IN THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BARRY ROAD ASSOCIATES, INC., d/b/a MINSKY'S PIZZA,	)	FILED
	)	
and	)	NOV 15 2011
	)	
THE MAIN STREET ASSOCIATES, INC. d/b/a MINSKY'S PIZZA,	)	Missouri Public Service Commission 10:03am MA
	)	
and	)	
	)	**Case No.**
HARRY MARK WOOLDRIDGE,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T MISSOURI,	)	
	)	
Respondent.	)	

NOTICE OF APPEAL PURSUANT TO SECTION 386.510, RSMo.

COME NOW Appellants Barry Road Associates, Inc. d/b/a Minsky's Pizza, The Main Street Associates, Inc. d/b/a Minsky's Pizza, and Harry Mark Wooldridge, by and through undersigned counsel, and hereby file their Notice of Appeal of the Missouri Public Service Commission's ("Commission") Order issued on September 13, 2011 granting Respondent Southwestern Bell Telephone Company d/b/a AT&T Missouri's Motion for Summary Determination. Appellants hereby incorporate by reference their Notice of Appeal, attached hereto, which is being filed contemporaneously with the Missouri Public Service Commission, as if fully set forth herein.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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.	)	**File No.: TC-2011-0396**
SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T MISSOURI,	)	
Respondent.	)	

NOTICE OF APPEAL PURSUANT TO SECTION 386.510, RSMo.

COME NOW Complainants Barry Road Associates, Inc. d/b/a Minsky's Pizza, The Main Street Associates, Inc. d/b/a Minsky's Pizza, and Harry Mark Wooldridge, by and through undersigned counsel, and hereby file their Notice of Appeal of the Missouri Public Service Commission's ("Commission") Order issued on September 13, 2011 granting Respondent Southwestern Bell Telephone Company d/b/a AT&T Missouri's Motion for Summary Determination. Pursuant to Section 386.510, RSMo, Complainants state as follows:

1. This Notice of Appeal is being filed contemporaneously in the Court to which the appeal is taken, which is the Missouri Court of Appeals, Western District, along with a docket fee of $70 pursuant to Rule 81.04.
2. A true and correct copy of Complainants' Application for Rehearing, filed with the Commission on September 22, 2011, is attached hereto as Exhibit A.

3. A true and correct copy of the Commission's Order issued on September 13, 2011, which is the Order being appealed, is attached hereto as Exhibit B.

4. Because this is not a proceeding "resulting in the establishment of new rates for a public utility that is not classified as a price-cap or competitive company," pursuant to Section 386.420, RSMo., no reconciliation as set forth in that Section is filed herewith.

5. The issue being appealed is concisely stated as follows:

   The Commission erroneously granted Respondent's Motion for Summary Determination because 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.

6. The parties to the Commission proceeding are listed in the caption hereto and there are no other parties to the proceeding being appealed.

Respectfully submitted,

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ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via U.S. mail and email on this 10th day of November, 2011 to the following:

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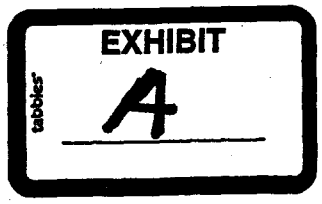
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

COMPLAINANTS' 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;[1] as set forth in the Complaint, it is Complainants' principal contention that a voluntarily-incurred litigation settlement liability

[1] 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 statues 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.[2]

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.

[2] 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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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

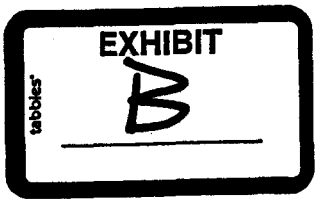
At a session of the Public Service Commission held at its office in Jefferson City on the 13th day of September, 2011.

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.	)	File No. TC-2011-0396
Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Respondent.	)	

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, 2011[1], 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 amount 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]

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[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]

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[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 ay 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.

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[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 hearing[24] 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

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[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.

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[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).

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 13th day of September 2011.

Steven C. Reed
Secretary

MOPSC

Digitally signed by MOPSC
DN: cn=MOPSC, o=Public Service Commission, ou=Missouri, email=DataCenter-PSC@psc.mo.gov, c=US
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MISSOURI PUBLIC SERVICE COMMISSION

September 13, 2011

File/Case No. TC-2011-0396

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Enclosed find a certified copy of an ORDER in the above-numbered matter(s).

Sincerely,

Steven C. Reed
Secretary

Individuals listed above with a valid e-mail address will receive electronic service. Individuals listed above without a valid e-mail address will receive paper service.