

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

In the Matter of the Determination of Prices,	)	
Terms, and Conditions of Certain Unbundled	)	Case No. TO-2005-0037
Network Elements: Consideration Upon Remand	)	
From the United States District Court.	)	

**SBC MISSOURI’S MOTION FOR CLARIFICATION  
AND, IN THE ALTERNATIVE, APPLICATION FOR REHEARING**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (“SBC Missouri”) and for its Motion for Clarification and, In the Alternative, Application for Rehearing states as follows:

1. This proceeding was initiated at the time the Missouri Public Service Commission (“Commission”) approved SBC Missouri’s 271 Interconnection Agreement (“M2A”) in Case No. TO-99-227. The M2A contained a number of rates for unbundled network elements (“UNEs”) which had not previously been set by the Commission. The M2A contained provisions establishing interim rates for these UNEs and establishing a process by which the rates would change when the Commission established final rates.

2. The Commission’s initial decision in Case No. TO-2001-438 was issued on August 6, 2002. At that time, the Commission’s Report and Order resolved some 356 issues identified by the parties and required SBC Missouri to rerun cost studies in compliance with the Commission’s determinations in order to develop prices. Those prices were approved in an Order issued on June 27, 2003. In accordance with the provisions of the M2A, the rates were then applied to existing interconnection agreements and to M2A interconnection agreements subsequently adopted by CLECs.

3. SBC Missouri appealed the Commission’s decision to the U.S. District Court for the Western District of Missouri. Among other issues, SBC Missouri contended the Commission erroneously failed to comply with the Federal Communication Commission’s (“FCC’s”) rules in

determining SBC Missouri's capital structure. The U.S. District Court agreed with SBC Missouri's position in an Order issued on June 17, 2004. The Court vacated the Commission's capital structure determination and remanded the case to the Commission for determination of the appropriate capital structure and resulting rates.

4. SBC Missouri respectfully requests clarification or rehearing of two aspects of the Commission's December 28, 2004 Report and Order. First, SBC Missouri requests the Commission to reconsider its determination that an appropriate capital structure should be composed of 70% equity and 30% debt. Second, SBC Missouri respectfully requests the Commission to clarify or rehear its apparent determination that the rates to be established in this case will not be incorporated into existing interconnection agreements absent compliance with change of law provisions in those agreements.

5. With regard to the capital structure determination, SBC Missouri notes that the only admissible and relevant evidence in the case came from two sources, neither of which recommended a capital structure with an equity component of less than 80%. SBC Missouri's witness Dr. Avera recommended a capital structure containing 86% equity based upon a group of seven local exchange companies being comparable to SBC Missouri, while the CLEC's witness Mr. Hirshleifer utilized a market-based capital structure of 80% equity and 20% debt. As the Commission noted, Mr. Hirschleifer's proposed adjustment to this capital structure by averaging it against a book value capital structure was expressly rejected by the District Court and cannot be relied upon by the Commission. Accordingly, while the Commission would have an evidentiary basis on which to adopt either an 80% or 86% equity component of the capital structure, there is absolutely no record evidence that supports the Commission's determination of a 70% equity capital structure. That decision is arbitrary and capricious as it lacks any substantive evidentiary basis. Moreover, the proposed capital structure is contrary to the FCC's TELRIC methodology in making

an unsubstantiated adjustment to the capital structure proposals submitted in evidence. While the Commission has some discretion in its role as arbitrator under the 1996 federal Act, it does not have free reign to adopt a capital structure that has no evidentiary basis.

6. SBC Missouri is equally concerned with the Commission's apparent determination that the rates which will ultimately be established in this case will not be incorporated into existing contracts absent compliance with the change of law process contained in those agreements. When the Commission's decision approving the rates in Case No. TO-2001-438 became effective, those rates were immediately incorporated into existing agreements as well as in the model M2A agreement that remained available to CLECs. (Attached as Exhibit A is the CLEC Accessible Letter by which notification of the rate changes was accomplished.) There was no requirement for the parties to engage in change of law negotiations precisely because the agreement itself contemplated that the rates would change in accordance with the Commission's decision. Unfortunately, the Commission failed to comply with the FCC's TELRIC rules in establishing the capital structure that was the basis of many of the rates determined in Case No. TO-2001-438. Now that the Commission has attempted to correct its error, the rates which are to be established must be immediately incorporated into both the existing M2A agreements and any future M2A agreements. This is not a change in law, but is instead in compliance with the agreement of the parties, i.e., to implement final rates as established by the Commission. Exhibit 1 to Appendix Pricing-UNE clearly establishes that the interim rates for UNEs are to be in effect only until the effective date of the order establishing final rates:

Each of the rates listed in the following Appendix Pricing UNE Schedule of Prices that are interim will be in effect only until the effective date of the Missouri Public Service Commission's order establishing permanent rates, in Case No. TO-2001-438 or otherwise.

Once the Commission issues an order approving rates in this case, those rates will be implemented as of the effective date of the order pursuant to the provisions of the existing interconnection

agreement. As noted in its December 28 Report and Order in this case, the Commission cannot unilaterally change the agreement of the parties. That agreement contemplates that the new rates shall be implemented as of the effective date of the Commission order adopting those rates.

7. Many of the rates which were established in Case No. TO-2001-438 were lower than the interim rates in the existing M2A interconnection agreement. The rates to be established under the Report and Order in this proceeding, however, will increase UNE rates. There is no justification for an interpretation of the contract that requires immediate implementation of lower rates which were set erroneously and then rejecting immediate implementation of higher rates which correct an error made by the Commission. Whether or not the Commission corrects the capital structure, SBC Missouri respectfully requests the Commission to clarify or reconsider its assertion that the higher rates be established in this case are only to be incorporated into existing agreements through the change of law process. That assertion is simply contrary to the binding provisions of the interconnection agreements under the M2A.

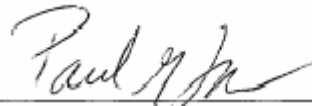
8. SBC Missouri wishes to clarify that the immediate implementation of the rates on a prospective basis is a matter separate and distinct from the retroactive application of those rates. While SBC Missouri believes that the M2A agreement contemplates a retroactive rate adjustment to correct the erroneously established rates in Case No. TO-2001-438, it acknowledges the apparent reluctance to impose retroactive liability. That is no justification, however, for a refusal to prospectively incorporate lawful rates into the existing M2A agreements immediately upon the effective date of the order establishing those rates. SBC Missouri respectfully requests the Commission to clarify or rehear its Order in that regard.

WHEREFORE, for all the forgoing reasons, SBC Missouri respectfully requests the Commission to grant this Motion for Clarification and, In the Alternative, Application for Rehearing and issue an order revising its capital structure determination to comport with the

evidence in this case and to clarify that any order subsequently establishing rates shall be implemented prospectively as of the effective date of the order in accordance with the terms of the M2A interconnection agreements.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing document were served to all parties by e-mail on January 6, 2005.

  
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