

**MATT BLUNT**  
**Secretary of State**  
**Administrative Rules Division**  
**RULE TRANSMITTAL**

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SEP 11 2000  
ADMINISTRATIVE RULES DIVISION

A "SEPARATE" rule transmittal sheet must be used for EACH individual rulemaking.

A. Rule Number 4 CSR 240-36.040  
Diskette File Name Final Rule 240-36.040  
Name of Person to call with questions about this rule:  
Content Nathan Williams Phone 573-751-8702 FAX 573-751-9285  
Data Entry Tammy Vieth Phone 573-751-8377 FAX 573-751-9285  
Email Address nathan.williams@psc.mo.gov  
Interagency Mailing Address Governor Office Building, 200 Madison St., 8th Floor, Jefferson City, MO  
Statutory Authority 386.410 Current RSMo date 2000  
Date Filed With the Joint Committee on Administrative Rules Exempt per Sections 536.024 and 536.037, RSMo 2000, and Executive Order No. 97-97 (June 27, 1997)

B. CHECK, IF INCLUDED:

- |                                                                |                                                                       |
|----------------------------------------------------------------|-----------------------------------------------------------------------|
| <input checked="" type="checkbox"/> This transmittal completed | <input type="checkbox"/> Incorporation by reference materials, if any |
| <input checked="" type="checkbox"/> Cover letter               | <input type="checkbox"/> Authority with history of the rule           |
| <input type="checkbox"/> Affidavit                             | <input type="checkbox"/> Public cost                                  |
| <input type="checkbox"/> Forms, number of pages _____          | <input type="checkbox"/> Private cost                                 |
| <input type="checkbox"/> Fiscal notes                          | <input type="checkbox"/> Hearing and comment period                   |

C. RULEMAKING ACTION TO BE TAKEN

- ☐ Emergency Rulemaking, (check one) ☐ rule ☐ amendment ☐ rescission ☐ termination  
**MUST** include effective date \_\_\_\_\_
- ☐ Proposed Rulemaking (check one) ☐ rule ☐ amendment ☐ rescission
- ☒ Order of Rulemaking (check one) ☒ rule ☐ amendment ☐ rescission ☐ termination  
**MUST** complete page 2 of this transmittal
- ☐ Withdrawal (check one) ☐ rule ☐ amendment ☐ rescission ☐ emergency
- ☐ Rule action notice
- ☐ In addition
- ☐ Rule under consideration

D. SPECIFIC INSTRUCTIONS: Please indicate any special instructions (e.g., publication date preference, identify material to be incorporated by reference, or forms included herein).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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E. ORDER OF RULEMAKING: Rule Number 4 CSR 240-36.040

1a. Effective Date for the Order

☒ Statutory 30 days

Specific date \_\_\_\_\_

1b. Does the Order of Rulemaking contain changes to the rule text?

☒ YES

☐ NO

1c. If the answer is YES, please complete section F. If the answer is NO, **STOP** here.

F. Please provide a complete list of the changes in the rule text for the order of rulemaking, indicating the specific section, subsection, paragraph, subparagraph, part, etc., where each change is found. It is especially important to identify the parts of the rule that are being deleted in this order of rulemaking. This is not a reprinting of your order, but an explanation of what sections, subsections, etc. have been changed since the original proposed rule was filed.

(Start text here. If text continues to a third page, insert a continuous section break and, in section 3, delete the footer text. DO NOT delete the header, however.)

Section (1) is revised to include a reference to section 252 of the Telecommunications Act of 1996.

Section (3)(E) is revised from requiring the filing of direct testimony with the petition for arbitration to requiring the filing of all relevant documentation.

Section (3)(F) is revised to delete the requirement of compliance with 4 CSR 240-36.020(2) since that rule has been modified to eliminate the filing requirements referenced in section (3)(F) of this rule as proposed.

Section (5)(A) is revised to permit entire package arbitration only if all parties agree rather than at the arbitrator's discretion.

Section (5)(B) is revised to reflect that settlements may be proposed to the commission, if appropriate.

Proposed section (5)(D) is eliminated as duplicative and proposed sections (5)(E) and (5)(F) are redesignated sections (5)(D) and (5)(E), respectively.

