

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

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

**AT&T MISSOURI'S  
RESPONSE TO APPLICATION FOR REHEARING**

AT&T Missouri<sup>1</sup> respectfully submits this Response opposing Complainants'<sup>2</sup> Application for Rehearing, filed July 3, 2013.<sup>3</sup> Complainants' Application raises no argument that has not already been fully considered and addressed by the Commission. As Complainants have failed to provide any basis for granting rehearing, their Application should be denied.

1. The Commission Correctly Articulated its Authority. Complainants miss the point of the Commission's Order in arguing that the Commission had to assume their legal claims are

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<sup>1</sup> Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to as "AT&T Missouri."

<sup>2</sup> Complainants Tari Christ, d/b/a ANJ Communications; Bev Coleman, an Individual; Commercial Communications Services, L.L.C.; Community Payphones, Inc.; Com-Tech Resources, Inc.,g 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.; Bob Lindeman, d/b/a Lindeman Communications; John Mabe, an Individual; Midwest Communications 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; HKH Management Services, Inc. will be referred to in this pleading as "Complainants."

<sup>3</sup> 4 CSR 240-2.080(13) ("Parties shall be allowed ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission"). Because the 10<sup>th</sup> day falls on a Saturday (July 13, 2013), the period is expanded until Monday, July 15, 2013 under 4 CSR 240-2.050(1) ("In computing any period of time prescribed or allowed by the commission, the day of the act, event, or default shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which case the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday . . .")

true in ruling on the motion to dismiss. That is not the law. On a motion to dismiss the Commission may take the plaintiff's factual allegations as true, but it does not have to accept the plaintiff's legal conclusions. Indeed, the purpose of a motion to dismiss is to determine whether, even if the facts alleged were true, there is a legal barrier to the plaintiff's claims. The Order did not purport to speak to the veracity or sufficiency of Complainants' factual allegations. Rather, the Commission's Order focused on the Commission's lack of legal authority to award the relief Complainants requested. With respect to Complainants' request for the Commission to set rates prospectively, the Commission ruled that:

Complainants' attempt to challenge AT&T Missouri's payphone rates runs headlong into the previously established fact that the Commission no longer has statutory authority to modify the rates charged by a competitive company such as AT&T Missouri. Thus the Commission no longer has authority to determine whether the rates AT&T Missouri charges for payphone service are in the public interest.<sup>4</sup>

And with respect to Complainants' request for retroactive refunds, the Commission ruled:

. . . the Commission has no authority to order such refunds. First, since AT&T Missouri's payphone rates were lawfully established in 1997 and have remained the company's lawful rates since that time, there could be no factual basis for any refund. Second, even if there were some factual basis for ordering a refund, the Commission has no legal authority to do so. The Missouri Supreme Court has held that retroactive ratemaking is not allowed under Missouri law.<sup>5</sup>

When the Commission - - as is the case here - - lacks authority, it can only exercise its inherent power to dismiss the matter. Any action it takes without such authority would be null and void.<sup>6</sup>

2. Complainants Cannot Avoid the Bar Against Retroactive Ratemaking. Complainants again, without any citation to Missouri law, claim "the Commission's 1997 order allowing the rates to take effect merely made the rates 'legal,' not 'lawful,'" and thus outside Missouri's bar

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<sup>4</sup> Order Regarding AT&T's Motion to Dismiss, Case No. TC-2005-0067, issued June 5, 2013 at p. 7.

<sup>5</sup> *Id.*, p. 8.

<sup>6</sup> *In the Matter of the Application of Tri-M Communications, Inc. d/b/a TMC Communications and SLINX Enterprises, Inc. for Approval of a Stock Purchase Agreement*, Case No. XM-2011-0027, issued September 18, 2010 at p. 2, citing *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. Ct. App. 2000) ("When a court lacks subject matter jurisdiction, it cannot take any other action except its inherent power to dismiss . . . Moreover, any action a court takes without jurisdiction is null and void") (internal citations omitted).

against retroactive ratemaking.<sup>7</sup> Complainants are mistaken. Section 386.270 RSMo. makes clear that:

All rates . . . fixed by the commission shall be in force and shall be *prima facie* lawful . . . until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter. (emphasis added)

The Court of Appeals rejected a similar argument in an order issued less than a month ago:

Plaintiffs argue that the filed rate doctrine is inapplicable because it applies only to “lawfully approved rates”; however, as explained above, rates are *prima facie* lawful until found otherwise upon the conclusion of the appeal process. “When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.” *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo.1950); *see also State ex rel. City of Joplin v. Public Serv. Comm’n*, 186 S.W.3d 290, 295 (Mo.App.W.D.2005) (“[S]uperseded tariffs cannot be corrected retroactively[.]”).<sup>8</sup>

Moreover, no hearing is required for the bar to apply. Pursuant to statute, utilities in Missouri file schedules stating a new rate or charge, rule or regulation, and they become valid unless suspended by the Commission. Under this “file and suspend” method, which has been upheld by the Missouri Supreme Court,<sup>9</sup> once a rate is approved by the Commission or allowed to go into effect, it becomes a lawful rate and “has the same force and effect as if set by the Legislature.”<sup>10</sup>

Complainants also misstate AT&T Missouri’s Motion to Dismiss, claiming (without quoting) that “AT&T pointed out” that it “had supplied the Commission with New Services Test documentation that turned out in fact to be inconsistent with the FCC’s standards articulated in

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<sup>7</sup> Complainants Application for Rehearing, pp. 3, 6.

<sup>8</sup> *Brooks v. Empire Dist. Elec. Co.*, No. SD32177, slip op. at 10, 2013 WL 3029119 at \*5 (Mo. Ct. App. SD June 18, 2013). (Note that this opinion has not yet been released for publication as it was still subject to a motion for rehearing or transfer).

<sup>9</sup> *See, State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), Cert. denied 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). *Arizona Grocery*, 284 U.S. at 386 (“When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature.”)

<sup>10</sup> *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979), citing *State ex. rel. Jackson County*, 532 S.W.2d at 28.

the *Wisconsin Payphone Orders*”<sup>11</sup> and that “AT&T’s own conduct [led] the Commission into error.”<sup>12</sup>

In addition to being inaccurate, Complainants’ claim is irrelevant. As the Court of Appeals reaffirmed less than a month ago, even in cases where the Commission’s approval of a tariff rate was improper,<sup>13</sup> that rate remains the lawful rate that must be charged until it is replaced:

If Public Counsel had initially been allowed a reasonable time to file an application for rehearing pursuant to section 386.500.1, the higher rates approved by the PSC’s December 29, 2006 order would still have been enforced throughout the pendency of the administrative appeal. Section 386.500.3. Therefore, pending the ultimate outcome of Public Counsel’s appeal, the higher rates were the lawful rates, and Empire was *required* by statute to charge those rates approved by the PSC in its December 29, 2006 order. *See* section 393.140(11).<sup>14</sup>

This decision follows the well-settled line of Missouri court decisions denying retroactive refunds when the rate being challenged is later found to be inappropriate<sup>15</sup> or based on errors previously made in setting the rate.<sup>16</sup>

### 3. The Commission’s Order is Consistent with the FCC’s 2013 Declaratory Ruling.

Complainants question the Commission’s “analysis of applicable state and federal law”<sup>17</sup> and go

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<sup>11</sup> Complainants Application for Rehearing, p. 6.

<sup>12</sup> *Id.*, p. 7.

<sup>13</sup> There, the Supreme Court had vacated the Commission’s order approving the tariff rates because the timing of the Commission’s order did not permit sufficient time for opposing parties to seek rehearing. *Brooks v. Empire Dist. Elec. Co.*, slip op. at 3-4.

<sup>14</sup> *Brooks v. Empire Dist. Elec. Co.*, No. SD32177, slip op. at 8. (emphasis in original) (Section 393.140(11) RSMo., which applies to gas, electric, water and sewer companies, is similar to Section 392.220 RSMo., which applies to telecommunications companies.)

<sup>15</sup> *State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission*, 585 S.W.2d 41, 58 (Mo. 1979) (finding Commission had no authority to allow a utility to collect increased fuel costs under a fuel adjustment clause, but rejecting - - as retroactive ratemaking - - request for a remand to determine the excess amounts collected by the utilities and to order a refund of any such excess).

<sup>16</sup> *AT&T v. GTE North*, 29 Mo. P.S.C (N.S.) at 594 (finding rates unjust and unreasonable because of discovery of calculation errors made when rates previously approved that when corrected result in earning above the prescribed limits, but rejected retroactive refunds ruling: “the Commission cannot adjust the Respondent’s rates retroactively . . . Nor can the Commission require the Respondent to refund Complainant the over billing. First, the Commission does not have the statutory authority to pronounce monetary judgments and enforce their execution. Second, such a refund would be retroactive lowering of rates and would constitute retroactive ratemaking”) (emphasis added).

so far as to claim that the Commission has “foregone such an analysis.”<sup>18</sup> To the contrary, the Commission’s Order demonstrates a careful review and application of controlling state and federal law, especially with respect to the FCC’s refusal to preempt several state commissions that denied refunds based on state law approaches to retroactive ratemaking or the filed rate doctrine.

