

1 STATE OF MISSOURI  
2 PUBLIC SERVICE COMMISSION

3  
4 TRANSCRIPT OF PROCEEDINGS

5 Hearing

6 June 24, 2003  
7 Jefferson City, Missouri  
8 Volume 2

9 Tri-Lakes Net, Inc., )  
10 Complainant, )  
11 vs. ) Case No.: XC-2003-0011  
12 MCI WorldCom )  
13 Communications, Inc., )  
14 Respondent. )

15 BILL HOPKINS, Presiding,  
16 SENIOR REGULATORY LAW JUDGE.

17 KELVIN SIMMONS, Chair,  
18 CONNIE MURRAY,  
19 STEVE GAW,  
20 BRYAN FORBIS,  
ROBERT CLAYTON,  
COMMISSIONERS.

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FOR: Staff of the Missouri Public Service  
Commission.

1 P R O C E E D I N G S

2 JUDGE HOPKINS: Let's go on the record. This  
3 is June 24th, 2003, Tuesday. This is Tri-Lakes Net  
4 versus MCI WorldCom Communications.

5 And as you all know, we have an Order  
6 directing briefing that was -- went out on the 17th day  
7 of June requiring the parties to brief and argue  
8 four questions.

9 And we've gone on the record and I want to go  
10 get the rest of the Commissioners who want to be in on  
11 this, and we will start that argument and briefing at  
12 that time.

13 Yes, Mr. Fain?

14 MR. FAIN: If the Commission please.

15 JUDGE HOPKINS: You'll have to speak into the  
16 microphone there so --

17 MR. FAIN: If the Commission please, I'm  
18 Mr. Fain. As you know, I represent Mr. Aaron. We've  
19 had a -- a very difficult situation come up that -- the  
20 professional witness who had been an employee for many,  
21 many years is no longer available to us.

22 And we are in a position where we feel that it  
23 is not fair to us to continue. I would -- I would li--  
24 seek a -- a -- at least a 30-day continuance on this  
25 matter until we can properly represent the Commission

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1 on the questions that that professional witness was  
2 taking care of.

3 Now, we have -- we have substituted Mr. David  
4 Tracy. But if the -- if the Commission please, we will  
5 want to renew our motion for a continuance to allow him  
6 to -- to -- more time to prepare in this matter.

7 JUDGE HOPKINS: Okay. Mr. Fain, we will have  
8 the Commission discuss that motion also. I'm -- I need  
9 a little more information, if you could tell me,  
10 please, who is the witness you're missing?

11 MR. FAIN: Joanie Ellis. Mrs. Jo-- Joanie  
12 Ellis was the witness that was with the Company for so  
13 long, and handled all of these matters with the  
14 Company. And she is no longer with the Company. In  
15 fact, I don't even know her whereabouts at the present  
16 time.

17 And for this reason we were not able to  
18 prepare her testimony and we were not -- I've not been  
19 able to discuss these matters with her. Her boss  
20 doesn't even know where she is.

21 So for that reason I am seeking a continuance  
22 until we are able to properly prepare on -- on the  
23 testimony that -- that she would have -- have supplied  
24 and given to this Commission.

25 And we feel that in all fairness that we

1     should have time to -- to prepare with Mr. David Tracy  
2     who is our -- who has replaced her.

3             JUDGE HOPKINS:   How long have you known of her  
4     unavailability?

5             MR. FAIN:   Unavailability?

6             JUDGE HOPKINS:   Yes, sir.

7             MR. FAIN:   Oh, I'd say maybe a week or  
8     ten days.

9             JUDGE HOPKINS:   And you never did file any  
10    direct testimony that -- that she had, did you?

11            MR. FAIN:   No.   No, sir.

12            JUDGE HOPKINS:   So she was never a witness to  
13    begin with; is that correct?

14            MR. FAIN:   Oh, yes.   Yes, she was -- she was  
15    the witness that I had prepared.   And that she had  
16    prepared testimony, but I had not put it in the form.  
17    I had been working on it, but -- when she disappeared.

18            But it was never put in the form and -- and --  
19    and sent up here to the secretary as I did on  
20    Mr. Aaron's testimony.

