

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

ATTORNEYS AT LAW

EUGENE E. ANDERECK

TERRY M. EVANS

ERWIN L. MILNE

JACK PEACE

CRAIG S. JOHNSON

RODRICA A. WIDGER

GEORGE M. JOHNSON

BEVERLY J. FIGG

WILLIAM S. LEWIS

VICTOR S. SCOTT

COREY K. HERRON

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

MATTHEW M. KROHN

LANETTE R. GOOCH

SHAWN BATTAGLER

ROB TROWBRIDGE

JOSEPH M. PAGE

LISA C. CHASE

JUDITH E. KOEHLER

ANDREW J. SPORLEDER

September 8, 2003

OF COUNSEL

MARVIN J. SHARP

PATRICK A. BAUMHOER

GREGORY C. STOCKARD (1904-1993)

PHIL HAUCK (1924-1991)

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

**FILED<sup>3</sup>**

SEP 08 2003

Re: Case No. TK-2004-0070

Missouri Public  
Service Commission

Dear Secretary:

Enclosed please find an original and eight copies of the Application to Intervene in Opposition to Agreement, and Request for Hearing of the Missouri Independent Telephone Company Group in the above cited case.

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

Sincerely,



Lisa Cole Chase

LCC:sw

Enc.

Cc: Michael Dandino  
Dan Joyce  
Mark P. Johnson  
Trina R. LeRiche  
SBC Regulatory Counsel  
MITG Managers

Trenton Office  
9<sup>th</sup> 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

FILED<sup>3</sup>

SEP 08 2003

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

Missouri Public  
Service Commission

In the Matter of the Application of American )  
Fiber Systems, Inc. for Approval of an )  
Agreement with Southwestern Bell Telephone, )  
L.P., d/b/a SBC Missouri, Under the )  
Telecommunications Act of 1996. )

Case No. TK-2004-0070

Application to Intervene in Opposition To Agreement, and  
Request for Hearing  
Missouri Independent Telephone Company Group

COMES NOW the Missouri Independent Telephone Company Group (MITG)<sup>1</sup>,  
and hereby submit this Application In Opposition to Approval of the proposed  
Agreement between American Fiber Systems, Inc. ("AFS") and Southwestern Bell  
Telephone L.P. d/b/a SBC Missouri ("SBC"). The MITG request that those provisions of  
the Agreement pertaining to "transit" traffic be disapproved, rejected, or removed from  
the Agreement, or, in the alternative, that the Agreement be rejected or not approved in  
its entirety.

Such "transit" provisions are discriminatory to the MITG companies in that, as  
non-parties they have been denied the ability to negotiate the same terms and conditions  
to protect their interests as SBC has enjoyed.

Such transit provisions are prejudicial in that they will allow the termination of  
originated toll traffic over a local connection in derogation to the tariffs of the MITG  
companies requiring such traffic to be terminated by an interexchange carrier over an  
access facility subject to access tariffs. There is no such thing as "local" traffic between  
a CLEC and a MITG company unless it is contained in a Commission-approved

agreement, of which there are none. The Commission has ordered that no traffic is to be terminated from CLECs or CMRS providers to the MITG companies unless there is an approved agreement with the MITG companies therefore. In Missouri the past 5 years' experience has demonstrated that the large ILEC's efforts to include "transit" traffic provisions in interconnection agreements is contrary to the public interest, convenience, and necessity, particularly as applied to rural areas.

In support of this Application, the MITG states as follows:

1. The MITG Companies are ILECs. Under 47 USC 252(e)(2)(A) each of the MITG Companies is a telecommunications carrier against whom no interconnection agreement, or portion thereof, can discriminate against, or prejudice, unless that carrier is party to the agreement itself.
2. Alma and Choctaw are each end office companies being subtended by SWB's tandem, MoKan is an end office company subtended by Sprint and receives inter-tandem transited traffic from SBC's tandem, and Chariton Valley, Mid-Missouri and Northeast are each tandem companies being subtended by SBC's McGee tandem. Each MITG company is directly interested in and affected by provisions of the agreement whereby AFS and SBC propose to "transit" local and non-local traffic from each other to carriers other than AFS or SBC.<sup>2</sup> Yet the MITG companies have not been a participant in the negotiation of the proposed agreement.
3. The MITG companies are also ILECs and have an interest in ending the utilization of "transit" traffic provisions in interconnection agreements.

---

<sup>1</sup> Alma Communications Co., Chariton Valley Telephone Corp., Choctaw Telephone Co., Mid-Missouri Telephone Company, MoKan Dial Inc., and Northeast Missouri Rural Telephone Co.

<sup>2</sup> See Appendix ITR § 4.2.1, § 4.3; Appendix Reciprocal Compensation § 9.1, § 9.2.

4. As ILECs each of the MITG companies have the right to negotiate their own interconnection agreements with CLECs and CMRS providers, which right is equal in dignity to that of SBC.

