

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY**

**December 30, 1997**

**CASE NO: TW-97-333**

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

**Enclosed find certified copy of ORDER in the above-numbered case(s).**

**Sincerely,**



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

**Uncertified Copy:**

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111.

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 30th  
day of December, 1997.

In the Matter of an Investigation into         )  
the Provision of Community Optional         )  
Calling Service in Missouri.                 )

CASE NO. TW-97-333

**ORDER REGARDING PETITION**

On December 19, 1997, the Office of the Public Counsel (Public Counsel) filed with the Commission a pleading captioned "PETITION OF THE OFFICE OF THE PUBLIC COUNSEL REQUESTING A STAY, THE OPENING OF A DOCKET, AND PUBLIC HEARINGS" (Petition). This Petition was not filed in an existing case, but bore a fill-in-the-blank designation of "TO-98-\_\_\_." The Petition was styled "In the Matter of the Petition of the Office of the Public Counsel to Stay the Elimination of Community Optional Service (COS) as of March 31, 1998." The Petition consistently referred to Case No. TW-97-333 and asked the Commission to stay the implementation of the elimination of Community Optional Calling Services (COS).

The threshold question in addressing the Petition is whether it properly requests the establishment of a new case or whether it belongs in Case No. TW-97-333. If the Petition were docketed as a new case, the action therein would constitute a collateral attack on the Commission's order in Case No. TW-97-333. In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.<sup>1</sup>

"Collateral estoppel has played an important role in lending stability to prior administrative determinations in Missouri. As a result,

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<sup>1</sup> § 386.550 RSMo 1994

it has aided the efficiency of the administrative as well as the judicial process by reducing to one the number of 'bites at the apple,' or 'trips to the well,' on the same issue".<sup>2</sup> The collateral estoppel doctrine, designed to further judicial economy by avoiding continual trials on the same issue, precludes parties from relitigating issues that have been previously adjudicated. King General Contractors v. Reorganized Church, 821 S.W.2d 495, 500 (Mo.banc 1991). The same claim is not to be relitigated if it once has reached final judgment on the merits. Unappealed unambiguous awards are *res judicata* and are not subject to collateral attack. Veal v. St. Louis, 365 Mo. 836, 289 S.W.2d 7 (1956).

The factors to be considered in evaluating collateral estoppel are:

- (1) Whether the issue decided in the prior adjudication was identical with the issue presented in the present action;
- (2) Whether the prior adjudication resulted in a judgment on the merits;
- (3) Whether the party against whom collateral estoppel is asserted was a party (or in privity with a party) to the prior adjudication; and
- (4) Whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.<sup>3</sup>

In State ex rel. State Highway Com'n v. Conrad, 310 S.W.2d 871 (Mo.1958), the court stated that it had so frequently been held that orders of the PSC are not subject to collateral attack that the court was not required to elaborate on the effect and meaning of Section 386.550. The court held that Section 386.510 provides the sole method of obtaining review of any final order of the commission. At 876.

The Commission concludes the Public Counsel's Petition, if docketed as a new case, would constitute a collateral attack on the Commission's

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<sup>2</sup> Missouri Practice: Administrative Practice and Procedure, 2nd Edition. Alfred S. Neely, West Publishing Company 1995, page 611.

<sup>3</sup> Oates v. Safeco Ins. Co., 583 S.W.2d 713, 719 (Mo.banc 1979).

Report and Order in TW-97-333. The Petition has, therefore, been filed herein.

The Report and Order in this case was entered on October 17, 1997, with an effective date of October 28. Public Counsel filed a Motion Requesting Rehearing and Reconsideration on October 27, which alleged the premature elimination of COS. The motion was fully considered and denied by the Commission on November 18. The present petition effectively asks the Commission once again to reconsider its decision on the elimination of COS, as well as to hold public hearings on the issue. The Commission notes that Public Counsel made no formal motion for public hearings while the case was pending. To do so after the Report and Order has become final is not timely.

Section 386.510 provided Public Counsel with the appropriate method to obtain review of the Commission's final order. Public Counsel apparently chose not to seek judicial review in that more than 30 days have passed since the Commission denied the Application for Rehearing. Public Counsel's attempt to obtain Commission review of a matter that has become ripe for appeal is untimely. Therefore, the Petition must be denied as untimely.

**IT IS THEREFORE ORDERED:**

1. That the Petition of the Office of the Public Counsel Requesting a Stay, the Opening of a Docket, and Public Hearings is denied.

2. That this order shall be effective on December 30, 1997.

**BY THE COMMISSION**

*Dale Hardy Roberts*

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

(S E A L)

Lumpe, Ch., Crumpton,  
Murray, and Drainer,  
CC., Concur.  
Concurrence by Crumpton to follow.

Roberts, Chief Regulatory Law Judge

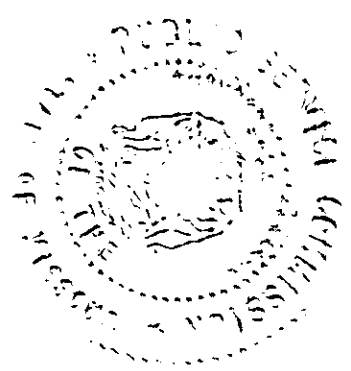
Att/Sec'y: Roberty/Pridgen  
12-29-97 TC-97-333  
 Date Circulated CASE NO.  
12-30-97  
 Agenda Date  
 Action taken: 4-0 AA  
 Must Vote Not Later Than Concurrence by Crumpton  
follows <sup>PR</sup>

12-29-97  
 Lumpe, Chair  
CR  
 Crumpton, Commissioner  
CR  
 Murray, Commissioner  
CR  
 Commissioner  
CR  
 Drainer, Vice-Chair

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 30th day of December, 1997.



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