

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day of
May, 2005.

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| Application of Chariton Valley Communications Corporation, Inc., 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 |)))))) | <u>Case No. TK-2005-0300</u> |
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ORDER REJECTING INTERCONNECTION AGREEMENT

Issue Date: May 19, 2005

Effective Date: May 29, 2005

Syllabus: This order rejects the Interconnection Agreement executed by the parties and filed by Chariton Valley Communication Corporation, Inc.

Procedural History

On March 9, 2005, CVCI filed an application with the Commission for approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri. The Agreement was filed pursuant to Section 252(e)(1) of the Telecommunications Act of 1996.¹ The Agreement would permit CVCI to interconnect its facilities with SBC Missouri. SBC Missouri holds a certificate of service authority to provide basic local exchange telecommunications services in Missouri.

¹ See 47 U.S.C. § 251, et seq.

FILED⁴
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Missouri Public
Service Commission

Exhibit No. 209
Case No(s) 10-2005-0336
Date 5-25-05 Rptr KF

Although SBC Missouri is a party to the Agreement, it did not join in the application. On March 14, 2005, the Commission issued an order making SBC Missouri a party in this case and directing any party wishing to request a hearing to do so no later than April 4, 2005. No requests for hearing were filed.

On April 13, 2005, the Staff of the Commission recommended that the Commission reject the Agreement. Staff stated that it contacted CVCI and confirmed that the parties had entered into a separate agreement for transit traffic and did not intend to submit that agreement to the Commission for approval. Staff argued that transit traffic is an interconnection service and that an interconnection agreement omitting an interconnection service would be discriminatory and against the public interest because other carriers would not be able to adopt the "whole" interconnection agreement. Quoting the Federal Communications Commission, Staff further stated that indirect interconnection is a form of interconnection explicitly recognized and supported by the Telecommunications Act and that the availability of transit service is increasingly critical to establishing indirect interconnection.² Staff suggested that the Commission direct the parties to file the transiting agreement. Staff further suggested that if the parties do not file the transiting agreement then the Commission should reject the interconnection agreement.

Positions of CVCI and SBC

SBC Missouri argues that it is not obligated to provide transit service under the Telecommunications Act. Based on this premise, SBC Missouri argues that it does not have to file the transiting agreement between it and Chariton with the Commission.

² In the Matter of Developing a Unified Inter-carrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, released March 3, 2005, at 126.

Although recognizing that the Act requires carriers to indirectly interconnect, SBC Missouri argues that the Act does not require carriers to *provide* indirect interconnection.

CVCI stated that it has no objection to filing the transit agreement with the Commission. CVCI further stated that when negotiating the interconnection agreement between it and SBC Missouri, SBC notified CVCI that it would not negotiate a transiting agreement unless CVCI agreed that the agreement was not subject to Commission approval. CVCI stated that it disagrees with that position, but complied in order to make transiting services available.

Discussion

As recognized by SBC Missouri, the Telecommunications Act requires companies to indirectly interconnect. If companies are required under the Act to indirectly connect, there must be an intermediary through which those companies connect indirectly. If the intermediary is not required under the Act transit the indirect traffic, then the purpose of the Act would be frustrated.

The Act requires that interconnection agreements be filed for approval with the state commission.³ An interconnection agreement is any agreement, negotiated or arbitrated, that contains terms of interconnection. Transit service falls within the definition of interconnection service.⁴ SBC and CVCI have an agreement covering transit service. Because the transit agreement is an interconnection service, it must be filed with the Commission for approval.

³ 47 U.S.C. §252(e).

⁴ Connecticut Telcom, Docket No. 02-01-23, 2003 Conn. PUC Lexis 11 (January 15, 2003)

SBC and CVCI have filed an interconnection agreement that does not include provisions for transiting traffic. It is conceivable that an interconnection agreement need not contain transit services. However, in this matter, CVCI intends to use transiting as its method of indirect interconnection, but SBC and CVCI have failed to include transiting provisions in the interconnection agreement. This agreement is deficient in that it does not include all of the interconnection terms to which the parties have agreed. The Commission finds that it is against the public interest to approve only part of an interconnection agreement; the whole of which should be before the Commission and, if approved, subject to adoption by other carriers. Having found that it is against the public interest to approve the agreement between SBC and CVCI, the Commission will reject the agreement.

Conclusion

The Commission concludes that transit traffic is an interconnection service and is therefore subject to Commission approval. The Commission finds that it is against the public interest to approve an interconnection agreement when the parties have also entered into a transit traffic agreement that is not before the Commission. The Commission will therefore reject the interconnection agreement. The Commission, however, will not order SBC Missouri and CVCI file the transiting agreement. SBC Missouri and CVCI now know that the Commission will not approve an interconnection agreement when the parties have also entered into, but have not submitted for Commission approval, a transit traffic agreement.

If the parties subsequently file the interconnection agreement and associated transit traffic agreement for Commission approval, that filing will create a new case.

