



**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

BARRY ROAD ASSOCIATES, et al

Plaintiffs

v.

**SOUTHWESTERN BELL
TELEPHONE COMPANY, et al.**

Defendants.

CASE NO. 1016-CV02438

DIVISION 7

**ORDER DENYING AT&T MISSOURI'S MOTION FOR SUMMARY
JUDGMENT AND STAYING THESE PROCEEDINGS FOR FORTY-FIVE DAYS**

On the 3rd day of March, 2011, this matter came before the court for hearing and consideration. The parties appeared by counsel. Counsel presented oral argument. Based on consideration of the pleadings, applicable statutory, regulatory and case authority the court enters the following findings and orders:

Findings of Fact

1) On February 14, 2007, the State of Missouri, in the case of *State of Mo. ex rel City Collectors of Wellston, et al*, Cause No. 044-02645, filed its Consolidated Master Petition for Declaratory Judgment and Other Relief. The proposed class included approximately 240¹ municipalities all of whom had enacted municipal ordinances that required AT&T and related companies to pay taxes on "Gross receipts." Plaintiffs claimed that AT&T had failed to pay certain taxes as provided for in the municipal ordinances. The City of Springfield and the City of St. Louis both filed similar court actions.

¹ Approximately 270 municipalities were included in the final settlements



2) The parties entered into settlements of the disputes with the municipalities in each of the three filed actions in 2009. By the terms of the settlement agreement in *Wellston*, defendants did not admit liability for any back taxes; however, defendants did agree to pay monies to the municipalities for claimed back taxes and further agreed to pay to the municipalities, in accordance with the terms of the settlement, "future tax benefits" in excess of what defendants contended they would otherwise owe as described in the settlement agreement. They defined the term "Business License Tax" to mean:

any tax, including any fee, charge, or assessment in the nature of a tax, imposed by a Municipality on any entity which constitutes a "telephone company," "... or any similar entity or service provider for the privilege of engaging in the business of providing telephone, exchange telephone, public utility, or any other type of telecommunications service, specifically includes any such tax imposed under §§ (cites Mo. Statutes) including municipal sales tax..., right of way usage fee..., tax...for emergency services..., rent for use of municipal premises; or Any tax which would otherwise meet the definition of Business License Tax ...

3) On November 9, 2009, the Honorable Judge Edward Sweeney approved the settlement agreement in the court's Judgment and Order Approving Settlement, and Attorneys' Fees for Class Counsel, and Dismissing Case in Accordance with Terms of Settlement. In determining if the settlement was fair, the court considered among other factors: whether there was fraud or collusion; the complexity, expense, and likely duration of the litigation; the nature and extent of the discovery process; the probability of the plaintiff's success on the merits; the range of possible recovery; and the opinions of class counsel, citing *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 378 (Mo. App. 1997).

4) Judge Sweeney's Judgment and Order specifically held that the "Settlement includes an agreement by Defendants to increase the services on which Defendants will pay taxes to the municipalities in the Settlement Class, which will result in a substantial increase of tax revenues."

5) On or about December 9, 2009, customers received bills assessing charges attributed to "Special Municipal Charge to cover settlement entered into with municipalities for gross receipts taxes imposed as follows:

MUNICIPAL CHARGES

Beginning November 1, 2009, you may see increases in the amount of Special Municipal Charges billed on your account. *These increases will help cover payments made to municipalities to settle claims related to past gross receipts taxes they imposed, and also includes such taxes on services covered by the settlement going forward...."*

6) On January 15, 2010, plaintiffs filed their Class Action Petition for Damages. Thereafter, on March 11, 2010, plaintiffs filed their First Amended Class Action Petition alleging three counts:

Count I. Violation of the Missouri Merchandising Practices Act R.S.Mo 417.010, 407.025;

Count II. Unjust Enrichment by collecting moneys from the Special Municipal Charges; and

Count III. Action for Money had and Received for receipt and retention of money belonging to plaintiffs.

7) On October 22, 2010, AT&T Missouri filed its Motion for Summary Judgment asserting that the back-tax surcharge at issue is mandated under tariff approved by the Missouri Public Service Commission and that pursuant to Rule 74.04, Mo Rules of Civ. Pro, where a tariff is "filed with the appropriate regulatory agency it is sanctioned by the government and cannot be the subject of legal action." *Bauer v. SW Bell Tel Co.*, 958 S.W.2d 568, 570 (Mo. App 1970).

