BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, et al.	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	Case No. TC-2003-0066
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.	)	

SOUTHWESTERN BELL TELEPHONE COMPANY'S
REPLY TO COMPLAINANTS' SUGGESTIONS IN
OPPOSITION TO MOTIONS TO DISMISS COMPLAINT

Southwestern Bell Telephone Company[1] respectfully submits this Reply to Complainants'[2] Suggestions in Opposition to Respondents' Separate Motions to Dismiss Complaint, filed October 18, 2002.[3]

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[1] Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company, will be referred to in this pleading as "Southwestern Bell" or "SWBT."

[2] The Complainant group is composed of the following individual complainants: 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").

[3] On October 25, 2002, Respondents Southwestern Bell, Sprint and Verizon requested an additional four days to file their responses to Complainants' Suggestions in Opposition, and indicated that Complainants had no objection to this request. If granted, this Reply would be due on November 1, 2002.

1. Complainants Are Barred From Collaterally Attacking the Commission's Decisions Approving SWBT's Payphone Tariffs.

In an attempt to avoid the preclusive effect of Section 386.550 RSMo (2000),[4] Complainants try to distinguish the Licata case,[5] claiming that Licata "involved a challenge to an existing and approved **rule** of a public utility," while this case "involved the lawfulness and reasonableness of the respondents' rates."[6]

Complainants' attempt to limit the application of Section 386.550 RSMo (2000) to Commission proceedings involving a utility's tariffed rules and regulations is misplaced. While Licata did involve a rule set out in a utility company's tariff,[7] it demonstrates the preclusive effect of Section 386.550, which draws no distinction between a utility's tariffed rules and its tariffed rates. A reading of Licata itself shows that the statute's application is not limited to rules of a public utility, as the Court in Licata cited a Missouri Supreme Court decision that applied the statute to the Commission's apportionment of construction costs for a railroad crossing:

> 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[4] (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.[8]

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[4] Section 386.550 RSMo (2000) 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.

[5] State ex rel. Licata, Inc. v. Public Service Commission, 829 S.W.2d 519 (Mo. App. 1992).

[6] Complainants' Suggestions in Opposition at p. 4 (bold in original).

[7] Specifically, the Complainant in the Licata case challenged a gas utility's tariffed rules and regulations for gas service that required a mobile home park owner to comply with specific safety standards and to provide individual meters at each pad within the mobile home park. State ex rel. Licata, 829 S.W.2d at 515.

[8] State ex rel. Licata, 829 S.W.2d at 518.

Indeed, the Courts and the Commission itself have applied Section 386.550 RSMo (2000) in a wide variety of Commission cases,[9] including proceedings involving tariffed rates:

> No objection was ever raised to Atmos' tariff and it is not before the Commission in this case. Having been duly approved by the Commission, Atmos' tariff is immune to collateral attack, therefore, no order affecting that tariff can be made in this case. n9 "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statue enacted by the legislature." n10
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> n9 Section 386.550, RSMo Supp. (2001).
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> n10 A.C. Jacobs & Co., Inc. v. Union Electric Company, 17 S.W.3d 579, 581 (Mo. App., W.D. 2000); Bauer v. Southwestern Bell Telephone Company, 958 S.W.2d 568. 570 (Mo. App. W.D. 1997).[10]

Complainants also seek to avoid Section 386.550 RSMo (2000) apparently claiming that their Complaint is a "direct attack on the rates as charged" by Southwestern Bell and not a collateral attack on the Commission's decision that "allowed the rates to go into effect" as filed.[11] But as the Court in Licata ruled, this is a distinction without a difference. There, the Complainant similarly contended that it was not attacking the Order in which the Commission approved a utility's rule, but that it was only attacking the rule itself. The Court flatly rejected the this sophistry:

> Licata contends that the utility rule, Article 10, is not the order of the commission but is simply a utility rule. However, Licata fails to note that the only purpose of the order of the commission in 1985 was the approval of article 10. Thus, it is impossible to separate article 10 from the order of the commission. When Licata

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[9] 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).

