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.	)	

COMPLAINANTS' RESPONSE TO AT&T MISSOURI'S MOTION TO DISMISS

Complainants,[1] by and through counsel, submit this response to AT&T Missouri's (AT&T) motion to dismiss the complaint.[2] AT&T's motion to dismiss should be overruled for reasons that follow.

I. Background

A. Case No. TT-97-345

Over sixteen years ago, Southwestern Bell Telephone Company[3] filed a proposed revision to its General Exchange Tariff, PSC Mo. No. 35, Sections 18 and 34, pertaining to Semi-Public Telephone Service and Customer-Owned Pay Telephone Service (the "Payphone Tariffs" or "Payphone Rates"). The purpose of the filing was two-fold. First, AT&T was required by the Federal Communications Commission ("FCC") to make payphone lines used by

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

[2] AT&T filed its answer on April 1, 2013 joining with it a motion to dismiss. By order dated April 5, 2013, the Commission granted parties until April 30, 2013 to respond.

[3] Southwestern Bell Telephone Company now does business under the name "AT&T Missouri" and will be referred to by that business name, as abbreviated, irrespective of time period throughout this response.

competitors available at cost-based rates. Second, once AT&T had complied with this requirement, AT&T was then free to collect from long distance companies a fee any a time a customer used one of AT&T Missouri's payphones to make a coinless long distance call (refered to as "dial-around" compensation). See, *In the Matter of Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order (FCC, Sept. 20, 1996) and *Order on Reconsideration* (FCC, Nov. 8, 1996) (the *"Payphone Orders")*. The proposed tariff revisions were to be effective April 15, 1997.[4] Thus there was a quid pro quo; in return for providing competitors with cost based rates, Bell Operating Companies were allowed to collect dial around compensation.

Timely motions to suspend the Payphone Tariffs were filed with the Commission by MCI Telecommunications Corporation (MCI) and the Midwest Independent Coin Payphone Association (MICPA), each requesting an investigation of the lawfulness of those tariffs under the requirements of the Telecommunications Act of 1996, which was incorporated into the Federal Communications Act(FCA). Case No. TT-97-345 was assigned to the matter.

On April 11, 1997, the Commission denied the motions to suspend filed by MCI and MICPA and wrote on page 10 of its order[5]:

> 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. 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. Therefore, the applications to intervene and motions to suspend filed by MCI and MICPA should be denied.

[4] The revised tariffs were filed with the Commission on January 15, 1997.
[5] *Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order, and Denying as Moot Discovery Requests, Case No. TT-97-345 (MoPSC Payphone Order).*

Although written argument was submitted by MICPA and other parties to Case No. TT-97-345, the investigation was entirely one-sided, and closed from inspection by the parties who ultimately would be most affected by the decision. Staff and AT&T, not payphone service providers, were the only parties who knew the contents of AT&T's cost studies. There was no cross-examination conducted of the preparers of those studies. The Commission conducted no hearing on the lawfulness of the tariffs. There was no record except that which was created by AT&T's confidential cost information, and Staff's analysis of that cost information, all of which were outside the discovery and inspection by MCI and MICPA and never quoted in the Commission's order. The information upon which the Commission relied in making its decision had not been subjected to analysis by opposing parties. The Commission essentially treated that data it as if it were unassailable and incapable of impeachment.

With respect to the Commission's remarks that "SWBT's proposed tariff revisions are in compliance with the FCC's orders" and "the tariff revisions comply with the directives of the FCC," it is important to recognize that it was not clear then that the New Services Test (NST) was the applicable standard for compliance. While AT&T now, in its discussion of Case No TW-98-207 characterizes the cost material submitted in TT-97-345 as NST compliant, it admits that this is an ex post facto, off the record characterization of the evidence it submitted in Case No. TT-97-345. The Commission will search the *MoPSC Payphone Order* and its various orders in Case No. TW-98-207 in vain for any reference or even a hint of the New Services Test or its application. In fact, the FCC's clarification of the apposite orders and directives became effective **after** the Commission's decision in Case No. TT-97-345. As the FCC observed in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-12, FCC 13-24 (rel. February 27, 2013) (the

"NST Refund Order"), prior to its circa 2000 order clarifying the parameters of the new services test,[6] "some state commissions believed that payphone rates based on historical costs were consistent with the NST." *NST Refund Order*, ¶ 43. *See also id.*¶¶ 10, 39. It was not until the FCC issued the clarification in 2000 that the parameters of the applicable NST cost standard became clear.

It has not been confirmed, and is highly doubtful, that AT&T and the Staff utilized the proper NST cost standard when evaluating the Payphone Tariffs. It is highly likely that the information the Commission relied upon in 1997 when finding the tariffs "comply with the directives of the FCC" does not in fact support a finding of NST compliance as the standard was later explained by the FCC, and could not serve as a basis for the Staff to determine that the "cost information was sufficient justification for SWBT's proposed rates."[7]

Aside from the general discussion quoted from page 10 of the *MoPSC Payphone Order* above, the Commission did not enter findings of fact articulating the specific evidence on which it relied in deciding to allow the Payphone Tariffs to become effective without a hearing, or the specific evidence upon which it rendered the purported "finding" that the "rates proposed by [AT&T] for its payphone services are just and reasonable."[8] It appears that the Commission's singular basis for calling the new payphone rates "just and reasonable" was that it believed there was "adequate information for the Commission" and therefore, "suspension of the tariff revisions [was] unnecessary." The Commission did not set out conclusions of law. There is no valid finding or conclusion in the order that the Payphone Tariffs set rates that are just and reasonable. When the Commission allowed them to become effective the Payphone Rates were from that

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[6] *Wisconsin Pub. Serv. Comm'n*; *Order Directing Filings*, CCB/CPD No. 00-01, Order, 15 FCC Rcd 9978 (CCB rel. Mar. 2, 2000) (*Wisconsin Bureau Order*), on review *Wisconsin Payphone Order*, 17 FCC Rcd 2051(2002) (hereafter jointly referred to as *Wisconsin Payphone Orders*) .

