

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

Staff of the Missouri Public Service)
Commission,)
)
Complainant,)
v.)
)
BPS Telephone Company,)
)
Respondent.)

Case No. TC-2002-1076

APPLICATION FOR REHEARING

Comes now BPS Telephone Company ("BPS") and for its Application for Rehearing of Order Denying Motion to Dismiss and Setting Procedural Schedule ("Order") states to the Missouri Public Service Commission ("Commission") as follows:

1. The Commission's Order is unlawful, unreasonable and unsupported by competent and substantial evidence when it denies the Motion to Dismiss filed by BPS and finds that the Commission has jurisdiction to prosecute this overearnings complaint against BPS despite the fact that BPS has made a written election to be regulated subject to price cap regulation pursuant to § 392.245, RSMo. The Commission is considering that election in Case No. TO-2004-0597. In addition, BPS is pursuing an appeal of the Commission's decision in an earlier price cap election case¹ which is currently pending in the Cole County Circuit Court.² Until these issues of jurisdiction are resolved, the Commission's decision to proceed with its complaint against BPS is

¹Case No. IO-2003-0012.

²Cole County Circuit Court Case No. 04CV323251.

unlawful as § 392.245.2, RSMo, clearly states that an incumbent company making an election under that statute remains subject to regulation under that statute after the election.

2. In its Order, the Commission states that it has authority to hear an earnings complaint under § 392.240, RSMo, and does not lose that authorization by the "mere filing of a contested notice of price cap election." (Order, p.2) On the contrary, however, and as BPS has repeatedly argued, § 392.245.2 authorizes a small local exchange company to elect to be regulated pursuant to price cap regulation by filing a written election, and the plain language of the statute states that "the incumbent company shall remain subject to regulation *under this section* after such election." (Emphasis added.) Although the election of the small local exchange company can be challenged by other parties, until the issue of whether BPS has made a valid election has been determined, the company remains subject to price cap regulation under § 392.245, and the Commission does not have jurisdiction to pursue an earnings complaint based on rate-base, rate-of-return regulation. After BPS's earlier election in Case No. IO-2003-0012, the Commission issued a "Notice of Case Status" in this complaint case in which it stated that, "the Commission will take no further action in this matter until the issue regarding the price cap status of BPS Telephone Company is resolved in Commission Case No. IO-2003-0012." So, at an earlier stage in this proceeding, the Commission did acknowledge its lack of jurisdiction to proceed until the issue of the price cap election was resolved.

3. BPS's election to be regulated under the price cap statute is not frivolous. To understand that BPS's current price cap election is a good faith attempt to elect price cap regulation one must review the history of this entire proceeding. On March 13, 2002, BPS first notified the Commission by letter of its counsel that the company elected to be regulated under

price cap regulation pursuant to § 392.245, RSMo, inasmuch as: 1) it was a small incumbent local exchange company; 2) an alternative local telecommunications company (i.e. Missouri State Discount Telephone Company) had been certified to provide basic local telecommunications service in the BPS service area; and 3) such alternative local exchange telecommunications company was providing basic local service in the BPS service area. All of these statements were either uncontested and/or admitted in the record in this case. Under the applicable statute these were the only requirements for price cap election by a small incumbent local exchange company, and the company was only required to provide written notice to the Commission of its election.³ After an issue with the alternative local exchange company's tariff was resolved, BPS filed a second election on July 17, 2002, in which it restated the applicable requirements. The Commission created Case No. IO-2003-0012 to consider this election, and a hearing was held on February 7, 2003. The Commission issued its Report and Order in that case on November 13, 2003, in which it found that BPS was ineligible to elect price cap status because it had "entered into a contract by which MSDT agrees not to compete with BPS and BPS is not subject to any competition from MSDT." (Report and Order, p.12) This was the only impediment to price cap status relied on by the Commission in its Report and Order.

4. On January 20, 2004, BPS and Missouri State Discount Telephone ("MSDT") filed an amendment to their Resale Agreement which removed the language relied on by the Commission to make its decision, i.e. that there was a contract not to compete between MSDT and BPS. Since BPS considered that the previous impediment to its price cap election had been removed

³Section 392.245.2, RSMo 2000.

through the amendment to the Resale Agreement, it filed a third written election on May 28, 2004. However, both the Commission Staff and the Office of Public Counsel filed objections to this election as well, and a procedural schedule was established in the Commission's August 5 Order.

5. The Commission states in its Order that it retains jurisdiction in this proceeding despite the price cap election, because, "The Complaint was pending when the company filed its most recent notice of price-cap election, and that notice is being contested." (Order, p.2) However, in light of the plain language of the statute set out above which states that the incumbent company shall remain subject to regulation under the price cap statute after its election, it makes no difference when the Staff filed its Complaint in this case. After the Commission issued its decision in IO-2003-0012, BPS and MSDT amended the Resale Agreement between the parties, and despite the appeal of this decision to the Cole County Circuit Court, BPS filed another written election on May 28, 2004. If the Court finds that the first election was valid and the Commission refuses to recognize the May election, BPS will be forced to unnecessarily defend an earnings complaint despite its valid price cap election. The last written notice of election was merely a good faith attempt by BPS to comply with what it considered to be the Commission's direction in the Report and Order regarding the first election by removing the impediments to price cap regulation listed by the Commission. In light of the fact that the Commission stayed this proceeding during the pendency of the first consideration of the BPS price cap election, it would seem that there is even more reason to stay the proceeding again now that BPS has amended its Resale Agreement to remove the objectionable language and that the Commission's first decision is before the circuit court. BPS did not just file a

written notice after there was an earnings complaint filed against them. The last written notice is part of a series of attempts to be regulated as a price cap company started well before the Complaint was filed.

6. The Commission's decision denying BPS' Motion to Dismiss for lack of jurisdiction is unlawful, unjust and unreasonable because of the Commission's unlawful and unreasonable interpretation of the statute under which BPS made its election to be regulated as a price cap company. The language of the statute is clear and the plain meaning of the statute is easily ascertained. The requirements for a small local exchange company to be able to elect to be regulated pursuant to price cap regulation are very straightforward and unambiguous. The relevant statutory language is set out in § 392.245.2 and reads as follows:

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.

As can be seen from this language, a "mere letter to the Commission" from the small local exchange company is all it takes for that company to be subject to price cap regulation, and the incumbent company remains subject to that regulation after its election. There is no need for statutory construction such as that used by the Commission to deny the Motion to Dismiss or in its earlier Report and Order in Case No. IO-2003-0012. Missouri law states that it is presumed that the legislature intends what the law states directly.⁴ The Commission cannot, under the

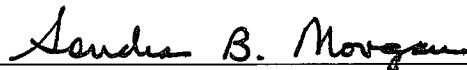
⁴ *Craven v. Premium Standard Farms, Inc.*, 19 S.W.3d 160, 167-68 (Mo. App. W.D. 2000).

guise of construction of a statute, proceed in a manner contrary to the plain terms of a statute. Where the language of the statute is clear and unambiguous, it is not subject to any other construction.⁵ The Commission cannot change the meaning of the statute to add the requirement of competition or the ability to assert jurisdiction to pursue a rate-of-return earnings complaint by construing the plain and unambiguous language of the price cap statute using the broad, policy principles set out in § 392.185, RSMo. Because the language of the statute is clear and unambiguous, no construction is needed or required.

Conclusion

For all the reasons set out above, BPS Telephone Company respectfully requests that the Commission reconsider its decision denying the Motion to Dismiss for lack of subject matter jurisdiction.

Respectfully submitted,



W.R. England, III #23975
Sondra B. Morgan #35482
BRYDON, SWEARENGEN & ENGLAND P.C.
P.O. Box 456
Jefferson City, MO 65102-0456
(573) 635-7166
(573) 635-0427 (fax)
smorgan@brydonlaw.com (email)

Attorneys for BPS Telephone Company

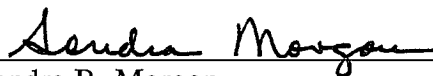
⁵ *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission*, 225 S.W.2d 792, 794 (Mo. App. 1949).

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 13th day of August, 2004, to the following parties:

Mr. Cliff Snodgrass
Senior 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