BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

COMPLAINT'S RESPONSE TO SOUTHWESTERN BELL TELEPHONE'S *RENEWED MOTION TO COMPEL RESPONSES TO DATA REQUESTS* AND *COMPLAINANT'S MOTION TO TERMINATE ALL FURTHER DISCOVERY*

Comes now Complainant with *Complaint's Response to Southwestern Bell Telephone's Renewed Motion to Compel Responses to Data Requests* and *Complainant's Motion to Terminate all further discovery*, and states:

1. The Respondent states falsely that the Complainant "still refuses to respond to virtually any of them," (referring to Respondent's data requests), and incredibly states that "absent these responses, AT&T Missouri is unable to prepare a full and fair defense to the Complaint and to *Complainant's Motion for Summary Judgment*. On page two of *Respondent's Renewed Motion*, however, Respondent contradicts itself: it **admits** that the Complainant did, in fact, file answers and objections!

A "response" in the normal meaning of the word applicable to legal pleadings in Missouri[1] may include answers or objections to interrogatories/data requests. (*See*, definition, *Black's Law Dictionary* and Missouri Rule of Civil Procedure; Rule 57.01: *"Each interrogatory shall be answered separately . . . unless it is objected to. If the answer is objected to, the reasons for objection shall be stated in lieu of an answer."*)

The Commission did not require, nor did the Complainant ever offer to provide, **answers *without any objections,*** to the Respondent's data requests. Complainant had/has a legal right to object to those data requests which were not/are not *reasonably* calculated to lead to the discovery of *admissible* evidence and which were irrelevant and/or immaterial, and/or were propounded solely for the purpose of invasion of privacy and/or harassment and/or which sought information already in the care, custody, possession, and control of the Respondent, and/or sought to obtain the "work product" of the Complaint.

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[1] As any attorney familiar with the Missouri Code of Civil Procedure would verify.

Many of the Respondent's data requests, or parts thereof, were obviously propounded solely to harass and/or to invade Complainant's privacy and that of others. [**NOTE: ALL** Respondent's data requests were filed ***prior to*** the filing by the Complainant of **two affidavits** in support of *Complainant's Motion for Summary Judgment.*] The aforesaid affidavits were incorporated by reference in some of the Complainant's answers to the data requests. The Respondent fails to indicate or to acknowledge anything about these two affidavits in its *Respondent's Renewed Motion to Compel!*

The Complainant did, in fact, faithfully and conscientiously respond to each of Respondent's data requests: with an answer or an objection. If an objection were warranted, the reasons applicable were set forth. Whether the Respondent "likes" the responses or not, is irrelevant. The Complainant's responses to the Respondent's data requests are attached hereto. **(Exhibit "A").** Whether the Respondent *believes* that the objections set forth by the Complainant are well taken, or not, is for a determination of the Commission after reviewing the pleadings. The Complainant did, in fact, duly respond to each data request and this is a matter of record. Therefore, any broad, expansive, all-inclusive, and unlimited (without limitation), *Renewed Motion to Compel* by the Respondent is not only not well taken, but is also oppressive, disingenuous, and set forth merely for the sake of argument.

The Respondent states in its *Renewed Motion* at page five of its *Motion*, " . . . the Commission has already made clear, however, Mark's view of the proper disposition of this case is erroneous . . ." The Commission has made NO SUCH FINDING OR STATEMENT! The Commission, very fairly, has permitted discovery to be continued in the interest of fundamental fairness in order to provide the Respondent with every opportunity to refute the material facts set forth in the Respondent's affidavits. Now that this has been accomplished and, additionally, the *Staff Report* has been filed, it should be very obvious to the Commission, as it is to its own Staff and the Complainant, that nothing further--no further discovery, is warranted or is going to make any difference! The material facts as set forth by the Complainant in his affidavits, indicate **irrefutable** material facts and that there are **no genuine issue of material facts** yet to be determined! The *Complainant's Motion for Summary Judgment* should, accordingly, be granted by the Commission also, in accordance with the Staff's findings, conclusions, and recommendations.

The Staff has correctly and properly accepted the sworn affidavits of the Complainant on the **only** issues of material facts applicable to this case: the Complainant's residential telephone P.O.T.S. line has been used ***exclusively*** with a data terminal: a fax machine. It has been used since November 2003 **exclusively** for non-voice communication. Not only has no voice use been "contemplated," but it has been used **only** for non-voice communication: data reception/transmission, since the aforesaid date.

No amount of speculation, no amount of conjecture, no amount of etherial argument on the part of the Respondent's four attorneys of record, is going to change the aforesaid *irrefutable* material facts. The Respondent knows that it cannot refute the irrefutable, so, it has embarked on a tactic of throwing everything up in the air "to see what might stick!" **NOTHING IS GOING TO STICK!** It has actively, by the threat of taking Complainant's deposition **after** its present *Renewed Motion* is decided by the Commission, made it quite clear that it is going to unfairly, improperly, and in bad faith attempt to intimidate and persuade the

Complainant to drop his Complaint against the Respondent, knowing that the Respondent has unlimited legal and financial resources and the Complainant has not, knowing that there are **no material facts** that the Complainant *can possibly offer* **other than** what has been already set forth and sworn to in two affidavits. It has done all of this *knowing* that the only monetary issue is an insignificant amount of monthly service charge, only a few dollars each month, which the Respondent has charged and the Complainant has been forced to pay, improperly, for an unpublished residential P.O.T.S. line on which there has been a data terminal (and no other device), and which has been utilized with no voice use contemplated, or actually used, since November 2003 forward!

Respondent further seeks to continue to charge the Complainant improperly in violation of G.E.T. §6.12.6(E). The Respondent's tactics demonstrate nothing but the incredible extent and degree to which it will go to WIN AT ALL COSTS, to obfuscate, to harass, and to make data request under the guise of "shedding light" on the facts and "fleshing out" the facts despite the Respondent's "inability" to find any material facts (because there are none), with which to respond to the *Complainant's Motion for Summary Judgment* with its supporting affidavits. Additionally, despite information and records of its own and in its possession, care, custody and control (which have *even been furnished* to the Staff in response to Staff's data requests), Respondent makes it crystal clear that its only purpose is harassment of the Complainant! There is *no reasonable* likelihood that any information previously NOT furnished by the Complainant can, or will, be *reasonably calculated* to lead to the discovery of *admissible* evidence. The Staff knows this, the Complainant knows this, and there can be no doubt that the Respondent knows this, too!

2. It is *very important* for the Commission to now review the **record**. The Record irrefutably indicates that the Respondent's data requests were propounded by the Respondent ***PRIOR TO*** the *Complainant's Motion for Summary Judgment*, and **prior** to the two affidavits (attached) in support thereof. The affidavits were incorporated by reference in Complainant's answers to certain data requests. Copies are also attached to this pleading. **(Exhibit B, B-1)**. Any relevant and material questions, and even irrelevant and immaterial questions, were fully answered in the aforesaid two sworn affidavits and in the Complainant's responses to the data requests. Nevertheless, the Respondent disingenuously and falsely states, in order to apparently and deliberately mislead the Commission, that "Complainant still refuses to respond to virtually any of them!" Incredibly, the Respondent further states in its *Motion* that ". . . answers to their data requests are necessary" before it can respond to the *Complainant's Motion for Summary Judgment!* One word can be used to describe this statement of the Respondent's learned counsel: **poppycock!** Respondent's aforesaid statement is manifestly deceptive, factually incorrect, and completely disingenuous.

3. The Commission should also bear in mind when considering *Respondent's Renewed Motion*, that G.E.T. 6.12.6(E) requires ***only*** an *oral* statement of a residential telephone customer that the telephone line is being used with a data terminal (i.e., a fax machine), and that "no voice use is contemplated." **Nothing more, nothing less!** In November 2003 the Complainant met this requirement when he called and advised

the Respondent. This is not disputed!

The aforesaid General Exchange tariff **does not require** a telephone customer to provide information to the telephone company as to what alternative *voice* communication the customer may or may not use, (if any), i.e., payphone, cellphone, neighbor's telephone line, VOIP, etc. Further, Respondent erroneously now demands and concludes, that merely because of the *mention* of alternative possibilities of *voice* communications these days *by people*--in a **footnote** to the Complaint, the Respondent is entitled to an "anything goes" informational quest so that this etherial matter can "shed light" on, and "flesh out," whatever Respondent wishes!

