BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Southwestern Bell Telephone Company, d/b/a SBC Missouri's Proposed Revised Tariff Sheet Intended to Increase by Eight Percent the Rates for Line Status Verification and Busy Line Interrupt as Authorized by Section 392.245, RSMo, the Price Cap Statute.	))))))	Case No. IT-2004-0015 Tariff No. JI-2003-2141

SBC MISSOURI'S REPLY MEMORANDUM

SBC Missouri,[1] pursuant to the Missouri Public Service Commission's ("Commission's") August 12, 2003 Order Directing Filing and Adopting Procedural Schedule, respectfully submits this Reply Memorandum.

Executive Summary

With the exception of the Office of Public Counsel ("OPC"), all parties to this case concur that the Commission as a matter of law is bound to approve SBC Missouri's proposed rate increases for Line Status Verification and Busy Line Interrupt services.[2] Section 392.245.11 requires the Commission to approve, within 30 days, tariffs filed by a price cap regulated incumbent local exchange company ("ILEC") which change the rate charged for any non-basic telecommunications service, so long as the price cap regulated ILEC: (1) provides notice to the Commission; and (2) files a tariff establishing a rate for such service that is not in excess of the maximum allowable price for such service. As SBC Missouri's proposed tariff satisfies all of the statutory requirements of Section 392.245.11, the Commission must approve it.

OPC, however, exhorts the Commission to ignore the clear mandate of the statute and conduct an investigation into the justness and reasonableness of the proposed rate increases. In

[1] Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC" or "SBC Missouri."
[2] See, Initial Memorandum of Law of CenturyTel, p. 6; Brief of Sprint Missouri, Inc., pp. 1-2; and Staff's Legal Memorandum, pp. 1, 2, 8.

doing so, OPC fundamentally misinterprets the Missouri price cap statute and misapplies the rules of statutory construction. Accordingly, the Commission should reject OPC's position and approve SBC Missouri's proposed tariffs.

Argument

I. The Price Cap Statute Mandates the Method of Regulation for Price Cap Companies.

OPC devotes the first section of its Initial Legal Memorandum to the Commission's jurisdiction over price cap regulated companies and attempts to interject a false issue. OPC contends that the totality of the Commission's jurisdiction is being threatened in this case. For example, OPC argues that "a competitive classification or price cap regulation does not set the company free from all PSC supervision of its rates and conduct. . . ."[3] ". . .Section 392.245, RSMo does not immunize SBC from PSC regulatory authority. . . ."[4] And "the only outright restriction on the Commission's oversight authority in Section 392.245 is the restriction on consideration of rate base/rate of return considerations in Section 392.240.1, RSMo 2000."[5]

OPC's concerns about the Commission's jurisdiction are misplaced. No party here claims the Commission lacks all jurisdiction over price cap regulated ILECs. Rather, the dispute focuses on the Commission's role in reviewing price changes proposed by price cap regulated ILECs for non-basic services. As Staff and all the carriers in this case have demonstrated, the Legislature has mandated that the Commission employ the price cap method of regulation.[6] Specifically, Section 392.245.2 RSMo (2000) provides that the Commission must use price cap regulation for large ILECs like SBC Missouri when it finds that a competitor has begun operating anywhere in the large ILEC's territory:

[3] OPC Initial Memorandum, p. 3.
[4] OPC Initial Memorandum, p. 5.
[5] OPC Initial Memorandum, pp. 5-6.
[6] See, Staff's Legal Memorandum, pp. 3, 7; Initial Memorandum of Law of CenturyTel, p. 7; SBC Missouri's Initial Memorandum, pp. 2-4; Brief of Sprint Missouri, Inc. p. 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 local telecommunications service and is providing such service in any part of the large incumbent company's service area.[7]

In enacting the statute, the Legislature provided the Commission with very specific and strict parameters for employing price cap regulation. The statute defines "price cap regulation" as the "establishment of maximum allowable prices for telecommunications services offered by an incumbent local exchange telecommunications company, which maximum allowable prices shall not be subject to increase except as otherwise provided in this section."[8]

