

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

Application of Chariton Valley Communications)
Corporation, Inc., for Approval of an Interconnection)
Agreement with Southwestern Bell Telephone, L.P.) Case No. TK-2005-0300
d/b/a SBC Missouri pursuant to Section 252(e) of)
the Telecommunications Act of 1996.)

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to reject the comprehensive interconnection agreement (ICA) filed by Chariton Valley Communications Corporation, Inc. (Chariton Valley) and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (SBC Missouri) that was the result of extensive and lengthy negotiations between these companies and represents the true business arrangements under which these companies wish to do business. The Commission rejects the filed ICA because Chariton Valley and SBC Missouri did not formally file a separate, privately negotiated transiting traffic agreement.¹ I must dissent from this order because I disagree that the transiting traffic agreement must be filed for Commission approval.

The Commission has approved a very similar ICA in a recent decision in which SBC Missouri and Level 3 Communications had not reached a final agreement on transit traffic provisioning.² While the decision in that case included a requirement that the parties file any transiting traffic agreement that they do finally reach, the

¹ Transiting traffic is a service that allows Chariton Valley to deliver traffic originating on its network to SBC Missouri, who then sends the traffic to a third-party carrier where the call terminates.

² See *In the Matter of the Application of Level 3 Communications, LLC and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri for Approval of Their Negotiated Interconnection Agreement and Superseding Amendment under Section 252(3)(1) of the Telecommunications Act*, Order Approving Interconnection Agreement and Directing Parties to File Their Transiting Traffic Agreement as an Amendment to the Interconnection Agreement, Case No. TK-2005-0285 (May 13, 2005).

Commission found the existing ICA met the requirements of the 1996 Telecommunications Act, stating:

"There is no reason to believe that an interconnection agreement must include specific provisions for transiting traffic in order to be approved. . . . Therefore, the mere absence of specific transiting traffic provisions in the submitted SBC Missouri – Level 3 interconnection agreement can not justify the rejection of that agreement. . . . the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity."³

While the majority felt that a future transiting traffic agreement might alter their view of the filed ICA, they could not fault the terms of the existing ICA under review.

I disagree with the Commission's rejection of a perfectly acceptable interconnection agreement similar to those previously approved, because the parties declined to file a transiting traffic commercial agreement for approval under § 252(e).

The majority asserts that transit traffic provisioning is a form of "interconnection service"⁴ and that no interconnection agreement should be approved if it leaves out an interconnection service that is contained in a separate agreement. It reasons that the inability for other carriers to opt into the transiting traffic provisions renders the whole ICA discriminatory. Neither Staff's pleadings nor the Commission's Order point to a specific provision of the 1996 Telecommunications Act (the Act) or any of the FCC's rules thereunder that require the provisioning of transiting traffic services.

Section 251(a) of the Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other

³ *Id.* See also, *In the Matter of the Application of ALLTEL Communications, Inc., for Approval of its Successor Cellular/PCS Interconnection Agreement and Accompanying Amendment with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, Under 47 U.S.C. §252.*, Order Approving Interconnection Agreement, Case No. TK-2005-0114.

⁴ It is telling that the only alleged authority cited in the Report and Order for the majority's conclusory statement that transit service falls within the definition of interconnection service is a 2003 Connecticut PUC case.

telecommunications carriers." This does not mean that every indirect transmittal of traffic is going to constitute an "interconnection service." The duty to interconnect that is intended by this language is the duty to terminate traffic that is indirectly provided from another carrier, upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251.

Both Staff and SBC Missouri (in other cases before the Commission) have pointed out that in a recent proposed rulemaking the FCC noted that it "has not had occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.⁵ At least one federal district court has reached the same conclusion.⁶ Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this Commission did not need to reach the conclusion that an agreement to provide these services, negotiated under private commercial standards, needs to be filed with the

⁵ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

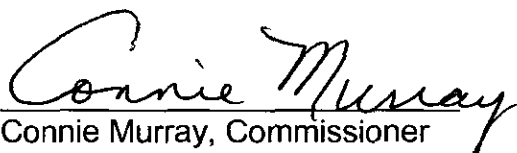
⁶ See *Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules. I would note that simply because we could require transiting traffic agreements be filed with the Commission, does not mean we should.

Commission for approval or that the failure to file the transiting traffic provisions renders the existing ICA discriminatory.

It is my opinion that requiring transiting traffic agreements to be filed with the Commission and thereafter available for adoption by all CLECs could have an adverse impact on carriers' willingness to negotiate private, commercial agreements for transiting traffic or for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. SBC Missouri has shown its compliance with the Act by filing the existing transiting traffic agreement with the FCC pursuant to this provision. No other review is necessary.⁷

Respectfully submitted,


Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 19th day of May, 2005.

⁷ SBC Missouri submitted as an attachment a copy of the Transit Traffic Service Agreement between it and Chariton Valley as a courtesy to the Commission. See Response of Southwestern Bell Telephone, L.P. to the Staff's Recommendation. SBC Missouri asserts that it filed this agreement with the Federal Communications Commission ("FCC") on February 15, 2005.