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April 23, 2002

FILED²

APR 24 2002

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102

Re: TO-2001-439

Dear Mr. Roberts:

Please find enclosed for filing an original and nine (9) copies of IP Communications of the Southwest's Request for Limited Substitution of Counsel. Please stamp the extra copy filed and return in the self addressed stamped envelope. If there are any questions, please contact me at (913) 831-1013. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'David J. Stueven'. The signature is stylized with a large, sweeping 'D' and a long, horizontal line extending to the right.

David J. Stueven
Director, Regulatory
IP Communications Corporation

Cc
Counsel of Record

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

FILED²
APR 24 2002

In the Matter of the Determination of)
Prices, Terms and Conditions for Loop)
Conditioning.)

Case No. TO-2001-439

Missouri Public
Service Commission

REQUEST FOR LIMITED SUBSTITUTION OF COUNSEL

COME NOW IP Communications of the Southwest ("IP") and for its Request for Limited Substitution of Counsel, states as follows:

1. On April 19, 2002, the Missouri Public Service Commission issued an Order scheduling an oral argument concerning the various pleadings filed after the Commission's Final Order in this case. The oral argument is scheduled for April 30, 2002 at 10:00 am.

2. The undersigned counsel for IP is unable to attend for medical reasons.¹

3. To ensure IP interests are properly represented without requesting that these proceedings be delayed, IP is requesting that IP's witness in this proceeding be allowed to make IP's legal argument for the limited purposes of the oral argument scheduled by the Commission. IP's witness, Mr. Howard Siegel, is a licensed attorney in the State of Texas and was previously granted permission to appear before the Commission.

4. The applicable Supreme Court Rule is Rule 3.7.²

¹ Upon request, IP's counsel will provide the Commission with a more detailed description of his medical condition. That said, based on the declarations herein and the undersigned's

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Rule 3.7 Lawyer as Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
...(3) disqualification of the lawyer would work substantial hardship on the client.³

In the present case, disallowing Mr. Siegel would prevent IP from presenting its oral arguments to the Commission. IP would have to rely on other parties in the hope that they would present the issues most important to IP with the same level of detail and persuasion as IP would.

6. The Comment to Rule 3.7⁴ recognizes that a tribunal needs to balance the interests of the client and any opposing party that may be prejudiced and that an opposing party has a proper objection where the combination of roles may prejudice that party's rights in the litigation. The theory is that it may not be clear to a trier of fact whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. However, in the present case, that should not be at issue. Clearly an oral argument is not evidence and the Commission would be more than able to differentiate between Mr. Siegel's testimony already a part of the record in this case and any legal argument Mr. Siegel would present on April 30, 2002. Moreover, it would rarely be the case that such confusion could occur when a case is heard by a professional agency, such as the Commission. Instead, the safeguards discussed in the Supreme Court rule are more relevant to the jury setting.

ethical responsibilities as an officer of the court, IP does not believe further disclosure should be if necessary.

² Supreme Court Rule 3.7.

³ A copy of the rule is attached as Appendix A.

⁴ A copy of the comment is attached as Appendix B.

7. With the above in mind, the prejudice that the rule envisions will not occur with respect to Southwestern Bell Telephone Company ("SWBT"). However, the hardship that would be suffered by IP is apparent. If the Commission does not allow Mr. Siegel to present IP's argument, IP will not be able to fully participate in a matter that can have a significant impact on its operations. IP is the only participant in this case that **only** provides broadband services, including DSL. Other parties are unlikely to fully represent IP's interests in that the other parties' operations are different from that of IP.

8. Counsel for IP has contacted the other parties in this case, including CLECs, Staff, Public Counsel, and SWBT. Of the parties to this case, AT&T, Birch, NUVOX, and WorldCom have represented to undersigned counsel that they support IP's request. Staff has represented to counsel for IP that absent a strict prohibition, Staff will not oppose IP's request. Public Counsel has represented to undersigned counsel that Public Counsel will not oppose. All other parties to this case, save SWBT, have represented that they will not oppose IP's request.

9. As SWBT will not suffer the prejudice envisioned by the rule, SWBT's reluctance in this matter is without merit and should be treated as such. IP does not make the above request lightly and does so only based on unique circumstances.

WHEREFORE, IP Communications of the Southwest respectfully requests that the Commission grant IP's Request for Limited Substitution of Counsel and permit Mr. Siegel to present IP's oral argument at the April 30, 2002 Oral Argument scheduled by the Commission in this case.

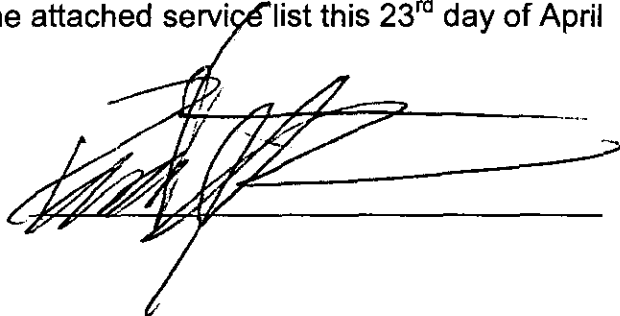
Respectfully submitted,



David J. Stueven MO Bar No. 51274
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**Attorney for IP Communications
of the Southwest**

Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 23rd day of April 2002.



**Service List for
Case No. TO-2001-439**

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Appendix A

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment to Rule 3.7

Rule 3.7 Code Comparison

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JACKSON COUNTY LOCAL RULES | FEDERAL EVIDENCE | FEDERAL CIVIL PROCEDURE | FEDERAL
CRIMINAL PROCEDURE |

Appendix B

Comment to Rule 3.7

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on the evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the also.

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