

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) **Case No. TO-2005-0336**
for a Successor Interconnection Agreement to the)
Missouri 271 Agreement ("M2A").)

ORDER DIRECTING NOTICE OF PETITION FOR ARBITRATION, APPOINTMENT OF ARBITRATOR, APPOINTMENT OF ARBITRATOR ADVISORY STAFF, ADDING PARTIES, SETTING INITIAL ARBITRATION MEETING, DIRECTING FILING, AND ADOPTING PROTECTIVE ORDER

Introduction:

On March 30, 2005, Southwestern Bell Telephone, L.P., doing business as SBC Missouri, filed its Petition for Arbitration with the Commission pursuant to Section 4.2 of the M2A, Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. SBC's petition asks the Commission to arbitrate unresolved issues in the negotiation of interconnection agreements between SBC and various competitive local exchange carriers ("CLECs") to replace the M2A, the interconnection agreement approved by the Commission on March 15, 2001, in conjunction with its recommendation to the FCC that SBC Missouri be approved to provide in-region long distance service in Missouri pursuant to Section 271 of the Act.¹

¹In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227, (Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), issued March 15, 2001).

The M2A established terms for the resale of SBC Missouri's services and for the provision by SBC Missouri of Interconnection, Unbundled Network Elements, and Ancillary Functions as designated in the Attachments to the M2A. Most CLECs operating in SBC's territory have adopted the M2A. The M2A expired on March 6, 2005. However, under Section 4.2 of the M2A's General Terms and Conditions, the terms, conditions, and prices of the agreement will remain in effect for 135 days after its expiration for completion of negotiations and any necessary arbitration of a successor interconnection agreement. Thus, on July 19, 2005, the M2A will no longer be in effect. SBC's petition also moves the Commission to notify certain non-responsive CLECs that SBC's obligations to them will end on the 136th day following the expiration of the M2A on March 6, 2005. In the alternative, should the Commission decline to issue the requested notification, SBC requests that the Commission add the non-responsive CLECs to this arbitration as parties.

Parties:

SBC requests that the Commission add some 39 CLECs as parties to this arbitration. These include 20 CLECs with which SBC has been actively negotiating successor interconnection agreements.² Arbitration is required to settle certain unresolved issues. Another seven CLECs notified SBC that they are quitting operations

²Including the AT&T Group: AT&T Communications of the Southwest, TCG Kansas City and TCG St. Louis; the CLEC Coalition: Big River Telephone Company, LLC, Birch Telecom of Missouri, Inc., Ionex Communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., Allegiance Telecom of Missouri, XO Missouri, Inc., Xspedius Management Co. of Kansas City, LLC, and Xspedius Management Co. Switched Services, LLC; the MCI Group: MCI WorldCom Communications, Inc., and MCImetro Access Transmission Services, LLC; and others: Charter Fiberlink-Missouri, LLC, Metro Teleconnect Companies, Inc., Navigator Telecommunications, LLC, Sprint Communications Company, L.P., The Pager Company, and WilTel Local Network, LLC.

and do not intend to enter into new interconnection agreements with SBC.³ SBC requests that they be made parties to this arbitration. Another twelve CLECs failed to respond to SBC's request to negotiate a successor interconnection agreement.⁴ SBC prays that the Commission either notify these CLECs that SBC's obligations to them will end on the 135th day following the expiration of the M2A or make them parties to this arbitration. Finally, a fourth group of some 36 CLECs entered into a written Memorandum of Understanding with SBC stating that they did not intend to either negotiate or arbitrate a successor interconnection agreement, but would instead adopt one of the successor agreements resulting from this arbitration pursuant to Section 252(i) of the Act.⁵

The Commission will make the CLECs listed in Footnotes 2, 3 and 4 parties to this arbitration.

³ALLTEL Communications, Inc., Ameritel Missouri, Inc., Business Telecom, Inc., CD Telecommunications, Inc., Magnus Communications, doing business as M Comm, Steve's Wildcat Web, Inc., and Sure-Tel, Inc.

⁴Cat Communications International, Inc., Cinergy Communications, Family Tel of Missouri, LLC, ICG Telecom Group, Inc., KMC Data, LLC, KMC Telecom III, LLC, Mark Twain Communication Company, Ren-Tel Communications, Inc., Victory Communications, Inc., Quick-Tel Communications, Inc., The Phone Connection, doing business as Affordable Phone Company, and TruComm Corporation.

⁵AccuTel of Texas, Inc., ACN Communications Services, Inc., Affordaphone, Inc., American Fiber Network, Inc., American Fiber Systems, Inc., BasicPhone, Inc., Budget Phone, Inc., Cbeyond Communications, LLC, CenturyTel Solutions, LLC, Chariton Valley Telecom Corporation, Comm South Companies, Inc., Davidson Telecom, LLC, DSLnet Communications, LLC, Empire District Industries, Inc., Ernest Communications, Inc., Everest Midwest Licensee, LLC, Excel Telecommunications, Inc., ExOp of Missouri, Inc., Fidelity Communications Services III, Inc., Local Line America, Inc., McLeod USA Telecommunications, Inc., Missouri Network Alliance, LLC, Missouri Telecom, Inc., New Edge Network, Inc., Nexus Communications, Inc., NOW Intermedia, Inc., PNG Telecommunications, Inc., Preferred Carrier Services, Inc., Qwest Communications Corporation, Sage Telecom, Inc., Southern Telcom Network, Inc., Talk America, Inc., Tele-Reconnect, Inc., VarTec Telecom, Inc., Western Communications, Inc. (Logix), and Z-Tel Communications, Inc. (TRINSIC).

Timeliness of the Petition:

SBC's Petition states that it is brought "pursuant to Section 4.2 of the M2A, Section 252 of the Federal Telecommunications Act of 1996 (the "Act"), and 4 CSR 240-36.040." Sections 4.1, 4.2 and 4.3 of the General Terms and Conditions of the M2A provide that all negotiations and any necessary arbitrations required to achieve successor interconnection agreements must be completed within a prescribed 270-day period commencing 135 days before the M2A's expiration and concluding 135 days after the M2A's expiration. The M2A expired on March 6, 2005. The negotiation-arbitration period prescribed by the M2A thus began on October 22, 2004, and will end on July 19, 2005.

Section 4.1 provides that negotiations for a successor interconnection agreement must be initiated by a written request to negotiate "not later than 180 days prior to the expiration of this Agreement," that is, by September 7, 2004. SBC states, at Paragraph 11 of its Petition, that it sent a letter expressing a desire to negotiate a successor agreement to each CLEC on September 3, 2004. Thus, SBC timely initiated negotiations under Section 4.1 of the M2A.

At Section 4.2, the M2A provides:

4.2 If either party has served a Notice to Negotiate pursuant to paragraph 4.1 above then, notwithstanding the expiration of the Agreement in accordance with paragraph 4.1 above, the terms, conditions, and prices of this Agreement will remain in effect for a maximum of 135 days after expiration of the Agreement for completion of said negotiations and any necessary arbitration. The Parties agree to resolve any impasse by submission of the disputed matters to the Missouri PSC for arbitration. Should the Missouri PSC decline jurisdiction, the Parties will resort to a commercial provider of arbitration services.

Section 4.2 does not set any particular deadline for requesting the Commission to arbitrate unresolved issues; however, Section 4.3 makes it clear that any arbitration must be completed by the 135th day following the expiration of the M2A. Based on its analysis of these provisions, the Commission concludes that SBC's Petition was timely-filed under Sections 4.1, 4.2 and 4.3 of the M2A.

Section 252(b) of the Act governs compulsory arbitration of interconnection agreements. The party seeking arbitration must file its petition with the state commission "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[.]"⁶ In its Petition, SBC states: "As the M2A, by its terms, expired on March 6, 2005, the negotiations that occurred were required to, and did, commence by October 22, 2004; and the 135 to 160-day period during which either party was permitted to file for arbitration under Section 252(b)(1) of the Act began on March 6, 2005, and will end on March 31, 2005, inclusive."

