

BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF MISSOURI

In the Matter of Proposed Commission Rules)	
4 CSR 240-36.010, 36.020, 36.030, 36.040,)	Case No. TX-2003-0487
36.050, 36.060, 36.070, and 36.080)	

SOUTHWESTERN BELL TELEPHONE, L.P.,
D/B/A SBC MISSOURI'S FURTHER COMMENTS
REGARDING PROPOSED COMMISSION RULES 4 CSR 240-36.010,
36.020, 36.030, 36.040, 36.050, 36.060, 36.070, AND 36.080

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), and for its Further Comments Regarding Proposed Commission Rules 4 CSR 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070, and 36.080, states as follows:

1. As the Commission is aware, SBC Missouri objected to proposed Rules 4 CSR 240-36.040(12), Arbitrator's Reliance on Experts and 4 CSR 240-36.040(16), Participation in the Arbitration Conferences and Hearings. Proposed Rule 36.040(12) is very broad, and would impose no substantive limits on activities of its advisory staff, which would be permitted to provide "legal advice and other analysis" to the arbitrator in arbitration under the Federal Telecommunications Act of 1996. Because of the unchecked scope of permissible activities, in its initial comments SBC Missouri recommended that proposed Rule 4 CSR 240-36.040(12) be eliminated in its entirety and the reference to the advisory staff in Rule 4 CSR 240-36.040(16) should similarly be eliminated because both rules may result in a potential denial of due process under the 5th and 14th Amendments of the United States Constitution, Article I, Section 10 of the Missouri Constitution, Sections 386.420(1), 435.370(2), 491.070, and 536.070(2) RSMo.,

as well as other applicable federal and/or Missouri statutes. SBC Missouri offers the following additional comments regarding its due process concerns.

2. As indicated at the March 12 hearing, SBC Missouri is not opposed to the concept of an advisory staff and, therefore, SBC Missouri did not object to the enactment of §386.135, RSMo. 2004 (L. 2003 H.B. 208)¹. However, while the concept of an advisory staff is not objectionable, the activities of such a staff must be carefully sculpted to avoid due process violations. In contested cases, the concern regarding the permissible scope of activities by the advisory staff is heightened, and any rule adopted must carefully limit the actions of the advisory staff. The role of an advisory staff in the context of an arbitration should be limited to providing accounting, economics, finance, engineering/utility operations, law, or public policy advice at a high level and should not include providing advice regarding factual matters that are the subject of the underlying dispute. If an advisory staff is utilized in an arbitration proceeding, 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 issue that is to be resolved by the arbitrator. SBC Missouri offers the following examples which it hopes will provide guidance to the Commission.

3. At the hearing, the advisory staff was analogized to the role filled by law clerks to judges. While that analogy does not exactly match the role of the advisory staff under the proposed rule, it can be used to demonstrate the permissible scope of activities. In this example, assume that a lawsuit is pending between two parties for injuries sustained as a result of an automobile collision. Under this example, assume Car A is

¹ All statutory references are to the Missouri Revised Statutes, 2004, unless specifically noted otherwise herein.

proceeding down Main Street and has a red light at the corner of Main Street and First Street. The light turns green and Car A proceeds east to the next intersection--Main Street and Second Street. When Car A enters the latter intersection, Car A is involved in a collision with Car B, who was proceeding southbound on Second Street through this same intersection. Each party contends that he/she had a green light. If this case were heard by a judge (without a jury), SBC Missouri believes the judge would be able to discuss with his or her clerk the legal issues involved in the case. However, the clerk should not convey to the court any input on factual issues outside of the trial process. The clerk should not, for example, convey to the court the results of any test of either witnesses' testimony for veracity by, for example, driving to the intersection of Main Street and First Street, stopping at the intersection, and determining if the light was green when the clerk reached the intersection of Main Street and Second Street. Further, the law clerk should not provide his or her opinion on any other factual input or analysis that would form the basis of the judge's decision. SBC Missouri believes these same principles should hold with regard to the Commission's advisory staff. If the advisory staff is providing input with regard to any contested fact or mixed question of law and fact, all of the parties should have notice and an opportunity to contest the assertion through testimony and cross-examination.

4. As a second example, and in the context of the telecommunications industry, assume there is an arbitration regarding the cost of a particular unbundled network element, a DS-loop, and that the only factual issues between the parties involve the amount of investment to be recovered and the labor rate and time associated with maintaining the loop. In this circumstance, the advisory staff would not be prohibited

from explaining factual matters that are not the subject of the dispute including, for example, factual information regarding how a DS-1 loop works and how it is different than a plain old telephone service (“POTs”) line. The advisory staff would also be permitted to provide legal advice regarding the Commission’s authority under the Federal Act to make the determination, as well as advice regarding the controlling law. However, the advisory staff must not be permitted to provide factual input or analysis on any disputed factual issue that is to be resolved in the arbitration. In the context of this example, the advisory staff should not be authorized to provide factual information regarding the capital costs to place a DS-1 in service or the labor rate or time that should be approved with regard to maintaining the DS-1 line. If the advisory staff crosses this line and provides such information, it would violate SBC Missouri’s due process rights in violation of the 5th and 14th Amendments of the United States Constitution, Article I, Section 10 of the Missouri Constitution, Sections 386.420(1), 435.370(2), 491.070, and 536.070(2) RSMo., as well as other applicable federal and/or Missouri statutes, because SBC Missouri would not know what information the advisory staff provided to the Commission and would not have an opportunity to cross examine any witness or to present countervailing information.

5. Thus, while SBC Missouri does not object to the concept of an advisory staff, the rule itself must carefully limit the permissible scope of activities. An authorization to provide any “other analysis” (as the rule currently provides), is extraordinarily overbroad and inappropriate. If the Commission wishes to have the advisory staff assume a role in arbitration under the Federal Telecommunications Act, it must limit that role by precluding the advisory staff from offering facts or opinions on

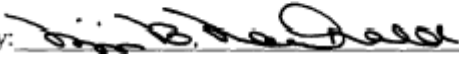
any factual or mixed factual/legal issue which is to be determined in the arbitration.

6. Whether advisory staffs are authorized, and the particular role of advisory staffs, varies across the areas served by SBC. SBC Missouri determined that some of the states served by SBC have no advisory staff, others have advisory staffs on a formal basis (i.e. recognized by statute or rule) and still others utilize advisory staffs on an informal basis (an advisory staff exists but has not been authorized by statute or rules). In Kansas, where a technical staff is authorized, the legislature has made clear the limitation on the technical staff's role. Kansas Statute annotated 77-545(c) provides: "For purposes of this section, no member of the technical staff shall be considered a party to any proceeding before the commission, regardless of participation in staff investigations with respect to the proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid the commission in the proper discharge of its duties, the presiding officers shall be free at all times to confer with any staff member with respect to any proceedings. However, no facts that are outside the record, and that reasonably could be expected to influence the decision in any matter pending before the commission, shall be furnished to any presiding officer unless all parties to the proceeding are likewise informed and afforded a reasonable opportunity to respond. . . ."

Wherefore, SBC Missouri prays the Commission consider its Comments Regarding Proposed Commission Rules 4 CSR 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070, and 36.080, as well as its Further Comments Regarding Proposed Commission Rules 4 CSR 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070, and 36.080 and eliminate or modify the proposed rules as outlined in these pleadings, together with any further and/or additional relief the Commission deems just and proper.

Respectfully submitted,

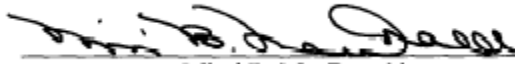
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CERTIFICATE OF SERVICE

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