Proposed sections (5)(E) and (5)(F), now sections (5)(D) and (5)(E), are both revised to add that compliance with the rules of the Federal Communications Commission is required.

Section (7) is revised to require responses to the petition to contain all relevant documentation, not direct testimony.

Section (9) is revised to expressly state that the arbitrator has authority to fix the filing of all testimony, not just rebuttal testimony.

Section (10) is revised to explicitly state that the parties will have input in identifying the factual issues that may require evidentiary hearings, and that conferences and hearings are to begin as soon as possible.

Section (12) is revised to further distinguish and clarify the roles of advisors to the arbitrator, commission staff and outside experts in assisting the arbitrator.

Section (13) is revised to state that the conference and hearing process is to conclude within ten (10) days of the beginning of the first hearing rather than it shall so conclude, under the arbitrator determines otherwise.

Section (15) is revised to provide a clearer reference to the rule.

Section (16) is revised to clarify that commission staff and outside experts may participate in arbitration conferences and hearings in certain circumstances.

Section (18) is revised to explicitly state that the arbitrator may alter the date that post-hearing briefs are due.

Section (22) is revised to incorporate the *ex parte* protections of section 386.210 RSMo. rather than commission rule 4 CSR 240-4.020.

Section (24) is revised to state that the arbitration decision is wholly a decision of the commission, not the arbitrator as defined in these chapter 36 rules.

NOTE: ALL changes MUST be specified here in order for those changes to be made in the rule as published in the *Missouri Register* and the *Code of State Regulations*.

Add additional sheet(s), if more space is needed.



**Commissioners**

**STEVE GAW**  
Chair

**CONNIE MURRAY**

**ROBERT M. CLAYTON III**

**JEFF DAVIS**

**LINWARD "LIN" APPLING**

***Missouri Public Service Commission***

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Executive Director

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**ROBERT SCHALLENBERG**  
Director, Utility Services

**DALE HARDY ROBERTS**  
Secretary/Chief Regulatory Law Judge

**DANA K. JOYCE**  
General Counsel

June 10, 2004

Hon. Matt Blunt  
Secretary of State  
Administrative Rules Division  
600 West Main Street  
Jefferson City, MO 65101

Dear Secretary Blunt,

Re: Final Order of Rulemaking 4 CSR 240-36.040

**CERTIFICATION OF ADMINISTRATIVE RULE**

I hereby certify that the attached is an accurate and complete copy of the order of rulemaking lawfully submitted by the Missouri Public Service Commission for filing on this 10<sup>th</sup> day of June 2004.

Statutory Authority: Section 386.410

If there are any questions, please contact:

Nathan Williams  
Senior Counsel  
P.O. Box 360  
Jefferson City, MO 65102  
(573) 751-8702, FAX (573) 751-9285  
[nathan.williams@psc.mo.gov](mailto:nathan.williams@psc.mo.gov)

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Dale Hardy Roberts", is written over a horizontal line.

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

**Title 4—DEPARTMENT OF ECONOMIC  
DEVELOPMENT  
Division 240—Public Service Commission  
Chapter 36—Alternative Dispute Resolution Procedural  
Rules Governing Filings Made Pursuant to the  
Telecommunications Act of 1996**

RECEIVED  
FEB 12 2004  
STATE  
SECRETARY

**ORDER OF RULEMAKING**

By the authority vested in the Public Service Commission under section 386.410 RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-36.040 Arbitration is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 199-202). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, P.C., provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, P.C., provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, L.P., Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest that section (1) should include a reference to section 252 of the Telecommunications Act of 1996 as well as a reference to section 251 of that act.

RESPONSE AND EXPLANATION OF CHANGE: Because 47 U.S.C. § 252 addresses negotiations and when parties to negotiations may seek arbitration it should also be referenced in the rule. Section (1) of the rule will be changed.

COMMENT: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company assert that the rule should provide for notice to carriers that are not parties to the negotiations, but to whom traffic contemplated in the negotiations is destined, to allow them the opportunity to participate in the negotiations as to provisions addressing such traffic. In particular, these commenters suggest adding a requirement in section (3) to disclose whether resolved or unresolved aspects of the agreement in question address traffic destined for any carrier not a party to the agreement. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC support limiting the participants in the arbitration to the parties to the negotiation. Southwestern Bell Telephone, LP also takes the position that only parties to the negotiation should participate in the arbitration and, further, suggests that allowing third parties to participate in the arbitration would violate section 252 of the Act. Southwestern Bell Telephone, LP correctly paraphrases section 252(b)(4)(A) which provides: "The State commission shall limit its consideration of any petition filed under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the appropriate point in the proceedings at which a non-party to the negotiation should be heard is when the negotiated agreement is being presented to the commission for approval, not earlier.

RESPONSE: No changes have been made to section (3) of the rule as a result of this comment.

COMMENT: The staff of the Public Service Commission suggests that section (3)(B) be revised to require the petition to only state the petitioner's positions on unresolved issues and not those of the other parties. Southwestern Bell Telephone, LP points out that section 252(b)(2)(A)(ii) of the Telecommunications Act of 1996 requires the petition to a state commission for arbitration to include the position of each of the parties with respect to the unresolved issues and opposes the staff's proposed change.

RESPONSE: No changes have been made to the rule as a result of this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that section (3)(D) mandates the organization of a proposed agreement follow that of an agreement previously arbitrated and approved by the commission and that such a requirement should be eliminated, or that at least the limitation to arbitrated agreements should be eliminated.

RESPONSE: The rule does not mandate the organization of a proposed agreement; it expresses a preference. No changes have been made to the rule as a result of this comment.

COMMENT: Sprint, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the section (3)(E) requirement that direct testimony supporting the petitioner's positions be filed with the petition be deleted. In support of

their position MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that individuals involved in negotiations also tend to be the witnesses in arbitrations, that similar activities may be taking place in multiple jurisdictions at the same time and that it would be better for the parties and arbitrator to develop a schedule for filing testimony in each arbitration, with filing testimony with the petition an available option.

RESPONSE AND EXPLANATION OF CHANGE: Section 252(b)(2)(A) of the Telecommunications Act of 1996 directs that a petitioner shall provide to the commission all relevant documentation concerning the unresolved issues, the position of each party on each unresolved issue, and any issue discussed and resolved by the parties. Rather than requiring the filing of testimony, section (3)(E) will be changed to require the filing of all relevant documentation that supports the petitioner's position on each unresolved issue.

COMMENT: Sprint suggests that the reference to proposed rule 4 CSR 240-36.020(2) be deleted from section (3)(F) as Sprint has proposed the certification requirement of proposed rule 4 CSR 240-36.020(2) be deleted.

RESPONSE AND EXPLANATION OF CHANGE: Because the commission has deleted the certification requirement of proposed rule 4 CSR 240-36.020(2) it adopts Sprint's proposal. Section (3)(F) of the rule will be revised.

COMMENT: Southwestern Bell Telephone, LP objects to section (4) which provides that the commission will appoint an arbitrator. The bases of the objection are Southwestern Bell Telephone, LP's claims that neither the Telecommunications Act of 1996 nor state statute authorize the commission to delegate its authority to act as an arbitrator. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that as the rule is drafted, the arbitrator acts as a special master who develops the record and recommends a decision to the Public Service Commission which ultimately decides the arbitration.

RESPONSE: Under the rule, the Public Service Commission ultimately makes the arbitration decision. No changes have been made to the rule as a result of this comment.

COMMENT: Southwestern Bell Telephone, LP objects to the authorization for the arbitrator to utilize entire package arbitration found in section (5)(A) for providing no standard for when the arbitrator may use this approach, for providing no deadline by which parties will know what approach the arbitrator is using, for limiting the commission's ability to make decisions on each issue and because entire package arbitration appears inconsistent with section (19) which requires the arbitrator's report to the commission to address each issue and for the arbitrator, on each issue, to adopt the position of one of the parties. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. echo the concern with use of entire package arbitration pointing out that it could force the acceptance of bad results on particular issues.

