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JURISDICTIONAL STATEMENT

Sprint has filed a Notice of Appeal, seeking this Court's determination of the reasonableness and lawfulness of the Report and Order issued by Respondent, the Missouri Public Service Commission, in Case No. TT-2002-447, *In the Matter of the Tariff Filing of Sprint Missouri, Inc., d/b/a Sprint, to Increase the Residential and Business Monthly Rate for the Metropolitan Calling Area (MCA) Plan*. Sprint filed a timely Application for Rehearing from each of the Commission's order, as called for by Section 386.500.2 RSMo. (2000)¹ as a prerequisite to appeal, which the Commission denied. The Commission has its principal office in Cole County, Missouri. Pursuant to Section 386.510, jurisdiction and venue were properly in the Circuit Court of Cole County. As called for by Section 386.510, the circuit court entered its judgment after hearing, and it affirmed the Commission's Orders. Sprint timely appealed the circuit court decisions to this Court, pursuant to Section 386.540.

The matters on appeal do not involve any of the grounds within the exclusive appellate jurisdiction of the Supreme Court, and thus the appeal is within the general appellate jurisdiction of the Court of Appeals, Western District. Mo. Const. art. V, Section 3.

¹ All statutory citations in this brief are to RSMo. (2000).

STATEMENT OF FACTS

The Commission adopts the statement of facts set forth in Appellant Sprint's brief, with one exception. As described in the second paragraph, rather than "increas[ing] its maximum allowable prices" without raising the rates actually charged to customers, Sprint simply altered the figures in columns encaptioned "maximum allowable rate" on tariff sheets entitled "Statement of maximum allowable rates." See Legal File ("L.F.") at 50 and 54 for an example. This act did not constitute an increase of maximum allowable prices as that term is used in Section 392.245.11.

STANDARD OF REVIEW

An order of the Public Service Commission has a presumption of validity, and the burden is on the party attacking it to prove its invalidity. The court views the evidence in the light most favorable to the Commission's order and affords the Commission the benefit of all reasonable inferences. A court reviewing a decision of the Commission is to determine whether the Commission's order is lawful and reasonable. Accordingly, the court applies a two-pronged analysis to its review of the Commission's decision. First, the court must determine whether the Commission's order is lawful. An order's lawfulness turns on whether the Commission had the statutory authority to act as it did. *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Comm'n*, 37 S.W.3d 287, 292 (Mo.App. W.D. 2000). When determining whether the order is lawful, the reviewing court exercises independent judgment and must correct erroneous interpretations of the law. *State ex rel. Midwest Gas Users Ass'n v. Pub. Serv. Comm'n*, 976 S.W.2d 470, 476 (Mo.App. W.D. 1998), citing to *Burlington N. R.R. v. Director of Revenue*, 785 S.W.2d 272, 273 (Mo. banc 1990).

Once the court has determined that the Commission's order is lawful, it must review the order to determine whether the order was reasonable. The reasonableness of the Commission's order depends on whether it was supported by competent and substantial evidence upon the whole record; whether it was arbitrary, capricious, or unreasonable; or whether the Commission abused its discretion. The court will not substitute its judgment for that of the Commission on issues within the realm of the

Commission's expertise. *Associated Natural Gas Co.*, 37 S.W.3d at 292. The Court of Appeals reviews the decision of the Commission, not the judgment of the circuit court. *Id.*; *Deaconess Manor Ass'n v. Public Serv. Comm'n*, 994 S.W.2d 602, 608 (Mo.App. W.D.1999).

POINTS RELIED ON

I.

The Commission's actions should be affirmed because its rejection of Sprint's rate increase was lawful and reasonable in that Section 392.245 requires that Sprint establish the rates it actually charges at the maximum allowable price each year to preserve the rate increases it is permitted to make under the Price Cap Statute, and Sprint did not do so.

Section 392.245.11

Section 392.230.3

State ex rel GTE North v. Missouri Pub. Serv. Comm'n, 835 S.W.2d 356 (Mo.App. 1992)

II.

The Court need not address the issue of whether price-cap regulated rates are, by definition, "just, reasonable and lawful," or whether the Commission has a broader role in reviewing price-cap regulated filings, because the Commission's Report and Order explicitly declined to address this issue and such a finding is not required for this Court to reach a determination on the case before it.

Section 392.245.11

Section 392.230.3

Richardson v. Quicktrip Corp., 81 S.W.3d 54 (Mo.App. W.D. 2002)

ARGUMENT

I.

The Commission's actions should be affirmed because its rejection of Sprint's rate increase was lawful and reasonable in that Section 392.245 requires that Sprint establish the rates it actually charges at the maximum allowable price each year to preserve the rate increases it is permitted to make under the Price Cap Statute, and Sprint did not do so. (Responds to Point II of Appellant's Brief)

The issue before this Court is whether Sprint has the authority to impose a rate increase on its customers that is greater than eight percent in a twelve-month period for an optional service. The aspects of the Commission's decision that have been appealed are of statutory interpretation. As the Commission notes in the Findings of Fact section of its *Report and Order*, the facts in this case were not in dispute. (L.F. at 150).

In this case, the Commission has framed the dispute between the parties as a disagreement over "the level to which a price cap company may increase its rates for nonbasic services." (L.F. at 154). To make its determination, the Commission examined the pertinent language of Section 392.245 (the "Price Cap Statute") and more specifically, subsection 11 of the Price Cap Statute. Subsection 11 governs the degree that a price-capped company such as Sprint may increase the rates it charges its customers for non-basic telecommunications services such as Sprint's MCA service in the optional tiers of the Kansas City metropolitan area:

The maximum allowable prices for nonbasic telecommunications services of a large, incumbent local exchange telecommunications company regulated under this section shall not be changed until January 1, 1999, or on an exchange-by-exchange basis, until an alternative local exchange telecommunications company is certified and providing basic local telecommunications service in such exchange, whichever is earlier. *Thereafter, the 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.* This subsection shall not preclude an incumbent local exchange telecommunications company from proposing new telecommunications services and establishing prices for such new services. 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. (emphasis supplied.)

If the agency's interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference. Generally, “[t]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight.” *Heavy Constructors Ass’n v. Division of Labor Standards*, 993 S.W.2d 569, 572 (Mo.App. W.D. 1999) (citation omitted). Nonetheless, “when an administrative agency's decision is based on the agency's interpretations of law, the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations.” *Morton v. Missouri Air Comm’n*, 944 S.W.2d 231, 237 (Mo.App. S.D. 1997) (citation omitted).

The Commission found that it had authority to make a determination in this case. To support the exercise of its authority, the Commission found that:

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company. That section also authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days plus an additional six months. Neither this section nor the price Cap Statute [sic] contains any specific exemption from this suspension provision. Price cap regulation does not strip the Commission of its authority to investigate whether or not a proposed tariff is lawful. The Commission finds that it retains authority to

suspend a proposed tariff filed by price-cap regulated companies, and if necessary, conduct a hearing regarding the proposed tariff.

(L.F. 155-56). Thus, though the Commission is indeed an agency of limited jurisdiction and has only the powers conferred upon it by statute, the Commission has statutory support for its actions in this case. *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 877 (Mo.App. W.D. 1994).

It is important to note that a number of statutory sections in Chapter 392 (the statutory chapter setting forth regulation principles for telecommunications companies) contain language of general applicability to support Commission action on a discretionary basis. The Price Cap Statute specifically prohibits the Commission from relying upon one such statutory section: the general provisions of Section 392.240.1. Section 392.240.1 permits the Commission to examine, among other things, whether a proposed rate is unjust, unreasonable, unjustly discriminatory, or unduly preferential, and then set a new rate based on a reasonable average return on the value of property, among other considerations. This section may be limited in its application to examinations of existing, not proposed, rates. The Price Cap Statute, at Section 392.245.7, explicitly exempts price-capped companies from the application of that statutory section.

In its decision, the Commission chose not to rely upon Section 392.200.1, another statute of general discretionary authority that might authorize Commission action, although the Price Cap Statute does not explicitly exempt price-capped companies from its application. Sprint discusses this section extensively in Point I of its brief, but, as

discussed in Point II of this brief, as the Commission did not rely upon this statute, this Court need not construe it to resolve the issues before it.

In arriving at its decision, the Commission grappled with the Legislature's use of two terms in Section 392.245.11: "rate" and "maximum allowable price." "Rate" is defined at Section 386.020(45) as, essentially, the charge for services to customers. If, as Sprint proposes, the "maximum allowable price" may be increased without actually increasing the "rates," then the maximum allowable price can increase from twelve-month period to twelve-month period without being constrained by the rates actually charged to consumers. If, in contrast, the maximum allowable price effectively resets at the rate actually being charged to customers at the end of a twelve-month period, then the banking concept is contrary to the statute and Sprint's tariff sheets were rightly rejected.

The Commission chose the latter statutory interpretation. In the key section of its Report and Order, the Commission opined:

... Section 392.245(11) provides that "maximum allowable prices" (the price cap) may be increased by "up to eight percent" each year, by "providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges **at such maximum allowable prices**... [Emphasis added.] The Commission finds that the phrase "at such maximum allowable prices" means just that; the maximum allowable price (or price cap) may be raised no more than eight percent annually by establishing the rates **at** such maximum allowable prices. If an ILEC increases its prices by less than eight percent, then the price cap for the

following year increases by less than eight percent – and any part of the eight percent annual increase that is not used is lost. Thus, the statute provides a “use it or lose it” price cap mechanism and the maximum allowable price increase for the following year is still limited to eight percent. Therefore, Sprint’s attempt to “bank” increases violates the Price Cap Statute and the proposed tariff must be rejected.

(L.F. 155).

Sprint suggests that, under the Commission’s interpretation, it is forced to raise its rates a full eight percent in each twelve-month period in order to preserve its full pricing flexibility. Although this may be true, the Legislature seems to have incorporated this prospect into the statutory language. For Sprint to obtain regulation under the Price Cap Statute, the Commission previously had to determine that an alternative local exchange telecommunications company was certified to provide local telecommunications service in at least a part of the Sprint’s service area and was actually providing service.² Section 392.245.2. As such, it is possible that Sprint could be subject to competitive pressures and may not seek to increase its rates a full eight percent anyway. Certainly the Price Cap Statute does not *require* Sprint to increase its maximum allowable price or its rates

² The Commission approved Sprint’s price cap application in Case No. TO-99-359, on August 19, 1999.

eight percent: the statute prefaces the eight percent cap with the words “up to,” and a reasonable interpretation is that the Legislature placed that qualification in the statute so a price-capped company would not feel obliged to raise its maximum allowable prices to the highest degree if it was otherwise not necessary.

The Commission notes that it is not bound by its prior decisions in unrelated cases and that the courts have ruled that the doctrine of *stare decisis* does not apply to Missouri administrative tribunals. *State ex rel GTE North v. Missouri Pub. Serv. Comm’n*, 835 S.W.2d 356, 371 (Mo.App. 1992) (quoting *State ex rel Churchill Truck Lines Inc. v. Pub. Serv. Comm’n*, 734 S.W.2d 586 (Mo.App. 1987)). The Commission acknowledges that it previously permitted tariff sheets to go into effect in December 2000 and again in December 2001 that contained maximum allowable prices set at values more than eight percent over its current rates. (Compare L.F. 49 with L.F. 50 and L.F. 54; see also L.F. at 151-52.) However, Sprint at that time did not seek to increase the rates actually charged to customers more than eight percent over the rates charged when Sprint entered price cap regulation. “Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.” *Central County Emergency 911 v. International Ass’n of Firefighters Local 2665*, 967 S.W.2d 696, 702 (Mo.App. W.D. 1998), quoting *City of Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.App.1980). Moreover, the Commission has not previously addressed the issues raised in this matter concerning an increase in the rates actually charged to Sprint customers.

Thus, the Commission's decision in this matter was lawful, as the Commission had the statutory authority to reject Sprint's tariff sheet because it raised the rates charged beyond a legal maximum price allowed by Section 392.245.11; and it was reasonable because it was not arbitrary and capricious as the facts before the Commission indicated that Sprint intended to raise its rates for the MCA optional tiers more than eight percent for the first time since it became a price-capped company.

II.

