BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application for Approval of a Section 251 Agreement Exclusively for Intercarrier Compensation between Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, and Camarato Distributing, Inc.	)))))	Case No. TK-2006-0262

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to approve the comprehensive interconnection agreement ("ICA") submitted by Camarato Distributing, Inc. (Camarato) and Southwestern Bell Telephone Company, L.P. d/b/a AT&T Missouri ("AT&T Missouri") that was the result of negotiations between these companies. I voted in favor of this order because I agree with the Commission's conclusion that:

> "the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity."

I am writing this concurrence, however, because I disagree with both the Commission's rationale and decision that requires Camarato and AT&T Missouri to file a transiting traffic commercial agreement for approval under § 252(3) if and when it is finalized.

In AT&T Missouri's Response to Staff's recommendation, AT&T Missouri informed the Commission that the ICA does not contain a transiting traffic agreement, and that AT&T Missouri does not intend to enter into a transiting traffic agreement because Camarato is not a facilities-based competitive local exchange carrier in Missouri.[1]

[1] *See* AT&T Missouri's Response, filed on February 17, 2006.

Section 251(a) of the Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This does not mean that every indirect transmittal of traffic is going to constitute an "interconnection". The duty to interconnect indirectly that is intended by the language is the duty to terminate traffic that is indirectly provided from another carrier upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251. The duty of ILECs to provide interconnection indirectly, therefore, is limited to providing interconnection with the ILECs' networks for terminating traffic, not with the other carriers' networks as an intermediary.

In a recent proposed rulemaking the FCC noted that it "has not had occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.[2] At least one federal district court has made the same observation.[3] Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this

[2] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

[3] *See Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules.

Commission did not need to reach the conclusion that any agreement to provide transit services needs to be filed with the Commission for approval.

Requiring transiting agreements to be filed and approved by the Commission could make them available for adoption by all CLECs and could serve as a disincentive for ILECs to negotiate private, commercial agreements for transiting traffic. This is true for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. AT&T Missouri may file any future transiting traffic agreements with the FCC pursuant to this provision. No other review is necessary.

Respectfully submitted,

Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 14th day of March, 2006.