

In the Matter of the Interconnection Agreement)
between Southwestern Bell Telephone, L.P.,)
d/b/a SBC Missouri, and Navigator Telecommunica-) **Case No. TK-2006-0042**
tions, L.L.C., Arbitrated as a Successor Intercon-)
nection Agreement to the Missouri 271 Agreement)
("M2A").)

On March 30, 2005, Southwestern Bell Telephone, L.P., doing business as SBC Missouri, filed its Petition for Arbitration with the Commission pursuant to Section 4.2 of the Missouri 271 Agreement ("M2A"), Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. SBC petitioned the Commission to arbitrate unresolved issues in the negotiation of interconnection agreements between SBC and various competitive local exchange carriers ("CLECs") to replace the M2A, the generally-available interconnection agreement approved by the Commission on March 15, 2001, in conjunction with its recommendation to the United States Federal Communications Commission ("FCC") that SBC be approved to provide in-region long

distance service in Missouri pursuant to Section 271 of the Act.¹ The Commission docketed SBC's Petition as Case No. TO-2005-0336.

The Commission appointed an Arbitrator and proceedings were held pursuant to Commission Rule 4 CSR 240-36.040, concerning Arbitrations under the Telecommunications Act of 1996. The Arbitrator issued his Final Arbitrator's Report on June 21, 2005. After receiving comments from the parties on June 24 and hearing oral argument on June 29 and 30, the Commission issued its Arbitration Order on July 11, 2005. Pursuant to the timeline established by the M2A and the procedural schedule adopted by the Arbitrator, the Commission directed the parties to file their conformed interconnection agreements by July 13. By order of July 14 and with the agreement of all of the parties, this deadline was extended to August 3. The order also amended by interlineation the existing interconnection agreements based on the M2A to extend their expiration from July 19 to August 10.

On August 2, in order to facilitate the adoption by other carriers of the several interconnection agreements resulting from the arbitration in Case No. TO-2005-0336, the Commission established nine spin-off dockets, numbered from TK-2006-0042 through TK-2006-0050. Each of these dockets will serve as the vehicle for further proceedings regarding one of the interconnection agreements arbitrated in Case No. TO-2005-0336.

The present case concerns the arbitrated interconnection agreement between SBC and Navigator Telecommunications, L.L.C. The parties filed their conformed

¹ *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227, (Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), issued March 15, 2001).*

interconnection agreement on August 3. However, SBC and Navigator were unable to agree on the requirements of the Commission's Arbitration Order of July 11 with respect to three areas of the interconnection agreement. The parties request that the Commission specify the correct language and approve their interconnection agreement. In support of their positions on the disputed language, the parties filed memoranda on August 4.

The Staff of the Commission filed its Memorandum and Recommendation stating that the parties' interconnection agreement meets the requirements of § 251 of the Act, including the implementing regulations prescribed by the F.C.C., as well as the pricing standards in § 252(d), and recommending that the arbitrated interconnection agreement be approved. In addition, Staff reviewed the disputed language proposals and finds that either proposal conforms to the provisions of the Act. Staff also recommends that the Commission direct the parties to submit a serially- numbered copy of the agreement and to submit any future amendments to the Commission for approval.

Discussion:

The Disputed Language

1. Navigator GT&C Issue 7: Limitation of Liability.

Navigator GT&C Issue 7: *Should the contract contain limits on liability for willful or intentional misconduct? Which Party's limitation of liability language should be incorporated into this Agreement?*

The Arbitrator considered this issue at Section I(A), pages 66-71 of his Final Arbitrator's Report. The Commission's Arbitration Order adopted this portion of the Report, without modification, as the decision of the Commission. The Arbitrator stated:

The Arbitrator concludes, first, that it is improper for this ICA to attempt to limit or alter damages available under a statute. Second, the Arbitrator concludes that it is contrary to public policy to cap liability for intentional, willful or grossly negligent conduct. Third, the

Arbitrator concludes that liability and indemnity provisions should be reciprocal and symmetrical.

Navigator contends that the Summary Decision Matrix attached to the Report, which states "SBC's language is most consistent with the Arbitrator's Report," is in error.

SBC contends that there is no error. The proposed language is as follows:²

7.1.1 Except as specifically provided in Attachment 25 DSL-MO, the Parties' liability to each other during any Contract Year resulting from any and all causes, other than as specified below in Sections 7.3.1 and 7.3.6, following, **and except** for willful or intentional misconduct (including gross negligence), will not exceed the total of any amounts charged to CLEC by SBC MISSOURI under this Agreement during the Contract Year in which such cause accrues or arises. For purposes of this Section, the first Contract Year commences on the first day this Agreement becomes effective and each subsequent Contract Year commences on the day following that anniversary date.

The effect of the word "and" – proposed by SBC – is to limit liability for willful or intentional misconduct, while the effect of the word "except" – proposed by Navigator – is to not limit such liability. The Commission's Order provides that such liability should not be limited; therefore, Section 7.1.1 of the General Terms and Conditions of the parties' agreement should contain the word "except" as Navigator contends and not the word "and."

