

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

In the Matter of the Investigation into)	
the Services Provided by Universal)	<u>Case No. TO-2005-0128</u>
Telecom, Inc., and Missouri State)	
Discount Telephone		

Dissenting Opinion of Commissioner Robert M. Clayton III

This Commissioner respectfully dissents from the majority's order closing this case. This investigation arose from Case Number IO-2002-1083, in which ALLTEL Missouri, Inc., a "small incumbent local exchange telecommunications company" (a company serving fewer than 100,000 access lines in Missouri; a "small ILEC") sought price cap regulation based on the assertion that two competing companies, Universal Telecom, Inc. ("Universal") and Missouri State Discount Telephone ("MSDT"), provided basic local service in the small ILEC's service territory. This event triggers such price cap election. The Commission rejected the price cap election based on the fact that Universal and MSDT did not provide all of the elements of basic local telecommunications service. These were essential elements of service that the Commission ordered the companies to provide as conditions of being granted certificates to provide basic local service; service elements which both companies had stipulated they would provide; and service elements that Missouri state law requires the companies to offer in the territory of a small ILEC. This apparent violation of the law and Commission Order and the fact that such an alleged violation has a significant impact on the ratepaying consumer in the small ILEC territory, require this investigation to move forward to protect the public interest.

For telephone providers who wish to offer service in the territory of a small ILEC, compliance with Section 392.451, RSMo. is mandatory. This section provides that:

[T]he commission shall approve an application for a certificate of local exchange service authority to provide basic local telecommunications service or for the resale of basic local telecommunications service in an area that is served by a small incumbent local exchange telecommunications company only upon a showing by the applicant, and a finding by the commission, after notice and hearing, that:

(1) The applicant shall, throughout the service area of the incumbent local exchange telecommunication company, offer all telecommunications services which the commission has determined are essential for purposes of qualifying for state universal service fund support; (emphasis added), §392.451, RSMO., 2000.

The Commission, charged with the responsibility of determining what services are essential for purposes of qualifying for state universal service fund support, designated those essential elements in a rule making proceeding, codified in 4 CSR 240-32.010(6)¹, which lists a total of eight services necessary for USF support. That regulation reads as follows,

Essential local telecommunications services--Two (2)-way switched voice residential service within a local calling scope as determined by the commission, comprised of the following services and their recurring charges:

- (A) Single line residential service, including Touch-Tone dialing, and any applicable mileage or zone charges;
- (B) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (C) Access to basic local operator services;
- (D) Access to basic local directory assistance;
- (E) Standard intercept service;
- (F) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission (FCC);
- (G) One (1) standard white pages directory listing; and
- (H) Toll blocking or toll control for qualifying low-income customers.

On October 12, 2001, Universal Telecom, Inc., in Case Number TA-2002-183, applied for a

¹ In 2003, a new paragraph (1) was added to this regulation, causing paragraph (5) to be renumbered as paragraph (6). References to (5) in this document are to the previous (5), now (6).

certificate of service to provide basic local telecommunications service in a small ILEC service territory. In that application, Universal pleaded that “Applicant shall, throughout the service area of the small [ILEC], offer all telecommunications services which the Commission determines are essential for purposes of qualifying for State Universal Services Fund support.” P. 4, *Application for Certificate of Service Authority*. On March 21, 2002, the Commission granted Universal’s application and awarded Universal a certificate to provide basic local telecommunications services. In that Order, the Commission found that Universal proposed to “offer basic local services that satisfy the minimum standards established by the Commission,” p. 3, *Order Granting Certificate*, and that Universal “will offer each of the telecommunications services defined by the Commission as essential to qualify for state universal service fund support as found in 4 CSR 240-31-010(5).” *Id.* at pp. 3-4. In addition, the Staff recommended, and the Commission adopted as a condition of granting the certificate, that Universal would offer all of the essential services referred to in §392.451 and 4 CSR 240-31.010(6). *Id.*

