

**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.	)	

**RESPONSE OF SBC MISSOURI TO  
AT&T'S MOTION TO SUSPEND, RESPONSE TO  
ORDER DIRECTING FILING AND APPLICATION  
TO INTERVENE**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Response to AT&T Communications of the Southwest, Inc.'s Motion to Suspend, Response to Order Directing Filing and Application to Intervene ("AT&T's Motion") states as follows:

1. On November 12, 2003, 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"). The Staff recommended approval of the proposed tariff on December 3, 2003 and restated its recommendation for approval on December 16, 2003.
2. On December 23, 2003, more than a month after SBC Missouri filed its proposed tariff, AT&T filed its Motion to Suspend and Application to Intervene. AT&T's late-filed Motion raises no new issues and should be summarily denied.
3. The crux of AT&T's Motion is that SBC Missouri's proposed tariff "plainly fail[s] to comply with the [Federal Communications] Commission's Triennial Review Order and the FCC's rules that permit commingling." AT&T's Motion, para. 5. AT&T faces an insurmountable hurdle in its Motion as the FCC has previously considered and rejected the

same claims raised by AT&T. See: SBC Missouri's Response to MCImetro Access Transmission Services, L.L.C.'s Motion to Suspend or Reject Proposed Tariff Sheets, December 8, 2003, para. 3, Exhibit C. AT&T's Motion rests upon the unsupportable assertion that SBC Missouri's tariff violates the FCC's Triennial Review Order despite the fact that the FCC itself has rejected the identical claim in approving SBC Missouri's federal tariff. AT&T would have this Commission override the FCC's prior determination that the tariff is consistent with and does properly implement the FCC's Triennial Review Order which permits commingling of access and unbundled network elements.

4. AT&T must concede that the FCC is in the best position to determine whether the proposed tariff violates the FCC's Triennial Review Order and implementing rules. Because the FCC allowed a substantively identical tariff to go into effect, AT&T is left to argue that "the process at the FCC is quite different from the tariff approval process at the state level, and nothing that occurred at the FCC can limit AT&T's rights before this Commission." AT&T's Motion, para. 13. AT&T contends that the FCC's review is limited to whether the tariff "appears patently unlawful." AT&T has not presented the full story to this Commission. Like the Missouri Commission, the FCC has authority either to reject a proposed tariff as patently unlawful, or to suspend and investigate tariffs if it raises any significant question of lawfulness. In this case, despite MCI's and AT&T's claims to the contrary, the FCC found AT&T and MCI had not demonstrated that the tariff was patently unlawful or even raised any significant issues of lawfulness:

Pursuant to authority delegated under ' 0.291 of the Commission's Rule, 47 C.F.R. ' 0.291, the Pricing Policy Division of the Wireline Competition Bureau has reviewed the petitions to reject or to suspend and investigate the tariff transmittals in this Report.

We conclude that the parties filing the petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to require rejection. Similarly, we conclude the parties have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals listed in this Report.

Accordingly, the petitions to reject or suspend and investigate the following tariff transmittals are denied, and the transmittals will, or have, become effective on the date specified below. Applications for review and petitions for reconsideration of these decisions may be filed within 30 days from the date of this public notice in accordance with sections 1.115 and 1.106 of the Commission's Rules, 47 C.F.R. ' ' 1.115, 1.106. See: Exhibit A attached hereto.

Despite the FCC's action allowing the tariff to go into effect, AT&T contends the FCC's action "is by no means a final determination of the tariff's validity" because parties "may file a petition for reconsideration or seek review." AT&T's Motion, para. 13. Again, AT&T's position is disingenuous. AT&T fails to disclose that neither it nor any other CLEC filed an application for review or petition for reconsideration or that the time to do so has long since expired.