Applicable Legal Authority

§ 17.11 of General Exchange Tariff 35 (the "Tariff") states in pertinent part:

There shall be added to the customer's bill or charge, as a part of the rate for service, a surcharge equal to the pro rata share of any franchise, occupation, business, license, excise, privilege or other similar tax, fee or charge (hereafter called "tax") or hereafter imposed upon the Telephone Company by taxing body or authority, whether by statute, ordinance, law or otherwise and whether presently due or to hereafter become due.

R.S.Mo § 392.350 states:

In case any telecommunications company shall do or cause to be done...any act...required to be done by this chapter or by any order or decision of the commission, such telecommunications company shall be liable to the person or corporation affected thereby for all loss, damage or injury...if the court shall find

that such an act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee...

R.S.Mo §407.020.1 states:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce...is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce... is declared to be an unlawful practice. ...

Discussion and Legal Analysis

The issues before the court include, but are not limited to, the following:

- a) Are defendants liable to the class and sub-class for violations of the MMPA R.S.Mo § 407.010, et seq?
- b) Were the Special Municipal charges billed to customers unauthorized, unlawful and/or illegal?
- c) Were defendants unjustly enriched through unlawful, unauthorized and/or inequitable billing practices?
- d) Did Defendants actions cause injury to the class and subclass and should defendants be enjoined from further injurious practices?
- e) Are the class and sub-class entitled to damages?
- f) Does the Missouri Public Service Commission pursuant 17.11 General Exchange Tariff 35 or another similar and related tariff require the pass through of applicable settlement payments to customers?

Plaintiffs claim that defendants should be precluded, based on the doctrine of judicial estoppel, from asserting that the settlement payments were payments of taxes. The doctrine of judicial estoppel exists to prevent parties from playing "fast and loose" with the court. *State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 404 (Mo. App.1998). The circumstances of this case do not bring into play the principles of judicial estoppel because not all inconsistent positions justify judicial estoppel. See *Egan v. Craig*, 967 S.W.2d 120, 126-27 (Mo. App. 1998) (citations omitted). There is no question defendants consistently denied that they owed additional taxes to the

municipalities in the Wellston litigation, and the judgment of Judge Sweeney acknowledged that whether additional taxes were due was dependent on matters as to which "Missouri law is unsettled." *Wellston* Judgment at p.12. This court knows of no law that denies a party the right to deny liability as a part of a settlement, and especially as to an area about which the law is unsettled. Because AT&T did nothing more than vigorously defend its right to challenge interpretations of law as it relates to past and future taxes, there is nothing to suggest defendants were attempting to impugn the integrity of the court.

A significant issue in this case is whether a settlement of a dispute between AT&T companies and approximately 270 municipalities concerning claims of underpaid gross receipts taxes can, pursuant to applicable tariffs, be passed on to AT&T's customers, or whether AT&T and the municipalities are precluded from settlement and must instead complete the entirety of the litigation and trial procedure. This court is aware of no statutory or other legal authority that would force AT&T to go through the burdensome discovery, trial and appeals processes in order to claim the applicability of § 17.11 of General Exchange Tariff 35. In fact, the Missouri Supreme Court, in *Roxanne Kerperien v. Lumberman's Mutual Casualty Company*, 100 S.W.3d 778 (Mo. 2003), acknowledged the recognized public policy in Missouri favoring settlement of litigation. 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. On page 18 of the *Wellston* Judgment, the court found with regard to past taxes that:

"FURTHER, in accordance with the terms and provisions of the Settlement Agreement, this Court orders that Defendants shall make Back Tax Payments to Class Members which have submitted approved claims as provided in the Settlement Agreement..."

On page 14 of the *Wellston* Judgment, the court stated with regard to future taxes that:

"...the Settlement includes an agreement by Defendants to increase the services on which Defendants will pay taxes to the municipalities in the Settlement Class, which will result in a substantial increase of tax revenues received from Defendants..."

