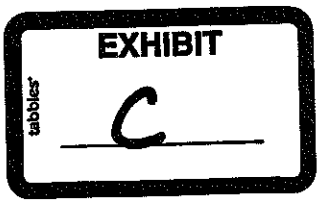
IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

BARRY ROAD ASSOCIATES, INC., d/b/a MINSKY'S PIZZA, et al	)	
Individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
	)	**Case No: 1016-CV02438**
v.	)	
	)	**Div. 7**
SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T MISSOURI, et al	)	
Defendants.	)	

PLAINTIFFS' RESPONSE AND MEMORANDUM IN OPPOSITION TO AT&T MISSOURI'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Having repeatedly and unequivocally denied all liability for payment of "back taxes" to certain municipalities, AT&T Missouri ("AT&T") now defends this action based entirely on a contention that it paid "back taxes" to those municipalities. Plaintiffs fully understand, and do not challenge, AT&T's entitlement to recover from its customers, pursuant to a lawfully filed tariff, taxes imposed upon it by a government body acting in its taxing capacity. Such is the manifest meaning of the tariff at issue. But, there are at least two immediate reasons that the tariff is entirely inapposite here. First, nobody *imposed* anything upon AT&T. Rather, the company voluntarily paid the municipalities sums of money in order to reduce its litigation exposure; i.e. AT&T *chose* to settle the lawsuits. Second, when entering into settlement agreements with local exchange carriers, or anyone else for that matter, Missouri municipalities are plainly not acting as taxing authorities, as contemplated under the tariff. If the



2. In accordance with this regulatory scheme, AT&T Missouri filed its current General Exchange Tariff, P.S.C. Mo. - No. 35 (the "Tariff"), on December 29, 1983. *See* Ex. 1 and 2.

Response: Plaintiffs object and move to strike Fact 2, as it does not state a proposition of fact, but rather a legal conclusion. *Id.*

3. Under its rate-oversight authority, the PSC approved the Tariff effective January 1, 1984. *See* 1983 Mo. PSC LEXIS 4 (Mo. PSC 1983), attached as Ex. 3.

Response: Plaintiffs object and move to strike Fact 3, as it does not state a proposition of fact, but rather a legal conclusion. *Id.*

4. For decades, AT&T Missouri's General Exchange Tariffs have contained provisions requiring municipal taxes to be passed through to subscribers. Section 17.11 of the Tariff (hereinafter § 17.11), the current pass-through tariff provision for any franchise, occupation, business, license, excise, privilege or other similar tax, fee, or charge, arose from § 25.11 of the prior General Exchange Tariff, P.S.C. Mo. – No. 22, which remained in effect from July 1971 until January 1, 1984 (when it was replaced in its entirety by P.S.C. Mo. – No. 35). *See* Ex. 4. The pass-through provision of the Tariff originated from provisions contained in P.S.C. Mo. – No. 16 (the General Exchange Tariff preceding P.S.C. Mo. – No. 22) that the Commission approved April 10, 1968, through Telephone Authority Order No. 558. *See* Exs. 5 and 6.

Response: Plaintiffs object and move to strike Fact 4, as it does not state a proposition of fact, but rather legal conclusions. *Id.* Plaintiffs further object and move to strike to Fact 4 because it contains more that one statement of "fact," in violation of Rule 74.01(c)(1).

5. Section 17.11 of the Tariff states in relevant 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") now or hereafter imposed upon the Telephone Company by any taxing body or authority, whether by statute, ordinance, law or otherwise and whether presently due or to hereafter become due.
>
> On or after the effective date thereof, any subsequent increase, decrease, imposition or determination of liability for such taxes, fees or charges as described above shall be applied . . . to the customer's bill or charge on each individual billing date.

See Ex. 2 (emphasis added).

Response: Plaintiffs object and move to strike Fact 5, as it does not state a proposition of fact, but rather a legal conclusion. *Id.* Plaintiffs further object to Fact 5 to the extent it purports to state, as uncontroverted, the "relevant part" of AT&T's tariff, which is similarly a legal conclusion.

6. The Tariff governs the relationship between AT&T Missouri and its landline telephone customers, including Plaintiffs and the putative class. *Bauer v. Sw. Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997).

