BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Adoption of An Interconnection Agreement with Sprint Missouri, Inc. by Socket Telecom, LLC	)))	Case No. CO-2005-0039

RESPONSE OF SPRINT MISSOURI, INC. TO ORDER DIRECTING FILING

COMES NOW Sprint Missouri, Inc. ("Sprint") and responds to the Commission's November 8, 2004 Order Directing Filing ("Order Directing Filing") regarding the Commission's ability to rehear decisions related to determinations made by the Commission under Section 252. Sprint filed its original motion for rehearing because the FCC's Interim Rules prohibit CLECs from adopting interconnection agreements containing provisions that are frozen in place by the FCC's interim approach.[1] The Commission does have the authority to grant rehearing and implement the FCC's Interim Rules because: (1) the Act requires state commissions to reject agreements inconsistent with the public interest and failure to implement the Interim Rules Order is contrary to the public interest; (2) this matter involves an adoption of an interconnection agreement under section 252(i), not an arbitration under 252(b); (3) the Act does not prohibit federal court review of a "determination" made on rehearing; and (4) the Commission has the ability under 386.500.4 RSMo to make changes in Commission Orders that it deems unjust and unreasonable. Sprint states as follows:

[1] *In the Matter of the 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 and Notice of Proposed Rulemaking, (Released August 20, 2004, Effective Date: September 13, 2004). ("Interim Rules").

I. BACKGROUND

1. On August 4, 2004, Socket Telecom, LLC ("Socket") filed a Notice of Adoption of Interconnection Agreement with the Missouri Public Service Commission ("Commission"). Socket stated that it intended to adopt the interconnection agreement between Sprint and Level 3 approved by the Commission in Case No. TK-2004-0567. The Commission ultimately approved the interconnection agreement on September 14, 2004 and Sprint sought rehearing before the effective date of the Commission Order (September 24, 2004) under 386.500 RSMo.

2. Sprint demonstrated in its Rehearing Motion that actions taken by the FCC with respect to its rules governing access to unbundled network elements have superseded the ability of CLECs to opt into interconnection agreements that contain contract provisions frozen in place by the FCC's Interim Rules.

3. The Interim Rules became effective on publication. The FCC stated, "[g]iven the need for immediate interim action, the requirements set forth here shall take effect immediately upon Federal Register publication, and without prior public notice and comment."[2] Publication occurred on September 13, 2004 in the Federal Register at 69 Federal Register 55111-12, just one day before the Missouri Commission's approval of Socket's Notice of Adoption.

4. Due to its thrust of providing interim relief only to CLECs in light of the USTA II decision vacating and remanding certain UNEs, the FCC also found that CLECs *cannot* opt into contract provisions referring to UNEs frozen by the FCC's interim approach. The FCC stated: "**We also hold that competitive LECs may not opt into the contract**

provisions 'frozen' in place by this interim approach."[3] The Interim Rules became effective on September 13, 2004, only one day before the Commission's Order allowing Socket to opt into the Level 3 agreement. Clearly, under the FCC's Interim rules, Socket is prohibited from opting into the Level 3 agreement with Sprint.

5. Staff's filing of October 5, 2004 agreed with Sprint's reading of the FCC's Interim Rules Order. Staff stated that the "FCC clearly held that CLECs may not opt into an existing agreement" and rejected Socket's suggestion that the Interim Rules Order only applied to new carriers.[4]

II. DISCUSSION

6. The Commission asks in its Order Directing Filing if the Commission has jurisdiction to grant rehearing in interconnection cases, especially in light of two previous Commission decisions. The answer is yes for several reasons.

A. Federal law allows states to reject interconnection agreements inconsistent with the public interest. Allowing Socket to adopt a "frozen" interconnection agreement is contrary to the Interim Order and thus the public interest.

7. First, the Federal Telecommunications Act, 47 U.S.C. §252(e) requires states to approve interconnection agreements either arrived at through negotiation or through arbitration. Section 252(e)(2)(A) allows states to reject agreements arrived at by negotiation if (ii) "the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." Sprint has shown and Staff agrees that allowing Socket to opt into an interconnection agreement after the June 15, 2004 date is contrary to the unambiguous direction in the Interim Rules Order. Given that reviewing courts have struck

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[2] Interim Rules, ¶ 27.
[3] Interim Rules ¶ 22 (Emphasis Added).

down many of the FCC's unbundling rules, the FCC clearly does not want to expand the ability of carriers opting into agreements that contain provisions contrary to the law. Allowing Socket to opt into the Level 3 agreement is inconsistent with the public interest, convenience and necessity and violates Section 252(e)(2)(A) because the FCC has declared that it prohibits the expansion of interconnection obligations related to the court-stricken rules.

