BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

PETITION OF SOCKET TELECOM, LLC FOR COMPULSORY ARBITRATION OF INTERCONNECTION AGREEMENTS WITH CENTURYTEL OF MISSOURI, LLC AND SPECTRA COMMUNICATIONS, LLC PURSUANT TO SECTION 252(b)(1) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))))	**CASE NO. TO-2006-0299**

SOCKET TELECOM, LLC BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

COMES NOW Socket Telecom, LLC ("Socket") and files this Brief in Support of its pending "Motion for Reconsideration of Final Commission Decision on Points of Interconnection" ("Motion for Reconsideration"). Socket files this Brief in response to discussions at Commission agenda meetings regarding the extent of the Commission's authority to consider Socket's Motion for Reconsideration.

Socket's point in this Brief is a simple one: the Commission retains jurisdiction over this matter, and the Commission has the authority to consider and decide Socket's Motion for Reconsideration.

1. Section 252 of the federal Telecommunications Act of 1996 (the "Act") provides that a state commission arbitrating disputes brought to it by parties pursuant to Section 252 "shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request" for interconnection, services, or network elements under Section 252.[1] Section 252 does not provide that a state commission loses jurisdiction over a Section 252 proceeding at the conclusion of the 9 month arbitration period.

2. Congress instructed state commissions that intended to participate in the federal Act's telecommunications regulatory scheme to complete their considerations of contested

[1] Act Section 252(b)(4)(C).

Section 252 proceedings within a time certain.[2] Congress further provided a remedy if the state commission "failed to act" on the responsibilities set forth in Section 252. The sole remedy is pre-emption of state jurisdiction by the Federal Communications Commission ("FCC"). It is only when a state commission "fails to act" that the FCC is authorized to "issue an order preempting the State commission's jurisdiction" over a pending proceeding or matter.[3]

3. The federal courts interpreting the Act have held that the grant of jurisdiction to state commissions included in Section 252 gives state commissions the authority to interpret the terms of interconnection agreements in post-arbitration disputes, thus extending state commission jurisdiction beyond the arbitration and approval of interconnection agreements.[4] As the Eleventh Circuit held in the *BellSouth* decision cited below:

> While § 252 expressly gives state commissions authority to approve or reject interconnection agreements, the statute does not specifically say that this empowerment includes the interpretation and enforcement of interconnection agreements after their initial approval. We agree with all the parties before us, however, that a common sense reading of the statute leads to the conclusion that the authority to approve or reject agreements carries with it the authority to interpret agreements that have already been approved. We find further support for this conclusion in the recent decision of the Supreme Court in *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), in the decisions of all other circuit courts to have considered the question, and in the determination of the Federal Communications Commission, (" FCC"), which is

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[2] The Act does not require state commissions to participate in the implementation of the Act through arbitration and approval of interconnection agreements. If states decline the jurisdiction offered in Section 252 (as the Commonwealth of Virginia and its commission have done in the past), the FCC is authorized to take over the implementation of the Act in the context of particular interconnection agreements.

[3] Section 252(e)(5) (emphasis added).

[4] *See BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003) (hereinafter "BellSouth"); *Bell Atl. Md., Inc. v. MCI WorldCom*, 240 F.3d 279, 304 (4th Cir.2001); *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir.2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir.2000); *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10-13 (1st Cir.1999); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir.1999); *Iowa Util. Bd. v. F.C.C.*, 120 F.3d 753, 804 (8th Cir.1997), *rev'd on other grounds by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

entitled to deference in the interpretation of the pertinent statute. See *In re Starpower,* 15 F.C.C.R. 11277, ¶ 6, at 1129-80, 2000 WL 767701 (2000).[5]

It is clear from the courts' and the FCC's interpretations of the Act that Section 252 jurisdiction does not terminate at the conclusion of the "9 month period" set forth in Section 252(b)(4)(C).

4. The FCC has affirmed this principle in its rulings on various petitions alleging state commission "failure to act," including one involving this Commission.[6] Section 252(e)(5) and the FCC's rules implementing it have been applied in a number of cases, but the FCC has taken jurisdiction only over cases where a state commission affirmatively refused to conduct the interconnection agreement arbitration, review or approval responsibilities set forth in Section 252. The most well-known example is in Virginia, where that state's utility commission refused to undertake Section 252 duties based on constitutional states' rights arguments.[7] In the Virginia cases, as in all others, the FCC took over the matter because the state asserted it would not resolve the issue, not because it did not complete its work within 9 months. In several cases, the FCC has found state commission actions reasonable in spite of the fact that 9-month deadlines were not met. Even though a technical violation of the 9-month deadline might have been established, the FCC found reason to leave the case with the state commission. For example, the preemption petition against the Missouri Commission was denied in 1997, even though UNE pricing disputes had been deferred for further proceedings in a manner that left the parties with

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5 *BellSouth,* 317 F.3d at 1274.

6 The FCC's rules on "failure to act" are found at 47 C.F.R. § 51.801-803. The FCC's rule on failure to act tracks the Section 252, including as a possible "failure to act" a state commission's inability "to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act." 47 C.F.R. § 51.801(b).

7 *In the Matter of Star-power Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 15 FCC Rcd. 11,277 (2000).

no decision at the conclusion of the 9-month period.[8] In the Missouri case, the FCC found that while the pricing issues had been identified as disputes, the issues "were not clearly and specifically presented to the state commission" for arbitration. The FCC believed that the Commission did not have the information it needed to properly arbitrate the dispute, and it concluded that the Commission should retain its jurisdiction. In other cases, the FCC has upheld continued state jurisdiction because the state commission concluded its actions before the FCC was required to address the "failure to act" claim. In no case has the FCC preempted state jurisdiction because a ruling related to an arbitration was issued after the 9 month arbitration period ended.

