



Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, Petitioners, v. Southwestern Bell Telephone Company, Southwestern Bell Wireless (Cingular), Voicestream Wireless (Western Wireless), Aerial Communications, Inc., CMT Partners (Verizon Wireless), Sprint Spectrum LP, United States Cellular Corp., and Ameritech Mobile Communications, Inc., Respondents

Case No. TC-2002-57

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

*2002 Mo. PSC LEXIS 260*

February 14, 2002

**PANEL:** [\*1] Simmons, Ch., Lumpe, Gaw, and Forbis, CC., concur. Murray, C., dissents. Thompson, Deputy Chief Regulatory Law Judge.

# **OPINION: ORDER REGARDING SUBJECT MATTER JURISDICTION**

## **Syllabus:**

This order takes up and examines certain objections raised to the Commission's subject matter jurisdiction in these consolidated complaint cases and finds them to be without merit.

## **Procedural History:**

At the prehearing conference held on January 10, 2002, the parties agreed that the Commission would take up and determine, by February 15, 2002, the issue of subject matter jurisdiction. This issue was originally raised in Case No. TC-2002-114, the only one of these six consolidated cases in which a procedural schedule had been adopted prior to consolidation. In that case, at a prehearing conference held on October 3, 2001, the parties agreed to brief the issues of the Commission's jurisdiction of the subject matter and of the parties. Accordingly, Mid-Missouri Telephone Company filed its Suggestions in Support of Subject Matter Jurisdiction on November 9, 2001; the Commission's Staff filed its brief on November 30, as did Ameritech Mobile Communications, Inc., and CMT Partners. Sprint Spectrum L.P., [\*2] doing business as Sprint PCS, filed a letter brief on November 30. Mid-Missouri filed replies to Sprint PCS and to Ameritech and CMT Partners on December 10.

## **Discussion:**

Each of the pleadings filed by Sprint PCS and by Ameritech Mobile and CMT Partners contained a motion that the Commission dismiss these proceedings for lack of subject matter jurisdiction. Sprint PCS argues that the Commission lacks "subject matter jurisdiction to approve [or enforce] a tariff that imposes access charges on intraMTA traffic originated by or terminated to wireless carriers." n1 Ameritech Mobile and CMT Partners argue that the Commission has no jurisdiction over them under Missouri law because services and facilities licensed by the F.C.C. under the Commercial Mobile Radio Services rules are expressly excluded from the Commission's jurisdiction at *Section 386.020(53)(c)*. n2 Staff and Mid-Missouri assert that the Commission does have subject matter jurisdiction.

n1 *Letter Brief of Sprint PCS*, filed November 30, 2001, at 1.

n2 *Reply Brief of Respondents Ameritech Mobile and CMT Partners*, filed November 30, 2001, at 1-4.

The Missouri Supreme Court has said that "the Public Service Commission [\*3] is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service

Commission Law, by which it was created." n3 Among the powers conferred on the Commission by the Public Service Commission Law is the power to hear and determine complaints: n4

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, [\*4] sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

n3 *State ex rel. Laundry, Inc. v. Public Service Commission*, 327 Mo. 93,, 34 S.W.2d 37, 43 (1931).

n4 *Section 386.390.1, RSMo 2000*. All statutory references herein, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

These cases were all initiated by the filing of complaints. The complaining parties are all telecommunications corporations and incumbent local exchange carriers. The complaining parties are all public utilities within the intendments of Missouri law, subject to regulation by the Missouri Public Service Commission. n5 The respondents are either commercial mobile radio service providers or incumbent local exchange carriers. [\*5] If the latter, then those respondents are also public utilities for the purposes of Missouri law, subject to regulation by this Commission. n6 If the former, then the respondents are not public utilities and are not subject to regulation by this Commission. n7

n5 *Sections 386.020, (51), (52) & (53), and 386.250.2*.

n6 *Section 386.020, (4) & (22), and 386.250.2*.

n7 *Section 386.020(53)(c)*.

A complaint may be brought before this Commission by "any corporation or person," including regulated utilities, against "any corporation, person, or public utility." n8 The language is very broad and is clearly intended to extend to entities not subject to Commission regulation. As long as at least one party, whether a petitioner or a respondent, is a public utility, the Commission has jurisdiction under the law. Thus, for example, the Commission has jurisdiction over disputes between public utilities and their customers and often hears such cases. According to the complaints filed in these cases, the respondents are all customers of the petitioners in that they originate or transport traffic intended for termination on the petitioners' networks, to petitioners' subscribers. The Commission [\*6] has jurisdiction over the dealings of a public utility with its customers.

n8 *Sections 386.390.1 and 386.400*.

In Missouri, the concept of subject matter jurisdiction extends to and encompasses the relief demanded. The Commission is without authority to award money to a complainant. n9 Nonetheless, the Public Service Commission has exclusive jurisdiction, in the first instance, to decide all matters placed within the Commission's jurisdiction by the Public Service Commission Act. n10 In particular, the Public Service Commission has exclusive authority "to regulate and fix rates or charges for public utilities, and to classify those users or consumers to whom such rates or charges shall be applicable." n11 The dispute here, concerning what charges, if any, are due to the Complainants for the traffic in question is within the Commission's primary jurisdiction. "Missouri has long recognized the doctrine of primary jurisdiction. Under this doctrine, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision." n12

n9 *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943).

[\*7]

n10 *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 766, 168 S.W.2d 1044, 1046 (Mo. banc 1943).

n11 *State ex rel. Laundry, Inc. v. Public Service Commission*, 327 Mo. 93, 107, 34 S.W.2d 37, 43 (Mo. 1931); and see *Buzard*, 350 Mo. at 768, 168 S.W.2d at 1047; *Inter-City Beverage Company v. Kansas City Power & Light Company*, 889 S.W.2d 875, 877 (Mo. App., W.D. 1994).

n12 *MCI Metro Access Transmission Services, Inc. v. City of St. Louis*, 941 S.W.2d 634, 644 (Mo. App., E.D. 1997); citing *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. banc 1991).

Based on these considerations, the Commission determines that it has jurisdiction to determine whether any charges are owed to Petitioners with respect to the traffic in question and, if so, how the charges are to be calculated. These are questions that necessarily require that the Commission classify Respondents as customers of Petitioners and determine which tariffed [\*8] rate applies to the transactions in question.

Respondents Ameritech Mobile and CMT Partners also argue that the Commission lacks subject matter jurisdiction because of inadequate initial service. The Commission's organic law provides in pertinent part: n13

3. \* \* \* Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the public utility, corporation or person complained of.

4. Service in all hearings, investigations and proceedings pending before the commission may be made upon any person upon whom summons may be served in accordance with the provisions of the code of civil procedure of this state, and may be made personally or by mailing in a sealed envelope with postage prepaid.

n13 *Section 386.390*.

In administrative law, the jurisdiction of the tribunal must affirmatively appear on the face of the record. n14 Where the authorizing statute requires that jurisdiction be perfected by some action such as the service of notice upon the respondent, the record must demonstrate strict compliance with the statute or the administrative proceedings are void. n15 However, a defect in notice may be waived where it is not raised at the first opportunity [\*9] and the respondent participates in the proceedings and has an opportunity to be heard. n16 Respondents contend that service in this case was defective in that, where *Section 506.150.1(3)* permits service upon corporations, partnerships and unincorporated associations by leaving a copy at any business office "with the person having charge thereof," the Commission merely directed service by mail to the "Legal Department." n17 Mid-Missouri responds that Respondents have waived any defect in service of notice by failing to raise this point in their Answer and Affirmative Defenses filed on September 21, 2001. n18

n14 *State ex rel. Wilson Chevrolet v. Wilson*, 332 S.W.2d 867, 871 (Mo. 1960).

n15 *Wilson Chevrolet, supra*, 332 S.W.2d at 871-872 (action of Board of Equalization was void where record did not show that personal notice required by statute had been sent).

n16 1 *Mo. Administrative Law*, Section 3.17 (Mo. Bar, 3rd ed. 2000), and cases cited therein.

n17 *Reply Brief of Respondents Ameritech Mobile and CMT Partners, supra*, at 4-6.

n18 *Response to Reply Brief of Respondents Ameritech Mobile and CMT Partners*, filed December 10, 2001, at 6-7.

[\*10]

It is true that pre-decision procedural requirements in administrative proceedings can be waived; however, waiver occurs not upon the filing of an answer but upon participation in the hearing without objection. n19 The cases relied upon by Mid-Missouri apply to actions in court under the civil rules n20 and not to administrative proceedings to which

the civil rules do not apply. n21 The hearing in this matter has not yet commenced and Respondents cannot yet be said to have waived their objection as to the adequacy of service of notice. However, it is also true that

one having actual notice is not prejudiced by and may not complain of the failure to receive statutory notice. Statutes that impose certain technical requirements for notice should not be strictly enforced where the party seeking enforcement had actual notice and cannot show prejudice as a result of the failure to follow the technical requirements. n22

n19 *Section 536.060; and see Weber v. Firemen's Retirement System*, 872 S.W.2d 477, (Mo. banc 1994).

n20 *See State ex rel. Buffington v. Gaertner*, 657 S.W.2d 957, 958 (Mo. banc 1983), and its progeny, all of which depend upon Supreme Court Rule 55.27(g).

[\*11]

n21 *Meek v. Pizza Inn*, 903 S.W.2d 541, 544 (Mo. App., W.D. 1995); *AT & T Information Systems, Inc. v. Wallemann*, 827 S.W.2d 217, 221 (Mo. App., W.D. 1992).

n22 *Medical Management of Osage Beach, Inc. v. Missouri Health Facilities Review Committee*, 904 S.W.2d 291, 296 (Mo. App., W.D. 1995); *Larabee v. Washington*, 793 S.W.2d 357, 361 (Mo. App., W.D. 1990).

Respondents have not asserted that they have suffered any prejudice due to the purportedly defective service. The cases they rely upon all concern service of process in civil cases, not service of notice in administrative proceedings. n23 Further, the defect they assert is a matter of fact. n24 It is not self-proving and Respondents must bring forward evidence to prove the facts upon which they rely. Respondents' Reply Brief is not verified, nor is any affidavit attached to it.

n23 *St. ex rel. MFA Mutual Insurance Co. v. Rooney*, 406 S.W.2d 1 (Mo. banc 1966) (suit for money damages in circuit court); *Robinson v. Director of Revenue*, 32 S.W.3d 148 (Mo. App., S.D. 2000) (action in circuit court to set aside administrative suspension of driver's license); *Sipes v. American Honda Motor Co., Inc.*, 608 S.W.2d 125 (Mo. App., W.D. 1980) (a personal injury action brought in circuit court); *St. ex rel. Craig v. Grimm*, 542 S.W.2d 335 (Mo. App., Spfd. D. 1976) (action in circuit court to contest election); *Ponder v. AAMCO Automatic Transmission, Inc.*, 536 S.W.2d 888 (Mo. App. 1976) (action for damages in circuit court). All of these cases stand for the proposition that a court does not acquire personal jurisdiction over a defendant where service of process is fatally defective.

[\*12]

n24 *Independent Stave Co., Inc. v. Missouri Highway and Transportation Commission*, 748 S.W.2d 870, 873-874 (Mo. App., S.D. 1988).

The Commission finds that Respondents have not shown that service of notice herein was defective pursuant to *Section 386.390.4*.

#### **IT IS THEREFORE ORDERED:**

1. That the motions to dismiss for lack of subject matter jurisdiction contained in the letter brief filed on November 30, 2001, by Sprint Spectrum L.P., doing business as Sprint PCS, and in the Reply Brief filed jointly on November 30, 2001, by Ameritech Mobile Communications, Inc., and CMT Partners, are denied.

2. That this order shall become effective on February 24, 2002.

#### **BY THE COMMISSION**

Simmons, Ch., Lumpe, Gaw, and Forbis, CC., concur.  
Murray, C., dissents.

Thompson, Deputy Chief Regulatory Law Judge