

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

In the Matter of the Tariff Filing of)	
Sprint Missouri, Inc., d/b/a Sprint to)	Case No. IT-2003-0292
Increase the Rate for the Metropolitan)	Tariff No. J1-2003-1401
Calling Area Plan.)	

**SOUTHWESTERN BELL TELEPHONE, L.P.,
D/B/A SBC MISSOURI'S REPLY BRIEF**

Executive Summary

As the sole opponent of Sprint Missouri, Inc., d/b/a Sprint's ("Sprint") tariff to increase optional Metropolitan Calling Area ("MCA") rates for both its residential and business customers ("Sprint's MCA Tariff"), the Office of Public Counsel ("OPC") proposes that the Missouri Public Service Commission ("Commission") ignore the explicit statutory provisions contained in Section 392.245.11, RSMo. 2000,¹ as well as the explicit language in the Commission's Report and Order, In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996, Case No. TO-99-483, September 7, 2000 ("MCA Post Act Order") and reject Sprint's proposed rate increase. This the Commission may not do.

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 the large ILEC charges for any non-basic telecommunications service, so long as the large ILEC provides notice to the Commission and files tariffs establishing a rate for such service that is not in excess of the maximum allowable prices established for such service. Since Sprint provided notice to the Commission and filed tariffs establishing rates for optional MCA service that are not in excess of

¹ All statutory references are to RSMo. 2000 unless specifically noted otherwise.

the maximum allowable prices for the non-basic telecommunications service, the Commission must approve Sprint's MCA Tariff.²

OPC, however, invites the Commission to ignore the explicit statutory provisions contained in Section 392.245 on the theory that an overriding "legislative purpose" embodies the Commission with authority to refuse to follow the legislature's express directives.³ The Commission should reject OPC's invitation as it flies in the face of well-established case law. Specifically, 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,⁴ even when a court (or Commission) may prefer a policy different from that enunciated by the legislature.⁵ 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 eight percent in any twelve-month period, there is no room for construction and OPC's request that the Commission look beyond Section 392.245.11 must be denied.

OPC also ignores the explicit determinations of the Commission in the MCA Post Act Order, which clearly state that price cap companies are allowed to increase rates for optional MCA service pursuant to the price cap statute. Sprint's proposal to increase the optional MCA rates for its residential and business customers is consistent with the explicit language in the MCA Post Act Order. Specifically, in that opinion, the Commission determined that ILECs should have the full pricing flexibility that they are statutorily entitled to have.⁶ For price cap companies, that means that pricing flexibility subject to maximum allowable prices under

² See Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Initial Brief, pp. 4-6.

³ See Reply Brief of the Office of Public Counsel, pp. 1-2.

⁴ 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).

⁵ Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000).

⁶ MCA Post Act Order, p. 23.

Section 392.245.⁷ Since Sprint's proposal to increase optional MCA rates does not exceed the maximum allowable prices under Section 392.245, the Commission must approve Sprint's MCA Tariff.

Finally, Staff argues that the Commission has the authority to determine whether any rate, including a rate established by a price cap company under Section 392.245.11, is just and reasonable.⁸ Staff's argument is erroneous. If the legislature intended that the Commission could reject a price cap ILEC's tariff filing which increases rates on any non-basic service by no more than eight percent, it would have so provided. Instead, Section 392.245.11, as written, is mandatory. Thus, it is the exclusive right of the price cap company to increase its rate for any non-basic service by up to eight percent annually.

For all these reasons, the Commission must approve Sprint's MCA Tariff.

Argument

I. The Commission Must Approve Sprint's MCA Tariff Since Sprint Complied With All Of The Provisions Set Forth In Section 392.245.11.

The Commission must approve Sprint's MCA Tariff because Sprint complied with all of the statutory provisions contained in Section 392.245.11. Specifically, as SBC Missouri explained in its Initial Brief,⁹ 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. It is undisputed that Sprint is a price cap regulated company. It is also undisputed that Sprint provided notice to the Commission and

⁷ Id. at 23-24.

⁸ Initial Brief of the Staff of the Missouri Public Service Commission, pp. 3-6.

⁹ See SBC Missouri's Initial Brief, pp. 4-6.

filed tariffs to increase its rates for optional MCA service by amounts that do not exceed the eight percent cap. Thus, since Sprint complied with all of the provisions set forth in Section 392.245.11, the Commission must approve Sprint's MCA Tariff.

Despite the clarity of the statute, which provides that the Commission "shall" approve, within 30 days, a tariff filed by an ILEC to change the rate for any of its non-basic telecommunications services, so long as the rate does not exceed the maximum allowable price, OPC invites the Commission to ignore this legislative directive on the theory that an overriding "legislative purpose" embodies the Commission with authority to ignore the specific provisions of Section 392.245.11. Specifically, OPC contends that the general purposes set forth in Section 392.185 authorize the Commission to override the clear provisions of Section 392.245.11. This the Commission may not do.

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.¹⁰ Absent a definition in the statute, the court must follow the plain and ordinary meaning of the words themselves.¹¹ There is no room for construction where a statute is clear and unambiguous.¹² To determine whether a statute is clear and unambiguous, courts look to whether the language is plain and clear to a person of ordinary intelligence.¹³ In other words, when the words are clear,

¹⁰ 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); Lonergan 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).

¹¹ Id.

¹² 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).

¹³ Lonergan 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).

there is nothing to construe beyond applying the plain meaning of the law.¹⁴ Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning.¹⁵ The legislature is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction¹⁶ even when a court (or Commission) may prefer a policy different from that enunciated by the legislature.¹⁷ Further, the use of the word "shall" in a statute is generally interpreted as mandatory.¹⁸

Here, the legislative intent is clearly expressed in the words of the statute. Section 392.245.11 provides in pertinent part: "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 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." In other words, an ILEC may change its rate for any non-basic telecommunications service by filing a tariff, which shall be approved by the Commission within thirty days, so long as the ILEC does not increase its rate by more than eight percent in a twelve-month period. Since the statute is clear and unambiguous, there is no room for OPC's statutory "construction." Thus, OPC's contention that the "price cap statute must be read and harmonized with the whole regulatory framework and legislative

¹⁴ 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).

¹⁵ 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);

¹⁶ 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).

¹⁷ Mo. Nat. Educ. v. Mo. State Bd. of Educ., 34 S.W. 3d 266, 279 (Mo. App. W.D. 2000).

¹⁸ Burns v. Elk River Ambulance, Inc., 55 S.W. 3d 466, 484 (Mo. App. D. 2001).

purposes"¹⁹ is legally incorrect. The Commission must give effect to the plain and ordinary meaning of the words in Section 392.245.11 and approve Sprint's MCA Tariff.

OPC takes issue with the plain and ordinary meaning of the words in Section 392.245.11, contending: "to adopt the interpretation posed by Sprint and SBC, the Commission's role would be reduced to a tally clerk whose only task is to check the math and stamp 'approved' if the math is right, without consideration of the PSC's broader duties and authority."²⁰ With regard to price cap regulated ILECs' tariffs to increase rates for non-basic local telecommunications services, OPC is precisely correct; the Commission's role is to ensure that ILECs do not increase the price(s) for non-basic local service by more than eight percent per year. While the Commission may have preferred otherwise, the legislature made no provision for the Commission to override the price cap regime.

Next, OPC contends: "[t]here is no exemption or exclusion for competitive companies or price cap companies in Section 392.470 declaring that the PSC can impose any conditions that it deems reasonable and necessary upon any company providing telecommunications service if those conditions are in the public interest and are consistent with the provisions and purposes of this chapter."²¹ OPC is partially correct; there is no exemption or exclusion for competitive companies or price cap companies in Section 392.470. However, the language that OPC cites is the very language that invalidates OPC's position. Specifically, Section 392.470 provides: "The commission may impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest and are consistent with the provisions and purposes of this chapter. . . ." (Emphasis

¹⁹ See Reply Brief of the Office of Public Counsel, p. 2.

²⁰ Id. at p. 5.

²¹ Id. at p. 7.

added). It would not be consistent with the provisions of the chapter, specifically Section 392.245.11, to reject a price cap regulated ILEC's tariff to increase its rates for non-basic telecommunications service by up to the eight percent cap. It is an axiom of legislative interpretation that the terms of the specific provision (i.e. 392.245.11) control over allegedly inconsistent general provisions (i.e. 392.185).²² Thus, OPC's argument is without merit.

Apparently realizing that neither the statutes nor case law support OPC's position that the Commission should reject Sprint's MCA Tariff, OPC next urges the Commission to rely on a Senate resolution as a reason to reject the tariff. Specifically, OPC contends that: "[t]he General Assembly has not tried to reduce the authority of the PSC to regulate calling scopes or to establish flat rate expanded calling plans that allow for calling within the community of interest without incurring toll charges."²³ OPC continues: "In fact, the legislature has gone on record as supporting PSC ordered expanding calling plans."²⁴ Thereafter, OPC states:

When the termination of Community Optional Service in the name of promoting a competitive environment brought considerable cost, inconvenience, and frustration to the affected communities and customers, the Senate adopted Concurring Resolution No. 30 on January 12, 1998 with House concurrence on (sic) January 1998. This resolution urged the PSC to reconsider its decision to end this expanded calling plan. It does not appear that the legislature was concerned about limitations on the ability of the PSC to regulate rates, terms and conditions of service for price cap companies.²⁵

At the outset, SBC Missouri notes that it objects to OPC's attempt to introduce evidence in its brief that was neither part of the Stipulated Facts nor part of any Commission proceeding of which the Commission could take official notice. It is ironic that OPC attempts to introduce purported "facts" not in the record in the same pleading in which it urges the Commission to

²² Brooks v. Cooksey, 427 S.W. 2d 498, 503 (Mo. 1968); Union Electric Company v. Jones, 356 S.W. 2d 857, 860 (Mo. 1962).

²³ See Reply Brief of the Office of Public Counsel, p. 11.

²⁴ Id.

²⁵ Id.

reject Staff's analysis of the tariff under a "just and reasonable" standard. OPC cites State ex rel. Rice v. PSC, 220 S.W.2d 61 (Mo. 1949) ("Rice")²⁶ for the proposition that the Commission cannot consider facts developed outside of the record as the basis of its decision. The Rice decision is applicable here and bars OPC's attempt to urge reliance on the legislative resolution.

Moreover, even if it were permissible to rely on OPC's purported "fact" (that the legislature urged the Commission to reconsider its decision to end Community Optional Service) as true, this fact is completely irrelevant to the question posed here. A legislative resolution does not govern whether Sprint may increase its optional MCA rates for its residential and business customers; rather, Section 392.245.11 governs this issue. Further, as demonstrated above, since Sprint complied with all of the provisions set forth in Section 392.245.11, the Commission must approve Sprint's MCA Tariff.

Finally, in a supplemental brief, OPC cites State ex rel. MoKan Dial, Inc., et al. v. Public Service Commission, 897 S.W.2d 54 (Mo. App. W. D. 1995) ("MoKan") so as to "fully advise the Commission of all known, relevant and material authorities related to the Commission's legal authority for Metropolitan Calling Area plans."²⁷ OPC contends:

The Court held that 'Section 392.240.1 is applicable here and invests the Commission with authority to revise and set reasonable rates for toll and other services when customer needs are not being met and service is inadequate. At 55. (Emphasis added). The Court said that the 'statutes, the record, and the case law put to rest all arguments raised here.' At 55. The Court noted that the plan was adopted after extensive hearings. 'The Commission had the legal authority to set up this plan. The only other consideration is whether the action and the resultant rates were reasonable.' At 56. The Court failed to see how the appealing telephone companies suffered any harm and affirmed the Commission's order.²⁸

²⁶ Id. at p. 4.

²⁷ See Supplement to Public Counsel's Reply Brief, p. 1.

²⁸ Id.

OPC's reliance on MoKan is misplaced. Section 392.245(7) provides: "A company regulated under this section shall not be subject to regulation under subsection 1 of section 392.240." Thus, since Section 392.240.1 does not apply to price cap companies, such as Sprint, OPC's citation to this case is irrelevant and provides no guidance to the Commission.

In summary, the Commission should approve Sprint's MCA Tariff because Sprint complied with all of the provisions set forth in Section 392.245.11. Specifically, Sprint provided notice to the Commission, filed its tariffs establishing rates for optional MCA service, and did so in a manner such that the rates that it established for MCA service do not exceed the maximum allowable prices pursuant to Section 392.245.11.

II. Sprint's MCA Tariff Is Consistent With The MCA Post Act Order.

OPC contends that: "Sprint and SBC ignore the Commission's September 2000 decision that reaffirmed MCA's public interest value and held that the current prices shall serve as the maximum price to protect the consumer and provide just and reasonable rates."²⁹

Sprint's MCA Tariff is consistent with the MCA Post Act Order. In the MCA Post Act Order, the Commission determined that it:

is in the public interest to allow ILECs to exercise the full pricing flexibility that they are statutorily entitled to have. The Commission determines that ILECs are allowed to change their MCA service charges in response to competition brought on by flexible pricing of MCA service by CLECs, subject to statutes and other safeguards against predatory pricing. For price cap companies, that means that pricing flexibility subject to maximum allowable prices under Section 392.245, RSMo. For rate-of-return companies, that means pricing flexibility subject to total earning limitations under Section 392.220-240, RSMo.

