

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

In the Matter of Level 3 Communications, LLC's)	
Petition for Arbitration Pursuant to Section 252(b) of)	
the Communications Act of 1934, as Amended by)	Case No. TO-2004-0606
the Telecommunications Act of 1996, to Establish)	
an Interconnection Agreement with Southwestern)	
Bell Telephone, L.P., d/b/a SBC Missouri.)	

**SOUTHWESTERN BELL TELEPHONE, L.P.'S RESPONSE TO ORDER
DIRECTING FILING**

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), hereby files this response to the Commission's June 18, 2004 Order Directing Filing ("Order") regarding the Petition For Arbitration ("Petition") filed by Level 3 Communications, Inc. ("Level 3"). The Order requires the parties to explain the timing of the request for negotiations in order for the Commission to determine whether it has jurisdiction over the arbitration. As explained below, the Commission has previously determined that parties to an arbitration cannot confer jurisdiction upon the Commission by agreeing to a revised start date for negotiations. However, for the reasons explained below, the Commission could appropriately determine that the request date for the initiation of negotiations was SBC Missouri's March 1, 2004 letter, which sought an entirely new interconnection agreement rather than amendments to the current agreement. Recognizing this date would permit Level 3 to refile a petition for arbitration as early as July 14, 2004. The parties would be able to utilize the additional time to negotiate the remaining issues, many of which have not yet been discussed, and thereby reduce the issues ultimately presented to the Commission.

1. Level 3 filed its Petition with the Commission on June 15, 2004. Level 3's Petition identifies November 29, 2002 as the date on which SBC received Level 3's request to negotiate a new successor agreement. Petition, ¶¶ 10, 18. The Petition further states that "the applicable date for the start of negotiations is November 29, 2002." Petition, n. 7.

2. The Commission's June 18, 2004 Order directed Level 3 to file, by June 23, 2004, "an amendment to its petition clarifying the date on which negotiations began for purposes of the Commission's jurisdiction." Order, p. 1. The Order also directed SBC Missouri to "either join in [Level 3's] filing or file a response thereto, no later than June 28, 2004." Id.

3. On June 23, 2004 Level 3 filed its Amendment to Petition For Arbitration ("Amendment"). The Amendment substitutes a new paragraph 18 in lieu of the paragraph 18 that appeared in Level 3's June 15, 2004 Petition. While the language of the two paragraphs differs in several respects, the key differences for purposes of the Commission's Order is (1) Level 3's assertion that, pursuant to an April 23, 2004 stipulation, "the statutorily prescribed period for arbitration in Missouri expires on June 15, 2004, as set forth in Appendix A." (Amendment, p. 1); and (2) Level 3's change to the dates it asserts apply to the arbitration window (from May 7 through June 1, 2004 in "old" paragraph 18, to May 21 through June 15, 2004 in "new" paragraph 18). (Amendment, p. 2). Otherwise, the two paragraphs mirror each other in one key respect: the identification of November 29, 2002 as the date on which "Request for Negotiations Received." Moreover, Level 3 did not amend paragraph 10 of its petition, which also

states that November 29, 2002 was the date on which SBC received Level 3's request to negotiate a new successor agreement.

4. Reading Level 3's petition and Amendment together, Level 3 maintains that while November 29, 2002 was the date on which SBC Missouri received Level 3's request to negotiate a new successor agreement, the parties later agreed to an arbitration filing window of May 21 through June 15, 2004 almost 18 months later.

5. Subject matter jurisdiction exists only where a court or agency "has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed." Missouri Soybean Asso. v. Missouri Clean Water Comm., 102 S.W. 3d 10, 21 (Mo. banc 2003). Dismissal is proper "whenever it appears, by suggestion of the parties or otherwise," that subject matter jurisdiction is lacking. Id., at 22.

6. Section 252(b)(1) of the Communications Act of 1934, as amended, governs the question of whether a petition for arbitration filed with a state commission is timely filed. It states as follows:

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 arbitration under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues. (emphasis added).

In short, Section 252(b)(1) of the Act requires that any Petition for Arbitration be filed between the 135th and 160th day (inclusive) following the initiation of a request to negotiate. Thus, based on Level 3's identification of November 29, 2002 as the date on which a request to negotiate was received, the arbitration

filing window would have closed over one year ago unless that period is extended based on agreement between the parties.

7. The Commission has previously determined that parties are not authorized to change the deadline for filing requests for arbitrations under Section 252 of the Act by agreement. In its September 4, 1997, Order Regarding Jurisdiction and Status of Case in Case No. TO-98-14 (attached hereto as Exhibit 1), the Commission noted:

The Act does not provide for parties to agree to a “start date” for purposes of requesting interconnection. In essence, TCG and SWBT have attempted to cause this Commission to have jurisdiction by Agreement. The Public Service Commission is a creature of statute and can only exercise such powers as are expressly conferred on it, the limits of which are clearly defined. [Footnote omitted] Therefore, it is clear this Commission does not have jurisdiction to arbitrate whatever open issues relating to an interconnection remain between TCG and SWBT under the Act.”

Id. at p. 2.¹

8. SBC Missouri notes that if Level 3’s Petition were dismissed, Level 3 would be able to refile on a fairly prompt basis. Level 3 alleges, and SBC Missouri agrees, that the parties’ initial negotiations were devoted to attempting to reach agreement on various amendments to Level 3’s then-existing agreement. Petition, ¶ 10. But these negotiations never reached fruition, and the Commission was never asked to arbitrate any open issues regarding them. In a March 1, 2004 letter, SBC requested that the parties


¹ More recently, the Commission reached a similar conclusion in Case No. TO-2001-715. Order Dismissing Parties, Adopting Arbitration Procedures and Adopting Procedural Schedule (August 7, 2001) (attached hereto as Exhibit 2). This result is consistent with the observation of the Eighth Circuit Court of Appeals, which has noted that “the parties’ ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC.” Iowa Utilities Board v. Federal Communications Commission, 120 F. 3d 753, 801 (8th Cir. 1997), *aff’d in part and remanded*, AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), *on remand*, Iowa Utilities Board v. Federal Communications Commission, 219 F. 3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications, Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002) (emphasis added).

“negotiate rates, terms and conditions for successor agreements to the Agreements rather than continuing the ongoing Amendment negotiations.” (attached as Exhibit 3). Given that the scope of the issues between the parties are being defined by negotiations that were precipitated by the March 1, 2004 letter, the appropriate arbitration window (i.e., the period from the 135th to the 160th day) would be from July 14 through August 8, 2004. The additional time before refiling would permit the parties to continue negotiations and reduce and/or refine the issues that may ultimately have to be resolved by the Commission. A refiling in middle July to middle August would also be consistent with the parties’ recent agreement to seek a 30-day extension of the procedural schedule in various arbitrations filed throughout the areas served by SBC ILECs.

WHEREFORE, SBC Missouri respectfully requests the Commission to accept this response to the Commission’s June 18, 2004, Order Directing Filing, and for such other and further relief as the Commission deems proper and just.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

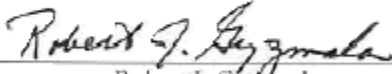
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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this document were served on all counsel of record by electronic mail on June 28, 2004.


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