LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

November 14, 2003

Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

FILED
NOV 14 2003
Missouri Public
Service Commission

Re: Case No. TK-2004-0199

Dear Mr. Roberts:

Enclosed for filing on behalf of the Small Telephone Company Group, please find the Application to Intervene and Request for Hearing in the above-referenced matter.

Please bring this filing to the attention of the appropriate Commission personnel. A copy of this filing will be provided to parties of record. If there are any questions, please direct them to me at the above number. I thank you in advance for your cooperation in this matter.

Sincerely,

Brian T. McCartney

Brian T. McCartney

BTM/da
Enclosures
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In re: The Traffic Termination Agreement by and between Chariton Valley Telecom Corporation and Southwestern Bell Telephone Company pursuant to the Telecommunications Act of 1996	))))	Case No. TK-2004-0199

APPLICATION TO INTERVENE AND REQUEST FOR HEARING

COMES NOW the Small Telephone Company Group (STCG)[1] and for its Application to Intervene and Request for Hearing, states to the Missouri Public Service Commission (Commission) as follows:

SUMMARY

The Traffic Termination Agreement (the Agreement) between Chariton Valley Telecom Corporation (Chariton Valley) and Southwestern Bell Telephone L.P. d/b/a Southwestern Bell Telephone Company (SWBT) discriminates against third parties and is inconsistent with the public interest by purporting to allow SWBT and Chariton Valley to deliver local and non-local (i.e., interexchange) "transit" traffic to third party incumbent local exchange carriers (ILECs), such as the STCG member companies, in violation of STCG tariffs and in the absence of billing records for compensation.

Although the Agreement recites that it is an originating party's responsibility to enter into arrangements with third party ILECs prior to delivering traffic for transiting to a third party ILEC, there is nothing in the Agreement that requires the originating party to do so. Instead, there are numerous provisions that purport to limit the liability of the

[1] *See* Attachment A.

parties for "transit" traffic that is delivered to third party carriers such as the STCG member companies. As a practical matter, "transit" traffic (primarily interexchange traffic) is being delivered absent any agreement with the third party ILEC, without timely, detailed, and appropriate records for the traffic being terminated, and without any payment in accordance with the approved intrastate access tariffs of third party ILECs.

The Agreement specifically allows the transiting of non-local (i.e., interexchange) traffic to third party ILECs, such as the STCG member companies. There is absolutely nothing in the Telecommunications Act of 1996 (or any other requirement of which the STCG is aware) that requires local exchange carriers to transit interexchange traffic. In fact, the FCC has explained that ILECs have no general obligation to transit another carrier's traffic to a third party, and SWBT has itself filed pleadings before this Commission and the FCC which explain that SWBT is not obligated to provide transit service.

Interexchange traffic is clearly subject to the intrastate access tariffs of the STCG member companies and should be delivered and compensated in accordance with those tariffs. The effect of the Agreement is to circumvent the traditional routing of interexchange traffic (i.e., via Feature Group D Signaling) and deliver such traffic over common trunk groups (i.e., via Feature Group C Signaling) where it is commingled with other local and interexchange traffic and unidentifiable to the terminating ILEC. The Agreement, to the extent it permits the transit of interexchange traffic, discriminates against third party ILECs by preventing them from applying their access tariffs (or

making it problematic to apply those tariffs) to this traffic.

To the extent the Agreement contemplates the transit of local traffic, this too discriminates against third party ILECs, such as STCG member companies. Although the Agreement acknowledges that the originating party should have an agreement with the third party ILEC prior to delivering local transit traffic to third party ILECs, experience has shown that the CLECs have not done so. In fact, the STCG is unaware of any instance where an originating carrier has obtained an agreement prior to transiting local traffic to third party ILECs.