Response: Plaintiffs object and move to strike Fact 6, as it does not state a proposition of fact, but rather a legal conclusion. *Id.* Plaintiffs further object and move to strike to Fact 6 because it does not contain any "specific references to the pleadings, discovery, exhibits or affidavits," as required by Rule 74.04(c)(1).

7. On March 11, 2010, Plaintiffs Barry Road Associates, Inc., d/b/a Minsky's Pizza, The Main Street Associates, Inc. d/b/a Minsky's Pizza, and Harry Mark Wooldridge filed a first amended putative class action petition against Southwestern Bell Telephone Company, d/b/a AT&T Missouri, AT&T Corp., and AT&T Inc., for violation of the Missouri Merchandising Practices Act ("MMPA"), unjust enrichment, money had and received, breach of the implied

covenant of good faith and fair dealing, and statutory damages under § 392.350 RSMo. *See generally* First Am. Pet.

Response: Fact 7 is undisputed.

8. Plaintiffs' claims arise out of and relate to charges on their telephone bills. *See* First Am. Pet. ¶ 4. Plaintiffs allege that charges attributed to "Special Municipal Charge to cover settlement paid to municipalities for past gross receipts taxes imposed" are unlawful and entitle them to damages. *Id.* ¶¶ 20-22, 25, 39, 47, 56-58, 62-64, 68-69, and 72.

Response: Plaintiffs object and move to strike to Fact 8 because it contains more that one statement of "fact," in violation of Rule 74.01(c)(1). Plaintiffs dispute AT&T's incomplete characterization of the First Amended Petition, which Plaintiffs hereby cite and incorporate by reference, as if fully set forth herein.

9. Plaintiffs' proposed class includes all individuals and businesses in Missouri who:

> have received local exchange carrier telephone services through "Southwestern Bell Telephone Company," "AT&T Missouri," or "AT&T," have been billed for such services, and have received a charge on a bill attributable to a settlement agreement reached in response to a lawsuit by any Missouri municipality alleging that Defendants failed to pay business license or municipal gross receipts taxes, including, but not limited to, the settlements reached in *State of Missouri v. SBC Communications, Inc.*, Case No. 004-02645, filed on June 26, 2009 in the Circuit Court of St. Louis, Missouri and *City of Jefferson and City of Springfield v. Cingular Wireless LLC, et al.*, Case No. 04-CV-4099-NKL, filed on May 12, 2004 in the United States District Court for the Western District of Missouri.

Id. ¶ 29.

Response: Fact 9 is undisputed.

10. The pass through of back taxes (*i.e.*, the Special Municipal Charges) upon which Plaintiffs' claims rest is rooted in three prior lawsuits filed against AT&T Missouri and related entities. *See* Ex. 7, *City of Wellston, Mo., et al. v. SBC Communications, Inc., et al.*, Case No.

044-02645 (filed December 30, 2004, St. Louis City Cir. Ct.); Ex. 8, *City of Springfield v. AT&T Missouri., et al.*, No. 04-4099-cv (filed May 14, 2004, W.D. Mo.); Ex. 9, *St. Louis County, Missouri v. AT&T Corp., et al.*, No. 08SL-CC00125 (filed Jan. 11, 2008, St. Louis County Cir. Ct.) (collectively the "Tax Litigation").

Response: Fact 10 is disputed. Plaintiffs claims do not rest on the pass through of any taxes or back taxes, as set forth in response to Fact 11, below, which response is hereby incorporated by reference as if fully set forth herein.

11. Each of these lawsuits was settled, and the settlement terms required that AT&T Missouri make back tax payments to eligible taxing entities. *See* Ex. 10, *Wellston* Settlement Agreement at 14, § II.A; Ex. 11, *Wellston* J. & Order Approving Settlement; Ex. 12, S. Shashack Aff., at Exs. 12A at 8, § II.A and 12B at 2, ¶ 2.

