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**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office  
in Jefferson City on the 6th  
day of February, 1998.

In the Matter of the Petition of MCI  
Telecommunications Corporation and  
Its Affiliates, Including MCImetro  
Access Transmission Services, Inc.,  
for Arbitration and Mediation Under  
the Federal Telecommunications Act of 1996  
of Unresolved Interconnection Issues with  
Southwestern Bell Telephone Company

and

Case No. TO-97-40

In the Matter of AT&T Communications of the  
Southwest, Inc.'s Petition for Arbitration  
Pursuant to Section 252(b) of the  
Telecommunications Act of 1996 to Establish  
an Interconnection Agreement with  
Southwestern Bell Telephone Company

In the Matter of the Mediation and Arbitration  
of Remaining Interconnection Issues Between  
MCI Telecommunications Corporation and Its  
Affiliates and Southwestern Bell Telephone  
Company

Case No. TO-98-200

**ORDER SETTING PROCEDURAL SCHEDULE AND DIRECTING FILING OF  
PARTIAL INTERCONNECTION AGREEMENTS**

On November 20, 1997, the Commission entered its Order  
Establishing Case for Accelerated Mediation and Arbitration, which  
established a procedural schedule for MCI Telecommunications Corporation  
and its affiliates (MCI) and Southwestern Bell Telephone Company (SWBT) to  
mediate and arbitrate the issues which remained regarding interconnection  
between them. Case No. TO-98-200 was established for the purpose of  
bifurcating the issues not previously arbitrated from those which were

arbitrated in consolidated Case No. TO-97-40<sup>1</sup>. On November 26, SWBT filed an application for rehearing of the November 20 Commission order, alleging that the Commission does not have jurisdiction to arbitrate the issues in Case No. TO-98-200. MCI replied on December 5, and SWBT responded to MCI's reply on December 8. The Commission granted SWBT's request for rehearing on December 11 and set a hearing for the parties to address the extent of the Commission's jurisdiction. SWBT and MCI attended and presented oral argument and evidence at the December 30 hearing on jurisdictional issues.

### **Discussion**

In its application for rehearing, SWBT alleged that MCI had never made a formal request to negotiate the issues which are the subject of Case No. TO-98-200 pursuant to the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. §151 et seq. SWBT further alleged that no formal petition requesting the Commission to address these issues was filed pursuant to Section 252(b) of the Act within the time window mandated by the Act. SWBT explained that negotiations were requested on January 16 to develop language to implement the Commission's December 11, 1996, Arbitration Order, but that even if this constituted a proper "request," then the Commission could not assume jurisdiction because more than nine months had passed since that time. MCI responded prior to the hearing by suggesting

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<sup>1</sup>MCI's first petition for arbitration of interconnection issues was initially the subject of TO-97-67, but that case was subsequently consolidated with and into Case No. TO-97-40. The Commission issued its first Arbitration Order in Case No. TO-97-40 on December 11, 1996 to resolve the issues presented to it at that time. The Commission's Final Arbitration Order was issued on July 31, 1997. The November 20 order required the parties to file an executed agreement in Case No. TO-97-40 to implement the arbitration orders that had already been issued in Case No. TO-97-40. MCI and SWBT submitted an unsigned agreement containing disputed language on December 1 that did not comply with the Commission's November 20 order.

that it had made a request to negotiate on June 3, 1997, and that it had filed a petition within the corresponding deadline under the Act on November 3. MCI asserted in the alternative that if SWBT's argument that negotiations began on January 16 was correct, then the Commission should find that MCI's June 16 pleading in Case No. TO-97-40 constituted a petition. MCI asserted that the Commission could exercise jurisdiction even if more than nine months had passed following the date of the request. At the hearing, MCI further alleged that it had made another request to negotiate with SWBT on August 20, 1997, and that the time frame for filing a petition to arbitrate would begin on January 2, 1998, and last until the end of the day on January 27.

#### **A. Applicable Law**

The Act sets forth certain procedures for negotiation, arbitration, and approval of interconnection agreements:

##### **(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION--**

**(1) ARBITRATION--** During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

##### **(2) DUTY OF PETITIONER--**

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues;  
and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

**(3) OPPORTUNITY TO RESPOND—** A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such information as it wishes within 25 days after the State commission receives the petition.

