

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

Duke Manufacturing Co.,)	
)	
Complainant,)	
v.)	
)	Case No. TC-2008-0191
McLeodUSA Telecommunications)	
Services, Inc.)	
)	
Respondent.)	

**AT&T MISSOURI'S RESPONSE TO STAFF'S MOTION TO JOIN
AT&T MISSOURI AS A PARTY**

AT&T Missouri¹ objects to Staff's Motion to Join AT&T Missouri as a Party in this case.

For the reasons explained below, AT&T Missouri commits to assist Staff in its investigation of the Complaint, but it need not and should not be made a party.

1. The Complaint brought by Duke Manufacturing Co. ("Duke") alleges that McLeodUSA Telecommunications Services, Inc. (McLeod") failed to provide Duke adequate, just and reasonable service. (*See*, Complaint, ¶¶ 8, 10). Duke's Complaint is directed exclusively against McLeod. The Complaint neither names AT&T Missouri as a Respondent nor does it anywhere mention AT&T Missouri.

2. McLeod's Answer to the Complaint asserts that "the source of the majority of the service issues relate to the condition of several access loops provided by AT&T Missouri that are leased as unbundled network elements." (Answer, ¶ 9). McLeod, however, does not assert that AT&T Missouri should be made a party to the case, and it does not seek any affirmative relief (whether legal, equitable or otherwise) against AT&T Missouri. To the contrary, McLeod directly challenges Duke's own request for relief, asserting that Duke's "sole remedy" pursuant

¹ Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri").

to a “Master Service Agreement between Duke and McLeod” is to “terminate service at the affected locations.” (Answer, ¶ 9).

3. Staff’s Motion, filed pursuant to Mo. S. Ct. Rule 52.04, “suggests” that AT&T Missouri should be joined in this case because, first, “in AT&T’s absence complete relief cannot be accorded among those already parties,” and second, AT&T Missouri “has an interest relating to the subject matter” and that AT&T Missouri’s absence “may as a practical matter impair or impede AT&T Missouri’s ability to protect that interest.” (Motion, ¶ 3).

4. Staff’s first argument, a conclusion unaccompanied by explanation, is mistaken. Complete relief can in fact be accorded solely between the present parties. Duke’s claims against McLeod rest exclusively on their mutual contract (or McLeod’s tariff obligation to Duke, which is a form of contract). Duke is McLeod’s, not AT&T Missouri’s, “customer.” (Complaint, ¶ 10). Duke makes no claims against AT&T Missouri, nor could it. It has no contract with AT&T Missouri, nor is it in any way in privity with AT&T Missouri.

5. Moreover, even if (merely for purposes of argument) AT&T Missouri’s services provided to McLeod were in some manner deficient, that would not excuse McLeod from its own obligations to Duke, and McLeod does not claim otherwise. Indeed, it is very telling that while McLeod “concurs in” Staff’s Motion,² McLeod offers no supporting reason or explanation.

6. Staff’s second argument can be equally easily dismissed. While Staff claims AT&T Missouri “has an interest in” the case, Staff never identifies what that interest is. AT&T Missouri can confirm that it has *no* interest in the subject matter of this case. Further, even if it were otherwise, AT&T Missouri is confident that no outcome reached between Duke and McLeod would either impair or impede AT&T Missouri’s ability to protect that interest. AT&T

² McLeodUSA’s Concurrence in Staff Motion to Join AT&T Missouri, p. 1.

Missouri presently believes that the services it has provided to McLeod at Duke's location are interstate special access services ordered pursuant to AT&T Missouri's federal access services tariff (FCC Tariff No. 73), not unbundled network elements ("UNEs"). The Staff's outstanding discovery to McLeod is intended to confirm that. No outcome in this state proceeding could purport to adjudicate the relative rights of McLeod and AT&T Missouri under that federal tariff, or to provide any relief under it, as the Commission has no jurisdiction to do either.

7. In sum, Staff does not meet either of the alternative requirements of Rule 52.04. In this breach of contract action, "the only parties defendant who may be necessary are the other parties to the contract sued on, and those who have an interest in the dispute which will be affected by the action."³ AT&T Missouri is not a party to the contract and has no interest which will be affected by the outcome of this case. Furthermore, neither Duke's nor McLeod's rights will be compromised by denying Staff's Motion. Duke can pursue whatever remedies are available to it against its service provider, McLeod, and if AT&T Missouri's wholesale service to McLeod has been deficient in any respect, McLeod can pursue whatever remedies are available to it under the terms and conditions of that wholesale service arrangement.⁴

8. AT&T Missouri appreciates that Staff has been directed to investigate the matter of the Complaint and to provide a report to the Commission.⁵ AT&T Missouri has already been in discussions with Staff and commits to expeditiously assist Staff regarding any reasonable request. However, it need not be a party to the case to do so.

³ Bunting v. McDonnell Aircraft Corp., 522 S.W. 2d 161, 169 (Mo. en banc 1975); Bankcard Systems, Inc. v. Miller/Overfelt, Inc., 219 F. 3d 770, 775 (8th Cir. 2000). Moreover, the nature of the "interest" cannot be theoretical or remote. Rather, it "must be such a direct claim upon the subject matter of the action that the [nonparty] will either gain or lose by direct operation of the judgment to be rendered." Bunting, at 169; Bankcard Systems, at 775.

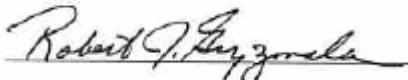
⁴ In this regard, the situation is analogous to a claim against the contractor whose subcontractor may have been ultimately at fault. The claimant, having no contract with the subcontractor, is limited to a claim against the contractor, who must answer for the conduct of its subcontractor.

⁵ Order Directing Staff to Investigate and File a Report, p. 1.

WHEREFORE, AT&T Missouri respectfully submits that Staff's Motion should be denied.

Respectfully submitted,

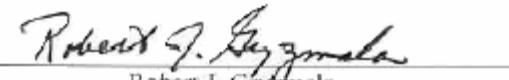
SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

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CERTIFICATE OF SERVICE

Copies of this document were served on all counsel of record by e-mail on February 11, 2008



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