BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of a Proposed Rescission and Consolidation of Commission Rules Relating to Telecommunications	**Case No. TX-2015-0097**

COMMENTS OF THE MISSOURI CABLE TELECOMMUNICATIONS ASSOCIATION

Comes now the Missouri Cable Telecommunications Association (the "MCTA") and submits these Comments in response to the publication in the Missouri Register of proposed revisions of the Missouri Public Service Commission's (the "Commission") telecommunications rules. While largely supportive of the proposed rule revisions, the MCTA provides these Comments consistent with its positions in Docket No. TW-2014-0295,[1] which was the precursor of this formal rulemaking proceeding.

I. The Commission Does Not Have Jurisdiction to Impose a Call Completion Obligation on Interconnected VoIP Service ("IVoIP") Providers

The Commission proposes the following as Rule 28.060(2):

> Any company certificated or registered with the commission has a duty to ensure calls are being completed. No company shall intentionally frustrate, delay, impede or prevent the completion of any intrastate call.

As MCTA and other parties extensively discussed in Docket No. TW-2014-0295,[2] which was the precursor of this formal rulemaking proceeding, the 2014 enactment of section 392.611, RSMo, clearly establishes that the Commission cannot impose the proposed rule on IVoIP providers.

[1] *Repository Case in Which to Receive Feedback and Other Suggestions Concerning Staff's Proposed Consolidation and Simplification of the Commission's Telecommunications Rules*, Docket No. TW-2014-0295.

[2] *See, e.g.*, MCTA's Comments dated August 2, 2014 and Verizon's Additional Comments dated September 17, 2014.

Section 392.611.2, RSMo, states that "[b]roadband *and other internet protocol-enabled services* shall not be subject to regulation under chapter 386 or this chapter, except that interconnected voice over internet protocol service shall continue to be subject to section 392.550." (Emphasis added). Section 392.550, RSMo, requires IVoIP providers to register with the Commission and imposes the obligation to pay exchange access charges and several specifically-delineated Commission program-related charges on IVoIP providers and their customers. Nothing in Section 392.550, RSMo, however, suggests the Commission has any jurisdiction to impose call completion requirements on, or, indeed, any other requirements with regard to IVoIP providers. While section 392.611.3, RSMo, provides that "nothing in this section extends, modifies, or restricts any authority the commission may have arising under state law relating to interconnection obligations or other intercarrier issue," that subsection does not constitute an independent grant of authority to impose call completion requirements on IVoIP providers. There is no provision in Chapter 386 or Chapter 392 of the Missouri Revised Statutes that confers such authority. The MCTA respectfully requests that the proposed rule be amended to remove the reference to IVoIP providers.

II. MCTA Supports Proposed Rule 4 CSR 240-28.080(2) (Interconnection Agreements)

MCTA supports and appreciates the addition of the following sentence:

> Approved interconnection agreements whose original term has expired, but which remain in effect pursuant to term renewal or extension provisions, will be subject to adoption for so long as the interconnection agreement remains subject to the renewal or extension provision.

AT&T objected to Staff's addition of this sentence in the draft proposed rules considered in Case TW-2014-0295.[3] In objecting to the language, AT&T made two arguments:

(1) The purpose of the Commission's proceeding is merely to "consolidate and simplify the Commission's telecommunications rules," *i.e.*, not to effect substantive changes.

[3] *See* AT&T's Second Round Comments, filed September 16, 2014.

(2) The proposed provision conflicts with federal law and is outside the Commission's discretion.

Because AT&T or others will likely review one or both of these arguments, MCTA addresses them in these Comments.

With respect to AT&T's first objection, for over a year the Commission has consistently stated there would be substantive changes to the Commission's telecommunications rules. In its April 23, 2014 order opening Docket No. TW-2014-0295, the Commission asked whether any commenter would object to any proposed substantive changes to the rules. As extensively discussed in that proceeding, a number of rules, for the first time, would be directed to telecommunications service as well as to interconnected VoIP service. In its Submission of Documents dated June 24, 2014, in Docket No. TW-2014-0295, the Staff stated that it had "identif[ied] rules to be substantively eliminated as well as identify rules to be moved into proposed Chapter 28." With the commencement of the present proceeding, the Commission has conferred notice of its intended rule revisions.

With respect to its second objection, AT&T cited 47 C.F.R. § 51.809(c). Rule 51.809(c), entitled "Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act," states:

> Individual interconnection, service or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for inspection under section 252(f) of the [Communications Act of 1934, as amended by the Telecommunications] Act [of 1996].