It further erroneously states, *inter-alia*, that "Mr. Mark claims that his voice communication needs are met EXCLUSIVELY **(emphasis added)** by wireless service!" This statement appears nowhere in the Complaint or elsewhere in any pleading filed by the Complainant and is incorrect. It is false and deliberately misleading. Complainant has used all forms of voice communication--but most importantly, **NOT** the telephone line at issue which has been used exclusively and solely with a data terminal since November 2003 for the transmission/reception of data with not only **no voice use contemplated,** but also with **no voice use at all on the line!**

The standard for what is, and what is not allowed, in the discovery process is **NOT** whether any discovery sought will "shed light" on, or "flesh out" (in the sole *opinion* of the Respondent), anything, but that the information sought is ***reasonably calculated*** to lead to the discovery of ***admissible evidence!*** Whatever alternate means of *voice* communication the Complainant may or may not have used and/or uses, is **totally** immaterial and irrelevant. Once again, the Complainant has indicated by sworn affidavit that the Complainant's P.O.T.S. residential telephone line should not be charged, and should not have been charged, a non-published charge since November 2003 and forward since it has been used exclusively with a data terminal for the transmission/reception of faxes; not only has no voice use been contemplated on the line since November 2003, but also, no voice communication has been used on the line. **PERIOD!**

Would a pay phone telephone number, a neighbor's telephone number and account information, or a relative's cell phone number and account information be *reasonably likely* to lead to the discovery of *admissible* evidence? **Certainly not!** The Respondent wishes to conduct no more than a *fishing expedition* under the guise of anything it is requesting will somehow and in some way, "shed light" or "flesh out" the fundamental issue in this case: **Is a fax machine a data terminal?** Since the Complainant has stated under oath there has been no voice communication and the required "no voice communication contemplated" pursuant to G.E.T. §6.12.6(E) since November 2003, is not the Complainant absolutely entitled to the relief sought, forthwith? The Commission's own Staff thinks so; after investigation and research, it agrees with the Complainant!

Once again, G.E.T. §6.12.6(E) requires nothing more than an oral (unverified) statement from the telephone customer that a data terminal is being used on the line and that no voice use is contemplated. G.E.T. 6.12.6(E) does not require the type, make, model, date of purchase, paper capacity, software version, serial number, or "nature" of messages sent and/or received on the data terminal. The aforesaid facts are

superfluous, **totally and completely** immaterial and irrelevant, to *any* requirement of G.E.T. 6.12.6(E)! Notwithstanding this, the Complainant has *bent over backwards* and has indicated, by affidavit, that faxes sent and received were *personal* in nature unrelated to any business! The Respondent knows from its own records that the Complainant's P.O.T.S. residential line involves a residential telephone line, is in a residential building, and that the entire building contains no business telephone lines because there are no offices or businesses in the building!

4. It is significant, and should be *very* significant to the Commission, that its own *Staff's Report* dated June 30, 2006 (with affidavit affixed thereto by William Voight of the Commission's Staff), after a full and careful examination of all the facts and the law, has concluded and recommended:[2]

> **Issue #1** - *Should the Commission rule that the Complainant qualifies for a non published rate exemption?* **YES!**
>
> **Issue #3** - *Should the Commission rule that the Complainant qualifies for future non-published rate exemptions?*[3] **YES**

In the Conclusion[4] of the Commission's own *Staff Report*, (incorporate by reference as if fully set forth herein), **the Staff recommends** that the Commission find in favor of the Complainant on issues #1 and #3, as set forth therein and hereinabove. Further the affiant's certification at the end of the *Staff Report*, on behalf of the Commission's Staff, further concludes that:

> "The Staff is unaware of **any other matter that affected, or that would be affected, by these recommendations.**"[5] (emphasis added).

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[2] *Staff Report*, page #10.

[3] This would include, it goes without saying, whether the Complainant uses a pay telephone, a neighbor's telephone, a cellphone, for voice communications, etc. This would include, it goes without saying, the paper capacity of the fax machine used, the date of purchase, the place of purchase, the model number, the serial number, the color of the machine, etc. This would include, it goes without saying, the "type and/or nature" of the faxes sent or received on the Complainant's fax machine. This would include, it goes without saying, what if any business or employment is applicable to the Complainant!

[4] Their Conclusion is found on P-11 of the *Staff Report*.

[5] This would include, it goes without say, whether the Complainant uses a pay telephone, a neighbor's telephone, a cellphone, etc. for voice communications. This would include, it goes without saying, the paper capacity of the fax machine used, the date of purchase, the place of purchase, the model number, the serial number, etc. This would include, it goes without saying, the "type and/or nature" of the faxes sent or received on the Complainant's fax machine. This would include, it goes without saying, what if any business or employment is applicable to the Complainant.

The Commission's own Staff concluded and found that nothing, ***no other factual issues***, remained to be determined and that no other facts would affect its recommendation and finding: **the Complainant was/is entitled to relief and future relief from Respondent's non-published monthly charges!** The Staff further, reasonably and properly, accepted the two affidavits of fact submitted by the Complainant in support of the *Complainant's Motion for Summary Judgment* -- **as should also the Commission.**

As the Commission is aware, the Complainant *Motion for Summary Judgment with Affidavit* attached and a *Supplemental Affidavit* filed thereafter, is *still pending*. These documents *clearly* entitle the Complainant to judgment on the pleading since there is **NO ISSUE OF MATERIAL FACT** to be determined. The only proper and correct judicial determination remaining for the Commission is to grant *Complainant's Motion for Summary Judgment*. The Complainant is entitled to reimbursement for improper unpublished monthly charges charged by the Respondent (with interest), since November 2003 through the present and *in futuro*.

The Respondent has never previously alleged any issue of fact, material or otherwise, in dispute on each occasion when it has arbitrarily and capriciously refused to waive its monthly charge for Complainant's unpublished residential service since November 2003; at all times in the past, it has simply stated that it does "not agree" that a fax machine is a data terminal! Complainant has at all times since November 2003 been entitled to the waiver--as the Commission's Staff has now also concluded. The Complainant's residential telephone line has been used **only, and exclusively**, with a data terminal: a fax machine, and not only has there been "no voice use contemplated" since November 2003, but also there has been no voice use on the telephone line at any time since the aforesaid date.

Further the Commission's *Staff Report* concludes, with regard to ***any*** "alleged" remaining issue of fact, at P-6:

> ***". . . based on his certified statement, the Staff has no reason to doubt Mr. Mark's assertions."***

The Staff is satisfied with the affidavits filed by the Complainant in support of his *Motion for Summary Judgment*, filed, once again, *subsequent to* the propounding of the Respondent's data requests which it now seeks to compel *in total* and *without limitation*! The Commission's Staff has had a full and fair opportunity to be advised of the Respondent's "position" (by the cadre of Respondent's four attorneys of record) --prior to the Staff's comprehensive independent research, preparation, findings, and recommendations.

The Commission's *Staff Report* recites the fact that SBC/AT&T (now) "claims" that it should not be forced "to accept" Complainant's statement that his voice communication needs are met by a "wireless" telephone merely because Complainant makes the assertion."[6] (This statement relating to the Respondent

[6] Presumably, the Respondent would not even accept the fact that the sun rises in the East each morning!

is not, however, *even correct* since that is **NOT** what *footnote #1* of the Complaint states!)[7] SBC/AT&T insists that it is "entitled" to contest "untested claims" by Complainant that his telephone landline is not used for voice purposes."[8] It should be noted in the *Staff Report*, P-6, that the Staff further indicates:

> **"At&t has demanded that Mr. Mark provide 'strict proof' that 'no voice use is contemplated' on his telephone line."**

Apparently sworn affidavits are not sufficient enough for the Respondent!

> Complainant's Query: *Would a document signed in the* **blood** *of the Complainant with Complainant's* **hand on a bible** *satisfy the Respondent--probably even this would not!*

Even the Commission's Staff states that it is . . .

