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In the Matter of the Small Telephone Company Group's Petition for Arbitration Pursuant
to 47 U.S.C. § 252 to Establish a Reciprocal Compensation Arrangement for the
Termination of Traffic with ALLTEL Communications Inc.

Case No. TO-2001-715

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

2001 Mo. PSC LEXIS 1062

August 7, 2001

CORE TERMS: arbitrator, arbitration, negotiation, unresolved, discovery, arbitration hearing, final offer, interconnection, intend, disputed issues, depositions, subject matter jurisdiction, issue-by-issue, pre-hearing, Regulatory Law, direct testimony, telephone, arbitrate, e-mail, minutes, Telecommunications Act, supporting documentation, regulatory authority, rebuttal testimony, present evidence, state commission, intends to offer, good cause shown, written notice, expert report

PANEL: [*1] Thompson, Deputy Chief Regulatory Law Judge, Simmons, Chm., Lumpe, C., absent, Murray, Gaw, CC.

OPINION: ORDER DISMISSING PARTIES, ADOPTING

ARBITRATION PROCEDURES AND

ADOPTING PROCEDURAL SCHEDULE

This order dismisses certain parties, adopts procedures for the arbitration and sets a procedural schedule.

Procedural History:

On June 29, 2001, the Small Telephone Company Group (STCG) filed a petition asking the Commission to arbitrate unresolved issues following negotiations between STCG and ALLTEL Communications, Inc. n1 STCG requests arbitration under the provisions of Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code (the Act), and its implementing regulations, and pursuant to Section 386.230, RSMo 2000. As permitted by the Act, ALLTEL filed a response to STCG's arbitration petition on July 24.

n1 STCG is a group of 27 small local exchange telephone companies, identified in Exhibit No. 1 to the Petition as follows: BPS Telephone Company, Cass County Telephone Company, New Florence Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Seneca Telephone Company, Ozark Telephone Company, Granby Telephone Company, Grand River Telephone Corporation, Lathrop Telephone Company, Green Hills Telephone Company, Holway Telephone Company, KLM Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, Oregon Farmers Mutual Telephone Company, Peace Valley Telephone Company, Rock Port Telephone Company, and Steelville Telephone Exchange, Inc.

[*2] **Jurisdiction:**

ALLTEL's response raises an issue that calls into question the Commission's jurisdiction to proceed with this arbitration. ALLTEL points out that it sent its request for negotiations to member companies of the STCG on November 15, 2000. However, on June 6, 2001, ALLTEL and STCG agreed to establish a "start date" for their negotiations of January 20, 2001.

The starting date for negotiations is important because of the tight timeframes established by the Act for arbitration by a state commission. Section 252(b)(1) of the Act provides that a party to the interconnection negotiations may petition a state commission to arbitrate unresolved issues during the period from the "135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section." If November 15, 2000 - the date upon which both parties agree that ALLTEL sent its request for negotiation to the members of STCG - is used as the starting date, then the window for arbitration under the Act opened on March 30, 2001 and closed on April 24, 2001, and STCG's petition was not timely filed. If, instead, the agreed upon start day of January [*3] 20, 2001, is accepted, the window for arbitration opened on June 4, 2001, and closed on April 29, 2001, thus making STCG's petition timely.

ALLTEL does not ask the Commission to dismiss STCG's petition as untimely. But ALLTEL does point out that in 1997, in a similar case, n2 the Commission dismissed an arbitration petition on a finding that it lacked subject matter jurisdiction because the parties had similarly chosen an artificial start date. ALLTEL asks that if the Commission chooses to dismiss this arbitration petition for the same reason, it do so as soon as possible so that the parties may avoid the expense of preparing for the arbitration.

n2 *In the Matter of TCG St. Louis for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-98-14 (*Order Regarding Jurisdiction and Status of Case*, issued September 4, 1997).

On August 1, STCG filed its reply to ALLTEL's response. STCG notes that one of its [*4] members, Grand River Mutual Telephone Corporation, did not receive a request for negotiation in November 2000. STCG asserts that January 20, 2001, is the date upon which ALLTEL first requested negotiations with Grand River and that STCG's petition for arbitration was therefore timely under the Act as to its member Grand River.

