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Southwestern Bell

September 22, 1998

FILED
SEP 22 1998
Missouri Public
Service Commission

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

Re: Case No. TO-98-115

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case are an original and fourteen (14) copies of Southwestern Bell Telephone Company's Response to AT&T's Reply to Motion to Strike.

Also enclosed is an additional copy to be file stamped and returned to us in the enclosed self-addressed, stamped envelope.

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

Sincerely,

Katherine C. Swaller /TM

Enclosures

cc: Parties of Record

51.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
SEP 2 2 1998
Missouri Public Service Commission

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

SOUTHWESTERN BELL TELEPHONE COMPANY'S
RESPONSE TO AT&T'S REPLY TO MOTION TO STRIKE

COMES NOW, Southwestern Bell Telephone Company (Southwestern Bell) and for its Response to the Reply of AT&T's Motion to Strike states as follows:

1. AT&T's Response suffers from the same problems as its testimony: its goes far beyond the scope of the docket and attempts to introduce irrelevant and prejudicial half-truths into the record. Southwestern Bell will confine its response to the substance of its Motion to Strike.

2. The only issue before the Commission at this juncture is Southwestern Bell's Motion to Strike portions of the testimonies of Mr. Rhinehart as being beyond the scope of the proceedings and Mr. Flappan as being irrelevant and without a proper foundation. The issues to be addressed regarding Southwestern Bell's Motion are straightforward evidentiary issues and not the merits of the case at this point. Although AT&T argues the merits of the case SWBT will address the merits in its brief if its Motion to Strike is denied.

3. AT&T seeks to defend its misuse of information from other jurisdictions by offering additional misleading statements of the status of 271 proceedings in Texas.

These are the very type of statements which led the Texas Commission to reprimand AT&T and others for misrepresenting and misusing its statements in an open meeting held a few months ago. Chairman Wood stated at the July 22, 1998 Open Meeting of the Texas Public Utility Commission:

> I've been a little, I guess, dismayed at how our deliberations the three of us on – when was it – the end of May? – had been taken out of context outside of the State. I know there are a lot of activities going on with this utility and with a lot of these other parties in other forums that – I know there are a lot of activities that are going on in other forums that people look to what Texas says and does.
>
> And I think – I've said this in the electric dockets before. It is unfortunate when our, I think, very good faith compliance with the Open Meetings Act in Texas is taken as a bludgeoning instrument that misrepresents what I think we're all about; and to wit, I'm talking about some ads and representations that have been made about our reaction to Southwestern Bell's initial filing here and the result of the hearing...

At the same meeting, Commissioner Walsh added:

> ...But I think there is a lot to like about what Southwestern Bell has already done. And I believe and I think other people around the country believe that in terms of setting up procedures to handle customer – CLECs' order and also how far they are along on the OSS, they may be further along than anybody.
>
> And I absolutely have to commend Southwestern Bell after what a totally contentious hearing where everybody sort lined up against them to point out why not, that at the end of the day their president said, "Look , we know we are not there and we're prepared to do what is necessary." And I think they have done that.
>
> I think they have been absolutely quick and dedicated to put the experts on each of the issues that we've raised. And I personally am pleased with an attitude that Southwestern Bell has exhibited. And I want to see the rest of this process be much more collegial and collaborative than it has been before.

Southwestern Bell's Texas 271 case is not at issue in this case. The issues here involve setting permanent rates primarily for certain nonrecurring activities in the UNE ordering and provisioning process. Nevertheless, if there is any relevance to what Southwestern Bell is doing in other states it is that the Company is sticking to the business at hand: trying to open its local market to competition. AT&T refuses to provide competing local service in Missouri even though other CLECs, (including MFS, ACSI and Brooks each of which have agreed to pay higher contractual UNE prices than AT&T) have already begun to compete. Yet, AT&T accuses Southwestern Bell of dragging its feet. Southwestern Bell is already competing with other local providers, but AT&T apparently sees delay as more advantageous to its "local" business plan.