[7] *MoPSC Payphone Order at p. 8-9.*

[8] *MoPSC Payphone Order at p. 11.*

point forward "legal" telephone rates, yet there is no finding in the *MoPSC Payphone Order*, let alone a sufficient basis in fact, for the Commission to have concluded or conclude that the Payphone Tariffs set "lawful" rates. The lack of findings and conclusions would render the order in Case No. TT-97-345 patently defective today.[9]

B. Case No. TW-98-207

To comply with directives of the FCA, and FCC implementation orders, the Commission opened this case on December 9, 1997 to investigate whether its rules and regulations contained barriers to free entry and exit from the competitive payphone market. Another subject addressed in the docket was public interest payphones. The Kansas Payphone Association (KPA) and MICPA intervened and moved to broaden the scope of the proceeding to include other issues related to the progress of competition in the payphone marketplace as envisioned by the FCA and the FCC. One of the other issues proposed was whether the rates charged by all local exchange companies, not just AT&T, for payphone services were cost based and in compliance with Computer III's "new services" test. The Commission elected not to expand the scope of the proceeding beyond examination of any entry or exit barriers and public interest payphones.

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[9] Whether a case is contested or uncontested, . . . the requirements of §§ 386.420.2 and 536.090 apply such that the Commission's decision or order is required to be in writing, including findings of fact and conclusions of law. *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 542 (Mo.App.2003); *AT & T Communications of the Southwest, Inc. v. Pub. Serv. Comm'n*, 62 S.W.3d 545, 546–47 (Mo.App.2001); *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 244–45 (Mo.App.2000). The Commission's findings cannot be "completely conclusory." *AT & T*, 62 S.W.3d at 546; *State ex rel. Noranda Aluminum*, 24 S.W.3d at 244–45. They "must articulate the 'basic facts from which [the Commission] reached its ultimate conclusion' regarding disposition of the case. While detailed factual summaries are not needed there, nevertheless, must be sufficient findings of fact to determine how the controlling issues were decided by the Commission." *State ex rel. Coffman*, 121 S.W.3d at 542 (citations omitted).

Neither the Commission's July 23, 2002 order approving Sprint's proposed tariff revisions nor its August 27, 2002 order approving MCI's proposed tariff revisions contain findings of fact. Rather, the orders simply contain a general discussion of the parties' positions and a brief explanation of which position the Commission deemed correct. This does not satisfy the requirement that the Commission articulate the basic facts from which it reached its decision. *State ex rel. Noranda Aluminum*, 24 S.W.3d at 245–47.

State ex rel. Acting Public Counsel v. Public Service Commission, 150 S.W.3d 92, 101 (Mo.App. W.D. 2004).

This case was not opened to examine a proposed tariff or payphone rate and was not initiated upon a Section 386.390[10] complaint.

The Commission had still not reviewed the lawfulness or reasonableness of the Payphone Tariffs under contested case procedures.

C. Case No. TC-2003-0066.

On August 22, 2002, twenty-five payphone providers, many of whom are complainants in the present matter, filed a complaint against Southwestern Bell Telephone Company, Sprint Missouri, Inc. and GTE Midwest Incorporated, doing business as Verizon Midwest, asserting that the respondents' payphone access line rates, and other charges related to private payphone services, were unjust, unreasonable and unlawful. MICPA was not a party. Case No. TC-2003-0066 was assigned to the complaint.

Motions to dismiss were filed by each respondent. On January 9, 2003, the Commission entered an order sustaining the motions, ruling that: a) the complaint lacked the twenty-five customers or prospective customers required by Section 386.390.1; and b) without an allegation that an intervening change in circumstances had occurred, the complaint constituted a collateral attack on previously Commission-approved tariffs barred by Section 386.550.

The Complainants and the Office of Public Counsel (OPC) filed timely applications for rehearing in which they jointly argued, among other things, that the Commission misinterpreted Section 386.550 particularly when juxtaposed against Section 386.270 which provides:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services 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.** [emphasis added]

[10] Statutory references are to RSMo 2000, as updated through the current cumulative supplement, unless otherwise indicated.

In its order denying rehearing, the Commission rejected those arguments relying on opinions in *State ex rel. Licata v. PSC*, 829 S.W.2d 515, 519 (Mo. App., W.D. 1992), and *State ex rel. Ozark Border Electric Cooperative v. PSC,* 924 S.W.2d 597, 600-601 (Mo. App., W.D. 1996). The Commission went on to describe the manner in which the bar of Section 386.550 might be lifted:

> The *Ozark Border* case, also cited by the Commission in its Order of January 9, explains how the requirement of Section 386.550 may be satisfied. **The complaint need simply contain an allegation of a substantial change in circumstances. This is not a heavy burden for a pleader to meet.** In the case of an earnings investigation, for example, a complaint might be sufficient that did no more than **plead the passage of time** since the Commission's last rate order and the occurrence of intervening economic fluctuations.[11] [emphasis added]

The complainants filed a Petition for Review of the Commission's decision in Case No. TC-2003-0066 with the Circuit Court of Cole County.[12] Following briefing and argument, the Circuit Court affirmed the Commission's decision. No court has disturbed the Commission's conclusion about how a complainant may lift the bar of Section 386.550 to challenge the lawfulness of rates previously approved by the Commission.

