

FILED<sup>3</sup>

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**

**FILED<sup>3</sup>**

MAY 25 2006

Missouri Public  
Service Commission

**R. MARK,**

Complainant

**v.**

Case No. TC-2006-0354

**ATT a/k/a SBC a/k/a Southwestern**

**Bell Telephone Company,**

Respondent

**COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT  
AND AFFIDAVIT IN SUPPORT**

Comes now Complainant with COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT IN SUPPORT in accordance with 4 CSR 240-2.117; in support thereof, Complainant states that there are no material facts to be determined and no genuine issue of fact to be considered by the Commission, as a matter of law, Complainant is entitled to the grant of Complainant's MOTION FOR SUMMARY JUDGMENT.

**FACTS**

The Complainant states in support:

1. That incorporated herein by reference, as if stated in their entirety, is the COMPLAINANT'S COMPLAINT, the RESPONDENT'S ANSWER, and the attached AFFIDAVIT OF THE COMPLAINANT in support.

2. That Complainant alleges, and the Respondent admits, the following:

a. That Respondent provides, and has provided, plain ordinary telephone service, P.O.T.S., to the Complainant.

b. That the Respondent, AT&T, is a utility subject to regulation by the Missouri Public Service Commission and provides telecommunications services pursuant to tariffs on file with the Commission.

c. That the Complainant has, and has had, for a period of time in excess of ten years, the non-published telephone number whose unpublished service charge is the subject of this case. Respondent is aware of said telephone number.

d. That the Complainant, prior to November 2003, and after, paid Respondent a monthly service charge for non-published service.

e. That the Complainant contacted Respondent in November 2003 and indicated that Complainant should not be charged for non-published service henceforth because Complainant "was now" using a data terminal for the reception and/or transmission of data for non-voice communication and that no further voice communication was contemplated.

f. That from and after November 2003, the Respondent, nevertheless, continued to charge the Complainant a monthly charge for Complainant non-published line despite Complainant's November 2003 certification to Respondent's representative that the P.O.T.S. residential line was, effective November 1, 2003, used for non-voice communication and that no further voice communication was contemplated.

g. That General Exchange Tariff 6.12.6(E) mandates that no monthly unlisted service charge shall apply: "When a customer who has service which involves data terminals where there is no voice use contemplated."

3. That the ANSWER OF THE RESPONDENT alleges that the Complainant advised in November 2003 that the Complainant's data terminal was a "computer" (*as opposed to a fax machine*). This unsupported Respondent's allegation set forth in RESPONDENT'S ANSWER, however, is affirmatively refuted in the attached Complainant's affidavit which states in **paragraph #4**:

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

Further, the Complainant's affidavit, **paragraph #6**, states:

***"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 used, and would be used henceforth, exclusively for the reception (transmission) of data with a fax machine--and that no further voice communication was contemplated."***

4. That the RESPONDENT'S ANSWER admits that Respondent did not know, and does not know, whether the data terminal of the Respondent was used exclusively for the reception and transmission of data, to wit: faxes. The Complainant's Affidavit, **paragraph #7**, affirmatively states:

***"That the unpublished 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."***

5. That the Affidavit of the Complainant in **paragraph #5** is not refuted by the Respondent in its Answer; the Affidavit states the following;

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

6. That the *Respondent's Answer* states that Respondent believes that the unpublished charges since November 2003 were "appropriately assessed," but it alleges **no law and no facts, material or otherwise**, in support of its speculative averred *opinion*. It has continued to maintain the same *opinion* since November 2003 and it continues to offer **no legal or factual support** for its *opinion*!

7. That further, RESPONDENT'S ANSWER fails to provide any factual or legal support for its continued monthly charges to the Complainant for unpublished service from and after November 2003.

## **DISCUSSION**

It should be noted that the Respondent is represented by not one, not two, not three, but by four attorneys. Needless to say, the cost of this aforesaid legal cadre are no doubt passed on to Missouri utility telephone customers as "legitimate and necessary legal costs." The Respondent is a utility providing telephone service to Missouri consumers. Surely, said Respondent's learned counsel as well as its General Counsel for Mo-Ks, are, and were, familiar with the basic fact that a telephone line is used for the transmission of voice and/or data.

It is not even necessary for the Complainant to request that the Commission take judicial notice of the fact that a machine or device for the reception and transmission of data can be a facsimile machine. No less than the United States District Court, N.D. Illinois, Eastern Division, in *Oneac Corporation v. RayChem Corporation*, 20 F.Supp 2d 1233, (1998), at 4, stated with regard to signals carried over a telephone line, *inter-alia*, in relevant part:

**"The data signal carries either the voices that one hears in the receiver or data sent to a fax machine or computer.**  
(emphasis added). This signal is high frequency and low voltage."

Missouri, V.A.M.S. 400.5-102 (2), (as well as the statutes of most other states), has adopted the *Uniform Commercial Code*, Sec. 5-102; the U.C.C. provides in relevant part:

"2. . . . the fact that **data** transmitted in a nonpaper (unwritten) medium can be recorded on paper by a recipient's **computer** printer, **facsimile machine**, or the like does not under current practice render the data so transmitted a 'document.'"

