

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
September 1, 1998**

**CASE NO: TO-98-115**

**Office of the Public Counsel**  
P.O. Box 7800  
Jefferson City, MO 65102

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Southwestern Bell Telephone Company  
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2345 Grand Blvd.  
Kansas City, MO 64108

**Enclosed find certified copy of ORDER in the above-numbered case(s).**

Sincerely,



**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

**Uncertified Copy:**

**Mark Witcher**  
AT&T Communications  
Suite 1500, 919 Congress  
Austin, TX 78701

**Brent Stewart**  
Stewart & Keevil, LLC  
1001 Cherry Street, Suite 302  
Columbia, MO 65201-7931

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office  
in Jefferson City on the 1st  
day of September, 1998.

In the Matter of AT&T Communications of the )  
Southwest, Inc.'s Petition for Second Compulsory )  
Arbitration Pursuant to Section 252(b) of the ) Case No. TO-98-115  
Telecommunications Act of 1996 to Establish an )  
Interconnection Agreement with Southwestern Bell )  
Telephone Company. )

**ORDER STRIKING DATA REQUESTS**

On or about August 10, 1998, Southwestern Bell Telephone Company (SWBT) submitted a data request (Data Request No. 1) by facsimile to Commission Staff (Staff) employee Dan Gordon. Mr. Gordon, as well as other Staff employees, have been designated as the Commission's "Arbitration Advisory Staff" (AAS) and are assigned to work with the Commissioners and the Regulatory Law Judges for the duration of this case. It has been made clear in previous orders of the Commission that these individuals are not acting in the traditional capacity of "Staff" as parties to a proceeding before the Commission, but rather are working with the Commissioners and Regulatory Law Judges as members of the Adjudicatory Staff. The remainder of the Commission's Staff is not participating in the arbitration<sup>1</sup>.

The data request is attached to this order as Attachment 1. The data request in question asks "Staff" to:

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<sup>1</sup>Non-AAS members of the Staff made special appearances in arbitration cases to advise the Commission of Staff's views concerning the Commission's jurisdiction, but have not made a general appearance in such cases. See, e.g., Case No. TO-98-200 (Tr. of proceedings held on December 30, 1997).

Please provide all work papers or materials relied upon or reviewed in preparation of the staff report. (Excluding materials provided by SWBT which can simply be identified rather than produced.)

The data request references the AAS Report that was developed by the AAS and filed on July 24.

SWBT seeks to discover the workpapers and the thought processes of the Commissioners and their advisors within the adjudicatory process of this arbitration. The Commission views this data request as indistinguishable from one which might be served upon the Commission's Regulatory Law Judges in an attempt to discover their workpapers and recommendations to the Commissioners. SWBT has failed to cite any authority, and the Commission is aware of none, which would require the Commission to allow this intrusion into the work process of the Commissioners or their adjudicatory/arbitration staff. The Commission finds that the information requested by SWBT is protected by the deliberative privilege, for the following reasons.

The Missouri Supreme Court has declared that an administrative agency acting in a quasi-judicial capacity "is not and cannot be a court in a Constitutional sense." *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982) (quoting *In Re City of Kinloch*, 361 Mo. 434, 440-41, 242 S.W.2d 59, 63 (1951)). This is because the Missouri Constitution vests the judicial power of the state in the courts designated therein. Mo. Const. art. V, s 1 (1945); *Gershan Inv. Corp. v. Danforth*, 517 S.W.2d 33, 35 (Mo banc 1974).

However, our Supreme Court has also "recognized that executive agencies may exercise 'quasi judicial powers' that are 'incidental and necessary to the proper discharge' of their administrative functions, even through by doing so they at times determine questions of a 'purely

legal nature.'" *State Tax Comm'n*, 641 S.W.2d at 75. When doing so, they are exercising "adjudicative power," by ascertaining facts and applying existing law thereto in order to resolve issues. *Id.* By definition, the term "adjudicate" means "to hear and decide judicially." *Webster's New Twentieth Century Dictionary* 24 (2d ed. 1979). "Thus, when an administrative agency is acting in a quasi-judicial capacity, it is judicially hearing and deciding the matter before it. While judicial proceedings are generally open to the public, judicial deliberations are closed. . . . Without identifying precisely the origin of the practice of closed judicial deliberations, we can say that it is ancient and is grounded in strong public policy." *Nasrallah v. State Board of Chiropractic Examiners*, 1996 WL 678640 (Mo.App W.D.). In such circumstances, "where judicial duties and powers are conferred, there is necessarily implied therein the prerogative of carrying out those duties in the way the judiciary traditionally functions." *Common Cause v. Utah Pub. Serv. Comm'n*, 598 P.2d 1312, 1315 (Utah 1979). And, we likewise believe that such proposition is consistent with a practical application of the Sunshine Law. *Nasrallah*.

The Commission will strike SWBT's Data Request No. 1 as an improper attempt to discover the workpapers and thought processes of the Commissioners.

**IT IS THEREFORE ORDERED:**

1. That Data Request No. 1, served by Southwestern Bell Telephone Company upon the Commissioners' Arbitration Advisory Staff is stricken as seeking information which is not properly discoverable.

2. That this order shall become effective on September 11, 1998.

BY THE COMMISSION



Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

( S E A L )

Lumpe, Ch., Crumpton, Murray and  
Schemenauer, CC., concur.  
Drainer, C., absent.

Randles, Regulatory Law Judge

CASE NO. TO-98-115

SOUTHWESTERN BELL TELEPHONE COMPANY  
DATA REQUEST NO. 1

Requested From: PSC Staff

Date Requested: August 10, 1998

Information Requested:

Please provide all work papers or materials relied upon or reviewed in preparation of the staff report. (Excluding materials provided by SWBT which can simply be identified rather than produced.)

Requested by: David Osborn

Information Provided:

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Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: \_\_\_\_\_

Signed By: \_\_\_\_\_

Prepared By: \_\_\_\_\_

ATTACHMENT 1

ALJ/Sec'y: Randles/Boye  
8-28 70-98-115  
Date Circulated CASE NO.

[Signature]  
Lumpe, Chair

[Signature]  
Crompton, Commissioner

[Signature]  
Murray, Commissioner

[Signature]  
Schemenauer, Commissioner

absent  
Drainer, Vice-Chair

9-1  
Agenda Date

Action taken: 4-0 AS

Must Vote Not Later Than \_\_\_\_\_

STATE OF MISSOURI  
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and  
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 1st day of September, 1998.

[Signature]  
Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge