

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

In the Matter of the Revised Tariff Filing)
of MoKan Dial, Inc.)

File No. TR-2012-0299

THE OFFICE OF THE PUBLIC COUNSEL’S APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states that rehearing is warranted and the Order Denying Public Counsel’s Motion to Suspend and Approving Tariff should be reheard because the decision is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is unauthorized by law, and constitutes an abuse of discretion, all as more specifically and particularly described in this motion and as follows:

Application for Rehearing

A. Introduction

The Office of the Public Counsel (Public Counsel), pursuant to Section 386.500¹ and 4 CSR 240-2.160, specifically sets forth the reasons warranting a rehearing and moves the Missouri Public Service Commission (Commission) for rehearing of its Order Denying Public Counsel’s Motion to Suspend and Approving Tariff (Order) of May 1, 2012, effective May 11, 2012, which ordered that: (1) Public Counsel’s Amended Objection and Motion to Suspend is denied; (2) the tariff filed by MoKan Dial, Inc. (Company) on March 14, 2012, assigned Tariff

¹ All statutory citations are to the Revised Statutes of Missouri 2000, unless otherwise noted.

Tracking Number JI-2012-0441, is approved, as substituted, to become effective on July 1, 2012.; and (3) Public Counsel's Motion to Compel Discovery is denied as moot.²

B. Not Based On Substantial And Competent Evidence In The Record As A Whole

The Commission's Order is unlawful, unjust and unreasonable because it was not based on substantial and competent evidence in the record as a whole in that it relied on a spreadsheet prepared by the Staff of the Public Service Commission (Staff)³ and a Federal Communications Commission (FCC) Order⁴ as evidence that the proposed rates were just and reasonable.

The Commission's decision must be based on competent and substantial evidence:

The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" *and whether the action is "supported by competent and substantial evidence upon the whole record."* Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law."⁵

The evidence that the Commission admits and makes the basis of its decision must have probative value and cannot be based on the Commission's own witnesses or expertise:

The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. *But if judicial review is to have any meaning, it is a minimum requirement that*

² Order Denying Public Counsel's Motion to Suspend and Approving Tariff, pg. 6.

³ Staff Response and Recommendation, Attachment 1.

⁴ Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, et al., FCC 11-161.

⁵ *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).

the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise.⁶

In its Order, the Commission concluded that Public Counsel's motion to suspend the tariff to allow time to conduct a further investigation, including an earnings review, was unnecessary and should be denied.⁷ As justification, the Commission states its belief that there is sufficient information available to the Commission to conclude that the Company's revised tariff will result in "just and reasonable" rates.⁸ The Commission's decision to approve the proposed rates as just and reasonable was based primarily on a Staff spreadsheet and an order by the FCC.

The use of the Staff spreadsheet as a basis for the Commission's decision was unreasonable. Section 490.065.3 states that the facts upon which an expert bases an opinion or inference must be of a type reasonably relied upon by experts in that field and must be otherwise reasonably reliable. Public Counsel requested that Staff provide a detailed description of the development of the R-1, B-1, MCA Plan Residence and MCA Plan Business access line counts shown in Attachment 1 to the Staff's Response and Recommendation as well as a detailed description of all activities conducted by Staff to verify the accuracy of the R-1, B-1, MCA Plan Residence and MCA Plan Business access line counts shown in that Attachment 1. In response, Staff admitted that it had not performed any such analysis, but relied on the submissions and calculations provided by the company, which the Staff merely assumed to be true and correct. (See Attachment A) As a result, Staff's spreadsheet is based on unverified information and is not a product of a neutral evaluation by Staff that the proposed tariff rates are just and reasonable. Staff cannot represent to the Commission that the spreadsheet is true and accurate

⁶ *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).

⁷ Order Denying Public Counsel's Motion to Suspend and Approving Tariff, pg. 5.

⁸ *Id.*, pg. 4.

since it did not verify whether the underlying data it relied on met the standard of accuracy and reliability. The Commission's decision was also unreasonable in that it failed to consider potential challenges to the accuracy and reliability of the information when it denied Public Counsel's Motion to Compel that would have allowed Public Counsel the opportunity to independently evaluate the accuracy and impact of the proposed rate adjustments. For these reasons, the Commission's reliance on Staff's spreadsheet as a determining factor in its decision to approve these proposed tariff rates is unjustified and unreasonable.

The FCC Order also does not constitute competent and substantial evidence that the proposed tariff revisions are just and reasonable. The use of the FCC Order as a basis for the Commission's decision was unreasonable because the changes in rates contained in the proposed tariffs went beyond the Phase 1 rate threshold contemplated in the FCC Order. The Commission Order approved the proposed tariff which includes the Company's request that residential rates initially be increased to \$10 per month, rising a year later to \$14 per month while business rates also be increased to \$14 per month.⁹ The Commission's decision acknowledges that according to Phase 1 of the FCC Order, the Company must increase its local rate to at least \$10 per month by July 1, 2012, or risk losing Federal universal service support.¹⁰ The Commission's decision notes that the local rate is expected to rise to \$14 per month on July 1, 2013, and may be further increased in subsequent years.¹¹ The FCC Order is hardly set in stone, especially for any proposal that goes beyond July 1, 2012. If the FCC Order is modified, any rates approved by this Commission based on the original FCC Order must be modified as well. Therefore, the Commission's reliance on the FCC Order as evidence that the proposed tariff revisions are just

⁹ Id., pg. 4.

¹⁰ Id., pg. 2.

¹¹ Id., pg. 2.

and reasonable is misplaced. This is especially true for any changes in rates that go beyond the Phase 1 rate threshold contemplated by the FCC Order.

Because the Commission's decision relied on Staff's spreadsheet and the FCC Order as proof of the reasonableness of the rates and failed to allow for potential challenges to the justness and reasonableness of those rates, the Commission's Order is not based on substantial and competent evidence in the record as a whole and is therefore, unlawful, unjust and unreasonable.

C. Determination That Earnings Review Not Necessary Not Lawful, Just And Reasonable

In its Order, the Commission determined that an earnings review is not necessary to determine whether the proposed rates are just and reasonable.¹²

The Commission's determination that waiving 392.240.1 removes the requirement for an earnings review in this case is unreasonable. Section 392.240.1 provides, in relevant part:

Whenever the commission shall be of the opinion, **after a hearing ... or upon a complaint**, that the rates ... demanded ... by any telecommunications company ... are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law, ... the commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, ... and shall fix the same by order to be served upon all telecommunications companies by which such rates, charges and rentals are thereafter to be observed, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission. [Emphasis added]

However, this statute does not apply to the situation in this case. There has been no hearing or complaint as contemplated by this statute. In this case it is the Company that seeks rate increases. Moreover, the waiver of the provisions of Section 392.240.1 does not change in any way the requirements of Section 392.200 that rates be "just and reasonable" and "not more than allowed by law or by order or decision of the commission."

¹² Id., pg. 4.

Long standing precedent supports an earnings review as the method of ensuring just and reasonable rates. The Commission cannot just assume that an increase in basic local rates will result in just and reasonable rates; it must conduct an investigation, and come to a conclusion based upon an objective analysis of the proposed rate increase. The rates approved by the Commission are not lawful, just and reasonable in that the evidence the Commission relied upon for approval of the rates was insufficient and its use was unreasonable. Neither the Company nor any of the other respondents identified an objective standard to substitute for an earnings review. The Commission continues to have authority and the responsibility to conduct an earnings review to ensure that the proposed rates will be just and reasonable in this case.

Therefore, the rates approved by the Commission without an earnings review are not lawful, just and reasonable in that the evidence the Commission relied upon to determine the rate was just and reasonable was insufficient and its use unreasonable.

D. Violated Public Counsel's Statutory Right To Discovery

Because the Commission approved the Company's tariff to take effect on July 1, 2012, the effective date chosen by the Company, the Commission denied Public Counsel's pending motion to compel discovery as moot.¹³

Public Counsel's right to discovery is statutorily based and cannot be considered moot. Public Counsel's right to pose data requests seeking information from any utility and the right to inspect and obtain copies of any utility's records or documents in its possession is coequal to that of the Staff and is broader than the discovery authority permitted other litigants under Commission Rules.¹⁴ This right is not conditioned on considerations of relevance under MO Rule Civ. Pro. 56.01(b)(1) and Commission Rule 4 CSR 240-2.090(1). The Commission has

¹³ Id., pg. 5.

¹⁴ RSMo. Section 386.450 and *In the Matter of Missouri-American Water Company's Tariff* (Case No. WR-2000-281, et al.) (2-2-2000).

recognized that information sought by the Public Counsel, if not relevant, may well lead to other information which is relevant.¹⁵ Therefore, the Commission has determined that Public Counsel and Staff can request records they want in their investigation without any showing that it is otherwise discoverable or is relevant to a specific case even if it is no more admissible in a hearing in their hands than in those of any other party.¹⁶ Public Counsel's right to discovery transcends any action the Commission takes in a pending case. The Commission has stated that the statute does not require Public Counsel to show that the requested documents are relevant to any particular issue in a contested case. The Commission has also stated that the statute allows the Commission to require the production of the requested documents even if there were no contested case in existence. Therefore, the fact that Public Counsel requested production of these documents in the context of this rate increase request does not in any way diminish or moot Public Counsel's right to examine those documents in a timely manner.

Public Counsel has a statutory right to discovery. Thorough discovery is necessary to Public Counsel in its efforts to protect consumers through investigation and presenting its position to this Commission. Without these documents Public Counsel is unable to perform an investigation to clarify concerns whether the proposed rates are just and reasonable as required by Section 392.200.1 or to present a complete and well documented position to the Commission. Therefore, the Commission decision to deny Public Counsel's pending motion to compel discovery as moot is unjust and unreasonable.

E. Conclusion

Public Counsel's Application for Rehearing should be granted in that the rates approved by the Commission are not just and reasonable due to the fact that the Commission Order was

¹⁵ *Staff of the Missouri Public Service Commission, v. Union Electric Company, doing business as AmerenUE, Case No. EC-2002-1*, 2002 Mo. PSC LEXIS 31.

¹⁶ *Id.*

not based on substantial and competent evidence in the record as a whole, the determination that an earnings review is not necessary to determine whether the proposed rates are just and reasonable was unjust and unreasonable, and the Commission's Order violated Public Counsel's statutory right to discovery.

WHEREFORE, Public Counsel respectfully requests that the Commission grant its application for rehearing.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 10th day of May 2012:

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Director of Regulatory Review

January 24, 2012

Via Electronic Mail

The Office of the Public Counsel
Ms. Christina Baker
PO Box 2230
Jefferson City, MO 65102

RE: TR-2012-0299 Data requests 3001-3005

Dear Ms. Baker:

This letter represents an objection on behalf of Staff of the Missouri Public Service Commission, pursuant to 4 CSR 240-2.090 (2). On April 26, 2012, Staff received the following data request from your office directed toward Cully Dale from Barbara Meisenheimer:

Information Requested:

Please provide a copy of all Staff workpapers prepared on or before March 30, 2012, which support the calculations shown in Attachment 1 to the Staff's Response and Recommendation filed in Case No. TR-2012-0299 on March 30, 2012.

Please provide a copy of all analysis, studies or other documentation not provided in response to DR 3001 relied upon by Staff in developing Attachment 1 of Staff's Response and Recommendation filed in Case No. TR-2012-0299 on March 30, 2012.

Please provide a detailed description of the development of the R-1, B-1, MCA Plan Residence and MCA Plan Business access line counts shown in Attachment 1 to the Staff's Response and Recommendation filed in Case No. TR-2012-0299 on March 30, 2012, including but not limited to a description of the records used as source data, the date or date range used to develop the access line counts, and all assumptions regarding changes in take rates associated with the proposed rate changes.

Please provide a detailed description of all activities conducted by Staff on or before March 30, 2012, and documentation reviewed by Staff on or before March 30, 2012, to verify the accuracy of the R-1, B-1, MCA Plan Residence and MCA Plan Business access line counts shown in Attachment 1 to the Staff's Response and Recommendation filed in Case No. TR-2012-0299 on March 30, 2012.

To the extent that Staff has reviewed or developed updated materials related to the information requested in DR 3001, DR 3002, DR 3003 and DR 3004, please provide the updated materials.

Staff objects to this Data Request on the grounds that it is not likely to lead to any admissible evidence, is equally accessible to the Office of the Public Counsel through the Commission's Electronic Filing Information System and that, since the case was resolved subsequent to the receipt of the data requests, the matter is moot. Without waiving this objection, Staff asserts that it is not in possession of any such analysis, but relied on the submissions and calculations provided by the company, which the Staff believes are true and correct.

Sincerely,

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', with a stylized, cursive script.

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