

BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, et al.)	
)	
Complainants,)	
)	Case No. TC-2005-0067
Southwestern Bell Telephone Company, L.P., d/b/a)	
Southwestern Bell Telephone Company,)	
)	
Respondent.)	

COMPLAINANTS' MOTION FOR REHEARING OR RECONSIDERATION
OF THE COMMISSION'S JULY 28, 2011 ORDER

Come now the Complainants,¹ by and through counsel, and submit for their above titled motion for rehearing or reconsideration respectfully submit the following:

1. On July 28, 2011 the Commission entered an order directing the Respondent, Southwestern Bell Telephone Company, L.P., to answer the complaint in this proceeding. The order essentially removes the matter from the mediation phase in which it has been pending, admittedly, for a prolonged period of time.

2. Despite the age of this case, and despite the Commission's valid interest in disposing of disputes before it in a deliberate way, Complainants submit that just and good cause appears to maintain this matter in a state of suspense, whether it be classified as a phase of mediation, or an ordered delay in the proceeding.

3. Shortly after the Commission's order staying proceedings, which was issued in November of 2004, the parties met without a mediator to assess if a compromise might be

¹ The named complainants are Tari Christ, d/b/a ANJ Communications, Bev Coleman, an Individual, Commercial Communication Services, L.L.C., Community Payphones, Inc., Com-Tech Resources, Inc., d/b/a Com-Tech Systems, Coyote Call, Inc., William J. Crews, d/b/a Bell-Tone Enterprises, Davidson Telecom LLC, Evercom Systems, Inc., Harold B. Flora, d/b/a American Telephone Service, Illinois Payphone Systems, Inc., JOLTRAN Communications Corp., Lind-Comm, L.L.C., John Mabe, an Individual, Midwest Communication Solutions, Inc., Missouri Telephone & Telegraph, Inc., Jerry Myers, an Individual, Pay Phone Concepts, Inc., Jerry Perry, an Individual, PhoneTel Technologies, Inc., Craig D. Rash, an Individual, Sunset Enterprises, Inc., Telaleasing Enterprises, Inc., Teletrust, Inc., Tel Pro, Inc., Toni M. Tolley, d/b/a Payphones of America North, Tom Tucker, d/b/a Herschel's Coin Communications Company, and HKH Management Services, Inc.

achieved unassisted by a third party. Respondent in turn proposed terms of settlement in February, 2005, which were countered by the Complainants in November of the same year. Since that time, Respondent and Complainants have exchanged several more settlement offers, the most recent one being proposed by Respondent and it is now under consideration by the Complainants.

4. During the time this matter has been in this state of suspension, the law underlying the complaint has received more and differing interpretation from the federal judiciary and the Federal Communications Commission (FCC). The Complainants, and certainly the Respondent, have weighed the various settlement offers against the landscape of the changing law in this area. Of importance to the Complainants in particular is the “refund” issue raised in the complaint.

5. As the Commission is aware, the FCC has had before it for a lengthy period of time the issue of the appropriate rates for payphone line services and whether payphone services providers (“PSP”s) should be awarded refunds for payphone line rates exceeding rates that comply with the FCC’s New Services Test.² Although the FCC has moved this item slowly, and this Commission has been patient in awaiting FCC action before proceeding in the instant proceeding, Complainants believe the Commission should nonetheless grant an additional delay in the instant proceeding because there is reason to believe that FCC action may at last be forthcoming within a reasonable time frame.

6. Without attempting to rationalize away the FCC delay in issuing a ruling, it is instructive to consider the current request in the context of the *FCC Payphone Docket*. By way

² The issue has been raised in the FCC’s continuing, omnibus docket on implementation of the payphone provisions, Section 276, of the Communications Act, as added by the Telecommunications Act of 1996. *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (hereafter “*FCC Payphone Docket*”).

of background, the initial petition that launched the current inquiry on the appropriateness of refunds was filed on July 30, 2004.³ Since that initial filing, there were an additional four petitions filed, two primary jurisdiction referrals from two different U.S. Courts of Appeals, a similar referral from a state supreme court, and at least one request from a state commission for guidance -- all filed in the same docket with each raising essentially overlapping issues, each with its own twists, and each arising with its own unique regulatory (before a state commission) and court (including both state and federal courts) history. These various new matters arrived at the FCC spaced out over the next almost four years, with the last so far as can be determined from a review of the FCC's public records, being filed on May 2, 2008.⁴ Each of these various petitions and other appeals, required its own pleading cycle, requiring several weeks,⁵ and because the various petitions and referral and their respective pleading cycles did not overlap, each time a new petition, or referral, arrived, it stretched and further extended the time it took to get the proceedings concluded.

7. In sum, the first four years of the proceeding at the FCC to address the issue now pending before this Commission were spent with the FCC record constantly shifting and with constant new refinements and subtleties being spun around the issue by new developments.⁶

³ Illinois Public Telecommunications Association Petition for a Declaratory Ruling, filed July 30, 2004.

⁴ *See Pleading Cycle Established For Ton Services, Inc. Petition For Declaratory Ruling On A Primary Jurisdiction Referral*, Public Notice (Released May 15, 2008, DA08-1148). The pleading cycle extended to June 16, 2008.

⁵ It would be excessively burdensome for Complainant PSPs to set forth the individual pleading cycles and notices for each of the proceedings as they arrived at the FCC. Moreover, it would not advance the Commission's understanding of the point Complainant PSPs are trying to make, as explained further in the text following this footnote. Accordingly, Complainant PSPs have just set forth this summary.

