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December 29, 1997

FILED

DEC 29 1997

MISSOURI  
PUBLIC SERVICE COMMISSION

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
301 West High Street, Floor 5A  
Jefferson City, Missouri 65101

Re: Case No. TO-98-115

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and 14 copies of Southwestern Bell Telephone Company's Objections To Process For Establishing Permanent Rates.

Please stamp "Filed" on the extra copy and return the copy to me in the enclosed self-addressed, stamped envelope.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

A handwritten signature in cursive script that reads "Paul G. Lane" followed by a small "fm" or similar mark.

Paul G. Lane

Enclosure

cc: All Attorneys of Record

24.

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

**FILED**

**DEC 29 1997**

**MISSOURI  
PUBLIC SERVICE COMMISSION**

In the Matter of AT&T Communications of the Southwest, )  
Inc.'s Petition for Second Compulsory Arbitration Pursuant )  
to Section 252(b) of the Telecommunications Act of 1996 )  
to Establish an Interconnection Agreement with )  
Southwestern Bell Telephone Company. )

Case No. TO-98-115

**SOUTHWESTERN BELL TELEPHONE COMPANY'S  
OBJECTIONS TO PROCESS FOR ESTABLISHING PERMANENT RATES**

Southwestern Bell Telephone Company respectfully objects to the process the Missouri Public Service Commission proposes to employ in establishing permanent rates.

The issues being considered by the Commission involve substantial property interests and will have significant impacts on the competitive balance in the local exchange market. Cutting off basic procedural rights violates not only state and federal administrative procedural rules, but also fundamental due process rights protected by the Missouri and U.S. Constitutions.

During these arbitration proceedings, Southwestern Bell has consistently sought, but been denied, appropriate evidentiary hearings permitting the presentation of testimony and other evidence, cross-examination of witnesses, oral argument and briefing. All parties to these arbitration proceedings have previously expressed serious concerns that the procedure for setting permanent rates did not comport with minimum due process requirements.<sup>1</sup>

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<sup>1</sup>Joint Application for Rehearing of MCI Telecommunications Corporation and Its Affiliates Including MCImetro Access Transmission Services, Inc. and AT&T Communications of the Southwest, Inc., Case Nos. TO-97-40 and TO-97-67, filed February 3, 1997, at p. 2; and Response of Southwestern Bell Telephone Company, Case Nos. TO-97-40 and TO-97-67, filed February 13, 1997, at pp. 1-2. See also, Southwestern Bell Telephone Company's Motion for Clarification, Modification and Application for Rehearing of Final Arbitration Order, Case Nos. TO-97-40 and TO-97-67, filed August 20, 1997, pp. 10-17.

Apparently believing it is permitted as an arbitrator to determine whether or not to conduct a hearing and what procedure to use, the Commission misunderstands its role. The Commission is not free to use whatever procedural process it chooses and its decisions are not immune from scrutiny. Perhaps it is possible for two parties to agree to an arbitration process in which the arbitrator decides whether to conduct a hearing and whether to explain its decision, all free from judicial review or scrutiny.<sup>2</sup> But this is not a consensual arbitration in which the parties have imbued the arbitrator with such extraordinary powers. Rather, this arbitration is being conducted by a state governmental agency pursuant to mandatory provisions of federal legislation. Constitutional due process requirements and state and federal administrative procedural rules therefore apply here. The Commission must follow them.

#### Background

In its December 23, 1997 Report and Order, the Commission set rates for various additional services and facilities AT&T wishes to obtain from Southwestern Bell. But the Commission indicated that the rates would be interim only and that further proceedings would be conducted to establish permanent rates. In order to implement permanent rates, the Commission directed its Arbitration Advisory Staff (AAS) to conduct an investigation, focusing on identifying the critical inputs and analyzing Southwestern Bell and AT&T's costing models. The Commission ordered the AAS to submit a report proposing permanent rates (based on the same permanent rate costing approach adopted in Case No. TO-97-40) and commenting on the

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<sup>2</sup>But even here, the Missouri arbitration act guarantees a hearing with the right to cross-examination. Section 435.370(2) RSMo (1994)

costing approach proposed by the parties during the review process. Report and Order, pp. 51-52.

The Commission also indicated that the parties would be given an opportunity to file comments on the AAS' proposed rates and costing model and would be permitted to file affidavits and schedules to support their positions. It also stated that it would hold a hearing for the sole purpose of providing the Commission with an opportunity to ask questions of the parties, the AAS, and Office of Public Counsel. But it ruled that there will be no opportunity for cross-examination by the parties<sup>3</sup>, although it would permit them to file post-hearing briefs. Id., p. 52.

