

**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 OBJECTIONS TO ISSUANCE OF SUBPOENA

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T Missouri") hereby states its objections to Complainant's request for the issuance of a subpoena duces tecum, which request was filed with the Commission on October 19, 2006. In support thereof, AT&T Missouri states as follows:

1. On October 19, 2006, Complainant requested that the Commission issue a subpoena duces tecum directing that Mr. Paul G. Lane, AT&T Missouri's General Counsel, appear at the scheduled December 12, 2006, hearing in this case, and that he be directed to bring with him, as noted in the subpoena form attached to Complainant's request, a copy of the stipulation document he received from the Complainant.
2. For several reasons, AT&T Missouri objects to Complainant's Request, and requests that the requested subpoena not be issued.
3. First, Mr. Lane is employed in the capacity of General Counsel, responsible for all legal matters pending before the Commission involving AT&T Missouri's operations, including but not limited to the defense and all other matters associated with Complainant's complaint

directed to AT&T Missouri. Any legal advice provided to AT&T Missouri is subject to the attorney-client privilege and the decisions undertaken with respect to the handling of the complaint are subject to protection as attorney work product. Accordingly, Mr. Lane's receipt of and response to the "stipulation" referred to in Complainant's request, are protected by both the attorney-client privilege and the work product doctrine.

4. Second, Complainant admits that the stipulation he refers to was "tendered by the Complainant to the Respondent in order to attempt to resolve undisputed issues in lieu of, and prior to, the filing of the Complainant's Complaint." Request, para. 3. (emphasis added). Complainant thus admits that the Stipulation was tendered in connection with settlement efforts. The law is clear that settlement offers and negotiations concerning them are inadmissible. Daniel v. Indiana Mills & Manufacturing, Inc., 103 S.W. 3d 302, 316 (Mo. App. 2003); O'Neal v. Pipes Enterprises, Inc., 930 S.W. 2d 416, 423 (Mo. App. 1995). Thus, the stipulation and any discussions in connection with it are inadmissible.

5. Third, even if the stipulation were at all relevant to this case, still there is no need to subpoena AT&T Missouri's General Counsel in order to assure its production at trial. Complainant's above-quoted reference in his request to "a stipulation tendered by the Complainant to the Respondent" makes clear that Complainant has the document in his possession. As such, Complainant needs no subpoena duces tecum to assure its production at the December 12, 2006, hearing. Subject to evidentiary principles barring consideration of settlement discussions, Complainant is free to attempt to introduce it into evidence during his own direct testimony. The rationale underlying AT&T Missouri's refusal to agree to the purported stipulation, however, is fully protected by the work product doctrine, the attorney-client privilege and the prohibition against consideration of settlement negotiations.

6. Fourth, and finally, the uses to which Complainant intends to put the stipulation and negotiations had in connection with it are completely irrelevant to this case. According to the request, “Complainant considers the appearance by said witness producing the stipulation document to be necessary to the resolution of the issues in this case, the bias and prejudice of the Respondent, the arbitrariness and capriciousness of the Respondent, and the subsequent denial of the waiver by the Respondent during the period from November 1, 2003 and the filing of the formal Complaint.” Request, para. 4. None of these items are directed to the dispositive question in this case, that is, whether the Complainant can provide competent and substantial evidence demonstrating that he qualifies for the waiver of the non-published-listing charge contained in AT&T Missouri’s tariff.

7. Under Missouri law, “[a]ny attempt to depose an opposing counsel calls for special scrutiny because ‘such depositions inherently constitute an invitation to harass the attorney and parties.’” State v. Andersen, 79 S.W. 3d 420, 438 (Mo. En Banc 2002) (quashing subpoenas for post-trial depositions of a prosecutor and his investigator)), quoting, State ex rel. Chaney v. Franklin, 941 S.W. 2d 790, 793 (Mo. App. 1997) (quashing the state’s subpoenas for depositions of defendant’s counsel). “When the issue is whether a party should be permitted to depose an attorney about his involvement in the case, it is appropriate to require that party to establish a legitimate basis for requesting it, and demonstrate that it will not be overly disruptive or burdensome.” Chaney, 941 S.W. 2d at 793. Complainant’s request, meant to compel the appearance of AT&T Missouri’s General Counsel at the December 12, 2006, hearing, fails the special scrutiny test inasmuch as it has no legitimate purpose.

For all of the foregoing reasons, AT&T Missouri objects to Complainant's request for the issuance of a subpoena duces tecum, and respectfully requests that the subpoena submitted by Complainant should not be issued.

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 U.S. Mail on October 25, 2006.


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