Pre-filed Testimony of Robert Flappan on OSS Issues

4. AT&T has attempted to defend Mr. Flappan's testimony on OSS issues by introducing new information about his qualifications [Response at pp.9-10], which not even the Commission or the Regulatory Law Judge can cross examine at this late date. AT&T reiterates Mr. Flappan's experience in testifying on cost issues in the various Southwestern Bell states, but the mere fact that he has testifies often on cost issues, does not qualify him as an expert on SWBT OSSs. An expert is one who has special knowledge about a subject and whose expertise can assist the trier of fact. See Section 490.065.1 RSMo 1994. Being an expert on one issue does not extend to other issues.

Mr. Flappan has failed to identify any relevant experience related to SWBT OSSs which would qualify him as an experts on those systems: that he submitted access orders to SWBT on behalf of AT&T more than ten (10) years ago does not qualify him as an

expert; and that he worked in an AT&T business office 14 years ago does not qualify him as an expert. The OSS issues in this case, related to SWBT's labor rates, is the amount of time involved to manually perform numerous tasks to provision unbundled network elements. Mr. Flappan's experiences have nothing to do with that issue, e.g., unlike SWBT's witnesses, Mr. Flappan did not design the OSS systems at issue nor has he conducted any of the activities involved in pre-ordering, ordering, etc.[1] Mr. Flappan has never been involved in the design of OSS, nor does he have recent business office experience or experience in billing systems. He has never programmed switches like Ms. McCrary Bazzle or Ms. Merri Lynn Owens. Nor has Mr. Flappan ever attended one of the OSS demonstrations attended by numerous AT&T personal.

AT&T criticizes SWBT for bringing more witnesses to the hearing than AT&T elected to bring. Southwestern Bell brought the real experts, the ones that perform the ordering and provisioning tasks day in and day out and the ones who measured the time necessary to perform those tasks. AT&T's criticism is unwarranted and an effort to obscure the real issue: Mr. Flappan's lack of qualifications to testify about SWBT's OSSs.

Schedules to Flappan's Testimony

5. Southwestern Bell also moved to strike certain schedules attached to Mr. Flappan's testimony on the grounds that: (a) a proper foundation had not and could not be laid by Mr. Flappan and (b) the information contained in the schedules had no

[1]AT&T complains that Southwestern Bell did not seek to strike his testimony in Kansas. This is a Missouri case and the testimony at issue is the pre-filed testimony of Mr. Flappan in Missouri. It is that testimony that should be stricken because Mr. Flappan is not qualified to give expert testimony.

relevancy to the issues in this case. AT&T's first instinct in its Response is to attack the affidavits of various Southwestern Bell witnesses even though AT&T never objected to those exhibits at the hearing and they have already been received into the record. Once again, AT&T appears to mistake the Motion to Strike Response with its brief and has made substantive arguments about the import of Southwestern Bell's testimony. Southwestern Bell will save its argument on those issues for the brief since that is where they properly belong.[2]

6. AT&T challenges Southwestern Bell's request to strike Flappan Schedule 2 which is an analysis of the requirements of Section 252(d) of the Act. The analysis is in the nature of arguments in a brief and may be appropriate in that context, but is inappropriate as a schedule to testimony, particularly where the witness is not qualified to analyze the requirements of the law. In its response to the Motion to Strike, AT&T attempts to supplement Schedule 2 by adding additional arguments about what the law requires. That is more properly an issue for the briefs and Southwestern Bell will respond to that argument at the proper time. But AT&T's response highlights the impropriety of a non-lawyer espousing his views of the law. Schedule 2 should be stricken.

7. Southwestern Bell moved to strike Schedules 4, 7, 9 and 12, which purport to be portions of testimony and materials of Southwestern Bell witnesses in other

[2]But it is worth noting that the standard by which the testimony of Southwestern Bell time estimate witnesses is to be judged is different than the standard by which Mr. Flappan, Ms. Smith and Mr. Rhinehart's testimony would be judged because Southwestern Bell's time estimate witnesses are fact witnesses, rather than expert witnesses. Any person with personal knowledge of an activity or event is qualified to describe that event. An expert witness must have special knowledge upon which to express an opinion.

jurisdictions concerning other cost studies because such materials are irrelevant and the proper foundation has not been shown. AT&T responded once again by arguing the merits of the issues they have interjected, but has failed to show that the materials are relevant or that a proper foundation was laid for their admission into the record.

First the testimony and Data Request answers of Southwestern Bell witnesses in Kansas, Texas and Oklahoma are not relevant to this Missouri case. This case is about Southwestern Bell's costs and proposed rates for certain nonrecurring charges in Missouri for which Southwestern Bell prepared Missouri-specific cost studies. If the Commission is interested in the entire record of the proceedings in Kansas, Oklahoma and Texas, Southwestern Bell could supply a copy of the entire record, but this Commission has always been interested in information directly related to Missouri. It would be improper to change the evidentiary standard at this point so that AT&T can pick and choose carefully selected and "mis-representative" bits and pieces from other jurisdictions and not allow Southwestern Bell to complete the record. It is as if AT&T is seeking to collaterally attack the decision of the Eighth Circuit that the individual states will set rates for intrastate offerings by seeking to impose the evidence and decisions of other jurisdictions upon this Commission. The Commission should reject that attempt and see it for what it is: AT&T spent all its time and energy in other states and did not get ready for this case and now seeks to use materials from those other jurisdictions here.

Even if the Schedules were relevant, a proper foundation must be laid for admission. The documents must be shown to be full and complete business records of SWBT. AT&T failed to conduct any discovery to establish the matter, but seeks to

introduce portions of materials taken out of context as allegedly supporting its position. The Commission's evidentiary rules exist for a reason--and at least one of the reasons is to prevent a party from attempting to slip material in the record which is inaccurate and prejudicial.

8. AT&T complains about access to Southwestern Bell's Missouri cost studies and implies that lack of access is the reason they chose to use materials from other states rather than develop Missouri-specific evidence. Southwestern Bell initiated a discussion with AT&T about access to Highly Confidential materials shortly after the procedural schedule was established and volunteered to allow AT&T's employees to review Southwestern Bell's information even though the Protective Order would have allowed only attorneys and outside consultants to review such materials (the arrangement was reciprocal so that Southwestern Bell witness Barbara Smith could review AT&T TOC studies). AT&T agreed to those arrangement, but never bothered to ask for or review Southwestern Bell's Missouri information. AT&T's entire case is based upon information from other jurisdictions, not because AT&T did not have access to Southwestern Bell cost studies, but because AT&T chose not to review those materials. That is no justification for using irrelevant documents from other jurisdictions in this case.

9. Even if the material attached to Mr. Flappan's testimony were relevant, Mr. Flappan cannot lay a proper foundation because the materials are not business records and he is not a records custodian. AT&T's abuse of the procedures in this case prevents Southwestern Bell from correcting the record by offering the rest of the

testimony of the witnesses AT&T sought to use or for those witnesses to explain the manner in which he has taken information out of context. Not being able to cross examine is inconsistent with due process, but the due process problem is compounded by allowing AT&T witnesses to attach materials to their testimony about which they are unqualified to speak and which has no bearing on this Missouri case and at a time when Southwestern Bell is not permitted to respond. [3]

AT&T argues that it is okay for an expert witness to rely upon material of witnesses from other jurisdictions–prior statements of a witness may be admissible for impeachment, if the witness contradicts those statements, but here where the witnesses did not contradict the statements and were given no opportunity to explain it is plain error to allow Mr. Flappan to put words in their mouths for the record in this case. Once again, if Mr. Flappan was qualified to address OSS issues or had reviewed the cost studies in this case he would not need to rely upon irrelevant information from other states.

10. At paragraph 11, AT&T pre-files its brief concerning OSS requirements for 271 by arguing about Southwestern Bell's Texas 271 proceeding. Southwestern Bell will respond to those allegations in its brief, but is compelled to set the record straight now to say that it will not be using inferior OSSs in Missouri, but that AT&T has badly and intentionally confused what the Texas Commission has said about Southwestern Bell's

[3]AT&T makes another reference to the fact that AT&T got away with their improper tactics in Kansas. That may be true. It does not mean that what they have done is right, but only that the procedures and evidentiary standards in Kansas may be different than in Missouri. Southwestern Bell relies upon the Missouri Commission's practice of holding witnesses closely to their own knowledge and areas of expertise.

