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February 25, 2004

FILED

FEB 25 2004

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

Missouri Public
Service Commission

Re: Comments of the Missouri Independent Telephone Company Group ("MITG")
Case No. TX-2003-0487

Dear Secretary:

Enclosed please find an original and eight copies of the Comments of the Missouri Independent Telephone Company Group ("MITG") in the above referenced case.

Thank you for seeing this filed.

Sincerely,


Lisa C. Chase

LCC:lw

Encl.

CC: Public Service Commission
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FILED

FEB 25 2004

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Missouri Public
Service Commission

In the Matter of Proposed Commission Rules)
4 CSR 240-36.010, 36.020, 36.030, 36.040,)
36.050, 36.060, 36.070, and 36.080.)

Case No. TX-2003-0487

**COMMENTS OF THE MISSOURI INDEPENDENT TELEPHONE COMPANY
GROUP ("MITG")**

The Missouri Independent Telephone Company Group, consisting of the following telephone companies, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc., and Northeast Missouri Rural Telephone Company, hereby submits the following comments with respect to the proposed rules, 4 CSR 240-36.040, 4 CSR 240-36.050, 4 CSR 240-36.060, and 4 CSR 240-36.080 pertaining to Alternative Dispute Resolution Procedures through Mediation and Arbitration. Generally, these comments will address the need for modifying the rules to permit notice and opportunity for third-party carrier intervention at the earliest opportunity to protect their interests when the parties to an interconnection agreement have addressed terms for the delivery of traffic to third-party carriers.

4 CSR 240-36.040 Arbitration

1. If a petition for arbitration is filed concerning an agreement that addresses traffic destined for carriers that are not party to the agreement, the rule should provide for notice to such carriers, so they will have the opportunity to participate with respect to provisions that concern traffic destined for them. When the parties to the arbitration petition have included, either in the resolved or unresolved portions of the agreement presented for arbitration, provisions for the transport of "transit" of traffic to carriers that

are not parties to the agreement, such non-party carriers should be provided with the opportunity to intervene to ensure that the traffic will terminate to their networks in accordance with their applicable tariffs or agreements. The petition for arbitration should be required to state if the resolved or unresolved aspects of the agreement submitted for arbitration addresses traffic destined for any carrier not party to the agreement.

2. To address these concerns, the MITG offer the following modifications as reflected in bold:

4 CSR 240-36.040(3) Content -- A petition for arbitration must contain:

- (A) A statement of each unresolved issue;
- (B) A description of each party's position on each unresolved issue;
- (C) A statement of all resolved issues and the terms of resolution;
- (D) A proposed agreement addressing all issues, including those upon which the parties have reached an agreement and those that are unresolved. In preparing the proposed agreement, the petitioner should rely on the fundamental organization of clauses and subjects contained in an agreement previously arbitrated and approved by this commission;
- (E) Direct testimony that supports the petitioner's position on each unresolved issue [and];
- (F) **A statement of whether the resolved or unresolved aspects of the agreement submitted for arbitration addresses traffic destined for any carrier not party to the agreement; and**
- (G) Documentation that the petition complies with the time requirements of 4 CSR 240-36.040(2) and the certificate requirement of 4 CSR 240-36.020(2).

4 CSR 240-36.040(5) Style of Arbitration -- An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

- (A) ...
- (B) Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted[.], **however there shall be no further negotiation of provisions affecting third party carriers unless said carriers agree to any settlements reached and submitted to the Commission.** Parties may submit to the commission any settlements reached following such negotiations.

(C) ...

(F) If a final offer submitted by one (1) or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, **adopting a result submitted by an intervening carrier that is not party to the agreement**, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission pursuant to that section.

