

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

In the Matter of the Application of MultiBand, Inc.    )  
For a Certificate of Service Authority to Provide    )       Case No. ZA-2006-0346  
Shared Tenant Services in the State of Missouri.    )

**AT&T MISSOURI'S RESPONSE TO MOTIONS FOR  
DETERMINATION ON THE PLEADINGS  
AND TO DISMISS INTERVENOR**

AT&T Missouri,<sup>1</sup> respectfully requests the Missouri Public Service Commission ("Commission") to deny MultiBand, Inc.'s ("MultiBand's") Motion for Determination on the Pleadings and its Motion to Dismiss Intervenor.

**EXECUTIVE SUMMARY**

Multiband has sought certification as a shared tenant services ("STS") provider, which requires the Commission to consider whether certification is in the public interest. In making that public interest determination, the Commission must determine whether a carrier that has and continues to provide telecommunications service without approval of the Commission is entitled to certification. Moreover, the unlawful provision of service has been accomplished by the unlawful use of AT&T Missouri's facilities. Again, the Commission must determine whether it is in the public interest to grant certification to a company which has engaged in this conduct.

AT&T Missouri has lost customers and the use of its facilities by the unlawful actions of MultiBand. Although AT&T Missouri clearly could have taken steps to prevent the continuation of this unlawful use, such a step would have left some MultiBand customers without service for some period of time. AT&T Missouri instead determined that it would prevent expansion of

---

<sup>1</sup> Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri will be referred to in this pleading as "AT&T Missouri." It previously conducted business as "SBC Missouri."

MultiBand's unlawful use of its facilities, but did not take steps to eliminate the unlawful use of its facilities subject to MultiBand's agreement to seek certification and an interconnection agreement. In response, MultiBand now claims that AT&T Missouri has no interest in the proceeding and that there is no need for further proceedings by the Commission. MultiBand is wrong on both counts.

AT&T Missouri's interest in the proceeding: AT&T Missouri has lost customers as a result of MultiBand's unlawful provision of local service. And AT&T Missouri has lost the use of its facilities. As a competitor whose facilities are being used unlawfully and whose customers are being taken unlawfully, it is absurd for MultiBand to contend that AT&T Missouri has no interest in this proceeding. Under the Commission's rules, AT&T Missouri has a right to intervene, and the Commission has agreed. Nothing has changed that would justify a different result, and MultiBand has failed to justify what amounts to an untimely application for rehearing of the grant of intervention.

Remaining Issues for the Commission: Certification of a party to provide telecommunications service raises a multitude of issues, many of which are subsumed under the public interest analysis. In this case, the Commission must determine whether to reward a company which has ignored the public service commission law and provided service without first seeking and obtaining a grant of service authority from the Commission. It must determine whether to permit a company which has unlawfully taken another telecommunications provider's customers and unlawfully made use of its facilities to be certificated. And it must determine whether any certification should be conditioned on the entry of MultiBand into an interconnection agreement that would permit it to continue to use AT&T Missouri's facilities. Failing to do so runs the substantial risk that MultiBand will not carry through on its obligations

and that AT&T Missouri will have no realistic choice other than to prevent the continued unlawful use of its facilities. Customers of MultiBand would then be without service. All of these issues require detailed factual analysis and cannot be determined merely on the pleadings.

### **ARGUMENT**

1. MultiBand's Motion for Determination on the Pleadings. MultiBand, pursuant to 4 CSR 240-2.117(2),<sup>2</sup> requests the Commission grant MultiBand's STS certificate of service authority "based on the pleadings in this case, without the need for additional proceedings."<sup>3</sup>

A determination on the pleadings is inappropriate here. The standard MultiBand would have the Commission apply -- that granting a certificate of service authority "is not otherwise contrary to law or contrary to the public interest"<sup>4</sup> -- is not the proper Commission standard for determining whether a certificate of service authority should be granted. As the Commission has explained, a much higher, positive standard must be met: "When granting a certificate of service authority to provide shared tenant services the Commission must determine whether certification is in the public interest."<sup>5</sup> Clearly, the higher standard required in a certification case precludes application of a determination on the pleadings under 4 CSR 240-2.117(2).

