

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service
Commission held at its office in
Jefferson City on the 17th day of
September, 2002.

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Initiate Residential Customer Winback Promotion)))	<u>Case No. TT-2002-472</u> Tariff No. 200200831
In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Extend Business Customer Winback Promotions)))	<u>Case No. TT-2002-473</u> Tariff No. 200200828

ORDER REGARDING MOTIONS TO STRIKE TESTIMONY

On August 29, 2002, Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company, filed a motion asking the Commission to strike certain testimony prefiled by other parties. On September 4, MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc., filed a response to Southwestern Bell's motion to strike. Southwestern Bell replied to that response on September 10. On September 4, 2002, MCImetro Access, Brooks Fiber, and MCI WorldCom, filed a motion asking the Commission to strike certain testimony prefiled by Southwestern Bell. Southwestern Bell filed a response to that motion on September 10. The Commission will address both motions to strike.

Southwestern Bell's Motion to Strike

The motion to strike filed by Southwestern Bell objects to several items of prefiled testimony, for different reasons. In paragraph 5 of its motion, Southwestern Bell asks the Commission to strike five specified portions of the rebuttal testimony of Don Price, filed by MCImetro Access, Brooks Fiber, and MCI WorldCom. Subsections A, C, D, and E of that paragraph object to portions of testimony regarding allegations that Southwestern Bell has misused its access to Customer Proprietary Network Information, or CPNI, to target retention and winback efforts at customers who are planning to move from Southwestern Bell to a competitor.

In an order issued on August 22, 2002, the Commission held that an issue regarding Southwestern Bell's alleged misuse of CPNI – an issue proposed by MCImetro Access, Brooks Fiber, MCI WorldCom, and AT&T – was beyond the scope of this case, which was established to consider whether to approve two particular tariffs offered by Southwestern Bell. Because the specifics of Southwestern Bell's use of CPNI are not an issue in this case, the testimony challenged by Southwestern Bell is not relevant, and will be struck.

The other section of Price's rebuttal testimony that Southwestern Bell challenges – in paragraph 5B of its motion – is a ten-page section dealing with Price's analysis of Southwestern Bell's market power. The question of Southwestern Bell's market power and the possible effect that Southwestern Bell's winback tariffs might have on the market are relevant to the question of whether those tariffs should be approved. The challenged

section of Price's rebuttal testimony explains the possible effect of those tariffs and is relevant. Southwestern Bell's motion to strike that testimony will be denied.

Southwestern Bell also asks the Commission to strike all of Price's surrebuttal testimony because it does not comply with Commission rule 4 CSR 240-2.130(7). That rule provides that "surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony." Southwestern Bell argues that the testimony should be struck because it only explains why the rebuttal testimony of other – non-Southwestern Bell – witnesses is in substantial agreement with the positions advocated by Price in his rebuttal testimony. According to Southwestern Bell, that testimony is improper surrebuttal because it does not take issue with any rebuttal testimony and is instead an effort to restate and embellish Price's rebuttal testimony.

The Commission's rule simply requires that surrebuttal testimony be responsive to rebuttal testimony. The rule does not require that surrebuttal testimony dispute some aspect of rebuttal testimony. Price's surrebuttal testimony clearly does respond to the rebuttal testimony offered by other witnesses. The fact that Price's response expresses agreement with that testimony does not make his surrebuttal testimony improper. Southwestern Bell's motion to strike the surrebuttal testimony of Don Price will be denied.

Southwestern Bell also asks the Commission to strike portions of the rebuttal testimony of R. Matthew Kohly, filed by AT&T Communications of the Southwest, Inc. Southwestern Bell objects to a section of Kohly's testimony in which he discusses the "totality of SWBT's retention and winback efforts," including advertising and customer letters. Southwestern Bell argues that this testimony is "clearly outside the scope of the

issues identified by the Commission.” The Commission disagrees. The challenged section of Kohly’s testimony appears to be an attempt to explain the larger picture of the state of competition in the local telecommunications market. It is relevant to the question of how Southwestern Bell’s proposed tariffs might affect that market and whether those tariffs should be approved. Southwestern Bell’s motion to strike the entire section of Kohly’s testimony will be denied.

Southwestern Bell also challenges a portion of this section of Kohly’s testimony on a different ground. Southwestern Bell asks the Commission to strike, as hearsay, eight lines of Kohly’s testimony that repeat a statement made by an unnamed AT&T employee about statements made by an SBC technician while installing DSL service in her home. The challenged testimony clearly is hearsay and will be struck.

MCImetro Access, Brooks Fiber, and MCI WorldCom’s Motion to Strike

MCImetro Access, Brooks Fiber, and MCI WorldCom ask the Commission to strike the surrebuttal testimony of Dr. Debra J. Aron, filed by Southwestern Bell. According to MCImetro Access, Brooks Fiber, and MCI WorldCom, Dr. Aron’s surrebuttal testimony should have been offered as direct testimony and is therefore improper surrebuttal. MCImetro Access, Brooks Fiber, and MCI WorldCom point out that Dr. Aron has offered similar testimony as direct testimony in another tariff case and that the offering of her testimony as surrebuttal in this case deprives the other parties of an opportunity to file responsive testimony.

An examination of Dr. Aron’s testimony reveals that it is responsive to rebuttal testimony, and offers an alternative explanation of the economics of competition to refute

that testimony. The testimony is proper surrebuttal. The motion to strike filed by MCImetro Access, Brooks Fiber, and MCI WorldCom will be denied.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company's Motion to Strike is granted in part. The following testimony is struck:

A. Rebuttal Testimony of Don Price

The sentence beginning on page 2, line 22, with "I will discuss . . .," continuing through the end of the sentence on page 3, line 3.

The sentence beginning on page 14, line 1, with "First . . .," and ending on page 14, line 3.

Page 14, line 9, continuing through page 17, line 15.

The phrase beginning at page 26, line 23, with the phrase "and should initiate . . .," continuing through the end of the sentence on page 27, line 3.

B. Rebuttal Testimony of R. Matthew Kohly

The sentences on page 20, beginning on line 1, with "Even at the install level . . .," continuing through line 8.

2. That in all other respects, Southwestern Bell Telephone Company's Motion to Strike is denied.

3. That the Motion to Strike filed by MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc., is denied.

4. That this order shall become effective on September 24, 2002.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

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

Woodruff, Senior Regulatory Law Judge