D. Case No. TC-2005-0067

On August 27, 2004, the instant complaint was filed by the named complainants.

E. The Payphone Industry

Over the past 16 years, the number of private payphone providers has declined dramatically. The industry is but a shadow of its former image. Is the decline due to competition with wireless technology? Is the decline related to rates set noncompetitively for payphone access lines?

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[11] *Order Denying Rehearing And Denying Complainants' Alternative Motion For Leave To Amend, Case No. TC-2003-0066,* February 4, 2003, pages 9-10.

[12] *State ex rel Christ et al. v. Missouri Public Service Commission*, Case No. 03CV323550, Circuit Court of Cole County, Missouri.

II. AT&T's Motion to Dismiss

AT&T asserts that the complaint is subject to dismissal on six grounds: 1) the filed rate doctrine; 2) the Commission's prohibition on retroactive rate making; 3) collateral estoppel; 4) the number of qualified complainants has dropped below twenty-five and none have signed the complaint; 5) the effect of the Missouri price cap statute; and 6) lack of Commission jurisdiction.

A. THE COMPLAINT IS NOT BARRED BY COLLATERAL ESTOPPEL OR LIKE DOCTRINES OF REPOSE.

In its three pages of argument regarding collateral estoppel AT&T cites Section 386.550 and chronicles the several times MICPA or the named complainants, or many of them, have attempted to convince this Commission that at last a hearing should be conducted on whether the Payphone Tariffs truly comply with the FCA. No other authority is cited for the argument.

Section 386.550 provides:

> In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.

As discussed above, the Commission has never fully adjudicated the lawfulness of the Payphone Tariffs. But even if the Commission could somehow conclude that it has adjudicated the rates in those earlier proceeding, the Commission has noted in previous orders that in its estimation, Section 386.550 is not a restatement of the doctrine of collateral estoppel articulated in case precedent but rather a statutory creation unique to the Commission and its tariff and rule approval process. The equitable principles of estoppel were announced accurately in *Wilkes v. St. Paul Fire and Marine Ins. Co.* 92 S.W.3d 116, 120 (Mo.App. E.D., 2002):

> Collateral estoppel, or issue preclusion, precludes the same parties, or those in privity with the parties, from relitigating issues that have been previously litigated. *Major v. Frontenac Industries, Inc.*, 968 S.W.2d 758, 761 (Mo.App. E.D.1998). In deciding whether the application of collateral estoppel is proper, we consider the following four factors: (1) whether the issue in the present case is identical to the issue decided in the prior adjudication; (2) whether the prior

> adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party, or was in privity with a party, to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. *Cox v. Steck*, 992 S.W.2d 221, 224 (Mo.App. E.D.1999). Collateral estoppel will not be applied where to do so would be inequitable. *James v. Paul*, 49 S.W.3d 678, 683 (Mo. banc 2001). Fairness is the overriding consideration. *Cox*, 992 S.W.2d at 224. Each case must be analyzed on its own facts. *James*, 49 S.W.3d at 683.

If the Commission applied collateral estoppel as described in *Wilkes* then without delay the Commission must easily conclude that it does not apply in this case on the basis of factor number 4 alone. There has never been an adjudication --- a contested case proceeding--- involving the Payphone Tariffs and their compliance with the FCA.

Most importantly, when the Commission's interpretation of Section 386.550 is applied, the complaint most certainly meets the statutory requirements. In Paragraphs 45 through 51 of the complaint, the Complainants have fully shouldered the light pleading burden imposed by the Commission:

> 45. Since the time SWBT's Payphone Rates were approved, there has been a substantial change in circumstances.
>
> 46. Even before the Payphone Rates were approved by this Commission, SWBT and other regional Bell Operating Companies were unclear on what their obligations were to comply with the New Services Test, and were unaware of some of the basic rules in setting these rates. The RBOC Coalition, of which SWBT was a member, sought from the FCC a 45 day waiver of the requirement that the intrastate tariffs for basic payphone service, features and unbundled features and functions filed by the companies satisfy the New Services Test in order for the RBOCs to gather and review the cost studies for compliance with the New Services Test. See Letter from Michael Kellogg to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, dated April 10, 1997 ("Kellogg April 10 Letter"); Letter from Michael Kellogg to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, dated April 11, 1997 at page 1 (Kellogg April 11 Letter) (filed as ex parte letters in FCC Docket No. 96-128, copies of which are attached to this Complaint as Attachment 1).

47 . In consideration of the FCC waiver, the RBOC Coalition agreed that where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs . Kellogg April 11 Letter at page 1 .

48 . The FCC granted the waiver on April 15, 1997, giving the Bell Operating Companies until May 19, 1997 to comply. The FCC specifically required, as a condition of granting the waiver, that Bell Operating Companies refund to payphone providers, for the period from April 15, 1997 until the date that rates complying with the new services test became effective, the difference between the payphone service rates in effect on April 15, 1997 and the rates implemented to comply with the new services test. *Clarification Order*, ¶25.

49. Even though the Payphone Rates were allowed to go into effect by this Commission, SWBT's admitted doubts about compliance with federal mandates supply sufficient cause for the rates to be reviewed and tested by this Commission. Until theFCC issued the *Wisconsin Order*, state commissions generally applied disparate approaches to application ofthe new services test, and in many cases did not correctly interpret the FCC's orders regarding application of the new services test. See *Wisconsin Order*, ¶2, n. 10.