RESPONSE AND EXPLANATION OF CHANGE: Unresolved issues being decided by arbitration should be decided issue-by-issue. Thus, final offer arbitration should be issue-by-

issue final arbitration, unless the parties choose to employ entire package final arbitration. Section (5)(A) of the rule will be changed.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that section (5)(B) should be modified to allow a settlement to go to the arbitrator rather than the commission as the settlement is likely to be partial rather than a total settlement and that parties should be allowed to amend their final offers with the consent of the other parties. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company propose modifying section (5)(B) to prohibit negotiations of provisions that would affect third party carriers unless those carriers agree to any settlements reached and submitted to the commission. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC support limiting the participants in the arbitration to the parties to the negotiation. Southwestern Bell Telephone, LP also takes the position that only parties to the negotiation should participate in the arbitration and, further, suggests that allowing third parties to participate in the arbitration would violate section 252 of the Act. Southwestern Bell Telephone, LP correctly paraphrases section 252(b)(4)(A) which provides: "The State commission shall limit its consideration of any petition filed under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the appropriate point in the proceedings at which a non-party to the negotiation should be heard is when the negotiated agreement is being presented to the commission for approval, not earlier.

RESPONSE AND EXPLANATION OF CHANGE: The rule should be changed to state that settlements may be submitted to the arbitrator after final arbitration offers are submitted. Section (5) of the rule will be changed in response to this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that section (5)(D) is duplicative of section (5)(E) and that sections (5)(D), (5)(E) and (5)(F) should refer to the Federal Communication Commission's rules in addition to the commission's rules. The staff of the Public Service Commission recommends expanding section (5)(E)(2) to include terms and conditions as well as rates. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company propose modifying section (5)(F) to authorize the arbitrator to adopt a result submitted by an intervening carrier that is not a party to the negotiation. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC support limiting the participants in the arbitration to the parties to the negotiation. Southwestern Bell Telephone, LP also takes the position that only parties to the negotiation should participate in the arbitration and, further, suggests that allowing third parties to participate in the arbitration would violate section 252 of the Act. Southwestern Bell Telephone, LP correctly paraphrases section 252(b)(4)(A) which provides: "The State commission shall limit its consideration of any petition filed under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." MCI WorldCom Communications, Inc., Brooks Fiber Communications of

Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the appropriate point in the proceedings at which a non-party to the negotiation should be heard is when the negotiated agreement is being presented to the commission for approval, not earlier.

RESPONSE AND EXPLANATION OF CHANGE: The rule should be changed to eliminate duplication, state that the final offer must comply with the applicable rules of the Federal Communications Commission and clarify that rates are not the only issue for interconnection. Section (5) of the rule will be changed in response to this comment.

COMMENT: Sprint, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the section (7) requirement that direct testimony supporting the respondent's positions be filed with the response to the petition be deleted. In support of their position MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that individuals involved in negotiations also tend to be the witnesses in arbitrations, that similar activities may be taking place in multiple jurisdictions at the same time and that it would be better for the parties and arbitrator to develop a schedule for filing testimony in each arbitration.

RESPONSE AND EXPLANATION OF CHANGE: Section 252(b)(3) of the Telecommunications Act of 1996 directs that a party responding to a petition may provide to the commission such additional information that it wishes to provide. Rather than requiring the filing of testimony, section (7) will be changed to require the filing of all relevant documentation that supports the responding party's position on each unresolved issue.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that cost studies upon which the incumbent local exchange carrier relies for rates should be made available to the other party(ies) to the negotiation, subject to any applicable protective order or nondisclosure agreement, immediately upon the filing of the petition for arbitration. Southwestern Bell Telephone, LP responds that such a requirement would violate section 252(b)(3) of the Telecommunications Act of 1996 which allows twenty-five (25) days for response to a petition for arbitration.

RESPONSE: Ideally, where rates are involved, the parties will be exchanging cost study information during their negotiations and long before the filing of a petition for arbitration. The Public Service Commission notes that 47 CFR section 51.505(e)(2) requires that where the commission considers a cost study for purposes of establishing rates, the cost study be in the record before the commission; thus, cost studies upon which the parties want the commission to rely should be included in the documentation filed with the petition or response. No changes to the rule have been made as a result of this comment.

COMMENT: The staff of the Public Service Commission states that section (7) requires the respondent to file a proposed agreement that identifies resolved issues and unresolved issues in duplication of the document that the petitioner is required to file under section (3).

RESPONSE: Under section (3) the petitioner is to file a proposed agreement that identifies resolved issues with the agreed to language and unresolved issues with the petitioner's proposed language. Under section (7) the respondent is to file a proposed agreement that identifies the



language the parties have agreed to (resolved issues) and both the petitioner's and the respondent's proposed language for unresolved issues. No changes to the rule have been made as a result of this comment.