Moreover, substantive public interest issues requiring factual analysis also preclude a determination on the pleadings. Under Missouri law, carriers are prohibited from providing

---

<sup>2</sup> 4 CSR 240-2.117(2) states:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its motion or on the motion of any party, dispose of all or part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

<sup>3</sup> MultiBand Motion, p. 1.

<sup>4</sup> 4 CSR 240-2.117.

<sup>5</sup> In the Matter of the Application of Carr Square Tenant Corp. for Certificate of Service Authority to Provide Shared Tenant Services within the State of Missouri, 1996 MoPSC LEXIS 27, at \*3 (June 14, 1996) (citing Section 392.440 RSMo). See also In Re: Application of GE Capital-ResCom, L.P., for Certificate of Service Authority to Provide Shared Tenant Services, 1995 MoPSC LEXIS 44, at \*15 (October 27, 1995) (comparing the "lesser 'not detrimental to the public interest' standard" used for determining whether to grant a multi-building waiver with the "test as to whether an STS is in the public interest," used for the question of whether an STS application should be approved).

telecommunications services in the state without first obtaining authority to do so from the Commission:

No telecommunications company not exempt from this subsection shall transact any business in the state until it shall have obtained a certificate of service authority from the Commission pursuant to the provisions of this chapter. . . .<sup>6</sup>

And in addition to certification, telecommunications companies are required by law to comply with a host of other regulatory requirements. Even STS providers, which are subject to the minimum regulation permitted by Chapter 392 for competitive telecommunications services,<sup>7</sup> have statutory regulatory obligations with which they must comply:

The Commission reminds the company that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to the following:

- A) The obligation to file an annual report, as established by Section 392.210, RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of \$100 per day for each day the violation continues. 4 CSR 240-3.540 requires telecommunications utilities to file their annual report on or before April 15 of each year.
- B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000.
- C) The obligation to comply with all relevant laws and regulation, as well as orders issued by the commission. If the company fails to comply, it is subject to penalties for noncompliance ranging from \$100 to \$2000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.
- D) The obligation to keep the Commission informed of its current address and telephone number.<sup>8</sup>

---

<sup>6</sup> Section 392.410.1 RSMo (2000).

<sup>7</sup> Section 392.520 RSMo (2000).

<sup>8</sup> In the Matter of Heartland Health's Application to Amend its Certificate of Service Authority to Provide Shared Tenant Services, 2004 MoPSC LEXIS 1488, at \*3 (September 28, 2004).

The Commission requires STS providers to comply with these requirements and has not hesitated in its enforcement of them.<sup>9</sup>

By its own admission, MultiBand has been providing telecommunications services to residential customers in the Jefferson Arms Apartment building, located at 415 Tucker Boulevard in St. Louis, Missouri, without Commission approval. MultiBand has also disregarded the statutory requirements to file annual reports and pay the Commission's annual assessment fee.

Although MultiBand claims it was "unaware" of the statutory requirements in Missouri, ignorance of the law does not excuse compliance.<sup>10</sup> Information pertaining to the certification and other requirements for STS providers is readily available through state statutes, published Commission rules, Missouri Commission Staff personnel, and information maintained by Staff on the Commission's official website. Ordinary due diligence dictates that such routine inquiries be made concerning the necessary state certifications, licenses and other requirements prior to engaging in any line of business. Moreover, even after MultiBand became "aware" of the requirements to first obtain certification, it has continued to provide service to its customers.

MultiBand's clear disregard of the statutory requirements and its failure to make even the most basic inquiries concerning the expected responsibilities of an STS provider at a minimum raise significant questions as to its fitness to hold a STS certification and whether granting such certification to MultiBand would be in the public interest. Clearly, the existence of these factual issues preclude a determination on the pleadings pursuant to 4 CSR 240-2.117(2).

