

Missouri Public Service Commission
Adjudication Division - Data Center
P.O. Box 360
Jefferson City, Missouri 65102-0360

MO 419-2651 (9-01)

FILED

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Missouri Public
Service Commission

R. Mark
9029 Gravois View Court, #C
St. Louis, MO 63123

MARK029* 631233602 1A05 02 10/16/06
RETURN TO SENDER
MARK
MOVED LEFT NO ADDRESS
UNABLE TO FORWARD
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**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 12th day
of October, 2006.

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

**ORDER GRANTING IN PART MOTION TO
COMPEL RESPONSES TO DATA REQUESTS**

Issue Date: October 12, 2006

Effective Date: October 22, 2006

Syllabus

This order grants Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's Renewed Motion to Compel Responses to Data Requests as to data request numbers 1, 2, 3, 7, 8, and 9 with certain exclusions, and denies that renewed motion as to data requests 4, 5 and 6.

Introduction

R. Mark filed a complaint against Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, on March 15, 2006. AT&T filed its answer on May 1, 2006, and the Commission Staff filed its recommendation on June 30, 2006. The Commission has addressed several discovery disputes and service issues in this case through a series of orders.

On August 4, 2006, AT&T filed a Renewed Motion to Compel Responses to Data Requests (Motion to Compel). In its Motion to Compel AT&T claimed that Mr. Mark has only provided partial answers to two of its nine data requests and made inappropriate objections to the remaining seven. R. Mark responded on August 23, stating that he had fully responded to AT&T's data requests, answering some and objecting to others. Mr. Mark further contended that each of his objections was appropriate.

In its Motion to Compel, AT&T also requested that the Commission waive, for good cause, the requirements of Commission rule 4 CSR 240-2.090(8) which states that the Commission will not entertain any discovery motions until counsel for the moving party has conferred with counsel for the opposing party regarding the dispute. If the conference between counsels does not resolve the dispute, then the counsel for the moving party must arrange a telephone conference with the presiding officer and opposing counsel before filing a discovery motion with the Commission. In support of its request, AT&T stated that it sent to R. Mark on July 25, 2006, a letter, both by facsimile and first-class mail, asking that R. Mark contact AT&T in an attempt to resolve the discovery dispute. R. Mark declined to do so. In his August 23rd response, R. Mark did not rebut this assertion.

On September 13, 2006, a prehearing conference was held to address discovery issues and discuss the scheduling of an evidentiary hearing in this case. During the on-the-record portion of that conference the appropriateness of AT&T's data requests and R. Mark's responses and objections thereto were addressed in detail.

Discussion

Commission Rule 4 CSR 240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. The civil court standards for discovery are found in Missouri Rule of Civil Procedure 56.01(b),

which states that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter. Determining the appropriate scope of discovery involves "the pragmatic task of weighing the conflicting interests of interrogator and the respondent."¹ In ruling on an objection to a discovery request, the Commission, like a trial court, must not only consider questions of privilege, work product, relevance, and the tendency of the request to lead to the discovery of admissible evidence, it must also balance the need of the interrogator to obtain the information against the respondent's burden of furnishing it, including the extent to which the request will be an invasion of privacy, particularly the privacy of a non-party.²

With these precepts in mind, the Commission has reviewed the verified pleadings and the additional information provided during the on-the-record discovery conference, and will grant in part and deny in part AT&T's Motion to Compel.

AT&T initially contends that because R. Mark's objections were made over two months after the data requests were issued, they have long since been waived. Commission Rule 4 CSR 240-2.090 provides that, "If the recipient objects to data requests . . . the recipient shall serve all of the objections . . . in writing upon the requesting party within ten (10) days after receipt of the data requests"

The Commission agrees with AT&T, as a general rule, a party that does not timely object to a discovery request has waived its objection. However, R. Mark as a pro se litigant is unfamiliar with Commission procedural rules. Further, upon review the nine data requests as issue the Commission found portions of those data requests to be

¹ *State ex rel. LaBarge v. Clifford*, 979 S.W.2d 206, 208 (Mo.App. E.D. 1988)(quoting *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo.App. E.D. 1985)).

² *LaBarge*, 979 S.W.2d at 208; *Anheuser*, 692 S.W.2d at 328.

inappropriate. Accordingly, the Commission will not dismiss R. Mark's objections on the grounds of timeliness, but will address each objection and request independently.

Data request number 1 asks R. Mark to, "[p]lease state your full name, your residential address, and the telephone number(s) for that residential address, if any." R. Mark objects to this data request as "propounded by the Respondent solely for the purpose of impermissible harassment." Complainant further contends that Respondent already has the requested information.

AT&T contends that it is entitled to know the full name, address and phone number of Complainant. AT&T further argues that the presence or lack of any other phone number situated at Complainant's home sheds light on whether his "fax" line is used exclusively for facsimile purposes. AT&T notes that the line in question is clearly capable of voice service, and was in fact used for voice telecommunications service prior to November of 2003. AT&T argues that it is entitled to corroborate R. Mark's "untested claim" that he has not used his line for voice service or business purposes.

The Commission finds that the information sought by AT&T's first data request is indeed relevant, within the scope of these proceedings, and reasonably calculated to lead to admissible evidence. The Commission will grant AT&T's Motion to Compel as to data request number 1.

R. Mark objected to data requests 2 and 3 contending that each of these data requests seeks information which is totally irrelevant and immaterial, an invasion of privacy, not reasonably calculated to lead to the discovery of admissible evidence, and not related in any way to the applicable tariff.

Data request numbers 2 and 3 read as follows:

D.R. 2: Please state whether, since November 1, 2003 (the date referenced in Paragraph 5 of your Complaint), you have had or

presently have telephone service at any address other than the residential address identified in your response to DR 1. If your response is in the affirmative, please state:

- a. Each address where you had or have telephone service and the dates of service,
- b. For each such address, whether you had or have residential or business telephone service, and,
- c. For each such address, your telephone number(s).

D.R. 3: Please state whether you have been employed at any time since November 1, 2003 and, if so, then state the name of each such employer, and with respect to each such employer, please further identify the date of your employment, your title/ position, your job responsibilities, your business address and your business telephone number.

AT&T contends that the information it seeks in these two data requests is not only likely to lead to admissible evidence, but to evidence that is pertinent to a Commission decision in this case. Specifically, AT&T contends that details regarding R. Mark's employment and whether the fax machine was used for business purposes (type, duration, period and the like) are pertinent to the resolution of this case, because the tariff provision at issue specifically excludes data-only service used for business purposes. AT&T also contends that R. Mark's employment details bear directly upon his credibility on this issue. AT&T argues that it should be allowed to explore the circumstances and purposes to which R. Mark has put the telephone line in question. AT&T believes it is entitled to corroborate R. Mark's claim that he has not used his telephone line for voice or business purposes. The Commission finds that AT&T's data request numbers 2 and 3 are likely to lead to relevant admissible evidence, and do not constitute an unreasonable invasion of privacy. The Commission will grant AT&T's Motion to Compel as to data requests 2 and 3.

The Commission will address data request numbers 4, 5 and 6 together. Data request number 4 reads:

DR4. Please state whether, since November 1, 2003, you have provided services to another for compensation in other than an employer/employee relationship (e.g., as an independent contractor) and, if so, then with respect to each such occasion, please state the name of the company or other entity to whom you provided such services, the period over which you provided the services, the nature and type of services provided, your business address and your business telephone number.

Complainant objected to data request number 4 on several grounds, but then answered as follows: "NO! Complainant has provided no services to another for compensation!"

Data request number 5 reads:

DR 5. Please identify the nature and/or type of messages sent by and/or received by the fax machine referenced in Paragraph 4 of your Complaint, i.e., were the messages sent in connection with some business enterprise or where the faxes personal in nature. If connected with a business enterprise, please identify the companies or other business entities to whom faxes were sent or from which they were received and the nature of your business relationship with such company or entity.

Complainant objected to data request number 5 as irrelevant to the tariff at issue, but then answered as follows: "Subject to said objections, as indicated in the affidavits filed, faxes sent/received by Complainant are personal, non-business, in nature."

Data request number 6 reads:

DR 6. Please identify whether the principal purpose of the messages originated by and/or received by the fax machine referenced in Paragraph 4 of your Complaint is business or personal.

Complainant objected to data request number 6 as irrelevant to the tariff at issue, but then answered as follows: "personal, non-business use."

The Commission finds that R. Mark fully answered data request numbers 4, 5 and 6. While Mr. Mark's answers are obviously are not to AT&T's liking, they are

nonetheless complete. AT&T's Motion to Compel will be denied as to data request numbers 4, 5 and 6.

Data Request number 7 reads:

DR 7. Please produce all documents referring or relating to the allegation in paragraph 4 of your Complaint that "a fax machine is a data terminal for the reception and/or transmission of data where no voice use is contemplated."

Complainant objected to data request number 7 claiming that it sought disclosure of legal research and is protected as Complainant's work product. He contends that any documents found through research, therefore, are protected from disclosure.

AT&T argues that it "is entitled to documents in Mark's possession regarding whether his fax machine qualifies for the tariffed exemption, albeit under Mark's mistaken view of how that exemption should be applied." The Commission does not believe the information in question would qualify as protected "work product." As set out at Rule 56.01(b)(3), the work product doctrine protects trial preparation materials from discovery except on a showing of "substantial need" and "undue hardship." The party raising these defenses has the burden of establishing them.³ The material covered by this data request does not appear to be covered by this defense. Further, the information requested was not prepared in anticipation of litigation or for trial. In any event, R. Mark has failed to show that this defense applies.

Further, the Commission notes that the central argument upon which R. Mark bases his complaint is his assertion that "a fax machine is a data terminal for the reception and/or transmission of data where no voice use is contemplated." It is reasonable to expect R. Mark to provide, not only to the Respondent, but to the Commission, any information he

³ *Hutchinson v. Steinke*, 353 S.W.2d 137, 144 (Mo. App. 1962).

possesses which supports this position. Accordingly, the Commission will grant AT&T's Motion to Compel a response to its data request number 7.

Data request number 8 reads as follows:

D.R. 8: Please identify the manufacturer, type, model, purchase data, and serial number of the fax machine referenced in Paragraph 5 of your Complaint.

Complainant objected to data request number 8 contending the information requested is irrelevant, immaterial and will not lead to the discovery of admissible evidence. Further, Complainant stated that the tariff does not require this type of information be provided. However, complainant then answered by stating, "[t]he date of purchase and serial number are unknown. The type of the machine is a stand-alone machine for the reception/transmission of data, to wit: faxes."

AT&T contends that the information sought in data request number 8 is relevant to establish that Mr. Mark even has a facsimile machine and whether such machine has voice use capabilities. The Commission agrees with AT&T's argument in part. The Commission does not believe Mr. Mark should be required to document the date he purchased his facsimile machine. In fact he may well no longer possess that information. However, it is reasonable to expect Mr. Mark to read the brand name, model number and serial number off the facsimile machine and provide it to AT&T. The Commission will order Mr. Mark to fully answer this data request with the exception of providing a date of purchase.

Data request number 9 reads:

DR 9. Please state the telephone number, account number, cellular provider, and the date on which service was established with regard to the cellular service you referenced in footnote 1 of your Complaint.

Complainant objected to DR number 9 on the following grounds. The request was overly broad and ambiguous. The information sought is irrelevant and immaterial. Providing the cellular number of another person would be an invasion of privacy. The information sought is not reasonably calculated to lead to the discovery of admissible evidence.

AT&T argues the information sought in its DR number 9 is relevant given that R. Mark stated in his complaint that his voice communications needs are met exclusively by wireless service. AT&T argues that it should not be required to accept this unsubstantiated claim. AT&T feels it is fair and reasonable to inquire about and confirm that claim by requesting the wireless telephone number, the account number, the name of the provider and the date the service was established.

The Commission agrees with AT&T's argument in part. Specifically, the Commission agrees that it is reasonable for AT&T to request the name of the provider, phone number and account information as to any cellular account owned by Mr. Mark. However, Mr. Mark correctly notes that it would be inappropriate to require him to provide the cellular account information of other people. It is more reasonable and less invasive to require Mr. Mark to provide the names of the individuals whose cellular phones he may use. If AT&T required any additional information from such an individual, it could seek a subpoena. The Commission will grant AT&T's Motion to Compel as to data request number 9 subject to the limitations set out above.

IT IS ORDERED THAT:

1. Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri's Renewed Motion to Compel Responses to Data Requests is granted, with the exceptions set out herein, as to data request numbers 1, 2, 3, 7, 8 and 9.

2. The Commission finds that R. Mark has fully answered data requests 4, 5 and 6, and is therefore not required to provide any additional response thereto.

3. The objections of R. Mark to Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's data request numbers 1, 2, 3, 7, 8 and 9 are overruled in that the requests are permissible data requests under Commission Rule 4 CSR 240-2.090(2), within the permissible scope of discovery, are not irrelevant, and are not barred by the attorney-client privilege or the attorney work product doctrine.

4. With the exceptions noted in the body of this order, R. Mark shall serve answers to Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri data requests numbers 1, 2, 3, 7, 8, and 9, and copies of documents therein requested, on counsel for Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri on or before October 23, 2006.

5. R. Mark is advised that failure to comply with this order by fully answering the data requests, as set out in the body of this order, could result in his complaint being dismissed.

6. This order shall become effective on October 22, 2006.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw,
and Appling, CC., concur.
Clayton, C., absent.

Voss, Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

**I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 12th day of October 2006.**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

**Colleen M. Dale
Secretary**

MISSOURI PUBLIC SERVICE COMMISSION

October 12, 2006

Case No. TC-2006-0354

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Enclosed find a certified copy of an ORDER in the above-numbered case(s).

Sincerely,



**Colleen M. Dale
Secretary**