

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's)
Petition for Compulsory Arbitration of Unresolved Issues) Case No. TO-2005-0336
for a Successor Interconnection Agreement to the)
Missouri 271 Agreement ("M2A"))

**MCI's RESPONSE TO SBC MISSOURI AND STAFF PLEADINGS REGARDING
TIMELINESS OF PETITION**

COMES NOW MCImetro Access Transmission Services, LLC (MCI), pursuant to Order dated April 6, 2005 and for its Response to SBC Missouri and Staff pleadings regarding the timeliness of the Petition states:

Executive Summary

The arbitration should proceed. The inquiry regarding the timeliness of the filing of the Petition should be abandoned. No party has raised this issue. Timeliness is not jurisdictional, but rather an affirmative defense. Absent abandonment of the inquiry, MCI reserves the right to supply further information regarding the timeliness of the Petition.

Discussion

1. MCI joins SBC Missouri and Staff in urging the Arbitrator and the Commission to move forward with this proceeding. One cannot even begin to imagine the chaos that would result from an erroneous determination not to move forward. SBC has made it clear that it will not voluntarily agree to an extension of the M2A-based interconnection agreements beyond July 19, 2005. Absent prompt and continued proceedings herein, it is not clear how replacement agreements could be put into effect by July 19, 2005. All concerned have already acknowledged it will be hard enough to meet the target date simply by pressing ahead in this case. Starting a new proceeding before this Commission or a commercial arbitrator is impracticable under the circumstances.

2. MCI respectfully suggests that the Arbitrator and the Commission should discontinue the inquiry into the purported issue of the timeliness of the Petition. No party has asserted that the Petition was not timely filed. There is no requirement under applicable law that the parties submit allegations or proof of the timeliness of the filing. The statutory timeframes set forth in 47 USC § 252 are limitations periods, not jurisdictional boundaries. Objections based on such limitations periods are affirmative defenses that are waived if not raised by a party. (See, e.g., Missouri Rule of Civil Procedure 55.08, FRCP 8(c)). In the recent decision of the United States Supreme Court in *Scarborough v. Principi*, 124 S.Ct. 1856 (2004), the Court made it clear that such federal time limitations are not jurisdictional, and are subject to the same waiver principles as limitations statutes applicable generally. In explanation, the Court stated: "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the class of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 124 S.Ct. at 1865.

3. As Staff notes in its Memorandum of Law, there is no judicial precedent to support a conclusion that the timeframes set forth in 47 USC § 252 are jurisdictional.

4. The Commission's new rule (4 CSR 240-36.040(2)) simply recites the timeframes from Section 252. The Commission does not have authority to convert by rulemaking the Section 252 federal time prescriptions into jurisdictional constraints. In any event, the Arbitrator or the Commission should exercise authority under 4 CSR 240-36.040(15) to waive the rule to the extent it is deemed somehow to be more restrictive than the federal statute.

5. SBC specifically alleges in the Petition that its filing was timely under Section 252. (See paragraph 10). Again, no party contests the allegation. As directed, SBC made a Supplemental Submission that reiterated that allegation and supplied various documents that had

been exchanged between CLECs and SBC. AS SBC indicates, its records are not complete and CLECs have additional documents that could be supplied. However, the inquiry would not end there, as Section 252 does not require written requests for interconnection. To develop the full story of the process by which CLECs made Section 252 requests for interconnection, the parties would have to either prepare extensive affidavits or supply live testimony. There is no provision for such preliminary proceedings under Section 252, particularly in the absence of any contention by any party that a petition for arbitration was not timely filed. Hence, pending further rulings herein, MCI reserves the right to file additional documents and provide testimony in the event the inquiry into the timeliness issue is not discontinued.

6. MCI agrees with SBC that the parties have complied with the applicable provisions of the M2A and thereby have satisfied the time periods of Section 252 applicable to the filing of an arbitration. The M2A required the parties to give early notification to facilitate the negotiation and arbitration process. The early notifications and continued discussions regarding these proceedings resulted in timely requests for interconnection and a subsequent timely filing by SBC. By agreement of all involved, SBC made a single filing, in lieu of multiple filings by the involved CLECs. Section 252 does not require any specific method for making a request for interconnection and does not in any way preclude the methodology set forth in the M2A, which was approved by the Commission and endorsed by the FCC.

WHEREFORE, MCI urges the Arbitrator and the Commission to end the inquiry into the issue of the timeliness of the filing of the Petition and proceed with this arbitration in accordance with the recently-ordered case schedule. In the alternative, MCI reserves the right to supply additional evidence regarding the timeliness of the filing of the Petition.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 (FAX)
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

CERTIFICATE OF SERVICE

A true and correct copy of the forgoing was mailed this 25th day of April, 2005, by email or by placing same in the U.S. Mail postage paid, to the persons listed on the attached service list.

/s/ Carl J. Lumley

Dana K. Joyce
General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
gencounsel@psc.mo.gov

John B. Coffman
Office of Public Counsel
P.O. Box 2230
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

Nathan Williams
Missouri Public Service Commission
P.O. Box 360
200 Madison, Suite 800
Jefferson City, MO 65102
Nathan.Williams@psc.mo.gov

Mark Comley
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
comleyM@ncrpc.com

Leo Bub
Legal Department
Southwestern Bell Telephone Co., L.P.
d/b/a SBC Missouri
One Bell Center, Room 3520
St. Louis, Missouri 63101
leo.bu@sbc.com

Brett D. Leopold
Sprint
6450 Sprint Parkway
Mail Stop KSOPHN0212-2A218
Overland Park, KS 66251
Brett.D.Leopold@mail.sprint.com

Karl Zobrist
Mark Johnson
Sonnenschein, Nath & Rosenthal, LLC
4520 Main Street, Suite 1100
Kansas City, MO 64111
kzobrist@sonnenschein.com
mjohnson@sonnenschein.com

Legal Department
Wiltel Local Network, LLC
One Technology Center TC-151
Tulsa, OK 74103

Kevin Thompson, Deputy Chief
Regulatory Law Judge and Arbitrator
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
Kevin.thompson@psc.mo.gov

Bill Magness
98 San Jacinto Blvd., Ste 1400
Austin, TX 78701
bmagness@phonelaw.com

Stephen F. Morris
MC WorldCom Communications, Inc.
MCImetro Access Transmission Services, LLC
701 Braozs, Suite 600
Austin, TX 78701
stephen.morris@mci.com