

**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)	Case No. IT-2004-0015
Tariff Sheet Intended to Increase by Eight Percent)	Tariff No. JI-2003-2141
the Rates for Line Status Verification and Busy)	
Line Interrupt as Authorized by Section 392.245,)	
RSMo, the Price Cap Statute.)	

SBC MISSOURI'S INITIAL 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 Initial Memorandum.

Executive Summary

Section 392.245.11 requires the Commission to approve, within 30 days, a tariff filed by a large incumbent local exchange company ("ILEC") which changes the rate it charges for any non-basic telecommunications service, so long as it provides notice to the Commission and files tariffs establishing a rate that is not in excess of the maximum allowable price established for the service. Since SBC Missouri provided notice to the Commission and filed a proposed tariff establishing new rates for its Line Status Verification and Busy Line Interrupt services that are not in excess of the maximum allowable prices for these non-basic telecommunications services, the Commission must approve SBC Missouri's proposed tariff.

Although the Commission has questioned whether "the legislature intended to permit annual rate increases of 8% regardless of general economic conditions,"² the language of the

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 Order suspending Tariff and Setting Prehearing Conference, Case No. TT-2004-0015, issued July 3, 2003 at p. 2.

price cap statute leaves no doubt as to the legislature's intent. 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,³ even when a court (or Commission) may prefer a policy different from that enunciated by the legislature.⁴ Since Section 392.245.11, in clear and unambiguous terms, provides that a price cap regulated ILEC may increase rates for non-basic telecommunication services by up to 8% in any 12 month period, there is no room for construction and any contention that the Commission may look beyond Section 392.245.11 must be rejected.

Background On The Price Cap Statute

SB 507, which both the Missouri House and Senate passed overwhelmingly, significantly changed the method under which the Commission regulates ILECs in Missouri by mandating the use of price cap regulation once certain conditions are met. Pursuant to Section 392.245.2 RSMo (2000), 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:

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.⁵

³ 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).

⁴ Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000).

⁵ Section 392.245.2 RSMo (2000) (emphasis added).

The Commission found that these conditions for the mandatory application of price cap regulation were satisfied with respect to SBC Missouri in a September 16, 1997 Report and Order in Case No. TO-97-397.⁶

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.”⁷ An ILEC subject to price cap regulation is permitted to raise or lower its price for a service, as it deems appropriate, subject to the requirement that the price not exceed the maximum allowable price.⁸ The statute specifies that the initial maximum allowable prices are those in effect on December 31 of the year preceding the companies being subject to price cap regulation.⁹ In SBC Missouri’s case, the initial maximum allowable rates were those in effect on December 31, 1996.¹⁰

The Legislature made specific provision for maximum allowable prices to change over time. The maximum allowable prices for exchange access and basic local telecommunications services of a large ILEC could not be changed prior to January 1, 2000.¹¹ But thereafter, the

⁶ 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.

⁷ Section 392.245.1.

⁸ Section 392.245.4(5).

⁹ Section 392.245.3.

¹⁰ Case No. TO-97-397, Report and Order, pp. 26, 28.

¹¹ Section 392.245.4.

maximum allowable prices for exchange access¹² and basic local telecommunications services¹³ 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.¹⁴

The maximum allowable prices for non-basic telecommunications services¹⁵ of a large ILEC were not to be changed until January 1, 1999.¹⁶ 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.¹⁷

¹² 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.

¹³ 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).

¹⁴ Section 392.245.4(1).

¹⁵ Defined in Section 386.020 (as “all regulated telecommunications services other than basic local and exchange access telecommunications services, and shall include the services identified in paragraph (d) and (e) of subdivision (4) of this section. Any retail telecommunications service offered for the first time after August 28, 1996, shall be classified as a non-basic telecommunications service, including any new service which does not replace an existing service.

¹⁶ However, on an exchange-by-exchange basis, the freeze on maximum allowable prices for non-basic services would be lifted when a competitor is certified and begins providing basic local telecommunications services in that exchange. Id.

¹⁷ Section 392.245.11.

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.¹⁸

Argument

I. The Commission Must Approve SBC Missouri's Proposed Tariff Rate Increases Because It Complied With All of the Provisions of Section 392.245.11.

The Commission must approve SBC Missouri's proposed rate increases for Line Status Verification and Busy Line Interrupt service MCA Tariff because it complied with all of the statutory provisions in Section 392.245.11. Specifically, Section 392.245.11 requires the Commission to approve, within thirty days, a tariff filed by a price cap regulated ILEC which changes a rate charged for any non-basic telecommunications services, 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.

Here, there is no dispute that SBC Missouri is a price cap regulated company; that the Line Status Verification and Busy Line Interrupt services are both non-basic telecommunications services as defined by statute;¹⁹ or that SBC Missouri provided notice to the Commission and filed tariffs to increase its rates for these services by amounts that do not exceed the 8% statutory

¹⁸ Section 392.245.4(5) (emphasis added).

