BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, et al.	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	Case No. TC-2003-0066
	)	
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.	)	

SBC MISSOURI'S
RESPONSE TO APPLICATIONS FOR REHEARING
AND MOTION FOR LEAVE TO AMEND

SBC Missouri[1] respectfully submits this response opposing the Applications for Rehearing filed by Complainants[2] on January 16, 2003 and by the Office of the Public Counsel ("OPC") on January 17, 2003. Neither Complainants nor OPC have provided any basis for granting rehearing and their Applications should be denied. In addition, the Missouri Public Service Commission ("Commission") should deny Complainants' Motion to amend their Complaint. Permitting such amendment would serve no purpose. In addition to the grounds for dismissal cited by the Commission, the price cap statute bars any prospective relief and the prohibition against retroactive ratemaking would bar any retroactive relief.

[1] Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri."
[2] The Complainant group is composed of the following individual complainants: 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").

1. The Commission's Dismissal Rests on Firm Ground.

(a) The Commission Correctly Determined that Complainants Have Failed to Perfect Their Complaint.

In an attempt to avoid the perfection requirement for complaints under Section 386.390.1 RSMo (2000),[3] Complainants claim that the Commission "over analyzes the allegations of the complaint contrary to the standard in law" and "created an unlawful and unreasonable standard for the terms 'customer' or 'prospective customer' as used in Section 386.390.1."[4] Contrary to Complainants' protestations, however, the Commission simply followed mandatory requirements laid out both in State statutes and the Commission's own rules, and applied those requirements reasonably and in a manner consistent with prior Commission decisions.

There is no dispute that Section 386.390.1 RSMo (2000) permits customer rate complaints only when they are brought by "not less than 25 consumers or purchasers, or prospective consumers or purchasers." As the complaint in this case is against three carriers (SBC, Sprint and Verizon), it must be brought by at least 25 customers or prospective customers of each carrier in order to meet the statutory requirement. But as is evident from the face of the Complaint itself, Complainants have failed to meet his requirement.

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[3] 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.

[4] Complainant's Application for Rehearing, p. 2.

With respect to Complainants' status as current customers, Complainants did not allege that they were customers of each of the Respondents. And in fact, Complainants have acknowledged that they are not ("the Complainants may not be customers of each of the respondent").[5]

Thus, to state a claim under Section 386.390.1 RSMo (2000), Complainants can only proceed as "prospective customers." And to do so, they must allege sufficient facts.[6] But as their Complaint reflects, Complainants have not -- and cannot -- make the necessary factual allegations.

In an attempt to gloss over this deficiency, Complainants assert that they "are prospective customers" and imply that they "would be customers" if the rates were lower.[7] Complainants, however, miss the point. In examining the facts alleged by Complainants to establish their status as prospective purchasers, the Commission did not focus on Complainants' economic ability to purchase service. Rather, the Commission looked at whether facts were alleged to establish their authorization to be a purchaser. And in doing so, the Commission ruled, as it has before, that without the requisite authority to provide public telecommunications service in Missouri, a claimant cannot constitute a prospective purchaser or prospective consumer as contemplated by Section 386.390.1 or 4 CSR 240-2.070(3): "three of the putative Complainants are not certified to provide public telephone services in Missouri and one other has no relationship with Missouri at all."[8] Accordingly, the Commission correctly concluded that:

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[5] Complainant's Application for Rehearing, p. 2.
[6] Berkowski v. St. Louis County, 854 S.W.2d 819, 823 (Mo. App. 1993); Cady v. Hartford Accident & Indemnity Company, 439 S.W.2d 483, 485-486 (Mo. 1969) (A petition containing conclusions without alleging ultimate facts to support the allegations cannot withstand a motion to dismiss for failure to state a claim on which relief can be granted).
[7] Complainants' Application for Rehearing, p. 2.
[8] Order Regarding Motions to Dismiss, Case No. TC-2003-0066, issued January 9, 2003, p. 25.

> None of these four are either customers or prospective customers of the Respondents within the meaning of Section 386.390.1. This defect of perfection alone is sufficient to require dismissal of the complaint insofar as it is brought under the Commission's special complaint authority in Section 386.390.1.[9]

Moreover, it has recently come to SBC Missouri's attention that yet another Complainant also lacks the requisite authority to be either a customer or prospective customer of the services at issue in this case. On June 12, 2002, Complainant Gale Wachsnicht, d/b/a Wavelength LTD., filed an Application for Cancellation of Wavelength LTD's Certificate to Provide Private Telephone Service, indicating that she is "no longer in the payphone business" and has "sold all of [her] phones and equipment."[10] Based on a recommendation from its Staff's investigation, the Commission cancelled Wavelength, LTD.'s certificate of authority on June 29, 2002.[11]

It is therefore abundantly clear that the Commission correctly dismissed the Complainants' Complaint for a failure to perfect it as required by Section 386.390.1 RSMo (2000).

