

Paul G. Lane
General Counsel-
Missouri

Southwestern Bell Telephone
One Bell Center, Room 3520
St. Louis, Missouri 63101
Phone 314 235-4300
Fax 314 247-0014



January 19, 2000

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

FILED²

JAN 19 2000

Missouri Public
Service Commission

Re: Case No. TO-2000-322

Dear Judge Roberts:

Enclosed, for filing in the above-captioned case, are an original and fourteen copies of Response of Southwestern Bell Telephone Company to Covad Communication Company's Second Amended Notice of Deposition.

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

Very truly yours,

Paul G. Lane /TM

Paul G. Lane

Enclosures

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

JAN 19 2000

Missouri Public
Service Commission

In the Matter of the Petition of DIECA)
Communications, Inc. d/b/a Covad)
Communications Company for Arbitration)
of Interconnection Rates, Terms, Conditions)
and Related Arrangements with Southwestern)
Bell Telephone Company.)

Case No. TO-2000-322

**RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY
TO COVAD COMMUNICATION COMPANY'S
SECOND AMENDED NOTICE OF DEPOSITIONS**

Comes now Southwestern Bell Telephone Company (Southwestern Bell) and for its Response to DIECA Communications Inc, d/b/a Covad Communications Company's (Covad) Second Amended Notice of Deposition states as follows:

1. As set forth herein, the Commission's Arbitration Procedures do not contemplate discovery except as the Commission may permit on a case-by-case basis. Given the limited timeframes for resolution of arbitrations under the Telecommunications Act of 1996, and the concern that SWBT's ability to prepare and present its case would be compromised if it was forced to comply with extensive and time consuming discovery, SWBT supports the Arbitration Procedures. Nevertheless, SWBT has proposed to Covad the following resolution which should be adopted by this Commission.

2. SWBT will produce James Smallwood and John Lube for depositions in St. Louis on January 26, 2000.¹ Immediately upon the conclusion of those depositions,

¹ SWBT understands that Covad has agreed to the deposition of Mr. Lube and Mr. Smallwood in lieu of the corporate designee notices in its second amended notice of depositions. To the extent that Covad does not so agree, then SWBT objects to the deposition requests on the grounds that the designations are so overbroad that dozens of persons would be subject to the notice and so vague that SWBT could not reasonably determine the witnesses to be produced.

SWBT will take the depositions of Terry Murray and John Donovan, and/or any other expert witnesses for Covad, if such persons are present for the depositions of Mr. Smallwood and/or Mr. Lube. A copy of SWBT's Notice of Deposition is attached hereto as Exhibit 1. SWBT will produce its cost studies for Covad's use during the arbitration and Covad has been directed to produce the workpapers of Ms. Murray and Mr. Donovan.

3. SWBT believes it appropriate to set forth its position in this matter. SWBT consistently explained its position to Covad that the Commission's Arbitration Procedures issued on June 17, 1996 do not contemplate discovery except as specifically permitted by the Commission on a case-by-case basis. The Commission recognized that information would be exchanged between the parties in the context of the negotiations under the Telecommunications Act and as contained in the arbitration petition and response required by Section 252(b) of the Act. The Commission stated:

Whether additional discovery or intervention is allowed
will be determined on a case by case basis.

Arbitration Procedures, p. 2.

4. The Commission interpreted and applied its arbitration procedures in the arbitration between SWBT and AT&T, Case No. TO-97-40. The Commission noted that discovery would be permitted only on a case-by-case basis as specifically ordered by the Commission.

The Commission has considered whether to allow discovery between the parties in an arbitration proceeding. As stated in the Arbitration Procedures, the issue of discovery will be looked at on a case-by-case basis. In this case, the Commission generally agrees with SWB. There is not enough time to allow for extensive discovery when the timeframe for filing testimony and the hearing is so short.

Each party may present its case and the Commission will decide the appropriate result. If a party fails to support its case, then it accepts the risk of not prevailing. In addition, many of the costing issues must be considered in light of the decision of the Federal Communications Commission (FCC) in CC Docket 96-98. The Commission will therefore not authorize discovery during the arbitration process. The prefiled testimony should provide sufficient information for each party to understand the other party's position. The Commission will allow parties to file a pleading with the Commission after direct testimony is filed indicating what additional information the party believes it needs and the Commission will issue an order addressing those requests. Order Addressing Motion to Establish Procedural Schedule and Adopt Protective Order, Case No. TO-97-40 (August 9, 1996).

5. In this case, Covad did not seek a Commission order to obtain discovery as required under the Arbitration Procedures. It did not do so, even though SWBT consistently advised Covad that such a request was necessary, including during the December 22, 1999 prehearing in this case. Instead, Covad filed a Notice of Deposition and a Request for Deposition on January 11, 2000. Although Commission Rules provide for 10 days to respond to a pleading, SWBT responded to the January 11, 2000 Request for Deposition by Covad on January 14, 2000. That same date, and prior to receipt of SWBT's Response to the Request for Depositions, the Regulatory Law Judge issued a Notice Regarding Depositions, which stated that Commission action on Covad's Request for Depositions was not required. With respect, that conclusion is erroneous both under the Arbitration Procedures and the prior Commission decision interpreting and applying those Arbitration Procedures. These procedures and the prior order make clear that discovery is not permissible except as the Commission may authorize upon specific request on a case-by-case basis.

