

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

Tari Christ, d/b/a ANJ Communications; )  
Bev Coleman, an Individual; Commercial )  
Communications Services, L.L.C.; Community )  
Payphones, Inc.; Coyote Call, Inc.; William J. )  
Crews, d/b/a Bell-Tone Enterprises; Illinois )  
Payphone Systems, Inc.; Jerry Myers, d/b/a )  
Jerry Myers Phone Co.; John Ryan, an Individual; )  
JOLTRAN Communications Corp.; Bob Lindeman, )  
d/b/a Lindeman Communications; Monica T. )  
Herman, d/b/a M L Phones; Midwest )  
Communications Solutions, Inc.; Mark B. )  
Langworthy, d/b/a Midwest Telephone; Missouri )  
Public Pay Phone Corp.; Missouri Telephone & )  
Telegraph, Inc.; Pay Phone Concepts, Inc.; )  
Toni M. Tolley, d/b/a Payphones of America )  
North; Jerry Perry, an Individual; PhoneTel )  
Technologies, Inc.; Sunset Enterprises, Inc.; )  
Teletrust, Inc.; Tel Pro, Inc.; Vision )  
Communications, Incorporated, and Gale )  
Wachsnicht, d/b/a Wavelength, LTD., )  
)  
Complainants, )  
)  
v. )  
)  
Southwestern Bell Telephone Company, L.P., )  
d/b/a Southwestern Bell Telephone Company; )  
Sprint Missouri, Inc., d/b/a Sprint; and GTE )  
Midwest Incorporated, d/b/a Verizon Midwest, )  
)  
Respondents. )

Case No. TC-2003-0066

**SOUTHWESTERN BELL TELEPHONE COMPANY'S  
MOTION TO DISMISS, ANSWER AND AFFIRMATIVE DEFENSES**

Southwestern Bell Telephone Company,<sup>1</sup> pursuant to Commission Rule 4 CSR 240-  
2.070, and respectfully submits its Motion to Dismiss, Answer and Affirmative Defenses to the

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<sup>1</sup> Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company, will be referred to in this pleading as "Southwestern Bell" or "SWBT."

Complaint filed by Tari Christ, d/b/a ANJ Communications; Bev Coleman, an Individual; Commercial Communications Services, L.L.C.; Community Payphones, Inc.; Coyote Call, Inc.; William J. Crews, d/b/a Bell-Tone Enterprises; Illinois Payphone Systems, Inc.; Jerry Myers, d/b/a Jerry Myers Phone Co.; John Ryan, an Individual; JOLTRAN Communications Corp.; Bob Lindeman, d/b/a Lindeman Communications; Monica T. Herman, d/b/a M L Phones; Midwest Communications Solutions, Inc.; Mark B. Langworthy, d/b/a Midwest Telephone; Missouri Public Pay Phone Corp.; Missouri Telephone & Telegraph, Inc.; Pay Phone Concepts, Inc.; Toni M. Tolley, d/b/a Payphones of America North; Jerry Perry, an Individual; PhoneTel Technologies, Inc.; Sunset Enterprises, Inc.; Teletrust, Inc.; Tel Pro, Inc.; Vision Communications, Incorporated, and Gale Wachsnicht, d/b/a Wavelength, LTD. (“Complainants”).

## **INTRODUCTION**

The Missouri Public Service Commission should reject Complainants’ attempt to collaterally attack Southwestern Bell’s payphone tariffs years after they were thoroughly examined and approved by the Commission. The claims Complainants are raising now are the same claims they raised and the Commission rejected in 1997 when Southwestern Bell filed its revised tariffs for Semi-Public Telephone Service and Customer-Owned Pay Telephone Service to reflect changes required to deregulate pay telephone service as required by the Federal Communications Commission (“FCC”). In Case No. TT-97-345, the Commission specifically ruled that Southwestern Bell’s tariff revisions complied with the FCC’s Orders and that its rates for payphone services were just and reasonable.

Had Complainants wished to contest the Commission’s determinations, they had the right to seek review under the procedures specifically set out by statute. But they elected not to do so. Having failed to exercise their right to seek review within the statutory timeframes, they should

not now, over five years later, be permitted to collaterally attack the Commission's prior Order and Southwestern Bell's lawfully-approved tariff.

Moreover, even if the Commission had not previously determined the same issues, the Complaint should be dismissed for failure to comply with Section 386.390(1) and Commission Rule 4 CSR 240-2.070(3), each of which require 25 actual or prospective customers to lodge a complaint about an existing tariff rates. Finally, the Complaint should be dismissed as the rates are not in excess of the maximum allowable rates which Southwestern Bell is permitted to charge under price cap regulation, and the Commission is without authority to require a reduction in a rate which complies with the statutory regime. And in any event, Complainants' claim for retroactive refunds is barred by the prohibition against retroactive ratemaking.

### **MOTION TO DISMISS**

For its Motion to Dismiss, pursuant to Commission Rule 4 CSR 240-2.070(6), Southwestern Bell states:

1. The Filed Rate Doctrine Bars this Complaint. Complainants have failed to state a claim upon which relief may be granted, in that the specific rates of Southwestern Bell alleged by Complainants to be unlawful and excessive were in fact, at all pertinent times, the lawful rates approved by, and on file with, this Commission, and thereby presumed to be lawful, just and reasonable pursuant to the filed rate doctrine. Complainants' challenge to Southwestern Bell's approved tariffs constitutes an impermissible collateral attack on the Commission's approval of those tariffs and should be dismissed. See, State ex rel. Licata, Inc. v. Public Service Com'n of State (App.1992) 829 S.W.2d 515.

Complainants' claims have already been specifically considered and rejected by the Commission. The issues being raised here by Complainants are the same issues that they, as members of the Midwest Independent Coin Payphone Association ("MICPA"), raised in Case

No. TT-97-345 and which were rejected by the Commission in its April 11, 1997 Order Regarding Deregulation of Payphones. In that case, Southwestern Bell had filed revised tariffs for semi-public telephone service and customer-owned payphone telephone service to comply with the FCC's requirements to deregulate pay telephone service. In approving the tariffs, the Commission stated:

The Commission has thoroughly reviewed the many filings in this case, including the Motions to Suspend filed by MCI and MICPA and finds that SWBT's proposed tariff revisions are in compliance with the FCC's Orders, and should therefore be approved as amended.<sup>2</sup> Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary.

The Commission also found that "while MICPA questions whether SWBT is pricing its services at cost-based rates, SWBT has supplied to the Staff supporting cost information which the Staff believes to be sufficient justification for SWBT's proposed rates."<sup>3</sup> As a result, the Commission found that "no intrastate rate reductions are necessary in conjunction with SWBT's subsidy calculation, and finds that the rates proposed by SWBT for its payphone services are just and reasonable."<sup>4</sup>

This is not the first time that Complainants, through MICPA, have attempted to resurrect issues previously addressed in Case No. TT-97-345. In Case No. TW-98-207, which the

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<sup>2</sup> In the Matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff, PSC Mo. No. 35, Regarding Deregulated Pay Telephone Service, Case No. 97-345, Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order and Denying as Moot Discovery Requests, issued April 11, 1997, at p. 10.

<sup>3</sup> Id., p. 8.

<sup>4</sup> Ibid.

Commission established in compliance with an FCC mandate,<sup>5</sup> MICPA also alleged that Southwestern Bell's payphone service tariffs failed to meet the New Services Test. In opposing their attempt to inject previously-resolved issues into the Commission's investigation in Case No. TW-98-207, Southwestern Bell explained that it had provided a copy of the New Services Test referenced in the FCC's Orders to Staff in support of the rates Southwestern Bell included in its tariff filing in Case No. TT-97-345 concerning the deregulation of payphone service. Southwestern Bell complied with the FCC's New Services Test requirement by providing the required analysis to Commission Staff for each payphone service offered. After reviewing the new services test and other cost information, Staff stated and the Commission found that Southwestern Bell had supplied sufficient justification, including satisfaction of the New Services Test, for Southwestern Bell's proposed tariffs to be approved. In a June 16, 1998 Order, the Commission rejected the attempt to broaden the investigation and reopen these issues.<sup>6</sup>

As the Commission previously examined Southwestern Bell's payphone tariff rates and found them just and reasonable, this Complaint is nothing more than an impermissible collateral attack --albeit five years later -- on the Commission's approval of those tariff rates. Accordingly, the Complaint should be dismissed.

