

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 11<sup>th</sup> day of  
March, 2008.

Duke Manufacturing Co.,                     )  
   )  
                          Complainant,                     )  
   )  
v.   )  
   )  
McLeodUSA Telecommunications             )  
Services, Inc.,                                     )  
   )  
                          Respondent.                     )

**Case No. TC-2008-0191**

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

Issue Date: March 11, 2008

Effective Date: March 21, 2008

Duke Manufacturing Co. ("Duke") filed a formal complaint against Respondent McLeodUSA Telecommunications Services, Inc. ("McLeod") on December 11, 2007. Exhibit 1 attached to the complaint lists nearly 100 contacts concerning approximately 15 service issues between Duke and McLeod going back over a two-year period. On December 14, 2007, the Commission notified McLeod of the complaint and allowed it thirty days in which to answer as provided by 4 CSR 240-2.070(7). On the same day, the Commission also directed the Staff to investigate this matter and to file a report concerning the results of that investigation no later than one week after McLeod filed its answer.

McLeod filed its answer on January 14, 2008. McLeod generally denied that it has failed to provide adequate, just, and reasonable services, but also averred that the majority

of the chronic service issues identified by Duke in its complaint relate to the condition of several access loops provided by Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri") that are leased as unbundled network elements.

On January 18, 2008, Staff filed a pleading captioned "Motion to Postpone Filing Report and Motion to Schedule Prehearing Conference." In this pleading, Staff requested that the Commission extend the due date for Staff's report from January 21, 2008 to an unspecified later date, explaining that "Staff's investigation will of necessity include extensive inquiries of Duke, McLeod, and AT&T Missouri and an examination of the facilities of Duke, McLeod, and AT&T Missouri, as well as that of any other as yet unidentified connecting carriers." Staff also requested that the Commission schedule a prehearing conference in this matter, at which time the parties would develop a proposed procedural schedule, including the time for Staff to file testimony on its investigation. The Commission granted those requests by order dated January 29, 2008. In a separate order issued the same day, the Commission also set this matter for a prehearing conference on February 7, 2008.<sup>1</sup>

On February 1, 2008, Staff filed its "Motion to Join AT&T Missouri as a Party," which is the subject of this order and must be decided before this case can proceed. The legal issues raised by the motion, which AT&T Missouri opposes and all existing parties support, have now been fully briefed and are ripe for decision by the Commission.

Unfortunately, many of the arguments presented to the Commission focus on the specific language of Missouri Supreme Court Rule of Civil Procedure 52.04(a), which

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<sup>1</sup> On February 4, 2008, McLeod filed a motion requesting that the prehearing conference be postponed "until sometime after the Commission rules on Staff's Motion to Join AT&T Missouri as a Party," contending that it would be "inefficient to proceed with the Prehearing conference while Staff's motion is pending, in light of the uncertainty as to whether all necessary parties have been identified, joined, and been given adequate notice of the prehearing conference." The Commission granted that motion by order dated February 6, 2008,

governs the joinder of persons needed for the just adjudication of a civil action.<sup>2</sup> The Commission finds that focus to be misguided, because no one has cited any authority whatsoever for the proposition that the Public Service Commission has a duty to follow the Supreme Court rules of civil procedure governing joinder. In fact, as recently explained by the Missouri Court of Appeals for the Western District, the general rule is to the contrary:

There is, however, authority stating that the rules of civil procedure are inapplicable to administrative proceedings. In *Woodman v. Director of Revenue*, 8 S.W.3d 154, 157 (Mo. App. 1999), this court held that “Rules 41 through 101, by their terms[,] do not apply to proceedings in administrative agencies.” The rules apply to administrative proceedings only “when specifically authorized by statute.” *Id.* See also *Johnson v. Mo. Bd. of Nursing Adm’rs*, 130 S.W.3d 619, 626 (Mo. App. 2004) (“The general rule . . . is that the Missouri Rules of Civil Procedure do not govern the conduct of proceedings before administrative agencies[.]”)<sup>3</sup>

Therefore, the Commission will focus not on the specific language of Rule 52.04(a), but on relevant Missouri statutes, the Commission’s own administrative rules, and generally applicable common law principles.

The Commission concludes that there are two major reasons AT&T Missouri should be joined as a party to this case. First, as argued by McLeod, because AT&T Missouri is specifically mentioned more than 40 times in the trouble ticket document attached to Duke’s complaint and McLeod has asserted in its answer that the majority of the chronic service issues identified by Duke in its complaint relate to the condition of AT&T Missouri’s access loops, AT&T Missouri’s full participation in this case as a party will not only aid Staff

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directing the parties to meet and confer and jointly file an appropriate pleading containing a proposed date and time for the prehearing conference within a week of the Commission’s decision on Staff’s pending motion.

<sup>2</sup> The Commission has no written procedural rule comparable to Rule 52.04(a).

<sup>3</sup> *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 762 (Mo. App. W.D. 2007). It is also worth noting that the Missouri Rules of Civil Procedure and the Commission’s own procedural rules do not always agree, even when they both address the same general procedural issue. For example, Commission Rule 4 CSR 240-2.070(12) expressly states that “no motion for dismissal shall be entertained against a complainant for . . . misjoinder or nonjoinder of parties.” (Section 386.390.2 says essentially the same thing.) Meanwhile, the analogous Missouri Supreme Court Rule of Civil Procedure 52.06 prohibits dismissal for misjoinder, but does not prohibit dismissal for nonjoinder. See *Kingsley v. Burack*, 536 S.W.2d 7, 9 (Mo. banc 1976) (“The

in performing the investigation the Commission has already ordered Staff to perform,<sup>4</sup> but may be essential to the Commission's final decision in this case. Indeed, as argued by Staff and OPC, if AT&T Missouri is not joined as a party and the Commission ultimately determines, after a hearing, that some or all of Duke's alleged chronic service problems relate to the condition of access loops provided by AT&T Missouri, the Commission would be unable to order AT&T Missouri to promptly repair or replace those loops because of due process considerations, thereby requiring the filing of another complaint (this time against AT&T Missouri).

Second, as argued by McLeod, unless AT&T Missouri is made a party to this case, all discovery involving AT&T Missouri would have to be conducted on a purely voluntary, informal basis since the Commission's rules regarding Data Requests and discovery disputes refer to "parties."<sup>5</sup> Only by making AT&T Missouri a party to this case can the Commission ensure that all entities allegedly involved in the subject matter of Duke's complaint receive the rights, responsibilities and protections of the Commission's discovery rules.

For these reasons, the Commission finds that joining AT&T Missouri as a party now will not only increase the efficiency and value of the discovery process for the existing

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substantive provision of 52.06 prohibits dismissal for misjoinder. It does not prohibit dismissal for nonjoinder.")

<sup>4</sup> As noted *supra*, Staff has already indicated that its investigation "will of necessity include extensive inquiries of Duke, McLeod, and AT&T Missouri and an examination of the facilities of Duke, McLeod, and AT&T Missouri, as well as that of any other as yet unidentified connecting carriers."

<sup>5</sup> See, e.g., Commission Rule 4 CSR 240-2.090(2) & (8). AT&T Missouri attempts to meet this argument by stating that it "has already been in discussions with Staff and commits to expeditiously assist Staff regarding any reasonable request." While the Commission commends AT&T Missouri for its voluntary cooperation with Staff to date, this is of little comfort to the other parties, who will not have equal access to AT&T Missouri or the information the company may provide informally to Staff unless AT&T Missouri is joined as a party. Therefore, the Commission concludes that to the extent Staff will be obtaining information from AT&T Missouri essential to Staff's investigation, that information flow should occur within the scope of the Commission's discovery rules, rather than be conducted on a purely informal basis.

parties, but may also prevent needless relitigation in a second hearing<sup>6</sup> and promote the public interest in judicial economy.<sup>7</sup> Accordingly, joinder is indicated under Commission Rule 4 CSR 240-2.070(12) and Section 386.390.2, both of which state that “[a]ll matters upon which [a] complaint may be founded may be joined in one . . . hearing.”

