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January 29, 1999

Mr. Dale Hardy Roberts  
Secretary  
Missouri Public Service Commission  
301 W. High Street, Room 530  
Jefferson City, MO 65102

FILED

JAN 29 1999

Missouri Public  
Service Commission

RE: TO-99-294

Dear Mr. Roberts:

Enclosed for filing with the Commission is an original and 14 copies of :

**OFFICE OF THE PUBLIC COUNSEL'S  
MOTION FOR REHEARING**

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Michael F. Dandino  
Senior Public Counsel

cc: Attorneys of Record

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

In the Matter of the	)	
Petition of GTE	)	
Midwest Inc. Regarding	)	Case No TO-99-294
Price Cap Regulation Under	)	
RSMo Section 392.245 (1996)	)	

**FILED**  
JAN 29 1999  
Missouri Public  
Service Commission

**OFFICE OF THE PUBLIC COUNSEL'S  
MOTION FOR REHEARING**

Comes now the Office of the Public Counsel and, pursuant to Section 386.500, RSMo. moves the Public Service Commission to set aside its order entered in this case on January 26, 1999 approving GTE's price cap application and to reconsider the order and grant rehearing in this application case. In support of its motion for rehearing of the Commission's order, Public Counsel states as follows:

1. GTE Midwest Inc.'s application for a determination by the Commission that it is subject to price cap regulation marks a significant departure from the present form of rate regulation in the State of Missouri and represents a crucial event in the development of a competitive marketplace for telecommunications in the local exchange. This departure from the status quo and this determination of qualification for price cap regulation must be accompanied by a thorough investigation of the relevant facts to determine whether GTE has fulfilled all the legal requirements. The burden is on the applicant GTE to demonstrate compliance in all respects by facts shown in the evidentiary record before the Commission so that the Commission can make factual findings and conclusions of law.

2. Public Counsel states that the Commission erred as a matter of law when it issued an order approving GTE's application without docketing this petition for hearing, without notifying the public and the industry, without allowing intervention of any interested parties, without hearing any evidence, without requiring any sworn testimony filed in support of the application to provide evidence of compliance with the law, without giving any party, including the Office of the Public Counsel, an opportunity to be heard and without an opportunity to cross-examine any GTE witness filing testimony or otherwise providing evidence in support of the application, without permitting Public Counsel or any interested party to file evidence in opposition to the application and testimony in support of the application, without providing adequate notice in its agenda that the Commission intended to take up and decide the substantive issues in the application based solely on the unverified application and issue a final order, without providing notice to Public Counsel and to any interested party that it intended to take official notice of certain Commission records and certain information in Commission records which are not filed or a part of this case as required by Section 536.070, RSMo and without notice that it intended to make its final decision on this application based on such officially noticed facts, without basing its order and decision upon an evidentiary record, without making findings of fact and conclusions of law based upon competent and substantial evidence on the whole record, without providing on the face of the order the vote of the Commissioners to demonstrate that the order was approved by a majority of the Commission and without providing Public Counsel or any interested party due process of law to be heard at a meaningful time and in a meaningful manner to protect the rights of the public.

3 On January 26, 1999, the Commission issued its Order in Case No. TO-99-3294 approving price cap regulation for GTE Midwest, Inc. pursuant to GTE's unverified application. The decision was effective February 5, 1999.

4. Public Counsel files its Application For Rehearing pursuant to Section 386.500, RSMo. and 4 CSR 240-2.160 and states the specific the reasons warranting a rehearing.

5. Public Counsel asks the Commission to set aside its order and grant rehearing in Case No. TO-99-294 because the decision is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is in violation of constitutional provisions of due process, is unauthorized by law, made upon an unlawful procedure and without a fair trial, and constitutes an abuse of discretion, all as more specifically and particularly described as follows:

- A. The Public Service Commission erred as a matter of fact and law when it issued its order making a determination that GTE met the conditions in Section 392.245.2, RSMo. and ordered that GTE is subject to price cap regulation.
- B. The Public Service Commission erred as a matter of fact and law when it said GTE satisfies the conditions of Section 392.245.2, RSMo, when there was no evidentiary record made before the Commission. The Commission made its determination based solely on the 3 page petition filed by GTE comprised of four paragraphs and a prayer for relief. The petition is not verified.

Further, it makes allegations of fact and makes legal conclusions and factual conclusions without supporting facts, certified official documents, affidavits, or supporting sworn testimony to demonstrate that GTE meets the statutory qualifications for price cap treatment.

C. The Commission improperly considered and acted upon official records of the Commission not offered or introduced into any record proceeding in violation of Section 536.070 (5).

D. The Commission improperly took official notice of Commission records without complying with the provisions of Section 536.070(6) providing for notice of proposed taking of official notice and for a reasonable opportunity to contest the facts or to show that it would not be proper for the Commission to officially notice such facts.

E.. The Public Service Commission erred as a matter of fact and law and abused its discretion and deprived Public Counsel and other interested parties of a lawful hearing and fair trial by issuing an order without allowing interventions in the proceeding and by making a final decision without taking evidence or holding a hearing. This is a contested case under Section 536.010 (2), RSMo, in that the Commission must make a determination of the qualifications for price caps under Section 392.245.2, RSMo. The Commission must hold a hearing to receive evidence to support the

eligibility of GTE. The legal rights, duties, and privileges of GTE, other telecommunication companies, GTE customers and the public are affected by the Commission's determination of eligibility of price caps.

