BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In Re: The Master Interconnection and Resale Agreement By and Between Sprint Missouri, Inc., and ICG Telecom Group, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996	)))))	**Case No. TK-2003-0535**

RESPONSE OF SPRINT MISSOURI, INC. AND ICG TELECOM GROUP, INC. TO MOTIONS TO INTERVENE

COMES NOW, Sprint Missouri, Inc, d/b/a Sprint (hereinafter "Sprint"), and ICG Telecom Group, Inc. ("ICG"), and hereby respond to the motions to intervene and requests for hearing filed by the Missouri Independent Telephone Company Group ("MITCG"), and the Small Telephone Company Group ("STCG"), as follows:

INTRODUCTION

On June 4, 2003, Sprint filed an Application for Approval of a Master Interconnection and Resale Agreement and Amendment between it and ICG. The Agreement is the same agreement approved by the Commission in Case No TK-2003-0409. Further, with the exception of the removal of five words pursuant to Amendment No 1 to the ICG/Sprint Agreement, the Agreement is the same as the agreement approved in Case Nos. TK-2003-0407, TK-2003-0414 and LK-2002-1038.

On June 19, 2003 and June 23, 2003, MITCG and STCG, respectively, filed motions to intervene. Both groups argue that the FCC has ruled that the provisions like those in the Sprint/ICG agreements allowing traffic to be transited to their networks of members of these groups facilitating indirect interconnections are not required under the Federal

Telecommunications Act of 1996 (the "Act"). Further, MITCG and STCG contend that allowing traffic to terminate to them through indirect interconnections discriminates against them. Finally, they argue that allowing traffic to transit to them is inconsistent with the public interest because the agreements allegedly allow the parties to avoid paying third parties for traffic. These arguments are misplaced and should not defeat the approval of the Sprint/ICG agreement. Further, these arguments are not sufficient to grant intervention or to grant a request for a hearing.

I. ILECS ARE OBLIGATED TO PROVIDE FOR INDIRECT INTERCONNECTION AND TRANSITING TRAFFIC

The Act and the Federal Communication Commission's ("FCC's") implementing rules, require telecommunications carriers to interconnect, either directly or indirectly with other carriers, and to transit traffic.[1] STCG and MITCG are incorrect when they suggest that federal law imposes no duty to facilitate or aid in the interconnection of two unrelated carriers. In this regard, Section 251(c)(2)(a) requires ILECs to, among other things, interconnect with requesting carriers for the transmission and routing of telephone exchange service and exchange access. The rules implementing this provision of the Act identify the tandem as one of the technically feasible points of interconnection within the incumbent LEC's network.[2] By definition, interconnection at a tandem switch provides access to the tandem switching functionality by connecting the requesting carrier with all the end offices subtending the tandem, including the end offices of third parties.

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1 *See* 47 U.S.C. § 251(a), 47 C.F.R. 51.100(a)(1).

2 47 C.F.R. § 51.305(a)(2)(iii)

Contrary to any inferences the MITCG and STCG wish the Commission to draw, the FCC has not determined that ILECs have no duty to provide transit service.[3] In an arbitration decided by the **Wireline Competition Bureau,** acting on delegate authority and standing in stead of the Virginia Commission, the Wireline Competition Bureau addressed the issue of whether Verizon must charge TELRIC-based rates for transit services. On this issue, the Wireline Competition Bureau "declined to determine for the fist time on delegated authority from the FCC, that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates."[4] The Wireline Competition Bureau, however, was careful not to undermine the CLEC's ability to obtain the UNEs that comprise transit service. In this regard, the Wireline Competition Bureau stated:

> We note, however, that Verizon has not argued that competitive LECs should be prevented from using UNEs to exchange transit traffic with third-party carriers. To avoid such a result, we remind the parties of the petitioners' rights to access UNEs independent of Verizon's terms for transit service. Furthermore, we caution Verizon not to apply its terms for transit service as a restriction on the petitioners' rights to access UNEs for the provision of telecommunications services, including local exchange service involving the exchange of traffic with third-party carriers.[5] (Emphasis supplied.)

