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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' Application for Rehearing and Contingent Motion for Leave to File Amended Complaint.

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, *et al.*	)	
	)	
	)	
Complainants,	)	Case No. TC-2003-0066
	)	
Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company, *et al.*	)	
	)	
Respondents.	)	

COMPLAINANTS' APPLICATION FOR REHEARING AND CONTINGENT MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Come now Complainants in the captioned cause, by and through their attorneys of record, and pursuant to Section 386.500 RSMo. 2000[1] and 4 CSR 240-2.160 move and apply for a rehearing of the Commission's Order Regarding Motions to Dismiss entered on January 9, 2003, (the Order).

I. The Commission has applied technical rules of pleading in judging the averments of the complaint.

At page 14 of the Order, the Commission recites the standard to test the sufficiency of the complaint and states correctly that a complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading. Despite its seeming acceptance of this statement as the standard to test the complaint, the Commission enters a lengthy discussion on page 15 of the Order regarding the identity of the Complainants, the relationship each may have with the respondents and otherwise engages in a highly mechanical process in scrutinizing the averments of the complaint. It is a level of scrutiny that rivals, if not exceeds, that of the most intensive circuit court. The Commission should set aside its order or so much of it that relies on the super

[1] Statutory references herein shall be to RSMo 2000 unless otherwise indicated.

technical analysis of the averments of the complaint. Complainants submit that their standing as customers or prospective customers of the respondents was pleaded sufficiently and does not establish an independent cause for dismissal of the complaint.

On page 24 of the Order the Commission again over analyzes the allegations of the complaint contrary to the standard in law. There the Commission has created an unlawful and unreasonable standard for the terms "customer" or "prospective customer" as used in Section 386.390.1. The Complainants may not be customers of each of the respondents, but are prospective customers and would be customers if the rates were lawfully and reasonably set and charged. Section 386.390.1 should be interpreted to allow parties such as these a venue for relief irrespective of whether they have commenced a service from the respondents. There should be no rule before this Commission requiring a complainant to first pay an unlawful rate before complaining about it.

II. Section 386.550 does not bar an original action before this Commission contesting the lawfulness or reasonableness of tariffed rates.

The Commission has in error concluded that Section 386.550 bars complaints about rates previously approved by this Commission. Section 386.550 provides:

> In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.

Section 386.270 provides:

> 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.

These sections must be read so that neither negates the other. Obviously, in order to have any force or effect, rates, tolls, charges and joint rates are fixed by the Commission in orders and decisions that have become final. In its order of January 9, 2003, the Commission has concluded

that since a final decision was entered in April 1997 allowing respondents' payphone rates to go into effect without a hearing, Section 386.550 bars a suit brought by Complainants for the purpose of challenging the rates fixed by the decision. The Commission has interpreted Section 386.550 to steal away what Section 386.270 expressly allows for Complainants, and in that interpretation renders the provisions of Section 386.270 meaningless, all of which is contrary to legislative intent. Missouri ex rel. Bouchard v. Grady, 86 S.W.3d 121, 123 Mo.App. E.D.2002) (the legislature is not presumed to have intended a meaningless act).

Reliance on State ex rel. Licata, Inc. v. Public Service Commission, 829 S.W.2d 515 (Mo.App. W.D.1992) is misplaced. The case cannot be used as an excuse to erase the operative provisions of Sections 386.270 or 386.390. The case is fully distinguishable. *Licata* dealt with a Commission rule that was approved after a hearing. At the hearing, members of the complainant's same business/industry participated after notice. The instant complaint concerns the respondents' rates (not rules), which were approved without a hearing in a proceeding in which no member of the affected industry was made a party. The Commission relies on *Licata* erroneously.

In reaching its conclusions, the Commission has also erroneously relied on State ex rel. Ozark Border Electric Cooperative v. Public Service Commission, 924 S.W.2d 597 (Mo.App. W.D. 1996). In that case the Western District Court of Appeals examined the statute that authorizes complaints attacking territorial agreements. The court concluded that a complaint lodged against an agreement previously approved by the Commission must contain an allegation that a substantial change in circumstances has occurred since the last order. *Ozark Border* is readily distinguishable from the present case. The territorial agreement complained of was approved after a hearing in which the complaining party was asked to intervene but refused; the parties to the territorial agreement under review were actually parties to the case in which it was approved; and a hearing was conducted at which evidence was adduced under contested procedures, and thereafter opposing arguments were heard and considered. The instant complaint concerns the respondents' rates (not a territorial agreement or rules), which were approved

without a hearing; in a proceeding in which the Complainants were not asked to intervene; and were never made parties after the request of a representative organization. Furthermore, the Court in *Ozark Border* did not analyze the interplay between Section 386.270 and 386.550. There was no ruling that Section 386.550 rendered a suit brought for the purpose of challenging rates "fixed by the commission" a forbidden collateral proceeding.

