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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 4th
day of May, 1999.

In the Matter of the Application of)
Southwestern Bell Telephone Company and Gabriel)
Communications of Missouri, Inc., for Approval) Case No. TO-99-400
of Resale Agreement under the Telecommunications)
Act of 1996)

ORDER APPROVING INTERCONNECTION AGREEMENT

Procedural History

On March 22, 1999, Gabriel Communications of Missouri, Inc. (Gabriel) filed an Interconnection Agreement (Gabriel Agreement) and *Gabriel Communications of Missouri, Inc.'s Petition for Approval of Interconnection Agreement* under the provisions of Telecommunications Act of 1996 (the Act). The Commission issued its *Order Directing Notice and Making Southwestern Bell Telephone Company a Party* on March 30, 1999, directing any party wishing to request a hearing or participate without intervention to do so no later than April 19, 1999, and also making Southwestern Bell Telephone Company (SWBT) a party. No applications to participate or requests for hearing were filed. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has asked permission

to participate or requested a hearing in this case, the Commission may grant the relief requested based on the verified application.

On April 27, 1999, SWBT filed *Southwestern Bell Telephone Company's Suggestions Regarding Petition for Approval of Interconnection Agreement* (first suggestions). SWBT stated that the Gabriel Agreement was entered into pursuant to Section 252(i) of the Act and is premised upon the arbitrated interconnection agreement between SWBT and AT&T¹. SWBT stated that it ". . . entered into the agreement with Gabriel pursuant to Section 252(i) of the Act only after the Parties had agreed to include language acknowledging that the [Gabriel Agreement] is an AT&T 'MFN' and that it is subject to the outcome of the appeal in the AT&T arbitration²." SWBT stated that it entered into the Gabriel Agreement in reliance upon the Commission's decision in *Mediation and Arbitration of Remaining Interconnection Issues between MCI Telecommunications Corporation and its Affiliates and Southwestern Bell Telephone Company*, Case No. TO-98-200.

On April 29, 1999, SWBT filed *Southwestern Bell Telephone Company's Supplemental Suggestions Regarding Petition for Approval of Interconnection Agreement* (second suggestions). SWBT stated that it filed the first suggestions to express

. . . concern regarding issues recently raised by other competitive local exchange carriers (CLEC[s]) involved in the appeal of. . . [the AT&T arbitration] regarding the intent of the [Gabriel Agreement] should the underlying AT&T agreement

1 *AT&T Communications' Petition for Arbitration to Establish Interconnection Agreement With Southwestern Bell*, Case No. TO-97-40 (AT&T arbitration). See also Section 3.1 of the Gabriel Agreement, attached as Exhibit A.

2 "MFN" means "most favored nation." SWBT's pleadings use this acronym both as a noun and a verb.

be voided or require modification in whole or in part as a result of the AT&T appeal.

In the second suggestions, SWBT also stated that there was no case or controversy with Gabriel. SWBT noted that Gabriel was not one of the CLECs who raised the issue set forth above. Thus, SWBT stated that the Gabriel Agreement should be approved without delay.

However, SWBT stated in the second suggestions, because Section 252(i)³ of the Act allows any requesting carrier to obtain the same terms and conditions as are contained in the Gabriel Agreement, i.e., to MFN, SWBT's pleadings are intended to put on notice those carriers who have expressed an intent to MFN into the Gabriel Agreement. SWBT stated that it is SWBT's intent that, should the AT&T agreement be voided in whole or in part as a result of the appeal of that agreement, then, pursuant to Section 3.1 of the Gabriel Agreement, SWBT and Gabriel would continue to perform until replacement terms and conditions were put into place. SWBT stated that the replacement terms and conditions would be those resulting from the SWBT/AT&T appeal or remand because the Gabriel Agreement would continue to be an AT&T MFN.

³ 47 U.S.C. 252(i) states: "Availability to Other Telecommunications Carriers.--A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

Gabriel was granted a certificate of service authority to provide basic local, local exchange and interexchange intrastate telecommunication services in the *Order Approving Stipulation and Agreement* issued on March 4, 1999, in Case No. TA-99-173.

Discussion

The Commission, under the provisions of Section 252(e) of the Act, has authority to approve an interconnection agreement negotiated between an incumbent local exchange company (LEC) and a new provider of basic local exchange service. The Commission may reject an interconnection agreement only if the agreement is discriminatory or is inconsistent with the public interest, convenience and necessity.

On April 22, 1999, the Staff of the Public Service Commission (Staff) filed a Memorandum that recommended that Gabriel and SWBT be granted approval of the resale and facilities-based interconnection agreement (i.e., the Gabriel Agreement). Staff stated that the Gabriel Agreement meets the limited requirements of the Act. Specifically, Staff stated that the Gabriel Agreement does not appear to discriminate against telecommunications carriers not party to the Gabriel Agreement, and the Gabriel Agreement does not appear to be against the public interest, convenience or necessity. Staff further recommended that the Commission direct SWBT and Gabriel to submit any modifications or amendments to the Gabriel Agreement to the Commission for approval. This condition has been applied in prior cases where the Commission has approved similar agreements.

