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November 8, 2002

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Missouri Public Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Re: Tari Christ, d/b/a ANJ Communications, et al. v. Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company, et al.
Case No. TC-2003-0066

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of Complainants' Additional Suggestions in Opposition to Respondents' Separate Motions to Dismiss.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By: Mark W. Comley
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MWC:ab
Enclosure
cc: Office of Public Counsel
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BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, Bev Coleman, an individual, Commercial Communication Services, L.L.C., Community Payphones, Inc., Coyote Call, Inc., William J. Crews, d/b/a Bell-Tone Enterprises, Illinois Payphone Systems, Inc., Jerry Myers, d/b/a Jerry Myers Phone Co., John Ryan, an individual, JOLTRAN Communications Corp., Bob Lindeman, d/b/a Lindeman Communications, Monica T. Herman, d/b/a M L Phones, Midwest Communication Solutions, Inc., Mark B. Langworthy, d/b/a Midwest Telephone, Missouri Public Pay Phone Corp., Missouri Telephone & Telegraph, Inc., Pay Phone Concepts, Inc., Toni M. Tolley, d/b/a Payphones of America North, Jerry Perry, an individual, PhoneTel Technologies, Inc., Sunset Enterprises, Inc., Teletrust, Inc., Tel Pro, Inc., Vision Communications, Incorporated, Gale Wachsnicht, d/b/a Wavelength, LTD. Complainants, Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company, Sprint Missouri, Inc., d/b/a Sprint, and GTE Midwest Incorporated, d/b/a Verizon Midwest, Respondents.	)	Case No. TC-2003-0066

COMPLAINANTS' ADDITIONAL SUGGESTIONS IN OPPOSITION TO RESPONDENTS' SEPARATE MOTIONS TO DISMISS

On November 1, 2002, each of the respondents filed a reply to the complainants' suggestions in

opposition to the separate motions to dismiss.[1] Much of the material in the respondents' replies is repetitive of their motions to dismiss, but some new matter has emerged, and although complainants recognize that this might become an endless circle of filings and responses, they submit these further suggestions in opposition to respondents' motions to dismiss.

A. The complaint is an original action authorized by statute.

Sprint Missouri, Inc. (Sprint) and Southwestern Bell Telephone Company (SWB) reargue that the complaint is an impermissible collateral attack on the Commission orders that allowed their payphone access rates to go into effect. In support of the argument, they cite Section 386.550, RSMo 2000,[2] and cases that have construed this provision, including State ex rel. Licata, Inc. v. Public Service Commission, 829 S.W.2d 515 (Mo.App. W.D.1992). The position of these parties is that a complaint filed pursuant to Section 386.390.1 or 392.400.6 to challenge payphone access rates approved by the Commission is a collateral attack on an order of the Commission that is prohibited by Section 386.550.

Neither Sprint nor SWB has given any attention to Section 386.270 which provides:

> [a]ll 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.

The statute anticipates that suits **will be brought** to challenge the rates fixed by the Commission. Such a

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[1]Complainants' Suggestions in Opposition to Respondents' Separate Motions to Dismiss Complaint were filed on October 18, 2002 and each argument and position made or taken in those opposing suggestions is reasserted by reference herein.

[2]All statutory citations herein are to RSMo 2000 unless otherwise indicated.

suit authorized by the chapter[3] to challenge the rates fixed by the commission is the complaint procedure identified in Section 386.390.1 and referred to throughout the Public Service Commission Law.

It is quite clear from these citations that the legislature has, by design, sanctioned an original proceeding before this body by which the lawfulness and reasonableness of rates that were fixed by the Commission in other cases can be challenged by qualified parties. Whatever the holding in *Licata* may be, it cannot be construed to abrogate the clear intention of Section 386.270 and its recognition of the complaint process provided for in the same chapter. The opinion in *Licata* does not mention Section 386.270.

Agreeing with the respondents' arguments would bar all of the parties mentioned in Section 386.390.1 from instituting a complaint as to the reasonableness of rates. In turn, this would bar the Commission from its key duty of monitoring the rates of utilities. If the Commission accepts the arguments of Sprint and SWB on this matter, then it would essentially eliminate the remedy which Section 386.390 provides for public counsel, municipal officials, consumers and the Commission itself to contest the reasonableness of utility rates. Under the theory espoused by Sprint and SWB, tariffs of a utility would be beyond the investigatory reach of the Commission once they were approved, because any action to challenge them by any party, including the Commission, would be a collateral attack on a Commission order. At the core, respondents argue that by allowing rates to go into effect without a hearing, (or with a hearing), the Commission forecloses itself from later investigating those rates by complaint on its own motion despite evidence that the rates are unlawful or unreasonable. The result is incongruent with the

[3]The Public Service Commission Law is found in one chapter which includes all of Chapter 386, and in 1939, included Sections 392.190 through 392.260.

intention of the Public Service Commission Law. The Commission should reject an interpretation of Section 386.550 which would in effect prevent it, and any of the potential complainants listed in Section 386.390, from altering through the complaint process the rates of a utility company that are unreasonable to consumers.

There is further guidance on this issue in State ex. rel Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. 1975) in which Judge Morgan, after a lengthy opinion, summarized the system by which electric rates were approved or challenged by and within the Commission:

> There is a substantial difference between a utility and one of its consumers. Only the former would be in a position to suggest the need for new rates (§393.140(11)), by virtue of its singular knowledge as to changing financial conditions and its own present financial status. A consumer, on the other hand, even absent such knowledge is given a legal right to complain (§ 386.390 and §393.260) of the new rate. The statutory scheme authorizes the Commission to call for "notice" and "hearing" but does permit approval absent either in certain instances. **In that event, the consumer can initiate a complaint to review the validity of a new rate--which results in the same being 'temporary' at best.** [emphasis added]

Id. at 32-33.

SWB stated in its reply at page 5 that had complainants "filed their Petition on April 16, 1997, one day after the tariff became effective, there is no doubt the Complaint would have been subject to dismissal." Review of the *SWB Payphone Order* will establish that the rates for payphone access went into effect without notice and hearing. According to Judge Morgan, those rates were temporary at best and could be challenged by complainants even the day after they were effective.

B. Collateral estoppel cannot be applied in this case.

SWB has put more flesh on its argument that complainants are barred by collateral estoppel, but the argument is utterly without merit. In their opposing suggestions to the respondents' motions to dismiss,

complainants discussed collateral estoppel from MICPA's perspective as a mere participant in *In the matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff, PSC Mo. NO. 35, Regarding Deregulated Pay Telephone Service,* Case No. TT-97-345, (*SWB Payphone Order)* and even under that analysis it was shown that collateral estoppel could not be fairly applied in this instance. That conclusion is reinforced further by stricter examination of just one of the factors to consider in applying collateral estoppel. One factor is whether the party against whom collateral estoppel is asserted was a party, or was in privity with a party, to the prior adjudication. Wilkes v. St. Paul Fire and Marine, Insurance Company, 2002 WL 31162792 (Mo.App. E.D 2002). MICPA was never a party to the *SWB Payphone Order.* Its application for intervention was summarily denied.[4] It would be an injustice for the Commission to bind MICPA to the holding of any case in which it was not a party; more unjust still to bind a MICPA member to a case in which neither MICPA nor its members were parties. Failure of this factor means that discussion of the others is purely academic. In sum, Complainants are not collaterally estopped from bringing their complaint.

C. The Commission may independently determine as a matter of policy that the New Services Test applies to Sprint and Verizon.

Sprint and Verizon argue that the new services test cannot be applied to them because of the holdings in recent FCC cases, specifically *In the Matter of Wisconsin Public Service Commission Order*

[4]MICPA's applications to intervene were also denied in *In the Matter of United Telephone of Missori's d/b/a Sprint Revision tro its General Exchange Tariff, P.S.C. MO. No. 22, and its Intrastate Access Services Tariff, P.S. C. MO. No. 26, Regarding Deregulated Pay Telephone Service*, Case No. TT-97-421 and *In the Matter of GTE Midwest Incorporated's Revision to its General ExchangeTariff, P.S.C. MO. No. 1, Regarding Deregulated Pay Telephone Service,* Case No. TT-97-399. It was never a party to any of the cases in which the respondents' payphone rates were allowed to go into effect.

Directing Filings, FCC 02-25; Bureau/CPD No. 00-01. (*Wisconsin Order).*[5] Their arguments are silent about their representations to this Commission in 1997 that their payphone access rates were set in accordance with the New Services Test. More importantly, Sprint and Verizon fail to realize the power of this Commission to independently decide the standard under which the reasonableness of payphone access rates can and should be determined in Missouri. Even if the FCC has modified its original ruling about the sweep of the New Services Test, this Commission can nonetheless, under its own authority, decide that 1) for the promotion of competition among payphone service providers and promotion of the widespread deployment of payphone services to the benefit of the general public in Missouri, and 2) to be reasonable under Missouri law, payphone access services offered by the respondents, BOC or Non-BOC, must be priced using the New Services Test. It is up to the Commission to decide if the federal standard applicable to BOCs is the proper standard to apply to non-BOCs operating in Missouri. Complainants suggest strongly that the proper standard is to be left to the Commisson and, given the acceptance and appeal of the New Services Test in this and other regulatory settings, there is little, if anything, that can be raised against its application in Missouri.

On page 14 of its reply, Sprint cites to an order of the North Carolina Utilities Commission[6] in which it concluded that as a matter of law it need not apply the New Services Test to non-BOC LECs. Even though the North Carolina Utilities Commission has reached this conclusion, it has also concluded it can apply the test to non-BOC LECs as a matter of policy. In the same order it has elected to reserve for

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[5]The *Wisconsin Order* is on appeal and it is conceivable that the FCC will be directed to correct its decision so that Sprint and Verizon are under the duty to set their payphone access rates in accordance with the New Services Test.

[6]*In the Matter of Petition of the North Carolina Payphone Association for Review of Local Exchange Company Tarriffs for Basic Payphone Services,* Order on Reconsideration, Docket No. P-100, Sub 84b, October 23, 2002.

can apply the test to non-BOC LECs as a matter of policy. In the same order it has elected to reserve for a later date its decision on whether it should require retrospective refunds from non-BOC LECs. Nothing forbids this Commission from following the FCC's lead regarding the proper pricing of payphone access rates and adopting the New Services Test for all companies as the standard of reasonableness. It is also complainants' position that the Commission should not shy from granting refunds.

D. The RBOC Coalition's waiver and the extent to which Sprint and Verizon may have relied on a similar waiver are issues of fact.

The complainants explained in their opposing suggestions to the motions to dismiss how the waiver described in the letter from Michael Kellogg to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, dated April 11, 1997 (attached to the suggestions as Attachment 1) nullifies a defense of "retroactive rate making" when considering complainants' prayer for refunds. In response, SWB claims that complainants "have grossly misconstrued the Kellogg letter."[7] Verizon argues that it was never, and can never be, an RBOC. Complainants submit that at this early stage of the proceedings, the significance of the Kellogg letter, its interpretation or construction, the reliance on the waiver by the respondents and the interpretation of the waiver by other regulatory commissions are matters of fact that have not been properly introduced in evidence, and to argue them as grounds for a motion to dismiss is premature. Complainants' suggestion of the waiver should be sufficient to trigger the issue, and the Commission can make its own conclusions as the evidence unfolds. It is complainants' position the evidence will support a finding by the Commission that refunds can be lawfully ordered in this case without offense to the prohibition on retroactive ratemaking.

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[7]SWB Reply to Complainant's Suggestions In Opposition to Motions to Dismiss Complaint, page 19

CONCLUSION

On the basis of the foregoing, complainants respectfully request that the Commission deny the respondents' motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2002, a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand delivery, to:

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