This Commission has previously held that an untimely petition for arbitration under the Act fails to confer subject matter jurisdiction. n3 In the absence of subject matter jurisdiction, the tribunal cannot proceed: n4

Jurisdiction concerns the right, power and authority of a court to act. Parties cannot confer subject matter jurisdiction upon a court by their actions or agreements, where such jurisdiction does not otherwise exist. The only power the court has when it lacks subject matter jurisdiction is to dismiss the action; any other actions or proceedings of the court are null and void.

n3 *Id.*

n4 *Schneider v. Feeder's Grain & Supply, Inc.*, 24 S.W.2d 739, 741 (Mo. App., E.D. 2000).

[*5]

The Commission will dismiss all of the members of STCG as parties except for Grand River Telephone Corporation, as to which the petition was timely. The arbitration between Grand River and ALLTEL will proceed.
Arbitration Procedures:

This Commission has used various procedures in the past for arbitrations under the Act. The Act does not specify any particular procedure for arbitrations by state commissions. The Commission is authorized by its organic law to arbitrate disputes. n5 However, that provision also does not specify any particular procedure, other than to require "due notice" and a hearing. n6

n5 Section 386.230, RSMo 2000.

n6 "The commission . . . shall proceed to hear such controversy[.]" Section 386.230 (emphasis added). The applicability of this section to arbitrations under the Act is also open to some question as this section expressly requires the written agreement of all parties to submit the dispute to arbitration. Arbitration under the Act, however, is mandatory.

The Commission will adopt [*6] for this case the arbitration procedures used by the F.C.C., 47 C.F.R. Section 51.807 (October 2000), as supplemented by the F.C.C.'s Public Notice of the establishment of procedures for arbitration of interconnection agreements between Verizon and AT&T, Cox, and WorldCom (DA 01-270, Feb. 1, 2001) (attached hereto as Attachment A). These procedures will be modified to reflect the fact that the petition and response have already been filed in this case, that a prehearing conference has been held, and the procedural dates selected by the Commission in this case. For purposes of this case, arbitrator refers to the Commission or the Regulatory Law Judge assigned to preside over the hearing.

Procedural Schedule and Conditions:

The parties have failed to agree upon procedural dates in their Proposed Procedural Schedules. The Commission has reviewed the proposed schedules and has selected appropriate dates.

The procedural schedules proposed by STCG and ALLTEL are fundamentally similar. STCG proposed a three-day hearing beginning on August 29. ALLTEL indicated that its counsel would not be available on those date and suggested a three-day hearing beginning on September 12. STCG suggested [*7] that both parties file direct testimony on August 8 and rebuttal testimony on August 23. ALLTEL proposed that it file its direct and rebuttal testimony approximately one week after STCG files its testimony. The Commission will accept the hearing dates suggested by ALLTEL, but will require the parties to file their testimony simultaneously.

The Commission finds that the following conditions should be applied to the schedule:

(A) The Commission will require the prefiling of testimony as defined in 4 CSR 240-2.130. All parties shall comply with this rule, including the requirement that testimony be filed on line-numbered pages. The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing.

(B) The parties shall agree on and file a list of issues, in accordance with Subsection P of Attachment A, to be determined herein by the Commission. Any issue not included in the issues list will be presumed to not require determination by the Commission.

(C) Each party shall file a list of the witnesses to appear on each day of the hearing [*8] and the order in which they shall be called.

(D) Each party shall file a statement of its position on each disputed issue, including a summary of the factual and legal points relied on by the party. Such statement shall be simple and concise, shall follow the issues set out in the issues list, and shall not contain argument about why the party believes its position to be the correct one. The position statement shall be filed in both paper form and electronically, either on computer disk or by e-mail. Electronically-submitted documents shall be in Word, WordPerfect, or ASCII format. The Regulatory Law Judge's e-mail address is: woodrm@mail.state.mo.us.

(E) The transcript shall be expedited and shall be available on the next business day following the conclusion of the hearing.

(F) All pleadings, briefs and amendments shall be filed in accordance with 4 CSR 240-2.080. The briefs to be submitted by the parties shall follow the same list of issues as filed in the case. The briefing schedule set out herein is subject to modification by the presiding officer in the event that the hearing is concluded early.

(G) All parties are required to bring an adequate number of copies of exhibits which [*9] they intend to offer into evidence at the hearing. If an exhibit has been prefiled, only three copies of the exhibit are necessary for the court reporter. If an exhibit has not been prefiled, the party offering it should bring, in addition to the three copies for the court reporter, copies for the Commissioners, the regulatory law judge, and all counsel.

