

**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.)	<u>Case No. TC-2003-0066</u>
)	
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 REPLY
TO
COMPLAINANTS’ SUGGESTIONS IN OPPOSITION TO RESPONDENTS’
SEPARATE MOTIONS TO DISMISS COMPLAINT**

COMES NOW Respondent GTE Midwest Incorporated d/b/a Verizon Midwest (“Verizon”), pursuant to Commission Rule 4 CSR 240-2.080(16)¹, and respectfully

¹ On October 25, 2002, the Respondents collectively filed their “Motion for Extension of Time to File Replies to Complainants’ Suggestions in Opposition to Respondents’ Separate Motions to Dismiss

submits its Reply to the Complainants' Suggestions in Opposition to Respondents' Separate Motions to Dismiss Complaint ("Suggestions in Opposition") previously filed in this matter on October 18, 2002.

Introduction

In its Motion to Dismiss, Answer and Affirmative Defenses filed in this matter on October 1, 2002, Verizon set forth, pursuant to 4 CSR 240-2.070(6), the many reasons why the Complainants have failed to state a claim upon which relief may be granted and have failed to comply with the provisions of the Commission's Rules. In essence, Verizon is not a local exchange telecommunications company or a public utility subject to this Commission's jurisdiction and any purported claims against Verizon are clearly moot; the specific rates of Verizon which are the subject of this Complaint were at all times the lawfully approved rates on file with the Commission, presumed to be just and reasonable, pursuant to the filed rate doctrine, and the complaint constitutes an impermissible collateral attack on the Commission's previous approval of those tariffs in violation of Section 386.550 RSMo 2000; and the Complaint violates the provisions of Section 386.390, RSMo 2000 and 4 CSR 240-2.070(3). Additional bases for dismissal set forth in Verizon's initial pleadings are discussed below. The novel arguments proposed by Complainants in their Suggestions in Opposition – the complaint is a "direct" attack on the approved rates as charged and not a "collateral" attack; this is an "administrative" action and not a "legal" action; "refunds" do not reach the level of "damages;" the Commission must presume as true the allegations of the complaint, implying that any erroneous statement of law or fact automatically withstands a motion to

Complaint, wherein they requested an extension of time of four days, up to and including November 1, 2002, for the filing of separate replies to the Complainants' Suggestions in Opposition.

dismiss, etc. – do not allow the Complainants to avoid the fatal legal deficiencies of their complaint. Failure to address any particular argument or statement contained in the Suggestions in Opposition should not be construed as acquiescence therein.

I. The New Services Test Is Not Applicable to GTE Midwest Incorporated d/b/a Verizon Midwest.

As set forth in Verizon’s Motion to Dismiss, Complainants have failed to state a claim upon which relief may be granted, in that Complainants do not request a Commission determination that Respondent Verizon’s rates are in violation of the purported “New Services Test” pricing requirements of the Federal Communications Commission. In Complainants’ prayer for relief against Verizon, as specifically set forth in Count III, page 18 of the Complaint, Complainants request, *inter alia*:

- a. That the Commission declare that since April 15, 1997 **SWBT** has charged rates for network services made available to payphone providers that are not cost-based, recover more than a reasonable amount of overhead costs, and are in violation of the New Services Test pricing requirements; (Emphasis supplied).

Accordingly, there is no claim or relief requested against Respondent Verizon concerning the purported violation of the New Services Test pricing requirements, which appears to be the underlying premise and bases for all relief requested.

In their Suggestions in Opposition, Complainants state that they “. . . will agree that a harmless error has occurred, and with a simple amendment by interlineation it can be remedied. The Commission should freely grant leave to the Complainants to amend the complaint in this manner.”² Respondent Verizon submits that even if the Commission allows the Complainants to amend their complaint as suggested, the

² Suggestions in Opposition, p. 14.

underlying premise and bases for the relief requested – a declaration that Verizon is in violation of the New Services Test pricing requirements – is totally without merit, as discussed below.³

The Complainants urge the Commission to adopt the FCC’s New Services Test, which at one time was required by the FCC.⁴ As the Complainants acknowledge, however, the FCC has retreated from that position and recently held that it had no authority under Section 276(b)(1)(b) to apply the New Services Test to non-BOC LECs:

[W]e do not find that Congress has expressed with the requisite clarity its intention that the [FCC] exercise jurisdiction over the intrastate payphone prices of non-BOC LECs. Since [Section 276(b)(1)(c) empowers] us to apply the New Services Test to payphone line rates and grant us authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates.⁵

Additionally, in a Common Carrier Bureau decision adopted March 4, 2002, the Bureau stated, “[a]s a matter of jurisdiction under section 276, the *Wisconsin Order* rulings do not extend to non-BOC LECs.”⁶

³ Rather than wait for a possible determination that the Commission will allow Complainants to amend their Complaint, and then move for leave to amend Respondent Verizon’s Motion to Dismiss, Answer and Affirmative Defenses accordingly, Verizon will address this issue at this time.

