

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 5th day of
June, 2013.

Tari Christ d/b/a ANJ Communications, et al.,

Complainants,

v.

Southwestern Bell Telephone Company, L.P.
d/b/a Southwestern Bell Telephone Company,

Respondent.

)
)
)
)
)
)
)
)
)
)

Case No. TC-2005-0067

ORDER REGARDING AT&T MISSOURI'S MOTION TO DISMISS

Issue Date: June 5, 2013

Effective Date: July 5, 2013

This complaint has been pending since August 27, 2004, when the Complainants, a group of payphone service providers, filed a complaint against Southwestern Bell Telephone Company, L.P. d/b/a Southwestern Bell Telephone Company. (Southwestern Bell Telephone Company now does business as AT&T Missouri and will be referred to as such in this order.) The Complainants and AT&T Missouri agreed to mediation in 2004, and the Commission stayed these proceedings to allow mediation to proceed. Despite periodic prodding from the Commission, this complaint remained stayed for mediation until July 28, 2011, when the Commission ended the stay of proceedings and ordered AT&T Missouri to file its answer.

The Complainants asked the Commission to reconsider its order directing AT&T Missouri to file its answer, explaining that proceedings on the complaint should remain suspended while the parties awaited guidance from an anticipated ruling from the Federal Communications Commission (FCC). At the Complainant's urging, the Commission reconsidered its order and further suspended these proceedings to await a ruling from the FCC.

On February 26, 2013, the Commission denied the Complainant's request for a further suspension and ordered AT&T Missouri to file its answer by April 1, 2013. Coincidentally, the FCC released its long-awaited order on February 27, 2013.¹ AT&T Missouri filed its answer, accompanied by a motion to dismiss, on April 1, 2013. At the Commission's direction, Staff and the Complainants responded to the motion to dismiss on April 30, 2013. AT&T Missouri replied on May 20, 2013.

AT&T Missouri's motion to dismiss asks the Commission to dismiss the complaint on the pleadings. In deciding such a motion, the Commission must decide "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings"² That means the well pleaded facts of the non-moving party's pleading are accepted as true for purposes of the motion.³ Thus, in deciding AT&T Missouri's motion, the Commission must accept the factual allegations of the complaint as true. It is also important to remember that the motion to dismiss currently before the Commission is not a motion for summary determination. For that reason, the Commission cannot consider factual allegations outside the four corners of the pleadings.

¹ Despite the long wait for the FCC to issue the order, nothing in that order is dispositive of this complaint.

² *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo 2011), citing *RGB2, Inc. v. Chestnut Plaza, Inc.* 103 S.W.3d 420, 424 (Mo. App. 2003).

³ *Ocello v. Koster*, at 197.

Before examining AT&T Missouri's motion to dismiss, the Commission must first consider the details of the complaint. The Complainants are a group of competitive independent payphone service providers who are either present or prospective customers of network services including payphone access line service and other associated services that are offered under rates, terms and conditions set forth in AT&T Missouri's tariffs. The complaint alleges that in 1996 Congress amended the Federal Communications Act to promote competition in the public payphone field. In particular, 47 U.S.C. §276 imposes certain restrictions on Bell operating companies, such as AT&T Missouri, to prevent them from subsidizing or discriminating in favor of their own payphone services.

One of the restrictions placed on Bell operating companies is a requirement that network services made available to payphone providers be provided at rates that comply with the New Services Test pricing formula as established by Federal regulations at 47 C.F.R. §61.49. In implementing that regulation, the FCC required the Bell operating companies to submit tariffs for basic payphone service to the appropriate state commissions for approval. AT&T Missouri submitted payphone service tariffs to this Commission and the Commission approved those tariffs in Case No. TT-97-345, to be effective on April 15, 1997.

The Complainants assert that there has been a substantial change in circumstances since the Commission approved AT&T Missouri's payphone tariffs. In particular, they assert that subsequent interpretations of the New Services Test set forth by the FCC call into doubt whether the AT&T Missouri tariffs that the Commission approved in 1997 comply with that test. The Complainants assert that since those tariffs do not comply with the New Services Test, the payphone rates charged by AT&T Missouri since 1997 are unjust and

unreasonable and are above what is allowed by applicable law. They ask the Commission to set new rates for AT&T Missouri's payphone services. Further they ask the Commission to order AT&T Missouri to calculate the difference between the old and new payphone rates and refund the difference, with interest, to the Complainants.

