

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTON

July 18, 2003

FILED²

JUL 18 2003

Missouri Public
Service Commission

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


Re: Case No. TK-2003-0535

Dear Mr. Roberts:

Enclosed for filing please find an original and eight copies of the STCG's Suggestions in Support of Request for Hearing and Proposed Procedural Schedule.

Please see that this filing is brought to the attention of the appropriate Commission personnel. Copies of the attached are being provided to parties of record. If you have any questions regarding this filing, please give me a call. I thank you in advance for your attention to and cooperation in this matter.

Sincerely,



Brian T. McCartney

BTM/da
Enclosure
cc: Parties of Record

FILED²

JUL 18 2003

Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Application of Sprint Missouri, Inc. d/b/a/ Sprint)
for Approval of its Master Interconnection)
and Resale Agreement with ICG Telecom Group)

Case No. TK-2003-0535

**THE STCG'S SUGGESTIONS IN SUPPORT OF REQUEST FOR HEARING
AND PROPOSED PROCEDURAL SCHEDULE**

COMES NOW the Small Telephone Company Group (STCG) and states to the
Missouri Public Service Commission (Commission) as follows:

1. In this case, thirty-five (35) of Missouri's small rural incumbent local
exchange telephone companies (ILECs) have intervened and opposed the
Interconnection Agreement (the Agreement) between Sprint and ICG. The Commission
granted the STCG's Application to Intervene on July 8, 2003.

2. On July 11, 2003, the Commission held its prehearing conference in this
matter. At that time, the parties were directed to brief the question of whether a hearing
was necessary in this matter. (Tr. 142)

3. The Telecommunications Act of 1996 (the Act) establishes two grounds for
the Commission to reject a negotiated agreement:

- (1) The agreement, or a portion thereof, **discriminates against a
telecommunications carrier not a party to the agreement;** or
- (2) The implementation of such an agreement is **not consistent with the public
interest, convenience, or necessity.**

47 U.S.C. § 252(e)(2)(emphasis added).

4. The STCG has alleged that the Agreement does not meet the standards established by Section 252 of the Act, and the STCG has requested a hearing to examine the Agreement's "transiting" provisions under these standards. Specifically, the STCG alleges that the Agreement, insofar as it contemplates the "transiting" of local and toll traffic, is against the public interest and discriminates against the STCG member companies in the following respects:

- (A) The Agreement would allow Sprint and ICG to take interexchange traffic off of the traditional interexchange network and "transit" this traffic over Sprint's so-called "LEC-to-LEC" network between local exchange carriers. Because neither Sprint nor ICG pass any records, this essentially prohibits, or at least makes it extremely difficult, for the small ILECs to identify, bill, and collect compensation for the use of their exchange access networks. This problem is not hypothetical; it is real. The STCG member companies are prepared to present evidence that: (1) Sprint is not providing billing records for "transit" traffic; and (2) a number of competitive local exchange carriers (CLECs) are failing or refusing to pay for their traffic that is "transited" to STCG member companies.
- (B) The terms of the Agreement are discriminatory against third party carriers because the Agreement requires Sprint to provide ICG with detailed billing records for all third party traffic that Sprint transits to ICG,¹ yet the Agreement does not obligate Sprint to provide such records when Sprint

¹ Agreement, § 66.4.2.

transits ICG traffic to third party carriers such as the STCG member companies. Similarly, the Agreement allows ICG to bill Sprint for any transit traffic for which Sprint does not provide a record identifying the originating party,² but it does not provide the STCG companies with the same right (i.e. "default billing"). Instead, the Agreement purports to limit the liability of ICG and Sprint for traffic delivered to third parties. These provisions are clearly discriminatory to third parties.

A hearing is necessary for the STCG to present evidence on these issues.

STATE LAW

5. In general, the term "hearing" refers to "a proceeding before a competent tribunal in which adversarial parties are apprised of all the evidence offered or considered, with the opportunity to test, examine, explain, or refute such evidence, and have the right to present their contentions and to support them by proof and argument." *Hagley v. Board of Education of Webster Groves*, 841 S.W.2d 663, 668 (Mo. banc 1992). A "contested case" is "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 536.010 RSMo 2000; *State ex rel. Division of Transp. v. Sure-Way Transp.*, 948 S.W.2d 651, 656 (Mo. App. 1997). Because this proceeding affects the rights, duties, and privileges of Sprint, ICG, and the members of the STCG, it is a contested case. The Supreme Court has warned that "[t]he relevant inquiry is not whether the agency in fact held a contested case hearing, but whether it should have

² Agreement, § 66.3.1.2.

done so.” *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc 1995).

6. Section 386.420 RSMo 2000 sets forth minimum procedural requirements for Commission hearings. “This section guarantees that Public Counsel and all other parties to a Commission proceeding have the right to be heard and to introduce evidence.” *State ex rel. Fischer v. Public Service Comm’n*, 645 S.W.2d 39, 42 (Mo. App. 1982). Due process requires that Commission hearings be fair and consistent with rudimentary elements of fair play. *Id.* One component of the due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. *Id.* Moreover, Commission decisions must be supported by adequate findings of fact, and findings of fact that are completely conclusory, providing no insights into how controlling issues are resolved, are inadequate. Section 386.420 RSMo 2000; *State ex rel. Monsanto Co. v. Public Service Comm’n*, 716 S.W.2d 791 (Mo. banc 1986).