B. The arbitration cases cited in the Order Directing Filing do not apply to an opt-in agreement.

8. Next, the cases cited by the Commission in its Order Directing Filing that the Commission does not have jurisdiction to entertain a motion for rehearing in arbitrations conducted by the Commission under Section 252 are inapplicable. The concern in the Sprint case cited, TO- 99-461, was that a motion for rehearing would breach the Act's requirement in Section 252(b)(4)(C) that arbitrations be resolved in 9 months after receiving the interconnection request. That concern does not apply here where Socket adopted an agreement under Section 252(i), which is not an arbitration situation subject to the timeframes of Section 252(b)(4)(C) but an agreement adopted by negotiation and subject to a 90 day approval timeframe by the Commission. 47 U.S.C. § 252(e)(4). Since Socket filed on August 4, the Commission's consideration of Sprint's Application for Rehearing filed on September 23, 2004 was well within the 90 day timeframe.

9. The difference between this case, an opt-in by Socket and the concerns expressed in the Commission Order in the AT&T arbitration, Case No. 2001-455, is crucial. In AT&T, the Commission stated that an arbitration order can only be reviewed in federal

[4] Staff Response, p. 4.

court and not state court. This is not an arbitration order and thus the concerns expressed in the AT&T arbitration do not apply.

C. Review of a state commission "determination" on rehearing can still be reviewed in federal court. Nothing in the Act prevents a state commission from making an initial "determination" and a subsequent "determination" upon rehearing.

10. The section from the Act, 252(e)(6), requiring judicial review of state commission determinations in federal court, does not prevent this Commission from granting rehearing based upon an applicable FCC decision that mandates no opt-ins into interconnection agreements containing frozen FCC rules after June 15, 2004. Section 252(e)(6) states, in part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court ...." An order issued on rehearing by the Commission is a "determination" in the same manner that the original order is a "determination." While Sprint could not appeal the Commission's determination on rehearing to state court under Section 252(e)(6), the language in that Section does not prohibit a state commission from reviewing its own determination and making a subsequent determination.

11. Case law found by Sprint indicates that the Act does not require that parties in arbitration proceedings must exhaust state remedies by filing for rehearing under state law before filing in federal court. The Ninth Circuit stated "we determined that Congress did not intend that varying state procedural requirements should act as bars to judicial review of proceedings pursuant to the 1996 Act."[5] On the other hand, filing for rehearing at the state

[5] *AT&T and MCI v. Pac Bell*, 375 F.3d 894, 908 (9th Cir. 2004), *citing, AT&T v. Pac Bell*, 203 F.3d 1183, 1186 (9th Cir. 2000).

commission clearly is not prohibited by the Act. Federal court jurisdiction can still be had over any appeal of a state commission's determination made on rehearing.

D. Section 386.500.4 RSMo. allows the Commission to change its decision on rehearing upon an appropriate showing. The federal act does not infringe upon that right.

12. Finally, the text of Section 386.500.4 RSMo allows for the Commission to change its original decision based upon a consideration of the facts, including those arising since the making of the order or decision. As stated in Sprint's Application for Rehearing, the FCC's Interim Rules Order was made effective on September 13, 2004 only one day before the Commission's Order allowing Socket to opt into the Level 3 agreement. It is fair to assume that the Commission did not consider the effect of the Interim Rules Order in issuing its Order to allow Socket to opt into the Level 3 agreement. The statute allows the Commission to modify its original order if in the Commission's opinion the original order is "unjust or unwarranted." Section 386.500.4 RSMo.

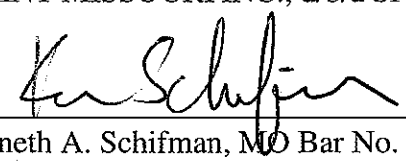
13. Sprint has shown that due to the FCC's Interim Rules Order, the Commission's original decision is unjust and unwarranted. Regardless of the requirements for exclusive federal court review of the Commission's determinations, the Commission has the authority under Missouri law to correct any mistakes. Sprint has pointed out such a mistake based upon clear direction from the FCC ruling that carriers may not opt into interconnection agreements containing provisions frozen in place by the FCC's interim approach.[6] The Commission has the discretion and power to correct itself upon a motion made for rehearing and still allow for exclusive federal court review of its "determination" on rehearing.

14. Indeed, if the Commission could not grant rehearing, the effective date of the Order should have been the same date it was issued. The Commission rightly recognized that rehearing is applicable in this situation by making its Order effective ten (10) days after it was issued.[7]

WHEREFORE, for the reasons stated herein, Socket's adoption of the Sprint and Level 3 Interconnection Agreement approved by the Commission on September 14, 2004 is unlawful because the FCC's Interim Rules prohibiting CLEC adoption of interconnection agreements became effective on September 13, 2004. The granting of Sprint's application and motion for rehearing is consistent with federal and state law. Sprint requests that its application and motion for rehearing be granted.

Respectfully submitted,

SPRINT MISSOURI INC., d/b/a SPRINT



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[6] Interim Order, ¶ 22.

[7] See, Order Recognizing Adoption of Interconnection Agreement, Case No. CO-2005-0039, (dated September 14, 2004; effective September 24, 2004).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of November, 2004, a copy of Sprint Missouri, Inc.'s Response to Order Directing Filing was served via U.S. Mail, postage prepaid, to each of the following parties:

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