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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' Suggestions in Opposition to Respondents' Separate Motions to Dismiss 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
Mark W. Comley

MWC:ab
Enclosure
cc: Office of Public Counsel
General Counsel's Office
Paul H. Gardner
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BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, Bev Coleman, an individual, Commercial Communication 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 Communication 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, Gale Wachsnicht, d/b/a Wavelength, LTD.	)	Case No. TC-2003-0066
Complainants,	)	
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.	)	

COMPLAINANTS' SUGGESTIONS IN OPPOSITION TO RESPONDENTS' SEPARATE MOTIONS TO DISMISS COMPLAINT

On August 22, 2002, the complainants in this action filed a complaint which, in three separate counts, challenged the lawfulness and reasonableness of the rates charged by the respondents for network services made available to them as payphone providers. Each of the respondents has filed a motion to dismiss the complaint for failure to state a claim upon which relief

may be granted. Their motions should be denied.

Although technical rules of pleading are not applied to applications or pleadings filed with the Public Service Commission and pleadings are to be liberally construed; State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123, 126 (K.C. Ct. App.1944); the pleading rules adopted by the Commission are in great measure the same as those promulgated by the Supreme Court of Missouri, and applying the maxims of pleading construction used by the courts of our state when motions to dismiss are filed would be appropriate here. Consequently, the sufficiency of the instant complaint should be evaluated under the following principles:

> As noted in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993), a motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Reynolds v. Diamond Foods & Poultry, Inc.,79 S.W.3d 907, 909 (Mo. banc 2002).

A. The complaint is not barred by the filed rate doctrine or collateral estoppel.

All three of the respondents contend in one variation or another that the complaint constitutes an impermissible collateral attack on their rates.

Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company (SWB) argues that the filed rate doctrine shields its rates from a complaint. It further argues that the complainants "as members of the Midwest Independent Coin Payphone Association ('MICPA)" raised the same issues in Case No. TT-97-345 in which the Commission allowed the rates and charges to go into effect without a hearing over MICPA's objection. Although SWB does not

expressly refer to collateral estoppel as a ground for its motion,[1] SWB's reference to MICPA's participation in Case No. TT-97-345 is close enough to a claim in estoppel that Complainants will treat it as such. Sprint Missouri, Inc., d/b/a Sprint (Sprint) claims that the complaint is an unlawful collateral attack on its rates in violation of Section 386.550, RSMo. 2000.[2] Like SWB, GTE Midwest Incorporated d/b/a Verizon Midwest (Verizon) contends that the filed rate doctrine bars the complaint in that it is an impermissible collateral attack.

1. *The Licata Case*

In support of their contentions that the complaint is an impermissible collateral attack on an order of the Commission, SWB and Verizon have cited State ex rel. Licata, Inc. v. Public Service Commission, 829 S.W.2d 515 (Mo.App. W.D.1992) . In *Licata*, the complainant filed a complaint with the Commission against The Kansas Power and Light Company, Inc., (KPL) concerning gas service for a mobile home village operated by Licata in Kansas City. KPL refused service to the mobile home park on grounds that it was not in compliance with Article 10 of its rules. Article 10 had been approved by the Commission in an earlier hearing in which Licata had not participated but for which it had received notice. Licata complained that Article 10 was unreasonable and unconstitutional, unreasonable and unlawful. The Commission dismissed the complaint and its decision was upheld by the appellate court.

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[1] At pages 13-14 of its answer, SWB has asserted "latches [sic], waiver and estoppel" and res judicata as affirmative defenses.

[2] All statutory citations herein are to RSMo 2000 unless otherwise indicated. Section 386.550 provides that in "all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." 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. The Public Service Commission Law anticipates that there will be challenges to rates that are fixed by the Commission. Section 386.270 provides that "[a]ll rates, tolls and charges . . . fixed by the commission shall be in force and shall be prima facie lawful, . . . until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." This is such a suit.

