BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF MISSOURI

In the Matter of Proposed Commission Rules 4 CSR 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070, and 36.080	)))	Case No. TX-2003-0487

SOUTHWESTERN BELL TELEPHONE, L.P.'S COMMENTS REGARDING PROPOSED COMMISSION RULES 4 CSR 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070, AND 36.080

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), and for its Comments Regarding Proposed Commission Rules 4 CSR 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070, and 36.080, states as follows:

1. SBC Missouri objects to proposed Rule 4 CSR 240-36.040(4), Appointment of Arbitrator. The Federal Telecommunications Act of 1996 ("the Act") does not give the Commission the authority to delegate its responsibilities to a third-party arbitrator. Rather, the Act requires the Commission to arbitrate open issues. Section 252(b)(1) provides: "During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." (Emphasis added). Nor does state law permit the Commission to require arbitrations to be conducted under the auspices of a Commission appointed arbitrator. Missouri statutes authorize the Commission to conduct arbitration proceedings only where all parties consent to arbitration. Specifically, Section 386.230, RSMo. 2000[1] provides:

> Whenever any public utility has a controversy with another public utility or person and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission shall act as such

[1] All statutory references are to the Missouri Revised Statutes, 2000, unless specifically noted otherwise.

> arbitrators, and after due notice to all parties interested shall proceed to hear such controversy, and their award shall be final. Parties may appear in person or by attorney before such arbitrators. (Emphasis added).

Arbitrations under the Act are not consensual, and parties to arbitrations under the Act do not agree in waiting to submit the controversy to the Commission, much less to arbitrators that the Commission may appoint. Accordingly, the proposed Rule authorizing the Commission to appoint arbitrators to hear proceedings under the Act cannot be squared either with federal or state law.

2. SBC Missouri objects to proposed Rule 4 CSR 240-36.040(5)(A), Style of Arbitration. Specifically, Rule 4 CSR 240-36.040(5)(A) gives the arbitrator the sole discretion to adopt entire package final offer arbitration or issue-by-issue final offer arbitration. However, Rule 4 CSR 240-36.040(5)(A) fails to set forth any standards for the arbitrator by which he/she is to exercise his/her discretion. Further, although Rule 4 CSR 240-36.040(5)(A) gives the arbitrator the sole discretion to adopt entire package final offer arbitration or issue-by-issue final offer arbitration, this Rule fails to define a deadline by which the arbitrator is to advise the parties regarding which type of arbitration is being proposed.

Further, use of entire package final offer arbitration could lead to inappropriate results. For example, an arbitrator may prefer party A's approach on 29 out of 30 issues. However, under entire package final offer arbitration, the arbitrator would be unable to accept party A's entire package because of the arbitrator's belief that party A's proposal on one issue is unlawful under the Act. The Commission should eliminate the prospect of entire package final offer arbitration.

SBC Missouri further notes that entire package final offer arbitration appears to be inconsistent with the requirements of proposed Rule 4 CSR 240-36.040(19) which requires the

arbitrator to "issue a decision on the merits of the parties' positions on each issue raised by the petition for arbitration and response(s)" and provides "[u]nless the result would be clearly unreasonable or contrary to the public interest for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue." (Emphasis added).

3. SBC Missouri objects to proposed Rule 4 CSR 240-36.040(10), Arbitration Conferences and Hearings.

a. Specifically, proposed Rule 4 CSR 240-36.040(10) provides: "At the mark up conferences, the arbitrator shall hear the concerns of the parties, determine whether the parties can further resolve their differences, and identify factual issues that may require limited evidentiary hearings." (Emphasis added). This sentence implies that it is the arbitrator who decides what factual issues may require limited evidentiary hearings. However, proposed Rule 4 CSR 240-36.040(10) also provides: "The parties shall be given the opportunity to present witnesses at an on-the-record evidentiary hearing, and to cross-examine the witnesses of the other party(ies) to the arbitration." This sentence appears to give the parties the absolute right to insist upon an on-the-record evidentiary hearing with the right to cross-examine the witnesses of the other party(ies) to the arbitration. It is mandatory that the parties be given the opportunity to present evidence and to cross-examine the witnesses in an on-the-the-record evidentiary hearing in order to satisfy the procedural due process requirements of both the 5th and 14th Amendments of the United States Constitution, Article I, Section 10 of the Missouri Constitution, Sections 386.420(1), 435.370(2), 491.070, and 536.070(2) RSMo., as well as other applicable federal and/or Missouri statutes. The Commission should, therefore, clarify that the arbitrator has no authority to preclude these rights.