Response: Plaintiffs object and move to strike Fact 11, as it does not state a proposition of fact, but rather a legal conclusion. To the extent Fact 11 states a proposition of fact, it is disputed. In the *Wellston* and *St. Louis County* settlement agreements, the term "Back Tax Payment" is specifically defined, and therefore cannot be given its common meaning, or any other meaning than that indicated in the agreements. Ex. 10[2] at 12; Ex. 12A at 6, 8-9. That definition relates to sums paid according to the agreements themselves; the definition does not include actual taxes. *Id.* In the *Springfield* settlement agreement, the term "Back Tack Payment" is undefined but, in context, clearly has the same meaning as that attributed to it in the *Wellston* and *St. Louis County* settlement agreements. Ex. 12B at 2. All three settlement agreements make clear that the payments being made by AT&T are not tax payments, but rather are voluntarily made in consideration for the Plaintiffs' dismissal of the lawsuits and release of claims; in fact, in all three agreements Defendants unequivocally deny that they are agreeing to pay taxes. Ex.

[2] All references to exhibits are to the exhibits attached to AT&T's Memorandum of Law, except where indicated.

10 at 3 ("Defendants have denied and continue to deny any and all liability with respect to the allegations raised against them in the various lawsuits involving the applicability of Plaintiffs' and other Municipalities' respective Business License Tax ordinances to Defendants' products and services."); Ex. 10 at 37 (stating that the agreement was entered into "[i]n order to effectuate the Parties' desire to fully, finally and forever settle, compromise, and discharge all disputes arising from or related to the Action by way of compromise rather than by way of further litigation."); Ex 10 at 43 ("Neither the acceptance by Defendants of the terms of this Settlement Agreement nor any of the related negotiation or proceedings is or shall be construed as deemed to be legal evidence of an admission by Defendants with respect to the merits of the claims alleged in the Action, the validity of any claims that could have been asserted by any of the Class members in the Action, or the liability of Defendants in the Action. Defendants specifically deny any liability or wrongdoing of any kind associated with the claims alleged in the Action. Aside from the obligation to pay Business License Taxes going forward. . . **this settlement agreement is not intended to, and shall not be construed as imposing any other obligation on Defendants under the Class member's respective ordinances**, including without limitation any rate regulation or customer service requirements.) (Emphasis added); Ex. 12A at 3, 20-21, 23 (same); Ex. 12B at 1 ("**AT&T denies any and all liability for taxes** and will continue to defend itself in litigation and otherwise absent execution of this Agreement.") (Emphasis added.); Ex. 12B at 2, ¶1 (expressly agreeing that there was no determination on the merits of the municipalities' claims); ex. 12B at 4, ¶11. As the terms of the settlement agreements establish, merely calling the payments "back taxes" does not make it so.

12. AT&T Missouri accordingly made back tax payments to eligible taxing entities pursuant to the settlement agreements. *See* Ex. 10 at 14, § II.A; Ex. 12 at Exs. 12A at 8, § II.A

and 12B at 2, ¶ 2.

Response: Plaintiffs object and move to strike Fact 12, as it does not state a proposition of fact, but rather a legal conclusion. To the extent Fact 12 states a proposition of fact, it is disputed. As set forth above, any payments made by AT&T pursuant to the settlement agreements were not tax or back tax payments. Plaintiffs incorporate their response to Fact 11 as if fully set forth herein.

13. AT&T Missouri began to pass through these back tax payments to its customers via a monthly surcharge. *See* First Am. Pet.

Response: Fact 13 is disputed. As set forth above, any charge attributed to the settlement agreements and passed through to AT&T's customers is not attributable to any tax or back tax imposed upon AT&T. Plaintiffs incorporate their response to Fact 11, as if fully set forth herein.

14. These back-tax surcharges give rise to each of Plaintiffs' asserted causes of action. *See generally* First Am. Pet.

Response: Fact 14 is disputed. The surcharges are unrelated to any tax or back tax. Plaintiffs incorporate their response to Fact 11, as if fully set forth herein.

III. Additional Disputed Material Facts

1. Neither Plaintiffs nor any member of the proposed Class are parties to the *Wellston*, *Springfield*, and/or *St. Louis County* cases or settlement agreements. Exs. 7, 8, 9, 10, 12A, 12B.

2. AT&T failed to pay business license and gross receipt taxes to Missouri municipalities, as alleged in the *Wellston*, *Springfield*, and *St. Louis County* Petitions. Exs. 7, 8, 9, 10, 12A, 12B.