However, while the Commission finds that both the ILECs and the CLECs should be given flexibility to set lower rates than the rates set out in Case No. TO-92-306, the evidence also suggested that it would be reasonable, necessary and in the public interest to place a cap on those rates to protect consumers from price increases. The rates set in 1992 were found to be just and reasonable and were

²⁹ See Reply Brief of the Office of Public Counsel, p. 2.

not based on cost to the carriers; thus, those rates are still a just and reasonable cap on the price of MCA service to consumers. (Emphasis added).³⁰

Thus, the Commission explicitly determined that ILECs, such as Sprint, are entitled to the full pricing flexibility to which they are statutorily entitled. For Sprint, a price cap company, that means the pricing flexibility subject to maximum allowable prices under Section 392.245, RSMo.

That the Commission determined that price cap ILECs, like Sprint, are entitled to the full pricing flexibility that they are statutorily entitled to have under Section 392.245 is further supported by Ordered Paragraph 14 of the Commission's MCA Post Act Order, which provides:

That each telecommunications company offering Metropolitan Calling Area Service shall charge rates for such service which are no greater than the rates set forth in TO-92-306, by filing those rates in tariffs approved by the Commission. That each telecommunications company offering Metropolitan Calling Area service may propose changes in such rates by filing revised tariffs for review and approval under the statutes applicable to that company and its proposed tariff revision. (Emphasis Added).³¹

Thus, consistent with the MCA Post Act Order, Sprint's MCA Tariff is appropriately approved because Sprint simply proposes changes to its MCA rates for residential and business customers in compliance with the price cap statute--Section 392.245.11. Thus, the Commission must approve Sprint's MCA Tariff.³²

³⁰ MCA Post Act Order, pp. 23-24.

³¹ Id. at p. 34.

³² SWBT notes that OPC argues that the Commission's MCA Post Act Order provides that the current prices shall serve as the maximum price to protect the consumer and provide just and reasonable rates. See Reply Brief of the Office of Public Counsel, p. 2. OPC provides no reference in the Commission's MCA Post Act Order that specifies that the current prices shall serve as the maximum price and none exists. Rather, the Commission specifically determined that the rates were a reasonable cap on the price of MCA service. MCA Post Act Order, p. 24. From that cap, the price cap or maximum allowable price for MCA service may be increased by up to eight percent in a twelve-month period under Section 392.245.11.

III. Section 392.245.11 By Its Explicit Terms Is Mandatory. Thus, The Commission May Not Reject A Price Cap Regulated ILEC's Tariff To Increase Non-basic Telecommunications Rates By Up To Eight Percent In A Twelve-Month Period On The Basis That The Rates Are Not Just And Reasonable.

In the Initial Brief of the Staff of the Missouri Public Service Commission, Staff notes that:

in Case No. TR-2001-65, In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri, however, the Staff argued that the price cap statute can also be interpreted not to limit the Commission's authority to determine whether any rate, including rates charged by price cap regulated companies, are just and reasonable.³³

Thereafter, the Staff argues that a price cap regulated ILEC's proposed increase of non-basic telecommunications service must be just and reasonable under Section 392.200.1 and 392.245.1.³⁴

Section 392.245.11 specifically provides that a price cap regulated ILEC may increase its rates for non-basic telecommunications service by up to eight percent in a twelve-month period. The legislature did not give the Commission the authority to reject tariff filings made consistent with Section 392.245.11. Section 392.245.11, as written, is mandatory. Thus, it is the exclusive right of the price cap company to increase its rates for non-basic service so long as the eight percent cap is not exceeded.

Conclusion

The Commission must approve Sprint's MCA Tariff since Sprint, as a price cap regulated company, complied with all of the provisions set forth in Section 392.245.11. The Commission should reject OPC's proposal that it ignore express language both in Section 392.245.11 and the

³³ See Initial Brief of the Staff of the Missouri Public Service Commission, p. 3.

³⁴ Id. at pp. 4-6.

Commission's MCA Post Act Order to reach a contrary result. The Commission should also reject Staff's request that the Commission conduct a just and reasonable analysis. Section 392.245.11 by its explicit terms is mandatory. Thus, the Commission may not reject a price cap regulated ILEC's tariff to increase non-basic telecommunications services by up to eight percent in a twelve-month period on the basis that the rates are not just and reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on May16, 2003.


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