The Commission directed that any objections to the process established in the Report and Order for the setting of permanent rates shall be filed no later than December 29, 1997. Id., pp. 54.

The Proposed Procedural Process violates Missouri and U.S. Constitutional Due Process Requirements, and State and Federal Administrative and Arbitration Procedural Requirements.

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The Federal Telecommunications Act of 1996 (FTA), the right to due process contained in both the Missouri and U.S. Constitutions, the requirements of the statutes governing the Commission, the requirements of the Commission's own rules, the Missouri Administrative Procedure Act, and the Federal and State Arbitration Acts all require that significant decisions

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<sup>3</sup>In its December 23rd Report and Order, the Commission also specifically denied Southwestern Bell's November 26, 1997 request for a contested case hearing with opportunity for cross-examination prior to the Commission's establishment of permanent rates. Report and Order, p. 53.

by a State agency adjudicating Southwestern Bell's property rights require, at the least, an on the record proceeding before the Commission in which testimony is submitted, cross-examination is permitted and an opportunity for briefing or oral argument is provided.

While it is not apparent from the FTA whether Federal or State administrative process rules apply, the process proposed by the Commission does not comport with either. Regardless of which set of administrative or arbitration rules apply to interconnection rate arbitrations under the FTA, all require notice and a full hearing with presentation of evidence and cross-examination before rates can lawfully be adjudicated.

A. The Commission's Irregular Procedure Contravenes the Parties' Due Process Rights Guaranteed by the U.S. and Missouri Constitutions.

Whether the Commission is acting as an arbitrator or otherwise, it is a state agency that must comply with the requirements of due process mandated by Article I, Sec. 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. See Elmore v. Chicago & Illinois Midland Ry., 782 F.2d 94, 96 (7th Cir. 1986). Accordingly, the rules governing the conduct of private, voluntary arbitration proceedings must be supplemented to the extent necessary to satisfy procedural due process.

At a minimum, due process requires in a proceeding of this type that the "parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner." State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 43 (Mo. App. 1982). An "essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985) quoting Mullane v. Central Hanover Bank & Trust Co.,

339 U.S. 306, 313 (1950) (emphasis supplied). The Supreme Court has described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Id.*, at p. 542 quoting Bobbie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis in original).

The Commission's reliance on "evidence" gathered *ex parte* by the Commission's Staff without providing any party an opportunity to offer testimony and evidence in support of its own proposals or to cross-examine opposing witnesses, contest "evidence" presented by the arbitration advisory staff and to object to the proposals ultimately accepted, denies to the parties the right to a meaningful hearing. As the United States Supreme Court stated in Morgan v. United States, 304 U.S. 1 (1938): "a case in which [an agency] accepts and makes as [its] own the findings which have been prepared by the active prosecutors for the Government after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them...is more than an irregularity in practice; it is a vital defect." See also Ohio Bell Tel. Co. V. Public Utilities Commission, 301 U.S. 292 (1937) (reliance on evidence not placed on record and not subject to scrutiny by affected parties violates fundamental requirements of due process); United Food & Commercial Workers International Union, AFL-CIO v. SIPCO, Inc., 1992 U.S. Dist. LEXIS 21332, at \*29 (S.D. Iowa 1992), *aff'd* 8 F.3d 10 (8th Cir. 1993) (arbitrator's reliance on *ex parte* evidence without "opportunity to examine, object to, and cross-examine the evidence on grounds of relevance and accuracy" deprived parties of their right to a fair hearing); Totem Marine Tug & Barge, Inc. v. North American Towing, 607 F.2d 649, 651 (5th Cir. 1979) (same).

Moreover, it is clear that the procedures employed in this proceeding fail to satisfy the requirements of due process as articulated in the United States Supreme Court's decision in Matthews v. Eldridge, 424 U.S. 319 (1976). The nature of the parties' interests and the grave risk of error inherent in the Commission's reliance on ex parte evidence in this complex proceeding clearly lead to the conclusion that the parties were not afforded the process due them under the Missouri Constitution and the United States Constitution.

B. The Commission's Failure to Follow Contested Case Procedures Violated the Missouri Administrative Procedure Act and the Commission's Own Rules.