(H) Cross-examination shall be limited to ten minutes per party per witness; recross-examination based on questions from the Bench shall be limited to five minutes per party per witness. Redirect examination shall be limited to ten minutes.

(I) Every witness must be present throughout the hearing; any witness not present throughout the hearing shall not be permitted to testify. Questions from the Bench may be directed to any witness or to several witnesses, whether or not the witnesses in question have already testified. All witnesses shall be placed under oath at the opening of the hearing.

(J) The parties shall prepare and file proposed findings of fact and conclusions of law. Each proposed finding of fact shall include a citation to a location in the record where may be found competent and substantial evidence such as supports [*10] the proposed finding of fact.

IT IS THEREFORE ORDERED:

1. That the following members of the Small Telephone Company Group are dismissed as parties from this case: BPS Telephone Company, Cass County Telephone Company, New Florence Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Seneca Telephone Company, Ozark Telephone Company, Granby Telephone Company, Lathrop Telephone Company, Green Hills Telephone Company, Holway Telephone Company, KLM Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, Oregon Farmers Mutual Telephone Company, Peace Valley Telephone Company, Rock Port Telephone Company, and Steelville Telephone Exchange, Inc.

2. That the procedures set out in Attachment A shall be applied to this proceeding and the parties shall comply therewith.

3. That Petitioners and Respondent shall supplement their Petition for Arbitration and Response as necessary to meet [*11] the requirements set out in Attachment A on or before August 17, 2001, except as otherwise directed in Ordered Paragraph No. 3.

4. That the following procedural schedule is adopted, subject to the foregoing conditions:

Event	Date
Direct Testimony	August 15, 2001
Rebuttal Testimony	August 28, 2001
Statement of Positions	September 5, 2001
Hearing	September 12, 13 and 14, 2001
Briefs of the Parties	September 28, 2001

The hearing will be held at the Commission's offices in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, a facility which meets the accessibility standards of the Americans with Disabilities Act (ADA). If any person needs additional accommodations to participate in this hearing, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the hearing.

5. That this order shall become effective on August 15, 2001.

BY THE COMMISSION

Simmons, Ch., Murray, and Gaw, CC., concur. Lumpe, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

ATTACHMENT A - ARBITRATION PROCEDURES

A. In resolving, by arbitration under section 252(b) of the Act, any open issues and in imposing conditions [*12] upon the parties to the agreement, the Commission shall:

- (1) Ensure that such resolution and conditions meet the requirements of section 251 of the Act;
 - (2) Establish any rates for interconnection, services, or network elements according to section 252(d) of the Act;
- and
- (3) Provide a schedule for implementation of the terms and conditions by the parties to the agreement.

B. An arbitrator, acting pursuant to the Commission's authority under section 252(b)(4) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(1) At the discretion of the arbitrator, final offer arbitration may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.

(2) Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit subsequent final offers following such negotiations.

C. The parties shall submit final offers on dates established by the arbitrator. Final offers submitted by the parties to the arbitrator shall be consistent with section 251 of the Act. The arbitrator may direct the parties to submit new final offers [*13] if those already submitted are unsatisfactory.

D. Each final offer shall:

(1) Meet the requirements of section 251;

(2) Establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act; and

(3) Provide a schedule for implementation of the terms and conditions by the parties to the agreement.

E. If a final offer submitted by one or more parties fails to comply with the requirements of this section, or if the Commission determines that special circumstances exist, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

F. Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier, the incumbent LEC, and the Staff of the Missouri Public Service Commission.

G. Absent mutual consent of the parties [*14] to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.

H. The Petition for Arbitration shall include:

(1) The name, address, telephone number, facsimile number, and e-mail address of each party to the negotiations and of each party's designated representative in the proceeding;

(2) A description of the parties' efforts to resolve their differences through negotiation;

(3) A list of every unresolved issue, categorized by subject matter, and the position of each of the parties on each issue (Statement of Unresolved Issues);

(4) A list of the issues that have been resolved by the parties;

(5) The most current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed upon language and the disputed language each party proposes;

(6) A copy of the interconnection agreement, if any, under which the parties are currently operating;

(7) A list identifying each person with knowledge upon whom Petitioner intends to rely to support its position on each of the unresolved issues;

(8) Copies of all cost models, cost studies, and other studies on which petitioner intends to rely [*15] to support its position and any documentation underlying those cost models, cost studies, and other studies. Computerized cost models must be submitted in a form that allows the arbitrator and the parties to alter inputs and determine the effect on cost estimates; and

(9) The Statement of Relevant Authority shall be organized on an issue-by-issue basis, in the same manner as the Statement of Unresolved Issues, and shall:

- (a) Identify any proceeding pending before the Commission relating to the disputed issues; and
- (b) Discuss all federal and state statutory, judicial, and regulatory authority (including contrary authority) relating to the disputed issues.

