

Service Copy 65
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IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

FILED³

RECEIVED⁵

SEP 19 2002

SEP 19 2002

State of Missouri ex rel. BPS
Telephone Company,

Relator,

v.

Public Service Commission of the State
of Missouri,

Respondent.

Missouri Public Service Commission *Records*
Public Service Commission

Cause No. 02CV325414

RECEIVED
SEP 19 2002
COLE COUNTY
SHERIFF'S OFFICE

PRELIMINARY ORDER IN PROHIBITIONS

The State of Missouri to Respondent Public Service Commission.

You are hereby directed to file your pleading to the petition in prohibition on or before the 21st day of October, 2002, and to serve a copy of your pleading upon W. R. England, III or Sondra B. Morgan, attorneys for Relator, whose address is 312 East Capitol Avenue, P.O. Box 456, Jefferson City, MO 65102. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

You are ordered to refrain from all action in the premises until further order.

Thomas J. Beam
Circuit Judge

Dated: September 18, 2002

Preliminary Order in Prohibition

1894 Sept 2002

Deborah M. Chesher

Directions to Clerk

The clerk should insert in the preliminary order in prohibition the names of only the respondent or respondents who are to be personally served by the officer to whom the preliminary order is delivered. The preliminary order should be signed by the judge under seal of the court and a copy of the preliminary order and a copy of the petition for each of such respondents should be delivered along with the original preliminary order to the officer and sealed in the same as a true copy. The copy of the petition may be a carbon or other copy of the preliminary order but need not be certified a true copy. If relator has no attorney, the address of relator should be stated in the preliminary order, and the words "attorney . . . for" eliminated.

Return on Service of Preliminary Order

I hereby certify that I have served the within preliminary order in prohibition:

(1) By delivering on the _____ day of _____, 20____, a copy of the preliminary order and a copy of the petition to each of the within-named respondents, the Public Service Commission of the State of Missouri;

(2) By leaving on the _____ day of _____, 20____, for each of the within-named respondents, the Public Service Commission of the State of Missouri, a copy of the preliminary order and a copy of the petition at the respective dwelling place or usual place of abode of said respondents with some person of his or her family over the age of 15 years;

(3) _____

All done in _____ County, Missouri

Sheriff's fees:

Preliminary Order)	
Non est)	
Mileage)	
)	
Total)	_____

John Hemeyer
Sheriff of Cole County, Missouri

By: _____

Directions to Sheriff

A copy of the preliminary order and a copy of the petition must be served on each respondent. For methods of service in all civil actions, see Rule 54.

Service Copy

FILED

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

SEP 18 2002 *JS*

DEBORAH M. CHESHIRE
CLERK CIRCUIT COURT
COLE COUNTY, MISSOURI

State of Missouri ex rel. BPS)
Telephone Company,)
)
Relator,)
)
v.)
)
Public Service Commission of the State)
of Missouri,)
)
Respondent.)

Cause No. 02CV325414
I Brown

PETITION FOR WRIT OF PROHIBITION

COMES NOW Relator, BPS Telephone Company ("BPS"), by and through its counsel,
and for its Petition for Writ of Prohibition, pursuant to Supreme Court Rule 97, states:

1. Relator BPS is a small incumbent local exchange telecommunications company providing telecommunications service to approximately 3900 access lines in three (3) exchanges in Missouri. BPS maintains its principal office at 120 Stewart Street, Bernie, Missouri 63822.

2. Respondent is the Public Service Commission of the State of Missouri ("Commission"), an agency of the State of Missouri established by the Missouri General Assembly to regulate public utilities, pursuant to Chapters 386 and 392 RSMo. The Commission maintains its principal office in the Governor State Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

3. This proceeding is brought and maintained to determine whether Respondent Commission acted in excess of its jurisdiction by entering its "Order Granting Authority to File

an Excessive Earnings Complaint" dated June 20, 2002, in Commission Case No. TC-2002-1076 which authorized its Staff to file an excessive earnings complaint against BPS. On August 6, Staff filed an Excess Earnings Complaint, and the Commission subsequently issued a "Notice of Complaint" to BPS directing it to file an "Answer" to the Staff's complaint within thirty (30) days of the Notice, or September 19, 2002, indicating that it intends to hear the complaint.

The Commission issued its "Order Granting Authority to File an Excessive Earnings Complaint" and "Notice of Complaint" without any consideration of BPS's previous election of price cap status pursuant to § 392.245.2, RSMo 2000. (Order, Exhibit A) However, when a small telecommunications company elects to be regulated by price cap regulation under § 392.245, the Commission no longer has jurisdiction to regulate that company through rate base/rate of return regulation. Therefore, the Commission was without authority to direct its Staff to file an excessive earnings complaint or to entertain that complaint, and in issuing the Order and proceeding with the Complaint, the Commission has exceeded its statutory authority.

The election of price cap regulation by BPS was a valid election fully-compliant with the governing statute, § 392.245.2, RSMo 2000.¹ Pursuant to the statute, the election was effective as of the date of notification to the Commission, or March 13, 2002. As of that date, BPS was

¹Section 392.245.2 states in pertinent part:

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.

no longer subject to rate base, rate-of-return regulation, and the Commission no longer has jurisdiction to regulate the rates of BPS other than pursuant to the price cap statute. Neither does the Commission have jurisdiction to authorize its Staff to file an earnings complaint or to entertain that complaint. Therefore, Relator seeks a writ of prohibition to declare that the Commission had no jurisdiction to issue the "Order Granting Authority to File an Excessive Earnings Complaint" or to consider and hear the complaint and to prevent the Commission from issuing any other orders or authorizing its Staff to take any further action in Case No. TC-2002-1076.

Factual and Procedural Background

4. On March 13, 2002, BPS 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 service in the BPS service area. 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.²

5. On May 15, 2002, the Staff of the Commission filed a Motion for Commission Authority to File an Excessive Earnings Complaint with the Commission in which it alleged that

²Section 392.245.2, RSMo 2000.

the price cap election of BPS was invalid and requested authority from the Commission to file an excessive earnings complaint against BPS.

6. On May 24, BPS filed Suggestions in Opposition to Staff's Motion. On June 20 the Commission issued its Order Granting Authority to File an Excessive Earnings Complaint. On June 28, 2002, BPS filed a Motion for Reconsideration suggesting to the Commission that it could not grant its Staff authority to file an earnings complaint until such time as it had determined whether or not BPS's election to be regulated under the price cap statute was valid. That motion was never ruled on by the Commission.

7. On July 17, 2002, BPS filed a second price cap election in which it stated that it was making the second filing in order to remove any uncertainty regarding whether its competitor, MSDT, was lawfully providing service within its exchanges. On July 22, 2002, the Commission issued a "Notice of Price Cap Election" establishing Case No. IO-2003-0012 and directing any party who wished to respond to do so by filing a pleading no later than August 12, 2002. Both Staff and the Office of Public Counsel ("Public Counsel") filed pleadings. Staff requested that the Commission reject BPS's price cap election and requested that the Commission consolidate Case No. IO-2003-0012 with the Complaint Case, TC-2002-1076. Public Counsel requested that the Commission set the matter for an evidentiary hearing. BPS filed a response to these pleadings in which it reiterated that the determination of whether the price cap election was valid must be considered first and stating its opposition to the consolidation of the two cases.

8. On August 6, 2002, the Staff filed its "Excessive Earnings Complaint Against BPS Telephone Company" ("Complaint"). On August 20, 2002, the Commission issued its "Notice of Complaint" ("Notice") directing BPS to file its answer to the Complaint within thirty (30) days.

9. On August 16, 2002, BPS filed a "Motion to Dismiss" the Complaint in which it argued that the Commission did not have jurisdiction to authorize or hear a Staff Complaint based on alleged overearnings until such time as it had been determined, after evidentiary hearing, that BPS's price cap election was invalid. BPS argued that until such a determination had been made by the Commission, it must be considered to be regulated pursuant to the price cap statute. The Commission had thus put the "cart before the horse" in allowing its Staff to file a complaint while the price cap status of the company was at issue, and the Complaint must be dismissed. To date, the Commission has not ruled on the Motion to Dismiss.

Prohibition is Appropriate

10. Respondent Commission is without jurisdiction or authority to enter the "Order Granting Authority to File an Excessive Earnings Complaint" or to further entertain the Complaint filed against BPS in Case No. TC-2002-1076 in that the Commission lacked subject matter jurisdiction to authorize its Staff to file an earnings complaint based on rate base rate of return regulation after BPS had made a valid statutory election to be regulated as a price cap company. And certainly, the Commission did not have jurisdiction to authorize the complaint until such time as it had first considered the validity of the price cap election. Instead, the Commission in its Order stated that, "BPS may choose to raise its other arguments as defenses to Staff's complaints." (Order at p.2) Subject matter jurisdiction cannot be deferred and considered within the context of the Complaint, but must be determined before the Complaint can proceed.

11. Relator institutes this proceeding and this Court has jurisdiction to hear and determine this Petition in Prohibition pursuant to Article V, § 4 of the Missouri Constitution, as

amended, and pursuant to Supreme Court Rule 97.

