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 Increase the Rate for the Metropolitan Calling Area Plan	))))	**Case No. IT-2003-0292** Tariff No. JI-2003-1401

Concurring Opinion of Commissioner Clayton

I join in the majority in approving the tariffs at issue. In this concurrence, I explain the reasoning that leads me to conclude that the price cap statute[1] establishes only a rebuttable presumption that a properly calculated increase is just and reasonable.

The Commission is vested with broad powers and a great deal of discretion to regulate public utilities. The Commission retains whatever powers and discretion it is accorded by other statutes except to the extent that the price cap statute revokes or limits them by express language or unavoidable implication. It is beyond question that, absent the price cap statute, the Commission would have the power and the discretion – and even a duty – to examine Sprint's proposed tariffs to determine if the increase they would implement is just and reasonable. Does the price cap statute strip the Commission of its ability to examine the justness and reasonableness of a proposed increase by a price cap company? I conclude that while it does not strip the Commission of all power, it does somewhat constrain the Commission.

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[1] Section 392.245, RSMo Supp. 2002. All subsequent statutory references, except where

SBC Missouri and Sprint argue that the Commission's role under the price cap statute is limited to confirming the arithmetic of the increase.[2] This argument is based almost exclusively on Section 392.245(11).

> [T]he maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices.... An incumbent local exchange telecommunications company may change the 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.

Sprint and SBC Missouri focus on the portions that allow an eight percent increase, but give short shrift to the statutory requirement that any price cap increase must be "consistent with the provisions of Section 392.200." That section provides (in part): "All charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission."[3] Two of the primary principles of statutory construction are that all related provisions must be given effect (that is, problematic provisions cannot simply be ignored), and that apparently-conflicting provisions must be reconciled if possible.[4] The task is therefore to give effect to the "eight

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otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[2] The arithmetic is not at issue here; the parties stipulated and the Commission found that Sprint's proposed increases are eight percent or less.

[3] Section 392.200.1.

[4] Generally, statutes relating to the same subject are considered in pari materia, even if

percent every year" provision in Section 292.245.11 as well as to the "just and reasonable" standard in Section 392.200.1.

I reconcile these two sections thus: when a price cap company files an increase pursuant to Section 392.245.11, and that increase is not more than eight percent, the increase is presumed to be just and reasonable. But this presumption is rebuttable, otherwise the reference to Section 392.200 and the requirement that rates be "just and reasonable and not more than allowed by law or by order or decision of the commission" would have no meaning.

Another principle of statutory construction is that it is to be presumed that the legislature did not intend an absurd result.[5] Surely the legislature did not intend to allow price-cap-regulated telephone companies to increase their rates by eight percent every year forever without giving the Commission any power to examine the reasonableness of those increases. My reconciliation of Section 292.245.11 and Section 392.200.1 avoids this result; the construction urged by Sprint and SBC Missouri does not.

Yet another principle of statutory construction is that the court (or, as here, the

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those statutes were enacted at different times. Andresen v. Bd. of Regents of Mo. W. State Coll., 58 S.W.3d 581, 587 (Mo.App.2001) (quoting Farmers' & Laborers' Co-op. Ins. Ass'n v. Dir. of Revenue, 742 S.W.2d 141, 145 (Mo. banc 1987)). "Where two statutes concerning the same subject matter, when read individually, are unambiguous, but conflict when read together, [this court] will attempt to reconcile them and give effect to both." Habjan v. Earnest, 2 S.W.3d 875, 881 (Mo.App.1999).

[5] "In addition, we will not construe the statute so as to work unreasonable, oppressive or absurd results." Jenkins v. Missouri Farmers Ass'n, Inc., 851 S.W.2d 542, 545 (Mo.App.1993).

Commission) should endeavor to give effect to the intent of the legislature.[6] With respect to the regulation of telecommunications companies, the legislature has explicitly stated its intent. Section 392.185 provides an explicit framework in which the provisions of all of Chapter 392 are to be construed:

> (1) Promote universally available and widely affordable telecommunications services;
> (2) Maintain and advance the efficiency and availability of telecommunications services;
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
> (4) Ensure that customers pay only reasonable charges for telecommunications service;
> (5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;
> (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
> (7) Promote parity of urban and rural telecommunications services;
> (8) Promote economic, educational, health care and cultural enhancements; and
> (9) Protect consumer privacy.

The way that I have reconciled Section 329.245.11 with Section 392.200 is consistent with this framework; the narrow interpretation advanced by Sprint and SBC Missouri is not. Allowing a price cap company to increase rates by eight percent every year forever with no regulatory oversight would not "[e]nsure that customers pay only reasonable charges for telecommunications service," nor would it be "consistent with the protection of ratepayers and otherwise consistent with the public interest." I conclude that every applicable

[6] "The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." Eminence R-1 School Dist. v. Hodge, 635 S.W.2d 10, at 13 (Mo. 1982).

principle of statutory construction supports its conclusion that Section 392.245.11 creates only a rebuttable presumption that an eight percent increase is just and reasonable; it does not afford a price cap company the unfettered right to eight percent yearly increases in perpetuity.

Having established that Sprint enjoys a rebuttable presumption that its proposed increase is lawful, the next question is whether there is any reason in this instance to challenge that presumption. Sprint and SBC Missouri do not address the question of reasonableness; they take the position that the question of whether the increased rates are just and reasonable is not within the Commission's purview. Staff addresses the question at length, arguing persuasively that, since Sprint has not increased the rates for these services for ten years, increases up to eight percent are reasonable. Public Counsel, the only party that urges the Commission to reject the proposed tariffs, does not allege that it is unjust or unreasonable to implement an eight percent (or less) increase after ten years. Public Counsel's main argument is that the Commission intended to cap MCA rates in its Report and Order in Case No. TO-99-483, an argument that the Commission has already rejected.

I conclude that there is no reason to find that Sprint's proposed increase is not just and reasonable, and indeed there is reason to find that it is just and reasonable and consistent with Section 392.200, as required by Section 392.245(11). Based on this analysis, I have joined in the majority opinion approving the tariffs.

Respectfully submitted,

Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 6th day of November, 2003.