In this litigation, the plaintiffs are essentially requesting that this court ignore the above findings and orders of another circuit court on the nature of the settlement, in regards to whether the payments are actually for taxes, past and future, or to "reverse" these critical findings and the orders entered by the court in *Wellston*. This court does not have that authority. In the case of *Richard E. Standridge v. Jacqueline M. Adams*, 636 S.W.2d 680, 683 (Mo. App.1982), the appellate court considered the matter of the authority of one circuit court judge to review decisions of another circuit court judge and held that "the second judge is invested with no review authority." *Id.*

The significance of these limitations on circuit court judges is particularly pertinent in a case of this nature, where it is a specific court decision that is the subject of the plaintiffs' claims. Here, the prior court ruled on a number of issues that are challenged in these proceedings. Among these are the following:

- a) Whether the settlement specifically involves past and future gross receipts or sales taxes. *See* discussion above.
- b) Whether the settlement payments can be passed through to AT&T customers. The court in *Wellston* did not rule as to whether the taxes paid by defendants to the municipalities could be included in the Defendants' billing to consumers. Instead, it determined that the pass through of tax payments to customers was a matter determined by the Public Service Commission.

"[w]hether or not any tax paid by Defendants to the municipalities can be included in the Defendants' billing to consumers who are their customers is determined by the Public Service Commission. It is this Court's understanding, based on the presentations of counsel at the November 2, 2009, hearing, and the supporting documents...that: 1.) 'The governing tariff [of the PSC] authorizes AT&T Missouri to pass through to its customers the amounts it pays in the form of taxes, fees, or charges imposed by any taxing body, including municipal business license taxes imposed by municipalities.'" *Wellston* Judgment.

- c) Whether there were other payments than taxes that were passed through to customers:

"AT&T is not surcharging its retail customers any amounts paid as attorneys' fees in connection with the settlement..." *Wellston* Judgment.

- d) Whether there was a fraud against AT&T customers in the settlement of the *Wellston* litigation. The court discussed the complexity of the litigation, and that:

“[The] issues presented by this case are in some part matters in which Missouri law is unsettled, neither Plaintiffs nor Defendants can be confident that a trial would result in judgment in their favor” *Wellston Judgment*.

Public utility tariffs that have been approved by the Missouri Public Service Commission become Missouri law and have the same force and effect as a statute enacted by legislature. *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App. 1997) citing *Southwestern Bell Telephone Co. v. Metro-Link Telecom, Inc.*, 937 S.W.2d 314, 317 (Mo. App. 1996). When analyzing a tariff, if the tariff is clear and unambiguous, the court cannot give it another meaning. *Id.* at 570. The court in *Bauer* further stated:

“The filed tariff, or filed rate doctrine governs a utility’s relationship with its customers... The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of the published tariffs.” *Id.*

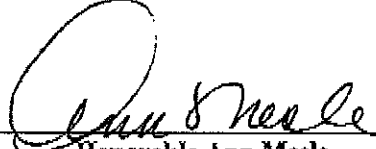
Plaintiffs claim that defendants cannot seek the protection of the Missouri Public Service Commission because AT&T has opted out of certain regulatory tariffs. It is unclear to this court whether that action does or does not have any impact on the authority of the court to act in this matter. However, because, as set forth above, the court believes that Judge Sweeney determined that the Missouri Public Service Commission had jurisdiction to determine whether these payments should be passed through to customers, this court believes it has no authority to second guess that decision.

This court finds and believes that it has no authority to second guess the decision of Judge Sweeney that the underlying settlement was for back and future tax payments. The Court also finds and believes that it has no authority to second guess the decision of Judge Sweeney that it is the Missouri Public Service Commission that must determine whether these tax payments should be passed through to customers and further to determine whether AT&T’s actions in deregulating some of its business activities is controlling as to the applicability of the General Exchange tariffs to this litigation. This court therefore believes it is appropriate to stay these proceedings to allow plaintiffs 45 days to seek a ruling from the Missouri Public Service Commission concerning whether the settlement payments made by AT&T Missouri are tax payments which are required to be passed through to AT&T customers consistent with applicable tariffs.

WHEREFORE, IT IS ORDERED THAT further proceedings in this case are stayed for 45 days to allow plaintiffs to seek ruling from the Missouri Public Service Commission as to whether the settlement payments made by AT&T are to be passed through to AT&T customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs.

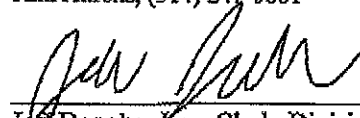
IT IS SO ORDERED.

April 4, 2011
Date


Honorable Ann Mesle
Circuit Court Judge

I certify that copies were faxed/mailed on
this 4th day of April, 2011 to:

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