12. Relator has no adequate remedy except by means of this Petition in Prohibition in that:

a. The Commission is proceeding as if BPS is still under rate base rate of return regulation and ignoring the price cap election made by that company effective on March 13, 2002, and,

b. In the absence of a writ of prohibition, Relator will be forced to defend an overearnings complaint, and both the company and the Commission will expend considerable time and resources before the question of the Commission's jurisdiction to even hear the complaint has been determined, and,

13. The Respondent Commission should be preliminarily prohibited from further action pending final adjudication.

WHEREFORE, Relator prays:

1. That the Court, pursuant to Article V, § 4, exercise and assume jurisdiction herein;

2. That the Court, pursuant to Supreme Court Rule 97.04, make and enter its preliminary order in prohibition which preliminary order, during the pendency hereof, orders, restrains, and enjoins Respondent from all further action with respect to an overearnings complaint against BPS until further order of the Court;

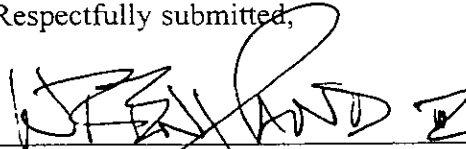
3. That the Court, after final hearing and determination, determine that Respondent has acted, and will, unless prohibited, continue to act in excess of its jurisdiction and that Respondent was without jurisdiction or authority to enter its "Order Granting Authority to File an

Excessive Earnings Complaint" and to entertain the Complaint subsequently filed by its Staff;

4. That the Court upon final adjudication make and enter a permanent Order in prohibition which determines that Respondent was without jurisdiction to enter its "Order Granting Authority to File an Excessive Earnings Complaint" and to entertain the Complaint; and

5. That the Court grant Relator such other relief as the Court deems just and appropriate in the premises and not inconsistent herewith.

Respectfully submitted,



W. R. England, III #23975

Sondra B. Morgan #35482

Brydon, Swearngen & England P.C.

312 East Capitol

P.O. Box 456

Jefferson City, Missouri 65102

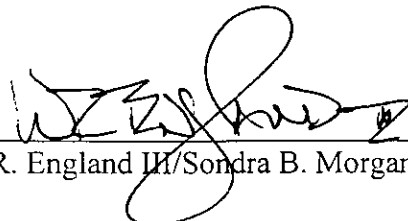
Telephone (573) 635-7166

Facsimile (573) 634-7431

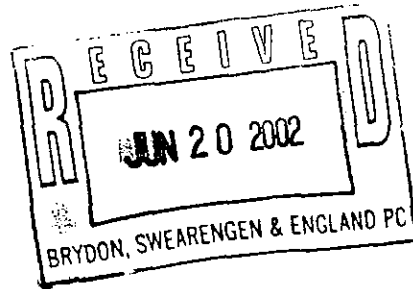
Attorneys for Relator BPS Telephone Company

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was either hand-delivered or sent by U.S. Mail, postage prepaid this 18th day of September, 2002, to the following: (1) Mr. Cliff Snodgrass, Senior Counsel, Missouri Public Service Commission, Governor State Office Building, 200 Madison Street, Jefferson City, MO 65102; and (2) Mr. Michael F. Dandino, Senior Public Counsel, Office of Public Counsel, P.O. Box 7800, Jefferson City, MO 65102.

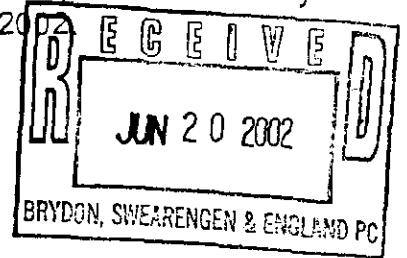


W.R. England III/Sondra B. Morgan



STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office in
Jefferson City on the 20th day
of June, 2002



Staff of the Missouri Public Service
Commission,

Complainant,

v.

BPS Telephone Company,

Respondent.

Case No. TC-2002-1076

ORDER GRANTING AUTHORITY TO FILE
AN EXCESSIVE EARNINGS COMPLAINT

This order authorizes the Staff of the Missouri Public Service Commission to file an excessive earnings complaint against BPS Telephone Company.

On May 15, 2002, Staff filed a motion requesting authority under Sections 386.240, 386.390.1, 392.200.1, and 392.240.1, RSMo, to file an excessive earnings complaint against BPS Telephone Company. The Commission issued notice of the motion to BPS, the Office of the Public Counsel, and Missouri State Discount Telephone Company. The Commission directed that any requests for intervention and responses to Staff's motion should be filed no later than June 6, 2002.

Staff states in its motion that it had been conducting an earnings investigation of BPS. Staff further states that on March 13, 2002, while the investigation was ongoing, BPS sent notice to the Commission electing to be regulated under the provisions of the price cap

statute.¹ Staff argues, however, that BPS is not a price cap company and makes two arguments to support its position.

Staff's first argument is that BPS's election of price cap regulation inappropriately relies on the presence of service provided by Missouri State Discount Telephone Company. Second, Staff argues that the existence of a reseller of basic local service is not sufficient to meet the statutory requirement of an alternative local exchange carrier.