3. AT&T did not fail to pay business license and gross receipt taxes to Missouri

municipalities, as alleged in the *Wellston*, *Springfield*, and *St. Louis County* Petitions. Exs. 7, 8, 9, 10, 12A, 12B.

4. AT&T's payments under the *Wellston*, *Springfield*, and *St. Louis County* settlement agreements were not imposed upon AT&T. Ex. 10 at 3, 10, 12, 37, 43; Ex. 12A at 3, 6, 8-9, 20-21, 23; Ex. 12B at 1, 2 (¶1), 4 (¶11).

IV. Argument

AT&T's Memorandum begins and ends under the incorrect assumption that this case is about taxes imposed upon it, filed rates, and case law establishing the legal effects of filed tariffs. None of the cases cited by AT&T in support of application of the filed rate doctrine touch upon the threshold question at the center of Plaintiffs' allegations, which is whether the facts of this case trigger application of the tariff in the first instance. To be sure, it is unclear whether AT&T *did not* owe unpaid taxes to the municipalities, as it stated in the settlement agreements, or whether AT&T *did* owe and pay such taxes to those municipalities, as it argues now. From Plaintiffs' perspective, Plaintiffs are either paying for AT&T's decision to violate municipal tax laws or paying for AT&T's decision to pay the municipalities to go away. What AT&T cannot adequately explain is why either of these possibilities is in accordance with the law or any recognizable public policy. There is one point on which the parties squarely agree, and it is that AT&T's duly approved and filed tariffs should be construed according to general rules of statutory interpretation. *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 210 S.W.3d 330, 337 (Mo. App. W.D. 2006).

Section 17.11 of General Exchange Tariff 35 (the "Tariff") begins as follows:

> 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") now or hereafter imposed upon the Telephone Company by any

taxing body or authority, whether by statute, ordinance, law or otherwise and whether presently due or to hereafter become due.

When construing statutes, "the primary rule is to consider words in their plain and ordinary meaning." *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. 2006). "A court may not add words by implication to a statute that is clear and unambiguous." *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. 2008). "When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary." *Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22, 24-25 (Mo. 2008). Accordingly, in order for AT&T to bill a customer for a surcharge under the Tariff, such charge must be *all* of the following:

(1) equal to the pro rata share of one of the following: franchise tax, franchise fee, franchise charge, occupation tax, occupation fee, occupation charge, business tax, business fee, business charge, license tax, license fee, license charge, excise tax, excise fee, excise charge, privilege tax, privilege fee, privilege charge, or some other, similar tax, fee or charge; and

(2) now or hereafter imposed upon the Telephone Company; and

(3) by any taxing body or authority, whether by statute, ordinance, law or otherwise; and

(4) presently due or to hereafter become due.

The second element of the Tariff is dispositive of AT&T's defense in this case. While the statute unambiguously requires that a payment be imposed upon AT&T in order for an allowable pass-through, AT&T has indisputably taken on the settlement liabilities voluntarily, not by imposition. *See* Fact 11 and Response, above. Of course, it may be just as apt to state that AT&T imposed the charge upon itself, in which case element 2 is met, but element 3, which requires imposition by someone else, would plainly not be met. "Impose" means "[t]o levy or exact (a tax or duty)." Black's Law Dictionary (9th ed. 2009). Plaintiffs submit that a company's voluntarily entering into a litigation settlement agreement is the antithesis of having a sum of

money levied or exacted from it. The shareholders of AT&T are ultimately liable for the risks the company takes and for what its Board of Directors chooses to spend. AT&T has put forth no evidence, whatsoever, that in this case such liability was lifted from the shareholders and placed upon the shoulders of customers by anyone other than AT&T itself.