On November 29, 2000, MSDT applied for a certificate of service to provide local service in all local telecommunications territories and offered to comply with “all applicable Commission rules and [was] willing to meet all relevant service standards...,” and MSDT further agreed to “meet the minimum basic local service standards, including quality of service and billing standards, as the Commission may require... .” P.6, *Application for Certificate of Service Authority*, Case No. TA-2001-334. On February 28, 2001, a Unanimous Stipulation and Agreement was filed in the case wherein the applicant “agree[d] to comply with § 392.451 and provide the ‘essential local telecommunications services’ listed in 4 CSR 240-31.010(5). Pp.1, 5 and 6, *Unanimous Stipulation and Agreement*. On March 16, 2001, the Commission granted MSDT a Certificate subject to the conditions listed in the Order which included the agreed-to proposal that MSDT would offer basic local services that satisfy the

minimum standards established by the Commission and that “[I]n areas served by small LECs, [MSDT] will offer telecommunications services that the Commission has determined are essential for purposes of qualifying for state universal service fund support found in 4 CSR 240-31.010(5).” Pp. 3-4 and 8, *Order Granting Certificate*.

In Case No. IO-2002-1083 (the ALLTEL price cap election case noted above), the Commission found that Universal and MSDT do not provide access to operator services, directory assistance or equal access to interexchange carriers, each of which is a service deemed “essential” by this Commission. By such a finding, it appears that Universal and MSDT are in violation of §392.451, RSMo., and that they are out of compliance with the Applications they filed with the Commission and the subsequent Orders granting their respective certificates. Allegedly, Universal and MSDT offer only four or five of the eight essential services required by law and Commission Order.

This Commissioner is very concerned that by closing this case, the public interest will be undermined. The Missouri legislature established a system of interdependent checks and balances permitting increases in effective competition to justify less strenuous regulation of telecommunications companies. To allow a company to pick and choose which statutory provisions and regulations apply to it upsets that balance. In addition, allowing a company to disregard conditions imposed in a Commission Order undermines the Commission’s authority and ability to make reasoned and binding decisions.

This case was brought to the attention of the Commission because the law grants a reduced level of regulation of certain carriers upon the entry of competitive forces into their market. The price cap statute provides that

A small [ILEC] 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. . . (emphasis added) §392.245.2, RSMo. 2000.

The only time in which the Commission exercises any discretion in this type of proceeding is in the granting of the certificate for the alternate provider. For this reason, the Commission must carefully condition any "alternate LEC" certificates to ensure that the statutory requirements are met, and continue to be met for the duration of the certificate. The Commission complied with the law in requiring the "essential" services to be provided and placing those restrictions in the Order. By allowing Universal and MSDT to disregard those conditions and offer a lesser amount of service, an ILEC is given an argument to seek price cap status, a less stringent regulatory method, without the accompanying competitive pressure, such as price constraints. This is especially the case in rural parts of the state where competition is non-existent or minimal. The potential revenue for smaller areas is too low and the economies of scale are too small to attract a sufficient number of alternate providers. Because of the lack of competition in rural areas and the monopolistic nature of this business, this high level of scrutiny is critical to protect the rate-paying public.

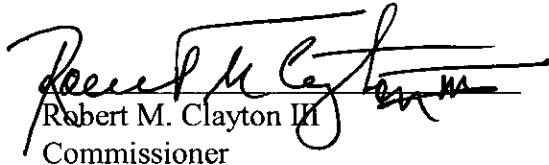
To the extent that Universal and MSDT are offering basic local service in any small ILEC service territory, they must comply with the provisions of §392.451, which means that they must offer **all** of the essential services listed in 4 CSR 240-31.010(6). To the extent that they offer service anywhere else in the state, I believe it is necessary for the Commission to fully investigate why these companies are not complying with the regulations they agreed to be bound by, and to evaluate whether waiving any more of those regulations is in the public interest. This Commissioner further

believes that the Commission should take action to revoke certificates when the company is found to be violating the law or Commission Order.

This Commissioner disagrees with the majority's view that to take action in this case would unfairly single out the two carriers who are involved in this case. While this Commissioner certainly supports the opening of other cases to determine whether other carriers are failing to comply with our statutes and regulations, this Commissioner does not believe it is unfair to pursue violations of law when the Commission is presented with undisputed facts demonstrating noncompliance.

In conclusion, this Commissioner argues that this matter should not be dismissed. It is for this reason that this Commissioner cannot support the majority's Report and Order.

Respectfully submitted,


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 25th day of February, 2005.