(b) Section 386.550 Bars Complainants' Attack on the Commission's Prior Order Approving the Respondents' Payphone Tariffs.

In an effort to avoid the preclusive effect of Section 386.550 RSMo (2000), Complainants make the alarmist claim that interpreting Section 386.550 to require dismissal of the Complaint would render Section 386.270[12] meaningless and bar all suits brought challenging

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[9] Ibid.

[10] See, Gale Wachsnicht's June 1, 2002 letter in Case No. PD-2002-1131 to the Missouri Public Service Commission requesting cancellation of private pay telephone certificate (appended as "Attachment 1").

[11] See, Order Canceling Payphone Certificate, Case No. PD-2002-1131, issued June 19, 2002. (Appended as "Attachment 2").

[12] Section 386.270 states:

> **386.270. All orders prima facie lawful and reasonable. -** All rates, tolls, charges fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and service prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

rates previously fixed by the Commission.[13] OPC similarly expresses the concern that future rate cases might be barred or that in the future a rate payer could not bring a complaint based on unreasonable, unlawful and unjust rates.[14]

Complainants and OPC have read too much into the Commission's Order. As the Order makes plain, the Commission only sought to prevent the relitigation of the same matters it had previously resolved, unless substantially changed circumstances were shown:

> Reading Licata and Ozark Porter together, it is clear that a complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstance; otherwise, Section 386.550 bars the complaint.[15]

The appropriateness of the Commission's application of Section 386.550 in this case can be seen from the following hypothetical: Assume that OPC files a complaint against a rate of return company claiming that the company's rates are unlawfully high. Based on this complaint, the Commission initiates an earnings investigation. Following a contested case proceeding, the Commission finds the company to be over-earning and lowers its rates. In compliance with the Commission's Order, the company files revised rates to alleviate the over-earnings. A few months later, however, OPC files another rate complaint claiming that the company's rates, even as adjusted, are still too high.

Under this hypothetical, it is unlikely that any party in this case would disagree that the second hypothetical rate complaint would be barred by Section 386.550. OPC candidly concedes as much:

> If the PSC decides a rate case and the order becomes final, then that decision is presumed final and lawful. That is true for all manner of collecting and enforcing the rates. Also, strangers to the rate case may not challenge the validity of it in

[13] Complainants' Application for Rehearing, pp. 2-4.
[14] OPC Motion for Rehearing, p. 4.
[15] Order Regarding Motions to Dismiss, p. 21.

any other litigation. The parties may not bring a collateral action to challenge the effectiveness of the decision.[16]

This interpretation, however, does not bar all future rate proceedings. As the Commission in this case has indicated, while Section 386.550 bars the relitigation of matters previously determined by the Commission, cases that allege a substantial change of circumstances are permitted to go forward. For example, few would argue that if OPC in the hypothetical above filed the second rate complaint ten years (instead of a few months) later, such an action would be permitted to go forward, as OPC would be proceeding under substantially changed circumstances.

But as the Commission pointed out in its Order Regarding Motions to Dismiss, there are no substantially changed circumstances in this case. Complainants here are merely raising the same issues previously raised when Respondents' payphone tariffs were filed and approved. The Commission therefore correctly dismissed Complainants' claims pursuant to Section 386.550.

(c) The Commission Correctly Interpreted Section 392.400.6 as Authorizing Only Certain Types of Complaints.

Complainants dispute the Commission's determination that Section 392.400.6 only permits complaints that a company's noncompetitive services are subsidizing its competitive or transitionally competitive services.[17] Although the Commission relied on its 1997 Decision in the MCI case, [18] Complainants apparently assert that the Commission cannot utilize this authority. Instead, Complainants point to the 1989 GTE North case [19] as controlling authority for the proposition that Section 392.400.6 claims are not so limited and claim that the

[16] OPC's Motion for Rehearing, p. 4.

[17] Order Regarding Motions to Dismiss, p. 26.

[18] MCI Communications Corp., et al., v. Southwestern Bell Telephone Company, Case No. TC-97-303 (Report and Order, issued September 16, 1997.

[19] AT&T Communications of the Southwest, Inc. v. GTE North, Case No. TC-89-28, 29 MoPSC (NS) 591 (May 19, 1989).

