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March 17, 2000

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 3660
Jefferson City, Missouri 65102

RE: *GS Technology Operating Company, Inc., d/b/a GST Steel Company v. Kansas City Power & Light Company*, Case No. EC-99-553

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are the original and fourteen (14) copies of Respondent Kansas City Power & Light Company's Suggestions in Response to the Commission's Order Regarding Show Cause Hearing. A copy of the foregoing Suggestions of KCPL has been hand-delivered or mailed this date to parties of record.

Thank you for your attention to this matter.

Sincerely,

James M. Fischer

James M. Fischer

/jr
Enclosures

cc: Paul S. DeFord
James W. Brew
Christopher C. O'Hara
John B. Coffman
Dana K. Joyce
Steven T. Dottheim
Lera L. Shemwell

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

GS TECHNOLOGY OPERATING, COMPANY, INC. d/b/a, GST STEEL COMPANY,	)	
Complainant,	)	
v.	)	**Case No. EC-99-553**
KANSAS CITY POWER & LIGHT, COMPANY,	)	
Respondent.	)	

RESPONDENT KANSAS CITY POWER & LIGHT COMPANY'S SUGGESTIONS IN RESPONSE TO THE COMMISSION'S ORDER REGARDING SHOW CAUSE HEARING

COMES NOW Kansas City Power & Light Company ("KCPL") and for its Suggestions In Response to the Commission's February 17, 2000, Order Concerning Show Cause Hearing, states as follows:

1. On February 17, 2000, the Missouri Pubic Service Commission ("Commission") issued its Order Concerning Show Cause Hearing ("Order") in this matter in which it directed the parties to address the following issues:

A. Whether or not the Commission has jurisdiction over the Complaint filed herein by GS Technology Operating Company, Inc., doing business as GST Steel Company, insofar as it concerns the reasonableness of the rates and charges made to GS Technology Operating Company, Inc., doing business as GST Steel Company, by Kansas City Power & Light Company, inasmuch as it is not perfected pursuant to Section 386.390.1, RSMo?

B. Whether or not the Commission has jurisdiction over the Complaint filed herein by GS Technology Operating Company, Inc., doing business as GST Steel Company, inasmuch the contract of the parties requires that disputes between them be resolved through arbitration?

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KCPL respectfully submits the following suggestions in compliance with the Commission's Order.

Section 386.390.1 Requires Perfection Prior To Filing A Complaint Regarding The Reasonableness Of Rates

2. As the Commission noted in its Order, the tribunal may raise the issue of jurisdiction any time, *sua sponte.* J. DEVINE, MISSOURI CIVIL PLEADING & PRACTICE, sec. 9-3 (1986). The Commission has properly requested legal analysis and argument regarding whether GS Technology Operating Company, Inc. d/b/a GST Steel Company ("GST") may bring a complaint regarding the reasonableness of rates without having met the prerequisites of Section 386.390.1, which states:

> *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, 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. (emphasis added)

3. Section 386.390.1 (and 4 CSR 240-2.070(3)) requires that any complaint regarding the reasonableness of rates be signed by: (1) the Office of Public Counsel; (2) 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 (3) not less than twenty-five (25) consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service (hereafter referred to as "perfection"). It is clear from the plain language of Section 386.390.1 and previous Commission rulings that perfection is a condition precedent to the Commission's jurisdiction. The Commission has also correctly observed that:

> GST has not perfected its Complaint by any of these three alternative methods. If such perfection is, in fact, required, then the Commission lacks subject matter jurisdiction over the portion of GST's complaint directed to the reasonableness of KCPL's rates, and must dismiss that issue. (Order, pp. 6-7) (emphasis added.)

4. In 1993, the Commission carefully considered this identical issue in forty-four (44) separate complaint proceedings brought by AT&T[1] involving the rates of various local exchange companies. In each case, the Commission came to the conclusion that Section 386.390.1 required the complainant to perfect its complaint by having at least twenty-five (25) customers sign the complaint involving the rates of a public utility. See Order Granting Motion To Dismiss, Case Nos. TC-93-58, TC-93-59, TC-93-60, TC-93-61, TC-93-62, TC-93-63, TC-93-64, TC-93-65, TC-93-66, TC-93-67, TC-93-68, TC-93-69, TC-93-70, TC-93-71, TC-93-72, TC-93-73, TC-93-74, TC-93-75, TC-93-76, TC-93-77, TC-93-78, TC-93-79, TC-93-80, TC-93-81, TC-93-82, TC-93-83, TC-93-84, TC-93-85, TC-93-86, TC-93-87, TC-93-88, TC-93-89, TC-93-90, TC-93-91, TC-93-92, TC-93-93, TC-93-94, TC-93-95, TC-93-96, TC-93-97, TC-93-98, TC-93-99,

[1] It should also be noted GST's counsel, Mr. Paul S. DeFord, represented AT&T in each of these rate complaint proceedings.

TC-93-100, TC-93-101.[2] In each of these orders, the Commission reached the conclusion that the Complaint was required to be dismissed for failure to meet the prerequisites of Section 386. 390.1:

> Although not cited in AT&T's complaint, or in any of the pleadings filed in this case, the question of the possible applicability of Section 386.390.1 was raised in some of the other 43 AT&T complaint cases, and the Commission deems it appropriate to address the impact of that statute on the present proceeding....
>
> Section 386.390.1, along with its sister statute § 393.260.1, which deals with gas, electricity, 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 provisions of the more specific statute conflicts with the provisions of the more general statute, the provisions of the specific statute must hold sway over the general statute.... 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. (emphasis added) (citations omitted).

5. More recently, in 1997, the Commission again interpreted Section 386.390.1 in a case involving a rate complaint brought by MCI Telecommunications Corporation and a number of other interexchange telecommunications companies against Southwestern Bell Telephone Company ("SWBT"). See Report & Order, MCI v. Southwestern Bell Tel. Co., Case No. TC-97-303 (September 16, 1997)(Attachment No. 2) Although the complaint against SWBT was brought by MCI and 28 co-

[2] Attached to this pleading is a small sample of the orders issued by Commission. See Order Granting Motion To Dismiss, Case Nos. TC-93-58, TC-93-62, TC-93-96, and TC-93-101 (Attachment No. 1). The orders in each case were substantially similar, but were issued on June 20, June 29, and July 20, 1993. Unfortunately, the quality of the reproduction leaves something to be desired since the orders were only available from the Commission's Records Room on microfilm.

complainants (and subsequently amended to include 31 co-complainants), the Commission found that a number of the co-complainants were not purchasers of the SWBT intrastate services, and that other co-complainants failed to appear. Finding that the absence of these co-complainants brought the number of complainants below the minimum number of 25, the Commission dismissed the complaint for failure to meet the statutory requirement of Section 386.390.1: "The Commission must conclude that this complaint as to the reasonableness of SWBT's rates was not filed by a party who has standing to file such a complaint under section 386.390." (Report & Order, p. 10)

6. The courts have also recognized that Section 386.390.1 has an exception that denies a single consumer standing to bring a complaint regarding the rates of a public utility. In State ex rel. Jackson County v. Public Serv. Comm'n, 532 S.W.2d 20 (Mo. App. 1973), the Court observed:

> Section 386.390, heretofore quoted, prior to the exception therein allows for complaints to be filed against utility companies. The exception therein pertains specifically to rates and limits those who may complain to governmental bodies through the 'mayor,' 'president or chairman of the board of aldermen,' a 'majority of the council, commission or other legislative body' of any city, town, village or county or 'twenty-five consumers.'

7. The Missouri Supreme Court has recognized "that it was never intended that every citizen might participate in any case." See State ex rel. Dyer v. Public Serv. Comm'n, 341 S.W.2d 795, 797 (Mo. 1960); State ex rel. Laundry, Inc. v. Public Serv. Comm'n, 34 S.W.2d 37, 41 (Mo. 1931). By requiring that any complaint relating to the reasonableness of rates be signed by a minimum of (twenty-five) 25 consumers or prospective customers, the Missouri General Assembly recognized

that the Commission could be inundated with complaint cases if each member of the public had standing to challenge the reasonableness of electric rates.

8. Based upon the Commission's previous application of Section 386.390.1 and Missouri case law, KCPL believes it is clear that GST has failed to perfect its Complaint regarding its allegations relating to the "reasonableness" of the rates contained in GST's Special Contract or KCPL's tariffed rates approved by this Commission. As a result, the Commission should, *sua sponte*, dismiss those sections of GST's Complaint that relate to the reasonableness of KCPL's rates since it has failed to perfect its Complaint, as required by Section 386.390.1.

Section 393.260.1 Requires Perfection Prior To Filing A Complaint Regarding The Adequacy Of Electric Service

9. With regard to GST's request for an investigation into the adequacy and quality of KCPL's service, KCPL does not believe that Section 386.390.1 requires perfection before a complaint can be heard by the Commission. However, Section 393.260.1 imposes similar perfection requirements for any complaint regarding the adequacy and quality of service, including specifically "the voltage of the current supplied for light, heat or power." Section 393.260 (1) & (2) state:

> 393.260. 1. Upon the complaint in writing of 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 by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such gas, electricity, water or sewer, as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price of electricity sold and delivered in such municipality, or the purity, pressure or price of water or the adequacy, sanitation or price of sewer service, the commission shall investigate as to the cause of such complaint. (emphasis added.)

> 2. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant, devices, appliances and methods used by such person or corporation in manufacturing, transmitting and supplying such gas, electricity or water or furnishing said sewer service, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas, electricity or water or furnishing of such sewer service.

10. Prior to the filing of the instant complaint and throughout this proceeding, GST has made false allegations in various forums regarding the quality of service provided by KCPL. KCPL has filed extensive testimony that demonstrates that its service meets or exceeds industry standards, is safe and adequate, and otherwise reliable. While KCPL looks forward to presenting these matters to the Commission in this proceeding to remove the cloud that GST has created by its unfounded allegations regarding the adequacy and reliability of KCPL's service, the fact remains that once again GST has failed to satisfy the requirements imposed by the Missouri General Assembly.

11. Moreover, what remains of GST's case relates to the Hawthorn Incident. The Commission is already conducting an investigation of the Hawthorn incident, and has ordered Staff to file its Report no later than June 8, 2000. See Order Directing Filing, Case No. ES-99-581 (February 9, 2000). The Commission should not duplicate this ongoing investigation as a part of this proceeding.

12. For all of the foregoing reasons, the Commission, *sua sponte,* should find that GST's Complaint regarding KCPL's rates must be dismissed for failure to meet the prerequisites of Section 393.260.1.

Binding Arbitration Under The Contract

13. The contract between KCPL and GST contains an arbitration provision. Section 7.5 of the contract reads as follows:

> Dispute Resolution. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

14. Nothing in this provision purports to divest the Commission of any jurisdiction it may have. In fact, Section 7.2 of the Special Contract specifically states that the contract does not divest the Commission of jurisdiction.

> Commission Authority. This Agreement is in all respects made subject to the jurisdiction and authority of the Commission. Notwithstanding any other provisions in this Agreement, nothing in the Agreement shall be construed as divesting or attempting to divest the Commission ... of its ... jurisdiction...(emphasis added).

15. Arbitration is a contractual right of the parties to the contract. Ernst v. Tallahassee, 527 F. Supp. 1141 (N.D. Fla 1981). An arbitration provision sets out a contractual right of each of the parties to compel to arbitrate any dispute that the party may wish to have arbitrated. In the instant case, neither of the parties to the Special Contract has sought to compel the other party to arbitrate the disputes giving rise to the instant proceeding. Both KCPL and GST were fully aware of their rights to arbitrate their dispute. GST chose to file its petition before the Commission and KCPL has answered. Both parties have proceeded before the Commission through extensive discovery and pre-hearing preparation. Neither party has expressed any interest in invoking the arbitration clause contained in the Special Contract. Due to the extensive proceedings before the Commission and the extent of the pre-hearing preparation, it is

likely that both parties have lost their right to arbitration under the Special Contract through waiver.

16. Missouri courts have found that "(t)here is a presumption against finding a waiver of a right to arbitrate a claim." Fru-Con Const. Co. v. Southwestern Redevelopment Corp. II, 908 S.W. 2d 741, 745 (Mo. App. E.D. 1995). But waiver will be found in certain instances.

> In order to establish that a party has waived its right to arbitration, the opposing party must show that: (1) the party knows of its existing right to arbitrate; (2) the party acted inconsistently with its right to arbitrate; and (3) the party's inconsistent acts prejudiced the opponent. *Reis v. Peabody Coal Co.*, 935 S.W. 2d 625, 630 (Mo. App. E.D. 1996.)

17. KCPL and GST knew of their arbitration rights and both have acted inconsistently with their rights by proceeding before the Commission in the instant proceeding. Further, a court is likely to find that prejudice to both parties has occurred if the issue is raised. The Reis court, at 631 stated:

> Lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, or litigation of substantial issues may constitute prejudice. (Citation omitted.) Although delay in requesting arbitration by itself does not constitute prejudice, "delay and the moving party's trial oriented activity are material factors in assessing prejudice." Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir. 1987).
>
> Prejudice can also result when a party loses a motion on the merits and then attempts to invoke arbitration, or when a party postpones invoking arbitration, causing "his adversary to incur unnecessary delay or expense." Kramer v. Hammond, 943 F.2d 176,179 (2nd Cir. 1991).

18. In light of the history of this proceeding before the Commission, it is very likely that a court would rule that both parties have waived their right to arbitrate the matters currently before the Commission.

In summary, the Special Contract explicitly provides that its arbitration provision does not divest the Commission of jurisdiction over the matters involved in this proceeding. Further, arbitration is a right of the parties to the contract. They may exercise this right as they see fit. In the instant case, they have chosen not to seek arbitration. Finally, it is likely the parties have waived their right to arbitration by progressing so far before the Commission. Under the foregoing circumstances, it appears that the arbitration provision of the Special Contract does not divest the Commission of its jurisdiction over the matters relating to the instant controversy between KCPL and GST. As stated earlier, however, GST's failure to perfect its complaint regarding the reasonableness of rates and adequacy of service mandates dismissal of those sections of GST's Complaint. In addition, the Commission should dismiss GST's remaining allegations since GST has failed to state claims upon which relief may be granted.

The Commission Should Dismiss GST's Complaint In Its Entirety Since The Commission Lacks The Requisite Statutory Authority To Grant The Relief Sought by GST

19. In a long line of cases, the Missouri Supreme Court has held that as an administrative body, the Commission has no power to order a refund, declare or enforce any principle of law or equity, determine damages, construe contracts or enforce contracts. Wilshire Constr. Co. v. Union Elec. Co., 463 S.W.2d 903, 905 (Mo. 1971); Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044, 1046 (Mo. 1943); May

Dep't Stores Co. v. Union Elec. Light & Power Co., 107 S.W.2d 41, 48 (Mo. 1937); Laundry, 34 S.W.2d at 45; see DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674, 676 (Mo.App. 1978); Hoffman v. Public Serv. Comm'n, 530 S.W.2d 434, 438 (Mo.App. 1975); Katz Drug Co. v. Kansas City Power & Light Co., 303 S.W.2d 672, 679 (Mo.App. 1957).

20. In its complaint and subsequent pleadings, GST has asked the Commission to grant equitable relief and monetary damages. As the Commission has already ruled in other orders issued in this proceeding[3] and as Missouri Courts have held, the Commission lacks the statutory authority to grant GST: (1) equitable relief by calculating incremental costs as if Hawthorn continued to operate; (2) money damages by requiring KCPL to pay GST any insurance proceeds; and/or (3) otherwise altering the terms of the contract between KCPL and GST. See KCPL's Response to GST's Motion to Compel Production of Documents, for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief, pp. 17-20 (filed March 3, 2000). KCPL is in no way suggesting that the Commission lacks the authority to rule that the Special Contract is no longer "just and reasonable." The contractual rights of KCPL and GST cannot abrogate the Commission's authority to establish just and reasonable rates. May, 107 S.W.2d at 48. If the Commission determines that the rate KCPL charges GST under the Special Contract is no longer just and reasonable, it is clear that the Commission has the authority to rescind the Special Contract and place GST on an appropriate tariff. But, it is also clear that the Commission lacks the authority to grant the relief sought by GST.

[3] See Order Denying Reconsideration, pp. 2-3 (August 19, 1999); Order Regarding Kansas City Power And Light Company's First Motion To Compel Discovery, pp. 7-8 (November 2, 1999).

21. GST has alleged that KCPL's imprudent operation of Hawthorn 5 entitles it to equitable relief, monetary damage, and/or a unilateral reformation of the Special Contract. Assuming *arguendo* that KCPL's imprudent operation of Hawthorn 5 resulted in the Hawthorn Incident, it does not follow that the Commission has the statutory authority to grant the relief sought by GST. It does not. Under the Special Contract the amount of GST's electric bill is determined, in large part, by KCPL's incremental costs. The Special Contract does not shield GST from unplanned outages.[4] The Commission has no legal basis to order KCPL to assume that Hawthorn 5 is still in operation when it calculates GST's electric bill. Accordingly, the Commission should dismiss GST's Complaint in its entirety since the Commission lacks the requisite statutory authority to grant the relief sought by GST.

WHEREFORE, having fully responded to the Commission's Order Regarding Show Cause Hearing, Kansas City Power & Light Company respectfully requests that the Commission consider these suggestions, and adopt the recommendations contained herein.

Respectfully submitted,

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[4] On January 26, 1999, KCPL presented GST with a written offer to share the risk relating to the availability of KCPL's power plants. GST rejected this offer. See Rebuttal Testimony of William H. Koegel, p. 4.

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Attorneys for Kansas City Power & Light Company

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered or mailed, First Class mail, postage prepaid, this 17th day of March, 2000, to:

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James M. Fischer

ATTACHMENT NO. 1

COMMISSION ORDERS:

1. *AT&T Communications of the Southwest, Inc. v. GTE North Incorporated*, Case No. TC-93-58

2. *AT&T Communications of the Southwest, Inc. v. Contel of Arkansas, Inc., d/b/a GTE Arkansas,* Case No. TC-93-62

3. *AT&T Communications of the Southwest, Inc. v. Seneca Telephone Company,* Case No. TC-93-96

4. *AT&T Communications of the Southwest, Inc. v. Contel Systems of Missouri, Inc., d/b/a GTE Systems of Missouri*, Case No. TC-93-101

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY

May 20, 1993

CASE NO: TO-93-101

Paul S. DeFord, Charles W. McKee, Lathrop & Norquist, 2345 Grand Ave., Suite 2600, Kansas City, MO 64108
Gloria Salinas, Attorney, AT&T Communications of the Southwest, Inc., 8911 Capitol of Texas Highway, Austin, TX 78759
Carl J. Lumley, Leland B. Curtis, Curtis, Oetting, Heinz, Garrett and Soule, 130 S. Bemiston, Suite 200, St. Louis, MO 63105
Edward J. Cadieux, Senior Attorney MCI Telecommunications, Corp., 100 S. Fourth Street, 2nd Floor, St. Louis, MO 63102
James C. Stroo, GTE Systems of Missouri, 1000 GTE Drive, P.O. Box 307, Wentzville, MO 63385-0307
Office of the Public Counsel, P.O. Box 7800, Jefferson City, MO 65102
Alfred G. Richter, Jr., Katherine C. Swaller, Southwestern Bell Telephone Company 100 North Tucker, Room 630, St. Louis, MO 63101

Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,

Brent Stewart

Brent Stewart
Executive Secretary

Uncertified Copy:

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 20th day of July, 1993.

AT&T Communications of the Southwest, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. TC-93-101
	)	
Contel Systems of Missouri, Inc., d/b/a GTE Systems of Missouri,	)	
	)	
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 Contel Systems of Missouri, Inc., d/b/a GTE Systems of Missouri, (GTE Systems), alleging that GTE Systems' 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 13, 1992 GTE Systems filed its Answer, and on October 21, 1992 the Office of the Public Counsel filed a Motion To Dismiss. On November 16, 1992 AT&T filed Suggestions in Opposition to the Public Counsel's Motion 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 GTE Systems 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 GTE Systems with excessive levels of

contribution and encourage competition. GTE Systems' access charges were set in 1989 and have not changed since that time. AT&T claims that the minutes of use for GTE Systems' 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, and thus appears to imply that the current access charges are not cost-based.

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 GTE Systems' access rates and rate design unlawful, and to reduce GTE Systems' 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.

GTE Systems filed an Answer in which it sought dismissal of AT&T's complaint. The Office of the Public Counsel filed a Motion to Dismiss on October 21, 1992, which expressed serious reservations about whether the complaint was an appropriate way to deal with AT&T's concerns, given that access charges could not be lowered without a consideration of all relevant factors,

including the effect on other rates. On November 16, 1992, AT&T filed Suggestions in Opposition to the Public Counsel's Motion to Dismiss. 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. The Commission's treatment of this complaint is consistent with its treatment of the other 43 complaints filed by AT&T. 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 GTE Systems 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 GTE Systems 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

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

construed to aver a violation by GTE Systems of any provision of law, or of the terms of its franchise or charter, or of any order or decision of the Commission. Like §386.200.1, §386.330.2 does not authorize a complaint as to the reasonableness of rates.

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. *Lebowitz 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 subsidising other services. There is no indication anywhere in the statute that the legislature contemplated a situation where one company's telecommunications service is subsidising 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 subsidising 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 AT&T has not alleged in its complaint that GTE Systems offers services which have been classified as transitionally competitive or competitive.

Although not cited in AT&T's complaint, or in any of the pleadings filed in this case, the question of the possible applicability of §386.390.1 was raised in some of the other 43 AT&T complaint cases, and the Commission deems it appropriate to address the impact of that statute on the present proceeding. 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 V.A.M.S. Supp. 1986.

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.

A 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. The Office of the Public Counsel, which filed a Motion to Dismiss in some although not all of the 44 AT&T complaint cases, expressed concern that access charges not be lowered without consideration of other relevant factors, including the effect on other rates. AT&T itself admits in its Suggestions in Opposition that the Commission's duty

to consider [illegible] relevant factors in setting access rates "may include the analysis of other rates and charges of the Respondent, the cost of capital, increasing or decreasing equipment costs and any other issue the Commission deems relevant." Suggestions in Opposition at 2.

At a min[illegible]n 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 [illegible] on AT&T, as, for example, it hints in its complaint that the rates charged by the respondent companies are not cost-based. In *Shephard 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.

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.

In addition, AT&T may have an opportunity to address the issue of access charges in Case No. TR-89-182, in which AT&T previously participated,

which was remanded to the Commission by the Missouri Court of Appeals for further proceedings in *State ex rel. GTE North v. Missouri Public Service Commission*, 838, S.W.2d 356 (Mo. App. 1992). The remanded issue involves the question of whether GTE North Incorporated's carrier common line charge portion of access charges for intrastate interLATA traffic should be reduced to achieve parity with the rates charged for intrastate intraLATA traffic. Although that case specifically involved GTE North, GTE North and GTE Systems have become a part of GTE Midwest Incorporated, along with other GTE companies, pursuant to a Report and Order issued on December 8, 1992 in Case No. TM-93-1, therefore the remand in TR-89-182 may have the potential to affect other GTE companies against which AT&T has brought complaints as well.

AT&T's recitation in its complaint of other matters which can affect or be affected by the access rates charged by GTE Systems 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 GTE Systems 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 GTE Systems' 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 Contel Systems of Missouri, Inc., d/b/a GTE Systems of Missouri 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 August 9, 1993.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

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

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 28th day of June, 1993.

AT&T Communications of the Southwest, Inc., Complainant,	)	
v.	)	Case No. TC-93-96
Seneca 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 Seneca Telephone Company (Seneca), alleging that Seneca'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 9, 1992 Seneca filed an Answer and a Motion to Dismiss and Suggestions, and on October 21, 1992 the Office of the Public Counsel filed a Motion to Dismiss. On November 16, 1992 AT&T filed Suggestions in Opposition to Motions to Dismiss of Respondent and Public Counsel, and on November 23, 1992 Seneca 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 Seneca 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 Seneca with excessive levels of contribution and

discourage competition. Seneca'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 Seneca'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 Seneca's access rates and rate design unlawful, and to reduce Seneca'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.

Seneca 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 Motions to Dismiss of Respondent and Public Counsel, and on November 23, 1992 Seneca

filed a Reply to Co[illegible]inant's Suggestions in Opposit[illegible] 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 Seneca 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 Seneca 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 Seneca of any provision of law, or of the terms

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

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.

Neither does §392.400.6 aid AT&T in support of its requested relief. §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. *Lebowitz 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 assist 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, section 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 subsidising 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, 715, 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 Seneca 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

than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, power, 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. Seneca 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 Seneca:

> 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 Seneca 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 [redacted] 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, Seneca 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 Motions to Dismiss of Respondent and Public Counsel that it is not seeking to engage in single-issue

ratemaking, not consistent with its complaint and the relief sought therein. AT&T distinguishes a case cited by Seneca, *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 7-8. 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 Montsville*, 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 Seneca 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 Seneca 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 Seneca 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 Seneca'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 Seneca 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 15, 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.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY

July 20, 1993

CASE NO: TT-93-62

Paul S. DeFord, Charles W. McKee, Lathrop & Norquist, 2345 Grand Ave., Suite 2600, Kansas City, MO 64108
Gloria Salinas, Attorney, AT&T Communications of the Southwest, Inc., 8911 Capitol of Texas Highway, Austin, TX 78759
Carl J. Lumley, Leland B. Curtis, Curtis, Oetting, Heinz, Garrett and Soule, 130 S. Bemiston, Suite 200, St. Louis, MO 63105
Edward J. Cadieux, Senior Attorney, MCI Telecommunications, Corp., 100 S. Fourth Street, 2nd Floor, St. Louis, MO 63102
James C. Stroo, GTE Arkansas, 1000 GTE Drive, P.O. Box 307, Wentzville, MO 63385-0307
Office of the Public Counsel, P.O. Box 7800, Jefferson City, MO 65102
Alfred G. Richter, Jr., Katherine C. Swaller, Southwestern Bell Telephone Company 100 North Tucker, Room 630, St. Louis, MO 63101

Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,

Brent Stewart

Brent Stewart
Executive Secretary

Uncertified Copy:

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 20th day of July, 1993.

AT&T Communications of the Southwest, Inc., Complainant,	)	
v.	)	Case No. TC-93-62
Contel of Arkansas, Inc., d/b/a GTE Arkansas, 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 Contel of Arkansas, Inc., d/b/a GTE Arkansas (GTE Arkansas), alleging that GTE Arkansas' 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 13, 1992 GTE Arkansas filed its Answer, and on October 13, 1992 the Office of the Public Counsel filed a Motion To Dismiss. On November 16, 1992 AT&T filed Suggestions in Opposition to the Public Counsel's Motion 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 GTE Arkansas 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 GTE Arkansas with excessive levels of contribution and discourage competition. GTE Arkansas's access charges were set

in 1989 and have not changed since that time. AT&T claims that the minutes of use for GTE Arkansas' 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, and thus appears to imply that the current access charges are not cost-based.

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 GTE Arkansas' access rates and rate design unlawful, and to reduce GTE Arkansas'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.

GTE Arkansas filed an Answer in which it sought dismissal of AT&T's complaint. The Office of the Public Counsel filed a Motion to Dismiss on October 13, 1992, which expressed serious reservations about whether the complaint was an appropriate way to deal with AT&T's concerns, given that access charges could not be lowered without a consideration of all relevant factors, including the effect on other rates. On November 16, 1992, AT&T filed

Suggestions in Opposition to the Public Counsel's Motion to Dismiss. 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. The Commission's treatment of this complaint is consistent with its treatment of the other 43 complaints filed by AT&T. In addition, the Commission further determines that the principle of judicial economy dictates that AT&T's complaint 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 GTE Arkansas 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 GTE Arkansas 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 GTE Arkansas of any provision of law, or of the

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

terms of its franchise or charter, or of any order or decision of the Commission. Like §386.200.1, §386.330.2 does not authorize a complaint as to the reasonableness of rates.

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. Labowitz 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 subsidising other services. There is no indication anywhere in the statute that the legislature contemplated a situation where one company's telecommunications service is subsidising the telecommunications service of another company; rather, the focus is on offering 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 subsidising 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 AT&T has not alleged in its complaint that GTE Arkansas offers services which have been classified as transitionally competitive or competitive.

Although not cited in AT&T's complaint, or in any of the pleadings filed in this case, the question of the possible applicability of §386.390.1 was raised in some of the other 43 AT&T complaint cases, and the Commission deems it appropriate to address the impact of that statute on the present proceeding. 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. Supp. 1986.

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.

A 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. The Office of the Public Counsel, which filed a Motion to Dismiss in some although not all of the 44 AT&T complaint cases, expressed concern that access charges not be lowered without consideration of other relevant factors, including the effect on other rates. AT&T itself admits in its Suggestions in Opposition that the Commission's duty to consider all relevant factors in setting access rates "may include the

analysis of other rates and charges of the Respondent, the cost of capital, increasing or decreasing equipment costs and any other issue the Commission deems relevant." Suggestions in Opposition at 2.

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 Shephard v. *City of Huntsville*, 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.

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 GTE Arkansas 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 GTE Arkansas 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 GTE Arkansas' 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 Contel of Arkansas, Inc., d/b/a GTE Arkansas 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 August 9, 1993.

BY THE COMMISSION

(S E A L)

Brent Stewart

Brent Stewart
Executive Secretary

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

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY

July 20, 1993

CASE NO: TC-93-58

Paul S. DeFord, Charles W. McKee, Lathrop & Norquist, 2345 Grand Ave., Suite 2600, Kansas City, MO 64108
Gloria Salinas, Attorney, AT&T Communications of the Southwest, Inc., 8911 Capitol of Texas Highway, Austin, TX 78759
Carl J. Lumley, Leland B. Curtis, Curtis, Oetting, Heinz, Garrett and Soule, 130 S. Bemiston, Suite 200, St. Louis, MO 63105
Edward J. Cadieux, Senior Attorney, MCI Telecommunications, Corp., 100 S. Fourth Street, 2nd Floor, St. Louis, MO 63102
James C. Stroo, GTE North Inc., 1000 GTE Drive, P.O. Box 307, Wentzville, MO 63385-0307
Office of the Public Counsel, P.O. Box 7800, Jefferson City, MO 65102
Alfred G. Richter, Jr., Katherine C. Swaller, Southwestern Bell Telephone Company 100 North Tucker, Room 630, St. Louis, MO 63101

Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,

Brent Stewart

Brent Stewart
Executive Secretary

Uncertified Copy:

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 20th day of July, 1993.

AT&T Communications of the Southwest, Inc., Complainant,	)	
v.	)	Case No. TC-93-58
GTE North Incorporated, 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 GTE North Incorporated, (GTE North), alleging that GTE North's charges for access service are too high. At the same time AT&T filed complaints against 63 other noncompetitive local exchange telecommunications companies in the state of Missouri. On October 13, 1992 GTE North filed its Answer, and on October 13, 1992 the Office of the Public Counsel filed a Motion To Dismiss. On November 16, 1992 AT&T filed Suggestions in Opposition to the Public Counsel's Motion 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 GTE North 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 GTE North with excessive levels of contribution and discourage competition. GTE North's access charges were set in 1989 and have

not changed since that time. AT&T claims that the minutes of use for GTE North'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, and thus appears to imply that the current access charges are not cost-based.

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 GTE North's access rates and rate design unlawful, and to reduce GTE North'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.

GTE North filed an Answer in which it sought dismissal of AT&T's complaint. The Office of the Public Counsel filed a Motion to Dismiss on October 13, 1992, which expressed serious reservations about whether the complaint was an appropriate way to deal with AT&T's concerns, given that access charges could not be lowered without a consideration of all relevant factors, including the effect on other rates. On November 16, 1992, AT&T filed

Suggestions in Opposition to the Public Counsel's Motion to Dismiss. 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. The Commission's treatment of this complaint is consistent with its treatment of the other 43 complaints filed by AT&T. 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 GTE North 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 GTE North 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 GTE North of any provision of law, or of the

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

terms of its franchise or charter, or of any order or decision of the Commission. Like §386.200.1, §386.330.2 does not authorize a complaint as to the reasonableness of rates.

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. *Labowitz 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 basis, 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 AT&T has not alleged in its complaint that GTE North offers services which have been classified as transitionally competitive or competitive.

Although not cited in AT&T's complaint, or in any of the pleadings filed in this case, the question of the possible applicability of §386.390.1 was raised in some of the other 43 AT&T complaint cases, and the Commission deems it appropriate to address the impact of that statute on the present proceeding. 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. Supp. 1986.

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.

A 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. The Office of the Public Counsel, which filed a Motion to Dismiss in some although not all of the 44 AT&T complaint cases, expressed concern that access charges not be lowered without consideration of other relevant factors, including the effect on other rates. AT&T itself admits in its Suggestions in Opposition that the Commission's duty to consider all relevant factors in setting access rates "may include the

analysis of other rates and charges of the Respondent, the cost of capital, increasing or decreasing equipment costs and any other issue the Commission deems relevant." Suggestions in Opposition at 2.

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 *Shephard v. City of Montgomery*, 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.

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.

In addition, AT&T may have an opportunity to address the issue of GTE North's access charges in Case No. TR-89-182, in which AT&T previously participated, which was remanded to the Commission by the Missouri Court of

Appeals for further proceedings in State ex rel. GTE North v. Missouri Public Service Commission, 835 S.W.2d 356 (Mo. App. 1992). The remanded issue involves the question of whether GTE North's carrier common line charge portion of access charges for intrastate interLATA traffic should be reduced to achieve parity with the rates charged for intrastate intraLATA traffic. GTE North no longer exists as a separate regulated entity but has become a part of GTE Midwest Incorporated, along with other GTE companies, pursuant to a Report and Order issued on December 8, 1992 in Case No. TM-93-1, therefore the remand in TR-92-182 may have the potential to affect other GTE companies against which AT&T has brought complaints as well.

AT&T's recitation in its complaint of other matters which can affect or be affected by the access rates charged by GTE North 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 GTE North 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 GTE North'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 [illegible] ORDERED:

1. That the complaint filed by AT&T Communications of the Southwest, Inc. on September 10, 1992 against GTE North Incorporated 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 August 9, 1993.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

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

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

MCI Telecommunications Corporation, Inc. *et al.*,	)	
Complainants,	)	
vs.	)	CASE NO. TC-97-303
Southwestern Bell Telephone Company, Inc.,	)	
Respondent.	)	

REPORT AND ORDER

Issue Date: September 16, 1997

Effective Date: September 26, 1997

ATTACHMENT NO. 1

74.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

MCI Telecommunications Corporation, Inc. *et al.*,	)	
Complainants,	)	
vs.	)	CASE NO. TC-97-303
Southwestern Bell Telephone Company, Inc.,	)	
Respondent.	)	

APPEARANCES

Carl J. Lumley and **Leland B. Curtis**, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation.

Paul S. DeFord, Lathrop & Gage L.C., 2345 Grand Boulevard, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

Mark W. Comley, Newman, Comley & Ruth, 205 East Capitol Avenue, P.O. Box 537, Jefferson City, Missouri 65102, for WorldCom, Inc.; Dial U.S.; Valu Line of St. Joseph, Inc.; LDD, Inc.; CGI; and Consolidated Communications Telecom Services, Inc.

Paul G. Lane, Southwestern Bell Telephone Company, 100 North Tucker, Room 630, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

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Ronald Molteni and **Mark E. Long**, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, for the State of Missouri.

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ADMINISTRATIVE
LAW JUDGE: Dale Hardy Roberts, Chief.

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REPORT AND ORDER

I. Procedural History

On February 6, 1997, MCI Telecommunications Corporation, Inc. (MCI) and a number of other interexchange telecommunications companies[1] filed a complaint against Southwestern Bell Telephone Company (SWBT) alleging that SWBT's intrastate switched access rates are excessive and should be reduced. Notice of the complaint was issued by the Commission and an answer was filed on March 28. On April 7 MCI *et al.* filed an amended complaint.

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[1]MCI Telecommunications Corporation, Inc., MCImetro Access Transmission Services, Inc., Teleconnect Long Distance Services & Systems Company, Inc., AT&T Communications of the Southwest, Inc., Metropolitan Fiber Systems of Kansas City, L.P., MFS Intelenet of Missouri, Inc., WorldCom, Inc., Communications Cable-Laying Company d/b/a Dial U.S., Valu-Line of St. Joseph, Inc., LDD, Inc., CommuniGroup of K.C., Inc., Kansas City Fiber Network, L.P., North American Communications Group, Inc., American Tel Group, Inc., MVP Communications, Inc., New Century Telecom, Inc., NOS Communications, Inc., NOSVA, Limited Partnership, Affinity Network, Incorporated, America's Tele-Network Corp., IXC Long Distance, Inc., Nations Bell, Inc. d/b/a Nations Tel., Coastal Telecom Limited Company, Telegroup, Inc., Wright Businesses, Inc. d/b/a Long Distance Management, Inc., QCC, Inc., ActiveTel L.D., Inc., Maxcom, Inc., Consolidated Communications Telecom Services, Inc., and Dial and Save of Missouri, Inc., hereinafter referred to collectively as "MCI *et al.*" or "Complainants."

The Commission's rule on complaints requires that, upon the filing of a complaint, notice of such complaint shall be filed upon the respondent and the respondent shall file an answer within 30 days. See 4 CSR 240-2.070(7). The purpose of the notice provision of the rule is to ensure that the respondent has formal notification of the complaint. The notice also serves to begin the time period within which an answer must be filed. The respondent had already been served with the complaint and had filed an answer in response to the initial complaint.

The complainants filed a certificate of service which verified that a copy of the amended complaint had been mailed by prepaid first class mail to the respondent. Ten days later, on April 17, the respondent filed its answer to the amended complaint. This confirms that the respondent received the amended complaint and although the respondent complained at the hearing that no formal notice of an amended complaint had been delivered to it, the respondent would now be *estopped* to deny receipt of the amended complaint. SWBT has also alleged that the Commission has not authorized the amended complaint pursuant to 4 CSR 240-2.080(14). It is not clear from the rule cited that Commission authorization is required. That question will remain for another day as this procedure is not dispositive of the complaint filed herein.

Numerous applications were filed requesting intervention in this case and an order disposing of those applications has not been necessary. The Commission received motions to allow cross complaints, motions to expand the scope, motions to dismiss, and a variety of other motions and responses thereto. The Commission determined that those pleadings and motions should be heard prior to considering the necessity of a procedural schedule or an evidentiary hearing.

On July 15 the Commission issued an Order Setting Motions Hearing so that the Commission might entertain oral argument on whether there was jurisdiction to proceed with this complaint case. The Commission specifically deferred ruling upon the numerous applications to intervene and instead granted each entity which had applications for intervention pending the opportunity to make a special appearance and participate at the motions hearing without intervention. On July 29 the Commission convened the motions hearing. At that hearing, the Commission first took up SWBT's motion to dismiss and the issue of the complainants' standing or lack thereof and after hearing from SWBT every party present was offered the opportunity to respond to SWBT's motion and argument.

Subsequently, the Commission took up the motions of the various complainants regarding their requests to expand the scope of this proceeding along with any other pending motions and then heard SWBT's response to the complainants' motions and arguments. The Commission provided for initial briefs and on August 15 post-hearing briefs were filed by MCI, the Office of the Public Counsel (Public Counsel), the Office of the Attorney General (Attorney General), the Staff of the Missouri Public Service Commission (Staff), AT&T Communications of the Southwest, Inc. (AT&T) and SWBT.

On September 5 MCI filed a Supplement to Introduction Section of Complainants' Brief filed on August 15. This filing was out of time and no leave to supplement the briefs was sought. On September 8 SWBT filed its Motion to Strike Complainants' Supplement to Introduction of Complainants' Brief Filed. SWBT's motion will be granted.

II. Discussion

The complaint states that SWBT's intrastate switched access rates were last set by this Commission in 1994 and that the Commission had not required a cost study to assess the reasonableness of those rates at that time. The complaint claims that SWBT's intrastate switched access minutes of use, and resulting revenues from its intrastate switched access services, have increased and that an amount of excess profits above the cost to provide the service has grown commensurate with the increased minutes of use. The complaint then concludes that SWBT's existing intrastate rate design is unjust, unreasonable and unlawful and that the Commission should reduce SWBT's intrastate switched exchange access charges in relationship to their direct economic costs before SWBT is permitted to provide in-region long-distance service in Missouri pursuant the Telecommunications Act of 1996.[2]

The Commission would not be acting in the interest of judicial economy to convene an evidentiary hearing on the substantive allegations raised by the complaint if the Commission lacks jurisdiction to proceed or if the Commission finds other statutory barriers to hearing and resolving the complaint. The initial inquiry at the motions hearing was whether an individual entity, such as MCI, may properly file a complaint of this type. If not, the Commission must consider whether MCI and its co-complainants constitute 25 or more proper parties. If MCI and the co-complainants qualify as proper parties, the Commission may proceed to the next step. However, if they do not, the Commission must then address whether Public Counsel's motion in this case constituted a formal complaint of the Public Counsel and thus conferred jurisdiction where none previously existed. If

[2]47 U.S.C. § 271.

the Commission finds either that there were sufficient co-complainants or that Public Counsel's motion constituted a formal complaint then the Commission must next consider whether addressing the substance of the complaint would constitute "single-issue ratemaking" as prohibited both by statute and by common law interpretation thereof.[3]

(A) Section 386.390

SWBT's first argument was based upon Section 386.390.1 RSMo[4] which states in pertinent part that a complaint may be filed setting forth any act or thing done or omitted to be done 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 as to the reasonableness of any rates unless 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 25 consumers or purchasers, or prospective consumers or purchasers. This section has been interpreted by the Commission to mean that "anyone may petition for reasonable and necessary relief *except as to rates.*" Cole v. Ft. Scott & Nevada Light, Etc., Co., 1 Mo.P.S.C. 130; 138, (1913) (emphasis added.)

The complaint filed in this case may not be filed by a single entity such as MCI. Section 386.390 and section 386.400, taken together,

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[3]Single-issue ratemaking is unlawful pursuant to the court's holding in State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. Banc 1979) hereafter "UCCM"; State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 812 (Mo. App. 1993). These cases interpret Section 392.240.

[4]All statutory citations are to Revised Statutes of Missouri, 1994, unless otherwise noted.

provide for complaints by public utilities concerning violations or claimed violations of any provision of law, or of any rule or order or decision of the Commission. There is no allegation by the complainants of a violation of law or of a violation of rule or order or decision of the Commission. Therefore, if complainants are attempting to assert standing of a single entity under these provisions, they have failed to state a claim for which this Commission can grant relief thereunder. The complainants have not invoked the Commission's jurisdiction under these provisions because the subject of the complaint is not one contemplated by the statutory language.

There are only two remaining possibilities for concluding that this complaint was filed by the proper party(ies). Section 386.390 provides for complaints as to the reasonableness of a rate or charge. However, the language is clear that a complaint as to the reasonableness of rates charged by a utility may be entertained by the Commission only upon its own motion unless the complaint is signed by the public counsel or appropriate representative of any municipality within which the alleged violation occurred, or not less than 25 consumers or purchasers, or prospective consumers or purchasers. There are no complainants which represent any municipality. Therefore, the Commission must determine whether the complaint was filed either by Public Counsel or a group of 25 or more purchasers or prospective purchasers.

This complaint was not filed by the Public Counsel, but Public Counsel has actively taken part subsequent to the filing of the complaint. It is clear that Public Counsel's participation in this case should not be viewed in the same light as a complaint filed by Public Counsel. Under direct questioning on the issue, Public Counsel confirmed that this is not a complaint filed by the Public Counsel but rather is one in which the

Public Counsel has chosen to participate. In fact, Chair Zobrist[5] asked the Public Counsel:

> Ms. Hogerty, are you saying that your March 18th motion which requests that the scope be expanded and that the investigation/audit be expedited, that this is tantamount to a complaint under 386.390?

Public Counsel responded "I don't know if technically it is because I have not actually filed a separate complaint. So I can't say that it is." Later in the hearing, Commissioner Murray asked Public Counsel:

> Did you ask the Commission to order its staff to do that against Southwestern Bell in this instance prior to joining in on this?

Public Counsel answered "No. No, I have not. And I actually haven't joined this complaint." Public Counsel itself does not assert that its participation herein constitutes a complaint filed by Public Counsel pursuant to Section 386.390.1. Therefore, in order for the complaint to clear the preliminary filing requirement, it must be established that 25 or more purchasers or potential purchasers of the respondent have filed this complaint.

In the initial filing, MCI appeared to be joined by 28 co-complainants. Thereafter, a number of parties appear to have been added in the April 7 amended complaint. The Amended Complaint appears to have been filed by MCI and 31 co-complainants. Although this number exceeds the minimum requirement of 25 complainants, a number of these co-complainants are not purchasers of SWBT at this time and there is little authority to establish what constitutes a "potential" purchaser. SWBT has noted that only 13 of the complainants have ever purchased any intrastate switched

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[5]At the time of the July 29 hearing, Karl Zobrist was the Chair of the Commission. Since that time, Chair Zobrist resigned from the Commission and the concurrences to this order will reflect that Sheila Lumpe is now the Chair of the Commission.

access service from SWBT, leaving 19 complainants who have never purchased intrastate access service from SWBT. SWBT has alleged that those companies who have never purchased intrastate access services do not constitute prospective purchasers. It is not entirely clear what constitutes a prospective purchaser and without citing any authority the parties have left this issue to be determined by the Commission. The Commission has determined that it need not answer that question in order to dispose of this case.

However, the record has shown that one complainant, Wright Business, Inc., is not even certificated to provide telecommunications services within the State of Missouri. Another, North American Communications Group, Inc., holds no certificate although North American Communications Corporation does. If these two are one and the same then this corporation should both litigate and do business under the same name. If these are two separate entities then this complainant, too, holds no certificate to provide telecommunications services in the State of Missouri. It would be tenuous to grant prospective purchaser status to a complainant who has never been certificated by this Commission to provide services within the State of Missouri.

Furthermore, in the Commission's Order Setting Motions Hearing, ordered paragraph number one stated: "That all parties to this case shall appear to argue those motions which are now pending in this docket on July 29, 1997, at 1:30 p.m. in Room 520B of the Commission's offices in the Harry S Truman Building". Although ordered to appear, 10 of the 32 parties failed to do so. The absent complainants did not seek leave of the Commission to be excused from the hearing nor did they arrange to have anyone else appear on their behalf. Vice-Chair Drainer made repeated inquiries to ensure that none of those counsel who did appear did so as co-

counsel or local counsel for the absent parties. Although the complainants may have been in communication with each other it was evident that ten of the complainants had failed to request leave to be absent and had failed to appear as ordered. Failure to appear at a hearing without previously having secured a continuance shall constitute grounds for dismissal of the party's complaint or of the party. See 4 CSR 240-2.110(4)(B).

Those companies which failed to appear were (1) Metropolitan Fiber Systems of Kansas City L.P., (2) MFS Intelenet of Missouri, Inc., (3) Metropolitan Fiber Systems of St. Louis, Missouri, Inc., (4) MVP Communications, Inc., (5) New Century Telecom, Inc., (6) NOS Communications, Inc., (7) NOSVA, Limited Partnership, (8) Affinity Network, Inc., (9) America's Tele-Network Corp., and (10) Dial & Save of Missouri, Inc. The absence of these co-complainants brings the number of complainants below the minimum number of 25.

The Commission must conclude that this complaint as to the reasonableness of SWBT's rates was not filed by a party who has standing to file such a complaint under section 386.390.

Assuming, *arguendo*, that the Commission had determined this complaint to be filed by the proper parties, the Commission would then look at those issues which may be complained of under this statute.

As stated earlier Section 386.390 provides for complaints as to the lawfulness or reasonableness of a rate or charge. Inasmuch as SWBT's access rates constitute the crux of the complaint, it must be noted that there is no allegation by the complainants of a violation of law, rule, order or decision of the Commission on the part of SWBT. If MCI *et al.* are complaining as to the reasonableness of the rates that SWBT is charging the record reflects that SWBT is charging the rate authorized, found previously to be reasonable and subsequently required by Commission order.

(B) 392.400

The Commission has previously found and concludes again that Section 392.400 addresses the enforcement by the Commission of the segregation of noncompetitive services from transitionally competitive or competitive services. The complainants in this case have made no allegation that SWBT's intrastate switched access services are subsidizing SWBT's transitionally competitive or competitive services. Section 392.400.6 only permits complaints that a company's noncompetitive services are subsidizing its competitive or transitionally competitive services and the complainants have failed to state such a claim. Complainants have made no allegation of subsidization. The complaint simply fails to state a claim upon which relief may be granted.

(C) Single-issue Ratemaking

Setting aside the various technical pleading or procedural irregularities of the complaint, the Commission turns its attention to the concern over single-issue ratemaking. The term "single-issue ratemaking" is essentially a shorthand method of referring to the requirement that all relevant factors must be considered. Ratemaking is a balancing process, which focuses on a number of factors such as the rate of return the utility has an opportunity to earn, the rate base upon which a return may be earned, the depreciation costs of plant and equipment, and allowable operating expenses. Union Electric Co. v. Public Serv. Comm'n, 765 S.W.2d 618, 622 (Mo. App. 1988). [W]hether the rates in effect at any given time are just and reasonable depends upon many facts and can only be determined after rather extended investigation and study." State ex rel. Laclede Gas Co. v. P.S.C., 535 S.W.2d 561, 570 (Mo. App. 1976). The Commission must "match" the revenue/expense/rate base relationship. The Staff of the

Missouri Public Serv. Comm'n v. Southwestern Bell Telephone Co., 2 Mo. P.S.C. 3d 479, 486-87, 544-45 (1993). The effect of one component of the relationship may be offset by another component. See, e.g., Id. at 544-45.

SWBT has asserted that the prohibition against single-issue ratemaking is based on the absence of statutory authority to set rates based upon single factors. Section 392.240 requires the Commission to consider all relevant factors when determining a rate Indeed, the court has held that while the Commission has the authority to investigate rates, it does not have the authority to look at only a single factor in permitting those rates to be adjusted. UCCM at 56.

Complainants stated in paragraph 40 of their amended complaint that "SWBT's total earnings are unreasonable and should be decreased by the access charge reductions proposed by complainants." However, it is clear that this is a complaint over one single rate. Complainants do not ask that the rates be restructured *in toto* but ask only that this one rate be reduced.

