

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

Tari Christ, d/b/a ANJ Communications; Bev Coleman,	)	
an Individual; Commercial Communications 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 Communications	)	
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, and Gale Wachsnicht, d/b/a	)	
Wavelength, LTD.,	)	
	)	
Complainants,	)	
	)	
v.	)	<b><u>Case No. TC-2003-0066</u></b>
	)	
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.	)	

**RESPONDENT VERIZON MIDWEST'S  
RESPONSE IN OPPOSITION TO  
(1) COMPLAINANTS' APPLICATION FOR REHEARING AND  
CONTINGENT MOTION FOR LEAVE TO FILE AMENDED COMPLAINT  
AND (2) OFFICE OF THE PUBLIC COUNSEL'S MOTION FOR REHEARING**

**COMES NOW** Respondent GTE Midwest Incorporated d/b/a Verizon Midwest ("Verizon"), pursuant to Commission Rule 4 CSR 240-2.080(16), and respectfully submits its Response in Opposition to the Complainants' Application for Rehearing and

Contingent Motion for Leave to File Amended Complaint (“Application for Rehearing”) and Office of the Public Counsel’s Motion for Rehearing (“OPC’s Motion”).

### **Summary**

Section 386.500, RSMo 2000, provides that the Commission shall grant an application for rehearing if “in its judgment sufficient reason therefor be made to appear.” The arguments regarding rehearing presented by Complainants (and the “concerns” expressed by Public Counsel) simply restate the arguments that were previously presented to the Commission and rejected in the Order Regarding Motions to Dismiss (“Order”). Complainants and Office of the Public Counsel have failed to establish sufficient reason to grant rehearing, and Complainants have failed to establish sufficient reason to grant leave to file an amended complaint.

### **Response**

The Commission’s Order contains an extensive analysis of over five pages detailing the reasons why the Commission determined that the instant Complaint cannot go forward to the extent that it is brought under the Commission’s *general* complaint authority in Section 386.390.1<sup>1</sup> Significantly, the Commission notes that:

Each of the Respondents points to a prior Order in which this Commission approved that Respondent’s present payphone service tariffs, specifically finding that they were in compliance with the federal statute and regulatory orders relied on by Complainants and refusing to suspend the tariffs on grounds similar in part to those raised in the present Complaint.<sup>[82]</sup> . . . [T]he Commission’s prior orders were determinations on the merits. In them, the Commission found that the Respondents’ tariffs complied with the F.C.C. directive relied on herein by Complainants. Those orders are long-since final and this is a collateral proceeding. The Complaint does not include any allegation of substantially changed circumstances.<sup>2</sup>

---

<sup>1</sup> Order Regarding Motions to Dismiss, January 9, 2003, at 18-23.

<sup>2</sup> *Id.*, at 21-22.

In addition, the Commission's Order expressly addresses the Complainants' and OPC's arguments regarding the Commission's complaint authority as to rates under Section 386.390.1, as well as Complainants' contentions regarding Section 392.400.6.<sup>3</sup> After lengthy analysis, the Commission correctly finds "that the Complaint cannot go forward to the extent that it is brought under the Commission's special complaint authority as to rates in Section 386.390.1," and "that the Complaint fails to state a claim under Section 392.400.6."<sup>4</sup>

Regarding Complainants' Contingent Motion for Leave to File Amended Complaint, there is absolutely no basis for granting such relief. As reflected in the Commission's Order, there are many fatal deficiencies contained in the instant Complaint, although the Commission took up ". . . only those issues, among the many raised by the parties, that are necessary to the resolution of the motions before it."<sup>5</sup>

The Commission recites in its Order the myriad grounds Verizon alleges in support of its motion to dismiss for failure to state a claim, as contained in its Motion to Dismiss filed on October 1, as well as its Reply filed on November 1.

