BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Revised Tariff Filing of Choctaw Telephone Company	))	File No. TR-2012-0298 Tariff No. JI-2012-0441
In the Matter of the Revised Tariff Filing of MoKan Dial, Inc.	))	File No. TR-2012-0299 Tariff No. JI-2012-0442

The Missouri Small Telephone Company Group's
Reply to OPC's April 9, 2012 Response

Comes now the Missouri Small Telephone Company Group ("STCG"), and for its Reply to the Office of Public Counsel's April 9, 2012 Response ("Response"), states to the Missouri Public Service Commission ("Commission" or "PSC") as follows:

1. Public Counsel's Response fails to address the law and the facts that required (and allow) the rate filings at issue. Specifically:

(a) **FCC Order**. Public Counsel's Response fails to acknowledge the Federal Communications Commission (FCC) *USF/ICC Transformation Order* issued on November 18, 2011 (FCC *Order*).[1] Among other things, the FCC's *Order* established a minimum $10.00 local rate floor for residential service that all incumbent local exchange companies (ILECs) must meet by July 1, 2012 or lose federal High Cost Loop (HCL) Universal Service Fund (USF) support in the amount by which the rate floors exceed the company's local rates. Thus, Public Counsel fails to address the reason for the rate increases filed by Choctaw Telephone Company and MoKan Dial, Inc. ("the

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

Companies") as well as the underlying FCC decision which determined that rates below $10.00 were not just and reasonable.[2]

(b) **HB 1779**. Public Counsel fails to acknowledge or address HB 1779, which was passed by the Missouri General Assembly and signed into law in 2008. Instead, Public Counsel seeks to impose a monopolistic, rate-of-return regulatory regime that is no longer appropriate for a highly competitive telecommunications environment. In 2008, HB 1779 recognized that Missouri's telecommunications environment had substantially changed and specifically allowed ILECs to waive a number of traditional statutory and rule requirements including §392.240.1 once an alternative local exchange carrier (ALEC) was authorized or voice over internet service (VoIP) provider was registered in the ILEC's service area. Public Counsel's Reply omits any reference to HB 1779 as well as the following relevant language in §392.420:

> . . . **Notwithstanding any other provision of law in this chapter and chapter 386,** where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company's authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. In addition, where an interconnected voice over Internet protocol service provider is registered to provide service in an incumbent local exchange telecommunications company's authorized service area under section 392.550, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. . . .

[2] *See e.g*. ¶235 of the FCC's *Order*, "[T]here are a number of carriers with local rates that are significantly lower than rates that urban consumers pay. . . . We do not believe that Congress intended to create a regime in which universal service subsidizes artificially low rates in rural areas . . ."

(emphasis added) The Companies, along with virtually all of Missouri's ILECs, have opted in to the waivers allowed by HB 1779, including the "rate of return" statute §392.240.1 RSMo. *See* Case No. TE-2012-0073. Therefore, there is no legal basis for Public Counsel to conduct a traditional "rate of return" earnings investigation.

2. Public Counsel also fails to acknowledge that the telecommunications industry in Missouri is competitive and dynamic. The Missouri Legislature (via HB 1779) recognized this fact by allowing companies to opt into a standard set of waivers, including the "rate of return" statute,[3] and the Commission has duly acknowledged such election of waivers. The FCC's *Local Telephone Competition Status Report* (as of June 30, 2010) recognizes that:

(a) 22% of Total End-User Switched Access Lines and VoIP Subscriptions in Missouri are served by non-ILECs.

(b) Total ILEC access lines are steadily <u>decreasing</u> in Missouri (*i.e*. "line loss"), from 2,842,000 in June 2006 to 2,162,000 in June, 2010.

(c) Landlines are being replaced by cable television voice products, wireless service, and/or VoIP service. For example, mobile telephone subscribers <u>increased</u> from 4,068,000 in June 2006 to 5,141,000 in June of 2010.

See <u>Attachment A</u>, Excerpts from FCC's *2010 Local Competition Report*. Public Counsel's Response fails to acknowledge the fact that numerous CLECs, VoIP

[3] Last year, the General Assembly passed HB 338, effective August 28, 2011, which allows all telecommunications companies to charge retail rates and apply terms and conditions in the <u>absence</u> of a PSC-approved tariff. *See* §392.461 RSMo. 2011 Supp. AT&T Missouri, the state's largest ILEC, recently filed notice to "de-tariff" its local rates. *See* Filing Nos. JC-2012-0537 and JC-2012-0541.

providers, and wireless carriers have been certificated, registered, or licensed to operate throughout the state of Missouri. Instead, Public Counsel argues that the Companies seek to be treated as "a protected monopoly."[4] Even a cursory review of the FCC data above and the PSC's own records of certificated CLECs and registered VoIP providers dispels Public Counsel's belief that Missouri ILECs are being treated as "protected monopolies." More importantly, the presence of certificated CLECs and registered VoIP providers in the Companies' service areas allows the Companies to waive §392.240.1. The Companies have done so, and the Commission has acknowledged these waivers in Case No. TE-2012-0073.

3. Public Counsel claims, "An earnings review as a condition of potential local rate increases is a reasonable alternative to the consequences of electing price cap regulation or receiving competitive classification."[5] The STCG disagrees. As a matter of law, an earnings review is no longer appropriate or allowed for companies that have waived §392.240.1 pursuant to §392.420. As a practical matter, the costs of an earnings review for a small Missouri company would in most cases exceed the amount of the rate increases required by the FCC's *Order*. Thus, Public Counsel's proposal to require earnings reviews for small rural ILECs is neither lawful nor reasonable.

4. Public Counsel states, "The respondents erroneously argue that Section 392.420, RSMo. allows for waiver of just and reasonable rates in this situation."[6] The

[4] Public Counsel Response, p. 2.
[5] *Id*.
[6] Public Counsel Response, p. 2.

STCG did not argue that the PSC has no authority to determine whether rates are just and reasonable. Rather, the STCG stated as follows:

> **[A]n earnings review under the rate-of-return regime is no longer a basis for determining whether the Companies' tariffs are just and reasonable**. This only makes sense because telephone companies now face constant competition from wireless carriers and VoIP providers that are essentially unregulated by the Commission.[7] . . . The Companies are no longer regulated under the traditional rate-of-return regulatory regime. **Therefore, the Commission may determine that the proposed rates are "just and reasonable" without suspension of the tariffs**.[8]

After the Companies waived §392.240.1, the traditional earnings review sought by Public Counsel is no longer authorized by law. Rather, the Commission's review is limited to whether the rates are just and reasonable. In light of the following facts and circumstances, the Commission has sufficient information to determine that the Companies' rate filings are just and reasonable:

(i) the FCC's *Order* establishes a $10.00 minimum rate floor;

(ii) the Companies will suffer a loss of federal USF support if they do not raise their rates to the minimum floor by July 1, 2012;

(iii) national, regional, and Missouri average local rates are all above $15.00;

[7] STCG Suggestions in Opposition to OPC, filed March 30, 2012, pp. 6-7 (emphasis added).
[8] *Id*. at p. 11 (emphasis added).

(iv) the FCC's *Order* requires reductions in the Companies' intercarrier compensation rates; and

(v) it has been twenty-five years since MoKan raised its local rates and twenty-three years since Choctaw raised its local rates.

Therefore, the Commission may approve the tariffs because they are just and reasonable or allow them to go into effect by operation of law.[9] The Companies have waived rate-of-return regulation as allowed by HB 1779, so Public Counsel is no longer entitled to rely on §392.240.1 to demand a rate case.

WHEREFORE, the STCG respectfully requests that the Commission overrule OPC's objections to the proposed tariffs, deny OPC's Motion to Suspend, determine that the rate filings are just and reasonable, and approve or allow the tariffs to become effective without suspension or further review.

Respectfully submitted,

By: **/s/ Brian McCartney**
W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
(573) 635-7166
(573) 634-7431 (Fax)

Attorneys for Company

[9] Under the "file and suspend" method, the Commission may either suspend rates pending further investigation or permit those rates to go into effect without further action. *State ex rel. Jackson County v. Public Service Comm'n*, 532 S.W.2d 20, 31 (Mo. banc 1975); *State of Missouri ex rel. Acting Public Counsel v. Public Service Comm'n*, 121 S.W.3d 534, 539 (Mo. App. W.D. 2003).

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were sent by electronic mail, or hand-delivered, on this 17th day of April, 2012, to:

General Counsel
Missouri Public Service Commission
Governor Office Building, 8th Floor
P.O. Box 360
Jefferson City, MO 65102
gencounsel@psc.mo.gov

Office of the Public Counsel
Governor Office Building, 6th Floor
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Craig Johnson
Johnson and Sporleder, LLP
304 E. High Street, Suite 200
P.O. Box 1670
Jefferson City, MO 65102
cj@cjaslaw.com

Larry Dority
Fischer and Dority
101 Madison, Suite 400
Jefferson City, MO 65101
lwdority@sprintmail.com

/s/ W.R. England
W.R .England