

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

In the Matter of the Application of)
Missouri RSA No. 5 Partnership, d/b/a)
Chariton Valley Wireless for Approval of)
an Interconnection Agreement with)
Southwestern Bell Telephone Company,)
LP d/b/a SBC Missouri Pursuant to)
Section 252(e) of the Telecommunications)
Act of 1996.)

Case No. TK-2005-0304

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”) and states:

1. On March 15, 2005, Missouri RSA No. 5 Partnership, d/b/a Chariton Valley Wireless (“Chariton Valley”) filed an application for approval of an interconnection agreement with Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (“SBC”).

2. The interconnection agreement between SBC and Chariton Valley appears to lack a complete transit traffic provision. In a recent interconnection arbitration case between SBC and Level 3 Communications, LLC (“Level 3”), SBC claimed transit traffic provisions are not “interconnection” and are therefore not required to be submitted to the Commission for approval. *In the Matter of Level 3 Communications, LLC’s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to establish an Interconnection Agreement with Southwestern Bell Telephone Company, LP d/b/a SBC Missouri*, Case No. TO-2005-0166. Following up on this understanding of SBC’s position, the Staff contacted Chariton Valley and confirmed that the parties had in fact entered into a separate agreement for transit traffic and did not intend to submit this additional agreement to the Commission for approval.

3. The Staff is not convinced by SBC's argument in the Level 3 arbitration proceeding that the transit traffic provisions do not constitute interconnection with SBC. Transit traffic provisions are routinely made a part of the interconnection agreements filed with the Commission under Section 252(e). SBC's arguments do not explain what has changed to remove transit traffic provisions from interconnection agreements reviewed by this Commission. Absent any legal authority for removing transit traffic as an interconnection service under Section 252(e), the Staff recommends that the interconnection agreement be rejected unless the parties submit the transit traffic agreement as an amendment to the interconnection agreement.

4. A recent Federal Communications Commission ("FCC") order discusses the issue of whether transit traffic provisions should be included in interconnection agreements. In the FCC's Further Notice of Proposed Rulemaking released on March 3, 2005 in CC Docket No. 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime* ("FNPRM"), the FCC stated that "although many incumbent LECs, mostly BOCs, currently provide transit service pursuant to interconnection agreements, the [FCC] has not had occasion to determine whether carriers have a duty to provide transit service."¹ The FCC further stated:

The record suggests that the availability of transit service is increasingly critical to establishing indirect interconnection - a form of interconnection explicitly recognized and supported by the Act. It is evident that competitive LECs, CMRS carriers, and rural LECs often rely upon transit service from the incumbent LECs to facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.²

Moreover, it appears that indirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic. Competitive LECs and CMRS carriers claim that indirect interconnection via the incumbent LEC is an efficient form of interconnection where traffic levels do not justify establishing costly direct connections. As AT&T explains,

¹ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, released March 3, 2005, at 120.

² *Id.* at 125.

“transiting lowers barriers to entry because two carriers avoid having to incur the costs of constructing the dedicated facilities necessary to link their networks directly.” This conclusion appears to be supported by the widespread use of transiting arrangements.³

Here the FCC recognizes that transit service is a form of interconnection “explicitly recognized and supported by the Act.” Despite this conclusion, the FCC is currently seeking comment on whether the FCC has the legal authority to impose transiting obligations. The FCC is also seeking comment, assuming it has the necessary legal authority, on whether the FCC should exercise that authority to require the provisioning of transit services. It is clear from the *FNPRM* that the FCC intends to directly address the issue in the near future.

5. The Staff believes the transit traffic agreement between SBC and Chariton Valley should be submitted to this Commission under Section 252(e) of the Telecommunications Act. Without conclusively deciding the issue, the FCC’s *FNPRM* suggests that transit service is a form of indirect interconnection. Accordingly, the Staff believes it is premature for SBC and/or Chariton Valley to determine that they are under no obligation to submit the transit traffic agreement to the Commission. The Staff recommends that the Commission direct the parties to file the transit traffic agreement with the Commission for approval under Section 252(e) or a response explaining the authority under which they refuse to submit the agreement to the Commission for approval.

6. The Commission’s authority to approve or reject this interconnection agreement is pursuant to 47 U.S.C. § 252(e) of the Telecommunications Act. Under this section, the Commission may only reject an interconnection agreement adopted by negotiation if: 1) the Commission finds that the agreement discriminates against a telecommunications carrier not a

³ *Id.* at 126.

party to the agreement; or 2) the implementation of such agreement is not consistent with the public interest, convenience or necessity.

7. The Staff believes 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. Other carriers may wish to opt into the SBC/Chariton Valley transit traffic provision under Section 252(i), which states:

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.

If SBC and Chariton Valley 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). Furthermore, to the extent transit traffic service is subject to Section 252, the Staff is unable to determine whether the terms and conditions are discriminatory or against the public interest without reviewing the parties’ agreement on transit traffic. If the parties maintain that the transit traffic provision does not need to be filed with the Commission, the Staff recommends that the interconnection agreement be rejected for discriminating against third-party carriers unable to opt into the same terms and conditions agreed to between SBC and Chariton Valley.

8. This recommendation is consistent with the Staff’s recommendation filed earlier this week in Case No. TK-2005-0285, *In the Matter of the Application of Level 3 Communications, LLC, and Southwestern Bell Telephone Company, LP d/b/a SBC Missouri for Approval of their Negotiated Interconnection Agreement and Superseding Amendment under*

Section 252(e)(1) of the Telecommunications Act, in which SBC and Level 3 entered into an interconnection agreement that lacks a complete transit traffic provision.

WHEREFORE, 1) The Staff recommends that the parties be given an opportunity to file the transit traffic provision as an amendment to the interconnection agreement or to separately explain why SBC and Chariton Valley are not required to file the traffic transit provision with the Commission; and 2) The Staff recommends 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).

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14th day of April 2005.

/s/ Marc Poston
