

**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,**

**v.**

**SOUTHWESTERN BELL TELEPHONE COMPANY**  
**d/b/a AT&T MISSOURI,**

**Respondent.**

**Case No: TC-2011-0396**

**COMPLAINANTS’ APPLICATION FOR REHEARING**

COME NOW Complainants Barry Road Associates, Inc., The Main Street Associates, Inc., and Harry Mark Wooldridge (“Complainants”) and, pursuant to Section 386.500, RSMo, hereby respectfully state as follows:

1. The Commission issued its Order Granting Motion for Summary Determination on September 13, 2011, which Order is to become effective on September 23, 2011.
2. Complainants hereby request a rehearing as to the Commission’s Order and the Complaint because the Order is unjust, unlawful, and unreasonable for the following reasons:
  - a. The plain language of AT&T Missouri’s General Exchange Tariff No. 35, Section 17.11, Original Sheet No. 26 (issued September 9, 1991, effective October 9, 1991), which must be construed as Missouri law, does not provide for a pass through to the customers of AT&T Missouri, including

Complainants, of amounts incurred by AT&T in settling litigation brought against it in Missouri courts.

- b. The Commission's Order is based on the erroneous factual finding that the three lawsuits underlying the pass-through (the *Wellston*, *St. Louis County*, and *Springfield* cases) resulted in settlement agreements which "required that AT&T Missouri make back tax payments to eligible entities," in that the it is undisputed that the payments made by AT&T to class members were not taxes, but rather settlement payments, and the term "back tax payments" must be attributed the meaning expressly given to it in the settlement agreements and not its ordinary meaning or any other meaning.
- c. The Commission's Order is based on its factual findings that "'total back tax payment' means \$65 million, inclusive of attorney's fees, to be divided [among] class members, St. Louis County, and class counsel," that the claim form in the class action litigation "requires a class member to provide a certified copy of an ordinance enacted by the class member accepting the settlement with AT&T Missouri," and that "AT&T Missouri is not surcharging its retail customers any amounts paid as attorneys' fees in connection with the settlement," and the Commission's reliance on these facts is erroneous because these factual findings are irrelevant to the matter now before the Commission in that each and every one of these terms (the division of the settlement amount among interested parties, the requirement under the settlement agreements that the class members present an ordinance, and that attorney's fees are not part of the surcharge) is a function of the settlement

agreements themselves, and not the imposition of any tax or “back tax” upon AT&T Missouri.

- d. The Commission’s Order is based on the erroneous factual findings that “the *Wellston* [and *St. Louis County*] court[s] ordered AT&T Missouri to make back tax payments,” in that the terms of the *Wellston* and *St. Louis* settlement agreement require not the payment of any literal tax or “back tax,” but rather an amount calculated pursuant to a formula devised solely for the purpose of settlement.
- e. The Commission’s Order is based on the erroneous legal conclusion that reference to “back tax payments” by the *Wellston* and *St. Louis County* parties and the Court in those cases is a reference to the common meaning of “back tax payment,” when in fact it is a contractually defined term which must be attributed the meaning it is given in the contract.
- f. The Commission’s Order is based on the erroneous threshold finding that “Complainants’ theory is based upon the claim that the phrase ‘back tax payments’ in the *Wellston, et al.* settlements have a meaning specifically defined in those settlements,” in that it is *AT&T Missouri*, not Complainants, which attributes relevance to the terms under which it settled litigation with non-parties to this case;<sup>1</sup> as set forth in the Complaint, it is Complainants’ principal contention that a voluntarily-incurred litigation settlement liability

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<sup>1</sup> Complainants contend that they would be entitled to relief even if the settlement agreements did not define “back tax payments” and, indeed, even if the term was defined as “taxes.” Neither a contractual settlement agreement nor the approval by a Missouri court of such agreement constitutes a tax or other charge that may be lawfully passed through to customers under the plain language of General Exchange Tariff No. 35, Sec. 17.11. Complainant’s response to AT&T’s repeated focus on the term “back tax payments” is intended to illustrate the legally untenable position AT&T takes, which is that it can agree to make litigation over its alleged wrongdoing go away and, in the process, simply agree to attach a label to the settlement payments which “fits” its pass-through tariffs.

(of any sort) is not a “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,” and it is undisputed that this language is to be construed in the same manner in which Missouri statutes are to be construed.

- g. The Commission’s Order is based on the erroneous finding that, because the term “total back tax payments” does not include attorney’s fees, the term is to be given the common meaning of “total back tax payments,” in that the term must be attributed its contractual definition, which was indisputably devised solely for the purposes of settlement.
- h. The Commission’s Order is based on the erroneous finding that “Complainants. . . do not state” what the actual meaning of “back tax payments” is, in that Complainants specifically pointed in their Memorandum in Opposition to Summary Determination to the only definition of “back tax payments” which may arguably have bearing on this matter, which is that contained in the settlement agreements. (Complainant’s Memo. in Opp. at 6, citing AT&T’s Exhibits 10 at 12 and 12A at 6, 8-9.)
- i. The Commission’s Order is based on the erroneous finding that the requirement under the settlement agreements that the class members pass ordinances accepting the terms of the settlement precludes “any other conclusion but that AT&T Missouri, in paying according to the settlement, did

so pay a “tax. . . imposed by any taxing body or authority. . . by. . . ordinance,” in that it is undisputed that these ordinances constitute not the exacting or imposition of taxes, but rather the meeting of a term of the settlement agreements giving the class members the contractual right to recover from the settlement fund.

- j. The Commission’s Order is based on the erroneous finding that approval by a Missouri Court of a settlement agreement in litigation wherein a utility is accused of violation of municipal tax laws renders the contractual settlement agreement a “tax. . . imposed. . . by statute, ordinance, law or otherwise,” (emphasis in original), in that (1) the liability of a settling litigant which arises from a settlement agreement is, by definition under Missouri law, not a “tax,” (2) approval by a Missouri Court of a class action settlement agreement is not a judicial imposition by such Court of contractual rights between the parties, but rather a device to protect absent class members, and (3) neither the *Wellston* nor the *St. Louis County* Court made a determination that the settlement amounts for “back tax payments” (as opposed to the portions of the settlements pertaining to *future* tax payments, which are manifestly not at issue here) were taxes, as that term is defined under Missouri law.
- k. The Commission’s Order is based on the erroneous finding that both the “*Wellston* and the class action courts themselves rejected Complainant’s arguments, and found the payment specifically involved taxes,” in that the *Wellston* Court made no findings with respect to actual taxes (except with respect to “future” taxes, which portions of the settlements are not at issue

here), but rather made findings with respect to the terms of the settlement agreement, and the Circuit Court of Jackson County, in its Order leading to the Complaint at issue, specifically left to this Commission the question of whether the settlement amounts were lawfully to be passed through pursuant to the tariff.

- l. The pass through by AT&T Missouri of litigation losses is an unlawful attempt to capitalize losses and recover them from customers as operating costs when, in fact, they are simply losses to be set against the company's profits, not costs of doing business which are the subject of lawful rate-making.<sup>2</sup>
- m. The pass through of a portion of the settlement liabilities to current AT&T Missouri customers who were not customers of AT&T Missouri during the timeframe that is at issue in the *Wellston, St. Louis County*, and *Springfield* lawsuits is unlawful.
- n. The Commission lacks subject matter jurisdiction to rule upon the meaning of Missouri law, including Section 17.11 of General Exchange Tariff 35.

WHEREFORE, for the foregoing reasons, Complainants respectfully request a rehearing of the issues set forth in their Complaint, that the Commission's Order Granting Motion for Summary Determination be set aside, and such other relief as the Commission deems lawful and proper.

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<sup>2</sup> Complainants reiterate that they do not challenge the legality of any of AT&T Missouri's lawfully filed rates, but rather seek application of the plain language of Section 17.11 pursuant to Missouri law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was served via email on this 22<sup>nd</sup> day of September, 2011 to the following:

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