

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

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)	Case No. TO-2005-0336
Missouri 271 Agreement ("M2A"))	

**COMMENTS OF NAVIGATOR TELECOMMUNICATIONS, LLC, CONCERNING
ARBITRATOR'S REPORT**

Comes now Navigator Telecommunications, LLC ("Navigator"), and pursuant to 4 CSR 240-36.040(20), files its Comments concerning the Arbitrator's Report in this proceeding.

1. The Arbitrator issued his Report on June 21, 2005. Navigator has reviewed the Report and has determined that several of the conclusions reached by the Arbitrator require consideration by the Commission. First, Navigator will address one issue which the Arbitrator appears to have overlooked (an understandable error, given the sheer volume of the record with which he was faced). Second, Navigator will point out a situation, involving the requirement of payment of disputed amounts into escrow, in which it appears the Arbitrator reached inconsistent conclusions in two issues. Finally, Navigator will address several issues about which it believes the Arbitrator reached an erroneous conclusion in adopting the language proposed by SBC.

2. Although Navigator will bring to the Commission's attention a number of items where the Arbitrator may have reached erroneous conclusions, that should in no way detract from the Arbitrator's accomplishment in coming to grips with several independent cases in a praiseworthy manner under extreme circumstances. The deadlines imposed by the federal statute made these consolidated cases difficult throughout, and a nightmare at certain points. In this pleading Navigator only asks the Commission to review some of the decisions reached in the Arbitrator's Report, not to find that the Arbitrator failed to consider the evidence and reach conclusions he considered supported by that evidence.

A. OVERLOOKED ISSUE

3. Given the brief time Navigator and the parties have had to review the Arbitrator's Report, it is quite likely that the parties may claim that the Arbitrator has failed to address issues which he in fact dealt with. Navigator does not claim that it has found every relevant item in the Report, given its monumental length. However, it does appear that the Arbitrator failed to make a ruling on one issue presented by Navigator: GT&C Issue 6 (equal payment for SBC changing Billing Account Numbers for resale and UNE lines). Navigator asks the Commission to consider this issue and find that Navigator's language proposal should be adopted.

4. **Navigator GT&C Issue 6:** The Arbitrator noted in his Report that Navigator raised the issue of charges imposed by SBC for changing OCN/ACNA information. As noted by the Arbitrator, Navigator does not object to compensating SBC for those functions, but it does object to SBC's discriminatory practice of imposing a separate charge for each resale line, while imposing a single charge for an entire block of UNE lines. The Arbitrator quoted Navigator witness LeDoux: "As a substantial number of our lines are resale, this practice could have a substantial impact on Navigator. We simply believe that SBC should impose the same block charges for both UNE and resale lines." (Report, Section 1(A), p. 22).

5. The Arbitrator found that SBC may impose a reasonable charge for database corrections, but he did not address the issue raised by Navigator, that is, disparate charges for UNE and resale lines. (Report, Section 1(A), p. 23). Unlike other CLECs in this proceeding, Navigator does not seek a free ride, i.e., the right to demand that SBC impose no charge for performing these functions, but rather asks the Commission to find that the charges should be imposed in a nondiscriminatory fashion.

6. Although SBC addressed in its post-hearing brief the issue of requiring CLECs to pay for costs incurred in changes of CLEC company identifiers, SBC did not address Navigator's

issue relating to discriminatory charges. (SBC Brief, pp. 13-15). Further, SBC provided no testimony to justify this practice. Thus, the Commission should find that the language proposed by Navigator, which would eliminate the practice, should be incorporated into the interconnection agreement.

B. INCONSISTENT FINDINGS IN REPORT

7. One of the more hotly contested issues in this proceeding involves the responsibility of the CLECs to deposit in escrow accounts funds equal to the amounts they dispute in SBC's bills. SBC's rationale for these escrow accounts is to ensure that it will have assurance that the CLEC will pay its bills after disputed charges have been resolved, even if the CLEC goes out of business. In addition, SBC argued that an escrow requirement will reduce, or eliminate, CLEC incentive to assert frivolous objections to their SBC bills. In response, Navigator argued that the requirement for escrow payments of disputed amounts would impound needed resources while billing disputes are resolved. In his decision on GT&C Issue 11, the Arbitrator sided with Navigator. However, his ruling on GT&C Issue 10 is wholly inconsistent with that finding, as the Arbitrator agreed with SBC that it could force Navigator to pay disputed amounts into escrow, under pain of complete termination of all services. The Commission should resolve this inconsistency by finding that Navigator's proposal for GT&C Issue 10 should be adopted.

7. **GT&C Issues 10 and 11:** These issues are in effect two sides of the same coin. Issue 11 involves whether Navigator should have to pay into escrow amounts which it disputes in SBC's bills, while Issue 10 involves SBC's claim that it should be allowed to terminate the services it provides to Navigator, if Navigator fails to pay all charges in SBC's bills (which would include payment into escrow of charges which Navigator disputes). It stands to reason that the resolution of these issues must be consistent, that is, SBC should not be able to demand

that Navigator pay disputed charges be paid into escrow, on pain of service termination, if it does not in the first place have the power to require Navigator to make escrow payments of disputed charges. Yet the Arbitrator appears to have reached inconsistent conclusions on these issues, finding with respect to Issue 11 that “the record shows that SBC’s bills contain an unusually large number of errors, leaving the CLECs no option but to dispute many bills,” (Section 1(A), p. 41) and that CLECs such as Navigator should not have to pay disputed amounts into escrow to initiate the billing dispute resolution process, and then finding with respect to Issue 10 that Navigator’s proposal that SBC’s right to disconnect service should apply to failure to pay undisputed charges should be rejected. These results cannot be reconciled.

8. Under the Arbitrator’s findings, Navigator does not have to pay disputed charges into escrow to initiate the dispute resolution process, but if it fails to do so, SBC can disconnect all of the services it provides to Navigator. Given the overwhelming evidence that the bills which SBC sends to Navigator contain many errors, and the absence of evidence that Navigator raises frivolous billing disputes or has a poor payment history, and the necessity that the findings on Issues 10 and 11 must be consistent, the Commission should reverse the Arbitrator’s recommendation concerning Issue 10 and adopt Navigator’s proposal.

C. ARBITRATOR’S FINDINGS REQUIRING RECONSIDERATION

9. As noted above, the Arbitrator reached several conclusions which Navigator respectfully questions and for which it seeks Commission reconsideration.

10. **GT&C Issue 4 (Deposit)**: The parties recently reached a voluntary resolution of this issue, and Navigator asks the Commission to find that the portion of the Arbitrator’s Report which addresses the deposit requirement should not apply to Navigator.

11. **GT&C Issue 5 (Material Breach)**: The Arbitrator found that SBC should have the right to terminate the agreement if Navigator commits a “material breach” which is not cured

within 45 days. As support for this finding, the Arbitrator notes that if Navigator's proposal to delete this section (Section 4.8) were adopted, it would allow Navigator to breach the agreement without consequence and deny SBC a remedy. (Section 1(A), p. 93). That reasoning is incorrect, requiring a finding that Navigator's language must be adopted.

12. The agreement is replete with remedial provisions to which SBC could refer if Navigator breaches the agreement. For example, SBC may disconnect all services provided to Navigator and refuse to provide new services -- in effect terminating the agreement -- if Navigator fails to pay its bills. (Section 14). SBC can impose deposit/escrow requirements under Section 3.9, and can refuse to perform any obligation under the agreement until those payments are made. Thus, SBC will not be left without a remedy.

13. On the other hand, SBC's proposal contains no definition of what a "material" breach might be, and it has the sole discretion to determine whether Navigator has cured the breach. The Arbitrator notes both of these facts in his Report, even calling "troublesome" SBC's right to terminate the agreement upon expiration of the 45-day notice period. (Section 1(A), p. 92). Even without this cancellation power, SBC is fully protected by other remedial provisions in the agreement. Navigator's language should be adopted.

14. **GT&C Issue 8 (Intellectual Property)**: The Arbitrator found for SBC on this issue, largely relying on SBC's reasoning that since this language is in the present M2A and other CLECs have agreed to it, it should appear in the Navigator's successor agreement. (Section 1(A), p. 96). There is no citation to any record evidence as to why this provision should be made applicable to Navigator as an individual company. On the other hand, Navigator provides evidence that the SBC language imposes on Navigator the obligation to indemnify SBC for intellectual property infringement arising out of SBC's provision of facilities to Navigator. It is reasonable to require SBC to resolve such issues before making the subject facilities available

to CLECs, otherwise these CLECs are open to unknown -- and unknowable -- liabilities for which SBC professes to take no responsibility. This is a commercial risk which the Commission should not ask Navigator to assume. The Commission should adopt Navigator's proposal to eliminate SBC's language from the Navigator-SBC agreement.

15. **GT&C Issue 20 (Coin Functionality)**: The Arbitrator decided to adopt SBC's position on this point, but did not provide the rationale for his decision. This function, which is a basic feature of a switch port and is crucial for Navigator's continued provision of service to its many payphone customers in Missouri, is set to be phased out over the next year. Navigator concedes that point, and wishes only to continue to purchase the service from SBC as part of a transition to other service alternatives for these customers. Navigator also understands that the TELRIC pricing for this service is no longer available, and is willing to negotiate an appropriate price for the service, as part of SBC's Section 271 obligations, rather than Section 251/252 obligations. However, Navigator maintains that access to this service is part of the FCC's transition plan, as it is part of the service provided when switching is purchased from SBC. As properly noted by the Arbitrator: "...Navigator seeks to ensure that it has uninterrupted access to coin functionality for the duration of the twelve-month transition period set forth under the TRRO for CLECs to transition to other local circuit switching arrangements." (Section 1(A), p. 100).

16. The public policy reasons supporting Navigator's requested language are, ultimately, simple: this coin service is important to a certain portion of Missouri's outstate population. Without access to coin telephone service, many Missourians will be unable to access the PSTN. As the Commission well understands, there are many portions of the state which are so remote, both geographically and topographically, from wireless service that without pay telephones, travelers -- or low income persons -- will not have access to a telephone. Thus, there

is a real need for this service. From Navigator's point of view, this is an issue of cost (how much should Navigator have to pay for the service), rather than an issue of availability (will the service be offered).

17. In response to Navigator's arguments, SBC says that it is not required to provide the service, and thus it is unwilling to provide the service. SBC also argues that the Commission cannot consider the issue because Navigator did not raise it in negotiations. The Arbitrator simply finds in SBC's favor "for the reasons stated." (Section 1(A), p. 101). But his decision provides no reasons. The Commission should reconsider the Arbitrator's decision and find that SBC should offer coin functionality on a transitional basis at a just and reasonable price.

18. **UNE Issue 6 (Commingling Request Charges)**: This issue acknowledges that with the evolution of telecommunications services, CLECs will request that SBC combine certain services in new and innovative manners. SBC will perforce incur costs in creating new processes for responding to these commingling requests, and Navigator is prepared to pay reasonable charges to reimburse SBC for those costs. The Arbitrator's findings recognize that negotiation of those charges is the desirable solution. (Section III, p. 26). However, negotiation may not always be possible, and SBC's proposal would allow it -- indeed, give it every incentive -- to charge manual Service Order charges (which are much higher the electronic Service Order charges) for these commingling requests. As noted in its post-hearing brief, SBC has failed to develop specific order charges for commingling, even though it has been under order to comply with commingling requests since August, 2003. (Navigator post-hearing brief, p. 30).

19. Navigator's proposal is that where there are no specific charges in place, the electronic Service Order charge should be the default. This would give SBC every incentive to develop the charges it should have developed long ago. Navigator is quite willing to negotiate

the charges, and stands ready to do so. But it takes two to negotiate, and unless the Commission adopts Navigator's language, SBC will not come to the table.

20. **UNE Issue 12 (Definition of "Spare")**: The Arbitrator decided this issue in SBC's favor with little discussion of the evidence. SBC simply fails to define "spare" in the context of Section 4.3.1.2, where the word appears twice in the SBC-proposed language. It is imperative where a term appears in the agreement, the parties know what it means. As proposed by SBC, and adopted by the Arbitrator, the language does not tell the parties what "spare" means. This will naturally lead to disputes requiring Commission intervention. It would be best to resolve this issue before those disputes arise.

21. Navigator definition is elegant: if a customer decides to move its service from SBC to Navigator, why not just use the same line for the service? Why should SBC go to the trouble and expense of providing an entirely new facility to provide the same service? There is no good reason, and indeed SBC provides no evidence of any reason, good or bad, for the same loop not to be used. However, under the agreement this loop must be designated as "spare" for SBC to provision the loop to Navigator. Thus, Navigator proposes to include such loops within the definition of "spare" in its language.

22. The Arbitrator's suggestion that Navigator should complain to the Commission if it believes SBC is dragging its feet in providing loops or other facilities is a solution, but not the best. There is no need to create new disputes for the Commission to resolve, as Navigator's proposal to reuse existing SBC lines for new customers would preempt the creation of such disputes. The administrative burden which the Arbitrator indicates might be imposed on SBC is ephemeral. In fact, the administrative burden would be on the Commission, as it would be forced to deal with CLEC complaints. This would be avoided if the Commission adopts Navigator's language.

Wherefore, Navigator Telecommunications respectfully requests that the Commission consider the proposals discussed in these comments, and find that they should adopted for language to be included in the interconnection agreement between SBC and Navigator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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