BPS filed a response on May 24, 2002. BPS claims in its response that "the only issue to be determined is whether BPS is subject to price cap regulation." BPS argues that Staff has misinterpreted Section 392.245 to reach its conclusion that no certified provider of basic local telecommunications service is operating in the service area of BPS. BPS argues that Missouri State Discount Telephone is such a provider and has been operating in BPS's territory.

The Commission determines that whether Missouri State Discount Telephone has been providing service in BPS's service area is a factual issue that will have to be determined after the presentation of evidence to the Commission. The Commission further determines that whether Missouri State Discount Telephone is providing lawful service and, if not, whether unlawful service is sufficient to support BPS's election of price cap status are legal questions that can only be determined after the factual issue is resolved. BPS may choose to raise its other arguments as defenses to Staff's complaints.

Staff has requested permission to file an excessive earnings complaint against BPS. The Commission has jurisdiction to hear such a complaint under Sections 386.240, 386.390, 392.200, and 392.240, RSMo. The factual issues in dispute will be more

¹ Section 392.245, RSMo.

appropriately addressed after the complaint has been filed. Therefore, the Commission will authorize its Staff to file an excessive earnings complaint and to continue with its earnings investigation.

IT IS THEREFORE ORDERED:

1. That the Motion for Commission Authority to File an Excessive Earnings Complaint filed by the Staff of the Missouri Public Service Commission on May 15, 2002, is granted.
2. That the Staff of the Missouri Public Service Commission is authorized to file an excessive earnings complaint against BPS Telephone Company.
3. That this order shall become effective on June 20, 2002.

BY THE COMMISSION



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

(S E A L)

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Dippell, Senior Regulatory Law Judge

STATE OF MISSOURI

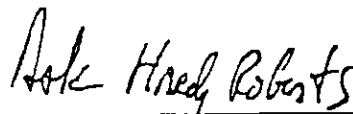
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,

Missouri, this 20th day of June 2002 .



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
June 20, 2002

CASE NO: TC-2002-1076

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

✓ W.R. England, III
Brydon, Swearngen & England
P.O. Box 456
Jefferson City, MO 65102

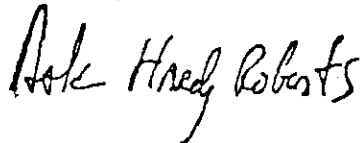
Missouri State Discount Telephone
804 Elkins Lake
Huntsville, TX 77340

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

David Carson
Assistant Secretary Treasurer
BPS Telephone Company
120 Stewart Street
Bernie, MO 63822

Enclosed find certified copy of an NOTICE in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Uncertified copies:

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

State of Missouri ex rel. BPS)	
Telephone Company,)	
)	
Relator,)	
)	
v.)	Cause No. _____
)	
Public Service Commission of the State)	
of Missouri,)	
)	
Respondent.)	

PRELIMINARY ORDER IN PROHIBITION

The State of Missouri to Respondent Public Service Commission.

You are hereby directed to file your pleading to the petition in prohibition on or before the ____ day of _____, 2002, and to serve a copy of your pleading upon W. R. England, III or Sondra B. Morgan, attorneys for Relator, whose address is 312 East Capitol Avenue, P.O. Box 456, Jefferson City, MO 65102. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

You are ordered to refrain from all action in the premises until further order.

Circuit Judge

Dated: _____

Directions to Clerk

The clerk should insert in the preliminary order in prohibition the names of only the respondent or respondents who are to be personally served by the officer to whom the preliminary order is delivered. The preliminary order should be signed by the judge under seal of the court and a copy of the preliminary order and a copy of the petition for each of such respondents should be delivered along with the original preliminary order to the officer and sealed in the same as a true copy. The copy of the petition may be a carbon or other copy of the preliminary order but need not be certified a true copy. If relator has no attorney, the address of relator should be stated in the preliminary order, and the words "attorney . . . for" eliminated.

Return on Service of Preliminary Order

I hereby certify that I have served the within preliminary order in prohibition:

(1) By delivering on the ____ day of _____, 20____, a copy of the preliminary order and a copy of the petition to each of the within-named respondents, the Public Service Commission of the State of Missouri;

(2) By leaving on the ____ day of _____, 20____, for each of the within-named respondents, the Public Service Commission of the State of Missouri, a copy of the preliminary order and a copy of the petition at the respective dwelling place or usual place of abode of said respondents with some person of his or her family over the age of 15 years;

(3) _____

All done in _____ County, Missouri

Sheriff's fees:

Preliminary Order)
Non est)
Mileage)
)
Total)

John Hemeyer
Sheriff of Cole County, Missouri

By: _____

Directions to Sheriff

A copy of the preliminary order and a copy of the petition must be served on each respondent. For methods of service in all civil actions, see Rule 54.

