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June 23, 2003

Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Case No. TK-2003-0540

FILED⁴
JUN 23 2003
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing on behalf of the Small Telephone Company Group, please find an original and eight copies of an Application to Intervene and Request for Hearing.

Please see that this filing is brought to the attention of the appropriate Commission personnel. Copies of the attached are being provided to parties of record. If you have any questions regarding this filing, please give me a call. I thank you in advance for your attention to and cooperation in this matter.

Sincerely,

Brian T. McCartney

Brian T. McCartney

BTM/da
Enclosure
cc: Parties of Record

FILED⁴

JUN 23 2003

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

**Missouri Public
Service Commission**

Application of Sprint Missouri, Inc. d/b/a/ Sprint)
for Approval of its Master Interconnection and Resale)
Agreement with Comm South Companies, Inc.)

Case No. TK-2003-0540

APPLICATION TO INTERVENE AND REQUEST FOR HEARING

COMES NOW the Small Telephone Company Group (STCG)¹ and for its
Application to Intervene and Request for Hearing, states to the Missouri Public Service
Commission (Commission) as follows:

SUMMARY

The Master Interconnection Agreement and Resale Agreement (the Agreement)
between Sprint Missouri, Inc. (Sprint) and Comm South Companies, Inc. d/b/a Comm
South, Inc. (Comm South) discriminates against third parties and is inconsistent with
the public interest by purporting to allow Sprint and Comm South to deliver local and
non-local (i.e., interexchange) traffic to third party incumbent local exchange carriers
(ILECs), such as the STCG member companies, in violation of STCG tariffs and in the
absence of billing records for compensation.

Although the Agreement "acknowledges" an originating party's responsibility to
enter into arrangements with third party LECs to whom they terminate traffic, there is
nothing in the Agreement that requires the originating party to do so. As a practical
matter, competitive local exchange carriers (CLECs), such as Comm South, routinely
terminate traffic (primarily interexchange traffic) to third party ILECs via these transit

¹ See Attachment A.

provisions without any agreement with the third party ILEC to do so, without providing records of the traffic so terminated, and without paying for such terminating traffic in accordance with the approved intrastate access tariffs of third party ILECs.

The Agreement specifically allows the transiting of non-local (i.e., interexchange) traffic to third party ILECs, such as the STCG member companies. There is absolutely nothing in the Telecommunications Act of 1996 (or any other requirement of which the STCG is aware) that requires local exchange carriers, such as Sprint, to transit interexchange traffic. Interexchange traffic is clearly subject to the intrastate access tariffs of the STCG member companies and should be delivered and compensated in accordance with those tariffs. The effect of the Agreement is to circumvent the traditional routing of interexchange traffic (i.e., via Feature Group D Signaling) and deliver such traffic over common trunk groups (i.e., via Feature Group C Signaling) where it is commingled with other local and interexchange traffic and unidentifiable to the terminating ILEC. The Agreement, to the extent it permits the transit of interexchange traffic, discriminates against third party ILECs by preventing them from applying their access tariffs to this traffic.

To the extent the Agreement contemplates the transit of local traffic, this too discriminates against third party ILECs, such as STCG member companies. Although the Agreement acknowledges that the originating party should have an agreement with the third party ILEC to exchange local traffic, experience has shown that the CLECs have not done so. In fact, the STCG is unaware of any instance where an originating CLEC, such as Comm South, has obtained an agreement prior to transiting local traffic

to third party ILECs. More importantly, all of the rights of Sprint and the obligations of Comm South pursuant to the Agreement are unavailable to third party ILECs because they are "non-parties" and as such the Agreement prohibits third parties from obtaining any of the benefits of the Agreement (such as the requirement for the creation and exchange of records and the ability to disconnect for failure to pay).

The fact that the Agreement purports to allow Comm South to send traffic to STCG companies in violation of their access tariffs and without any safeguards to ensure identification and compensation for this traffic will have a direct and adverse impact upon the STCG member companies. The STCG therefore seeks intervention and hearing to address the provisions of the Agreement, particularly those that purport to allow Sprint and Comm South to deliver traffic to STCG exchanges in violation of STCG's lawful switched access tariffs. The Agreement's "transiting" provisions are discriminatory and against the public interest. Accordingly, either Sprint and Comm South must remove these provisions from the Agreement, or the Commission must reject the Agreement as filed.