> ***"uncertain of how much proof is required to meet AT&T's criteria."***[9][10]

The Complainant, too, is *uncertain* of how much proof is required to meet At&T's criteria! The Complainant has stated, *under oath*, that the Complainant's telephone line has not been used for voice purposes, but only for the sending and receiving of faxes since November 2003! **NOTHING, ABSOLUTELY NOTHING, WILL EVER, OR COULD EVER, CONFIRM THIS TO THE SATISFACTION OF THE RESPONDENT!**[11] Such excesses on the part of the Respondent and its legal cadre of four attorneys of record--are incredible; its stockholders should find that such waste cannot, and should not, be condoned by any standard!

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[7] In any and all events, what difference does it make what mode or modes of voice transmissions have been used, or are used, (if any), by the Complainant as long as such voice transmission have not been on the residential telephone line with the data terminal attached (since November 2003)? At all times, the Complainant has been absolutely entitled to a waiver of monthly unpublished line charges pursuant to G.E.T. §6.12.6(1)!

[8] AT&T's Combined *Motion to Compel Responses to Data Requests . . .*

[9] Having provide a sworn affidavit, what more could the Respondent reasonably furnish -nothing!

[10] Even the Commission's own Staff is "uncertain of how much proof is required to meet AT&T's criteria." P6, Staff Report, last paragraph.

[11] One cannot help but wonder how the Respondent's corporate stockholders can allow such a manifest **waste of corporate assets and legal talent in opposing** the few dollars involved in this case! Where is the proportionality? One would think that this case involved millions of dollars! The law is against the Respondent, the facts are against the Respondent, even the Commission's own Staff Report is not in favor of the Respondent's "position." **What more is needed?**

Respondent will, it is fully apparent, resort to whatever excesses it desires and can "get away with" while this matter is before the Commission; it is prepared to apparently take, and use, whatever unprecedented legal tactics it feels it can to continue to harass the Complainant for having the audacity, fortitude, and the temerity to object[12] to the outrageous and groundless refusal of the Respondent to merely abide by its own tariff, let alone to furnish to the Complainant (at any time) **ANY** factual or legal reason why it has manifestly and consistently, *albeit* arbitrarily and capriciously, consistently refused to provide a waiver of, (previously less than $2/month and now an incredible $2.49/month), monthly charges which the Complainant has **absolutely** been entitled to have waived since November 2003 pursuant to *any* reading of G.E.T. §6.12.6(E)!

Respondent obviously intends to make a "federal case" of the "defense" of Complainant's Complaint and to try to make an example of this Complainant who *merely seeks* to have justice: to persuade the Commission that the Respondent has acted improperly and contrary to its own tariff! The Respondent seeks to chastise a Complainant (and make an example of such Complainant), who has had the will, stamina, temerity and the fortitude to challenge the Respondent-- a Respondent with unlimited financial resources, effective lobbyists, and a multitude of legal talent! All of this, despite the fact that the matter involves only a small improper monthly charge for an unpublished telephone number erroneously charged since November 2003 when a data terminal: a fax machine, has been used exclusively on a residential telephone line and no voice use has been contemplated, or even used! It appears to be the intention of the Respondent and its cadre of four learned counsel to make an example of this Complainant: the Respondent's "order of the day"appears to be that anyone challenging the Respondent *in any way* will be subjected to voluminous and overwhelming pleadings and harassment! The Commission should conclude: **Enough is enough!**

The Commission's *Staff Report* indicates that AT&T (merely) "disagrees" that the tariff exemption *applies*. Respondent is entitled to "disagree," but it is not entitled to harass a Complainant with speculative, illusory and etherial, factual inquires that are ***totally unrelated*** *to the issues before the Commission and are* ***solely*** in the *imagination* of its attorneys! The **ONLY** issue has been, **and still is**, a factual finding to be made by the Commission: ***Is a fax machine a data terminal?*** If it is, then Complainant is entitled to relief since he has stated and attested, in sworn statements, that his data terminal, to wit: fax machine, has been used with his residential P.O.T.S. telephone line since November 2003 for non-voice communications. No voice use of the line has occurred since November 2003 to the present. He initially stated this to the Respondent residential office back in November 2003.

The Commission Staff does **not** agree with AT&T; the Complainant does **not** agree with ATT. Paragraph five of the Commission's *Staff Report* states and concludes:

> ***"In this regard, the Staff recommends that the Commission determine that a facsimile machine is a data terminal."***

[12] (by his filing of a formal complaint after an *informal* complaint proved fruitless).

At the risk of repetition, G.E.T. Tariff, Sec. 6.12.6(E) is clear, simple, and straightforward. There is no ambiguity as to its meaning in the mind of the Commission's own Staff or in the mind of the Complainant! Statutory interpretation proscribes that one **not look any further** than *the words* of the tariff (statute) **if** those words are unambiguous and the tariff (statute) is capable of being understood on its face. One who uses a "data terminal" where "no voice use is contemplated" **is *absolutely entitled*** to a waiver of monthly charges for an unpublished residential telephone number **PERIOD!** Nothing more, nothing less!

The purpose of the *Respondent's Renewed Motion to Compel* is for no other purpose than harassment and nothing more.[13] For example, in **DR1**, it seeks the name, address, and telephone number of the Complainant. Not only is this within the Respondent's own business and service records, but also, in response to a Staff data request inquiry, the Respondent **FURNISHED** this ***same information*** **to the Commission Staff!** It was provided by Respondent's Donna Halwe, Area Manager--Regulatory, of SBC/ATT: (Request No. 1, RFI No. 1-16, page *1 of 1*) . . . [14]

Now, the Respondent punitively seeks, nevertheless, an order compelling the Complainant to respond, *inter-alia*, to this *same* data request requiring this *same* information to be furnished *by the Complainant*, despite the Respondent's **not only possessing** it, **but also** having **provided** it to the Commission Staff! Without this information, *inter-alia*, Respondent incredibly "claims," it cannot respond to the *Complainant's Motion for Summary Judgment!* Can you beat that? Even the Respondent's own business and service records reflect, further, that the Complainant's residential telephone line is in a residential building that contains no offices and no businesses; the residence is *at least* 1/2 mile from any business! By affidavit, the Complainant has stated that his stand-alone fax machine has been used for personal, non-business faxes.

Such tactics on the part of the Respondent are not only grossly unfair and in manifest bad faith, but also are oppressive, reprehensible, and indefensible! Again, once again, it is obvious and apparent that the Respondent has taken the low road, one of not seeking *legitimate discovery*, but one which leads to the castigation of the Complainant for having the audacity, tenacity, will, and temerity to seek only what the Complainant has been, and is, entitled to receive, to wit: a waiver of improper monthly unpublished charges

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[13] Sadly, the Commission does not provide for financial relief to a Complainant when a **frivolous defense** is proffered (as in this case), by a telephone utility, even though it **does provide** for sanctions/relief **IF** a **Complainant files a frivolous complaint.** Should not what applies to the goose, also apply to the gander? The Missouri Public Service Commission should act on this unfairness at the same time that it considers this case.

[14] Subsequent to the Staff's disclosure to the Complainant that this same information, sought now to be compelled by the Respondent, was previously furnished to the Staff **by the Respondent, itself**, it is the Complainant's understanding that one of the Respondent's counsel expressed his *substantial* displeasure to the Commission's Staff for having disclosed this information to the Complainant! (Obviously, the disclosure of this information to the Complainant as to what information Respondent furnished to Staff, would provide the Complainant with the knowledge that any future demand by the Respondent [**exactly like** the current *Respondent's Motion to Compel*], was patently oppressive, totally frivolous, in manifestly bad faith, and completely disingenuous!)

charged by the Respondent since November 2003 forward in accordance with G.E.T. §6.12.6(E).

Additionally, the Respondent wishes to inquire in one of its data requests whether the Complaint has "access" to any other service for ***voice*** communication! There is not even a time frame set forth in this data request. **Query:** What conceivable difference would this make? Whether the answer is yes or no, such cannot "shed light on," or "flesh out," anything, let alone be *reasonably calculated* to lead to the discovery of *admissible evidence*! Whether the Complainant may use satellite voice communications, whether the Complaint may use the corner pay telephone, whether the Complainant may use his next door neighbor's residential telephone, whether the Complainant may use computer voice over the Internet (VOIP) or a cell phone belonging to a relative--how could *any of this* possibly change the **irrefutable fact,** and *sworn affidavit* attesting to the fact, that Complainant's P.O.T.S. residential line is used **only,** and exclusively, with a data terminal and that not only has no voice use been "contemplated" since November 2003, but also, there has been NO VOICE use of the line **AT ANY TIME** since the aforesaid date?

The Complainant has indicated, by sworn affidavit, that his P.O.T.S. residential line has been utilized with a stand-alone data terminal and it has been used *exclusively* for the transmission and reception of data since November 2003. He has further sworn to the fact (although not relevant to G.E.T. §6.12.6(e)), that the telephone line has never been used for business faxes, just personal faxes. **NOTHING IS GOING TO CHANGE THESE IRREFUTABLE FACTS!** Nothing more will "shed light" on, or "flesh out," these absolutely and incontestible facts!

G.E.T. §6.12.6(e) REQUIRES NOTHING MORE that an *oral* statement by a telephone customer to the telephone utility that the customer uses the telephone line with a "data terminal" and that "no voice use is contemplated." It does not require the telephone customer to advise the color of the data terminal, the make, model, type, paper capacity, paper size, serial number, or the "nature"[15] of faxes that may be sent or received on the data terminal. The affidavits of the Complainant in this case confirm the fact that the Complainant has a fax machine and that it has been used exclusively on the Complainant's residential P.O.T.S. line to the exclusion of *any* voice use.

DR2. In the Complaint, the Complainant indicated *only in a footnote*: #1 "*Use* (*generally*) of cellular telephone service by the Complainant (**other than** and **NOT** AT[T] a/k/a Southwestern Bell Telephone Company and at no time stating any *exclusive* use of cellular telephone service), **and others**, has replaced (*generally*) the need for any land-line based 'voice contemplated' telephone service." (emphasis/clarification added). The Complainant does not deny that over the years, he has "used" one or more cell telephones of others for voice communications. So what? Also, from time to time, the complainant has utilized a pay telephone for voice communications. So what? Further, from time to time, the Complainant has utilized other modalities for voice communications, i.e. VOIP. So what?? SBC/AT&T claims that it should not be "forced to accept" Complainant's *footnoted* statement that his **voice** communication needs are met by a

[15] The subject of one of Respondent's data requests!

"wireless telephone" (or other telephone service, i.e. pay telephone, etc.) SBC/ATT states: "merely because Mr. Mark makes the assertion,[16] it should not have to accept it!" SBC/AT&T insists that it is entitled to "corroborate the 'untested claims' by the Complainant that his landline telephone is not used for voice purposes![17] Just how is it going to contest or to "corroborate" these absolute and indisputable facts? It can't, but it is going to harass the Complainant nevertheless! It further misrepresents what Complainant's *footnote* even states: the Complainant's "use," **not** ownership, **not** exclusive use, of cell telephone service (at some time)! At no time did the Complainant say, contrary to what the Respondent now states and wishes the Commission to believe, (in its *Renewed Motion)*, that Complainant has a personal cell phone that he has used *exclusively* for voice communications and therefore the Respondent is entitled to inquire so that it may "shed light" on the issues! Complainant could *use* for voice communication, a pay telephone, someone's else's cell telephone, satellite voice communication, internet cable telephone, VOIP, etc.--none of this could conceivably lead to the *reasonable* discovery of *admissible* evidence!

For the Respondent to demand anything related to ***voice*** use **unrelated to the telephone line** in question, i.e., someone else's telephone number, account, or some other method (i.e. satellite voice communication, VOIP, etc), makes no sense, is non-sequitur, not legitimate, in bad faith, and manifestly unprecedented; such inquiry further is an invasive, intrusive, irrelevant, and immaterial data request which should not, and cannot, be condoned or sanctioned by the Commission. Such a data request could not be considered by *any* rational, reasonable person to be "*reasonably* likely to lead to the discovery of *admissible* evidence!" Further, by affidavit, the Complainant has **already stated**, even though it is not required by G.E.T. §6.12.6 (E), that his stand-alone fax machine has been used *exclusively* for personal, non-business, use.

What could conceivably satisfy the Respondent? **NOTHING!** The *Respondent's Renewed Motion to Compel* argues that it requires a purported *wireless voice telephone number*, the account number, the name of the provider, and the date the service was established *or* it cannot provide a "defense" to the affidavits in support of *Complainant's Motion for Summary Judgment!* INCREDIBLE! Even if the Respondent were to receive information about all other forms of communications used for ***voice*** by the Complainant since November 2003, it ***STILL*** would be unable to provide a "defense" to the indefensible! It ***STILL*** would be in no better position than it is right now! Is it also going to demand every pay telephone and location of pay phones that the Complainant may have ever used? Is it also going to ask the same information about a neighbor's telephone that the Complainant may have used? Is it also going to inquire about the cellular service of a friend or relative whose cellular telephone Complainant may have used at some

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[16] It appears that Respondent's four learned counsel believe that they are involved in an automobile injury case in which personal injury damages are sought! In such a case, the Plaintiff might claim that the Defendant's negligence caused $500,000 in permanent injuries and the Defendant might claim that the injuries are valued at only $100,000! **Let's be real!**

[17] AT&T's Combined Motion to Compel Responses to Data Requests . . .

time? Is it also going to inquire about any VOIP that Complainant may have used? This data request is overly broad, invasive, punitive, invasive, patently ridiculous **and** incredibly absurd! Further, in the *FOOTNOTE* of the Complainant's Complaint, the Complainant did not indicate whose service or the type of service he may have used, or is using, or whether or not any account associated with the voice service was his or that of another! Respondent did indicate in the Complainant's *footnote*, however, that whatever alternative voice services were/are/have been used, such was **NOT** that of the Respondent!

At no time did Complainant ever indicate that he had a cellular telephone account with any provider; (as if that would make any difference or not since a [*very general*] informational (only) statement was made in the *footnote* that *people* are using alternative methods for voice communication these days *including* cellular service. In the *footnote*, once again, the Complainant also stated: any alternative use of voice communication by the Complainant was **NOT** utilizing any service provided by Respondent, ATT/Southwestern Bell. Of what business or relevance or materiality, therefore, is any *voice* communication of the Complainant,[18] other than that which would apply, **IF ANY**, to the residential P.O.T.S. line used by the Complainant solely with a fax machine in which there is no voice use contemplated? All factual issues have been *clearly* and *decisively* set forth affirmatively in the Complainant's affidavits in support. The Staff has accepted the irrefutable facts without dispute or question, so should the Commission.

Query: Is the Commission going to now sanction Respondent's "broad and all-encompassing, invasive brush" approach to discovery that *anything* the Respondent wants, the Respondent shall receive on discovery, no matter how immaterial, no matter how irrelevant, no matter how ridiculous and absurd, no matter how private, no matter who is involved, no matter whether the Respondent already has the same information sought and has already *even furnished it to Staff*, and no matter what the invasion? *Any* discovery **must be** *reasonably calculated* to lead to the discovery of *admissible evidence!* Using this standard, other than that which was previously furnished by the Complainant in affidavits and answers filed subsequent to the Respondent's data requests, even if furnished by the Complainant, **could conceivably** be *reasonably calculated* to lead to the discovery of *admissible evidence*!

Footnote #1 of the Complaint does not, and cannot, give rise to *any legitimate discovery request* relating to voice communications that Complainant *might* utilize and which is *totally unrelated* to the Complainant's SBC/ATT provided, telephone line *used exclusively* with a data terminal: fax machine. Further, SBC/ATT's request for information about *other* voice telephone service at *any other location*, is also immaterial and irrelevant and could *not possibly lead* to the discovery of *admissible* evidence. Whether the Respondent has a summer home or other property with **non**-SBC/ATT telephone service, of what conceivable or possible relevance is this other than to invade the Complainant's privacy and to harass the Complainant? AT&T/SBC's data request, *inter-alia*, is not *reasonably calculated* to lead to the discovery of *admissible evidence* and is not related **IN ANY WAY** to G.E.T. §6.12.6(F) and the Complainant's entitlement to relief

[18] whether by pay telephone, neighbor's land-line phone, neighbor's cell phone, VOIP, etc. All of the aforesaid, if any, *could be* used for *voice* communications.

thereunder.

