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June 17, 2002

**HAND-DELIVERED**

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, Missouri 65102

**FILED**<sup>3</sup>  
JUN 17 2002

Missouri Public  
Service Commission

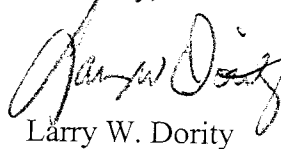
**RE: Case No. IO-2002-1083**

Dear Mr. Roberts:

Please find enclosed for filing with the Commission the original and eight (8) copies of ALLTEL Missouri, Inc.'s **Suggestions In Opposition To Staff's Motion To Reject ALLTEL's Price Cap Election.**

Copies of the foregoing Suggestions have been hand-delivered or mailed this date to counsel of record. Thank you for your attention to this matter.

Sincerely,



Larry W. DORITY

Enclosures

cc: Dana K. Joyce, General Counsel  
William K. Haas, Deputy General Counsel  
Michael Dandino, Office of the Public Counsel

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>  
JUN 17 2002

Missouri Public  
Service Commission

In the Matter of the Notice of )  
Election of ALLTEL Missouri, Inc. )  
To Be Price Cap Regulated Under )  
Section 392.245, RSMo. 2000. )

Case No. IO-2002-1083

**SUGGESTIONS IN OPPOSITION  
TO STAFF'S MOTION TO REJECT  
ALLTEL'S PRICE CAP ELECTION**

COMES NOW ALLTEL Missouri, Inc. (ALLTEL), pursuant to 4 CSR 240-2.080(16), and for its Suggestions In Opposition To Staff's Motion To Reject ALLTEL's Price Cap Election states to the Missouri Public Service Commission ("Commission") as follows:

1. On May 17, 2002, ALLTEL filed its Notice of Election To Be Price Cap Regulated Under Section 392.245, RSMo 2000<sup>1</sup> ("Notice of Election"). As fully set forth in the Notice of Election, ALLTEL advised the Commission: (1) that it is a "small local exchange telecommunications company," as defined by Section 386.020(30), serving less than one hundred thousand (100,000) access lines in Missouri; (2) that Universal Telecom, Inc. ("Universal") and Missouri State Discount Telephone ("M-SDT"), both alternative local exchange telecommunications companies as defined in Section 386.020(1), had been granted certificates of service authority to provide basic local exchange telecommunications services in exchanges served by various local exchange companies, including ALLTEL; and (3) that both Universal and M-SDT, as explained in the affidavit of an officer of ALLTEL attached to the Notice of Election, were, in fact, currently providing basic local exchange service in ALLTEL's service area in Missouri. The verified Notice of Election, in addition to the

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<sup>1</sup> All statutory references are to the Revised Missouri Statutes 2000, unless otherwise indicated.

above-referenced affidavit, included copies of the Commission's Orders granting certificates to provide basic local exchange service for both Universal and M-SDT.<sup>2</sup>

2. ALLTEL further advised the Commission that it was exercising its statutory right to elect to be regulated under Section 392.245 by providing written notice to the Commission, in conformance with Section 392.245(2), which states:

A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the commission that 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 large incumbent company's service area. 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, and the incumbent company shall remain subject to regulation under this section after such election. (*emphasis added.*)

ALLTEL further stated that it will remain subject to regulation under Section 392.245 after the filing of the Notice of Election and that no further action of the Commission was required to effectuate ALLTEL's election.

3. On June 6, 2002, the Staff of the Commission filed its Motion To Reject ALLTEL's Price Cap Election ("Motion") in which it requests the Commission to reject ALLTEL's notice of price cap election and suggests two reasons why it believes the election is invalid: (1) that the existence of a reseller of basic local telecommunications service in an incumbent local exchange carrier's service area should not be used as a basis for acquiring price cap regulated status under the election provisions of Section 392.245.2 RSMo 2000; and

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<sup>2</sup> Universal: *Order Granting Certificate To Provide Basic Local Exchange Service*, Case No. TA-2002-183, attached to the Notice as Appendix 1; M-SDT: *Order Granting Certificate To Provide Basic Local Exchange and Interexchange Telecommunications Service*, Case No. TA-2001-334, attached to the Notice as Appendix 2.

(2) that neither Universal or M-SDT is providing basic local telecommunications service under Commission rules.

4. As shown below, Staff's Motion is an attempt to manipulate the plain meaning of the statute, in contravention of Staff's prior position in other price cap cases as well as the decisions of this Commission and the Cole County Circuit Court, to serve its purposes of denying price cap status to ALLTEL as a small incumbent local exchange telecommunications company.

