BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In Re: The Commercial Mobile Radio Service (CMRS) Interconnection Agreement Between SBC Missouri and Sprint Spectrum L.P. Under Sections 251 and 252 of the Telecommunications Act of 1996.	)))))	**Case No. TK-2004-0180**

RESPONSE OF SPRINT SPECTRUM L.P. TO MOTION TO INTERVENE

COMES NOW, Sprint Spectrum L.P., d/b/a Sprint (hereinafter "Sprint"), and hereby responds to the motion to intervene filed by the Missouri Independent Telephone Company Group ("MITG") as follows:

INTRODUCTION

On October 14, 2003, Sprint filed an application to approve an interconnection agreement between it and SBC Missouri (hereinafter "SBC") for approval pursuant to 47 U.S.C. 252 ("the Sprint/SBC Agreement"). The agreement was negotiated by Sprint and SBC and is similar to the majority of interconnection agreements approved by this Commission since the passage of the Federal Telecommunications Act of 1996 (the "Act").

On November 5, 2003, MITG filed an application to intervene. In the application, MITG indicated that it would like to end transit provisions in agreements in which it is not a party and that the FCC rejected any requirement for ILECs to allow traffic to be transited on their network through indirect connections under the Act. Further, MITG contends that allowing traffic to transit through indirect connections discriminates against them in that it precludes MITG from recording its own minutes of use and would not require adequate call information consistent with an unpublished rule being discussed at the Commission. Finally,

they argue that allowing traffic to transit to them is inconsistent with the public interest because the agreements allegedly allow the parties to avoid paying third parties for traffic. These arguments are misplaced and should not defeat the approval of the Sprint /SBC agreement. Further, these arguments are not sufficient to grant intervention or to grant a request for a hearing.

I. ILECS ARE OBLIGATED TO PROVIDE FOR INDIRECT INTERCONNECTION AND TRANSITING TRAFFIC

An ILEC's duty to provide transit service is grounded in its obligation to provide for indirect interconnection. In this regard, the Act and the Federal Communication Commission's ("FCC's") implementing rules, require telecommunications carriers to interconnect, either directly or indirectly with other carriers.[1] MITG is incorrect when it suggests that federal law imposes no duty to facilitate or aid in the interconnection of two unrelated carriers (provide "transit service."). First, Section 251(c)(2)(a) requires ILECs to, among other things, interconnect with requesting carriers for the transmission and routing of telephone exchange service (local) and exchange access (toll). The rules implementing this provision of the Act identify the tandem as one of the technically feasible points of interconnection within the incumbent's network.[2] By definition, interconnection at a tandem switch provides access to the tandem switching functionality by connecting the requesting carrier with all the end offices subtending the tandem, including the end offices of third parties.

Second, whether you call it "transit service" or something else, the law and public policy require carriers to exchange traffic through the public switched telephone network. As the FCC itself has held, a "fundamental purpose" of section 251 is to "promote the

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1 *See* 47 U.S.C. § 251(a), 47 C.F.R. 51.100(a)(1).
2 47 C.F.R. § 51.305(a)(2)(iii)

interconnection of all telecommunications networks by ensuring that that incumbent LECs are not the only carriers that that are able to interconnect efficiently with other carriers."[3]

Indeed, the agreement entered between Sprint and a MITG member, MoKan Dial, Inc. ("MoKan"), contemplates that transit traffic will be delivered to them. (*See e.g.,* Section 4.2 of Wireless Interconnection and Reciprocal Compensation Agreement Between MoKan and Sprint approved in Case no TK-2003-0427). Therefore, while MITG may suggest to the Commission in this case that there is no obligation to transit traffic, they are incorrect and they recognize this in their agreements.

Clearly, SBC has an obligation under the Act to offer indirect connection and transit traffic. This obligation is recognized by MITG's members in their own agreement. MITG's arguments seeking to abolish transit are contrary to the law and do not merit granting MITG intervention, or rejecting of the Sprint/SBC Agreement in this case.

II. THE INTERCONNECTION AGREEMENT DOES NOT DISCRIMINATE AGAINST MITG

The Sprint/SBC Agreement does not discriminate against MITG because (1) MITG is treated the same as all similarly situated parties and (2) the Sprint/SBC Agreement does effect any rights of the MITG members.

