

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

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

**STAFF'S RESPONSE TO SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI'S MOTION FOR SUMMARY DISPOSITION**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through the undersigned counsel, and files *Staff's Response to Southwestern Bell Telephone Company, d/b/a AT&T Missouri's Motion for Summary Disposition* with the Missouri Public Service Commission ("Commission") respectfully stating the following:

1. On June 20, 2011, 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 (collectively, the "Complainants") filed a *Complaint* against Southwestern Bell Telephone Company, d/b/a/ AT&T Missouri ("AT&T" or "Respondent"), in which it alleged wrongful pass through of back tax settlement payments by the Respondents to a certain class of customers. The Complaint has been filed with the Commission pursuant to an Order of the

Honorable Anne Mesle Judge of the Circuit Court of Jackson County, Missouri. The sole question before the Commission is, “whether the settlement payments made by AT&T are to be passed through to AT&T customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs.” (Complaint p.3; Ex. A to Complaint, 04/04/11 Order).

2. On July 27, 2011, AT&T filed its Motion for Summary Disposition, and Memorandum of Law in support of its Motion. AT&T argues that the back tax surcharge at issue is mandated under a tariff approved by the Commission, and therefore summary judgment is therefore warranted under Rule 74.04 of the Missouri Rules of Civil Procedure pursuant to the filed rate doctrine.

3. Commission Rule 4 C.S.R. 240-2.117(1)(E) in relevant part provides that, “the Commission may grant a 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...”

4. AT&T is subject to the jurisdiction of the Commission under Section 386.320 RSMO 2000.

5. Staff believes summary judgment is proper for AT&T in this matter because Minsky’s Pizza will be unable to produce evidence sufficient to allow the Commission to find the surcharge contains improperly passed through costs, in that AT&T’s tariff provides for such costs to be passed through to customers, and Commission Rule also provides for such costs to be passed on to consumers.

6. Commission Rule 4 C.S.R. 240-33.040(8)(I) states the types of costs that may be passed through to a customer's bill, "Every bill should clearly state—An itemization of the amount due for taxes, franchise fees and other fees and/or surcharges which the telecommunications company, pursuant to its tariff, bills to customers..." Although this rule is waived as to AT&T, it does remain a valid rule, and the Staff is of the opinion that companies should adhere to it as a standard of acceptable practice.

7. Section 17.11 of AT&T's General Exchange Tariff presently on file with the Commission states, "[t]here shall be added to the customer's bill or charge, as 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 . . . now or hereinafter imposed by any taxing body or authority, whether by statute, ordinance, law or otherwise and whether presently due or to hereafter become due." Although recently passed legislation may make reliance on such tariff language moot, in this case, the tariffs are and have been approved and on file at all times relevant to this matter.

8. Further, although not binding on the Commission, the Order of the Circuit Court points out that the settlement upon which this case is based specifically states, "FURTHER, in accordance with the terms and provisions of the Settlement Agreement, this Court orders that Defendants shall make Back Tax Payments to Class members which have submitted approved claims as provided in the Settlement Agreement..." Order of the Circuit Court of Jackson County, p. 5. This statement indicates the Court is treating the settlement payments as back taxes which are the type of payments contemplated by AT&T's tariff.

9. The same judgment of the court states that no payments other than taxes were passed through to customers, "AT&T is not surcharging its retail customers any amounts paid as

attorneys' fees in connection with the settlement..." This statement seems to indicate that the costs being passed through on to customer bills are only those payments being made in the nature of tax payments.

10. As the Court that approved the settlement found that the settlement payments were in the nature of back taxes, the Honorable Judge Mesle declined to review that finding, and Commission Rule allows for the pass-through of tax payments to customers, summary judgment for AT&T is proper in this matter. Although there may be some question as to whether the tariff provides for collection of taxes retrospectively as well as prospectively, there is no prohibition against the collection of back taxes, there is certainly precedent for doing so, and the settled case law that permits the collection of taxes on bills does not limit collection to prospective application.

11. Finally, an equity argument exists that has not been touched on in this matter. The payment of these back taxes applied to dozens of governmental entities to whom the taxes were owed. AT&T met with the Staff to discuss their application of these taxes, in which they assured the Staff that no other fees or costs were included as noted by the court above, and were applied to customer bills starting within a few months of the settlement in January, 2010. The Staff believed it had no authority to tell AT&T it could not put the charges on the bill in light of the court's determination, and asked that the charge be separately listed on the customer bills, which AT&T did. In some instances, the amounts owed to municipalities has been fully repaid. It would be unfair to customers who have already paid off their tax burden to apply a different standard at this point. The taxes assessed on the customer bills were lawfully assessed by officials elected by the constituency that includes the Complainants. If they believe that those taxes are unlawful or unreasonably high, they should direct their complaint to the taxing authority.

WHEREFORE, Staff recommends the Commission issue an Order granting AT&T summary judgment in this matter.

Respectfully submitted,

/s/ Meghan E. McClowry
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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, emailed, sent by facsimile or hand-delivered to all counsel of record this 26th day of August, 2011.

/s/ Meghan E. McClowry