⁴ See *Implementing of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*First Payphone Order*), Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*) (collectively “*Payphone Orders*”), aff’d in part and remanded in part, *Illinois Public Telecomms. Ass’n v. FCC*, 117 F.3d 555 (D.C.Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (*Second Payphone Order*), vacated and remanded, *MCI Telecomms. Corp. v. FCC*, 143 F.3d 51 (D.C. Cir. 2000); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999), aff’d *American Pub. Communications Counsel v. FCC*, 215 F.2d 51 (D.C. Cir. 2000).

⁵ *In the Matter of Wisconsin Public Service Commission*, Bureau CPD No. 00-01, FCC 02-25, Memorandum Opinion and Order (January 31, 2002) (“*Wisconsin Order*”) at ¶42.

⁶ *In the Matter of North Carolina Payphone Association*, 17 FCC Rcd 4275, para. 5.

At no point during this or any other Commission proceeding has GTE Midwest Incorporated d/b/a Verizon Midwest (“Verizon”) been a BOC as defined by the Telecommunications Act at 47 U.S.C. § 153. In 1997, Verizon was operating as GTE Midwest Incorporated. Moreover, following the merger of GTE Corporation with Bell Atlantic Corporation to form Verizon Communications, Inc., Verizon did not transform into a BOC as each ILEC defined as a “BOC” was determined on the passage of the Telecommunications Act:

Bell Operating Company. – The term “Bell operating company” –

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).”⁷

Verizon is not one of the entities listed in paragraph (A) and is not a successor or assign of any such company.⁸ Verizon is an affiliate of some of those companies, but paragraph

⁷ 47 U.S.C. § 153(4).

⁸ For the Commission’s information, on July 21, 2001, in Case No. TO-2001-29, the Commission acknowledged the name change of GTE Midwest Incorporated to GTE Midwest Incorporated d/b/a Verizon Midwest.

(C) makes clear that an affiliate is not itself a BOC. Accordingly, under the Telecommunications Act and the FCC's *Wisconsin Order*, Verizon is not a BOC and therefore not subject to the New Services Test.

Moreover, Complainants' Suggestions in Opposition provide no compelling reason why Verizon *should* be subject to the New Services Test. Indeed, this Commission addressed the very issue of applying the New Services Test to non-BOCs just a few months ago in Case No. TM-2002-232. In its Order Denying Application to Intervene, Denying Motion to Suspend Tariff, Approving Tariffs, Canceling Tariffs, and Directing Filing, issued on August 29, 2002, the Commission addressed MICPA's contention that the *Wisconsin Order* would require the Commission to apply the New Services Test to CenturyTel's proposed tariffs:

The "New Services Test" is one of the "nonstructural safeguards" promulgated by the FCC as required by Section 276 of the Telecommunications Act of 1996, *codified* as 47 U.S.C. Section 276. That section requires that the FCC "prescribe a set of nonstructural safeguards for Bell operating company payphone service" MICPA particularly relies upon the FCC's January 31, 2002, Memorandum Opinion and Order in *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, FCC 02-25; Bureau/CPD No. 00-01 ("*Wisconsin Order*"), which MICPA characterized as requiring this Commission to apply the New Services Test to CenturyTel's tariffs. However, the FCC itself acknowledged in the *Wisconsin Order* that it lacked authority to require the application of the New Services Test to Local Exchange Carriers that are not Bell Operating Companies: "Since there are statutory provisions that empower us to apply the new services test to payphone line rates and grant us that authority only over BOCs, we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates." *Wisconsin Order* at Para. 42. **Thus, MICPA's motion appears to be without merit.** (Order, Footnote 2, page 4, emphasis added.)

The Complainants' attempt to apply the New Services Test to Verizon is equally without merit and should be summarily rejected by the Commission.

II. The Complaint Is Not Perfected As Required by Section 386.390.1, RSMo 2000, and Commission Rule 4 CSR 240-2.070(3).

At Paragraph 3 of Verizon's Motion to Dismiss, Verizon sets forth the many reasons why the subject Complaint does not meet the criteria set forth in Section 386.390.1 and 4 CSR 240-2.070(3). In their Suggestions in Opposition, Complainants appear to implicitly acknowledge that the complaint is not perfected by having the requisite twenty-five consumers or purchasers of the service, and attempt to shift the focus to purported authority under Section 392.400.6.

