

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY**

**October 20, 1997**

**CASE NO: TO-98-115**

Office of the Public Counsel, P.O. Box 7800, Jefferson City, MO 65102  
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.64108  
Mark Witcher, AT&T Communications, Suite 1500, 919 Congress, Austin, TX 78701

**Enclosed find certified copy of ORDER in the above-numbered case(s).**

Sincerely,

A handwritten signature in dark ink, appearing to read "Cecil I. Wright", with a stylized flourish at the end.

**Cecil I. Wright  
Executive Secretary**

**Uncertified Copy:**

# BEFORE THE PUBLIC SERVICE COMMISSION

## OF THE STATE OF MISSOURI

In the Matter of AT&T Communications of the )  
Southwest, Inc.'s Petition for Second )  
Compulsory Arbitration Pursuant to Section ) Case No. TO-98-115  
252(b) of the Telecommunications Acts of 1996 )  
to Establish an Interconnection Agreement with )  
Southwestern Bell Telephone Company. )  
)

### ORDER REGARDING PETITION FOR SECOND ARBITRATION

AT&T Communications of the Southwest, Inc. (AT&T) filed a petition for arbitration between AT&T and Southwestern Bell Telephone Company (SWBT) under the Telecommunications Act of 1996 (the Act) on July 29, 1996, in Case No. TO-97-40<sup>1</sup>. The Commission issued an order resolving the issues presented by the parties and setting interim rates for resale of SWBT's services, and for unbundled network elements, on December 10, 1996. Further proceedings and orders were issued by the Commission, but none have relevance here. In its petition for arbitration AT&T stated that negotiations between the parties had begun on March 14, 1996.

AT&T filed a petition on September 10, 1997, requesting a second "compulsory" arbitration before the Commission between AT&T and SWBT, citing a start date for renewed negotiations of April 3. SWBT filed a response that also included the April 3 negotiation date.

The Act provides that "during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange

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<sup>1</sup> Case No. TA-97-40 was consolidated with Case No. TA-97-67, a petition for arbitration of an interconnection agreement between MCI Telecommunications Corporation and Southwestern Bell Telephone Company (SWBT).

carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a state commission to arbitrate any open issues." The telecommunications companies subject to the Act are under a duty to negotiate in good faith<sup>2</sup> and are specifically required to present to the state Commission any unresolved issues<sup>3</sup>.

In a recent decision the Eight Circuit Court of Appeals interpreted Section 252(b)(1) of the Act narrowly, finding 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" (emphasis added). See Iowa Utilities Board v. Federal Communications Commission, No. 96-3321 (8th Cir., July 18, 1997).

The Federal Communications Commission (FCC), in rejecting a petition for preemption of this Commission for failure to act in Case No. TA-97-40, found that state commissions cannot be preempted for failure to arbitrate issues that were not "clearly and specifically" presented by the parties. See In the Matter of Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, ¶ 37, FCC 97-345, Released September 26, 1997. In its discussion the FCC cited the Act's requirement that a state Commission "limit its consideration . . . to the issues set forth in the petition and in the response, if any"<sup>4</sup>. The FCC emphasized the parties' obligation to negotiate in good faith and to present to a state commission all issues in dispute. As illustration, the FCC pointed to the Missouri Commission's directive that

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<sup>2</sup> 47 U.S.C. §251(c)(1).

<sup>3</sup> 47 U.S.C. §252(b)(2).

<sup>4</sup> 47 U.S.C. §252(b)(4)(A).

the parties submit a Joint Issues Memorandum clearly identifying each unresolved issue and the parties' positions on each issue. The parties injected "catch-all" language in Issue No. 42 which the FCC found failed to satisfy the duty to present all open issues as required by Section 252(b)(2).<sup>5</sup>

Given the provisions of the Act and the Eighth Circuit and FCC decisions, the Commission has concerns about whether it has jurisdiction to undertake a second arbitration, whether the nine-month time limitation would apply to a second arbitration, and what procedures would produce the most expeditious and satisfactory results. In order to resolve these questions as quickly as possible the Commission will direct the parties to meet and narrow the issues, and to appear before the Commission to respond to Commission questions and to present their legal arguments regarding second arbitration jurisdiction and related issues. The Commission would also remind the parties that they are under a federal statutory duty to negotiate in good faith.

The Commission will direct the parties to send their technical experts to meet in a technical conference with members of the Commission's Arbitration Advisory Staff during the week of October 20. The parties will be expected to prepare for Commission review, no later than October 24, a comprehensive well-defined list of issues on which they are requesting a second round of arbitration. The Commission will accept only one jointly produced list of issues.

Each party must be prepared to address on October 27 the issues described above and the specific questions listed below. The following

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<sup>5</sup> MCI Preemption Petition, at ¶ 34.

list is not intended to be comprehensive but to give the parties guidance as to the Commission's concerns.

a) Are the parties willing to subject the issues presented in this arbitration request first to voluntary mediation under Commission authority?

b) If the parties participate in mediation, to what extent may the information elicited during that process be used in the event the Commission finds it has jurisdiction to pursue subsequent arbitration under the Act?

c) Does the Commission have the authority to retain or appoint an external party to conduct the arbitration and present the Commission with a proposed disposition for Commission action? Would the parties be willing to proceed to arbitration if the Commission chose to contract with a surrogate professional arbitrator to fill the formal role of arbitrator? If so, what qualifications should be required of a proposed arbitrator?

d) Given the Act, does the Commission have jurisdiction to arbitrate these issues under the state arbitration statute? If so, are the parties willing to arbitrate the issues presented in this request under the Missouri Arbitration Act (MAA) found in Chapter 435, RSMo 1994?

e) If the parties are not willing to proceed under the MAA, upon what authority do they seek a second round of arbitrations under the Act?

f) The parties shall address Section 252 of the Act, section by section, and explain how each section authorizes, or prohibits, subsequent arbitrations.

g) If the parties are not willing to proceed under the MAA, is it their position that the federal act requires that a decision must be rendered by January 5, 1998? If not, what authority supports an argument

that the nine-month federal time frame does not apply to a second arbitration?

h) If the parties are not willing to proceed under the MAA, are they willing to waive the nine-month federal time line? And, if so, how does that waiver affect this Commission's jurisdiction and the parties' rights to appeal the arbitration result?

i) Should the Commission decide to take this matter up as a second compulsory arbitration under the Act, would the parties be willing to immediately submit their disputed issues to a mediation process under Commission auspices to eliminate all resolvable issues, and then proceed to arbitration on the remaining issues?

j) What result could be expected should the Commission decide to take this matter up as a second compulsory arbitration under the Federal Act, and require the parties to immediately submit their disputed issues to a mediation process before they would be permitted to proceed to arbitration?

k) If the Commission finds it lacks jurisdiction to take up this matter as a second mandatory arbitration under the Act, and one party refuses to proceed under the voluntary arbitration procedure set out in the MAA, or refuses to voluntary mediation under the Act, what will be the result? What are the remaining alternatives?

The Commission takes note of the fact that the parties to this arbitration request are also party to Case No. TO-97-217 set for hearing on October 23 through November 4. Because of the importance of this issue, the TO-97-217 hearing session for October 27 has been rescheduled by notice to begin at 1:30 p.m. on that day only.

**IT IS THEREFORE ORDERED:**

1. That the parties shall meet in a technical conference beginning on October 21, 1997, at 10:00 a.m. The Commission's Arbitration Advisory Staff shall facilitate the technical conference, the outcome of which shall be a single, jointly produced well-defined issues memorandum to be filed no later than Friday, October 24, 1997. The parties shall file the issues memorandum with the Commission and shall include a version on 3.5" computer disk in WordPerfect format.

2. That the Arbitration Advisory Staff shall arrange a meeting place for the technical conference and shall advise the Adjudication Division and all parties by fax transmission of its location.

3. That the parties shall appear before the Commission at 9:00 a.m. on Monday, October 27, 1997, to address *inter alia* the questions delineated in this order.

4. That, at the hearing set in paragraph 3, the parties shall appear by a representative authorized to commit the company to a position without reservation or qualification.

5. That the hearing scheduled for October 27, 1997, shall be convened in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri.

6. That anyone with special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days before the prehearing or hearing at one of the following numbers: Consumer Services Hotline - 1-800-392-4211 or TDD Hotline - 1-800-829-7541.

7. That this order shall become effective on October 17, 1997.

**BY THE COMMISSION**



**Cecil I. Wright  
Executive Secretary**

(S E A L)

L. Anne Wickliffe, Deputy Chief  
Regulatory Law Judge, by delegation  
of authority pursuant to 4 CSR  
240-2.120(1) (November 30, 1995)  
and Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,  
on this 17th day of October, 1997.



ALJ/Sec'y:

Widliffe / Pope

10-17  
Date Circulated

10-17  
Return by 3 p.m.

RUSH

TO-98-115  
CASE NO.

*SL*  
~~Zobrist, Chairman~~  
LUMPE

*CH*  
Crumpton, Commissioner

*am*  
Murray, Commissioner

Lumpe, Commissioner

*noe*  
Drainer, Vice-Chair

STATE OF MISSOURI  
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,

Missouri, this 20th day of October, 1997.

*Cecil I. Wright*  
Cecil I. Wright  
Executive Secretary

