

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

In the Matter of Southwestern Telephone L.P., d/b/a)	
SBC Missouri's Proposed Tariff Revisions Restricting)	Case No. TT-2004-0245
Commingling of Unbundled Network Elements with)	Tariff No.: JI-2004-0654
Wholesale Facilities And Services.)	

**REPLY OF SBC MISSOURI TO STAFF'S
RESPONSE AND RECOMMENDATION**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Reply to the Staff Response and Recommendation states as follows:

1. SBC Missouri filed its proposed tariff changes to implement the commingling requirements imposed by the Federal Communications Commission ("FCC") in its Triennial Review Order ("TRO") on November 12, 2003. The Staff recommended approval of the proposed tariff on December 3, 2003.

2. On December 5, 2003, MCImetro Access Transmission Services, L.L.C. ("MCI") filed a Motion to Suspend or Reject Proposed Tariff sheets ("Motion to Suspend"). SBC Missouri responded to MCI's Motion to Suspend on December 8, 2003 ("SBC Missouri's Response"). SBC Missouri pointed out, among other matters, that the proposed tariff was substantively identical to a tariff previously filed by Southwestern Bell Telephone, L.P. that was approved by the FCC on October 23, 2003, over the objections of certain carriers, including MCI.

3. The Missouri Public Service Commission ("Commission") issued its Order Regarding Tariff on December 9, 2003, in which it suspended the tariff for 30 days in order to permit it additional time to consider the tariff and MCI's objections. On December 10, 2003, the Commission issued its Order Directing Filing in which it required the Staff to file its Response and Recommendation to the MCI Motion to Suspend on December 16, 2003, with

any replies to be filed by December 23, 2003. Staff filed its Response and Recommendation (“Staff’s Response”) on December 16, 2003.

4. In Staff’s Response, it again recommended to the Commission that SBC Missouri’s tariff permitting commingling be approved. Staff rejected many of the contentions advanced by MCI, most of which had previously been advanced to and rejected by the FCC when it allowed a substantively identical tariff to go into effect.¹

5. Although Staff recommends approval of the tariff, one statement in Staff’s Response is of concern to SBC Missouri. Staff incorrectly asserts that amendments to interconnection agreements would be necessary only for those agreements that specifically prohibit commingling. Staff Response, para. 3. Staff’s position is directly contrary to the directives of the FCC in the TRO. The FCC has made clear that its TRO is not self-executing and that CLECs and ILECs must negotiate revisions to the terms and conditions of their interconnection agreements to implement the required changes, including those related to commingling. TRO, paras. 700-706.² Further, the FCC specifically noted that the negotiation process for interconnection agreements would provide incumbent local exchange companies (“ILECs”) the necessary time to transition to commingled arrangements. Staff’s attempt to impose commingling obligations via tariff that do not exist in interconnection agreements would contravene the negotiations process for such terms and conditions that was expressly envisioned by Congress under the federal Telecommunications Act as well as by the FCC in

¹ As SBC Missouri previously pointed out, the only differences between the FCC-approved tariff and the proposed tariff in Missouri relates to matters such as (1) different section numbers and (2) how the FCC is identified (i.e., the FCC is identified as “the Commission” in the federal filing and as the “Federal Communications Commission” in the Missouri filing). See, SBC Missouri’s Response, p. 2, fn. 1.

² The FCC stated:

Thus, to the extent our decision in this Order changes carriers’ obligations under section 251, we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions. Permitting voluntary negotiation for binding interconnection agreement is “the very essence of sections 251 and 252.” TRO, para. 701.

the TRO. Such regulatory actions previously have been invalidated. *See Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir 2003)(“The tariff procedure short circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement. 47 U.S.C. § 253(b)(1).”). TRO, para. 583.³ Finally, Staff’s position is also contrary to basic contract law, which provides that the duties and obligations between parties must be set forth in the contract; contract law does not provide one party the right to take any actions it wants unless specifically prohibited in the agreement.

6. Although Staff is wrong in its analysis of the necessity to address commingling issues in interconnection agreements between SBC Missouri and CLECs, Staff is correct in recommending approval of the tariff which is substantively identical to that which was approved by the FCC. MCI’s objections were rejected by the FCC and must be rejected here as well. It would be unusual, to put it mildly, for the Commission to reject the tariff changes necessary to permit commingling on the basis that the tariff is inconsistent with the FCC’s TRO when the FCC has already approved a substantively identical tariff over the same objections raised by MCI here.

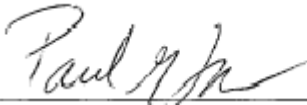
WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to approve the commingling tariff filed in this case on November 12, 2003.

³ The FCC stated:

Finally, we conclude that the billing and operational issues raised by Verizon do not warrant a permanent commingling restriction, but instead can be addressed through the same process that applies for other changes in our unbundling requirements adopted herein, i.e., through change of law provisions in interconnection agreements. We expect that change of law provisions will afford incumbent LECs sufficient time to complete all actions necessary to permit commingling. TRO, para. 583.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on December 22, 2003.



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