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

State of Missouri ex rel. BPS)	
Telephone Company,)	
)	
Relator,)	
)	
v.)	Cause No. _____
)	
Public Service Commission of the State)	
of Missouri,)	
)	
Respondent.)	

**SUGGESTIONS IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION**

This application for writ of prohibition comes before the Court because Respondent Commission has clearly acted beyond its statutory jurisdiction in issuing an "Order Granting Authority to File an Excessive Earnings Complaint" and authorizing its Staff to file a rate base, rate of return earnings complaint against Relator after Relator has made a lawful statutory election to be regulated under price cap regulation. If BPS Telephone Company is a price cap company pursuant to its election, then the Commission has no jurisdiction to regulate the company except under the provisions of § 392.245, RSMo, and no jurisdiction to authorize its Staff to file an excessive earnings complaint or to consider that Complaint. Yet the Commission ignored this primary jurisdictional issue and deferred it to be "taken with the case."

Factual and Procedural Background

On March 13, 2002, BPS Telephone Company notified the Commission through a letter from its counsel that it was making an election to be regulated under "price cap" regulation. In its letter, BPS cited Section 392.245, RSMo 2000, which allows a small incumbent local exchange telecommunications company to elect regulation under that statute when "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 incumbent company's service area." BPS stated in its March 13 letter that it was a small incumbent local exchange company serving approximately 3900 access lines, that an alternative local exchange telecommunications company (i.e. Missouri State Discount Telephone Company or MSDT) had been certified to provide basic local telecommunications service in its service area, and that MSDT was providing service in its service area. BPS stated that it had thus met all the necessary requirements to allow it to be regulated under § 392.245.

On May 15, 2002, the Staff of the Commission filed a Motion for Commission Authority to File an Excessive Earnings Complaint against Relator BPS. In this Motion, the Staff conceded that the election of price cap status by BPS on its face prevented Staff from asserting a traditional "rate of return on rate base" earnings complaint against BPS. However, the Staff challenged BPS's price cap election on two grounds. The Staff alleged that the alternative local exchange company, Missouri State Discount Telephone, was not "providing service" as contemplated by § 392.245 and that a reseller of basic local telecommunications services, such as MSDT, could not be used as a criterion for electing price cap status.

On May 24, 2002, BPS filed Suggestions in Opposition to Staff's Motion, and on June 3, 2002, Staff filed a Response to BPS's Suggestions in Opposition. On June 20, 2002, the

Commission issued its Order Granting Authority to File an Excessive Earnings Complaint. In this Order, the Commission did not address the price cap issue except to state that whether MSDT was providing service in BPS's service area would have to be determined after presentation of evidence to the Commission and that whether the service was lawful was a legal question which could only be determined after the factual issue was resolved. (Order at 2) The Commission stated that, "BPS may choose to raise its other arguments as defenses to Staff's complaints." (Order at 2) On June 28, 2002, BPS filed a Motion for Reconsideration in which it argued that the Commission did not have jurisdiction to authorize its Staff to file an overearnings complaint until it had first considered the issue of BPS's price cap election. The resolution of that issue could not be deferred and considered within the context of the complaint case as suggested by the Commission. To date, the Commission has not ruled on BPS's Motion for Reconsideration.

On August 6, 2002, the Staff filed its Excessive Earnings Complaint Against BPS Telephone Company ("Complaint"), and on August 20, the Commission issued its "Notice of Complaint" ("Notice") directing BPS to file its answer to the Complaint within thirty (30) days. On August 16, BPS filed a "Motion to Dismiss" the Complaint in which it argued that the Commission did not have jurisdiction to authorize or hear a Staff Complaint based on alleged overearnings until such time as it had been determined that BPS's price cap election was invalid. BPS argued that after its election, it must be considered a price cap company until it had been proved otherwise. Thus, the Commission was without jurisdiction to hear the Complaint until the Commission had determined, after hearing, that the price cap election was invalid. To date, the Commission has not ruled on this Motion to Dismiss.

Issuance of a Writ is Proper

The writ of prohibition is a common law remedy which allows a superior court to exercise its superintending control over an inferior court.¹ The primary purpose of the writ is to confine inferior courts to their proper jurisdiction and to prevent them from acting without, or in excess of, their jurisdiction.² The courts have issued writs in situations where there was an usurpation of judicial power because the trial court lacked either personal or subject matter jurisdiction, where there existed a clear excess of jurisdiction or abuse of discretion such that the lower court lacked the power to act as contemplated, and in certain cases where even when there was not a clear abuse of discretion or excess of jurisdiction there was no adequate remedy by appeal.³ Thus, the two requirements for the issuance of a writ can be stated as lack of jurisdiction and lack of an otherwise adequate remedy.⁴ Jurisdiction may have many meanings depending upon the context in which it is used. "Jurisdiction" generally includes three kinds of authority; over the subject matter, over the person, and the power to render the order given.⁵ "No adequate remedy by appeal" encompasses those situations where an issue is being decided wrongly and where the aggrieved party may suffer considerable hardship and expense as a consequence of such action.⁶

Relator BPS Telephone Company can demonstrate that a writ of prohibition should issue to restrain Respondent on the grounds that Respondent has acted in excess of its jurisdiction in

¹ *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. banc 1986).

