 (Mo. 1966); *City of Springfield v. Forrest Smith*, 125 S.W 2d 883 (Mo. 1939). In this case, Section 392.200 RSMo was originally passed in 1939 and generally applies to all telecommunications companies. Section 392.200.1 RSMo requires that all charges for any services rendered by telecommunications companies shall be just and reasonable. The Missouri Price Cap Statute was passed in 1996 and applies specifically to Price Cap companies. Section 392.245.1 of the Price Cap Statute states that "[t]he commission shall have the authority to ensure that rates, charges, tolls and rental for telecommunications services *are just, reasonable and lawful by employing price cap regulation****." (Emphasis added). Therefore, the provisions of the price cap statute prevail over the general provision of Section 392.200.1 RSMo and the Commission's decisions regarding rates for price cap companies must comply with Section 392.245 RSMo.

Second, the legislators have made it clear that they did not intend for Section 392.200.1 to apply to price cap companies. Pursuant to subsection 5 of the Price Cap Statute, price cap companies can move out of price regulation upon a finding that effective competition exists for a given service. In addressing the Commission's authority in the event that effective competition is found not to exist, the legislators have stated that companies will remain under price cap and

the maximum allowable prices set forth in subsection (4) and (11) and **only Section 392.200 (4)(c)(2)** will continue to apply. Thus, clearly, the maximum allowable price is to be set only in reference to the just and reasonable price formulas provided in the Price Cap Statute – not pursuant to the Commission's general authority provided in 392.200.1 RSMo.

Finally, the plain language of the Price Cap Statute leaves no doubt that only the terms of the Price Cap Statute are to guide the Commission's determination regarding compliance with the maximum allowable price provision. By way of example, Section 392.245.3 RSMo states: "...**except as otherwise provided in this statute**, the maximum allowable prices for a company under section 1 **shall be** those in effect on December 31 of the year proceeding..." (Emphasis added). Section 392.245.4(b)(2) states "... the commission **shall approve a change** to the maximum allowable price **filed pursuant to paragraph (a) of subdivision (1) of this section within 45 days of filing of notice by the local exchange company...**" (Emphasis added). . Sections 392.245.4.5 and 11 RSMo provide that the Commission shall approve rates for services **provided that any such rate is not in excess of the maximum allowable prices established for such services under this section.**"[2] Therefore, the Price Cap Statute does not confer Commission authority to make further determinations with respect to rate increases, if such increases are consistent with the maximum allowable price provisions of the Price Cap Statute.

This conclusion is further supported by the fact that the Price Cap Statute explicitly exempts price cap companies from the very mechanism through which the Commission exercises its general rate jurisdiction – Section 392.240.1 RSMo. Section 392.245.7 RSMo of the Price Cap Statute states: A company regulated under this **section shall not be subject to regulation**

[2] Sprint acknowledges that both Sections 11 and 4.5 of the Price Cap Statute cite to Section 392.200. However, Section 392.200 contains many provisions, the majority of which deal with unjust discrimination. As the Price Cap Statute does not explicitly address unjust discrimination, Sprint must still comply with the requirements of Section 392.200, specifically subsection (4)©(2) as provided in subsection 5 of the Price Cap Statute.

under subsection 1 of 392.240. (Emphasis added). Subsection 1 of 392.240 addresses the ability of the Commission to review rates and set new rates if the Commission determines that any rates offered by telecommunications companies are unjust and unreasonable.[3] As the Commission stated in an earlier MCA case "Section 392.240 grants the Commission authority over the rates and charges that are charged and collected by telecommunications companies operating in Missouri."[4] The fact that price cap companies are exempted from this authority clearly indicates that the Commission should evaluate requests to increase rates of price cap companies based only on the criteria set out in the Price Cap Statute. The Price Cap Statute does not allow an exercise of authority under Section 392.240.1 to override the pricing flexibility it provides.

In an attempt to avoid the dictates of the Price Cap Statute, OPC suggest, without legal authority, that the Price Cap Statute is merely an enabling statute versus one that limits the Commission's authority. However, such a position ignores the clear and unambiguous language of the statute that establishes what maximum allowable rates **shall** be. If the statute was not intended to be limiting, it would not limit the Commission through the repeated use of the word "shall," nor would it explicitly exempt price cap companies from the very mechanism through which this Commission exercises its general authority to ensure that rates are just and reasonable – Section 392.140.1 RSMo. The use of the word shall is imperative when entities are granted rights dependent on the Commission's action. *See State ex rel Springfield Warehouse and Transfer Company and Sur-way Lines, Inc. v. PSC* 225 SW 2d 792 (Mo. App. 1949). Further, the origin and powers of the Public Service Commission are purely statutory, and it has no

[3] Section 392.240 has two additional subsections. However, they address rules, regulations and practices of telecommunications companies and physical connections.

