

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

In the Matter of the Revised Tariff Filing of	)	File No. TR-2012-0299
MoKan Dial, Inc.	)	Tariff No. JI-2012-0442

MoKan Dial Inc. Opposition to OPC Motion to Compel
and OPC's Request for Expedited Treatment
and
Request for Protective Order

Comes now MoKan Dial Inc. ("Company"), for its Opposition to OPC's April 12, 2012 Motion to Compel Discovery and Request for Expedited Treatment, and for the Company's Request for a Protective Order that OPC's earnings review discovery requests not be compelled until and unless the Commission rules that the Company is subject to rate of return regulation, and orders an earnings review, states as follows:

1. As a point of clarification, the Company did propose that the local rate increases be offset by optional MCA rate decreases. The Company supplied Staff and OPC with the local and MCA customer counts and revenue calculations. These counts and calculations, based on December 31, 2011 customer counts, establish that the Company will increase local revenue by \$13.44 more per year than the MCA revenue decrease. The schedule showing these calculations is Attachment 1 to William Voight's March 30, 2012 Memorandum to approve the tariffs, attached to Staff's March 30, 2012 Response and Recommendation.¹ For ease of reference, it is also attached hereto.

2. The Proposed tariffs were filed March 14, 2012. Their proposed effective date is July 1, 2012.

¹ The "Phase 2" rate changes set forth in Attachment 1 are not set forth in the tariffs currently before the Commission. Phase 2 would have resulted in an overall net revenue decrease to the Company.

3. On March 16, OPC moved to suspend the tariffs for 150 days beyond July 1 in order to conduct an earnings review. The Company has opposed OPC's request for an earnings review on the ground that, due to election of waiver or rate of return regulation, the Company is no longer subject to rate of return regulation, and there is no longer jurisdiction to conduct an earnings review. The Commission has yet to rule on OPC's Motion to Suspend. The Commission has yet to determine if the Company is subject to an earnings review.

4. OPC's Discovery Requests, Motion to Compel, and Request for Expedited Treatment, are premature. They should not be considered until and unless the Commission suspends these tariffs specifically for an earnings review. As other companies are awaiting the outcome of this proceeding, Company suggests that the Commission act soon to prevent administrative burdens associated with a multitude of last minute simultaneous filings.

5. OPC failed to await the Commission's decision with respect to OPC's Motion to Suspend before propounding rate-of-return based earnings review discovery requests to the Company. This forced Company to object to responding to an earnings review on the grounds it is no longer subject to an earnings review. If the Company is not subject to an earnings review, there can be no earnings review hearing. OPC's discovery requests cannot be considered to be reasonably calculated to lead to the discovery of admissible evidence if can be no earnings review hearing.

6. OPC failed to abide the Company's suggestion the discovery requests be put on hold until and unless the Commission suspended the tariffs for an earnings review. OPC proceeded to Move to Compel Discovery before the Commission has addressed the

seminal issue of whether an earnings review can or should be conducted. Moreover, OPC has requested the Commission to expedite its decision on the Motion to Compel so OPC can receive responses to the discovery by April 27, 2012, regardless of the July 1 proposed effective date, and regardless of the fact the Commission has not decided whether an earnings review should be initiated.

7. OPC is being unreasonable. It refuses to accept the fact the legislature authorized the Company to elect waiver of rate of return. It refuses to accept that the Company is not subject to the earnings review for which OPC's discovery is directed. OPC refuses to accept that it is the Commission's decision, not OPC's, as to whether an earnings review will be conducted. It refuses to accept that the Commission no longer possesses the authority to subject Company to a rate of return based earnings review. OPC asks for an expedited ruling on a discovery dispute which presupposes the Commission will decide the Company is subject to an earnings review.

8. Company opposes OPC's Request for expedited treatment. It makes no sense for the Company to have to expend the quantity of time and labor necessary to comply with OPC's discovery requests unless and until the Commission Orders that an earnings review will be conducted.

9. OPC claims that it has broader discovery authority than other litigants. Company disagrees that the cases OPC cites for this claim have any applicability here. Company has reviewed the 2000 Missouri American Water Company discovery decision, and the 2002 Union Electric discovery decision. Both cases involved a utility that was subject to rate of return regulation. Proceedings were pending that would result in

hearing, and the Commission possessed rate of return jurisdiction over those companies. There was no statutorily authorized waiver of rate of return regulation as we have here.

10. Company agrees that OPC, or any litigant to an earnings review, is entitled to discovery of information reasonably calculated to lead to the discovery of admissible evidence in an evidentiary hearing. There has to be an evidentiary hearing the Commission is statutorily authorized to conduct in order for discovery to be permissible. The Commission can conduct hearings that it is statutorily authorized to conduct only. If the Company is not subject to rate of return regulation, there can be no earnings review hearing. OPC's discovery requests assume an earnings review hearing will be conducted. such hearing. If no hearing is authorized to be conducted by the Commission, there can be no evidence that the discovery is calculated to produce. For this reason OPC's discovery requests lack reasonable temporal, geographic, or subject matter limitations, and are impermissible use of the discovery process. *State ex rel. American Standard Ins. Co. v. The Honorable Thomas C. Clark*, 243 SW3d 526, 531 (Mo App WD 2008).

