BEFORE THE 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 REGARDING PSC
PROPOSED ARBITRATION/MEDIATION RULES

COME NOW MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intemedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T Communications of the Southwest, Inc., pursuant to 4 CSR 240-2.180 and notice published in the Missouri Register and for their Comments regarding proposed rules 4 CSR 240-36.010, 4 CSR 240-36.020, 4 CSR 240-36.030, 4 CSR 240-36.040, 4 CSR 240-36.250, 4 CSR 240-36.060, 4 CSR 240-36.070 and 4 CSR 240-36.080 pertaining to Alternative Dispute Resolution Procedural Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996, state as follows:

4 CSR 240-36.010(5)

The definition of "arbitration" appears incomplete, as the other rules contemplate that the Commission will still make the final decision. Perhaps it could be reworded as follows: "Arbitration means the submission of a dispute to the commission for resolution with the assistance of a commission-appointed third party neutral."

4 CSR 240-36.010(6)

We suggest a further refinement specifying that a petition comes under Section 252 of the Act.

4 CSR 240-36.010(8)

We suggest adding "as approved or modified by the commission" for consistency with the remaining proposed rules.

4 CSR 240-36.020(2)

We question the assertion that the requirement that historic information regarding prior cases must be preserved and/or retrieved will not cost the industry more than $500.

4 CSR 240-36.030(3) and (4)

In order to expedite the process, we suggest that the initial conference be convened within 15 days of the request for mediation and that any position statements be submitted at least 2 business days prior to the conference. Additionally, the initial conference should be required to involve substantive mediated negotiations rather than simply procedural discussions.

4 CSR 240-36.030(10)

This subsection should refer not only to exchange of information but also access to information. Oftentimes there are concerns about releasing custody of the information, or it may be a question of physical inspection.

4 CSR 240-36.030(15)

The ten day period is too long. 5 business days should be sufficient.

4 CSR 240-36.030(17)(A)

To the extent that the cross-reference to Section 386.480 could be read as allowing the Commission to order disclosure of information exchanged during mediation, that would be contrary to standard mediation practices and likely inhibit candid mediated negotiations.

4 CSR 240-36.030(18)

It would appear that this section could simply state that the agreement must be submitted under 36.060.

4 CSR 240-36.040(1)

We suggest adding a reference to Section 252 as well as 251.

4 CSR 240-36.040(3)

We suggest a continuation of the practice of allowing submission of testimony pursuant to a case schedule, rather than with the petition. Requiring the parties to devote substantial time during days 135 to 160 to the preparation of testimony will divert resources from efforts to negotiate resolutions. Parties would be free to file testimony with their petitions in order to expedite a case, but should not be required to do so. Also, it would appear to unduly restrict the rights of parties' in their negotiations to mandate that the organization of previous agreements must be followed. Perhaps this could be expressed as a preference, but allow deviation for good cause. In any event, if retained it should not be limited to arbitrated agreements, but rather should refer simply to approved agreements.

4 CSR 240-36.040(4)(B)

A settlement should go to the arbitrator, as it is more likely it will be partial rather than total settlement. The parties should be allowed to change their final offers with the consent of the other party.

4 CSR 240-36.040(5)(D)

This section seems redundant to the next section. The cross-reference should be to the FCC and the commission.

4 CSR 240-36.040(5)(E)

Again, the cross-references should be to the FCC and the commission.

4 CSR 240-36.040(5)(F)

Same comment.

4 CSR 240-36.040(7)

See comments above regarding requiring the filing of testimony with pleadings. On the other hand, because incumbent cost information is rarely made available during negotiations, the rules should require the incumbent (whether as petitioner or respondent) to make all cost studies on which it intends to rely available to the other party, subject to any applicable protective order or nondisclosure agreement, immediately upon the filing of the petition. It would probably best to make this the subject of a separate subsection.

4 CSR 240-36.040(9)

It would appear that the arbitrator should be required (i.e. "shall" rather than "may") to call such an initial meeting in order to organize the proceedings, just as the commission routinely sets prehearing conferences.

4 CSR 240-36.040(10)

We suggest that the timing of commencement of the conferences be left to the arbitrator. The arbitrator will be aware of the need to complete the proceedings within the time specified by the Act and the other portions of the proposed rules. Perhaps the same flexibility could be afforded as stated in subsection (13). That would eliminate an apparent conflict with subsection (15).

4 CSR 240-36.040(12)

Outside experts should not be affiliated with the parties, including any time in their recent past. This restriction should apply whether or not the expert is on advisory staff.

4 CSR 240-36.040(15)

The reference to varying from procedures set out "here" could be clarified to refer to this rule 36.040.

4 CSR 240-36.040(16)

There appears to be a conflict with the provisions of subsection (12) which would allow experts not on advisory staff to be involved.

4 CSR 240-36.040(18)

The arbitrator's ability to change the due date of the initial briefs under subsection (15) should be acknowledged through use of language similar to that in subsection (13).

4 CSR 240-36.040(22)

Ex parte restrictions should commence upon the filing of a petition, rather than the setting of a hearing. The application of Section 386.210 should be acknowledged.

4 CSR 240-36.040(24)

The commission needs to resolve the matter to comply with the Act. Hence, rejection of the report would not seem to be an option. If the concern is that "modification" is too limiting to allow total substitution, then a sentence should be added to indicate that in the event of rejection the commission will issue its own decision in place of the report.

4 CSR 240-36.050(1)

See above comments regarding rejection of the report. The Commission should set the time for filing the agreement when it makes its ruling, rather than employ a uniform seven days established in the abstract. The parties should be allowed to mutually propose an agreement that deviates from the commission's order, so long as they bring the changes to the attention of the commission.

4 CSR 240-36.050(2)

The cross-reference should be to subsection (4). All interested persons should be allowed to be heard, not just parties.

4 CSR 240-36.050(6)

It is unclear why this section is entitled "Applications for Rehearing". Moreover, the language regarding review should conform to 252(e)(6).

4 CSR 240-36.070(1)

The rule should leave room for adoption of portions of agreements as well as entire agreements, consistent with applicable law. The language of 51.809 should be followed.

Absent such modification, there could be costs to private entities substantially in excess of $500 that would not otherwise be incurred, because parties would have to change their practices if entire agreements must be adopted to adopt any portion thereof.

4 CSR 240-36.080(1)

Joint filing should not be required. Notice to the other party should be sufficient, as allowed under 36.070. Indeed, an amendment could be an adoption.

Other comments

Because of problems encountered in the past regarding the examination of costs underlying rate elements, it would be beneficial to also establish rules clarifying the process for filing petitions to investigate such matters independent of specific negotiation and arbitration timeframes. Such proceedings develop information that can then be used in subsequent negotiations and arbitrations regarding rates. Likewise, the commission could develop rules clarifying the process for filing petitions to establish state

requirements for access and interconnection obligations, including unbundling requirements, including as authorized under Section 251(d)(3).

Respectfully submitted,

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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 5th day of March, 2004, either by U.S. Mail, postage paid, fax transmission or e-mail transmission.

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