² *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991).

³ *State ex rel. Noranda Aluminum*, 706 S.W.2d at 862.

⁴ *State ex rel. Martin v. Peters*, 649 S.W.2d 561, 563 (Mo. App. 1983).

⁵ *Farrar v. Moore*, 416 S.W.2d 711, 713 (Mo. App. 1967).

⁶ *State ex rel. Noranda Aluminum*, 706 S.W.2d at 862.

authorizing the Staff to file an excessive complaint before determining whether BPS's price cap election is valid, that it intends to continue to act in excess of its jurisdiction by entertaining and hearing the Complaint filed by Staff, and on the grounds that there is no adequate remedy by appeal since BPS will be irreparably harmed if it is forced to go to the time and considerable expense of defending against an excessive earnings complaint if it is ultimately determined that it is a price cap company subject to regulation under § 392.245.

Prohibition, by its nature, is generally a preventative rather than a corrective remedy, but prohibition is available even if the act has been performed as long as the judicial body is acting in excess of its jurisdiction and as long as some part of its duties remain to be performed.⁷ The Commission has exceeded its jurisdiction by authorizing its Staff to file an overearnings complaint and issuing its Notice of Complaint, but these are only the first steps in the complaint proceeding, so a writ of prohibition is the appropriate procedure to prevent further proceedings in excess of the Commission's jurisdiction. Therefore, Respondent Commission may be restrained from continuing to act in excess of its jurisdiction.

Argument

The Commission had no jurisdiction to issue the "Order Granting Authority to File Excessive Earnings Complaint" in its Case No. TC-2002-1076, or in authorizing its Staff to proceed with an earnings complaint. Neither did the Commission have authority to issue its Notice of Complaint in that proceeding, and by issuing these orders after BPS had made its lawful price cap election, the Commission acted unlawfully.

The language of § 392.245.2 regarding a small incumbent local exchange company's

⁷*State ex rel. Ellis v. Creech*, 259 S.W.2d 372, 375 (Mo. banc 1953).

qualification for price cap status is very clear. It states:

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 was stated above, BPS made a valid and lawful election to be regulated by price cap regulation pursuant to this section on March 13, 2002. Pursuant to the statute, BPS was only required to provide "written notice" to the Commission of its election. In its letter providing that written notice, BPS stated that: 1) it was a small incumbent local exchange company (serving approximately 3900 access lines); 2) an alternative local exchange telecommunications company (i.e. Missouri State Discount Telephone Company) had been certified to provide basic local telecommunications service (MoPSC Case No. TA-2001-334, *Order Granting Certificate to Provide Basic Local Exchange and Interexchange Telecommunications Service*, issued March 16, 2001); and 3) such alternative local exchange telecommunications company was providing service in BPS's service area. This is all that is required by the statute for BPS to qualify as a price cap company.⁸

Despite this valid election, the Staff of the Commission filed its Motion for Commission Authority to File an Excessive Earnings Complaint on May 15, 2002. Although conceding that a complaint would not be appropriate if BPS were a price cap company, the Staff challenged the election on the grounds that the alternative local exchange telecommunications company

⁸On July 17, 2002, BPS filed a second price cap election in which it stated that it was making the second filing in order to remove any uncertainty regarding whether its competitor, MSDT, was lawfully providing service within its exchanges.

operating in BPS's service area was operating unlawfully since its tariff did not list the BPS exchanges, and that the alternative local exchange telecommunications company providing service in the BPS service area was not an effective competitor as envisioned by the statute as MSDT provided resold, prepaid telecommunications service. BPS filed Suggestions in Opposition to Staff's Motion in which it refuted Staff's assertions about the validity of the price cap election, but also pointed out to the Commission that the issue of whether BPS was a price cap company was primary in its consideration, because if BPS was a price cap company, the Commission had no further jurisdiction to authorize a rate base, rate of return investigation and complaint. When the Commission issued its Order it ignored this argument and stated that "BPS may choose to raise its other arguments as defenses to Staff's complaints." (Order at 2) In other words, the complaint case would go forward, and BPS would be forced to defend an earnings complaint that the Commission never had jurisdiction to hear in the first place.⁹

BPS believes that a writ of prohibition is the proper remedy to prevent further action by the Commission in excess of its jurisdiction and to prevent further hardship and expense to BPS as a consequence of the Commission's actions. The Commission simply has no jurisdiction to authorize its Staff to file an overearnings complaint at this time, nor, more importantly, does it have jurisdiction to "hear" such a complaint. The Commission is a creature of statute and limited thereby.¹⁰ Neither convenience, expediency or necessity are proper matters for consideration in

⁹BPS estimates that the cost of preparing for and litigating the complaint could be as much as \$75,000 to \$100,000.