DR3. Requests any **employer** of the Complainant, dates of employment, title/position, job responsibilities, and business address and business telephone number. **This case is not a personal injury case!** Once again, of what conceivable materiality, let alone relevance, could this possibly be other than for the sake of pure harassment and the invasion of the Complainant's privacy? What next, any employer's fax telephone number, alarm terminal number, and what the Complainant has had for lunch each day since November 2003? **Query:** How is the Complainant's job responsibilities, *if any*, outside of one's home going to have any effect whatsoever on the issue before the Commission in this case: *Whether a fax machine is a data terminal?* and *is one entitled to a waiver from non published charges if no voice use is contemplated and there is NO voice use on a residential telephone line*--all in accordance with G.E.T. §6.12.6(E)? The Commission's Staff has appropriately and thoroughly addressed, discussed, and answered these sole and relevant issues now before the Commission.

DR4. This data request seeks to know about ***compensation*** paid, if any, to the Complainant and whether the Complainant provides services "to another" for compensation! **INCREDIBLE!** This data request cannot be topped? What next, the Complainant's shoe size? What next, the Complainant's tax returns, if any, for the last five years? This is totally immaterial and irrelevant, private, privileged, and cannot reasonably, ***in anyone's mind***, be *reasonably* calculated to lead to the discovery of *admissible* evidence! It is "off the wall!" Is this a personal injury case? The request is totally unrelated to the tariff at issue or the facts supporting the Complainant's use of a data terminal, to wit: a fax machine, and the fact that the data terminal has been used exclusively since November 2003 for data with no voice use contemplated and no voice use, utilized! (*See*, Complainant's Affidavits in Support of his *Motion for Summary Judgment*, attached, once again, *filed subsequent* to the Respondent's propounding of this data request and the others herein indicated). Maybe such requests *might* be justified in an automobile injury case in which the Plaintiff has lost time from work and desires compensation from a Defendant, but such a request is inconceivably related to ANYTHING pertaining to G.E.T. §6.12.6(E)!

DR5. This data request further attempts to harass and invade Complainant's privacy, once again. The Respondent wants to know, the nature/type of *messages* sent by and/or received by the fax machine!" WHAT CONCEIVABLE DIFFERENCE COULD THIS MAKE? Does the Respondent want to know what kind of pizza has been ordered by fax? This is none of the Respondent's business! It is nonsense! The Complainant has a residential telephone line, in a residential building with no businesses or offices even located in the building! The Complainant has verified, nevertheless, **in his Affidavits** (again filed subsequent to the propounding of this data requests and the others), that the use of the fax machine has been for "personal, non-business use." Why then is the Respondent now seeking to compel answers to this data request seeking the "nature/type" of *messages* sent by and/or received by the fax machine? Even this question is

totally immaterial and irrelevant since the tariff, G.E.T. 6.12.6(E), does not make a distinction between the **type of data** that a data terminal may transmit and receive--it requires only the ***use of*** a data terminal, **not** a disclosure as to the nature/type of messages (data) sent by and/or received on the data terminal! Of what business is it of the Respondent to know the nature/type of *messages* sent on the fax machine? What next, production of Complainant's actual faxes sent and/or received? How could this make any difference to the *Commission's* ***decision and determination as to whether a fax machine is a data terminal, or is not a data terminal?*** How could the nature/type of *messages* sent/received make any difference to the fact that the Complainant has sworn, under oath, that only a data terminal has been used on the telephone line in question and that not only has no voice use been contemplated, but no voice use has been utilized since November 2003! *Com'on, fellows, lets get real!*

DR6. This data request again is propounded by Respondent for the sole purpose of the invasion of the Complainant's privacy and the Complainant's harassment--and for no other reason! It seeks the "principal purposes" of messages originated by/or received by, the Complainant's data terminal: fax machine. Was this not asked in the aforesaid DR5 but in another way? This was fully answered in the Complainant's Affidavit, even though not relevant: "personal, non-business use!" The affidavits were incorporated by reference in the Complainant's answers to this data request. Yet, the Respondent now comes before this Commission and moves for an ***Order to Compel Complainant*** to answer this data request (and all of the others); it requests an order to require the Complainant also to certify that such has been done, and in the absence thereof, Respondent wants the case against it dismissed! How oppressive can one get? Did not the Respondent even read the Complainant's affidavits prior to the filing of its *Motion to Compel?* It would appear not! If the Complainant had not objected to it and answered: "for ordering **pepperoni** pizzas and **hamburger** sandwiches to be picked up subsequent to a faxed order, would this assist Respondent *in any way* in the Respondent's quest for *anything* to try to refute the **irrefutable facts** that the Complainant uses, and has used, a data terminal: a fax machine, on his P.O.T.S. residential telephone line and that it has not been used for any voice communication since November 2003? Would a specific answer to this data request now enable the Respondent to respond to the Complainant's *Motion for Summary Judgment* and the irrefutable facts set forth in the attached affidavits in support thereof? Again, fellows, let's get real!

DR7 This request by the Respondent seeks to have "all documents referring or relating to the allegations that a fax machine is a data terminal . . ." Such requires the production of the legal research of the Complainant and others: his "work product!" Surely the Respondent and its four learned counsel know that such research is protected and privileged. The Commission's *Staff Report*, however, sets forth, in addition, to factual findings, conclusions, and recommendations, some legal and factual aspects relating to this data request. As any first year law student learns, work product is **not subject to be produced in any case!** Complainant's objection to this data request was, and is on its face, well taken.

DR8. Respondent wants to know in this data request, the type, model, purchase date, and serial number of the Complainant's fax machine. This, as well as the color of the fax machine, the size of the paper it takes, the price paid for the machine, the name and address of the store where it was purchased, etc. is **totally** immaterial and irrelevant and cannot legitimately be *reasonably calculated* to lead to the discovery of *admissible* evidence! Is the answer to this data request going to enable the Respondent to refute the factual statement contained in the Complainant's sworn affidavits, to wit: that Complainant's data terminal, to wit: fax machine, has been attached to the P.O.T.S. residential line of the Complainant and since November 2003, there has been no voice use contemplated or utilized on the line since that date? Is the answer to this data request going to enable the Respondent to refute the fact that a data terminal **can be,** *inter alia,* a fax machine? Whether the fax machine is a Model A, B, C or Model #10001 or #12002 and whether it has a Serial #XYZ123 or JCD1157 is not relevant or material and is not *reasonably* calculated lead to the discovery of *admissible* evidence!

A fax machine is a fax machine is a fax machine,
similarly, a rose is a rose is a rose, no matter what color,
no matter what size are the petals, and no matter how
long its stem may be!

Complainant is surprised that the Respondent did not also ask the color of the fax machine! Such would be equally as absurd as the requests posed in this data request! Would not this, too, "shed light" for the Respondent and allow it to "flesh out" facts relating to Complainant's fax machine?

DR-9 This data request further attempts to egregiously invade the Complainant's privacy and that of others. Whether the Complainant **uses** for ***voice*** communication, a pay telephone, his neighbor's phone, his neighbor's cell phone, satellite telephone service, VOIP, or any cell phone service, whether the account is in his own name or the name of another, cannot be relevant or material. Even an answer to this cannot be considered by anyone to be *reasonably calculated* to lead to the discovery of *admissible evidence.* In the ***footnote*** to the Complainant, Complainant set forth that any other alternative communication *used* was **not** that of SBC/ATT. Enough said! Likewise, the account number and "date of establishment" of ***voice*** communication(s) **utilized**, if any, is unreasonable, overly broad, not applicable, irrelevant, and immaterial. There can be no question in anyone's mind that this information sought is not *reasonably calculated* to lead to the discovery of *admissible evidence.* Once again, the Complainant has already stated that voice communications used, *if any,* is **not** furnished or provided by the Respondent, SBC/ATT, in any and all cases. The Complainant, subsequent to the Respondent's data requests, provided, including incorporation by reference as if stated in their entirety, **two separate sworn affidavits** including information that was

not even material or relevant. No degree of invasion of privacy or harassment ***will ever satisfy*** the Respondent, a Respondent that seeks, through power, intimidation,[19] and unlimited financial and legal resources, to repeatedly harass a lowly Missouri residential telephone customer merely because the customer is *entitled* to receive, but has *not* received, what the tariff, GET 6.12.6(E), provides and requires Respondent to do, to wit: provide a waiver of any monthly service fee for a non-published number if a "data terminal" is used and "no voice use is contemplated!" **The Staff has concluded that the Complainant has provide acceptable responses in his sworn affidavits.** ***Even the Staff has properly concluded that nothing will apparently satisfy the Respondent; the Complainant agrees with the Staff 's finding in this regard and the Commission should.***

The *sine qua non* is that even the Respondent ***tacitly*** **admits** that the only issue is one of interpretation, if any, as to what constitutes a "data terminal!" On January 31, 2006, Mimi B. MacDonald, Senior Counsel for the Respondent, wrote to Complainant. **(Exhibit C).** In her letter, she confirmed that the interpretation and application of the tariff is the only issue involved; she fails to recite ***any other factual issue*** applicable or required. No mention is made of **ANY** factual question to be determined by Respondent's **Senior Legal Counsel:**

> *"Southwestern Bell Telephone LP d/b/a ATT&T Missouri ("Att&T Missouri) continues to believe that* ***the tariff*** *is being* ***interpreted*** *and* ***applied*** *correctly, (by Respondent). Section 6.12.6(E) does not provide for the waiver of the charge for residential non-published service when a customer intends to use the line for either internet or facsimile purposes."*
> (emphasis added).

