

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

Petition of MCImetro Access Transmission	)	
Services, L.L.C., Brooks Fiber Communications	)	
of Missouri, Inc., and MCI WorldCom	)	Case No. TO-2002-222
Communications, Inc. for Arbitration of an	)	
Interconnection Agreement With Southwestern	)	
Bell Telephone Company Under the	)	
Telecommunications Act of 1996.	)	

**SOUTHWESTERN BELL TELEPHONE, L.P.,  
d/b/a SBC MISSOURI'S INITIAL BRIEF IN RESPONSE  
TO THE COMMISSION'S APRIL 10, 2003 ORDER DIRECTING FILING**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, and, for its Initial Brief in Response to the Commission's April 10, 2003 Order Directing Filing, states as follows:

**Executive Summary**

The doctrine of *functus officio*<sup>1</sup> does not preclude the Missouri Public Service Commission ("Commission") from addressing any or all of the parties' areas of disagreement because the Commission has not fulfilled the functions that are required of it by the Federal Telecommunications Act of 1996 ("the Act"). Specifically, the Commission has not resolved all unresolved issues as is required by Section 252(a)(4)(C) of the Act because, although the Commission issued its Arbitration Order, the parties, through various pleadings, have sought clarification of the Arbitration Order, and the Commission has not yet provided this clarification. Further, because the Commission has not yet clarified its Arbitration Order, the parties have not submitted a complete interconnection agreement to the Commission for approval as is required by Section 252(e)(1) of the Act. Moreover, since the parties have not submitted a complete

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<sup>1</sup> Black's Law Dictionary defines *functus officio* as: "A task performed. Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and therefore of no further virtue or effect." Black's Law Dictionary, Fifth Edition, 1983.

interconnection agreement, the Commission has not approved or rejected the agreement as is required by Section 252(e)(1) of the Act. Finally, because the Commission has not approved or rejected any interconnection agreement between MCImetro Access Transmission Services, L.L.C. ("MCImetro") and Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), there is no final order from which the parties may appeal. Thus, the doctrine of *functus officio* does not preclude the Commission from addressing the parties' areas of disagreement and the Commission should provide clarification of its Arbitration Order so that: (1) the parties can submit an interconnection agreement to the Commission for approval; (2) the Commission can approve or reject the agreement, with written findings as to any deficiencies; and (3) the parties may appeal the Commission's order(s) if they so desire.

### **Argument**

#### I. Procedural Background

On June 1, 2001, WCOM<sup>2</sup> and Southwestern Bell Telephone Company ("SWBT")<sup>3</sup> began negotiations to establish three separate interconnection agreements between three WCOM companies and SWBT. On November 5, 2001, which was just before the 160th day after SWBT received WCOM's request to negotiate interconnection, services, and network elements under Section 252 of the Act, WCOM filed its Petition for Arbitration under the Act. Following submission of prefiled testimony, an evidentiary hearing was held from January 14th through 18th, 2002. Following submission of briefs by the parties, on February 28, 2002, the Commission entered its Arbitration Order, ordering WCOM and SWBT to provide a draft of their conformed interconnection agreements to the Staff of the Missouri Public Service Commission ("Staff").

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<sup>2</sup> WCOM, as used in this pleading, means MCImetro Access Transmission Services, L.L.C. ("MCImetro"), Brooks Fiber Communications of Missouri, Inc. ("Brooks"), and MCI WorldCom Communications, Inc. ("MCIWC").

<sup>3</sup> Southwestern Bell Telephone Company is now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri.

