

FILED³

MAY 25 2006

NOTE

Missouri Public
Service Commission

Complainant's Response and Objections to Respondent's Motion to Strike will be filed on or before May 31, 2006 pursuant to the grant of additional time granted by the Commission for such filing.

In the interim, attached is: Complainant's **MOTION FOR SUMMARY JUDGMENT and Affidavit in Support Attached** and Complainant's **MOTION TO SUSPEND ALL DISCOVERY UNTIL DISPOSITION OF COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT.**

R. Mark,

Complainant

v.

ATT a/k/a SBC a/k/a Southwestern Bell Telephone Company,
Respondent

No. TC-2006-0354

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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Service Commission

R. MARK,

Complainant

v.

ATT a/k/a SBC a/k/a Southwestern
Bell Telephone Company,

Respondent

Case No. TC-2006-0354

**COMPLAINANT'S RESPONSE TO RESPONDENT'S
MOTION TO STRIKE**

Comes now Complainant with COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE and states:

1. That Complainant filed a Motion to Strike on or about May 1, 2006, the Commission generously granted Complainant until May 31, 2006, to respond..

2. The Respondent's Motion discusses references made by the Complainant to an Offer of Settlement heretofore made by Respondent in the Complaint, to wit: a pittance, and the fact that Respondent's General Counsel wanted to continue to charge Respondent, at all future times, a monthly charge for unpublished service despite Respondent's knowledge that Complainant qualified for no monthly charge pursuant to G.E.T. 6.12.6(E).

3. Respondent states that the indirect references mentioned in the Complaint relating to the aforesaid settlement offer are privileged pursuant to CSR 240-2.090(7). The latter CSR provides that settlement offers are privileged and ". . . shall not be used **against participating parties** (emphasis added) unless fully substantiated . . . Query: Respondents are referring to a statement in a pleading, **such is not evidence!** Complainant has not moved the Commission to admit **into evidence** anything related thereto. Unless or until such is moved to be admitted into evidence before the Commission, any Motion to Strike on behalf of the Respondent is premature and not well taken.

4. Once again, P-2 of the RESPONDENT'S MOTION TO STRIKE refers to an **allegation** in the **pleading**, the Complaint, **NOT** to evidence. P-2, paragraph #4 of Respondent Motion cites four cases, *Daniel v. Indiana Mills & Manufacturing, Inc.* 103 S.W.3d 302, 316 (Mo. App. 2003), *O'Neal v. Pipes Enterprises, Inc.* 930 S.W.2d 416, 423 (Mo. App. 1995), *Rodgers v. Czmsanske*, 862 S.W.2d 453, 460 (Mo. App. 1993) and *Daniel v. Indiana Mills & Manufacturing, Inc.* 103

S.W.3d 302, 316-317 (Mo. App. 2003). A review of each of the four cases cited by the Respondent indicates that **each** discusses settlement offers in the context of **EVIDENCE**, **not** in the context of a mere allegation in a pleading. Even *Daniel v. Indiana Mills & Manufacturing, Inc.* 103 S.W.3d 302, 316-317 (Mo. App. 203) cited by Respondent in its **Motion** holds, in the Respondent's own words, "Settlement agreements are highly prejudicial and should not be admitted **IN EVIDENCE** (emphasis added) unless there is a clear and cogent reason to do so." Any indirect mention of a settlement in the Complaint (without any detail as to what the "pittance" was that was offered), was set forth in the Complainant to provide a cogent history of the matter and to provide the Commission with a scenario of the events that led up to the necessity of the Complainant to file a formal complaint.

5. At the risk of being repetitious, the Complainant has not moved or requested that the Commission consider any settlement discussion as "evidence." Once again, unless, and until, Complainant should move to have admitted any facts and details related to a settlement or settlement discussion, any MOTION TO STRIKE by the Respondent is premature and untimely. The Court in *State v. Russ*, 945 S.W.2d 633, Mo. App. E.D. (1997) stated the proposition clearly: "... the state's information is not evidence, **but only a pleading which contains allegations to be proven.** See, *Nash v. State*, 775 S.W.2d 338, 339 (Mo. App.E.D. 1989).

6. Respondent AT&T in paragraph #5 of its MOTION TO STRIKE, moves to strike paragraph 15, including footnote 6, and paragraphs B, C, D, and E of Complainant's prayer (i.e., *Wherefore* clause). The Commission is fully aware of the authority which it has. Whether the Complainant's prayer in part is justified or not or is within the authority and jurisdiction of the Commission is not a matter which is subject to a Motion to Strike but is within the knowledge and expertise of the Commission to determine.

Respondent cites, *Straube, et. al v. Bowling Green Gas. Co.*, 360 Mo. 132, 227 S.W.2d 666 (Mo.1950), and *State of Missouri ex rel Fee Fee Trunk Sewer, Inc. v. The Honorable Arthur Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980) related to the authority of the Commission to award damages or to grant equitable relief or to consider purported class actions. SO WHAT? Neither of the cases cited support any proposition that a MOTION TO STRIKE is applicable or appropriate; both cases discuss only what the jurisdiction of the tribunal is or should be and the fact that the Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function. If the Commission does not find and/or conclude that it has not the power and/or jurisdiction to grant any particular portion of the prayer for relief, it will, presumably, say so and/or it will not grant that particular prayer for relief.

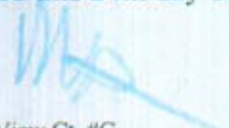
7. Then the Respondent, in RESPONDENT'S MOTION TO STRIKE suggests that the Commission, See, also, *Shaffer Lombardo Shurin v. Xspedius*, Case No. TC-2005-0266. This *slip opinion*, also found at 2005WL900588 and 2005WL1722664, not only is non-published and of **no precedent value**, (and cannot, and should not, under circumstances, be considered as precedent by the Commission), but it also discusses, i.e., documents not part of the complaint. This unpublished opinion, again, once again, simply permits the Commission to state what it has authority to do and what it does not have authority to do and whether the Commission has jurisdiction or does not have jurisdiction to grant particular relief. Further in the aforesaid, the Commission found that the "complaint fails to allege any action of Xspedius that violates . . . Xspedius' tariffs." In the instant case, the Commission can easily and incontrovertibly find that the Respondent violated G.E.T. 6.12.6(E).

8. This case is not being tried to a jury and the Complaint is not being considered as evidence by the trier of fact. RESPONDENT'S MOTION TO STRIKE is premature, untimely, and inapplicable. **Allegations in a Complaint are not evidence.** Until and/or unless Complainant moves to include such matters in evidence, there is no basis for any Motion to Strike. The Commission is fully aware of its jurisdiction, its powers, and its authority. The Commission is aware that it may grant or deny any particular relief requested by the Complainant in Complainant's conclusion.

WHEREFORE, Complainant prays that the Missouri Public Service Commission will summarily deny RESPONDENT'S MOTION TO STRIKE paragraphs 12, 13, 15, and footnote 6 of the Complaint as well as paragraphs B, C, D, and E of the Prayer set forth in said Complaint for the reasons stated hereinabove. Complainant further prays for such other and further relief as the Commission may find, in its wisdom, to be just and proper in the premises.

Respectfully,


Complainant

cc: Attorneys for Respondent
Additional parties of record.
Mailed/faxed this 24th day of
May 2006. 

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St. Louis, Missouri 63123