

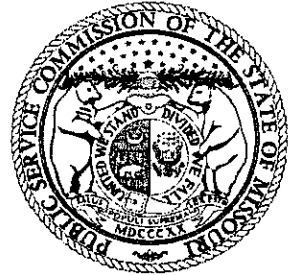
## Notice of *Ex Parte* Contact

TO: All Commissioners  
All Parties in Case No. IO-2003-0012

FROM: Nancy Dippell, Senior Law Judge  
REVIEWED: Dale Hardy Roberts, Chief Judge



DATE: October 18, 2002



On October 18, 2002, each of the Commissioners, Chief Judge Dale Hardy Roberts, and I received the attached electronic mail message and with it a draft proposed order for Case No. IO-2003-0012. The electronic mail message and its attachment were sent by Dana K. Joyce, General Counsel for the Staff of the Public Service Commission. Within that message, the General Counsel asserts that the Chairman had authorized him to prepare an order *ex parte* for a case in which the General Counsel had already entered an appearance. In Case No. IO-2003-0012, the Commission is currently considering the issues discussed in the electronic mail message and the draft order which was proposed for that case. This is a contested case for which I am the presiding officer and in which the Staff, represented by Dana K. Joyce, is a party.

The Commission is bound by the same *ex parte* rule as a court of law. All communications from a party regarding substantive matters in a contested case must be made known to all parties to a contested case so that those parties have the opportunity to respond. According to the Commission's rules (4 CSR 240-4), when a communication (either oral or written) occurs outside the hearing process, any member of the Commission or Regulatory Law Judge who received the communication shall prepare a written report concerning the communication and submit it each member of the Commission and the parties to the case. The report shall identify the people who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the Commission.

Therefore, I submit this report pursuant to the rules cited above. This will ensure that any party to this case will have notice of the attached information and a full and fair opportunity to respond to the comments contained therein.

Attachment (5 pages)

cc: Executive Director  
Secretary/Chief Regulatory Law Judge

## Dippell, Nancy\*

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**From:** Joyce, Dan  
**Sent:** Friday, October 18, 2002 11:21 AM  
**To:** Commissioners - PSC  
**Cc:** Roberts, Dale; Dippell, Nancy\*; Williams, Nathan  
**Subject:** Draft ORDER RE BPS.

**Importance:** High

Attached is a draft order for issuance in the BPS election of price cap case. The following language on the second page is the key language we have agreed on with Trip England for his client to agree to dissolve the preliminary writ against the Commission in the BPS overearnings complaint case (TC-2002-1076). Trip has agreed to extend the Monday filing deadline for response to the preliminary writ while awaiting the Commission's order. His client will file to dissolve the preliminary writ after Commission issuance of the order setting action on the IO-2003-0012 case.

Chair Simmons authorized me to circulate this draft order for the Commission's review for either issuance by vote on Tuesday's Agenda or by delegation on Monday. The key language is:

**"Because determinations of the validity of BPS Telephone Company's July 17, 2002 and March 13, 2002 elections under Section 392.245, RSMo 2000 to be price cap regulated are necessary for determining the Commission's subject matter jurisdiction in the Staff's excess earnings complaint case against BPS Telephone Company, the Commission will take no further action in Case No. TC-2002-1076 until after the Commission has determined in this case the validity of BPS Telephone Company's March 13 and July 17, 2002 elections to be price cap regulated."**

At last Tuesday's Agenda, it was agreed that an immediate prehearing and setting of an expedited schedule in the IO case was desirable. Dates included in the order are only suggested, of course, but they are intended to move the IO case as quickly as possible. Nathan Williams is available today for any questions, and both of us will be available Monday. Thanks.



GC proposed draft  
order.doc

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

In the Matter of BPS Telephone Company's Election to )  
be Regulated under Price Cap Regulation as Provided ) **Case No. IO-2003-0012**  
in Section 392.245, RSMo 2000. )

**ORDER SETTING PREHEARING CONFERENCE**

On July 17, 2002, BPS Telephone Company notified the Commission that it was renewing its March 13, 2002 election under Section 392.245, RSMo 2000, to be price cap regulated. The Commission issued a Notice of Price Cap Election giving interested parties until August 12, 2002 to file responses.

On August 12, 2002, the Staff filed its response moving that the Commission reject BPS' price cap election or, alternatively, that the Commission consolidate this case with the Staff's excess earnings complaint case against BPS, Case No. TC-2002-1076.

On August 13, 2002, the Office of the Public Counsel filed a response in which it respectfully request[ed] the Commission to set this matter for an evidentiary hearing to determine the factual matters and legal issues regarding the status of BPS Telephone Company as a price cap regulated small company under Section 392.245, RSMo 2000, the ability of the Commission to pursue an overearnings investigation against BPS Telephone Company, and determine if the presence of an alternative local exchange telecommunications company providing prepaid local service is sufficient to satisfy the requirements of the price cap statute.

On August 22, 2002, BPS filed a pleading responding to both the Staff and the Office of the Public Counsel. In response to the motion to consolidate, among other things, BPS stated:

BPS believes that Case No. TC-2002-1076 should be held in abeyance until the issues raised in this case have been determined. Only after a determination that BPS' election to price cap status is invalid, based on competent and substantial evidence, can the Commission proceed to hear a complaint based on rate base/rate of return regulation. These two cases must necessarily be kept separate, and if the Commission believes that an investigation and hearing to determine whether BPS' price cap election is valid is appropriate, Case No. IO-2002-0012 must be decided first.

It also stated:

While BPS does not agree that it is necessary for the Commission to hold an evidentiary hearing in order for BPS to be considered a price cap company, if the Commission is inclined to entertain a challenge to that status by Public Counsel or Staff, BPS agrees that this case is the "horse" that must come before the "cart" of an earnings complaint. To that extent, BPS does not disagree with Public Counsel's request for an evidentiary hearing to address the issues set out in its Response.

As the Commission stated in its June 20, 2002 Order Granting Authority to File an Excess Earnings Complaint entered in Case No. TC-2002-1076, a determination of whether BPS Telephone Company met the requirements of Section 392.245, RSMo 2000, to elect price cap status requires both findings of facts and determinations of law. Because determinations of the validity of BPS Telephone Company's July 17, 2002 and March 13, 2002 elections under Section 392.245, RSMo 2000 to be price cap regulated are necessary for determining the Commission's subject matter jurisdiction in the Staff's excess earnings complaint case against BPS Telephone Company, the Commission will take no further action in Case No. TC-2002-1076 until after the Commission has determined in this case the validity of BPS Telephone Company's March 13 and July 17, 2002 elections to be price cap regulated. It is appropriate at this time to set a prehearing conference for the purpose of establishing a procedural schedule in this case.

**IT IS THEREFORE ORDERED:**

1. That, a prehearing conference shall be held on November 6?, 2002, beginning at 10:00 a.m. The prehearing conference shall be held at the Commission's office in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, a building that meets accessibility standards of the Americans with Disabilities Act. Any person who needs specific accessibility accommodations may call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the hearing.

2. That the parties shall present a proposed procedural schedule at the prehearing conference. The proposed procedural schedule shall include dates for the filing of testimony and the holding of an evidentiary hearing.

3. That the parties shall be prepared to argue at the prehearing conference any disputes as to procedure in this case, including issues of burden of proof.

4. That, to the extent not otherwise granted in this order, the requests and motions of the parties are denied.

5. That this order shall become effective on Friday, November 1, 2002.

**BY THE COMMISSION**

**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

( S E A L )

Commissioners as voted.

Dated at Jefferson City, Missouri,  
on this 22nd day of October, 2002.