

1 BEFORE THE PUBLIC SERVICE COMMISSION
2 OF THE STATE OF MISSOURI
3
4 TRANSCRIPT OF PROCEEDINGS
5 Public Hearing
6 March 12, 2004
7 Jefferson City, Missouri
8 Volume 1
9
10 In the Matter of Proposed Commission)
11 Rules 4 CSR 240-36.010, 36.020,)
12 36.030, 36.040, 36.050, 36.060) Case No.
13 36.070 and 36.080) TX-2003-0487
14
15 NANCY DIPPELL, Presiding,
16 Senior Regulatory Law Judge
17
18 REPORTED BY:
19 Jennifer L. Leibach
20 ASSOCIATED COURT REPORTERS
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1 PROCEEDINGS

2 JUDGE DIPPELL: Let's go ahead and get
3 started. We can go on the record. This is Case No.
4 TX-2003-0487 in the matter of Proposed Commission Rules 4 CSR
5 240-36.010, 36.020, 36.030, 36.040, 36.050, 36.060, 36.070,
6 and 36.080. My name is Nancy Dippell and I'm the Regulatory
7 Law Judge assigned to this matter, and we've come here today
8 to have public comment hearing on these proposed rules, which
9 were published in the Missouri Register.

10 Typically our procedure has been in these, I
11 see a lot of lawyers that represent various people who filed
12 comments in this matter, and typically our procedure has been
13 that we treat everyone as a witness and we swear you in and
14 you can give comments, so I know you're used to not being the
15 witness, you're used to being the lawyer, but in these cases,
16 we treat you like a witness, so I'll just mention that before
17 we get started.

18 Also, typically, start with pro comments and
19 then take comments opposing. I know a lot of the comments
20 that were pre-filed were kind of mixed, so I will just ask if
21 there's anyone present that has only comments in favor of the
22 rule. All right then, in that case, we will -- we'll just
23 bring people up as they want to speak, and I guess I will
24 begin by asking, then, if there -- if Staff would like to
25 begin and present any additional comments.

1 MR. WILLIAMS: I guess I will, just briefly.

2 JUDGE DIPPELL: All right. I'll ask you to go
3 ahead and come up to the witness stand, Mr. Williams. Please
4 raise your right hand.

5 (THE WITNESS WAS SWORN.)

6 JUDGE DIPPELL: Thank you.

7 MR. WILLIAMS: My name is Nathan Williams, and
8 basically, the comment I would like to make is in response to
9 comments that were submitted by some of the commenters, in
10 particular, SBC.

11 JUDGE DIPPELL: Would you like to go ahead and
12 state how you're employed and address and so forth?

13 MR. WILLIAMS: I'm employed by the Public
14 Service Commission, and my address is PO Box 360, Jefferson
15 City, Missouri, 65102, and what I'd like to point out to the
16 Commission is that Section -- 47 USC, Section 252(e)(3)
17 explicitly states that the Commission has authority in
18 interconnection agreements to implement state law
19 requirements in addition to those by federal law. We're not
20 advocating that there would not be federal preemption, but in
21 particular, the federal statute explicitly refers to
22 intrastate telecommunication or quality standards or
23 requirements and just wanted to make sure the Commission was
24 aware of that.

25 JUDGE DIPPELL: All right. Is that all of

1 your comments?

2 MR. WILLIAMS: Yes.

3 JUDGE DIPPELL: I have just a couple questions
4 for you, Mr. Williams, just to clarify some things that were
5 filed in Staff's comments. When you were discussing under
6 36.030(1).

7 MR. WILLIAMS: If you give me a moment to
8 retrieve my copy.

9 JUDGE DIPPELL: All right.

10 MR. WILLIAMS: Okay.

11 JUDGE DIPPELL: Okay. And this may be clearer
12 if it's put in context, but just in the -- in the comments, I
13 just wanted to request for clarification. You list out
14 Subsection 1 there who request mediation, and it says a party
15 engaged in the negotiation for interconnection services,
16 rates, or unbundling network elements, et cetera, what
17 services -- what kind of services does that refer to? Is
18 services defined somewhere else in the rule?

19 MR. WILLIAMS: I think that question would be
20 better directed towards in Ms. Natelle Dietrich, she's a
21 member of Staff.

22 JUDGE DIPPELL: All right. I may ask Ms.
23 Dietrich to come up in a minute. And then later when the
24 Staff is discussing that it recommends that certain rules not
25 be published at this time, they're referring to the Chapter

1 36 rules in that comment?

2 MR. WILLIAMS: You're talking about 060, 070,
3 and 080?

4 JUDGE DIPPELL: That's correct.

5 MR. WILLIAMS: Yes, and the reason is there
6 are some rules being contemplated, in particular, for
7 interconnection agreements in addition to these Chapter 36
8 rules, and the concern is that there might be inconsistency
9 if we were to go forward -- if the Commission were to go
10 forward with Chapter 36 rules at this time.

11 JUDGE DIPPELL: Okay. And can you tell me
12 what kinds of contacts Staff has had with the industry,
13 outside the formal contacts in this case with regard to
14 formulating these rules?

15 MR. WILLIAMS: I haven't had any. I can't
16 speak for other members of Staff, but I'm not aware of what,
17 if any, contacts there have been, other than I believe there
18 has been some input to General Counsel from SBC.

19 JUDGE DIPPELL: Okay. Thank you. Ms.
20 Dietrich, would you be willing to put some comments on the
21 record? Would you please raise your right hand.

22 (THE WITNESS WAS SWORN.)

23 JUDGE DIPPELL: Thank you. Could you state
24 your name and spell it for the Court Reporter?

25 MS. DIETRICH: My name is Natelle,

1 N-A-T-E-L-L-E, Dietrich, D-I-E-T-R-I-C-H, and I'm a
2 Regulatory Economist with the Commission Staff. My address
3 is PO Box 360, Jefferson City, Missouri, 65102.

4 JUDGE DIPPELL: And did you hear my question
5 to Mr. Williams regarding services?

6 MS. DIETRICH: Yes, I did.

7 JUDGE DIPPELL: Did you understand what I was
8 --

9 MS. DIETRICH: Yes.

10 JUDGE DIPPELL: -- asking there? Can you
11 explain that a little better for me?

12 MS. DIETRICH: Sure. In the rule itself,
13 services is not defined, but if you look in the Act and
14 specifically Section 252(c) -- excuse me, (d), -- (c)(2), I'm
15 sorry, it says establish any rates for interconnection
16 services or network elements according to Subsection D, so
17 that's where the services comes from is from the Act itself.

18 JUDGE DIPPELL: And when you say the Act,
19 you're referring to the Telecommunications Act of 1996?

20 MS. DIETRICH: Correct, uh-huh.

21 JUDGE DIPPELL: And then can you tell me what,
22 if any, contacts that you have had with outside industry in
23 promulgating this rule other than the formal contacts on the
24 record?

25 MS. DIETRICH: I, personally, have not had any

1 contacts, but from sitting in agendas, I know at times before
2 the rule was actually formalized, the draft rule, so to
3 speak, was present to a few of the parties that have
4 participated in arbitrations before the Commission and some
5 informal comments were received and discussed.

6 JUDGE DIPPELL: Okay. Do you have any other
7 comments you'd like to --

8 MS. DIETRICH: I don't think so.

9 JUDGE DIPPELL: Okay. Thank you.

10 MS. DIETRICH: Thank you.

11 MR. WILLIAMS: Judge, if I might.

12 JUDGE DIPPELL: Yes, Mr. Williams.

13 MR. WILLIAMS: It's my understanding that a
14 draft of the rules was presented to the Missouri
15 Telecommunications Association, so that it was presented in
16 some form to the industry through that means, I believe.

17 JUDGE DIPPELL: All right. Thank you. You
18 may step down, Ms. Dietrich.

19 MS. DIETRICH: Thank you.

20 JUDGE DIPPELL: Is there anyone else present
21 that would like to make comments regarding this rule on the
22 record? Mr. Dandino.

23 MR. DANDINO: May I use the podium?

24 JUDGE DIPPELL: Sure. I'm still going to
25 swear you in.

1 MR. DANDINO: That's fine. It's just easier
2 for me to use this.

3 JUDGE DIPPELL: I understand.

4 (THE WITNESS WAS SWORN.)

5 MR. DANDINO: Your Honor, the point I would
6 like to make on behalf of Public Counsel is rules would be in
7 -- it's more of a point of clarification, and specifically
8 we're talking about proposed rule 4 CSR 240-36.040,
9 arbitration, and the section of that would be, let's see, 16
10 in parenthesis that cease participation in the arbitration
11 conferences and hearings, the rule talks about participation
12 in the arbitration conference, and hearing is strictly
13 limited to the parties and negotiation pursuant to Sections
14 251 and 252 of the Act, and the Arbitrator's Advisory Staff.

15 I just wanted to point out that the Commission
16 that -- that I think they need to clarify that point to
17 include Public Counsel, if not specifically, or at least
18 recognize that the general Chapter 2 Pleadings of Practice
19 and Procedure defines a party as any Applicant, Complainant,
20 Petitioner, Respondent, Intervenor, or Public Utility, in a
21 proceeding before the Commission, and then it says that the
22 Commission Staff and the Public Counsel are also parties,
23 unless they file Notice of their intention not to participate
24 within the period established for intervention or Commission
25 Rule or Order.

1 In addition, Section 386.710.1(2) further
2 provides that the duties of the powers and duties of the
3 Office of Public Counsel is that the Public Counsel may
4 represent the interest of the public in any proceeding or
5 appeal from the Public Service Commission, so by statute, we
6 are automatically a party in any proceeding before the Public
7 Service Commission, and that's a point I would like to make.

8 Early in the interconnection agreement
9 proceedings in 1996 and '97, Public Counsel was an active
10 participant in the Southwestern Bell, AT&T and MCI
11 affiliates. Arbitrations on the interconnection agreement
12 also in the GTE Midwest arbitrations, and to some extent, and
13 the Sprint arbitrations with some of the other CLECs at the
14 early stage, and we also participated in providing comments
15 to the Commission on the processes for dealing with, I guess,
16 the further the second phase of the arbitration proceeding
17 when there was the dispute concerning the specific text
18 language to go into the Interconnection Agreement, and we
19 offered certain comments on and suggestions on some of the
20 procedures that the Commission should use and, I think, they
21 even adopted some of those suggestions.

22 Basically, I just wanted to make sure that the
23 record before the Commission in this is -- recognizes the
24 role of Public Counsel as a party in this. In recent years,
25 we have not participated in interconnection agreements or

1 arbitration hearings, mostly because it is at -- once the
2 template, I guess, was established in the earlier cases, and
3 the central -- the initial pricings were established it
4 became more of a matter of the CLECs' predominant interest in
5 the terms of the interconnection agreement, rather than the
6 public as a whole.

7 I will say that Public Counsel did participate
8 in the -- in -- as part of the Section 271 proceeding,
9 comments, and participated in the final -- the final version
10 of the M2A, which was interconnection agreement, which was
11 part of that process. That's all I have, your Honor.

12 JUDGE DIPPELL: Okay. And Mr. Dandino, to
13 your knowledge, has the Office of the Public Counsel had any
14 other discussions with industry or any input from the public
15 in general regarding this rule that hasn't been included in
16 the formal record?

17 MR. DANDINO: No. Reviewing the comments that
18 came in, we -- we're not taking a position one way or the
19 other on it except for this point. In general, it seems like
20 the parties who made comments are -- have addressed some of
21 the, I guess, more technical concerns that the Commission
22 should consider.

23 JUDGE DIPPELL: Okay. Thank you very much.

24 MR. DANDINO: Thank you.

25 JUDGE DIPPELL: Would anyone else like to add

1 additional comments? Ms. MacDonald, do you have some
2 comments?

3 MS. MACDONALD: Yeah, I have just one, I
4 think. Of course, that will never happen, but you want me
5 here or over there?

6 JUDGE DIPPELL: I would rather have you over
7 at the witness stand, if you don't mind.

8 MS. MACDONALD: No problem.

9 JUDGE DIPPELL: I'm not sure I'm
10 technologically savvy enough to switch it.

11 MS. MACDONALD: That would be a challenge for
12 me, too.

13 (THE WITNESS WAS SWORN.)

14 JUDGE DIPPELL: Thank you.

15 MS. MACDONALD: The one comment.

16 JUDGE DIPPELL: Can you start out --

17 MS. MACDONALD: My name is Mimi, M-I-M-I,
18 MacDonald, M-A-C-D-O-N-A-L-D. I'm Senior Counsel with
19 Southwestern Bell Telephone, LP, doing business as SBC
20 Missouri. My address is One SBC Center, Room 3510, St.
21 Louis, Missouri, 63101.

22 The one point that I wanted to make that I
23 would have made if we had opening comments is that I wanted
24 to address one thing that we did not put in our written
25 comments, which was a position which Sprint took that a

1 sitting Commissioner should not serve as a mediator under
2 4-36.030(2). We fully support Sprint's position on that, and
3 we also believe that it should go one step further and that
4 an employee of the Commission should not serve as a mediator
5 under 4 CSR 240-36.030(2).

6 And that was my main basic comment, but I
7 wanted to kind of seek a clarification about where we're
8 going from here. Are we going to have the opportunity to
9 file written comments about, for example, anything that Mr.
10 Dandino said or our positions that are contained within the
11 written comments that were filed last Friday?

12 JUDGE DIPPELL: There's no opportunity for,
13 like, reply comments, so this would be it. I mean, if you
14 have additional comments, the end of this hearing today will
15 end the comment period, and from here, the procedure is that
16 the Commissioners decide from the comments that have been
17 received whether or not to promulgate the rules or make
18 changes and publish an Order of Rulemaking.

19 MS. MACDONALD: Okay. Given that, can I just
20 have a few minutes, and then I'll just point out the major
21 things that we had a problem with that people were proposing.

22 JUDGE DIPPELL: You may.

23 MS. MACDONALD: Okay.

24 JUDGE DIPPELL: If you would.

25 MS. MACDONALD: Do you want me to step down?

1 JUDGE DIPPELL: It doesn't matter.

2 MS. MACDONALD: That's fine.

3 JUDGE DIPPELL: Okay. We'll go ahead and do
4 that, and then I'll call you back up.

5 JUDGE DIPPELL: Mr. Lumley, would you like to
6 make some comments?

7 (THE WITNESS WAS SWORN.)

8 JUDGE DIPPELL: Thank you. Please state your
9 name.

10 MR. LUMLEY: Good morning. Carl Lumley of the
11 Curtis Law Firm representing MCI, WorldCom, MCI Metro, Brooks
12 Fiber, Intermedia and AT&T of the Southwest in this matter
13 and submitted comments in writing on their behalf earlier in
14 the proceeding, and our clients appreciate the efforts to
15 establish these rules.

16 It's valuable to provide more clarity to the
17 process behind these kinds of proceedings, and hopefully our
18 comments were received in that vein that we are trying to
19 assist in the process of clarifications, and obviously
20 willing to answer any questions you have about our comments,
21 and I'm not going to repeat all of them, but we do have a
22 couple to highlight.

23 First, the issue of the timing of when
24 testimony must be filed in an arbitration is a very critical
25 issue. From a practical experience, the process of

1 assembling the Petition itself is really a difficult task.

2 The negotiations tend to still be ongoing.

3 It's a very fluid situation. The parties that
4 -- the people that ultimately become witnesses tend to be
5 involved in the negotiations. Many times, it's a multi-state
6 activity, so they're going pretty fast trying to avoid the
7 need for a case, trying to resolve things in many instances
8 with significant negotiations going on, but yet a federal
9 deadline looming, so assembling the Petition itself and the
10 required information is a challenge, you know, from our
11 perspective as the attorneys. It's coming in and you're
12 trying to put it all together.

13 To add to that, the completeness that would be
14 required, you know, to get into all the details behind
15 positions and testimony really would be very difficult, and
16 we would hope to retain some flexibility there. We think the
17 opportunity to file that testimony at the beginning, you
18 know, should be allowed as an option, if it's a very narrow
19 case and the issues are well defined and the parties early on
20 identify we're just not going to be able to work this out.
21 Our interests are too diverse.

22 That can help speed the case up certainly, but
23 other times, as the Commission knows from experience, there
24 can be a whole myriad of issues, and it's kind of fluid,
25 maybe we've resolved all these things, maybe we can't resolve

1 this one, then we really haven't resolved all these things,
2 and we would appreciate the flexibility with that in the past
3 to submit testimony a little bit after the Petition, although
4 obviously on a much tighter time frame than traditional
5 Commission cases. We also, at various points in our
6 comments, are encouraging the Commission to retain
7 flexibility in terms of the case schedule, and I think you'll
8 see similar comments by most of the other parties as well.

9 When we have a well defined end date and, you
10 know, similar to what we've had in rate cases in the past,
11 you know when the case must be over, everyone knows how to
12 work together to come up with a schedule that meets the
13 specific aspects of the case before them, but it makes it
14 that much more difficult when we have, you know, five, six,
15 or seven steps along the way that seem fairly rigid, the
16 arbitrator may feel they don't have a lot discretion, and so
17 a lot of our comments are devoted to that perspective.

18 We've also noted in our comments that it's
19 essential to have early access to cost information as soon as
20 possible in cases, and the Commission knows that this has
21 been a sticking point or a battling point in many cases.
22 Unlike traditional commercial negotiations where parties
23 simply say this is the price we're willing to charge, this is
24 the price we're willing to pay, there's an additional aspect
25 to these cases as the Commission knows, and that is that the

1 rates have to be related to cost, and when that information
2 is not made available, it makes the process more difficult.

3 We note in our comments that we're very
4 concerned about the idea that we could go all the way through
5 the process and end up with the Commission simply rejecting
6 the arbitrator's report, which would seem to leave us all in
7 limbo, and so we're encouraging the Commission to not really
8 allow that as an option, but if they're totally dissatisfied,
9 then they come up with their own result, but the matter does
10 need to be resolved.

11 And finally, we've noted in our comments that
12 we're encouraging the Commission to consider procedures not
13 only for arbitration, but for general evaluations of issues
14 like cost and unbundled elements and things that may or may
15 not be wide open and depending on how certain court cases go,
16 but as Mr. Williams pointed out, there is state authority in
17 these areas, and in some instances, it would be beneficial to
18 look at things more on an industry basis than in a specific
19 negotiation.

20 With regard to the comments filed by others,
21 Staff's comments in general, seem to be focused on
22 streamlining the process and adding clarity, and we certainly
23 support that. A couple concerns regarding 36.050, they're
24 advocating that the parties be compelled to use the ordered
25 result by the Commission, and we would encourage the

1 Commission to recognize that just like in court matters, it's
2 not that unusual for at the end of the day with maybe the
3 possibility of appeal hanging over parties heads for them to
4 ultimately settle the matter by contract, and they should
5 remain free to do that. These are still contracts, the
6 arbitration process is a means of making the parties get
7 together and achieving a result, but at the end of the day,
8 they should always retain their flexibility if the two
9 parties to the agreement can resolve matters.

10 They still have to present the contract to the
11 Commission for approval, so it's not like they'll be able to
12 agree to something improper, but that flexibility should be
13 preserved.

14 And then with regard to the last three
15 sections of the proposed rules where Staff is encouraging
16 deferral, I checked the EFAS system this morning and it
17 doesn't seem there's been any public activity in that case
18 since July of last year, so from our perspective, perhaps it
19 would be better to go ahead with these rules now, and as
20 Chapter 3 is developed, these could be rescinded or
21 cross-reference could just be added to Chapter 3 to these
22 procedures, but there's a benefit to having some clarity in
23 these areas as soon as possible.

24 We generally support Sprint's comments, and we
25 don't oppose the use of outside experts, which they raised.

1 We do acknowledge that there could be a timing issue in terms
2 of the Commission's obligations, you know, for a public date
3 or whatever steps you must take to engage someone, but as
4 long as you can satisfy your requirements, we're not opposed
5 to the concept of getting such assistance that the Commission
6 feels is necessary.

7 For the MITG, we understand their concerns and
8 obviously it's been raised in a number of cases that we've
9 been involved in, but we do feel that they go a little bit
10 too far and contemplate too much involvement in what
11 ultimately remains a bilateral matter. We think it's fair
12 for them to ask that there be some identification if their
13 interests are indirectly implicated, but really we feel they
14 must still wait until a contract is being submitted for
15 approval to get involved, and we don't feel they have the
16 right to impair the ability to adopt agreements under federal
17 law.

18 And finally regarding Southwestern Bell's
19 comments, we don't believe there's anything improper about
20 the Commission allowing what the rules are describing as an
21 arbitrator to develop the record for the Commission. There
22 certainly can be an efficiency achieved. Obviously the
23 Commissioners can, only where you have multi-cases that are
24 going on with very short deadlines, perhaps the confusion
25 comes from the use of the word arbitrator.

1 I mean, ultimately by law, the Commission must
2 remain the final arbitrator, and that seems to be the sense
3 of the rules that at the end of the day, a recommended result
4 is being presented to the Commission, and it is remaining the
5 ultimate arbitrator. Perhaps parties would be more
6 comfortable if it was just acknowledged that this is really
7 more of the rule of one of the Regulatory Law Judges or it's
8 the appointment of a special master, you know, something
9 along those lines, but we do believe that the Commission has
10 the right to develop the record in an efficient way.

11 We do agree with Southwestern Bell's comments
12 that the Commissioners need to be fully informed before a
13 decision, and they made some points about oral arguments and
14 even further hearings that the Commissioners feel the record
15 is lacking in a certain area.

16 We also agree that with the comment that they
17 made that there can be abuse of the final entire package type
18 arbitration. The Act does require attention to each issue,
19 or at least each area of issues. The idea that there's some
20 flexibility depending on the scope of a case makes sense, but
21 overall, we'd like to see, you know, a certain flavor to the
22 rules, a recognition that, you know, if we take, you know, as
23 an example, the most recent MCI arbitration, we had some very
24 diverse areas of issues that were organized in the
25 Commission's decision, and to say that, well, you can't

1 prevail on your position on directory listings unless you
2 also prevail on your position on access to loops, I mean,
3 when they get so unrelated, we think that as Southwestern
4 Bell noted, it really could be a problem to force entire
5 package arbitration on the parties. We do support the tone
6 of the rule that suggests that the adoption of existing
7 agreements would be a fairly streamline process.

8 The idea of allowing the parties to do this by
9 a notice process, we believe, is a legitimate one. There
10 have been occasions when carriers have kind of dragged their
11 feet and imposed some conditions like you must sign a
12 document that says this, that, and the other thing that
13 really doesn't have anything do with the adoption process,
14 but we would acknowledge that to the extent SBC is concerned
15 that they are not properly notified, that that's a legitimate
16 concern. Every company that comes before the Commission, you
17 know, doesn't want to be surprised to learn that something
18 significant was sent, you know, to one of their addresses
19 that has nothing to do with the regulatory process, so that's
20 certainly a legitimate concern, and that's the nature of our
21 comments this morning.

22 Thanks for the time to present them.

23 JUDGE DIPPELL: Okay. Thank you Mr. Lumley.

24 Is there anyone else that would like to make
25 further comments? Ms. MacDonald, are you ready to --

1 MS. MACDONALD: Yeah, I'm totally ready now.

2 JUDGE DIPPELL: Go ahead.

3 MS. MACDONALD: Thank you. My comments I'm
4 going to try to organize according to where they appear in
5 the rules, rather than which party presented them, but I will
6 identify which party when I'm talking about that particular
7 rule.

8 First, under 4 CSR 240-36.030, Staff makes the
9 suggestion that they would like to change the wording of this
10 rule to require any mediating party to provide clarification
11 and additional information to the mediator. We don't think
12 that change is necessary because we might not have any
13 additional information that we can provide, so we feel that
14 the wording allowing -- allowing that the mediator request
15 information is probably more appropriate than the word
16 require, given the lack of information that we may have.

17 With respect to 4 CSR 240-36.040, which is the
18 arbitration rule, Staff has a concern and wants to require
19 the Petitioner to include only its position on each
20 unresolved issue and not the position of the Respondents.
21 Staff argues that Section 7 already requires the Respondent
22 to file its position on each unresolved issue with its
23 opportunity to respond, and our position on that is that
24 Staff's position appears to be inconsistent with the Act.
25 Section 252(b)(2)(a)(ii) requires the Petitioner to state the

1 position of each party -- each -- to state the position of
2 each of the parties with respect to each unresolved issue
3 when they're bringing the matter to the attention of the
4 Commission, so we think that that should not be changed.

5 With regard to 4 CSR 240-36.040(7), WorldCom
6 argues that because incumbent cost information is rarely made
7 available during negotiation, the law should require
8 incumbents to make all cost studies on which it intends to
9 rely available to the other party subject to applicable
10 protective order of non-disclosure agreement immediately upon
11 the filing of the Petition. Again, we believe that that
12 conflicts and is beyond the scope of 252(b)(3), which gives
13 the Respondent 25 days to provide additional information to
14 the state Commission that the Respondent believes is
15 relevant.

16 Sprint raised a concern with respect to 4 CSR
17 240-36.040(12), and their concern with an arbitrator relying
18 on an outside expert and Sprint would like Staff to serve as
19 an independent expert. It's SBC Missouri's position that
20 there should be no independent experts, whether they be
21 outside or Staff, and that if Staff is going to participate
22 in the arbitration proceedings, they should participate on
23 the same basis as the parties, and file testimony and be
24 subject to cross-examination.

25 There should be no ex parte contacts or behind

1 the scenes evaluations with regard to that.

2 Staff filed a concern regarding 4 CSR
3 240-36.040(12), and specifically Staff said it would like to
4 change the last sentence to read advisory staff shall not
5 have ex parte contacts with any of the parties or with the
6 Commission and members or outside individuals who answer
7 technical questions and are not advisory staff, an individual
8 regarding the issues in this negotiation.

9 Frankly, I'm not exactly too sure what that
10 sentence means, but I tried to follow it, and I believe that
11 they don't want advisory staff to have contact with the
12 Commission staff members who answer technical questions, and
13 my understanding of the rule was that if the Commission were
14 to go down the path and approve this rule, which is an aside,
15 we've already said in our comments we don't think there
16 should be an advisory staff, but if they did have an advisory
17 staff, those would be the Commission staff members who are
18 answering technical questions, they would be one in the same
19 entity, and therefore, you wouldn't have a problem with the
20 contacts, but again, I'm not exactly sure what that sentence
21 was supposed to mean, so that's the best I could do with
22 that.

23 Sprint raised a concern regarding 4 CSR
24 240-36.050(2) regarding the approval of an arbitrated
25 agreement in the absence of the Commission action. Section

1 252(e) (4) of the Federal Telecommunications Acts provides if
2 the state Commission does not act to approve or reject
3 agreement within 90 days after submission by the parties of
4 an agreement adopted by negotiation under Subsection A or
5 within 30 days after a submission by the parties of an
6 agreement adopted by arbitration in Subsection B, the
7 agreement shall be deemed approved, so frankly, I -- while I
8 understand Sprint's desire to have the agreement approved as
9 an operation of law event after 30 days, I'm not so sure that
10 that could happen, because what has typically happened in
11 arbitrations is they're both negotiated and arbitrated
12 provisions in one agreement, and therefore, the Commission
13 may have 90 days to actually act, so I just thought the
14 Commission should be aware of that rule.

15 I think Mr. Lumley made reference to Staff's
16 suggestion regarding adding language to advise parties that
17 one of the conditions of entering into arbitration is that
18 they will be bound by the Commission's decision, and I have
19 to say that I agree that I don't think that that's
20 permissible under the Federal Telecommunications Act. While
21 we're very cognizant of the time and resources of all of the
22 parties as well as the Commission that go into arbitrated
23 agreements, I think that a requesting carrier could seek to
24 opt into a previously approved Commission agreement under
25 252(i), and I don't think that we can institute a rule which

1 would take away that right.

2 And finally -- well, actually, I have two more
3 things I wanted to talk about. Regarding 4 CSR
4 240-36.070(1), WorldCom argues that this rule should be moved
5 for adoption of portions of agreements as well as entire
6 agreements consistent with applicable law, and WorldCom
7 argues that the language of Section 51.809 should be
8 followed.

9 With respect to this argument, I would take
10 issue with this if it is intended to imply that you can take
11 part of an -- part of an arbitrated agreement without
12 reference to the legitimately-related portions that you want
13 to opt into. For example, if there were 10 sections, and a
14 previously approved arbitration agreement, and it said you
15 have to take -- if you take something, you have to take 1, 2,
16 3, 4, 5 together, and that's the only way it will be offered,
17 I don't think you can subsequently say I opt into 2 and 4,
18 and finally, I wanted to go back to SBC Missouri's position
19 with regard to the appointment of an arbitrator.

20 SBC Missouri feels very strongly that the
21 Federal Telecommunications Act of 1996 does not give the
22 Commission the authority to delegate its responsibilities to
23 a third party arbitrator. Under Section 252(b)(1), the
24 Commission must arbitrate open issues, and it specifically
25 says the Commission. It specifies during the period from the

1 135th to the 160th day inclusive after the date of which an
2 incumbent will exchange periods of procedure for negotiation
3 under this section, the carrier or any other party to the
4 Commission -- to the negotiation may petition a state
5 Commission to arbitrate any open issues. Again, the
6 reference is specifically to the Commission.

7 Furthermore, SBC Missouri strongly believes
8 that state law does not permit the Commission to require
9 arbitrations to be conducted under the auspices of a
10 Commission-approved arbitrator. Missouri statutes only
11 authorize the Commission to conduct arbitration proceedings
12 where all parties consent to the arbitration.
13 That provision is contained in Section 386.230, and that
14 statute provides whenever a public utility has a controversy
15 with another public utility or person and all parties to such
16 controversy agree in writing to submit such controversy to
17 the Commission as arbitrators -- shall the Commission shall
18 act as arbitrators and after due notice to all parties
19 interested shall proceed to hear such controversy and their
20 word shall be final.

21 Parties may appear in person or by attorney
22 before such arbitrators. Arbitrators -- arbitrations under
23 the Act are not consensual and parties under the Act do not
24 agree in writing to submit the controversy to the Commission
25 much less to arbitrators that the Commission may appoint.

1 This provision and this proposal 4 CSR 240-36.040(4) quite
2 simply cannot be squared with federal or state law, and I
3 would be able and happy to answer any questions that you may
4 have with regard to SBC Missouri's comments that we filed
5 and/or our position on anybody else's comments. I
6 highlighted just some areas where we disagree.

7 JUDGE DIPPELL: Let me look at something.
8 Just a moment, and I may have a question.

9 MS. MACDONALD: Sure.

10 JUDGE DIPPELL: Okay. With regard to your
11 argument that the Commission must be the arbitrator, what
12 about -- how does Section 386.240 play into that where powers
13 of the Commission may be delegated to any of its employees?

14 MS. MACDONALD: Hold on one second, let me
15 just grab that. Let me say, in general, my position would be
16 that when looking at statutory references, the specific
17 governs over the general, and there's a specific statute with
18 regard to arbitrations, so even without reviewing that
19 statute, my position would be that since we have an
20 arbitration provision in our statutes, which would give the
21 Commission authority only if the parties consent in writing,
22 that provision would prevail over a more general provision,
23 and as I indicated in the context of an arbitration under the
24 Federal Telecommunications Act, that is not at all a
25 consensual arbitration. It's not something that the parties

1 would sit down and voluntarily agree to, quite frankly, as an
2 arduous process, so we would believe that -- that that more
3 specific provision would apply. Now, let me just look at
4 that really quickly in case I wanted to add anything else.

5 That is generally my feeling that the more
6 specific provision in 286.230 trumps the provisions of
7 386.240 because the specific governs rather than the general,
8 and in addition to that, I would say even if you looked at
9 just 386.240, I would have concerns that the rules were
10 specifically addressing this provision because it indicates
11 that -- that no order rule or regulation of any person
12 employed by the Commission shall be binding on any public
13 utility or any person unless expressly authorized or approved
14 by the Commission.

15 And while I understand that the intent of
16 these rules may be that you have some kind of an independent
17 arbitrator making the initial decisions, which then are ruled
18 upon by the overall Commission, the problem is the due
19 process concerns that we've raised in our comments, because
20 not only do we not believe it's permissible under 286.230,
21 but it's less than clear under these rules that we're going
22 to be entitled to cross-examination, which would be required
23 under the 5th and 14th Amendment of the United States
24 Constitution as well as Article I, Section X of the Missouri
25 Constitution and numerous statutes that we've studied in our

1 Pleadings, because it appears that the Commission could just
2 approve the arbitrator's award or the arbitrators suggested
3 award without itself actually conducting any hearings, and we
4 don't think that that's permissible.

5 JUDGE DIPPELL: Okay. Did you have any
6 additional comments?

7 MS. MACDONALD: I have no additional comments.

8 JUDGE DIPPELL: Okay. Is there anyone else
9 that wanted to add comments on the record today? Mr. Dority.
10 You do. Okay. Ms. MacDonald, please step down. It's
11 unusual for the Commission to have an agenda on Friday, and
12 they had -- when we originally scheduled this, that was not
13 the case, and so they had intended to want to participate,
14 and I believe that the Chairman may be on his way down,
15 because he had some questions he wanted to ask, so I may ask
16 some of you to speak up when he comes in. Mr. Dority, let's
17 go ahead.

18 (THE WITNESS WAS SWORN.)

19 JUDGE DIPPELL: Thank you.

20 MR. DORITY: My name is Larry W. Dority
21 D-O-R-I-T-Y, with the law firm Fisher and Dority, P.C., our
22 address is 101 Madison, Suite 400, Jefferson City, Missouri,
23 65101, and I would be offering comments today on behalf of
24 CenturyTel of Missouri, LLC, and Spectra Communications
25 Group, LLP, doing business as CenturyTel, and I'm going to

1 keep my comments very brief, your Honor.

2 JUDGE DIPPELL: Okay.

3 MR. DORITY: Generally, CenturyTel would be
4 supportive of the comments of SBC Missouri, both those
5 written and orally offered this morning by Ms. MacDonald. A
6 couple of things that I would like to focus on. The Staff
7 comments address the last three sections of the proposed
8 rule, and Staff suggests that the Commission defer action at
9 this time because of continuing discussions with the
10 Commissioners regarding Chapter 3 revisions, and we would be
11 supportive of that, we have not had the opportunity to be
12 involved in those discussions, obviously, but we do have some
13 points of view on those particular sections and would look
14 forward to the opportunity of offering our positions to the
15 Staff as they continue promulgating or coming forward with
16 suggestions as to what a proposed rule should contain as it
17 relates to those specific provisions and particularly 36.070,
18 the Notices of Adoption section that's contained in the
19 proposed rule.

20 CenturyTel has a concern as to how that is
21 written right now because it would appear to be an exclusive
22 methodology for presenting Notices of Adoption to the
23 Commission, and I can speak from experience that there have
24 been occasions where it's not necessarily the requesting
25 carrier that would make the filing, but in fact, the ILEC

1 would make a filing that would be representative of the
2 underlying agreement, and perhaps a letter or memorandum of
3 understanding that the parties have reached in accordance
4 with notice provisions and other things that would be
5 applicable to a particular underlying interconnection
6 agreement, so we would just be concerned that the language as
7 written not deemed to be an exclusive methodology, and I
8 think that's something that the carriers in working with
9 Staff and perhaps the Chapter 3 revisions could address, so
10 we would be supportive of deferring -- the Commission
11 deferring action on those items at this time.

12 And then finally, I would just simply note
13 that we would be opposed to the suggestions of the MITG where
14 it appears that they would be trying to interject the
15 transiting issue into this rulemaking proceeding. I think
16 the Commission should stay the course and continue to limit
17 arbitration proceedings to those parties that are actually
18 negotiating the underlying contractual provisions of the
19 interconnection agreement, and that's all I have.

20 JUDGE DIPPELL: Thank you very much, Mr.
21 Dority.

22 Okay. It's my understanding that the
23 Commission have broken for a few minutes from their agenda,
24 and I believe they want to come down and participate. Is
25 there anyone else that wanted to present comments?

1 MS. MACDONALD: I hate to do this, but can I
2 now comment on what Mr. Dority just said?

3 JUDGE DIPPELL: Sure, Ms. MacDonald. Come on
4 up.

5 (CHAIRMAN GAW AND COMMISSIONER MURRAY ENTER
6 THE ROOM.)

7 JUDGE DIPPELL: Let's go off-the-record for
8 just a couple of minutes. I'm going to find out what's going
9 on with the agenda.

10 (A BREAK WAS HAD.)

11 JUDGE DIPPELL: Okay. Let's go ahead and go
12 back on the record. Ms. MacDonald, I'm going to let you go
13 ahead and step down.

14 MS. MACDONALD: Okay.

15 JUDGE DIPPELL: And I believe, though, that
16 the Chairman has some questions for you, but he may also have
17 some questions for some of the others, so I'm just going to
18 let you all speak from down there, but if you would be sure
19 to speak into your microphone and make sure it's on.

20 CHAIRMAN GAW: Thank you, Judge.

21 JUDGE DIPPELL: Yes, go ahead.

22 CHAIRMAN GAW: I want to explore this a little
23 bit. I understand some issues were raised about due process
24 elements, and if I could, I need to understand, in a capsule,
25 what the arguments is about the due process issue or issues,

1 whoever was raising them.

2 JUDGE DIPPELL: I think Ms. MacDonald is the
3 one to speak to that.

4 MS. MACDONALD: I did raise the due process
5 argument, and specifically, we had due process concerns with
6 three different provisions, actually, it might be four. In 4
7 CSR 240-36.040(10), we believe that the Commission should
8 make it clear that the parties to an arbitration has an
9 absolute right to insist upon an evidentiary hearing during
10 which time they may cross-examine witnesses of the other
11 parties to the arbitration, and we believe that that's not
12 only required under 5th and 14th Amendments of the U.S.
13 Constitution but also under Article I, Subsection X of the
14 Missouri Constitution as well as numerous Missouri statutes.

15 Our second due process concern was with regard
16 to 4 CSR 240-36.040(12). We believe that that rule should be
17 eliminated in its entirety. We do not believe an advisory
18 staff should be allowed to provide information to the
19 arbitrator that is not shared with the parties, because we
20 believe that that may result in a violation of our due
21 process rights, and that we would not know what was said and
22 would not have the opportunity to cross-examine that advisory
23 staff member with regard to what exchanges occurred.

24 And I think --

25 CHAIRMAN GAW: Would you mind telling me how

1 you're going to deal with advisory staff being hired by the
2 Commission on cases from now on, if that's going to be a
3 violation of due process when that legislation was passed?

4 If that's a due process concern here, how in
5 the world do -- are we going to do anything with advisory
6 staff in the future and how do you all function with your due
7 process rights violated in other states that have advisory
8 staff? Please explain that to me.

9 MS. MACDONALD: I'm not so sure I can talk
10 about what is going on in all other states, but --

11 CHAIRMAN GAW: Well, I want you to, because
12 it's going on in other states, and you all operate in several
13 states. If you aren't able to do it, maybe you have someone
14 here who could do that for me, because I don't understand
15 that issue as being a due process concern here but not in
16 other states, or if it's a due process concern here in regard
17 to any -- in regard to use of staff from an advisory
18 standpoint to interpret a record, and maybe it's more narrow
19 than that and what I'm looking for here is whether you're
20 talking about something very broad, which to me is -- I don't
21 see how you make that argument without running into the wall
22 with these other -- with the statutory language that's now in
23 effect on advisory staff or other hearings and with other
24 states that utilize advisory staff as Commissions.

25 If you're talking about something much more

1 narrow than that, then I may understand where you're coming
2 from, and I guess what I'm looking for is how broad is your
3 argument on this due process issue with this one?

4 MS. MACDONALD: Okay. I think I might be able
5 to address it, and let's see if this does it. We have had
6 experiences in the past where there have been arbitrations
7 involving advisory staff where there were communications that
8 we did not know about, and if an advisory staff has a rule
9 advising the Commission, I don't necessarily think that that
10 in and of itself is a problem, but the problem occurs when
11 that advisory staff is making comments outside of the hearing
12 room, outside of written testimony, and are being contacted
13 about technical questions and answers to technical questions
14 that you don't know what they have said, so you don't know
15 how you're going to cross-examine them or ensure that your
16 due process rights --

17 CHAIRMAN GAW: How is that going to function
18 if we hire advisory staff then, under the new statutory
19 allowance, to do that, if you believe that that's going to be
20 a problem? How in the world are you going to function? Is
21 Bell going to object to the use of advisory staff that's now
22 authorized by the statute?

23 MS. MACDONALD: Well, I mean, I guess -- or I
24 guess our position would be that it's not -- and maybe I'm
25 just talking circles, it's not that we necessarily object to

1 the advisory staff in and of itself, and if we have the
2 opportunity to have the advisory staff answering technical
3 questions where we feel that we can cross-examine them or
4 seek clarification on a position that we have, then we would
5 be okay with that, but absent that.

6 CHAIRMAN GAW: What I'm looking for is for you
7 to draw a line for me in between what's done with the
8 statutory authorization and what you're concerned about here,
9 and that's what I'm looking for. I am not -- because
10 otherwise, advisory staff statutes, any communication that we
11 have with them, I'm assuming that we put public notice up and
12 invite you all in on those conversations.

13 If you're concerned about something that's
14 added to the record by that communication or added in -- into
15 the mix on an issue where there's a factual add-on that's not
16 in the record by advisory staff, then I understand your
17 point, then you're making an argument to me that I
18 understand.

19 MS. MACDONALD: Okay. That is what I think
20 I'm saying, but.

21 CHAIRMAN GAW: I'm trying to understand if
22 that's all you're saying, because when I'm reading this and
23 when I'm hearing your argument, it sounds much broader than
24 that, so I'm looking for you to narrow it down for me so I
25 can work through what your concerns are, and in that way,

1 maybe we can talk about whether -- whether we need to adjust
2 some language here. That's what I'm trying to gather.

3 MS. MACDONALD: Well, I think I am talking the
4 more narrow position that you're talking about, that if
5 they're providing facts that we don't even know that they're
6 providing facts about, it's pretty hard for us to
7 cross-examine or make sure that our due process rights are
8 protected.

9 CHAIRMAN GAW: There's a difference between
10 analysis of the record and adding to the record, and I think
11 that if your concern is about adding to the record something
12 which you may not know or adding something to the -- to a
13 consideration in a decision that should have been a part of
14 the record, okay, and all I can tell you is in order for any
15 advisory staff communications to take place, you're going to
16 have to -- there needs to be a fairly clear line saying this
17 is allowed, this isn't. I understand that. But what you're
18 setting up here in the argument could be you just can't have
19 any communication with them unless it's on the record, and
20 that is a big problem not just with this arbitration, but
21 also with implementing the advisory staff provisions of how
22 Bill 208 reads.

23 MS. MACDONALD: Just one moment.

24 CHAIRMAN GAW: Go ahead.

25 MS. MACDONALD: Sorry for that --

1 CHAIRMAN GAW: No problem.

2 MS. MACDONALD: -- limited interruption, but I
3 mean, I generally think that our position is that for better,
4 for worse, we believe that we have to be present when the
5 communications are occurring that involve substantive details
6 of the provisions of a proposed interconnection agreement,
7 because if we're not, we will not know what we should be
8 cross-examining the advisory staff on, if they're going to be
9 a party or not a party, or they're only going to serve simply
10 to give the Commission guidance.

11 CHAIRMAN GAW: Did Bell oppose those
12 provisions of 208 last year in regarding advisory staff? Did
13 I miss something?

14 MS. MACDONALD: We did not take a position on
15 that.

16 CHAIRMAN GAW: I didn't remember you taking a
17 position either. Well, we'll have to work through this. I
18 understand your concerns, I just -- I just -- if we agree
19 with the breadth of your concerns, we won't be able to
20 implement that other bill either. I don't see how the
21 arguments are different in these hearing cases than they
22 might be in dealing with an arbitration from the standpoint
23 of whether or not we can have any communication from a
24 constitutional standpoint.

25 Anyway, I think -- Commissioner Murray, have

1 you got something that you're ready to go on? Let me look at
2 this a little bit if you have something.

3 COMMISSIONER MURRAY: Just one quick follow-up
4 on that. I would like to ask the various parties is it your
5 understanding that when we do have advisory staff, that when
6 we are in a contested case proceeding that our advisory staff
7 will be subject to cross-examination? Mr. Dandino.

8 MR. DANDINO: If I remember right, I don't
9 think it provides that in the statute. I thought it was --
10 they're not considered a party to it, and I hadn't envisioned
11 them as being, since their role, as I saw it, was just to
12 provide technical advice, legal advice, but not add facts to
13 the record or do independent investigation into the facts.

14 COMMISSIONER MURRAY: Thank you. What's
15 Staff's position on that?

16 MR. WILLIAMS: I think Staff's position is the
17 same as what the Office of the Public Counsel's expressed.

18 COMMISSIONER MURRAY: The other parties, would
19 you respond?

20 MR. LUMLEY: Good morning, commissioner, Carl
21 Lumley.

22 We certainly believe that the Commission has
23 the right to not only use its own experience, and we were
24 just discussing this this morning off-the-record, the wide
25 variety of subject matters that you all are expecting to be

1 experts in and rule on, and in particular with a new
2 Commissioner coming in, the tremendous value to having an
3 advisory staff person that's been around for a while and can
4 explain, you know, what all these acronyms mean, and I mean
5 we never develop absolutely totally complete records in these
6 cases, that is give you every piece of background that you
7 would need to have to make it -- I mean, if somebody was to
8 actually just go over it and say what actually is the MCAA,
9 you could pick a number of examples where we all kind of take
10 a certain amount of background for granted and don't burden
11 the record with dumping all that in time after time, and I
12 can see an individual Commissioner having a private
13 discussion with that advisor.

14 I think the Chairman noted if you're having a
15 quorum present, obviously it's a posted meeting and those
16 would be public discussions if they occurred in that context,
17 and the ultimate limitation that's already been discussed is
18 if that -- if there's to be information supplied that's
19 actually going to be a factual basis for the decision, then
20 obviously that would have to be on the record for the
21 Commission to rely on it, and I suppose if you chose to have
22 an advisory staff member be the witness that supplied that
23 information, you know, if they go on the record and testify,
24 that would then subject them to cross-examination, but not
25 because they've had either a private discussion with an

1 individual Commissioner or a public one at a posted pleading,
2 only if the Commission itself sponsored that person as a
3 witness, then yes, if they were testifying, they would be
4 subject.

5 COMMISSIONER MURRAY: So let me ask you this.
6 Are you contemplating a situation in which we have advisory
7 staff that, for example, we may have asked them to research
8 an issue on -- for something that we wanted to know, and in
9 that -- in getting back to us with the information, they
10 provided some information that we felt was necessary to, as
11 evidence to support our decision, and that was the only place
12 it was available, it wasn't otherwise in the record, is that
13 what you're contemplating?

14 MR. LUMLEY: Well, even then, I think you
15 would have the option of directing your non-advisory staff
16 with a question, you know, we want information about and have
17 them sponsor the witness. I don't think you would be
18 required to use your advisory staff as the evidentiary
19 support for it. I mean, they could just alert you that
20 there's a question you have, but ultimately if you chose to
21 pick that individual to sit in the witness stand and testify,
22 then yes, they would be subject to cross.

23 COMMISSIONER MURRAY: Okay. So just to be
24 clear, I think we're just talking about making sure that a
25 record that we base our decision is based on evidence, but

1 that there's no prohibition against our talking to our
2 advisory staff about any information that we may need for
3 background, for education on an issue or anything of that
4 nature?

5 MR. LUMLEY: Right, and it will always come
6 down to judgment calls, but no, the Court of Appeals in this
7 country have always had law clerks to help the judges sort
8 through cases, and you always have to make a judgment call,
9 and nobody will ever be perfect, but in the guideline, you
10 know, is are we actually creating, you know, a fact that
11 we're now going to base our decision on or are we just trying
12 to understand what everybody told us.

13 COMMISSIONER MURRAY: Okay. Thank you.

14 MS. MACDONALD: I'm sorry, go ahead.

15 JUDGE DIPPELL: Ms. MacDonald, would you like
16 to respond to Commissioner Murray's question?

17 MS. MACDONALD: Yeah, I'm not sure it's that
18 clear cut, because under the proposed rule 36.040(12), it
19 provides a technical question should be answered either in
20 written form or at an arbitration session attended by the
21 parties, which could lead one to believe that you're going to
22 be allowed to cross-examine the person that's answering the
23 technical questions, and the sentence following that says the
24 parties may submit written responses to answers to technical
25 questions in a timely manner as determined by the arbitrator,

1 so I'm not so sure it's that clear cut, and I mean, we do
2 have a concern that we be present when substantive questions
3 are being answered.

4 I mean, if it's an acronym, I doubt we're
5 overly concerned, but if it's an actual technical question,
6 then we are very concerned.

7 COMMISSIONER MURRAY: Well, technical
8 question, for example, how just as an example, I'm pulling
9 out of the air here, how Feature Group C and Feature Group D
10 work. Would you consider that a technical question that need
11 to be on the record or is it just one of those hazy lines
12 that leads us subject --

13 MS. MACDONALD: That's our concern is that if
14 we don't know where that hazy line is drawn, how are we to
15 know exactly what information was provided, and that's why we
16 do have these due process concerns.

17 CHAIRMAN GAW: If I could follow-up. Are you
18 familiar with the practice in Illinois?

19 MS. MACDONALD: No.

20 CHAIRMAN GAW: But Bell does practice in
21 Illinois. They do business in Illinois, correct?

22 MS. MACDONALD: That's correct.

23 CHAIRMAN GAW: And Illinois has advisory
24 staff, correct?

25 MS. MACDONALD: I believe that's true.

1 CHAIRMAN GAW: And has Bell challenged the
2 advisory staff involved in Illinois on due process grounds?

3 MS. MACDONALD: I don't know, and I also don't
4 know how it specifically works in Illinois or whether the
5 advisory staff is subject to cross-examination or has a
6 provision that has.

7 CHAIRMAN GAW: I'm not aware that they're
8 subject to any cross-examination, and I'm not aware of
9 anything that's ever been raised, and this goes on all over
10 the country. I have -- I'm trying to understand whether or
11 not Bell has seen something peculiar about the Missouri
12 Constitution that raises this issue or whether Bell has
13 raised the issue in other states where they have had this on
14 the books for many years, and whether or not this Commission
15 is supposed to ignore the fact that nothing has been
16 challenged in those other states, to my knowledge, that would
17 say that by Bell that says that there's a due process
18 concern.

19 MS. MACDONALD: Well --

20 CHAIRMAN GAW: I understand your concerns. A
21 part of this could be revolving around how this process is
22 going to be handled, and who we are talking about in this
23 communication. It needs to be clear that there is a line
24 drawn in regard to what Staff -- or what Staff or on what
25 side of the wall, and all of that is very important, because

1 if you -- and it evidently in one -- in the one case where
2 there were advisory staff quote-unquote utilized in the past
3 that were -- it was -- that it was challenged and the Circuit
4 Court said no, you can't do it in this case.

5 In that case, the Staff had been moved in the
6 case from one side of the wall to the other, clearly --
7 clearly problematic, but it just strikes me that if Bell is
8 focused in on the concern that we want to make sure that the
9 people who are providing the record and who are a part of
10 putting things into evidence that we are allowed to ask them
11 questions, and we want to make sure that there's nothing
12 being added to the record.

13 It's one thing to say we're going to have a
14 rule saying that these are rules of engagement here, but it's
15 another thing to suggest that to us that Bell is going to
16 hold Missouri to a different -- the Missouri Commission to a
17 different standard than it seems to be holding other states
18 it does business in, and you're going to have to testify that
19 to me, because I can tell you from my knowledge that there
20 are other states all around us, including Illinois, including
21 Iowa, I think, who have advisory staff who function as a part
22 of the Commission side of the wall, and whether or not this
23 arbitration rule as drafted is where it needs to be on being
24 sure those lines are clear and things like that, that's what
25 I'm really wanting to hear from you, but the broad attack

1 here on this from a due process grounds, I'm having trouble
2 understanding until you differentiate what is different about
3 Illinois.

4 MS. MACDONALD: Well, unfortunately --

5 CHAIRMAN GAW: And I know -- I know you don't
6 know right now.

7 MS. MACDONALD: And I will be happy to file
8 some written comments regarding that, if you would like me
9 to.

10 CHAIRMAN GAW: I want this to be constructive,
11 and just telling me that you can't do this, it violates our
12 due process, it's not helping me, because I can't tell what
13 it is that I need to improve the rule on, and I know that we
14 have this kind of a system in existence all around the United
15 States, and I'm sorry, but we don't -- we're not living in a
16 cave here in Missouri, we kind of talk to those other people,
17 and every now and then figure out what they're doing, too.
18 I'm finished.

19 COMMISSIONER MURRAY: I just -- I don't know
20 for what this is worth, but I just learned at the
21 neighborhood meeting that Connecticut's advisory staff
22 actually cross-examine witnesses themselves, so I mean there
23 are all kinds of arrangements, I believe, and I didn't ask
24 the follow-up question as to whether they were subject to
25 cross-examination, but I think -- I share Chairman Gaw's

1 concern that we don't want to be put in a situation here
2 where we're afraid to use our advisory staff once we have the
3 opportunity to have advisory staff, and I think -- I know it
4 needs to be pretty clear how we can use that staff, and if we
5 can't get information from them, it seems like it's kind of
6 counterproductive to even have them, but I understand Mr.
7 Lumley's explanation as to how to use advisory staff, and
8 when it gets into the situation where a part of the evidence
9 that you're using to make a decision is based on information
10 that you got from your advisor and only there, then it has to
11 be somehow put into the record.

12 I understand that, but I don't understand how
13 it would be a problem if we get our technical advice to
14 understand -- understand any of the technical issues in the
15 case so long as it's not something that we're isolating that
16 was not a part of the record in making a decision based on
17 it, so I guess I don't know. Was there anybody else that
18 wanted to comment on that?

19 MR. DANDINO: If I may. Commissioner, kind of
20 following up from what you were saying is the example of
21 Connecticut where the advisory staff does cross-examination.
22 In a way, I'm saying that they're almost helping you perform
23 your function and doing the cross-examination, whether it's
24 they do it or whether they develop the questions for the
25 commission, it all goes to a part of is it an analysis or is

1 it fact finding.

2 Is it going out and getting information, such
3 as you could ask them now here's the evidence on the rate of
4 return, could you evaluate that for me and tell me if they're
5 hitting all the right points and items like that versus could
6 you go out and get me, you know, some information where I can
7 take that information and compare it to what's in the record
8 to see if that's fine.

9 I think there's a distinction there. And as
10 Mr. Lumley said, it's difficult to draw a line on it, but I
11 think it goes to the point of evaluation of analysis,
12 anything that helps assist you in there versus factual
13 investigation and presenting new facts that the other parties
14 are not aware of.

15 COMMISSIONER MURRAY: Yeah, beyond the record.

16 MR. DANDINO: Right.

17 COMMISSIONER MURRAY: Okay.

18 CHAIRMAN GAW: And it's not like FERC doesn't
19 do this. FERC has -- FERC has -- FERC had a whole system of
20 things that these arguments could easily be applied to them
21 in due process side, so anyway, try to give us something that
22 narrows it down a little bit more, if you could.

23 MS. MACDONALD: We'd be happy to.

24 CHAIRMAN GAW: We're going to try to take some
25 of this into account, so I'm really not trying to shut off

1 your argument. I want to know what portions of it can be
2 utilized to improve this rulemaking in a way that -- so that
3 we can continue to function the way we want to involve into
4 functioning, so I don't want to just say no to you and right
5 now, I don't have any way to -- to understand this in a right
6 enough approach to see what we can do to help alleviate some
7 of your concerns, okay.

8 MS. MACDONALD: Absolutely.

9 COMMISSIONER MURRAY: Could I just ask in that
10 we've -- we obviously have agenda at the same time, and we're
11 going back to agenda now, but in terms of the rulemaking, the
12 proposed rulemaking, did the parties take the position that
13 this was done without discussion with any of the industry
14 people or is that a misconception that I'm -- that I have
15 from not being here earlier? Is anyone taking the position
16 that this was not -- this rulemaking was not discussed and
17 that you didn't have an opportunity for input?

18 MR. LUMLEY: That's not our position. We've
19 offered comments -- there's sections we'd like to see
20 clarified, there's certain sections or subsections that we're
21 concerned about and would like to see go in a different
22 direction, but we introduced our comments by saying that we
23 thought it was valuable to clarify how we go about these
24 cases.

25 COMMISSIONER MURRAY: And were there

1 discussions prior to the actual wording being developed?

2 MR. LUMLEY: My recollection is that a draft
3 was supplied, and I couldn't tell you when, it's been a while
4 ago, and I believe we submitted a few comments, we didn't get
5 into the minutia of it because it seemed a little early for
6 that, but certainly, there was a -- I want to say it was last
7 summer perhaps where Staff made available either on the their
8 website or sent it to us, I can't remember exactly how we got
9 it, but there were quite a few different rulemakings, the
10 text that they were considering, and they allowed us to
11 interact with them about that in varying degrees. I know
12 there was a truth in billing where they were having meetings,
13 if I remember right, getting into a great deal of detail.

14 COMMISSIONER MURRAY: Is there any
15 disagreement with that? Okay. Thank you.

16 CHAIRMAN GAW: Thank you all.

17 JUDGE DIPPELL: Ms. MacDonald, you were about
18 to make some comments regarding reply comments, yes, if you
19 don't mind. I'll let you go ahead and finish with what we
20 started. Thank you.

21 MS. MACDONALD: Okay. I have one other
22 comment, and then I'll go to my comments regarding what Mr.
23 Dority was speaking about.

24 On 4 CSR 24-36.030, Sprint seeks a
25 clarification regarding written statements, and they say that

1 they should not be necessary unless both parties agree to a
2 mediation, and we agree with Sprint's position on that.
3 Written statements should be filed within 15 days after the
4 selection of mediator would be fine.

5 And what I really wanted to talk about, that
6 was just an aside, is with regard to Mr. Dority's position
7 regarding MITG's desire to be involved in all of these
8 interconnection agreements. We agree with Mr. Dority that
9 this is not the place or the time. We specifically think
10 that MITG's proposals are contrary to the Telecommunications
11 Act of 1996, and I wanted to briefly go through the
12 provisions that we think would be violated if they were
13 allowed to be involved.