50. Over seven years have passed since the Payphone Rates were filed with the Commission by SWBT. At the time the Payphone Rates were filed, the Commission was asked by intervening parties to conduct an investigation and hearing so that the Payphone Rates could be examined properly under the requirements of the *Payphone Orders* and other applicable authority. The Commission denied hearings on the Payphone Rates and allowed them to go into effect . This Commission has not yet conducted a New Services Test review of the SWBT rates that complies with the *Payphone Orders* and subsequent orders of the FCC, including the *Wisconsin Order*. [footnote omitted]

51 . Additionally, the forward-looking cost studies the FCC requires to satisfy analysis under the New Services Test produce cost estimates on an "unseparated" basis (i.e. not separated between the interstate and intrastate jurisdictions.) In order to avoid double recovery of costs, therefore, SWBT must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (e.g., SLC/EUCL, PICC, and CCL access charges) that are used to recover the costs of the facilities involved. SWBT's EUCL rates have fluctuated since April 15, 1997 from as high as $7 .39 to as low as $5.27. However, at no time during these EUCL rate fluctuations did SWBT modify or adjust the monthly rate for the COCOT service. Because the EUCL charge revenue must be taken into account in setting the COCOT rate, the failure of SWBT to modify its monthly COCOT service rates would indicate that SWBT's COCOT rate is not cost-based, and does not comply with the FCC's New Services Test.

Not only have the complainants alleged a significant change in the circumstances, but they have identified those changes in trailing allegations. Furthermore, they have alleged the passage of time and significant intervening economic fluctuations.

At the time the instant complaint was filed, seven years had lapsed since the Payphone Tariffs were approved. **Sixteen years have now passed** and the EUCL fluctuations referred to in Paragraph 51 of the complaint have not subsided, but have only made the need to examine the Payphone Tariffs under FCA directives more urgent.

In sum, the Complaint is not barred by Section 386.550 or by the doctrines of collateral estoppel or res judicata.

B. THE COMPLAINT IS NOT BARRED BY THE FILED RATE DOCTRINE

As a preface to its remaining points of argument, Complainants offer as a frame of reference Section 276 (c) of the FCA which provides:

> (c) STATE PREEMPTION.-- To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

The complainants are entitled to the relief they request as a matter of federal law, and also state law. To the extent the requirements of state law may be inconsistent with the federal law, it is preempted.

1. The Filed Rate Doctrine

The filed rate doctrine is said to have two purposes. The first is to prevent carriers like AT&T from offering discriminatory or preferential rates. *See Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004) ("*Hill*"). The second purpose is said to be to prevent courts from trespassing into the regulatory agency's ratemaking process and thereby to

"preserv[e] the exclusive role of federal agencies in approving rates for telecommunications services that are 'reasonable'." *Hill*, 364 F.3d at 1317; *Marcus v. AT&T Co.*, 138 F.3d 46, 58 (2d Cir. 1998) ("*Marcus*"). The discussion that follows addresses each of these purposes first in the federal realm and then, to a lesser degree, in the state realm.

a. Federal Jurisdiction

Although the first purpose of the filed rate doctrine is to prevent carriers like AT&T from offering discriminatory or preferential rates, it generally only precludes a carrier from providing refunds as a result of the application of state or federal laws *other* than the Communications Act. Thus, Communications Act cases applying the filed rate doctrine generally have dealt with claims arising under contract, tort, or antitrust law. *See, e.g. Bryan v. BellSouth Comms., Inc.*, 377 F.3d 424 (4th Cir. 2004); *Hill; Marcus*. The doctrine does *not* prevent the FCC from awarding damages as the required remedy for violations of the Communications Act itself. If it did, the doctrine would have the absurd result that, in order to prevent the assessment of unlawfully discriminatory rates, the FCC would be precluded from awarding damages for a carrier's imposition of an unlawfully discriminatory rate.

Not surprisingly, therefore, the Supreme Court has made clear that the filed rate doctrine does not bar a customer from seeking reparations under the Communications Act for a discriminatory rate that violates the same statute from which the doctrine arises, i.e., the Communications Act. In *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), where the Supreme Court held that a reseller's contract and tort claims were barred by the filed rate doctrine, the court expressly stated that, "[t]o the extent respondent [the reseller] is asserting discriminatory treatment, its remedy is to bring suit under § 202 of the Communications Act." *Id.* at 226 (footnote omitted).

Similarly, the filed rate doctrine does not preclude the award of damages for an unreasonable rate violating Section 201(b). As explained in *Maislin Industries, U.S., v. Primary Steel, Inc.*, 497 U.S. 116 (1990), where a carrier's trustee in bankruptcy sued shippers to recover the difference between the tariffed rate and the contract rate paid by shippers,

> The filed rate doctrine . . . contains an important caveat: the filed rate is not enforceable if the [Interstate Commerce Commission] finds the rate to be unreasonable.

Id. at 128. In other words, the shippers were not precluded from attacking the rate itself.

Similarly, in *Reiter v. Cooper*, 507 U.S. 258, 113 S.Ct. 1213 (1993), where a carrier's trustee in bankruptcy sued its customer for collection of the filed rate, and the carrier's customer counterclaimed that the rate was unreasonable, the Supreme Court required the lower court to hold the case in abeyance pending the agency's determination whether the rate was reasonable, but denied the trustee's request for a ruling that the unreasonableness counterclaim was barred by the filed rate doctrine. The court held that the Interstate Commerce Act's ("ICA's") filed rate doctrine does not "preclude shippers from asserting (by way of claim or counterclaim) the reparations rights explicitly conferred by [the ICA itself]." 113 S.Ct. at 1219.

Like the Interstate Commerce Act at the time of *Reiter*, the Communications Act specifically provides for reparations for rates that violate the Act. See 47 U.S.C. §§ 206-208. Indeed, this principle has been applied by two United States Courts of Appeals in cases involving the very same claims that are at issue in this case.