With respect to non-basic telecommunications services, large ILECs were not permitted to change the maximum allowable prices until January 1, 1999. Thereafter, the maximum allowable prices for non-basic services (e.g., Call Waiting, Caller ID) could be increased annually by an amount not to exceed 8% per year:

> The maximum allowable prices for non-basic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following 12-month periods upon providing notice to the Commission and filing tariffs establishing the rates for such service in such exchanges at such maximum allowable prices.[9]

As long as price changes proposed by a price cap company fall within the maximum allowable price parameters of the statute, the statute specifically requires the Commission to approve them:

> An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of Section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the Commission within 30 days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.[10]

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[7] Section 392.245.2 RSMo (2000) (emphasis added).
[8] Section 392.245.1.
[9] Section 392.245.11.
[10] Section 392.245.4(5) (emphasis added).

II. The Commission is not Free to Ignore Legislative Directives Expressed in the Price Cap Statute.

OPC asks the Commission to ignore the mandatory directives of the price cap statute, claiming that such an interpretation would leave "a hole in the fabric of the state's power to protect its citizens,"[11] and questions the Legislature's purpose in permitting price cap regulated ILECs to increase non-basic services up to 8% per year:

> If price cap companies can increase non-basic services by 8% annually, over a 3-year period the prices could be 24% higher; after 5 years 40% higher. Prices for these services under rate of return regulation certainly did not see this type of annual increase. Was it the intent of the General Assembly to give price cap companies a free hand to increase rates 8% per year, every year, for every non-basic service all at the sole and unrestricted discretion of the company?[12]

In taking this position, however, OPC only presents half the story. Even the most cursory review of the price cap statute as a whole reveals that the statute is a set of carefully crafted provisions that balance the interests of consumers, ILECs and their competitors to achieve specific legislative goals. The Commission is not free to ignore this legislatively-established balance. While it is certainly true that the Legislature gave price cap regulated ILECs the ability to raise the maximum allowable prices for non-basic services up to 8% per year, OPC fails to explain that the legislature enacted very stringent pricing controls for basic and exchange access services. At first, the maximum allowable prices for exchange access and basic local telecommunications services of a large ILEC were frozen and could not be changed prior to January 1, 2000.[13] Thereafter, the maximum allowable prices for exchange access[14] and basic local telecommunications services[15]

[11] OPC Initial Memorandum, p. 6.
[12] OPC Initial Memorandum, p. 11.
[13] Section 392.245.4.
[14] Defined in Section 386.020(17) as "a service provided by a local exchange telecommunications company which enables the telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service.
[15] Defined in Section 386.020(4) as "two-way switched voice service within a local calling scope as determined by the Commission" comprised of any of the services and their recurring and non-recurring charges identified in 396.020(4)(a)-(h).

are required to be increased or decreased by (a) the change in the telephone service component of the consumer price index ("CPI-TS"), or (b) if requested by the telecommunications company, by the change in gross domestic product price index ("GDP-PI") minus the productivity offset established for telecommunications service by the FCC and adjusted for exogenous factors.[16]

The legislative give and take can easily be seen by the manner in which the price cap statute has been applied since its enactment. In SBC Missouri's case, it became subject to price cap regulation when the Commission found that the statutory conditions were satisfied in a September 16, 1997 Report and Order in Case No. TO-97-397.[17] Under the terms of the statute, SBC Missouri's rates for its basic local telecommunications services and exchange access services were frozen until January 1, 2000, and its rates for non-basic services were frozen until January 1, 1999. Although the statute permitted SBC Missouri to raise its maximum allowable rates for non-basic services up to 8% per year, it has not raised prices for all non-basic services across the board, but has filed increases on a selective basis. Moreover, SBC Missouri has offered a myriad of promotions and packages that provide value to its customers, including price reductions through credits and promotional prices. While OPC suggests that carrier rate increases for non-basic services under price caps will be unlimited, the operation of the statute in practice shows this is not the case. Carriers are in fact restrained by competition and other market conditions including customer willingness to pay for nonessential services. But even if the price increases were more than OPC believes are appropriate, the Commission does not have the authority to override express legislative directives.

Further, with respect to basic local and access services, the application of the price cap statute has actually resulted in price decreases. As a result of the pricing formulas in the statute,

[16] Section 392.245.4(1).
[17] Petition of Southwestern Bell Telephone Company for Determination that it is Subject to Price Cap Regulation Under Section 392.245 RSMo (1996), Case No. TO-97-397, Report and Order, issued September 16, 1997 at pp. 26, 28.

which are driven by changes in the applicable consumer price index, SBC Missouri's prices for basic local service and exchange access are now lower than they were in 1984.[18]

Moreover, OPC completely ignores the Legislature's clear public policy determination that rates for non-basic services set pursuant to the provisions of the price cap statute are, as a matter of law, just and reasonable. As Staff explained:

> As noted above, Section 392.245.1 states that the 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." (emphasis supplied). This language suggests that the price cap regulatory framework, by its design, will lead to just and reasonable rates. Such a conclusion is supported by Section 392.245.7 as well. That subsection states that price cap companies "shall not be subject to regulation under subsection 1 of section 392.240." Section 392.240.1 provides the Commission, among other things, with the authority to determine whether the rates charged by a company are "unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law" and to determine the appropriate just and reasonable rates. By relieving the Commission of this duty with respect to price cap companies, the legislature appears to have consistently indicated that the rates charged through the price cap mechanism are, by definition, just and reasonable.[19]

OPC contends that the Commission retains the right to determine whether price changes for non-basic services are "just and reasonable" even when the rates do not exceed the maximum allowable price.[20] But the cases cited by OPC make clear that whether a rate is "just and reasonable" requires an inquiry into whether a rate is sufficient "to insure the investors a reasonable return upon funds invested,"[21] an inquiry the Commission is specifically prohibited from making.[22] OPC also cites to the Commission's September 7, 2000 Report and Order in Case No. TO-99-483 ("MCA Order") as support for the view that the Commission has previously determined that it has authority to review prices for non-basic services offered by price cap regulated on a "just and

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[18] See, Direct Testimony of SBC Missouri witness Craig A. Unruh, filed July 31, 2003 in Case No. IT-2004-0015 at p. 8 (explaining that in December, 2000, the rates decreased by .92%; in December, 2001, the rates decreased by .75%; and in December, 2002, the rates increased by .9%, reflecting an overall decrease of approximately .77% from rates in effect on December 31, 1996).
[19] Staff Legal Memorandum, pp. 4-5.
[20] OPC Initial Memorandum, p. 2
[21] Id., quoting State ex rel. Washington University v. Public Service Commission, 272 S.W. 971, 973 (Mo. banc 1925).
[22] Section 392.245.7.

reasonable" standard.[23] What OPC fails to disclose, however, is that the Commission specifically found that price cap companies had flexibility in pricing MCA service, "subject to maximum allowable prices under Section 392.245, RSMo."[24]

OPC also apparently contends that the Commission's authority over price increases for non-basic services is not impacted until effective competition is found to exist.[25] Once again, OPC's interpretation of the price cap statute is simply wrong. The Legislature clearly rejected the continued application of rate base rate of return regulation without requiring a finding of effective competition. First, as OPC itself notes,[26] price cap regulation is not tied to a finding of effective competition, but to the presence of one competitor operating anywhere in a large ILEC's operating territory.[27] The price cap statute then provides for an end to price cap regulation, with complete price deregulation substituted in its place, upon a finding of effective competition.[28] Further, the price cap statute provides that if the Commission subsequently determines that effective competition no longer exists, price cap regulation may be reimposed, and requires that all maximum allowable prices shall be revised to "reflect all index adjustments which were or could have been filed from all preceding years since the company's maximum allowable prices were first adjusted pursuant to subsection 4 or 11 of this section."[29] It is crystal clear that the price cap statute did not give the Commission continued authority over determining whether rates, which do not exceed the maximum allowable price, should nevertheless be rejected on the basis that such rates were higher than would be experienced in a market subject to effective competition.

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[23] OPC Initial Memorandum, p. 4.
[24] MCA Order, p. 24.
[25] "Throughout the entire regulatory system for telecommunications in Chapter 392 RSMo 2000, competition is the precondition for changes in regulation." OPC Initial Memorandum, p. 7.
[26] "While the mere presence of a competitor in one of the incumbent's exchanges is sufficient to allow price cap regulation. . . ." OPC Initial Memorandum, p. 7.
[27] Section 392.245.2.
[28] Section 392.245.5.
[29] Section 392.245.11.

III. Sections 392.185 and 392.470 Do Not Override Section 392.245.

OPC also points to Section 392.185, which it characterizes as providing "the legislative goals and purposes of the General Assembly,"[30] and suggests that:

> By using the price cap statute in the context of the entire legislative plan for the regulation of telecommunications companies, the PSC has the authority to review the proposed rate increases to determine if the proposed rates are just and reasonable and if the proposed rates are in the public interest.[31]

But as SBC Missouri and other parties explained in their initial briefs,[32] the general purposes set forth in Section 392.185 do not authorize the Commission to override the clear provisions of Section 392.245.11. Section 392.185 merely provides general statements of intent; these general statements cannot override clear legislative mandates.[33] Only where a statute is ambiguous may the purpose and intent of the statute be considered.[34] Even then, the plain language of the statute may not be ignored.[35] Here, the mandatory obligations of Section 392.245.11 are clear and unambiguous. The Commission is not permitted to resort to its own interpretation of policy statements in Section 392.185 to override the legislative mandate to approve non-basic service price increases that are within the 8% statutory limit.

OPC also contends that Section 392.470 gives the Commission authority to impose any condition it deems fit, and can thereby override the directives of 392.245.[36] OPC is simply wrong, and is grasping at straws to support the results it believes should be reached, despite the legislative mandate. First, Section 392.470 specifically requires that any conditions be "consistent with the provisions of the chapter," thereby precluding imposition of any condition that is contrary to the provisions of Section 392.245. Second, it is black letter law that the specific provisions of a statute

[30] OPC Initial Memorandum, p. 3.
[31] OPC Initial Memorandum, p. 1.
[32] See, SBC Missouri Initial Memorandum, pp. 8-9; Initial Memorandum of CenturyTel, pp. 9-11.
[33] Anthony v. Downs Amusement Co., 205 S.W.2d 925, 929 (Mo. App. 1947); Hoover v. Abell. 231 S.W.2d 217, 221 (Mo. App. 1950).
[34] Risk Control Associates v. Melahn, 822 S.W.2d 531, 534 (Mo. App. 1991).
[35] State v. Pretended Consolidated School District No. 1, 223 S.W.2d 489, 488 (Mo. banc 1979).
[36] OPC Initial Brief, p. 3.

(e.g., 392.245) prevail over general provisions (e.g., 392.470), thus foreclosing any attempt to impose conditions inconsistent with Section 392.245.[37]

The legislature is presumed to have intended what a statute says. Consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction,[38] even when a court (or Commission) may prefer a policy different from that enunciated by the legislature.[39]

Conclusion

Since Section 392.245.11, in clear and unambiguous terms, provides that a price cap regulated ILEC may increase rates for non-basic telecommunication service by up to 8% in any 12 month period, there is no room for construction and any contention that the Commission look beyond Section 392.245.11 must be rejected. The Commission must give effect to the plain and ordinary meaning of the words in Section 392.245.11 and approve SBC Missouri's proposed tariff.

Respectfully submitted,

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[37] SBC Missouri's Initial Memorandum, pp. 9-11.
[38] Burns v. Elk River Ambulance, Inc., 55 S.W. 3d 466, 484 (Mo. App. S. D. 2001); State v. Harney, 51 S.W. 3d 519, 532 (Mo. App. W.D. 2001); Davis v. Byram, 31 S.W. 3d 148, 151 (Mo. App. E.D. 2000).
[39] Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000).

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on October 3, 2003.

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