2. Navigator GT&C Issue 10: Escrow of Payments on Disputed Invoices.

Navigator GT&C Issue 10: Which party's language regarding grounds for termination for non-payment should be included in this agreement?

The Arbitrator considered Navigator GT&C Issue 10 at Section I(A), pages 49-52 of his Final Arbitrator's Report. The Arbitrator decided the issue of termination for nonpayment as follows:

² SBC's proposed language in **bold font**; CLEC proposed language in underlined font.

SBC's proposed language is reasonable and should be adopted. The necessary and ultimate sanction for nonpayment of undisputed amounts is disconnection. For the reasons raised by SBC, disconnection should be of all services, not just those under a single account number. The timeline contained in SBC's language is commercially reasonable and provides ample warning to the CLEC before disconnection occurs. SBC need not seek specific permission from the Commission before terminating service to a non-paying CLEC.

However, the Arbitrator considered the escrow of payments on disputed bills at Section I(A), pages 34-41. On that point, the Arbitrator stated:

The record shows that SBC's bills contain an unusually large number of errors, leaving the CLECs no option but to dispute many bills. For this reason, the Arbitrator concludes that it would be highly inequitable and contrary to the public interest to require the CLECs to deposit the amount of the disputed bills into escrow as a prerequisite to the billing dispute resolution process. Otherwise, a significant amount of CLEC capital might be tied up in escrow. Therefore, the Arbitrator directs the parties to use the CLECs' proposed language on this point.

The Commission's Arbitration Order took up the issue of inconsistencies alleged by Navigator at pages 44-45, stating, "The Commission agrees that the Final Arbitration Report is inconsistent as alleged by Navigator. However, none of the proposed language is appropriate in view of the Arbitrator's decision that disputed amounts need not be escrowed." The Commission went on to direct that "neither party's Section 14.2.4 shall be incorporated into their ICA" because both versions discussed the escrow of payments on disputed bills. Navigator contends that inconsistencies remain at Sections 9.9, 14.1, 14.2, and 14.5.1.

The Commission's Arbitration Order adopted, as the decision of the Commission, the Arbitrator's determinations that (1) payments on disputed bills need not be escrowed and (2) SBC may terminate all services to CLECs that do not timely pay all undisputed

amounts. In light of these two principles, the Commission makes the following modifications to GT&C Sections 9.9, 14.1, 14.2, and 14.5.1, and directs the parties to adopt the modified language:³

9.9 Failure by the Non-Paying Party to pay any **undisputed** charges determined to be owed to the Billing Party within the times specified in Section 9.7 shall be grounds for termination of the Interconnection, Resale Services, Section 251 (c)(3) Unbundled Network Elements, Collocation, functions, facilities, products and services provided under this Agreement.

14.1 Failure to pay all or any portion of any **undisputed** amount required to be paid may be grounds for disconnection of Resale Services, Section 251 (c)(3) Unbundled Network Elements under this Agreement. If a Party fails to pay any **undisputed** charges billed to it under this Agreement, including but not limited to any Late Payment Charges or miscellaneous charges ("Unpaid Charges"), and any portion of such **undisputed** Unpaid Charges remain unpaid after the Bill Due Date, the Billing Party will notify the Non-Paying Party in writing that in order to avoid disruption or disconnection of the Resale Services, Section 251 (c)(3) Unbundled Network Elements furnished under this Agreement, the Non-Paying Party must remit all Unpaid Non-disputed Charges to the Billing Party within ten (10) Business Days following receipt of the Billing Party's notice of Unpaid Charges.

14.2 If the Non-Paying Party desires to dispute any portion of the Unpaid Charges, the Non-Paying Party must complete all of the following actions not later than ten (10) Business Days following receipt of the Billing Party's notice of Unpaid Charges:

* * *

14.2.2 pay all undisputed Unpaid Charges to the Billing Party;
and .

14.2.3 ~~pay all Disputed Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into an interest bearing escrow account that complies with the requirements set forth in Section 9.4, unless the nonpaying party is not required to escrow such amounts pursuant to Section XX herein; and~~ **Intentionally Left Blank.**

³ Language added by the Commission is shown in **bold**; language stricken by the Commission is shown in ~~strikeout~~.

14.5 Notwithstanding anything to the contrary in this Agreement, SBC MISSOURI's exercise of any of its options under Section 4.4, 10.4.1 and 14.4.2:

14.5.1 will not delay or relieve CLEC's obligation to pay all **undisputed** charges on each and every invoice on or before the applicable Bill Due Date, and

3. Navigator UNE Rider Issue 1: Remand Order Embedded Base Temporary Rider.

Navigator/SBC MO UNE Rider Issue 1: Should the Remand Order Embedded Base Rider be included in Navigator's ICA?

The Arbitrator addressed this issue at Section III, pages 51-52, of his Final Arbitration Report, stating:

This Commission has already approved the Remand Order Embedded Base Rider as an amendment to existing interconnection agreements. To the extent that the Rider fails to address certain provisions, the Parties should address them in this agreement or amend the Rider prior to its inclusion in the agreement. The Commission ordered in TC-2005-0294 that SBC Missouri continue to provide service to CLECs for their embedded customer base under the terms of that Order until new interconnections are reached. Therefore, the Embedded Base Rider, with customer base construed consistently with the Commission's decision, is to be included in the agreement.

The Commission's Arbitration Order adopted this portion of the Arbitrator's Report, without modification, as the decision of the Commission.

The parties' six-page Remand Order Embedded Base Temporary Rider attachment contains numerous disputes of language. The Commission hereby resolves those disputes as follows:

1. All language appearing in bold or underlined font shall be stricken from the attachment, except:

2. At Section 1.1, the underlined words "existing" and "customer" in the third line thereof shall be retained, and
3. At Section 1.1(a), the underlined phrase "termination of service to the existing customer" shall be retained, and
4. At Section 2.1(a), the underlined phrase "termination of service to the existing customer" shall be retained, and
5. At the portion of Section 2.1 beginning at the bottom of page 3, the underlined word "new" in the third line thereof shall be retained, and
6. At the portion of Section 2.1 continuing on the top of page 4, the underlined words "moves, adds and changes" and "to CLEC's existing" and "customer" and "for" and "at existing or new locations," shall be retained, and
7. At Section 2.2.1, the bold phrase "beginning March 11, 2005." shall be retained.

Approval of the Arbitrated Interconnection Agreement

Section 252(e) of the Telecommunications Act provides:

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject -

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that –

(I) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.⁴

Under § 252(e)(1) of the Act, every interconnection agreement must be submitted to the Commission for approval. The Commission may reject a negotiated agreement if it finds that the agreement is discriminatory or that it is not consistent with the public interest, convenience and necessity. The Commission may reject an arbitrated agreement if it finds that the agreement does not meet the requirements of § 251 of the Act, including the F.C.C.'s implementing regulations, or the pricing standards in § 252(d) of the Act. In the present case, it is the latter standard that applies.

Findings of Fact:

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has considered the conformed interconnection agreement, as modified herein by the Commission, and Staff's recommendation. Based upon that review, the Commission concludes that the parties' agreement conforms to the Commission's Arbitration Order of July 11. The Commission finds that approval of the agreement should

⁴ Subsection (d) contains pricing standards.

be conditioned upon the parties submitting a serially-numbered copy of the agreement and submitting any amendments to the Commission for approval pursuant to the procedure set out below.

Amendment Procedure:

The Commission has a duty to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act.⁵ In order for the Commission's role of review and approval to be effective, the Commission must also review and approve or recognize amendments to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection.⁶ This duty is in keeping with the Commission's practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission.⁷

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all amendments, in the Commission's offices. Any proposed amendment must be submitted pursuant to Commission Rule 4 CSR 240-3.513(6).

Conclusions of Law:

The Missouri Public Service Commission has arrived at the following conclusions of law.

⁵ 47 U.S.C. § 252.

⁶ 47 U.S.C. § 252(h).

⁷ 4 CSR 240-3.545.

The Commission, under the provisions of § 252(e) of the Telecommunications Act of 1996,⁸ is required to review interconnection agreements. It may only reject an arbitrated agreement if it finds that the agreement does not meet the requirements of § 251 of the Act, including the F.C.C.'s implementing regulations, or the pricing standards in § 252(d) of the Act. Based upon its review of the agreement between SBC and Navigator Telecommunications, L.L.C. and Staff's Memorandum and Recommendation, the Commission concludes that the agreement meets the requirements of § 251 of the Act, including the F.C.C.'s implementing regulations and the pricing standards at § 252(d) of the Act, and should therefore be approved.

IT IS THEREFORE ORDERED:

1. That the parties shall adopt the modifications to their interconnection agreement described above.
2. That the Interconnection Agreement of Southwestern Bell Telephone, L.P., doing business as SBC Missouri, and Navigator Telecommunications, L.L.C., filed on August 3, 2005, is approved as modified above.
3. That any changes or amendments to this Interconnection Agreement shall be submitted to the Commission for approval in compliance with Commission Rule 4 CSR 240-3.513(6).
4. That no later than noon, August 9, 2005, the parties shall submit a copy of the modified Interconnection Agreement to the Staff of the Missouri Public Service Commission, with the pages sequentially numbered. On the same date, the parties shall

⁸ 47 U.S.C. § 252(e)(1).

file a notice in the official case file advising the Commission that they have complied with this order.

5. That this order shall become effective on August 10, 2005.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to Section 386.240,
RSMo 2000.

Dated at Jefferson City, Missouri,
on this 8th day of August, 2005.