OSSs–perhaps because their witness is unqualified on the subject. The Texas Commission Staff made an initial recommendation that just the ordering phase of the OSS be electronic (i.e., the "front office" portion of OSS as identified by SWBT witness Randy Vest), not that the entire ordering and provisioning (i.e., the "back office" function) of unbundled network elements be electronic–something Southwestern Bell is willing to do. However, as noted at the hearing, until there are OBF standards,[4] it is imprudent for Southwestern Bell to create ordering systems for new UNEs that will need to be scrapped when OBF standards are released.

11. AT&T attempts to defend the use of a USA Today article in Mr. Flappan's testimony by saying that he used the same material in other jurisdictions. So what! Newspaper articles have no place in the evidentiary record, unless they were authored by the sponsoring witness. AT&T claims Southwestern Bell is trying to skirt an important issue concerning OSSs. That is unfair and inaccurate. Southwestern Bell brought ten witnesses to the hearing to discuss the OSS issue while AT&T failed to bring even one qualified witness. What Southwestern Bell is trying to do is seek application of basic rules of procedure and evidence so that both parties have a fair opportunity to present their cases.

12. AT&T argues that 252(b)(4)(B) allows the state commission to "proceed on the basis of the best information available to it from whatever source derived" where "a party refuses or fails unreasonably to respond on a timely basis to any reasonable request

[4]The Ordering and Billing Forum (OBF) is an industry group in which both AT&T and SWBT participate which attempts to develop consensus industry standards for ordering and billing.

from the State commission." It is inconceivable that AT&T is attempting to boot strap its irrelevant and unsupported exhibits by implying that Southwestern Bell somehow failed to respond to request for information of this Commission. Southwestern Bell spent fifteen (15) weeks with the AAS Staff and the AAS has not complained that Southwestern Bell failed to provide any requested information. AT&T simply propounded no Data Requests and failed to avail itself of the opportunity to review Southwestern Bell's Missouri cost studies. AT&T's failure to review relevant materials and conduct any discovery does not justify AT&T's violation of the rules of evidence.

Testimony of Daniel Rhinehart

13. AT&T argues that the global cost issues tried in the second round of arbitration were within the scope of this hearing and that Southwestern Bell should have anticipated that and prepared testimony on the issue. The Commission's order setting up this most recent and perhaps last phase of the arbitration clearly provided that "the AAS should then submit to the Commission, SWBT, AT&T and OPC its report containing proposed permanent rates based on the same permanent rate costing approach adopted in Case No. TO-97-40 and commenting on the costing approaches proposed by the parties in the review process." December 23, 1997 Report and Order at p. 52. The Order further provides that "the scope of the evidentiary hearing...shall be limited as described in this order..." Id. at p. 53. Southwestern Bell, although not agreeing with many of the global modifications ordered in the second phase of the arbitration, noted that fact to Staff in its comments on the Report, and did not seek to retry those issues in compliance with the Commission's Order. AT&T ignored that Order and now argues that

Southwestern Bell should not be permitted to respond. If Southwestern Bell was simply wrong and the Commission wanted testimony on those previously resolved issues, the Commission should permit the record to be supplemented. A procedure where the parties have only one round of testimony and no opportunity to cross examine leads to these evidentiary issues and gross inequities if the rules of evidence are not reasonably enforced.

The problems with the procedure adopted by the Commission are crystallized here. If AT&T is permitted to retry issues previously resolved by the Commission, SWBT must be given the opportunity to respond. The Commission can hardly be confident that its decision will be just and reasonable when it precludes a party from responding to the claims of its opponent. While the hearing process may at times become drawn out, that process is the best means to arrive at a just and reasonable decision, and gives the parties the opportunity to make their case.

WHEREFORE, Southwestern Bell urges the Commission to grant the Motion to Strike and in the alternative to allow Southwestern Bell to supplement the record on the issues raised by AT&T beyond the scope of the proceedings.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the attached Service List by first-class postage prepaid, U.S. Mail on September 22, 1998.

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