[10] In the Matter of 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).

[11] Complainants' Suggestions in Opposition at p. 4.

> attacks article 10, it must necessarily attack the order which enabled KPL to adopt and enforce article 10. By Section 386.550, Licata cannot collaterally attack the order of the commission by which article 10 was adopted.[12]

In this case, there should be no question that Complainants' action is a collateral attack. In the Fischer case, the Court defined "collateral attack" for purposes of Section 386.550 RSMo (2000):

> This court defined the term "collateral attack" in *Flanary v. Rowlett*, 612 S.W.2d 47, 49 (Mo. App. 1981), quoting from Restatement of Judgments as follows: "where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'"[13]

Here, that is exactly what Complainants are doing. The gist of their Complaint is that Southwestern Bell's payphone rates do not comply with the Federal Communications Commission's ("FCC's") requirements and are therefore unjust, unreasonable and unlawful.[14] Obviously, such claims are a direct attack on the prior determinations the Commission made when it approved these tariff 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 . . . 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.[15]

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[12] State ex. rel. Licata, 829 S.W.2d at 518.

[13] State ex rel. Fischer v. Public Service Commission, 670 S.W.2d 24, 26 (Mo. App. 1984).

[14] Complainants' Complaint, pp. 12-13.

[15] 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. TT-97-345, Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order and Denying As Moot Discovery Request, issued April 11, 1997 at pp. 10-11 (emphasis added).

The payphone tariff at issue here was approved by the Commission and became effective on April 15, 1997, despite challenges by MCI and Midwest Independent Coin Payphone Association ("MICPA"). Had the Complainants here filed their Petition on April 16, 1997, one day after the tariff became effective, there is no doubt the Complaint would have been subject to dismissal. It is equally subject to dismissal when challenged five years later on the same basis as previously considered and rejected by the Commission. As this Order has been final since 1997, it is immune from collateral attack pursuant to Section 386.550 RSMo (2000) and the Commission should dismiss this Complaint.

2. The Filed Rate Doctrine Applies in Both Administrative and Court Proceedings.

While Complainants acknowledge that the filed rate doctrine "protects rates that have been lawfully approved by the Commission from relitigation, in separate case filings, in the courts of law and equity," they claim that the doctrine does not apply here because this is an "administrative action, not a legal action."[16]

Contrary to Complainants' claims, however, the filed rate doctrine is not so circumscribed. As the Courts have ruled, the filed rate doctrine also prohibits the retroactive alteration of rates by a regulatory agency:

> The filed rate doctrine also precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency. *Nantahala*, 476 U.S. at 963, 106 S.Ct. at 2355; *Arkansas*, 453 U.S. at 577, 101 S.Ct. at 2930. This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration. *Columbia Gas Transmission Corp. v. F.E.R.C.*, 831 F.2d 1135, 1140 (D.C. Cir. 1987). In its discussion of the doctrine, the *Arkansas* Court explains that it explicitly prohibits an entity from "imposing a rate increase for gas already sold," 453 U.S. at 578, 101 S.Ct. at 2931, and states, in a footnote, that an entity "may not *impose* a retroactive rate

[16] Complainants' Suggestions in Opposition at p. 5.

alteration and, in particular, may not order reparations." *Id.* at note 8 (emphasis in original).[17]

Pursuant to statute, utilities in Missouri are permitted to 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,[18] 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."[19] And charges collected pursuant to such filed rates are the lawful property of the utility:

> 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.[20]

As Complainants are seeking refunds of charges collected by Southwestern Bell for services rendered under tariffs filed with and approved by the Commission, such claims are barred by the filed rate doctrine. The Commission has no authority to change a utility's tariffs and apply them on a retroactive basis even if it had the authority to award money damages, which it clearly does not.

