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.	)	

AT&T MISSOURI'S
REPLY

LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
Attorneys for AT&T Missouri and AT&T Communications
909 Chestnut Street, Room 3518
St. Louis, Missouri 63101
314-235-2508 (Telephone)/314-247-0014(Facsimile)
leo.bub@att.com

May 20, 2013

TABLE OF CONTENTS

PAGE

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.	)	

AT&T MISSOURI'S
REPLY

AT&T Missouri[1] respectfully submits this Reply to Complainants'[2] Response opposing AT&T Missouri's Motion to Dismiss.

1. The Filed Rate Doctrine and the Prohibition against Retroactive Ratemaking Bar Complainants' Claims for Refunds.

(a) The Doctrines bar retroactive refunds. Complainants completely miss the mark in arguing against the applicability of the filed rate doctrine and the prohibition against retroactive ratemaking. In its Motion to Dismiss, AT&T Missouri never asserted that either doctrine barred the Commission from reviewing and revising intrastate rates prospectively for services under the

[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri, will be referred to as "AT&T Missouri."

[2] Complainants Tari Christ, d/b/a ANJ Communications; Bev Coleman, an Individual; Commercial Communications Services, L.L.C.; Community Payphones, Inc.; Com-Tech Resources, Inc.,g d/b/a Com-Tech Systems; Coyote Call, Inc.; William J. Crews, d/b/a Bell-Tone Enterprises; Davidson Telecom LLC; Evercom Systems, Inc.; Harold B. Flora, d/b/a American Telephone Service; Illinois Payphone Systems, Inc.; JOLTRAN Communications Corp.; Bob Lindeman, d/b/a Lindeman Communications; John Mabe, an Individual; Midwest Communications Solutions, Inc.; Missouri Telephone & Telegraph, Inc.; Jerry Myers, an Individual; Pay Phone Concepts, Inc.; Jerry Perry, an Individual; PhoneTel Technologies, Inc.; Craig D. Rash, an Individual; Sunset Enterprises, Inc.; Telaleasing Enterprises, Inc.; Teletrust, Inc.; Tel Pro, Inc.; Toni M. Tolley, d/b/a Payphones of America North; Tom Tucker, d/b/a Herschel's Coin Communications Company; HKH Management Services, Inc. will be referred to in this pleading as "Complainants."

Commission's jurisdiction[3] (although other grounds, set out below, do bar Complainants from raising such claims). Rather, the Motion focused on these doctrines' bar to claims for retroactive refunds based on some alleged right to a rate different from the previously approved filed tariff rate.

Section 386.270 RSMo., which AT&T Missouri quoted fully in its Motion, makes clear the prospective nature of the Commission's rate-setting authority: "All rates . . . 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" (emphasis added).

Missouri courts and the Commission have uniformly interpreted this statutory provision as authorizing the Commission to set and adjust rates only on a going-forward basis,[4] and as strictly prohibiting retroactive refunds. For example, in *Utility Consumers Council*[5], the Missouri Supreme Court determined that the Commission had no authority to allow a utility to

[3] Complainants' Response, p. 17 ("AT&T cites AT&T cites *State ex rel St. Louis County Gas Co* . . . for the proposition that the Commission itself is bound by the rate it approves and the Commission cannot change it.")

[4] *See, e.g., A.C. Jacobs & Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. Ct. App. 2000) ("The General Assembly . . . has mandated that we deem the 'rates, tolls, charges, schedules and joint rates fixed by the commission' to be lawful and reasonable until, in a lawsuit litigating that issue, the commission or a court determines otherwise.")(emphasis added); *Peter B. Howard v. AmerenUE*, Case No. EC-2008-0329, 2008 WL 5274284, issued December 11, 2008 ("Consequently, once a tariff is approved and has become effective, it is valid until found otherwise invalid in a lawsuit litigating that issue; either by an appeal of the Commission's decision in a court of competent jurisdiction pursuant to Section 386.510, or in a complaint action before the Commission pursuant to Section 386.390. In both of these litigation choices, the burden of proof lies with the petitioner challenging the lawfulness of the order approving the tariff.") Courts in other states have also frequently enforced the rule against retroactive ratemaking by relying, in part, on forward-looking statutory language, like the "until" language in Missouri, reconfirming that the state commission's rate-setting power is prospective. *E.g.*, *BellSouth Telecomms., Inc. v. Alabama Pub. Serv. Comm'n***,** 987 So.2d 1079, 1087 (Ala. 2008) (state statute allowed commission to establish rates to apply "in the future"); *Lucas County Commr's v. Public Utils Comm'n of Ohio*, 686 N.E.2d 501, 504 (Ohio 1997) (no refunds allowed where state statute only allowed complaints that a rate "is" unreasonable, and use of present tense supported conclusion that refunds were not available for past charges); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981) (no refunds where state referred to agency setting rates to be "thereafter observed").

[5] *State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission*, 585 S.W.2d 41, 58 (Mo. 1979).

collect increased fuel costs under a fuel adjustment clause ("FAC") [6] but specifically rejected -- as retroactive ratemaking -- Public Counsel's requested for a remand to the Commission for a determination by it "of the excess amounts collected by the utilities under the FAC over that which they would have collected under a just and reasonable rate, which would include rate increases properly authorized, and to order a refund of any such excess." The Court stated:

> However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, Section 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, see, *State ex. rel. General Telephone Co. of the Midwest v. Public Service Comm'n*, 537 S.W.2d 655 (Mo. App. 1976). It 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. See, *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co.*, 284 US 370, 389-90, 76 L.Ed. 348, 52 S.Ct. 183 (1932); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 31, 70 L.Ed. 808, 46 S.Ct. 363 (1926); *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).[7]

Likewise, the Commission, even in cases where errors were made in previously setting a rate, has firmly ruled that rate adjustments can be made only prospectively:

> The Commission found TC-87-57 rates just and reasonable because it was unaware that the underlying calculations contained errors which caused Respondent to earn more than the prescribed limits. Now aware of said errors and their effect, the Commission finds the rates established in TC-87-57, Respondent's present CCL rates, are unjust and unreasonable.
>
> The second issue is whether because of these errors the Commission should adjust Respondent's intrastate CCL rates retroactive to January 1987, to reflect the proper quantification of Respondent's local transport revenues. 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

[6] A fuel adjustment clause is a clause, filed as a part of an electric utility's tariff which allows it automatically to increase or decrease the charge for power per-kilowatt-hour to consumers by the amount of an increase or decrease in the utility's fuel cost, usually on a monthly basis. *Utility Consumer Council*, 585 S.W.2d at 44.

[7] *Utility Consumer Council*, 585 S.W.2d at, 58 (emphasis added).

> Complainant the over billing. First, the Commission does not have the statutory authority to pronounce monetary judgments and enforce their execution. Second, such a refund would be 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.[8]

(b) A hearing is not required for the bar to apply. Complainants argue the bar against retroactive ratemaking is not applicable, claiming the Commission simply allowed the payphone rates to become effective without a hearing and did not enter a "valid finding or conclusion based upon evidence that the Payphone Rates are just and reasonable."[9] Complaintants, however, ignore the Commission's established process for administering and enforcing tariffs; well-settled state and federal law; and undisputed facts as recited in their own Complaint.