The Verizon Order lists tandem switching and interoffice transport as examples of UNEs that can be ordered.[6] Competitors can, therefore, order a combination of these UNEs at TELRIC-based rates to achieve to transit service. As such, the MITCG's and STCG's

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3 *See In the Matter of Petition 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 No. 00-218; CC Docket No. 00-249; CC Docket No. 00-251, 2002 FCC LEXIS 3544, July 17, 2002 Released; Adopted July 17, 2002. (Hereinafter referred to as the "Verizon decision.")

4 *Verizon* at ¶ 117.

5 *Id* at ¶ 121.

6 *Id.*

assertions that the FCC ruled that there is no federal obligation to transit traffic are not accurate.

Indeed, a party who receives substantial benefit from the allowance of transit traffic is a member of MITCG, Mo-Kan Dial. Mo-Kan Dial is indirectly connected to SBC through Sprint's tandem. Over this indirect interconnection, Mo-Kan dial sends interexchange traffic for termination in SBC's territory, including traffic bound for customers of CLECs interconnected to both Sprint and SBC. Sprint believes that much of this traffic is Metropolitan Calling Area ("MCA") traffic. Mo-Kan has no interconnection agreement with Sprint that allows it to transit this traffic. Thus, it would appear that Mo-Kan has no issue with accepting the benefits of indirect connections, but would want to deny the same benefits to others. Under Mo-Kan's argument, it should be allowed to transit its traffic unimpeded without having to secure interconnection agreements or direct interconnections.[7] However, MoKan asserts that to the extent any other party wants to deliver "non-local' traffic to it, different rules should inexplicably apply.

Clearly, Sprint has an obligation under the Act to facilitate indirect interconnection and transit traffic.

II. THE INTERCONNECTION AGREEMENT DOES NOT DISCRIMINATE AGAINST MITG AND STG

In order for the interconnection agreement to discriminate against a carrier not a party to the agreement in violation of the section 252(e) of the Act, the agreement would have to treat a specific carrier different than all other similarly situated carriers. Further, in light of the overall purpose of the Federal Telecommunications Act, it is likely that Congress

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7 In this regard, the originating carrier and the terminating carrier are responsible for establishing an interconnection agreement/compensation arrangement for traffic they exchange via Sprint's tandem e.g., on an indirect basis.

intended § 252(e) to forbid anticompetitive discrimination, *i.e.*, collusive discrimination or oligopolistic behavior among the incumbent and one or more incoming carriers. *MCI Telecomms Corp v. Illinois Bell Telephone Company,* 1999 US DIST LEXIS 11418. (N.D. Ill, June 22, 1999). Nowhere in any of the pleadings have either MITCG or STG identified any manner in which they are treated different than any other non-party, much less a manner that is anticompetitive. MITCG's allegations are solely focused on the difference between parties to the agreements and non-parties. As these groups are not similarly situated, there is no allegation of discrimination that would in any fashion provide grounds for the Commission to reject the interconnection agreement.

III. THE INTERCONNECTION AGREEMENT IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY

Both STCG and MITCG make repeated claims that as the interconnection agreement is inconsistent with the public interest because it purportedly allows a CLEC to transit traffic for termination to their members without compensation. However, the agreement does not affect the right of STCG or MITCG to receive compensation for traffic terminated in their members' respective service areas. First, as acknowledged by STCG, the Commission has held that interconnection agreements do not impose terms on third-parties. (See Paragraph 16 of STCG's Motion to Intervene). Therefore, there is nothing the agreement can do to affect third parties' right to compensation. Further, the agreement expressly acknowledges that "it is the originating Party's responsibility to enter into arrangements with each third party, LEC, ILEC, or CMRS provider for the exchange of transit traffic from the originating Party." Section 66.2.1 of the Interconnection Agreement and Amendment No. 1. Therefore, the agreement specifically preserves any rights STCG or MITCG may have to compensation.

STCG and MITCG retain all rights to seek compensation and to file a complaint if such compensation is not forthcoming. While STCG and MITCG make several complaints about ICG's alleged failure to pay bills and Sprint's alleged failure to deliver records, neither party has ever filed a complaint against ICG or Sprint relating to CLEC-originated transit traffic for CLECs directly connected to Sprint.[8] Indeed, to Sprint's and ICG's knowledge, the only traffic that would be transited under the agreement would be MCA traffic that is based on bill & keep, not access.

