

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

BARRY ROAD ASSOCIATES, INC.,
d/b/a MINSKY'S PIZZA, and

THE MAIN STREET ASSOCIATES, INC.
d/b/a MINSKY'S PIZZA, and

HARRY MARK WOOLDRIDGE,

Complainants,

v.

SOUTHWESTERN BELL TELEPHONE
COMPANY, d/b/a AT&T MISSOURI,

Respondent.

CASE NO. TC-2011-0396

**RESPONDENT AT&T MISSOURI'S BRIEF IN RESPONSE TO COMPLAINANTS'
APPLICATION FOR REHEARING**

Pursuant to 4 CSR 240-2.080 (15), Respondent AT&T Missouri¹ respectfully submits this Response to Complainants' Application for Rehearing regarding the Commission's September 13, 2011 Report and Order Granting Respondent's Motion for Summary Determination (the "Commission Order" or "Order").

Background

In its Order, the Commission found that AT&T Missouri may pass through back tax settlement payments (exclusive of attorney's fees) to its customers pursuant to AT&T Missouri General Exchange Tariff, P.S.C. Mo.-No. 35, Section 17.11, Original Sheet No. 26. The Order was based on substantial evidence in the record, and the Commission correctly interpreted the law and relevant cases. Through their Application, Complainants now request the Commission to

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

reconsider its Order. But Complainants cite no new law or facts to support this request, nor do they do any more than offer a retread of their argument that the tax dispute settlement payments could not themselves be considered tax payments because they were paid to settle tax litigation. Complainants, however, continue to ignore the fundamental flaw in this argument: the municipalities pursued the collection of back taxes through litigation, thus making any settlement of litigation inextricably part of the tax collection and payment process. The Commission's finding was correct, and Complainants have provided no reason to conclude otherwise. For the reasons set forth below, Complainants' Application for Rehearing should be denied.

Discussion

The Commission is obligated to grant a rehearing only "if in its judgment a sufficient reason" exists that the order or decision is "unlawful, unjust or unreasonable" or "unjust or unwarranted." § 386.500 RSMo. *See State ex rel. County of Jackson v. Pub. Serv. Comm'n*, 14 S.W.3d 99, 102 (Mo. App. 2000). It is Complainants' burden to demonstrate this. In their Application, however, Complainants have completely failed to meet this statutory burden and their Application should be denied.²

The Commission Order carefully set forth findings of fact based on the record and prior court actions regarding the municipal tax settlements. In particular, the Commission based certain of its findings on a review of the court order that approved the *Wellston* tax collection settlement in November 2009 (the "*Wellston* Court"). In that action, the court recognized that the settlement payments made by AT&T Missouri to the municipalities were "for back and future taxes." Ex. A to the Complaint at 7. Rather than bring new facts to the Commission's attention to justify

² Similarly, Complainants have not raised any new facts that have arisen since the date of the September 13, 2011, Order. *See* § 386.500(4) RSMo.

reconsideration, Complainants merely repeat the argument that the settlement payments made to the municipalities and then passed on to AT&T Missouri customers were not a tax or a “back tax” because the tax payment to the municipalities was a “voluntarily-incurred litigation settlement liability.” The Commission thoroughly considered this argument and rejected it as without merit. The Commission correctly recognized repeated references to “back tax payments” in the settlements and noted that Complainants offered no facts or evidence to indicate that the settlement payments represented anything other than back tax payments or payments involving taxes. Indeed, it stretches credulity to suggest that the payment of nearly \$60 million to Missouri cities to settle claims raised in tax collection litigation with respect to the amounts of taxes owed by AT&T Missouri is anything other than a back tax payment. *See* Ex. 10 at 3 (*Wellston* Settlement) (whereas clause indicating plaintiffs’ and defendants’ intent to “compromise[e] Defendants’ alleged past **tax** liability”) (emphasis added); *see also* Ex. 12A at 3 (*County* Settlement) (same); Ex. 12 at Ex. 12B at 3 (*Springfield* Settlement) (noting that Springfield’s receipt of the back tax payment was sufficient consideration for a release of AT&T Missouri’s back tax liability).

The Commission also found that there was no evidence to support Complainants’ bald assertion that “back tax payment” means something other than its plain meaning. Complainants’ Application raises no new facts, offers no new evidence, and cites no new circumstance supporting their view that the settlement payments have any other meaning than payments to settle claims for back taxes. In their Application, Complainants’ principal contention is that because the back tax settlement payments were “voluntarily-incurred,” they were not a payment for back taxes.³ The

³ Complainants’ contention that it is “undisputed that the payments made by AT&T to class members were not taxes” is patently false. As the Commission noted in its order, two separate courts recognized that the settlement payments made by AT&T Missouri to the municipalities were back tax payments, and that has been AT&T Missouri’s position since reaching the settlements in the tax litigation. Commission Order at 7.

Commission wisely rejected this interpretation and found that there was no genuine issue as to the fact that the settlement payments represented payment for back taxes. Commission Order at 6-7.

Complainants also challenge the Commission's finding that the *Wellston* Court⁴ and the Jackson County Circuit Court⁵ found that the settlement payments represented back tax payments. The *Wellston* Court specifically stated that "[t]his court approves the Settlement Agreement submitted to the Court, which includes [AT&T's] agreement to establish a \$65 million fund for payment to two-hundred-seventy Missouri municipalities of **back taxes** related to telephone landline services provided by [AT&T]." *Wellston* Court 1 (emphasis added). Under the heading, "What This Case is About (And What It is Not About)," the *Wellston* Court stated that "[t]his case is about claims made by municipalities **for taxes** which the municipalities claim are owed to them by [AT&T] for telephone landline and related services provided by [AT&T] in each municipality." *Id.* (emphasis added). The Jackson County Circuit Court, in reviewing the *Wellston* Court order, found that there was "no ambiguity in the *Wellston* court's findings in the Judgment and Order Approving the *Wellston* Settlement, and the court specifically found that the monies paid to the municipalities was for **back and future taxes**." Jackson County Circuit Court 5 (emphasis added). Complainants would have the Commission ignore the unambiguous and critical conclusions of two circuit courts, reverse its earlier Order, and then reach the illogical conclusion that payments made to settle tax collection litigation were not tax payments. The Commission should reject Complainants' efforts.

⁴ See November 9, 2009 Order of the Circuit Court of the City of St. Louis ("*Wellston* Court") (attached as Exhibit 11 to Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition).

⁵ See April 4, 2011, Order of the Circuit Court of Jackson County, Missouri ("*Jackson County Circuit Court*") (attached as Exhibit A to Complainants' complaint).

Complainants also now contend that the Commission lacks jurisdiction to rule upon the meaning of Section 17.11 of the General Exchange Tariff 35. This is an odd argument, particularly in light of the fact that the Complainants themselves initially brought the Complaint and never once challenged that the Commission had sufficient jurisdiction to decide whether the settlement payments were to be passed through to AT&T customers pursuant to the terms of the Tariff. Now that the Commission has issued an adverse ruling against them, they now disingenuously argue that the Commission lacks jurisdiction.⁶

Complainants' also contend that the pass through of back tax settlement payments to current customers who were not customers of AT&T Missouri during the time frame of the tax litigation is somehow unlawful.⁷ Complainants raised fundamentally the same allegation in Complainants' Response to AT&T Missouri's Motion for Summary Disposition. Complainants' Response at 17. As in that Response, Complainants here offer no evidence, nor is there anything in the record, to support this allegation. Neither this allegation, or any other allegations in the Application, shed any new light on the singular issue they presented to the Commission for determination: whether the settlement payments made by AT&T Missouri are to be passed through to AT&T Missouri customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs.

⁶ The Commission should not take seriously Complainants' late hour claim that the Commission now lacks jurisdiction to interpret the terms of a properly filed tariff. Pursuant to §§ 392.220 and 392.245 RSMo., the Commission has authority over AT&T Missouri's telephone service rates, and AT&T Missouri must include them in a filed tariff subject to the jurisdiction of the Commission. And, as correctly noted in the Commission Order, the Commission has the authority to hear and decide complaints brought against public utilities operating in Missouri. § 386.390 RSMo.

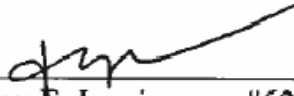
⁷ In support of the claim in their Response to AT&T Missouri's Motion for Summary Disposition that AT&T Missouri is precluded from assessing present customers for the back tax payments, Complainants cited the *State ex rel. Capital City Water Co.* case. See Complainants' Response at 17. As noted in Respondent AT&T Missouri's Brief In Reply To Complainants' Response To AT&T Missouri's Motion For Summary Disposition (p.11), *Capital City* simply has no application to the facts of this case. AT&T Missouri paid back taxes to Missouri municipalities that, had it paid from the beginning, would have undoubtedly been passed through to its customers. It is these customers—customers who were customers during the time of the tax litigation—whom AT&T Missouri is passing through the back tax payment pursuant to its tariff authority.

Conclusion

The Commission's Order was not unwarranted, unreasonable, or unjust because the evidence presented by Complainants simply did not present any genuine issue of material fact. The Commission was correct in granting AT&T Missouri's motion for summary determination. The Complainant's Application fails to meet the statutory burden necessary to justify rehearing, presenting no new evidence or arguments that were not made, or could not have been made, in their Response to AT&T Missouri's Motion for Summary Determination. For each of the foregoing reasons, AT&T Missouri respectfully submits that Complainants' Application for Rehearing should be denied in all respects.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY
d/b/a AT&T MISSOURI



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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on October 3, 2011.



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