COMMENT: Sprint suggests that section (9) be modified to eliminate references to the filing of rebuttal testimony consistent with its view that the dates for filing of all testimony should be set after the initial meeting referred to in section (9). MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the holding of an initial conference be mandatory, not optional.

RESPONSE AND EXPLANATION OF CHANGE: Because the Public Service Commission has revised sections (3) and (7) of the rule from requiring "direct testimony" to requiring "all relevant documentation" be filed with the petition and response, the modifier "rebuttal" should not be used with the word "testimony" in this section. Section (9) of the rule will be changed.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that sections (10) and (13) be modified to give the arbitrator more flexibility in the timing of conferences. Southwestern Bell Telephone, LP raises a concern that the language of section (10) leaves it to the arbitrator's discretion to determine which issues are factual and require evidentiary hearings and the apparent inflexibility of the arbitrator to vary the timing under which conferences and hearings are to begin.

RESPONSE AND EXPLANATION OF CHANGE: Sections (10) and (13) will be revised to clarify the commission's intent that identification of factual issues will be a collaborative process and that the arbitrator has discretion in the scheduling of the conferences and hearings.

COMMENT: Sprint suggests that the unresolved issues should be limited to those framed by the petition and response, and suggests modifying section (11) to eliminate the reference to the revised statement of unresolved issues.

RESPONSE: The revised statement of unresolved issues is limited in section (8) of the rule to a listing of issues raised in the petition and response. No changes to the rule have been made as a result of this comment.

COMMENT: Sprint expressed concern with the use by the arbitrator of outside experts contemplated in section (12). In particular Sprint noted the time required to retain such an expert and the likelihood of one or more parties questioning the neutrality of the expert. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. comment that outside experts, regardless of whether on advisory staff, should not be affiliated with the parties, including in the recent past. Southwestern Bell Telephone, LP objects to section (12) in its entirety asserting the section apparently contemplates that advisory staff will provide information to the arbitrator that is not shared with the parties implicating due process as expressed in both the state and federal constitutions, and in Southwestern Bell Telephone, LP's view, sections 386.420(1), 435.370(2), 491.070 and 536.070(2) of the Revised Statutes of Missouri. Southwestern Bell Telephone, LP asserts that if the commission employs advisory staff under a rule, then the rule must specifically limit the permissible scope of activities and must specifically prohibit the advisory staff from providing input regarding any factual or

mixed factual/legal issues before the arbitrator for resolution. The staff of the Public Service Commission suggests that the list of those with whom advisory staff is prohibited from having *ex parte* contacts during the arbitration be expanded to include staff or outside individuals who provide responses to questions in the arbitration.

RESPONSE AND EXPLANATION OF CHANGE: As proposed, the rule limits the role of advisory staff to providing legal advice and other analysis, not to creating extra-record evidence. Nothing in the rule requires that outside experts not be retained until after the filing of a petition for arbitration. Nothing in the rule would require biased outside experts. While there are legitimate concerns raised as to how advisory staff and outside experts may be utilized, nothing in the proposed rule itself is a violation of due process embodied in state or federal constitution, or law. Unlike the identity of parties, who are known at the outset of the arbitration, the identity of commission staff or outside individuals who will provide responses to questions likely will not be known until the arbitration process is well underway. Rather than establishing by rule a blanket prohibition on *ex parte* contacts by the arbitrator's advisory staff with commission staff and outside individuals who answer questions, the commission will leave it to the arbitrator's discretion to conduct the proceedings in a fashion that avoids any appearance of impropriety and comports with due process. However, changes will be made to the rule to emphasize and clarify that questions and responses to questions posed to commission staff members and outside experts will be part of the record of the arbitration, and that these persons will be subject to cross-examination by parties on their responses. Further, changes will be made to emphasize and clarify that the arbitrator's advisory staff is not the commission's advisory staff allowed by Missouri statute and that the role of the arbitrator's advisory staff is to provide legal advice and analysis, not to provide evidence, extra-record or otherwise. Section (12) of the rule will be changed.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest specifying that "here" in section (15) refers to "this rule 36.040."