5. In its Motion, Staff undertakes a strained statutory construction, completely contrary to the plain language and plain meaning of Section 392.245.2, by suggesting that because Section 392.450.1 refers to a certificate of local exchange authority "to provide basic local telecommunications service or for the resale of basic local telecommunications service," there are two types of certificates.<sup>3</sup> Following Staff's argument, "since the price cap statute does not include or mention the resale of telecommunications service, the company's election to price cap status based on the existence of a reseller in part of its service area was ineffective."<sup>4</sup>

6. First, as noted above, the language of Section 392.245.2 regarding a small incumbent local exchange company's qualification for price cap status is very clear, to-wit: "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 . . ." *Id.*<sup>5</sup> Where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.<sup>6</sup> In *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. E.D. 1992), the court held

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<sup>3</sup> Staff Motion, Par. 5, p. 2.

<sup>4</sup> *Id.*, Par. 6, pp. 2-3.

<sup>5</sup> ALLTEL Notice of Election, p. 3.

<sup>6</sup> *Brownstein v. Rhomberg-Haglin and Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

that “the legislature is presumed to have intended what a statute says directly.” The legislature expressed its intent in the plain language of the statute, and there is no need to seek any other meaning through statutory construction.

7. Second, while Staff acknowledges that prior Commission precedent specifically holds that price cap status should be granted on the basis that an alternative local exchange telecommunications company is providing basic local telecommunications service *on a resale basis* to customers within an incumbent local exchange company’s service area,<sup>7</sup> it fails to point out that the Commission fully addressed the issue of statutory construction of Section 392.245 in the first petition for price cap regulation filed by Southwestern Bell Telephone Company.<sup>8</sup> In the Southwestern Bell Price Cap Case, the Commission stated “the Commission finds nothing in either [Section 392.245.2 or Senate Bill 507] which would create an ambiguity in Section 392.245.2 . . .” The Commission further stated, “The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute’s clear and unambiguous language. Thus, the parties’ attempt to create ambiguity where none exists must fail.”<sup>9</sup>

At page 3 of its Motion, Staff cites a portion of the language of the Cole County Circuit Court’s Judgment affirming the Commission’s Report and Order in Case No. TO-97-397, to the effect that it might be possible to distinguish a reseller from a facilities-based company for purposes of price cap determination. However, the Circuit Court affirmed the

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<sup>7</sup> *In the Matter of the Petition of GTE Midwest Inc. Regarding Price Cap Regulation under RSMo Section 392.245 (1996)*, Case No. TO-99-294, (“GTE Price Cap Case”) and *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 Supp. 1996*, Case No. TO-97-397, (“Southwestern Bell Price Cap Case”). Staff Motion, Par. 7, p. 3.

<sup>8</sup> Southwestern Bell Price Cap Case. This decision may be found at 6 Mo.P.S.C. 3d 493, 503 (1997).

<sup>9</sup> *Id.* at 506, citing *State ex rel. Doe Run v. Brown*, 918 S.W. 2d 303,306 (Mo. App. 1996).

decision of the Commission granting price cap status to Southwestern Bell based on the existence of one reseller, and the Commission did not change its decision regarding Southwestern Bell's qualification for price cap status after the Circuit Court's decision, nor did the Commission adopt this position in either the Sprint or GTE price cap cases.<sup>10</sup> The Commission noted the language from the Circuit Court decision cited by Staff in the GTE decision, but found that GTE had met the prerequisites for price cap regulation through competition from one reseller.<sup>11</sup>

8. Third, the Commission has never made any distinction between facilities-based providers and resellers in the certificates of service authority granted to competitive local exchange telecommunications providers. As reflected in the Order Granting Certificate To Provide Basic Local Exchange Telecommunications Service for both Universal and M-SDT (Appendices 1 and 2 to ALLTEL's Notice of Election), the orders state that the respective companies are "granted a certificate of service authority to provide basic local telecommunications service in the state of Missouri . . . ." Indeed, in the Universal Order, the Commission had previously recited as a specific finding of fact that "Universal Telecom proposes to provide prepaid basic local telecommunications service on a resold basis." (Order, p. 3). However, as consistent with the other eighty-plus competitive local exchange telecommunications provider certificates, neither Universal nor M-SDT was granted a certificate to provide "resold" or even "prepaid" telecommunications service; rather, they were granted certificates of service authority to provide basic local telecommunications services in the state of Missouri.

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<sup>10</sup> GTE Price Cap Case; *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.

<sup>11</sup> GTE Price Cap Case, at pp. 3-4.

Staff is well aware that the Commission has never made any distinction in the certificates granted to providers and, in fact, in the briefs filed by the Staff in the Southwestern Bell Price Cap Case, the Staff's position was completely opposite to the position now espoused in its Motion. In the Initial Brief of Staff in Case No. TO-907-397, the Staff stated, "There is no distinction in this definition [Section 392.245.2] between a facilities-based versus reseller provider, only that there be a certificate to provide 'basic or non-basic local telecommunications service'".<sup>12</sup> In its Report and Order in that case, the Commission stated:

[N]owhere in Section 392.245 is there a requirement that the alternative local exchange telecommunications company be facilities-based rather than a reseller before price cap regulation can be employed. "[C]ourts must construe a statute as it stands, and must give effect to it as it is written. [A] court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." The parties argument that the language in Section 392.450.1 and 392.451.1 constitutes such an implication is not persuasive. These sections describe the certification process for the provision of basic local telecommunications service. Significantly, the statutes make no distinction in the requirements for facilities-based competitors and resellers. More importantly, Section 386.020(46) defines the resale of telecommunications service as "the offering *or providing* of telecommunications service primarily through the use of services or facilities owned or provided by a separate telecommunications company . . . . Thus, there is nothing to suggest that a reseller does not *provide* service to its customers."<sup>13</sup>

Nevertheless, under the guise that the "Commission requires flexibility in exercising its ratemaking function to deal with changing and unforeseen circumstances" (although never suggesting what those changing and unforeseen circumstances might be), the Staff now tries to change the plain language of the statute through strained interpretation and reach a result directly contrary to that reached in cases involving large companies, *supra*. The operative

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<sup>12</sup> Initial Brief of Staff of the Missouri Public Service Commission, Case No. TO-97-397, p. 4. See also, Reply Brief of the Staff of the Missouri Public Service Commission, Case No. TO-97-397, pp. 1-2.

<sup>13</sup> Southwestern Bell Price Cap Case, 6 Mo. P.S.C. 3d at 505.

language of the statute is the same for both large and small local exchange companies, and for Staff to argue differently in this case involving a small local exchange company is arbitrary and discriminatory.

9. Staff's second reason for believing that ALLTEL's price cap election is invalid is the contention that neither Universal nor M-SDT are providing service, in that the service the carriers provide does not constitute minimum basic local telecommunications service under Commission rules. Staff asserts that because both companies' tariffs are toll restricted (tariffs that had to have a positive Staff Recommendation to obtain approval), there is not equal access to interexchange carriers.

Again, however, Staff is proposing a standard not consistent with the plain reading of the price cap statute and the standard definition of "basic local telecommunications service." The Staff cites 4 CSR 240-32.100(2)(G) for the proposition of what constitutes minimum basic local telecommunications service; but the controlling definition of "basic local telecommunications service" is found in Section 386.020(4), where "basic local telecommunications service" is defined as:

(4) "Basic local telecommunications service", two-way switched voice service within a local calling scope as determined by the commission comprised of **any** of the following services and their recurring and nonrecurring charges:

(a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;

(b) 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 and speech impaired;

(c) Access to local emergency services including, but not limited to, 911 service established by local authorities;

(d) Access to basic local operator services;



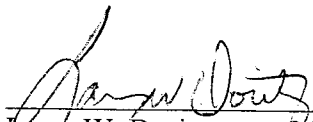
- (e) Access to basic local directory assistance;
- (f) Standard intercept service;
- (g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations;

(Emphasis added.) Indeed, the very Chapter of the Commission's Rules that the Staff cites, Chapter 32, specifically refers to the above statutory definition for "basic local telecommunications service": 4 CSR 240-32.020 Definitions, (5) Basic local telecommunications service – basic local telecommunications service **as defined in section 386.020(4)**, RSMo Supp. 1997 (Emphasis added; of course, the supplement has been updated to RSMo 2000). Both carriers provide many of these services, and thus provide basic local telecommunications service under the applicable statutory definition.

WHEREFORE, for all of the above reasons, ALLTEL Missouri, Inc. respectfully requests the Commission to deny Staff's Motion.

Respectfully submitted,



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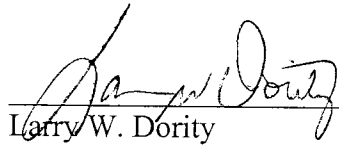
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered or mailed, United States Mail, postage prepaid, this 17th day of June, 2002, to:

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