b. Rule 4 CSR 240-36.040(10) provides: "These conferences and hearings shall commence no later than ten (10) days after all responses to the petition for arbitration are filed with the commission." The obligation to begin conferences and hearings no later than ten (10) days after all responses to the petition for arbitration are filed should be modified to provide the arbitrator with the discretion to vary the timeline as appropriate. There are a number of reasons why additional time might be granted in a particular case. For example, additional time might be required because the parties are actively engaged in further negotiations, the parties are engaged in hearings in other states, or the limited number of issues in a particular arbitration permits additional time. While the Commission may wish to adopt a general rule concerning the initiation of hearings, it is appropriate to provide the Arbitrator with the authority to vary the time when circumstances support a revision.

4. SBC Missouri objects to 4 CSR 240-36.040(12), Arbitrator's Reliance on Experts. This proposed Rule should be eliminated in its entirety. This proposed Rule apparently contemplates that the advisory staff will provide information to the arbitrator that is not shared with the parties to the arbitration. This is wholly improper and would result in a potential denial of due process under the 5th and 14th Amendments of the United States Constitution, Article I, Section 10 of the Missouri Constitution, Sections 386.420(1), 435.370(2), 491.070, and 536.070(2) RSMo., as well as other applicable federal and/or Missouri statutes. The Commission should not adopt a Rule which is clearly unlawful.

5. SBC Missouri objects to 4 CSR 240-36.040(16), Participation in the Arbitration Conferences and Hearings. SBC Missouri objects to the appointment of an advisory staff because it would potentially result in the denial of due process under the 5th and 14th

Amendments of the United States Constitution, Article I, Section 10 of the Missouri Constitution, Sections 386.420(1), 435.370(2), 491.070, and 536.070(2) RSMo., as well as other applicable federal and/or Missouri statutes. Thus, the reference to the advisory staff in this Rule should be deleted.

6. SBC Missouri objects to 4 CSR 240-36.040(17), Arbitration Open to the Public. This proposed Rule should be modified to permit the arbitrator to close a portion of an arbitration hearing from the public where confidential or proprietary information is to be disclosed and such closure should be permitted without obtaining a written request from a party supporting the party's request for a closed session or consulting with the commission. Parties have an absolute right to protect highly confidential or proprietary information which may not be abrogated by the Commission through the adoption of rules. Moreover, this proposed Rule does not appear to be practical as it would require the hearing to be held in abeyance in order for the arbitrator to consult with the Commission on any request that an arbitration session be closed. Given that the hearings are to be concluded within ten (10) days of their initiation under proposed Rule 4 CSR 240-36.040(13), the proposal to require consultation with the Commission before going into closed session is inappropriate. Further, there is no need for this type of provision as the Commission's standard Protective Order already provides a procedure for handling highly confidential or proprietary material during the course of a hearing. During the past eight years, this process has been successfully used by the Commission in arbitrations under the Act.

7. SBC Missouri objects to 4 CSR 240-36.040(24), Final Arbitrator's Report. Specifically, this proposed Rule should be modified to require the Commission to conduct oral arguments and evidentiary hearings on any objection to the Final Arbitrator's Report. The parties' rights to due process under the 5th and 14th Amendments of the United States

Constitution, Article I, Section 10 of the Missouri Constitution, Sections 386.420(1), 435.370(2), 491.070, and 536.070(2) RSMo., as well as other applicable federal and/or Missouri statutes, cannot be abrogated by the Commission's refusal to comply with the duties imposed upon it by the Act and by Missouri law. Even if the Commission had the authority to refuse to conduct oral arguments and evidentiary hearings, it should not do so. Eight years of experience under the Act has shown that the number of arbitrations are not so great as to impose an undue imposition on the Commission's ability to handle both arbitrations and its other requirements. And if the number of arbitrations increases in the future, the Commission may at that time decline to exercise its role under the Act and allow the arbitration to be conducted at the FCC, see 47 U.S.C. Section 252(e)(5).