Nothing in AT&T Missouri’s response to Staff’s motion convinces the Commission otherwise. To begin with, AT&T Missouri’s response is based heavily on the specific language of Rule 52.04(a), which the Commission has declined to apply in this case. Second, in characterizing it as “exclusively” a “breach of contract action,” AT&T Missouri misperceives the fundamental nature of Duke’s complaint. In a nutshell, AT&T Missouri argues that it should not be made a party to this case because: (1) Duke has only a breach of contract claim against McLeod, which arises from the Master Service Agreement between them and/or McLeod’s tariff; (2) Duke cannot make any claim whatsoever against AT&T Missouri since AT&T Missouri is not a party to the contract between Duke and McLeod; and (3) McLeod’s only remedy against AT&T Missouri is to sue AT&T Missouri under the terms and conditions of their contractual wholesale service arrangement. All three of these contentions are devoid of merit.

As Duke correctly points out, this is not a breach of contract action. This is a complaint case filed pursuant to Section 386.390 of the Public Service Commission Law, in which Duke alleges that for the past several years, McLeod has violated Section 392.200.1, which imposes a legal obligation on all Commission-regulated telecommunications companies to “furnish and provide with respect to [their] business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable.” In its answer to

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<sup>6</sup> See *Skidmore v. Back*, 512 S.W.2d 223, 234 (Mo. App. S.D. 1974) (referring to relitigation in a subsequent hearing as “the evil sought to be avoided” by joinder).

the complaint, McLeod pled that most of the service problems experienced by Duke involved the inadequate performance of facilities owned by AT&T Missouri, which led to Staff's motion to join AT&T Missouri as a party. Duke is not seeking contractual remedies or monetary damages of any kind against anyone. Quite simply, Duke is asking the Commission to take whatever action is necessary to ensure that Duke receives from McLeod the adequate, just and reasonable telephone service to which it is entitled under Missouri law.

AT&T Missouri cites no authority of any kind for the proposition that it should not be added as a party to this case simply because it is not in privity of contract with Duke or because McLeod, not AT&T Missouri, is Duke's direct telecommunications provider.<sup>8</sup> Instead, AT&T Missouri attempts to analogize the situation here to one involving "a claim against [a] contractor whose subcontractor may have been ultimately at fault. The claimant, having no contract with the subcontractor, is limited to a claim against the contractor, who must answer for the conduct of its subcontractor." However, the idea that Duke is limited to a breach of contract claim against McLeod and that McLeod must necessarily answer for the conduct of AT&T Missouri is manifestly erroneous, since it ignores the plain language of Section 392.200.1, which imposes independent, extra-contractual statutory obligations on both McLeod and AT&T Missouri to "furnish and provide with respect to [their] business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable." Likewise, AT&T Missouri's argument

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<sup>7</sup> See *Feinstein v. Feinstein*, 778 S.W.2d 253, 257 (Mo. App. E.D. 1989) (noting that "society's interest in judicial economy" is promoted by joinder).

<sup>8</sup> AT&T Missouri asserts that "the services it has provided to McLeod at Duke's location are interstate special access services ordered pursuant to AT&T Missouri's federal access services tariff (FCC Tariff No. 73), not unbundled network elements ('UNEs')." AT&T Missouri goes on to claim that "[n]o outcome in this state proceeding could purport to adjudicate the relative rights of McLeod and AT&T Missouri under that federal tariff, or to provide any relief under it, as the Commission has no jurisdiction to do either." Be that as it may,

ignores Section 386.390.3 and Commission Rule 4 CSR 240-2.070(4), both of which expressly state: "The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant."

For all of these reasons, the Commission shall grant Staff's Motion to Join AT&T Missouri as a Party.

**IT IS ORDERED THAT:**

1. Staff's "Motion to Join AT&T Missouri as a Party," which it filed on February 1, 2008, is granted. Southwestern Bell Telephone Company d/b/a AT&T Missouri shall be joined as a party to Case No. TC-2008-0191.

2. In accordance with the Commission's order of February 6, 2008, by no later than March 28, 2008, the parties shall meet and confer and jointly file an appropriate pleading containing a proposed date and time for a prehearing conference.

3. This order shall become effective on March 21, 2008.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Clayton, Appling,  
and Jarrett, CC., concur

Lane, Regulatory Law Judge

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AT&T Missouri does not claim that the Commission lacks jurisdiction to join it as a party to this complaint case.