Complainants’ reference to state commission orders reaching different conclusions have no bearing on this case. Rather, they simply reflect the laws the Commissions in those other states are bound to follow, which is highlighted by the Kentucky Court of Appeal’s reversal of the Kentucky Commission case (cited by Complainants) for failing to follow controlling state law barring retroactive refunds:

BellSouth contends that the rate approved by the PSC in January 1999, was and remained at all relevant times the “filed rate.” Thus, based upon the constraints of the filed rate doctrine, that rate could not be altered **retroactively** by the PSC. We agree.

In its 1999 proceedings, the PSC duly adjusted the 1997 interim rates of local exchange carriers for the local exchange carriers. Each of the parties accepted the PSC’s new, final rate. In light of the General Assembly’s comprehensive rate-making scheme, including only a narrowly defined circumstance under which refunds can be ordered, the filed rate can only be lawfully altered **prospectively**. KRS 278.270, *supra*. Under the requirements of the statutes, the rate that the PSC authorized BellSouth to charge payphone service providers remained in full force and effect until the Commission modified it by its order of May 2003. Consequently, as a matter of law, BellSouth was never overpaid; no credits accrued; and no refunds were owed.<sup>19</sup>

Similarly, courts in Illinois and Ohio applied their state’s rule against retroactive ratemaking and filed rate doctrine in refusing to order retroactive refunds of payphone rates, even when the prior

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<sup>17</sup> Complainants Application for Rehearing, p. 5.

<sup>18</sup> *Id.*, p. 6.

<sup>19</sup> Cincinnati Bell Tel. Co. v. Kentucky Pub. Serv. Comm’n, 223 S.W.3d 829, 839 (Ky. Ct. App. 2007) (emphasis in original).

rates had been found not to comply with the New Services Test.<sup>20</sup> Notably, the FCC refused to preempt those decisions or require refunds.<sup>21</sup>

In this case, the Commission -- as it was bound to do -- correctly recognized that “retroactive ratemaking is not allowed under Missouri law” and that it “has no authority under state law to order AT&T Missouri to make any refunds to the Complainants.”<sup>22</sup>

4. AT&T Missouri’s Competitive Status. Attempting to revive its challenge to AT&T Missouri’s payphone line rates as “non NST compliant,” Complainants quote from “Section 392.200 RSMo 2000” and assert that “a rate in excess of the amount allowed by law is prohibited and statutorily declared unlawful.”<sup>23</sup>

Complainants misread the law. Although not properly cited, Complainants have actually quoted Section 392.200.1, which does not apply. When Complainants filed their complaint, AT&T Missouri operated pursuant to the price cap portion of Section 392.245 RSMo. Price cap regulation requires the Commission to evaluate rates in relation to the statutory “maximum allowable price,” not by the standards of Section 392.200.1: “[a]ny rate, charge, toll, or rental that does not exceed the maximum allowable price under this section shall be deemed to be just, reasonable, and lawful.”<sup>24</sup> The statute specifically excludes Section 392.200.1 (by omission) from the criteria the Commission is to apply in evaluating rates under price caps:

An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of subsections 2 through 5 of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within ten days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.<sup>25</sup>

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<sup>20</sup> See 2013 Declaratory Ruling, ¶¶ 15-16, 30-31 (discussing Illinois and Ohio cases). See also the FCC’s discussion of the Mississippi and New York application of these doctrines in refusing to order retroactive refunds to payphone providers. *Id.*, ¶¶ 18, 23-24.

<sup>21</sup> *Id.*, ¶¶ 40-42.

<sup>22</sup> Order Regarding AT&T’s Motion to Dismiss, p. 8.

<sup>23</sup> Complainants Application for Rehearing, pp. 7-8.

<sup>24</sup> Section 392.245.1 RSMo.

<sup>25</sup> Section 392.245.4(3) RSMo. (emphasis added)

As AT&T Missouri has effected its transition from price caps to a competitive classification, the Commission has correctly determined that it “no longer has statutory authority to modify the rates charged by a competitive company such as AT&T Missouri,”<sup>26</sup>

WHEREFORE, AT&T Missouri respectfully requests the Commission to enter an Order denying Complainants’ Application for Rehearing.

Respectfully submitted,

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<sup>26</sup> Order Regarding AT&T’s Motion to Dismiss, p. 7.

## CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on July 15, 2013.



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