APPLICATION TO INTERVENE

1. On June 11, 2003, the Commission issued its order giving notice of this case and allowing twenty (20) days for intervention and motions for hearing.

2. The STCG requests a hearing to address the provisions in the agreement that purport to allow Sprint and Comm South to deliver interexchange traffic to third party ILECs in violation of STCG tariffs and prior Commission orders. The STCG

opposes the Agreement's "transiting" provisions because they are discriminatory and inconsistent with the public interest.

3. For the purposes of this case, the STCG consists of the companies listed in Attachment A. The member companies are small incumbent local exchange carriers that provide local and exchange access service in the state of Missouri. Some STCG members directly subtend Sprint switched access tandems.²

4. As explained below, the interests of the STCG member companies will be directly and adversely affected if the Commission approves an Agreement that will allow Sprint and Comm South to deliver local and interexchange telecommunications traffic to the STCG member companies' exchanges in violation of the STCG's tariffs and in the absence of billing records or compensation. Moreover, granting the STCG's proposed intervention will serve the public interest because the STCG member companies have many years of expertise in the regulatory and technical requirements for providing telecommunications services to rural Missouri.

REQUEST FOR HEARING

5. **The Federal Act.** The STCG requests a hearing to examine the Agreement's "transiting" provisions under the standards contained in the federal Telecommunications Act of 1996 ("the Act"). The Act establishes two grounds for the Commission to reject a negotiated agreement:

² e.g. Holway Telephone Company, IAMO Telephone Corporation, Kingdom Telephone Company, and Rock Port Telephone Company.

- (1) The agreement, or a portion thereof, discriminates against a telecommunications carrier not a party to the agreement; or
- (2) The implementation of such an agreement is not consistent with the public interest, convenience, or necessity.

47 U.S.C. § 252(e)(2). In this case, both grounds for rejection are present. First, the Agreement discriminates against third parties by purporting to allow Sprint and Comm South to deliver interexchange traffic to third-party ILECs such as the STCG member companies in violation of Commission-approved switched access tariffs. Second, the Agreement is inconsistent with the public interest, convenience, and necessity because it encourages the continued flow of uncompensated and unidentified traffic over Missouri's telecommunications network, which in turn places an increased burden on those companies and customers that do pay their bills and play by the rules.

6. **The Agreement is discriminatory to third-party carriers such as the STCG companies.** The Agreement discriminates against the STCG in that it purports to allow Comm South to send interexchange "intraLATA toll and switched traffic"³ to STCG exchanges in violation of STCG switched access tariffs and in the absence of billing records or compensation for the use of the STCG's facilities and services. The two Parties to the Agreement are attempting to establish terms and conditions for the use of third parties' networks, but the STCG member companies already have Commission-approved switched access tariffs that apply to interexchange CLEC traffic. Thus, the "transiting" provision is inappropriate and unlawful in that it purports to

³ Agreement, § 66.1.

authorize and establish terms for the delivery of traffic that directly violates the STCG member companies' existing tariffs.

7. The Agreement is also discriminatory in that it establishes clear guidelines and rules for the exchange of traffic between Comm South and Sprint, yet it provides no such protections for the third parties with which it also purports to authorize the exchange of traffic. For example, the Agreement requires the transiting party to provide the terminating party with information about transit traffic from a third party LEC, yet the agreement does require either party to provide information on transit traffic terminating to a third party LEC.⁴ Similarly, the Agreement allows Comm South and Sprint to bill the transiting Party for transit traffic that does not identify the originating party, but it does not provide the STCG companies with the same right.⁵ Rather, the Agreement purports to limit the liability of Comm South and Sprint for traffic delivered to third parties.⁶

8. The Agreement also contains a number of safeguards to ensure that Sprint receives payment for its termination services, but no such safeguards are available to ensure that the STCG companies receive payment for their termination services. For example, the Agreement does not become effective until Sprint collects all past due amounts from Comm South, but there is no such mechanism for the STCG

⁴ Agreement, § 66.4.2.

⁵ Agreement, § 66.3.1.2.

