

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Recommendation)
Concerning the Surcharge for Deaf Relay)
Service and Equipment Distribution Program)
Fund.)

Case No. TO-2005-0308

STAFF’S SUPPLEMENTAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and for its brief states:

1. In the Order Directing Filings, issued on June 15, 2005, the Commission directed the Staff to file a brief further discussing Staff’s position on the Commission’s authority, or lack thereof, to implement a moratorium on the distribution of CapTel phones.

2. As explained below, it is the Staff’s opinion that the Commission does not have the legal authority to order a moratorium on the distribution of CapTel phones.

3. Section 209.255.1 RSMo 2000 directs that the Commission shall establish a rate recovery mechanism to recover the costs of implementing and maintaining the programs provided for in Section 209.253. That statute provides for a statewide dual-party relay system (Relay Program) under the Commission and a statewide adaptive telecommunications equipment distribution program under the Missouri assistive technology advisory council. Section 209.259.1 directs that the Commission shall review the surcharge no less frequently than every two (2) years but no more than annually and “shall” order changes in the amount of the surcharge as necessary “**to assure available funds** for the provisions of the programs established in Section 209.253.” (emphasis added)

4. Section 209.253.2 states:

The **Missouri assistive technology advisory council shall** provide a statewide telecommunications equipment distribution program making available reasonable access to basic telecommunications service for eligible subscribers who are unable to use traditional telecommunications equipment due to disability.

Section 209.253.5 states:

The **Missouri assistive technology advisory council shall** be the program administrator for the statewide telecommunications equipment distribution program.

Section 209.253.6 states:

The **Missouri assistive technology advisory council may** promulgate rules necessary to implement and administer the telecommunications equipment distribution program . . .

Section 209.253.7 states:

The **Missouri assistive technology advisory council may** enter into contracts as necessary to carry out the telecommunications equipment distribution program, including but not limited to contracts with disability organizations.

As can be clearly seen by reviewing the above, the legislature has set out a statutory scheme making the council the sole administrator of the equipment program, while at the same time entrusting to the Commission the job of managing the surcharge so as to “assure available funds” for the provision of **both** the equipment program and the Relay Program. (emphasis added)

5. Whether the statutory word “shall” in section 209.259.1 is mandatory or directory is a function of context. Where the legislature fails to include a sanction for failure to do that which “shall” be done, courts have said that “shall” is directory not mandatory¹. However, the absence of a penalty provision does not automatically override other considerations.² For

¹ *Farmers & Merchant Bank and Trust Company v. Director of Revenue*, 896 S.W. 2d 30, 32-33 (Mo. Banc 1995).

² *Bauer v. Transitional School District*, 111 S.W. 3d 405, 408 (Mo. banc 2003).

example, the statutory directive that a county clerk shall assess the amount certified by a school district is a ministerial duty, not a discretionary one.³ A Commission decision to order a moratorium on the council's distribution of CapTel phones could conceivably be implemented, albeit indirectly, by setting the surcharge in an amount that would not "assure available funds" for the full legislative appropriation to the equipment distribution program. Although the statutes do not provide a sanction for a Commission failure to set the surcharge in an amount necessary to assure available funds for the equipment distribution program appropriation, the Staff suggests that a statutory directive to assure funds are available for a separate state agency is a ministerial duty, not a discretionary one.

6. The Staff included \$2,150,000 in its calculations to fund the equipment distribution program. This is the amount that the Governor requested for the program. The legislature appropriated \$2,150,445 from the equipment distribution program.⁴ A decision by the Commission to implement a moratorium on the distribution of CapTel phones, effectuated by adoption of a surcharge that might result in a fund shortfall, could bring about a clash between expenditure claims upon the fund by the both Relay Program and the equipment distribution program. Section 209.258 provides that the "Deaf Relay Service and Equipment Distribution Fund ... shall be devoted solely to the payment of expenditures actually incurred in operation of the statewide dual-part relay service and **equipment distribution program authorized by section 209.253.**" (emphasis added) Although highly unlikely, adoption of a surcharge that produced a fund shortfall could potentially subject the Commission to a mandamus action from affected interest groups representing the disabled community for failing to meet its statutory

³ *Southwestern Bell Telephone v. Mahn*, 766 S.W. 2d 443 (Mo. banc 1989).

⁴ The Governor has not yet signed H.B. 5.

obligation to set the surcharge amount in an amount necessary to ensure available funds for both the equipment distribution program and the Relay Program.

WHEREFORE, the Staff suggests that the Commission does not have the legal authority to order a moratorium on the distribution of CapTel phones.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 20th day of June, 2005.

/s/ William K. Haas