Verizon filed its Motion to Dismiss on October 1. Verizon asserts, first, that Verizon does not now operate as a telecommunications carrier in Missouri and is therefore no longer subject to this Commission's jurisdiction. Verizon asserts, second, that the rates it formerly charged were properly tariffed and approved by this Commission and that the Complaint therefore represents an impermissible collateral attack on the Commission's approval of those tariffs.<sup>[4]</sup> Verizon asserts, third, that Complainants have failed to perfect their complaint as required by Section 386.390.1, RSMo 2000,<sup>[5]</sup> in that, while signed by 25 purported customers or prospective customers, it is not signed by 25 customers or prospective customers of Verizon.<sup>[6]</sup> Verizon points out that one complainant is authorized to provide payphone services in Illinois, not Missouri. Verizon also points out a scrivener's error in the Complaint by

---

<sup>3</sup> *Id.*, at 24-27.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, at 14.

which Complainants demand a remedy from Bell in a paragraph ostensibly dealing with Verizon.<sup>[7]</sup>

\* \* \*

Verizon replied on November 1. First, Verizon points out that the F.C.C. itself has acknowledged that it lacks jurisdiction to impose the New Services Test on non-BOC LECs.<sup>[25]</sup> Verizon's predecessor, GTE Midwest, was not a BOC, and did not become one when GTE Corporation merged with Bell Atlantic to form Verizon. The BOCs are defined by statute.<sup>[26]</sup> Verizon points out that this Commission recently read Paragraph 42 of the *Wisconsin Order* and understood that the F.C.C. itself has concluded that it cannot impose the New Services Test on non-BOC LECs.<sup>[27]</sup> Second, Verizon contends that the perfection requirement at Section 386.390.1 does indeed apply to this Complaint and, inasmuch as the Complaint is not properly perfected, as Complainants themselves admit, it must be dismissed in accordance with long-standing Commission precedent.<sup>[28]</sup> Verizon denies that Section 392.400.6, cited by Complainants as an alternative source of jurisdiction, authorizes the present Complaint, explaining that the Commission has consistently interpreted Section 392.400.6 as authorizing only complaints intended to prevent noncompetitive and transitionally competitive carriers from improperly subsidizing their competitive services.<sup>[29]</sup> Third, Verizon contends that the Commission is without authority to either award money damages or retroactively correct a rate.<sup>[30]</sup> Verizon again points to its present uncertificated status in Missouri and suggests, in view of the Commission's purely prospective powers, that the matters urged in the Complaint are moot as to it.<sup>6</sup>

Respondents Southwestern Bell and Sprint raised many of the same, and additional, issues in their respective pleadings, any and all of which would support the dismissal of Complainants' purported cause of action. Simply put, there are no bases upon which the Complainants can cure their instant action and, accordingly, the Commission should not grant Complainants' contingent motion for leave to file amended complaint.

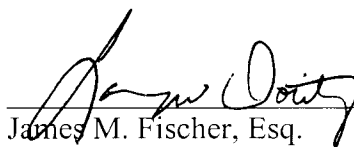
---

<sup>6</sup> *Id.*, at 3-4, 8-9.

### Conclusion

For all of the above reasons, Complainants and Office of the Public Counsel have failed to establish sufficient reason to grant rehearing, and Complainants have failed to establish sufficient reason to grant leave to file an amended complaint.

Respectfully submitted,



James M. Fischer, Esq. MBN 27543

e-mail: jfischerpc@aol.com

Larry W. Dority, Esq. MBN 25617

e-mail: lwdority@sprintmail.com

FISCHER & DORITY, P.C.

101 Madison Street, Suite 400

Jefferson City, Missouri 65101

Telephone: (573) 636-6758

Facsimile: (573) 636-0383

Attorneys for GTE Midwest Incorporated  
d/b/a Verizon Midwest

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, sent electronically or hand-delivered, this 27th day of January, 2003, to:

Mark W. Comley  
Newman, Comley & Ruth, P.C.  
601 Monroe Street, Suite 301  
P.O. Box 537  
Jefferson City, MO 65102-0537

Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

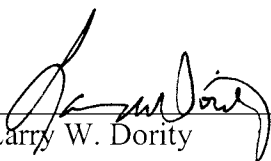
Lisa Creighton Hendricks  
Sprint  
6450 Sprint Pkwy  
MS: KSOPHN0212-2A253  
Overland Park, KS 66251

Paul H. Gardner  
Goller, Gardner and Feather, PC  
131 East High Street  
Jefferson City, MO 65101

Dana K. Joyce  
General Counsel  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

Paul G. Lane  
Leo J. Bub  
Southwestern Bell Telephone Company  
One SBC Center, Room 3518  
St. Louis, MO 63101

Kenneth A. Schiffman  
Sprint  
6450 Sprint Pkwy  
MS: KSOPHN0212-2A303  
Overland Park, KS 66251

  
\_\_\_\_\_  
Larry W. Dority