---

<sup>9</sup> See e.g., Staff of the Missouri Public Service Commission v. St. John's Regional Medical Center, 2004 MoPSC LEXIS 1537, at \*3 (October 19, 2004); Staff of the Missouri Public Service Commission v. Officeplus Corporation of Missouri, 2004 MoPSC LEXIS 1458, at \*4-\*6 (September 23, 2004) ("The Commission concludes that Officeplus did not timely file its 2002 Annual Report. The law requires Officeplus to file that report with the Commission no later than April 15, 2003. See Section 392.210(1), RSMo (2000), Commission Rule 4 CSR 240-3.540(1) . . . The Commission further concludes that Staff is entitled to seek relief for that failure in Circuit Court.").

<sup>10</sup> Investigation and Citation of Henry Mason, Joe T. Ruhl, and Missouri Petroleum Products Company, 1960 MoPSC LEXIS 223, at \*9 (June 21, 1960).

2. MultiBand's Motion to Dismiss Intervenor. MultiBand asks the Commission to dismiss AT&T Missouri as an intervenor and preclude it from participating in this proceeding claiming that it does not have a sufficient interest in this proceeding to warrant intervention.<sup>11</sup>

MultiBand's claim is misplaced. From a procedural perspective, MultiBand's attempt to preclude AT&T Missouri from participating in this proceeding is irregular and untimely. AT&T Missouri sought to intervene in this proceeding on March 31, 2006. If MultiBand wished to oppose AT&T Missouri's Application, it was required by 4 CSR 240-2.080(15)<sup>12</sup> to respond to AT&T Missouri's Application within ten days and set out any objections it may have had to AT&T Missouri's participation as an intervenor. MultiBand, however, failed to do so. Its attempt to now have AT&T Missouri dismissed as an intervenor is nothing more than an untimely application for rehearing of the Commission's Order granting AT&T Missouri intervention.

MultiBand is also incorrect substantively. As AT&T Missouri explained in its Application, as the incumbent local exchange company in St. Louis, AT&T Missouri has customers located in the Jefferson Arms Apartment building and has a considerable investment in facilities (e.g., cross-connect box, jumper wires, riser and house cabling) that AT&T Missouri installed and maintains to provide telephone service to its customers in the building. In situations such as this where STS is to be provided in an existing building, the Commission has

---

<sup>11</sup> In its Motion, MultiBand states:

The only interest that AT&T Missouri has expressed in this case pertains to the peripheral commercial dispute concerning risers and inside wiring at the Jefferson Arms Apartment building, which is irrelevant to the issues before the Commission in this certificate application case. AT&T Missouri cannot show that its interest in this peripheral issue would be adversely affected by a final order granting MultiBand certificate of service authority to provide STS service. MultiBand Motion, pp. 8-9.

<sup>12</sup> 4 CSR 240-2.080(15) states: "Parties shall be allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the Commission."

ruled that the STS provider is either to contract for the use of the incumbent LEC's riser cables or install its own cables:

Where STS is provided in an existing building, the 180 day notice is not required. The STS provider can either contract for the use of LEC riser cable or install its own, and since the LEC would already have cabled the existing building for multitenant there should be little additional cost to the LEC. Even though the LEC would have idle facilities, this would be no different than if a large non-STS tenant with a PBX moved into the building. The evidence indicated SWB would not change its planning for the STS provider. Notice of the location of STS tenants shall be given by the STS provider to the LEC for existing buildings at the time the STS provider connects with the LEC.<sup>13</sup>