Pursuant to 4 CSR 240-2.070(5) the complaint shall state the nature of the complaint and the complainant's interest in the complaint, in a clear and concise manner. The only clear and concise issue raised within the complaint is the issue of SWBT's access rates. The prohibition against single-issue ratemaking raises a bar against the Commission's ability to proceed with the complaint as pleaded.

III. Summary

Finally, the Commission turns its attention to the motion to dismiss and the issue as to whether there exists the necessity of an evidentiary hearing. One of the complainants framed its comments at the motions hearing in the context of a hearing for judgment on the pleadings

or, in the alternative, a dismissal for failure to state a claim upon which relief can be granted. The Commission will not view it as a motion for judgment on the pleadings.

The Commission treats this as a Motion to Dismiss pursuant to 4 CSR 240-2.070(6). This rule is similar to, if not based upon, Rule 55.27(6) "failure to state a claim upon which relief can be granted." A motion to dismiss for failure to state a claim upon which relief can be granted attacks the legal sufficiency of the petition by claiming that, even if the facts in the pleading are true, the facts do not constitute legal grounds for any relief.[6] In considering a motion to dismiss the Commission must accept as true all well-pleaded factual allegations of the petition.[7]

The parties to this case offered argument at the motions hearing as to what constituted a fact versus a legal conclusion. The Commission must make its conclusions of law in order to dispose of the motions which are now before it. As the U. S. Supreme Court has observed: "The court has previously noted the vexing nature of the distinction between questions of fact and questions of law . . . nor do we yet know of any . . . rule or principle that will unerringly distinguish a factual finding from a legal conclusion". Pullman-Standard Co. v. Swint, 456 U.S. 273, 288(1982). For example, the classification of a prospective purchaser may require some factual evidence but in some instances a conclusion of law must define that term before the facts may be reviewed to consider whether they meet the necessary standard. The Commission has discussed that particular distinction elsewhere in this order.

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[6] Black's Law Dictionary, p. 520 (rev. 4th ed. 1968).

[7] Hon Inc. v. The Board of Regents Central Mo. State Univ., 678 S.W.2d 413, 414 (Mo.App. 1984).

The purpose of a motion to dismiss is to expedite litigation and lies in the interest of judicial economy. Motions to dismiss may relieve this forum from hearing cases for which there is no remedy within the jurisdiction of the Commission and for which no relief may be granted.

This complaint may not be treated as if filed as a complaint by the Office of the Public Counsel. This has been made clear by Public Counsel's own comments at the motions hearing. Neither may this complaint be treated as if it were filed by 25 purchasers or potential purchasers. The record at the hearing suggests that only 13 of the complainants have actually purchased switched access service from SWBT which leaves the complainants to rely on the meaning of "potential purchaser". Of those potential purchasers, it is clear to the Commission that one, possibly two, of them are not yet certificated to provide telecommunications services within the State of Missouri and therefore they could not be potential purchasers of SWBT's switched access services within Missouri. Irrespective of the definition of a potential purchaser, only 22 complainants appeared for the hearing and this number also fails to meet the statutory minimum.

The complainants have not alleged any "thing or act done or omitted to be done" by SWBT in violation of any provision of law or rule or order or decision of the Commission. Although the complainants have stated that SWBT's access rates are excessive, SWBT is, in fact, charging an access rate which has been previously ordered by the Commission.

If, *arguendo*, the complainants were able to correct every pleading deficiency in this case, they would still face the absolute prohibition against single-issue ratemaking. The Commission concludes it must dismiss this case as an attempt to bring before it a single-issue ratemaking decision.

IV. The Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Southwestern Bell Telephone Company is a regulated telecommunications company pursuant to Section 386.020 and is therefore subject to the jurisdiction of the Missouri Public Service Commission.

Section 386.390.1 provides jurisdiction for the Commission to hear complaints regarding any thing or act done by a telecommunications company in violation of any provision of law, rule, order or decision of the Commission.

The complaint fails to set forth any act or thing done or omitted to be done or claimed to be in violation of any act or any provision of law, rule, order or decision of the Commission.

Section 386.390.1 provides jurisdiction for the Commission to hear complaints regarding the reasonableness of rates of a telephone corporation *only if* 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 25 consumers or purchasers, or prospective consumers or purchasers, of such telephone service. The complaint is not signed by the proper parties.

Although the complaint purports to be filed by more than 25 consumers or purchasers or prospective consumers or purchasers, the number of proper complainants is in fact less than 25.

A telecommunications business which has neither sought nor received the necessary authority to conduct business in Missouri could not constitute a prospective purchaser or prospective consumer as contemplated by section 386.390.1. Therefore one, possibly two, of the complainants

cannot be considered to be consumers or purchasers or prospective consumers or purchasers for purposes of this statute.

The failure of a party to appear when specifically ordered to do so is cause for that party's dismissal pursuant to 4 CSR 240-2.110(4)(B). Therefore, ten of the original complainants will be dismissed for failure to appear.

Neither section 392.200.1 nor 386.330.2 authorizes a complaint as to the reasonableness of rates. Therefore, neither section 386.390, 392.200 nor 386.330 provide standing for the complainants in this case to sustain a complaint based upon reasonableness of rates.

Section 392.400 authorizes complaints regarding alleged subsidization from a non-competitive service to a competitive or transitionally competitive service. Neither the complaint nor the amended complaint is based upon a claim that SWBT's non-competitive services are subsidizing its competitive or transitionally competitive services.

Section 392.240 requires the Commission to consider all relevant factors when determining a rate. Failure to do so has been designated by the courts as single-issue ratemaking and is impermissible pursuant to the court's holding in State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41 (Mo. Banc 1979) and State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, (Mo. App. 1993). The process advocated by the complainants herein would constitute a violation of the single-issue ratemaking prohibition.

The complaint filed herein fails to state a claim upon which relief can be granted and may therefore be dismissed pursuant to 4 CSR 240-2.070(6)

The Commission may sustain a motion to dismiss where the complainant has failed to show that genuine justiciable issues of fact exist.

IT IS THEREFORE ORDERED:

1. That the complaint is dismissed for failure to state a claim upon which relief may be granted.

2. That the complaint filed in this case against Southwestern Bell Telephone Company is dismissed for seeking an action which violates the prohibition against single-issue ratemaking.

3. That those complainants which failed to appear, as ordered, for the motions hearing on July 29, 1997, are hereby dismissed pursuant to 4 CSR 240-2.110(4)(B). Those complainants are Metropolitan Fiber Systems of Kansas City L.P., MFS Intelenet of Missouri, Inc., Metropolitan Fiber Systems of St. Louis, Missouri, Inc., MVP Communications, Inc., New Century Telecom, Inc., NOS Communications, Inc., NOSVA, Limited Partnership, Affinity Network, Inc., America's Tele-Network Corp., and Dial & Save of Missouri, Inc.

4. That the complaint is dismissed for failing to meet the statutory requirement of being filed by the proper parties.

5. That the Commission will grant the September 8, 1997, motion of Southwestern Bell Telephone Company to Strike Complainants' Supplement to Introduction of Complainants' Brief.

6. That all motions not previously ruled upon by the Commission in this case are hereby denied and all objections not previously ruled upon are hereby overruled.

7. That all pending applications to intervene are hereby denied and dismissed as moot.

8. That this order shall be effective on September 26, 1997.

BY THE COMMISSION

Cecil I. Wright
Executive Secretary

(S E A L)

Lumpe, Ch., Crumpton, Drainer and Murray, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

Dated at Jefferson City, Missouri, on this 16th day of September, 1997.