

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

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

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

HARRY MARK WOOLDRIDGE,
Individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

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

AT&T CORP.,

Defendants.

Cause No. 1016-CV02438

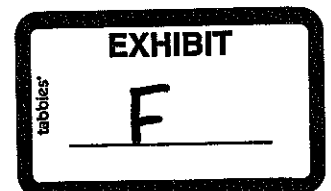
Division No. 07

FILED - CIRCUIT COURT
JACKSON CO., MO - KC
10 OCT 22 AM 10:35

AT&T MISSOURI'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant AT&T Missouri and moves this Court pursuant to Rule 74.04 of the Missouri Rules of Civil Procedure to grant summary judgment in favor of AT&T Missouri with respect to Plaintiffs' First Amended Class Action Petition for Damages. In support of its Motion, AT&T Missouri states as follows:

1. 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 (collectively "Plaintiffs") filed a first amended putative class action petition against Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri"), AT&T Corp., and AT&T Inc. (collectively "Defendants"), for violation of the Merchandising Practices



Act, unjust enrichment, money had and received, breach of the implied covenant of good faith and fair dealing, and statutory damages under § 392.350 RSMo.¹

2. Plaintiffs' claims arise out of and relate to charges on their telephone bills. *See* First Am. Pet. ¶ 4. Specifically, each of the counts set forth in the First Amended Petition is premised on Plaintiffs' allegation that Defendants wrongfully charged AT&T Missouri's customers for back tax payments Defendants made as a result of settlement agreements with Missouri municipalities. *Id.*; *see also id.* ¶¶ 20-22, 25, 39, 47, 56-58, 62-64, 68-69, 72.

3. Plaintiffs' proposed class includes all individuals and businesses in Missouri who have local exchange telephone service through AT&T Missouri and who have been charged fees related to a pass-through of back taxes. *Id.* ¶ 24.

4. The back-tax surcharge at issue is mandated under a tariff approved by the Missouri Public Service Commission ("PSC"). *See* Exs. 1 and 2 to AT&T Missouri's Memorandum of Law in Support of its Motion for Summary Judgment.

5. Summary judgment in favor of AT&T Missouri is therefore warranted under Rule 74.04 of the Missouri Rules of Civil Procedure pursuant to the filed rate doctrine, which holds that 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. 1997).

6. Count V of Plaintiffs' First Amended Petition seeks statutory damages under § 392.350 RSMo. *See generally* First Am. Pet., Count V.

¹ Plaintiffs voluntarily dismissed AT&T Inc. on June 3, 2010.

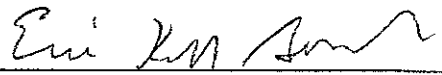
7. Summary judgment in favor of AT&T Missouri is warranted under Rule 74.04 as to Count V because Plaintiffs did not secure an order from the PSC declaring the practices of which they complain unlawful, which is a condition precedent to this cause of action. *See Overman v. Sw. Bell Tel. Co.*, 706 S.W.2d 244, 251 (Mo. App. 1986) ("a final order by the Public Service Commission that an act or omission is in violation of § 392.200.3, *supra*, is, however, a condition precedent to filing a statutory action under § 392.350").

8. In further support of this Motion, AT&T Missouri files herewith and incorporates herein by reference its Memorandum in Support of its Motion for Summary Judgment.

WHEREFORE, Defendant AT&T Missouri respectfully requests that this Court enter an Order granting summary judgment in its favor with respect to Plaintiffs' First Amended Class Action Petition. It also requests such other and further relief as this Court deems just and proper under the circumstance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, first class
mail postage prepaid, this 22nd day of October, 2010 to:

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IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

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

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

HARRY MARK WOOLDRIDGE,)
Individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

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

AT&T CORP.,)

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Cause No. 1016-CV02438

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**MEMORANDUM OF LAW IN SUPPORT OF
AT&T MISSOURI'S MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Plaintiffs' class action lawsuit challenges back-tax surcharges billed by AT&T Missouri to its customers. Because this surcharge was mandated under a tariff approved by the Missouri Public Service Commission ("PSC"), Plaintiffs' claims are barred as a matter of law under the filed rate doctrine. Accordingly, summary judgment must be granted in AT&T Missouri's favor as to claims asserted in Counts I through IV.

Summary judgment in AT&T Missouri's favor is also mandated with respect to Count V, which seeks statutory damages under § 392.350 RSMo. This statutory claim fails because Plaintiffs did not secure an order from the PSC declaring the practices of which they complain unlawful, a condition precedent to this cause of action.

II. Statement of Uncontroverted Material Facts

1. The PSC has authority over AT&T Missouri's telephone service rates, and AT&T Missouri must include them in a filed tariff subject to the jurisdiction of the PSC. §§ 392.220, 392.245 RSMo.¹

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, 1983.² See Ex. 1 and 2.³

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.

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.

¹ Plaintiffs' vague allegations regarding a "newly unregulated environment," First Am. Pet. ¶ 3, do not change the controlling statutes, nor the governing tariff. Thus, the extent and specifics of any partial deregulation are irrelevant to the specific charges at issue here, which the governing tariff expressly requires. Nor may Plaintiffs' allegation that no tariff "covers" the challenged tax pass-through charges be given any effect. First Am. Pet. ¶ 71. This Court must interpret the tariff as a matter of law and ignore Plaintiffs' allegations regarding its meaning. See *Allstates Transworld Vanlines, Inc. v. Sw. Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996) (interpreting tariff as a matter of law). Cf. *State ex rel. State Tax Comm'n v. Briscoe*, 451 S.W.2d 1, 3 (Mo. banc 1970) (court must "disregard[] those allegations which are nothing more than legal conclusions").

² The copies of the Tariffs attached as Exhibits are judicially noticeable and admissible in that form without certification. See § 490.235 RSMo. (holding that copies of tariffs on file with the PSC are admissible without certification); see also *Cent. Controls Co. v. AT&T Info. Sys., Inc.*, 746 S.W.2d 150, 153 (Mo. App. 1988) (trial court can take judicial notice of tariffs on file with the PSC).

³ Ex. 2 (1991 tariff) is the current tariff on file with the PSC. It is identical to the tariff approved by the PSC on January 1, 1984. See Ex. 1 (1983 tariff).

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.

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).

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).

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.⁴ *See generally* First Am. Pet.

⁴ Plaintiffs voluntarily dismissed AT&T Inc. on June 3, 2010. Contemporaneously with this motion, AT&T Corp. will be filing its own motion for summary judgment, arguing that because Plaintiffs are not its customers, and because it never imposed the Special Municipal Charge at issue, it is not a proper party to this lawsuit.

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.

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.

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").⁵

⁵ Plaintiffs' First Amended Petition alleges that "Defendants are parties to settlement agreements in lawsuits wherein they were sued by Missouri municipalities for failure to pay business license . . . taxes for landline telephone operations." First Am. Pet. ¶ 2. This court may therefore judicially notice the court papers in the Tax Litigation, including the Petitions and any other documents filed with the respective courts. See *Knorp v. Thompson*, 175 S.W.2d 889, 894 (Mo. 1943) ("[T]here may be cases so closely interwoven, or so clearly interdependent as to invoke a rule of judicial notice in one suit of the proceedings in another suit.") (internal quotations

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, ¶ 2.⁶

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.

13. AT&T Missouri began to pass through these back tax payments to its customers via a monthly surcharge. See First Am. Pet. ¶ 2.

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

III. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. MO. R. CIV. P. 74.04; *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. banc 1993). A defendant establishes a right to summary judgment by (1) offering facts that negate one or more essential elements of the plaintiff's claim, or (2) showing that the plaintiff will be unable to produce sufficient evidence to establish one or more essential elements of the plaintiff's claim. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381. See also *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 707 (Mo. banc 2005).

omitted); see also *State ex rel. Moore v. Sharp*, 151 S.W.3d 104, 106 (Mo. App. 2004) (judicially noticing relevant parts of court file in separate case).

⁶ The original affidavit of S. Shashack, with Exhibits A and B, was filed as Exhibit 6 to AT&T Inc.'s Memorandum in Support of its Motion to Dismiss, filed on May 19, 2010.

The movant bears the burden of proving that summary judgment is proper. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 378. “Facts set forth by affidavit or otherwise in support of a party’s motion are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion.” *Id.* at 376. When the movant introduces facts showing a right to judgment as a matter of law, the burden then shifts to the non-movant, who must respond with countervailing evidence showing that there is a genuine dispute as to one or more of the movant’s material facts. *Id.* at 381. As a matter of both law and uncontroverted fact, AT&T Missouri is entitled to summary judgment here.