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<sup>5</sup> In a September 20, 1996 Order and a November 8, 1996 Order on Reconsideration, the FCC in CC Docket No. 96-128, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, directed state commissions to investigate (1) whether the Commission rules and regulations contained barriers to free entry and exit from the competitive payphone market; and (2) to address the issue of provisioning and funding of "public interest" payphones. See, Order Establishing Case, Case No. TW-98-207, In the Matter of an Investigation of Payphone Issues Pursuant to the Telecommunications Act of 1996, issued December 9, 1997 at p. 1.

<sup>6</sup> See, In the Matter of an Investigation of Payphone Issues Pursuant to the Telecommunications Act of 1996, Case No. TW-98-207, Order Denying Motion to Expand Issues Under Investigation and Amend Procedural Schedule and Granting Request to Submit Case on the Record Presented, issued June 16, 1998, at p. 2.

2. The Complaint Falls Short of the Statutorily-Required Number of Claimants.

Complainants have also failed to state a claim upon which relief may be granted in that they have failed to meet the prerequisites set out by statute and the Commission's Rules for bringing a complaint concerning rates.

Section 386.390(1), RSMo (2000), states:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service. (emphasis added).

Commission Rule 4 CSR 240-2.070(3) contains a similar requirement:

(3) Formal Complaints. If a complainant is not satisfied with the outcome of the informal complaint, a formal complaint may be filed. Formal complaint may be made by petition or complaint in writing, setting forth any act or thing done or admitted to be done by any person, corporation or public utility, including any rule or change established or fixed by or for any person, corporation or public utility, in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission. However, no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any public utility unless the complaint is signed by the public counsel, the mayor or the president or chairman of the board of alderman or a majority of the council or other legislative body of any town, village, county or other political subdivision, within which the alleged violation occurred, or not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of public utility gas, electricity, sewer or telephone service as provided by law. Any public utility has the right to file a formal complaint on any of the grounds upon which complaint are allowed to be filed by other persons and the same procedure shall be followed as in other cases.

The section of the Complaint designated “The Parties” (pages 2 through 6), lists twenty-five different people or entities that purportedly are “customers, or prospective customers, of network services that are made available to companies that provide pay telephone service to end users . . . under rates, terms and conditions set forth in the Respondents’ tariffs that are later described herein.” (Complaint, para. 26, p. 6). On the face of the Complaint, however, it is clear that Complainants have not met the mandatory 25-party threshold:

- There is no allegation that all twenty-five customers or prospective customers subscribe, or could subscribe, to such service from Southwestern Bell.
- Complainant Toni M. Tolley d/b/a Payphones of America North has no standing as a customer, or prospective customer, of the Missouri tariffed services at issue as Complainant Tolley does not appear to have authority to provide public telecommunications service in Missouri. Paragraph 18 merely states that Complainant “Toni M. Tolley, d/b/a Payphones of America North, is an individual authorized to provide public telecommunications service in the State of Illinois.” (emphasis added).
- Complainant Commercial Communications Services, L.L.C. (“CCS”) has no standing as a customer, or prospective customer of the Missouri tariff service at issue as Complainant CCS does not appear to have authority to provide public telecommunications service in Missouri. Paragraph 3 of the Complaint merely states that Complainant CCS is a Missouri “limited liability company.”
- Complainant Coyote Call, Inc. has no standing as a customer or prospective customer of the Missouri tariff service at issue as Complainant Coyote Call does not appear to have authority to provide public telecommunications service in Missouri. Paragraph 5 of the Complaint merely states that Coyote Call “is a corporation organized under the laws of the State of Kansas and has been duly authorized by the Secretary of State of the State of Missouri to transact business as a foreign entity.”
- Complainant PayPhone Concepts (“PPC”) has no standing as a customer, or prospective customer of the Missouri tariff service at issue as Complainant PPC does not appear to have authority to provide public telecommunications service in Missouri. Paragraph 17 of the Complaint merely states that Complainant PPC is a “corporation organized under the laws of the State of Kansas” and that PPC “has been duly authorized by the Secretary of State of the State of Missouri to transact business as a foreign entity.”

