

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 2nd  
day of May, 2002.

In the Matter of the Determining of Prices,  
Terms and Conditions of Conditioning for  
xDSL-capable Loops

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**Case No. TO-2001-439**

**ORDER DENYING MOTION FOR LIMITED SUBSTITUTION OF  
COUNSEL**

Syllabus: The Commission denies a request by IP Communications of the Southwest to allow a lawyer who has appeared in this case as a witness to act as an advocate.

In an order issued on April 19, 2002, the Commission scheduled an oral argument to address all the pleadings that have been filed since the Report and Order was issued. On April 24, IP Communications of the Southwest filed a pleading entitled Request for Limited Substitution of Counsel. IP stated that David Steuven, its "Director, Regulatory – MO, OK, KS" who generally serves as its legal counsel in proceedings before the Commission, is unavailable on the scheduled date. The Commission rescheduled the oral argument, in part to address this concern, but IP filed a second pleading<sup>1</sup> in which it stated

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<sup>1</sup> This second pleading was filed on April 24, 2002, and is discussed in more detail below.

that Mr. Steuven is unavailable on the rescheduled date as well, and will be unavailable for some time.

Because Mr. Steuven will be unavailable, IP asked that Howard Seigel, IP's witness in this case, be allowed to present IP's legal argument. IP stated that Mr. Seigel is an attorney licensed in Texas. IP stated that the rule prohibiting a lawyer from acting both as a witness and as an advocate<sup>2</sup> is not absolute, and asserted that a lawyer may appear if his disqualification would work substantial hardship on the client. IP stated that if Mr. Seigel were not allowed to appear at the oral argument, IP would be prevented from presenting oral argument and would have to rely on other parties to argue the issues in which IP is interested. IP stated that no other party is likely to fully represent IP's interests. IP stated that it has contacted all the other parties, and only one party opposes its request.

That one party is Southwestern Bell Telephone Company, which filed a pleading opposing IP's request on April 24. Bell stated that the Commission issued an order on June 22, 2001, allowing Mr. Seigel to appear pursuant to 4 CSR 240-2.040(3)(C), but that he later withdrew as counsel, stating: "Due to unforeseen circumstances, Mr. Siegel ... will be testifying in this case, and as such cannot function as counsel of record." Bell stated that IP's request does not meet any of the exceptions to the rule prohibiting a lawyer from acting as both a witness and an advocate in the same case. Bell pointed out that IP has made no showing of hardship. Bell also argued that allowing Mr. Siegel to serve as counsel would give him access to Highly Confidential information he would otherwise be prohibited from viewing.

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<sup>2</sup>Missouri Supreme Court Rule 4-3.7

On April 29, 2002, IP filed a pleading in which it responded to Bell's April 24 pleading. IP again asserted that it fits into the "hardship" exception to Rule 4-3.7. IP also asserted that Bell's raising the issue of Highly Confidential material is disingenuous, because IP and Bell have a "side agreement" that allows Mr. Siegel access to Highly Confidential information, apparently in derogation of the terms of the Commission-issued protective order.

On May 1, 2002, Bell filed a response to IP's April 29 pleading. Bell reiterated its position that Mr. Siegel is prohibited from appearing as a lawyer in this case by Supreme Court Rule 4-3.7, and that allowing him to appear would improperly give him access to Highly Confidential information. Bell denied IP's assertion that there is a side agreement about Highly Confidential information. Bell stated that an agreement was proposed but never executed.

The Commission determines that IP does not meet any of the limited exceptions to Supreme Court Rule 4-3.7. There are only three: if the testimony given by the lawyer/advocate is uncontested, if the testimony is about the value of legal services, or if the client will suffer hardship. Clearly, neither of the first two applies here. The comment to the rule explains that the third exception, hardship to the client, is examined before the lawyer has testified. It refers to the probable tenor of the lawyer's testimony and the probability that the testimony will conflict with that of other witnesses, and discusses the relevance of whether a party could foresee that the lawyer would be a witness. Reading the rule together with the comment, it is clear that the rule does not make an exception to the general prohibition for a situation where the lawyer has already been a witness on a contested issue and then wants to step in as an advocate.

Even if there were such an exception, the party seeking to use the same lawyer as a witness and an advocate would have to show hardship to the client if the lawyer was prevented from serving both roles. Simply because Mr. Steuven is unavailable, does not mean that a hardship will be worked on the client if Mr. Siegel is not allowed to act as an advocate. Mr. Steuven and Mr. Siegel are not the only two attorneys in the world that could present IP's oral argument. Furthermore, it appears that Mr. Siegel is not licensed to practice law in Missouri, so that even if the Commission were to grant the request, IP would still have to hire Missouri counsel to "simultaneously enter an appearance as an attorney of record."<sup>3</sup> The Commission will deny IP's request.

**IT IS THEREFORE ORDERED:**

1. That the Request for Limited Substitution of Counsel filed on April 24, 2002, by IP Communications of the Southwest is denied.
2. That this order shall become effective on May 8, 2002.

**BY THE COMMISSION**



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

( S E A L )

Simmons, Ch., Murray, Gaw and Forbis, CC., concur  
Lumpe, C., absent

Mills, Deputy Chief Regulatory Law Judge

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<sup>3</sup> 4 CSR 240-2.040(3)(C)1