¹⁹ See, Direct Testimony of SBC Missouri Witness Craig A. Unruh, filed July 31, 2003, in Case No. IT-2004-0015 at p. 4.

limit.²⁰ Accordingly, the proposed tariff rate changes for Line Status Verification and Busy Line Interrupt meet the statutory criteria and must be approved by the Commission within 30 days.

II. The Price Cap Statute Does Not Permit the Commission to Consider Any Other Criteria In Evaluating Price Increases for Non-Basic Services Other than Whether the 8% Limit Has Been Met.

Despite the clarity of the statute, the Commission has questioned whether “the legislature intended to permit annual rate increases of 8% regardless of general economic conditions.”²¹

The Commission expressed the concern that:

Rate increases of eight percent under the current economic conditions would appear to violate Section 392.185(4)²² because affected customers might pay unreasonable charges for telecommunications services. Likewise, services subject to inappropriate rate increases cannot be said to be “widely affordable.” Section 392.185.²³ In particular, Section 392.185(6)²⁴ conditions competition between carriers as a substitute for regulation upon “the protection of ratepayers” and “the public interest.”²⁵

The language of the price cap statute, however, leaves no doubt as to the legislature’s intent to confine Commission review of filed rate increases for non-basic services to whether the increase complies with the 8% limit:

An incumbent local exchange telecommunications company may change 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

²⁰ Unruh Direct, p. 3.

²¹ See Order suspending Tariff and Setting Prehearing Conference, Case No. TT-2004-0015, issued July 3, 2003 at p. 2.

²² Section 392.185(4) states that “The provisions of this chapter shall be construed to . . . Ensure that customers pay only reasonable charges for telecommunications service . . .”

²³ Section 392.185(1) states that “The provisions of this chapter shall be construed to . . . Promote universally available and widely affordable telecommunications services.”

²⁴ Section 392.185(6) states that “The provisions of this chapter shall be construed to . . . 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.”

²⁵ Id. at pp. 3-4.

commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.²⁶

(a) Section 392.245 Leaves No Room for Interpretation.

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,²⁷ even when a court (or Commission) may prefer a policy different from that enunciated by the legislature.²⁸

Missouri courts have consistently held that when interpreting a statute, courts must give effect to the intent of the legislature as it is expressed in the words of the statute.²⁹ Absent a definition in the statute, the court must follow the plain and ordinary meaning of the words themselves.³⁰ There is no room for construction where a statute is clear and unambiguous.³¹ To determine whether a statute is clear and unambiguous, courts look to whether the language is

²⁶ Section 392.245.11

²⁷ 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).

²⁸ Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000).

²⁹ Ste. Genevieve School District R-II, et al. v. Board of Alderman of the City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. 2002); Burns v. Elk River Ambulance, Inc., 55 S.W. 3d 466, 484 (Mo. App. S. D. 2001); Loneragan v. May, 53 S.W. 3d 122, 126 (Mo. App. W.D. 2001); State v Harney, 51 S.W.3d 519, 532 (Mo. App. W.D. 2001); Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000); Davis v. Byram, 31 S.W. 3d 148, 151 (Mo. App. E.D. 2000); Sisco v. Bd. of Trus. of Police Retire. Sys., 31 S.W. 3d 114, 118 (Mo. App. E.D. 2000); Boone County v. County Emp. Retirement Fund, 26 S.W. 3d 257, 261 (Mo. App. W.D. 2000).

³⁰ Ste. Genevieve School District R-II, et al. v. Board of Alderman of the City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. 2002); Burns v. Elk River Ambulance, Inc., 55 S.W. 3d 466, 484 (Mo. App. S.D. 2001); Loneragan v. May, 53 S.W. 3d 122, 126 (Mo. App. W.D. 2001); State v Harney, 51 S.W. 3d 519, 532 (Mo. App. W.D. 2001); Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000); Davis v. Byram, 31 S.W. 3d 148, 151 (Mo. App. E.D. 2000); Sisco v. Bd. of Trus. of Police Retire. Sys., 31 S.W. 3d 114, 118 (Mo. App. E.D. 2000); Boone County v. County Emp. Retirement Fund, 26 S.W. 3d 257, 261 (Mo. App. W.D. 2000).

³¹ Ste. Genevieve School District R-II, et al. v. Board of Alderman of the City of Ste. Genevieve, 66 S.W. 3d 6, 10 (Mo. 2002); Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000).

plain and clear to a person of ordinary intelligence.³² When the words are clear, there is nothing to construe beyond applying the plain meaning of the law.³³ Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning.³⁴

(b) The Legislature's Use of the Word "Shall" Makes Strict Compliance Mandatory.

The law is quite clear that when the Legislature uses the word "shall," it is mandatory.³⁵ The courts have uniformly interpreted "shall" in this manner whenever, as here, the statute refers to decisions to be made or actions to be taken if particular conditions are met.³⁶ In SB 507, the Legislature has determined that price increases for non-basic services shall be approved by the Commission once limited conditions have been established. There is nothing in Section 392.245.2 that permits the Commission to refrain from granting this approval when the statutory conditions have been met.