Licata is readily distinguishable. Unlike this case, which involves the lawfulness and reasonableness of the respondents' rates, *Licata* involved a challenge to an existing and approved **rule** of a public utility. Complaints about the rules of utilities are also governed by Section 386.390. They are entertained by the Commission if there are allegations that the utility violated the rule, or the rules or orders of the Commission. Section 386.390.1. Indeed, this complaint has been brought pursuant to Section 386.390.1[3], but under its provisions on challenges to the reasonableness of rates. Just as importantly, the complaint has been brought pursuant to Section 392.400.6,[4] which expressly permits challenges to the reasonableness and lawfulness of rates charged by noncompetitive telecommunications companies. No allegation of unlawfulness of Commission orders is required.[5] As they apply to complaints about the reasonableness of rates, these statutes make no exceptions about which rates are subject to challenge. There is no exemption for rates approved by the "file and go into effect" method, or the "file, suspend and approve after hearing" method. This is a direct attack on the rates as charged, and not a collateral attack on the rates as filed and allowed to go into

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[3]Section 386.390.1 provides in part,

> provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, of not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

[4]Section 386.400.6 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.

[5]Sprint has argued that an allegation that it violated a Commission rule or order is required to state a proper complaint about the reasonableness or lawfulness of its payphone access rates, but this is entirely refuted by the text of the statutes.

effect. The reasonableness of the rates is subject to review by administrative complaint by the plain provisions of these sections. To agree with the respondents' argument would render the complaint procedures as to rates powerless, thus effectively editing those provisions from the statutes. Under respondents' theory, virtually no rate charged by a utility would be subject to challenge by consumers or companies under these two sections of the regulatory law. It would mean that only those rates which have never been filed with the Commission would be subject to attack by complaint, and that is utterly inconsistent with the provisions as written.

2. *The Filed Rate Doctrine*

The filed rate doctrine was described in Bauer v. Southwestern Bell Telephone Co., 958 S.W.2d 568, (Mo.App. E.D.1997).

> The filed tariff, or filed rate, doctrine governs a utility's relationship with its customers and provides that any rate filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action. *Metro-Link Telecom*, 919 S.W.2d at 692. The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of the published tariffs. *Id. at 693.*

Bauer at 568. The filed rate doctrine protects rates that have been lawfully approved by the Commission from relitigation, in separate case filings, in the courts of law and equity. The doctrine is a companion concept to primary jurisdiction in this sense. In the instant case, complainants have sought relief from an unreasonable and unlawful rate under precise statutory language allowing the Commission itself, or other qualified parties, to directly attack rates charged by utilities. This is an administrative action, not a legal action, before the agency with the regulatory authority in the first instance to cure the illegality and unreasonableness of the charged rates. The filed rate doctrine does not forbid this action and the respondents will not locate any contrary authority.

3. *Collateral Estoppel*

SWB gives more attention to this argument than the other respondents and did not address it fully. Its contention appears to be that since MICPA moved to suspend SWB's payphone tariffs in Case No. TT-97-345, all of MICPA's members, at least, were bound by the order in that case, and are hence estopped to complain now. The argument is meritless.

Wilkes v. St. Paul Fire and Marine, Insurance Company, a recent Eastern District Court of Appeals case, still unreported[6], provides an excellent discussion of the elements of collateral estoppel:

> Collateral estoppel, or issue preclusion, precludes the same parties, or those in privity with the parties, from relitigating issues that have been previously litigated. *Major v. Frontenac Industries, Inc.*, 968 S.W.2d 758, 761 (Mo.App.E.D.1998). In deciding whether the application of collateral estoppel is proper, we consider the following four factors: (1) whether the issue in the present case is identical to the issue decided in the prior adjudication; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party, or was in privity with a party, to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. *Cox v. Steck*, 992 S.W.2d 221, 224 (Mo.App.E.D.1999). Collateral estoppel will not be applied where to do so would be inequitable. *James v. Paul*, 49 S.W.3d 678, 683 (Mo. banc 2001). Fairness is the overriding consideration. *Cox*, 992 S.W.2d at 224. Each case must be analyzed on its own facts. *James*, 49 S.W.3d at 683.

Id at 3.

As for the first factor, whether the issue in the present case is identical to the issue decided in the prior adjudication, Complainants agree that the Commission considered the reasonableness and lawfulness of the respondents' tariffs, but the proceeding in which that consideration was made

[6]The opinion has not been released for publication in the permanent law reports. It may be subject to a motion for rehearing or transfer. Although the opinion may be later modified, its summary of the elements of collateral estoppel is still cogent. It is available in print at this time at 2002 WL 31162792 (Mo.App. E.D 2002.)

was not an adjudication. This factor must therefore fail.

