

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

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

**COMMENTS OF WITEL LOCAL NETWORK, LLC**  
**ON FINAL ARBITRATOR'S REPORT**

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Dated: June 24, 2005

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WitTel Local Network, LLC ("WitTel"), pursuant to 4 CSR 240-36.040(20), hereby respectfully submits these Comments on the Final Arbitrator's Report (the "Report") issued by the Deputy Chief Regulatory Law Judge (referred to herein as "Arbitrator") on June 21, 2005 in the above-captioned proceeding.

**I. Introduction**

WitTel commends the Arbitrator for the thoughtful analysis of the issues contained in the Report. WitTel additionally applauds the time and effort expended by the Staff of the Missouri Public Service Commission. Even given the sheer magnitude of this proceeding involving multiple parties and some 727 specific disputed points presented for the Arbitrator's resolution, a Final Arbitration Report was completed and issued in a substantially abbreviated time period. The Report provides detailed summaries of the parties' positions and reaches conclusions that are generally consistent with applicable requirements under the Telecommunications Act of 1996 (the "Act"), and the Detailed Decision Language Matrices (hereafter referred to generally as "DLMs") provide clear guidance to the parties for applying the Arbitrator's findings and conclusions in crafting executable interconnection agreements for approval by this Commission. Nonetheless, WitTel respectfully takes exception and submits these

comments in response to a few factual, legal or technical errors or clarifications within the findings and conclusions contained in the Report.

## **II. WilTel's Comments on GTC Issues**

### Issue GTC 7

GTC Issue 7 deals with changes by WilTel to its OCN or ACNA company codes and whether SBC should be entitled to imposed a charge for such changes. WilTel maintains that any charge imposed for what is simply an internal SBC function and a cost of doing business is not permitted under FCC Rules and is inconsistent with section 251 of the Act requiring that rates, terms and conditions be just, reasonable and nondiscriminatory. 47 U.S.C. § 251. Further, even according to the findings and conclusions of the Arbitrator, SBC at most is only entitled to recover a “reasonable charge for database corrections.” Report, Section 1(A), at 23. SBC’s language, however, leaves open the potential for SBC to impose charges beyond what is just and reasonable, and in practice SBC has attempted to charge more than a reasonable charge for what should be a simple record change. *See* WilTel’s Post-Hearing Brief, Ex. 8, at p. 2:24-26. At a minimum, any charges or other conditions imposed upon WilTel for OCN/ACNA changes should be nondiscriminatory in relation to those imposed upon other carriers. For the foregoing reasons, WilTel requests that the Commission reconsider GTC Issue 7.

### Issue GTC 10

GTC Issue 10 deals with credit and assurance of payment provisions. Particularly with regard to the “triggers” that allow SBC to seek a deposit, WilTel maintains that its proposed definition of what constitutes “satisfactory credit” and a “good payment history” with SBC is more consistent with the requirements of section 251 of the Act

requiring SBC to provide interconnection and access to unbundled network elements at rates, terms and conditions that are just, reasonable and nondiscriminatory. 47 U.S.C. § 251. WilTel lauds the Arbitrator for limiting the triggers which SBC may use to request a deposit to only those situations where CLECs have not yet established a good payment record or have failed to pay undisputed bills when due. Report, Section 1(A), at 55-56. However, the remaining triggers themselves as proposed by SBC are too restrictive and contrary to the “just and reasonable” requirements of section 251. For the foregoing reasons, WilTel requests that the Commission reconsider GTC Issue 10 in the Report and approve WilTel’s proposed trigger language.

#### Issue GTC 12

GTC Issue 12 deals with indemnification obligations under the Agreement. A particular issue for WilTel is whether it is reasonable for SBC to attempt to contractually limit SBC’s liability to WilTel in situations where SBC has violated a statutory obligation. *See* Report, Section 1(A), at 69. The Arbitrator’s findings in the Report were clearly in support of WilTel’s position when he concluded that “it is improper for this ICA to attempt to limit or alter damages available under a statute.” Report, Section 1(A), at 71. However, in the DLM for this issue, the Arbitrator’s position states incorrectly that SBC’s language is most consistent with the Report. DDLM, Attachment I.A., at 207. SBC’s language states that “...each Party’s liability ... whether in contract, tort or otherwise, including alleged breaches of this Agreement *and* causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act... shall not exceed in total the amount ...” (etc.). *Id.* (emphasis added). WilTel’s language, on the other hand, states that “...each Party’s liability ...

whether in contract, tort or otherwise, including alleged breaches of this Agreement, *but excluding* causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act... shall not exceed in total the amount ...” (etc.). *Id.* (emphasis added). WilTel’s language is clearly most consistent with the Report and, therefore, the DLM incorrectly implements the Arbitrator’s findings and conclusions in the Report. WilTel requests that the Commission correct the DLM and order that WilTel’s proposed language be adopted.

#### Issue GTC 13

GTC Issue 13 deals with the parties’ competing Intervening Law provisions addressing how changes in law that form the bases for rights and obligations under the Agreement to be implemented. WilTel acknowledges the Arbitrator’s conclusion in the Report that “[p]ublic policy is best served by the prompt implementation of changes of governing law.” Report, Section 1(A), at 87. WilTel generally agrees with the Arbitrator but respectfully submits that a disservice to public policy would be had if SBC is given the ability to make a prompt, yet unilateral, implementation of what it perceives as a change in law but which may in fact be a self-serving interpretation. As incumbent LECs demonstrated in the recent past when the *USTA II* court issued its ruling, SBC and other ILECs incorrectly imposed their interpretation that the ruling also overturned the FCC’s impairment findings for high-capacity loops. SBC immediately began the process of implementing this “change in law” and notified CLECs that it would immediately begin ceasing the provision of such UNEs to CLECs. CLECs were forced to file complaints with this and other commissions in order to stop what would have been an inaccurate interpretation of the law. Requiring the parties to negotiate and agree upon changes of

law prior to implementation would best serve the public policy, even if time limits were placed upon the parties to achieve resolution so as not to delay implementation unnecessarily. For clarification, WilTel does not seek to stand in the way of self-effectuating changes in law either (a concern expressed by the Arbitrator in the Report), and to the extent that the FCC issues rules that clearly state that they are self-effectuating, WilTel would not seek to delay. It is when the FCC's rulings do not clearly state they are self-effectuating where the parties' interests must be protected. For the foregoing reasons, the change of law provision in the Agreement should be worded to prevent a rushing to judgment by one party to the detriment of the other, and WilTel requests that the Commission reconsider this GTC Issue 13 and find in WilTel's favor.

### **III. WilTel's Comments on UNE Issues**

#### Issue UNE 8

WilTel UNE Issue 8 deals with UNE conversion issues, in particular with issues surrounding processes to carry out conversions. WilTel maintains that its proposed language acknowledging the existence of processes as of the effective date of the agreement, providing for new processes to be established within 30 days, and providing for the implementation of price changes by the next billing cycle are all consistent with the Arbitrator's Report and more consistent with the requirements of the FCC's ruling in the *TRO* than SBC's language. *See* DLM, Attachment III, Part 2, at 100; *see also* Report, Section III, at 32-35. At a minimum, any terms and conditions governing conversions should be nondiscriminatory in relation to those imposed upon other carriers. For the foregoing reasons, WilTel requests that the Commission reconsider UNE Issue 8.

#### Issue UNE 18

WilTel UNE Issue 18 deals with SBC's auditing rights and obligations pertaining to the eligibility criteria established by the FCC for access to enhanced extended links (EELs). *See* DML Attachment III.B. Part 3, at 79-82. The Arbitrator's ruling on the audit issues stated only that "[t]o the extent that these issues relate to SBC Missouri's auditing functions concerning the eligibility criteria, SBC Missouri's proposed language is reasonable." Report, Section III, at 39-40. The Commission's rules require a "reasoned articulation of the basis for the decision on each issue, including how the decision meets the standards set in sections 251 and 252 of the Act." 4 CSR 240-36.040(19). Further, many elements of SBC's proposed language are contrary to FCC rules as established in its *Triennial Review Order*.<sup>1</sup>

The FCC addressed the rights and obligations pertaining to an ILEC's right to audit a CLEC's compliance with the FCC-mandated eligibility criteria set forth in FCC Rule 51.318(b). *See TRO* at ¶¶ 625-629. Among other things, the FCC mandated that ILECs "should have a limited right" to audit compliance with the service eligibility criteria. *TRO* at ¶ 625. The language approved in the Report, however, provides SBC a virtually unlimited right to audit because of SBC's all-encompassing "in addition to any other rights" phrase. *See* DML Attachment III.B. Part 3, at 79 (Section 2.18.7 of language). Additionally, SBC language in Section 2.18.7.4 of the Agreement (*see* DML Attachment III.B. Part 3, at 80) imposes a 100% compliance standard for the audit which

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<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004) (hereafter referred to as the "*TRO*").

is contrary to the FCC's rules which state clearly that "the concept of materiality governs this type of audit." *TRO* at ¶ 626, and f.n. 1905. Finally, SBC's language would allow it to seek payment at wholesale rates even during any time period when WilTel was in fact in compliance with eligibility criteria, which is clearly contrary to the FCC's Rules and section 251 of the Act requiring SBC to provide access to UNEs at rates that are reasonable and nondiscriminatory.

SBC's proposed audit language goes beyond what is permitted by law in accordance with the FCC's rules and should not have been approved in the Report. WilTel's proposed language, on the other hand, is consistent with the FCC's rulings in the *TRO*. WilTel requests that the Commission approve its language over SBC's language on this UNE Issue 18.

#### **IV. Conclusion**

WHEREFORE, for the foregoing reasons, WilTel respectfully requests that the Commission consider WilTel's comments and exceptions and modify the Final Arbitrator's Report accordingly.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of WilTel Local Network, LLC's Comments on Final Arbitrator's Report was served electronically on all parties of record on the 24<sup>th</sup> day of June, 2005.

/s/ Adam Kupetsky  
Adam Kupetsky