RESPONSE AND EXPLANATION FOR CHANGE: Clarity will be enhanced by making the reference in the second clause of the second sentence of section (15) from "here" to "in this rule." Section (15) of the rule will be changed.

COMMENT: The staff of the Public Service Commission suggests modifying section (16) to clarify that commission staff or outside individuals may participate in arbitration conferences or hearings to the extent required for them to provide answers to questions posed to them by the arbitrator as contemplated in section (12). MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. echo the staff's concern and state that those not parties to a negotiation should raise their concerns when the agreement is being presented to the commission for approval, not before. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company assert that section (16) of the rule should be modified to allow participation in the arbitration proceedings of carriers to which traffic addressed in the negotiation is destined. Southwestern Bell Telephone, LP objects to the use of advisory staff out of a concern that due process will be violated and requests the reference to advisory staff be stricken from section (16). CenturyTel of Missouri,

LLC and Spectra Communications Group, LLP oppose participation in the arbitration of those not parties to the negotiation. Public Counsel points out its statutory role and requests modification of the rule to include it as a party to arbitrations.

RESPONSE AND EXPLANATION OF CHANGE: As indicated in its response to proposed changes to section (12), the use of advisory staff as contemplated in the rule is not a violation of due process embodied in state or federal constitution, or law. Only those parties to the negotiation should participate in arbitration conferences and hearings. Section (16) of the rule will be changed to clarify that commission staff and outside experts may participate in arbitration conferences or hearing, but only to the extent required to provide answers to questions posed by the arbitrator as contemplated in section (12) of the rule.

COMMENT: Southwestern Bell Telephone, LP objects to the requirement in section (17) that arbitration hearings be held in an open forum and requires the arbitrator to consult with the commission to close proceedings from the public.

RESPONSE: Section (17) provides that requests to close proceedings from the public shall be made in writing and that the arbitrator will consult with the commission in acting on such a request. Although Southwestern Bell Telephone, LP's comment is drafted on the apparent premise that such requests will be made during the conferences and hearings, nothing in the rule prohibits such a request from being made in advance of such proceedings and, given the time constraints to which the commenter alludes, the rule contemplates that such requests typically will be made in advance. No changes to the rule have been made as a result of this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest modification of section (18) to expressly state that the arbitrator has discretion to extend the time within which post-hearing briefs may be filed.

RESPONSE AND EXPLANATION FOR CHANGE: The arbitrator's authority to extend the time within which post-hearing briefs should be more explicitly stated in the rule. Section (18) of the rule will be changed.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission assert that restrictions on *ex parte* communications should attach upon the filing of the petition.

RESPONSE AND EXPLANATION OF CHANGE: In 2003 the Missouri Legislature enacted House Bill 208, now codified at section 386.210 of the Revised Statutes of Missouri. That bill establishes when appropriate *ex parte* communications may take place and how disclosure of *ex parte* communications is to occur. The same timing and process should be followed in arbitrations under the Act. The reference to Rule 4 CSR 240-4.020 in section (22) will be changed to refer to section 386.210 RSMo. Section (22) of the Rule will be revised.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission suggest that rejection of the arbitrator's report as an option of the commission in section (24) should not be allowed as the commission must make a decision, or that if the report is rejected that the commission must make its own decisions. Southwestern Bell Telephone, LP objects to section (24) and asserts that it should be modified to permit the parties to conduct oral argument and present evidence on any objection to the final arbitrator's report.

RESPONSE AND EXPLANATION FOR CHANGE: The rule should be changed to emphasize that it is the commission that makes the final determinations on the unresolved issues. Parties will have had ample opportunity to present their positions on the disputed issues in a record that the commission can review; therefore, the opportunity for oral argument and to present evidence to the commission on objections to the arbitrator's report need not be mandatory. Section (24) of the rule will be changed.

#### **4 CSR 240-36.040 Arbitration**

(1) Who May Petition for Arbitration—A party to a negotiation entered into pursuant to sections 251 and 252 of the Act may file a petition for arbitration.

(3) Content—A petition for arbitration must contain:

(E) All relevant documentation that supports the petitioner's position on each unresolved issue; and

(F) Documentation that the petition complies with the time requirements of 4 CSR 240-36.040(2).