21            JUDGE HOPKINS:   According to the procedural  
22    schedule, this testimony was due on May the 5th, which  
23    is about six weeks ago; is that correct?

24            MR. FAIN:   I believe that's correct, Your  
25    Honor.   But, of course, I was not available and --

1 and -- and neither -- neither was she.

2 JUDGE HOPKINS: Now, you just told me her  
3 unavailability had been for the last week.

4 MR. FAIN: I mean, since she had disappeared.  
5 But before that time, it was very difficult for me  
6 to -- to get with her.

7 JUDGE HOPKINS: Did you file anything -- well,  
8 I know you didn't. You didn't file anything with the  
9 Commission asking for a continuance to file your direct  
10 testimony?

11 MR. FAIN: No, sir, I did not.

12 JUDGE HOPKINS: So this has all just come up,  
13 you say, within the last week?

14 MR. FAIN: That's correct.

15 JUDGE HOPKINS: Okay. Thank you -- thank you,  
16 Mr. Fain.

17 The -- the Commission will also look into your  
18 question of a continuance, all right, sir?

19 MR. FAIN: Sir, I -- I didn't understand that.

20 JUDGE HOPKINS: The Commission will take that  
21 question under advisement and discuss it this morning,  
22 all right, sir?

23 MR. FAIN: Oh, very well. Thank you, Judge.

24 MR. LUMLEY: Judge, may I ask, do you want me  
25 to respond at this time or do you want to take this up

1 later?

2 JUDGE HOPKINS: If you would like to respond,  
3 you may certainly do so now. But let me get the rest  
4 of the Commissioners before you do that.

5 We'll go off the record just a moment and let  
6 me get the rest of the Commissioners, please.

7 Thank you.

8 (A RECESS WAS TAKEN.)

9 JUDGE HOPKINS: Let's go back on the record  
10 please.

11 Go ahead, sir -- would you enter your  
12 appearance first, sir?

13 MR. LUMLEY: Yes, sir, I will.

14 I'm Carl Lumley with the Curtis, Oetting law  
15 firm representing MCI WorldCom Communications in this  
16 matter, Judge.

17 I can report to you that the parties have just  
18 made an agreement under which Tri-Lakes will dismiss  
19 their complaint without prejudice. MCI WorldCom will  
20 dismiss its counterclaim without prejudice, and state  
21 on the record our commitment that we will continue to  
22 provide service to this company for up to 45 days from  
23 today's date -- it's my understanding they're in the  
24 midst of making arrangements to have new provider that  
25 can accomplish the change in service within that time

1 period.

2           And our hope is that, therefore, this matter  
3 will not come back to the Commission. We do not intend  
4 in any way to resolve the financial question of who  
5 owes whom what. But the parties will be free to  
6 litigate that in court once the relationship has been  
7 concluded in this manner.

8           JUDGE HOPKINS: Mr. Lumley, I am certainly not  
9 a bankruptcy expert, but I know that this case was  
10 filed a week before you all filed for bankruptcy.

11           Will Tri-Lakes be prohibited from now on  
12 against filing any kind of suit against you because of  
13 the bankruptcy order?

14           MR. LUMLEY: They would not be prohibited in a  
15 total sense. There -- there are certain issues --  
16 financial claims that they would, in my opinion, have  
17 to pursue in the bankruptcy venue if they claim that  
18 monies are owed to them for the period of time that  
19 pre-date the bankruptcy filing, which was July 21st of  
20 last year.

21           That's my opinion. I don't know what their  
22 opinion is. To the extent that there's financial  
23 issues that arise from the post-petition business  
24 relationship that's been going on, I think that's a  
25 different matter.



1           Although, because there's an automatic stay  
2   issued in bankruptcy and they might have to wait  
3   until -- to prosecute such a claim. They might be able  
4   to file it to preserve the statute-of-limitations-type  
5   issues and get leave to do that.

6           But when I -- when I say they can sort out the  
7   financial matters in court, they can have either the  
8   bankruptcy court or a regular circuit court state  
9   proceeding to resolve these things.

10          That's, again, my opinion, and it's been  
11   expressed in my position statement that those kind of  
12   issues can't be resolved here in any event.

