

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED³

JUN 06 2003

Missouri Public
Service Commission

In the Matter of the Determination of)
Prices, Terms and Conditions of)
Certain Unbundled Network Elements.)

Case No. TO-2001-438

**JOINT SPONSORS' RESPONSE OPPOSING SOUTHWESTERN BELL
TELEPHONE COMPANY, LP D/B/A SBC MISSOURI'S APPLICATION FOR
RECONSIDERATION AND/OR REHEARING, AND ALTERNATIVE MOTION TO
HOLD IN ABEYANCE**

COME NOW AT&T Communications of the Southwest, Inc. ("AT&T"), MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc. (collectively "MCI"), Birch Telecom of Missouri, Inc., XO Missouri, Inc., NuVox Communications of Missouri, Inc., McLeodUSA Telecommunications Services, Inc., TCG of Kansas City, Inc., and TCG of St. Louis, Inc. (collectively "Joint Sponsors"),¹ and for their response opposing Southwestern Bell Telephone Company's ("SBC") third application for reconsideration and/or rehearing, and SBC's alternative motion to hold in abeyance, respectfully state as follows:

1. As an initial matter, the Joint Sponsors concur with the conclusion of Staff's responsive pleading filed June 3, 2003. The Joint Sponsors will not recapitulate the procedural context of SBC's most recent motion for reconsideration, which Staff's pleading has nicely captured. SBC's motion reargues points that have already been rejected by the Commission, and relies on a press release that has no legal significance.

¹ Undersigned counsel for AT&T has been authorized to represent Birch's concurrence in this pleading.

The Commission should no longer tolerate SBC's continuing efforts to postpone its compliance with the Report and Order that was issued in this case last August.

2. The Commission has already made its decision in this case. It has instructed SBC to comply with that decision. SBC has finally submitted compliant rates. These rates are to be inserted in the M2A and interconnection agreements based thereon, including on a retroactive basis, in order to replace interim rates that were proposed and accepted to facilitate SBC's admission into the interLATA market in Missouri under Section 271. It is time to conclude this process of implementing the Commission's Report and Order. It is not time to consider potential prospective changes in law.

3. SBC inappropriately relies on the FCC's "Triennial Review Order" February 20, 2003 press release to argue that the Commission should change its decisions on depreciation and cost of capital, or else further delay implementation of its final decision in this case until the Triennial Review Order is released. Notably, SBC raises no new arguments regarding the correctness of the Commission's decision under existing law. Most importantly, regarding SBC's only new argument, Staff has pointed out that the FCC press release, by its own terms, declares that it is an "unofficial announcement" and does not constitute official action. Aside from the fact that the actual terms of the Triennial Review Order ("Order") *might not* include the TELRIC clarifications that the press release suggests, it is also possible that the Order might clarify or change other aspects of the FCC's TELRIC rules. This possibility has existed ever since the Triennial Review was contemplated, yet the Commission properly applied existing law to the record before it in order to render its final decision requiring production of the compliance rates that have now been filed by SBC. The mere *prospect* that the law might

change in unclear ways² at some unknown time³ down the road, after the FCC completes its work on the Triennial Review Order and all stays and appeals run their course, does not justify or authorize a change in the Commission's final decision in this case. As Staff's response also pointed out, the Commission has previously determined that it would be inappropriate to open cases to consider Triennial Review issues when the Order itself had not yet been issued. Here as well, it would be inappropriate to postpone implementation of the Commission's decision based on the uncertainty of possible future changes in law.

4. SBC's motion seeks a delay in the Commission's "adoption of final rates." Although the Commission will most likely still issue an order confirming the compliance rates that have now been filed by SBC, the Commission's final decision on the merits in this case was rendered on August 6, 2002, and SBC's arguments for reconsideration under existing law were rejected long ago. SBC's motion for reconsideration is procedurally out of order. This constitutes SBC's third motion for rehearing/reconsideration on the same issues, all addressed to the same Report and Order, which is surely not contemplated by 4 CSR 240-2.160.⁴ SBC's alternative motion for abeyance relies on the same flimsy grounds as its chief motion, and it ignores the costs of

² The FCC could address any number of issues in its official Order that cut any number of ways across the interests of the parties.

³ The FCC's Order will not be retroactive, and might not even be effective upon issuance, even in the absence of stays and appeals.

⁴ The mere fact that SBC incorporates its previous arguments from its August 15 and September 20, 2002 motions demonstrates that SBC is simply raising again, for the third time, arguments that the Commission previously rejected. Parties should not be put to the time and effort of having to repeatedly respond to the same arguments when those arguments have already been rejected. The Joint Sponsors have already presented many additional arguments about why SBC's arguments on fiber fill and feature activations are wrong, but it borders on the ridiculous to have to once again address, even superficially, SBC's already rejected arguments.

the resources of the Commission and the Joint Sponsors that have already been expended on this case. While SBC may be able to raise issues related to the ultimate outcome of the Triennial Review in some future proceeding, there is no basis for its attempt to inject such issues in an effort to avoid implementation of the final decision in this case.

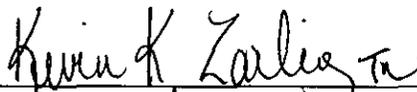
5. SBC prefaces its arguments for rehearing/reconsideration with the statement that, from SBC's perspective, most of the Commission's rulings in this case were adverse to SBC.⁵ SBC obviously makes this statement in order to try to create a context in which its request for rehearing/reconsideration seems limited and humble, and thus somehow more meritorious. While SBC may be correct that on a numeric basis most of the issues in this case were not decided in SBC's favor, just counting issues does not accurately reflect the outcome. There are a number of issues on which the Joint Sponsors did not prevail where the result of those adverse rulings far outweigh the benefit of the favorable rulings associated with a particular cost study. For some UNE costs studies, while the Joint Sponsors may have "won" the majority of the issues, the one or two issues that the Joint Sponsors "lost" were the biggest cost drivers in the study, resulting in final rates much closer to what SBC proposed than to what the Joint Sponsors proposed. There were a number of important issues on which the Joint Sponsors could have asked for rehearing/reconsideration, but the Joint Sponsors believed back in August 2002, and still believe, that they have had their "day in court" and that it is time to implement the final rates for these UNEs. The Commission should not be misled: SBC's motion has no merit and, on balance, SBC did not make out poorly in this case.

⁵ SBC Motion, pg. 5.

6. The concepts of due process, judicial economy, and finality argue for the Commission to stand behind its final decision on the merits in this case, to expediently confirm that the rates filed by SBC are in compliance with that decision, and to deny SBC's motions in all respects. The Commission should make clear that SBC's latest motion for rehearing/reconsideration is out of order, and that no such further motion by SBC would be appropriate simply because the Commission issues a subsequent order confirming the compliance rates, or denying SBC's motion. No further SBC reply to Staff's and Joint Sponsors' responses should be contemplated, and no further challenge to these compliance rates when they are incorporated into parties' interconnection agreements should be permitted. It is time for SBC's §271 bargain calling for replacement of the interim UNE rates in the Missouri §271 Agreement to be fulfilled.

WHEREFORE, because SBC has raised no ground sufficient for the Commission to reconsider its decisions set forth in its Report and Order issued August 6, 2002, to rehear the matter or to delay issuing an order confirming rates in this case, the Joint Sponsors respond that the Commission should deny both SBC's Application for Reconsideration and/or Rehearing of Revised UNE Costs and Rates and its motion to delay adopting final rates pending the FCC's issuance of its Triennial Review order.

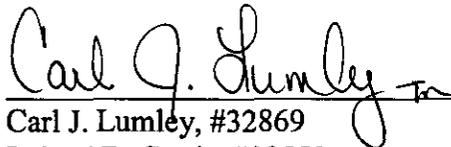
Respectfully Submitted,



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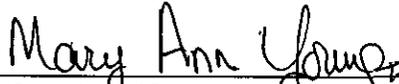
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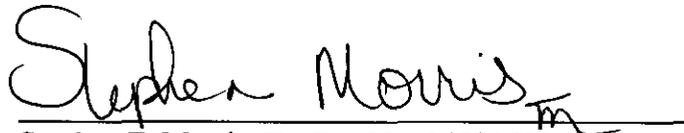
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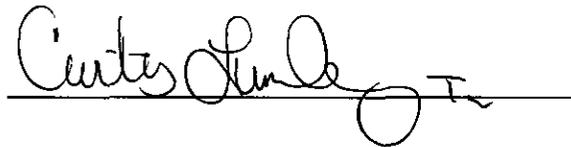


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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was mailed this 6 day
of June, 2003, to the persons listed on the attached service list, by U.S.
Mail postage paid.



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