

**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)	

FILED³

NOV 7 2006

**COMPLAINANT'S RESPONSE TO
RESPONDENT'S OBJECTIONS TO ISSUANCE
OF SUBPOENA**

Missouri Public
Service Commission

Comes now Complainant with Complainant's Response to Respondent's Objections to Issuance of Subpoena, and states:

1. That the Complainant requested that the Commission issue a subpoena duces tecum directing Respondent's employee, Paul G. Lane, to appear on December 12, 2006 at a hearing in this case if such hearing is to take place.

2. That at all times, Lane, **prior to** the filing of the formal Complaint in this case in 2006, was an employee of the Respondent. More importantly, he was **THE** employee who, upon information and belief, was the **DECISION MAKER**; he made the decision to refuse to waive the monthly charge for non-published service in 2004 despite G.E.T. §6.12.6(E) requiring compliance by the Respondent since the Complainant had a data terminal attached to his P.O.T.S. residential line and no voice use was contemplated in 2003!

3. Merely because Lane is now one of four attorneys of record for the Respondent does not insulate him and/or give him **unqualified immunity** to refuse to appear and to be examined on all aspects of **HIS** decision in 2003 not to agree on behalf of Respondent to the waiver that Complainant was entitled to receive in November 2003.

4. That the purpose of Lane's examination is not to explore or to inquire into any matter subsequent to the filing of the formal Complaint, i.e., legal strategy of the Respondent's defense, potential settlement agreements, or settlement of a matter in litigation.

5. The filing of the formal Complaint and the commencement of **ANY** litigation did not occur until 2006. For the Respondent to now claim that Lane's decisions and actions **IN 2004** were "work product" and/or were related to some then non-existent "attorney-client privilege" is absurd!

6. Complainant has an absolute right to inquire as to all factual reasons, if any, why Lane refused to agree, on behalf of Respondent, to authorize the waiver of the non-published monthly charge in 2003 in accordance with Complainant's request pursuant to G.E.T. §6.12.6(E). Further Complainant has an absolute right to inquire of the witness on all matters, *inter-alia*, relating to

his refusal to agree even that the Respondent was a residential telephone exchange customer. Complainant has an absolute right to inquire of the prospective witness how many other residential customers have been denied relief despite their unquestioned entitlement to relief under any General Exchange Tariff.

7. The stipulation that was provided to Mr. Lane in 2004 was NOT part of any attempt at settlement. Said stipulation is attached hereto and made a part hereof so that there is no question that this stipulation was for the purpose of the Complainant ascertaining from Lane what facts, if any, were in controversy and/or disputed and specifically why relief pursuant to G.E.T. §6.12.6(c) was not accorded to Complainant by the Respondent.

8. The examination of Mr. Lane has nothing to do with settlement offers and settlement negotiations as the Respondent would now try to mislead the Commission into believing. The cases cited by the Respondent, *Daniel v. Indiana Mills and Manufacturing, Inc.* and *O'Neal v. Pipes Enterprises, Inc.* are not on point; they each have nothing to do with an employee making a decision for a company *two years before* there was any litigation—two years **prior** to the filing of any formal complaint! The aforesaid cases are totally inapplicable.

9. As indicated, Complainant, if the hearing goes forward on December 12, 2006, is entitled to constitutional due process and the right to examine any of Respondent's employees who have had ANY input or made ANY decision to deny the Complainant's request for a waiver of the monthly charge for Complainant's non-published residential telephone number in 2003 and thereafter.

10. Further, any suggestion of "work product" or "attorney-privilege" is an outrageous attempt to mislead the Commission. How could there be any "work product" and/or an "attorney-client privilege" *in November 2003* when there was no litigation and no case file **until 2006**! Once again, the Respondent seeks to deliberately obfuscate and to mislead.

11. The Respondent has steadfastly refused to provide to the Complainant from 2003 forward any facts to substantiate its denial of the waiver of the monthly non-published monthly charge. The prospective witness may very well be able to enlighten the Commission and the Complainant on these matters and to provide relevant information related thereto. Heretofore, the **ONLY** statement of the Respondent has been from Lane who has stated (long before the filing of the formal complaint), that he does not agree on the "interpretation" of the tariff—but has refused to state, subsequent to 2003, anything more!