**(4) ACTION BY STATE COMMISSION—**

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

47 U.S.C. § 252(b). The "request for negotiation under this section," as described in (b)(1) refers to a "request for interconnection, services, or network elements pursuant to section 251 . . . ." See 47 U.S.C. § 252(a). Subsection (a) of § 252 addresses voluntary negotiations between

telecommunications carriers, and states that upon receipt of such a request, "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . ." Id. Both carriers are obligated under § 251(c)(1) of the Act to negotiate in good faith.

## **B. Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. The failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

### **1. Request to Negotiate**

MCI presented evidence showing that on January 8 and August 20, 1997, MCI requested to meet with SWBT for the purpose of negotiating interconnection issues and that, on or near both of these occasions, MCI provided a sample agreement covering the topics which MCI sought to address. MCI also argued that it requested negotiations on June 3, and introduced a letter of that date addressed to SWBT from MCI to support its position. SWBT argues that each of the requests to negotiate concerned issues which had been decided by the Commission in its arbitration orders in Case No. TO-97-40, to resolve MCI's first arbitration petition. SWBT admits that MCI added previously unarbitrated issues to its requests of January 8 and August 20, but SWBT introduced uncontroverted evidence that the requests to negotiate were presented to SWBT by MCI as requests to merely negotiate language to implement the Commission's prior arbitration

orders rather than to negotiate new issues. SWBT argues that MCI's presentation of contracts with its requests shows that MCI did not request negotiation, but implementation, of the Commission's prior arbitration orders. With respect to the alleged June 3 request, SWBT argues that the letter does not even request meetings.

The Commission finds that MCI requested, on January 8 and August 20, to meet with SWBT to negotiate interconnection issues. The set of issues which MCI sought to address on each of these occasions included both issues subsumed in the Commission's prior arbitration orders, and issues not previously arbitrated. The fact that MCI gave proposed contracts to SWBT together with or near the time of MCI's January 8 and August 20 letters does not negate MCI's requests, because in each letter, MCI stated that it proposed to use the contracts as topic outlines for conducting negotiations. The Commission further finds that MCI did not request negotiations on June 3. The letter does not contain any language suggesting that MCI would like to discuss interconnection issues with SWBT. (Exhibit 1).

## **2. Petition to Arbitrate Filed Within Statutory Time Limits**

MCI presented evidence at the hearing concerning various pleadings that it filed with the Commission in Case No. TO-97-40, arguing that these pleadings constituted "petitions." MCI argues that it filed petitions within the meaning of the Act on June 16 and November 3. The Commission has reviewed the pleadings in Case No. TO-97-40 and concludes that, at the time of the hearing, MCI had never filed a pleading denominated as a "petition" with the Commission<sup>2</sup>. The documents specified in § 252(b)(2)(A) of the Act were not filed together with the November 3 pleading or

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<sup>2</sup>MCI did file a pleading denominated as a "petition" on January 27, 1998, which is discussed *infra*.

incorporated by reference. In the June 16 pleading, MCI requested the Commission to adopt the language of the agreement that was attached (except for the bolded and underlined language proposed by SWBT) in order to "fully capture the Arbitration Order." (See p. 4 of MCI's June 16 Motion for Approval of Interconnection Agreement). MCI further stated in its June 16 pleading that "does not believe that an additional contested case is needed to decide these issues that may almost certainly be decided on the existing record." (See p. 5, Ibid.). The June 16 pleading did not request the Commission to initiate a second arbitration proceeding.

### **C. Conclusions of Law**

Based upon its findings of fact and the applicable law, the Commission has reached the following conclusions of law:

#### **1. Request to Negotiate**

The Commission concludes that MCI made two different requests to negotiate interconnection issues to SWBT in accordance with the Act: on January 8 and August 20. The Act does not establish a minimum level of formality for making such requests. SWBT's contention that the request must be "clear and unequivocal" is not based upon the language of the statute. Likewise, despite SWBT's argument to the contrary, the Act does not state that a party with a history of prior negotiations and arbitration must carefully state whether it seeks to negotiate new issues or issues that have been previously negotiated or arbitrated.

SWBT takes the position that a party requesting negotiation for a second time must be clear about its intention to initiate negotiations on new issues so that SWBT is made aware of the fact that the Act's 135th-160th day time window is approaching and can take advantage of the opportunity to negotiate. SWBT argues that MCI is attempting to recreate history. The Commission rejects SWBT's argument because SWBT has an

obligation to negotiate in good faith with a requesting party, regardless of when the time window for arbitration will run. SWBT does not need to concern itself with the petition filing time window or the requesting parties' intent to ultimately initiate a new arbitration proceeding unless and until negotiations are unsuccessful. The Act contemplates that if and when negotiations fail, then the parties will refer back to the date on which their negotiations were initiated for the purpose of calculating when a petition for arbitration can be filed -- not earlier.

The Commission acknowledges that SWBT's ability to negotiate in good faith is affected by the nature of the request to negotiate, however. Because MCI presented two requests for negotiations as requests to meet and confer over language to implement the Commission's prior arbitration orders rather than as requests to address new issues, and yet MCI was proposing language on issues that had not yet been arbitrated, SWBT was justifiably confused about MCI's approach to negotiations. Nevertheless, SWBT was put on notice on January 8 and August 20 about the set of issues which MCI wanted to address, regardless of whether they were previously arbitrated, and SWBT has had ample time to negotiate prior to the filing of a petition.

The Act references the date on which a request for negotiation is made so that the state commissions can determine when they have jurisdiction. The date does not have any significance unless negotiations are unsuccessful, and it is not intended to trigger a response deadline or any other deadline that would prejudice a non-requesting party if missed. As discussed *infra*, the request for negotiation differs from a petition for arbitration, which does trigger a response time and must be clear.

## **2. Petition to Arbitrate Filed Within Statutory Time Limits**

The Act explicitly requires a party petitioning a state commission for arbitration to provide the state commission all relevant documentation



concerning the unresolved issues, the position of each of the parties with respect to those issues, and any other issue discussed and resolved by the parties, "at the same time as it submits the petition." 47 U.S.C. § 252(b)(2)(A). Copies of the petition and documentation must be provided to the other party on or before the date the petition is filed. 47 U.S.C. § 252(b)(2)(B). MCI argues that this permits a petitioner to file a request to arbitrate, in any form, to the Commission, and that the accompanying documents need only be provided to the Commission at some time prior to the completion of the case. MCI takes the position that the term "submits" in § 252(b)(2)(A) of the Act is used in the sense of "submission of a case" following receipt of all evidence and argument.

The Commission disagrees with MCI's interpretation because it is contrary to other provisions of the Act. For example, § 252(b)(3) states that a non-petitioning party may respond to the other party's petition and "provide such additional information as it wishes" within 25 days after the state receives the petition. This provision suggests that the petitioning party will have already presented its documentation to the Commission and the responding party's information will be "additional." Moreover, § 252(b)(4) provides that the Commission will limit its consideration of any petition to the issues "set forth in the petition and in the response, if any . . . ." The Act clearly contemplates that a petition and response will serve the same functions as a complaint and answer in other civil actions, and the term "submits" in § 252(b)(2)(A) is intended to mean "files." Unlike the request to negotiate, the petition triggers a deadline for the respondent to state its position, and the petition and the response together define the set of issues to be arbitrated by the Commission. Finally, the Commission concludes that a petition need not necessarily be

titled as such<sup>3</sup>, but it must clearly request the Commission to arbitrate a set of issues.

Given that a petition must include a clear request to arbitrate and must include the documentation specified in § 252 (b) (2) (A) (i-iii) of the Act, the Commission concludes that MCI failed to file a petition on June 16 or November 3. The pleading which MCI identifies as its June 16 petition contained no request for the Commission to engage in a new arbitration, but rather urged the Commission to adopt specific language to implement its December 11, 1996 Arbitration Order. The November 3 pleading clearly requested a new arbitration proceeding, but did not include or incorporate by reference the required documentation. If MCI had verified its November 3 pleading and, in the body of that pleading, incorporated the required documentation by reference from other pleadings on file with the Commission, then the Commission could have entertained the November 3 pleading as a petition and notified SWBT of the date on which its response was due. The Commission's rules authorize parties to incorporate by reference pleadings and other documents that are already on file with the Commission as though received into evidence in the case at bar<sup>4</sup>. See 4 CSR 240-2.130(2).

Nevertheless, although the June 16 and November 3 filings did not constitute "petitions" for arbitration within the meaning of the Act, MCI's January 27, 1998, "petition" does meet those requirements. The petition is verified, contains a clear request for a second arbitration proceeding, attaches or incorporates by reference the specific documents required to

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<sup>3</sup>The Commission nevertheless encourages parties wishing to initiate arbitration on new issues after they have already completed an earlier arbitration or arbitrations to denominate their requests as "petitions" in order to clarify the nature of the relief requested from the outset.

<sup>4</sup>A verified petition is a form of evidence to which the Commission's rule applies.

be provided under § 252(b)(2)(A)(i-iii) of the Act, and was filed between the 135th and 160th day, inclusive, following MCI's August 20, 1997, request for negotiations.

### **Conclusion**

The Commission concludes at this time that it has jurisdiction over the petition filed by MCI on January 27, 1998, and that SWBT must file its response, if any by February 23. However, SWBT's response may allege that there are defects in the January 27 petition that will cause the Commission to reconsider its conclusion. In the interim, the Commission will establish an expedited procedural schedule so that a decision can be made by the Commission concerning the issues raised in MCI's petition within the nine month time window established by the Act. 47 U.S.C. § 252(b)(4)(C). The procedure is similar, but not identical, to the procedure followed in Case No. TO-98-115 and the arbitration between MCI and SWBT in Texas. In addition, the Commission finds that the following conditions shall be applied to the schedule.

A. MCI and SWBT shall sign and file, in Case No. TO-97-40, a partial interconnection agreement containing all language that has been agreed upon by MCI and SWBT during the course of their negotiations to date.

B. MCI and SWBT shall file, in Case No. TO-97-40, a signed, partial interconnection agreement containing all language that they have agreed would implement the Commission's previous arbitration orders in Case No. TO-97-40. The parties will reserve their rights to appeal the Commission's previous arbitration orders, but the language of the partial interconnection agreement will be binding absent a court order preventing its enforcement.

C. MCI and SWBT shall file, in Case No. TO-98-200, a Joint Statement of Issues for Mediation which identifies each of the issues remaining in dispute that have not been previously arbitrated or for which MCI and SWBT cannot agree on language to implement the Commission's previous arbitration orders.

D. The Commission's General Counsel, Dana K. Joyce, or his designee, and the Commission's Arbitration Advisory Staff (AAS) shall meet with MCI, SWBT and OPC for the purpose of assisting MCI and SWBT in resolving the disputed issues. MCI and SWBT shall use the meeting with the AAS and the General Counsel or his designee to eliminate issues through compromise and through clarification of misunderstandings, explanation of an issue's interrelationship with other issues, and correction of clerical or arithmetical errors. Prior to the beginning of mediation sessions, MCI and SWBT shall submit position papers to the Commission's General Counsel or his designee for use by the parties, the General Counsel and the AAS during the mediation sessions. Each party's position paper shall include the issues, the party's proposed language for resolving the issues, and the reasons supporting the party's position. MCI and SWBT shall file a notice in Case No. TO-98-200 that the position papers have been submitted to the General Counsel or his designee in accordance with this order. At the conclusion of the mediation sessions, the AAS and the General Counsel or his designee shall jointly file, in Case No. TO-98-200, their preliminary recommendation concerning the manner in which the Commission should resolve each issue not resolved during the mediation stage. MCI and SWBT shall jointly file a Statement of Resolved Issues at the conclusion of their mediation sessions, containing the specific language that they will use to implement their agreement on all issues resolved during mediation. No issue shall be identified as settled if MCI and SWBT have not agreed to

specific language. MCI, SWBT, the AAS and the General Counsel or his designee shall ensure that each of the issues identified in the Joint Statement of Issues for Mediation is addressed in either the Statement of Resolved Issues or the preliminary recommendation of the AAS and General Counsel or his designee. Following the deadline established in this order for MCI and SWBT to file their Settlement Document, MCI and SWBT shall not be permitted to withdraw issues from the Joint Statement of Issues for Mediation by settling them. Rather, all issues not settled as of the deadline for filing the Statement of Resolved Issues shall be resolved by the Commission as it deems appropriate. The Commission intends to rely on its own experts, including the AAS and General Counsel or his designee, in reaching a final arbitration decision.

E. The Commission will require MCI and SWBT to prefile testimony in Case No. TO-98-200 in preparation for the arbitration hearing. In this proceeding, the prefiled testimony shall set forth specific language proposed by the filing party for resolving the remaining issues in dispute and shall support the filing party's reason for proposing that language. The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays in the proceedings caused by allegations of unfair surprise at the hearing. The Commission expects the parties to comply with the requirements of 4 CSR 240-2.130, including the filing of testimony on line-numbered pages. MCI and SWBT will also be given an opportunity to file rebuttal testimony in the same fashion.

F. Testimony and schedules shall not be filed under seal and treated as proprietary or highly confidential unless a protective order has first been established by the Commission. The party that considers the information to be proprietary or highly confidential should request a

protective order. Any testimony or schedule filed without a protective order first being established shall be considered information open to the public.

G. At the arbitration hearing, MCI, SWBT and OPC will be permitted to cross-examine witnesses. One member of the AAS will be permitted to ask questions from the bench, along with the Commission and Regulatory Law Judge. The AAS and the General Counsel or his designee will then file final recommendations on the issues presented during the arbitration hearing.

H. The Commission's general policy provides for the filing of the transcript within ten working days after the conclusion of the hearing. The Commission will expedite the transcript in this case.

I. Initial briefs shall be limited to 60 pages and reply briefs to 30 pages. All pleadings, briefs and amendments shall be filed in accordance with 4 CSR 240-2.080(7).

J. All pleadings shall be filed in accordance with 4 CSR 240-2.080. All pleadings and testimony, and the position papers to be submitted to the AAS and General Counsel or his designee, shall be filed (or submitted) both in paper form and on 3½" x 5" diskettes in WordPerfect 6.1 format, and shall employ the same headings and numbers to identify the issues that will be employed in the Joint Statement of Issues for Mediation. The preliminary and final recommendations of the AAS and General Counsel or his designee shall contain the language proposed by MCI, the language proposed by SWBT, and the recommendation to adopt either the MCI language or the SWBT language. The final recommendation shall contain an explanation of the AAS's and General Counsel's, or his designee's, position.

The Commission notes that, although it will schedule a hearing and permit cross-examination in this case, the Commission is doing so because the Commission finds that cross-examination is in the public interest, and not because of any statutory or other legal requirement that it do so.

**IT IS THEREFORE ORDERED:**

1. That the procedural schedule established by the Commission in its November 20, 1997, order is rescinded.

2. That the MCI Telecommunications Corporations and its Affiliates and Southwestern Bell Telephone Company shall file a signed, partial interconnection agreement containing language for all agreed upon interconnection issues in Case No. TO-97-40 no later than February 25, 1998.

3. That MCI Telecommunications Corporation and its Affiliates and Southwestern Bell Telephone Company shall file a signed, partial interconnection agreement containing all language that they agree would implement the Commission's prior arbitration orders in Case No. TO-97-40 no later than February 25, 1998.

4. That the following procedural schedule be adopted for Case No. TO-98-200, subject to the conditions discussed above:

SWBT response to petition	- February 23, 1998
MCI/SWBT Joint Statement of Issues	- February 25, 1998
MCI/SWBT notices of submission of position papers	- March 2, 1998
Mediation sessions	- March 9-20, 1998
AAS/General Counsel preliminary recommendation	- March 25, 1998
MCI/SWBT direct testimony for arbitration	- March 27, 1998
MCI/SWBT Joint Statement of Resolved Issues	- March 27, 1998

MCI/SWBT rebuttal testimony for arbitration	- April 1, 1998
Arbitration hearing	- April 8-22, 1998
AAS/General Counsel final recommendation	- May 4, 1998
Simultaneous initial briefs of MCI, SWBT and OPC	- May 8, 1998
Simultaneous reply briefs of MCI, SWBT and OPC	- May 11, 1998

5. That a procedural conference will be held in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri, beginning at 10:00 a.m. on Friday, February 13, 1998.

6. That the arbitration hearing will be held in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri, beginning at 8:30 a.m. on the first day and at 9:00 a.m. on each succeeding day.

7. That anyone wishing to attend who has special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days before the procedural conference or arbitration hearing at: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

8. That the parties shall comply with this order in all respects.



9. That this order shall become effective on February 6, 1998.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, somewhat stylized script.

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

( S E A L )

Lumpe, Ch., Crumpton, Drainer  
and Murray, CC., concur.

Randles, Regulatory Law Judge

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COMMISSION COUNSEL  
PUBLIC SERVICE COMMISSION