The gravamen of the instant complaint is the challenge to the reasonableness of specific rates and charges of the three Respondents. "As the discussion on this topic will demonstrate, this complaint is a direct **action on the rates charged** by the Respondents under statutes and procedures adopted for that purpose." (Suggestions in Opposition, p. 3, footnote 2, emphasis added.) "Indeed, this complaint has been brought pursuant to Section 386.390.1, but under its provisions on challenges to the reasonableness of rates." (Suggestions in Opposition, p. 4.) As a result, perfection under Section 386.390.1 is required, as this Commission has held on numerous occasions⁹. The sole purpose for this statutory section and the Commission's complementary Rule is to prevent a single customer from initiating a complaint case that challenges the reasonableness of Commission-approved rates and charges by prohibiting the Commission from

⁹ See Order Granting Motion To Dismiss, Case Nos. TC-93-58, TC-93-59, TC-93-60, TC-93-61, TC-93-62, TC-93-63, TC-93-64, TC-93-65, TC-93-66, TC-93-67, TC-93-68, TC-93-69, TC-93-70, TC-93-71, TC-93-72, TC-93-73, TC-93-74, TC-93-75, TC-93-76, TC-93-77, TC-93-78, TC-93-79, TC-93-80, TC-93-81, TC-93-82, TC-93-83, TC-93-84, TC-93-85, TC-93-86, TC-93-87, TC-93-88, TC-93-89, TC-93-90, TC-93-91, TC-93-92, TC-93-93, TC-93-94, TC-93-95, TC-93-96, TC-93-97, TC-93-98, TC-93-99, TC-93-100, TC-93-101; See Report & Order, MCI v. Southwestern Bell Tel. Co., Case No. TC-97-303.

entertaining such a case until the customer files a perfected complaint. The perfection requirement protects the Commission from being inundated by complaints filed by single individuals or companies who disagree with the reasonableness of a Commission-approved rate or charge.

While trying to shift the focus to Section 392.400.6, the Complainants rightfully acknowledge the case cited by some of the Respondents in their Motions to Dismiss, but attack this precedent as an erroneous interpretation of the statute.

In 1997, the Commission issued a report and order in MCI Telecommunications Corporation, Inc. et al. v. Southwestern Bell Telephone Company, Case No. TC-97-303, and interpreted Section 392.400.6 to only permit complaints that a company's noncompetitive services are subsidizing its competitive or transitionally competitive services. This interpretation is contrary to the express language of the statute. (Suggestions in Opposition, p. 12, footnote 11.)

To the contrary, the *MCI Case*, decided almost a decade after the *ATT v. GTE North* case cited by the Complainants, correctly interpreted the statute and reached a lawful and consistent result regarding the perfection requirement. The General Assembly has seen fit to withhold subject matter jurisdiction from the Commission unless a complainant files a perfected complaint, and the Commission should not disregard this statutory requirement.

III. Jurisdiction to Provide a Remedy.

As noted above, Complainants seek to rely on the case of *AT&T Communications of the Southwest, Inc. v. GTE North, Inc.*, 29 Mo. P.S.C. (N.S.) 591 (decided May 19, 1989), as authority to circumvent the requirements of 4 CSR 240-2.070(3). Such reliance is misplaced, as fully discussed in the later *MCI Case, supra*. Most curious about Complainants' solicitation that the Commission rely on *AT&T v. GTE North* in this

proceeding (contending that the similarities of the cases are “unmistakable”), is the failure of Complainants to disclose that the headnote and findings and conclusions of the *AT&T Case* specifically address the fact that the Commission may only order a **prospective** reduction in rates, and **may not adjust rates retroactively** – a significant legal point that all Respondents raised in their Motions to Dismiss.

Accordingly, even if one could assume that the Complainants’ complaint was lawfully perfected (which Verizon adamantly denies), authority to hear and determine the instant complaint does not necessarily equal the authority to grant the relief therein requested. As the Complaint and Suggestions in Opposition clearly state, the relief requested by these Complainants is a **refund of alleged overcharges**. This Commission is well aware of the limitations and restrictions on its ability to award monetary damages or retroactive relief.