AT&T Missouri's motion to dismiss asserts multiple grounds upon which the Commission should dismiss the complaint. The Commission will address two of those grounds in detail as together they are dispositive. The first ground asserted by AT&T Missouri is that the Commission no longer has authority under either federal or state law to set the rates the company may charge its payphone customers.

AT&T Missouri points out that the foundation of the Complainants claim is 47 U.S.C. 276. That section of the federal statutes is designed to prevent Bell operating companies, such as AT&T Missouri, from subsidizing their own payphone service or otherwise discriminating against independent payphone providers. As the Complainants explain in their complaint, the requirement that AT&T Missouri's payphone rates comply with the New Services Test pricing formula is founded on section 276.⁴ AT&T Missouri now asserts that it has not provided its own payphone service since at least 2010 and therefore the Commission no longer has authority to adjudicate the complaint under federal law.⁵

AT&T Missouri's argument may be correct, but the Commission has no basis for considering that argument for purposes of the current motion to dismiss the complaint on the pleadings. For purposes of the motion to dismiss, the Commission is only evaluating whether the complaint is sufficient to state a claim that the Commission can address. At this point, there is no evidence before the Commission that would establish as a fact that

⁴ Complaint, Paragraphs 36-37.

⁵ Motion to Dismiss, Paragraph 6.

AT&T Missouri no longer provides its own payphone service. Indeed, for purposes of considering the motion to dismiss, the Commission must presume that the Complainant's allegation to the contrary is true. As a result, AT&T Missouri's argument that it is no longer subject to 47 U.S.C. 276 cannot be the basis for the dismissal of the complaint.

AT&T Missouri also argues that the Commission no longer has authority to set AT&T Missouri's payphone rates because of changes in Missouri law. The Commission takes administrative notice of the fact that AT&T Missouri is currently a competitive company for purposes of regulation by this Commission.⁶ Missouri law provides:

If the services of an incumbent local exchange telecommunications company are classified as competitive under this subsection, the local exchange telecommunications company may thereafter adjust its rate for such competitive services upward or downward as it determines appropriate in its competitive environment, upon filing tariffs which shall become effective within the time lines identified in section 392.500.⁷

Thus, under Missouri law, the Commission no longer has authority to order AT&T Missouri to charge a particular rate for its competitive services, including its payphone services.

The second ground AT&T Missouri asserts as a basis for dismissing the complaint is its claim that the Complainants have no legal right to challenge the validity of AT&T Missouri's existing payphone rates. Furthermore, AT&T Missouri asserts that even if the Commission were to find those rates to be invalid, it has no authority to order refunds as requested by the Complainants.

⁶ *In the Matter of Southwestern Bell Telephone Company, d/b/a AT&T Missouri's Application for a Commission Finding that 55% of AT&T Missouri's Total Subscriber Access Lines are in Exchanges Where Its Services have been Declared Competitive*. Declaration of Competitive Status, File No. TO-2009-0063, Issued November 26, 2008.

⁷ Section 392.245.5(6), RSMo (Supp. 2012). Under Section 392.500 RSMo (Supp. 2012), tariff filings that would decrease rates are effective on one day's notice to the Commission. Tariff filings to increase rates require ten-day's notice.

AT&T Missouri's current payphone rates were established by tariff, effective on April 15, 1997. The Commission approved those tariffs in an order issued on April 11, 1997.⁸ Missouri law regarding the effect of utility tariffs is quite clear. Section 386.270, RSMo 2000 states:

All 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.

Thus, once AT&T Missouri's tariff went into effect, that tariff acquired:

the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. ... If such a schedule it to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.⁹

As a result, AT&T Missouri's payphone rates that were put into effect by its 1997 tariff are the company's lawful rates and remain in effect.

The complainants seek to attack the lawfulness of AT&T Missouri's payphone services tariff by attacking the lawfulness of the Commission's order that approved that tariff. In their response to AT&T Missouri's Motion to Dismiss, the Complainants argue that the Commission's order that approved AT&T Missouri's tariff was unlawful because the Commission did not conduct a hearing under contested case procedures before issuing its order approving the tariff and did not make findings of fact and conclusions of law in its order approving the tariff.

The Complainants' argument that the Commission was required to conduct a hearing and make findings of fact and conclusions of law when it approved AT&T

⁸ *In the Matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff*, PSC Mo. No. 35, *Regarding Deregulated Pay Telephone Service*, 6 Mo. P.S.C. 3d 216 (1997).

⁹ *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Com'n of Mo.* 315 Mo. 312, 317, 286 S.W. 84, 86 (Mo.