(5) Style of Arbitration—An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(A) Final offer arbitration shall take the form of issue-by-issue final offer arbitration, unless all of the parties agree to the use of entire package final offer arbitration. The arbitrator in the initial arbitration meeting shall set time limits for submission of final offers and time limits for subsequent final offers, which shall precede the date of a limited evidentiary hearing.

(B) Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit to the arbitrator or commission, as appropriate, any settlements reached following such negotiations.

(D) Each final offer submitted by the parties to the arbitrator shall:

1. Meet the requirements of section 251 of the Act, including the rules prescribed by the commission and the Federal Communications Commission pursuant to that section;

2. Establish interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the commission and the Federal Communications Commission pursuant to that section; and

3. Provide a schedule for implementation of the agreement.

(E) If a final offer submitted by one (1) or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section.

(7) Opportunity to Respond—Pursuant to subsection 252(b)(3) of the Act, any party to a negotiation, which did not file a petition for arbitration ("respondent"), shall file with the

commission, within twenty-five (25) days of the date the petition for arbitration is filed with the commission, a response to the petition for arbitration. For each issue listed in the petition, the respondent shall restate the issue followed by the respondent's position on that issue. The respondent shall also identify and present any additional issues for which the respondent seeks resolution and provide such additional information and evidence necessary for the commission's review. The respondent shall include, in the response, a document containing the language upon which the parties agree and, show where the parties disagree, and provide both the petitioner's proposed language (bolded) and the respondent's proposed language (underscored). Finally, the response must contain all relevant documentation that supports the respondent's position on each issue identified in the response that remains unresolved. On the same day that the respondent files a response with the commission, the respondent must serve a copy of the response, and all supporting documentation, on each other party to the negotiation.

(9) Initial Arbitration Meeting—The arbitrator may call a mandatory initial meeting for purposes such as setting a procedural schedule, establishing a time limit for submission of final offers, allowing the filing of testimony, setting times by which testimony may be filed, simplifying issues, or resolving the scope and timing of discovery.

(10) Arbitration Conferences and Hearings—The arbitration shall consist of mark-up conferences and limited evidentiary hearings. At the mark-up conferences, the arbitrator shall hear the concerns of the parties, determine whether the parties can further resolve their differences, and, with the parties, identify factual issues that may require limited evidentiary hearings. The arbitrator shall also announce rulings at the conferences as the issues are resolved. The conduct of the conferences and hearings shall be noticed on the commission's hearings calendar and notice shall be provided to all parties on the service list. Parties are expected to respond to questions from the arbitrator, and the arbitrator's advisory staff. The parties shall be given the opportunity to present witnesses at an on-the-record evidentiary hearing, and to cross-examine the witnesses of the other party(ies) to the arbitration. These conferences and hearings shall commence as soon as possible after all responses to the petition for arbitration are filed with the commission.

(12) Arbitrator's Reliance on Experts—The arbitrator may rely upon:

(A) An arbitrator advisory staff to assist the arbitrator in the decision-making process. The arbitrator shall appoint the members of the arbitrator advisory staff from either or both commission staff and retained outside experts. The arbitrator shall inform the parties of the names of the members of the arbitrator advisory staff. Arbitrator advisory staff shall not have *ex parte* contacts with any of the parties individually regarding the issues in the negotiation. The arbitrator advisory staff's role is limited to providing legal advice and other analysis to the arbitrator, not to provide evidence. Persons that advised a mediator regarding the same negotiation are ineligible to serve as members of the arbitrator advisory staff.

(B) Responses to questions posed by the arbitrator that are made by commission staff members or outside individuals who are not members of advisory staff. Upon the arbitrator's request, and after notice to the parties to the arbitration, the arbitrator may pose questions to commission staff members or outside individuals who are not advisory staff. These questions shall be answered either in written form or at an arbitration session attended by the parties. The parties may submit written responses to answers to technical questions in a timely manner as determined by the arbitrator and shall be entitled to cross-examine any commission staff member

or outside individual regarding the answer he, or she, provides in response to a question posed by the arbitrator. These questions and responses shall be included in the record before the arbitrator and commission.

(13) Close of Arbitration—The conference and hearing process is to conclude within ten (10) days of the commencement of the first hearing, unless the arbitrator determines otherwise.