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[17] State ex rel. Associated Natural Gas Company v. Public Service Commission, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997) (affirming PSC's decision that Natural Gas local distribution company has to file appropriate purchased gas adjustment tariff before it could recover take-or-pay costs from interruptible transportation customers).

[18] 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).

[19] 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.

[20] 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).

3. Complainants Are Collaterally Estopped From Attacking Southwestern Bell's Payphone Rates.

Despite acknowledging that their trade association, MICPA, participated in the prior Commission proceedings in which Southwestern Bell's payphone tariff rates were approved, Complainants seek to avoid being bound by the Order in that case, arguing against each of the elements of collateral estoppel.[21]

With respect to the first element, Complainants concede that the issue in the present case is identical to the issue in Case No. TT-97-345. That should be the end of the inquiry for this factor. However, Complainants claim that the proceeding in which the Commission approved the tariff was not an "adjudication." Complainants are mistaken. As is evidently clear from the Commission's Order approving the tariff, the Commission adjudicated the issue:

> 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.[22]

As the collateral estoppel elements themselves make clear, the focus of this first factor is on the similarity of the issues considered by the tribunal, not the nature of the proceeding as

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[21] Like the federal Court decision cited Complainants, the Missouri Courts similarly consider the following four factors in evaluating collateral estoppel:

> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action;
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> (2) whether the prior adjudication resulted in a judgment on the merits;
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> (3) whether the party against whom collateral estoppel is asserted was a party (or in privity with a party) to a higher adjudication; and
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> (4) whether the party against whom collateral estoppel had a full and fair opportunity to litigate the issue in the prior suit.

See, e.g., In the Matter of an Investigation into the Provision of Community Optional Calling Service in Missouri, Case No. TW-97-333, Order Regarding Petition, issued December 30, 1997, at p. 2, citing Oates v. Safeco Insurance Co., 583 S.W.2d 713, 719 (Mo. banc 1979).

[22] Order Approving Tariff Revisions, Case No. TT-97-435 at p. 10.

Complainants appear to imply. In fact, the Missouri Supreme Court in Oates (the case cited by the Commission) put emphasis on the word "identical" in its recitation of this element.[23]

With respect to the second element, Complainants contend that Case No. TT-97-345 was not a "judgment on the merits."[24] Complainants are incorrect. As the case cited by Complainants makes clear, a judgment "on the merits" occurs when the decisionmaker "determines which party is in the right" after argument and investigation, as distinguished from a decision resulting from a preliminary technicality or default and without trial.[25] As is clear from the Commission's Order approving Southwestern Bell's revised payphone tariff, Staff conducted an investigation into the cost support for the tariffs, and made a recommendation to the Commission. Based on that recommendation and arguments made by the payphone trade group, SWBT 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."[26]

With the respect to the third element, similarity of parties or privity with a party, Complainants coyly avoid acknowledging whether or not they are MICPA members. Rather, they simply claim that "SWB offers no proof that they are MICPA members" and that their Complaint "makes no claim that they are members of MICPA."[27] But even if not all Complainants are MICPA members, they are certainly in privity with MICPA, as MICPA has traditionally represented the interests of payphone providers before the Commission and

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[23] Oates, 583 S.W.2d at 719 (whether the issue decided in the prior adjudication was *identical* with the issues presented in the present action") (emphasis in original).

[24] Complainants' Suggestions In Opposition at p. 7.

[25] Complainants' Suggestions In Opposition at p. 7.

[26] Order Approving Tariff Revisions, Case No. TT-97-345 at pp. 8, 10.

[27] Complainants' Suggestions In Opposition at pp. 7-8.

specifically represented payphone provider interests in Case No. TT-97-345. Moreover, the claims that MICPA raised in Case No. TT-97-345 that Southwestern Bell's payphone rates "were priced well above their cost,"[28] is the exact same claim they are making here.[29] The privity rule is designed to foreclose precisely what Complainants seek to accomplish here --mounting a second and identical substantive challenge to a decision of the Commission by parties that are aligned in interest.

With respect to the fourth element, Complainants assert that a full and fair opportunity to litigate the issue in the prior adjudication was not permitted because "MICPA was denied the right to examine the cost studies supplied by SWB in support of its tariffs; the right to file the testimony of witnesses; and the right to cross-examine witnesses and brief and argue its position under contested case procedures."[30]

But as the Commission's Order in Case No. TT-97-345 makes clear, MICPA was given a full and fair opportunity to litigate the issues it was raising. It simply failed to convince the Commission of the merits of its position or that there was any need to further investigate the tariff filing.[31] And any purported claim that MICPA was denied a fair opportunity to litigate the issues it was raising 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 five years later. 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:

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[28] See, Order Approving Tariff Revisions, Case No. TT-97-345 at p. 4.

[29] See, page 12, paragraph 46 of Complainants' Complaint: "the rates set forth in paragraph 46 are not cost-based and recover more than a reasonable amount of the company's common expenses."

[30] Complainants' Suggestions In Opposition at p. 9.

[31] Order Approving Tariff Revisions, Case No. TT-97-345 at pp. 8, 10.

> 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.[32]

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 past since the Commission denied the application for rehearing. Public Counsels attempt to obtain Commission review of a matter that has been ripe for appeal is untimely. Therefore, the Petition must be denied as untimely.[33]

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).[34]
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> n2 Missouri Practice: Administrative Practice and Procedure, Second Edition. Alfred S. Neely, West Publishing Company 1995. p. 611.

[32] 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).

[33] Order Regarding Petition, Case No. TW-97-333, at p. 3.

[34] Order Regarding Petition, Case No. TW-97-333, at pp. 1-2.

4. Complainants' Complaint Must be Dismissed for Failure to Comply With Rule 4 CSR 240-2.070(3).

Complainants seek to avoid the application of rule 4 CSR 240-2.070(3) which requires 25 purchasers or prospective purchasers to initiate a complaint concerning rates. Complainants contend that only Section 386.390.1 RSMo (2000) contains the 25 purchaser or perspective purchaser requirement for filing a complaint while under Section 392.400.6 RSMo (2000), "only one telecommunications company is needed to bring a complaint and this Commission has so held,"[35] citing AT&T Communications of the Southwest, Inc. v GTE North, Inc., 29 Mo. P.S.C. (N.S.) 591 (decided May 19, 1989).

The Commission should question Complainants' citation of AT&T v. GTE North. While it is apparent in that case that the Commission did permit AT&T to proceed with a Complaint against GTE's intrastate access rates, there is no discussion in that case as to the application of the 25 Complainant requirement under Commission Rule 240-2.070(3). The Order in AT&T v. GTE North contains no indication that any party challenged AT&T's right to proceed by itself, and it is certainly clear that the Commission in that case expressed no opinion as to the application of the rule.

Moreover, Complainants have failed to make sufficient allegations to pursue a claim under Section 392.400.6 RSMo (2000).[36] They assert that even if some of their members were

[35] Complainants' Suggestions in Opposition at p. 10.

[36] Section 392.400.6 RSMo (2000) provides:

> A telecommunications company may file a complaint as to the reasonableness or lawfulness of any rate or charge for service offered or provided by a noncompetitive or transitionally competitive telecommunications company. Nothing in this chapter shall in any way preempt, modify, exempt, abrogate or otherwise affect any right, cause of action, defense, liability, duty or obligation arising from any federal, state or local law governing unfair business practices, antitrust, restraint of trade or other anti-competitive activity.