¹⁰*State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

the determination of whether or not an act is authorized by the statute.¹¹ Subject matter jurisdiction exists only when the tribunal "has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed."¹² Jurisdiction concerns the right, power and authority of a court to act.¹³ Jurisdiction is defined by statutory provisions, and the letter of the law is the limit of power.¹⁴ The only power the court, or the Commission acting in a quasi-judiciary capacity, has when it lacks jurisdiction is to dismiss the action; any other actions or proceedings are null and void.¹⁵ The Commission simply does not have jurisdiction to authorize its Staff to file a complaint or to hear such a complaint at this time.

By proceeding without either accepting BPS's price cap election or, in the alternative, determining whether Staff's allegations were valid, the Commission has acted unlawfully and in excess of its jurisdiction. By ignoring the BPS price cap election and authorizing the complaint, the Commission accepted its Staff's allegations as true without any evidentiary or legal support. Without relief from this Court, BPS will be forced to defend an overearnings complaint, and, at the same time, argue the legal issue of the validity of its price cap election.

BPS believes that the Commission should have recognized its price cap status because the legal issues raised by Staff regarding the validity of its price cap election can either be resolved by a plain reading of the language of the statute, or have been fully considered and determined by

¹¹*State ex rel. Missouri Cable Telecommunications Association v. Missouri Public Service Commission*, 929 S.W.2d 769, 772 (Mo. App. W.D. 1996), citing *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923).

¹²*State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 72 (Mo. banc 1982), citing *Cantrell v. City of Caruthersville*, 359 Mo. 282, 290, 221 S.W.2d 471, 476 (1949).

¹³*Heinle v. K & R Express Systems, Inc.*, 923 S.W.2d 461, 464 (Mo. App. E.D. 1996).

¹⁴*Wells v. Noldon*, 679 S.W.2d 889, 891 (Mo. App. E.D. 1984).

¹⁵*Heinle*, 923 S.W.2d at 464.

the Commission, as well as this Court, in other cases regarding price cap elections of large incumbent local exchange companies.¹⁶ Therefore, the Commission should have respected the price cap election made by BPS and considered the election valid until found otherwise.

In its Suggestions in Opposition to Staff's Motion, BPS argued that a plain reading of the applicable statute shows that BPS is a price cap company. Staff has attempted to insert words and requirements in the statute that are simply not there. For example, Staff argues that the alternative local exchange telecommunications company providing service in the BPS service area is not "providing service" because it is a "prepaid" reseller and does not provide all of the services required for minimum basic local telecommunications service under Commission rules. MSDT was, however, granted a certificate of service authority to provide basic local telecommunications service by the Commission in Case No. TA-2001-334. Section 392.245 only states that an alternative local exchange telecommunications company must be certificated to provide basic local telecommunications service in the incumbent's service area and is in fact providing service in that area. The statute does not exclude resellers or prepaid resellers, nor does it put restrictions or qualifications on the type of service provided by that carrier.

The issue of whether the statute requires "effective competition," as opposed to mere competition, was fully litigated in the context of the first large incumbent telecommunications

¹⁶*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, 6 Mo. P.S.C. 3d 493 (September 1997); In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation Under RSMo Section 392.245 (1996), Case No. TO-99-294, Order Denying Rehearing and Granting Reconsideration (February, 1999); and State of Missouri ex rel. Public Counsel Martha S. Hogerty et al. v. Public Service Commission of the State of Missouri, Cole County Circuit Court Case Nos. CV197-1795CC and CV197-1810CC (August 1998).*

company to request price cap status from the Commission. In the Southwestern Bell Telephone Company ("SWBT") case, the parties argued that the level of competition provided by the competitor, Dial U.S., was "trivial," because Dial U.S. was not an active, facilities-based competitor but merely resold Southwestern Bell's services.¹⁷ The Commission stated, however, that after a thorough review of the record it found that none of the parties had provided the Commission with persuasive legal argument in support of this contention. The Commission stated, "If the legislature had intended the conversion to price cap regulation to be contingent on the existence of 'effective competition,' it could have included such language in Section 392.245.2, as it did in Section 392.245.5."¹⁸

The Commission further addressed the statutory construction of this provision and the definition of "effective competition" in the SWBT Price Cap case when it stated:

With respect to the prerequisites of Section 392.245.2, the parties opposing SWBT's petition appear to want to imprint upon that statute requirements that are not there. "Provisions plainly written in the law, or necessarily implied from what is written, should not be added by a court under the guise of construction to accomplish an end that the court deems beneficial. 'We are guided by what the legislature says, and not by what we think it meant to say.'" *Wilson v. McNeal*, 575 S.W.2d 802, 809 (Mo. App. 1978) (citations omitted). As previously indicated, nowhere in Section 392.245 is there a requirement that "effective competition" precede price cap regulation.¹⁹

Thus resellers as well as prepaid providers such as MSDT provide service sufficient to meet the requirements of Section 392.245. The language of the statutory provision for large incumbent local exchange carriers in this regard is identical to the language for small

¹⁷*Southwestern Bell Telephone Company Price Cap Case*, 6 Mo. P.S.C. at 502.