Pursuant to statute, utilities in Missouri file schedules stating a new rate or charge, rule or regulation, and they become valid unless suspended by the Commission. Under this file and suspend method, which has been upheld by the Missouri Supreme Court,[10] once a rate is approved by the Commission or allowed to go into effect, it becomes a lawful rate and "has the same force and effect as if set by the Legislature."[11] And charges collected pursuant to such filed rates are the lawful property of the utility and cannot be retaken via retroactive rate changes:

> The money legally and properly collected from appellants under the established rate schedules became and was the property of respondent . . . of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.[12]

---

[8] *AT&T v. GTE North*, 29 Mo. P.S.C (N.S.) at 594 (emphasis added).
[9] Complainants' Response, p. 18.
[10] *See, State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), Cert denied 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). *Arizona Grocery*, 284 U.S. at 386 ("When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature.")
[11] *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979), citing *State ex. rel. Jackson County*, 532 S.W.2d at 28.
[12] *State ex rel. Barvick v. Public Service Commission*, 606 S.W.2d 474, 476 (Mo. App. W.D. 1980), citing *Straube v. Bowling Green Gas Company*, 227 S.W.2d 666, 671 (Mo. 1950).

Controlling federal law also does not support Complainants. They cite *Arizona Grocery,*[13] decided by the U.S. Supreme Court in 1932, for their claim that the retroactive ratemaking bar applies only to rates set after hearing. They state it created two classes of rates: a "legal" rate that has been "allowed to take effect" and a "lawful" rate that has "been through a rate-making proceeding establishing prospective rates" and assert that only "lawful" rates are protected by the bar against retroactive ratemaking.[14] Complainants, however, misstate the case. The distinction Complainants cite only applied prior to Congress' enactment of the Hepburn Act and Transportation Act and was provided by the Court only for background. Under the previous statute, the Interstate Commerce Act of 1887, "no authority was granted [the Commerce Commission] to prescribe rates to be charged in the future."[15] But the Hepburn Act and the Transportation Act granted the Commission power to fix rates prospectively:

> When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute. This Court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between the authority delegated by state legislation and that conferred by congressional action.[16]

[13] *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co.*, 284 US 370, 389-90, 76L.Ed. 348, 52 S.Ct. 183 (1932) (ICC, having declared the maximum reasonable rate after a complaint hearing, "may not at a later time, and upon the same or additional evidence . . . by declaring its own findings as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate").

[14] Complainants' Response, p. 18 ("unless a rate has been established as lawful, i.e., just and reasonable, the rate is vulnerable to attack in a complaint proceeding").

[15] Under the common law, "Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparations may be awarded." *Arizona Grocery*, 284 U.S. at 383. The Interstate Commerce Act of 1887, later "required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates . . those which must be charged to all shippers alike." *Id.* at 384. The 1887 Act "altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of published rates . . . but its action affected only the past so far as any remedy of the shipper was concerned, and adjudged for the present merely that the rate was then unreasonable." *Id.* at 384-5.

[16] *Arizona Grocery*, 284 U.S. at 386.

Under the new rate setting regime, the Court explained that as to rates "prescribed for the future . . . there is therefore no difference between the legal or published tariff rate and the lawful rate."[17]

And it clearly articulated the prohibition against retroactive ratemaking:

> ". . . [the Commerce Commission] was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislature itself.[18]

80 years later, the Third Circuit's thorough survey of the law confirms that controlling federal law continues to require no hearing for filed tariff rates to be lawful and binding and thus for the filed rate doctrine to bar retroactive changes to those rates:

> . . . the Supreme Court has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review. Instead, the doctrine applies as long as the agency has in fact authorized the challenged rate. As the District Court observed, the relevant statute in *Keogh* only required common carriers to provide ten days public notice before charging new rates, and did not require the ICC to expressly approve such rates before they went into effect. *See* 24 Stat. 381–84 (49th Cong. Feb. 4, 1887). Similarly, the statute in *Square D* did not require the ICC to affirmatively approve freight transportation rates. *See Square D. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1349 (2d Cir.1985) (characterizing the central issue as "whether *Keogh* ... has been overruled so far as its language extends to rates filed with but not investigated and approved by the [ICC]"). *Square D* also endorsed the appellate court's statement that the doctrine applies " 'whenever tariffs have been filed.' " *Square D*, 476 U.S. at 417 n. 19, 106 S.Ct. 1922 (citation omitted); *see also Montana–Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S.Ct. 692, 95 L.Ed. 912 (1951) (holding that the petitioner "can claim no rate as a legal right ... other than the filed rate, whether fixed or merely accepted by the [Agency] Commission"). Finally, the First Circuit has held that the filed rate doctrine only requires rates to be filed, not affirmatively approved or scrutinized. *See Town of Norwood v. New Eng. Power* ***239** *Co.*, 202 F.3d 408, 419 (1st Cir.2000) ("It is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.").[19]

[17] *Arizona Grocery*, 284 U.S. at 387 (emphasis added).
[18] *Arizona Grocery*, 284 U.S. at 389.
[19] *McCray v. Fid. Nat. Title Ins. Co.*, 682 F.3d 229, 238-39 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 1242, 185 L. Ed. 2d 231 (U.S. 2013) (emphasis added, internal citations omitted).

(c) The Commission actively approved the tariff. Moreover, Complainants' protests concerning the file and suspend method of tariff review are meaningless in this case because the Commission did much more than simply allow a tariff to go into effect after it was filed. As reflected in the Commission's April 11, 1997 *Order Approving Tariff Revisions*[20] and Complainants' own Response, both MCI and the Missouri Independent Coin Operated Payphone Association ("MICPA") filed motions to suspend the tariff revisions, raising numerous issues. AT&T Missouri (then known as "SWBT") responded to these filings. Commission Staff conducted an extensive investigation that culminated in an April 4, 1997 memorandum it filed with the Commission containing its overall recommendation regarding the proposed tariff. The Commission, in its *Order Approving Tariff Revisions* described the memorandum as containing "an extensive discussion of the background of this case, including an analysis of the FCC orders, the merits of the motions to suspend, and an analysis of whether the proposed tariff changes comply with the FCC orders."[21]

---

[20] *In the Matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff, PSC Mo. No. 35, Regarding Deregulated Pay Telephone Service*, Case No. 97-345, Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order and Denying as Moot Discovery Requests, issued April 11, 1997, at p. 10 ("*Order Approving Tariff Revisions")*.

[21] *Id.* at p. 7. Many state commissions and courts reviewing LEC rates to IPPs in similar contexts (*i.e.*, reexamining rates after a prior approval) have held that the rule against retroactive ratemaking barred any refund requirement. In Illinois, for example, the Illinois Commerce Commission denies refunds based on the rule against retroactive ratemaking and the filed rate doctrine,[21] and the appellate court affirmed, explaining that "[s]ince the rates in question were the subject of regulatory approval, SBC Illinois and Verizon were entitled to rely on those rates for as long as they were in effect" and that "the subsequent reduction in those rates in November 2003 afforded no right of action for a refund of the difference between the old and new rates." *Illinois Public Telecomms. Ass'n v. Illinois Comm. Comm'n*, No. 1-04-0225, slip op. at 8 (Ill. App. Nov. 23, 2005) (unpublished). Other state courts and commissions have agreed. *See Payphone Ass'n of Ohio v. Public Utils. Comm'n of Ohio*, 849 N.E.2d 4, 9 (Ohio 2006) (affirming Ohio PUC's refusal to order refunds of IPP rates in PUCO Case No. 96-1310-TP-COI (Nov. 26, 2002)**,** which stated that the refunds requested by the IPPs "would constitute unlawful, retroactive ratemaking"); *BellSouth Telecomms., Inc. v. Alabama Pub. Serv. Comm'n*, 987 So.2d 1079, 1087-88 (Ala. 2008) (applying rule against retroactive ratemaking and the filed rate doctrine to hold that "[T]he [LEC's IPP] rate established in October 1997 could be lawfully altered only prospectively. The APSC could not retroactively declare that the rate it had previously approve din 1997 was excessive, and, more importantly, it could not order a refund of those excess charges."); *Cincinnati Bell Tel. Co. v. Kentucky Pub. Serv.* Comm'n, 223 S.W.2d 829, 839-40 (Ken. App. 2007) (reversing state commission order requiring LEC to pay refunds to payphone providers, finding that "the filed arte can only be altered prospectively" and that "[c]onsequently, as a matter of law, BellSouth was never overpaid; no credits accrued; and no refunds were owed"); *Matter of Independent Payphone Ass'n of N.Y. v. Public Serv. Comm'n*, 5 A.D.3d 960, 964 (N.Y. App. 2004); *Re BellSouth Telecomms., Inc.* Docket No. 030300-TP, PSC-04-

Based on Staff's recommendation and arguments made by the payphone trade group, AT&T Missouri and other parties, the Commission made a substantive determination that the tariffs were "in compliance with the FCC's Orders," that "no intrastate rate reductions are necessary" and that "the rates proposed by SWBT for its payphone services are just and reasonable."[22] Any complaint that the Commission "has not entered a valid finding or conclusion based upon evidence that the Payphone Rates are just and reasonable" and "allowed those rates to become effective without hearing"[23] should have been raised in an application for rehearing before the Commission pursuant to Section 386.500 and a Writ of Review to Cole County Circuit Court under Section 386.510 RSMo (2000), not 16 years later. As this Reply sets out below, these statutory provisions provide the exclusive method for review of Commission decisions.

(d) The FCC has left the question of the legality and availability of refunds to the states as a matter of state law. Complainants suggest the FCC and the Communications Act somehow preempt the Commission from applying either the filed rate doctrine[24] or the bar against retroactive ratemaking.[25] Complainants are mistaken. The FCC itself, in its recent *2013 Declaratory Ruling*, has found state commission denial of refunds in accordance with state law appropriate:

> . . . 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. In Illinois, the ICC based its

---

0974-FOF-TP, 2004 WL 2359261, at *9-*10 (Fla. Pub. Serv. Comm'n, Oct. 7, 2004) (denying refunds based on changes to LEC's rates to IPPs, commission finds that the "most significant factor" precluding refunds is that the order allowing the LEC's prior rates "went into effect as a final Order," so that in seeking refunds, the IPPs were seeking to retroactively change the binding, filed rates); *In re: Complaint of the Southern Pacific Communications Ass'n*, Docket No. 2003-AD-927, at 4 (Miss. Pub. Serv. Comm'n, Sept. 1, 2004) (IPPs' request for refunds "would violate both the prohibition against retroactive ratemaking . . . as well as the filed rate doctrine").

[22] *Id.* at pp. 8, 10.
[23] Complainants' Response, p. 18.
[24] Complainants' Response, pp. 11-14.
[25] Complainants' Response, pp. 17-18.

> rejection of refunds on the Illinois filed tariff doctrine and the IPTA's failure to file a formal complaint. In Mississippi, the MPSC concluded that refunds would violate the filed tariff doctrine and the prohibition against retroactive ratemaking. The courts in New York ruled that IPANY was not entitled to refunds in part because it failed to properly raise the *Wisconsin Payphone Order* before the state commission, and therefore failed to exhaust its administrative remedies. In Florida, the FLPSC concluded that refunds were not appropriate, in part because the FPTA did not challenge the FLPSC's orders approving BellSouth's rates. Finally, in Ohio, the PUCO concluded that refunds were not appropriate because of the state prohibition against retroactive ratemaking and the filed rate doctrine. Although these decisions deny refunds in situations where a BOC's rates were not NST-compliant by April 15, 1997, they are not inconsistent with the Commission's orders and regulations implementing section 276 of the Act. Consequently, preemption is not warranted.[26]

Complainants' citations to the Ninth and Tenth Circuit Court decisions in *Davel*[27] and *TON Services*[28] are inapposite. While the courts in those cases declined to apply the prohibition against retroactive ratemaking, they did so because neither case involved a challenge to rates, as Qwest in both cases simply did not file the required tariffs and cost support. As explained by the Court in *TON Services*:

> At this stage of the litigation, where the procedural posture of the case requires all allegations in the complaint to be construed in TON's favor and this court's reading of TON's complaint demonstrates that TON's central challenge involves Qwest's procedural compliance with FCC orders and regulations rather than a challenge to the reasonableness of Qwest's rates, the filed rate doctrine cannot categorically preclude TON's claims.[15] *Accord Davel Commc'ns*, 460 F.3d at 1085.[29]

Complainants' reference to dicta in *Central Office Telephone*[30] for the proposition that "[t]o the extent respondent [the reseller] is asserting discriminatory treatment, its remedy is to bring suit under §202 of the Communications Act" has no relevance here because this is not a

---

[26] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 13-24 (rel. Feb. 27, 2013) ("*2013 Declaratory Ruling*") (emphasis added). The *2013 Declaratory Ruling* has been appealed to the D.C. Circuit by other parties. Those appeals remain pending.
[27] *Davel Communications, Inc.* v. *Qwest Corporation,* 460 F. 3d 1075 (9th Cir. 2006), Complainants' Reply p. 13.
[28] *TON Services, Inc.*, v. *Qwest Corporation,* 493 F. 3d 1225, 1236 (10th Cir. 2007), Complainants' Reply p. 14.
[29] *TON Services., Inc.,* 493 F.3d at 1237 (emphasis added).
[30] *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 226 (1998), Complainants' Reply p. 12.

§202 proceeding (the Supreme Court's ruling was actually that the reseller's breach of contract and tortious interference claims were barred by the filed rate doctrine). *Reiter*[31] is also distinguishable because the shipper brought its claim under a section of the Interstate Commerce Act that provided "an express cause of action against carriers for damages . . . in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC."[32] This section of the ICA, like Complaintants' references to Sections 206-208 of the federal Telecommunications Act, have no relevance here because Complaints are not proceeding under these federal statutes and would not be able to bring them to the Commission even if they wished to (Sections 206-208 vest jurisdiction in either the FCC or federal district court). The relevant statute here is Section 386.270 RSMo., which does not allow retroactive ratemaking or retroactive adjustments to filed tariff rates.

2. The Law of the Case, Res Judicata, and Collateral Estoppel Bar this Complaint, as Does State Law.

Complainants respond to the points in AT&T Missouri's Motion to Dismiss concerning law of the case, collateral estoppel and res judicata by asserting that AT&T Missouri only cited Section 386.550 RSMo. and recited the background of the various cases that have been litigated at the Commission on this matter with "no other authority . . . cited for the argument."[33]

Complainants overlook the citations to *Licata,*[34] *Czapla v. Czapla,*[35] *Walihan*[36], and the

[31] *Reiter v. Cooper*, 507 U.S. 258, 113 S.Ct. 1213 (1993), Complainants' Reply p. 13.
[32] *Reiter,* 507 U.S. at 262.
[33] Complainants' Response, p. 8.
[34] *State ex rel. Licata, Inc. v. Public Service Com'n of State* 829 S.W.2d 515 (Mo. W.D. App.1992).
[35] *Czapla v. Czapla,* 94 S.W.3d 426, 429 (Mo. App. E.D. 2003) ("In the first appeal, husband could have raised the issue of whether it was error for the trial court to make the maintenance award nonmodifiable. To permit him now to raise that issue in the present appeal contravenes the 'law of the case' doctrine. Husband's points on appeal are denied").

Cole County Circuit Court's opinion finding that the prior complaint against AT&T Missouri's payphone line rates was an impermissible collateral attack on prior Commission orders approving the rates, which it found were determinations on the merits.[37] Complainants have not even addressed law of the case or res judicata. Instead, they focus their arguments solely on one element of collateral estoppel and Section 386.550.

(a) The Law of the Case

Under the law of the case doctrine, once an appellate court has ruled on an issue, the lower tribunal is not free to rule differently on the issue in any subsequent proceedings. As the court explained in *Czapla v. Czapla,* "a former adjudication is conclusive not only as to all questions raised directly and passed upon, but also as to matters which arose prior to the first appeal and which might have been raised thereon but were not."[38] The doctrine applies with equal force to administrative agencies. For example, in *Alma Tel. Co.*, the Court held:

> The facts in PTC III were not substantially different from those facts vital to the trial court's decision in PTC II. The doctrine of law of the case, therefore, applied to preclude the Commission from relitigating in PTC III the issue of revenue neutrality upon elimination of the PTC Plan.[39]

Here, the Commission found -- and the Cole County Circuit Court affirmed -- that the claims Complainants raised in Case No. TC-2003-0066 were the same as those they raised through their industry group (the Missouri Independent Coin Payphone Association or "MICPA"), which the Commission rejected in 1997. The Court, affirming the Commission's dismissal of the complaint, stated:

---

[36] *Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*, 891 S.W.2d 545, 547 (Mo. App. E.D. 1995) ("Defendants could have raised the issue of the deductibility of the workers' compensation benefits from the Missouri verdict in their first appeal. To permit them now to raise that issue in the present appeal contravenes the 'law of the case' doctrine").

[37] *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court November 5, 2003).

[38] *Czapla v. Czapla*, 94 S.W.3d at 428.

[39] *State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 391 (Mo. Ct. App. 2001).

> The Commission's 1997 orders approving the tariffs were determinations on the merits. In them, the Commission found that SWBT, Sprint and Verizon's tariffs complied with federal law. Those orders are long-since final and the Relators' Complaint was a collateral attack. The Complaint did not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of Licata, the Commission lawfully concluded that Section 386.550 barred the Commission from reconsidering the lawfulness of the tariffs.[40]

Nothing has changed between the time Complainants filed their petition in Case No. TC-2003-0066 and their filing of the complaint in this case and Complainants make no argument against applying the law of the case doctrine. Accordingly, the Cole County Circuit Court ruling that Complainants' claims are barred by Section 386.550 is the law of the case that must be followed in this proceeding. The Commission cannot reach a different result on this issue, because doing so would be tantamount to overruling the circuit court and failing to abide by its decision.

(b) Collateral Estoppel

1. No substantial change in circumstances occurred. Complainants, in an attempt to avoid the preclusive effect of Section 386.550, [41] argue that they have properly pled a "substantial change in circumstances" pursuant to the Commission's February 4, 2003 *Order Denying Rehearing* in Case No. TC-2003-0066 and O*zark Border*[42] and should be allowed to proceed.[43] Complainants' attempts fail because it is clear from the face of their Complaint that a "substantial change in circumstances" has not occurred: they have raised nothing beyond what they either have or could have raised in their prior complaints and the Commission's last order (denying their previous complaint) on this very same matter.

---

[40] *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court November 5, 2003).

[41] Section 386.550 RSMo states:

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

[42] *State ex rel. Ozark Border Elec. Co-op. v. Pub. Serv. Comm'n of Missouri*, 924 S.W.2d 597, 601 (Mo. App. W.D. 1996).

[43] Complainants' Response, pp. 9-11.

In O*zark Border*, relied on by Complainants, the Court explained the "substantial change" exception to the preclusive effect of Section 386.550 and specifically ruled that the "change" had to occur since the last Commission order:

> The most relevant clause is contained within 386.550 which states, "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." This statute is indicative of the law's desire that judgments be final. *State ex rel. Harline v. Pub. Serv. Comm'n,* 343 S.W.2d 177, 184 (Mo.App.1960). A judgment of a court having jurisdiction cannot be impeached collaterally. *Id.* This statutory provision makes a decision of the Commission immune to collateral attack. If a complaint does not allege a change in circumstance it would be in conflict with this section providing for finality. If a change in circumstance has occurred *since the last order*, the complaint would not be attacking the previous order and would not be in conflict with section 386.550. It would be an independent proceeding to determine whether the change in circumstances causes the territorial agreement to no longer be in the public interest.[44]

Without arguing the accuracy of Complainants' allegations of "substantial change" (most of which AT&T Missouri has denied), it is clear that all of the alleged "changes" occurred well before Complainants filed their prior complaint (the TC-2003-0066 Complaint was filed on August 22, 2002), which the Commission denied and the Circuit Court affirmed. For example, Complainants point to two April 1997 letters from Michael Kellogg to the FCC; waivers the FCC granted in 1997; and the FCC's *Wisconsin Orders* issued on March 2, 2000 and January 31, 2002. Other statements in Complainants' Response and their Complaint make clear that all of these materials were fully available to Complaintants before the TC-2003-0066 Complaint was filed on August 22, 2002: "It was not until the FCC issued the clarifications in 2000 that the

[44] O*zark Border*, 924 S.W.2d at 601 (emphasis added).

parameters of the applicable NST cost standard became clear."[45] All of these allegations could have been raised in the TC-2003-0066 Complaint, but were not.

For these allegations to qualify as "substantial changes" with respect to the current complaint, they must have all occurred after the Commission's February 4, 2003 *Order Denying Rehearing* in Case No. TC-2003-0066. Since the instant Complaint makes plain that they did not, allowing that Complaint to proceed would constitute an impermissible collateral attack not only against the Commission's April 11, 1997 *Order Approving Tariff Revision,* but also against the Commission's January 9, 2003 *Order Regarding Motions to Dismiss* and its February 4, 2003 *Order Denying Rehearing* in Case No. TC-2003-0066. As none of the "changes" that Complainants now raise occurred subsequent to the Commission's orders in TC-2003-0066, they do not constitute "substantial changes" and dismissal is warranted under Section 386.550.[46]

2. The passage of time has no relevance here. Pointing to the Commission's February 4, 2003 *Order Denying Rehearing* in Case No. TC-2003-0066, Complainants claim that the mere "passage of time and significant intervening economic fluctuations"[47] should permit them to get around Section 386.550's preclusive effect.[48] Complainants, however, misread the Commission's *Order Denying Rehearing.* What Complainants point to was merely an example the Commission gave that would apply to an earnings investigation:

> The *Ozark Border* case, also cited by the Commission in its Order of January 9, explains how the requirement of Section 386.550 may be satisfied. The complaint

[45] Complainants' Response, p. 4. *See also* Complainants' Complaint, para. 40 (referencing the FCC's January 31, 2002 Wisconsin Order, the Complaint stated "The FCC substantially affirmed its Common Carrier Bureau's earlier order setting forth guidelines for LEC compliance with the new services test. *Wisconsin Public Service Commission: Order Directing Filings,* Bureau/CPD No. 00-01DA No. 00-347, Order, 15 FCC Rcd 9978 (March 2, 2002)").

[46] Moreover, even if Complainants could show that substantial changes had occurred since the Commission's orders in TC-2003-0066 (though they cannot), that would at best allow for consideration of prospective relief here, not any retroactive changes.

[47] Complainants claim the applicable time period is 16 years. Complainants' Response p. 11. The correct period under O*zark Border* must be measured from the last Commission order (here its February 4, 2003 *Order Denying Rehearing* in Case No. TC-2003-0066) and would be 10 years.

[48] Complainants' Response, p. 11.

> need simply contain an allegation of a substantial change in circumstances. This is not a heavy burden for a pleader to meet. In the case of an earnings investigation, for example, a complaint might be sufficient that did no more than plead the passage of time since the Commission's last rate order and the occurrence of intervening economic fluctuations.[49]

But this proceeding is not an earnings investigation. As the Commission is aware, AT&T Missouri is not subject to rate of return regulation and has, during all relevant periods, been subject to price cap regulation (under which its basic rates were frozen) and then regulated as a competitive service. Under these regulatory regimes, no relationship exists between rates, the passage of time, the Company's earnings or economic fluctuations.[50] Similarly, the level of AT&T's federal EUCL charge[51] has no role in the setting of intrastate rates under these Commission regulatory regimes.

3. The Commission has already found it previously adjudicated the matter. The Complainants also claim that neither Section 386.550 nor collateral estoppel applies here because the Commission "has never fully adjudicated the lawfulness of the Payphone Tariffs . . . [t]here has never been an adjudication -- a contested case proceeding -- involving the Payphone Tariffs and their compliance with the FCA."[52] They further complain of the lack of a hearing, cross examination, or discovery.[53]

Complainants' claim that no "adjudication" occurred is simply incorrect, as it is eminently clear the Commission did exactly that. Specifically addressing "allegations . . . that Respondents' rates do not comply with the New Services Test and are therefore

[49] *Order Denying Rehearing,* pp. 9-10.
[50] Furthermore, even in an earnings investigation that was justified by the passage of time or changed economic circumstances, rate changes would apply prospectively only. They would not be the basis for any retroactive rate changes or refunds.
[51] AT&T Missouri's current EUCL charge is $5.30 and is set out in its federal tariff, FCC No. 73, Access Service, Section 4.4(C)(3), 25th revised page 4-9.
[52] Complainants' Response, pp. 8-9.
[53] Complainants' Response, p. 3.

unlawful,"[54] the Commission in its *Order Regarding Motions to Dismiss* cited the following language from its April 11, 1997 *Order Approving Tariff Revision*:

> The Commission has thoroughly reviewed the many filings in this case, including the motions to suspend filed by MCI and MICPA, and finds that SWBT's[55] proposed tariff revisions are in compliance with the FCC's orders, and should therefore be approved as amended. Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary . . . The Commission further finds that no intrastate rate reductions are necessary in conjunction with SWBT's subsidy calculation, and finds that the rates proposed by SWBT for its payphone services are just and reasonable.[56]

Then, in its *Order Regarding Motions to Dismiss*, the Commission ruled:

> As the quoted language shows, the Commission's prior orders were determinations on the merits. In them, the Commission found that the Respondents' tariffs complied with the F.C.C. directives 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. Therefore, pursuant to the rule of *Licata*, the Commission concludes that Section 386.550 bars this proceeding and that the Complaint must be dismissed.[57]

The Cole County Circuit Court subsequently affirmed the Commission's dismissal of Complainants' prior complaint in Case No. TC-2003-0066 and ruled that the Commission's *Order Approving Tariff* was on the merits and barred by Section 386.550:

> The Commission's 1997 orders approving the tariffs <u>were determinations on the merits</u>. In them, the Commission found that SWBT, Sprint and Verizon's tariffs complied with federal law. Those orders are long-since final and the Relators' Complaint was a collateral attack. The Complaint did not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of <u>Licata</u>, the Commission lawfully concluded that Section 386.550 barred the Commission from reconsidering the lawfulness of the tariffs.[58]

---

[54] *Order Regarding Motions to Dismiss*, p. 21 (referencing paras. 47, 54 and 61 of the Complaint in Case No. TC-2003-0066).
[55] At that time, Bell was regularly referenced as "SWBT" in Commission orders.
[56] *Order Regarding Motions to Dismiss*, p. 22, quoting p. 10-11 of the Commission's April 11, 1997 *Order Approving Tariff Revision* in Case No. TT.-97-345.
[57] *Order Regarding Motions to Dismiss*, p. 22.
[58] *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court November 5, 2003).

Complainants also misconstrue Section 386.550. The statute focuses not on the type of proceeding the Commission conducts, but on the conclusiveness of Commission "orders and decisions." As the Court in *Licata* explained, the exclusive method for challenging a prior Commission order is through the statutory review process:

> Section 386.550, RSMo 1986, provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In *State ex rel. State Highway Com'n v. Conrad*, 310 S.W.2d 871, 876 (Mo. 1958), the Court stated that it had so frequently been held that orders of the PSC are not subject to collateral attack that the Court was not required to elaborate on the effect and meaning of Section 386.550. In that case the Court refused to entertain a collateral attack on an order of the commission which had apportioned the costs of constructing a railroad crossing. The Court held that Section 386.510 provides the sole method of obtaining review of any final order of the commission.[59]

Complainants make a similar argument in claiming that the fourth element of collateral estoppel, "a full and fair opportunity to litigate the issue in the prior adjudication," was not met.[60] But as the Commission's Orders cited above make clear, Complainants and their trade association MICPA, with which they are in privity, were given a full and fair opportunity to litigate the issues. They simply failed to convince the Commission of the merits of their position.

Claims such as those being raised by Complainants such as claims that the *Order Approving Tariff* is "patently defective today," "did not enter findings of fact," allowed the "Payphone Tariffs to become effective without a hearing," and "did not set out conclusions of law"[61] are all matters that should have been raised with respect to the Commission's *Order Approving Tariff* in an application for rehearing under Section 386.500 and a request for circuit

[59] *State ex rel. Licata*, 829 S.W.2d at 518 (emphasis added).
[60] Complainants' Response, p. 9.
[61] Complainants' Response, p. 4.

court review under Section 386.510 - - not 16 years later in a collateral attack. As the Courts have ruled, these statutory provisions provide the exclusive method for review of Commission decisions, and failure to follow them will bar a collateral attack:

> The Circuit Court concluded that the appellants waived any objection by not following the correct procedures for challenging a PSC decision. PSC created COS in its Report and Order of December 12, 1989. It adopted the revenue sharing plan in its Report and Order of April 18, 1990. None of the appellants filed a motion for rehearing under Section 386.500.1 . . . we agree with the Circuit Court. Appellants were parties to the cases. They had the right to ask for a rehearing, and because they did not do so, they lost the right to attack the decisions collaterally.[62]

And this Commission has reached a similar conclusion:

> Section 386.510 provided Public Counsel with the appropriate method to obtain review of the Commission's final order. Public Counsel apparently chose not to seek judicial review in that more than 30 days have passed since the Commission denied the application for rehearing. Public Counsel's attempt to obtain Commission review of a matter that has been ripe for appeal is untimely. Therefore, the Petition must be denied as untimely.[63]

Explaining its willingness to apply the doctrine of collateral estoppel, the Commission emphasized the importance of the doctrine to the judicial and administrative processes:

> Collateral estoppel has played an important role in lending stability to prior administrative determinations in Missouri. As a result, it has aided the efficiency of the administrative as well as the judicial process by reducing to one the number of 'bites at the apple,' or 'trips to the well' on the same issue. n2 The collateral estoppel doctrine, designed to further judicial economy by avoiding continual trials on the same issue, precludes parties from relitigating issues that have been previously adjudicated. King General Contractors v. Reorganized Church, 821 S.W.2d 595, 500 (Mo. banc 1991). This same claim is not to be relitigated if it once has reached final judgment on the merits. Unappealed unambiguous awards are res judicata and are not subject to collateral attack. Veal v. St. Louis, 365 Mo. 836, 289 S.W.2d 7 (1956).[64]
>
> n2 Missouri Practice: Administrative Practice and Procedure, Second Edition. Alfred S. Neely, West Publishing Company 1995, p. 611.

[62] *State ex rel. Mid-Missouri Tel. Co. v. Public Service Commission*, 867 S.W.2d 561, 565 (Mo. App. 1993) (internal quote of Section 386.500.2 omitted).
[63] Order Regarding Petition, Case No. TW-97-333, at p. 3.
[64] Order Regarding Petition, Case No. TW-97-333, at pp. 1-2.

The Courts and the Commission have applied Section 386.550 RSMo (2000) and collateral estoppel in a wide variety of Commission cases, including proceedings involving tariff rates, [65] and their application remains appropriate here.

(c) Res Judicata

Unlike Section 386.550, which applies to any petitioner - - whether or not it was a party in the prior proceeding or has any relationship with any party in the prior proceeding[66] - - the doctrine of res judicata bars a subsequent action between the same parties when the facts and points of law essential to the action are identical to those essential to the prior action.

The Commission has held that it has the discretion to apply the doctrine of *res judicata* and that the applicable criteria were set out generally by the U.S. Supreme Court in *United States v. Utah Construction & Mining Co.*[67], which are similar to the four criteria Complainants cite in their Response[68] for collateral estoppel:

> (1) issue must be identical to one in a prior adjudication;
> (2) there was a final judgment on the merits;
> (3) the estopped party was a party or is in privity with a party to the prior adjudication; and
> (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.[69]

---

[65] *McBride & Son Builders, Inc. v. Union Electric Company*,526 S.W.2d 310, 313-314 (Mo. 1975) (request for declaratory judgment an impermissible collateral attack under Section 386.550 on Commission rule, passed without a hearing and not appealed, that barred payment of allowances to a developer building all electrical homes); *Wabash Railroad Company v. City of Wellston*, 276 S.W.2d 208, 209-211 (Mo. 1955) (city precluded from attacking PSC order apportioning costs to install gates and flashing light signals at railroad crossing); *State ex rel. Mid-Missouri Tel. Co. v. Public Service Commission*, 867 S.W.2d 561, 565 (Mo. App. 1993) (failure to follow correct procedures for challenging PSC decision eliminating COS service bars collateral attack on PSC order under Section 386.550); *Associated Natural Gas Company's Tariff Revision Designed to Increase Rates for Gas Service to Customers in the Missouri Service Area of the Company*, Case No. GR-97-272, 2002 Mo. P.S.C LEXIS 261 (issued February 14, 2002).

[66] *Order Regarding Motions to Dismiss*, Case No. TC-2003-0066, issued January 9, 2003 at pp. 22-23.

[67] *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed.2d 642, 86 S.Ct. 1545 (1966), and more specifically in *Athan v. Professional Air Traffic Controllers Organization*, 672 F.2d 706 (8th Cir.1982).

[68] Complainants' Response, pp. 8-9.

[69] *In re Kansas City Power & Light Co.*, 75 P.U.R.4th 1, 133 (Apr. 23, 1986).

All four elements for res judicata are clearly met here. As noted above, Complainants only challenge the fourth element (which AT&T Missouri addressed above). Here, Complainants' claims have already been specifically considered and rejected by the Commission on three separate occasions. The Commission's April 11, 1997 *Order Approving Tariff Revision,* its January 9, 2003 *Order Regarding Motions to Dismiss* and its February 4, 2003 *Order Denying Rehearing* in Case No. TC-2003-0066 were decided on the merits in decisions that remain final and binding. The matters Complainants seeks to contest were resolved in the prior cases, and this case involves the same parties or their privies. *Res judicata* therefore bars the Complainants from seeking a different result than the Commission's prior decisions on the very same issues.

3. The Complaints Have Failed to Perfect the Complaint and the Complaint Therefore must be Dismissed.

(a) The perfection requirement is statutory and cannot be waived. In order to avoid the Section 386.390(1), RSMo.[70] requirement that the complaint be signed by not fewer than 25 consumers or purchasers or prospective consumers or purchasers of telephone service, Complainants assert that they had, with their complaint, sought a waiver of this requirement and that "they are entitled to a ruling on their request before undertaking the task of acquiring signatures of each" and have been waiting for the ruling for 16 years.[71]

Complainants miss the point. Statutory requirements that establish the jurisdictional parameters for bringing a complaint cannot be waived. Complainants' citation to Commission

[70]Section 386.390(1), in pertinent part states: "no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any . . . telephone corporation, unless the same be signed by . . . not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such . . . telephone service."
[71] Complainants' Response, p. 23.

Rule 4 CSR 240-2.015(1) only allows the Commission to waive its own rules, not statutes.[72] The Commission has, in dismissing Complainants' nearly identical prior complaint in Case No. TC-2003-0066, ruled these requirements are jurisdictional and that that compliance must be strict:

> . . . here, a statute or controlling judicial decision imposes a specific pleading requirement on an administrative complaint. Strict compliance is required with such specific and jurisdictional pleading requirements.[73] As discussed in the Order of January 9, the Commission's special complaint authority in Section 386.390.1 is expressly conditioned upon the joining of at least 25 customers or prospective customers as complainants. This requirement, by the unambiguous terms of the statute, is jurisdictional.[74]

Affirming, the Cole County Circuit Court ruled that "This defect of perfection alone was sufficient to require dismissal of the Complaint."[75]

Complainants' claim that the signature requirement is "merely a ministerial act which can be delegated"[76] misses the mark as well. The Commission itself has explicitly stated, referencing this very requirement, that a "complaint must meet any special requirements or restrictions imposed by the authorizing statute or statutes."[77] Explaining further, the Commission stated that it:

> "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes . . . Therefore, in determining the sufficiency of a complaint, the Commission must consider whether the pleading contains adequate allegations on each element of the authorizing statute or statutes.[78]

---

[72] 4 CSR 240-2.2.015(1) states that a "rule in this chapter may be waived by the commission for good cause." (emphasis added)
[73] *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 342 (Mo. banc 1991) (time limitations); *Farmer v. Barlow Truck Lines, Inc.*, 1998 WL 418740, *4 (Mo. App., W.D. 1998) (procedure for review of awards).
[74] *Tari Christ, d/b/a ANJ Communications, et al., v. Southwestern Bell Telephone Company, L.P., et al.,* Case No. TC-2003-0066, *Order Denying Rehearing and Denying Complaintants' Alternative Motion for Leave to Amend,* issued February 4, 2003, p. 6.
[75] *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri,* Case No. 03CV323550, slip op. at 5 (Cole County Circuit Court November 5, 2003).
[76] Complainants' Response, p. 24.
[77] *Order Regarding Motions to Dismiss*, p. 18.
[78] *Id.*, p. 18.

The purpose of statutory construction is to determine the intent of the legislature from the words used in the statute and to give effect to that intent.[79] In other contexts in which signatures were required to vest jurisdiction, the Court has required strict compliance.[80]

Complainants' attempt to liken their attorney's signature on the complaint to that of an assistant prosecuting attorney substituting for the prosecuting attorney's signature on an indictment is not an apt comparison. As the case Complainants themselves cite explains, the prosecutor's signature is ministerial because it goes only to the "form in which the charge is presented," not to the substance of the offense, which "is to be found in the body of the charge."[81] The perfection requirement under Section 386.390(1), however, is not ministerial, but substantive. It evidences compliance with the jurisdictional prerequisite necessary for the complaint to "be entertained by the commission"[82]: that there be "not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of . . . telephone service."[83] Explaining the rationale for the restrictions that Section 386.390(1) and 386.550 establish, the Commission stated:

> Section 386.390.1 authorizes the Commission to hear and determine complaints involving utilities; however, if the complaint goes to the reasonableness of rates, then certain extra restrictions apply. The unmistakable purpose of the legislature was to restrict such proceedings, not to facilitate them . . . . The legislature has made a public policy determination that utilities be insulated to a certain degree from rate challenges. The policy benefits all ratepayers, who must after all reimburse the utility through rates for the costs incurred in defending against meritless actions. The legislative policy is implemented by the restrictions imposed on such actions by the statutory scheme.[84]

---

[79] *Boone County v. County Employees Retirement Fund,* 26 S.W.3d 257, 261 (Mo. App., W.D. 2000).
[80] *See, e.g., State v. Walden,* 206 S.W. 2d 979, 987 (Mo. 1947) (petition signed by only two instead of 500 qualified voters, as required by statute, was insufficient to call into being the jurisdiction of circuit court to determine whether additional magistrates were needed in the county.)
[81] *State v. Elgin,* 391 S.W. 2d 341, 343 (Mo. 1965).
[82] Section 386.390(1).
[83] *Id.*
[84] *Order Denying Rehearing,* pp. 9.