Without the requisite authority to provide public telecommunications service in Missouri, the Commission has made clear that a claimant cannot constitute a prospective purchaser or prospective consumer as contemplated by Section 386.390(1) or 4 CSR 240-2.070(3):

Of those potential purchasers, it is clear to the Commission that one, possibly two, of them are not yet certificated to provide telecommunications services within the State of Missouri and therefore they could not be potential purchasers of SWBT's switched access service within Missouri.

...

A telecommunications business which has neither sought nor received the necessary authority to conduct business in Missouri could not constitute a prospective purchaser or prospective consumer as contemplated by Section 386.390.1. Therefore, one, possibly two, of the Complainants cannot be considered to be consumers or purchasers or prospective consumers or purchasers for purposes of this statute.<sup>7</sup>

Accordingly, the Complaint does not meet the prerequisites for bringing a complaint as set forth in Section 386.390.1 and 4 CSR 240-2.070(3) and should be dismissed.

3. The Price Cap Statute Bars this Complaint. Complainants have failed to state a claim upon which relief may be granted because their Complaint is barred by the Missouri price cap statute. Section 392.245 RSMo (2000) authorizes the Commission to employ price cap regulation to ensure just, reasonable and lawful rates<sup>8</sup> and subparagraph 2 of that section makes price cap regulation mandatory once the statutory criteria for such regulation has been met:

A large incumbent local exchange company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local

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<sup>7</sup> MCI Telecommunications Corporation, Inc., et al. v. Southwestern Bell Telephone Company, Case No. TC-97-303, Report and Order, issued September 16, 1997 at pp. 14, 15-16.

<sup>8</sup> Section 392.245(1) states:

The commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation. As used in this chapter, "**price cap regulation**" shall mean establishment of maximum allowable prices for telecommunications services offered by an incumbent local exchange telecommunications company, which maximum allowable prices shall not be subject to increase except as otherwise provided in this section. (emphasis added, bold in original).

telecommunications service and is providing such service in any part of the large incumbent companies service area. (emphasis added).

As the Commission is aware, an alternative local exchange telecommunications company (Dial U.S.) began providing alternative local service in January 1997 in Springfield, Missouri, thus subjecting Southwestern Bell to price cap regulation in accordance with the statute. Pursuant to Section 392.245(3),<sup>9</sup> Southwestern Bell's maximum allowable rates are those which were in effect on December 31, 1996. Any rate equal to or less than the rates in effect on December 31, 1996, are deemed just and reasonable as a matter of law under Section 392.245. As the rates at issue in this proceeding are not in excess of the maximum allowable rates which Southwestern Bell is permitted a charge under price cap regulation, the Commission is without authority to require a reduction in those rates as they comply with the statutory regime. Accordingly, the Complaint should be dismissed.

4. The Retroactive Ratemaking Prohibition Bars Claims for Retroactive Refunds.

Complainants have failed to state a claim upon which relief may be granted in that their claim for retroactive refunds is barred by the prohibition against retroactive ratemaking.

For their relief, Complainants seek a refund "in the amount of the difference between the rates approved by the Commission under the New Services Test, and the rates charged by Southwestern Bell to the Complainants since April 15, 1997" plus interest.<sup>10</sup> As the Commission is aware (and as set out above), the rates at issue here were approved by the Commission in its April 11, 1997 Order in Case No. TT-97-345. There, the Commission specifically found that

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<sup>9</sup> Section 392.245(3) states:

Except as otherwise provided in this section, the maximum allowable prices established for a company under subsection 1 of this section shall be those in effect on December 31 of the year preceding the year in which the company is first subject to regulation under this section. Tariffs authorized under subsection 9 of this section shall be phased in as provided under such tariffs as approved by the Commission.

<sup>10</sup> See, Complaint, pp. 13-14.

those rates complied with the directives of the FCC and were just and reasonable.<sup>11</sup> Even if the Commission were to now find that those rates should be adjusted (which Southwestern Bell denies), it can only do so prospectively and is barred by law from doing so on a retroactive basis. Under the well-established prohibition against retroactive ratemaking, the Commission may not redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his or her property without due process. In a case involving a fuel adjustment clause ("FAC"), the Missouri Supreme Court explained this well established principle:

Public Counsel requested in oral argument that we remand to the commission for a determination by it of the excess amounts collected by the utilities under the FAC over that which they would have collected under a just and reasonable rate, which would include rate increases properly authorized, and to order a refund of any such excess.