Commission' attempt to change its position in the MCI case was invalid because it did not adequately explain its rationale for the change.[20]

Complainants' arguments are misplaced. First, the GTE North decision contains no substantive discussion on the question at issue and therefore provides little support for the proposition Complainants advance. Second, there was no position change in the MCI case. In 1993, the Commission thoroughly examined the provisions of Section 392.400 and reached the same conclusion it did here concerning the scope of complaints which may be filed by telecommunications companies under Section 392.400.6 RSMo (2000). In AT&T Communications of the Southwest, Inc. v. Iamo Telephone Company, AT&T complained that Iamo's access service rates were priced above cost and should be reduced. In dismissing the complaint despite AT&T's contention that Section 392.400 authorized it, the Commission noted:

> A close reading of Section 392.400 as a whole indicates that the statute assumes the existence of a non-competitive or transitionally competitive telecommunications company which offers either transitionally competitive or competitive services . . . in sum, within the context of Section 392.400 as a whole, subsection 6 merely allows one telecommunications company to challenge the reasonableness of the rates charged by another telecommunications company on the ground that the latter company's non-competitive telecommunications services are subsidizing the latter company's transitionally competitive or competitive services.[21]

As the Commission's decisions in Iamo, MCI and this case illustrate, Section 392.400 is part of a comprehensive legislative plan under which telecommunication companies and the services they provide may be classified as competitive or transitionally competitive, resulting in the Commission reducing the scope of its regulation of such companies or services.[22] The legislature balanced the reduced regulatory oversight for telecommunications companies and

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[20] Complainants' Application for Rehearing, pp. 5-6.

[21] AT&T Communications of the Southwest, Inc. v. Iamo Telephone Company, Case No. TC-93-60, Order Granting Motion to Dismiss, (March 24, 1993), pp. 5-6.

[22] Section 392.361.5 RSMo (2000). See, e.g., Section 392.510 (rate banding for competitive or transitionally competitive services); Section 392.500 (permitting competitive services to be decreased on seven days notice or increased on ten instead of the 30-day notice required by Sections 392.220.2 and 392.230.3.

services that are declared competitive or transitionally competitive by prohibiting such companies from recovering expenses attributed to competitive or transitionally competitive services in their rates for non-competitive services[23] and providing a specific remedy through Section 392.400.6.

Because Complainants have made no allegation that Respondents' rates for non-competitive services are recovering costs which are attributable to a competitive or transitionally competitive service with which Complainants compete, Complainants may not proceed under Section 392.400.6 and the Commission correctly dismissed their Complaint.

2. Complainants Should Not Be Permitted to Amend Their Complaint.

As an alternative avenue of relief from the Commission's order dismissing their Complaint, Complainants request leave to file an amended Complaint. Complainants claim that the Commission made "changes in the pleading requirements" in requiring them to allege a substantial change in circumstances to avoid the preclusive effect of Section 386.550, and to sufficiently establish their status as prospective customers to proceed under Section 386.390.1.[24]

While the Commission did fully explain these grounds for dismissal in its Order Regarding Motions to Dismiss, they were not new pronouncements. With respect to the preclusive effect of Section 386.550, this statute has been on the books since 1939 and the Commission's decision followed Court of Appeals decisions dating back to 1992 and 1996.[25] With respect to its explanation of what constitutes a prospective purchaser, its conclusion is the same conclusion the Commission reached in its 1997 MCI and 1993 Iamo decisions.[26]

But even if Complainants could cure their perfection defect so as to meet the 25 customer requirement, and could allege the existence of substantially changes circumstances, their

[23] Section 392.400.1 RSMo (2000).
[24] Complainants' Application for Rehearing, p. 8.
[25] Order Regarding Motion to Dismiss, p. 20.
[26] MCI v. Southwestern Bell Telephone, Case No. TC-97-303, Report and Order, issued September 16, 1997 at pp. 14-16 ("a telecommunications business which is 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.").

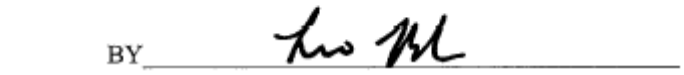
Complaint would still be subject to dismissal. As Respondents demonstrated in prior pleadings, Section 386.270 prohibits a retroactive adjustment of rates that have been lawfully established by the Commission.[27] Thus, the only remaining issue is whether the Complainants have met the requirements for challenging rates on a prospective basis. But here too, Complainants face an absolute bar. As Respondents again fully set out in previous pleadings, the Missouri price cap statute bars prospective relief.[28]

Thus, as no purpose would be served by permitting Complainants to amend their Complaint, the Commission should deny the request for leave to amend.

WHEREFORE, SBC Missouri respectfully requests the Commission to enter an Order denying Complainants' and OPC's Applications for Rehearing and Complainants' Motion to Amend their Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

BY 

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[27] See, SBC Missouri's Motion to Dismiss, pp. 9-10; Sprint's Motion to Dismiss, pp. 3-5; Verizon's Motion to Dismiss, pp. 2 and 6; see also, SBC Missouri's Reply, pp. 16-19; Sprint's Reply, pp. 6-8; Verizon's Reply, pp. 8-9, 11-12; and Sprint's Motion for Filing Supplemental Authority, p. 2.

[28] See, SBC Missouri's Motion to Dismiss, pp. 8-9; and SBC Missouri's Reply, pp. 13-16.

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on January 27, 2003.

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