

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

In the Matter of the Investigation of the)	
Status of Prepaid Local Service Providers)	
as Alternative Local Exchange Competitors)	Case No. CO-2002-1078
Under Section 392.245, RSMo.)	

**THE SMALL TELEPHONE COMPANY GROUP'S
SUGGESTIONS IN OPPOSITION TO THE OFFICE OF
PUBLIC COUNSEL'S MOTION TO ESTABLISH CASE
AND TO CONDUCT AN INVESTIGATION**

Comes now the Small Telephone Company Group ("STCG") and files its Suggestions in Opposition to the Office of Public Counsel's Motion to Establish Case and to Conduct an Investigation ("Motion") to the Missouri Public Service Commission ("Commission").

Summary

On May 16, 2002, the Office of Public Counsel ("Public Counsel") filed its Motion with the Commission requesting that the Commission "establish a case and . . . conduct an investigation into the status of prepaid local service providers as it relates to the existence of an alternative local exchange competitor that offers basic local service in any exchange of an incumbent local exchange company's service area under Section 392.245, RSMo . . ." The STCG files these Suggestions in Opposition as it does not believe that a case should be established, and further believes that any investigation into the status of prepaid local service providers serving as alternative local exchange companies for purposes of the incumbent local exchange company's qualification for price cap status under § 392.245, RSMo 2000, would be futile, as the statutory provision is clear and unambiguous and can only have one interpretation.

Applicable Statutes

Public Counsel requests that the Commission establish a case to conduct an investigation into whether certified basic local exchange telecommunications companies providing prepaid service fit within the definition of alternative local exchange telecommunications company ("ALEC") as used in the statute authorizing an incumbent local exchange telecommunications company ("ILEC") to elect price cap regulation based on competition in its exchanges from a certificated alternative local exchange telecommunications company. In order to understand this issue, it is first necessary to review the applicable statutes and definitions of terms used in the statute.

Section 392.245, RSMo 2000,¹ the "price cap statute," states in subsection 2:

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.

Section 386.020 (1) defines "Alternative local exchange telecommunications company" as "a local exchange telecommunications company *certified by the commission to provide basic or nonbasic local telecommunications service* or switched exchange access service, or any

¹All citations to the Missouri Revised Statutes are to the 2000 revision unless otherwise stated.

combination of such services, in a specific geographic area subsequent to December 31, 1995.

(Emphasis supplied.)

"Basic local telecommunications service" is defined at § 386.020(4) as:

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;
- (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 regulation of the Federal Communication Commission;
- (h) One standard white pages directory listing.

(Emphasis added.)

Background

Public Counsel requests an investigation of the issue of whether "prepaid" local exchange telecommunications companies should be considered alternative local exchange telecommunications companies under the price cap statute. Prepaid local exchange telecommunications companies have been granted certificates to provide basic local

telecommunications service by the Commission and have been providing basic local telecommunications service in the state for several years. Prepaid local exchange telecommunications companies provide essentially the same service as incumbent local exchange companies except that the prepaid customer enters into a contract with the company which states that the customer must "prepay" for the service and which states that the customer will not be able to make toll calls. Prepaid local exchange companies market to, and primarily serve, those customers who are unable to qualify for service from the incumbent provider. However, the prepaid companies provide "two-way switched voice service within a local calling scope." Thus, these companies offer basic local telecommunications service in accord with the statutory definition of basic local telecommunications service and are granted the same certificate of service authority to provide basic local telecommunications service as all other competitive local exchange providers.

Public Counsel references in its Motion the price cap election of BPS Telephone Company ("BPS") based on competition in its exchanges from a prepaid provider, Missouri State Discount Telephone ("MSDT"), and states that it is concerned that the nature of the prepaid business provided by MSDT may not provide the level of competition envisioned by the price cap statute. Again, Public Counsel is attempting to read more into the statute than is there. On March 16, 2001, MSDT was granted a certificate of service authority to provide basic local telecommunications service throughout the State of Missouri in Case No. TA-2001-344. MSDT was granted status as a competitive company in that same case. On June 26, 2001, the Commission issued its Order Approving Tariff. In this Order, the Commission stated, "The certificate of service authority granted to M-SDT to provide *basic local telecommunications*

services will become effective on July 2."² MSDT is thus fully-certificated by the Commission to provide basic local telecommunications service, and qualifies as an "alternative local exchange telecommunications company" as defined in § 386.020(1).

Authority to Pursue Investigation

Public Counsel states in its Motion that the Commission has authority to conduct such an investigation under its general supervisory powers found in § 386.320.1 as well as its duty to ensure customers pay reasonable rates as set out in § 392.185(4), (5) and (6). Neither of these statutes authorize the investigation requested in this case, however. Section 386.320.1 gives the Commission general supervision to examine telecommunications companies to determine "their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements." Public Counsel has not alleged in its Motion that any telecommunications company has failed to comply with any law or any order or decision of the Commission. Neither has it alleged that any telecommunications company has failed to comply with its charter or franchise requirements. The general supervisory power of the Commission cannot be invoked to investigate a matter simply because Public Counsel makes such a request when there has been no allegation of failure to comply with any law or Commission decision.

Neither does § 392.185 provide justification for establishing a case and conducting the investigation requested by Public Counsel. As is discussed more fully below, the Commission is authorized by § 392.245 to ensure that rates are just and reasonable by employing price cap regulation. Section 392.185 merely sets out the purposes of Chapter 392, while § 392.245 is a

²Case No. TA-2001-334, Order Approving Tariff, page 2 (emphasis added).

specific statutory provision allowing companies to elect price cap regulation. These two statutes are not in conflict, but if there were any conflict, the price cap statute, being the specific statute, would prevail. *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996). Finally, what Public Counsel is really seeking is an administrative "rewrite" of a statute - something no agency is authorized to do.