IV. Argument

A. The Filed Rate Doctrine Bars Counts I through IV.

It is established law that the filed rate doctrine “governs a utility’s relationship with its customers” *Bauer*, 958 S.W.2d at 570. Indeed, the doctrine holds that where a tariff is “filed with the appropriate regulatory agency [it] is sanctioned by the government and cannot be the subject of legal action.” *Id.* Where, as here, the surcharge complained of by plaintiffs is part of the tariff, the suit must be dismissed. *See id.*; *Orscheln Bros. Truck Lines, Inc. v. Ferguson Mfg., Inc.*, 793 S.W.2d 525, 530 (Mo. App. 1990).

1. Plaintiffs’ claims focus on back-tax surcharges.

The crux of Plaintiffs’ complaint in their First Amended Petition is that AT&T Missouri had no right to bill (or “pass through” to) its customers for back taxes paid as a result of settling the Tax Litigation. For example, Plaintiffs assert that common issues for the putative class are whether the back-tax surcharges were “unauthorized, unlawful, and/or illegal” and whether they were “legally or rightfully charged to customers.” First Am. Pet. ¶¶ 32(b), 39(b). Count I specifically alleges a violation of the MMPA premised upon the theory that the back-tax

surcharges “were not legally or rightfully chargeable to customers.” *Id.* ¶ 39(b). Counts II and III, alleging unjust enrichment and money had and received, are premised upon the theory that AT&T Missouri “had no legal basis for billing customers these charges” and that the back-tax surcharges themselves were “unlawful” and “unauthorized.” *Id.* ¶¶ 56, 58 and 62. And Count IV, for breach of the implied covenant of good faith and fair dealing, is based on “contracts or service agreements with Defendants” entered into by customers. *Id.* ¶ 66. The contract between AT&T Missouri and its customers as it relates to tax surcharges is the Tariff. *See generally* General Exchange Tariff No. 35.

2. Section 17.11 mandates tax surcharges, and does so to ensure non-discrimination.

Section 17.11 mandates that as part of the rate for service, AT&T Missouri bill its customers a surcharge for license tax payments such as those at issue in the Tax Litigation and their related settlements. *See* Ex. 2 at § 17.11 (“[t]here **shall be added** to the customer’s bill or charge . . . a surcharge equal to the pro rata share of any . . . tax, fee or charge”) (emphasis added). Because tariffs have the “same force and effect as a statute,” in interpreting § 17.11, this Court must apply general rules of statutory interpretation. *Allstates Transworld Vanlines v. Sw. Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996) (internal citations omitted). Specifically here, “[i]f a statute, or . . . tariff, is clear and unambiguous, [a court] cannot give it another meaning.” *Id.*

Not only does § 17.11 unambiguously require AT&T Missouri to add to its customers bills a surcharge equal to the customer’s pro-rata share of business license tax payments or other charges imposed on AT&T Missouri, but this requirement has clear public policy underpinnings. In *State ex rel. City of West Plains v. Public Service Commission*, the Supreme Court of Missouri affirmed a PSC order approving the pass through of license taxes to utility customers. 310

S.W.2d 925 (Mo. 1958).⁷ In doing so, the Court recognized the economic reality that if the carrier did not pass these taxes through directly to the residents of the taxing entity, the carrier's tax liability would simply become an operating expense reflected in the rates of **all** customers. *Id.* at 931. *Accord* A.J.G. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION: THEORY AND APPLICATION 51 (1969) ("The propriety of including all taxes among necessary operating expenses [in calculating rates] has been so long established as to require little attention.").

Against this background, the question for the Supreme Court in *West Plains* became not **whether** subscribers should or should not ultimately pay license taxes, as "a utility's subscribers will always provide the money for payment of all taxes." *West Plains*, 310 S.W.2d at 934. Rather, "the only question is **which** subscribers should pay the tax." *Id.* (emphasis added). The Court's conclusion aligns squarely with the predominant view that "discrimination results when all of a utility's customers are made to assume the burden of special taxes exacted by a particular municipality for its own purposes. And the passing along of such special taxes to local customers who are benefited by them seems patently reasonable." A.J.G. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION: THEORY AND APPLICATION at 54.⁸

⁷ The Supreme Court in *West Plains* also emphasized that the tax pass-through is part of the "total rate determination." *West Plains*, 310 S.W.2d at 928. *Accord* Ex. 2 § 17.11 (describing pass-through as a "rate for service"). Moreover, even if the pass-through were not so clearly a rate, the filed rate doctrine would still apply, as it bars all challenges to any tariff provision even affecting rates. *See In re Univ. Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1142 (D. Kan. 2003) ("Under this rule [the filed rate doctrine], charges as well as the classifications, practices, and regulations affecting such charges, filed with the FCC bind both carriers and [customers] with the force of law.") (internal quotations omitted).

⁸ Courts nearly universally subscribe to this policy. *See, e.g., City of Montrose v. Pub. Utils. Comm'n of Colo.*, 732 P.2d 1181, 1189 (Colo. 1987) ("[A] municipality could place an increasingly greater burden on customers outside its boundaries to support the municipality. [The pass-through], however, provides a disincentive for municipalities to negotiate inflated franchise fees since whatever fee a municipality is able to obtain from a utility will be paid for, in the end, by the municipality's own residents."); *City of Houston v. Pub. Util. Comm'n of Tex.*, 656 S.W.2d 107, 110 (Tex. App. 1983) ("The surcharge thus eliminates a discrimination that

3. Plaintiffs' claims are barred by the filed rate doctrine because they challenge the Tariff.

Plaintiffs' claims clearly implicate the Tariff itself, which "governs [AT&T Missouri's] relationship with its customers" *Bauer*, 958 S.W.2d at 570. More specifically, the entire thrust of Plaintiffs' suit amounts to a direct challenge to the mandate of § 17.11 that AT&T Missouri pass through license taxes. *See generally* First. Am. Pet. Accordingly, the filed rate doctrine bars Counts I through IV of Plaintiffs' First Amended Petition because "any rate filed with the appropriate regulatory agency is sanctioned by the government and **cannot be the subject of legal action.**" *Bauer*, 958 S.W.2d at 570 (emphasis added).

Moreover, Plaintiffs' claims are also barred by the filed rate doctrine to the extent that they seek refunds for amounts paid as back-tax surcharges. Indeed, courts routinely bar such claims because:

[a]llowing plaintiffs to collect damages measured by the difference between the filed rate and the rate a court finds reasonable would encourage consumers of a utility's services to sit out the state's rate-making process and then to repair to court to play litigation lottery. There could be no end to the number of strike suits that would be brought as eager lawyers, using the class action vehicle, circumvent the states' rate-making mechanisms—all at the expense of consumers.

Taffet v. S. Co., 967 F.2d 1483, 1492 (11th Cir. 1992) (en banc).

would result from distributing the cost of a municipality's gross receipts charge among all the ratepayers in the State."); *City of Spartanburg v. Pub. Serv. Comm'n of S.C.*, 314 S.E.2d 599, 600 (S.C. 1984) ("[T]o charge customers outside the city exchange or across the state for a city license tax would be unjust discrimination."); *City of Newport News v. Chesapeake & Potomac Tel. Co. of Va.*, 96 S.E.2d 145, 148 (Va. 1957) ("If a locality can levy taxes that are paid mostly by people who do not live and vote there, self-interest will persuade it to rely on such taxes for the support of local government."). *Cf. Conn. Office of Consumer Counsel v. FCC*, 915 F.2d 75, 79 (2d Cir. 1990) ("Absent a [pass-through], a gross receipts tax is a political and financial windfall to states imposing it because a state's coffers can be filled largely at the expense of persons in other states.").

Other courts addressing issues similar to those raised here have held that the filed rate doctrine bars an action at law challenging surcharges assessed on a customer's bill when the surcharges are included in the tariff approved by a regulator. For example, in *Hill v. BellSouth Telecommunications*, the United States Court of Appeals for the Eleventh Circuit addressed class action claims challenging the recoupment of payments made to the Universal Service Fund ("USF"). 364 F.3d 1308 (11th Cir. 2004). The plaintiffs contended that the telephone carrier's pass through of the USF charges to its customers violated Georgia's consumer protection statutes and implicated a number of common law causes of action. *Id.* at 1312. While the District Court had previously applied the filed rate doctrine in dismissing four of the claims, it declined to dismiss the remaining two counts alleging fraud and violations of a state consumer protection statute. *Id.* at 1312-13. But the Eleventh Circuit held that even these claims were barred by the filed rate doctrine because the USF surcharge was included in the company's tariff and was part of the regulator's rate-making authority. *Id.* at 1317. As such, it would be impermissible for a court to interfere with this authority by allowing complaints about the tariffed charges to be pursued in a court of law. *Id.*

In *Evanns v. AT&T Corp.*, the United States Court of Appeals for the Ninth Circuit considered a similar challenge to a pass through of USF charges to telephone customers. 229 F.3d 837, 840 (9th Cir. 2000). Because the pass through of the USF charges was part of a tariff (or rate) approved by the regulator, the court held that a customer could not "bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff." *Id.* Similarly, the United States Court of Appeals for the Second Circuit upheld the district court's dismissal of fraud and misrepresentation claims relating to a telephone carrier's billing practices in *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998). Although *Marcus*, like *Hill* and *Evanns*, dealt with a

federal rather than a state tariff, it reiterated the basic principle that legal claims related to billing surcharges are barred under the filed rate doctrine where the surcharge is part of the tariff. *Id.* at 58. See also *Pfeil v. Sprint Nextel Corp.*, 504 F. Supp. 2d 1273, 1276 (N.D. Fla. 2007) (holding that the filed rate doctrine bars complaints about a bill surcharge that was part of the rate approved by regulators); *In re Univ. Serv. Fund Tel. Billing Practices Litig.* (“*In re USF Litig.*”), 300 F. Supp. 2d 1107, 1143 (D. Kan. 2003) (same).

Here, the PSC, which has exclusive jurisdiction over the reasonableness of AT&T Missouri’s rates, has approved the Tariff’s pass-through provision. For this Court to support Plaintiffs’ pursuit of their claims and invalidate the pass-through provision would undercut the PSC’s authority and its critical role in regulating utilities like AT&T Missouri. See *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm’n of Mo.*, 938 S.W.2d 339, 344 (Mo. App. 1997) (“The Commission has considerable discretion in rate setting due to the inherent complexities involved in the rate setting process. . . . Missouri courts do not set utility rates.”).

4. The Tariff’s pass-through provision extends to back tax payments.

Both the language and the purpose of the pass-through provision in § 17.11 confirm that it applies equally to back tax payments and prospective tax payments. Under § 17.11, “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.” Ex. 2 (applying to taxes “now or hereafter imposed”) (emphasis added). If the rule were otherwise, then the policy enunciated in *West Plains* to avoid a state-wide rate increase for all customers based on taxes paid to a single taxing entity would be undercut. *Accord Village of Roselle v. Commonwealth Edison Co.*, 859 N.E.2d 1, 11 (Ill. App. Ct. 2006) (analyzing provision in tariff authorizing pass-through of taxes to apply to back taxes paid as a result of an accounting claim because

“underlying the . . . claim is the idea that [the utility] owes unpaid . . . tax”). *Cf. Farmland Indus. v. Kan. Corp. Comm’n*, 37 P.3d 640 (Kan. Ct. App. 2001) (tariff’s tax pass-through provision applied to refunds of already-paid taxes, not just prospective taxes).

Plaintiffs’ argument, logically extended, seeks to penalize AT&T Missouri for settling the tax dispute with Missouri municipalities, even though by doing so, AT&T Missouri paid far less than it would have if it paid—and subsequently passed through—these license taxes all along. And, the amount AT&T Missouri paid in settlement was significantly less than the amount it may have owed in a back-tax judgment if it had proceeded to trial against the municipalities. *Compare, e.g.*, Ex. 7 at ¶ 23, Ex. 8 at ¶ 34, & Ex. 9 at ¶ 17 (seeking tax payments on interstate revenues) *with* Ex. 10 at 15, Ex. 12 at Exs. 12A at 9-10 & 12B at 2 (excluding interstate revenues from the tax). Such an illogical result is contradicted by the plain meaning of the pass-through provision.

5. The Tariff’s pass-through provision extends to back tax payments paid pursuant to settlement agreements.

Plaintiffs’ First Amended Petition focuses on the fact that AT&T Missouri made the tax payments at issue to settle claims for back taxes made by a number of Missouri taxing entities. But this fact does not change the fundamental nature of these payments as taxes subject to the mandates of § 17.11. Indeed, the settlement agreements themselves characterized these payments as “back tax payments” and specifically foresaw that, as a result, the payments would be passed through to customers. *See* Ex. 10 at 14, § II.A (“AT&T Missouri and SBC Long Distance, LLC shall collectively make a Back Tax Payment”); Ex. 12 at Exs. 12A at 8, § II.A and 12B at 2, ¶ 2.⁹ *See also County of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001) (in a

⁹ *See also* Ex. 10 at 28, § II.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

lawsuit over utility's settlement affecting its gross receipt taxes, which were passed-through to consumers, court noted that "all competent lawyers . . . take tax consequences into account before specifying a settlement amount"). Moreover, the taxing entities bound by the Tax Litigation settlements released their claims for back taxes against AT&T Missouri as part of the settlement. *See* Ex. 10 at 37, § VI.A; Ex. 12 at Exs. 12A at 20, § IV.A and 12B at 3, ¶ 6. The settlement payments were thus accepted as full compensation of AT&T Missouri's tax liabilities and clearly fall within the pass-through provision of § 17.11, which mandate that the carrier bill its customers for any "tax, fee or charge . . . imposed upon the Telephone Company by any taxing body or authority, whether by statute, ordinance, law or otherwise." Ex. 2.

6. Plaintiffs' allegations regarding misrepresentations cannot overcome the bar of the filed rate doctrine.

Plaintiffs' allegations that AT&T Missouri "fail[ed] to inform the Plaintiffs" of the back-tax surcharges or "employed misleading statements," do not shield them from the strict bar of the filed rate doctrine. First Am. Pet. ¶¶ 39, 42. Indeed, courts routinely find that the filed rate doctrine applies even when a utility is alleged to have misquoted the tariff, or engaged in other allegedly fraudulent conduct in connection with a tariff charge. *See Orscheln Bros.*, 793 S.W.2d at 530; *Bauer*, 958 S.W.2d at 570 ("Courts that have considered the fraud issue almost unanimously have rejected the notion that there is a fraud exception to the filed rate doctrine.") (internal quotations omitted); *see also, e.g., Evanns*, 229 F.3d at 841 (rejecting plaintiff's "claim that the defendant carriers had obligations to him **beyond those** set out in the filed tariffs, i.e., that the defendants had a duty to **disclose** the fact that the . . . assessment was a pass-through charge, [as] also barred by the filed-rate doctrine") (emphasis added); *Marco Supply Co. v.*

to a Class Member under the Business License Tax ordinances and this Settlement Agreement."); Ex. 12 at Exs. 12A at 20, § II.C and 12B at 6, ¶ 21.

AT&T Commc'ns, Inc., 875 F.2d 434, 436 (4th Cir. 1989) (“[A] customer does not have a claim for relief against a carrier even if the latter’s representation as to applicable rates is fraudulent.”); *In re USF Litig.*, 300 F. Supp. 2d at 1143 (barring statutory fraud and money had and received claims where telephone company allegedly misrepresented a surcharge as a legally required pass-through by designating it as a tax, because “Plaintiffs cannot claim that they suffered any legally cognizable injury or were aggrieved by virtue of defendants’ alleged deception because plaintiffs were legally required to pay the tariff rate”).

B. Plaintiffs Have Failed to Satisfy the Condition Precedent to Count V.

Count V is premised upon AT&T Missouri’s alleged violation of § 392.350 RSMo., which provides in relevant part that if a “telecommunications company shall do . . . any act . . . declared to be unlawful . . . [it] shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom” § 392.350 RSMo. Further, “[a]n action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.” *Id.* A condition precedent to bringing a claim under this statute, however, is a determination by the PSC that the defendant has committed an act giving rise to liability under the statute. *See Overman v. Sw. Bell Tel. Co.*, 706 S.W.2d 244, 251 (Mo. App. 1986) (“a final order by the Public Service Commission that an act or omission is in violation of § 392.200.3, *supra*, is, however, a condition precedent to filing a statutory action under § 392.350”); *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo. App. 1978) (“A circuit court has no jurisdiction to consider the plaintiff’s action for recovery until the Commission makes its decision regarding the rates and classification. Matters 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.”). Because Plaintiffs have failed to plead, and cannot prove, that they obtained a final order of the PSC adjudicating

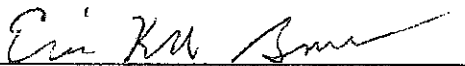
the lawfulness of the practices at issue, Plaintiffs have failed to state a claim for relief under § 392.350 RSMo., and summary judgment is appropriate.

V. Conclusion

The filed rate doctrine bars Plaintiffs' class action claims in Counts I through IV, seeking damages purportedly arising from back-tax surcharges. Because these back-tax surcharges were mandated under a tariff imposed by the PSC, this Court should grant summary judgment in favor of AT&T Missouri as to these claims. This Court should likewise grant summary judgment in favor of AT&T Missouri with respect to Count V because Plaintiffs have not satisfied the condition precedent to bringing this cause of action.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, first class mail postage prepaid, this 22nd day of October, 2010 to:

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