An **original** action that involves a direct challenge to the lawfulness and reasonableness of the rates charged by regulated utilities is expressly authorized by the Public Service Commission Law. By comparison, such an action is not permitted in the circuit courts of this state by reason of primary jurisdiction and the provisions of Section 386.550.[2] The **original** action is authorized by Sections 386.270, 386.309 and 392.400.6. To interpret Section 386.550 to bar the original action (or qualify access to the original action by the threshold requirement of "a substantial change in circumstances") defeats the predominant purposes of the Commission: To monitor and remedy, where necessary, the rates charged by utilities in this state. The complaint process envisioned by the legislature is a chief instrument for the Commission and ratepayers alike to alter the rates of a utility company that are unreasonable to consumers. Section 386.550 is not intended to impair this device.

III. The Commission has previously interpreted Section 386.400.6 to allow a complaint by a single telecommunications company.

At page 26 of the Order, the Commission states that, "[t]he Commission, . . ., **has always** understood Section 392.400.6 as only authorizing complaints as to violations of Section 392.400." [emphasis added]. This is simply wrong. In AT&T Communications of the Southwest, Inc. v. GTE North, Inc., Case No. TC-89-28, 29 Mo. P.S.C. (N.S.) 591, (May 19, 1989) (*GTE North)*, AT&T complained that GTE North made errors in its revenue calculation for its 1986 carrier common line (CCL) charge tariff filing thereby violating the Commission order in Case

[2]Neither could a defendant in a circuit court rate collection case contend that the rate for service the utility charged was unlawful. The collection case is a collateral proceeding. In such a case, the rate approved is considered conclusive on the issue of lawfulness and reasonableness. Section 386.550.

No. TO-84-222, and unlawfully and unreasonably overcharging ATT. The Commission found in favor of ATT on the matter and its findings of facts and conclusions are significant in this case:

> A review of the record shows the Complainant's allegation that Respondent's intrastate CCL rates are unreasonable is based entirely on the two errors made in 1986. Since that time, the CCL rates, which include the local transport rates where the errors were made, have been reduced because of the settlement in Case No. TC-87-57. Respondent has argued this removes the nexus between the errors made then and the rates charged now. However, no party to the Stipulation For Dismissal in Case No. TC-87-57 took any action to correct the errors because no one knew the errors existed until January of 1989. The errors which skewed the rates in TO-84-222 et al. also skewed the rates in TC-87-57. Thus, there is a nexus between the errors made in 1986 and the reasonableness of present rates. The Commission found TC-87-57 rates just and reasonable because it was unaware that the underlying calculations contained errors which caused Respondent to earn more than the prescribed limits. Now aware of said errors and their effect, the Commission finds the rates established in TC-87-57, Respondent's present CCL rates, are unjust and unreasonable.

Id. at 3.

The Commission also wrote this conclusion of law:

> The Commission has jurisdiction over the complaint pursuant to Section 392.400.6. This section allows a telecommunications company to file a complaint as to the reasonableness or lawfulness of any rate or charge provided by a noncompetitive telecommunications company.

Id.

The Commission should note that in *GTE North*, there was no allegation that the access rates under review were priced below cost--a violation of Section 392.400.5--or that the Commission had set the access rate levels in such a way that they were recovering GTE's costs of providing competitive or transitionally competitive services--a violation of Section 392.400.1. The Commission interpreted the complaint provision of this statute independently of the other sections, which as discussed further below, is the correct interpretation.

