BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

BARRY ROAD ASSOCIATES, INC., d/b/a MINSKY'S PIZZA, et al	)	
Individually and on behalf of all others similarly situated,	)	
Complainants,	)	
	)	**Case No: TC-2011-0396**
v.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T MISSOURI,	)	
Respondent.	)	

COMPLAINANTS' RESPONSE TO AT&T MISSOURI'S MOTION FOR SUMMARY DISPOSITION

COME NOW Complainants Barry Road Associates, Inc., The Main Street Associates, Inc. and Harry Mark Wooldridge ("Complainants"), pursuant to 4 CSR 240-2.117, and hereby respond to Respondent AT&T Missouri's ("AT&T") Motion for Summary Disposition as follows:

I. Introduction

The question before the Commission is a matter of interpretation of AT&T's tariff. Complainants do not challenge the validity or authority of any of AT&T's rates. In fact, Complainants believe the rate at issue, which is clearly designed to allocate the unavoidable costs of providing telephone services to residents of municipalities by recovering such costs from the residents of those municipalities, is both practical and logical. The tariff, as traditionally applied, makes sense precisely because it recognizes that, when a government body imposes a tax upon AT&T, the company has no say in the matter. It must pay and there is no

negotiating over the amount to be paid. The tax is literally a cost of doing business. In this sense, AT&T is in exactly the same position as an individual taxpayer. One cannot negotiate over payment of his taxes and, if he fails to pay taxes, the consequences are suffered by him alone.

However, what AT&T has passed through to its customers in this case is not a defined, pre-determined and *imposed* sum, but rather an amount resulting from allegations that AT&T *did not* pay its taxes, which amount was determined *by AT&T* in a wholly voluntary fashion and under repeated protests that it *was not paying taxes*. AT&T imposed this sum upon itself, either through its own failure to pay taxes or its own desire not to litigate that question to resolution. Voluntary settlement of a lawsuit over failure to pay taxes previously exacted does not, and cannot under the language of the tariff, be equated with an actual tax which is systematically imposed upon a utility and therefore becomes an involuntary "cost of doing business." If such settlement amounts were to be considered taxes which could be passed through to customers, Complainants respectfully suggest that the Commission would not have approved the tariff in the first instance, and therefore should not *interpret* it that way now. Moreover, AT&T suggests no logical endpoint for the interpretation it urges. For example, if AT&T were sued by its workers for violation of labor laws, would it be legitimate for AT&T's *customers*, through surcharges based on filed rates, to ultimately foot the bill for the company's decision to settle? Which of AT&T's litigation liabilities are its own? Fortunately, the tariff at issue answers these questions by allowing pass-through only of liabilities which are "imposed" upon AT&T, and not those which AT&T brings upon itself. Complainants ask only that this language be given effect.

II. Complainants' Response to AT&T's Statement of Uncontroverted Material Facts

1. The PSC has authority over AT&T Missouri's telephone service rates, and AT&T Missouri must include them in a filed tariff subject to the jurisdiction of the PSC. §§ 392.220, 392.245 RSMo.[1]

Response: Complainants object to this "fact" because it is a legal conclusion and not a statement of fact.

2. In accordance with this regulatory scheme, AT&T Missouri filed its current General Exchange Tariff, P.S.C. Mo. - No. 35 (the "Tariff"), on December 29, 1983. *See* Exs. 1 and 2.

Response: Admit.

3. Under its rate-oversight authority, the PSC approved the Tariff effective January 1, 1984. *See* 1983 Mo. PSC LEXIS 4 (Mo. PSC 1983), attached as Ex. 3.

Response: Complainants object to this "fact" because it is a legal conclusion and not a statement of fact.

4. For decades, AT&T Missouri's General Exchange Tariffs have contained provisions requiring municipal taxes to be passed through to subscribers. Section 17.11 of the Tariff (hereinafter § 17.11), the current pass-through tariff provision for any franchise, occupation, business, license, excise, privilege or other similar tax, fee, or charge, arose from § 25.11 of the prior General Exchange Tariff, P.S.C. Mo. – No. 22, which remained in effect from July 1971 until January 1, 1984 (when it was replaced in its entirety by P.S.C. Mo. – No. 35). *See* Ex. 4. The pass-through provision of the Tariff originated from provisions contained in P.S.C.

