

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

R. Mark,)	
)	
Complainant,)	
)	Case No. TC-2006-0354
vs.)	
)	
Southwestern Bell Telephone, L.P.,)	
d/b/a AT&T Missouri,)	
)	
Respondent)	

**SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A AT&T MISSOURI'S
COMBINED MOTION TO COMPEL RESPONSES TO DATA REQUESTS,
RESPONSE TO COMPLAINANT'S MOTION TO EXTEND TIME TO
RESPOND TO AT&T MISSOURI'S DATA REQUESTS, AND
MOTION FOR EXTENSION OF TIME WITHIN WHICH TO RESPOND TO
COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT**

Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri ("AT&T Missouri") respectfully requests that the Commission take action to ensure development of a full evidentiary record that will allow a reasoned and informed decision in this case. Equally importantly, and despite the contrary view of the Complainant, R. Mark ("Complainant" or "Mark"), the discovery process necessary to develop the record should be completed before the Commission renders any decision on the merits of the Complaint. As explained further below, Mark should be compelled to respond fully to AT&T Missouri's data requests -- none of which were the subject of timely objections -- as AT&T Missouri is unable to prepare a complete and informed response to his motion for summary judgment without them.

Mark's latest-filed pleadings requesting that the Commission rule on his motion before he responds to AT&T Missouri's discovery puts the cart before the horse. Moreover, these pleadings simply re-package Mark's previously filed -- and rejected -- motion to suspend discovery pending resolution of his motion for summary judgment.

Specifically, AT&T Missouri:

- Moves the Commission, pursuant to Commission Rule 2.090(8), to issue an Order compelling Complainant to provide full and complete responses to AT&T Missouri's data requests directed to him on May 11, 2006, a copy of which requests is attached hereto as Exhibit 1.
- Advises the Commission that it has no objection to the grant of Complainant's motion to extend the time within which to respond to AT&T Missouri May 11, 2006, data requests, through and including July 16, 2006, so long as the Commission likewise extends the time within which to respond to Complainant's June 13, 2006 data requests, through and including July 28, 2006.
- Moves the Commission, pursuant to Commission Rule 2.117(1)(D), to issue an Order determining that any ruling on Complainant's motion for summary judgment shall be deferred pending receipt of AT&T Missouri's response to the motion, which response shall be due not earlier than 30 days following the completion of discovery in this case.

I. NATURE OF THE CASE

This case was filed by Mr. Mark on March 15, 2006. Reduced to the nub, the case involves a determination of whether Complainant qualifies for a waiver of the tariffed charge otherwise applicable to non-published exchange service provided residence customers. Such a waiver is allowed to a customer "who has service which involves data terminals where there is no voice use contemplated."¹ AT&T Missouri has applied this language -- which has been in place in AT&T Missouri's tariff since at least 1973 -- such that the waiver is allowed when a customer is a user of TTY equipment (Teletypewriter or Text Telephone) or TDD equipment (Telecommunications Devices for the Deaf). Mark claims the waiver applies to the telephone

¹ On May 1, 2006, AT&T Missouri filed a motion to strike regarding other matters raised by the Complaint, including allegations about settlement discussions had between the parties, a request for relief made on behalf of a purported class of individuals beside Mark, a request for damages and equitable relief, and various allegations regarded under Rule 55.27(e) of the Missouri Rules of Civil Procedure as immaterial, impertinent and scandalous. The motion was denied on the ground that "[t]he Commission does not consider Mr. Mark's complaint to be evidence, nor does the Commission expect that Mr. Mark, a pro se litigant, will present pleadings to the Commission comparable to those prepared by attorneys who regularly practice before the Commission. Order Regarding Staff's Motion For Extension Of Time To File Report, Complainant's Motion To Suspend Discovery and AT&T's Motion to Strike, May 26, 2006, pp. 1-2.

line which, according to him, terminates by his choice into a fax machine and on which he alleges that no voice use is contemplated.

II. STATUS OF DISCOVERY

Following Mark's having declined the opportunity to mediate the matters raised in his Complaint,² the Commission determined that it "would like to have the benefit of an investigation and report by its Staff before it further considers this complaint."³ Thus, it directed its Staff to investigate Mark's Complaint and to file by May 31, 2006, a report concerning the results of the investigation.⁴

On May 12, 2006, Staff directed data requests to Mark. On May 26, 2006, the Commission granted Staff's request to defer the filing of its report until June 30, 2006,⁵ based on Staff's representation that it needed the additional time to allow it "to receive and analyze the data responses, and to follow up if necessary."⁶ On June 6, 2006, Mark provided Staff responses to its data requests directed to him, having raised no objections to any of the requests Staff submitted. Staff also directed data requests to AT&T Missouri. Subject to timely objections asserted with regard to but two of the data requests, AT&T Missouri provided timely responses to all 14 of the Staff's requests.

As did Staff, AT&T Missouri likewise directed data requests to Mark (Exhibit 1, attached). These nine requests -- submitted to Mr. Mark on May 11, 2006 -- are focused on the

² See, Order Directing Response To Request For Mediation, April 3, 2006; Complainant's Response To Request For Mediation, April 13, 2006.

³ See, Order Directing Staff To Investigate And File A Report, April 18, 2006, p. 1.

⁴ Id.

⁵ Order Regarding Staff's Motion For Extension Of Time To File Report, Complainant's Motion To Suspend Discovery and AT&T's Motion to Strike, May 26, 2006 ("Order"), p. 2.

⁶ Staff Motion For Extension Of Time To File Report, May 25, 2006, at p. 1.

core of Mark's Complaint, i.e., his qualification for the waiver to which he claims he is entitled.⁷ In the cover letter accompanying its requests, AT&T Missouri offered Mark a greater period than provided for under the Commission's rules in which to respond to them (i.e., May 31), asking for responses by June 10, 2006. Mark did not file any objections within the ten-day period set forth in Commission Rule 2.090(2). Thus, to the extent Mark now objects to these data requests, his objections have been waived.

III. MARK'S MOTION FOR SUMMARY JUDGMENT

On May 25, 2006, Mark moved for summary judgment. Mark argues that with regard to the telephone service he has had for over ten years, he "contacted Respondent in November, 2003, and indicated that Complainant should not be charged for non-published service henceforth because the Complainant 'was now' using a data terminal for the reception and/or transmission of data for non-voice communication and no further voice communication was contemplated."⁸ In essence, Mark alleges that the telephone line he once terminated into a telephone set became dedicated exclusively for his use with a fax machine, and that this substitution of Customer Premises Equipment ("CPE") therein qualifies for a waiver of the non-published exchange service charge.

AT&T Missouri's May 11, 2006, data requests seek to flesh out the allegations in Mark's Complaint. When Mark moved on May 25, 2006 to suspend all discovery until disposition of his motion, the Commission wisely rejected such a "cart before the horse" approach:

The Commission notes that the discovery process is designed to obtain information relevant to each party's claims and defenses and that data requests assist the parties in narrowing the issues for presentation to the Commission. In addition, discovery and data requests often form the basis for the prosecution or

⁷ None were directed to the matters noted in footnote 1, *supra*.

⁸ Complainant's Motion For Summary Judgment And Affidavit In Supprt. May 25, 2006, p. 2.

defense of a motion for summary judgment. The Commission will decline to suspend the discovery process.”⁹

Mark’s June 16, 2006 motion to extend the time within which to respond to AT&T Missouri’s data requests, and his contemporaneously filed supplemental motion in further support of his motion for summary judgment, dismisses AT&T Missouri’s data requests as unnecessary and irrelevant. As Mark puts it, he has already “addressed ALL relevant and material facts necessary for the Commission to rule in Complainant’s favor.”¹⁰ As the Commission has already made clear, however, Mark’s view of the proper disposition of this case is erroneous, and his latest attempt to assert that view should be rejected for the same reason that his first attempt was rejected.

