

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

Southwestern Bell Telephone, L.P., d/b/a)
SBC Missouri's Petition to Amend)
the Section 251/252 Interconnection)
Agreements Between SBC Missouri and Various)
Competitive Local Exchange Carriers.)

Southwestern Bell Telephone, L.P., d/b/a)
SBC Missouri,)

Petitioner,)

vs.)

Case No. TO-2005-0117

1-800-RECONEX, Inc., Adelphia Business)
Solution Operations, Inc., now known as TelCove)
Operations, Inc., Bullseye Telecom, Inc., Global)
Crossing Local Services, Inc., Global Crossing)
Telemanagement, Inc., Granite)
Telecommunications, L.L.C., Intermedia)
Communications, Inc., Level 3 Communications,)
L.L.C., Now Acquisition Corporation, Phone-Link,)
Inc., U.S. West Interprise America, Inc.,)
now known as Qwest Interprise America, Inc. and)
Winstar Communications, L.L.C.)

Respondents.)

**SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI'S
RESPONSE TO THE MISSOURI PUBLIC SERVICE COMMISSION'S
NOVEMBER 1, 2004 ORDER DIRECTING SBC MISSOURI
TO CLARIFY ITS PETITION**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri and, for its Response to the Missouri Public Service Commission's November 1, 2004 Order Directing SBC Missouri to Clarify Its Petition, states as follows:

1. On November 1, 2004, the Missouri Public Service Commission ("Commission") entered its Order Directing SBC Missouri to Clarify Its Petition ("Order"). In its Order, the Commission indicated that it was "unable to discern from

SBC Missouri’s petition precisely what it wants the Commission to do.”¹ The Commission, thereafter, ordered SBC Missouri to amend its Petition to clarify the relief that it seeks from the Commission and the source of the Commission’s authority to provide the relief that it requests.

2. As discussed more fully below, SBC Missouri is asking the Commission to approve amendment language submitted by SBC Missouri for purposes of conforming certain interconnection agreements to current law, and to order the agreements amended with the approved language. The language that SBC Missouri proposes is appropriate for purposes of amending the interconnection agreements with each of the 12 CLECs named in the Petition to adopt language to implement the Federal Communications Commission’s (“FCC’s”) *Triennial Review Order*² and the *USTA II*³ decisions. The interconnection agreements between SBC Missouri and each of the named CLECs contain provisions requiring modification of the agreement to conform to changes in applicable law and also contain provisions expressly authorizing the Commission to resolve any dispute over implementation of changes in law. Moreover, numerous courts and the FCC have determined that state commissions have the authority to interpret interconnection agreements not only based on provisions contained in the interconnection agreements, but also under Sections 251 and 252 of the Telecommunications Act of 1996

¹ *Order Directing SBC Missouri to Clarify Its Petition, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri’s Petition to Amend the Section 251/252 Interconnection Agreements between SBC Missouri and Various Competitive Local Exchange Carrier*, Case No. TO-2005-0117, November 1, 2004, page 2.

² *Report and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), *petitions for cert. denied, NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (October 12, 2004).

³ *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), *petitions for cert. denied, NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (October 12, 2004).

(“the Act”). Finally, this proceeding is contemplated by the FCC in its response on remand of the *USTA II* decision.

3. As the Commission is aware, federal unbundling has seen rapid change in recent years. The FCC first put in place a comprehensive set of unbundling rules in August 1996.⁴ For the next few years, those rules were under attack in the federal courts, and they were ultimately vacated as overbroad by the Supreme Court.⁵ The FCC responded by issuing two separate orders: the *UNE Remand Order*⁶ to address the unbundling of most facilities, and the *Line Sharing Order*⁷ to address the unbundling requirements as to DSL service.

4. In the spring of 2002, those rules met the same fate as the *Local Competition Order*: the D.C. Circuit, in *USTA I*, vacated and remanded both orders. In response to that decision, SBC timely invoked the change-of-law processes in its interconnection agreements, notifying CLECs of SBC’s intent to negotiate new agreement language. The FCC, however, quickly signaled its intent to put in place new rules to replace the ones the D.C. Circuit vacated. As a result, SBC abated its efforts to conform its agreements to governing law, and instead awaited the FCC’s new rules.

5. Those new rules were released on August 21, 2003, with the FCC’s massive *Triennial Review Order*, and they took effect two weeks later, on October 2,

⁴ *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) (“*Local Competition Order*”).

⁵ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁶ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”), vacated and remanded, *United States Telecomm. Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

⁷ Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”), vacated and remanded, *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

2003. At that point, SBC Missouri again timely and properly invoked the contractual amendment process set forth in its interconnection agreement. Specifically, following the effective date of the *Triennial Review* Order, SBC provided the CLEC Parties with written notice of the need to update their interconnection agreements to reflect the FCC's findings. Later, after the issuance of the D.C. Circuit's mandate in *USTA II*, which was issued on June 16, 2004, SBC notified the CLEC Parties with as-yet-unmodified interconnection agreements of the continuing need to conform their interconnection agreements to governing law, this time with the findings of *USTA II*. The CLEC Parties, however, made no constructive response, and their agreements remain un-amended. As a result, SBC Missouri filed its Petition with the Commission seeking the Commission's assistance in conforming its agreements to governing law.

6. Specifically, the interconnection agreements between SBC Missouri and the CLEC Parties contain so-called "change of law" provisions. The provisions contemplate that, in the event that any of the rates, terms, and/or conditions in the interconnection agreement are invalidated, modified, or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction, the affected provision shall be immediately invalidated, modified, or stayed consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party. The interconnection agreements also specify that the parties shall expend diligent efforts to arrive at an agreement regarding the appropriate modifications to the agreement. The interconnection agreements further specify that if the negotiations fail, disputes between the parties shall be resolved pursuant to the dispute resolution process provided for in the interconnection agreements. That process is two-fold. First, the

informal dispute resolution process provides that the parties will meet and negotiate in good faith to resolve any dispute arising under the Agreement. Second, if informal dispute resolution fails, either Party may avail itself of any remedy available to it as outlined in the interconnection agreements, including any remedy available to it pursuant to law.

7. As indicated above, SBC Missouri invoked the change of law provisions in its interconnection agreements with the CLEC Parties, but received no constructive response. Thus, the informal dispute resolution process failed. SBC Missouri, therefore, filed its Petition as a remedy that is available to SBC Missouri under the interconnection agreements. Moreover, both the courts and the FCC recognize that state commissions have the authority to interpret and implement interconnection agreements under Sections 251 and 252 of the federal Telecommunications Act of 1996. In *BellSouth v. MCI Metro Access Transmission Services*,⁸ the 11th Circuit noted that “[n]o court has held or suggested that a state commission does not have the authority to interpret and enforce interconnection agreements after they have been approved.” The 11th Circuit, thereafter, held: “we conclude that the Georgia Public Service Commission has the authority under federal law to interpret and enforce the interconnection agreements at issue between the parties.”⁹ Other circuits similarly recognize that state commissions have the authority to interpret interconnection agreements. See also *Bell Atlantic of Maryland, Inc. v. MCI WorldCom*¹⁰ (wherein the Fourth Circuit noted that: “The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements –

⁸ *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270, 1276 (11th Cir. 2003).

⁹ *Id.* at 1279.