I. Within 25 days after service of the Petition for Arbitration, respondent shall file with the Commission and serve on each party to the proceeding a Response, which shall include a Response to the Statement of Unresolved Issues, respondent's Statement of Additional Unresolved Issues, and a Statement of Relevant Authority. The Response to the Statement of Unresolved Issues shall include:

- (1) The respondent's position as to each unresolved issue identified by petitioner;
- (2) A list identifying each person with knowledge upon whom [*16] respondent intends to rely to support its position on each of the unresolved issues; and
- (3) Copies of all cost models, cost studies, and other studies on which respondent intends to rely to support its position and any documentation underlying those cost models, cost studies, and other studies. Computerized cost models must be submitted in a form that allows the arbitrator and the parties to alter inputs and determine the effect on cost estimates.
- (4) The respondent's Statement of Additional Unresolved Issues shall list each unresolved issue between petitioner and respondent for which arbitration is sought that is not identified in petitioner's Statement of Unresolved Issues and the position of each of the parties on each of these issues. This portion of the response shall be organized on an issue-by-issue basis and shall contain the information specified in G, above.
- (5) The Statement of Relevant Authority shall be organized on an issue-by-issue basis in the same manner as respondent's Statement of Unresolved Issues and Statement of Additional Unresolved Issues and, to the extent not provided by petitioner, shall:
- (6) Identify any proceeding pending before the Commission relating [*17] to the disputed issues; and
- (7) Discuss all federal and state statutory, judicial, and regulatory authority (including contrary authority) relating to the disputed issues.

J. The arbitrator may request that the petitioner file a reply to any unresolved issues identified by respondent and establish a deadline for its submission.

K. The Commission shall limit its consideration to the issues set forth in the Petition and in the Response, if any.

L. The parties shall appear for an initial status conference on a date set by the arbitrator. At this conference, the parties shall raise any challenges to the appropriateness for arbitration of any issue listed in the Petition for Arbitration or Response. If such challenges are not raised at this conference, they shall be deemed waived. The following matters also may be discussed:

- (1) Simplifying or narrowing the issues;
- (2) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (3) Settlement of some or all of the unresolved issues by agreement of the parties;
- (4) Discovery procedures and schedule;
- (5) The schedule for the remainder of the case and the dates for any further status [*18] conferences; and
- (6) Such other matters that may aid in resolving the unresolved issues or issuing an arbitration award.

M. The arbitrator may hold such other status conferences as deemed necessary.

N. Assertions made in the Petition and not specifically denied in the Response shall be deemed admitted for the purposes of this proceeding.

O. The parties may obtain discovery through data requests, production requests, interrogatories, oral depositions, and requests for admissions. Discovery disputes will be resolved based on the written pleadings.

(1) The arbitrator shall establish an expedited time frame for the commencement and completion of all discovery. All written discovery responses shall be served and all oral depositions shall be completed by the discovery cut-off date established by the arbitrator. All discovery disputes shall also be resolved by the discovery cut-off date.

(2) Responses to all data requests shall be submitted to the requesting party no later than five days after the date on which the request was received.

(3) The parties shall coordinate the scheduling of oral depositions in advance of taking such depositions. No party shall seek to depose a witness [*19] without first providing written notice at least five days in advance. Depositions shall be taken at a time and place agreed upon by the parties and convenient to the witness.

(4) Objections to discovery requests shall be filed within three days of receipt of the request. The parties shall negotiate diligently and in good faith concerning any discovery dispute prior to the filing of any objection. Each objection shall include a statement that negotiations were conducted diligently and in good faith. If necessary, the arbitrator will convene a discovery conference to resolve discovery disputes. The discovery conference may be conducted by telephone conference call. The arbitrator may rule orally on pending discovery disputes at any such discovery conference.