In *Davel Communications, Inc.* v. *Qwest Corporation*, 460 F. 3d 1075 (Ninth Cir. 2006), a group of payphone providers sued Qwest alleging that Qwest's rates did not comply with the new services test during the period 1997-2002. Qwest raised the filed rate doctrine as a defense. The court explained that "the filed-tariff doctrine does not bar a suit to enforce a command of the

very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff." 460 F. 3d 1085.

In the second case in which the U. S. Court of Appeals applied this analysis to the very situation involved in the instant case, Qwest again asserted the filed rate doctrine as a defense in a suit where a payphone provider sought to collect the difference between Qwest's rates prior to 2002 and the NST compliant 2002 rates. The Tenth Circuit Court of Appeals rejected this argument, citing the passage from *Davel* excerpted above. *TON Services, Inc.,* v. *Qwest Corporation,* 493 F. 3d 1225, 1236 (10th Cir. 2007). Indeed the *TON* Court went further, holding that "once a party has notice about a possible future rate change, the [filed rate] doctrine may be inapplicable." *Id.* 1238. The 45-day waiver sought by the RBOC Coalition mentioned in Paragraphs 46-48 of the complaint was notice that some future rate adjustment might be necessary and was sufficient to overcome the filed rate doctrine. *Id.*

These principles apply *a fortiori* in this proceeding. Here, application of the filed rate doctrine to deny refunds of non-NST-compliant rates would frustrate enforcement of a specific provision of the Act, Section 276, that is explicitly intended to *preclude* non-NST-compliant rates.[13] The application of the filed rate doctrine would lead to absurdity by frustrating enforcement of the same law that the doctrine is supposed to uphold.

The second purpose of the filed rate doctrine is said to be to prevent courts from trespassing into the regulatory agency's ratemaking process. The doctrine thereby "preserve[s] the exclusive role of federal agencies in approving rates for telecommunications service that are reasonable." *Hill*, 364 F.3d at 1317; *Marcus*, 138 F.3d at 58.

b. The Filed Rate Doctrine in Missouri

In Missouri,

[13] The continuing applicability of Section 276, despite AT&T's argument to the contrary, is discussed below.

> The filed rate doctrine ... precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency." *State ex rel. Associated Natural Gas Co.,* 954 S.W.2d at 531. "This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration." *Id.* Retroactive ratemaking is defined as "the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established." *State ex rel. Util. Consumers' Council of Mo.,* 585 S.W.2d at 59. The filed rate doctrine's rule against retroactive ratemaking has an "underlying policy of predictability, meaning that if a utility is bound by the rates which it properly filed with the appropriate regulatory agency, then its customers will know ***prior to purchase*** what rates are being charged, and can therefore make economic or business plans or adjustments in response." *State ex rel. Associated Natural Gas Co.,* 954 S.W.2d at 531 (emphasis added). In other words, the approved tariffs are to "provide advance notice to customers of prospective charges, allowing the customers to plan accordingly." *Id.* [emphasis original]

State ex rel. AG Processing, Inc. v. Public Service Com'n 311 S.W.3d 361, 365 (Mo.App. W.D.,2010)

Additionally, as held in *Bauer v. Southwestern Bell Telephone Co*., 958 S.W.2d 568, (Mo.App. E.D.1997):

> The filed tariff, or filed rate, doctrine governs a utility's relationship with its customers and provides that any rate filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action. *Metro-Link Telecom*, 919 S.W.2d at 692. The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of the published tariffs. *Id*. at 693.

Bauer, at 568. The filed rate doctrine protects rates that have been lawfully approved by the Commission from relitigation, in separate case filings, in the courts of law and equity. The doctrine is a companion concept to primary jurisdiction in this sense.

These Missouri case authorities do not contradict the reasoning and logic of the federal cases cited above. With respect to the first purpose of the filed rate doctrine, preventing discrimination, both the *Ton* (493 F. 3d 1236) and *Davel* (460 F. 3d 1084) Courts, quoting an

earlier case, spoke broadly in characterizing the filed rate doctrine as having the same effect "once a carrier's tariff is approved by the FCC [or an appropriate state agency]." Complainants submit that the same limitations on the filed rate doctrine also apply, namely that this Commission is not bound by the filed rate doctrine when the rate is itself at issue.[14] As discussed above, there has been no prior determination of the lawfulness of the rates at issue here, a necessary (but not necessarily a sufficient) predicate for any possible application of the filed rate doctrine. Indeed, for the Commission to preclude refunds on the basis of state law would be similarly inconsistent with enforcement of the "command of the very regulatory statute giving rise to the tariff-filing requirements."

Other state commissions have approved refunds of amounts paid by payphone providers in excess of New Services Test compliant payphone rates notwithstanding considerations of the filed rate doctrine. The FCC approved those decisions. *NST Refund Order* ¶ 48. Indeed the FCC urged states to make determinations based on the particular facts in front of them. *Id.* ¶ 49. The FCC stated that:

> To the extent that states ultimately determine that BOC rates were not NST-compliant while the BOC was receiving dial-around compensation at any time after April 15, 1997, the date on which the BOC obligation to have NST-compliant rates took effect, we clarify that states may consider that fact when determining whether refunds are appropriate.*Id.* ¶ 38.

The FCC was particularly concerned that

> should a state determine that a particular BOC's rates were not NST-compliant, even though the BOC had certified that they were and that the BOC had been collecting payphone compensation, this would present a strong argument that refunds should be ordered.

[14] AT&T cites *State ex rel St. Louis County Gas Co, v. Public Service Commission,* 315 Mo. 312, 286 S.W. 84 (1926) for the proposition that the Commission itself is bound by the rate it approves and the Commission cannot change it. However, the Supreme Court in that case specifically held that the Commission could set aside as unjust and unreasonable an approved rate pursuant to a complaint, exactly what complainants are requesting in the instant case. 315 Mo. at 318-319, 286 S.W. at 86.

With respect to the second purpose of the filed rate doctrine, preventing a conflict between the Commission and the courts, there is no danger of that here. The parties are before the Commission and so the Commission has the ability to ensure that any determination made in this case is consistent with exercise of its overall authority under Missouri law.

The filed rate doctrine is not a bar to the Commission's authority to review the rates at issue and to order refunds.

C. THE RELIEF REQUESTED IN THE COMPLAINT IS NOT BARRED BY THE PROHIBITION ON RETROACTIVE RATEMAKING.

Just as the filed rate doctrine is no bar to proceeding in this case and ordering refunds, the authority of the FCC to order refunds and the equity of providing refunds is equally unaffected by the "retroactive ratemaking" doctrine. Unlike the filed-rate doctrine, which addresses rates that are "legally" tariffed but not necessarily "lawful," the retroactive ratemaking doctrine comes into play only when a regulatory agency has determined that the "legal" rate is also the "lawful" rate. *Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Rwy. Co.*, 284 U.S. 370 (1932) ("*Arizona Grocery*"). In the absence of a determination of lawfulness, the mere fact that a rate has been filed and allowed to take effect does not make it lawful under the governing statute, and does not bar refunds if the rate is subsequently found unlawful.[15] The federal case law clearly distinguishes the FCC's ratemaking processes which are used to determine *prospectively* the lawfulness of a new or revised rate, from its complaint processes under Section 208 of the FCA, which are *adjudicative* in nature and can be used to determine *retroactively* the lawfulness of a tariffed rate. Absent special statutory exceptions, the fact that a rate has been filed and allowed

[15] *See Virgin Islands Telephone Corp. v. FCC*, 444 F. 3d 666, 669 (D.C. Cir. 2006) (explaining the difference between "legal" and "lawful" rates); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002) (same). *AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) and cases cited therein at nn. 33-46.

to take effect without a finding as to its lawfulness does not prevent the rate from being found unlawful and damages awarded in a complaint proceeding attacking the rate.

These rules ostensibly are the same in Missouri. The Supreme Court in *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 58 (Mo., 1979), cites favorably the *Arizona Grocery* decision. As noted *Arizona Grocery* establishes the distinction between a "legal" rate, that has been allowed to take effect, and a "lawful" rate, that has been through a rate-making proceeding establishing prospective rates. Unless a rate has been established as lawful, *i.e.* just and reasonable, the rate is vulnerable to attack in a complaint proceeding.

As discussed above, the Commission has not entered a valid finding or conclusion based upon evidence that the Payphone Rates are just and reasonable. The Commission allowed those rates to become effective without a hearing.

The complaint asserts that the Commission lacked the correct guidelines or information at the time of its 1997 ruling in Case No. TT-97-345. The Commission should not be barred from now finding the same rates *unlawful* and granting refunds under either state or *federal law.* Even if the ruling in Case No. TT-97-345 can be classified as a finding of "lawfulness" it clearly cannot survive to limit the Commission's powers after the FCC in *Wisconsin Payphone Orders* clarified the New Services Test guidelines.

Complainants submit that its complaint and request for refunds of payments above the NST compliant rates is not barred by principles prohibiting retroactive ratemaking.

D. THIS COMMISSION HAS JURISDICTION OF THE COMPLAINT.

AT&T argues that there is no jurisdiction under Section 276 of the FCA because the purpose of Section 276(a) was to prevent discrimination by LECs between a LEC's payphone

services and the payphone services of independent payphone services providers. Since AT&T purportedly stopped providing payphone services in 2010, it argues it cannot be discriminating between its own services and those of other providers. This argument must be rejected.

AT&T's argument ignores the fact that the prohibition on discrimination in rates became effective on April 15, 1997. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11, FCC Rcd. 21233, 21293, ¶130 (1996).[16] At a minimum, the Commission retains jurisdiction to determine whether the payphone rates were discriminatory during the period between that date and when AT&T purportedly exited the payphone business and what the appropriate remedy should be. As the Commission is aware, Complainants have requested that the Commission order refunds of the difference between a compliant rate and the rate AT&T in fact charged.

Moreover, once the Commission determines what the lawful rate should have been, that is the rate that should have been in effect at the time AT&T left the payphone business. If AT&T wants to deviate from that correct lawful rate, it should follow the Commission's regular tariff filing process. It cannot say it was charging an unlawful rate but that the passage of time has made the rate lawful without some showing as to the justification for the rate. AT&T must justify its departure from that lawful rate subsequent to its exit from the payphone business.

This result also follows from reading the statute as a whole. While AT&T cites Section 276(a) of the FCA, it fails to cite Section 276(b). Section 276(b)(1) provides that

> In order to promote competition between payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, . . . the [Federal Communications] Commission shall . . . prescribe regulations that ---

[16] As discussed earlier, the RBOC Coalition sought a waiver from compliance with the FCC's Payphone Orders. That waiver was granted until May 19, 1997. *Clarification Order* ¶25.

> (C) prescribe a set of nonstructural safeguards . . . for Bell operating company payphone services to implement the provisions of paragraphs (1) and (2) of subsection (a), which . . . [include] those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding.