13          But the -- the intent here is to give them the  
14   time that they say they need to find a new provider so  
15   that a relationship that is, you know, mutually  
16   dissatisfactory can be concluded.

17          And then when there's a closed set of  
18   information, the parties can sort that out in the  
19   appropriate venue or venues.

20          JUDGE HOPKINS: All right, sir. Let me see if  
21   any of the Commissioners have any questions of you.

22          Commissioner Simmons?

23          COMMISSIONER SIMMONS: Yes. Excuse me, sir.  
24   With what you just said, am I to perceive that the  
25   issue between you and Tri-Lakes is a contract issue or

1   you take it as a contract issue and you'll settle it on  
2   that basis?

3               MR. LUMLEY:  I see two distinct issues.  One  
4   is the issue that's been squarely presented to this  
5   Commission, and that is whether or not MCI should be  
6   able to cut off service to this Company for non-payment  
7   aside from whether that non-payment is \$5 or  
8   \$500,000 -- just whether or not service can be cut off.

9               The issue that I don't believe is before this  
10   Commission is who owes whom what at the end of the day.  
11   And that, I think, is purely a matter of contract as  
12   supplemented by what is now an online interstate  
13   pricing guide, but previously was an interstate tariff.

14              If we had gotten into our arguments this  
15   morning, I would have been addressing several different  
16   limitations on this Commission's jurisdiction, but I  
17   don't believe we need to get into that.

18              But to answer your question at least in part,  
19   yes, it is a contract dispute between the parties.  But  
20   I believe we've reached a settlement that will allow a  
21   resolution of the question of when should service be  
22   terminated, and we're doing it in a way that allows  
23   them the time they need to find a new provider.

24              COMMISSIONER SIMMONS:  Okay.  That's all the  
25   questions I have.  Thank you, Judge.

1 JUDGE HOPKINS: Commissioner Murray?

2 COMMISSIONER MURRAY: Thank you.

3 Mr. Lumley, was there anything in the  
4 agreement providing for payment for service between now  
5 and the time that Tri-Lakes finds another provider?

6 MR. LUMLEY: We have not addressed that. I  
7 mean, our position would be that they have to keep  
8 paying for service; their position may be that -- that  
9 they don't, but we're not addressing that. We're not  
10 asking them to commit to anything financial.

11 The only thing they're committing to is to  
12 dismiss the proceedings, and the only that we're  
13 committing to is to dismiss our part of the proceedings  
14 and to give them up to 45 days before we would  
15 terminate service.

16 COMMISSIONER MURRAY: Are they currently  
17 paying for service?

18 MR. LUMLEY: That's a difficult question to  
19 answer. They have made -- I need to look at a schedule  
20 to be accurate.

21 They -- they are not paying on a regular  
22 basis. But it also wouldn't be fair to say that  
23 they're not paying anything at all. And I apologize.  
24 I just can't remember the date.

25 They did make a payment on May 13th of

1     \$17,000.

2               COMMISSIONER MURRAY:  Mr. Lumley, is there any  
3     agreement as to what -- what the service -- any -- any  
4     agreement between the parties as to what the service  
5     costs?

6               MR. FAIN:  Now, wait a minute.

7               MR. LUMLEY:  Are you -- are you speaking --

8               COMMISSIONER MURRAY:  Going forward?

9               MR. LUMLEY:  -- in terms of -- under the  
10    settlement agreement or are you talking about the  
11    original understandings?  I just want to understand  
12    your question.

13              COMMISSIONER MURRAY:  Well, it's my  
14    understanding that there was -- there is a dispute  
15    regarding --

16              MR. LUMLEY:  Let me try and answer it this way  
17    and see -- see if I'm answering your question.

18              We are not in this settlement arrangement  
19    altering the terms that have been struck between the  
20    parties as to what should be paid for service.  We're  
21    not altering the dispute over what those terms are.

22              COMMISSIONER MURRAY:  All right.

23              MR. LUMLEY:  We're not trying to affect that  
24    at all.  We're not trying to prejudice Tri-Lakes'  
25    rights to assert their positions about that, nor are we

1     trying to prej-- prejudice our own rights to dispute  
2     that later.