The result in *GTE North* above was, as far as Complainants can determine, the only time Section 392.400.1 was interpreted by the Commission before the decision in *MCI*

Telecommunications Corp. et al. v. Southwestern Bell Telephone Company, Case No. TC-97-303 (*MCI)* which is cited by the Commission as the case expressing the interpretation the Commission has "always" had. The conclusion of *GTE North* was overturned some eight years later in *MCI.* However, in *MCI,* the Commission gave no explanation why it decided to ignore the conclusions and reasoning of *GTE North.* From the date of Section 392.400's enactment until the decision in *MCI,* the Commission subscribed to the interpretation of Section 392.400.6 argued by Complainants.

In the present order the Commission has agreed with the statement made in *MCI,* that "Section 392.400.6 only permits complaints that a company's noncompetitive services are subsidizing its competitive or transitionally competitive services[.]" This cannot be supported, and it illustrates the weakness of the Commission's interpretation of the statute. Section 392.400 also prohibits a noncompetitive or transitionally competitive telecommunications company from offering a competitive or transitionally competitive service below cost, whether it is subsidizing that rate or otherwise. See Section 392.400.5 To accept the Commission's understanding of the restrictions on filing complaints under Section 392.400.6 means that this statute offers no way for a telecommunications company to complain about all the offenses forbidden by the statute.

The topic of rates not covering expenses of competitive services is part of the revisor's heading on Section 392.400 and seems to be the only source for the Commission's erroneous interpretation of the purpose of the statute. The heading of a statute is merely an arbitrary indicator of a statute's content and is inserted by the revisor of statutes for convenience of reference. The revisor is without legislative authority and the language chosen as the heading does not affect the sense of the enactment and cannot not be considered in construing the statute. Snow v. Hicks Bros. Chevrolet, Inc., 480 S.W.2d 97, 101 (K.C. Ct.App. 1972). The Commission must be guided by the plain wording of Section 392.400.6[3] and its is plain that the

[3]Section 392.400.6 merely provides:

> A telecommunications company may file a complaint as to the reasonableness or lawfulness of any rate or charge for service offered or provided by a noncompetitive or transitionally competitive telecommunications company.

authority of a single telecommunications company to complain about the rates of a noncompetitive or transitionally competitive company is not restricted to just those kinds of rates forbidden by the other subparts of the same section. The Commission's restrictions to the complaint section (which are unwritten additives) deprive Complainants and other similarly situated telecommunications companies from the full benefit of the statute as written.

Moreover, the provisions of every statute enacted by the General Assembly are severable. If a court concludes that a section is unconstitutional or void, the remaining sections are valid unless the court determines that the valid provisions are so inseparably connected to the void sections that they must fall as well. Section 1.140. As written, Section 392.400.6 is not dependent upon any of the other sections or subparts of Section 392.400. It can stand alone even if the other sections were severed. It would be interpreted *in pari materia* with other sections of the Public Service Commission Law that regulate complaints before the Commission. It is entirely consistent with those provisions. The Commission in *GTE North* interpreted the section correctly. The Commission years later in *MCI* did not interpret it correctly, and the incorrect interpretation has been repeated in this case without explanation.

CONCLUSION

Based upon the above and foregoing, Complainants request that the Commission grant them a rehearing, with oral argument, regarding the Commission's Order Regarding Motions to Dismiss, and after hearing, set aside and vacate its Order and reinstate the complaint for further proceedings before the Commission.

CONTINGENT MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Pursuant to 4 CSR 240-2.080 (21), Complainants submit this contingent motion for leave to file an amended complaint. Despite the filing of this motion, Complainants specifically reserve, and do not waive, their arguments in support of a rehearing of the Commission's Order

issued January 9, 2003. This motion is contingent only and is offered in the event the Commission should deny Complainants' application for rehearing.

In its January 9, 2003 Order Regarding Motions to Dismiss (the Order), the Commission announced that a complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances. Complainants did not prepare their complaint, nor could they have prepared their complaint, under the guidance of this newly declared standard. In the Order, the Commission also gave additional direction on the qualifications of "customers" and "prospective customers" who are eligible to file and prosecute complaints under Section 386.390. In light of the Commission's Order and its changes in the pleading requirements for complaints on the lawfulness of rates, Complainants submit that in fairness and justice they be allowed leave to amend their complaint to conform to the requirements of the Order, in the event the Commission denies the Complainants' application for rehearing above.

WHEREFORE, in the event the Commission denies their application for rehearing, Complainants respectfully request 30 days leave within which to file an amended complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2003, 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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