IV. ARGUMENT

AT&T Missouri’s data requests directed to Mark are intended to obtain information relevant to both Mark’s claims and AT&T Missouri’s defenses and to narrow the issues in this case for presentation to the Commission. Moreover, without Mark’s responses to these requests, AT&T Missouri is unable to fully and meaningfully respond to Mark’s motion for summary judgment.

For example, AT&T Missouri disagrees that the tariffed exemption applies to the manner Mark claims he used his telephone line. However, AT&T Missouri is also entitled to determine whether the facts fit the theory (albeit erroneous) Mark offers.

In addition, AT&T Missouri should not have to respond to Mark’s motion for summary judgment at this time for the same reason the Commission deferred the due date for Staff’s report. With particular regard to AT&T Missouri’s May 11, 2006, data requests, Marks was

⁹ Order Regarding Staff’s Motion For Extension Of Time To File Report, Complainant’s Motion To Suspend Discovery and AT&T’s Motion to Strike, May 26, 2006, p. 2.

¹⁰ Complainant’s Supplemental Motion, June 16, 2006, p. 1. (emphasis original).

required to assert any objections he may have had to them by May 22, 2006, pursuant to Commission Rule 2.090(2) (the data requests were sent by regular mail and by facsimile). Because he failed to present any objections to them, any objections he may have are waived.

AT&T Missouri's data requests are reasonably calculated to lead to the discovery of admissible evidence. For example, AT&T Missouri is entitled to know the full name of the Complainant, his address and the telephone number(s) working in his residence. (AT&T Missouri's DR 1). For one thing, the presence or lack of any other telephone numbers situated at Mark's home sheds light on whether his "fax" line is used exclusively for facsimile purposes, rather than for voice purposes, as it is clearly capable of and as Marks apparently used the line for before November, 2003. Telephone service had at other addresses he has occupied since November, 2003, is likewise relevant as to whether Marks has used the line in question exclusively in connection with a fax machine rather than for voice purposes. (AT&T Missouri's DR 2).

Mark's claims that his voice communications needs are met exclusively by wireless service.¹¹ That claim is not required to be accepted merely because Mark says it is so. Rather, it is certainly fair and reasonable to inquire about and confirm that claim by requesting the wireless telephone number, the account number, the name of the provider and the date the service was established. (AT&T Missouri DR 9).

Mark complains that it is of no significance as to whether he uses his telephone line for business purposes (AT&T Missouri DRs 3 through 6), and he denies doing so.¹² However, this inquiry is likewise clearly relevant. The non-published exchange service offered and provided

¹¹ Complaint, note 1.

¹² Complainant's Supplemental Motion, June 16, 2006, p. 3; Complainant's Supplemental Affidavit, June 16, 2006, p. 1.

under AT&T Missouri's tariff, and for which Mark claims a waiver of the applicable charge, is available only to residence customers.

Moreover, details regarding Mark's employment and whether the fax machine was used for business purposes (type, duration, period and the like) are pertinent to the resolution of this case. Employment details can bear directly upon one's credibility, a matter which is always relevant in assessing the genuineness and accuracy of testimony offered by an individual. Moreover, AT&T Missouri should be allowed to explore the circumstances and purposes to which Mark has put the telephone line in question. AT&T Missouri is entitled to corroborate Mark's untested claim that he has not used his telephone line for voice purposes. The point is that these data requests are calculated to discover evidence related to whether Marks has actually used the telephone line exclusively for fax transmissions and receptions, rather than for conducting, for example, business and/or conversations from his home.

AT&T Missouri also is entitled to documents in Mark's possession regarding whether his fax machine qualifies for the tariffed exemption, albeit under Mark's mistaken view of how that exemption should be applied. (AT&T Missouri's DR 7). In addition, Mark should be compelled to identify the manufacturer, type, model, purchase date and serial number of his fax machine. (AT&T Missouri's DR 7). Among other things, documenting that Mark actually has a fax machine is appropriate, as is establishing the extent to which the fax machine has voice use capabilities.

AT&T Missouri is further entitled to and plans to take Mark's deposition following the receipt of his responses to the foregoing data requests. Moreover, the timing of the actual deposition is best suited only after Mark's responses are in hand. Such follow up of Mark's data responses, and any other necessary follow up necessitated by his responses, are appropriate and

should be allowed. In this regard, AT&T Missouri's position is not unlike that offered by Staff in seeking, and securing, additional time within which to file its report, so as to "to receive and analyze the data responses, and to follow up if necessary."¹³

AT&T Missouri respectfully requests that the Commission waive, for good cause, the requirements of Commission Rule 2.090(8), which contemplates a conference among the parties to resolve discovery disputes before they are brought to the Commission. Mark has declined to contact the undersigned though asked to do so. (Exhibit 1). He has refused to provide his wireless telephone number which would allow oral communications. In any case, his pleadings leave no doubt that an attempt to resolve the matter of AT&T Missouri's data requests short of a motion to compel would be fruitless.

AT&T Missouri has no objection to Mark's requested extension of time in which to respond to AT&T Missouri's data requests. On the other hand, AT&T Missouri should likewise be allowed additional time in which to respond to Mark's later-submitted discovery, as AT&T Missouri's data requests were submitted to Mark a full month earlier than Mark submitted his to AT&T Missouri.

Even more importantly, the Commission should, pursuant to Commission Rule 2.117(1)(D), now order that AT&T Missouri shall be afforded 30 days after the close of discovery in which to prepare and file its response to Mark's motion for summary judgment. As the Commission has already noted, discovery and data requests may form the basis for the defense of a motion for summary judgment.¹⁴ AT&T Missouri has demonstrated that its data requests directed to Mark are relevant, that Mark did not timely object to any of them, and that

¹³ Staff Motion For Extension Of Time To File Report, May 25, 2006, at p. 1.

¹⁴ Order Regarding Staff's Motion For Extension Of Time To File Report, Complainant's Motion To Suspend Discovery and AT&T's Motion to Strike, May 26, 2006, p. 2.

Mark's deposition and other follow up work remains to be done. AT&T Missouri has also been demonstrated that it is unable to prepare a complete and informed response to Mark's motion for summary judgment without completing discovery. The Commission should reject Mark's cart before the horse approach suggesting otherwise.

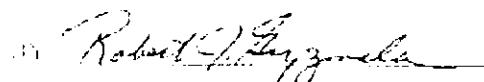
V. CONCLUSION

For the foregoing reasons AT&T Missouri respectfully requests that the Commission:

- Issue an Order compelling Complainant to provide full and complete responses to AT&T Missouri's data requests directed to him on May 11, 2006, a copy of which requests is attached hereto as Exhibit 1.
- Grant Complainant's motion to extend the time within which to respond to AT&T Missouri May 11, 2006, data requests, through and including July 16, 2006, so long as the Commission likewise extends the time within which AT&T Missouri is required respond to Complainant's June 13, 2006 data requests, through and including July 28, 2006.
- Issue an Order determining that any ruling on Complainant's motion for summary judgment shall be deferred pending receipt of AT&T Missouri's response to the motion, which response shall be due not earlier than 30 days following the completion of discovery in this case.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.



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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties via e-mail or U.S. Mail on June 20, 2006.