The second factor to consider is whether the prior Commission case resulted in a judgment on the merits.

> A judgment on the merits is one rendered when it is determined which party is in the right after argument and investigation, as distinguished from a judgment rendered upon some preliminary or technical point, or by default, and without trial. *Hayes v. United Fire & Cas. Co.*, 3 S.W.3d 853, 856 (Mo.App.E.D.1999). Where there is a question of whether a previous decision went to the merits of the case, no preclusive effect is given to the earlier decision.

Wilkes, 2002 WL at 3. This factor must be ruled against SWB. Although written argument was submitted by MICPA and other parties to Case No. TT-97-345, the investigation was entirely one-sided, and closed from inspection by the parties who ultimately would be most affected by the decision. Staff and SWB were the only parties who knew the contents of SWB's cost studies and there was no cross-examination conducted of the preparers of those studies. The decision of the Commission was reached without trial or hearing of any sort. For purposes of collateral estoppel, there was no adjudication and no judgment on the merits.

The third factor is whether the party against whom collateral estoppel is asserted was a party, or was in privity with a party, to the prior adjudication.

> For collateral estoppel purposes, parties are in privity when the interests of the nonparty are so closely related to the interests of the party that the nonparty can be fairly considered to have had his or her day in court. *[citation omitted]* Privity is not established simply because the parties are interested in the same question or in proving or disproving the same state of facts. *[citation omitted]*

Id. at 4. Complainants first notice that SWB has grouped them all into the class of MICPA members. SWB offers no proof that they are MICPA members. The complaint makes no claim that they are

members of MICPA. As a result, there is no fact upon which SWB can base this critical factor of collateral estoppel.[7] Assuming for purposes of argument only that all of the complainants are members of MICPA, Complainants submit that the privity requirement nonetheless fails. Even if MICPA and its individual members were interested in the same questions about SWB's payphone tariffs, their interests are not so closely related to suggest that each member had his or her day in court,-- if what the Commission convened in TT-97-345 could be considered "court," and it was not. Complainants renew their argument that no adjudication was ever made by the Commission for SWB's tariffs, or the tariffs of the other respondents.

The fourth consideration for the application of collateral estoppel is whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior adjudication.

> In deciding this factor, we consider the following additional four factors: (1) did the party against whom collateral estoppel is asserted have a strong incentive to litigate the prior adjudication; (2) does the second forum afford the party against whom collateral estoppel is asserted procedural opportunities not available in the first action; (3) is the prior judgment, upon which collateral estoppel is based, inconsistent with one or more prior judgments; and (4) was the forum in the first action substantially inconvenient to the party against whom collateral estoppel is asserted. *St. Louis Univ. v. Hesselberg Drug Co.,* 35 S.W.3d 451, 455-456 (Mo.App.E.D.2000).

Id. at 5. Discussion of the second of the four supplementary factors enumerated above is sufficient. Does this complaint proceeding offer the Complainants procedural opportunities not available in the

[7] What if some complainants are members of MICPA and others are not? What if some complainants withdrew from membership or became members of MICPA after the decision in Case No. TT-97-345? Would collateral estoppel apply only to then members, or is it possible under SWB's theory that MICPA as an association of more than one payphone provider could bind all payphone providers, present and future, if it intervened in a tariff filing case and was denied a hearing on its motion to suspend? Simply asking these questions illustrates the unfairness of collateral estoppel in this instance. Could it be used to permit several payphone providers to pursue a complaint while denying others who pay the same unlawful rate from doing so? Section 386.390 and 386.400.6 forbid such a result.

first action? In Case No. TT-97-345, MICPA was denied the right to examine the cost studies supplied by SWB in support of its tariffs; the right to file the testimony of witnesses; and the right to cross examine witnesses and brief and argue its position under contested case procedures. Under the Commission rules and the enabling statutes for the Commission, Complainants will be entitled to these procedures in the instant case. Quite clearly, there was no full and fair opportunity to litigate the issue in the Case No. TT-97-345.

Finally, in view of the foregoing analysis, considerations of fairness simply do not favor application of collateral estoppel. Any suggestion that collateral estoppel affects this complaint must be disregarded.

B. There are a sufficient number of complainants

All Respondents raise the issue of the number of complainants. Sprint argues that Complainants have failed to allege that they subscribe, or could subscribe, to Sprint service or that they are in Sprint's territory. Sprint states that only two of the complainants presently subscribe to its service. SWB similarly argues that there is no allegation that all twenty-five complainants subscribe or could subscribe to SWB service, and then challenges the capacity or certification of four of the complainants. Verizon's arguments follow suit. They contend that under Section 386.390.1 the complaint must be dismissed for failure to join 25 complainants who subscribe or could subscribe to the service of SWB, or Sprint or Verizon. Their arguments must be rejected.

This complaint has been brought under Section 386.390.1 and Section 392.400.6 of the Public Service Commission Law. Section 386.390.1 provides that the reasonableness of rates charged by public utilities may be challenged by certain classes of parties and by "not less that twenty-five consumers or purchasers, or prospective consumers or purchasers" of service. Section

392.400.6 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.

Even if the Commission were to cull out those complainants which Respondents argue are ineligible for the "twenty-five" needed under Section 386.390.1, the complainants remaining are "telecommunications companies"[8] within the context of this law, and the respondents are all classified as noncompetitive telecommunications companies, a classification that none of the Respondents refute in their answers or motions to dismiss. Under Section 392.400.6, only one telecommunications company is needed to bring a complaint and this Commission has so held.

In AT&T Communications of the Southwest, Inc. v. GTE North, Inc., 29 Mo. P.S.C. (N.S.) 591,[9] 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 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 especially 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-

[8]See, Section 386.020(51).

[9]This case is also cited at 1989 WL 513607 (Mo.P.S.C.) and citations to page numbers in the text will be to this West Law publication. For brevity it will be cited as *ATT v. GTE North* hereinafter

> 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 Missouri Public Service Commission has arrived at the following conclusions.
>
> 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 similarities between *ATT v. GTE North* and the instant case involving the Respondent's payphone access rates are unmistakable. Just as in the case with GTE North, the complainants here allege that rates made effective in an earlier Commission proceeding were miscalculated in violation of applicable law, a matter which the Commission may not have realized itself, and hence those rates are unlawful, unjust and unreasonable. It is noteworthy that the Commission did not consider itself forbidden by the filed rate doctrine, res judicata or collateral estoppel from reconsidering the matter.[10] Of further significance is that a solitary complainant, pursuant to Section 392.400.6, was sufficient to trigger Commission jurisdiction over the complaint against GTE North, and the

[10]The rates complained of in *ATT v. GTE North* had been approved for about two years when the complaint was filed, but this did not deter the Commission from investigating them. On page 5 of its Motion to Dismiss, Answer and Affirmative Defenses, SWB points out that five years have passed since the Commission allowed its payphone access rates to go into effect. As the conclusions reached in *ATT v. GTE North* confirm, the unlawfulness and unreasonableness of a tariff do not wear off with the passing of time.

Commission should rule likewise in this case.[11]

C. The price cap statute is no bar to the relief requested in the complaint.

SWB argues that Section 392.245, the price cap statute, bars the complaint. First, there is no authority by which SWB can establish that the price cap statute immunizes an unlawfully set rate from complaint, investigation and correction by the Commission. Second, even if the statute can be interpreted in a way that it restricts the filing of a complaint under the facts and circumstances alleged (which Complainants deny), it is of no effect. As Section 276 (c) of the FTA provides:

> (C) STATE PREEMPTION.-- To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

The complainants are entitled to the relief they request as a matter of federal law, and state law. To the extent state law may be inconsistent with the federal law, it is preempted.

D. Despite its sale of assets in Missouri, Verizon is still subject to Commission jurisdiction.

Verizon argues that since it transferred its remaining 96 exchanges to CenturyTel of Missouri, L.L.C. effective the end of August, 2002, it can no longer be subject to a complaint before the Commission. To accept this argument, the Commission must conclude that the unlawful acts of telecommunications companies committed while they offered service and collected rates from customers escape the investigatory reach of the Commission upon the closing of transactions in

[11]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. The statutory section allows telecommunications companies to complain about the reasonableness and lawfulness of a noncompetitive company's rates. There are no other qualifications on the scope or breadth of the complaint. The position taken by the Commission in *ATT v. GTE North* is consistent with the statute. Clearly, the legislature has carved out telecommunications companies as a special class of complainant. Where it will require twenty five ordinary customers of a utility to raise the issue of a rate's reasonableness, only one telecommunications company, a certificated and operating telephone service provider, is required to do so against a noncompetitive telecommunications company.

which their regulatory assets are transferred. There is nothing in the Public Service Commission law which supports this abrupt end to the power of the Commission.

Even so, it is undisputed that the facts and circumstances alleged in the complaint involve acts or omissions committed by Verizon in April of 1997 and continuing up until the date of the complaint, August 22, 2002. When the complaint was filed, Verizon was still offering service to payphone providers in the state, and expected payment for those services in the ordinary course. Complainants submit that jurisdiction of this Commission attached on the date the complaint was filed, and continues despite the intervening sale of the exchanges.

If this Commission somehow has been divested of jurisdiction over the question presented because of Verizon 's bulk sale, then what forum has jurisdiction? The next venue would be the circuit or district courts. Complainants submit that jurisdiction would be deferred by the courts back to the Commission if the matter were first brought to them.

> [The doctrine of primary jurisdiction] is based on a judicial policy of self-restraint and calls upon a court to defer to and give an administrative agency the first right to consider and act upon a matter which calls for factual analysis or the employment of special expertise within the scope of the agency's responsibility entrusted to it by the legislature. 2 *Am.Jur.*2d, Administrative Law, Sec. 788, p. 688 et seq.; 73 C.J.S. *Public Administrative Bodies and Procedure* § 40, p. 347; *State ex rel. Cirese v. Ridge*, 345 Mo. 1096, 138 S.W.2d 1012 (banc 1940).

Main Line Hauling Co., Inc. v. Public Service Commission, 577 S.W.2d 50, 51 (Mo.App.K.C. Ct. App. 1978). The nature of the complaint in this case involves a "factual analysis or the employment of special expertise within the scope" of the Commission's particular responsibility, and this will not change despite Verizon's sale of assets on August 31, 2002.

Verizon also suggests that the issues as to its conduct are moot. With 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 of overcharges are due the Complainants as a consequence of unlawful rates. Since these issues concern conduct of the company that occurred before its departure from the state, and not its conduct afterward, the issues are very much alive and fresh for resolution.

Complainants submit that jurisdiction over Verizon has been properly vested in this Commission with respect to the complaint, and arguments to the contrary should be denied.

E. Complainants should be permitted to amend the prayer in Count III.

Verizon argues that it should be dismissed because the prayer in Count III fails to mention it by name and instead names SWB. As much as Verizon may want SWB to be liable for Verizon's unlawfulness in setting the rates, Complainants 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. Absent from Verizon's motion to dismiss on this ground is a claim of prejudice.

F. The complaint states a claim for the refund of overcharges.

The Respondents, almost in unison, have claimed that the complaint should be dismissed, --not just a part of it-- because its request for refund of any overcharges violates principles against retroactive ratemaking. They have asserted "retroactive ratemaking" as a ground for a motion to dismiss or as an affirmative defense, or both.

Complainants deny that the refund requested in this matter would constitute retroactive ratemaking. First, the doctrine is not applicable. Second, Complainants expect that the evidence in this matter will show that all of the Respondents, (or, if not all, then any company that might be considered a Regional Bell Operating Company (RBOC)), are equitably estopped to assert

retroactive ratemaking as a defense or ground of dismissal.

Regarding applicability of the doctrine itself, Complainants reassert that all the Respondents were, as a matter of federal mandate, under the affirmative obligation to comply with the New Services Test by April 15, 1997. This was a duty to revise rates so that they were in accord with the regulations of the FCC. Presuming as true the allegations of the Complaint, as the Commission must do in reviewing a Motion to Dismiss, this means that the Respondents have collected money from the Complainants illegally while at the same time enjoying the right to receive per call compensation through their own payphone divisions. In this state, the essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct the error; the only step that the Commission can take is to prospectively revise rates in an effort to set more appropriate ones. State ex rel. Utility Consumers Council, Inc. v. Public Service Commission, 585 S.W.2d 41, 47 (Mo. banc 1979). This is not a case in which an estimate of costs has proven inaccurate. This is a case in which rates were illegally set in the first instance; the parties who set the rates illegally profited from those rates in addition to the right to receive per call compensation; and the agency to which the elimination of unlawful rates has been textually committed by statute has been requested to resolve the illegality by a return of the overcharges.[12] Retroactive ratemaking is not involved in the process.

Furthermore, as part of its implementation of Section 276 of the FTA, the FCC entered the

[12]Sprint has argued that the Commission is unauthorized to enter a "pecuniary award." SWB asserts as an affirmative defense that the Commission lacks authority to award 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. The respondents have no hesitation in asking the Commission to apply equitable defenses of laches, estoppel, and res judicata, and should not object when Complainants ask for "refunds," which in this administrative setting are distinctively different from "damages."

series of orders that are identified in paragraph 34 of the complaint. One of those orders was the *Clarification Order,* Order, FCC 97-805 (released April 15, 1997). Before this order was released, the RBOC coalition, consisting of all the RBOCs, sought a 45-day waiver of the intrastate tariff-filing requirements for basic payphone features and unbundled features and functions in order for the RBOCs to gather and review the cost studies for compliance with the New Services Test. See Letter from Michael Kellogg to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, dated April 11, 1997 at page 1 (filed as an ex parte letter in FCC Docket No. 96-128, a copy of which is attached to these Suggestions as Attachment 1). As Mr. Kellogg explained to the FCC in this letter:

> To the best of my knowledge, all of the RBOCs have (or will by April 15, 1997, have) effective state tariffs for all the basic payphone lines and unbundled features and functions required by the Commission's order. We are not seeking a waiver of that requirement. We seek a waiver only of the requirement that those intrastate tariffs satisfy the Commission's "new services" test. The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test or to file new or revised tariffs that do satisfy those standards. **Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.** [emphasis added]

Id.

Based upon the RBOCs' promise to reimburse the difference, the FCC granted the 45-day waiver and gave the LECs until May 19, 1997 to file their intrastate payphone access tariffs. See, *Clarification Order*, ¶ 20. For any RBOC, including SWB, to now argue that a refund is inappropriate is in direct contrast to their position before the FCC when they sought a waiver of the intrastate tariff filing requirements.

In addition to the RBOCs' independent pledge to reimburse the difference back to the independent payphone providers, the FCC has also ordered such a refund in the situation where the tariffed payphone access rates are reduced when reviewed under a New Services Test analysis.

Under the *Clarification Order*, to the extent that a tariffed rate is reduced after an investigation implementing the New Services Test, LECs (like Verizon and Sprint) are required to reimburse or provide credit to their customers for these payphone services from April 15, 1997 to the date of implementation:

> In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128. Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive the compensation from interexchange carriers ("IXCs") that is mandated in that proceeding.
>
> Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. . . **A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.** [emphasis added]

Clarification Order, ¶¶ 1-2; see also ¶ 25.

It is unclear to Complainants exactly what status Verizon may have with respect to the RBOC coalition and the representations made by Mr. Kellogg to the FCC. The predecessor of Verizon was

merged into Bell Atlantic Corporation. As evidence unfolds in discovery and at hearing, the link between Verizon and the RBOC promise of refunds may come into focus. However, for purposes of surviving a Motion to Dismiss, the Complainants have made satisfactory allegations in the complaint which if taken as true, clearly demonstrate a claim upon which relief may be granted.

Verizon is also a LEC, as is Sprint. To what extent Verizon and Sprint may have relied on the waiver granted in the Clarification Order is currently being investigated, and Complainants are entitled to make use of prehearing discovery in this Commission to uncover their reliance on the waiver. If indeed they relied on the waiver granted in the *Clarification Order*, Verizon and Sprint cannot in good faith assert that the retroactive ratemaking doctrine protects them from the lawful consequences of that reliance.

The complaint is not subject to dismissal because Complainants have sought refunds of overcharges. Respondents' motions to dismiss on that ground should be denied.

G. The New Services Test should be applied to Sprint's rates.

At page 1 through 2 of its motion to dismiss Sprint argues that the New Services Test only applies to BOCs. It also states that it was never required to comply with the New Services Test by order or rule of the FCC. It moves that it be dismissed from this case for those reasons. In support of this argument, Sprint relies upon certain portions of the FCC's order in *In the Matter of Wisconsin Public Service Commission Order Directing Filings,* FCC 02-25; Bureau/CPD No. 00-01. (*Wisconsin Order).*

At the outset, complainants must rid Sprint's argument of a clear misunderstanding. Contrary to what it may believe, Sprint was definitely ordered to comply with the New Services Test in April of

1997. In its *Payphone Orders,*[13] the FCC concluded that it would adopt the nonstructural safeguards developed through its Computer III proceedings, and apply those nonstructural safeguards to all the local exchange carriers including Sprint. One such nonstructural safeguard ordered by the FCC is the requirement that Sprint provide network services to payphone providers at rates that comply with the New Services Test pricing formula set forth at 47 C.F.R. §61.49. *Payphone Order*, ¶146. In its filing in Case No. TT-97-421, Sprint **represented that it had complied with all FCC requirements**. It was acutely aware that it was required to comply with the FCC directives and obediently did so, without objection. It agreed that the FCC could direct it to file its rates in accord with the New Services Test.

Second, Complainants acknowledge the FCC determined that "Congress has [not] expressed with the requisite clarity its intention that the [FCC] exercise jurisdiction over the intrastate payphone prices of non-BOC LECs." *Wisconsin Order*, ¶ 42. However, a complete review of the *Wisconsin Order* amply demonstrates the FCC's unequivocal intent to have states apply the New Services Test to all LECs. While finding insufficient jurisdiction under Section 276 to address non-BOC LEC payphone line service rates, the FCC

> "encourag[ed] states to apply the new services test to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines."

Wisconsin Order, ¶ 42 (emphasis added). The FCC further found that "UNE overhead loadings may be used in this manner, and states that have used this methodology are in full compliance with section 276 and our Payphone Orders." *Wisconsin Order*, ¶ 52. The FCC is expressly encouraging this Commission

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[13]The term "*Payphone Orders*" as used in these suggestions are a collective reference to *In the Matter of the Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, FCC 96-388 (released September 20, 1996) ("*Payphone Order*"); Order on Reconsideration, FCC 96-439 (released November 8, 1996) ("*Order on Reconsideration*")

to apply the New Services Test to all LEC's payphone access tariffs, including Sprint's. Here is abundant proof that this Commission has a more than justified basis in the public interest for using the New Services Test to judge the reasonableness of Sprint's tariffs under Missouri state law. After all, Sprint agreed that it would file tariffs that complied with the New Services Test. It represented to this Commission that its rates did comply. Complainants believe it entirely fair, and trust that this Commission will agree, for Sprint to prove at a contested hearing that the representations it made about its payphone rates in 1997 are true.

H. Leave to amend the complaint should be freely granted.

Complainants have confidence that the arguments opposing the respondents' motions to dismiss fully address and refute the grounds for dismissal set forth by each. Even so, complainants recognize that an amendment by interlineation is in order to correct the scrivener's error in Count III, and further recognize the differing interpretations placed upon Sections 386.390 and 386.400.6 by the Commission which will affect the number of complainants needed to be joined in this action. If the Commission is inclined to disagree with complainants' interpretation of these statutes, complainants request the Commission grant them a reasonable time after order within which to file an amended complaint pursuant to 4 CSR 240-2.080(21).

CONCLUSION

On the basis of the foregoing, complainants respectfully request the Commission to deny the respondents' motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2002, 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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April 11, 1997

Ex Parte Filing

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In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mary Beth:

This letter will clarify the request I made yesterday on behalf of the RBOCs for a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

To the best of my knowledge, all the RBOCs have (or will by April 15, 1997, have) effective state tariffs for all the basic payphone lines and unbundled features and functions required by the Commission's order. We are not seeking a waiver of that requirement. We seek a waiver only of the requirement that those intrastate tariffs satisfy the Commission's "new services" test. The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test or to file new or revised tariffs that do satisfy those standards. Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

I hope this clarification is helpful. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,

Michael K. Kellogg

cc:

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