(A) *The Agreements treats all non-parties the same.*

In order for the interconnection agreement to discriminate against a carrier not a party to the agreement in violation of the section 252(e) of the Act, the agreement would have to treat a specific carrier different than all other similarly situated carriers. Further, in light of

[3] See In the Matter of 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: CC Docket No. 00.249; CC Docket No. 00-251, 2002 FCC LEXIS 3544, July 17, 2002 Released; Adopted July 17, 2002. at ¶ 118.

the overall purpose of the Act, it is likely that Congress intended § 252(e) to forbid anticompetitive discrimination, *i.e.*, collusive discrimination or oligopolistic behavior among the incumbent and one or more incoming carriers. *MCI Telecomms Corp v. Illinois Bell Telephone Company,* 1999 US DIST LEXIS 11418. Nowhere in any of the pleadings has MITG identified any manner in which they are treated different than any other non-party, much less a manner that is anticompetitive. MITG's allegations are solely focused on the difference between parties to the agreements and non-parties. As these groups are not similarly situated, there is no allegation of discrimination that would in any fashion provide grounds for the Commission to reject the interconnection agreement.

(B) *The Agreement does not discriminate against MITG*

Nothing in the Sprint/SBC Agreement can interfere with any contract, tariff or other rights possessed by the MITG members. As the Commission has ruled repeatedly, "[t]he interconnection agreement is a contract between two private parties and there is no reason why strangers to that contract ought to be permitted involvement in its formation." *See Order Denying Intervention*, Case No. TO-2001-455. Further, the Commission has ruled that an interconnection agreement between two private parties does not impose conditions on third parties. *(In the Matter of AT&T Communications Petition to Establish An Interconnection Agreement with Southwestern Bell Telephone Company*, Arbitration Order, Case No TO- 97-40) Moreover, the Sprint/SBC Agreement specifically acknowledges that arrangements will be necessary with non-parties in connection with any traffic that is transited. (*See* Section 3.2.4.2 of the Agreement). Therefore, there is no right being effected or harm being caused to MITG.

Finally, nothing in the Agreement is in anyway inconsistent with MITG's wireless agreements or their wireless tariffs. Despite MITG's claim that the Sprint/SBC Agreement: (1) defines local service different than its wireless termination agreements; (2) allows different recording measurements than the wireless tariff; (3) precludes MITG from recording their own minutes of use for billing; and (4) is not consistent with an unpublished rules being discussed by the Commission, these claims lack a factual bases and do not demonstrate discrimination.

(i) *No inconsistency with the wireless termination agreement*

First, it must be noted that MoKan voluntarily negotiated wireless a termination agreement with Sprint. This agreement clearly contemplates that transited traffic will be delivered to MoKan. Sprint has complied with all terms of the wireless termination agreement and paid all fees under the wireless termination agreement. In this case, MITG alleges that somehow the definition of local traffic in the Sprint/SBC Agreement is inconsistent with the wireless termination agreement and, thus, they face discrimination. This is incorrect.

Nowhere in the wireless termination agreement is "local traffic" defined. To the extent any traffic is defined in the wireless termination agreement, it is "telecommunications traffic" and that definition is entirely consistent with the Sprint/SBC Agreement in this case and indeed, again even acknowledges that transit traffic will be delivered under the Sprint/SBC Agreement in this case. The wireless agreement defines Telecommunications Traffic as:

> Section 1.24 "Telecommunications Traffic" is defined for the purpose of compensation under this Agreement as traffic that (a) is originated by a customer of one Party on that party's network, (b) terminates to a customer of the other Party on that Party's network within the same Major trading Area, as

> defined in 47 CFR 24.202 (a) and (c) ***may be carried by a tandem LEC pursuant to an approved interconnection agreement between the originating party and that tandem LEC providing contractual transit services for the originating Party in lieu of a direct connection between the Parties.*** (Emphasis added).

Clearly, the agreement specifically contemplates the type of Sprint/SBC Agreement filed in this case and approval of the Sprint/SBC Agreement is entirely consistent with the wireless termination agreements entered into by the MITG members.

(B) *No inconsistencies with wireless termination tariffs*

First, it should be noted again that to the extent Sprint falls under any wireless termination tariffs, Sprint has complied with all requirement placed on it by the MITG members and paid the amounts billed. While MITG complains of inconsistencies between the Agreement and the wireless termination tariffs, MITG has cited no specific provision in the Agreement, nor can Sprint find one, that in anyway supports MITG's claim. MITG claims that the Agreement somehow prohibits it from using the measurement options allowed in the Wireless tariffs. The only measurement identified by MITG is the use of its own terminating minutes for billing. Nothing in the Agreement denies MITG this ability. Further, it is interesting to note that, even though MITG claims alleged discrimination based on its ability or inability to use its own record of terminating minutes to bill under the tariff, the MITG members *have never billed under their tariff based on their own terminating minutes of use for billing.* Instead, the MITG members use SBC's CTUSR reports. Therefore, as MITG's rights under the wireless tariff are not impacted by the Sprint/SBC Agreement, MITG's arguments with respect to the tariffs do not provide a basis to reject the Sprint/SBC Agreement.

(C) *No Inconsistency with unpublished rule*

Again, MITG makes a general allegation and fails to tie it to any provision in the agreement. MITG has failed to cite to any provision of the Sprint/SBC Agreement that is inconsistent with the unpublished opinion pertaining to records that is being discussed by the Commission. Therefore, MITG has created a straw man argument that is impossible to respond to and which is not necessary for the Commission to consider. This is particularly true as the rule is not yet published and its final form unknown.

Therefore, over and above the fact that MITG is treated similar to any other non-party, nothing in the agreement, or in MITG's arguments in any way supports an allegation of discrimination.

III. THE INTERCONNECTION AGREEMENT IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY

MITG makes repeated claims that as the interconnection agreement allows the transit of traffic, it is inconsistent with the public interest because it allows wireless carriers to transit traffic for termination to it without compensation. However, the Sprint/SBC Agreement does nothing to the right of MITG members to receive compensation for traffic terminated in their service area. Further, the Sprint/SBC Agreement expressly acknowledges that "Carrier shall establish billing arrangements directly with any Third Party Provider Telecommunications Carrier to which it may send traffic by means of SBC-13STAE's Transiting Service." (Section 3.2.4.2 of the Interconnection Agreement). Therefore, the Sprint/SBC Agreement specifically acknowledges the responsibility of originating carriers to establish billing arrangements directly with non-party carriers.

Further, while MITG makes allegations against wireless carriers in general, it has not made any allegations that Sprint has failed to pay for traffic terminated under a wireless

termination tariff or wireless agreement. Given Sprint's record of complying with the agreements and tariffs, Sprint is at a loss to understand how the provisions of the Sprint/SBC Agreement uniquely defy public policy such that it should be rejected. Cleary, to the extent that MITG has issues relating to the termination of traffic transited under an interconnection agreement, they retain the legal right to raise the issues before this Commission in a complaint case if necessary. Rejecting an agreement voluntarily negotiated by two parties and consistent with the provisions of 251 and 252 of the Act is not the proper remedy.

IV. THERE IS NO RIGHT TO INTERVENTION OR TO A HEARING IN THIS CASE.

MITG has no right to intervene, no property interest at stake and is not entitled to a hearing.

(a) No right to intervene or property interest at stake.

The Commission has already ruled that the MITG companies do not have a right to intervene, nor do they have a due process interest at stake, in connection with the formation and approval of interconnection agreements. In *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG ST. Louis, Inc. and TCG Kansas City Inc, for the Compulsory Arbitration of Unresolved Issues With Southwest Bell Telephone Company,* Case No TO-2001-455, the Commission was faced with the exact same allegations made in this case by the exact same parties as they sought to intervene. The Commission denied intervention because MITG's claim of harm from transiting traffic was "too remote to confer a right to intervene. MITG and it members are not parties to the Agreement at issue in this case; rather the Agreement *may* result in traffic being terminated on their networks without compensation. The Commission concludes that their interest in the agreement is too remote and indirect and that MITG does not have a right to intervene." (Emphasis in the original).

Order Denying Intervention, Approving Interconnection Agreement, and Closing Case, September 13, 2001, Case No TO-2002-455.

The Commission went on to rule that because MITG's interest was so remote, it also lacked a due process interest:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from depriving any person of "life, liberty or property" without "due process of law." The Commission has determined that MITG and its members lack a property or liberty interest in this matter such as would create the sort of right MITG seeks to assert.
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> *Order Denying Intervention, Approving Interconnection Agreement, and Closing Case*, September 13, 2001, Case No TO-2002-455.

MITG's position and interest in this case is no different than it was in Case No TO-2002-455. Therefore, as in that case, the Commission in this case should deny intervention.

(b) No right to a hearing

Sprint and SBC presented the Agreement to the Commission for approval pursuant to Section 252(e) of the Telecommunications Act of 1996. The statute does not provide for a hearing before the Commission makes its decision. Therefore, consistent with Missouri law, no hearing is required. *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W. 2d 41, 49 (Mo. Banc 1975) (holding that the decision to hold a hearing in the absence of statutory direction is a matter for the sound discretion of the Commission). Moreover, to the extent that there is an aggrieved party by the Commission's decision, that party may bring an action in Federal district court for examination of the agreement, not a review of the Commission's decision. These are the clear and express provisions of the statute. As held by the U.S. Court of Appeals in *US West Comm v. Jennings*, 304 F. 3d 950, 958 (9th Cir. 2003), the Act charges "the federal courts to review the agreement for compliance with the Act, rather than for the correctness of the state commission's decision."

Hearings are not required before an administrative agency when hearings are instead afforded later in court. *See e.g. State v. Jensen*, 381 S.W. 2d 353, 358 (Mo. Banc 1958). Therefore, no hearing is necessary in this case.

CONCLUSION

For the reasons stated herein, the Commission should deny the motions to intervene, deny the request for a hearing and approve the interconnection agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on each of the following parties by first-class/electronic/facsimile mail, this 13th day of November, 2003.

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