After the Arbitration Order was issued, MCImetro advised SWBT that it would opt into sections of the Missouri 271 Agreement ("M2A") rather than adopt the Arbitration Order in its entirety.<sup>4</sup> On April 2, 2002, MCImetro and SWBT provided Staff with portions of a conformed interconnection agreement. Specifically, MCImetro and SWBT advised Staff that since MCI would opt into the following items in the M2A: General Terms and Conditions, Resale (Attachments 1-5 & Appendices), UNEs (Attachments 6-10 & Appendices), Interconnection (Attachment 11 & Appendices), Reciprocal Compensation (Attachment 12 & Appendix), Ancillary Functions (Attachment 13 and Appendices), Number Portability (Attachment 14 and Appendix), E911 (Attachment 15), Network Security & Law Enforcement (Attachment 16), Performance Measures (Attachment 17, including Performance Remedy Plan and Appendices), White Pages-Other (Attachment 19), Clearinghouse (Attachment 20), Numbering (Attachment 21), DA-Facilities Based (Attached 24 and Appendices), DSL (Attachment 25), and Legitimately Related Provisions (Attachment 26), those items were not being provided to Staff (but would be provided if Staff wanted a copy). MCImetro and SWBT, however, did submit Mutual Exchange of Directory Listing Information (Attachment 18) to Staff for its review. MCImetro and SWBT also provided a draft conformed interconnection agreement with regard to Alternatively Billed Traffic, Attachment 27. However, because there was a dispute between the parties regarding Attachment 27, each party submitted its position, via a separate letter, on the dispute. SWBT explained that while MCImetro claimed it would opt into Attachments 6-10, Unbundled Network Elements ("UNEs"), MCImetro actually sought to alter those provisions of Attachment 10, Section 8.0, Alternatively Billed Traffic, which conflict with the provisions that are contained in Attachment 27. SWBT asserted that although MCImetro may opt into Attachment 6-10 (UNE) of the M2A, it may not change those provisions so as to claim the benefits of the arbitration decision on Attachment 27.

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<sup>4</sup> On October 24, 2002, the Commission approved the Brooks/SWBT and MCIWC/SWBT Interconnection Agreements.

On May 1, 2002, Staff filed its Recommendation and Status Update. In that pleading, Staff noted that the language addressing Alternatively Billed Traffic continued to be in dispute. On May 24, 2002, the Commission entered its Order Setting Prehearing Conference, setting a prehearing conference for June 5, 2002. On June 5, 2002, MCImetro and SWBT believed that they had resolved all outstanding disputes between the parties. Based on these assurances, Judge Ruth canceled the prehearing conference. On June 6, 2002, the Commission entered its Order Canceling Prehearing Conference. The Commission ordered MCImetro and SWBT to submit their conformed interconnection agreement to Staff within thirty (30) days. MCImetro and SWBT submitted their conformed interconnection agreement to Staff on July 3, 2002.

On July 18, 2002, the Commission ordered Staff to file a Status Report no later than August 1, 2002. On August 9, 2002, Staff filed its Status Report. In that Report, Staff identified several exceptions to the MCImetro/SWBT Interconnection Agreement. On August 30, 2002, the Commission issued its Order Directing Filing, ordering the parties to respond to Staff's questions and concerns. After a series of filings by WCOM and SWBT, on October 9, 2002, the Commission entered its Order Setting Post-Hearing Conference. On October 16, 2002, WCOM, SWBT, and Staff appeared at the post-hearing conference. On October 21, 2002, MCImetro filed its Comments Regarding Post-Hearing Conference. That same day, SWBT filed its Post-Hearing Brief.

On April 10, 2003, the Commission entered its Order Directing Filing, requiring the parties to brief the following questions: Does the doctrine of functus officio preclude the Commission from addressing any or all of the parties' areas of disagreement? Why or why not?

II. The Doctrine of Functus Officio Does Not Preclude the Commission From Addressing Any Or All Of The Parties' Areas of Disagreement.

The doctrine of functus officio does not preclude the Commission from addressing any or all of the parties' areas of disagreement because the Commission has not fulfilled the functions that are required of it by the Act. Although the Commission issued its Arbitration Order, the parties,

through various pleadings, have sought clarification of the Arbitration Order, and the Commission has not provided this clarification, which is necessary in order to resolve all unresolved issues. As the Commission has not yet clarified its Arbitration Order, the parties have not submitted a complete interconnection agreement to the Commission for approval nor has the Commission approved or rejected the agreement. Section 252(e)(1) of the Act provides:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Finally, because the Commission has not approved or rejected any interconnection agreement between MCImetro and SBC Missouri, there is no final order from which the parties may appeal. Section 252(e)(6) of the Act provides the exclusive remedies for parties aggrieved by a State commission determination. Specifically, Section 252(e)(6) provides:

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section. (Emphasis added).

