

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

In the Matter of the Notice of Election of ALLTEL)
Missouri, Inc., to be Price Cap Regulated under) **Case No. IO-2002-1083**
Section 392.245, RSMo 2000.)

Concurring Opinion of Commissioner Jeff Davis

I concur with the Commission's Order Denying Application for Rehearing in this matter for the sole purpose of avoiding any delays that would have resulted from a 2 – 2 vote. Although ALLTEL gave sufficient reason to grant its second motion for rehearing, any "no" votes cast by Commissioner Murray or myself would have been defeated by a 3 – 2 margin if all the Commissioners were present. Accordingly, I voted in favor of the denial in order to allow ALLTEL the opportunity to seek appellate remedies without delay.

ALLTEL's first motion for a rehearing was granted because the majority sought to deny ALLTEL price cap regulation using its own definition of "basic local telecommunications service" in direct conflict with statutory definition given to us by the Missouri General Assembly in Section 386.020(4), RSMo. 2000. Once a majority of Commissioners realized the error, rehearing was granted immediately.

The parties stipulated to the facts of this case and the only issue for this Commission to determine on rehearing was whether Missouri State Discount Telephone and Universal Telecom, Inc. are providing basic local telecommunications service in ALLTEL's service area.

In its Second Report and Order issued on October 5, 2004, the majority of Commissioners reasoned that Missouri State Discount Telephone and Universal Telecom, Inc. (MSTD) were "not providing basic local telecommunications service in a manner as intended by the legislature that authorizes ALLTEL to elect price cap regulation under Section 392.245."

Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute:

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. (emphasis added)

Thus, a small incumbent local exchange telecommunications company may elect to be regulated under the price cap statute if the following two criteria are met: (1) providing written notice to the Commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service; and (2) that alternative local exchange telecommunications company is providing basic local telecommunications service in any part of the small incumbent company's service area.

The statute does not say that the alternative local exchange company must be providing effective competition in order for the incumbent local exchange company to qualify for price cap regulation, nor does it say that the alternative local exchange company must be providing services of any description. Section

392.245.2 merely states the alternative local exchange company must be providing basic local telecommunications service. The only difference in the statutory language for price cap determination for small companies versus large companies is that the Commission must make a determination that the large companies have met the requirements of Section 392.245, while small companies are only required to provide written notice to the Commission of their election to be regulated pursuant to the price cap statute.

This Commission has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. State ex rel. Nixon v. Karpierz, 105 S.W.3d 487, 489-490 (Mo. banc 2003). The plain and ordinary meaning of statutory language is generally derived from the dictionary where no definition is provided. See Curry v. Ozarks Elec. Co., 39 S.W.3d 494, 496-97 (Mo. banc 2001).

In this case, the definition of the term "basic local telecommunications service" is in dispute; however, we do not have to look to the dictionary because the Missouri General Assembly provided us with a specific definition for this particular statute. Section 392.180 states "The provisions of section 386.020, RSMo, defining words, phrases and terms, shall apply to and determine the meaning of all such words, phrases and terms as used in sections 392.190 to 392.530." Section 386.020(4) specifically defines "basic local telecommunications service" and states in pertinent part:

(4) "Basic local telecommunications service", 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 and speech 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 regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

(Emphasis added)

Thus, "basic local telecommunications service" for purposes of Section 392.245 is "two-way switched voice service within a local calling scope as determined by the Commission" comprised of any of the above-listed services and their recurring and nonrecurring charges.

Section 386.020(4) states that any one of the eight services noted therein will qualify a provider for basic local telecommunications service. Section 392.180 states that the definition in Section 386.020(4) for "basic local telecommunications service" shall apply to and determine the meaning of "basic local telecommunications service" as used in Section 392.245.2.

Accordingly, an alternative local exchange carrier needs to only provide one of the services listed in Section 386.020(4) for the small incumbent local exchange carrier to elect price cap status under Section 392.245.2.

In this case, the Commission correctly found that the alternative local exchange telecommunications companies at the heart of this discussion were providing the following services pursuant to Section 380.020(4):

- (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
- (c) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (f) Standard intercept service; and
- (h) One standard white pages directory listing.

Using the relevant statutory definitions, there can be no question that the alternative local exchange carriers in this case are providing basic local telephone service in at least part of ALLTEL's service area.

Neither Commission staff, nor the Office of the Public Counsel has contested any of the other facts necessary to dispute ALLTEL's claim:

- (1) ALLTEL is a small incumbent local exchange telecommunications company;
- (2) ALLTEL provided written notice of its election to the Commission;
- (3) Alternative local exchange carriers, in this case both MSDT and Universal, have been certified to provide basic local telecommunications service in ALLTEL's service area; and

- (4) Alternative local exchange carriers, both MSDT and Universal, are providing some level of service in ALLTEL's service area.

Accordingly, the Commission should have granted ALLTEL's motion to be granted price cap status.

In its report and order, the Commission majority cites Section 392.185 as support for its position. This section states in its entirety:

392.185. Purpose of chapter. --The provisions of this chapter shall be construed to:

- (1) Promote universally available and widely affordable telecommunications services;
- (2) Maintain and advance the efficiency and availability of telecommunications services;
- (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
- (4) Ensure that customers pay only reasonable charges for telecommunications service;
- (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;
- (7) Promote parity of urban and rural telecommunications services;
- (8) Promote economic, educational, health care and cultural enhancements; and
- (9) Protect consumer privacy.

In its opinion, the majority of this Commission argued that granting price cap status to ALLTEL was akin to "full and fair competition as a substitute for regulation" and "would not be consistent with the public interest." This decision is

contrary to customary statutory interpretation; if a specific act applying to a particular class is enacted after a general act applying to an entire class, and certain provisions of the two acts cannot be harmonized, the specific act will be considered an exception to the general act and the terms of the specific act will control interpretation. See Bulova Watch Co. v. United States, 365 U.S. 753, 758 (U.S. 1961).

Section 392.185 is a general statute. It simply provides general guidance on how the chapter as a whole is to be construed. It does not require any particular thing to be done or not done. Section 392.245.2, on the other hand, is a specific statute. It sets out exactly what an ILEC must do to qualify for price cap treatment. It is a "well-established rule of statutory construction that where one statute deals with a particular subject in a general way, and a second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific." State ex rel. McKittrick v. Carolene Products Co., 346 Mo. 1049, 144 S.W.2d 153, 156. Or, put another way, "a special statute ... must prevail in all cases where it is possible to apply it, for it is a well-established rule of statutory construction that specific statutory provisions prevail over broad general provisions." State ex rel. Baker v. Goodman, 364 Mo. 1202, 274 SW2d 293, (Mo.banc 1955). In this case, Section 392.245.2 is a specific statutory provision, and Section 392.185 is obviously a general one. It would be contrary to the principles of statutory construction and lead to a ludicrous result to allow the broad general "purpose" language to negate the specific provisions that control what companies qualify for price cap treatment. Yet this is exactly the result the majority

opinion reaches.

In their opinion, the majority distinguishes the SBC price cap case¹ based on the following analysis:

Furthermore, a distinction on the facts can be made between the current case and the large ILEC cases. The facts of the Southwestern Bell case may be distinguished because the alternative carrier in that case was providing different basic local services including equal access to interexchange services. Also, the focus of the findings in that order is on whether effective competition must exist. In this case, the Commission is not finding that "effective competition" must exist before a company becomes price cap regulated. Instead, the Commission is finding that MSDT and Universal Telecom do not "provide basic local service" as the statute intends and, therefore, ALLTEL does not meet the statutory requirements to be price cap regulated.

These two attempts at distinction are meaningless. First, although the alternative carrier in the SBC price cap case may have been providing different basic local service than the two alternative carriers in this case, the majority does not explain why that difference distinguishes the two cases. In fact, by singling out one particular service (equal access), the majority is again focusing on the effectiveness of the competition – exactly the point it denies it is focusing on. And the majority completely sidesteps the question of what services the alternative local carrier in the SBC price cap case provided compared the services MSDT and Universal Telecom provide, and more importantly, why that difference should matter. The only possible reason that the difference could matter is if the alternative carrier in the SBC price cap case was providing more services, and


¹ 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 Supp. 1996, Case No. TO-97-397, 6 Mo. P.S.C. 3d 493, (1997)

thus more effective competition, than the two alternative carriers here. Again, this is the distinction that the majority denies it is making. The majority's attempts to distinguish the SBC price cap case simply fall flat. There is no meaningful difference in the facts between the two cases, and the result in this case should have followed the result in the SBC price cap case.

ALLTEL provided written notice of its intent to be regulated pursuant to the price cap statute on May 17, 2002. Neither staff nor the Office of the Public Council has contested ALLTEL's notice, including the fact that two companies have been certified to provide alternative local telecommunications service in ALLTEL's service area and that those companies are providing some sort of service in that area. The only issue in this case is whether either of the two alternative local exchange carriers are providing "basic local telecommunications service."

This opinion clearly establishes that, despite the strained rationale of the majority, ALLTEL's competitors are providing "basic local telecommunications service" as defined by the Missouri General Assembly. Therefore, ALLTEL's request to be regulated pursuant to price cap statutes should be granted.

Respectfully submitted,



Jeff Davis
Commissioner

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