

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Southwestern Bell Telephone)
Company d/b/a AT&T Missouri,)
)
Complainant,)
)
vs.)
)
Big River Telephone Company, LLC; Davidson)
Telecom, LLC; KMC Data; KMC Telecom III,)
LLC; Level 3 Communications LLC; Matrix)
Telecom, Inc.; MCImetro Access Transmission)
Services LLC; McLeodUSA Telecommunications)
Services, Inc.; Nexus Communications, Inc.;)
PAC-West Telecomm, Inc.; Qwest)
Communications Corporation; TruComm)
Corporation; tw telecom of kansas city llc,)
)
Respondents.)

Case No. _____

COMPLAINT

COMES NOW AT&T Missouri,¹ pursuant to the provisions of 47 U.S.C. §§ 251 and 252, the interconnection agreement in effect between AT&T Missouri and each of the Respondents identified herein, and other applicable authority, and hereby submits this Complaint against said Respondents, for resolution by the Commission.

A. Introduction/Summary

This Complaint seeks to compel the various Respondents -- all of whom are Missouri competitive local exchange companies ("CLECs") with whom AT&T Missouri does business under the terms of a Commission-approved interconnection agreement ("ICA") -- to enter into an "intervening law" (a/k/a "change of law") amendment pursuant to the ICA. The amendment, previously tendered to each Respondent, would reflect two developments in the law since each agreement was consummated: (1) the federal court's decision in the "Post-M2A Appeal"

¹ Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri").

stemming from the Commission's 2005 *Post-M2A Arbitration Order*,² and (2) the access charge provisions of new § 392.550.2, resulting from HB 1779, enacted last year. Such amendments involving other CLECs and covering each of these developments, either singly or together, have been previously filed, supported by Staff, and approved by the Commission. AT&T Missouri has sought to obtain the same amendments from the afore-mentioned Respondents, to no avail. AT&T Missouri respectfully requests, therefore, that the Commission exercise its power under the federal Telecommunications Act of 1996 to interpret and enforce the terms of the subject interconnection agreements in this circumstance.³

B. The Parties

The Respondents to whom this Complaint is directed, all of whom are parties to a Post-M2A Commission-approved ICA, are listed below. Following each listed Respondent is the case number in which the Commission approved that Respondent's ICA with AT&T Missouri.

- Big River Telephone Company, LLC (TK-2006-0073)
- Davidson Telecom, LLC (TK-2006-0044)
- KMC Data (TK-2006-0044)
- KMC Telecom III, LLC (TK-2006-0044)
- Level 3 Communications LLC (TK-2005-0285)
- MatrixTelecom, Inc. (VT-2006-0011)
- MCImetro Access Transmission Services LLC (TK-2006-0050)
- McLeodUSA Telecommunications Services, Inc. (VT-2006-0022)
- Nexus Communications, Inc. (TK-2006-0044)
- Pac-West Telecomm, Inc. (VT-2006-0037)
- Qwest Communications Corporation (TK-2006-0044)
- TruComm Corporation (TK-2006-0044)
- tw telecom of kansas city llc (VT-2009-0036)

² See, *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")*, Case No. TO-2005-0336, Arbitration Order, issued July 11, 2005 ("*Post-M2A Arbitration Order*"); see also, *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 1055 (E.D. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 555 U.S. ---, January 12, 2009.

³ See, *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) ("The Act provides that an interconnection agreement, reached either by negotiation or arbitration, must be submitted to the state commission for approval. See, 47 U.S.C. § 252(e)(1). This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement.") (further citation omitted).

C. The *Post-M2A Arbitration Order* and Subsequent Legal Developments

On July 11, 2005, the Commission issued its *Post-M2A Arbitration Order*, which represented the culmination of arbitration proceedings regarding a successor interconnection agreement to the Missouri 271 Agreement (“M2A”). Several “spin-off” proceedings thereafter commenced, to conform each CLEC’s ICA to the results of the *Post-M2A Arbitration Order*, with one principal exception. In the June 21, 2005, *Final Arbitrator’s Report* which was largely incorporated by reference into *Post-M2A Arbitration Order*, the Arbitrator ruled that with respect to those CLECs that had failed to respond to then SBC’s requests to negotiate a successor ICA, “SBC and the 19 non-responding CLECs will do business after July 19, 2005, pursuant to the rates, terms, and conditions set out in the Generic Successor ICA proposed by SBC, Exhibit 27 to SBC’s *Petition for Arbitration*.”⁴

The General Terms and Conditions of each of these Commission-approved ICAs contain “Intervening Law” provisions that are the same in all respects material to this Complaint as those contained in the Commission-approved Generic Successor ICA. These provisions provide a mechanism to ensure that the duties and obligations imposed by the interconnection agreements approved in 2005 remain consistent with later legislative, regulatory and judicial developments. In this regard, the General Terms and Conditions of the Generic Successor ICA provide, in pertinent part:

If any action by any state or federal regulatory or legislative body or court of competent jurisdiction invalidates, modifies, or stays the enforcement of laws or regulations that were the basis or rationale for any rate(s), term(s) and/or condition(s) (“Provisions”) of the Agreement and/or otherwise affects the rights or obligations of either Party that are addressed by this Agreement, specifically including but not limited to those arising with respect to the Government Actions, the affected Provision(s) shall be immediately invalidated, modified or stayed consistent with the action of the regulatory or legislative body or court of competent jurisdiction upon the written request of either Party (“Written Notice”). With respect to any Written Notices hereunder, the Parties shall have sixty (60)

⁴*Post-M2A Arbitration Order*, p. 67 (Ordering Clause One); *Final Arbitrator’s Report*, p. 13.

days from the Written Notice to attempt to negotiate and arrive at an agreement on the appropriate conforming modifications to the Agreement. If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the Written Notice, any disputes between the Parties concerning the interpretation of the actions required or the provisions affected by such order shall be resolved pursuant to the dispute resolution process provided for in this Agreement.” Petition for Arbitration, March 29, 2005, Exhibit 27, General Terms and Conditions, § 23.1. (pp. 37-38 of 58)

After issuance of the Commission’s *Post-M2A Arbitration Order*, two developments ensued, which impacted the ICAs with the Respondents named herein to the extent that each qualifies as an intervening or change in existing law.

The “Post-M2A Appeal” federal court decision – In September, 2006, in Case No. 4:05-CV-1264 CAS, the St. Louis federal district court issued its Memorandum and Order ruling on various appeals from the *Post-M2A Arbitration Order*. For purposes of this Complaint, two holdings by the Court are pertinent. First, in ruling in favor of AT&T Missouri, the Court concluded that “the Arbitration Order’s requirement that SBC include § 271 unbundling obligations is beyond the jurisdiction of the MPSC[,]” and that “the Arbitration Order conflicts with and is preempted by federal law to the extent it requires SBC to provide unbundled access to switching and the [Unbundled Network Element] Platform.”⁵ Second, in ruling in favor of the CLECs, the Court concluded that “the Arbitration Order should be affirmed to the extent it determined that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities.”⁶ The Court’s rulings, ultimately affirmed on appeal,⁷ resolved the uncertainties presented by the various legal challenges to the *Post-M2A Arbitration Order*.

⁵ 461 F. Supp. at 1069, 1070; *see also*, 461 F. Supp. At 1071 (“The MPSC lacks jurisdiction or authority to include § 271 checklist items or to order § 271 unbundling as part of arbitrated interconnection agreements, or to set rates for these items.”).

⁶ 461 F. Supp. at 1073.

⁷ *See*, note 2, *infra*.

HB 1779 – On August 28, 2009, § 392.550 became effective with the enactment of HB

1779. Subsection 2 of § 392.550 states:

Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges. Until January 1, 2010, this subsection shall not alter intercarrier compensation provisions specifically addressing interconnected voice over Internet protocol service contained in an interconnection agreement approved by the commission pursuant to 47 U.S. 252 and in existence as of August 28, 2008.

This new statutory provision represents intervening law regarding intercompany compensation on interconnected voice over Internet protocol service traffic.

In approximately September, 2008, AT&T Missouri set about preparing and tendering to CLECs with whom it had entered into ICAs a proposed ICA amendment reflecting these developments. As a result of this effort, and AT&T Missouri's having followed up with CLECs to whom it wrote, many CLECs have since executed these amendments (as has AT&T Missouri thereafter), and these amendments have been filed with and approved by the Commission.

Despite these efforts, however, each of the named Respondents has failed to execute and return the tendered amendment (or an agreed suitable alternative) to AT&T Missouri. AT&T Missouri has corresponded with these CLECs and has otherwise complied with the applicable dispute resolution process provided for in these CLECs' ICAs. Attached hereto are copies of the ICA amendment originally tendered to each of them.⁸

In sum, AT&T Missouri requests that the Commission issue an order directing each of the named Respondents to either execute the intervening law ICA amendment originally


⁸ See, Exhibit A (Big River Telephone Company); Exhibit B (Davidson Telecom, LLC); Exhibit C (KMC Data); Exhibit D (KMC Telecom III, LLC); Exhibit E (Level 3 Communications LLC); Exhibit F (MatrixTelecom, Inc.); Exhibit G (MCImetro Access Transmission Services LLC); Exhibit H (McLeodUSA Telecommunications Services, Inc.); Exhibit I (Nexus Communications, Inc.); Exhibit J (Pac-West Telecomm, Inc.); Exhibit K (Qwest Communications Corporation); Exhibit L (TruComm Corporation); Exhibit M (tw telecom of kansas city llc). The only exception is with respect to Big River Telephone Company, wherein the attached amendment reflects only the change of law developments referenced above, not additional modifications requested by that CLEC prior to AT&T Missouri's having tendered the amendment to it.

tendered to them or, alternatively, to show cause why their having not executed such amendment may be justified or otherwise excused. To the extent that any Respondent thereafter submits that their execution of such amendment is justified or otherwise excused, AT&T Missouri requests that the Commission hear and resolve the submission.⁹

WHEREFORE, AT&T Missouri respectfully requests that the Commission grant the relief requested herein, and that the Commission further grant such other and further relief as may be just and appropriate in the circumstances.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

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⁹ AT&T Missouri has reason to believe that executed agreed-upon amendments may be forthcoming from MCImetro Access Transmission Services LLC. Should this occur, an appropriate dismissal of this Complaint as to the CLEC will follow, pursuant to Commission Rule 2.116 (4 CSR 240-2.116).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on October 2, 2009.


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