[4] Report and order, *In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996*, Case No. TO-99-483, September 7, 2000, Conclusions of Law, State Law at page 27.

authority save that given it by statute. *See State ex rel Beaufort Transfer Company v. PSC*, 593 S.W 2d 241 (Mo. App 1979) The Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature. *See State ex rel Springfield Warehouse and Transfer Company and Sur-way Lines, Inc. v. PSC* 225 SW 2d 792 (Mo. App. 1949). Therefore, OPC's attempts to escape the limitations provided in the Price Cap Statute must be rejected as they are contrary to the law.

The fact that a price cap statute would limit a state commission's general rate making authority over non-basic prices is not surprising, nor unique to Missouri. In return for the pricing flexibility for non-basic service, Sprint and other price cap companies have agreed that prices for basic services will be unchanged, except as otherwise provided under the Price Cap Statute. Therefore, outside of rate re-balancing, the prices for basic services will only change to reflect movement in objective economic measurements, such as the telephone service component of the consumer price index (CPI-TS) or the Gross Domestic Product Price Index (GDPPI). Sprint and other price cap companies assume the full risk that to the extent they are adversely impacted by factors not reflected in the CPI-TS (such as loss of access lines), Sprint will not be able to recover it losses. Indeed, to date, despite declining access lines, Sprint has decreased its prices for basic services under the Price Cap Statute.[5] However, in exchange for assuming this risk with respect to basic services, the Price Cap Statutes gives Sprint greater pricing flexibility for non-basic services.

Providing such pricing flexibility to non-basic discretionary and/or competitive service is a feature of almost every price cap plan found around the country. During the on the record presentations, Commissioner Lumpe made several inquiries regarding the extent of pricing

[5] Sprint has also conducted two revenue neutral rate re-balances that have decreased access rates while increasing local rates. However, excluding the revenue-neutral rate re-balancing, the price cap formula resulted in decreases made to local and access rates for the last two years.

flexibility under other State plans. In response, Sprint provides the following summary of price cap plans applied in other states where Sprint operates as an incumbent local provider:

Florida - Non-basic services (that include optional residential and business services) in areas where there is no competition may be increased by an overall 6%. In areas where there is competition, services may be increased by an overall 20%. The percentage increases are for **total** non-basic revenues. Therefore, the increase to any one given service can exceed 6% or 20% as long as revenues for the total basket of non-basic services do not increase either 6% or 20% in the aggregate from the previous years' revenues.

Indiana - Only basic services are price capped. On all other competitive services, only price floor limits apply. (Non-competitive changes must be revenue neutral).

Kansas - Currently, basic and non-basic services are capped under a formula that considers the GDPPI chain weighted minus a productivity offset. Currently, both basic and non-basic services operated under a productivity factor of 2.3%. Beginning with annual plans filed next year, the productivity offset for non-basic service will decrease to 1.4%.

Minnesota - Services deemed essential for providing local services and access to local telephone network, integrally related to privacy, health, and safety of the companies' customers and for which no reasonable alternative exists within the relevant market, are price regulated. All other services are flexible priced (which means effective upon filing and notice unless objection is filed) or non-price regulated (which means pricing schedules filed on an informational basis only).

Nevada - Prices for non-basic essential services are capped at 5% change in prices that is measured on total revenue in basket. Thus, increases on individual services can exceed 5%.

North Carolina – New prices for non-basic services can increase by the percentage change in GDPPI over the proceeding year plus 15%.

Pennsylvania – Non-competitive, non-basic services are capped as the annual change in the GDPPI less an inflation offset of 2.0%. Competitive non-basic services are price deregulated.

South Carolina – As Sprint is considered a small LEC, under the price cap plan, Sprint is not subject to any caps. Large LECs are limited to increase of 20% for non-basic services.

Texas - No price cap for non-basic service.

Virginia - Non-basic, discretionary services may be increased the full increase in the GDPPI for the preceding year.[6]

[6] Sprint also operates in Tennessee. However, the Tennessee Price Cap Plan has already been discussed in the parties earlier Briefs.

Based on the above, the pricing flexibility provided for non-basic services in Missouri falls somewhere in the middle.

Finally, during the on the record hearing, several questions were raised pertaining to Case No. TO-99-438, wherein the Commission ruled:

> That each telecommunications company offering Metropolitan Calling Area Service shall charge rates for such service which are no greater than the rates set forth in TO-92-306, by filing those rates in tariffs approved by the Commission. That each telecommunications company, may propose changes in such rates by filing revised tariffs for review and approval under the statutes applicable to that company and it proposed tariff.

The questions appeared to suggest that the above ruling was intended to override the provisions of the Price Cap Statute and set a cap inconsistent with the maximum allowable prices provided in Section 392.245. As stated above, the Missouri statutes do not provide authority to set price caps inconsistent with Section 392.245. Indeed, the authority the Commission used in that case to set a price cap was Section 392.240.1 -- the very provision from which price cap companies are exempt. Further, it should be noted that even in the original MCA case, Case No TO-92-306, the Commission recognized that MCA prices were subject to change.[7] Finally, as Sprint and Staff have maintained, the primary focus of the proceeding was the manner under which competitive companies would be allowed to participate in the MCA offering. A reading of the position statements and the testimony from that case confirm this – the primary focus was on the CLECs. The bulk of the testimony addresses whether CLECs can price MCA services under the ILECs' prices and whether the ILECs' prices should service as a cap on the CLECs' prices. Undoubtedly, the parties understood the Commission's order in TO-99-438 to set a cap on CLECs' prices for MCA services. Indeed, SWBT has been forced to reduce its prices for basic service, which include MCA service, under the Price Cap Statute consistent with the maximum allowable price formula for basic services. In approving SWBT's price cap tariff filings, the

Commission correctly did not feel that its order in Case No. TO-99-438 prevented it from lowering the price for MCA services. Likewise, in this case, where the MCA service is not a basic service, since it is optional, the order in Case No TO-99-438 does not prevent the Commission from approving a rate increase consistent with the Price Cap Statute.

CONCLUSION

As argued in Sprint's initial brief and in this brief – the provisions of the Price Cap Statute govern the Commission's determinations in this case. The only issue raised by the party opposing the tariff – OPC – is whether the previously approved maximum allowable prices were lawful. To determine this, the Commission must decide if the Price Cap Statute contemplates rates and maximum allowable prices being two different things. As argued by Sprint in its initial brief – applying the cannons of statutory construction leads to only one conclusion – that maximum allowable prices and rates can be separate and distinct. If maximum allowable prices are separate and distinct, then all agree that Sprint can cumulate its increases even if Sprint rates do not reach the maximum allowable prices. On this point, Sprint directs the Commission to its initial brief and to subsection 5 of the Price Cap Statute that explicitly contemplates that a price cap provider can accumulate or carry over an unused maximum allowable price increase. Subsection 5 provides that if the Commission pulls a company back into price cap regulation, a company is entitled to all increases on a cumulative basis that it would have received for "all proceeding years" since the company's maximum allowable prices were first adjusted pursuant to Section 4 and 11. Further, there is no requirement in subsection 5 that the provider must have increased actual rates to be entitled to the maximum allowable price increases from all the proceeding years. Therefore, the maximum allowable prices that the Commission previously approved for Sprint without actual rate increases are lawful and Sprint's tariff should be

[7] See IN the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outside

approved as a matter of law, as it merely raises actual rates to rates that are less than, or equal to, the currently approved maximum allowable prices.[8]

WEREFORE, Sprint requests that this Commission approve its tariff revision and withdraw its motion to suspend.

Respectfully submitted,
Sprint

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing was mailed, postage prepaid, to the parties listed below, this 20th day of August, 2002.

Lisa Creighton Hendricks

Lisa Creighton Hendricks

Exchanges, Case No. TO-92-306, 2 Mo. PSC 3d 1, 20 (December 23, 1992)

[8] There were several questions raised at the on the record proceeding pertaining to cost. However, cost is not a factor in determining maximum allowable prices or rates under the Price Cap Statute. Even OPC admitted this fact under questioning. See, pages 101-102 of the Transcript of Proceedings. Further, Commissioner Gaw raised a question pertaining to the ability of price cap companies to establish rates for new services. While this is a valid inquiry for Case No. T0-2001-391, it is not necessary to answer this inquiry in connection with tariff in front of the Commission in this case.

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