5. By the inclusion of "transit" traffic provisions in the proposed agreement, AFS and SBC have negotiated for the delivery of traffic to the MITG companies without including the MITG in negotiations concerning the terms and conditions of delivery of such traffic.<sup>3</sup>

6. The inclusion of "transit" traffic in an interconnection agreement is inappropriate, as interconnection agreements are to be utilized for the mutual exchange of traffic between the two local competitors that are parties to the agreement. The inclusion of "transit" traffic destined for carriers not party to the agreement is outside the lawful scope of interconnection agreements.

7. The past reasoning of larger ILECs such as SBC that, as ILECs, they are obligated to "transit" traffic, has recently been rejected by the FCC.<sup>4</sup> In fact, SBC has acknowledged that it has no federal obligation to transit traffic.<sup>5</sup> ILECs have no

---

<sup>3</sup> Unlike the MITG, the parties to the Agreement have had the opportunity to negotiate six (6) pages of terms with respect to billing and payment and five (5) pages of terms with respect to non-payment and procedures for disconnection. See Appendix A, General Terms and Conditions, Section 8 and Section 9. Such provisions are clearly discriminatory to the MITG companies who have been deprived of the opportunity to negotiate for similar terms with respect to traffic delivered to their networks.

<sup>4</sup> 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).

<sup>5</sup> SWBT has made the following statements to this Commission in BPS Telephone Company et al. Complaint v. Voicestream and Western Wireless, Case No. TC-2002-1077, *Southwestern Bell's Initial Brief*, filed Dec. 12, 2003:

1. "Southwestern Bell is not required by federal law or regulation to provide transit traffic." *Id.* p3.
2. "[T]he FCC has not imposed an obligation to carry transit traffic, particularly at TELRIC rates." *Id.* p16.
3. "While existing interconnection agreements require Southwestern Bell to transit wireless traffic, there does not appear to be an obligation to do so under the Act after these agreements expire." *Id.* p.16-17.

obligation, and in fact no right, to include "transit" traffic provisions in interconnection agreements. Larger ILECs, such as SBC, are ILECs only in their certificated territory. Neither SBC nor AFS are ILECs in the service territories of the MITG companies. The Missouri Commission has stated that "For the purpose of originating intraLATA interexchange traffic, SWBT is now essentially just another intraLATA IXC, which may, if it chooses to comply with the Respondents' respective tariffs, originate traffic in the Respondents' exchanges. As an intraLATA IXC, competing for business with other IXCs, SWBT must comply with the Respondents' tariffs by using FGD."<sup>6</sup> The only authority SBC has to operate in the service territory of the MITG companies pursuant to this agreement is as an interexchange carrier.

8. The agreement is discriminatory and not in the public interest in that it is contrary to Missouri Commission Orders pertaining to the proper records to be provided to the MITG.<sup>7</sup> The Commission has ordered the former PTCs, including SBC, to provide standard Category 11 records to the small ILECs to provide better information about calls terminated to them.<sup>8</sup> The Commission has also ordered CLECs to "track and record

---

SWBT has made similar statements to the FCC in *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, *Comments of SWBT Communications, Inc.*, filed Oct. 18, 2002:

1. "[N]either the Act nor its rules require third party carriers to provide indirect interconnection or transit services." *Id.* p. 1.

2. "The duty to interconnect indirectly does not require any carrier to provide transit services to any other carrier." *Id.* p. 3.

<sup>6</sup> Southwestern Bell Telephone Company's Complaint against Mid-Missouri Telephone Company for blocking SWBT's 800 MaxiMizer Traffic, Case No. TC-2000-325, *Report and Order*, issued Sept. 26, 2000.

<sup>7</sup> At § 14.2 of Appendix Reciprocal Compensation, the Agreement provides for the exchange of 92 type records rather than the standard Category 11 records ordered by the Commission. The Agreement is further discriminatory to the MITG in that § 14.3 of that same Appendix which permits the parties to bill all MOU at switched access rates based upon a 7 day traffic study if the originating records are not received within 60 days upon written notification of the party not receiving originating records. The MITG have been deprived of the opportunity to negotiate similar terms with respect to traffic terminated to their networks.

<sup>8</sup> *In the Matter of an Investigation Concerning the Primary Toll Carrier Plan and IntraLATA Dialing Parity*, Case No. TO-99-254 et al., *Report and Order*, issued June 10, 1999.

Metropolitan Calling Area traffic and send reports to the small incumbent local exchange carriers for all non-MCA traffic. Alternatively, the competitive local exchange carriers may choose to separately trunk their Metropolitan Calling Area traffic.” In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996, Report and Order, Case No. TO-99-483, para. 19 (Mo.PSC issued. Sept. 19, 2000) The Commission further stated in that Order, “[m]ost of the CLECs concede that they will be responsible for paying terminating access charges on non-MCA traffic, yet the small ILECs have no way to bill for this traffic if the CLECs do not track the traffic and create the appropriate records. Therefore, CLECs must: (1) separately track and record non-MCA traffic, and (2) send reports to the small ILECs for all non-MCA traffic. Alternatively, the CLECs may choose to separately trunk their MCA traffic.” *Id* at p. 23 “Tracking and Recording of MCA Traffic.”