Respondent's Senior Legal Counsel's letter constitutes an *Admission against Interests*. Nevertheless, the Complainant fully responded to all of Respondent's data requests with answers or objections. When objections were set forth, details of the objections were indicated. All of the Complainant's objections were meritorious and are entitled to be sustained. None of the data requests to which Complainant objected can be overruled if the applicable legal standard is used for consideration, to wit: is the data request *reasonably calculated* to lead to the discovery of *admissible evidence*. In EACH case, the Commission should answer: **NO!** Respondent would like to have the Commission believe that the standard should be whether or not an answer will "shed light" on the issues or will allow the Respondent to "flesh out" facts! Such an etherial and illusory "standard" is *only* in the mind of the Respondent's counsel! Such is **NOT** the legal standard applicable and which must be applied.

The Respondent's Data Requests were filed *prior to* the submission of Complainant's *two* sworn affidavits filed in support of *Complainant's Motion for Summary Judgment*. **All** relevant and material answers are contained within these affidavits and in the answers provided by the Complainant to Respondent's data requests; it would appear that the Respondent has simply failed to read, and/or consider,

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[19] I.E., stating it intends to take the Complainant's deposition **after** the Commission rules on its Renewed Motion to Compel . . .

the affidavits, *inter-alia*, **before** filing its *Renewed Motion to Compel*. Otherwise, it must be assumed that the current *Respondent's Renewed Motion to Compel* has been filed in manifestly bad faith. Further, for the Respondent to now seek to compel information that the Respondent has/has had in its own care, custody, possession and control, and IRREFUTABLY, has also furnished to the Staff before filing its *Renewed Motion*, is reprehensible and unpardonable. This constitutes shear and unadulterated harassment!

If this Commission were to placate the Respondent and to grant, in whole or in any part, any aspect of the *Respondent's Renewed Motion*, in light of all the circumstances and facts set forth hereinabove and in the record, in light of its own *Staff Report*'s findings, conclusions, and recommendations, and in light of the patently oppressive and punitive tactics that are obviously being utilized by the Respondent in bad faith against the Complainant [including, but not limited to, material misstatements in its **Motion**, the omission of essential facts, the present attempt to demand and try to compel, information which it irrefutably already has in its care, custody, possession and control and has ***already*** furnished it to Staff], such would be, and constitute, a judicial travesty.

Anything further would only allow and condone further harassment by the Respondent including the invasion of the Complainant's privacy in retribution for his having the temerity, fortitude, and audacity to desire merely, (in relevant part and substantially), a refund of past improper monthly charges charged by the Respondent for unpublished telephone service since November 1, 2003 to the present and a waiver of such unpublished line service charges in the future--**that is**, if the Respondent does not eventually throw up his hands, cancel his local service with Respondent, and subscribe to another local service provider (and, in the process, receive a 10% discount--**far more than the monthly unpublished charge at issue in this case)**!

Exhibit (C), a letter from the Respondent's own Senior Legal Counsel states that "AT&T Missouri, continues to value your business." Complainant would hate to think what kind of treatment he would receive if the Respondent **DID NOT** value his business!

Before even considering the *Respondent's Renewed Motion*, the Commission should consider the fact that the Respondent is **guilty of *laches***--it has come before this Commission with its *Renewed Motion to Compel* with *unclean hands!* The Complainant propounded data requests to the Respondent and instead of providing answers to all such data requests, Respondent responded only with **what it would**, and **would not** answer! (Presumably in the future). The Complainant has received nothing further from the Respondent!

"In order to seek justice, one must do justice." It goes without saying that courts, as well as administrative law judges, have denied ***any consideration*** for any "alleged" relief sought by **any** party that has not done justice to the opposing party--in this case, Respondent has *only* indicated to the Complainant what it would, and would not, answer--thereafter, Complainant received nothing! Since Respondent has not "done justice," any relief requested should not even be considered on its face by the Commission!

CONCLUSION:

1. Respondent now comes before the Commission with its *Renewed Motion to Compel* with *unclean hands, to wit:* **laches**. It is not entitled to any consideration, in any and all events, by the Commission of its *Renewed Motion*. The *Respondent's Renewed Motion to Compel* should be summarily denied.

2. Notwithstanding the aforesaid, the Complainant has provided full and complete responses to the data requests of the Respondent consisting of answers and objections. Further, subsequent to the propounding of the Respondent's data requests, the Complainant filed two separate sworn affidavits (copies attached to this pleading), which were incorporated by reference in the Complainant's answers. The objections set forth by the Complainant to certain data requests were proper and well-founded. The information now sought by the Respondent relating to the objections, is immaterial, irrelevant, an invasion of privacy, privileged, consists of work product, is set forth for harassment only, is already in the possession of the Respondent (and furnished by the Respondent, itself, to the Staff), and is not *reasonably calculated* to lead to the discovery of *admissible* evidence. No *reasonable* interpretation of the tariff in question, to wit: G.E.T. §6.12.6(E), could conclude, as did the Commission's own professional Staff in this case, that any further "facts" could possibly make any difference or could change the Staff's recommendation or could possibly be justified. No further *fishing expeditions* by the Respondent, a Respondent *desperately* seeking **any** contradictory facts (which do not exist), could possibly placate or satisfy the Respondent!

3. Any further permission by the Commission to enable the Respondent to continue to harass the Complainant, i.e., the Respondent's outright and unmitigated threat to take the deposition of the Complainant ***after*** Respondent's *Renewed Motion to Compel* is decided by the Commission, would be outrageous, unreasonable, unjustified, and would enable the Respondent to further try to intimate the Complainant into withdrawing, or unfairly and inequitably settling, this case. The Commission should not, and must not allow, sanction, condone, or permit this unscrupulous and bad-faith tactic; it should now bar and terminate **any** further "discovery" in this case.

4. The "claim" of Respondent that it "needs" anything to which the Complainant has properly and reasonably objected, is frivolous, made in bad faith, and is totally without merit. Respondent has no facts to oppose the irrefutable facts sworn to by the Complainant. The Complainant has used the residential telephone line in question *solely* with a data terminal: a fax machine. Since November 2003, the residential telephone line has not been used for voice communication in any way. **PERIOD!** No further "discovery" will change or modify these material, fundamental, and irrefutable facts--no matter how much longer the Respondent is allowed and permitted to harass the Complainant with renewed motions like the one filed. The Commission should not tolerate false representations by the Respondent, i.e., on the first page of the *Respondent's Renewed Motion to Compel*: "Complainant still refuses to respond to virtually any of them (the data requests), and that without answers to the data requests objected to, it cannot provide a 'defense' to the facts provided by the Complainant . . . *Arguendo, even if* the Respondent had provided answers to each and every data request propounded (but heretofore objected to by the Complainant), Respondent could still not provide a "defense" to the irrefutable facts sworn to by the Complainant!

For the Commission to allow this Respondent to continue to attempt to invade the privacy of the Complainant (and potentially others), with totally immaterial and invasive, let alone irrelevant and overly broad, data requests, would be reprehensible. Even the Commission's own Staff states that it *does not know* what **proof** could be further offered by the Complainant! The Respondent ADMITS (against its own

interests and by its own Senior Counsel), that THE issue in this case is the tariff's *interpretation*. Nowhere in the letter from its SENIOR LEGAL COUNSEL in Missouri, Mimi B. MacDonald, does she raise ANY issue of MATERIAL FACT, or even immaterial fact, that is not already known! No letter, memo, or communication of the Respondent from November 2003 onward has **ever** raised any factual issue other than the fact that the Respondent "does not agree" with the interpretation of G.E.T. §6.12.6(E)!

The Respondent conveniently fails to indicate in its *Motion* that IT furnished to the Staff the very same information that it now seeks to compel from the Complainant. This is harassment and demonstrates bad faith. The fact that the Respondent's counsel was "very unhappy" with the fact that the Staff provided this information to the Complainant, buttresses and supports the fact that the Respondent merely now seeks to harass, and nothing more! Why else would it seek to compel, *inter-alia*, answers to a data request that it not only has, but has also provided to the Commission's Staff?

As if all of the foregoing, attached exhibits, admission of the Respondent's own Senior Legal Counsel, etc. were not enough for the Commission to summarily deny the *Respondent's Renewed Motion to Compel*, the Commission should be aware that the Complainant filed a certification with the Commission of the propounding of the *Complainant's* data requests directed to the Respondent. As of this date, although Respondent indicated the information that it would and would not provide, Complainant has failed to receive anything further from the Respondent! Complainant comes before this Commission with *unclean hands* and is guilty of laches. It is not entitled to even ANY consideration of its *Motion*.

COMPLAINANT'S PRAYER FOR RELIEF

Wherefore, Complainant respectfully prays that the Commission:

1. **Deny *Respondent's Renewed Motion to Compel Responses to Data Requests*** on the grounds of *laches*: the Respondent has failed to provide to Complainant with answers to any of the Complainant's data requests propounded by the Complainant. Complainant has failed to receive any answers as of the date of filing of this pleading. Respondent now comes before the Commission seeking relief, after having failed, itself, to do justice, to wit: to provide answers to **Complainant's** data requests. As such, under the *Doctrine of Laches*, it is not entitled to ANY consideration of any request for "alleged" relief by the Commission because it has come before this Commission with *"unclean hands."* To receive justice, the Respondent must do justice!

2. **Deny *Respondent's Renewed Motion to Compel, alternatively*** [notwithstanding the aforesaid], because the Complainant has fully responded with answers as well as reasonable, appropriate, and applicable objections to data requests propounded that are not *reasonably calculated* to lead to the discovery of *admissible evidence*. When the Commission considers the Complainant's objections set forth to particular data requests **in addition to** considering the two affidavits of the Complainant incorporated by reference in the Complainant's answers (subsequently filed after the Respondent's original data requests were made), the

Commission's ruling should be clear.

3. **Consider and review** its own *Staff Report* and the Report's findings, recommendations, and conclusions that no issue of fact would make ***any difference*** to its findings, conclusions, and recommendations that the Complainant **is entitled to relief on Issue #1 and #3.** Thereafter, the Commission should, in addition to denying *Respondent's Renewed Motion to Compel*, now, without any further pleading, either *instantur* consider and decide *Complainant's Motion for Summary Judgment* (since there is NO ISSUE of material fact to be determined), and sustain it, or, in lieu thereof, the Commission should provide no more than seven (7) days (until on or before August 29, 2006), for the Respondent to file, *if it so desires*, any counter-affidavits in opposition to Complainant's affidavits, affirmatively demonstrating that there are material issue of fact yet to be decided. At the expiration of the aforesaid seven (7) days, the Commission should then rule on the *Complainant's Motion for Summary Judgment* without further delay.

4. **Terminate all further discovery** in this case, effective immediately. The Commission should further find that no further discovery would have any *reasonable likelihood* that it will lead to the discovery of *admissible evidence*. Any further propounding of data requests or Respondent's threat of a deposition of the Complainant, would serve no useful purpose other than to harass the Complainant.

Respectfully,

Complainant

Copies faxed to the Public Service Commission, General Counsel's Office, 573-751-9285; Lewis R. Mills, Jr., Office of Public Counsel, 573-751-5562, and mailed to the Attorneys for AT&T Missouri, Respondent,.

9029 Gravois View Ct. #C
St. Louis, Missouri 63123

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

R. Mark, Complainant	)	
v.	)	Cause No. TC-2006-0354
ATT a/k/a SBC a/k/a Southwestern Bell Telephone Company, Respondent	)	

COMPLAINANT'S RESPONSES TO RESPONDENT'S DATA REQUESTS INCLUDING OBJECTIONS THERETO

Comes now Complainant with Complainant's Responses to *Respondent's Data Requests* including Objections pursuant to 4 CSR 240-2.090(2) thereto, and states:

Note #1: The Respondent's data requests were propounded prior to the affidavit/supplemental affidavits filed by the Complainant. Such are incorporated by reference as if stated in their entirety herein.

Note #2: The applicable tariff at issue in this case *mandates* that there is no monthly unlisted telephone service charge:

> *"6.12.6(E): When a customer who has service which involves data terminals where there is no voice use contemplated."*

The tariff sets forth only two requirements.

> A. A data terminal
> B. No voice use contemplated

Note #3: The Respondent has *admitted* that the *only* issue is whether a fax machine is a data terminal and not one of an issue of fact!

The applicable tariff does not require a telephone customer to state what, if any, alternative telephonic voice service, is, or may be utilized, by a customer; it does not require a model or serial numbers of the data terminal, it does not require the type and nature of the nature of the data conveyed over the data terminal, and it does not require personal information related to the income, title, etc. of the telephone customer. In fact, it requires no other customer requirements other than A and B, aforesaid, in order for a customer to be entitled to a waiver of the monthly unpublished service charge in accordance with the above-indicated tariff.

DR 1. The name, address, and telephone number of the complainant are not only within the records of the Respondent, but the Respondent has additionally *furnished* this information requested to *the Staff* in response to the Staff's data request of the Respondent. Complainant objects to this data request as propounded by the Respondent *solely for the purpose of impermissible harassment.*

DR1. This data request requests any *other* telephone service at any *other* location of Complainant. Complainant objects to such as being totally irrelevant and immaterial and an invasion of privacy; this data request, further, is not reasonably calculated to lead to the discovery of admissible evidence and is not related in any way to the applicable tariff and the Complainant's entitlement to the waiver based on the *use of a data terminal* and *non-voice use contemplated* of the P.O.T.S. Further, one could utilize, with permission, the telephone service of another customer at other location(s) and therefore such data request is overly broad and ambiguous. Incorporated by reference, further, are the affidavits of the Complainant previously filed as if stated in their entirety herein.

DR3 Requests any employment of the Complainant, dates of employment, title/position, job responsibilities, and business address and business telephone number. Complainant objects to this DR in that such is totally irrelevant and immaterial, constitutes an invasion of privacy, and is not reasonably calculated to lead to the discovery of admissible evidence. This is not a personal injury law suit. Further, such data request is not related, reasonably or otherwise, to the tariff at issue and is set forth solely for the purpose of harassment.

DR 4 Requests whether or not the Complainant has provided services "to another" for compensation in other than an employer/employee relationship (i.e., independent contractor) and if so, each such occasion, name of the services, nature of the services provided, business address and business telephone number. This is totally irrelevant, immaterial, an invasion of privacy, is not reasonably calculated to lead to the discovery of admissible evidence, is unrelated to the tariff at issue, and is propounded solely for the purpose of harassment. Additionally, incorporated by reference are the affidavits filed by the Complainant subsequent to the Respondent's propounding of this data request. Without waiving any objection, the Complainant responds: NO! Complainant has provided no services to another for compensation!

DR 5 Requests the nature/type of "messages sent by and/or received by the fax machine" (whether or not the messages sent were in connection with some business enterprise and whether or not the faxes were personal in nature, if connected to a business enterprise, a request is made in this DR to identify the companies, entities, relationship, etc. Response: The tariff at issue, 6.12.6(E), does not require a disclosure by a customer as to the particular content of faxes sent and/or received by a data terminal. This data request is irrelevant, immaterial, an invasion of privacy, and not reasonably calculated to the discovery of admissible evidence. Incorporated herein are the affidavits of the Complainant related to the non-business use (personal use) of the Complainant's fax machine. Subject to said objections, as indicated in the affidavits filed, faxes sent/received by Complainant are personal, non-business, in nature.