Public Counsel's Policy Argument

Public Counsel argues that the Commission should establish a case and investigate whether prepaid service providers fit the definition of "alternative local exchange telecommunications company" sufficient to allow an incumbent local exchange company to qualify for price cap regulation under § 392.245, RSMo. Public Counsel encourages the Commission to conduct this investigation because Public Counsel believes the Commission has a duty to carry out the legislative purposes of Chapter 392 and to ensure compliance with § 392.245, RSMo. Public Counsel quotes from § 392.185 which states, among other things, that the provisions of Chapter 392 shall be construed to:

- (4) Ensure that customers pay only reasonable charges for telecommunications services;
- (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
- (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest[.]³

Public Counsel argues that allowing ILECs to qualify for price cap status on the basis of

³Section 392.185 was a part of Senate Bill 507 which became law in 1996. Section 392.245, the price cap regulation statute, was also part of that same legislation.

competition provided by a prepaid provider is contrary to the policies set out above.

The STCG does not agree that allowing ILECs to qualify for price cap status on the basis of competition provided by a prepaid provider is contrary to these policies, however, and believes that Public Counsel's "policy" argument is really just another attempt to change the plain meaning of § 392.245 through statutory construction. In the same legislation that enacted § 392.185 setting out the policies listed above, the Missouri General Assembly enacted § 392.245 allowing an incumbent local exchange company to be regulated by price cap regulation when two things happened: 1) an alternative local exchange telecommunications company was certificated to provide basic local telecommunications service, and 2) the ALEC was providing service in any part of the incumbent's service area. The language of this statutory provision is very clear.

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.⁴

There is no ambiguity in the language which would require statutory construction even under the guise of championing public policy. The Commission fully addressed the issue of statutory construction of § 392.245 in the first petition for price cap regulation filed by Southwestern Bell Telephone Company wherein it stated, "the Commission finds nothing in either [§ 392.245.2 or Senate Bill 507] which would create an ambiguity in Section 392.245.2 . .

⁴The language for large incumbent telecommunications companies is identical as far as qualifications for price cap regulation.

..⁵ 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."⁶ While it is true that the legislature stated in § 392.185 that the Commission has a duty to carry out the purposes of Chapter 392 by ensuring that customers pay reasonable rates consistent with the protection of the ratepayers and consistent with the public interest, the legislature also stated in § 392.245 that those goals could be achieved through allowing a company to be regulated by price cap regulation when two simple requirements were met: 1) an alternative local exchange company was certified to provide basic local telecommunications service in the incumbent's service area, and 2) the alternative local exchange company was providing basic local telecommunications service in any part of the incumbent's service area. There are no gradations of service under which some certificated companies would be considered to be providing service and others would not.

Public Counsel further cites the language from § 392.245.1 which states that "[t]he commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." Public Counsel then proceeds to misinterpret the provision. The language means what it says: price cap regulation is a means to ensure that rates and charges are just, reasonable and lawful,

⁵*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 (1996)*, 6 Mo. P.S.C. 3d 493, 503 (1997) (hereinafter "Southwestern Bell Price Cap Case").

⁶*Southwestern Bell Price Cap Case*, 6 Mo. P.S.C. 3d at 506, citing *State ex rel. Doe Run v. Brown*, 918 S.W.2d 303, 306 (Mo. App. 1996).

and the Commission may discharge its duty to ensure reasonable rates through the employment of price cap regulation. The statute does not say that in order for ILECs to be price cap regulated, competitors must offer "sufficiently good substitutes" for the incumbent's services that it induces the incumbent to lower prices, nor does it say that those prices should move to a level that insures only a "normal profit" for the industry. These statements are inappropriate extensions of the statutory language, and an attempt by Public Counsel to give the statute a different meaning from what is expressed in the statute's clear and unambiguous language.

Prepaid service providers

Public Counsel states that this matter was brought to its attention after BPS Telephone Company ("BPS," a small incumbent local exchange company) elected to be regulated by price cap regulation based on competition by a prepaid provider.⁷ Public Counsel states that it is concerned that prepaid providers may not provide the incumbent with the competition envisioned by the price cap statute. (Motion, ¶ 1) This argument is really just another way of arguing that the competition referenced in § 392.245 must be "effective competition." That argument was

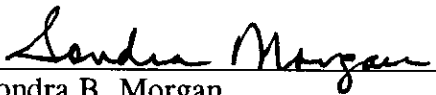
⁷Public Counsel also states that "it has come to its attention" that the interconnection agreement between BPS and the prepaid provider Missouri State Discount Telephone ("MSDT") restricts the prepaid provider from competing for the same customers as the ILEC. (Motion, ¶ 5) The STCG does not believe it is appropriate for Public Counsel to raise the issue of a specific agreement in this request for a generic docket, but BPS specifically addressed and refuted this issue in its response to Staff in Case No. TC-2002-1076. There is nothing in MSDT's tariffs nor in its Resale Agreement with BPS that precludes MSDT from providing service to anyone located in BPS's service territory. Section 6.1.1 of the Resale Agreement only states that MSDT will not "target" BPS customers. The Resale Agreement does not preclude MSDT from providing service to a current customer of BPS, and it is important to note that BPS has not and will not refuse to process any order for service from MSDT, whether or not the customer is a present customer of BPS.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 24th day of June, 2002, to the following parties:

Office of General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael F. Dandino
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102



Sondra B. Morgan