5. AT&T's pleading is more remarkable for what it does not contain than in its rehashed arguments previously rejected by the FCC. AT&T does not attempt to rebut SBC Missouri's showing that the tariff is substantively identical to that previously approved by the FCC. While AT&T contends that the tariff constitutes a restriction on commingling that is prohibited by the FCC (AT&T's Motion, para. 6), it cannot escape the fact that the FCC declined to reject or suspend a substantively identical tariff. Further, while AT&T states its concurrence with the Staff's view that amendments to interconnection agreements are necessary only for interconnection agreements that specifically prohibit commingling (AT&T's Motion, para. 8), AT&T fails to respond to SBC Missouri's citation to the FCC's Triennial Review Order that makes it unmistakably clear that amendments to interconnection agreements

were expressly contemplated by the FCC as the way to implement its new commingling requirements. See: Reply of SBC Missouri to Staff's Response and Recommendation, para. 5; TRO, paras. 583, 700-706.<sup>1</sup>

6. AT&T's Motion also objects to the provisions of SBC Missouri's proposed tariff that would terminate its commingling obligations in the event the FCC's TRO provisions requiring commingling are corrected on review. AT&T's Motion, paras. 9-12. AT&T fails to note, however, that the FCC has allowed SBC Missouri's federal tariff containing identical language to go into effect over the same objections. The changes to the tariff are required only as a result of the FCC's TRO; if the TRO is revised on appeal to eliminate the commingling obligations, it is appropriate and necessary for the tariff obligations to be revised accordingly. AT&T's objection provides no basis on which to suspend the tariff as identical provisions have previously been allowed to go into effect by the FCC.

7. AT&T's late-filed Motion presents no new issues for this Commission to consider. AT&T's Motion fails to provide any basis for this Commission to reject or suspend the proposed tariff as inconsistent with the FCC's TRO when the FCC itself has previously allowed a substantively identical tariff to go into effect over substantively identical objections raised by AT&T and MCI. AT&T has failed to make its case before the FCC and has similarly failed to make its case here. The Commission should approve the tariff.

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<sup>1</sup> The issue presented to the Commission here is whether to approve the proposed tariff revisions to permit commingling as required by the FCC's TRO. The issue of whether existing interconnection agreements must be amended to permit commingling is not before the Commission. In any event, the Commission clearly does not have the authority to overrule the FCC's express determination that amendments to interconnection agreements are required to implement changes required by the TRO including commingling.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to reject AT&T's Motion and approve the proposed tariff revisions.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.  
D/B/A SBC MISSOURI

BY: 

PAUL G. LANE	#27011
LEO J. BUB	#34326
ROBERT J. GRYZMALA	#32454
MIMI B. MACDONALD	#37606

Attorneys for SBC Missouri  
One SBC Center, Room 3520  
St. Louis, Missouri 63101  
314-235-4300 (Telephone)/314-247-0014 (Facsimile)  
[paul.lane@sbc.com](mailto:paul.lane@sbc.com)

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on January 2, 2004.



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Paul G. Lane

GENERAL COUNSEL  
MARC D. POSTON  
MISSOURI PUBLIC SERVICE COMMISSION  
PO BOX 360  
JEFFERSON CITY, MO 65102

PUBLIC COUNSEL  
JOHN B. COFFMAN  
OFFICE OF THE PUBLIC COUNSEL  
PO BOX 7800  
JEFFERSON CITY, MO 65102

STEPHEN F. MORRIS  
MCI TELECOMMUNICATIONS CORP.  
701 BRAZOS, SUITE 600  
AUSTIN, TX 78701

CARL LUMLEY  
CURTIS, OETTING, HEINZ, GARRETT &  
SOULE, P.C.  
130 SOUTH BEMISTON, SUITE 200  
CLAYTON, MO 63105

MARK W. COMLEY  
NEWMAN, COMLEY & RUTH  
601 MONROE STREET, SUITE 301  
PO BOX 537  
JEFFERSON CITY, MO 65102

REBECCA B. DECOOK  
AT&T COMMUNICATIONS OF THE  
SOUTHWESTS, INC.  
1875 LAWRENCE STREET, SUITE 1575  
DENVER, CO 80202