

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

Application of Chariton Valley Communications Corporation, Inc., for Approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri pursuant to Section 252(e) of the Telecommunications Act of 1996.)))))	Case No. TK-2005-0300
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**RESPONSE OF SOUTHWESTERN BELL TELEPHONE, L.P. TO THE STAFF'S
RECOMMENDATION**

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") hereby submits to the Commission its Response to the Staff's Recommendation filed on April 13 2005. As explained in more detail below, the Commission should reject Staff's Recommendation, and move expeditiously to approve the comprehensive Interconnection Agreement pending before it (hereinafter, "Agreement" or "Interconnection Agreement"). This Agreement was reached only after extensive and very time-intensive negotiations between Chariton Valley Communications Corporation, Inc. ("Chariton") and SBC Missouri and thus represents the arrangements on which the two companies are willing to do business. In any case, SBC Missouri disagrees with Staff's arguments, as they are not supported by any reasonable construction of the Telecommunications Act of 1996 ("the Act") or by any FCC precedent (which is, in fact, contrary to Staff's position).¹

Finally, the Commission should be aware that the FCC has expressly noted in its newly-opened Intercarrier Compensation Further Rulemaking proceeding that the FCC

¹ As a courtesy to the Commission, SBC Missouri is providing a copy of the Transit Traffic Service Agreement between it and Chariton, which was filed with the Federal Communications Commission ("FCC") on February 15, 2005.

“has not had occasion to determine whether carriers have a duty to provide transit service” and has requested comment on this and related questions.² In light of the FCC’s open proceeding, this Commission need not attempt to address these questions, especially given that SBC Missouri has already made a Transit Traffic Service Agreement available to all interested carriers.

In further support thereof, SBC Missouri states that:

1. This case was opened when Chariton filed, on March 9, 2005, an application for approval of an Interconnection Agreement reached with SBC Missouri after extensive negotiations with SBC Missouri.

2. On April 13, 2005, the Commission’s Staff filed a recommendation (“Staff’s Recommendation”) in which the Staff urged that the Commission’s approval process be halted because, as Staff put it, the agreement “appears to lack a complete transit traffic provision.” Staff’s Recommendation, p. 1. More particularly, although the Staff voiced no concern regarding any portion of the voluminous agreement that had been submitted by Chariton, Staff nonetheless recommended that the Commission “reject the interconnection agreement as discriminatory and against the public interest if the parties do not submit the transit traffic agreement to the Commission for approval under Section 252(e).” Staff’s Recommendation, p. 5. This Commission should reject Staff’s Recommendation, and the reasons Staff offers in support of it (both of which are the same as those made by Staff in Case No. TK-2005-0285), for the reasons that follow.

² In the Matter of Developing a Unified Inter-carrier Compensation Regime, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120 (“Inter-carrier Compensation FNPRM”). Moreover, Staff is incorrect that the FNPRM stands for the proposition that “transit service is a form of interconnection “explicitly recognized and supported by the Act.” Staff’s Recommendation, p. 4. Rather, The FCC confirmed that *indirect interconnection* is “a form of interconnection explicitly recognized and supported by the Act.” Inter-carrier Compensation FNPRM ¶ 125. The FCC has never held that ILECs are legally required to provide transit service in order to facilitate such indirect interconnection.

3. Staff indicates that it “is not convinced” by SBC Missouri’s position that transit traffic provisions do not constitute interconnection with SBC. Staff’s Recommendation, p. 2. However, Staff’s Recommendation does not point to a single authority holding that ILECs are required to provide transiting under the Act. Moreover, nowhere does Staff provide an analysis of the pertinent provisions of the Act implicated in the FCC’s Intercarrier Compensation rulemaking proceeding.

4. The FCC has never held that anything in its rules or the Act requires the provision of transit services. Section 251(a) requires all carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”³ However, there is a difference between a duty “to interconnect indirectly” and a duty “to provide indirect interconnection.” The duty to interconnect indirectly requires a carrier to terminate traffic provided indirectly from another carrier (*i.e.*, through an intermediary third party acting on behalf of the other carrier) upon request. A duty to provide indirect interconnection, however, would require all carriers to act as the intermediary (*i.e.*, provide transit services) when two other carriers desire to interconnect with each other indirectly. The FCC has never determined that Section 251(a) of the Act imposes any such duty. In any event, the requirements imposed by Section 251(a) are not subject to mandatory negotiation or arbitration under the 1996 Act. Section 251(c)(1), which is the provision that specifies the duties that ILECs must negotiate (and which therefore are subject to arbitration under Section 252), requires negotiation only of the duties that

³ In Case No. TO-2005-0166, Level 3 Communications, LLC (“Level 3”) witness William P. Hunt III admitted as much, stating that “[t]here is no FCC rule that requires SBC to transit traffic under Sections 251 and 252.” Case No. TO-2005-0166, Direct Testimony of William P. Hunt III, p. 46 (pre-filed December 14, 2004).

Sections 251(b) and 251(c) impose on local exchange carriers, not the duties that Section 251(a) imposes on them.

5. The only duty to provide interconnection is set forth in 47 U.S.C. 251(c)(2), and that obligation is limited to interconnection of the requesting carrier “with the [incumbent] local exchange carrier’s network.” The duty of ILECs to provide interconnection, therefore, is limited to providing interconnection with the ILECs’ networks, not with other carriers’ networks. The FCC has never held that this or any other provision of the Act imposes a duty upon ILECs to provide or facilitate indirect interconnection and transit services between two other carriers.

6. This interpretation is consistent with the decision of the FCC’s Wireline Competition Bureau (“Bureau”) in the Verizon/AT&T/WorldCom/Cox arbitration for Virginia (“FCC Virginia Arbitration Order”).⁴ In that proceeding, Verizon argued that, while every carrier has a right to interconnect indirectly with any other carrier under 47 U.S.C. § 251(a), there is nothing in the Act that permits carriers to transform that right into a duty on the part of ILECs to provide transit services and thus facilitate the duty of other carriers to interconnect indirectly.⁵

7. The Bureau noted that the FCC has not had occasion “to determine whether incumbent LECs have a duty to provide transit service under [47 U.S.C. § 251(c)(2)].”⁶ Nor did the Bureau find “clear Commission precedent or rules declaring such a duty.”⁷ The Bureau also did not specifically determine whether ILECs have a duty

⁴ Memorandum Opinion and Order, Petitions of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration, et. al., CC Docket Nos. 00-218, 00-249, 00-251, DA 02-1731 (released July 17, 2002).

⁵ FCC Virginia Arbitration Order, ¶ 113.

⁶ FCC Virginia Arbitration Order, ¶ 117.

⁷ FCC Virginia Arbitration Order, ¶ 117.

under 47 U.S.C. § 251(a) to provide transit services. Rather, the Bureau concluded that “any duty Verizon may have under section 47 U.S.C. § 251(a) of the Act to provide transit service would not require that service to be priced at TELRIC.”⁸ Thus, the Bureau has confirmed that no FCC rule requires carriers to provide transit services, and even if carriers are obligated to do so, they are permitted to charge market rates for those services.

8. In short, the FCC has never held that any provision of the Act requires ILECs to provide transit services. Nor is there any FCC rule requiring ILECs to provide transit services. Unless and until the FCC concludes otherwise, the Commission should not take a stance at odds with that taken by the FCC’s own Wireline Competition Bureau in the FCC Virginia Arbitration Order by refusing to approve the Interconnection Agreement submitted to it by Level 3 and SBC Missouri absent a transit traffic agreement that has not been reached between the parties. Stated another way, it would not be appropriate for the Commission to rule here that SBC Missouri has a duty under federal law when the FCC’s own delegated bureau declined to do so in a litigated arbitration.

9. Staff wonders about “what has changed to remove transit traffic provisions from Interconnection Agreements reviewed by this Commission.” Staff’s Recommendation, p. 2. But Staff’s question is addressed by three intervening developments since 2001. Certainly, one such intervening development is that the FCC Virginia Arbitration Order (July, 2002), discussed above, has been issued. Staff’s Recommendation nowhere mentions that ruling. A second development is the recent emergence of commercial agreements – recognized and explicitly encouraged by the

⁸ FCC Virginia Arbitration Order, ¶ 117.

FCC in its February, 2005, UNE Remand Order - in light of changing law.⁹ This development is likewise omitted in the Staff's Recommendation.

10. A third item overlooked by Staff is that only months ago it recommended that the Commission approve, in Case No. TK-2005-0114, a Cellular/PCS Interconnection Agreement between ALLTEL and SBC Missouri -- even though that agreement (as does the Level 3/SBC Missouri Interconnection Agreement) provides no rates, terms or conditions associated with transit traffic, but nonetheless clearly contemplates the passage of such traffic.¹⁰ The Staff's December 16, 2005 Recommendation in that case (at p. 1) concluded "that the interconnection agreement does not discriminate against telecommunications carriers not a party to the agreement, and the agreement is not against the public interest, convenience or necessity." The Commission approved the agreement five days later, similarly concluding that "the Agreement meets the requirements of the Act."¹¹ While the specific rates, terms and conditions of transit service are not presented in the Interconnection Agreement submitted by Chariton, neither were they presented in the Commission-approved

⁹ E.g., In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand released February 4, 2005, ¶ 145 (regarding the dedicated transport transition period, "[t]he transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of transport facilities or services"); ¶ 198 (regarding the unbundled high-capacity loops transition period, "[t]he transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of high-capacity loop facilities or services"); ¶ 228 (regarding the unbundled access to local circuit switching transition period, "[t]he transition mechanism adopted today also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of UNE-P or for a transition to UNE-L").

¹⁰ Section 30.1 of the General Terms and Conditions provides that "ALLTEL will not send to SBC-13 STATE local traffic that is destined for the network of a Third Party unless ALLTEL has the authority to exchange traffic with that Third Party." The matter of "Transit Traffic," although referenced within the table of contents to the Interconnection Trunking Requirements Appendix, does not appear within the body of that appendix.

¹¹ In the Matter of the Application of ALLTEL Communications, Inc., for Approval of its Successor Cellular/PCS Interconnection Agreement and Accompanying Amendment with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, under 47 U.S.C. Section 252, case No. TK-2005-0114, Order Approving Interconnection Agreement, p. 2.

ALLTEL agreement.¹² The Chariton/SBC Missouri Interconnection Agreement should be approved as is, as was the ALLTEL/SBC Missouri interconnection agreement.

11. Not only do these developments address Staff's question as to what has changed since 2001, they also belie Staff's broad claim that "an interconnection agreement is discriminatory and against the public interest if it intentionally omits an interconnection service and provides for that service in a separate agreement not submitted for Commission approval under Section 252." Staff's Recommendation, p. 4.

12. Furthermore, Staff concedes, as Section 252(e)(2)(A) expressly provides, that a state commission may reject an interconnection agreement only if the agreement "discriminates against a telecommunications carrier not a party to the agreement" or if the agreement "is not consistent with the public interest, convenience and necessity." Staff's Recommendation, pp. 3-4. But the Staff's Recommendation raises no issues with the Interconnection Agreement that Chariton did submit to this Commission for approval, and as to that Agreement, the law plainly requires that it be made available by SBC Missouri "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." Section 252(i).

13. Staff's related, if not principal concern, is that "[i]f SBC and Chariton do not submit the transit traffic agreement for approval as an amendment to the Interconnection Agreement, carriers wishing to opt into those terms and conditions could be discriminated against if SBC maintains the position that transit service is not subject to the 'opt[-]in' provision of Section 252(i)." Staff's Recommendation, p. 4. However, Staff's discrimination-related concern is again misplaced because, while it is SBC Missouri's position that a transit agreement would not be subject to Section 252(i),

¹² See, note 13, *infra*.

Staff's concern is also refuted by the facts.

14. First, SBC Missouri's testimony submitted in case No. TO-2005-0166 regarding the transit matter addressed – and put to bed – any potential claim of discrimination from other carriers that might want to negotiate a transit agreement with SBC Missouri. SBC Missouri witness Scott McPhee stated in pre-filed direct testimony filed in that case that “SBC Missouri will continue to offer a transit service for carriers that would prefer to use SBC Missouri's network to reach third party carriers.”¹³ He made the point even more plain in pre-filed rebuttal testimony filed in that case when, in explaining that “the terms of SBC Missouri's transit service are contained in a separate commercial agreement,” he stated unequivocally that “SBC Missouri has made this Transit Traffic Service Agreement available for all carriers interested in having SBC Missouri transit traffic for them.”¹⁴ (emphasis added). Additionally, SBC Missouri files consummated Transit Traffic Service Agreements with the FCC. For these reasons alone, Staff's apparent discrimination concern is without any factual basis.

15. Second, no local exchange carrier has even suggested, much less proven, that it is or could be the victim of discrimination relative to SBC Missouri's transit service. That may well be because, as demonstrated above, SBC Missouri has made its Transit Traffic Service Agreement available to all carriers, and publicly files them with the FCC. Indeed, the Transit Traffic Service Agreements consummated with ALLTEL and Chariton are prime examples. In any case, were Staff's claim possessed of any factual basis supporting it, one would have expected that several carriers would have sought to intervene in this case. However, not a single carrier chose to do so. Under this

¹³ Case No. TO-2005-0166, Direct Testimony of J. Scott McPhee, p. 20 (pre-filed January 24, 2005).

¹⁴ Case No. TO-2005-0166, Rebuttal Testimony of J. Scott McPhee, pp. 5-6 (pre-filed February 7, 2005).

circumstance, there is no factual basis to conclude that any carrier “may be adversely affected by a final order” approving the Interconnection Agreement or that any such final order might not “serve the public interest.” 4 CSR 240-2.075(4)(A),(B).

16. For all of the foregoing reasons, SBC Missouri respectfully submits that the Commission should reject Staff’s Recommendation. Because the concerns raised by Staff are not valid, SBC Missouri urges the Commission to move expeditiously to approve the Interconnection Agreement submitted for the Commission’s approval on March 9, 2005. This Agreement is the culmination of much hard work by Chariton and SBC Missouri. SBC Missouri disagrees with the Staff’s arguments, as they are not supported by any reasonable construction of the Act or any FCC precedent (which is contrary to Staff’s position). Finally, SBC Missouri urges that the Commission take no action to determine the merits of Staff’s Recommendation, given the legal and factual considerations presented above, and the FCC’s open Intercarrier Compensation Further Rulemaking proceeding.

Respectfully submitted,

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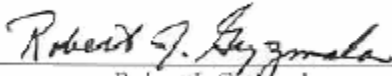
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Certificate of Service

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 22nd day of April, 2005.


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