DR 6 Requests whether the "*principal* purpose of messages" originated by and/or received by the fax machine is *business* or personal. *The* tariff at *issue* does not specify business or personal and such data request is *irrelevant* and *immaterial*. Additionally, incorporated by reference are *the Complainant's* affidavits *filed* subsequent to this data request. *Subject to* the aforesaid objections, as indicated in the aforesaid affidavits and in *DR5*, the response is: personal, non-business use.

DR 7 *Requests* "all documents referring or *relating* to the allegation that a fax machine is a data terminal for the reception *and/or* transmission of data where no voice use is contemplated." *This* alleged "data *request*" requires the disclosure of legal research and is protected as Complainant's work product. Any documents *found through* research, therefore, are protected from disclosure. *Respondent* has an equal opportunity to research this request. Incorporated by reference, as if stated *in its entirety* herein, is the Commission's ***Staff* Report** filed on or about June 30, 2006, correctly and appropriately concluding *that a fax machine is a data terminal* and setting forth the reasons for such conclusion. Also, *incorporated by* reference is the Illinois U.S. District Court legal case previously cited by the Complainant to the Commission.

DR 8. Requests type, model, purchase date, and serial number of the fax machine of the Complainant. This data request is irrelevant and immaterial. The tariff at issue does not require that such be provided to the Respondent *in order* for a telephone customer to receive a waiver of the monthly non-published charge. The model number is irrelevant and immaterial. Further objection is that this data request will not lead to the *discovery* of admissible evidence. Subject to the aforesaid *objections*, the purchase date and serial number are unknown. *The type* of the machine is a stand-alone machine for the reception/transmission of *data*, to wit: faxes.

DR 9. *Requests the telephone* number, account number, cellular provider and *the date* on which service was established with regard to *Footnote #1* of the Complaint. *Footnote #1* of the Complainant indicated that:

> "**Use of cell** *telephone* service (other than and NOT ATT a/k/a SBC a/k/a *Southwestern Bell*) telephone *Company*) by Complainant ***and others***, has replaced *the need* for any land-*line* based voice contemplated service."
>
> (emphasis added)

Data request *DR 9* is overly broad and ambiguous. *Cellular* service utilized, if any, by Complainant, is irrelevant and *material*. *Further*, such use, if any, could be through the account of another person, such is, and would be further, an invasion of privacy of such other account holder. Any cellular service, *if any* utilized by *Complainant*, is not furnished by *the Respondent*. Information related, if any, to any other person's account is private *and* confidential and will not be furnished; such is irrelevant *and immaterial* in any *way* applicable to the particular *tariff at issue*. The information sought in this data request is not reasonably calculated to lead to the discovery of admissible evidence. *Further*, the aforementioned was indicated *in a footnote* and speaks *in generalities* of common knowledge *rather than* specific allegations against the Respondent. *The footnote is/was informative in nature*. The footnote states *generally accepted and common knowledge* of the public and is totally inapplicable to the specific tariff at issue, to wit: whether or not the Complainant utilizes a data terminal and whether or not "no voice use is contemplated" by *Complainant* with regard to Complainant's P.O.T.S. *Further*, incorporated by reference as if stated herein are *Complainant's* affidavits related to the Complainant's *data terminal* and use thereof.

Respectfully,

Complainant

July 21, 2006

[illegible]
St. Louis, Missouri 63125

of Missouri)
) ss:
County of St. Louis)

p.24

18053620885

AFFIDAVIT OF COMPLAINANT
R. MARK

Comes now the undersigned affiant and under oath deposes and states,

1. That I am the Complainant in Case No. TC-2006-0254.

2. That I subscribe to, and pay for, an unpublished residential, plain, ordinary, telephone service (P.O.T.S.) line from the Respondent and have done so for well over a decade.

3. That the residential telephone line which is the subject of the Complaint has been used *exclusively* for the reception of data (non-voice) communication since on or before November 1, 2003.

4. That this P.O.T.S. line has never been used with a computer at any time from November 1, 2003 through the present.

5. That the P.O.T.S. line which is the subject of the Complaint has not been used for voice communication since November 1, 2003.

6. That on or about November 1, 2003, I advised the Respondent's representative to discontinue the charge for non-published service since the line was being, and would be used henceforth, exclusively for the reception of data with a fax machine—and that no further voice communication was contemplated.

7. That the unpublished telephone P.O.T.S. line has been used only with a stand-alone fax machine for the reception/transmission of data at all times since November 1, 2003.

8. That the Respondent, without providing any reason or justification, whether legal or factual, has continued to charge a monthly charge for non-published service since November 1, 2003.

9. That I paid such unpublished monthly charges for the aforesaid P.O.T.S. line, over objection, in order to avoid disconnection of the telephone service and in order to continue to have the telephone line unpublished.

10. That Respondent and its General Counsel Mo-ES, was advised in writing on two separate occasions since November 1, 2003 of the facts applicable, but to no avail.

11. That despite Complainant's request, said aforesaid Respondent's General Counsel failed and refused to provide any legal or factual reason why Respondent would not, and refused to, comply with G.E.T. § 12.6(E) and to direct that monthly charges for Complainant's non-published P.O.T.S. be terminated and that the Complainant be refunded/credited all amounts paid since November 1, 2003 for monthly non-published service.

12. That the undersigned Complaint verily believes that the actions of the Respondent in this case have been, and are, oppressive, willful, wanton, and irrational and that it uses its overwhelming financial, lobbying, and other considerable resources and power to deliberately disregard and to blatantly ignore Missouri Public Service Commission's General Exchange Tariffs, without legal or factual justification and with utter impunity, with the expectation that no aggrieved telephone utility customer will ever exert and incur the considerable time, trouble, and expense required to file a formal complaint with the Commission and to ask for Commission resolution in view of the fact that there appears to be no penalty under any C.S.R. for the arbitrary and/or deliberate and willful refusal of a Missouri regulated utility to comply with the Missouri Public Service's General Exchange Tariff(s).

13. That the Complainant's Complaint is hereby incorporated by reference as if stated in its entirety herein. That all facts stated in the Complaint are true and correct to the best of the Complainant's knowledge, information and belief.

, Missouri)
) ss.
unty of St. Louis)

SUPPLEMENTAL
AFFIDAVIT OF COMPLAINANT
R. MARK, IN SUPPORT OF COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT

Comes now the undersigned affiant and after being duly sworn, under oath, deposes and states;

1. That I am the Complainant in Case No. TC-2006-0325*4*.

2. That the data terminal used from November 1, 2003 to the present on the P.O.T.S. residential line which is the subject of the Complaint has not been used by the Complainant for the conduction of any business enterprise and have been personal in nature.

3. That the undersigned Complainant has earned no income from the use of said fax machine in any business enterprise.

/S/

Complainant/Affiant

Subscribed and sworn to before
me on this 15th day of June, 2006.

My commission expires:

SHIRLEY HERSHBARGER
Notary Public - Notary Seal
STATE OF MISSOURI
St. Louis County
My Commission Expires: Nov. 25, 2007

Complainant/Affiant

Subscribed and sworn to before
me on this 22nd day of May, 2006.

/S/

My commission expires:

(C)

at&t

Mimi B. MacDonald
Senior Counsel – Missouri

AT&T Missouri
One SBC Center
Room 3510
St. Louis, MO 63101
314.235.4094 Phone
314-247-0014 Fax
mimi.macdonald@att.com

January 31, 2006

In re: Section 6.12.6(E) of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's General Exchange Tariff

Dear Mr. Mark:

I am in receipt of your Offer of Settlement, dated January 21, 2006.

Enclosed please find a letter dated January 28, 2004, from Paul G. Lane, General Counsel-MO/KS to you regarding this same subject matter. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri ("AT&T Missouri") continues to believe that the tariff is being interpreted and applied correctly. Section 6.12.6(E) does not provide for the waiver of the charge for residence non-published service when a customer intends to use the line for either internet or facsimile purposes.

AT&T Missouri continues to value your business. I am sorry that we don't agree on this issue. Please kindly direct any future correspondence regarding this issue to me. Thank you in advance.

Very truly yours,

Mimi B. MacDonald

Enclosure

THE ATTACHED FAX CONSISTS OF THIS COVER PAGE PLUS 25 ADDITIONAL PAGES.