Nor can AT&T establish that the first element of the Tariff has been met here. Plaintiffs presume that AT&T would rely on the term "business tax" or the "some other, similar, tax fee or charge" language of the Tariff. But, the settlement agreements reached with the municipalities completely negate the possibility that the payments could be characterized as *any* type of tax, fee, or charge. First, AT&T has expressly denied that it owed any tax, as alleged in the municipalities' petitions. Fact 11 and Response, above. The settlement agreements were presented to, and approved by, Missouri Courts. *E.g.*, Ex. 11. AT&T should therefore be judicially estopped from taking the position it now takes in this litigation. "Judicial estoppel will lie to prevent litigants from taking a position, under oath, in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits. . . at that time." *State Bd. of Accountancy v. Integrated Financial Solutions, L.L.C.*, 256 S.W.3d 48, 54 (Mo. 2008). Moreover, the word "fee" means "[a] charge for labor or services, esp. professional services." Black's Law Dictionary (9th ed. 2009). AT&T's settlement payments to the municipalities certainly do not fall within this definition, because the agreements concede that AT&T is paying to avoid litigation exposure, and not for the municipalities' labor or services. Fact 11 and Response, above. Nor can the payments be reconciled with the definition of "charge," which is (in this context) "[a]n encumbrance, lien, or claim." *Id.* At base, the plain meaning of all three words—tax, fee, and charge—is that *someone else* is exacting something, as discussed above. But, even

if that were not the case, the meaning of these words does not coincide with what happened here.

Furthermore, although the municipalities are, in fact, taxing authorities, it does not follow that they act as such in all instances. The law is clear that the scope of a taxing body's right to tax is defined entirely by statute. *Excel Drug Co., Inc. v. Missouri Dept. of Revenue*, 609 S.W.2d 404, 409 (Mo. 1980). Although the municipalities' action in bringing suit against AT&T may well fall within their taxing capacities, there is no statute that imposes upon Missouri taxing authorities a duty or a right to end such tax recovery litigation and enter into a contract providing for payment of less than the full amount of tax due.[3] Indeed, to allow one corporation to pay less than the full amount of tax assessed, while others similarly-situated are required to pay 100 percent of their tax liabilities, would violate the very anti-discriminatory polices upon which AT&T bases it public policy arguments in this case. In essence, when the municipalities entered into the settlement agreements, they were acting simply as parties litigant, not as legislative bodies exacting taxes according to their constitutional and statutory authority. For this additional reason, yet another necessary element of the Tariff has not been satisfied.

Stepping back a bit from a mechanical approach to construction of the Tariff language (which approach Plaintiffs maintain is required), the Tariff, read as a whole, has a clear purpose and meaning. It exists to provide AT&T with a direct means by which to recover costs of operation about which it has no discretion, and no say in the matter. As AT&T correctly argues, in addition to its logistical utility, the Tariff provides the benefit of attributing taxes exacted upon AT&T to customers of the taxing entity that imposed the tax in the first place. The hallmark of the Tariff's operation, then, is a mechanical flow of *defined* tax liability, first exacted by the

[3] Plaintiffs do not suggest that the municipalities had no legal authority to settle with AT&T, but rather that the focus, purpose, and effect of such settlements constitute neither exacting a tax nor recovering what is due, in full. In choosing to settle, the municipalities were presumably weighing the risks and costs of litigation, and not exacting or collecting taxes.

taxing municipality, upon AT&T (serving in a truly ministerial capacity), to the customer-residents of the taxing municipality. The system is logical, fair, and uncontroversial, which is presumably why the PSC approved it many years ago. In contrast, what happened here is detached from, and foreign to, this tried-and-true system, primarily because the Special Municipal Charge was born entirely out of AT&T's prerogative, whether that prerogative is underpinned by its own failure to comply with the various tax ordinances or its own choice to avoid litigation exposure. The rationale and public policy behind the tariff are therefore absent. There is no logistical utility or inherent fairness where a corporate defendant intentionally negotiates with plaintiffs over millions of dollars in potential liabilities, knowing that it has an unquestioned statutory right—and even an *obligation*—to avoid paying any agreed upon settlement amount. If the Tariff can be read this way (which it cannot), AT&T is free to haphazardly settle, for any amount, litigation even remotely related to its "operating costs." After all, the consequences of its decision to avoid judgment on the merits of the litigation will never be felt by AT&T. It has no dog in the hunt. This particular settlement motivation need not be presumed, because AT&T expressly inserted it into all three settlement agreements. Ex. 10 at 28, §C ("The Class Members agree not to challenge the right of Defendants to pass through to their retail customers all or any part of the sums paid or to be paid to a Class Member under the Business License Tax Ordinances and this Settlement Agreement"); Ex. 12A at 20, §C; Ex. 12B at 6, §21. Neither the text nor the purpose or spirit of the tariff can be reconciled with AT&T's attempted use of it here.

AT&T makes an additional argument that the second paragraph of Section 17.11 allows the pass-through at issue. AT&T's memo at 11. That paragraph states as follows:

> On and after the effective date thereof, any subsequent increase, decrease, imposition or determination of liability for such taxes, fees or charges as

> described above shall be applied, in the manner provided below, to the customer's bill or charge on each individual billing date.

AT&T suggests that the language "imposition or determination of liability" somehow applies here. However, as discussed above, there has been no imposition of any tax, fee, or charge upon AT&T in this case. It did not have to settle the lawsuits, particularly in light of the fact that it denies liability for the taxes at issue in those cases. But, it did choose to settle. This is simply not an imposition upon AT&T. To the extent AT&T suggests that its voluntary settlement constitutes a "determination of liability," that position is untenable, given that the settlement agreements expressly and repeatedly deny any admission or determination of liability. AT&T agreed that "Defendants have denied and continue to deny any and all liability with respect to the allegations raised against them in the various lawsuits involving the applicability of Plaintiffs' and other Municipalities' respective Business License Tax ordinances to Defendants' products and services." Ex. 10 at 3. AT&T's motivation for settling could not be clearer: "to effectuate the Parties' desire to fully, finally and forever settle, compromise, and discharge all disputes arising from or related to the Action by way of compromise rather than by way of further litigation." Ex. 10 at 37. To be sure, AT&T did not rest on merely a single denial of liability in the settlement agreements, but rather repeated and expanded on its denial of liability for taxes:

> Neither the acceptance by Defendants of the terms of this Settlement Agreement nor any of the related negotiation or proceedings is or shall be construed as deemed to be legal evidence of an admission by Defendants with respect to the merits of the claims alleged in the Action, the validity of any claims that could have been asserted by any of the Class members in the Action, or the liability of Defendants in the Action. Defendants specifically deny any liability or wrongdoing of any kind associated with the claims alleged in the Action. Aside from the obligation to pay Business License Taxes going forward. . . **this settlement agreement is not intended to, and shall not be construed as imposing any other obligation on Defendants under the Class member's respective ordinances**, including without limitation any rate regulation or customer service requirements.

Ex. 10 at 43 (emphasis added); *see also* Ex. 12A at 3, 20-21, 23. Although this language from the *Wellston* and *St. Louis County* Agreements is unequivocal, the *Springfield* Agreement is even more so: **"AT&T denies any and all liability for taxes** and will continue to defend itself in litigation and otherwise absent execution of this Agreement." (emphasis added); *see also* Ex. 12B at 2, ¶1; ex. 12B at 4, ¶11.

Even if the filed rate doctrine were somehow applicable here, it would preclude AT&T's attempted surcharging of past liabilities to present customers such as Plaintiffs. In the rate-making case of *State ex rel. Capital City Water Co. v. Public Service Commission*, the Missouri Supreme Court reviewed the propriety of a utility's inclusion of past development costs in its calculation of future rates. 252 S.W. 446, 449 (Mo. 1922). The Court, adopting the analysis of the United States Supreme Court in *Galveston Electric Company v. Galveston*, 258 U. S. 388 (1922), also adopted the following statement made by the PSC: **"If it were possible to capitalize losses, the most unsuccessful property would have the greatest going value, thereby creating an illegal and absurd basis for rate making."** *Capital City Water Co.* at 449 (emphasis added). Similarly, the payments made by AT&T to the municipalities here constitute past losses which cannot, under the analysis of *Capital City Water Co.*, be capitalized and made part of the rates passed through to AT&T customers going forward. In short, the settlement payments represent losses to be set against profits, and do not represent costs of future operation. While Plaintiffs believe this analysis is unnecessary in light of the facial inapplicability of the Tariff, even if the Tariff could be given application here, the pass-through of past settlement liabilities to Plaintiffs and the Class would be contrary to Missouri law.