Missouri's tariff is legally incorrect. First, the Commission's decision whether to suspend a filed tariff is a noncontested case for which there is no automatic right to a hearing.¹⁰ Second, in a noncontested case the Commission is not required to make findings of fact.¹¹

More importantly, the Complainant's attempt to collaterally attack the Commission's 1997 order is precluded by Missouri law. Section 386.550, RSMo 2000 states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." That means, "if a statutory review of an order is not successful, the order becomes final and cannot be attacked in a collateral proceeding."¹² Consequently, the Commission's 1997 order approving AT&T Missouri's payphone rates cannot be challenged in this proceeding.

Just because the Commission's 1997 order is not subject to collateral attack does not mean AT&T Missouri's payphone rates can never be challenged. Instead, the Complainants can challenge those rates without engaging in a forbidden collateral attack by alleging a change in circumstances that would render those rates no longer in the public interest.¹³ The Complainants have made such an allegation in their complaint and for the purposes of this motion, the Commission must presume that allegation to be correct. However, at this point, the Complainants' attempt to challenge AT&T Missouri's payphone rates runs headlong into the previously established fact that the Commission no longer has statutory authority to modify the rates charged by a competitive company such as AT&T Missouri. Thus the Commission no longer has authority to determine whether the rates AT&T Missouri charges for payphone service are in the public interest.

1926).

¹⁰ *State ex rel. Coffman v. Pub. Serv. Com'n*, 121 S.W.3d 534 (Mo. App. W.D. 2003).

¹¹ *State ex rel. Public Counsel v. Pub. Serv. Com'n*, 210 S.W.3d 344 (Mo. App. W.D. 2006).

¹² *State ex rel. Licata, Inc. v. Pub. Serv. Com'n*, 829 S.W.2d 515 (Mo. App. W.D. 1992).

The Commission no longer has authority to alter AT&T Missouri's competitive rates, but can it, as the Complainant's ask, order the company to make refunds for past overcharges? Clearly, the Commission has no authority to order such refunds. First, since AT&T Missouri's payphone rates were lawfully established in 1997 and have remained the company's lawful rates since that time, there could be no factual basis for any refund. Second, even if there were some factual basis for ordering a refund, the Commission has no legal authority to do so.

The Missouri Supreme Court has held that retroactive ratemaking is not allowed under Missouri law. In the words of the court, "[the Commission] may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process."¹⁴ Thus, the Commission has no authority under state law to order AT&T Missouri to make any refunds to the Complainants.

That leaves open the question of whether this Commission is required under federal law to order AT&T Missouri to make refunds to the Complainants. The FCC has indicated that there is no "absolute right to refunds" in cases such as this that have been addressed by other state commissions. Instead, the FCC notes that "in deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and regulations and decided for reasons specific to each state's analysis, not to order refunds."¹⁵ The Commission concludes that nothing in federal law requires it to order AT&T Missouri to make refunds to the Complaints.

¹³ *State ex rel. Ozark Border Elec. Co-op v. Pub. Serv. Com'n*, 924 S.W.2d 597, 601 (Mo. App. W.D. 1996).

¹⁴ *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Com'n*, 585 S.W.2d 41, 58 (Mo. 1979).

¹⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 13-24, Paragraph 41, (Released February 27,

To summarize, the Commission concludes it has no authority to order a competitive company such as AT&T Missouri to charge a particular rate for its competitive services, including its payphone services. Furthermore, the Commission concludes that the Commission has no legal authority to order AT&T Missouri to make a refund to customers of its payphone services even if the Commission were to find that the company's payphone rates were improperly calculated in 1997. Together, those two conclusions mean the Commission cannot grant the relief the Complainants seek and therefore their complaint must be dismissed.

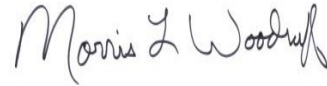
AT&T Missouri also contends the Complainants have failed to properly perfect their complaint by failing to comply with the requirements of Section 386.390(1), RSMo 2000. This argument about deficiencies in the complaint is not dispositive because, even if the Commission found in AT&T Missouri's favor, the Complainants could cure any such deficiencies by amending their complaint. Since the Commission concludes that the complaint must be dismissed on the previously described grounds, the Commission will not address these additional arguments.

THE COMMISSION ORDERS THAT:

1. The complaint of Tari Christ d/b/a ANJ Communications, et al. against Southwestern Bell Telephone Company, L.P. d/b/a Southwestern Bell Telephone Company is dismissed.

2. This order shall become effective on July 5, 2013.

BY THE COMMISSION

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge