

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

Northeast Missouri Rural Telephone Company)	
and Modern Telecommunications company,)	
)	
Petitioners)	
)	
v.)	
)	
Southwestern Bell Telephone Company,)	Case No. TC-2002-57
Southwestern Bell Wireless (Cingular),)	
Voicestream Wireless (Western Wireless), Aerial)	
Communications, Inc., CMT Partners (Verizon)	
Wireless), Sprint Spectrum LP, United States)	
Cellular Corp., and Ameritech Mobile)	
Communications, Inc.)	
)	
Respondents)	

SBC MISSOURI'S REPLY TO MOTION TO SHOW CAUSE

Having effectively cut SBC Missouri¹ out of the negotiations on the two stipulations they reached with U.S. Cellular, Complainants² now attempt to preclude any scrutiny of those stipulations. Complainants' Motion is in complete conflict with the Missouri Public Service Commission's ("Commission's") rules governing non-unanimous stipulations and should be denied out of hand.

Instead, the Commission should issue an Order scheduling a telephonic prehearing conference to establish a procedural schedule for the resolution of the remaining issues in this case.

¹ Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri" or "SBC."

² The Complainants that joined in the May 13, 2004 Motion for SBC Missouri to Show Cause are Chariton Valley Telephone Corporation and Northeast Missouri Rural Telephone Company.

1. Complainants' Motion Conflicts with Commission Rules.

Having reached non-unanimous stipulations with U.S. Cellular, T-Mobile and Western Wireless literally on the eve of trial (Complainants notified SBC Missouri of the stipulations at dinner time the night before trial),³ Complainants assert that the Commission should have ignored its own rules and forced an immediate hearing on any objections to the non-unanimous stipulations on the interMTA factors:

If SBC had any factual basis upon which to object to the stipulated factors announced on the record, it should have announced then and there that it would oppose the factors, so the RLJ could have conducted a hearing with respect to any factors SBC objected to.⁴

The Regulatory Law Judge correctly rejected this procedural path because it is completely contrary to the Commission's rules prescribing the procedure when a non-unanimous stipulation and agreement is presented to the Commission. These rules, which are designed to prevent unfair surprise, specifically require the Commission to give non-signatory parties to a non-unanimous stipulation and agreement seven days from its filing to review it and file formal objections:

(1) Stipulation and Agreements.

(A) The parties may at any time file a stipulation and agreement as a proposed resolution of all or any part of a contested case. A stipulation and agreement shall be filed as a pleading.

(2) Nonunanimous Stipulation and Agreement

(A) A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all of the parties.

(B) Each party shall have seven (7) days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement. Failure to file a timely objection shall constitute a full waiver of that party's right to a hearing.

³ T. 1340

⁴ Complainants' Motion to Show Cause, para. 4.

(D) A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.⁵

Although Complainants now complain that the hearing should have gone forward the morning they first announced them to the Commission, that is not what they themselves told the Commission then:

MR. CRIAG JOHNSON: Okay. We will do that. And then the plan is, when we file it, Bell will have their 10 days to object to it, and if in the meantime we can come up with a stipulation or language to a nonunanimous stipulation that satisfies everybody, we will do that.

JUDGE THOMPSON: Great.

MR. CRAIG JOHNSON: But in order to get the 10 days, your Honor, I think the intent is to file a piece of paper that has the agreed factors. Then the rest of us will be working on something to see if we can resolve any possible basis for Southwestern Bell's objection. If that doesn't happen, they'll have to file their objection 10 days after the stipulation is filed.

JUDGE THOMPSON: Okay. Okay. That sounds good. So that takes -- am I correct that there's nothing left for hearing today?

MR. CRAIG JOHNSON: That's correct.⁶

In an apparent attempt to blame others for their inability to conclude written non-unanimous stipulations, Complainants now appear to contend that SBC Missouri should have, the morning after the purported non-unanimous stipulations were reached the previous afternoon/evening, "announced then and there that it would oppose the factors, so the RLJ could have conducted the hearing with respect to any factors SBC objected to."⁷ SBC Missouri,

⁵ 4 CSR 240-2.115 (emphasis added).

⁶ T. 1342-1343.

⁷ Complainants' Motion to Show Cause, para. 4.

however, did just that. While SBC Missouri had only learned about the purported stipulations the previous evening and had not been able to thoroughly review them, SBC Missouri stated that “if history’s any guidance, we may have some problems with them.”⁸ Nevertheless, SBC Missouri indicated that it was willing to participate in discussions to develop language that might address all parties’ concerns. If not, it could file formal objections to any non-unanimous stipulation reached.⁹

While the hearing was suspended to allow Complainants to secure written non-unanimous stipulations and for further negotiations to address all parties concerns so that the stipulations might become unanimous, very little further negotiations occurred. SBC Missouri was not included in the negotiations between Complainants and Respondents U.S. Cellular, T-Mobile and Western Wireless. Although SBC Missouri circulated a rough draft stipulation on April 21, 2004 as a starting point for negotiations between the parties, and it received a draft from Complainants on April 22, 2004, SBC Missouri was not included in any discussions between Complainants and the wireless carriers. Nevertheless, SBC Missouri remains willing to participate in such discussions. However, any delay in the resolution of this phase of the case has resulted from Complainants’ lack of interest in pursuing the type of discussions outlined the morning the hearing was suspended.

2. Complainants Cannot Shift Their Burden of Proof.

Despite the fact that this is a complaint case in which Complainants must prove each and every element of their complaint -- including the interMTA factors -- Complainants seek to shift the burden to Respondent SBC Missouri “to show cause why it has factual basis to oppose the

⁸ T. 1340.

⁹ T. 1340, 1343.

stipulations” or that it appear “at an on-the-record presentation to answer questions from the Commission as to the necessity of another hearing.”¹⁰

Complainants, however, have completely missed the point. Complainants must meet their burden of proving every element of their Complaint before the Commission may award it relief. On the narrow issue of interMTA traffic, Complainants must meet their burden of proving that the traffic is interMTA in order to be entitled to impose their higher switched access rates on that traffic.

As it currently stands, there is absolutely nothing in the record to support the accuracy of the interMTA factors contained in the non-unanimous stipulations. As the Commission’s rules make clear, the non-unanimous stipulations here are nothing more than the positions of the signatory parties:

(D) A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.¹¹

And the interMTA factors contained in the non-unanimous stipulations are not even supported by the prefiled testimony in this case because they are significantly different than those proposed by Complainants, Respondents T-Mobile and Western Wireless, and Staff.¹² SBC Missouri has an absolute right to inquire into the basis of the proposed factors and will be sending discovery requests seeking any data or analysis that support the factors. Complaints’ allegations of bad faith are simply misplaced.

In an apparent attempt to avoid having to prove-up their interMTA factors, Complainants assert the half truth that “SBC is on record supporting the notion that wireless carriers and small

¹⁰ Complainants’ Motion to Show Cause, para. 10.

¹¹ 4 CSR 240-2.115(2)(D).

¹² T. 1340.

ILECs should reach their own agreements as to interMTA factors” and that “Petitioners and U.S. Cellular have done so.”¹³ What SBC Missouri supports is wireless carriers and terminating LECs reaching complete agreements for the exchange of traffic and intercompany compensation between them for terminating each others’ traffic.

And in fact, if this negotiated factor was presented as part of a negotiated interconnection agreement under the federal Telecommunications Act, SBC Missouri would not even be involved. And only a minimal showing would be necessary to allow the Commission to approve it.¹⁴ However, that is not the situation here. Rather than seek approval of an interconnection agreement governing the prospective exchange of traffic between ILECs (i.e., Northeast Missouri and Modern) and the wireless carriers (i.e., U.S. Cellular), the Complainants seek to use the non-unanimous stipulation to hold SBC Missouri retroactively responsible for traffic carried in the past.

Complainants have made the interMTA factor into a contested case issue by continuing to claim that transit carriers like SBC Missouri are liable for terminating charges on this traffic simply because they transited the traffic. Complainants’ continues to press this baseless argument despite the fact that:

- Accepted industry standards, as expressed by the FCC, call for the originating carrier to be responsible for compensating all downstream carriers involved in completing the call: “existing access charge rules and a majority of existing reciprocal compensation agreements require the calling party’s carrier, whether LEC, IXC or CMRS, to compensate the called party’s carrier for terminating the call . . . ‘calling-party’s-network-pays’ . . ., where the calling party’s network pays to terminate a call, are

¹³ Complainants’ Motion to Show Cause, para. 8.

¹⁴ Under Section 252(e)(2) a state commission is permitted to reject an agreement (or any portion thereof) adopted by negotiation under Section 252(a) if it finds that “(i) the agreement (or any portion thereof) discriminates against the telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience and necessity. . . .”

clearly the dominant form of interconnection regulation in the United States and abroad.¹⁵

- The FCC in the Verizon-Virginia arbitration with AT&T, Cox and WorldCom specifically rejected imposing financial liability on the transit carrier for expenses associated with traffic originated by another carrier.¹⁶
- The Missouri Commission Staff concurs that it is inappropriate to impose secondary liability on transit carriers like SBC Missouri for the traffic in dispute: . . . the originating carrier (CMRS provider) is responsible for payment of traffic in dispute”¹⁷
- And in an Order released in December, 2003, the FCC reaffirmed the continued appropriateness of the “calling-party’s-network-pays” standard in its decision in the Verizon-Virginia arbitration with Cavalier Telephone. Specifically referencing transit traffic, the FCC stated that it agreed that the “originating party is the appropriate party to be billed for the traffic it originates.”¹⁸

Thus, having chosen to ignore well-settled authority and include the transit carriers in this complaint case, all elements of Complainants’ claim, including the appropriate interMTA factor, are subject to the standard of proof applicable to complaint cases. Complainants must shoulder the burden of proving each element and cannot shift that burden to any other party.

¹⁵ In the Matter of Developing a Unified Carrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, released April 27, 2001, para. 9 (“Unified Carrier Compensation NPRM”)(emphasis added).

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¹⁶ In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia Inc., and for Expedited Arbitration, et al., CC Docket No. 00-218, et al., Memorandum, Opinion and Order, released July 17, 2002 (“FCC Verizon-Virginia Arbitration Order”) (the FCC’s Common Carrier Bureau served as the arbitrator because the Virginia Commission declined jurisdiction).

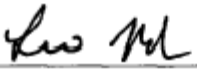
¹⁷ See, Staff’s Statement of Positions, Case No. TC-2002-57, filed July 12, 2002, pp. 3-4.

¹⁸ In the Matter of Petition of Cavalier Telephone L.L.C. Pursuant to Section 252(e)(5) of the Telecommunication Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration, WC Docket No. 02-359, Memorandum, Opinion and Order, released December 12, 2003, para. 49. The FCC’s Wireline Competition Bureau served as the arbitrator because the Virginia Commission declined jurisdiction. In its decision, the FCC indicated that in deciding the unresolved issues presented, it applied “current Commission rules and precedence, including those most recently adopted in the Triennial Review Order,” Id., at para 2.

WHEREFORE, SBC Missouri respectfully requests the Commission to issue an Order scheduling a telephonic prehearing conference and directing the parties to come prepared to discuss a procedural schedule for the resolution of the remaining issues in this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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