⁶ The various petitions, referrals, etc. were not exactly evenly spaced in time between each other, and perhaps the FCC had enough time in the window between the next petition and the last one to have issued a ruling at an earlier point. But for whatever reason of workload management, etc., the matter did not work its way to the agenda. Again, while it is possible to fault the FCC, and perhaps the FCC should be faulted, none of that takes away from the central point made in the sentence accompanying this footnote.

And of course during and over the course of these various petitions, appeals and referrals there were literally dozens and dozens of permitted, placed in the record ex parte meetings with FCC staff, Commissioners and/or their respective staffs, and the Chairman and/or his staff, often if not usually accompanied by additional briefing materials and or extensive background papers.⁷ By the time the target did stop moving, sometime in mid-summer 2008, the practicalities are that an election season began with the certainty that there would be a new President and Administration.⁸ The practicalities are that at that point the focus of the FCC's attention was on addressing very high priority matters.

8. The FCC was, again speaking in "practical" terms, in "caretaker" status until a new Chairman took office in May, 2009 with all the attendant transitional issues --- staffing, setting of priorities and others --- to address. This Commission is of course well familiar with the record of the current FCC, its priorities and points of emphasis, and Complainants do not intend to attempt to characterize the activities of the current FCC. What Complainants do observe is that the various petitioners, opponents, and other interested parties began their effort to shape the new Administration's views on this issue and in the next 16 months, there were at least 15 additional permitted, placed in the record ex parte meetings with FCC staff, Commissioners and/or their respective staffs, and the Chairman and/or his staff,⁹ and again often if not usually accompanied by additional briefing materials, Power Point presentations, and/or

⁷ See the record of filings available on the FCC's Electronic Case Filing System for docket 96-128. See also Note 8 below.

⁸ To remind the Commission of the obvious, George W. Bush was concluding his second term and of course did not stand for re-election.

⁹ See the record of filings available on the FCC's Electronic Case Filing System for docket 96-128. We emphasize that Complainant PSPs have included in this count only contacts known to involve this issue. There are other issues open and pending in this docket but those contacts and filings have not been included in this count. Moreover, these were not mere "contacts." Many were meetings with multiple FCC and/or Commissioner staff members.

extensive background papers.¹⁰ Suffice to say that this “education” effort was itself a burden on the record.

9. So it did take a longer while, but a draft order to address this issue did emerge from the Chairman’s office on September 7, 2010. The order was circulated to the offices of the other Commissioners for a vote.¹¹ There is no public record of how many FCC Commissioners, if any, have voted on the matter to date and the matter remains pending. Although there is no data of which Complainants are aware saying how long it usually takes between the time a draft order is circulated and voting is complete, this matter does seem to be taking a long time.

10. There is nonetheless reason to believe that the Commission may vote soon. There has been a recent pick up in visits with Commissioner's offices where there have been requests for action by the Commission. But most significantly, there is interest being expressed by members of Congress in having this matter promptly resolved. On March 30, as a part of hearings by the Financial Services and General Government Subcommittee of the House Committee on Appropriations, Representative Alexander directed a question asking why it was taking so long to get a vote on this matter. Just three weeks ago, on July 14, 2011, Representative Cliff Stearns, Chairman of the Oversight and Investigations Subcommittee and a member of the Communications and Technology Subcommittee, both of the House Energy and Commerce Committee, of which he is also a member, and all of which have jurisdiction over and oversight responsibility for the FCC, wrote Chairman Genachowski urging prompt action on this

¹⁰ See, e.g., Illinois Public Telecommunications Association Reply to AT&T and Verizon Preemption Comments (filed December 31, 2009)(68 pages); Reply of the Independent Payphone Association of New York, Inc. to AT&T and Verizon(dated January 21, 2010)(60 pages).

¹¹ Under prevailing FCC practice, only the Chairman can put a matter before the other Commissioners for a vote and typically the Chairman directs the order of staff work.

matter and inquiring how the FCC intends to get the matter promptly resolved.¹²

11. We have presented this extensive review of the history of the FCC proceeding to show that despite the inordinate amount of time the issue has been pending at the FCC, it has not been simply languishing. Given the amount of activity around the issue, and the impinging of the political processes, while one would hope and even expect that the FCC would have acted more quickly, it has not been simply a matter of FCC indifference. The matter is complicated and has been shifting.

12. Now, it is to be expected that the FCC and individual Commissioners will be responsive to congressional importuning and finish action on this matter within a reasonable time. Given the substantial time this Commission has already invested in waiting for the FCC to act, it would seem logical to defer for another 180 days to see if the FCC will act. If there has been no action by then, the Commission can revisit the issue. But it is worth waiting to see if the FCC responds to its congressional overseers.

13. When the FCC order is issued it will provide the parties authoritative guidance on how refunds are to be disposed by state regulators. Complainants are hopeful that if this matter continues in a state of suspense both parties will soon have the opportunity to evaluate settlement potential of this matter in light of the upcoming FCC decision.

WHEREFORE, Complainants respectfully request that the Commission reconsider its order of July 28, 2011 and vacate the same thus leaving the proceedings in a state of suspense for at least another 180 days.

¹² A copy of the letter from Representative Stearns is attached.

Respectfully submitted,

/s/ Mark W. Comley

Mark W. Comley #28847
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102
573/634-2266
573/636-3306 FAX
comley@ncrpc.com

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 7th day of August, 2011, to Leo Bub at lb7809@att.com; General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley

Mark W. Comley