However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, Section 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, see, State ex. rel. General Telephone Co. of the Midwest v. Public Service Comm'n, 537 S.W.2d 655 (Mo. App. 1976). It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process. See, Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co., 284 US 370, 389-90, 76L.Ed. 348, 52 S.Ct. 183 (1932); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31, 70 L.Ed. 808, 46 S.Ct. 363 (1926); Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).<sup>12</sup>

Thus, to the extent the Complaint seeks retroactive refunds of amounts paid under a previously approved Commission tariff, it should be dismissed.

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<sup>11</sup> Order Approving Revised Payphone Tariff, pp. 10-11.

<sup>12</sup> State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission, 585 S.W.2d 41, 58 (Mo. 1979).

## ANSWER

For its Answer Southwestern Bell states:

1. Southwestern Bell denies all allegations contained in the narrative “Nature of the Complaint.”
2. Southwestern Bell is without sufficient information to admit or deny the allegations contained in paragraphs 1-27 of the Complaint.
3. Southwestern Bell admits the allegations contained in paragraph 28 of the Complaint except that its name is Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company.
4. Southwestern Bell states that the assertions in paragraph 29 of the Complaint are directed to Respondent Sprint Missouri, Inc., which is in the best position to respond to the allegations contained in paragraph 29 of the Complaint.
5. Southwestern Bell states that the assertions in paragraph 30 of the Complaint are directed to Respondent GTE Midwest, Inc., d/b/a Verizon Midwest, which is in the best position to respond to the allegations.
6. Southwestern Bell is without sufficient information to admit or deny the allegations contained in paragraph 31 of the Complaint.
7. Southwestern Bell states that the Missouri statute referenced in paragraph 32 of the Complaint speaks for itself.
8. Southwestern Bell states that the FCC statutes and the order and rules referenced in paragraphs 33-42 of the Complaint speak for themselves.
9. Southwestern Bell denies the allegations contained in paragraphs 43-44 of the Complaint.

10. For its response to the allegations contained in paragraph 45 of the Complaint (which incorporates by reference the allegations of paragraphs 1-44), Southwestern Bell incorporates by reference its responses in paragraphs 1-9 above (which respond to the allegation contained in paragraphs 1-44 of the Complaint).

11. Southwestern Bell admits the allegations contained in paragraph 46 of the Complaint, with the exception of the \$6.85 rate for the End-User Common Line Charge (“EUCL”) quoted by Complainants. That rate is incorrect. The applicable EUCL rate is \$5.27.<sup>13</sup>

12. Southwestern Bell denies the allegations contained in paragraphs 47-51 of the Complaint.

13. Southwestern Bell is without sufficient information to admit or deny the allegations contained in paragraphs 52-58 of the Complaint, which are directed to Respondent Sprint Missouri, Inc.

14. Southwestern Bell is without sufficient information to admit or deny the allegations contained in paragraphs 59-65 of the Complaint, which are directed to Respondent Verizon Midwest.

15. To the extent that Southwestern Bell has neither specifically admitted nor denied any allegations contained in the Complaint, Southwestern Bell specifically denies those allegations.

### **AFFIRMATIVE DEFENSES**

1. Complainants failed to state a claim upon which relief can be granted.
2. Complainants’ claims are barred by laches, waiver and estoppel.

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<sup>13</sup> See, Southwestern Bell Telephone Company’s Access Service Tariff, FCC No. 73, Section 4.3.1(D) on Fifth Revised Page 4.4, effective October 28, 1998; and Section 4.4(D)(3) on Thirty-Third Revised Page 4-10, effective July 2, 2002.

**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on October 3, 2002.

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3. Complainants' Complaint is barred by res judicata.

4. Complainants' claims are barred by State law.

5. Complainants' claims are barred by applicable statutes of limitations.

6. The relief sought by Complainants is barred by the Commission's lack of authority to award damages.

7. Complainants' request for a retroactive refund constitutes unlawful and impermissible retroactive ratemaking in violation of federal and state law.

WHEREFORE, having fully answered, Southwestern Bell requests the Commission to enter an Order dismissing Complainants' Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY



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**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on October 3, 2002.



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