[1] In its first footnote, AT&T states that the Commission must "ignore" Complainant's arguments as to the meaning of Section 17.11. Apparently, AT&T would have the Commission fully consider and adopt AT&T's tortured interpretation of the tariff while disregarding the legal arguments of counsel for Complainants. AT&T cites no authority for this proposition, which would effectively give AT&T a license to serve as both legislator and judge with respect to its filed rates.

Mo. – No. 16 (the General Exchange Tariff preceding P.S.C. Mo. – No. 22) that the PSC approved April 10, 1968, through Telephone Authority Order No. 558. *See* Exs. 5 and 6.

Response: Admit. Complainants do not challenge the history or validity of Section 17.11, but rather seek application of its plain language pursuant to general rules of statutory interpretation.

5. Section 17.11 of the Tariff states in relevant part:

> There **shall** be added to the customer's bill or charge, as a part of the rate for service, a surcharge equal to the pro rata share of any franchise, occupation, business, license, excise, privilege or other similar tax, fee or charge (hereafter called "tax") now or hereafter imposed upon the Telephone Company by any taxing body or authority, whether by statute, ordinance, law or otherwise and whether presently due or to hereafter become due.
>
> On or after the effective date thereof, any subsequent increase, decrease, imposition or determination of liability for such taxes, fees or charges as described above shall be applied … to the customer's bill or charge on each individual billing date.
>
> *See* Ex. 2 (emphasis added).

Response: Complainants object to this "fact" because it purports to state the "relevant" part of Section 17.11 and emphasizes the word "shall" (which Complainants contend is not at issue here), because Section 17.11 must be must be construed in its entirety. *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 107 (Mo. App. W.D. 2008); *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 210 S.W.3d 330, 337 (Mo. App. W.D. 2006) (tariffs to be construed according to general rules of statutory interpretation).

6. The Tariff governs the relationship between AT&T Missouri and its landline telephone customers, including Complainants. *Bauer v. Sw. Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997).

Response: Complainants object to this "fact" because it is a legal conclusion and not a statement of fact.

7. On March 11, 2010, Complainants Barry Road Associates, Inc., d/b/a Minsky's Pizza, The Main Street Associates, Inc. d/b/a Minsky's Pizza, and Harry Mark Wooldridge filed a first amended putative class action petition against Southwestern Bell Telephone Company, d/b/a AT&T Missouri, AT&T Corp., and AT&T Inc., for violation of the Missouri Merchandising Practices Act ("MMPA"), unjust enrichment, money had and received, breach of the implied covenant of good faith and fair dealing, and statutory damages under § 392.350 RSMo. *See generally* First Am. Pet. (Exhibit B to the Complaint.)

Response: Admit.

8. The pass through of back taxes (*i.e.*, the Special Municipal Charges) upon which Complainants' underlying claims rest is rooted in three prior lawsuits filed against AT&T Missouri and related entities. *See* Ex. 7, *City of Wellston, Mo., et al. v. SBC Communications, Inc., et al.*, Case No. 044-02645 (filed December 30, 2004, St. Louis City Cir. Ct.); Ex. 8, *City of Springfield v. AT&T Missouri., et al.*, No. 04-4099-cv (filed May 14, 2004, W.D. Mo.); Ex. 9, *St. Louis County, Missouri v. AT&T Corp., et al.*, No. 08SL-CC00125 (filed Jan. 11, 2008, St. Louis County Cir. Ct.) (collectively the "Tax Litigation").

Response: Complainants deny that any of their claims are based upon the "pass through of back taxes." Their Petition and the Complaint before the Commission make clear that their claims are based on a pass through of AT&T's settlement liabilities. Complainants admit that the settlements for which they have been billed stem from the three cited lawsuits (the "*Wellston*," "*Springfield*," and "*St. Louis County*" suits).

9. Each of these lawsuits was settled, and the settlement terms required that AT&T Missouri make back tax payments to eligible taxing entities. *See* Ex. 10, *Wellston* Settlement Agreement at 14, § II.A; Ex. 11, *Wellston* J. & Order Approving Settlement; Ex. 12, S. Shashack Aff., at Exs. 12A at 8, § II.A and 12B at 2, ¶ 2.

Response: Plaintiffs object and move to strike this "fact," as the statement of what the settlement agreements required does not state a proposition of fact, but rather a legal conclusion. To the extent a proposition of fact is stated, it is denied and disputed. In the *Wellston* and *St. Louis County* settlement agreements, the term "Back Tax Payment" is specifically defined, and therefore cannot be given its common meaning, or any other meaning than that indicated in the agreements.[2] Ex. 10[3] at 12; Ex. 12A at 6, 8-9. That definition relates to sums paid according to the agreements themselves; the definition does not include actual taxes. *Id.* In the *Springfield* settlement agreement, the term "Back Tack Payment" is undefined but, in context, clearly has the same meaning as that attributed to it in the *Wellston* and *St. Louis County* settlement agreements. Ex. 12B at 2. All three settlement agreements make clear that the payments being made by AT&T are <u>not</u> tax payments, but rather are voluntarily made in consideration for the Plaintiffs' dismissal of the lawsuits and release of claims; in fact, in all three agreements AT&T unequivocally denied that it was agreeing to pay taxes. Ex. 10 at 3 ("Defendants have denied and continue to deny any and all liability with respect to the allegations raised against them in the various lawsuits involving the applicability of Plaintiffs' and other Municipalities'

[2] For this same reason and with due respect to the Circuit Court, Judge Sweeny's reference to "Back Tax Payments" in the *Wellston* Judgment is not a reference to *actual* taxes, but rather to the definition of "Back Tax Payments" devised by the parties to the settlements. Ex. A to the Complaint at 5. The remainder of Judge Sweeny's Judgment pertains to "future taxes," which were a subject of the litigation brought by the municipalities but are not at issue in this case.

[3] All references to exhibits are to the exhibits attached to AT&T's Memorandum of Law in Support of Summary Disposition, except where indicated.

respective Business License Tax ordinances to Defendants' products and services."); Ex. 10 at 37 (stating that the agreement was entered into "[i]n order to effectuate the Parties' desire to fully, finally and forever settle, compromise, and discharge all disputes arising from or related to the Action by way of compromise rather than by way of further litigation."); Ex 10 at 43 ("Neither the acceptance by Defendants of the terms of this Settlement Agreement nor any of the related negotiation or proceedings is or shall be construed as deemed to be legal evidence of an admission by Defendants with respect to the merits of the claims alleged in the Action, the validity of any claims that could have been asserted by any of the Class members in the Action, or the liability of Defendants in the Action. Defendants specifically deny any liability or wrongdoing of any kind associated with the claims alleged in the Action. Aside from the obligation to pay Business License Taxes going forward. . . this settlement agreement is not intended to, and shall not be construed as imposing any other obligation on Defendants under the Class member's respective ordinances, including without limitation any rate regulation or customer service requirements.") (Emphasis added); Ex. 12A at 3, 20-21, 23 (same); Ex. 12B at 1 ("AT&T denies any and all liability for taxes and will continue to defend itself in litigation and otherwise absent execution of this Agreement.") (Emphasis added.); Ex. 12B at 2, ¶1 (expressly agreeing that there was no determination on the merits of the municipalities' claims); ex. 12B at 4, ¶11. As the terms of the settlement agreements establish, merely calling the payments "back taxes" does not make it so.

10. AT&T Missouri accordingly made back tax payments to eligible taxing entities pursuant to the settlement agreements. *See* Ex. 10 at 14, § II.A; Ex. 12 at Exs. 12A at 8, § II.A and 12B at 2, ¶ 2.

Response: Complainants deny that AT&T made "back tax payments to eligible taxing entities." Regardless of what label was attached to the settlement payments, they were not tax payments. Complainants hereby incorporate their response to "fact" number 9, above, as if fully set forth herein.

11. AT&T Missouri began to pass through these back tax payments to its customers via a monthly surcharge. *See* Ex. B to the Complaint, First Am. Pet,. ¶ 2.

Response: Complainants deny that AT&T "began to pass through. . . back tax payments to its customers." Regardless of what label was attached to the settlement payments, they were not tax payments. Complainants hereby incorporate their response to "fact" number 9, above, as if fully set forth herein.

12. These back-tax surcharges give rise to each of Complainants' asserted causes of action. *See generally* First Am. Pet. and the allegations in the Complaint.

Response: Complainants deny that "back-tax" surcharges give rise to any of their complaints or causes of action. Regardless of what label was attached to the settlement payments, they were not tax payments. Complainants hereby incorporate their response to "fact" number 9, above, as if fully set forth herein.