The regulations requiring that payphone line rates be based on the new services test were adopted pursuant to Section 276(b)(1)(C). Although Section 276(b)(1)(C) in turn is designed to implement Section 276(a), the rates established pursuant to the former should have been in effect since April, 1997 and certainly by the time AT&T exited the payphone business. It is those lawful rates the Commission must set. AT&T should not be permitted to evade the law by failing to meet its obligations until the law was changed. Moreover, if AT&T wants to change those lawful rates to its current rates, it should have to first put into effect those correct lawful rates it was legally bound to have on file and then file for a rate change through and subject to the Commission's usual processes.

In addition, the FCC has specifically addressed the situation where a state Commission believes it is without jurisdiction to review a rate, and that is discussed more fully in the subsequent section of this response.

E. The Price Cap Statute Does Not Bar The Complaint

AT&T argues on page 11 of its motion that the Commission cannot order a change in AT&T's rates because it is no longer subject to the Commission's jurisdiction under Section 392.245, the price cap statute. Like AT&T's argument that the Commission has lost its jurisdiction under Section 276, this argument proceeds from the faulty predicate that a rate that was invalid *ab initio* is insulated from attack by state legislation. But not only is AT&T's argument inconsistent with the state legislation, which was intended for a different purpose, AT&T's argument ignores entirely federal legislation and federal agency directives.

Turning to the federal legislation and agency directives first, AT&T contends it came under competitive pressure and in turn was deregulated by Section 392.245 in December of 1996. Irrespective of its status under the Price Cap Statute, AT&T filed the Payphone Tariffs in obedience to the *Payphone Orders* and in acknowledgment of the supremacy of the FCC on the issues of payphone rate legality. If it had the right to ignore the FCC and refuse to file tariffs that complied with the *Payphone Orders,* it certainly failed to timely assert it. To accept AT&T's argument would mean that AT&T was not required under the Price Cap Statute to file new payphone tariffs as required by the FCC but it did so voluntarily anyway.

In any event, as AT&T's own chronicle of the many attempts to test the lawfulness of the rates by adjudication demonstrates, these are rates that have been under continuous challenge since they were proposed. If AT&T is correct that the Commission has no authority to reset the rate, that does not prevent the Commission from determining that the rate is not lawful because it exceeds a NST based rate and from ordering refunds. Nothing in the price cap law precludes the Commission from passing on the lawfulness of a tariffed rate which it was mandated to review and indeed had under review at the time the law was passed. The Commission is not precluded from completing that review and ordering refunds.

The fact that the Commission does have the authority to conclude its review of the rate and determine its lawfulness also makes clear the futility of AT&T's argument that the Commission cannot order a new rate. Complainants believe the Commission will, upon full review, find that the current rates do not meet the FCC's new services test standard and were therefore unlawful. Under AT&T's reasoning, the Commission would have to leave the unlawful rate in effect because the Commission cannot order a new rate.

There are two difficulties with AT&T's reasoning. The first is that it would lead to the paradox of leaving an unlawful rate in effect, which surely was not the intent of the legislature. And this leads to the second difficulty with AT&T's reasoning: if the rate were determined to be unlawful and AT&T persisted in charging the rate, payphone providers would periodically be able to sue for refunds of the excess above the lawful rate. As a practical matter, AT&T would have to amend the tariff or there would be periodic, wasteful litigation.

Finally, if it is determined that the Commission is without jurisdiction to review the Payphone Tariffs for compliance with the NST, there is a prescribed remedy. The FCC has specifically provided for the Commission to refer the matter to the FCC for the FCC to review the rate. As early as 1996, when the FCC first imposed the requirement that state commissions review rates to ensure that they were cost based, the FCC noted that state commissions who would not or could not conduct the review should refer the matter to the FCC. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 12 FCC Rcd 21233, 21308, ¶163 (1996). In the *NST Refund Order*, the FCC twice referred to "referral to the FCC" as the option to be followed where the state commission is unable or unwilling to review a rate for NST compliance. *NST Refund Order*, ¶¶ 6, 38. Indeed, this was the vehicle by which the *Wisconsin Payphone Orders*, which were discussed above and were the proceedings where the FCC gave definitive NST guidance to the state commissions, came to the FCC. *See id*. ¶44. Wisconsin had concluded that it was without jurisdiction to review the rates. If AT&T is correct, and the Commission is now without jurisdiction to conclude the review of the rates, either because it has been ousted of jurisdiction by either AT&T's exit from the payphone business or by the price cap statute, the Commission should refer the matter to the FCC.

F. The Complaint is Perfected Under The Statute and Commission Rules.

On pages 10 through 11 of its motion to dismiss, AT&T argues that the complaint should be dismissed because: 1) it has not been signed by the complainants; and 2) while the proceedings were suspended a number of the complainants were administratively dissolved leaving less than the required 25 qualified complainants to prosecute the complaint.

Paragraph 30 of the complaint in this matter seeks a waiver of certain rules of the Commission:

> The provisions of 4 CSR 240-2 .070 (5)(A)[17] provide that a complaint is to contain the signature of each complainant and, if different than the address of the complainant, the address where the subject utility service was rendered. Pursuant to 4 CSR 240-2.015, Complainants respectfully request a partial waiver for good cause of 4 CSR 240-2.070(5)(A) in connection with these requirements in that 1) counsel for complainants has executed a separate verification (attached) relating to the authority to file and pursue this complaint; and 2) one or more ofthe payphone access services, the rates for which are the subject matter of this complaint, are delivered to each payphone operated by the Complainants, and a recital of the address of each and every location where the complainants operate a payphone (which could approach several thousand separate locations, each of which is considered proprietary) would unnecessarily overburden the complaint.

Commission rule 4 CSR 240-2.015(1) provides that "[a] rule in this chapter may be waived by the commission for good cause."

1. Signature Requirement.

The Commission has not yet ruled on the Complainants' request for a waiver of the signature requirement. AT&T writes that the Complainants had sixteen years to sign the complaint which implies that they have been dilatory. Complainants submit that they are entitled to a ruling on their request before undertaking the task of acquiring signatures of each. That they have waited on that ruling is not a sign of delay or lack of vigilance.

[17] Amendments made since the complaint was filed have altered the paragraph numbering in this rule. Formal complaints are governed by 4 CSR 240-2.070 and the Complainants' requested waivers are from informational requirements in subparagraphs (A) and (B) of the currently promulgated rule.

Additionally, 4 CSR 240-2.070(4)(B) provides that the formal complaint shall contain, "[t]he signature, telephone number, facsimile number, and email address of each complainant **or their legal representative**, where applicable." [emphasis added]. Complainants have asked a waiver of the signature requirement because undersigned counsel has verified and signed the complaint on their behalf and provided contact information; a substitute for their signature which the rule allows.

AT&T contends that the signature requirement is jurisdictional but cites no case authority in support. The prevailing rule is that affixing a signature is merely a ministerial act which can be delegated.[18] There is no suggestion and certainly no evidence that the complaint was not prepared and filed at the direction and with the consent of the Complainants. Their right to sign the complaint was delegated to counsel.

In the event the Commission declines to grant the waiver, lack of the signatures at this stage of the proceeding does not defeat the complaint. The substance of the complaint does not change for lack of Complainants' signatures. Rather fairness and justice would require that if the waiver is not granted, the Complainants would be entitled to add their signatures to the complaint within a reasonable period of time.

2. <u>The Number of Complainants</u>

[18] *See e.g., State v. Elgin*, 391 S.W.2d 341, 343 -344 (Mo.1965):

> The ministerial act of a prosecuting attorney in signing an indictment goes to the form in which the charge is presented. The substance of the offense is to be found in the body of the charge. We doubt if in any criminal trial there has been an attempt to prove as part of the merits that the prosecuting attorney signed the indictment. Assistant prosecuting attorneys have authority to sign informations (State v. Easley, Mo., 338 S.W.2d 884[1, 2] and citations), and informations may be substituted for defective indictments. It logically follows that the signing of an indictment by an assistant prosecuting attorney does not now cause the indictment to become a nullity.

When the instant complaint was filed all the complainants were certified by this Commission to offer private pay telephone service,[19] and the seventeen corporate entities named as complainants were in good standing with the Missouri Secretary of State all as established by the certificates, which are conclusive, attached to the complaint. As time has passed, and the market place has changed, it is true that a number of the Complainants have become inactive and no longer in good standing with the state of Missouri.

The Commission has no rules on the substitution of parties to a complaint in the event of death, for example, or in the event a public utility complainant surrenders its certificate of authority during the time a complaint is pending.[20] In the absence of such rules, Complainants contend that the time to test the sufficiency of the number of complainants is at the time the complaint is filed. This would be consistent with the liberal construction of the Public Service Commission Law:

> [W]e bear in mind the long standing doctrine that the statute is to be liberally construed for the public's, [sic] ergo the consumer's, protection. '(T)he Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to, the police power of the state, and under well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be 'liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. [citations omitted]

De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co., 539 S.W.2d 542, 548 (Mo.App. St.L.D.1976).

The "consumers" in this instance are the payphone providers named as complainants. Giving them benefit of their qualified status when the complaint was filed is fully consistent with

[19] Attached to this response as Appendix 1 is a census of the complainants showing the Commission file or case number in which each obtained private payphone authority.

[20] Regarding dissolved corporate entities, dissolution does not "[a]bate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; . . . ." Section 351.476.2(6). Those corporate complainants that are dissolved administratively are not disqualified from being parties for that reason.

the remedial intention of the Public Service Commission Law. The complaint statute is also a measure that should be broadly construed to allow a remedial process rather than one to defeat a right granted by the legislature.[21]

Should the Commission conclude that the complaint lacks the needed twenty-five at this time, Complainants would respectfully request leave of the Commission to join other parties complainant by amendment to the complaint. The undersigned is authorized to represent to the Commission that the entities identified on Appendix 2 to this response are prepared to join as complainants in the complaint should the Commission conclude the present complement of complainants is insufficient.

CONCLUSION

Although the payphone industry has seen decline, that much which endures is vitally important to a segment of the public that has not subscribed or can afford to subscribe to wireless communication. Additionally, payphone service is provided over land lines which unlike cellular towers are virtually impervious to the shattering power of hurricane winds. In weather-related or other emergencies, payphones provide service when cell towers and devices relying on them may fail or become overloaded.

The Payphone Tariffs, now in effect for sixteen years, have never been deeply scrutinized and were allowed to go into effect upon data which in all likelihood was not in compliance with FCC orders and directives, as clarified. The hour has come to put them to a rigorous test under the contested case procedures of this Commission.

[21] Is it not fair and just also that if there were only one payphone provider remaining in Missouri, that single provider could insist in its state public service commission that it, although alone, is entitled to rates set as required by Federal law no matter what the state complaint procedures might be. Section 276(c) of the FCA pre-empts state requirements inconsistent with the relief afforded in the Act.

Based upon the above and foregoing, the Complainants request the Commission to overrule AT&T Missouri's Motion to Dismiss and Opposition to Request for Waiver.

Respectfully submitted,

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

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 30th day of April, 2013, to Leo Bub at lb7809@att.com; General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley
Mark W. Comley