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April 18, 2003

FILED[4]
APR 18 2003
Missouri Public
Service Commission

Secretary of the Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102-0360

Re: Case No.: TO-2002-202

Dear Secretary of the Commission:

Enclosed please find for filing with your office an original and nine (9) copies of MCI's Response to Order Directing Filing Upon your receipt, please file stamp the extra copy received and return to the undersigned. If you have any questions, please contact me.

Very truly yours,

Carl J. Lumley

CJL:dn
Enclosures
cc. Parties of Record (W/Enclosure)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED[4]

APR 18 2003

Missouri Public Service Commission

PETITION OF MCImetro ACCESS TRANSMISSION SERVICES LLC, BROOKS FIBER COMMUNICATIONS OF MISSOURI, INC. AND MCI WORLDCOM COMMUNICATIONS, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY UNDER THE TELECOMMUNICATIONS ACT OF 1996	)	Case No. TO-2002-222

MCI'S RESPONSE TO ORDER DIRECTING FILING

Comes Now MCImetro Access Transmission Services, LLC (MCI)[1] and for its Response to Order Directing Filing issued on April 10, 2003 states to the Commission:

1. On April 10, 2003 the Commission issued its Order Directing Filing, instructing the parties to brief the following questions: "Does the doctrine of *functus officio* preclude the Commission from addressing any or all of the parties' areas of disagreement? Why or why not?"

2. The Commission issued its Arbitration Order on February 28, 2002. It issued an Order Granting Motion for Correction on March 26, 2002. In the Arbitration Order, the Commission directed the parties to submit a conformed interconnection agreement to the Staff for review within 30 days. The parties submitted a draft

[1] The MCIWorldCom and Brooks agreements have been approved. MCImetro responds as the only MCI company that does not yet have an approved agreement under this case. MCI became the official brand name of these companies on April 14, 2003.

agreement to Staff. As Staff reported, the parties had a dispute over the draft agreement. Subsequently, the Commission ordered the parties to submit another conformed agreement to Staff by July 6, 2002. The parties complied by providing a document to Staff before that date. In the Arbitration Order, the Commission directed the parties not to file an agreement for approval until Staff indicated that the parties had successfully prepared a conformed agreement. To date, Staff has not found the agreement submitted to it by the parties to be satisfactory. Staff has identified two remaining issues: (1) conflicts in the Arbitration Order involving the deletion of Section 9.5.2.4 of Attachment 6 and the inclusion of Section 9.4.2.6 of Attachment 6; and (2) conflicts between the agreement and the reinstatement of the FCC's rules regarding combinations of unbundled network elements (47 CFR 51.315(c)-(f)) by the United States Supreme Court in a decision issued after the Arbitration Order. See Staff's Memorandum of October 21, 2002. MCI has also indicated that these two issues remain. See MCImetro's Comments Regarding Post-Hearing Conference of October 21, 2002.

3. According to the Missouri Supreme Court, the doctrine of *functus officio* generally refers to a body that "has fulfilled the purpose of its creation, and is therefore of no further virtue or effect." State v. Atterbury, 300 SW2d 806, 811 (Mo. banc 1957). "The term is applied to something which once has had life and power, but which has become of no virtue whatsoever." Id. Similar general explanations can be found in Black's Law Dictionary and Corpus Juris Secundum (CJS).

4. In the context of judgments, the doctrine refers to a judgment that has been performed and satisfied. See, e.g., 47 AmJur2d Judgments, Section 1006. In the specific context of arbitration decisions, the doctrine refers to the general inability of the arbitrator

to act once it has issued a final decision. See, e.g., Legion Insurance v. VCW, Inc., 198 F.3d 718, 719 (8th Cir. 1999); 48 AmJur 2d Labor & Labor Relations, Section 3508. Exceptions are recognized for correction of mistakes evident on the face of an arbitration award, for changes to which the parties consent, and for completion of an award by addressing post-award contingencies. See, e.g., Legion Insurance, *supra* p. 719; International Bhd. of Teamsters v. Silver State Disposal Serv. Inc., 109 F.3d 1409 (9th Cir. 1997); Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union v. Excelsior Foundry Co., 56 F. 3d 844 (7th Cir. 1995); 48 AmJur 2d Labor & Labor Relations, Section 3508.

5. There does not appear to be any precedent applying the doctrine in the context of an arbitration under Section 252 of the Telecommunications Act of 1996.

6. Assuming that the doctrine would generally apply to arbitrations under Section 252, it nevertheless does not apply in the instant situation for a number of reasons.

7. First, the award has not been performed and satisfied, in that the Commission expressly instructed the parties not to file an agreement until after Staff confirms that they have prepared an agreement that conforms to the award. Staff has not yet so acted and, accordingly, no agreement has been filed.

8. Second, the issue concerning Sections 9.5.2.4 and 9.4.2.6 involves a mistake on the face of the award. As indicated above, correction of such a mistake fits within one of the exceptions to the doctrine. The Commission has already made some such corrections after issuing the award.

9. Third, the issue concerning the reinstatement of the FCC's rules regarding UNE combinations subsequent to the issuance of the award constitutes a post-award contingency that renders the award incomplete. As indicated above, addressing such a contingency is another recognized exception to the doctrine.

10. In any event, despite the issuance of the arbitration award, the Commission has not fulfilled its responsibilities under Section 252. Once an interconnection agreement is submitted, the Commission must act to approve or reject it. The two open issues involve matters that, if not addressed prior to such submittal, will present grounds for rejection of the agreement. As indicated in prior comments submitted herein by MCI, in each instance the award conflicts with FCC regulations. In the instance of Sections 9.5.2.4 and 9.4.2.6, the Commission simply made a mistake by only deleting one of two similar unlawful restrictions. In the instance of the sections regarding UNE combinations, the FCC rules were reinstated after the award was issued, making restrictions on UNE combinations unlawful.

11. Hence, all debate aside regarding the remaining "virtue and effect" of the Commission in this proceeding in light of the doctrine of *functus officio*, as a practical matter the Commission will have to address the two remaining issues before it approves an agreement. MCI will be pleased to submit an agreement that it believes should be approved based on the arbitration award and the reinstated FCC rules, with or without further guidance from the Commission at this time. As expressed in prior pleadings, these reinstated rules must be followed. See US West v. Jennings, 304 F3d 950 (9th Cir. 2002). If the Commission does not want to provide any guidance now, it should simply

remove the present bar that precludes the parties from submitting any agreement for approval. Presumably everyone agrees that this matter needs to conclude.

WHEREFORE, MCImetro Access Transmission Services, LLC requests the Commission to accept these additional comments.

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Certificate of Service

A true and correct copy of the foregoing document was mailed this 18 day of April, 2003, to the persons listed on the attached list, by placing same in the U.S. Mail, postage paid.

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