Finally, Plaintiffs contend that, because Plaintiffs have not secured an order of the PSC regarding AT&T's liability, AT&T is entitled to summary judgment as to Plaintiffs' statutory

cause of action under section 392.350, RSMo. This is still another attempt by AT&T to "have its cake and eat it, too." AT&T has opted out of PSC regulation as to its billing procedures and practices, Ex. A. AT&T cannot have it both ways; either the PSC or this Court must have primary jurisdiction over alleged wrongful billing practices. AT&T has unequivocally chosen the latter.

Section 392.350, RSMo. states as follows:

> In case any telecommunications company shall do or cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or other thing 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 caused thereby or resulting therefrom, and in case of recovery, 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, which fee shall be taxed and collected as a part of the costs in the action. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

This statue provides a private cause of action as to *any* prohibited act or omission by a telecommunications company. Section 392.350 "is to be liberally construed for the public's, ergo the consumer's, protection." *De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo. App. 1976).

The Petition alleges numerous prohibited and unlawful acts by AT&T, including violations of the Merchandising Practices Act, wrongful and unjust retention of Plaintiffs' money, breach of the implied covenant of good faith and fair dealing, failure to file a rate encompassing the Special Municipal charges, failure to give Plaintiffs notice of the Special Municipal Charge, and failure to file tariff pages pursuant to an order of the PSC. *See* First Amended Petition. These unlawful acts entitle Plaintiffs to relief under the statute. The cases cited by AT&T are limited in their application to matters over which the PSC *has* jurisdiction

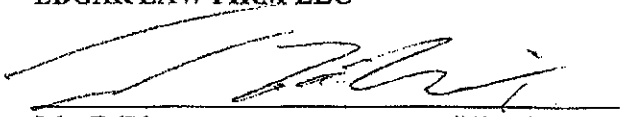
and authority to enter an order. In *Overman v. Sw. Bell Tel. Co.*, the Court held that an action brought under section 392.350 alleging violation of section 392.200, related to the reasonableness of charges, required a prior order of the PSC. 706 S.W.2d 244, 251-52 (Mo. App. 1986). However, *Overman* was decided long before AT&T opted out of PSC regulation of its billing practices. Ex. A. Because of Defendant's opting out, no PSC order could have bearing on the issues alleged in the Petition and the rationale for first seeking an order of that agency is therefore absent. This is confirmed by the other case AT&T cites, *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo. App. 1978). In that case, the Court stated that "[m]atters within the jurisdiction of the Public Service Commission must first be determined by it in every instance before the courts have jurisdiction to make judgments in the controversy." It follows, of course, that matters outside the PSC's jurisdiction, such as billing complaints against Defendant here, fall within the jurisdiction of the Circuit Courts.

V. Conclusion

Because AT&T's payments to the municipalities are not in the nature of tax payments, the Tariff is inapplicable and, consequently, the filed rate doctrine is also inapplicable. The Special Municipal charges are unlawful, deceptive, and unjust. Therefore, Plaintiffs respectfully ask that AT&T's Motion for Summary Judgment be denied.

Respectfully submitted,

EDGAR LAW FIRM LLC



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, via U.S. Mail, First Class, postage prepaid and electronically emailed in Microsoft Word format on this 10th day of January, 2011 to the following:

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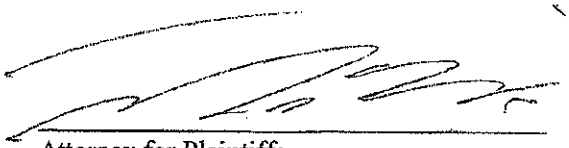


Attorney for Plaintiffs

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Notice of Election of Southwestern Bell Telephone Company d/b/a AT&T Missouri for Waiver of Commission Rules and Statutes Pursuant to Section 392.420, RSMo	))))	**Case No. IE-2009-0082**

ORDER CONCERNING ELECTION OF WAIVERS

Issue Date: November 10, 2008 Effective Date: November 10, 2008

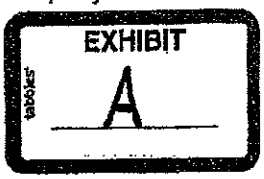
On August 28, 2008, House Bill 1779 became effective, modifying §392.420 RSMo 2000, so that it now provides, in pertinent part:

> Notwithstanding any other provision of law in this chapter and chapter 386, RSMo, where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company's authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected.