culled out making them "ineligible for the 25 needed under Section 386-390.1," the remaining complainants should be able to proceed under 392.400.6 because they are "'telecommunications companies' within the context of this law, and the respondents are all classified as non-competitive telecommunications companies."[37] These assertions are insufficient to meet the standard to proceed under Section 392.400.6 RSMo (2000). As the Commission has previously ruled, this statutory section only permits complaints that a company's non-competitive services are subsidizing its competitive or transitionally competitive services:

> The Commission has previously found and concludes again that Section 392.400 addresses the enforcement by the Commission of this segregation of noncompetitive services from transitionally competitive or competitive services. The complainants in this case have made no allegation that SWBT's intrastate switched access services are subsidizing SWBT's transitionally competitive or competitive services. Section 392.400.6 only permits complaints that a company's noncompetitive services are subsidizing its competitive or transitionally competitive services and the complainants have failed to state such a claim. Complainants have made no allegation of subsidization. The complaint simply fails to state a claim upon which relief may be granted.[38]

Here, Complainants have failed to identify any competitive or transitionally competitive service priced below cost so as to make a claim of subsidization. Accordingly, Complainants have failed to state a claim under Section 392.400 RSMo (2000). As they cannot proceed under either Section 386.390.1 or Section 392.400.6 RSMo (2000), the Complaint must be dismissed.

Southwestern Bell also notes that, if Section 392.400.6 RSMo (2000) were found to be applicable here, it would conflict with the price cap statute. Assuming an allegation that a non-competitive service was subsidizing a competitive or transitionally competitive service were properly asserted, the price cap statute would preclude both the lowering of the price of the non-competitive service and the increase in price of the competitive or transitionally competitive

[37] Complainants' Suggestions in Opposition at p. 10, internal citation to Section 386.020(51) omitted.

[38] MCI, et al. v. Southwestern Bell Telephone Company, Case No. TC-97-303, Report and Order, issued September 16, 1997 at p. 11.

service. As the Commission is aware, it rejected Southwestern Bell's proposed payphone use charge -- which it specifically found authorized by the FCC's rules -- on the basis that the charge exceeded Southwestern Bell's price cap:

> The FCC has held that carriers that pay compensation to payphone service providers are permitted, but not required, to pass all or part of those costs on to their customers. Therefore, Southwestern Bell's proposed tariff is consistent with the FCC's regulation . . . Section 392.245, RSMo 2000, permits the Commission to exercise its authority over the rates charged by Southwestern Bell through operation of a price cap. Section 392.245.3, RSMo 2000, caps Southwestern Bell's rates for telecommunications services at those it charged on December 31 of the year preceding the year in which the company was first subject to price cap regulation. Southwestern Bell became subject to price cap regulation on September 16, 1997, when the Commission approved Southwestern Bell's petition seeking to be regulated by price cap. Therefore, Southwestern Bell's rates are capped at those it charged on December 31, 1996. Southwestern Bell seeks to add a charge of $0.24 per call to its rates when it completes a call made by one of its customers from a payphone. In doing so it is providing a telecommunications service for which its rates are capped. Therefore, the proposed payphone use charge exceeds the amount Southwestern Bell is permitted to charge under the price cap and must be reject.[39]

The Commission should avoid an interpretation of Section 392.400.6 that would cause a conflict with the price cap statute, and continue to reject claims that do not meet the requirements of Section 392.400.6.

5. The Price Cap Statute Bars this Complaint.

In an effort to avoid the preclusive effect of the Missouri price cap statute, Complainants claim that "there is no authority by which SWB can establish that the price cap statute immunizes an unlawfully set rate from complaint, investigation and correction by the Commission."[40] 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

[39] In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Introduce a Payphone Use Charge, Case No. TT-2001-582, Report and Order, issued August 30, 2001 at p. 8 (emphasis added).

[40] Complainants' Suggestions in Opposition at p. 12.