The Court need not address the issue of whether price-cap regulated rates are, by definition, “just, reasonable and lawful,” or whether the Commission has a broader role in reviewing price-cap regulated filings, because the Commission’s Report and Order explicitly declined to address this issue and such a finding is not required for this Court to reach a determination on the case before it. (Responds to Point I of Appellant’s Brief)

As the Commission has authority under the Price Cap Statute and Section 392.230.3 to take the actions it took in this case, the Commission did not find it necessary to reach the arguments made by the parties before it regarding the general provisions regarding justness and reasonableness of rates located in Section 392.200.1. The Commission therefore did not determine whether the Commission has the authority to review price-capped companies’ rates on a broader level for their justness and reasonableness. (L.F. 156). Appellant Sprint discusses these principles at length in its Appellant’s Brief in its first Point Relied On, but the Commission has not made a holding in this case on this topic based on its statutory authority to address the issues raised, and, accordingly, does not address this topic here.

Regardless of the arguments of the parties on the subject of the Commission’s authority to examine rates submitted for approval under the Price Cap Statute, Section 392.230.3 grants the Commission authority to determine the *propriety* of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications

company. Whether or not rates submitted for approval under the Price Cap Statute can be examined for justness and reasonableness related to the service provided, the Commission always has a role in examining filings for mathematical correctness, improper discrimination, and even typographical errors. Accordingly, this statute remains as the legal support for Commission action if a company files a tariff sheet with statutorily incorrect contents.

“[S]tatements ... are obiter dicta [if] they [are] not essential to the court’s decision of the issue before it.” *Richardson v. Quicktrip Corp.*, 81 S.W.3d 54, 59 (Mo.App. W.D. 2002), quoting *Campbell v. Labor & Indus. Relations Comm’n*, 907 S.W.2d 246, 251 (Mo.App. W.D. 1995). The authority of a decision as a precedent is limited to the points of law that are raised by the record, considered by the court, and necessary to the decision. *Parker v. Bruner*, 683 S.W.2d 265, 265 (Mo.banc 1985), citing *State ex rel. Baker v. Goodman*, 274 S.W.2d 293, 297 (Mo.banc 1957). In this case, a determination of the Commission’s role in examining justness and reasonableness of price-capped company filings is not integral or essential to a decision on the statutory questions raised by the parties before this Court, and an analysis of Section 392.245.11 respecting the nature of a “maximum allowable price” and the availability of “banking” will fully address the questions answered in the Commission’s Report and Order.

Finally, the question of the scope of the Commission’s authority under Section 392.200.1 and Section 392.245.1 to examine the justness and reasonableness is currently before the Circuit Court of Cole County in Case No. 03CV326406, *State of Missouri ex*

rel. Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. The Missouri Public Service Commission.

CONCLUSION

WHEREFORE, the Public Service Commission requests the Court to affirm its Report and Order in Case No. TT-2002-447, *In the Matter of the Tariff Filing of Sprint Missouri, Inc., d/b/a Sprint, to Increase the Residential and Business Monthly Rate for the Metropolitan Calling Area (MCA) Plan.*

Respectfully submitted,

DANA K. JOYCE
General Counsel

David A. Meyer
Associate General Counsel
Missouri Bar No. 46620

Attorney for the Missouri
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8706 (Telephone)
(573) 751-9285 (Fax)
e-mail: david.meyer@psc.mo.gov

Service List

CERTIFICATE

I hereby certify that the foregoing brief of Respondent Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and that:

- (1) The signature block above contains the information required by Rule 55.03;
- (2) The brief complies with the limitations contained in Rule 84.06(b);
- (3) The brief contains 3,541 words, as determined by the word count feature of Microsoft Word;
- (4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and
- (5) That the attached computer disk has been scanned for viruses and that it is virus free.

I further certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the service list the 9th day of April 2004.

David A. Meyer

Lisa Creighton Hendricks
6450 Sprint Parkway
MS: KSOPHN0212-2A253
Overland Park, KS 66251

Michael F. Dandino
Office of the Public Counsel
P.O. Box 2200
Jefferson City, MO 65102

Paul Gardner
Goller, Gardner and Feather
131 East High Street
Jefferson City, MO 65101