11. OPC is statutorily limited to proceedings before the Commission and appeals from the Commission. §386.710.1 (2) RSMo. Implicit in this limitation is that the OPC is limited to participating in proceedings that are authorized to be conducted by the Commission. If, due to a statutorily-authorized waiver, the Commission is no longer authorized to conduct an earnings review of the Company, OPC cannot be heard to request a proceeding the Commission is not authorized to conduct. OPC can't request an earnings review of a company over whom the Commission has no rate of return regulatory jurisdiction. If OPC had this authority, why didn't it exercise such authority over all the rate increases implemented by AT&T and Centurylink over the past decade?

OPC has failed to demonstrate Good Cause

12. OPC cites § 386.450 RSMo as its authorization to obtain an Order compelling the requested discovery from Company. OPC has failed to demonstrate “good cause shown”, as required by this statute, for the following reasons:

a. Company’s tariffs were filed with the Commission in response to a Federal Communications Commission (FCC) *Order* that establishes minimum local rate levels which must be charged in order for the companies to continue receiving full federal HCL USF support.² In essence, the FCC concluded that local rates below the \$10.00 rate floor are not just and reasonable;

b. The FCC also mandated substantial reductions in the Company’s intrastate intercarrier compensation (ICC) rates for access and intraLATA wireless traffic. These actions have essentially preempted the Commission’s authority over intrastate ratemaking;

c. OPC accurately states, “The Commission has recognized that information sought by the Public Counsel, if not relevant, may well lead to other information which is relevant.”³ But OPC overstates its case by arguing OPC “can request records they want in their investigation without any showing that it is otherwise discoverable or is relevant to a specific case even if it is [in]admissible . . .”⁴ OPC Cites §386.450 as authority for its “we can ask anything of any utility at any time” proposition. But OPC overlooks the fact that even §386.450 requires

² *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 et al., FCC 11-161. The FCC’s *Order* determined that its rule changes will help further the statutory goal “of ensuring . . . quality services at ‘just, reasonable, and affordable rates...” *Id.* at ¶194.

³ OPC Motion, p. 3.

⁴ *Id.*

a showing of good cause. Here, the Companies are no longer rate-of-return regulated by the Commission, so the information sought by OPC is no longer authorized by law under the Commission's statutory jurisdiction, not relevant, and has no possibility of leading to relevant information;

d. OPC's insistence on seeking irrelevant earnings information without statutory authority also fails the "good cause" standard as a matter of logic. Specifically, the company's historical earnings will have no bearing or relevance on its future earnings because of the dramatic changes to the Companies' ICC rates structures required by the FCC to be effective on July 1, 2012. Even if OPC were entitled to an earnings review, the historical information requested by OPC could not possibly be relevant to Company's earnings on and after July 1, 2012 (the effective date of the rate tariffs). Simultaneous reductions in intrastate access rates, reciprocal compensation rates, and VoIP rates will render any historical analysis meaningless.⁵

⁵ See PSC Staff Recommendations, filed March 30, 2012 at ¶9 :

Although an earnings review is precluded, assuming *arguendo* that one is permitted, the Staff believes that the Public Counsel's request for one at this time is unreasonable. **The same FCC Order that established the minimum rates for basic local service required that local exchange telecommunications companies reduce their access rates.** If an earnings review were to be done, it would be unfair to do it when the Company appears to be raising rates, but not when it will reduce rates. **If an earnings review were permitted, the Public Counsel's request would be premature, and should be postponed until all of the increases and reductions ordered by the FCC are completed.**

(emphasis added); and also see Attached Staff Memorandum, pp.3-4 (citing Case No. TT-2012-0317):

e. Public Counsel fails to meet the necessary “good cause” standard because the cost of conducting Public Counsel’s investigation will exceed the cost of the Company’s proposed rate increases. Even if Public Counsel were authorized by law to seek the information it requests, Public Counsel’s motion to compel would fail the “good cause” standard because the cost to the Company and its customers of even a limited, rudimentary earnings investigation would exceed the net \$13 rate increases at issue. The expenses of a rate case, which are passed on to customers through the rate case process, are significantly higher on a per-customer basis for small companies because they are borne by a smaller customer base. Here, the Company only serves a few hundred customers. Each customer’s share of rate case expense would be significantly higher than a larger company ratepayer’s share.⁶

f. Finally, Public Counsel disregards the practical implications of the FCC’s *Order*. Issued on November 18, 2011, the FCC’s *Order*, including proposed rules and appendices, is over 750 pages long. Compliance with the FCC’s *Order* is requiring significant Company resources, including consultation with attorneys, outside consultants, and PSC Staff. The *Order* makes drastic

Staff respectfully reminds the Commission that the FCC is also requiring reductions to company exchange access rates, so any “earnings review” . . . would necessarily require a review of earnings related to the decrease in access rate revenues . . .

⁶ See e.g. *In the Matter of the Tariff Filing of Algonquin Water Resources of Missouri, LLC, to Implement A General Rate Increase for Water and Sewer Service Customers in its Missouri Service Area*, Case No. WR-2006-0425, *Report and Order*, issued March 13, 2007, stating “[T]he rate case expense amounts to **“more than two dollars per week for each [ratepayer]**, contrasted with KCPL’s rate case expense costing each ratepayer about 11 cents per month, and Aquila’s rate case expense costing each ratepayer about seven cents per month.”

changes to the telecommunications industry which will require the Company to make numerous filings with the PSC on an expedited timeframe. Many of these filings must be made on or before July 1, 2012.

g. The FCC's mandated changes involve significant filings with the FCC related to the Company's ICC rates, including intrastate access rates and reciprocal compensation rates. For example, the Company (and all of Missouri's other approximately 40 ILECs) must file reductions in intrastate access rates, and PSC Staff has requested that these filings be made on or about by May 1, 2012.⁷ Likewise, the Company (and all of Missouri's other ILECs) must negotiate and file amendments to its interconnection agreements with numerous wireless carriers, which are also filed with the PSC.⁸ These interconnection agreement modifications alone will likely result in over one hundred filings with the Commission. Additionally, the Company is currently burdened by contentious litigation involving Halo Wireless Inc.'s intrastate access avoidance scheme. In sum, the Companies and the Commission's Staff will have their hands full over the next few months and should not be asked to oblige OPC by providing information for an earnings investigation that lacks both statutory authority and practical meaning.

13. Regardless of the breadth of OPC's authority to conduct earnings reviews of utilities subject to rate of return regulation, there is no authority for the Commission to

⁷ See Case No. TT-2012-0317, *In the Matter of the Tariffs to Reduce Access Rates of Local Telecommunications Companies Pursuant to FCC Report and Order 11-161*.

⁸ See e.g. Case No. IK-2012-0337, *In the Matter of the Application of Choctaw Telephone Company for Approval of an Amendment to Its Traffic Termination Agreement with New Cingular Wireless PCS, LLC d/b/a AT&T Mobility*.

conduct an earnings review of Company. The Company is not subject to rate of return regulation, and as such is not subject to earnings reviews. OPC has failed to demonstrate good cause upon which the Commission could compel compliance with the discovery requests.

WHEREFORE, the Company respectfully requests that the Commission deny OPC's Motion to Compel, deny OPC's Request for Expedited Treatment, and grant the Company's request for a protective order that the Company not be required to respond to OPC's discovery requests.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was electronically mailed this 20th day of April, 2012 to PSC Staff, the Office of the Public Counsel, Larry Dority, WR England III, and to Brian McCartney.

/s/Craig S. Johnson
Craig S. Johnson

MoKan Dial, Inc. (MO)**Data as of 12/31/2011****Phase 1:**

	Access Lines	Current Rate *	Proposed Rate	Per Line Increase	% Increase	Annual Rev Increase
R-1	548	\$ 5.90	\$ 10.00	\$ 4.10	69%	\$ 26,961.60
B-1	91	\$ 9.15	\$ 10.00	\$ 0.85	9%	\$ 928.20

Total Increase to Basic Local Service Revenue	<u>\$ 27,889.80</u>
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MCA Plan:

Residence	325	\$ 32.50	\$ 25.59	\$ (6.91)	-21%	\$ (26,949.00)
Business	23	\$ 70.70	\$ 67.34	\$ (3.36)	-5%	\$ (927.36)

Total Decrease to MCA Revenue	<u>\$ (27,876.36)</u>
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Phase 2:

	Access Lines	Current Rate	Proposed Rate	Per Line Increase	% Increase	Annual Rev Increase
R-1	548	\$ 10.00	\$ 14.00	\$ 4.00	40%	\$ 26,304.00
B-1	91	\$ 10.00	\$ 14.00	\$ 4.00	40%	\$ 4,368.00

Total Increase to Basic Local Service Revenue	<u>\$ 30,672.00</u>
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MCA Plan:

Residence	325	\$ 25.59	\$ 18.84	\$ (6.75)	-26%	\$ (26,325.00)
Business	23	\$ 67.34	\$ 51.51	\$ (15.83)	-24%	\$ (4,369.08)

Total Decrease to MCA Revenue	<u>\$ (30,694.08)</u>
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Total Increases from Phase 1 and 2 of Local Rate Increases	\$ 58,561.80
Total Decreases to MCA Plan Revenue	<u>\$ (58,570.44)</u>
Difference	<u>\$ (8.64)</u>

* Includes TT Charge