12. The issue is **NOT** whether the Complainant can provide "competent and substantial evidence demonstrating that he qualifies for the waiver" as the Respondent would try to now mislead the Commission into believing. Complainant has already done that by affidavit and even the Staff has accepted the Complainant's representations. In fact, until the filing of the formal complaint, **at no time did Lane**, acting on behalf of his employer, the Respondent, ever question that the Complainant had fully qualified for the waiver. The **ONLY** question raised by Lane

since 2003 appears to have been/is the "interpretation" of the General Exchange Tariff. As the Staff concluded, nothing would or could ever satisfy the Respondent; even if the Complainant signed his affidavits in blood, the Respondent would never admit, now that there is a formal proceeding, satisfaction! Any *reasonable* person would acknowledge acceptance of the inexplicable and uncontrovertible facts: that since November 2003 the residential telephone line at issue has had a data terminal connected, a fax machine, and that not only was no voice use contemplated subsequent to November 2003, but no voice use was utilized on the line subsequent to that time.

13. Lane did not become an "opposing counsel" until **AFTER 2006** when the formal complaint was filed. He was not "opposing counsel" in 2004 or 2005. Once again, the cases cited by the Respondent, *State v. Anderson* and *Chaney v. Franklin* are completely irrelevant since Lane was not an opposing counsel in 2003 at the time HE made the decision on behalf of his employer, the Respondent. This decision was made prior to 2006. The Respondent cannot be allowed to hide this relevant and material witness behind a privilege or a relationship that did not exist in any way prior to 2006!

WHEREFORE, since there is a very legitimate and worthwhile purpose in having Mr. Lane appear and to produce, since he was the **DECISION MAKER** in 2004 and thereafter and was **NOT** an attorney representing the Respondent in **ANY** litigation with the Complainant prior to the filing of the formal Complaint in 2006, because he may have relevant and material evidence as to the factual reasons why the Respondent refused to comply with G.E.T. §6.12.6(E), in 2003 and thereafter, and because Complainant cannot receive a fair adjudication at any future hearing without having this very relevant and material witness available for testimony, his appearance must be compelled by the Commission with the subpoena duces tecum requested. For all the foregoing reasons, the Commission should issue the subpoena duces tecum requested and it should be served upon Paul G. Lane, Respondent's employee.

Respectfully,


Complainant

November 7, 2006

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 AC
St. Louis, Missouri 63123



1. The Complainant subscribes to a (P.O.T.S.) residential telephone line within St. Louis Missouri from the Respondent.
 2. That the Complainant has heretofore paid a monthly charge to the Respondent for unpublished telephone service for the aforesaid Complainant's residential line in accordance with G.E.T. 6.12.4, 15th Revised, Sheet 11.
 3. That a computer is a terminal for the reception and/or transmission of data.
 4. That a fax machine is a terminal for the reception and/or transmission of data.
 5. That on or about November 1, 2003, the Complainant advised the Respondent that the Respondent had placed a fax machine data terminal on the telephone line for the transmission and reception of fax, non-voice data. The Complainant also advised that the residential telephone line might be also used for a computer terminal utilizing a dial-up internet data connection.
 6. That in the aforesaid conversation occurred on or about November 1, 2003. The Complainant also advised the Respondent that no further voice use was contemplated for the aforesaid P.O.T.S. residential line.¹
 7. That in accordance with Sec. 6.12.6(E) of Southwestern Bell Telephone's General Exchange Tariff, Complainant requested that Respondent discontinue any further non-published monthly billing charge, effective as of the date of the Complainant's notification, for the Complainant's non-published residential exchange service.
 8. That the Respondent refused to discontinue the monthly charge charged for the Complainant's non-published residential exchange service.
 9. That the parties agree and stipulate that Section 6.12 of SBT's General Exchange Tariff states the following with regard to the nonpublished monthly rate not applying, to wit: \$2.14 per month (§6.12.4), for residential service when:

6.12.6: "E. When a customer who has service which involves data terminals where there is no voice use contemplated."
 10. That the Respondent advised Complainant on or about January 28, 2004 that Respondent does "not agree" that Section 6.12.6(E) provides that the charge for nonpublished Exchange Service shall be waived for residential non-published service under the aforesaid circumstances.
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(B)

VIA FACSIMILE

January 28, 2004

EXCERPT

In re: Section 6.12.6(E) of Southwestern Bell Telephone, L.P.'s General Exchange Tariff

Dear Mr. Mark:

I understand from your numerous phone calls that you do not agree with SBC Missouri's application of the tariff. While I respect your opinion, I do not agree with it. I want you to know that SBC Missouri values your business and I am sorry we don't agree on this issue.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Paul G. Lane", with a long, sweeping horizontal line extending to the right.

Paul G. Lane
General Counsel-MO/KS