13. On April 4, 2011, the Circuit Court issued the Order. In the Order, the Court stayed the case, and directed Complainants to seek a ruling from the PSC on the issue of whether "the settlement payments made by AT&T Missouri are tax payments which are required to be passed through to AT&T customers consistent with applicable tariffs." In its Order, the Circuit Court rejected Complainants' argument that AT&T Missouri should be precluded, based on the doctrine of judicial estoppel, from asserting that the settlement payments were payments of taxes. The Circuit Court found that the circumstances of the case did not bring into play the

principals of judicial estoppel and that "[b]ecause AT&T did nothing more than vigorously defend its right to challenge the interpretations of law as it relates to past and future taxes, there is nothing to suggest [AT&T Missouri was] attempting to impugn the integrity of the court." Ex. A to Complaint at 5.

Response: Complainants object to this "fact" as immaterial and misleading, because the sole ruling of the Circuit Court having effect before the Commission is its order that Complainants "seek ruling from the Missouri Public Service Commission as to whether the settlement payments made by AT&T are to be passed through to AT&T customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs." Ex. A to Complaint. The Circuit Court denied AT&T's Motion for Summary Judgment and specifically found that this Commission, and not the Court, must determine whether the settlement payments should be passed through to customers. ***Id.*** **The findings of the Circuit Court which are unrelated to this discrete question of law are therefore of no consequence to these proceedings.**

14. The Circuit Court also rejected Complainants' claims that the monies paid to the municipalities under the settlements were not payments for taxes. The Court found "**no ambiguity** in the *Wellston* court's findings in the Judgment and Order Approving the Wellston Settlement, and the court specifically found that the monies paid to the municipalities was for back and future taxes." Ex. A to the Complaint at 7 (emphasis added). The Circuit Court found that it had no authority to reverse the findings of the *Wellston* Court that the "settlement specifically involves past and future gross receipts or sales taxes." *Id.* The Circuit Court also found that it had no authority to second guess the decision of the *Wellston* Court that the underlying settlement was for back and future taxes. *Id.*

Response: Complainants object to this "fact" as immaterial and misleading, because the sole ruling of the Circuit Court having effect before the Commission is its order that Complainants "seek ruling from the Missouri Public Service Commission as to whether the settlement payments made by AT&T are to be passed through to AT&T customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs." Ex. A to Complaint. The Circuit Court denied AT&T's Motion for Summary Judgment and specifically found that this Commission, and not the Court, must determine whether the settlement payments should be passed through to customers. *Id.* The findings of the Circuit Court which are unrelated to this discrete question of law are therefore of no consequence to these proceedings.

15. Citing the *Wellston* Court, the Circuit Court also expressed its belief that the *Wellston* Court had determined that the PSC had jurisdiction to determine whether the settlement payments should be passed through to customers, and further that the Court had no authority to second guess the *Wellston* Court's decision. The Circuit Court also found that it was for the PSC to determine whether AT&T Missouri's actions in deregulating some of its business activities was controlling as to the applicability of the General Exchange Tariff in the Tax Litigation. Ex. A. to the Complaint at 7.

Response: Complainants object to this "fact" as immaterial and misleading, because the sole ruling of the Circuit Court having effect before the Commission is its order that Complainants "seek ruling from the Missouri Public Service Commission as to whether the settlement payments made by AT&T are to be passed through to AT&T customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs." Ex. A to Complaint. The Circuit Court denied AT&T's Motion for Summary Judgment and

specifically found that this Commission, and not the Court, must determine whether the settlement payments should be passed through to customers. ***Id.*** **The findings of the Circuit Court which are unrelated to this discrete question of law are therefore of no consequence to these proceedings.**

III. Argument

It is undisputed that AT&T was sued by Missouri municipalities for failure to pay certain business license and gross receipt taxes. It is also undisputed that AT&T settled those lawsuits and agreed to pay the municipalities in order to make the lawsuits go away. What AT&T now argues is that Section 17.11 *forces* it to pass this voluntarily-incurred liability through to its customers, even going so far as to argue that this is the most reasonable and fair result because AT&T's liability is somehow the fault of the municipalities themselves. But, there is one glaring question raised by all of AT&T's arguments although it is the very first question that occurred to Complainants when they discovered the "Special Municipal" charges on their telephone bills: Why are Complainants paying, years after the fact, for AT&T's avoidance of its tax liabilities? In its briefing, AT&T is unwilling to even address the possibility that its litigation liabilities should be borne *by AT&T*. The company apparently considers it a foregone conclusion that its customers will pay for all of AT&T's losses. Of course, AT&T is free to set its rates however it chooses, as long as the rate is set pursuant to Missouri law and the approval of this Commission.[4] There simply is no "settlement liability pass through" tariff, and Section 17.11 cannot be stretched to allow for such a pass through.

[4] AT&T inexplicably points out that new Missouri legislation could allow it, in the future, to avoid the filing of tariffs or scheduled rates. Memo in Support at 12-13. The implication it apparently urges is that the company should get a "pass" in this instance because it will soon be immune from the burdens of government-imposed accountability to its customers, if it chooses to be. Complainants do not see the point of this argument, as there is no dispute that AT&T's filed rates and tariffs, and Missouri law as of the time of the conduct complained of, are applicable to the question before the Commission in this case.

AT&T's litigation liabilities are not taxes imposed upon AT&T, regardless of the facts and causes of action underlying the litigation. Contrary to AT&T's arguments, a settlement payment is neither a "tax payment" nor a "back tax payment"; it is a liability of the company which must be set against its profits, and not an unavoidable "cost" to be systematically recovered from customers. This Commission need look no further than the tariff upon which AT&T relies in order to determine that Complainants are wrongfully footing the bill for AT&T's conduct.

Section 17.11 of General Exchange Tariff 35 begins as follows:

> There shall be added to the customer's bill or charge, as a part of the rate for service, a surcharge equal to the pro rata share of any franchise, occupation, business, license, excise, privilege or other similar tax, fee or charge (hereafter called "tax") now or hereafter imposed upon the Telephone Company by any taxing body or authority, whether by statute, ordinance, law or otherwise and whether presently due or to hereafter become due.

When construing statutes, "the primary rule is to consider words in their plain and ordinary meaning." *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. 2006). "A court may not add words by implication to a statute that is clear and unambiguous." *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. 2008). "When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary." *Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22, 24-25 (Mo. 2008). Accordingly, in order for AT&T to bill a customer for a surcharge under the Tariff, such charge must be *all* of the following:

(1) equal to the pro rata share of one of the following: franchise tax, franchise fee, franchise charge, occupation tax, occupation fee, occupation charge, business tax, business fee, business charge, license tax, license fee, license charge, excise tax, excise fee, excise charge, privilege tax, privilege fee, privilege charge, or some other, similar tax, fee or charge; and

(2) now or hereafter imposed upon the Telephone Company; and

(3) by any taxing body or authority, whether by statute, ordinance, law or otherwise; and

(4) presently due or to hereafter become due.

The second element of Section 17.11 is dispositive of AT&T's defense in this case. While the statute unambiguously requires that a payment be imposed upon AT&T in order for an allowable pass-through, AT&T has indisputably taken on the settlement liabilities voluntarily, not by imposition. *See* "fact" number 9 and Response, above. Of course, it may be just as apt to state that AT&T imposed the charge upon itself, in which case element 2 is met, but element 3, which requires imposition by someone else, would plainly not be met.

"Impose" means "[t]o levy or exact (a tax or duty)." Black's Law Dictionary (9th ed. 2009). Complainants submit that a company's voluntarily entering into a litigation settlement agreement is the antithesis of having a sum of money levied or exacted from it. The shareholders of AT&T are ultimately liable for the risks the company takes and for what its Board of Directors chooses to spend. AT&T has put forth no evidence or legal argument, whatsoever, that in this case such liability was lifted from the shareholders and placed upon the shoulders of customers by anyone other than AT&T itself.

Nor can AT&T establish that the first element of the Tariff has been met here. The settlement agreements reached with the municipalities completely negate the possibility that the payments could be characterized as *any* type of tax, fee, or charge. First, AT&T has expressly denied that it owed any tax, as alleged in the municipalities' petitions. Fact 9 and Response, above. AT&T provides no explanation as to why this Commission should consider the Special Municipal charge to constitute a tax pass-through even though AT&T explicitly and repeatedly rejected the notion that it was paying taxes to the municipalities. AT&T apparently wants the

payments to constitute taxes only where such designation suits its present purposes. Moreover, the word "fee" means "[a] charge for labor or services, esp. professional services." Black's Law Dictionary (9th ed. 2009). AT&T's settlement payments to the municipalities certainly do not fall within this definition, because the agreements concede that AT&T is paying to avoid litigation exposure, and not for the municipalities' labor or services. Fact 9 and Response, above. Nor can the payments be reconciled with the definition of "charge," which is (in this context) "[a]n encumbrance, lien, or claim." *Id.* At base, the plain meaning of all three words—tax, fee, and charge—is that *someone else* is exacting something, as discussed above. But, even if that were not the case, the meaning of these words does not coincide with what happened here.

Furthermore, although the municipalities are, in fact, taxing authorities, it does not follow that they act as such in all instances. The law is clear that the scope of a taxing body's right to tax is defined entirely by statute. *Excel Drug Co., Inc. v. Missouri Dept. of Revenue*, 609 S.W.2d 404, 409 (Mo. 1980). Although the municipalities' action in bringing suit against AT&T may well fall within their taxing capacities, there is no statute that imposes upon Missouri taxing authorities a duty or a right to end such litigation and enter into a contract providing for payment of less than the full amount of tax due.[5] Indeed, to allow one corporation to pay less than the full amount of tax assessed, while others similarly-situated are required to pay 100 percent of their tax liabilities, would violate the very anti-discriminatory polices upon which AT&T bases it public policy arguments in this case. In essence, when the municipalities entered into the settlement agreements, they were acting simply as parties litigant, not as legislative bodies exacting taxes according to their constitutional and statutory authority. For this additional

[5] Plaintiffs do not suggest that the municipalities had no legal authority to settle with AT&T, but rather that the focus, purpose, and effect of such settlements constitute neither exacting or imposing a tax nor recovering what is due, in full. In choosing to settle, the municipalities were presumably weighing the risks and costs of litigation, and not exacting, imposing, or collecting taxes.

reason, yet another necessary element of the Tariff has not been satisfied.

Stepping back a bit from a mechanical approach to construction of the Tariff language (which approach Complainants maintain is required), Section 17.11, read as a whole, has a clear purpose and meaning. It exists to provide AT&T with a direct means by which to recover costs of operation about which it has no discretion. As AT&T correctly argues, in addition to its logistical utility, the Tariff provides the benefit of attributing taxes exacted upon AT&T to customers of the taxing entity that imposed the tax in the first place. The hallmark of the Tariff's operation, then, is a mechanical flow of *defined* tax liability, first exacted by the taxing municipality, upon AT&T (serving in a truly ministerial capacity), to the customer-residents of the taxing municipality. The system is logical, fair, and uncontroversial, which is presumably why the Commission approved it many years ago. In contrast, what happened here is detached from, and foreign to, this tried-and-true system, primarily because the Special Municipal Charge was born entirely out of AT&T's prerogative, whether that prerogative is underpinned by its own failure to comply with the various tax ordinances or its own choice to avoid litigation exposure. The rationale and public policy behind the tariff are therefore absent. There is no logistical utility or inherent fairness where a corporate defendant intentionally negotiates with plaintiffs over millions of dollars in potential liabilities, knowing that it has an unquestioned statutory right—and even an *obligation*—to avoid paying any agreed upon settlement amount. If Section 17.11 could be read this way (which it cannot), AT&T would be free to haphazardly settle, for any amount, litigation even remotely related to its "operating costs." After all, the consequences of its decision to avoid judgment on the merits of the litigation will never be felt by AT&T. This particular settlement motivation need not be presumed because AT&T expressly inserted it into all three settlement agreements. Ex. 10 at 28, §C ("The Class Members agree not to challenge

the right of Defendants to pass through to their retail customers all or any part of the sums paid or to be paid to a Class Member under the Business License Tax Ordinances and this Settlement Agreement"); Ex. 12A at 20, §C; Ex. 12B at 6, §21. Neither the text nor the purpose or spirit of the tariff can be reconciled with AT&T's attempted use of it here.

AT&T makes an additional argument that the second paragraph of Section 17.11 allows the pass-through at issue. AT&T's memo at 11. That paragraph states as follows:

> On and after the effective date thereof, any subsequent increase, decrease, imposition or determination of liability for such taxes, fees or charges as described above shall be applied, in the manner provided below, to the customer's bill or charge on each individual billing date.

AT&T suggests that the language "imposition or determination of liability" somehow applies here. However, as discussed above, there has been no imposition of any tax, fee, or charge upon AT&T in this case. It did not have to avoid paying its taxes and did not have to settle the lawsuits, particularly in light of the fact that it denies liability for the taxes at issue in those cases. But, it did choose to settle. This is simply not an imposition upon AT&T. To the extent AT&T suggests that its voluntary settlement constitutes a "determination of liability," that position is untenable, given that the settlement agreements expressly and repeatedly deny any admission or determination of liability. AT&T agreed that "Defendants have denied and continue to deny any and all liability with respect to the allegations raised against them in the various lawsuits involving the applicability of Plaintiffs' and other Municipalities' respective Business License Tax ordinances to Defendants' products and services." Ex. 10 at 3. AT&T's motivation for settling could not be clearer: "to effectuate the Parties' desire to fully, finally and forever settle, compromise, and discharge all disputes arising from or related to the Action by way of compromise rather than by way of further litigation." Ex. 10 at 37. To be sure, AT&T did not rest on merely a single denial of liability in the settlement agreements, but rather repeated and

expanded on its denial of liability for taxes:

> Neither the acceptance by Defendants of the terms of this Settlement Agreement nor any of the related negotiation or proceedings is or shall be construed as deemed to be legal evidence of an admission by Defendants with respect to the merits of the claims alleged in the Action, the validity of any claims that could have been asserted by any of the Class members in the Action, or the liability of Defendants in the Action. Defendants specifically deny any liability or wrongdoing of any kind associated with the claims alleged in the Action. Aside from the obligation to pay Business License Taxes going forward. . . **this settlement agreement is not intended to, and shall not be construed as imposing any other obligation on Defendants under the Class member's respective ordinances**, including without limitation any rate regulation or customer service requirements.

Ex. 10 at 43 (emphasis added); *see also* Ex. 12A at 3, 20-21, 23. Although this language from the *Wellston* and *St. Louis County* Agreements is unequivocal, the *Springfield* Agreement is even more so: "**AT&T denies any and all liability for taxes** and will continue to defend itself in litigation and otherwise absent execution of this Agreement." (emphasis added); *see also* Ex. 12B at 2, ¶1; ex. 12B at 4, ¶11.

Even if the filed rate doctrine were somehow applicable here, it would preclude AT&T's attempted surcharging of past liabilities to present customers such as Complainants. In the rate-making case of *State ex rel. Capital City Water Co. v. Public Service Commission*, the Missouri Supreme Court reviewed the propriety of a utility's inclusion of past development costs in its calculation of future rates. 252 S.W. 446, 449 (Mo. 1922). The Court, adopting the analysis of the United States Supreme Court in *Galveston Electric Company v. Galveston*, 258 U. S. 388 (1922), also adopted the following statement made by this Commission: **"If it were possible to capitalize losses, the most unsuccessful property would have the greatest going value, thereby creating an illegal and absurd basis for rate making."** *Capital City Water Co.* at 449 (emphasis added). Similarly, the payments made by AT&T to the municipalities here constitute past losses which cannot, under the analysis of *Capital City Water Co.*, be capitalized and made

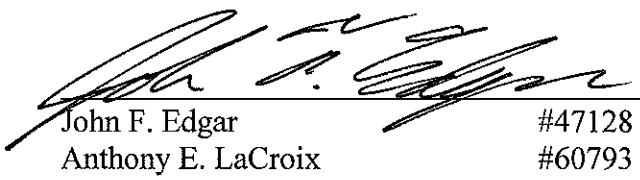
part of the rates passed through to AT&T customers going forward. In short, the settlement payments represent losses to be set against profits, and do not represent costs of future operation. While Plaintiffs believe this analysis is unnecessary in light of the facial inapplicability of Section 17.11, even if that Section could be given application here, the pass-through of past settlement liabilities to Complainants would be contrary to Missouri law.

V. Conclusion

Because AT&T's payments to the municipalities are not tax payments or "back tax payments," Section 17.11 of AT&T's Tariff is inapplicable and, consequently, the filed rate doctrine is also inapplicable. The Special Municipal charges are unlawful, deceptive, and unjust and are not in the public interest. Therefore, Complainants respectfully ask, pursuant to 4 CSR 240-2.117(1)(E), that AT&T's Motion for Summary Disposition be denied, for a determination that Complainants are entitled to relief as a matter of law, and for such other relief as the Commission deems lawful and proper.

Respectfully submitted,

EDGAR LAW FIRM LLC



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I hereby certify that a copy of the above and foregoing was served via email on this 26th day of August, 2011 to the following:

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