8. SBC Missouri objects to 4 CSR 240-36.060(1), Content of Commission Approval of Agreements Reached by Mediation or Negotiation. Specifically, proposed Rule 4 CSR 240-36.060(1) provides: "The request shall include a copy of the agreement and a statement of facts sufficient to show that the agreement meets the following: the standards contained in section 252(e) of the Act; requirements of Missouri state law; and the commission's intrastate telecommunications service quality standards or requirements." (Emphasis added). Interconnection agreements are entered into pursuant to Sections 251 and 252 of the Act and that is the applicable law which governs the interconnection agreement, not the requirements of Missouri state law. The Commission may not refuse to approve interconnection agreements reached by mediation or negotiation because of alleged inconsistency with state law if such agreements are consistent with the Act. Rather, the Commission is constrained by the Act for approval of such agreements. Section 252(e)(2) specifically provides the state commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

(i) the agreement (or portions thereof) discriminate against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, or necessity; or

(B) an agreement (or portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

Thus, the reference to "the requirements of Missouri state law" should be deleted in its entirety.

9. SBC Missouri objects to 4 CSR 240-36.060(2), Public Comments. Specifically, proposed Rule 4 CSR 240-36.060(2) provides: "Such protest shall be limited to the standards for rejection provided in section 252(e) of the Act, including other state law requirements and compliance with intrastate telecommunications service quality standards or requirements established by the commission." (Emphasis added). Again, interconnection agreements are entered into pursuant to Sections 251 and 252 of the Act and that is the applicable law which governs the interconnection agreement, not the requirements of Missouri state law. The Commission may not refuse to approve interconnection agreements because of alleged inconsistency with state law if such agreements are consistent with the Act. Rather, the Commission is constrained by the Act for approval of such agreements. See Section 252(e) discussed in paragraph 8 above. For these reasons, the reference to "including other state law requirements" should be deleted in its entirety.

10. SBC Missouri objects to proposed Rule 4 CSR 240-36.070, Commission Notice of Adoption of Previously Approved Agreement. This entire proposed Rule should be eliminated. The Commission's proposal to implement Section 252(i) by allowing the requesting carrier sole discretion to determine whether and how a prior agreement is to be made available is

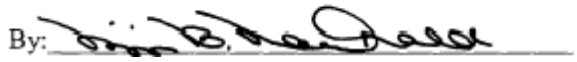
wholly inappropriate and inconsistent with the requirements of the Act. Section 252(i) provides that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (Emphasis added). Thus, under the express terms of the Act, a local exchange carrier must make any interconnection, service, or network elements provided under an agreement approved under that section available to any other telecommunications carrier that requests it, upon the same terms and conditions as are contained in the agreement.

Further, the notice requirements are wholly inappropriate as they do not permit the incumbent local exchange carrier the opportunity to require that a particular person be notified when any request for adoption is to be submitted. As a practical matter, the ILEC may not be able to object within the timeframe provided if it is not permitted to direct the person to whom such notice is to be provided. If, for example, the notice is addressed to "Southwestern Bell Telephone, L.P." and sent to a central office location in Missouri or another state, it is unlikely that the notice will be forwarded to the appropriate group for analysis and possible objection. The incumbent local exchange carrier must be given the opportunity to designate the person(s) to whom notice is sent, and the form of the notice (via mail and/or electronic). Otherwise, the "notice" requirement would be illusory and the process would likely result in a deprivation of property without procedural or substantive due process in violation of both the federal and state constitutions and statutes.

Wherefore, SBC Missouri prays the Commission consider its comments and eliminate or modify the proposed rules as outlined above, together with any further and/or additional relief the Commission deems just and proper.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI

By: 

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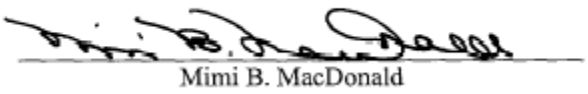
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on March 5th, 2004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