- E. The determination was not based on substantial and competent evidence on the whole record in that no hearing was held. The Commission's order is not supported by any sworn evidence and is void.
- F. The Public Service Commission deprived Public Counsel of a lawful hearing and fair trial by making its determination that GTE qualified for price cap regulation without an evidentiary hearing, without sworn evidence, without the opportunity to cross-examine witnesses in violation of Section 536.070 (2) and without due process as guaranteed by the Fourteenth Amendment, United States Constitution and Mo. Const. (1945, as amended) Art I, sec.10
- G. The Public Service Commission acted unreasonably by expediting this proceeding and limiting the scope of its inquiry solely to GTE's petition so that the Office of the Public Counsel and other interested parties were denied the opportunity to be heard and to present relevant evidence necessary for the Public Service Commission to act under the law.

- H. The Commission's agenda for the meeting at which the order was adopted did not provide reasonable notice calculated to inform the public of the proposed action the Commission intended to take on GTE's petition in that the agenda only referred to "Order Regarding Price Cap Application" while the actual caption and title of the order disclosed the true nature of the action the Commission intended to adopt, "Order Approving Price Cap Application."
- I. The Commission failed to follow the normal and customary Commission practice and policy of issuing a notice to interested parties of the filing of an application for some Commission action (for example, payphone authority, certificate for interlata toll service, certificate for local exchange service) and establishing a reasonable time for interventions. The Commission's failure to follow this practice effectively denied Public Counsel any interested parties an opportunity to be heard on the application.
- J. The Commission improperly relies upon State ex rel Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 SW2d 494 (Mo. App. 1989) as authority for its summary action on this application. The case does not support the Commission's position. In that case, the Commission issued a notice to interested parties and set an intervention deadline. In that order establishing an intervention deadline, the PSC advised

parties that if the staff, Public Counsel or parties did not request a hearing on the application by a certain date, then the PSC would allow the applicant to submit its evidence in support of its application by verified statement. The application was verified.

The Court of Appeals held that:

"In its Report and Order the Commission correctly determined that the requirement for a hearing contained in Section 393.170 was met **when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence.** There was no adverse parties and under the circumstances of the case at bar it was proper for the Commission to grant appellant's Certificate on the basis of appellant's **verified** Application **after affording notice and an opportunity to be heard to all proper parties.**" 776 SW2d at 496. (Emphasis supplied)

The Commission did not issue any notice to interested parties. The Commission did not establish an intervention date and did not advise any party, the staff or the Office of Public Counsel that upon a failure to request a hearing by a specified date, the Commission will allow the applicant **to submit evidence in support of the application by verified statement.** The Commission did not just give GTE an opportunity to submit evidence in support of its petition without a hearing through verified statements in support of its petition, but instead used an unverified petition, without submission of any sworn evidence or certified documents, to render a final order granting the petition. The Commission's actions are not authorized by law or the case relied upon.



- K. The Commission's order fails to make proper findings of fact and conclusions of law.
- L. The Commission's order fails to demonstrate on the face of the order that it was adopted by the Commission , that it was adopted by a majority of the Commissioners, and fails to disclose the vote.
- M. The Commission's order misapplies the ruling of the Circuit Court of Cole County in Case No. CV197-1795cc and improperly acts to "rubber stamp" this application for price caps under Section 392.245 without exercising its discretion and without hearing and considering any evidence to show compliance with the law.
- N. The Commission's order determines that Mark Twain has been providing basic local service to customers in the Lewiston and LaBelle exchanges since July 28, 1998 without any competent and substantial evidence of this alleged fact and without identifying the source and basis of this determination.
- O. The Commission recognized that GTE has these same exchanges of Lewiston and LaBelle offered for sale, but does not question the effect of the intended sale on its jurisdiction or on its ability to approve the application. Rather the Commission states that it may reevaluate at the time of the sales whether the sales would have any effect on the price cap status. This could very well be too late and allow the public to be harmed. This raises a serious question of law whether once granted based upon competition in an

exchange, can the Commission revoke price cap status if the exchange is sold. This issue should be decided prior to granted price cap status since a sale may be forthcoming. The facts are unknown but should be investigate. The Commission should not act without determining this issue prior to entering its order. Also, the present intent of GTE to sell those exchanges raises a serious question of whether the Commission has jurisdiction to consider granting price cap status at this time based on those exchanges. This jurisdictional matter should have been explored; it is proper to consider this issue now.

- P. The Commission's order fails to consider any evidence of the justness and reasonableness of the rates subject to price caps. There is a real issue of fact in this case as to the appropriateness of capping rates which are in excess of GTE's lawful authority as evidenced by the Staff's recent motion to open a docket to investigate potential overearnings by GTE.
- Q. The Public Service Commission's decision is not supported by substantial and competent evidence upon the whole record and was made arbitrary and capriciously without any evidentiary basis.

**WHEREFORE,** Public Counsel moves the Commission to (1) set aside its order approving GTE's price cap application and to grant rehearing and (2) issue a notice to all interested parties of the filing of the application and to establish an intervention deadline (3) hold an evidentiary hearing on the application and establish a procedural schedule and

find facts based on substantial and competent evidence and make conclusions of law based upon the relevant law; and (4) for such other relief as is proper.

Respectfully submitted,

**OFFICE OF THE PUBLIC COUNSEL  
MARTHA S. HOGERTY**

BY:



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was faxed or mailed to the following counsel of record on this 29 day of January, 1999:

Marc Poston  
Public Service Commission  
General Counsel's Office  
PO Box 360  
Jefferson City Mo. 65102



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