On August 28, 2008, Southwestern Bell Telephone Company d/b/a AT&T Missouri ("the Company") filed notification with the Missouri Public Service Commission ("Commission") that it elects to waive certain Commission rules and statutory provisions pursuant to RSMo Section 392.420. AT&T Missouri has not yet submitted a tariff filing to identify these waivers in their tariff.

On September 26, 2008, the Commission Staff submitted its memorandum concerning the notice. It noted that:

1. AT&T Missouri is an incumbent local exchange telecommunications company as that term is used in Section 392.420.



2. Prior Commission cases and annual reports confirm that one alternative local exchange telecommunications carrier is providing service in some part of the Company's territory.

3. AT&T Missouri is currently compliant in obligations relating to Commission assessment, Missouri Universal Service Fund, Relay Missouri, and the submission of an annual report.

4. The waivers into which AT&T Missouri has opted are:

4 CSR 240-3.550 (4) and (5)(A), Held order records, quality of service reports.
4 CSR 240-32.060 Engineering and maintenance
4 CSR 240-32.070 Quality of Service
4 CSR 240-32.080 Service objectives and surveillance levels
4 CSR 240-33.040(1-3) and (5-10) Billing and payment standards
4 CSR 240-33.045 Clear identification and placement of charges on bills
4 CSR 240-33.080(1) Identify company name and toll-free number on bills
4 CSR 240-33.130(1),(4) and (5) Operator service requirements
392.210(2) Accounting requirements (system of accounts)
392.240(1) Reasonableness of rates
392.270 Accounting requirements (valuation of property)
392.280 Accounting requirements (depreciation rates/accounts)
392.290 Issuance of stocks, bonds and other indebtedness
392.300 Transfer of property and ownership of stock
392.310 Approval of issuing stocks, bonds and other indebtedness
392.320 Certificate of Commission to be recorded-stock dividends
392.330 Accounting requirements (proceeds of sales of stock, bonds, notes, etc.)
392.340 Company reorganization

The Staff recommends that the Commission take notice of the Company's election to opt into the waivers listed in its Notice of Election for Waivers. In addition, Staff recommends the Commission direct AT&T to file tariff pages in compliance with the waivers that designate the rules and statutes waived.

Section 392.420 further provides:

> The commission may reimpose its quality of service and billing standards rules, as applicable, on an incumbent local exchange telecommunications company but not on a company granted competitive status under subdivision (7) of subsection 5 of section 392.245 in an exchange where there is no alternative local exchange telecommunications company or interconnected voice over Internet protocol service provider that is certificated or registered to provide local voice service only upon a finding, following formal notice and hearing, that the incumbent local exchange telecommunications company has engaged in a pattern or practice of

> inadequate service. Prior to formal notice and hearing, the commission shall notify the incumbent local exchange telecommunications company of any deficiencies and provide such company an opportunity to remedy such deficiencies in a reasonable amount of time, but not less than sixty days. Should the incumbent local exchange telecommunications company remedy such deficiencies within a reasonable amount of time, the commission shall not reimpose its quality of service or billing standards on such company.

THE COMMISSION ORDERS THAT:

1. The Company's Notice of Election is acknowledged as received.

2. The Staff shall send a public notice to news outlets in the Company's service area and the State Legislators whose districts are in the service area, notifying the news outlets and State Legislators that customers in those exchanges served by the filing company is no longer subject to certain Commission quality of service and billing rules, and also provide a brief description of the rules that are waived. The notice shall also inform the news outlets and State Legislators that although the Commission no longer has jurisdiction to process those complaints, the Commission will continue to track any positive and negative inquiries or complaints about service quality and billing issues.

3. The Company shall file tariff pages in compliance with the waivers that designate the rules and statutes waived on or before December 6, 2008. Such tariff pages will not be approved, but will take effect by operation of law.

4. The Commission's Customer Service Staff shall receive and track any positive and negative inquiries or complaints about service quality and billing issues and if Staff determines that the Company has engaged in a pattern or practice of inadequate service in service quality or increase in billing issues, it shall notify the Commission by filing a written report.

5. This order is effective upon issuance.

BY THE COMMISSION

Colleen M. Dale
Secretary

(SEAL)

Colleen M. Dale, Chief Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
On this 10th day of November, 2008.