Commission, it becomes a lawful rate and "has the same force and effect as if set by the Legislature."[41]

And Complainants' interpretation of the price cap statute is just plain wrong. Under Section 392.245.1 RSMo (2000), the Commission is authorized to employ price cap regulation to ensure that rates are just and reasonable. And Section 392.245.2 RSMo (2000) 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. Once that occurs, Section 392.245.3 RSMo (2000) provides that the maximum allowable prices are initially established at the level in effect on December 31 of the year prior to the price cap determination. And in interpreting the application of these statutory provisions, 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.[42]

As the Commission is aware, in that case, MCI and Public Counsel sought to initiate a rate case claiming that Southwestern Bell's access rates were excessive and that it was earning more than an authorized rate of return. The Court indicated that even if the Commission had

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[41] 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.

[42] 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).

proceeded with a rate case and revised Southwestern Bell's rates, they would be disregarded if the Commission determined that the price cap criteria had been met that same year:

> Section 392.245.3 RSMo Supp 1997 provides that the initial maximum allowable rates under price cap regulation are those rates which were in effect on December 31, prior to the price cap determination. The prior December 31 rates are deemed just and reasonable under Section 386.270 RSMo 1994 until changed by the PSC, with any such change operating only on a prospective basis. The price cap statute thus contemplates that even a recently completed rate proceeding would be disregarded for purposes of determining initial maximum allowable rates if the Commission determines that the price cap criteria have been met in the same year as any rate proceeding.[43]

Complainants also claim that the price cap statute does not apply here because "it is preempted."[44] Complainants are again mistaken. As the Complaint itself acknowledges, the FCC delegated to state commissions the task of ensuring that Southwestern Bell's payphone services comply with the requirements that they be provided at cost-based rates under the new services test.[45] Pursuant to that directive, the Missouri Commission did just that. In approving the revisions to Southwestern Bell'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.[46]

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[43] State ex rel. Public Counsel Martha S. Hogerty, Revised Findings of Fact and Conclusions of Law and Judgment, at p. 5 (emphasis added).

[44] Complainants' Suggestions in Opposition at p. 12.

[45] Complainants' Complaint at p. 11.

[46] Order Approving Tariff Revisions, Case No. TT-97-345 at pp. 8-9, 10-11.

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. Thus, those rates, as of the Order's April 15, 1997 effective date, became the maximum allowable price pursuant to Section 392.245.11.

6. The Prohibition Against Retroactive Ratemaking Bars Complainants' Claim for Retroactive Refunds.

In an attempt to avoid its refund claim being barred by the prohibition against retroactive ratemaking, Complainants' first claim that "the doctrine is not applicable."[47] To support this claim, Complainants assert that the rule against retroactive ratemaking is limited to situations "when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct the error; the only step that the Commission can take is to prospectively revise rates in an effort to set more appropriate ones."[48]

Complainants have misstated the rule against retroactive ratemaking. This can be clearly seen in the case Complainants themselves cite as authority for their position. State ex rel. Utility Consumers Council was not a case in which an estimate of costs upon which the Commission relied to set rates was later proven inaccurate. Rather, it focused on the appropriateness of a Fuel Adjustment Clause[49] that various electric utility companies were applying to residential customers pursuant to a temporary authorization issued by the Commission, which was subsequently extended and then authorized on a continuing basis. On review, the Supreme Court

[47] Complainants' Suggestions in Opposition at p. 14.

[48] Id. at p. 15.

[49] 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. State ex rel. Utility Consumer Council, 585 S.W.2d at 44.

ruled that the Commission was without authority to permit the use of such Fuel Adjustment Clauses. In view of the illegality of such clauses, Public Counsel asked the Supreme Court to remand the case to the Commission for determination of the excess amounts collected by the utilities under the Fuel Adjustment Clause, over what they would have collected under a just and reasonable rate. The Supreme Court, however, refused because doing so would violate the prohibition against retroactive ratemaking:

> 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 in the future, and so avoid further excess recovery, see, *State ex rel. General Telephone Company of the Midwest v. Public Service Commission*, 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 its property without due process. See *Arizona Grocery Company v. Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370, 389-90, 52 S.Ct. 183, 76 L.Ed.348 (1932); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 31 46 S.Ct. 363, 70 L.Ed.808 (1926); *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).[50]

Similarly, the appropriateness of the application of the rule against retroactive ratemaking can also be seen in another case cited by Complainants. In an effort to draw parallels between their case and the complaint AT&T made in AT&T v. GTE North, Complainants state that the similarities of the cases are "unmistakable," stating that:

> just as in the case with GTE North, the Complainants here allege that the rates made effective in an earlier Commission proceeding were miscalculated in violation of applicable law, a matter which the Commission may not have realized itself, and hence those rates are unlawful, unjust and unreasonable.[51]

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[50] State ex rel. Utility Consumers Council, 585 S.W.2d at 58 (emphasis added).

[51] See, Complainants' Suggestions in Opposition at p. 11.

In citing this case to the Commission, Complainants point out that the rates AT&T had complained about had been approved for two years, and highlight for the Commission the fact that "it is noteworthy that the Commission did not consider itself forbidden by the filed rate doctrine, res judicata or collateral estoppel from reconsidering the matter."[52] However, given the fact that each of the Respondents in this case also raised the defense of retroactive ratemaking, the Complainants curiously failed to disclose the fact that the Commission in that case did consider itself bound by the rule against retroactive ratemaking and refused to award retroactive refunds:

> 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 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.[53]

Finally, Complainants contend that Southwestern Bell, and perhaps the other Respondents, are "equitably estopped to asset retroactive ratemaking as a defense or ground of dismissal," and point to an April 11, 1997 letter from Michael Kellogg to the FCC.[54] In that letter, Mr. Kellogg, on behalf of the RBOCs, sought a 45-day waiver of the requirement that the RBOCs' intrastate tariffs satisfy the Commission's new services test. The purpose was to allow them 45 days to gather relevant cost

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[52] Ibid.

[53] AT&T v. GTE North, 29 Mo. P.S.C (N.S.) at 594 (emphasis added).

[54] Complainants' Suggestions in Opposition at p. 16.

information so that they could either certify that the existing tariffs satisfy the costing standards of the new services test or file new or revised tariffs that did satisfy those standards. That letter also indicated that where new or revised tariffs are required and the new tariff rates are lower than the existing rates, the RBOCs would, consistent with state requirements, reimburse or provide a credit back to the FCC's April 15, 1997 deadline.[55] Complainants' claim that "based upon the RBOCs' promise to reimburse the difference," Southwestern Bell should be estopped to now argue that a refund is inappropriate because it is "indirect contrast to their position before the FCC when they sought a waiver of the intrastate tariff filing requirements."[56]

Complainants have grossly misconstrued the Kellogg letter. First, as is evident on the face of the letter itself, estoppel does not apply here because the RBOCs' refund commitment was only for the 45 days for which the waiver was sought, not for five years. As is clear from the letter, the refund commitment was intended to apply only where an RBOC determined during that period that it needed to file a new or revised tariff with lower rates. In that situation, the refund was intended to put customers purchasing service during that 45-day period into the same position they would have been had the RBOC filed lower-rated tariffs in the first instance (on April 15, 1997). And second, the refund obligation under the commitment never arose in Missouri because the revised tariffs filed by Southwestern Bell did not result in lower rates.[57]

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[55] See, April 11, 1997 letter from Michael Kellogg to Mary Beth Richards, Deputy Bureau Chief of the FCC's Common Carrier Bureau, appended as Attachment A to Complainants' Suggestions in Opposition.

[56] Complainants' Suggestions in Opposition at p. 16.

[57] Order Approving Tariff Revisions, Case No. TT-97-345 at pp. 10-11.

WHEREFORE, Southwestern Bell respectfully renews its request that the Commission enter an order dismissing Complainants' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on November 1, 2002.

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