BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, et al.	)	
	)	
Complainants,	)	
v.	)	Case No. TC-2005-0067
	)	
Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company,	)	
	)	
Respondent.	)	

COMPLAINANTS' APPLICATION FOR REHEARING

Come now Complainants in the captioned cause, by and through their attorneys of record, and pursuant to Section 386.500 RSMo. 2000 and 4 CSR 240-2.160 move and apply for a rehearing of the Missouri Public Service Commission's (the Commission) Order Regarding AT&T Missouri's Motion to Dismiss entered on June 5, 2013 (the Order). In support thereof, Complainants respectfully submit the following:

1. In the Order, in which it dismisses the complaint brought in this matter, the Commission has concluded erroneously that it is utterly and unconditionally powerless to adjust AT&T Missouri's (AT&T)[1] payphone access line rates and is equally powerless to order a refund of amounts AT&T charged payphone service providers for access services in excess of new services test compliant payphone access line rates. The Order is unlawful, unjust and unreasonable and just grounds exist for the Commission to rehear the matter and set the same for hearing after approving customary procedural deadlines.

2. In a series of orders[2] the Federal Communications Commission (FCC) has repeatedly held that local exchange network services provided to payphone providers must be

[1] Southwestern Bell Telephone Company now does business under the name "AT&T Missouri" and will be referred to by that business name, as abbreviated, in this application.

[2] *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) ("*First Payphone Order"),* and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 ("*Payphone*

offered at cost-based rates that satisfy the new services test (NST), effective no later than April 15, 1997. Additionally, the FCC has held with emphasis that a local exchange carrier, such as AT&T, was not eligible to receive dial-around compensation like other payphone service providers until the carrier was in actual compliance with the requirement for providing network services to payphone service providers at NST compliant rates. The determination of whether a carrier was in actual compliance rested with the state regulatory commission.

3. In its review of AT&T's motion to dismiss, the Commission accepts as true the well pleaded facts of the complaint. *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo 2011), and cases cited therein. Therefore, in a succinct expression of the core allegations of the complaint:

a. In April, 1997, AT&T's payphone access lines rates were approved by the Commission without an investigation and subsequent hearing.

b. The rates do not comply with the New Services Test and are therefore unjust, unreasonable and above all unlawful.

c. Those rates have been in effect since April 15, 1997 and are still in effect.

4. Judged then by the allegations of the complaint, AT&T has overcharged the Complainants and other payphone service providers for local exchange network services since April 15, 1997, and has collected significant amounts of dial-around compensation for which it was not eligible, both in direct violation of the FCC's *Payphone Orders*.

5. AT&T's eligibility to receive dial-around compensation starting on April 15, 1997 and continuing was conditioned on AT&T's actual compliance with the prerequisite of providing cost-based rates to Complainants and other payphone service providers. Because AT&T collected dial-around compensation during this time period, it is required by federal law to have provided Complainants with rates that satisfied the new services test.

Reconsideration Order") aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC,* 523 U.S. 1046 (1998) (collectively, the *"Payphone Orders").*

Retroactive Ratemaking and Refunds

6. The Complainants prayed that the Commission order AT&T to refund the overcharges it collected through the non NST compliant payphone access line rates. At page 8 of the Order, the Commission concluded that it had no authority to order such refunds explaining that,

> First, 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."

The Commission's analysis begs the question. The complaint alleges that AT&T's payphone access rates were unlawful *ab initio* although the process under which they were approved may have rendered them the "legal" rate until challenged. The retroactive rate making principle should not be used to shield or protect an unlawful rate.

7. Furthermore, that the FCC has officially sanctioned the orders of other regulatory agencies that have granted refunds establishes that a satisfactory process can be and is afforded. If the regulatory process under which the Complainants' property (their money) has been taken from them by unlawful payphone access rates is procedurally sufficient, then the process of ordering refunds of overcharges, a process endorsed by the FCC as a means to redress non NST compliant payphone rates, is likewise procedurally sufficient and within constitutional minima.

8. At least six other state commissions have entered orders issuing refunds when payphone rates have been found to be excessive under the new services test:

a. *Michigan Public Service Commission ("MPSC") Docket No. U-11756* – The MPSC order of March 16, 2004 found that, to the extent SBC Michigan rates exceeded the new services test rates since April 15, 1997, the excess must be

returned to its payphone service provider customers with interest. The MPSC rejected SBC Michigan's argument that such refund violated the filed rate doctrine or the prohibition against retroactive ratemaking.

b. *Tennessee Regulatory Authority ("TRA") Docket No. 97-00409* – The TRA found that the FCC intended for an affected party to be placed in the position he or she would have been if all the requirements for the payphone access line rates had been met on April 15, 1997. Interim Order dated February 1, 2001 at 26. As such, the TRA voted unanimously to require the local exchange companies involved to pay as reimbursement any overpayment since April 15, 1997 adjusted to account for both inflation and the time value of money, equaling 6% interest annually. The TRA entered its final order adopting the parties' proposed settlement of payphone access service rates on May 21, 2002. The final order was silent on the issue of refunds, thus not interfering with the previous determination in the Interim Order regarding refunds.

c. *Kentucky Public Service Commission ("KPSC") Administrative Case No. 361* – The KPSC found that the rates tariffed by BellSouth, Cincinnati Bell Telephone, and GTE (now Verizon) were in excess of the appropriate cost-based rates under the new services test. As such, the incumbent local exchange carriers were ordered to issue refunds or credits back to April 15, 1997.

d. *South Carolina Public Services Commission ("SCPSC") Docket No. 97-124-C and Order No. 1999-284* – The SCPSC found that BellSouth's payphone access services were overpriced under a new services test analysis and ordered BellSouth to reimburse the payphone service providers that purchased the

services, including appropriate interest at the rate of 8.75% per annum, back to April 15, 1997.

e. *Louisiana Public Service Commission ("LPSC") Order No. U-22632* – The LPSC entered an order approving the terms of a stipulated agreement wherein the incumbent local exchange carriers agreed to issue refunds for the cumulative period from April 15, 1997 through the effective dates of the revised tariffs lowering the payphone access tariff rates.

f. *Pennsylvania Public Utility Commission ("PPUC") Docket No. R-0097386700001* – The PPUC adopted and approved the terms of a stipulated agreement wherein Bell Atlantic–Pennsylvania would establish new rates for payphone access services and provide a refund dating back to April 15, 1997.

9. In declining to implement here a means of ordering refunds of charges made by AT&T in excess of the lawful NST compliant rate, the Commission rests heavily on the FCC's recent decision in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, FCC 13-24, (Released February 27, 2013). At paragraph 41 of that decision, the FCC observed, with respect to refund decisions by several state jurisdictions, 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." [emphasis added] The Commission seems convinced that this excerpt from the order ends the inquiry and establishes conclusively that it does not offend federal law by rejecting a request for refunds or even conducting a hearing to determine if refunds are appropriate. To the contrary, this raises the question of what analysis of applicable state and federal law the Commission has engaged in

during and after a **hearing** as the other jurisdictions referred to by the FCC did. The Commission has foregone such an analysis.

10. AT&T's argument and the Commission's determination regarding the filed rate doctrine relies on the Commission's ruling in Case No. TT-97-345 which allowed the rates to go into effect. Similarly, AT&T's argument and the Commission's determination that refunds would be retroactive ratemaking turns on the argument that there was a determination of lawfulness. Complainants have already pointed out that the Commission's 1997 order allowing the rates to take effect merely made the rates "legal," not "lawful."

11. In addition, the complaint asserts that the Commission lacked the correct guidelines or information at the time of its 1997 ruling in Case No. TT-97-345. As AT&T pointed out in its Opposition and Motion to Dismiss (at 7), AT&T had supplied the Commission with New Services Test documentation that turned out in fact to be inconsistent with the FCC's standards articulated in the *Wisconsin Payphone Orders.*[3] Even if the ruling in Case No. TT-97-345 can be classified as a finding of "lawfulness" it clearly cannot survive to limit the Commission's powers after the FCC in *Wisconsin Payphone Orders* clarified the New Services Test guidelines. Without question, there could not have been a finding of lawfulness if the "finding" rested on a misstated legal test.

12. The Commission should not be barred from now finding the same rates *unlawful* and granting refunds under either state or *federal law*. The Commission is not barred from correcting an error it made in favor of AT&T in reliance on erroneous arguments made by AT&T. Indeed doctrines of estoppel in pais would seem to preclude AT&T from asserting filed

[3] *Wisconsin Pub. Serv. Comm'n*; *Order Directing Filings*, CCB/CPD No. 00-01, Order, 15 FCC Rcd 9978 (CCB rel. Mar. 2, 2000) (*Wisconsin Bureau Order*), on review *Wisconsin Payphone Order*, 17 FCC Rcd 2051(2002) (the "*Wisconsin Payphone Orders"*) .

rate or retroactive ratemaking defenses given that the lynch pin of any such argument is AT&T's own conduct in leading the Commission into error.[4] In any event, recognition that an erroneous test was applied surely qualifies as a change of circumstance justifying a reexamination of the Commission's determination.

13. Moreover, Missouri's case authority when analyzed against the FCC's directives and guidance is no bar to an order refunding overcharges for payphone access lines.

AT&T's Competitive Classification

14. On page 5 of the Order the Commission takes notice that AT&T qualified for competitive status in 2008. The Commission then determines that by virtue of the liberalized rate adjustment process set out in Section 392.245.5 (6), RSMo (Cum. Supp. 2012), it has no authority to adjust AT&T's payphone rates **for any period of time during which those rates may have been charged.**

15. Under Section 392.200 RSMo 2000:

> All charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order or decision of the commission is prohibited and declared to be unlawful.

16. As alleged in the complaint, AT&T's payphone access rates are higher than allowed by law. They were unlawful when effective in April, 1997, were unlawful thereafter and are unlawful still since they are non NST compliant.

[4] See, *Bonney v. Environmental Engineering, Inc.* 224 S.W.3d 109, 117 -118 (Mo.App. S.D.,2007) "The purpose of the doctrine of equitable estoppel is to prevent a party from taking inequitable advantage of a situation he or she has caused." *Weiss v. Rojanasathit,* 975 S.W.2d 113, 120 (Mo. banc 1998). "

17. A rate in excess of the amount allowed by law is prohibited and statutorily declared unlawful. Yet, the Commission has decided to interpret Section 392.245 RSMo (Cum. Supp. 2012) in such a way that an unlawful rate set years before AT&T was declared competitive and void *ab initio* is immunized and can be immunized perpetually until, at the whim and discretion of the telecommunications company, it is altered, and even as altered it may not be lawful.

18. Federal law guarantees the Complainants an NST compliant payphone access line rate commencing on April 15, 1997 and continuing. The Commission has concluded that state law preempts the federal law which makes that guarantee. Even if the Commission has no authority to reset the rate prospectively, which Complainants do not concede, that certainly does not prevent the Commission from determining that the current rate is unlawful because it exceeds a NST based rate and ordering refunds. Nothing in Section 392.245, RSMo (Cum. Supp. 2012), precludes the Commission from passing on the lawfulness of a tariffed rate which it was mandated to review and indeed had under review at about the time the law was passed.[5] The Commission is not precluded from completing that review, and it is not precluded from ordering refunds. Plainly, this Commission has not lost its power and authority to rectify the consequences of AT&T's collection of charges based on unjust, unreasonable and unlawful rates.

CONCLUSION

The construction of the Public Service Commission Law must give tribute to "public welfare, efficient facilities and substantial justice." Section 386.610, RSMo 2000. There is no justice in permitting AT&T to reap a windfall at the expense of the payphone service providers

[5] See, SB 507, Laws of 1996.

who paid it non NST compliant payphone access line rates. The Commission's order dismissing the within complaint should be withdrawn and the complaint set for investigation and hearing.

Respectfully submitted,

/s/ Mark W. Comley
Mark W. Comley #28847
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102
573/634-2266
573/636-3306 FAX
comleym@ncrpc.com

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 3rd day of July, 2013, to Leo Bub at lb7809@att.com; General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley
Mark W. Comley