

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Innsbrook Corporation,)	
)	
Complainant,)	
)	
v.)	Case No. IC-2007-0113
)	
AT&T Communications of the Southwest,)	
Inc.)	
)	
Respondent.)	

STAFF RECOMMENDATION

COMES NOW the Staff of the Public Service Commission, and provides its recommendation as directed by the Commission's *Order Directing Filing* of January 12, 2007, in response to The Innsbrook Corporation's complaint, AT&T Communications of the Southwest, Inc.'s response, and subsequent pleadings in this matter.

1. The Innsbrook Corporation has filed a complaint against AT&T Communications of the Southwest, Inc. In its complaint, The Innsbrook Corporation alleges that its service from AT&T Communications was wrongfully terminated, and that AT&T Communications misrepresented the terms of the contract The Innsbrook Corporation entered into with AT&T Communications. AT&T Communications has filed an answer acknowledging that the service was terminated, denying that it was wrongfully terminated, and indicating that this Commission has no jurisdiction because the service at issue is interstate in nature.

2. Staff has commenced discovery in order to further understand the issues raised in The Innsbrook Corporation's complaint and AT&T Communications's response. At this time, Staff is unable to recommend a particular disposition for the Commission to resolve The Innsbrook Corporation's complaint. Instead, Staff recommends that the Commission proceed to

set this matter for a prehearing in advance of the hearing process. Should the Commission wish its Staff to submit an investigation as indicated by the Commission rule at 4 CSR 240-2.070(10), Staff will require additional time to receive the responses from its discovery, engage in any necessary followup, and prepare the investigative report.

3. At this time, however, Staff provides the following response to requests The Innsbrook Corporation made in its initial Complaint.

4. Generally, issues falling within areas of administrative expertise are heard before an administrative tribunal before the related disputes may reach the circuit courts. This fundamental principle of “primary jurisdiction” in administrative law has been repeatedly verified in Missouri’s public utility law. “This doctrine [of primary jurisdiction] is based on a judicial policy of self-restraint and calls upon a court to defer to and give an administrative agency the first right to consider and act upon a matter which calls for factual analysis or the employment of special expertise within the scope of the agency's responsibility entrusted to it by the legislature.” *Main Line Hauling Co., Inc., v. Public Service Comm’n*, 577 S.W.2d 50, 51 (Mo.App. 1978). *See also Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. 1991); *MCI Metro Access Transmission Serv., Inc. v. City of St. Louis*, 941 S.W.2d 634, 644 (Mo.App. E.D. 1997).

5. To determine whether the Commission has subject matter jurisdiction over this case, it must determine the nature of the issues before it. If the issues involve the “construction of a contract or of a rate schedule upon which a contract is based,” relative to a claim of overcharging, for example, then jurisdiction lies with the circuit court. *Wilshire Construction Co. v. Union Electric Co.*, 463 S.W.2d 903, 905 (Mo. 1971). On the contrary, if the issues involve the “regulation and fixing of rates or charges for public utilities, and the classification of

the users or consumers to whom the rates are chargeable,” then the Commission has exclusive jurisdiction and should hear this matter. *Inter-City Beverage Co. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 877 (Mo.App. W.D. 1994). *See also State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1045 (Mo.banc 1943). Moreover, the Legislature has explicitly granted authority to the Commission to determine whether a public utility has violated its tariffs governing the type of service being provided. Section 386.390 RSMo. (2000) authorizes the Commission to hear complaints that set forth “any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility”

6. In the request for relief section of its complaint, The Innsbrook Corporation stated that it seeks an relief “[a]warding to Complainant Fifteen Thousand Nine Hundred and Thirty Six Dollars and Eighty One Cents (\$15,936.81), the amount charged over and above what was originally contracted for with AT&T;” relief “[a]warding to Complainant any amount in excess of the original contract price with AT&T currently being paid for long distance and T1 services from another company;” and its costs and attorneys fees. To be able to grant such a request, the Commission must have the jurisdiction and authority to make an award of this amount. Staff respectfully notes that the Commission has not been granted jurisdiction or authority to do so.

7. Based on The Innsbrook Corporation’s complaint, the relief requested appears to be for a refund of money paid for services that were not desired. The Commission may not grant the relief requested regardless of whether liability lies upon AT&T Communications because the dispute involves construction of contracts and an associated factual dispute, and the outcome of that dispute involves a pecuniary reparation or refund. The Commission simply may not provide this type of relief. “The Commission has no jurisdiction to promulgate an order requiring a

pecuniary reparation or refund.” *DeMaranville, et al. v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo.App. 1978); *Wilshire Construction Co.* 463 S.W.2d at 905.

8. However, in its *Answer and Affirmative Defenses, Motion to Dismiss, and Alternative Motion for Summary Disposition*, AT&T Communications has also placed at issue in this case the nature of the traffic and the question of whether that traffic is inter- or intra-state in nature, and the resulting determination of where jurisdiction lies to address the underlying questions governing the customer-provider relationship. The Commission may consider whether AT&T Communications has violated any statutes, rules, orders or tariffs. At this time, Staff is unable to tell whether such violations have taken place, and the discovery Staff has commenced is designed to illuminate this question.

WHEREFORE the Staff recommends that the Commission set this matter for prehearing preparatory to hearing.

Respectfully submitted,

/s/ David A. Meyer

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 24th day of January 2007.

/s/ David A. Meyer