Staff also notes that Gabriel submitted its proposed CLEC and access tariffs in Case No. TA-99-173 on March 22, 1999, concurrently with its interconnection agreement. A substitute tariff sheet was filed on April 21, 1999. Staff stated:

The tariffs have an effective date of May 6, 1999. Staff will address those tariffs in a separate memorandum. Staff recommends that the Commission approve the [Gabriel Agreement] **prior** to the approval of the proposed CLEC and access tariffs. (Emphasis in original.)

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has considered the application and the supporting documentation, including Staff's recommendation. Based upon that review, the Commission finds that the Gabriel Agreement meets the requirements of the Act in that it does not unduly discriminate against a nonparty carrier and also finds that implementation of the Gabriel Agreement is not inconsistent with the public interest, convenience and necessity. The Commission finds that approval of the Gabriel Agreement should be conditioned upon the parties submitting any modifications or amendments to the Commission for approval pursuant to the procedure set out below.

Modification Procedure

The Commission has a duty to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act. 47 U.S.C. 252. In order for the

Commission's review and approval to be effective, the Commission must also review and approve modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection. 47 U.S.C. 252(h). This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission. 4 CSR 240-30.010.

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications, in the Commission's offices. Any proposed modification must be submitted for Commission approval, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.

SWBT and Gabriel have already provided the Staff with a copy of the resale or interconnection agreement with all pages, including the appendices, numbered seriatim in the lower right-hand corner. Modifications to an agreement must be submitted to the Staff for review. When approved, the modified pages will be substituted in the agreement, which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the pages when they are inserted into the agreement. The official record of the original Gabriel Agreement and all the modifications made will be maintained by the Staff in the Commission's tariff room.

The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification

is identical to a provision that has been approved by the Commission in another agreement, the modification will be approved once Staff has verified that the provision is an approved provision, and prepared a recommendation advising approval. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission, under the provisions of Section 252(e)(1) of the federal Telecommunications Act of 1996 (47 U.S.C. 252(e)(1)), is required to review negotiated resale agreements. It may only reject a negotiated agreement upon a finding that its implementation would be discriminatory to a nonparty or inconsistent with the public interest, convenience and necessity under Section 252(e)(2)(A). Based upon its review of the interconnection agreement between SWBT and Gabriel and its findings of fact, the Commission concludes that the Gabriel Agreement is neither discriminatory nor inconsistent with the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the Interconnection Agreement between Southwestern Bell Telephone Company and Gabriel Communications of Missouri, Inc. filed on March 22, 1999 is approved.

2. That any changes or modifications to the Interconnection Agreement between Southwestern Bell Telephone Company and Gabriel Communications of Missouri, Inc. filed on March 22, 1999 shall be filed with the Commission for approval pursuant to the procedure outlined in this order.

3. That this order shall become effective on May 6, 1999.

4. That this case may be closed on May 7, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray,
Schemenauer, and Drainer, CC., concur

Hopkins, Senior Regulatory Law Judge

3.0 Intervening Law

- 3.1 This Agreement is entered into pursuant to Section 252(i) of the Telecommunications Act of 1996 (the Act) and is adopted from the interconnection agreements entered into between Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T). The interconnection agreements were entered into pursuant to negotiations and arbitrations conducted by the Missouri Public Service Commission (Commission) in Case Nos. TO-97-40 and TO-97-67 (the Initial AT&T Arbitration) and Case No. TO-98-115 (the Second AT&T Arbitration). These proceedings were conducted pursuant to orders of the Federal Communications Commission (FCC) which adopted rules implementing the Act, including those provided for in Part 1, subpart 2, Part 51, subparts C, D, E, F, G and H, Part 52, subparts A and B of title 47 of the Code of Federal Regulations (Rules). The FCC rules and Commission orders in the Initial and Second AT&T Arbitrations are the subject of various appeals, including an appeal in Case No. 97-4337-CV-W-5 and subsequent appeals may also be taken of Commission orders in Case No. TO-98-115.

The parties recognize and agree that, in the event of any administrative, regulatory, legislative or judicial order, rule, opinion, or other legal action which revises or modifies AT&T's or SWBT's rights and/or obligations pertaining to any matter contained in the AT&T interconnection agreements other than at the request of or with the consent of both AT&T and SWBT (subsequent development), the relevant provisions of this agreement shall be likewise revised or modified to be consistent with such subsequent development. To the extent necessary to implement such subsequent development, the parties will expend diligent efforts to implement such changes.

In the event any provision of this Agreement is invalidated as a result of any administrative, regulatory, legislative, or judicial order, rule, opinion, or other legal action, the affected provision shall nonetheless remain in effect until a replacement provision takes effect either by negotiation or dispute resolution, at which time a true-up will be performed as if the replacement provision had taken effect immediately upon the invalidation of the affected provision and any appropriate refund shall then be made.

- 3.2 Intentionally left blank.

4.0 Term of Agreement

- 4.1 This Agreement will become effective as of the Effective Date stated above, and will expire on November 7, 2000, subject to two one-year extensions, unless written Notice of Non Renewal and Request for Negotiation (Non Renewal Notice) is provided by either Party in accordance with the provisions of this Section. Any such Non Renewal Notice must be provided not later than 180 days before the day this Agreement would otherwise

RECEIVED

MAY 04 1939

COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION