

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of CenturyTel Solutions,)
LLC, and CenturyTel Fiber Company II, LLC, doing)
business as LightCore, a CenturyTel Company, for)
Adoption of an Approved Interconnection Agreement) **Case No. LK-2006-0095**
between Southwestern Bell Telephone, LP, doing)
business as SBC Missouri, and Xspedius Management)
Company of Kansas City, LLC, and Xspedius Manage-)
ment Company Switched Services, LLC.)

ORDER APPROVING ADOPTION OF INTERCONNECTION
AGREEMENT

Issue Date: November 1, 2005

Effective Date: November 11, 2005

Procedural History and Arguments of the Parties:

On August 30, 2005, CenturyTel Solutions, LLC, and CenturyTel Fiber Company II, LLC, doing business as LightCore, a CenturyTel Company, filed their Application for Adoption of an Approved Interconnection Agreement, notifying the Commission of their desire to adopt the terms of the interconnection agreement between Southwestern Bell Telephone, LP, doing business as SBC Missouri ("SBC"), and Xspedius Management Company of Kansas City, LLC, and Xspedius Management Company Switched Services, LLC ("Xspedius"), pursuant to § 252(i) of the federal Telecommunications Act of 1996 ("the Act").¹ The agreement between SBC and Xspedius was approved by the Commission in Case No. TK-2006-0043 by order effective on August 16, 2005.

¹ See 47 U.S.C. § 252, *et seq.*

The Applicants desire to adopt the SBC/Xspedius agreement as their agreement with SBC; however, SBC did not join in the application. The Applicants did not file a signature page executed by themselves and SBC because, they explained, SBC has refused to sign unless the Applicants are willing to execute a rider, not part of the SBC/Xspedius agreement, that would render their agreement subject to the results of SBC's pending appeal from the Commission's arbitration decision that resulted in the SBC/Xspedius agreement.² The Applicants refused to execute the rider desired by SBC because, they say, it would alter the change-of-law provisions of the SBC/Xspedius agreement that the Applicants desire to adopt.

Commission Rule 4 CSR 240-3.513(4)(B) provides that, upon the filing of an application with the Commission for adoption of an interconnection agreement that is not accompanied by a signature page executed by both parties, the Commission shall provide notice to the non-signatory party of the application and that the proposed adoption shall be deemed approved unless the non-signatory party objects within twenty days. The Commission issued the required notice to SBC on September 2.

SBC timely filed its Response on September 12. Therein, SBC explained that the SBC/Xspedius interconnection agreement resulted from an arbitration by this Commission, the result of which is currently the subject of litigation under § 252(e)(6) of the Act in the United States District Court for the Eastern District of Missouri.³ In the case, a preliminary injunction has been issued that enjoins the Commission's Arbitration Order and

² Case No. TO-2005-0336, *In the Matter of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement* ("M2A").

³ Case No. 4:05-cv-01264-CAS, *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. The Missouri Public Service Commission, et al.*

subsequent orders approving interconnection agreements "to the extent that they require SBC Missouri to fill new orders for unbundled local switching or UNE-P pursuant to the Federal Telecommunications Act of 1996 with respect to the CLEC Defendants or **any other telecommunications carrier that adopts one of the interconnection agreements that are the subject of this injunction.**"⁴ Under these circumstances, SBC asserts, "it would be unlawful for the Commission to approve an interconnection agreement between SBC Missouri and the CenturyTel Applicants to the extent it would require SBC Missouri to provide unbundled local switching or the UNE-P in contravention of the Preliminary Injunction Order."

SBC further asserts that "it would be unlawful and inappropriate for the Commission to approve an interconnection agreement that would give greater rights to the CenturyTel Applicants than to the parties to the underlying SBC Missouri-Xspedius interconnection agreement" because, while Xspedius would be immediately subject to the outcome of SBC's federal appeal, "the CenturyTel Applicants would continue to gain the benefit of the unlawful provisions until these changes were 'negotiated and arbitrated' with the CenturyTel Applicants, a process which the CenturyTel Applicants would seek to drag on for weeks or months." It is this provision of the SBC/Xspedius agreement, that the effect of changes in the law be subject to negotiation and arbitration, that SBC seeks to avoid. SBC contends that carriers that adopt interconnection agreements subject to pending appeals "routinely" agree that the adopted agreement will be subject to the outcome of the appeal.

⁴ Emphasis added.

The Applicants replied on September 21, stating that they had timely acted to adopt a successor interconnection agreement with SBC and that, under § 252(i) of the Act, they are entitled "to have the same interconnection agreement terms and conditions as found in the Xspedius agreement." The Applicants admit that their adopted agreement "is subject to the outcome of the appeal of any challenged arbitrated terms of the underlying Xspedius agreement." Nonetheless, they continue to object to SBC's proposed rider because it would alter the terms of the agreement they are adopting. Furthermore, the Applicants contend, because the injunction relied upon by SBC expressly applies to carriers adopting any of the interconnection agreements resulting from the arbitration, SBC's rider is unnecessary.

The Applicants point out that, under the terms of the SBC/Xspedius agreement, either party may seek on written notice to renegotiate and amend those provisions affected by any change of law resulting from SBC's appeal of the Commission's Arbitration Order.⁵ In the absence of this provision, the Applicants argue, they would be without recourse in the face of SBC's unilateral interpretation of the effects of any change of law – the Applicants refer to "harsh, draconian and uneven results[.]" Xspedius will enjoy the protection of § 23.1 of the agreement in the event of a change of law favoring SBC and the Applicants assert that they, having adopted the Xspedius agreement, must enjoy the same protection. Furthermore, the Applicants charge that SBC's position herein amounts to a violation of § 252(i) of the Act⁶ and the F.C.C.'s implementing regulation:⁷

⁵ SBC/Xspedius Interconnection Agreement, General Terms & Conditions, § 23.1.

⁶ The text of § 252(i) is set out below in the *Discussion* section of this order.

⁷ Regulation 47 C.F.R. § 51.809(a) (2004).

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

Also on September 21, the Commission's Staff filed its Recommendation, advising the Commission to approve the proposed adoption "and issue an order concluding that the adopted interconnection agreement between SBC and CenturyTel is subject to the terms of the Preliminary Injunction Order."

SBC responded to the Applicants' Reply and Staff's Recommendation on September 26. Therein, SBC states that

Staff's Recommendation does not appear to go far enough, as it does not make explicit that the CenturyTel Applicants are also subject to the ultimate outcome of the appeal of the Order approving the underlying Xspedius Interconnection Agreement. The Staff Recommendation does not even address SBC Missouri's arguments that the CenturyTel Applicants' agreement must be immediately revised to comply with any decision issued in the appeal of the underlying Xspedius Interconnection Agreement. SBC Missouri pointed out that it would be unlawful for the Commission to require SBC Missouri to "negotiate and arbitrate" with the CenturyTel Applicants the impact of any order on appeal of the underlying Xspedius Interconnection Agreement.

SBC then directs the Commission to its order in a similar, prior case,⁸ in which the Commission reasoned that the adoption of an arbitrated interconnection agreement is necessarily rendered void to the extent that the arbitrated agreement is invalidated on appeal because "[t]he [arbitrated] Agreement will no longer constitute an "approved agreement" that is subject to adoption pursuant to § 252(i)[.]"⁹ SBC argues that it is "better

⁸ *In the Matter of the Mediation and Arbitration of Remaining Interconnection Issues Between MCI Telecommunications Corporation and its Affiliates and Southwestern Bell Telephone Company*, 7 MoPSC3d 354 (July 22, 1998).

⁹ *Id.*, at 362.

practice" to require that the adopted agreement specify that it is subject to modification based on the results of the appeal of the underlying arbitrated agreement.

Discussion:

Section 252(e)(1) of the Act provides:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Section 252(i), in turn, provides:

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.

Commission Rule 4 CSR 240-3.513(4)(B)4 provides, in pertinent part, that "[i]f the non-signatory party does file an objection on or before the twentieth day, the commission, after following an appropriate procedure, will determine whether to approve or reject the adoption."

What is "an appropriate procedure"? The question presented is entirely one of law; thus, no evidentiary hearing is necessary to develop a factual record. None of the parties has requested a hearing or an opportunity for oral argument. The parties have filed written arguments and the last filing occurred a month ago. It appears that the parties have had ample opportunity to argue their positions to the Commission. The Commission concludes, therefore, that it may determine this matter upon the written arguments.

Section 252(i) of the Act and its implementing regulation entitle the Applicants to adopt the SBC/Xspedius interconnection agreement without alteration. Neither statute nor rule contains any exception for instances, such as the present, where the agreement

adopted is itself subject to ongoing litigation. For this reason, we conclude that the Applicants need not execute any rider or amendment as urged by SBC.

This does not mean that the Applicants will thus acquire greater rights than Xspedius or that they will somehow evade the outcome of the ongoing appeal. The preliminary injunction entered in that case expressly applies to adopting carriers and, thus, applies to the Applicants here. No action by this Commission is necessary to effectuate the order of the federal District Judge. Portions of the arbitrated order that the Applicants seek to adopt have been enjoined and they understand that they, too, are subject to that injunction.

As this Commission has explained in the past, the adopted agreement will necessarily be immediately affected by the outcome of the appeal. No action by this Commission is thus necessary and no modification of the agreement is necessary, either.

SBC desires to forestall any negotiation or arbitration with the Applicants in the event that it succeeds in its appeal of the Commission's Arbitration Order and the resulting interconnection agreements. That is not possible. The effect of SBC's success on appeal will be a *pro tanto* invalidation of the adopted agreement. Under those circumstances, the Applicants may choose to exercise their rights under the Act and issue a request for negotiation under § 252(a).

Having considered all of the arguments of the parties, the Commission will approve the adoption by the Applicants of the SBC/Xspedius interconnection agreement without modification or amendment.

IT IS THEREFORE ORDERED:

1. That the Application for Adoption of an Approved Interconnection Agreement, filed on August 30, 2005, by CenturyTel Solutions, LLC, and CenturyTel Fiber Company II, LLC, doing business as LightCore, a CenturyTel Company, is approved.
2. That this order shall become effective on November 11, 2005.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to Section 386.240,
RSMo 2000.

Dated at Jefferson City, Missouri,
on this 1st day of November, 2005.