

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Application of Missouri RSA No. 5 Partnership d/b/a)
Chariton Valley Wireless for Approval of a Direct)
Interconnection Agreement and for a Related Indirect) Case No. TK-2005-0447
Transiting Traffic Services Agreement with Southwestern)
Bell Telephone, L.P. d/b/a SBC Missouri, Pursuant to the)
Telecommunications Act of 1996.)

**RESPONSE OF SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC
MISSOURI TO THE STAFF'S RECOMMENDATION**

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") hereby submits to the Commission its Response to the Staff's Recommendation filed on June 16, 2005. As explained in more detail below, the Commission should approve the interconnection agreement between SBC Missouri and Missouri RSA No. 5 Partnership d/b/a Chariton Valley Wireless ("CVW") filed by CVW on May 27, 2005 ("ICA").¹ There has been no suggestion that this agreement discriminates against any telecommunications carrier that is not a party to the ICA or that the ICA is against the public interest, convenience or necessity. However, the Commission is neither required nor authorized to approve the Transit Agreement entered into between CVW and SBC Missouri, and submitted by CVW to the Commission on May 27, 2005.² Thus, the Commission should decline to approve the Transit Agreement. In support of its Response, SBC Missouri states as follows:

¹ The ICA is comprised of the Cellular/PCS Interconnection Agreement and amendment thereto which are attached to CVW's Application as Attachment 1.

² The Transit Agreement is comprised of the Wireless Service Provider Agreement, as well as the associated Transit Traffic Services Appendix (Wireless) and Transit Traffic rate sheet attached to CVW's Application as Attachment 2.

A. Introduction

1. This case was opened when CVW filed, on May 27, 2005, an Application for approval, pursuant to Section 252 of the Telecommunications Act of 1996 (“the Act”), of both an ICA and a Transit Agreement entered into between CVW and SBC Missouri. As a part of its Application, CVW filed as an attachment thereto both the ICA (as Attachment 1) and the Transit Agreement (as Attachment 3) for approval by the Commission. Application, paras. 10-14.

2. On June 16, 2005, the Staff filed a recommendation (“Staff’s Recommendation”) in which the Staff urged approval of both the ICA and Transit Agreement filed by CVW. The Staff’s recommendation noted the Commission’s having earlier held (in Case No. TK-2005-0300) that “[t]ransit service falls within the definition of interconnection service.”³ Staff’s Recommendation, however, does not address the fact that the parties to the Transit Agreement did not agree to submit the agreement to the Commission for its approval. Moreover, while Staff’s Recommendation notes that the Commission’s authority to approve or reject an interconnection agreement is based on Section 252(e) of the Act,⁴ it dismisses without any meaningful discussion SBC Missouri’s position that the Transit Agreement is not an interconnection agreement under Section 252, as well as SBC Missouri’s position that the Commission’s approval of it is neither required nor authorized by Section 252 of the Act.

B. The Commission has no authority to approve or reject an agreement both parties agree is private, commercial and not within the negotiation/arbitration provisions of Sections 251/252 of the Act.

³ Staff’s Recommendation, p. 2, citing, In the Matter of Missouri’s RSA No. 5 Partnership d/b/a Chariton Valley Wireless for Approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri Pursuant to Section 252(e) of the Telecommunications Act of 1996, Case No. TK-2005-0304, Amended Order Rejecting Interconnection Agreement, May 19, 2005, pp. 3-4.

⁴ Staff’s Recommendation, p. 1.

3. CVW and SBC Missouri have specifically acknowledged that the Transit Agreement is a “private commercial agreement” whose provisions “are not subject to Sections 251/252 of the [Act] and are not subject to negotiation and/or arbitration under Section 252 of the Act.” Application, Attachment 2, para. 1.2. That being the case, the parties have agreed that “[e]xcept as otherwise provided herein, this Agreement shall not be filed with any State Commission unless requested by such agency.” Id.⁵ Given these express agreements made by CVW and SBC Missouri, CVW lacked the authority to unilaterally determine to submit the transit agreement to the Commission and to request that the Commission approve it. Where, as here, the parties to an agreement have expressly agreed that it is not to be submitted to the Commission for approval, the agreement is not properly before the Commission and the Commission has no authority to approve or reject it.

C. The Commission’s authority to approve or reject agreements is limited to those containing obligations based on Section 251(b) and Section 251(c), and neither of these sections imposes any duty to provide transit service.

4. Additionally, Commission approval of the Transit Agreement is neither required nor authorized by Section 252 of the Act. For this independent reason, SBC Missouri urges that the Commission not approve the Transit Agreement submitted by CVW. Federal law confines the Commission’s Section 252 authority to approve or reject agreements to those containing obligations based on Section 251(b) and Section 251(c). Neither of these sections imposes any duty to provide transit service, i.e., when two

⁵ CVW has not alleged that it submitted the transit agreement to the Commission because the Commission either requested or ordered it to do so. To the contrary, when the Commission earlier rejected the parties’ ICA, it expressly declined to order the filing of the transit agreement. Case No. TK-2005-0304, Order

carriers that are not directly connected exchange non-access traffic by routing the traffic through an intermediary carrier's network.⁶ Thus, the Commission is without authority to approve or reject the Transit Agreement entered into by CVW and SBC Missouri.

5. As explained in greater detail below, Section 251(b) of the Act imposes certain duties on all local exchange carriers ("LECs"), and Section 251(c) imposes certain additional duties on all incumbent LECs ("ILECs"). With regard to agreements negotiated between a requesting carrier and an ILEC (such as SBC Missouri), Section 252(a)(1) of the Act provides that a requesting carrier and an ILEC may negotiate and enter into a binding agreement without regard to the standards set forth in sections (b) and (c) of section 251, and further, that the agreement "shall be submitted to the State commission under subsection (e) of this section." Subsection (e) provides, in relevant part, that an interconnection agreement adopted by negotiation "shall be submitted for approval to the State commission." Staff's Recommendation recognizes that the Commission's authority to approve or reject an interconnection agreement is based on Section 252(e) of the Act.⁷

6. Not all negotiated agreements entered into between a requesting carrier and an ILEC must be submitted to a state commission for Section 252 approval. Rather, only certain, specific agreements between a requesting carrier and an ILEC are subject to the filing/approval requirements of Section 252. It is settled that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under

Rejecting Interconnection Agreement, p. 4 ("The Commission, however, will not order SBC Missouri and [CVW] to file the transiting agreement.").

⁶ In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33, released March 3, 2005, para. 120.

⁷ Staff's Recommendation, p. 1.

252(a)(1).⁸ The same result obtains under Section 252(e) as applied to negotiated interconnection agreements, because the “duty to negotiate” as defined by Section 251(c)(1) is directed to “the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.” (i.e., once again, Section 251, subsections (b) and (c)).

7. Nothing in paragraphs (b)(1) through (b)(5) of Section 251 speaks to interconnection of networks. Instead, these provisions are limited to resale, at Section 251(b)(1); number portability, at Section 251(b)(2); dialing parity, at Section 251(b)(3); access to rights-of-way, at Section 251(b)(4); and, reciprocal compensation, at Section 251(b)(5). Staff’s Recommendation does not suggest that the Transit Agreement is within the purview of any of these provisions.

8. Section 251(c) is thus left as the only remaining provision for which a duty to negotiate exists. Given the Staff’s suggestion that transit service falls within the definition of an interconnection service, the only potentially germane portion of Section 251(c) would be Section 251(c)(2), entitled “Interconnection.” Section 251(c)(2) provides that the duty to provide interconnection is “[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier’s network.” Under Section 251(c)(2), the

⁸ Qwest Corp. v. Montana Public Service Commission, CV-04-053-H-CSO (Dis. Montana), Order on Qwest’s Motion for Judgment on Appeal, June 9, 2005, p. 15, quoting, In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26; see also, In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Michigan, WC Docket No. 03-138, Memorandum Opinion and Order, 18 FCC Rcd 19024, n. 635 (“The Commission has previously held that if an agreement creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation, it is an interconnection agreement pursuant to section 252(a)(1).”).

duty of ILECs is limited to providing requesting carriers interconnection with the ILECs' networks – it does not include providing requesting carriers interconnection with other carriers' networks. The FCC has never held that this (or any other provision of the Act) imposes a duty upon ILECs to provide or facilitate indirect interconnection and transit services between two other carriers.⁹

9. This interpretation is consistent with the July, 2002, decision of the FCC's Wireline Competition Bureau ("Bureau") in the Verizon/AT&T/WorldCom/Cox arbitration for Virginia ("FCC Virginia Arbitration Order"),¹⁰ and with the FCC's September, 2002, BellSouth Section 271 Approval Order.¹¹ In the first proceeding, Verizon argued that, while every carrier has a right to interconnect indirectly with any other carrier under Section 251(a), there is nothing in the Act that permits carriers to transform that right into a duty on the part of ILECs to provide transit services and thus facilitate the duty of other carriers to interconnect indirectly.¹²

⁹ To the extent that the Staff means to suggest that transit service is encompassed within Section 251(a)(1), it is wrong. One cannot reasonably treat the Section 251(a)(1) obligation to "interconnect directly or indirectly" as if it were a Section 251(b) or (c) obligation that must be negotiated and/or arbitrated under Section 252 of the Act. Had that been Congress' intent, it would have placed the obligation to "interconnect directly or indirectly" under Section 251(b) or (c), and not under Section 251(a)(1). Congress' intent to limit the type of interconnections it wished to subject to Section 252 negotiation and arbitration is explicitly stated in Section 251(c)(2), which imposes "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network." Under Section 251(c)(2), the duty of an ILEC is limited to providing requesting carriers interconnection with the ILEC's own network – it does not include providing requesting carriers interconnection with other carriers' networks.

¹⁰ Memorandum Opinion and Order, Petitions of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration, et. al., CC Docket Nos. 00-218, 00-249, 00-251, DA 02-1731 (released July 17, 2002) ("FCC Virginia Arbitration Order").

¹¹ Memorandum Opinion and Order, In the Matter of Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150, 17 FCC Rcd 17595, 17719 (2002) ("BellSouth Section 271 Approval Order").

¹² FCC Virginia Arbitration Order, ¶ 113.

10. The Bureau noted that the Commission has not had occasion “to determine whether incumbent LECs have a duty to provide transit service under [Section 251(c)(2)].”¹³ Nor did the Bureau find “clear Commission precedent or rules declaring such a duty.”¹⁴ The Bureau also did not specifically determine whether ILECs have a duty under 47 U.S.C. Section 251(a) to provide transit services. Rather, the Bureau concluded that “any duty Verizon may have under section 47 U.S.C. § 251(a) of the Act to provide transit service would not require that service to be priced at TELRIC.”¹⁵ Thus, the Bureau has confirmed that no Commission rule requires carriers to provide indirect interconnection and transit services (whether at TELRIC prices or otherwise).

11. In the FCC’s September, 2002, BellSouth Section 271 Approval Order, the FCC declined to investigate BellSouth’s charging of access tariff rates for transit service because of a lack of any clear FCC precedent or rules declaring a duty upon incumbent LECs to provide transit service under Section 251(c)(2).¹⁶ The FCC found that BellSouth’s transit rates did not violate Checklist Item 1.¹⁷ This is significant in that Checklist Item 1 is “Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).” See, Section 271(c)(2)(B)(1). Therefore, finding no authority to interfere in how BellSouth offered and priced the service, the FCC did not find transit traffic subject to Section 251(c) and did not find that BellSouth’s pricing of its transit service at access rates was a violation of §252(d)(1).

12. These decisions are also consistent with the FCC’s earliest interpretation of Section 251(c)(2). For example, in the FCC’s First Report and Order issuing rules and

¹³ FCC Virginia Arbitration Order, ¶ 117.

¹⁴ FCC Virginia Arbitration Order, ¶ 117.

¹⁵ FCC Virginia Arbitration Order, ¶ 117.

¹⁶ BellSouth Section 271 Approval Order, para. 222, n. 849.

regulations to interpret and implement the Act, the FCC concluded that the “term ‘interconnection’ under section 251(c)(2) refers *only* to the physical linking of *two networks* for the *mutual exchange* of traffic.”¹⁸ Similarly, the FCC held that “[s]ection 251(c)(2) gives competing carriers the right to deliver traffic *terminating on an incumbent LEC’s network* at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points.”¹⁹

D. CVW’s entry into a transit agreement is not necessary in order for CVW to obtain billing records from originating carriers.

13. To the extent that CVW believes that entry into a transit agreement is necessary in order for SBC Missouri to provide it with “billing records” from originating carriers, CVW misunderstands.²⁰ Nothing in the transit agreement refers to billing records. SBC Missouri is willing to provide billing records to any wireless carriers that completes the appendix meet point billing.

14. Nor is it of any consequence that CVW may sometime “in the future” deliver traffic it originates to SBC Missouri for transit and termination to other non-party carriers.”²¹ Under the ICA it executed, CVW has agreed that it “will not send to [SBC Missouri] local traffic that is destined for the network of a Third Party unless [CVW] has the authority to exchange traffic with that Third Party.” (ICA, Section 30.1).

¹⁷ BellSouth Section 271 Approval Order, para. 222, n. 849.

¹⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996), para. 176 (emphasis added) (“First Report and Order”), modified on recon, 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff’d in part, rev’d in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), aff’d in part, rev’d in part sub nom., Verizon Communications Inc. v. FCC, 122 S. Ct. 1646 (2002).

¹⁹ First Report and Order, para. 209. (emphasis added).

²⁰ Application. p. 2.

²¹ Application, p. 2.

15. In sum, the parties have expressly agreed that the transit agreement entered into between them is not subject to negotiation and/or arbitration under Section 252 of the Act and should not be filed with the Commission. Additionally, the transit agreement is not an “interconnection agreement” for purposes of Section 251, subsections (b) and (c), and thus, the agreement is not subject to the Commission’s approval under Section 252(e)(1).

WHEREFORE, SBC Missouri urges the Commission’s approval of the ICA entered into between CVW and SBC Missouri, but respectfully submits that the Commission is neither required nor authorized to approve the Transit Agreement entered into between CVW and SBC Missouri. Thus, the Commission should decline to approve the Transit Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 27th day of June, 2005.


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