

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

In the Matter of the Determination of Prices,)	
Terms, and Conditions of Certain Unbundled)	Case No. TO-2005-0037
Network Elements: Consideration Upon Remand)	
From the United States District Court.)	

**SBC MISSOURI'S PROPOSED PROCEDURAL SCHEDULE
AND SUPPORTING SUGGESTIONS**

SBC Missouri,¹ pursuant to the Missouri Public Service Commission's ("Commission's") August 20, 2004 Order,² respectfully submits the following proposed procedural schedule for handling the U.S. District Court's remand of the capital structure issue, and SBC Missouri's supporting suggestions:

1. Proposed Procedural Schedule. SBC Missouri respectfully requests the Commission to adopt the following procedural schedule for the Commission's reconsideration of the appropriate capital structure and resulting rates for the unbundled network elements ("UNEs") from Case No. TO-2001-438:

Simultaneous Initial Briefs on the Appropriate Capital Structure	30 Days from Issuance of Scheduling Order
Simultaneous Reply Briefs	15 Days After Filing of Initial Briefs

2. The Commission Should Limit Parties to the Filing of Briefs. On remand, the Commission may, without any further proceedings, apply the correct legal standard (as confirmed by the Court) to the evidence in the record and immediately issue an order setting the appropriate capital structure. Under this approach, the Commission would then direct SBC Missouri to recalculate the rates with this corrected input.

¹ Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri."

² Second Notice Regarding Filing of Proposed Procedural Schedule, Case No. TO-2004-0037, issued August 20, 2004.

SBC Missouri, however, believes that the Commission's deliberations on remand would be facilitated by the parties' filing of briefs. Such submissions would not only provide the Commission with the specific capital structure ratio advocated by each party, but also with the rationale and citations to the record supporting each party's position.

Proceeding in this manner would be fully consistent with the U.S. District Court's mandate specifically remanding the case to the Commission "for reconsideration of the appropriate capital structure and resulting rates."³ A customary round of simultaneous initial and reply briefs should not unreasonably delay resolution of the final issue in this case.

But in its reconsideration of the appropriate capital structure for the cost of capital factor, the Commission must decide the case on the existing record. The District Court determined that the Commission's August 6, 2002 Report and Order applied the wrong legal standard to the evidence on capital structure. Accordingly, it remanded the case to the Commission "for reconsideration of the appropriate capital structure and resulting rates."⁴

This remand, however, was not a general remand for further proceedings. Rather, it is a specific remand to reconsider the capital structure and the resulting rates. The Court did not direct the Commission to conduct further hearings or gather any additional evidence. The Commission is only authorized to proceed in accordance with the express directions set forth in the District Court's mandate and opinion. Sumnicht v. Sackman, 968 S.W.2d 171, 174 (Mo. App. W.D. A998) ("It is well settled that a trial court, on remand, with respect to issues addressed by the appellate court on appeal, only has that authority granted to it by the appellate court in its mandate"). The Commission is without authority to issue an order exceeding the court's mandate Id. ("if in entering its judgment, the trial court exceeds the authority of the appellate court's

³ Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission, et al., No. 03-04148-CV-C-NKL, slip op. at 12 (D. Mo. June 12, 2004).

⁴ Id.

mandate, it is without jurisdiction to enter it, rendering it void”). Now that the District Court has confirmed the correct standard to use in determining the appropriate capital structure, the Commission is now bound to apply it to the evidence presented. No party has any right to present new information that could or should have been presented in the initial case as the question of the proper capital structure was fully litigated.

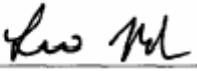
3. Only the Capital Structure Element May Be Addressed. On remand, all that is open to the Commission for reconsideration is the capital structure issue. The Commission’s determinations on the other inputs to the cost of capital factor (the cost of debt and the cost of equity) were not appealed by any party and are now final.

The Commission’s previous rulings on these issues are the law of the case and preclude relitigation of them on remand. State v. Graham, 13 S.W.3d 290, 293 (Mo. banc 2000) (law of the case doctrine provides that “a previous holding in a case constitutes the law of the case and precludes relitigation of that issue on remand and subsequent appeal”); Czapla v. Czapla, 94 S.W.3d 426, 428 (Mo. App. E.D. 2003) (“pursuant to the doctrine of the ‘law of the case,’ a former adjudication is conclusive and not only as to all questions raised directly and passed upon, but also as to matters which arose prior to the first appeal and which might have been raised thereon but were not”); Accord, U.S. v. Kress, 58 F. 3d 370, 373 (8th Cir. 1995) (“where a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter”); Sandes v. Frisby, 736 F. 2d 1230, 1232 (8th Cir. 1984) (failure to raise Fourth Amendment issues in criminal appeal held to preclude litigation of same issues in subsequent 42 U.S.C. Section 1983 action). The law of the case doctrine applies not only to determinations of law, but also to determinations of fact. Williams v. Kimes, 25 S.W.3d 150, 154 (Mo. banc 2000) (held court bound by the “facts and holdings” from previous decisions in the case).

WHEREFORE, SBC Missouri respectfully requests the Commission to adopt the briefing schedule outlined above as the procedure for handling this remand from the U.S. District Court.

Respectfully submitted,

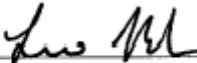
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on September 3, 2004.



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