⁶ Agreement, § 10.7.

companies to collect their past due amounts from Comm South.⁷ The Agreement allows the Parties (i.e. Sprint and Comm South) to perform traffic studies to determine traffic jurisdiction, but does not provide the STCG companies with the same rights or access to those studies.⁸ Similarly, the Agreement allows Sprint to disconnect service after reasonable notice if Comm South fails to pay its bills, but the Agreement does not provide the same protections for third-party carriers such as the STCG member companies.⁹ In fact, because the transit traffic is commingled with other traffic on common trunk groups, STCG member companies are not able to distinguish and block the traffic.

9. **The Agreement is inconsistent with the public interest, convenience, and necessity.** The Agreement encourages the delivery of uncompensated interexchange CLEC traffic, and thus it contradicts the STCG member companies' lawful tariffs and prior Commission orders. The Agreement will have direct and adverse impacts upon the STCG member companies. Uncompensated and unidentified "transit" traffic is a real problem in Missouri, and this problem is made worse by the fact that Sprint has ceased passing records of the "transit" traffic that Sprint delivers to the STCG companies. In other words, neither Sprint nor the CLECs and wireless carriers who interconnect with Sprint are providing records that would allow the STCG companies to bill for the interexchange traffic that Sprint delivers to

⁷ Agreement, § 4.1.

⁸ Agreement, § 37.4.

⁹ Agreement, § 2.2.

STCG member companies. Therefore, the Agreement is inconsistent with the public interest because it encourages the continued flow of uncompensated and unidentified traffic over Missouri's telecommunications network, and this in turn places an increased burden on those companies and customers that do pay their bills and play by the rules.

10. **Interexchange Traffic.** The Agreement claims that it establishes the "rates, terms and conditions for **local** interconnection, **local** resale, and the purchase of unbundled network elements,"¹⁰ but the Agreement's "transiting" provisions purport to authorize Sprint and Comm South to deliver **interexchange "intraLATA toll and switched traffic"**¹¹ **to the STCG companies in violation of STCG tariffs and in the absence of billing records or compensation.** The Agreement's "transiting" provisions are outside the purview of lawful agreements under the Act. The transit provisions would allow CLECs to avoid paying for interexchange traffic that is delivered to the STCG exchanges by avoiding the Feature Group D (FGD) network for interexchange traffic. Instead, the Agreement would allow **interexchange** CLEC traffic, to which access rates clearly apply, to be delivered to the STCG companies over the common trunk groups of the so-called "local exchange carrier" Feature Group C (FGC) network without any records or compensation.

11. Interconnection agreements establish the rates, terms, and conditions for the interconnection and exchange of traffic between the two companies that are parties to the agreement. It is unlawful and unreasonable to allow two parties to the

¹⁰ Agreement, page 1.

¹¹ Agreement, § 66.1.

agreement to establish terms and conditions that would allow them to avoid paying for traffic that is destined for third party carriers. Such provisions are outside the scope of interconnection agreements.

12. As a result of the "transit" provisions in this Agreement, unidentified traffic is delivered to STCG exchanges in violation of STCG access tariffs. Under the Agreement, Sprint is clearly acting as an interexchange carrier (IXC), not a local exchange carrier, when Sprint delivers traffic from one exchange to a third party carrier's exchange. Nevertheless, Sprint's Agreement seeks to avoid the traditional IXC responsibilities to comply with access tariffs and compensate terminating carriers for the use of their networks. This will result, and indeed has already resulted, in the delivery of unidentified, unauthorized, and uncompensated traffic to STCG exchanges. When STCG member companies attempt to bill for interexchange CLEC traffic for which they have received records, the CLECs typically refuse to pay.

13. Comm South should deliver interexchange traffic to the STCG companies in accordance with the rates, terms and conditions of their respective access tariffs, just as any other local exchange carrier is required to do. Likewise, Sprint should bear responsibility for interexchange traffic that it delivers to STCG exchanges in the same way that traditional interexchange carriers such as AT&T and MCI/WorldCom bear responsibility for the traffic they deliver to STCG exchanges.

14. **The Agreement violates prior Commission Orders.** Specifically, the Agreement's "transiting" provisions violate prior Commission orders which establish access tariffs as the lawful compensation mechanism for interexchange CLEC traffic

and require CLECs to either (a) provide billing information for interexchange traffic delivered over common trunks; or (b) deliver interexchange traffic over separate trunks.