The federal courts have consistently ruled that unless: (1) the parties submit an interconnection agreement, adopted by negotiation or arbitration, for approval to the State commission; (2) the State commission either approves or rejects the agreement, with written findings as to any deficiencies as is required by Section 252(e)(1); and (3) there is a party aggrieved by the State commission's determination, the Court lacks subject matter jurisdiction. See The Destek Group, Inc., d/b/a The Destek Networking Group v. State of New Hampshire Public Utilities Commission, 318 F.3d 32, 38 (1st Cir. 2003); Indiana Bell Telephone Company Incorporated, d/b/a Ameritech Indiana v. Smithville Telephone Company, et al., 31 F. Supp. 628, 633, 636-643 (S. D. In. 1998); AT&T

Communications of Ohio v. Ohio Bell Telephone Company, et al., 29 F. Supp. 2d 855, 856 (S.D. Ohio 1998); GTE North Incorporated, et al., v. William D. McCarty, et al., 978 F. Supp. 827, 834-836 (N.D. Indiana 1997); and GTE South, Inc. v. Linda Breathitt, 963 F. Supp. 610, 612 (E. D. Ken. 1997). In other words, Section 252(e)(6) does not extend the scope of review to determinations prior to the approval or rejection of an interconnection agreement or statement. Id. The Court in GTE North Incorporated, et al., v. William D. McCarty, et al., 978 F. Supp. 827, 834-836 (N.D. Indiana 1997) explained this is true because a variety of actions could take place after the issuance of an arbitration order that would affect the content of the final agreement. Id. at 835. For example, "it is conceivable, even probable, that a state commission might decide, once it sees an executed agreement, that parts of a previously issued arbitration order were wrongly decided." Id. The Court explained that a state commission should be given the chance to correct any mistakes before federal court review. Id. The Court further noted that it is probable that new issues might arise between the time an arbitration order is issued and the time an agreement is ruled upon, which should be subject to commission review before appeal. Id. Finally, the Court noted that the parties may opt out of language mandated by an arbitration order if they can agree to other language. Id. Thus, the Act requires the Commission to either approve or reject an interconnection agreement, submitted by the parties, before federal court jurisdiction attaches. Id.

In summary, the doctrine of *functus officio* does not preclude the Commission from addressing the parties' areas of disagreement, and the Commission should address these issues so that: (1) the parties can submit a complete interconnection agreement to the Commission for approval; (2) the Commission can approve or reject the agreement, with written findings as to any

deficiencies; and (3) the parties may appeal the Commission's order(s) if they so desire.<sup>5</sup> For these reasons, SBC Missouri respectfully requests the Commission to rule on the remaining unresolved issues as outlined in Section III below.

III. Unresolved Issues Presented To The Commission For Determination.

A. The Commission Must Determine Whether It Is Appropriate To Include Sections 9.4.2.6 and 9.5.2.4 In The Interconnection Agreement.

SBC Missouri will not reiterate the totality of its argument on this issue as its position is clearly presented in: (1) SWBT's Response to Order Directing Filing, dated September 13, 2002, pages 2-4; (2) SWBT's Reply to WorldCom's Response to Order Directing Filing, dated September 23, 2002, pages 2-5; and (3) SWBT's Post-Hearing Brief, dated October 21, 2002, on pages 1-2, 3-8 and 14. However, in summary, as both Staff and SBC Missouri indicated at the Post-Hearing Conference, the language in sections 9.4.2.6 and 9.5.2.4 of Attachment 6, UNEs, should be included in the parties' Interconnection Agreement. It is clear from Staff's statements at the Post-Hearing Conference and in the Commission's Arbitration Order, that both Staff and the Commission mistakenly believed that section 9.5.2.4 referred to matters outside the state of Missouri and, for that reason and that reason alone, that section was rejected. The intent in both sections 9.4.2.6 and 9.5.2.4 is that SBC Missouri will provide LIDB/CNAM service only as such service is used in MCImetro's capacity as a local service provider, not in its capacity as an IXC (in which case state and federal tariffs address such use). The Commission should make clear that both sections 9.4.2.6 and 9.5.2.4 are to be included in the parties' Interconnection Agreement.

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<sup>5</sup> SBC Missouri notes that Section 252(e)(5) provides: "If a State commission fails to carry out its responsibilities under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." At this time, SBC Missouri does not believe that the Commission has failed to carry out its responsibilities. Rather, SBC Missouri believes the Commission is merely seeking clarification from the parties regarding how they believe the Commission should proceed. SBC Missouri further believes the Commission will take appropriate action by resolving the parties unresolved issues. Thus, SBC Missouri has not sought relief from the Federal Communications Commission.

B. The Commission Must Determine Whether The Language In Issue 30, Attachment 27, Alternatively Billed Traffic, Should Be Included In The Interconnection Agreement.

SBC Missouri will not reiterate the totality of its argument on this issue as its position is clearly presented in its: (1) SWBT's Response to Order Directing Filing, dated September 13, 2002, pages 4-6; (2) SWBT's Reply to WorldCom's Response to Order Directing Filing, dated September 23, 2002, pages 5-7; (3) SWBT's Reply to WorldCom's Reply to SWBT's Response to Order Directing Filing and Reply to WorldCom's Reply to SWBT's Reply to WorldCom's Response to Order Directing Filing, dated October 7, 2002, pages 1-2; and (4) SWBT's Post-Hearing Brief, dated October 21, 2002, pages 2, 8-9 and 14. SBC Missouri further notes that the factual background and its position regarding the disputes between MCImetro and SBC Missouri are contained in SWBT's Response to Staff's Recommendation, dated May 3, 2002. In summary, Attachment 27 as a whole is neither technically feasible nor capable of implementation. SBC Missouri, quite simply, cannot implement it. Thus, the Commission should reject Attachment 27, not only because it is not technically feasible but also because it is inconsistent with the provisions of Attachment 10 of the M2A, which MCImetro has opted into.

C. The Commission Must Determine Whether There Is A Conflict Between The Commission's Arbitration Order And The Supreme Court's Decision in Verizon Communications, Inc. v. FCC, 122 S.Ct. 1646 (2002).

SBC Missouri will not reiterate the totality of its argument on this issue as its position is clearly presented in its: (1) SWBT's Response to Order Directing Filing, dated September 13, 2002, pages 6-11; (2) SWBT's Reply to WorldCom's Response to Order Directing Filing, dated September 23, 2002, pages 7-11; (3) SWBT's Reply to WorldCom's Reply to SWBT's Response to Order Directing Filing and Reply to WorldCom's Reply to SWBT's Reply to WorldCom's Response to Order Directing Filing, dated October 7, 2002, pages 2-4; and (4) SWBT's Post-Hearing Brief, dated October 21, 2002, pages 2-3, 9-14. However, in summary, SBC Missouri does not agree that

the Commission's Arbitration Order necessarily conflicts with the Supreme Court's decision in Verizon Communications, Inc. v. FCC, 122 S.Ct. 1646 (2002) ("Verizon") as that decision requires SBC Missouri to perform combinations in only limited circumstances that have not been shown to be present here. However, in the event any provisions of an approved interconnection agreement are subsequently determined to be inconsistent with Verizon, the change in law procedures in Section 18.4 of the General Terms and Conditions ("GT&Cs") are the appropriate process for any changes. Thus, the Commission does not need to address the Verizon decision at this time. Rather, the Commission should approve the parties' Interconnection Agreement, with the modifications discussed above. Once approved, if the parties determine that a change to Attachment 6, UNEs, is necessary as a result of the Verizon decision, the parties will negotiate such changes, or utilize the dispute resolution process described in the Interconnection Agreement if they are unable to come to an agreement.

### **Conclusion**

For the foregoing reasons, the doctrine of *functus officio* does not preclude the Commission from addressing any or all of the parties' areas of disagreement. Rather, the Commission should clarify its Arbitration Order in order to address all of the parties' areas of disagreement, as summarized in Section III above, so that: (1) the parties can submit an interconnection agreement, to the Commission for approval; (2) the Commission can approve or reject the agreement, with written findings as to any deficiencies; and (3) the parties may appeal the Commission's order(s) if they so desire.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

BY 

PAUL G. LANE	#27011
LEO J. BUB	#34326
ANTHONY K. CONROY	#35199
MIMI B. MACDONALD	#37606

Attorneys for Southwestern Bell Telephone, L.P.

One SBC Center, Room 3510

St. Louis, Missouri 63101

314-235-4094 (Telephone)

314-247-0014 (Facsimile)

[mimi.macdonald@sbc.com](mailto:mimi.macdonald@sbc.com) (E-Mail)

#### CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on this 18th day of April, 2003.



Mimi B. MacDonald

BRUCE BATES  
MISSOURI PUBLIC SERVICE COMMISSION  
P.O. BOX 360  
JEFFERSON CITY, MO. 65102-0360

MICHAEL F. DANDINO  
OFFICE OF THE PUBLIC COUNSEL  
P.O. BOX 7800  
JEFFERSON CITY, MO. 65102

CARL J. LUMLEY  
LELAND B. CURTIS  
CURTIS, OETTING, HEINZ, GARRETT &  
SOULE, P.C.  
130 S. BEMISTON, SUITE 200  
CLAYTON, MO. 63105

STEPHEN F. MORRIS  
701 BRAZOS, SUITE 600  
AUSTIN, TEXAS 78701