For almost three years, the Respondent has improperly, unlawfully, and with utter impunity and disregard for G.E.T. §6.12.6(E) continued to charge the Respondent monthly for unpublished telephone service on the telephone line in issue despite Respondent's having been affirmatively advised, and admitting, that the Respondent's P.O.T.S.. was being used, effective November 1, 2003, for the reception of data and that no voice use was contemplated.

Why? Because it, by its General Counsel Mo-KS, merely speculated and "believed" that the monthly charge was "appropriately charged!" The Respondent's General Counsel, without **any** factual or legal support, failed and refused to provide to the Complainant any justification or rational for the monthly charges in light of the facts, thus necessitating a formal complaint to be made to the Commission for relief.

Although the Commission may be limited in the type and extent of the relief granted to the Complainant, and although it may be empowered to provide the Complainant with no more relief than its Order requiring the Respondent to provide to the Complainant a credit for all amounts paid for unpublished monthly service from November 1, 2003, (with interest at the legal rate of interest compounded), and to order that the Respondent cease and desist further monthly unpublished charges for the non-voice use of the Respondent's P.O.T.S. line, the Commission is empowered to refer the matter to its Staff for investigation and reporting of the onerous and oppressive conduct of the Respondent brought about, in this case, merely because the Complainant desired the relief specified, and which the Complainant was entitled to receive, pursuant to G.E.T. §6.12.6(E). Upon information and belief, the Commission can investigate the Respondent's willful, wantonly, and blatant disregard of the aforesaid General Exchange Tariff.

*Arguendo*, **even if** the Complainant had decided to use a computer for the transmission and receipt of data utilizing said computer with a software program for receipt and transmission of facsimiles in lieu of a stand-alone fax machine, said computer data terminal would **still** continue to be within the pursue and intent of G.E.T. §612.6(E).

The *sine qua non* of the aforesaid tariff's intent is that if a telephone utility customer utilizes a telephone line with a data terminal, whether facsimile machine or computer or the like, **and** there is no voice use contemplated, the Commission requires, **instantur**, that the Respondent cease and desist further monthly charges for non-published service (unless the utility has reasonable and substantiated evidence to the contrary). To do otherwise, would grant this Respondent *carte blanche* to continue to use its awesome financial power and resources, both legal and otherwise, to oppress the lawful entitlements of Missouri telephone utility customers and to flagrantly disregard this Commission's Missouri General Exchange tariffs.

There being no genuine issue of material fact to be determined by the Commission in this case, the Complainant respectfully requests that the Commission, on the basis of the irrefutable facts presented hereinabove and attached, without further proceedings, grant *Complainant's Motion for Summary Judgment* and enter its judgment in favor of Complainant and against the Respondent, AT&T, and order:

1. That the Respondent shall immediately and forthwith credit the Complainant's telephone service line bill for all unpublished charges plus interest at the legal rate of interest compounded annually from November 1, 2003 to the present and that further, that it Order that the Respondent shall, unless the Complainant indicates in the future a change in the Respondent's use of the line to that of voice-use contemplated, continue to provide unpublished service at no monthly additional charge.

2. That to the extent that the jurisdiction of the Commission allows, order its Staff to investigate and report all instances in which this Respondent has failed and refused to discontinue monthly unpublished charges to other Missouri utility customers who have notified Respondent that their P.O.T.S. line(s) were/are being used with data terminals, where no voice use is contemplated.

3. That to the extent that the jurisdiction of the Commission allows, consider requesting its Staff to investigate and report whether the Commission should order that Respondent notify all of its Missouri utility customers that in the event that the Respondent has, as in this case, unjustly and improperly denied relief under G.E.T. §6.12.6(E), that said instances should be reported to the Commission Staff.

4. That to the extent that the jurisdiction of the Commission allows, order that its Staff investigate and report all facts with regard to the extreme disparity of monthly charges for non-published service made by AT&T, Respondent, compared to this same utility company's charges in other states, i.e., California, where an ATT telephone residential utility customer pays only \$ .28/month whereas an ATT residential customer in Missouri, for the *same* unpublished service by the *same* utility company, is currently charged \$2.49/month!

5. That to the extent that the jurisdiction of the Commission allows, order that its Staff investigate and report any justification for unpublished monthly charges for ATT/Respondent's land-line based telephone service when, at the same time, Respondent ATT's wireless Missouri telephone operation, *Cingular*, does not charge its Missouri customer *any* monthly charge for unpublished telephone service. The Commission should, and must, be provided an opportunity, *sua sponte*, to investigate this; particularly in view of the fact that the Missouri Public Counsel's Office is apparently so strapped for operating funds, that it has been rendered ineffective and impotent in its obligation and duty to attempt to protect Missouri utility customers from unsupported and oppressive price gauging on the part of any Missouri regulated utility.

6 . Order that unless the Respondent has substantial evidence that a utility customer is not utilizing a data terminal *and* is not using said telephone line for non-voice communication, that it shall *instantur*, cease and desist any monthly charge for

unpublished service upon request of a Missouri utility customer, all in accordance with G.E.T. 6.12.6(E)

7. **AND**, enter such other and further Orders of the Commission that may be found by the Commission to be just and proper in the premises.


Respectfully,



Complainant

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

Copy to Respondent and others of record 5/23/06



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

**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-2006-03254.
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-KS, 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. 6.12.6(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.

*[Handwritten signature]*

Complainant/Affiant

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

*[Handwritten signature: Shirley Hershberger]*

My commission expires:

