

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

Southwestern Bell Telephone, L.P., d/b/a)
SBC Missouri's Petition for Compulsory)
Arbitration of Unresolved Issues for a) Case No. TO-2005-0336
Successor Interconnection Agreement to)
the Missouri 271 Agreement ("M2A").

STAFF'S MEMORANDUM OF LAW

COMES NOW the Staff of the Missouri Public Service Commission and states:

1. On March 30, 2005, Southwestern Bell Telephone L.P., d/b/a SBC Missouri filed its Petition for Arbitration pursuant to Section 4.2 of the M2A, Section 252 of the Telecommunications Act of 1996 (47 U.S.C. 252), and Commission Rule 4 CSR 240-36.040. SBC petitions the Commission to conduct nine arbitrations.

2. Section 252 (b) (1) reads:

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

3. Commission Rule 4 CSR 240-36.040(2), which applies to petitions under Section 252, reiterates:

A petition for arbitration may be filed not earlier than the one hundred thirty-fifth day nor later than the one hundred sixtieth day following the date on which an incumbent local exchange carrier receives the request for negotiation.

4. SBC Missouri's Petition does not address when it, the incumbent local exchange carrier, received the applicable requests for negotiation.

5. In an Order issued April 6, 2005, the Commission directed SBC to supplement its Petition so the timeliness of the Petition can be determined and further directed SBC and the Staff to prepare Memoranda of Law advising the Commission of the effects, if any, should

SBC's Petition have not been timely-filed under Section 252 (b) (1) of the Act and Section (2) of the Commission's Arbitration Rule.

6. The Commission has previously determined that parties are not authorized to change the deadline for filing requests for arbitrations under Section 252 of the Act by agreement. In its September 4, 1997, Order Regarding Jurisdiction and Status of Case in *In the Matter of TCG St. Louis for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-98-14, the Commission noted:

The Act does not provide for parties to agree to a "start date" for purposes of requesting interconnection. In essence, TCG and SWBT have attempted to cause this Commission to have jurisdiction by Agreement. The Public Service Commission is a creature of statute and can only exercise such powers as are expressly conferred on it, the limits of which are clearly defined. Therefore, it is clear that this Commission does not have jurisdiction to arbitrate whatever open issues relating to an interconnection remain between TCG and SWBT under the Act."

In that case, the Commission directed the parties to file a pleading as to how they proposed to proceed, including whether the parties wished to proceed under Section 386.230 RSMo.

7. Section 386.230 RSMo reads:

Whenever any public utility has a controversy with another public utility or person and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission shall act as such arbitrators, and after due notice to all parties interested shall proceed to hear such controversy, and their award shall be final. Parties may appear in person or by attorney before such arbitrators.

8. The Commission's April 6 Order concludes that SBC's Petition was timely-filed under Sections 4.1, 4.2 and 4.3 of the M2A. If SBC's Petition was not timely-filed under Section 252 (b) (1) and Commission Rule 4 CSR 240-36.040 (2) as to any of the nine requested

arbitrations, the Commission could still proceed under Section 386.230 if both parties agree to do so.

9. In the alternative, considering the absence of judicial precedent, the Commission could determine that the 135th to 160th day timeframe is not jurisdictional but rather is in the nature of a statute of limitations, i.e., an affirmative defense that is waived if not timely pled.

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ William K. Haas

William K. Haas
Deputy General Counsel
Missouri Bar No. 28701

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-7510 (Telephone)
(573) 751-9285 (Fax)
william.haas@psc.mo.gov

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 15th day of April 2005.

/s/ William K. Haas

William K. Haas