6. Covad also advised SWBT on January 14, 2000 that it intended to bring is expert witnesses to the deposition. In SWBT's view, this request is unprecedented, and a sharp departure from common practice under the Missouri Rules of Civil Procedure. It is apparently Covad's view that it was SWBT's obligation to obtain a protective order to preclude the attendance of its expert witnesses. Whether Covad is correct in this claim or not, it is clear that Covad did not disclose its intention to bring expert witnesses to the depositions in sufficient time for SWBT to obtain such a protective order, as the Commission was closed on January 17, 2000 and the depositions were noticed for the morning of January 18, 2000. Covad presumably will seek to include its witnesses in the deposition it has requested on January 26, 2000. SWBT will not object to the attendance of Ms. Murray or Mr. Donovan provided that such persons are made available for depositions immediately after the conclusion of the deposition of the SWBT witnesses.

7. In addition to the more than 9,000 pages of documents which SWBT has provided to Covad in response to discovery requests, Covad will now be permitted to take depositions on the eve of the filing of rebuttal testimony. While this will severely impact SWBT's ability to prepare its case under the short timeframes permitted under the Act and the Commission's procedural schedule, SWBT is attempting to avoid a protracted proceeding which would preclude the Commission's ability to resolve this arbitration within the timeframe set by the Act. Nevertheless, SWBT believes it appropriate for the Commission to reaffirm that discovery is not permitted except as may specifically be allowed on a case-by-case basis.

WHEREFORE, for all the foregoing reasons, SWBT respectfully requests that the Commission enter an order requiring discovery to be conducted as outlined herein, and

for such other relief as the Commission deems just and proper.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Paul G. Lane /tm

PAUL G. LANE #27011

LEO J. BUB #34326

ANTHONY K. CONROY #35199

MIMI B. MACDONALD #37606

Attorneys for Southwestern Bell Telephone Company

One Bell Center, Room 3520

St. Louis, Missouri 63101

(314) 235-4300 (Telephone)

(314) 247-0014 (Facsimile)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by Airborne Express on January 19, 2000.

Paul G. Lane /tm
Paul G. Lane

Paul G. Lane
General Counsel-
Missouri

Southwestern Bell Telephone
One Bell Center, Room 3520
St. Louis, Missouri 63101
Phone 314 235-4300
Fax 314 247-0014



January 19, 2000

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-2000-322

Dear Judge Roberts:

Enclosed, for filing in the above-captioned case, are an original and fourteen copies of Southwestern Bell Telephone Company's Notice of Deposition.

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 stylized "Hm" or similar mark.

Paul G. Lane

Enclosures

cc: Attorneys of Record

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

In the Matter of the Petition of DIECA)	
Communications, Inc. d/b/a Covad)	
Communications Company for Arbitration)	
of Interconnection Rates, Terms, Conditions)	Case No. TO-2000-322
and Related Arrangements with Southwestern)	
Bell Telephone Company.)	

**NOTICE OF DEPOSITION TO DIECA COMMUNICATIONS, INC.,
D/B/A COVAD COMMUNICATIONS COMPANY**

Pursuant to Rule 4 CSR 240-2.090(1) of the Missouri Public Service Commission's Practice and Procedures and Rule 56.01 and 57.03 of the Missouri Rules of Civil Procedure, Southwestern Bell Telephone Company (SWBT) hereby requests that DIECA Communications, Inc., d/b/a Covad Communications Company (Covad) produce the following persons for depositions to testify on January 26, 2000:

- (1) Terry L. Murray
- (2) John C. Donovan
- (3) Any other expert who attends the deposition of John Lube and/or James Smallwood on behalf of Covad.

The depositions shall take place at the offices of SWBT, One Bell Center, St. Louis, Missouri. The depositions of the designated witnesses will take place immediately following the depositions requested by Covad on that same date and will continue from day-to-day until completed. The witnesses are directed to bring with them all workpapers utilized or prepared in connection with their prefiled testimony in this proceeding, including the support for all of the tables in John C. Donovan's Direct Testimony. The

depositions will be before a stenographic reporter or other person duly authorized to administer oath.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Paul G. Lane /tm

PAUL G. LANE #27011

LEO J. BUB #34326

ANTHONY K. CONROY #35199

MIMI B. MACDONALD #37606

Attorneys for Southwestern Bell Telephone Company

One Bell Center, Room 3520

St. Louis, Missouri 63101

(314) 235-4300 (Telephone)

(314) 247-0014 (Facsimile)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by Airborne Express on January 19, 2000.

Paul G. Lane /tm
Paul G. Lane

WILLIAM HAAS
MISSOURI PUBLIC SERVICE COMMISSION
301 WEST HIGH STREET, SUITE 530
JEFFERSON CITY, MO 65102

LISA C. CREIGHTON
MARK P. JOHNSON
SONNENSCHNEIN, NATH & ROSENTHAL
4520 MAIN STREET, SUITE 1100
KANSAS CITY, MO 64111