The Federal Communications Commission (the "FCC") has provided little guidance concerning what constitutes a "reasonable period of time" within which a competitive carrier may adopt an approved interconnection agreement. However, in its Notice of Proposed Rulemaking, *In the Matter*

of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, the FCC recognized that § 252(i) "appears to be a primary tool of the 1996 Act for preventing discrimination under section 251."[4] It is critical, therefore, that § 252(i) and § 51.809 be applied in a way that prevents ILECs from discriminating among the competitive carriers with which they interconnect.

In its comments in Docket No. TW-2014-0295, AT&T contended that permitting a competitive carrier to adopt an "expired" agreement would violate § 51.809(c); however, the authorities upon which it relies do not support its attack on the Commission's proposed rule. AT&T quoted the court's statement in *BellSouth Telecomms., Inc. v. Universal Telecom, Inc.*, 454 F.3d 559, 560 (6th Cir. 2006), that "an entrant seeking to adopt an approved agreement must do so within 'a reasonable period of time after the approved agreement is available for public inspection,'"[5] The Sixth Circuit made that statement in the context of upholding the Kentucky Public Service Commission's determination that the ILEC had provided no evidence that the requesting carrier had not sought to adopt an interconnection agreement within a reasonable period. The court recognized that "a flexible standard is implicit in the FCC's use of the term 'reasonable'"[6]. and rejected an argument that a change of law that rendered the interconnection agreement in question non-compliant established that any "reasonable period of time" had passed. Thus, the Sixth Circuit's decision provides no support for AT&T's argument that adoption of an interconnection agreement that is still in effect and being performed by the original parties is *per se* unreasonable if the initial term of the agreement has expired.

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[4] 11 FCC Rcd. 14171 (1996), at ¶ 269. § 252(i) states "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

[5] 454 F.3d at 560 (quoting from § 51.809(c)).

[6] *Id.* at 564 (quoting from ILEC's brief).

AT&T also cited *In Re: Global NAPs South, Inc.*, 15 FCC Rcd. 23318 (Common Carrier Bureau 1999), in support of its argument, but that case says nothing about what is a "reasonable period of time" within which to adopt an interconnection agreement. In that case, the Virginia Corporation Commission had ruled that a competitive carrier could not adopt a specific interconnection agreement that was scheduled to expire within a short period. The carrier petitioned the FCC to preempt that decision under 47 USC § 252(e)(5), which requires the FCC to preempt a state commission's jurisdiction if the state commission "fails to act to carry out its responsibility" to arbitrate or approve an interconnection agreement. The Common Carrier Bureau found that the state commission had not "fail[ed] to act" in the matter but simply had ruled against the competitive carrier. Declining to preempt the state commission, the Bureau noted that the competitive carrier's proper avenue for relief from that decision, if incorrect, was through an action in federal district court, not a petition for preemption.[7] The Bureau expressed no view concerning the correctness of the state commission's decision or whether the competitive carrier had sought to adopt the interconnection agreement within a reasonable period.

State commissions have reached varying results under different circumstances concerning what is a "reasonable period of time" within which to adopt an interconnection agreement. Although, as AT&T noted, the Maryland commission refused to permit the adoption of an interconnection agreement approximately six (6) months before its specifically stated termination date when the competitive carrier sought a three (3) year term as provided in the agreement,[8] the Florida commission denied an ILEC's motion to dismiss a notice of adoption of a interconnection agreement whose initial term was scheduled to expire 72 days after the filing of the notice (and

[7] 15 FCC Rcd. 23318, at ¶ 20.

[8] *Re Approval of Agreements and Arbitration of Unresolved Issues Arising Under § 252 of the Telecommunications Act of 1996,* 90 Md.P.S.C. 48, 1999 WL 1893473 (Md. P.S.C. 1999).

whose initial term did expire before the commission issued its order).[9] The Oregon commission rejected a proposed rule prohibiting the adoption of an interconnection agreement "that is scheduled to terminate within 90 days," stating:

> While it is questionable whether the adoption of terms that will only be in effect for a matter of days or weeks meets that standard and will benefit any party, we decline to adopt a bright-line rule. An affected carrier will be allowed to object to an adoption based on the FCC's rule.

As the Sixth Circuit ruled, in such a case the ILEC must demonstrate *why* the adoption request is unreasonable because of the passage of time.