Here, MultiBand has failed to negotiate a contract for the use of AT&T Missouri's riser cables and other facilities owned by AT&T Missouri and the Jefferson Arms building. Instead, MultiBand simply appropriated those facilities for its own use. As a result of MultiBand's unlawful actions, AT&T Missouri has lost customers and the use of its facilities serving those customers. These facts readily demonstrate that AT&T Missouri has a sufficient interest to warrant being granted intervention in this proceeding, and the Commission has agreed that AT&T Missouri has met the criteria established by the Commission for intervention:

Upon review of the application and in light of no parties objecting to AT&T Missouri's request, the Commission finds that AT&T Missouri has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case, or the granting of the proposed intervention would serve the public interest. Therefore, the Commission will grant the application to intervene.<sup>14</sup>

Nothing has changed that would justify a different result. As the Commission has made the substantive determination that AT&T Missouri has satisfied the Commission criteria for

---

<sup>13</sup> In the Matter of the Establishment of Appropriate Permanent Tariffs for the Provision of Shared Tenant Services (STS) within Local Telephone Company Exchanges, 1988 MoPSC LEXIS 7, at \*41-\*42 (April 19, 1988).

<sup>14</sup> Order Granting Intervention and Directing Filing, Case No. ZA-2006-0346, issued April 11, 2006, at p. 2.

intervention, MultiBand may not now collaterally attack that determination through a Motion to Dismiss.<sup>15</sup>

As AT&T Missouri indicated in prior pleadings, it believed it had a reasonable basis to believe that its dispute with Multiband would be resolved in the negotiation process and it was on that basis that AT&T Missouri agreed to extend the deadline for filing a procedural schedule in the case. But MultiBand's filing of motions for determination on the pleadings and to dismiss AT&T Missouri from this case is inconsistent with the notion of placing the certification case briefly on hold to allow negotiations to take place and casts serious doubt on MultiBand's intentions. Given Multiband's prior unlawful acts, the Commission should, if it decides to grant MultiBand's certification request, condition that grant of service authority on Multiband's completion of an appropriate agreement with AT&T Missouri for the lawful use of AT&T Missouri's facilities and the approval of that agreement by the Commission.

WHEREFORE, AT&T Missouri respectfully requests the Commission to deny MultiBand's Motion for Determination on the Pleadings and Motion to Dismiss Intervenor.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

BY 

PAUL G. LANE #27011

LEO J. BUB #34326

ROBERT J. GRYZMALA #32454

Attorneys for AT&T Missouri

One AT&T Center, Room 3518

St. Louis, Missouri 63101

314-235-2508 (Telephone)/314-247-0014(Facsimile)

[leo.bub@att.com](mailto:leo.bub@att.com)

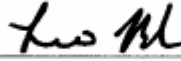
---

<sup>15</sup> In the Matter of an Investigation into the Provision of Community Optional Calling Service in Missouri, 1997 MoPSC LEXIS 97, at \*2 (December 30, 1997), citing King General Contractors v. Reorganized Church, 821 S.W.2d 495, 500 (Mo. banc 1991) ("The collateral estoppel doctrine, designed to further judicial economy by avoiding continual trials on the same issue, precludes parties from relitigating issues that have been previously adjudicated.").



## **CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on June 16, 2006.



---

Leo J. Bub

General Counsel  
William Haas  
Missouri Public Service Commission  
PO Box 360  
Jefferson City, MO 65102  
[william.haas@psc.mo.gov](mailto:william.haas@psc.mo.gov)  
[general.counsel@psc.mo.gov](mailto:general.counsel@psc.mo.gov)

Public Counsel  
Lewis Mills  
Office of the Public Counsel  
PO Box 7800  
Jefferson City, MO 65102  
[lewis.mills@ded.mo.gov](mailto:lewis.mills@ded.mo.gov)  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)

William Steinmeier  
Mary Ann (Garr) Young  
William D. Steinmeier, P.C.  
P.O. Box 104595  
Jefferson City, MO 65110  
[myoung0654@aol.com](mailto:myoung0654@aol.com)  
[wds@wdspe.com](mailto:wds@wdspe.com)