While neither Sprint nor ICG are in a position to deny that STCG and MITCG may receive traffic through indirect interconnections within the State of Missouri upon which compensation is not received, Sprint and ICG are at a loss to understand how the provisions of this agreement uniquely defies public policy such that it should be rejected. STCG and MITCG have other cases in which this issue is being addressed by the Commission. These other cases include Case No. TX-2003-0301 in which a rule governing records exchange is currently under development. Additionally, there is Case No TC-2002-057, a complaint case filed by MITCG against several wireless providers. In that case, to the extent that the MITCG companies had applicable tariffs for traffic transited under an interconnection agreement, the amounts were paid. Further, the disagreement in that case was not whether the originating party was willing to compensate the terminating party on the remaining traffic not covered by a tariff. The disagreement was the rate of compensation for that traffic. Cleary, to the extent that STCG or MITCG have issues relating to the termination of traffic transited under an interconnection, they retain the legal right to raise the issues and have raised them before this Commission. Rejecting an agreement voluntarily negotiated

[8] MITCG did file a complaint that initially named Sprint and that related to the delivery of CLEC-originated traffic. However, subsequently dismissed Sprint when it realized that none of the traffic was originating from CLECs directly connected to Sprint. See Case No. TC-2002-194.

between two parties and consistent with the provisions of 251 and 252 of the Act is not the proper remedy.

IV. THE COMMISSION SHOULD NOT GRANT INTERVENTION AND SHOULD PROCEED TO RULE ON THE AGREEMENT WITHOUT A HEARING

In order to grant intervention, the Commission is required to find that the interveners (a) have an interest different than the general public which may be adversely affected or (b) granting intervention would serve the public interest. Neither condition is present in this case. First, as STCG admits, the interconnection agreement will not impose any terms on them. Second, as established above, STCG and MITCG retain all legal rights with respect to any traffic they terminate. Further, with respect to MITCG, only one of the seven members even has an end office connected to Sprint's tandem through which traffic is transited. Therefore, the remaining members have no interest in this proceeding, much less one that may be adversely impacted. With respect to STCG, only 4 of its 30 members have end office connected to Sprint's tandem. Therefore, approximately 90% of STCG's members have no interest in this case, much less one that could be adversely impacted. Finally, granting intervention will not serve the public interest as STCG and MITCG's stated intent is to merely attack provisions of an interconnection agreement that fulfills Sprint's federal obligation to offer transit service and has been repeatedly approved by the Commission. Therefore, the Commission should deny intervention.

Both STCG and MITCG also request an evidentiary hearing in their motions to intervene. However, they cite to no statutory provision that would entitle them to a hearing. In the absence of a statutory requirement, a request for a hearing is discretionary with the Commission. See *State ex rel. Laclede Gas Co. v. Public Service Comm'n,* 535 S.W.2d 561, 566 (Mo. App. 1976); *Cade v. State,* 990 S.W. 2d 32, 37 (Mo. App 1999). STCG and

MITCG have failed to show cause why the Commission should exercise its discretion and grant a hearing. First, the Commission's determination in this case is very limited – it can only approve or reject the agreement. *See* 47 U.S.C 252(a); *See also Bellsouth Telecoms v. MCIMetro Access Transmission Servs,* 317 F.3d 1270 (11th Cir. 2003). The Commission can not reject the "offending provisions" only or order the parties to modify the agreement as requested by STCG and MITCG. Second, identical versions of this agreement have been repeatedly approved by the Commission including this year. STCG and MITCG have not raised any new allegations that were not pending in separate cases before the Commission when the earlier agreements were approved. Therefore, just as the Commission found in the earlier case without a hearing, the Commission can find in this case – that the agreement should be approved as it is consistent with the terms of section 252 of the Federal Telecommunications Act.

CONCLUSION

For the reasons stated herein, the Commission should deny the motions to intervene, deny the request for a hearing and approve the interconnection agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on each of the following parties by first-class electronic/facsimile mail, this 2nd day of July, 2003.

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