(15) Authority of the Arbitrator—In addition to authority granted elsewhere in this rule, the arbitrator shall have the same authority in conducting the arbitration as a presiding officer, as defined in 4 CSR 240-2.120, has in conducting hearings under the commission's rules of practice and procedure. Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out in this rule; however, the arbitrator's procedures must substantially comply with the procedures listed herein. The arbitrator may vary from the schedule in this rule as long as the arbitrator complies with the deadlines contained in the Act.

(16) Participation in the Arbitration Conferences and Hearings—Participation in the arbitration conferences and hearings is strictly limited to the parties in a negotiation pursuant to sections 251 and 252 of the Act, the arbitrator, the arbitrator's advisory staff and, only to the extent needed to provide the answer(s) to a question(s) posed by the arbitrator under the procedure of section (12), commission staff and outside experts. Only those parties involved in the negotiation shall be parties in the arbitration. Others that formally request to be kept apprised of the arbitration proceeding will be placed on the "Information Only" portion of the service list.

(18) Filing of Post-Hearing Briefs—Each party to the arbitration may file a post-hearing brief within seven (7) days of the end of the markup conferences and hearings, unless the arbitrator extends the due date. Post-hearing briefs shall present, for each disputed issue, the party's argument in support of adopting its recommended position, with all supporting evidence and legal authorities cited therein. The arbitrator may limit the length of post-hearing briefs. The arbitrator shall also establish a time for the filing of reply briefs. The arbitrator may also permit or require the parties to file proposed arbitrator's reports or decisions.

(22) *Ex Parte* Rules Applicable to Arbitration Proceedings—the restrictions on *ex parte* communications contained in 386.210 RSMo apply to arbitration proceedings held under this rule.

(24) Commission's decision—The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred and seventieth (270<sup>th</sup>) day following the request for negotiation. The commission may adopt, modify or reject the arbitrator's final report, in whole or in part.

# MEMORANDUM

**TO:** Dale Hardy Roberts, Secretary

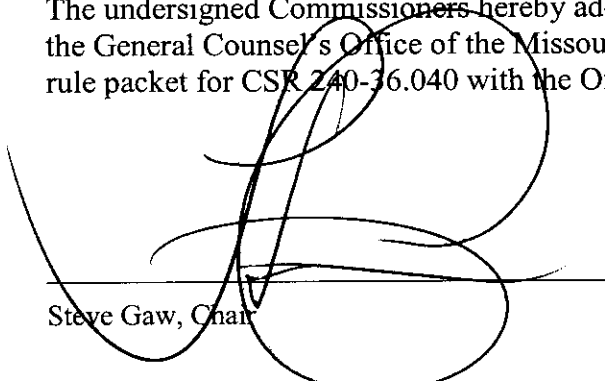
**THROUGH:** Dan Joyce

**FROM:** Nathan Williams

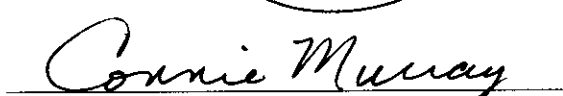
**DATE:** June 8, 2004

**SUBJECT:** APPROVAL OF FINAL RULE 4 CSR 240-36.040 AND  
AUTHORIZATION TO FILE ORDER ADOPTING FINAL RULE  
4 CSR 240-36.040 WITH THE OFFICE OF THE SECRETARY OF  
STATE

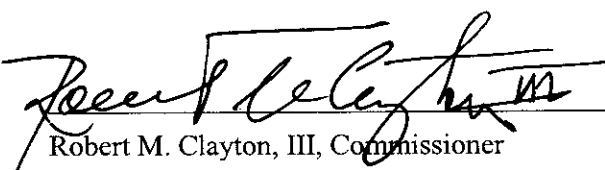
The undersigned Commissioners hereby adopt final rule 4 CSR 240-36.040 and authorize the General Counsel's Office of the Missouri Public Service Commission to file the final rule packet for CSR 240-36.040 with the Office of the Secretary of State.



Steve Gaw, Chair




Connie Murray, Commissioner



Robert M. Clayton, III, Commissioner



Jeff Davis, Commissioner



Linward "Lin" Appling, Commissioner