IT IS THEREFORE ORDERED:

1. That the Interconnection Agreement between Chariton Valley Communication Corporation, Inc. and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri filed on March 9, 2005, is rejected.
2. That this order shall become effective on May 29, 2005.
3. That this case may be closed on May 30, 2005.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton and Appling, CC., concur
Murray, C., dissents, dissenting opinion attached

Pridgin, Regulatory Law Judge

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

Application of Chariton Valley Communications Corporation, Inc., 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-2005-0300

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to reject the comprehensive interconnection agreement (ICA) filed by Chariton Valley Communications Corporation, Inc. (Chariton Valley) and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (SBC Missouri) that was the result of extensive and lengthy negotiations between these companies and represents the true business arrangements under which these companies wish to do business. The Commission rejects the filed ICA because Chariton Valley and SBC Missouri did not formally file a separate, privately negotiated transiting traffic agreement.¹ I must dissent from this order because I disagree that the transiting traffic agreement must be filed for Commission approval.

The Commission has approved a very similar ICA in a recent decision in which SBC Missouri and Level 3 Communications had not reached a final agreement on transit traffic provisioning.² While the decision in that case included a requirement that the parties file any transiting traffic agreement that they do finally reach, the

¹ Transiting traffic is a service that allows Chariton Valley to deliver traffic originating on its network to SBC Missouri, who then sends the traffic to a third-party carrier where the call terminates.

² See *In the Matter of the Application of Level 3 Communications, LLC and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri for Approval of Their Negotiated Interconnection Agreement and Superseding Amendment under Section 252(3)(1) of the Telecommunications Act*, Order Approving Interconnection Agreement and Directing Parties to File Their Transiting Traffic Agreement as an Amendment to the Interconnection Agreement, Case No. TK-2005-0285 (May 13, 2005).

Commission found the existing ICA met the requirements of the 1996 Telecommunications Act, stating:

"There is no reason to believe that an interconnection agreement must include specific provisions for transiting traffic in order to be approved. . . . Therefore, the mere absence of specific transiting traffic provisions in the submitted SBC Missouri – Level 3 interconnection agreement can not justify the rejection of that agreement. . . . the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity."³

While the majority felt that a future transiting traffic agreement might alter their view of the filed ICA, they could not fault the terms of the existing ICA under review.

I disagree with the Commission's rejection of a perfectly acceptable interconnection agreement similar to those previously approved, because the parties declined to file a transiting traffic commercial agreement for approval under § 252(e).

The majority asserts that transit traffic provisioning is a form of "interconnection service"⁴ and that no interconnection agreement should be approved if it leaves out an interconnection service that is contained in a separate agreement. It reasons that the inability for other carriers to opt into the transiting traffic provisions renders the whole ICA discriminatory. Neither Staff's pleadings nor the Commission's Order point to a specific provision of the 1996 Telecommunications Act (the Act) or any of the FCC's rules thereunder that require the provisioning of transiting traffic services.

Section 251(a) of the Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other

³ *Id.* See also, *In the Matter of the Application of ALLTEL Communications, Inc., for Approval of its Successor Cellular/PCS Interconnection Agreement and Accompanying Amendment with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, Under 47 U.S.C. §252., Order Approving Interconnection Agreement, Case No. TK-2005-0114.*

⁴ It is telling that the only alleged authority cited in the Report and Order for the majority's conclusory statement that transit service falls within the definition of interconnection service is a 2003 Connecticut PUC case.

telecommunications carriers." This does not mean that every indirect transmittal of traffic is going to constitute an "interconnection service." The duty to interconnect that is intended by this language is the duty to terminate traffic that is indirectly provided from another carrier, upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251.

Both Staff and SBC Missouri (in other cases before the Commission) have pointed out that in a recent proposed rulemaking the FCC noted that it "has not had occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.⁵ At least one federal district court has reached the same conclusion.⁶ Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this Commission did not need to reach the conclusion that an agreement to provide these services, negotiated under private commercial standards, needs to be filed with the

⁵ *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

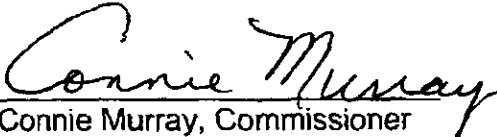
⁶ See *Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules. I would note that simply because we could require transiting traffic agreements be filed with the Commission, does not mean we should.

Commission for approval or that the failure to file the transiting traffic provisions renders the existing ICA discriminatory.

It is my opinion that requiring transiting traffic agreements to be filed with the Commission and thereafter available for adoption by all CLECs could have an adverse impact on carriers' willingness to negotiate private, commercial agreements for transiting traffic or for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. SBC Missouri has shown its compliance with the Act by filing the existing transiting traffic agreement with the FCC pursuant to this provision. No other review is necessary.⁷

Respectfully submitted,


Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 19th day of May, 2005.

⁷ SBC Missouri submitted as an attachment a copy of the Transit Traffic Service Agreement between it and Chariton Valley as a courtesy to the Commission. See Response of Southwestern Bell Telephone, L.P. to the Staff's Recommendation. SBC Missouri asserts that it filed this agreement with the Federal Communications Commission ("FCC") on February 15, 2005.