¹⁰ *Bell Atlantic of Maryland, Inc. v. MCI WorldCom*, 240 F.3d 279, 304 (4th Cir. 2001).

we believe they do – but whether these decisions are to be reviewed by State court or federal courts.”); see also *Southwestern Bell Telephone Company v. PUC*¹¹ (wherein the Fifth Circuit noted that “the Act’s grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved); see also *Southwestern Bell Telephone Company v. Brooks*¹² (wherein the Tenth Circuit deferred to the FCC’s conclusion that state commissions have the authority to interpret and enforce interconnection agreements); see also *Puerto Rico Tel. Co. v. Telecommunications Regulatory Board*¹³ (wherein the court held that there was no jurisdiction over a dispute between an ILEC and a CLEC regarding whether long-distance charges applied to certain cellular calls, but did not question the state commission’s authority to resolve the dispute); see also *Illinois Bell Telephone Company v. WorldCom Techs., Inc.*¹⁴ (wherein the court stated that, in deciding a dispute between a CLEC and an ILEC over whether ISP calls were local traffic, the state commission “was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements”); finally, see *Iowa Utilities Board v. FCC*¹⁵ (wherein the court commented that “state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252.”)

¹¹ *Southwestern Bell Telephone Company v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000).

¹² *Southwestern Bell Telephone Company v. Brooks Fiber Communication of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000).

¹³ *Puerto Rico Telephone Company v. Telecommunications Regulatory Board*, 189 F.3d 1, 10-13 (1st Cir. 1999).

¹⁴ *Illinois Bell Telephone Company v. WorldCom Techs, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999).

¹⁵ *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997).

8. Further, as noted above, the FCC has clearly stated that state commissions have the authority to interpret interconnection agreements.¹⁶ Specifically, the FCC held that a determination of whether ISP traffic was subject to reciprocal compensation under an interconnection agreement was a determination that a state commission was required to make under §252(e)(5). The FCC noted that it “must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states’ ‘responsibility’ under section 252.”¹⁷ The FCC held that interpretation and enforcement of interconnection agreements were responsibilities of the states under section 252, citing Southwestern Bell¹⁸ and Illinois Bell¹⁹ for support.

9. This proceeding is also contemplated by the FCC in its response on remand of the *USTA II* decision. In that order, the FCC “*expressly preserve[d]* incumbent LECs’ contractual prerogatives to initiate change of law proceedings,²⁰ and it directed that such proceedings should “presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements.”²¹ (Emphasis added). For all of these reasons, the Commission has the authority to provide the relief that SBC Missouri requests.

10. Consistent with the extent of the Commission’s authority, SBC Missouri seeks the following relief from the Commission:

¹⁶ *In re. Starpower*, 15 F.C.C.R. 11277.

¹⁷ *Id.*

¹⁸ *Southwestern Bell Telephone Company v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000).

¹⁹ *Illinois Bell Telephone Company v. WorldCom Techs, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999).

²⁰ *Order and Notice of Proposed Rulemaking, In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-388, FCC 04-179 (FCC rel. August 20, 2004) (“*Interim Order*”), paragraph 22.

²¹ *Id.*

a. An Order approving SBC Missouri's proposed language, as reflected in Exhibit A of SBC Missouri's Petition to Amend the Section 251/252 Interconnection Agreements Between SBC Missouri and Various Competitive Local Exchange Carriers to Conform Such Agreements to Governing Law, as sufficient to conform interconnection agreements to governing law related to UNEs; and

b. An Order directing that SBC Missouri and the CLEC Parties conform their interconnection agreements to the approved language by December 31, 2004 (in anticipation of FCC unbundling rules issuing in December 2004).

11. Finally, in response to the Commission's Order, SBC Missouri attaches hereto as Exhibit 1, its First Amended Petition to Amend the Section 251/252 Interconnection Agreements between SBC Missouri and Various Competitive Local Exchange Carriers to Conform Such Agreements to Governing Law, in which SBC Missouri has inserted a section entitled: "Legal Authority" on pages 5 and 6.

Wherefore, SBC Missouri requests the Commission issue an Order approving SBC Missouri's proposed language as sufficient to conform interconnection agreements to governing law related to UNEs and issue an Order directing SBC Missouri and the CLEC Parties to conform their interconnection agreements to the approved language by December 31, 2004 (in anticipation of FCC unbundling rules issuing in December 2004), together with any further and/or additional relief the Commission deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by U.S. Mail postage prepaid or by e-mail on November 9th, 2004.


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