The fact that the Agreement purports to allow the parties to deliver traffic to STCG companies in violation of their access tariffs and without any safeguards to ensure identification and compensation for local traffic will have a direct and adverse impact upon the STCG member companies. The STCG therefore seeks intervention and hearing to address the "transit" provisions of the Agreement, particularly those that purport to allow SWBT and Chariton Valley to deliver traffic to STCG exchanges in violation of STCG's lawful switched access tariffs. The Agreement's "transiting" provisions are discriminatory and against the public interest. Accordingly, either SWBT and Chariton Valley must remove these provisions from the Agreement, or the Commission must reject the Agreement as filed.

APPLICATION TO INTERVENE

1. On October 28, 2003, the Commission issued its order giving notice of this case and allowing twenty (20) days for intervention and motions for hearing.

2. The STCG requests a hearing to address the provisions in the agreement that purport to allow SWBT and Chariton Valley to deliver interexchange traffic to third party ILECs in violation of STCG tariffs and prior Commission orders. The STCG opposes the Agreement's "transiting" provisions because they are discriminatory and inconsistent with the public interest.

3. For the purposes of this case, the STCG consists of the companies listed in Attachment A. The member companies are small incumbent local exchange carriers that provide local and exchange access service in the state of Missouri. The majority of the STCG member companies directly subtend SWBT switched access tandems.

4. As explained below, the interests of the STCG member companies will be directly and adversely affected if the Commission approves an Agreement that will allow SWBT and Chariton Valley to deliver local and interexchange telecommunications traffic to the STCG member companies' exchanges in violation of the STCG's tariffs and in the absence of billing records or compensation. Moreover, granting the STCG's proposed intervention will serve the public interest because the STCG member companies have many years of expertise in the regulatory and technical requirements for providing telecommunications services to rural Missouri.

REQUEST FOR HEARING

5. **The Federal Act**. The STCG requests a hearing to examine the Agreement's "transiting" provisions under the standards contained in the federal Telecommunications Act of 1996 ("the Act"). The Act establishes two grounds for the Commission to reject a negotiated agreement:

(1) The agreement, or a portion thereof, discriminates against a telecommunications carrier not a party to the agreement; or

(2) The implementation of such an agreement is not consistent with the public interest, convenience, or necessity.

47 U.S.C. § 252(e)(2). In this case, both grounds for rejection are present. First, the Agreement discriminates against third parties by purporting to allow SWBT and Chariton Valley to deliver interexchange traffic to third-party ILECs such as the STCG member companies in violation of Commission-approved switched access tariffs. Second, the Agreement is inconsistent with the public interest, convenience, and necessity because it encourages the continued flow of uncompensated and unidentified traffic over Missouri's telecommunications network, which in turn places an increased burden on those companies and customers that do pay their bills and play by the rules.

6. **The Agreement is discriminatory to third-party carriers such as the STCG companies**. The Agreement discriminates against the STCG in that it purports to allow Chariton Valley to send interexchange "toll traffic"[2] to STCG exchanges in

[2] Agreement, § 7.

violation of STCG switched access tariffs and in the absence of billing records or compensation for the use of the STCG's facilities and services. The two Parties to the Agreement are attempting to establish terms and conditions for the use of third parties' networks, but the STCG member companies already have Commission-approved switched access tariffs that apply to interexchange traffic. Thus, the "transiting" provision is inappropriate and unlawful in that it purports to authorize and establish terms for the delivery of traffic that directly violate the STCG member companies' existing tariffs.

7. The Agreement is also discriminatory in that it establishes clear guidelines and rules for the exchange of traffic between SWBT and Chariton Valley, yet it provides *no such protections for the third parties with which it also purports to authorize the* exchange of traffic. Rather, the Agreement purports to limit the liability of SWBT and Chariton Valley for "transit" traffic delivered to third parties,[3] and the STCG member companies are left holding the bag for unidentified and uncompensated traffic that is being delivered to their exchanges by SWBT. Because the transit traffic is commingled with other traffic on common trunk groups, STCG member companies are not able to distinguish and block the traffic.

