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October 1, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

FILED
OCT 01 2002
Missouri Public
Service Commission

RE: Case No. TC-2003-0066

Dear Mr. Roberts:

Please find enclosed for filing with the Commission in the above referenced matter, an original and eight (8) copies of the Motion to Dismiss, Answer and Affirmative Defenses of Respondent Verizon Midwest.

Copies of this pleading have been served upon each party of record.

Sincerely,


Larry W. DORITY

Enclosures

cc: Parties of Record

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

Tari Christ, d/b/a ANJ Communications; Bev Coleman,
an Individual; Commercial Communications Services,
L.L.C.; Community Payphones, Inc.; Coyote Call, Inc.;
William J. Crews, d/b/a Bell-Tone Enterprises;
Illinois Payphone Systems, Inc.; Jerry Myers, d/b/a
Jerry Myers Phone Co.; John Ryan, an Individual;
JOLTRAN Communications Corp.; Bob Lindeman,
d/b/a Lindeman Communications; Monica T. Herman,
d/b/a M L Phones; Midwest Communications
Solutions, Inc.; Mark B. Langworthy, d/b/a Midwest
Telephone; Missouri Public Pay Phone Corp.;
Missouri Telephone & Telegraph, Inc.; Pay Phone
Concepts, Inc.; Toni M. Tolley, d/b/a Payphones of
America North; Jerry Perry, an Individual; PhoneTel
Technologies, Inc.; Sunset Enterprises, Inc.;
Teletrust, Inc.; Tel Pro, Inc.; Vision Communications,
Incorporated, and Gale Wachsnicht, d/b/a
Wavelength, LTD.,

Complainants,

v.

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.

FILED⁴

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Missouri Public
Service Commission

Case No. TC-2003-0066

**MOTION TO DISMISS, ANSWER AND AFFIRMATIVE DEFENSES
OF RESPONDENT VERIZON MIDWEST**

COMES NOW Respondent GTE Midwest Incorporated d/b/a Verizon Midwest
("Verizon"), pursuant to Commission Rule 4 CSR 240-2.070, and respectfully submits its
Motion to Dismiss, Answer and Affirmative Defenses to the Complaint filed in this
matter on August 22, 2002.

MOTION TO DISMISS

For its Motion to Dismiss, pursuant to Commission Rule 4 CSR 240-2.070(6), Verizon states:

1. Complainants have failed to state a claim upon which relief may be granted, in that Verizon does not operate as a local exchange telecommunications company or a public utility subject to this Commission's jurisdiction. Prior to the date of the Commission's Notice of Complaint issued herein, September 3, 2002, Verizon's Missouri tariffs were canceled effective September 1, 2002, pursuant to this Commission's *Order Denying Application to Intervene, Denying Motion to Suspend Tariff, Approving Tariffs, Canceling Tariffs, and Directing Filing* issued in Mo. P.S.C. Case No. TM-2002-232 on August 29, 2002. On May 21, 2002, the Commission issued its *Report and Order* in Case No. TM-2002-232, approving the application of GTE Midwest Incorporated, d/b/a Verizon Midwest and CenturyTel of Missouri, LLC, seeking, among other things, approval of Verizon's transfer to CenturyTel of its remaining 96 Missouri exchanges. The Complainants were clearly aware of Verizon's status in this state, as the Application to Intervene addressed in the above-referenced Order of August 29, 2002, was filed by the Midwest Independent Coin Payphone Association (of which many, if not all, of the Complainants ostensibly are members) on the same date as the subject complaint. Accordingly, any purported claims against Respondent Verizon are clearly moot.

2. Complainants have failed to state a claim upon which relief may be granted, in that the specific rates of Respondent Verizon alleged by Complainants to be unlawful and excessive were in fact, at all times pertinent hereto, the lawful rates

approved by, and on file with, this Commission, and thereby presumed to be lawful, just and reasonable pursuant to the filed rate doctrine. Complainants' challenge to Respondent Verizon's approved tariffs constitutes an impermissible collateral attack on the Commission's approval of those tariffs. See *State ex rel. Licata, Inc. v. Public Service Com'n of State* (App.1992) 829 S.W.2d 515.

3. Complainants have failed to state a claim upon which relief may be granted and have failed to comply with the provisions of the Commission's Rules, in that the complaint violates the provisions of Section 386.390, RSMo 2000 and 4 CSR 240-2.070(3).

Section 386.390.1, RSMo 2000, provides as follows:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; **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, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.** (Emphasis added).

Commission Rule 4 CSR 240-2.070(3) contains similar prohibitions regarding the filing of formal complaints as to the reasonableness of rates or charges.

The section of the Complaint designated “The Parties” (pages 2 through 6), lists twenty-five different people or entities that purportedly are “customers, or prospective customers, of network services that are made available to companies that provide pay telephone service to end users . . . under rates, terms and conditions set forth in the Respondents’ tariffs that are later described herein.” (Complaint, ¶ 26, p. 6). However, there is no allegation that all twenty-five customers or prospective customers subscribe, or could subscribe, to such service from Respondent Verizon. Indeed, as set forth in Paragraph 18, Complainant “Toni M. Tolley, d/b/a Payphones of America North, is an individual authorized to provide public telecommunications service **in the State of Illinois.**” (Emphasis added). Clearly, even if the complainants could meet the threshold of twenty-five by being customers or prospective customers of the collective individual Respondents (which Verizon denies), Complainant Toni M. Tolley d/b/a Payphones of America North certainly has no standing as a customer, or prospective customer, of the Missouri tariffed services at issue. The Legislature could not have intended that such a “prospective” customer would qualify; otherwise, individuals from twenty-five different states could claim that they might be, at some point in the future, prospective customers of a service for which a rate complaint could be lodged. Accordingly, the Complaint does not meet the criteria set forth in Section 386.390.1 and 4 CSR 240-2.070(3).

4. Complainants have failed to state a claim upon which relief may be granted, in that Complainants do not request a Commission determination that Respondent Verizon’s rates are in violation of the purported “New Services Test” pricing requirements of the Federal Communications Commission. In Complainants’ prayer for

relief against Verizon, as specifically set forth in Count III, page 18 of the Complaint, Complainants request, *inter alia*:

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

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

5. Based on the above, the Complaint should be dismissed; in the alternative, GTE Midwest Incorporated d/b/a Verizon Midwest should be dismissed as a party-Respondent.

ANSWER AND AFFIRMATIVE DEFENSES

For its Answer and Affirmative Defenses, pursuant to Commission Rule 4 CSR 240-2.070(8), Verizon states as follows:

1. Respondent Verizon denies all allegations contained in the narrative "Nature of the Complaint," and denies all allegations contained in Paragraphs 1 through 44, and 59 through 65 of the Complaint.

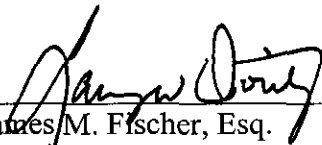
2. Respondent Verizon is not obligated to admit or deny the allegations contained in Counts I and II, Paragraphs 45 through 58, of the Complaint, but in an abundance of caution, denies same.

3. For its Affirmative Defenses, Respondent Verizon re-alleges the facts and legal citations contained in Paragraphs 1 through 4 of its Motion to Dismiss, *supra*, and incorporates same by reference herein. In essence, Verizon is not a local exchange telecommunications company or a public utility subject to this Commission's jurisdiction and any purported claims against Verizon are clearly moot; the specific rates of Verizon which are the subject of this Complaint were at all times the lawfully approved rates on file with the Commission, presumed to be just and reasonable, pursuant to the filed rate doctrine, and the complaint constitutes an impermissible collateral attack on the Commission's previous approval of those tariffs; and the Complaint violates the provisions of Section 386.390, RSMo 2000 and 4 CSR 240-2.070(3).

4. In addition, the Complainants' allegations and request for relief wherein they claim entitlement to a refund "in the amount of the difference between the rates approved by the Commission under the New Services Test, and the rates charged by Verizon to the Complainants since April 15, 1997" plus interest, would constitute unlawful and impermissible retroactive ratemaking in violation of Missouri statutes and case law.

WHEREFORE, having fully answered and for the reasons set forth above, GTE Midwest Incorporated d/b/a Verizon Midwest requests the Commission to enter an Order dismissing the Complaint filed herein or, in the alternative, dismissing GTE Midwest Incorporated d/b/a Verizon Midwest as a party-Respondent.

Respectfully submitted,



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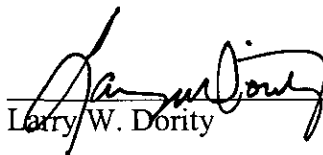
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, sent electronically or hand-delivered, this 1st day of October, 2002, to:

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