The Public Service Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 47 (Mo. banc 1979); State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 928 (Mo. banc 1958). While the Commission properly exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary. State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69, 75 (Mo. 1982), *quoting* Liechty v. Kansas City Bridge Co., 162 S.W.2d 275, 279 (Mo. 1942). "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law

thereto in order to resolve issues within the given area of agency expertise." State Tax Commission, *supra*. The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, "'neither convenience, expediency or necessity are proper matters for consideration in the determination of' whether or not an act of the commission is authorized by the statute." *Id.*, quoting State ex rel. Kansas City v. Public Service Commission, 301 Mo. 179, 257 S.W. 462 (banc 1923). The Commission is without authority to award money to Complainants. American Petroleum Exchange v. Public Service Commission, 172 S.W.2d 952, 955 (Mo. 1943).

Complainants attempt to mask their requested relief as not rising to the "level of damages." "Complainants understand the limitations upon Commission jurisdiction with respect to awards of 'damages' and announcing and acting upon principles of law or equity, **but the refunds requested in the complaint do not reach to the level of damages or a prohibited decree in equity.**" (Suggestions in Opposition, p. 15, Footnote 12, emphasis added.) The Commission need only refer to the language set forth in the *AT&T v. GTE North* case, *supra*, to see that the Complainants' request for a "refund of overcharges" is unlawful and should be summarily dismissed.

Complainant is also seeking a refund from January 1987. As stated in its Order Setting Hearing, the Commission cannot adjust the Respondent's rates retroactively. *State ex rel. Utility Consumers Council v. the Public Service Commission*, 585 S.W. 2d 41 (Mo. 1979). Nor can the Commission require the Respondent to refund Complainant the overbilling. **First, the Commission does not have the statutory authority to pronounce monetary judgments and enforce their execution. Second, such a refund would be a retroactive lowering of rates and would constitute retroactive ratemaking.** Therefore, the remaining issue is whether Respondent's rates should be adjusted on a going-forward basis to reflect a proper quantification of Respondent's local transport revenues. (*AT&T v. GTE North*, *supra*, at 594, emphasis added)

As this Commission is well aware, Verizon does not operate as a local exchange telecommunications company or a public utility subject to this Commission's jurisdiction. Prior to the date of the Commission's Notice of Complaint issued herein, September 3, 2002, Verizon's Missouri tariffs were canceled effective September 1, 2002, pursuant to this Commission's *Order Denying Application to Intervene, Denying Motion to Suspend Tariff, Approving Tariffs, Canceling Tariffs, and Directing Filing* issued in Mo. P.S.C. Case No. TM-2002-232 on August 29, 2002. Clearly, any purported claims for relief against Verizon are now moot. Nevertheless, Complainants erroneously argue that "[w]ith Verizon's exit from the state, the remaining issues for which the Complainants may seek Commission review are whether Verizon set its payphone access rates in accord with federal law, and whether and in what amounts refunds or overcharges are due the Complainants as a consequence of unlawful rates." (Suggestions in Opposition, pp. 13-14.)

For all of the reasons discussed above, the relief requested is clearly unlawful. As previously discussed, the lawful rates on file with this Commission were approved on April 11, 1997 in Case No. TT-97-399. In its Order Approving Tariff, Denying Motion to Suspend, and Denying Application to Intervene entered in that case, the Commission stated: "The Commission finds that the rates proposed by GTE for its payphone services are properly made, lawful, and reasonable. The Commission finds the tariff sheets properly provide nondiscriminatory network access services and unbundled features in compliance with the FCC directives." (Order, pp. 3-4.)

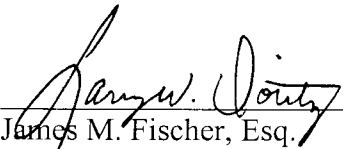
Given the absolute prohibition against retroactive ratemaking, there can be no Commission determination of "whether and in what amount refunds or overcharges are

due the Complainants.” As any possible relief could only be prospective in nature by adjusting rates on a going-forward basis (and Verizon adamantly denies that any relief is appropriate herein), no remedy exists as to Verizon, a carrier no longer operating as a local exchange telecommunications company in Missouri subject to this Commission’s jurisdiction, and whose tariffs obviously have been canceled.

Conclusion

For all of the above reasons, GTE Midwest Incorporated d/b/a Verizon Midwest requests the Commission to enter an Order dismissing the Complaint filed herein; or, in the alternative, to enter an Order dismissing GTE Midwest Incorporated d/b/a Verizon Midwest as a party-Respondent.

Respectfully submitted,


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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 1st day of November, 2002, to:

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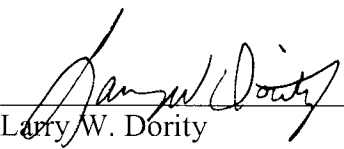
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