FEDERAL LAW

7. When reviewing state public service commission orders under the Act, federal courts are limited to determining whether the order is consistent with Sections 251 and 252 of the Act. Federal courts review state commission interpretations of the Act *de novo*, “according little deference to the Commission’s interpretation of the Act.” *Michigan Bell Tel. Co. v. MCIMetro Access*, 323 F.3d 348, 354 (6th Cir. 2003). Federal courts apply the “arbitrary and capricious” standard to a state commission’s findings of fact to determine whether the outcome is “supported by a reasoned explanation, **based upon the evidence in the record as a whole.**” *Id.* (emphasis added). Therefore,

federal courts appear to expect some type of evidentiary record. The *Michigan Bell* court explained, "We will uphold a decision if it is the result of a deliberate principled reasoning process and if it is **supported by substantial evidence**." *Id.* (emphasis added). A commission order is subject to reversal if it fails to "consider relevant factors or aspects of the problem." *Id.*

8. When the Commission is presented with numerous genuine issues of material fact, it is clear error to issue an order without holding an evidentiary hearing. *New England Tel. Co. v. Conversent Comm.*, 178 F.Supp. 2d 81 (D.R.I. 2001). Federal courts review state commission actions to ensure that the state commission "considered all relevant factors, articulated a reasonable connection between the facts and the conclusion drawn, and did not make a clear error in judgment." *Id.* at 91. Under the arbitrary and capricious standard, a commission decision must be supported by record evidence:

In addition to requiring a reasoned basis for agency action, **the arbitrary and capricious standard requires an agency's action to be supported by the facts in the record.**

Id. at 92. (emphasis supplied).

9. In *New England Tel.*, the Rhode Island Public Utilities Commission (PUC) issued an order interpreting an existing interconnection agreement over a party's objections and without holding a hearing. The PUC's procedure was rejected by the federal district court:

Because the PUC issued its order when there appeared to be numerous genuine issues of material fact and failed to hold an evidentiary hearing to determine whether there were genuine issues of material fact, the PUC committed clear error.

Id. at 94. (emphasis added).

10. *New England Tel.* also observed that due process requires a meaningful hearing at a meaningful time before a deprivation of property can occur, and the court set out the familiar three factor weighing test:

The reviewing court must weigh the private interest at stake, the risk of erroneous deprivation because of the procedures used as well as the probative value of more procedural safeguards, and the burden on the government of more procedural safeguards.

Id. at 95. 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.

11. Thus, in determining whether to have a hearing and what procedures to employ, the Commission must consider the interests of the thirty-five (35) small Missouri ILECs, the customers they serve, and the alleged discrimination and public detriment. Specifically, the Commission must weigh the STCG member companies' right to apply their existing tariffs to the traffic of other telecommunications companies in a non-discriminatory manner and their constitutional right to be compensated for the use of their exchange access networks against the burden on the Commission to hold a

hearing and issue a decision within the Act's expedited timeline for review (*i.e.* 90 days). In this case, the alleged discrimination and public detriment are significant, and a proposed procedural schedule has been filed that will accommodate the due process rights of the parties within the short time frame established by the Act.

12. In *New England Tel.*, the court noted that "the parties, the PUC, and this court would have greatly benefitted from a clear record being developed as to the facts in dispute in this case." *Id.* The court concluded:

The long and short of it here is that the PUC must treat this matter as a contested case, not as a rule-making matter, give the parties an opportunity to present evidence and make arguments, and in the end make findings of fact and conclusions of law so that this Court can exercise its appellate jurisdiction in a meaningful way on an adequately developed record.

Id. (emphasis added).

13. The Eighth Circuit has also stressed the importance of due process and state commission procedure:

[W]e caution the PSC to be more circumspect in the process it employs, with particular attention to excessive reliance on staff reports, especially those reports compiled after unnecessary *ex parte* discussions with parties. If the PSC fails to do so, the next aggrieved party to appear in federal court on a matter such as this may well be able to demonstrate that the procedures employed (which, incidentally, were vehemently objected to by AT&T as well

as SWBT at the time of the arbitrations) either were inherently lacking in due process or resulted in prejudice to the aggrieved party, requiring vacatur of the results of the proceedings.

Southwestern Bell v. Missouri Public Serv. Comm'n, 236 F.3d 922, 925 (8th Cir. 2001).

14. The same reasoning applies in the case at hand. Because the STCG has raised specific questions as to whether the Agreement is contrary to the standards established by the Act, the STCG must be afforded due process and allowed to present evidence that supports its position. The Commission must make findings and supply a reasoned explanation, based upon the record evidence, as to whether the Agreement does or does not comply with Section 252(e).

15. Although the STCG is entitled to due process, the STCG recognizes that due process depends on circumstances in this case. Therefore, the STCG is ready and 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 in this matter by the Commission's Staff.

CONCLUSION

WHEREFORE, the STCG respectfully requests that the Commission establish a procedural schedule, issue a protective order, set this case for hearing, and issue such other orders as are reasonable in the circumstances.

Respectfully submitted,

By Brian T. McCartney

W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
(573) 635-7166
(573) 634-7431 (FAX)

Attorneys for the STCG

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 18th day of July, 2003, to the following parties:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

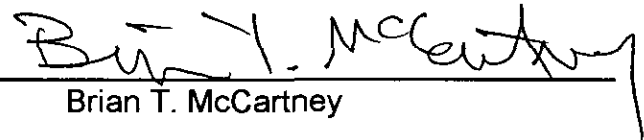
Michael F. Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Lisa Creighton Hendricks
Sprint Missouri, Inc.
6450 Sprint Parkway
MSp: KSOPHN0212-2A253
Overland Park, Kansas 66251

Cheryl Hills
Senior Director and Counsel
ICG Telecom Group, Inc.
180 Grand Avenue, Suite 450
Oakland, California 94612

Craig Johnson
Andereck, Evans, Milne, Peace & Johnson
P.O. Box 1438
Jefferson City, Missouri 65102-1438

Carl Lumley
Curtis, Oetting, Heinz et al.
130 S. Bemiston, Suite 200
Clayton, MO 63105


Brian T. McCartney