14 Section 252(b) contemplates the participation
15 arbitrations of only parties to the negotiations.
16 Specifically, under Section 252(b)(1), only a party to the
17 negotiation may petition the state Commissions to arbitrate
18 any open issues. Under Section 252(b)(3), it provides an
19 opportunity respond only to a non-participation party to a
20 negotiation. There is no authorization for a third party
21 response. Under Section 252(b)(4), it requires state
22 Commission to limit its consideration of arbitration
23 petitions to the issues set forth in the petition and the
24 response, if any. State Commissioner's are not authorized to
25 consider issues raised by third parties under that provision.

1 And finally, under section 252(b) (4) --
2 (b) (4) (c), it requires the Commission to resolve each issue
3 set forth in the petition and a response, again, state
4 Commissions are not authorized to address matters outside of
5 those parties in negotiation.

6 Specifically, terms contained in
7 interconnection agreement apply only to the carriers that are
8 the parties to the agreement, and carriers that would not be
9 bound by the agreement should not be permitted to participate
10 in the arbitration of its terms. With respect to third --
11 traffic to third parties, SBC Missouri in its interconnection
12 agreements provide that the interconnecting carrier is to
13 make its own arrangements for termination of its traffic to
14 third party carriers.

15 Any special arrangement MITG wishes to
16 negotiate concerning traffic they receive from an
17 interconnecting carrier should be the subject of a separate
18 negotiation under the Act with the originating carrier.
19 Specifically, I mean, MITG being the originating carrier.
20 MITG suggests that proposed rule 4 CSR 240-36.040(5) to
21 further -- to restrict further negotiations between parties
22 of provisions affecting third party carriers unless they
23 agree to any settlements reached and submitted to the
24 Commission, such restrictions would improperly give control
25 of further negotiations to third parties.

1 MITG suggests adding language to proposed rule
2 4 CSR 240-36.040(5)(f) giving the arbitrator discretion to
3 adopt proposals submitted by an intervening carrier that is
4 not a party to such agreement. Such agreement would be
5 contrary to Section 252(b)(4)(a), which states that state
6 Commissions quote shall limit its consideration of any
7 Petition to the issues set forth in the Petition and in the
8 response followed by the parties to the negotiation and
9 254(b)(4)(c), which only authorizes the state Commission to
10 resolve issues set forth in the Petition of the response of
11 the parties to the negotiation.

12 Finally, with respect to 4 CSR 240-36.080,
13 which is Commission approval of a matter to existing
14 Commission approved agreements, MITG suggests adding language
15 to the proposed rule requiring requests for Commission
16 approval of agreements reached by mediation or negotiation to
17 include a statement of whether the agreement submitted for
18 approval addresses traffic destined for any carrier not a
19 party to the agreement.

20 They also propose similar language for
21 submission of amendments to existing agreements. This
22 requirement is completely unnecessary. The Commission
23 already provides electronic access to agreements that are
24 filed with it for approval. MITG has effectively used the
25 Commission system to monitor the filings of other carriers to

1 -- and to seek intervention in cases it believes it has an
2 interest, and those are my comments regarding MITG.

3 JUDGE DIPPELL: Thank you.

4 MS. MACDONALD: Thank you.

5 JUDGE DIPPELL: Let's see. I'm seeing Ms.
6 Dietrich wanting to make some additional responses, but Ms.
7 Chase hasn't had a chance to make any comments, so I am going
8 to let her go first.

9 MS. CHASE: Thank you, your Honor.

10 (THE WITNESS WAS SWORN.)

11 JUDGE DIPPELL: Thank you. Go ahead.

12 MS. CHASE: My name is Lisa Chase and I work
13 for and Andereck, Evans, Milne, Peace and Johnson, LLP, at
14 700 East Capitol, Jefferson City, Missouri, 65102, and I
15 represent the parties of the MITG, which is the Alma
16 Telephone Company, Chariton Village Corporation, Mid-Missouri
17 Telephone Company, MoKan Dial, Inc., and Northeast Missouri
18 Rural Telephone Company.

19 And I just have a few brief comments in
20 response to Ms. MacDonald, because I believe that our filed
21 comments completely express our position with respect to
22 these rules, and my concern with respect to limiting these
23 arbitrations to just the parties who have filed is that I
24 agree that should be limited to just those parties provided
25 they are just negotiating traffic between themselves, but

1 once they start including traffic to third parties, those
2 third parties should have a right to be put on notice that
3 traffic to their networks is subject to this interconnection
4 agreement and that the terms of the interconnection agreement
5 may be contrary to the terms of their filed tariffs.

6 The problems that we have had arise in the
7 past stem from the fact that many of these interconnection
8 agreements dealing with transiting traffic put the -- differ
9 from the filed access tariffs that have been approved by the
10 Commission for the MITG companies, and once the Commission
11 approves the interconnection agreements, they are, in effect,
12 making a separate order that is contrary to their Order
13 granting approval of the tariffs, so there are two
14 competitive orders of the Commission with respect to how
15 traffic to the MITG companies is to be treated.

16 And we -- it is our position that our tariff
17 supply, which hold that our access tariff supply that hold
18 that the party delivering the traffic to the companies is
19 primarily liable, and most of these interconnection
20 agreements or all of these interconnection agreements hold
21 that it is the originating carrier.

22 It has in the -- in this practice, although we
23 are trying to work with it, it has had many, many, many
24 problems in the past and we are just raising our concerns
25 with this rule with respect to how it may play out with

1 respect to transiting traffic.

2 JUDGE DIPPELL: Do you have other comments?

3 MS. CHASE: No, that's all.

4 JUDGE DIPPELL: Okay. Thank you very much.

5 MS. CHASE: Thank you.

6 JUDGE DIPPELL: Ms. Dietrich, you wanted to
7 make some additional comments?

8 MS. DIETRICH: Thank you, your Honor. I just
9 wanted to provide some clarification on the status of the
10 interconnection agreement rule. As you're aware, we made a
11 recommendation that the interconnection pieces be removed
12 from this pending rulemaking. In TX-2003-0565, we have
13 another proposed rulemaking that's in the process, it's
14 addressing all the various types of interconnection
15 agreements so on and so forth, and as Mr. Lumley mentioned,
16 there was some activity back in July, 2003, which I believe
17 what he was referencing was the Order finding necessity,
18 which basically gave us the green light to go ahead with
19 rulemaking language. Since accepted, we have talked with
20 Commissioners several times on various proposals on the
21 rulemaking language, and in fact, I'm scheduled to talk to
22 them again today about the current draft.

23 I think without being too presumptuous, we're
24 fairly close to moving ahead on it, and given the timing of
25 this current proceeding where within 90 days there would be

1 final order of rulemaking, it's quite likely either very
2 close to or at the publication of the interconnection
3 agreement rule, and so that was the reason for
4 recommendation.

5 The way the rule is drafted today, it is --
6 there are several parts that directly conflict with what is
7 in the arbitration rule for interconnection agreements, and
8 so I think we're at the point that the timing would be so
9 close that it would not make sense to go ahead and publish
10 the rules as they stand in Chapter 3, and then you know
11 within a few weeks or a month or whatever, file a rescission
12 or a modification of those, so I just wanted to provide some
13 clarification.

14 JUDGE DIPPELL: Thank you very much. Are
15 there any other comments on these proposed rules? Don't see
16 anyone else that would like to testify. Commissioner Gaw
17 asked for Bell to give it some additional information, and I
18 know the general procedure, because the statute says that
19 there's a comment period and then when the hearing can be in
20 a rulemaking procedure, I'm not 100 percent sure that the
21 Commission will be allowed to consider in its rulemaking
22 comments filed after the end of the comment period or after
23 the close of the hearing, so what I'm going to do is I'm
24 going to say that the hearing is going to remain open until
25 the transcript from this session is filed, and at that time,

1 the hearing will adjourn.

2 I will allow Ms. MacDonald to submit some
3 additional written comments as testimony to this hearing in
4 response to Mr. -- in response to the Chairman's questions.
5 I will, however, caution our Staff attorneys, who will be
6 preparing the background documents and so forth for the
7 orders of rulemaking to present to the Commission that they
8 may want to second guess my judgment on this and determine
9 whether the 90-day period for submitting orders of rulemaking
10 to the Secretary of State actually begins to run after this
11 day instead of at the end of what I expect will be 10 days
12 before -- or 10 business days before we get the transcript
13 back, so like I say, you might want to minus yourself some
14 time in there. I don't want the Commission to be have a
15 problem with when the orders of rulemaking are filed and have
16 that technical issue be a problem for the rulemaking.

17 Are there any other comments or any questions
18 that you all have for me procedurally? All right then. I
19 will leave the hearing record open until the transcript in
20 this matter is filed in this record, and we can go ahead and
21 adjourn for the day.

22 WHEREUPON, the recorded portion of the hearing
23 conference was concluded.

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