ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.

ATTORNEYS AT LAW
700 EAST CAPITOL AVENUE
COL. DARWIN MARMADUKE HOUSE
P.O. BOX 1438
JEFFERSON CITY, MISSOURI 65102-1438
TELEPHONE 573-634-3422
FAX 573-634-7822

EUGENE E. ANDERECK
TERRY M. EVANS
ERWIN L. MILNE
JACK PEACE
CRAIG S. JOHNSON
RODRIC A. WIDGER
GEORGE M. JOHNSON
BEVERLY J. FIGG
WILLIAM S. LEWIS
VICTOR S. SCOTT
COREY K. HERRON

MATTHEW M. KROHN
LANETTE R. GOOCH
SHAWN BATTAGLER
ROB TROWBRIDGE
JOSEPH M. PAGE
LISA C. CHASE
JUDITH E. KOEHLER
ANDREW J. SPORLEDER
REBECCA L. SELLERS
OF COUNSEL
MARVIN J. SHARP
PATRICK A. BAUMHOER
GREGORY C. STOCKARD *(1904-1993)*
PHIL HAUCK *(1924-1991)*

July 18, 2003

FILED[2]
JUL 18 2003
Missouri Public Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Administrative Law Judge
Missouri Public Service commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. TK-2003-0535

Dear Secretary Roberts:

Enclosed for filing please find an original and eight (8) copies of the MITG's Brief Pertaining to Hearing in the above referenced matter.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for seeing this filed.

Sincerely,

Craig S. Johnson

CSJ/kar
Enclosure
Cc: Dan Joyce, General Counsel
Mike Dandino, Office of Public Counsel
Lisa Creighton Hendricks, Sprint Mo. Inc.
~~Cheryl Hill~~s, ICG
Carl Lumley

Trenton Office
9th And Washington
Trenton, Missouri 64683
660-359-2244
Fax 660-359-2116

Springfield Office
1111 S. Glenstone
P.O. Box 4929
Springfield, Missouri 65808
417-864-6401
Fax 417-864-4967

Princeton Office
207 North Washington
Princeton, Missouri 64673
660-748-2244
Fax 660-748-4405

Smithville Office
119 E. Main Street
P.O. Box. 654
Smithville, Missouri 64089
816-532-3895
Fax 816-532-3899

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Master Interconnection	)	
and Resale Agreement by and between Sprint	)	
Missouri, Inc., and ICG Telecom Group, Inc.	)	**Case No. TK-2003-0535**
Pursuant to Section 251 and 252 of the	)	
Telecommunications Act of 1996.	)	

MITG BRIEF PERTAINING TO HEARING

COMES NOW the MITG, by and through its counsel of record, and pursuant to the Order issued at the prehearing conference held on July 11, 2003, hereby briefs the issue of any Hearing requirements to address the issues raised by Intervenors in this proceeding.

Section 252

Interconnection agreements adopted by negotiation are required to be submitted for approval to the State Commission. Under §252(e)(1), "A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."

Section 252(e)(2) specifies the grounds for rejection, and provides 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;...**" It is also noted that 252(3) preserves the Commission's state authority, notwithstanding 252(e)(2), to establish or enforce other requirements of state law, including "requiring compliance with intrastate telecommunications service quality standards or requirements".

The Telecommunications Act requires written findings as to the grounds for rejecting or approving a contested agreement. 47 USC 252(e)(1). The Act anticipates that carriers that are not a party to the agreement may have grounds to oppose it—either that portions are discriminatory, that portions are not in the public interest, or that intrastate telecommunications service requirements are not met.

At hearing the MITG plans to present evidence establishing that:

1. For transit traffic Sprint terminates, the agreement discriminates in favor of ICG and against non-party ILECs in that the agreement provides the following rights to ICG that Sprint refuses to provide to non-party ILECs:

A. ICG is entitled to record traffic terminating to ICG using its own network, and ICG is entitled to calculate usage made of its terminating facilities based on these recordings. (Section 65.1) In contrast non-party ILECs are not entitled to record or calculate the terminating usage made of their own facilities. A non-party ILEC is instead required to accept recordings supposedly to be made by originating and transiting carriers. A non-party ILECs is required to rely upon such recordings, even when the sum of such recordings do not equal the total traffic terminating to that non-party ILEC.

B. It is Sprint's obligation as a transit provider to provide ICG with traffic information originated by CLECs, ILECs, or CMRS providers. (Section 66.4.2). In contrast, when Sprint transits traffic to non-party ILECs, Sprint denies any obligation to provide traffic information for traffic originated by CLECs, ILECs, or CMRS providers. In fact Sprint has a past practice of failing to provide records. The agreement discriminates against non-party ILECs in that ICG is entitled to obtain billing records provided by Sprint, but similarly situated non-party ILECs are not so entitled.

C. The agreement provides that if Sprint fails to provide ICG with billing records for all traffic transited to ICG, ICG is entitled to bill Sprint for unidentified traffic. (Section 66.3.1.2). In contrast, when there is unidentified traffic terminating to a non-party ILEC, Sprint refuses to be responsible for such unidentified traffic. The agreement discriminates in favor of ICG and against ILECs in that Sprint is providing ICG with the business relationship that Sprint has refused to provide non-party ILECs.

2. The transit traffic provisions of the Interconnection Agreement are are contrary to the public interest in the following respects:

A. the transit traffic provisions purport to allow interLATA toll and intraLATA toll traffic to be transited to non-party ILECs (Sections 60.1, 1.83, 1.84,37.1, 37.2, 37.4, 37.41).

i. interLATA and intraLATA toll are outside of the proper scope of local reciprocal compensation traffic for interconnection agreements.

ii. non-party ILECs have in effect access tariffs that set forth the terms and conditions of compensation for terminating toll traffic. The terms of the agreement are inconsistent with the terms of these access tariffs. The access tariff controls, and no agreement to which an ILEC is not party should be allowed to conflict with an approved tariff.

B. the Missouri experience with "transit" provisions included in interconnection agreements, even those prohibiting the delivery of "transit" traffic before separate agreements with non-party ILECs are obtained, demonstrates that the "transit" relationship deprives non-party ILECs of their right to bill and collect compensation for use of their facilities, and if compensation is not forthcoming their right to stop such traffic from continuing to terminate. This has led to an enormous waste of private and public resources since 1998 in attempting to identify traffic, identify traffic jurisdiction, identify originating and transiting carriers, identify carriers responsible for compensation, obtain or create billing records, collect compensation, and attempting to disconnect trunks over which non-compensated traffic was being "transited". This in turn has led to the processing of complaints with the MoPSC to have primary jurisdiction decisions rendered as a required predicate to filing collection suits in court, and judicial review of Commission decisions in Circuit Court and the Court of Appeals.

C. The "transiting" relationship is not a structure embodied in the Telecommunications Act of 1996. Sprint has no obligation to transit traffic. The Act maintained the existing access regime. The Act adopted interconnection agreement as the platform upon which two local competitors will exchange local traffic. An FCC decision established that ILECs are not required by the Act to transit traffic at reciprocal

compensation rates. A Kansas Corporation Commission decision established that the inclusion of "transit" provisions to which a non-party ILEC does not agree denies the non-party ILEC its equal right to negotiate its own interconnection agreements, which is exactly what has happened in Missouri.

The MITG companies believe they are entitled to a hearing to submit such proof. In its verified application for approval, Sprint Mo Inc represented under oath that the proposed agreement was "consistent with the public interest, convenience, and necessity", and also that the agreement did "not discriminate against other carriers not a party to the agreement as the terms of the Agreement are equally available to any other carrier". See paragraph III of the Application, page 3, and also the personal verification provided by Lisa Creighton Hendricks. Such affirmative allegations of an Application put non-party carriers on notice they had to intervene to challenge such assertions.

The MITG has intervened. There is no question under the Act that non-party carriers have standing to assert that portions of the agreement discriminate against them. Sprint and ICG seem to suggest the MITG and STCG have no standing to contest the agreement because it is a privately negotiated agreement under the Act. The Sprint/ICG interpretation would render the terms of the Act allowing rejection of those portions of the agreement discriminating against non-party carriers a nullity. It is only non-party carriers that have the property rights, and financial interest, to object to such an agreement. It is only "carriers that are not party to the agreement" that can be expected to object to it. If they are not allowed to object, and to submit proof that the agreement should be rejected, it is difficult to see that any state Commission would ever have the occasion to issue written findings as to the deficiencies of any agreement.

The requirement of 252(e)(2) of written findings as to any deficiencies suggests the Commission is to make these determinations. The requirement of findings as to deficiencies suggests that the Commission will have to decide disputes as to whether an agreement is discriminatory, contrary to public interest, or violates intrastate service requirements. As the Missouri statutes require Commission decisions by Order, it is apparent the Commission has to have some basis for entering such an Order.

Judicial Review

The Act not only contemplates such state Commission decisions, it contemplates judicial review of those decisions in federal courts. 252(e)(6) provides for review of state Commission actions in federal district court: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." Both the agreement and Commission's statement are subject to review. Thus a record on which the written findings are based will be necessary.

In interpreting Section 252, the United States District Court for the Western District of Missouri, in the case of *AT&T Communications v Southwestern Bell Tel. Co*, 86 F. Supp 2d 932 (1999), has held that the federal district courts' standard and scope of review of approvals of interconnection agreements is confined to the record and no de novo proceeding may be held. The federal district court is to decide, in evaluating the record, if the factual determinations of the Commission are arbitrary or capricious. See *New England Tel. Co. v. Conversant Comm.*, 178 F.Supp.2d 81 (D.R.I. 2001).

Record

The MITG has asserted that the interconnection agreements are discriminatory and not in the public interest. The Commission must determine if the interconnection agreements are discriminatory as alleged, or not consistent with the public interest. To make these required findings, the Commission must consider substantial and competent evidence and make findings and conclusions based upon that evidence. This may be done by hearing, unanimous stipulation of the facts, or verified application as set forth in *State ex rel Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (MoApp. 1989). Under *Deffenderfer*, the Commission may grant relief based on a verified application *if the parties are provided an opportunity for a hearing and no party requests a hearing* to present evidence. The *Deffenderfer* case does not apply here as the MITG and STCG have clearly requested a hearing. Furthermore, the facts are contested, as reflected at the prehearing conference held on July 11, 2003, thus a unanimous stipulation of the facts will not likely be reached. The hearing process is the remaining process by which the parties can present record evidence upon which this Commission can render its decision.

Due Process

The MITG companies have alleged that approval of this interconnection agreement will damage non-party ILECs' interest in obtaining complete compensation for use of their networks. "Application of due process protection to executive and administrative action has followed from recognition of the basic principle that 'the constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making.' [cite omitted] This due process principle has vitality for executive and administrative determinations." *Thompson v. Washington*, 497 F.2d 626 (U.S.App.D.C. 1973).

Under *New England Tel. Co. v. Conversant Comm.*, 178 F.Supp.2d 81 (D.R.I. 2001), "due process requires a meaningful hearing at a meaningful time before a deprivation of property can occur." *Id.* at 95. The Court applied the three factor test, considering: (1) the weight of the private interest; (2) the risk of deprivation due to the procedure used and the probable value of additional procedural safeguards; and (3) the burden on the government of additional procedural safeguards. *Id.*

The *New England* Court found that "the amount of money at stake is not the touchstone for determining the harm to the private interest, rather it is the degree of potential deprivation that is important." *Id.* That Court determined that redefining Verizon's rights and obligations under the agreement without giving Verizon an opportunity for notice and a hearing potentially deprived Verizon of a substantial property interest. *Id.* Similarly, redefining the MITG companies' rights and obligations with respect to access traffic delivered to their networks without an opportunity for hearing places a substantial property interest of the MITG companies at risk.

Under the second factor, the *New England* Court noted that "[g]iven the confusion over the vague federal statute, the unclear FCC ruling [referring to the FCC's ruling on ISP traffic], ... and the mixed questions of regulatory law and contract interpretation, the parties, the PUC, and this Court would have greatly benefited from a clear record being developed as to the facts in dispute in this case..." *Id.* In this proceeding, there are similar questions of regulatory law and contract interpretations that could be clarified on the record. Sprint asserts that it has authority for superceding the access tariff regime by contract based on a notion that it is required to transit traffic. The MITG is prepared to present law that the 1996 Act retains the access regime until the Commission establishes explicit regulations to the contrary. The FCC has not made 'transit' an

explicit regulation to the contrary of the access regime. The Act does not require transit traffic, the Kansas Commission has specifically rejected this notion, and the FCC's Wireline Competition Bureau stated in the *Virginia Verizon Order* that it "has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty.[1]" The MITG is also prepared to submit evidence of the damage already done by "transit" traffic provisions in Missouri.

Finally, the third factor also weighs in favor of a hearing. The *New England* Court stated that "[a]s to the burden to government in giving more procedural protection, in the spirit of the 'cooperative federalism' underlying § 252, this Court looks to both the burdens on the PUC and the federal district court. The additional work of having a hearing and a more developed factual record would greatly reduce subsequent difficulties and serve the public interest." *Id.* When factual matters are disputed, such as claims the agreement discriminates against non-party carriers, or claims the agreement violates service requirements, the federal district court is not in a position to review the Commission's decision unless the following requirements are met:

a. the parties are allowed to present proof as to the contested issues;

b. a factual record of the proof presented is made;

c. the Commission enters written findings deciding the disputes.

It is obvious there can be no opportunity to present proof, and there can be no record of the competing proofs the adverse parties made, unless some type of hearing is conducted. A

[1] In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, *Memorandum Opinion and Order*, CC Docket No. 00-218, para. 117 (rel. July 17, 2002).

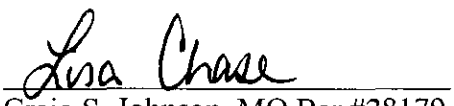
hearing in this matter is necessary to establish a record for review and will further serve the public interest by clarifying the issues and evidence in support thereof.

The MITG understands the special time constraints in this proceeding and is not trying to be obstructionist in raising its legitimate concerns. The MITG is willing to accept the expedited procedural schedule and the limitations on testimony and cross-examination contained in the *Motion in the Alternative for Establishment of Procedural Schedule* filed by the Commission's Staff.

The MITG requests the Commission establish a procedural schedule, issue a protective order, set this case for hearing, and issue such other orders as are reasonable under the circumstances.

Respectfully submitted.

ANDERECK, EVANS, MILNE PEACE & JOHNSON

By: 

Craig S. Johnson, MO Bar #28179
Lisa Cole Chase, MO Bar #51502
700 East Capitol Street
P.O. Box 1438
Jefferson City, MO 65102
Telephone: 573/634-3422
Facsimile: 573/634-7822
Email: CJohnson@aempb.com
Email: lisachase@aempb.com

ATTORNEYS FOR MITG

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 17th day of July, 2003, to:

Lisa Chase

Lisa Cole Chase