Contrary to Complainants' suggestion that they are "entitled to add their signatures to the complaint within a reasonable period of time,"[85] Complainants lack the legal capacity to do so. Complainants themselves in their Response admit that "it is true that a number of the Complainants have become inactive and no longer in good standing with the state of Missouri."[86] Under Section 351.476.1 RSMo., a dissolved corporation "may not carry on any business except that appropriate to wind up and liquidate its business and affairs," and therefore can neither be nor certify themselves as a purchaser or prospective purchaser of AT&T Missouri's services under Section 386.390(1).

The Commission previously held a "prospective customer is one that is presently ready and able to buy the service in question." Ruling that an entity not presently certificated to provide payphone services in Missouri cannot be a prospective customer of network services intended for such providers, it explained that "[a]ny other construction would defeat the legislative purpose of the restriction because any entity could be said to be a prospective customer" and that it "has consistently taken this position in the past."[87]

To the best of AT&T Missouri's knowledge, information and belief:

- Only four Complainants are customers of AT&T Missouri's payphone tariff;
- At most, only 13 Complainants are certificated by the Commission to provide pay telephone service (3 of which are maintaining their certificates only in order to pursue this complaint); and
- Nine of the corporate Complainants have been administratively dissolved.[88]

[85] Complainants' Response, p. 24.
[86] Complainants' Response, p. 25.
[87] *Order Denying Rehearing,* pp. 7.
[88] The current status of complainants' MoPSC certification (showing revocation date and MoPSC case number), corporate status (showing applicable dissolution dates) are summarized in the table appended as Attachment 1 and supporting documents from the Missouri Secretary of State's website are also included in Attachment 1.

Accordingly, the Complaint does not meet the prerequisites for bringing a complaint as set forth in Section 386.390.1 and 4 CSR 240-2.070(3) and should be dismissed.

(b) The Commission should not permit additional "entities" to join the Complaint. In the event the Commission rules that the perfection requirement has not been met for lack of 25 purchasers or prospective purchasers, Complainants request leave to join 17 other parties by amendment:

> The undersigned is authorized to represent to the Commission that the entities identified on Appendix 2 to this response are prepared to join as complainants in the complaint should the Commission conclude the present complement of complainants is insufficient.[89]

The Commission should deny this request. The complaint must be judged on its face for compliance with statutory requirements. It would not be appropriate to allow new parties to join a complaint filed nearly nine years ago. The interests and claims of such parties would be materially different than those contained in the original complaint. Their remedy, to the extent one exists, would be to file a new complaint.

The Commission should also deny this request because thirteen of the "entities" Complainants identify are not certificated to provide payphone service in Missouri. Moreover, these entities appear to be shams that the principals of some of the Complainants are attempting to artificially manufacture[90] for the purpose of evading the statutory and Commission requirement that complaints pertaining to rates must be signed by at least 25 purchasers or prospective purchasers of the service.[91] These new entities ("Applicants") filed their certification applications a little less than a month after AT&T filed its motion to dismiss - - and four days before Complainants filed their April 30 Response seeking to add these additional entities.

[89] Complainants' Response, p. 26.
[90] See Applicants' Applications for Certificate of Service Authority to Provide Private Pay Telephone Service in the State of Missouri, filed April 26, 2013, Commission File Nos. PA-2013-0469 through File No. PA-2013-0481.
[91] Section 386.390.1 RSMo; MoPSC Rule 4 CSR 240-2.070(5).

The Commission should note that neither Complainants nor Applicants have disclosed to the Commission that Applicants' organizers are parties in Case No. TC-2005-0067 through other entities they control, and their organizers' interests in Case No. TC-2005-0067. Documents from the Missouri Secretary of State's Office, of which the Commission may take administrative notice, show that Complainants are simply attempting to gin up additional "complainants" for Case No. TC-2005-0067 in attempt to evade statutory and Commission requirements:

(a) Jerome Schmidt, whom the Missouri Secretary of State lists as the registered agent for Complainant Sunset Enterprises, Inc., now seeks certification for:

- CruiseCom Enterprises, LLC File No. PA-2013-0469
- Vector Phones, LLC File No. PA-2013-0470
- Atlantis Link, LLC File No. PA-2013-0471[92]

(b) Jim Nesselhauf, whom the Missouri Secretary of State lists as the registered agent for Complainants ANJ Communications and Commercial Communication Services, L.L.C, (Mr. Nesselhauf is also the organizer of Commercial Communications Services, L.L.C.) now seeks certification for:

- OutDial Networks, LLC File No. PA-2013-0472
- EnduraVox, LLC File No. PA-2013-0473
- Robidoux Ringtone, LLC File No. PA-2013-0474
- PayCom Voice Enterprises, L.L.C. File No. PA-2013-0475[93]

[92] Copies of pages from the Missouri Secretary of State's website showing Mr. Schmidt's relationship to these entities are attached as Exhibit 1.
[93] Copies of pages from the Missouri Secretary of State's website showing Mr. Nesselhauf's relationship to these entities are attached to as Exhibit 2.

(c) Terry Platt, whom the Missouri Secretary of State lists as the registered agent for Case No. TC-2005-0067 Complainant Tel Pro, Inc. and organizer of Case No. TC-2005-0067 Complainant Commercial Communication Services, L.L.C, now seeks certification for:

- InterVox Link, L.L.C. File No. PA-2013-0476
- Olympic Ventures, L.L.C. File No. PA-2013-0477
- Countdown Communication, LLC File No. PA-2013-0478
- Roaming Contact, LLC File No. PA-2013-0479
- Economy Communications, LLC File No. PA-2013-0480
- All Day Saver Phones, LLC File No. PA-2013-0481[94]

On May 15, 2015, AT&T Missouri sought to intervene in opposition to these certification request. AT&T Missouri suggested that the Commission should question Applicants' true motives for seeking Commission certification; whether the Commission's processes are being abused to further Applicants' litigation strategy in another proceeding before the Commission; and whether the public interest is being served by allowing Applicants to create a multitude of additional certificated entities solely for the purpose of participating in another case.

The Commission should also inquire into the other four "entities" Complainants claim are "prepared to join as complainants in the complaint," as a similar story will be found. All four similarly appear to be shams that the principals of some of the Complainants artificially manufactured:

(d) QuickVox, LLC -- Jim Nesselhauf, whom the Secretary of State lists as registered agent for Complainants ANJ Communications and Commercial Communication Services, L.L.C. and the organizer of Commercial Communications Services, L.L.C., is also listed as the

[94] Copies of pages from the Missouri Secretary of State's website showing Mr. Platt's relationship to these entities are attached as Exhibit 3.

registered agent and organizer of QuickVox, LLC, which received Commission payphone certification in 2006.[95] The Commission should note that according to filings QuickVox made in response to a Staff certificate revocation motion, it appears that QuickVox has yet to offer payphone service in Missouri.[96] In that filing, QuickVox stated: "QuickVox has delayed its market launch contingent upon the results in a complaint before the Commission filed by certain other payphone providers in Case No. TC-2005-0067."[97]

(e) Linda Harvey, whom the Missouri Secretary of State lists as the registered agent for Complainants HKH Management Services, Inc. and Missouri Telephone and Telegraph, Inc. sought and obtained certification for:

- JN Payphones, LLC File No. PA-2006-0484
- Overlord Telecommunications, LLC File No. PA-2006-0485

Michael Harvey sought and obtained certification for:

- Titan Communications, LLC File No. PA-2005-0081[98]

The Commission should note that according to filings JN Payphones, LLC, Overlord Telecommunications, LLC, and Titan Communications, LLC made in response to a Staff certificate revocation motion, it appears that none of these three entities has yet to offer payphone service in Missouri.[99] In those filings, each stated that it has: "delayed its market

[95] QuickVox L.L.C. received its certificate of service authority on September 29, 2006 in Case No. PA-2005-0095. Copies of pages from the Missouri Secretary of State's website showing Mr. Nesselhauf's relationship to this entity is attached as Exhibit 2, p. 8 of 8.
[96] See QuickVox L.L.C.'s Objection to and Suggestions in Opposing Staff's Motion for Cancellation and Request for Hearing, filed April 26, 2011, in Case No. PD-2011-0314.
[97] *Id.*, p. 1.
[98] Copies of pages from the Missouri Secretary of State's website showing Ms. Harvey and Mr. Harvey's relationships to these entities are attached to this Application as Exhibit 4.
[99] See JN Payphones, LLC, Overlord Telecommunications, LLC, and Titan Communications, LLC Objections to and Suggestions Opposing Staff's Motion for Cancellation and Request for Hearing, filed April 11, 2011, in Case Nos. PD-2011-0309, PD-2011-0310, and April 26, 2011, in Case No. PD-2011-0316.

launch contingent upon the results in a complaint before the Commission filed by certain other payphone providers in Case No. TC-2005-0067."[100]

Based on Commission files and documents maintained by the Missouri Secretary of State, all 17 of the new "entities" Complainants claim are "prepared to join as complainants in the complaint" appear to be misusing the Commission's certification process and should be denied party status in this proceeding.

4. The Price Cap Statute Bars this Complaint.

Complainants appear to claim that AT&T Missouri somehow waived its price cap argument[101] because it "was deregulated by Section 392.245 in December or 1996," but filed revisions to its payphone service lines on January 15, 1997 to comply with the FCC's *Payphone* Orders.[102] Complainants are mistaken in their chronology. While it is correct that AT&T Missouri's maximum allowable rates were those which were in effect on December 31, 1996 (and that any rate equal to or less than the rates in effect on December 31, 1996, were deemed just and reasonable as a matter of law under Section 392.245), that is not the date AT&T Missouri's became subject to price cap regulation. After Dial U.S. began providing alternative local service in January 1997 in Springfield, Missouri, AT&T Missouri (then SWBT) made a filing with the Commission on March 21, 1997 seeking price cap status. Following a hearing in

[100] *Id.*, p. 1.

[101] Section 392.245 RSMo (2000) authorizes the Commission to employ price cap regulation to ensure just, reasonable and lawful rates[101] and subparagraph 2 of that section makes price cap regulation mandatory once the statutory criteria for such regulation has been met:

> A large incumbent local exchange company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent companies service area. (emphasis added).

[102] Complainants' Response, p. 21.

Case No. TO-97-397, the Commission approved AT&T Missouri as a price cap company effective September 26, 1997.

Complainants also claim that AT&T Missouri's payphone line rates were "invalid *ab initio"* and that AT&T Missouri's price cap argument "ignores entirely federal legislation and federal agency decisions."[103] Not only are Complainants mistaken, they also begin from a premise that misstates the law. As the Missouri Supreme Court has ruled, once a rate is fixed by the Commission, it becomes a lawful rate and "has the same force and effect as if set by the Legislature."[104]

Under Section 392.245.1 RSMo (2000), the Commission is authorized to employ price cap regulation to ensure that rates are just and reasonable. Section 392.245.2 RSMo requires the Commission to employ price cap regulation when the requisite determination has been made that an alternative local exchange telecommunications company has been certified and is providing basic local telecommunications service in a large incumbent areas service area. The Cole County Circuit Court ruled that the application of price cap regulation is mandatory and that the Commission loses its authority to examine the justness and reasonableness of a carrier's rates:

> Under Section 392.245.2 RSMo Supp. 1997, the application of price cap regulation is mandatory upon the PSC's determination that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service anywhere in a large incumbent telecommunications company's service area . . . once the PSC makes a determination that the criteria specified in Section 392.245.2 RSMo Supp. 1997 has been met, it loses its authority to examine the justness and reasonableness of SWBT's rates, charges, tolls and rentals for telecommunications service.[105]

[103] Complainants' Response, p. 20.
[104] State ex rel. Utility Consumers Counsel, 585 S.W.2d at 49 (citing that Court's decision in State ex rel. Jackson County, 532 S.W.2d at 28.
[105] State ex rel. Public Counsel Martha S. Hogerty v. Public Service Commission, et al., Case No. CV197-1795CC and CV197-1810CC, Revised Findings of Fact and Conclusions of Law and Judgment, issued August 6, 1998 at p. 4 (emphasis added).

Moreover, as the Complaint itself acknowledges, the FCC delegated to state commissions the task of ensuring that AT&T Missouri's payphone services comply with the requirements that they be provided at cost-based rates under the new services test.[106] Pursuant to that directive, the Missouri Commission did just that. In approving the revisions to AT&T Missouri's (then SWBT's) payphone tariffs, the Commission stated:

> While MICPA questions whether SWBT is pricing its services at cost-based rates, SWBT has supplied to the Staff supporting cost information which the Staff believes to be sufficient justification for SWBT's proposed rates . . . the Commission has thoroughly reviewed the many filings in this case, including the Motions to Suspend filed by MCI and MICPA and finds that SWBT's proposed tariff revisions are in compliance with the FCC's orders, and should therefore be approved as amended. Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary.[107]

And even if Southwestern Bell's payphone rates that were in effect on December 31, 1996 are not considered the maximum allowable prices under Section 392.245.3, the Commission reaffirmed those rates under the FCC's criteria in its April 11, 1997 *Order Approving Tariff Revisions*. Thus, those rates, as of the Order's April 15, 1997 effective date, became the maximum allowable price pursuant to Section 392.245.11.

5. <u>Section 276 of the 1996 Act</u>.

To the extent the Commission may be inclined toward changing AT&T Missouri's payphone rates on a prospective basis, those rates are no longer subject to Section 276 or the NST. The requirement that a Bell Operating Company's ("BOC") rates for payphone lines meet the NST is a "nonstructural safeguard" established under Section 276(b)(1)(C). Those nonstructural safeguards, however, exist only to implement subsections (a)(1) and (a)(2) of

[106] Complainants' Complaint at p. 10.
[107] <u>Order Approving Tariff Revisions</u>, Case No. TT-97-345 at pp. 8-9, 10-11.

Section 276. 47 U.S.C. § 276(b)(1)(C). Subsection (a)(1) and (a)(2), in turn, apply only to a BOC that "provides payphone service." *Id.* § 276(a). AT&T Missouri, however, no longer provides payphone service.[108] AT&T Missouri therefore is no longer subject to Section 276(a), and therefore no longer subject to the nonstructural pricing safeguards arising from Section 276(b)(1)(C). Thus, even if the Commission could lawfully find that, as a prospective matter, AT&T Missouri's rates for payphone lines did not meet the NST, the Commission could not change those rates, because the nonstructural pricing requirements no longer apply.

WHEREFORE, AT&T Missouri respectfully renews its request that the Commission enter an order dismissing Complainants' Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

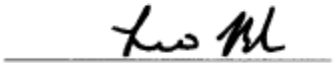
BY _____

LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
Attorneys for AT&T Missouri
909 Chestnut Street, Room 3518
St. Louis, Missouri 63101
314-235-2508 (Telephone)/314-247-0014(Facsimile)
leo.bub@att.com

[108] *See Order Canceling Certificate*, Case No. PD-2010-0318, issued June 18, 2010, cancelling Southwestern Bell Telephone Company, d/b/a AT&T Missouri's certificate of authority to provide private pay telephone services.

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on May 20, 2013.



Leo J. Bub

General Counsel
Jennifer Hernandez
Cully Dale
Missouri Public Service Commission
PO Box 360
Jefferson City, MO 65102
general.counsel@psc.mo.gov
jennifer.hernandez@psc.mo.gov
cully.dale@psc.mo.gov

Public Counsel
Office of the Public Counsel
PO Box 7800
Jefferson City, MO 65102
opcservice@ded.mo.gov

Mark W. Comley
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
PO Box 537
Jefferson City, MO 65102
comleym@ncrpc.com