In the present case, SBC is the incumbent local exchange carrier ("ILEC"). The Act says nothing about requests to negotiate received by a CLEC from an ILEC; rather, the compulsory arbitration window defined by the Act is triggered by the opposite scenario: the receipt by the ILEC of a request for negotiations from another carrier. Although SBC has enumerated the steps that it took, beginning on September 3, 2004, it has not provided sufficient detail concerning any requests for negotiation that it received from any of the CLECs. At Paragraph 16, the Petition states:

SBC Missouri received various responses to its accessible letters. These responses included requests to begin negotiations, requests

⁶ 47 U.S.C. § 252(b)(1).

to adopt other available agreements, and requests to terminate negotiations, which came from CLECs that planned to exit the business. However, numerous CLECs did not respond to any of the accessible letters. SBC Missouri's Account Managers attempted to individually contact the nonresponding CLECs to determine their intent. Unfortunately, many of those CLECs remained silent in response to SBC Missouri's attempts to engage in meaningful negotiations.

Therefore, the Commission is unable to determine from SBC's Petition whether or not the Petition was timely filed under the Act.

Regulation 4 CSR 240-36.040 is the Commission's Arbitration Rule. At Section (2), "Time to File," the rule states that "[a] petition for arbitration may be filed not earlier than the one hundred thirty-fifth day nor later than the one hundred sixtieth day following the date on which an incumbent local exchange carrier receives the request for negotiation." Again, the Commission cannot determine whether SBC's Petition was timely-filed under the rule because there is nothing in the record showing when the ILEC – SBC – received a request for negotiation.

The Commission will direct SBC to supplement its Petition so that the timeliness of the Petition can be determined. The Commission will further direct SBC and its Staff to prepare Memoranda of Law advising the Commission of the effects, if any, should SBC's Petition for Arbitration have not been timely-filed under Section 252(b)(1) of the Act and Section (2) of the Commission's Arbitration Rule.

Unresolved Issues:

At Section 252(b)(2)(A), the Act requires that the petitioner shall, simultaneously with its petition for arbitration, "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 issues discussed and resolved

by the parties." Section (3) of the Commission's Arbitration Rule states the same requirements. Attached to SBC's Petition are exhibits, including 9 matrices setting out the unresolved issues remaining in the negotiation of successor interconnection agreements with various CLECs and groups of CLECs. It appears that the Petitioners have complied with Section 252(b)(2)(A) of the Act.

Timely Service:

At Section 252(b)(2)(B), the Act requires that the petitioner "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." Section (2) of the Commission's Arbitration Rule states the same requirement. SBC's Petition includes a Certificate of Service that states, "I hereby certify that copies of the foregoing document were served to all parties by e-mail on or about March 31, 2005." Electronic mail is a valid method of service in Commission cases and such service is complete upon actual receipt.⁷ SBC filed its Petition with the Commission on March 30, a day earlier than it served its Petition on the other parties.

The effect of SBC's late service must be that the Petition is deemed to have been filed on the date that service was accomplished, as both the Act and the Commission's Arbitration Rule require. Therefore, the Commission will deem the Petition to have been filed on March 31, 2005, rather than on March 30, 2005.

Response Deadline:

The Act, at Section 252(b)(3), provides that the "non-petitioning party . . . may respond to the other party's petition and provide such additional information as it wishes

⁷ 4 CSR 240-2.080(18).

within 25 days after the State commission receives the petition." Section (7) of the Commission's Arbitration Rule is essentially similar. The Commission received the petition on March 30, 2005, and the 25th day thereafter is Sunday, April 24, 2005. However, as explained above, the Commission will deem the Petition to have been filed on March 31. The 25th day thereafter is Monday, April 25, 2005, and that is the deadline for the CLECs' responses.

Notice of Appointment of Arbitrator:

Section (4) of the Commission's Arbitration Rule provides for the appointment of an Arbitrator. The Parties are advised that the Commission has appointed Kevin A. Thompson, Deputy Chief Regulatory Law Judge, as the Arbitrator in this matter.

Notice of Appointment of Arbitrator Advisory Staff:

Section (12) of the Commission's Arbitration Rule provides for the Arbitrator's appointment of an Advisory Staff from the Commission's Staff to assist him in the decision-making process. The Parties are advised that the Arbitrator hereby appoints Natelle Dietrich, Mick Johnson, Mike Scheperle, Adam McKinnie, and Nathan Williams to his Advisory Staff for the purposes of this proceeding.

