



The Court of Appeals reversed the Commission's decision that the services previously classified as transitionally competitive services became competitive services in 1999 under Section 392.361 and Section 392.370 . The Court said in its review:

“... we hold that the Commission erred in finding that the services in question converted to competitive status in 1999. When SWB became subject to price-cap regulation in 1997, all its services became subject to price-cap regulation at that time, and the Commission erred in finding competitive status under the old statutes. We reverse the Commission's findings to the contrary, and we remand for the Commission to analyze the evidence it already has available in order to determine whether "effective competition" for these services currently exists. If the Commission deems it necessary, the Commission may receive additional evidence to determine the issues in question. 154 S.W.3d 316, 330 (MO App W.D. 2004)

AT&T should not be able to escape a return to prices that should not have been changed unless the change was made as provided under the price cap mechanism. While PSC decisions are afforded a presumption of legality and validity, there is a very relevant exception that prevents AT&T from reaping the benefits of an unlawful PSC decision. Section 386.490 3, RSMO, provides that “Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, **unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.**” (emphasis supplied)

Section 392.200.1, RSMo 2005 provides in part: “**All charges** made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and **not more than allowed by law or by order or decision of the commission.** Every unjust or unreasonable

charge made by or demanded for any such service or in connection therewith **or in excess of that allowed by law or by order or decision of the commission is prohibited and declared to be unlawful.**” (emphasis supplied)

Public Counsel successfully carried out its burden under Section 386.430 to have the PSC’s decision declared unlawful. It should not be given any effect or validity and any actions taken under this “authority” should be voided and the lawful status returned. 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).*

Public Counsel objects to any outcome that does not require AT&T to rollback its rates for the services at issue to the price cap level as of the effective date of the PSC’s Report and Order.

If AT&T intends to treat these services as competitive services, it can only do so in those exchanges where the Commission has approved a reclassification in *In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification Pursuant to Section 392.245.6, RSMo (2005) – 30-day Petition*. Case No. TO-2006-0093 and *In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for Competitive Classification Pursuant to Section 392.245.6, RSMo (2005) – 60-day Petition*. Case No. TO-2006-0102. Section 392.245, RSMo does not provide for a state-wide 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.

Therefore, the Commission should make its orders in this case directing AT&T to reinstate the former prices that were changed under the auspices of the decision reversed by the appellate court and then close this case. If AT&T wants to reclassify any of these services in any exchange, it must follow the process set out in the new Section 392.245.5, RSMo as amended by SB 237. The first step would be to file a 30 day or 60 day petition.

The provisions of the price cap law under which the initial hearing was tried have been substantially changed. Where a finding of “effective competition” was the standard for reclassification, the General Assembly amended the price cap statute with SB 237 to establish new criteria for reclassification, including new procedures and specific time limits for PSC action. The original price cap statute did not repeal Section 392.361 and 392.370, RSMO, but provided a new process for reclassifying price cap regulated companies. 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’s task now is 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 PSC 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).

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 which must have a specific trigger date, i.e. the filing of the petition.

Public Counsel suggests that 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.

OFFICE OF THE PUBLIC COUNSEL

**/s/ Michael F. Dandino**

BY: \_\_\_\_\_

Michael F. Dandino (24590)

Deputy Public Counsel

P.O. Box 2230

Jefferson City, MO 65102

(573) 751-4857

(573) 751-5559

Fax (573) 751-5562

email: [mike.dandino@ded.mo.gov](mailto:mike.dandino@ded.mo.gov)

**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 this 12th day of December 2006.

**/s/ Michael Dandino**

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