AT&T simply asserted in Docket No. TW-2014-0295 that "allowing adoption of an already expired agreement clearly falls outside the bounds of [this Commission's] discretion," but that is not what the proposed rule would permit. Proposed Rule 4 CSR 240-28.080(2) would permit the adoption of an interconnection agreement "whose *original term* has expired, but which *remain*[s] *in effect* pursuant to term renewal or extension provisions." (Emphasis added). Such an agreement is not an "already expired agreement." The proposed rule would permit only the adoption of agreements under which the original parties are still performing, not agreements that are no longer operative. Moreover, the proposed rule does not prevent an ILEC from raising arguments based on substantially higher costs or technical infeasibility, and, if in fact the interconnection agreement has been noticed for termination, the ILEC can seek to avoid adoption for that reason. The key point is that the ILEC bears the burden of demonstrating that adoption is not within a reasonable period, and must explain, not merely assert, that such period has passed under the circumstances of the case.

The Commission should bear in mind that the effect of AT&T's argument, if accepted, would be that in many situations competing providers would be forced to either agree to a template

[9] *Re: Petition of Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. for Adoption of Existing Interconnection Agreement Between ALLTEL Florida, Inc. and Level 3 Communications, LLC,* Order Denying Motion to Dismiss and Holding Proceedings in Abeyance, FPSC Docket No. 040343-TP, Order No. PSC-04-1109-PCO-TP (November 9, 2004).

interconnection agreement (quite possibly establishing a short term of agreement) or go through the expense of negotiating and arbitrating a new interconnection agreement. This would be extremely burdensome and discriminatory, especially when the requesting carriers' competitors are operating under "expired" agreements. Accordingly, and for all of the foregoing reasons, the proposed rule should be adopted.

III. Several Proposed Rules Should Be Clarified

Proposed Rule 28.040(2)(B) applies to annual reports. To avoid confusion regarding the application of the proposed rules to requests submitted after April 15th or for more than thirty (30) days for extensions to file annual reports, MCTA suggests the following revisions:

> The deadline for a company to submit a completed annual report is April 15th:
> 1. A company that is unable to meet the April 15 submission date deadline may request an extension of this deadline by filing a letter through EFIS ~~prior to the deadline~~. The letter shall include an explanation for failing to meet the deadline and the date by which the annual report will be filed.
> A. If a request for extension is made prior to the filing deadline, a 30-day extension will automatically be granted.
> B. Requests for an extension greater than 30 days or requests ~~to file an annual report~~ after the filing deadline ~~May 15~~ for an extension will be handled on a case-by-case basis depending on the explanation contained in the request.
> 2. A company that misses the ~~April 15th~~ filing deadline and has not requested an extension shall be considered delinquent and appropriate actions may be pursued.

With respect to proposed rule 28.060(6)(A) (Customer Dispute Resolution), the MCTA suggests that "with respect to its end user customers" be added after "A telecommunications company" in the first sentence:

> A telecommunications company with respect to its end user customers and services shall acknowledge or respond to all commission staff inquiries related to denial or discontinuance of service issues within a reasonable period of time. A telecommunications company's initial response may be an estimated timeframe for a company's final response but shall not exceed thirty (30) days.

The additional language would clarify that the obligations expressed therein are those of a telecommunications company with respect to its own end user customers and services, and not to the

end users or the retail services of an entity when the telecommunications company is providing interconnection and other telecommunications services to that entity.

Proposed Rule 28.020(3) requires that companies receiving certification or registration must maintain updated contact information. It is unclear if the second proposed sentence intends to notify companies receiving telecommunications or IVoIP service certification or registration that there are additional reporting requirements contained in the rules, or if it is intended to provide the Commission with broad authority to require additional reporting requirements in the future that are not set forth in the rules. In addition, IVoIP service providers receive registration from the Commission, while companies providing telecommunications services would receive certification or registration. To avoid confusion MCTA suggests the following edits to clarify the applicable form of process or authority and that the sentence is meant to reference the additional reporting requirements contained in Rule 28.040:

> Rule 28.020(3) (General Provisions): All companies receiving certification or registration from the commission shall maintain updated contact information. Any company with telecommunications <u>service certification or registration</u> or IVoIP service ~~certification or~~ registration is subject to additional reporting requirements <u>as set forth in 4 CSR 240-28.040.</u>

Finally, MCTA suggests the following edits:

> Rule 28.010(13) (definition of "Registration") – The granting of a registration to provide interconnected voice over ~~the~~ Internet protocol service or video service by the commission.
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> 4 CSR 240-28.030(9)(A)2 (Notice of Name Change) – Evidence the new name has been registered with the Missouri ~~of~~ Secretary of State

These non-substantive revisions would provide further clarity to the proposed rules.

Respectfully submitted this 29th day of June, 2015.

BLITZ, BARDGETT & DEUTSCH, L.C.

By: /s/ Stephanie S. Bell

Marc H. Ellinger, #40828
Stephanie S. Bell, #61855
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358
E-mail: mellinger@bbdlc.com
E-mail: sbell@bbdlc.com