The Commission must observe the procedural requirements of the Missouri Administrative Procedure Act (MAPA), RSMo, Ch. 536. While the Commission's jurisdiction over this proceeding arises under Section 252 of the FTA, 47 U.S.C. Section 252, that legislation neither mandates particular procedures to be followed by the Commission nor preempts, expressly or by implication, otherwise applicable procedural requirements mandated by state law. (See 47 U.S.C. Section 252(e)(3)). The Commission itself has acknowledged that state procedural law applies to this proceeding in that it has allowed the Office of the Public Counsel to participate in this proceeding as required by Section 386.710 RSMo (1994).<sup>4</sup>

As an agency of the state within the meaning of Section 536.010(1) RSMo (1994), the Commission is subject to the requirements of the MAPA. See State ex rel. St. Louis Public Service Co. v. Public Service Commission, 365 Mo. 1032, 291 S.W.2d 95, 98 (Mo. banc 1956); State ex. rel Fischer v. Public Service Commission, 645 S.W.2d 39, 42 n.3 (Mo. App. 1982). As

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<sup>4</sup>Initial Order, p. 4.

explained in State ex rel. Monsanto Company v. Public Service Commission, 716 S.W.2d 791, 796 (Mo. 1986): "The Public Service Commission is a creature of statute and can function only in accordance with statutes. Where a procedure before the Commission is prescribed by statute, that procedure must be followed."

The MAPA mandates extensive procedures governing any contested case. See, Sections 536.063, 536.067, 536.070, 536.073, 536.077, 536.070, 536.090 RSMo (1994). This proceeding is a "proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing," Section 536.010(2) RSMo (1994), and thus, is a "contested case" with the meaning of the MAPA. As explained by the Missouri Supreme Court in State ex rel. Yarber v. McHenry, 915 S.W.2d 325, 328 (Mo. 1995), if any proceeding before any agency involves issues in which a hearing is mandated by law, including "any statute or ordinance, or any provision of the state or federal constitutions" that hearing "must be conducted according to contested case procedures." Clearly, a proceeding involving the establishment of permanent rates or terms of service, a hearing is mandated by several sources of law including, but not limited to, Section 252 of the FTA, Sections 386.410 and 386.420 RSMo, Article I, Section 10 of the Missouri Constitution, and Section 1 of the Fourteenth Amendment to the U.S. Constitution. See State ex rel. Chicago, R.I. & P.R.R. v. Public Service Commission, 355 S.W.2d 45, 52 (Mo. banc 1962); State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 42-44 (Mo. App. 1982); Morgan v. United States, 304 U.S. 1 (1938); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937); Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 US. 88 (1913).



The Commission's proposed procedure also violates Section 386.410 RSMo (1994), which requires that "[a]ll hearings before the Commission . . . shall be governed by rules to be adopted and prescribed by the Commission." Here, the proposed procedure is inconsistent with the requirements of 4 CSR 240-2.110 and Section 386.420.1 which entitles the parties the right to be heard and present evidence.

The Commission plainly violates MAPA's requirements and its own rules governing contested cases by, *inter alia*, failing to conduct a hearing, depriving the parties of an opportunity to examine the evidence upon which the Commission relied for its order, failing to provide an opportunity to the parties to present evidence and cross-examine opposing witnesses, and failing to provide an opportunity for the parties to submit full briefs and argument.

C. The Commission's Procedure Violates the Missouri Uniform Arbitration Act and the Federal Arbitration Act Which Provides the Right to Be Heard, Present Evidence and Cross-Examine Witnesses.

Even if it should be determined that the statutory procedures described above are inapplicable to this proceeding, the Commission's proposed procedure to establish final rates is nonetheless unlawful for failing to comply with appropriate procedural requirements. The Commission's procedures exceeded the Commission's powers because such procedures violate the requirements of the Missouri Uniform Arbitration Act, Section 435.370 RSMo (1994). That section provides the parties to an arbitration with a right to a hearing in which "[the parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." Moreover, the Commission's failure to conduct the proceedings in a manner consistent with these requirements would substantially prejudice the rights of Southwestern Bell within the meaning of Section 435.405(4) RSMo (1994).

The Federal Arbitration Act similarly requires a hearing. Under 9 U. S.C. Section 10(a)(3), awards are to be set aside when, *inter alia*, the arbitrators are "guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced." Parties to an arbitration are entitled to a full and fair hearing on the merits, and the courts will not hesitate to overturn an award when such rights are violated. See, e.g., *Korikar Maritime Enterprises S.A. v. Compagnie Belge D'Affretement*, 668 F.Supp. 267, 271 (S.D.N.Y. 1987); *Petrol Corp. V. Groupement D'Achat Des Carburents*, 84 F.Supp. 446, 448 (D.C.N.Y. 1949).

#### Conclusion

The Commission's proposed procedure to establish permanent rates violates not only state and federal administrative procedural rules, but also fundamental due process rights protected by the Missouri and U.S. Constitutions. Southwestern Bell respectfully requests that the Commission instead conduct appropriate evidentiary hearings permitting the presentation of testimony and other evidence, cross-examination of witnesses, oral argument and briefing.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on December 29, 1997.

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