(c) Section 392.185 Does Not Override Section 392.345.

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.³⁷ Only

³² Loneragan v. May, 53 S.W. 3d 122, 126 (Mo. App. W.D. 2001); Sisco v. Bd. of Trus. of Police Retire. Sys., 31 S.W.3d 114, 118 (Mo. App. E.D. 2000); Boone County v. County Emp. Retirement Fund, 26 S.W. 3d 257, 261 (Mo. App. W.D. 2000).

³³ State of Missouri v. John Rowe, 63 S.W. 3d 647, 649 (Mo. 2002); Sisco v. Bd. of Trus. of Police Retire. Sys., 31 S.W. 3d 114, 118 (Mo. App. E.D. 2000); Boone County v. County Emp. Retirement Fund, 26 S.W. 3d 257, 261 (Mo. App. W.D. 2000).

³⁴ State of Missouri v. John Rowe, 63 S.W.3d 647, 650 (Mo. 2002); Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000);.

³⁵ Burns v. Elk River Ambulance, Inc., 55 S.W. 3d 466, 484 (Mo. App. D. 2001).

³⁶ State v. Paul, 437 S.W.2d 98, 101 (Mo. App. 1996); Missouri Society of American Colleges v. Roderick, 797 S.W.2d 521, 524 (Mo. App. 1990); Welch v. Eastwind Care Center, 890 S.W.2d 395, 397 (Mo. App. 1995).

³⁷ 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).

where a statute is ambiguous may the purpose and intent of the statute be considered.³⁸ Even then, the plain language of the statute may not be ignored.³⁹ 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.

(d) The Specific Requirements of Section 392.245 Prevail Over the General Requirements in Section 392.200.1.

Under Missouri law, when a statute specifically addresses a requirement, the language of the specific statute will prevail over the general statute.⁴⁰ Section 392.200.1, which was originally passed in 1939 and applies to all telecommunications companies, generally requires that all charges for any service rendered by telecommunications companies shall be “just and reasonable.” A more specific statute, however, applies to price cap companies to ensure that rates of those companies are just and reasonable:

The Commission shall have the authority to ensure that rates, charges, tolls and rental for telecommunications services are just, reasonable and lawful by employing price cap regulation. As used in this chapter, “price cap regulation” shall mean 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.⁴¹

Additional language in the price cap statute confirms that the Legislature did not intend for Section 392.200.1 to apply to price cap companies. Under Section 392.245.5, a company can obtain competitive classification for its services in an exchange (and be freed from price regulation there) upon a finding that effective competition exists in that exchange. Focusing on

³⁸ Risk Control Associates v. Melahn, 822 S.W.2d 531, 534 (Mo. App. 1991).

³⁹ State v. Pretended Consolidated School District No. 1, 223 S.W.2d 489, 488 (Mo. banc 1979).

⁴⁰ City of Kirkwood v. Leslie Allen, 399 S.W.2d 30 (Mo. 1966); City of Springfield v. Forrest Smith, 125 S.W.2d 883 (1939).

⁴¹ Section 392.245.1 (emphasis added).

the Commission's authority in the event effective competition is found not to exist, the statute provides that the company will remain under price caps in that exchange and that only Section 392.200.4(c)(2) will continue to apply:

If the Commission determines that effective competition does not exist in the exchange, the provisions of paragraph (c) of subdivision (2) of subsection 4 of section 392.200 and the maximum allowable prices established by the provisions of subsections 4 and 11 of this section shall continue to apply.⁴²

The statute similarly directs that these same requirements be reimposed on the company in exchanges where the Commission had previously found the existence of effective competition in an exchange, but later determines that effective competition no longer exists.⁴³ Had the Legislature intended other provisions from Section 392.200 to apply to companies under price cap regulation, it would have included them in the list of requirements that would either “continue to apply” or be “reimposed.” Their exclusion demonstrates the Legislature's intent that such other provisions not apply to price cap companies.

Moreover, this conclusion is further supported by the price cap statute's explicit exemption of price cap companies from Section 392.240.1, which is the provision that “grants the Commission authority over the rates and charges that are charged and collected by telecommunications companies operating in Missouri.”⁴⁴ Section 392.245.7 of the price cap statute states: “A company regulated under this section shall not be subject to regulation under subsection 1 of section 392.240.” The fact that price cap companies are exempted from this

⁴² Section 392.245.5.

⁴³ Ibid.

⁴⁴ In the Matter of an Investigation for Purpose of Clarify and Determining Certain Aspects Surrounding the Provision of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996, Case No. TO-99-483 Report and Order, issued September 7, 2000 at p. 27.

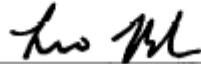
authority confirms that the Commission should evaluate price cap companies' requests to increase rates based only on the criteria set out in the price cap statute.

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,

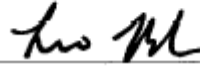
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CERTIFICATE OF SERVICE

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