5. Socket refers the Commission to these "failure to act" decisions not because it believes any allegation has been made that the Commission has failed to carry out its Section 252 responsibilities. Rather, the FCC's decisions demonstrate two important points about the Commission's jurisdiction.

6. First, the FCC's decisions and, in fact, the structure of Section 252 itself, demonstrate that a state commission's Section 252 jurisdiction does not extinguish at the end of the 9-month period. If it did, there would be no reason for the federal statute to explicitly authorize the FCC to "issue an order preempting the State commission's jurisdiction" if the state fails to act. If the state commission's jurisdiction to act in the arbitration proceeding terminated at the end of 9 months, there would be nothing for the FCC to preempt. Congress did not create

[8] *In the Matter of Petition of MCI For Pre-emption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 97-166, Memorandum Opinion and Order (rel. September 26, 1997). For other cases in which the FCC rejected § 252(e)(5) preemption claims, *see In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute With Bell Atlantic – New Jersey, Inc.*, CC Docket No. 99-154 (rel. August 3, 1999); *In the Matter of Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief*, CC Pol. 97-6 (rel. January 22, 1998).

a statutory scheme that leaves pending arbitration matters in a procedural no man's land, where state commission jurisdiction ends but no federal jurisdiction attaches.[9] Rather, Section 252 presumes that state jurisdiction over a "proceeding or matter" pending before a state commission pursuant to Section 252 continues unless and until the FCC affirmatively preempts state jurisdiction.

7. Second, the FCC obviously does not believe that state commission Section 252 authority over an arbitration proceeding terminates at the end of the 9-month period. As noted above, the FCC found that state commissions should be permitted to conclude their work on pending interconnection matters beyond the end of the 9-month period in certain circumstances, and that no violation of federal law occurred (and the FCC would not preempt) if they did not.

8. Pursuant to its continuing Section 252 and state law jurisdiction,[10] the Commission has the authority to decide Socket's Motion for Reconsideration. The Commission's jurisdiction over this matter, and thus its authority to decide Socket's Motion for Reconsideration, is unaffected by agreements between the parties regarding extensions of time to comply with various provisions of the Commission's procedural rules. The Missouri courts have long affirmed the general legal principle that "unlike personal jurisdiction, subject matter jurisdiction cannot be conferred or waived by agreement of the parties."[11] If the 9-month period

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[9] The U.S. Supreme Court found the same to be true of the Act's judicial review provisions. In *Verizon Md., Inc. v. Maryland PSC*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), the Court held that even where the right of federal court review of state commission actions provided in Section 252(e)(6) does not apply, a party may challenge a state commission action related to interpretation or implementation of the Act based on general "federal question" subject matter jurisdiction provided under 28 U.S.C. § 1331. Thus, there is no "gap" in the federal courts' ability to review actions related to state commission implementation of the federal Act, just as there is no gap in jurisdiction between state commissions and the FCC.

[10] When it promulgated its procedural rules governing interconnection-related dispute resolution proceedings, the Commission noted that its authority to issues the rules arose from Section 386.230 of the Missouri Revised Statutes, as well as from the federal Act.

[11] *Health Enterprises of America, Inc. v. Missouri Dep't of Social Services*, 668 S.W.2d 185, 187 (Mo. Ct. App. 1984), *citing Lafayette Federal Savings and Loan Association of Greater St. Louis v. Koontz,*

in Section 252 was jurisdictional, it could not be extended by the parties or by the Commission. No agreement of the parties regarding relaxation of the 9-month period for arbitration thus affects the Commission's jurisdiction over this case. Such extensions affect compliance with Commission procedural rules or schedules (which the parties here have at various times asked be extended), but they do not confer or limit jurisdiction.

9. The Commission completed its obligations under the 9 month standard when it issued its Final Decision on June 27, 2006. The Commission therefore will not violate the 9-month standard with a ruling on Socket's Motion for Reconsideration because the 9-month period requires the Commission to issue a decision on the disputed issues. The Commission met that obligation with its issuance of its Final Decision, but it did not thereby cede its jurisdiction to take any other necessary substantive actions with respect to this proceeding.

10. The federal Act does not prohibit the Commission from rehearing or reconsidering arbitration determinations. As the Commission knows, reconsideration is an important part of the administrative process. Reconsideration allows the Commission to consider any error, omission, or oversight in its Final Decision. In her Concurring Opinion issued with the Final Decision, Commissioner Murray stated that the Point of Interconnection ("POI") threshold provision that is the subject of Socket's Motion for Reconsideration is unreasonable and arbitrary. Assuming, *arguendo*, that the POI threshold provision is incorrect or illegal, the Commission should be able to correct its error and provide the parties with a sound and properly supported decision. Socket has already elaborated on its reasons for seeking reconsideration of the POI decision in other pleadings. Socket urges that the Commission has the authority to decide its Motion for Reconsideration, and again urges the Commission to grant its Motion.

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516 S.W.2d 502, 504 (Mo.App.1974).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the undersigned has caused a complete copy of the foregoing document to be electronically filed and served on the Commission's Office of General Counsel (at gencounsel@psc.mo.gov), the Office of Public Counsel (at opcservice@ded.mo.gov), counsel for CenturyTel of Missouri and Spectra Communications (at lwdority@sprintmail.com and at hartlef@hughesluce.com) on this 26th day of July, 2006.

/s/ Carl Lumley