Notice of Scheduling of Initial Arbitration Meeting:

Section (9) of the Commission's Arbitration Rule provides for an Initial Arbitration Meeting for purposes such as setting a procedural schedule, establishing a time limit for submission of final offers, allowing the filing of testimony, setting times by which testimony may be filed, simplifying issues, or resolving the scope and timing of discovery. The Parties are advised that the Initial Arbitration Meeting shall be held on

Thursday, April 14, 2005, commencing at 10:00 a.m. in Room 310 of the Governor Office Building in Jefferson City, Missouri.

Adoption of Protective Order:

On March 31, SBC moved the Commission to adopt its standard protective order for the purposes of this proceeding because Highly Confidential and Proprietary information will necessarily be involved. The Commission will adopt its standard protective order for this proceeding.

IT IS THEREFORE ORDERED:

1. That these carriers are made Parties to this case: The AT&T Group: AT&T Communications of the Southwest, TCG Kansas City and TCG St. Louis; the CLEC Coalition: Big River Telephone Company, LLC, Birch Telecom of Missouri, Inc., Ionex Communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., Allegiance Telecom of Missouri, XO Missouri, Inc., Xspedius Management Co. of Kansas City, LLC, and Xspedius Management Co. Switched Services, LLC; the MCI Group: MCI WorldCom Communications, Inc., and MCImetro Access Transmission Services, LLC; and others: Charter Fiberlink-Missouri, LLC, Metro Teleconnect Companies, Inc., Navigator Telecommunications, LLC, Sprint Communications Company, L.P., The Pager Company, and WiTel Local Network, LLC. ALLTEL Communications, Inc., Ameritel Missouri, Inc., Business Telecom, Inc., CD Telecommunications, Inc., Magnus Communications, doing business as M Comm, Steve's Wildcat Web, Inc., and Sure-Tel, Inc. Cat Communications International, Inc., Cinergy Communications, Family Tel of Missouri, LLC, ICG Telecom Group, Inc., KMC Data, LLC, KMC Telecom III, LLC, Mark Twain Communication Company, Ren-Tel Communications, Inc., Victory Communications, Inc., Quick-Tel

Communications, Inc., The Phone Connection, doing business as Affordable Phone Company, and TruComm Corporation.

2. That the Data Center of the Missouri Public Service Commission shall serve a copy of this Order upon each of the carriers listed in Ordered Paragraph No. 1, above. Their counsel shall be added to the service list.

3. That Southwestern Bell Telephone, L.P., doing business as SBC Missouri, shall, by Friday, April 15, 2005, supplement its Petition for Arbitration as discussed above so that the timeliness of the Petition under Section 252(b)(1) of the Telecommunications Act of 1996 and under Regulation 4 CSR 240-36.040(2) can be determined. Additionally, by the same date, Southwestern Bell Telephone, L.P., doing business as SBC Missouri, and the Staff of the Missouri Public Service Commission shall prepare Memoranda of Law advising the Commission of the effects, if any, should SBC's Petition for Arbitration have not been timely-filed under Section 252(b)(1) of the Act and Section (2) of the Commission's Arbitration Rule. Any of the carriers made parties in Ordered Paragraph No. 1 may also file such Memoranda by the same deadline.

4. That the parties listed in Ordered Paragraph No. 1, above, may file a response to the Petition for Arbitration, as well as any other information they may desire, not later than Monday, April 25, 2005, with the Secretary of the Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, and must serve a copy of any response, as well as a copy of any additional information they provide, upon Petitioners as well as the General Counsel of the Missouri Public Service Commission and the Office of the Public Counsel.

5. That Kevin A. Thompson, Deputy Chief Regulatory Law Judge, is hereby appointed as the Arbitrator in this matter.

6. That Natelle Dietrich, Mick Johnson, Mike Scheperle, Adam McKinnie, and Nathan Williams are hereby appointed to the Arbitration Advisory Staff for the purposes of this proceeding.

7. That the Initial Arbitration Meeting shall be held on Thursday, April 14, 2005, beginning at 10:00 a.m. The meeting will be held at the Commission's offices in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, Room 310, a building that meets the accessibility standards required by the Americans with Disabilities Act. If any person need additional accommodations to participate in this meeting, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or dial 711 for Relay Missouri.

8. That the Protective Order attached hereto as Attachment A is adopted for this proceeding. The parties are directed to comply with it.

9. That this order shall become effective on April 6, 2005.

BY THE COMMISSION

(S E A L)

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 6th day of April, 2005.