4 CSR 240-36.040(16) Participation in the Arbitration Conferences and Hearings -- Participation in the arbitration conferences and hearings is strictly limited to the parties in a negotiation pursuant to section 251 and 252 of the Act, the arbitrator, and the arbitrator's advisory staff[.], **except when the resolved or unresolved aspects of the agreement submitted for arbitration addresses traffic destined for any carrier not party to the agreement**. Only those parties involved in the negotiation shall be parties in the arbitration[.], **however, if those parties address traffic destined for any carrier not party to the agreement, then any such third-party carrier may intervene in the arbitration and participate with respect to all provisions addressing traffic destined to the third-party carrier**. Others that formally request to be kept apprised of the arbitration proceeding will be placed on the "Information Only" portion of the service list.

4 CSR 240-36.050 Commission Approval of Agreements Reached by Arbitration

3. With respect to proposed rule 4 CSR 240-36.050, waiting until the final arbitrated agreement is filed with the Commission for approval does not provide sufficient time for affected non-party carriers to object or intervene. The Commission only has 30 days from the time the final agreement is filed in which to approve or reject the agreement.

4. In Case No. TO-2001-455, the MITG sought to intervene in the arbitration of an interconnection agreement between AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., TCG Kansas City, Inc., and Southwestern Bell Telephone Company.

At the time the agreement was submitted for arbitration, it included "transit traffic" provisions that were not among the provisions in dispute submitted for arbitration. The MITG sought to intervene shortly after the Petition for Arbitration was filed in order to dispute the transit traffic provisions. The Commission denied MITG's Application to Intervene stating that:

"... the Act does not contemplate the intervention of third parties into the private contract negotiations of the parties."¹

"The old, established carriers are required to negotiate in good faith and, where the negotiations fail to result in an agreement, they must submit to arbitration."²

"The interconnection agreement is a contract between two private parties and there is no reason why strangers to that contract ought to be permitted involvement in its formation. As with any contract between private commercial entities, third parties may appropriately become involved at a later time."³

5. The Commission denied MITG intervention at the time the agreement was submitted for arbitration, even though the terms of the agreement addressed traffic destined for the MITG companies, and even though the MITG companies had not been participants in the negotiation of such transit traffic provisions. The Act is designed to foster competition by interconnection agreements between two carriers for the exchange of their local traffic. The Act is not designed to permit two carriers to agree between themselves to the terms of delivery of traffic to third-party carriers that are contrary to such carriers' tariffs or agreements.

6. After the disputed provisions had been arbitrated, and the resultant agreement was submitted for approval, the MITG again applied to intervene in

¹ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, *Order Denying Intervention* (issued May 7, 2001), located at <http://www.psc.state.mo.us/orders/10091455.htm>

² *Id.*

³ *Id.*

accordance with the Commission's Order denying the earlier intervention request. At this time the Commission recanted its earlier indication intervention would be permitted, because the remaining time for approval of the arbitrated agreement would not allow hearing of the MITG objections to the transit traffic provisions. When the MITG sought to intervene "at a later time" (i.e. when the interconnection agreement had been fully arbitrated and the final agreement was filed with the Commission for approval), the Commission stated:

"... the Commission has discretion to grant intervention if doing so will serve the public interest. However, the Commission cannot grant intervention in this case because the statutory time line does not permit extended proceedings such as would be necessary were intervention granted. While the Act requires that the parties submit the arbitrated interconnection agreement for approval by the state commission, the Act also provides that the state commission has only 30 days within which to approve or reject the agreement. If the state commission does not act by the 30th day, the agreement is 'deemed' approved by operation of law."⁴

7. As a consequence of this series of events, the MITG were denied the opportunity to contest the provisions of an agreement that addressed traffic destined for the MITG companies. Since then, such transit traffic has terminated to the MITG companies, and they have been denied their right to compensation for such traffic in accordance with their tariffs.