9. **The Agreement is inconsistent with the public interest, convenience, and necessity**. The Agreement encourages the delivery of uncompensated telecommunications traffic, and it contradicts the STCG member companies' lawful

[3] *See e.g.* Agreement, § 3.7 (SWBT "shall not compensate any Third Party incumbent LEC and/or Telecommunications Carrier for Local, ECC, Toll, IXC, or any other traffic that is inappropriately routed to [SWBT].")

tariffs and prior Commission orders. The Agreement will have direct and adverse impacts upon the STCG member companies. Uncompensated and unidentified "transit" traffic is a real problem in Missouri, and this problem is made worse by the fact that SWBT does not create and pass timely, accurate, and appropriate records of the "transit" traffic that SWBT delivers to the STCG companies. Therefore, the Agreement is inconsistent with the public interest because it encourages the continued flow of uncompensated and unidentified traffic over Missouri's telecommunications network, and this in turn places an increased burden on those companies and customers that do pay their bills and play by the rules.

10. **Interexchange Traffic**. The Agreement's "transiting" provisions purport to authorize SWBT and Chariton Valley to deliver **interexchange "non-local, non-EAS, toll traffic"[4] to the STCG companies in violation of STCG tariffs and in the absence of billing records or compensation**. The Agreement's "transiting" provisions are outside the purview of lawful agreements under the Act. The transit provisions would allow carriers to avoid paying for interexchange traffic that is delivered to the STCG exchanges by avoiding the Feature Group D (FGD) network for interexchange traffic. Instead, the Agreement would allow interexchange CLEC traffic, to which access rates clearly apply, to be delivered to the STCG companies over the common trunk groups of the so-called "local exchange carrier" Feature Group C (FGC) network without any records or compensation.

[4] Agreement, § 7.2.

11. Interconnection agreements establish the rates, terms, and conditions for the interconnection and exchange of traffic between the two companies that are parties to the agreement. It is unlawful and unreasonable to allow two parties to the agreement to establish terms and conditions that would allow them to avoid paying for traffic that is destined for third party carriers. Such provisions are outside the scope of interconnection agreements.

12. As a result of the "transit" provisions in SWBT's agreements, unidentified traffic is delivered to STCG exchanges in violation of STCG access tariffs. Under the Agreement, SWBT is clearly acting as an interexchange carrier (IXC), not a local exchange carrier, when SWBT delivers traffic from one exchange to a third party carrier's exchange. Nevertheless, SWBT's Agreement seeks to avoid the traditional IXC responsibilities to comply with access tariffs and compensate terminating carriers for the use of their networks. This will result, and indeed has already resulted, in the delivery of unidentified, unauthorized, and uncompensated traffic to STCG exchanges. When STCG member companies attempt to bill for interexchange CLEC traffic for which they have received records, the CLECs typically refuse to pay.

13. CLECs should deliver interexchange traffic to the STCG companies in accordance with the rates, terms and conditions of the STCG companies' respective access tariffs, just as any other local exchange carrier is required to do. Ironically, SWBT and Chariton Valley agree that when they exchange switched access traffic, they will establish meet point billing (MPB) arrangements in accordance with the guidelines established by the Ordering and Billing Forum's (OBF) MECOD and MECAB

documents.[5] But when SWBT transits interexchange or switched access traffic to third party ILECs, SWBT does not do so on a MPB basis in accordance with OBF guidelines. Thus, the agreement on its face (and as experience has shown) is discriminatory to third party ILECs because it prevents them from obtaining industry standard records of interexchange traffic which Chariton Valley is required to receive under the terms of the Agreement for interexchange traffic which SWBT transits to Chariton Valley.

14. **The Agreement violates prior Commission *Orders***. Specifically, the Agreement's "transiting" provisions violate prior Commission orders which establish access tariffs as the lawful compensation mechanism for interexchange CLEC traffic and require CLECs to either: (a) provide billing information for interexchange traffic delivered over common trunks; or (b) deliver interexchange traffic over separate trunks.

15. As a threshold matter, the Commission has approved the STCG's access tariff rates for intrastate interexchange traffic. Under Section 392.240, RSMo 2000, the Commission has the authority over the rates and charges that are charged or collected by telecommunications companies operating in Missouri. Rates promulgated by the Commission in accordance with statute have the same force and effect as if directly prescribed by the legislature.[6] Contracts between public utilities and their customers

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[5] Agreement, § 9.2.

[6] *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 114; 81 L.Ed. 540; 57 S.Ct. 345 (1937); *State ex rel. Jackson County v. Public Service Comm'n*, 532 S.W.2d 20, 22 (Mo. banc 1975)(*quoting* 64 Am.Jur2d Public Utilities, §244).

cannot limit the Commission's rate-making authority.[7] Two regulated utilities cannot contract around an order from the Commission.[8] This is especially true where a contract between carriers purports to supercede the lawful tariffs of a third carrier not a party to the contract. A Commission order "will supercede the terms of a contract agreement between two telephone companies as to the service rates they charge each other."[9]

16. In Case No. TO-97-40, the Commission explained that an interconnection agreement between two parties cannot impose terms on a third party. Specifically, the Commission held that an interconnection agreement between other parties cannot displace the STCG's lawful switched access rates:

> **The Commission finds that since the other LECs are not a party to this arbitration, traffic to and from them should be handled by existing switched access rates. . . . The switched access rates are already used when toll traffic is passed between carriers and represents an existing business arrangement between the companies.**[10]

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[7] *State ex rel. Capital City Water Co. v. Missouri Public Service Comm'n*, 850 S.W.2d 903 (Mo. App. 1993).

[8] *In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service after the Passage and Implementation of the Telecommunications Act of 1996*, Case No. TO-99-483, *Report and Order*, issued Sept. 7, 2000, p. 29.

[9] *Oak Grove Home Telephone Co. v. Round Prairie Telephone Co.*, 209 S.W. 552, 553[4] (Mo. Ct. App. 1919).

[10] *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act to Establish an*

Thus, the Commission has specifically held that the STCG's access rates apply to interexchange CLEC traffic.

17. The Commission has also held that when CLECs send interexchange traffic to STCG exchanges, the CLECs must either: (1) send records and reports to the STCG companies for any interexchange traffic that they send to STCG exchanges; or (2) separately trunk interexchange traffic destined to STCG exchanges.[11] Unfortunately, this has never happened, and CLECs have simply sent interexchange traffic to STCG exchanges in violation of STCG access tariffs, without records, and without separate trunking.

18. **Industry Standard Category 11 Records**. When the Commission eliminated the Primary Toll Carrier (PTC) Plan in 1999, it recognized that terminating traffic could be measured at almost all small ILEC end office switches, but the small ILECs "will not have information about the call's jurisdiction or the identification of the responsible carrier."[12] Therefore, the Commission ordered the former PTCs, including SWBT, to provide standard Category 11 records:

Interconnection Agreement with Southwestern Bell Telephone Company, Case No. TO-97-40, *Arbitration Order*, issued Dec. 11, 1996 (emphasis added).

[11] *In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service after the Passage and Implementation of the Telecommunications Act of 1996*, Case No. TO-99-483, *Report and Order*, issued Sept. 7, 2000, p. 34, ordered ¶ 19.

[12] *In the Matter of an Investigation Concerning the Primary Toll Carrier Plan and IntraLATA Dialing Parity*, Case No. TO-99-254 et al., *Report and Order*, issued June 10, 1999.

> **[T]he Commission will order the provision of standard "Category 11" records**. This will provide the SCs better information about calls terminated to them. . . . They are the records used in the carrier access billing system. **The Commission finds that requiring PTCs to provide industry standard 11-01 records is in the public interest, and will order these records to be provided by April 1, 2000.** [13]

The Agreement is contrary to the public interest and discriminatory to third parties because it effectively prevents the small ILECs from receiving these industry standard Category 11 records for the "transit" traffic that is being delivered to the small ILECs by SWBT.

19. **Carrier Identification Code Information**. In the context of originating interexchange traffic, the Commission has held that SWBT should be treated just like any other interexchange carrier. Specifically, the Commission has ruled that SWBT must provide Carrier Identification Codes (CIC) for any traffic that SWBT originates in small ILEC exchanges:

> **The Respondents [small ILECs] must be allowed to identify who is using their networks. The only practical way that Respondents can make that identification is through the use of a CIC**.[14]

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[13] *Id.* at p. 14 (emphasis added).

[14] *Southwestern Bell Telephone Company's Complaint against Mid-Missouri Telephone Company for blocking SWBT's 800 MaxiMizer Traffic*, Case No. TC-2000-325, *Report and Order*, issued Sept. 26, 2000.

The Commission explained, "For the purpose of originating intraLATA interexchange traffic, SWBT is now essentially just another intraLATA IXC, which may, if it chooses to comply with the Respondents' respective tariffs, originate traffic in the Respondents' exchanges. As an intraLATA IXC, competing for business with other IXCs, SWBT must comply with the Respondents' tariffs by using FGD."[15] Although the *MaxiMizer 800* case involved interexchange traffic that SWBT was originating in small ILEC exchanges, the same reasoning should apply to interexchange traffic that SWBT is delivering to small ILEC exchanges for termination.

20. **There is no federal obligation to transit traffic**. The Agreement purports to allow the delivery of local and non-local traffic, but the Act does not require SWBT to transit traffic. In fact, the FCC has explained that ILECs have no general obligation to transit another carrier's traffic to a third party,[16] and SWBT has itself filed pleadings before this Commission and the FCC which state:

(A) "Southwestern Bell is not required by federal law or regulation to provide transit service."[17]

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[15] *Id.*

[16] *In the Matter of the Petition of WorldCom, Inc. pursuant to Section 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n regarding Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, *Memorandum Opinion and Order*, released July 17, 2002.

[17] *BPS Telephone Company et al. Complaint v. Voicestream and Western Wireless*, Case No. TC-2002-1077, *Southwestern Bell's Initial Brief*, filed Dec. 12, 2002, p. 3.

(B) "[T]he FCC has not imposed an obligation to carry transit traffic, particularly at TELRIC rates."[18]

(C) "While existing interconnection agreements require Southwestern Bell to transit wireless traffic, there does not appear to be an obligation to do so under the Act after these agreements expire."[19]

(D) "[N]either the Act nor its rules require third party carriers to provide indirect interconnection or transit services."[20]

(E) "The duty to interconnect indirectly does not require any carrier to provide transit services to any other carrier."[21]

Thus, there is no requirement that the Agreement contain transit provisions which allow the parties to deliver interexchange traffic to third party carriers.

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[18] *Id.* at pp.16.

[19] *Id.* at pp.16-17.

[20] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Comments of SWBT Communications, Inc.*, filed Oct. 18, 2002, p.1.

[21] *Id.* at p. 3.

CONCLUSION

The Agreement discriminates against the STCG companies because it purports to allow SWBT and Chariton Valley to deliver traffic to the STCG exchanges in violation of STCG tariffs and in the absence of billing information or compensation for the use of STCG facilities and services. The Agreement is also inconsistent with the public interest because it encourages the continued flow of uncompensated and unidentified traffic over Missouri's telecommunications network, and this in turn places an increased burden on those companies and customers that do pay their bills and play by the rules. The Agreement's transiting provisions also violate prior Commission orders regarding the termination of interexchange CLEC traffic. For these reasons, the Agreement must either be modified by SWBT and Chariton Valley to eliminate "transit" traffic to third parties, or it must be rejected by the Commission.

Respectfully submitted,

By Brian T McCartney

W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
(573) 635-7166
(573) 634-7431 (FAX)

Attorneys for the STCG

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 19th day of November, 2003, to the following parties:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Michael F. Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Leo Bub
Southwestern Bell Telephone, L.P.
One SWBT Center, Room 3518
St. Louis, MO 63101

Craig Johnson
Andereck, Evans, Milne, Peace & Johnson, L.L.C.
P.O. Box 1438
Jefferson City, Missouri 65102-1438

Brian T. McCartney

ATTACHMENT A

BPS Telephone Company
Cass County Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corporation
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Company
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Exchange, Inc.
Stoutland Telephone Company