9. The inclusion of transit traffic provisions in this agreement between SBC and AFS has the effect of destroying the MITG’s right and preference for negotiating the terms and conditions of its own interconnections and reciprocal compensation provisions with CLECs or CMRS providers.

10. As a result of over 5 years of experience with such “transit” traffic provisions in large ILEC interconnection agreements, small ILECs such as the MITG have experienced the following which demonstrates the discriminatory and prejudicial impact of such transit traffic provisions on the MITG companies, and upon their customers:

- a. local competition is not brought to rural areas by CLEC providers interconnecting with the MITG companies in the rural areas, thereby depriving rural consumers of the presence of competitive services and vendors. If such providers are not willing to come to rural areas they should not be allowed to “transit” traffic to rural areas, particularly if the traffic is “transited” in violation of the tariffs of carriers that do serve rural areas, as well as in violation of prior Commission orders;
- b. CLEC traffic is placed on access facilities to the MITG companies without compliance with MITG access tariffs;
- c. the interexchange carrier responsible for the access facilities from the MITG companies, and responsible for traffic terminated over those facilities, attempts to use an interconnection agreement to avoid, supplant, or replace its responsibilities under the access tariffs;<sup>9</sup>
- d. as a result the MITG companies have experienced unauthorized traffic termination, a failure of such traffic to be reported, quantified, identified, or compensated for;
- e. the loss of compensation for interexchange traffic terminating to the MITG companies damages their revenues, is inconsistent with their rate design, and will result in upward pressure on the rates of their own local end users, who are innocent of such wrongdoing and upon whom this pressure should not be visited.

11. In the past the Commission has approved such transit traffic provisions in tariffs and agreements with the direction that, prior to the termination of “transit” traffic

---

<sup>9</sup> The Agreement provides, at Appendix Reciprocal Compensation § 4.5, that the transiting carrier will not be billed as the default originator, and at § 9.1 the originating party is responsible for payment of transit traffic ‘unless otherwise specified.’ However, when toll traffic is delivered to the MITG exchanges by SBC, SBC is the party responsible to compensate the MITG companies under their approved access tariffs.

that an agreement with the terminating LEC be obtained. This has not happened, as neither the CLECs, the CMRS providers, nor the transiting LECs such as SBC have bothered to enforce such provisions of these Orders or Agreements. In fact, when the MITG companies have attempted to bill for reported transited traffic, their bills have been dishonored by CLECS and CMRS providers, on the ground that no agreement exists.

12. The experience in Missouri with “transit” traffic has been a failure, causing the loss of millions of dollars in revenue to rural Missouri, and which for over five years has expended and taxed the Commission’s resources by litigating the applicability of state tariffs to traffic transited to small rural ILECs without any agreement with those ILECs, which litigation remains ongoing.

13. The Missouri Public Service Commission has authority under Section 252(e)(3) to establish and enforce “other requirements of State law in [the Commission’s] review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The MITG requests the Commission enforce the provision’s of their approved access tariff provisions when reviewing Interconnection Agreements containing transiting provisions, and further requests the Commission to establish requirements that parties to such interconnection agreements abide by current Commission Orders pertaining to reporting obligations, and to further abide by any and all business records rules that may be adopted by the Commission, i.e. the enhanced record exchange rule currently under discussion and development in Case No. TX-2003-0301.



14. The interests of the MITG are different from that of the general public, and granting them intervention and hearing will aid the Commission in understanding the reasons the proposed agreement is not in the public interest.

15. The following provisions or sections of the proposed agreement, either by their own terms, or in conjunction with other terms therein, give rise to this objection to transit traffic provisions: Appendix A, General Terms and Conditions § 8, § 9; Appendix ITR § 4.2.1, § 4.3; Appendix Reciprocal Compensation §4.5, § 9.1, § 9.2, § 10.1, § 14.2, 14.3.

16. Copies of all filings in this docket should be directed to the MITG by serving:

Craig S. Johnson MO Bar #28179  
Lisa Cole Chase, MO Bar #51502  
Andereck, Evans Milne, Peace & Johnson, LLC  
P. O. Box 1438  
Jefferson City, MO 65102  
Telephone: 573-634-3422  
Facsimile: 573-634-7822

WHEREFORE, on the basis of the foregoing, the MITG request that they be allowed to intervene in opposition to the proposed agreement, that an evidentiary hearing be provided upon which the Commission can base its decision in these regards, and that the Commission reject the proposed agreement or the offending provisions of the agreement as set forth above.

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

By:

  
Craig S. Johnson, MO Bar #28179  
Lisa Cole Chase, MO Bar #51502  
Col. Darwin Marmaduke House  
700 East Capitol  
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 8<sup>th</sup> day of September, 2003, to:

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

Mike Dandino  
Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, Missouri 65102

Mark P. Johnson  
Trina R. LeRiche  
Sonnenschein, Nath & Rosenthal L.L.P.  
4520 Main St., Suite 1100  
Kansas City, MO 64111

Southwestern Bell Telephone L.P.,  
d/b/a SBC Missouri  
Regulatory Counsel  
One Bell Center, Room 3520  
St. Louis, Missouri 63101

  
Lisa Cole Chase