P. Prior to the arbitration hearing, the parties shall jointly file a Decision Point List ("DPL") in a format approved by the Arbitrator, at the time set by the arbitrator. An electronic copy of the DPL shall be provided to the arbitrator. The DPL shall set forth, as to each unresolved issue:

- (1) A summary of each party's position;
- (2) A listing of all disputed issues of fact;
- (3) Relevant admissions or stipulations of fact; and [*20]
- (4) Each party's proposed contract language.

Q. The parties shall file an updated DPL at a time established by the arbitrator, which shall include specific citation to the parties' testimony and other evidentiary submissions relevant to each unresolved issue.

R. Unless the arbitrator orders to the contrary, the petitioner and respondent are required to file and serve the following on the dates established by the arbitrator:

(1) Each party shall file and serve on each other party all of the evidence it intends to offer as part of its direct case, in the form of affidavits, with supporting documentation, expert reports and exhibits. The evidence shall be organized on an issue-by-issue basis, in accordance with the DPL. Each expert report shall include a complete statement of all opinions to be expressed by the expert, the basis and reasons for each opinion, and all data or other information considered by the witness in forming those opinions.

(2) Each party shall file and serve on each other party all of the evidence it intends to offer as rebuttal to the other party's direct testimony, in the form of affidavits, with supporting documentation, expert reports and exhibits. Each expert [*21] report shall include a complete statement of all opinions to be expressed by the expert, the basis and reasons for each opinion, and all data or other information considered by the witness in forming those opinions.

(3) Each party shall file and serve on each other party a list of all witnesses the party intends to call and exhibits the party intends to introduce during the hearing. Expert witnesses shall be identified as such.

(4) Each party shall file and serve objections to any affidavits, exhibits, expert reports, or witnesses proposed by the other party, or file and serve a statement that it has no such objection.

S. An arbitration hearing conducted in these proceedings shall not constitute a contested case hearing within the meaning of Chapter 536, RSMo 2000.

(1) If the arbitrator determines that an arbitration hearing is required as to some or all of the issues, the Arbitrator will notify the parties, in writing, regarding: (a) the date, time and place of the hearing; (b) the length of the hearing; (c) the matters as to which the hearing is to relate; (d) the date of any pre-hearing conference; (e) the dates any pre-hearing submissions are to be filed and served; and (f) [*22] any other appropriate matters.

(2) Before the arbitration hearing, the arbitrator may allot to each party a specific time within which the party may present evidence and make argument during the hearing. The parties will be required to present all of their evidence and argument within the time allotted.

T. The arbitration hearing will be conducted on the record and the arbitrator shall preside. The arbitration hearing shall be open to the public, except that all or a portion of the arbitration hearing may be closed to protect a party's confidential information.

(1) The parties to the arbitration hearing are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the arbitration hearing. No party may introduce an exhibit (including expert reports) or call a witness unless the exhibit or witness was identified in that party's pre-hearing submission, except for good cause shown. Each witness presenting direct testimony by affidavit, and all authors of expert reports included in the pre-hearing submissions, shall be available for cross-examination by the other parties to the arbitration hearing. The arbitrator may order that certain witnesses not attend [*23] the arbitration hearing before having testified.

(2) The arbitrator and the Commissioners may ask questions at any point during the arbitration hearing and may direct a party or witness to provide additional information as needed to fully develop the record.

(3) The arbitrator may exclude evidence considered to be inadmissible, irrelevant, immaterial or cumulative.

U. On a date determined by the arbitrator, each party shall file and serve a post-hearing brief, which shall explain, as to each issue set forth in the DPL, and with appropriate citations to the record, why the Commission should adopt the position advocated by that party. The arbitrator may impose page limits with respect to such briefs.

V. The arbitrator may change these procedures by written notice in order to expedite the proceeding, preserve the resources of the Commission or the parties, promote settlement, or for good cause shown.

W. The parties' Statements of Unresolved Issues, Statements of Relevant Authority, and all briefs shall contain a Table of Contents and, if applicable, a Table of Authorities. Assertions in affidavits based upon information and belief are prohibited unless made in good faith and the [*24] affiant explains the basis for the belief and why the facts could not reasonably be ascertained.

X. Petitioner is obligated to inform the arbitrator in writing as soon as possible of the resolution by the parties of any unresolved issue identified in either party's Statement of Unresolved Issues or the DPL.

Y. The arbitrator may require the parties to provide such information as may be necessary to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request, then the Commission may proceed on the basis of the best information available to it from whatever source derived.