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Richard Mark
9029 Gravois View Court, #C
St. Louis, Missouri 63123
(Via Facsimile and U.S. Mail)

VIA U.S. MAIL AND FACSIMILE

June 15, 2006

Mr. Richard Mark
9029 Gravois View Court, #C
St. Louis, Missouri 63123

Re: Case No. TC-2006-0354 Data Request Responses

Dear Mr. Mark:

On May 11, 2006, AT&T Missouri submitted Data Request Nos. 1-9 for your response, a copy of which is attached. While your responses would have been due on May 31, 2006, AT&T Missouri offered to extend this period through June 10, 2006. We have not received any responses and would appreciate your advising me today when, in the absence of settlement of this case, we may expect to receive them.

Your responses are necessary to, among other things, enable AT&T Missouri to respond fully to your motion for summary judgment. Thus, I urge you to reply to this letter as soon as possible.

I am writing this letter as I have no other means in which to reach you.

Sincerely,

Robert J. Gryzmala

Attachment

VIA U.S. MAIL AND FACSIMILE

May 11, 2006

Mr. Richard Mark
P.O. Box 11562
Apt. 2, Wing A
St. Louis, MO 63105

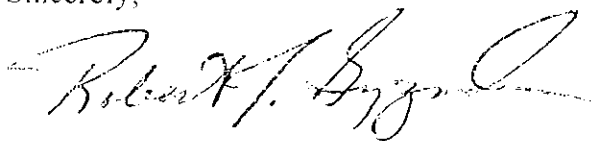
Re: Case No. TC-2006-0354

Dear Mr. Mark:

Attached hereto please find the Data Requests ("DRs") of Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri, which are submitted for your response within twenty (20) days, in accordance with 4 CSR 240-2.090. In light of your schedule, if you would like to have until June 10, 2006, to respond, AT&T Missouri would have no objection.

Please direct your responses to me at the above-listed address or fax number.

Sincerely,



**CASE NO. TC-2006-0354 – AT&T MISSOURI DATA REQUESTS (NOS. 1-8)
DIRECTED TO R. MARK ON MAY 11, 2006**

- DR 1. Please state your full name, your residential address, and the telephone number(s) for that residential address, if any.
- DR 2. Please state whether, since November 1, 2003 (the date referenced in Paragraph 5 of your Complaint), you have had or presently have telephone service at any address other than the residential address identified in your response to DR 1. If your response is in the affirmative, please state:
- (a) Each address where you had or have telephone service and the dates of service;
 - (b) For each such address, whether you had or have residential or business telephone service; and,
 - (c) For each such address, your telephone number(s).
- DR 3. Please state whether you have been employed at any time since November 1, 2003 and, if so, then state the name of each such employer, and with respect to each such employer, please further identify the date of your employment, your title/position, your job responsibilities, your business address and your business telephone number.
- DR 4. Please state whether, since November 1, 2003, you have provided services to another for compensation in other than an employer/employee relationship (e.g., as an independent contractor) and, if so, then with respect to each such occasion, please state the name of the company or other entity to whom you provided such services, the period over which you provided the services, the nature and type of services provided, your business address and your business telephone number.
- DR 5. Please identify the nature and/or type of messages sent by and/or received by the fax machine referenced in Paragraph 4 of your Complaint, i.e., were the messages sent in connection with some business enterprise or were the faxes personal in nature. If connected with a business enterprise, please identify the companies or other business entities to whom faxes were sent or from which they were received and the nature of your business relationship with such company or entity.
- DR 6. Please identify whether the principal purpose of the messages originated by and/or received by the fax machine referenced in Paragraph 4 of your Complaint is business or personal.
- DR 7. Please produce all documents referring or relating to the allegation in paragraph 4 of your Complaint that "a fax machine is a data terminal for the reception and/or transmission of data where no voice use is contemplated."
- DR 8. Please identify the manufacturer, type, model, purchase date, and serial number of the fax machine referenced in Paragraph 5 of your Complaint.
- DR 9. Please state the telephone number, account number, cellular provider, and the date on which service was established with regard to the cellular service you reference in footnote 1 of your Complaint.