¹⁸*Southwestern Bell Telephone Company Price Cap Case*, 6 Mo. P.S.C. 3d at 503. The Commission's decision in Case No. TO-97-397 was upheld by the Cole County Circuit Court in Case No. CV197-1795CC and CV197-1810CC.

¹⁹*Southwestern Bell Telephone Company Price Cap Case*, 6 Mo. P.S.C. 3d at 505.

incumbents. Thus the issue of whether the competition must be "effective competition" has already been fully-addressed and decided by the Commission. In the SWBT price cap case, the Commission said:

[N]owhere in Section 392.245 is there a requirement that the alternative local exchange telecommunications company be facilities-based rather than a reseller before price cap regulation can be employed. "[C]ourts must construe a statute as it stands, and must give effect to it as it is written. [A] court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." The parties argument that the language in Section 392.450.1 and 392.451.1 constitutes such an implication is not persuasive. These sections describe the certification process for the provision of basic local telecommunications service. Significantly, the statutes make no distinction in the requirements for facilities-based competitors and resellers. More importantly, Section 386.020(46) defines the resale of telecommunications service as "the offering *or providing* of telecommunications service primarily through the use of services or facilities owned or provided by a separate telecommunications company Thus, there is nothing to suggest that a reseller does not *provide* service to its customers."²⁰ (Citations and footnotes omitted, emphasis in original.)

Thus, this issue has been fully-considered and decided by the Commission. And, in this Court's review of that decision, the Court stated that, "there is no doubt that the competition envisioned by 392.245 would be met by the competition provided by a single reseller of telecommunications services, although Section 392.245.2 does not specify that any designated level of competition be obtained before price cap regulation is applied."²¹ The Commission cited this language when considering the GTE Midwest Incorporated petition for price cap regulation.²² Staff correctly notes that its present interpretation of § 392.245 was not applied by the Commission in the GTE Midwest Incorporated price cap petition, Case No. TO-99-294, and

²⁰Southwestern Bell Telephone Company Price Cap Case, 6 Mo. P.S.C. 3d at 505.

²¹*State ex rel. Public Counsel Martha S. Hogerty, et al. v. Public Service Commission of the State of Missouri*, Cole County Circuit Court Case Nos. CV197-1795CC and CV197-1810CC at p. 6.

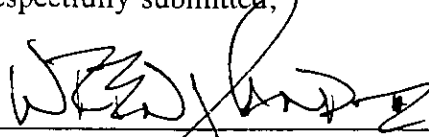
²²*In the Matter of the Petition of GTE Midwest Incorporated Regarding Price Cap Regulation under RSMo Section 392.245 (1996)*, Case No. TO-99-294, pp. 3-4.

the fact that Staff raised the issue in this proceeding, and did not do so in the GTE case, belies the merit of such an argument. The Commission should have followed this precedent and recognized BPS was a price cap company subject to price cap regulation instead of authorizing this Complaint in excess of its jurisdiction. And, at any rate, BPS must be considered a price cap company until determined otherwise. The Commission has thus acted, and continues to act, in excess of its jurisdiction by refusing to acknowledge the price cap election made by BPS.

Conclusion

The Commission had no jurisdiction to authorize its Staff to file an excessive earnings complaint against BPS or to docket and consider the Complaint after it was filed, because Relator BPS Telephone Company had made a lawful statutory election to be regulated by price cap regulation before the complaint was authorized and filed, and, until that election was proved invalid, the Commission had no jurisdiction to authorize or hear a complaint based on rate base rate of return regulation. Thus, the Court should enter its preliminary Order in Prohibition and prohibit the Commission from taking any further action in Case No. TC-2002-1076.

Respectfully submitted,



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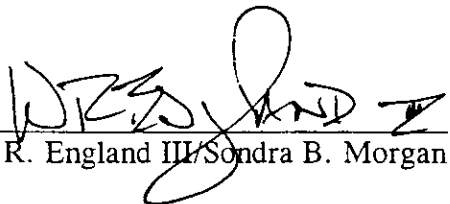
Attorneys for BPS Telephone Company

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 18th day of September, 2002, to the following parties:

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