STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 2nd day of July, 1993.

AT&T Communications of the Southwest, Inc., Complainant,	)	
v.	)	Case No. TC-93-67
Alma Telephone Company, Respondent.	)	

ORDER GRANTING MOTION TO DISMISS

On September 10, 1992, Complainant AT&T Communications of the Southwest, Inc. (AT&T) filed a complaint against Respondent Alma Telephone Company (Alma), alleging that Alma's charges for access service are too high. At the same time AT&T filed complaints against 43 other noncompetitive local exchange telecommunications companies in the state of Missouri. On October 7, 1992 Alma filed an Answer and a Motion to Dismiss and Suggestions. On November 16, 1992 AT&T filed Suggestions in Opposition to Respondent's Motion to Dismiss, and on November 25, 1992 Alma filed a Reply to Complainant's Suggestions In Opposition to Motions to Dismiss. Applications to intervene were filed by MCI Telecommunications Corporation (MCI) and Southwestern Bell Telephone Company (Southwestern Bell).

In its complaint AT&T alleges that the amount charged by Alma for monopoly exchange access services is substantially higher than the amount charged by Southwestern Bell for the same services; that the charges are on their face excessive and violative of §392.200.1, R.S.Mo. Supp. 1992; and that the monopoly exchange access services provide Alma with excessive levels of contribution and discourage competition. Alma's access charges were set in 1987 pursuant to

Commission order in ***Re the Missouri interLATA access charges and intraLATA toll pool***, 28 Mo. P.S.C. (N.S.) 535, 600, 604 (1986). AT&T appears to imply that the rates set in 1987 were not cost-based, and claims that the minutes of use for Alma's access services and resulting revenues have increased dramatically, while the average cost per minute of providing those services has declined substantially without a corresponding reduction in rates.

Additionally, AT&T posits concern that the alleged inequities in access charges will affect the then-proposed, now ordered Outstate Calling Area Plan, ***Re the establishment of a plan for expanded calling scopes in metropolitan and outstate exchanges***, Case No. TO-92-306 (Mo. P.S.C. Report and Order issued December 23, 1992), the mandatory network modernization project, 17 Mo. Reg. 1045, 4 CSR 240-32.100 ***et seq.***, and any review or revision of the Primary Toll Carrier Plan, ***Re the Missouri interLATA access charge and intraLATA toll pool***, 29 Mo. P.S.C. (N.S.) 249 (1987). In its prayer for relief, AT&T seeks to have the Commission declare Alma's access rates and rate design unlawful, and to reduce Alma's access charges to just and reasonable levels. AT&T suggests that it is uniquely harmed by the allegedly unreasonably high access charges, as it has been designated the carrier of last resort in the state of Missouri, and also is required under state law to charge the same price for intrastate calls of equivalent distance, accomplished through averaging statewide costs, while its competitors can choose not to serve an area with high access charges and thereby exclude the higher rates from calculation of the statewide averages.

Alma filed an Answer in which it asserted a number of affirmative defenses, as well as a Motion to Dismiss which listed several grounds for dismissal. On November 16, 1992 AT&T filed Suggestions in Opposition to Respondent's Motion to Dismiss, and on November 25, 1992 Alma filed a Reply to Complainant's Suggestions in Opposition to Motions to Dismiss. As the Commission has determined that one of the grounds propounded has merit and is dispositive

of AT&T's complaint, it sees no need to address the other issues raised by the parties. After a careful review of the various pleadings of the parties, research, and analysis, the Commission concludes that AT&T's complaint fails to state a claim upon which relief can be granted because there is no statutory authority cited which permits a consideration of AT&T's allegations in this manner. In addition, the Commission further determines that the principle of judicial economy dictates that AT&T's complaints be dismissed.

As authority for its complaint, AT&T cites the Commission to three statutory sections, §392.400.6, §392.200.1, and §386.330.2, R.S.Mo. Supp. 1992[1]. None of these sections is apposite to AT&T's complaint. Section 392.200.1 basically requires that charges for services rendered by telecommunications companies must be just and reasonable, and not more than allowed by law, or by order or decision of the Commission. Nothing in this statute, however, authorizes a utility, or any other person or corporation, to complain about the rates charged by another utility. Nor does AT&T allege that Alma has charged rates other than those authorized by the Commission, which rates are presumed to be prima facie lawful. §386.270 R.S.Mo. 1986.

Section 386.330.2 essentially allows complaints to be made regarding any thing or act done by a telecommunications company, and other specified regulated entities, in violation of any provision of law or of the terms and conditions of its franchise or charter or of any order or decision of the Commission. However, there have been no allegations that Alma has been charging access rates in excess of what it has been authorized to do by the Commission, and none of the facts alleged by AT&T in its complaint can be construed to aver a violation by Alma of any provision of law, or of the terms of its franchise or charter, or of any order or decision of the Commission. Like §392.200.1, §386.330.2 does not authorize a complaint as to the reasonableness of rates.

[1]All references are to R.S.Mo. Supp. 1992 except where otherwise noted.

Neither does §392.400.6 aid AT&T in support of its requested relief. Section 392.400.6 provides: "A telecommunications company may file a complaint as to the reasonableness or lawfulness of any rate or charge for service offered or provided by a noncompetitive or transitionally competitive telecommunications company." While at first blush §392.400.6 does seem to support AT&T's claim, this subsection cannot be read in isolation. It is a maxim of statutory construction that the various sections of a single act should be construed together as a consistent and homogeneous whole. ***State ex rel. Ashcroft v. Union Electric Company***, 559 S.W.2d 216, 221 (Mo. App. 1977). Scrutiny of a statute cannot be confined to the words quoted in a particular section, but must include the purpose of the act and objectives of the legislation. ***Lebcowitz v. Simms***, 300 S.W.2d 827, 829 (Mo. App. 1957). This includes reviewing the totality of the enactment and construing it in light of "'what is below the surface of the words and yet fairly a part of them.'" ***State ex rel. Henderson v. Proctor***, 361 S.W.2d 802, 805 (Mo. banc 1962).

Taken as a whole, §392.400 addresses the enforcement by the Commission of the segregation of noncompetitive services from transitionally competitive or competitive services. Subsection 1, for instance, prohibits the Commission from including expenses which are in any way associated with the provision of transitionally competitive or competitive telecommunications services in setting rates for noncompetitive services. The remaining subsections are designed to aid in the implementation of that prohibition. For example, subsection 2 provides for the establishment of accounting procedures to assist in implementing the prohibition; subsection 3 provides for the establishment of procedures for determining the cost of service of a telecommunications service, which would naturally aid in the segregation of expenses; subsection 4 provides an exception to the general prohibition, allowing the Commission to consider the revenues generated by a transitionally competitive or competitive telecommunications

service in setting rates for noncompetitive services where the revenues exceed the expense of the service plus a reasonable return on investment; subsection 5 prohibits noncompetitive or transitionally competitive telecommunications companies from offering transitionally competitive or competitive telecommunications services below the cost of such services, which again aids in segregation of expenses and discourages the development of subsidies; and subsection 7 provides the Commission with authority to inspect the books and records of noncompetitive or transitionally competitive telecommunications companies in order to implement the provisions of the statute.

A close reading of §392.400 as a whole indicates that the statute assumes the existence of a noncompetitive or transitionally competitive telecommunications company which offers either transitionally competitive or competitive services in addition to noncompetitive services, and is concerned with the interrelationship between rates charged for different services offered by the same company, or, more specifically, with the possibility that the company's noncompetitive services are subsidizing other services. There is no indication anywhere in the statute that the legislature contemplated a situation where one company's telecommunications service is subsidizing the telecommunications service of another company; rather, the focus is on differing services offered by the same company. A company would have a very real interest in challenging the rates of another company where the first company offered a service in competition with the second company and the noncompetitive services were subsidizing the competitive services of the second company; thus, subsection 6 merely provides the mechanism through which the first company is able to challenge the second company's rates. In sum, within the context of §392.400 as a whole, subsection 6 merely allows one telecommunications company to challenge the reasonableness of the rates charged by another telecommunications company on the ground that the latter company's noncompetitive telecommunications

services are subsidizing the latter company's transitionally competitive or competitive services.

This interpretation of §392.400.6 is also bolstered by a reading of the heading given to this section by the revisor of statutes: "Noncompetitive telecommunications services, rates not to cover expenses of competitive services, exception--complaint may be filed by another company, purpose--commission may examine records, purpose." Although the heading was not enacted by the General Assembly and cannot be relied upon to the extent as though it were, "headings and revisor's catchlines may be pertinent in demonstrating how the statute has generally been read and understood." ***Fiandaca v. Niehaus***, 570 S.W.2d 714, 716, n.2 (Mo. App. 1978).

Thus AT&T's claim does not fall within the ambit of §392.400.6, as any subsidy resulting from unreasonably high access charges would flow between companies instead of within a company as contemplated by the statute, and it is undisputed that Alma offers no telecommunications services which have been classified as transitionally competitive or competitive.

The only other statutory provisions cited by the parties which could conceivably authorize a complaint such as AT&T's are §§386.390.1 and 386.400, R.S.Mo. 1986. Section 386.390.1 is the main statute defining who may bring a complaint and on what basis. Section 386.390.1 clearly states:

> [N]o 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, 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.

§386.390.1 R.S.Mo. 1986.

Section 386.400 grants any person, corporation, or public utility the right to complain on any grounds upon which complaints are allowed to be filed by other parties. The term "public utility" is not found in §386.390.1's otherwise extensive list of who may file a complaint. Alma cites ***State ex rel. Jackson County v. Public Service Commission***, 532 S.W.2d 20 (Mo. banc 1975), for the proposition that §386.400 was intended to give utilities the right to file complaints against other utilities only on matters other than the reasonableness of rates. The Supreme Court very ably posited the question of the interrelationship between §386.400 and §386.390.1 in the case cited by Alma:

> With no effort toward over-simplification, the question may be posed--did §386.400 place a public utility only within those listed generally in §386.390 that might complain or were they also added to those allowed to complain as to "rates" in the "exception," i.e., public governmental units and consumers (25 or more)?

State ex rel. Jackson, 532 S.W.2d at 26. However, the Court resolved the issues before it without answering the question it raised, although it did quote extensively from briefs filed by the parties, in which one of the parties argued that §386.400 was only intended to give public utilities the right to file complaints on matters other than as to the reasonableness of their rates. ***Id.*** at 27. The Commission expresses no opinion as to the appropriateness of this interpretation of the statutes, as AT&T does not rely on §386.400.

Instead, AT&T suggests that the portion of §386.390.1 which permits complaints by twenty-five or more customers or purchasers should apply to it, as Alma may not <u>have</u> twenty-five purchasers of exchange access, whereas AT&T has far in excess of twenty-five customers. To do otherwise, AT&T maintains, would effectively bar purchasers of exchange access from ever challenging the reasonableness of an exchange access provider's rates.

Section 386.390.1, along with its sister statute §393.260.1, which deals specifically with gas, electric, water, and sewer corporations, are the

only statutes specifically authorizing a complaint as to the rates or prices charged by the various utilities regulated by the Public Service Commission, whereas the language of §386.330.2 is more general. It is an oft-cited axiom of statutory construction that where there are two separate statutes pertaining to the same subject matter, the two statutes must be read together, and where the provisions of the more specific statute conflict with the provisions of the more general statute, the provisions of the specific statute must hold sway over the general statute. ***State ex rel. Chicago, Rock Island and Pacific Railroad Company v. Public Service Commission***, 441 S.W.2d 742, 746 (Mo. App. 1969). See also ***City of Raytown v. Danforth***, 560 S.W.2d 846, 848 (Mo. banc 1977). Thus §386.390.1's provisions with respect to complaints regarding rates takes precedence over §386.330.2. AT&T has neither pleaded §386.390.1, nor has it met the preconditions listed therein for filing complaints as to rates; therefore, its complaints are required to be dismissed.

Another fundamental problem with AT&T's position is the lack of an appropriate forum. It is impractical and perhaps impossible to address AT&T's concerns outside of the context of a rate case. In its Motion to Dismiss and Suggestions, Alma argues that AT&T is inviting the Commission to engage in single-issue ratemaking. The Office of the Public Counsel, which filed a Motion to Dismiss in some although not all of the 44 AT&T complaint cases, also expressed concern that access charges not be lowered without consideration of other relevant factors, including the effect on other rates.

AT&T's claim in its Suggestions in Opposition to Respondent's Motion to Dismiss that it is not seeking to engage in single-issue ratemaking, is not consistent with its complaint and the relief sought therein. AT&T distinguishes a case cited by Alma, ***State ex rel. Utility Consumers Council of Missouri v. Public Service Commission***, 585 S.W.2d 41, 56 (Mo. banc 1979), by stating that the case stands for the proposition that the Commission may not consider a single

factor in determining the justness and reasonableness of a rate, not that the Commission may not determine the justness and reasonableness of a single rate. However, a single rate may in essence be considered a single factor, as any given rate may affect the amount of other rates charged in order for the company to maintain its revenue requirement.

AT&T itself admits in its Suggestions in Opposition that the Commission's duty to consider all relevant factors in determining the justness and reasonableness of access charges "may very well include the analysis of other rates and charges of the companies, the cost of capital, increasing or decreasing equipment costs and any other issue that the Commission deems relevant." Suggestions in Opposition at 6. At a minimum AT&T's complaints would almost certainly require audits of the respondent companies and cost of service studies relating to the companies' various rate designs. It is unclear whether AT&T expects to undertake the burden of conducting the audits and cost of service studies itself. Such a burden is likely to be on AT&T, as, for example, it hints in its complaint that the rates charged by the respondent companies are not cost-based. In ***Shepherd v. City of Wentzville***, 645 S.W.2d 130, 133 (Mo. App. 1982), the court, in the context of a customer challenge to the reasonableness of water rates charged by a municipal corporation not under the jurisdiction of the Public Service Commission, affirmed the denial of a declaratory judgment action, noting that the plaintiff failed to show proof that the rate charged bore no relation to the cost of service as claimed, and thus the plaintiff failed to carry his burden on the issue.

In its Suggestions in Opposition AT&T also suggests that the Commission entertain complaints against Alma and the 43 other local exchange telecommunications companies on its own motion. The Commission declines this invitation for many of the same reasons that support the dismissal of AT&T's complaint. To simultaneously mount what in essence would be 44 full blown rate

cases would be judicially uneconomic. Nor does the Commission have sufficient resources to undertake such an endeavor in addition to its normal workload. AT&T is not, however, without a remedy. It may intervene in the rate cases filed by local exchange telecommunications companies and raise its claims as to the reasonableness of the rate design and rates charged by the companies for monopoly exchange access services. Indeed, several of the companies against whom AT&T filed complaints have already initiated rate cases with the Commission, and AT&T has sought and been granted intervention in those cases.

AT&T's recitation in its complaint of other matters which can affect or be affected by the access rates charged by Alma only underscores the Commission's concern with judicial economy. For example, it is certainly possible that the Outstate Calling Area Plan and mandatory network modernization project, cited by AT&T in its complaint, and FCC Docket No. 91-141 on expanded interconnection with local telephone facilities, not cited by AT&T, may have an effect on the access rates charged by Alma and other local exchange telecommunications companies in Missouri. What effect these matters might have on the amount charged as access rates, either upwards or downwards, cannot be predicted with any certainty, as the occurrence of such an effect depends on future events. The best way to address AT&T's concerns, therefore, is to do so on a case-by-case basis in the context of a general rate case.

Thus, even if AT&T had statutory authority to complain about the reasonableness of Alma's access charges, no adjustment to those charges could be made outside the context of a general rate case, and judicial economy would require the Commission to dismiss the complaint, as the Commission would be unable to grant the relief requested.

IT IS THEREFORE ORDERED:

1. That the complaint filed by AT&T Communications of the Southwest, Inc. on September 10, 1992 against Alma Telephone Company is hereby dismissed.

2. That the applications to intervene of MCI Telecommunications Corporation and Southwestern Bell Telephone Company are hereby dismissed as moot.

3. That this order shall become effective on July 22, 1993.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
and Kincheloe, CC., Concur.
Crumpton, C., Absent.