8. In its Order Denying Rehearing, the Commission dismissed the concerns raised by the MITG and informed the MITG that it could take up its concerns elsewhere. The Commission stated:

⁴ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, *Order Denying Intervention, Approving Interconnection Agreement, and Closing Case*, p. 3 (issued September 13, 2001), located at <http://www.psc.state.mo.us/orders/09131455.htm>

"... the Commission is not authorized under the Telecommunications Act of 1996 to entertain a motion for rehearing. ...

For the benefit of the would-be intervenors, who have been stymied in their attempts to intervene at two different stages of this arbitration, the Commission will point out that their concerns may be addressed by pursuing a complaint in the appropriate forum [a United States district court]."⁵

9. Non-party carriers should not be relegated to federal court in order to challenge an agreement that allows for the termination of traffic in contravention to state tariffs. Either there should be a blanket prohibition against agreements addressing traffic destined for carriers not a party to the agreement, or the rule should contain a provision for meaningful notice and opportunity to intervene. The notice and opportunity to intervene should be provided at the time the petition for arbitration is filed, as that is the only stage where the time frames for arbitrations allow meaningful consideration of these transit traffic provisions.

10. If notice and opportunity to intervene is provided as recommended by the MITG with respect to the subsections of proposed rule 4 CSR 240-36.040 set forth above, then no substantive modifications to proposed rule 4 CSR 240-36.050 would be necessary.

4 CSR 240-36.060 Commission Approval of Agreements Reached by Mediation or Negotiation

11. As discussed above with respect to Commission approval of Arbitrated Agreements, when parties to an interconnection agreement agree to terms pertaining to the delivery of traffic to third parties that are not a party to the agreement, then, for the same reasons set forth above, the third party carriers must be given notice and an

⁵ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, *Order Denying Rehearing* (issued October 9, 2001), located at <http://www.psc.state.mo.us/orders/10091455.htm>

opportunity to intervene at the earliest opportunity to protect their interests. Recently, when the Commission has permitted the MITG as third-party carriers to intervene in petitions filed for approval of negotiated interconnection agreements, the MITG has been able to successfully address its concerns. In addition, permitting the MITG to intervene at the time the petitions were filed provided sufficient time to address the MITG concerns *and* approve the filed petitions.

12. The MITG recommends the following modification to proposed rule 4 CSR 240-36.060 as reflected in bold:

4 CSR 240-36.060(1) Content -- A request for commission approval of an agreement reached by mediation or negotiation shall be filed with the commission and must state that the agreement is a voluntary agreement that is being filed for commission approval under section 252 of the Act. The request shall include a copy of the agreement and a statement of facts sufficient to show that the agreement meets the following: the standards contained in section 252(e) of the Act; requirements of Missouri state law; and the commission's intrastate telecommunications service quality standards or requirements. If applicable, the agreement shall itemize the charges for interconnection and each service or network element that is included in the agreement. **The request shall also include a statement of whether the agreement submitted for approval addresses traffic destined for any carrier not party to the agreement.**

4 CSR 240-36.080 Commission Approval of Amendments to Existing Commission-Approved Agreements

13. Consistent with the above concerns pertaining to third-party carriers' notice and opportunity to intervene at the earliest opportunity to protect their interests, the MITG recommends the following modification to proposed rule 4 CSR 240-36.080 as reflected in bold:

4 CSR 240-36.080(1) Filing Requirements -- The parties to an amendment to any agreement approved or adopted under the rules in this chapter shall jointly submit the amendment to the secretary of the commission. **The pleading filed with the Commission shall include a**

statement of whether the amendment to the agreement submitted to the Commission addresses traffic destined for any carrier not party to the agreement.

WHEREFORE, on the basis of the foregoing, the MITG respectfully requests that the above suggested modifications to the proposed rules be adopted by the Commission.

Respectfully submitted,

**ANDERECK, EVANS, MILNE
PEACE & JOHNSON**

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**ATTORNEYS FOR MISSOURI
INDEPENDENT TELEPHONE
GROUP**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, U. S. Mail, postage pre-paid, this 25 day of February, 2004, to:

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