15. As a threshold matter, the Commission has approved the STCG's access tariff rates for intrastate interexchange traffic. Under Section 392.240, RSMo 2000, the Commission has the authority over the rates and charges that are charged or collected by telecommunications companies operating in Missouri. Rates promulgated by the Commission in accordance with statute have the same force and effect as if directly prescribed by the legislature.¹² Contracts between public utilities and their customers cannot limit the Commission's rate-making authority.¹³ Two regulated utilities cannot contract around an order from the Commission.¹⁴ This is especially true where a contract between carriers purports to supercede the lawful tariffs of a third carrier not a party to the contract. A Commission order "will supercede the terms of a contract agreement between two telephone companies as to the service rates they charge each other."¹⁵

¹² *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 114; 81 L.Ed. 540; 57 S.Ct. 345 (1937); *State ex rel. Jackson County v. Public Service Comm'n*, 532 S.W.2d 20, 22 (Mo. banc 1975)(quoting 64 Am.Jur2d Public Utilities, §244).

¹³ *State ex rel. Capital City Water Co. v. Missouri Public Service Comm'n*, 850 S.W.2d 903 (Mo. App. 1993).

¹⁴ *In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service after the Passage and Implementation of the Telecommunications Act of 1996*, Case No. TO-99-483, Report and Order, issued Sept. 7, 2000, p. 29.

¹⁵ *Oak Grove Home Telephone Co. v. Round Prairie Telephone Co.*, 209 S.W. 552, 553[4] (Mo. Ct. App. 1919).

16. Moreover, in Case No. TO-97-40, the Commission explained that an interconnection agreement between two parties cannot impose terms on a third party. Specifically, the Commission held that an interconnection agreement between other parties cannot displace the STCG's lawful switched access rates:

The Commission finds that since the other LECs are not a party to this arbitration, traffic to and from them should be handled by existing switched access rates. . . . The switched access rates are already used when toll traffic is passed between carriers and represents an existing business arrangement between the companies.¹⁶

Thus, the Commission has specifically held that the STCG's access rates apply to interexchange CLEC traffic.

17. Likewise, the Commission has also held that when CLECs send interexchange traffic to STCG exchanges, the CLECs must either: (1) send records and reports to the STCG companies for any interexchange traffic that they send to STCG exchanges; or (2) separately trunk interexchange traffic destined to STCG exchanges.¹⁷ Unfortunately, this has never happened, and CLECs have simply sent interexchange traffic to STCG exchanges in violation of STCG access tariffs, without records, and

¹⁶ *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40, *Arbitration Order*, issued Dec. 11, 1996 (emphasis added).

¹⁷ *In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service after the Passage and Implementation of the Telecommunications Act of 1996*, Case No. TO-99-483, *Report and Order*, issued Sept. 7, 2000, p. 34, ordered ¶ 19.

without separate trunking.

18. **There is no federal obligation to transit traffic.** The Agreement purports to allow the delivery of local and non-local traffic, but the Act does not require Sprint to transit traffic.¹⁸ In fact, the FCC has explained that ILECs have no general obligation to transit another carrier's traffic to a third party.¹⁹

CONCLUSION

The Agreement discriminates against the STCG companies because it purports to allow Comm South and Sprint to deliver traffic to the STCG exchanges in violation of STCG tariffs and in the absence of billing information or compensation for the use of STCG facilities and services. The Agreement is also inconsistent with the public interest because it encourages the continued flow of uncompensated and unidentified traffic over Missouri's telecommunications network, and this in turn places an increased burden on those companies and customers that do pay their bills and play by the rules. The Agreement's transiting provisions also violate prior Commission orders regarding the termination of interexchange CLEC traffic. For these reasons, the Agreement must either be modified by Comm South and Sprint to eliminate "transit" traffic to third parties, or it must be rejected by the Commission.

¹⁸ See Agreement, § 1.8.3 (defining "transit traffic" as delivery of local and non-local traffic).

¹⁹ *In the Matter of the Petition of WorldCom, Inc. pursuant to Section 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n regarding Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, released July 17, 2002.

Respectfully submitted,

By Brian T. McCartney

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 23rd day of June, 2003, to the following parties:

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Brian T. McCartney
Brian T. McCartney

ATTACHMENT A

BPS Telephone Company
Cass County Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Fidelity Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corporation
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Company
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Exchange, Inc.
Stoutland Telephone Company