

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 13th
day of September, 2011.

| | | |
|--------------------------------------|---|--|
| Barry Road Associates, Inc., |) | |
| d/b/a/ Minsky's Pizza, |) | |
| |) | |
| and |) | |
| |) | |
| The Main Street Associates, Inc., |) | |
| d/b/a Minsky's Pizza, |) | |
| |) | |
| and |) | |
| |) | |
| Harry Mark Wooldridge, |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | |
| |) | |
| Southwestern Bell Telephone Company, |) | |
| d/b/a AT&T Missouri, |) | |
| |) | |
| Respondent. |) | |

File No. TC-2011-0396

**REPORT AND ORDER GRANTING
MOTION FOR SUMMARY DETERMINATION**

Issue Date: September 13, 2011

Effective Date: September 23, 2011

Syllabus: This order grants summary determination in favor of Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri").

Background and Procedural History

On June 20, 2011¹, Complainants filed a Complaint with the Commission, pursuant to an April 4 order of the Honorable Anne Mesle, Judge of the Circuit Court of Jackson County, Missouri (“the Order”). Specifically, the Order stayed an underlying class action proceeding between Complainants and AT&T Missouri (hereafter “class action”) to allow the Complainants to seek a ruling from the Commission to determine whether the “settlement payments made by AT&T Missouri are to be passed through to AT&T Missouri customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs.”

On July 27, Southwestern Bell Telephone Company, d/b/a AT&T Missouri, filed an Answer, Affirmative Defenses, a Motion for Summary Disposition, and a Memorandum of Law in Support of its Motion for Summary Disposition. The Staff of the Commission supported AT&T’s motion, and Complainants opposed it, both filings being on August 26.

FINDINGS OF FACT

Based upon undisputed facts, the Commission makes these Findings of Fact.

1. On March 11, 2010, Complainants filed a first amended putative class action petition against AT&T Missouri, et. al, for violation of the Missouri Merchandising Practices Act, unjust enrichment, money had and received, breach of the implied covenant of good faith and fair dealing, and statutory damages.²

¹ Calendar references are to 2011 unless otherwise indicated.

² *Complaint*, Ex. A, p. 3.

2. The pass-through of back taxes upon which Complainants' underlying claims rest is rooted in three prior lawsuits filed against AT&T Missouri and related entities.³

3. Each of the lawsuits was settled, and the settlement terms required that AT&T Missouri make back tax payments to eligible taxing entities.⁴

4. AT&T Missouri began to pass through the back tax payments to its customers via a monthly surcharge.⁵

5. A "back tax payment" is an amount calculated by a formula given to each class member that has timely and validly submitted a claim form.⁶

6. A "total back tax payment" means \$65 million, inclusive of attorneys' fees, to be divided among class members, St. Louis County, and class counsel.⁷

7. The claim form requires a class member to provide a certified copy of an ordinance enacted by the class member accepting the settlement with AT&T Missouri.⁸

8. The fees class counsel were entitled to receive was \$16.25 million of the \$65 million total back tax payment.⁹

9. AT&T Missouri is not surcharging its retail customers any amounts paid as attorneys' fees in connection with the settlement.¹⁰

³ *Id.* (the underlying tax lawsuits will be referred to as the *Wellston*, *St. Louis County*, and *Springfield* cases).

⁴ *Id.* at pp. 1, 2, 5.

⁵ *Complaint*, Ex. B, p. 2.

⁶ *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 10 (or "the *Wellston* settlement"), p. 12

⁷ *Id.*

⁸ *Id.* at 32.

⁹ *Id.* at 36.

¹⁰ *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 11 (or "Order Approving Settlement"), p. 3.

10. \$48.75 million was set aside for payment of back taxes, with \$16.25 being left for attorney's fees.¹¹

11. The *Wellston* court ordered AT&T Missouri to make back tax payments.¹²

12. The *St. Louis County* settlement provided for AT&T Missouri to make back tax payments.¹³

13. Each party in *St. Louis County* was to pay its own attorneys' fees.¹⁴

14. The *Springfield* settlement specified the amount of money AT&T Missouri was to pay as back tax payment, and what amount AT&T Missouri was to pay as attorneys' fees.¹⁵

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission 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 Commission.¹⁶ The Commission has authority to hear and decide complaints brought against public utilities operating in Missouri.¹⁷

¹¹ *Id.* at 8, 13-17.

¹² *Id.* at 18.

¹³ *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 12A (or "*St. Louis County* Settlement"), p. 8.

¹⁴ *Id.* at 20.

¹⁵ *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 12B (or "*Springfield*" Settlement), p. 2.

¹⁶ Sections 392.220, 392.245 RSMo.

¹⁷ Section 386.390, RSMo 2000.

AT&T Missouri's current General Exchange Tariff states, in pertinent 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.¹⁸

Approved tariffs become law, and have the same force and effect as a statute.¹⁹

The tariff governs the relationship between AT&T Missouri and Complainants.²⁰

Standard of Review for Summary Determination

Commission Rule 4 CSR 240-2.117, which is titled "Summary Disposition," authorizes the Commission to decide all or any part of "a contested case by disposition in the nature of summary judgment or judgment on the pleadings."

Commission Rule 4 CSR 240-2.117(1), provides, in relevant part:

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period.

* * *

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

¹⁸ *AT&T Missouri General Exchange Tariff*, P.S.C. Mo. – No. 35, Section 17.11, Original Sheet No. 26 (issued September 9, 1991, effective October 9, 1991).

¹⁹ *Allstates Transworld Vanlines v. Sw. Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo.App. 1996).

²⁰ *See Bauer v. Sw. Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo.App. 1997).

This is not a case seeking a rate increase, or a case subject to an operation of law date. Thus, the motion for summary determination is properly before the Commission.

A defendant establishes a right to summary disposition by (1) offering facts that negate one or more essential elements of the plaintiff's claim, or (2) showing that the plaintiff will be unable to produce sufficient evidence to establish one or more essential elements of the plaintiff's claim.²¹

The movant has the burden to prove summary disposition is proper.²² When the movant introduces facts showing a right to judgment as a matter of law, the burden then shifts to the non-movant, who must respond with countervailing evidence showing that there is a genuine dispute as to one or more of the movant's material facts.²³

Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing²⁴ inasmuch as "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest."²⁵

DECISION

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

²¹ *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo.banc 1993). See also *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 707 (Mo.banc 2005).

²² See *ITT, id.*, 854 S.W.2d at 378.

²³ *Id.* at 381.

²⁴ See, e.g., *Determination on the Pleadings, The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation*, Case No. WC-2004-0342 (Oct. 19, 2004).

²⁵ *Determination on the Pleadings, In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004). See also *Wood & Hulston Bank v. Mahan*, 815 S.W.2d 454, 457 (Mo. App. 1991).

those settlements. In other words, the “back tax payments” aren’t really that, but something else.

Complainants, however, do not state what that meaning is, and the Commission can discern no other meaning to that phrase. This is especially true in light of the phrase “total back tax payments” including attorneys’ fees. The negative implication of those two phrases would appear to be that “back tax payments” do not include attorneys’ fees.

Further, class members (which are municipalities) claiming money under the *Wellston* settlements were required to produce copies of ordinances accepting the settlement. Thus, the Commission cannot see any other conclusion but that AT&T Missouri, in paying according to the settlement, did so to pay a “tax . . . imposed by any taxing body or authority . . . by . . . ordinance” as mentioned in AT&T Missouri’s tariff.

Further, paying the settlement per a court-approved settlement also is paying a “tax . . . imposed . . . by statute, ordinance, law or otherwise” as listed in AT&T Missouri’s tariff. Complainants’ mere assertion that “back tax payment” means something else other than its ordinary meaning, without any evidence that the agreement gave it any other meaning, is not a specific fact which shows there is a genuine issue for hearing.²⁶

Although not binding upon the Commission, the Commission notes that both the *Wellston* and the class action courts themselves rejected Complainants’ arguments, and found the payments specifically involve taxes.

²⁶ See *Kinder v. Notorangelo*, 615 S.W. 433, 434 (Mo.App. 1980).

Complainants' arguments do not present a *genuine* issue of *material* fact.²⁷ The Commission will grant AT&T Missouri's motion for summary determination.

THE COMMISSION ORDERS THAT:

1. The Motion for Summary Determination filed by Southwestern Bell Telephone Company d/b/a AT&T Missouri is granted.
2. Southwestern Bell Telephone Company d/b/a AT&T Missouri may pass through settlement payments, but not any amount paid as attorneys fees, to its customers pursuant to AT&T Missouri General Exchange Tariff, P.S.C. Mo. – No. 35, Section 17.11, Original Sheet No. 26.
3. This order shall become effective on September 23, 2011.
4. This case may be closed on September 24, 2011.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

²⁷ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48; 106 S.Ct. 2505, 2510 (1986).