3                 COMMISSIONER MURRAY: All right. Thank you.

4                 MR. FAIN: May I interrupt? Mr. Aaron  
5     has -- has brought up a question here. As I understand  
6     it, you would be billing under your normal tariffs and  
7     contracts, is that correct, in --

8                 MR. LUMLEY: We're --

9                 MR. FAIN: -- this 45-day period?

10                MR. LUMLEY: We're gonna continue to issue  
11     bills as we've been issuing them on the same basis that  
12     we've been issuing them in the past. And at whatever  
13     point the parties make some kind of financial agreement  
14     to resolve the issue, that's fine; or otherwise  
15     whichever party feels they need to go to court to  
16     resolve it, that's fine. We're not trying to affect  
17     that.

18                I mean, we will continue to issue bills to let  
19     you know what we think you owe us until the matter is  
20     resolved financially. But that's not gonna -- if your  
21     concern is, you know, do we issue a bill tomorrow and  
22     then, because you don't pay that bill, we try and cut  
23     you off earlier than the 45 days, no.

24                We are committing, period. You'll have a  
25     maximum of 45 days to change service providers.

1           MR. FAIN: Does that answer your question?

2           Well, the -- the whole -- the question that he  
3 raises is the -- the billing, as far as they are  
4 concerned is -- is not correct.

5           Now, if you, during this 45-day period,  
6 continue to bill on the basis that you have been, of  
7 course, they would be refusing to pay.

8           Now, I want you to explain to our satisfaction  
9 and to that of the Commission, would you terminate  
10 service if there was a question about the -- the  
11 billing in this 45-day period?

12          JUDGE HOPKINS: Let me interrupt -- Mr. Fain,  
13 let me just interrupt here just a second. And let me  
14 ask Mr. Lumley, if you are offering a 45-day maximum  
15 unconditional guarantee of service; is that true?

16          MR. LUMLEY: Yes, sir. And I'm not offering.  
17 I -- I thought I was reporting an agreement that the  
18 parties had reached.

19          JUDGE HOPKINS: Okay. You're -- you're  
20 reporting an agreement.

21          MR. LUMLEY: Our part of the agreement is that  
22 they will have 45 days in which to change providers.  
23 They indicated to us that they need 40, but they wanted  
24 a 5-day grace period.

25          JUDGE HOPKINS: Okay.

1           MR. LUMLEY: And we indicated that that was  
2 acceptable to us. They indicated that they were gonna  
3 try and do it as fast as possible. But if it takes  
4 them 45 days, they have 45 days.

5           JUDGE HOPKINS: Okay. Do you understand that,  
6 Mr. Fain?

7           MR. FAIN: Yes, sir.

8           JUDGE HOPKINS: Okay. You understand what  
9 Mr. Lumley is saying and what you are saying is -- is  
10 opinion, it's not evidence, do you understand that,  
11 sir?

12          MR. FAIN: May I inquire of -- of Mr. Aaron?

13          JUDGE HOPKINS: Mr. Fain, I'll tell you,  
14 we'll -- we'll finish with Mr. Lumley and you will  
15 certainly have a chance to say anything if you need to  
16 say it.

17          MR. FAIN: All right.

18          JUDGE HOPKINS: But what Mr. Lumley is doing  
19 is just reporting on a settlement that you all have  
20 agreed. Now, do you agree that there is a settlement  
21 to this matter?

22          MR. FAIN: Yes, sir. But it was -- there was  
23 a -- it was very quickly and without a lot of detail  
24 that -- and this is one of them that he has raised.

25          JUDGE HOPKINS: Okay. You understand -- and,

1 Mr. Lumley or Mr. Fain, you correct me if I'm wrong in  
2 any instance, but you have 45 days that they guarantee  
3 you that you will have service, and that there are no  
4 issues that are being settled here today or by that  
5 agreement concerning who owes what; is that correct?

6 MR. FAIN: And -- and how it was determined as  
7 to who owes --

8 JUDGE HOPKINS: Yes, sir.

9 MR. FAIN: -- what?

10 MR. LUMLEY: That's correct.

11 MR. FAIN: That's the question that he's --  
12 he's raised is the billing, we contend, has not been  
13 correctly applied.

14 JUDGE HOPKINS: And that won't be decided.

15 MR. LUMLEY: We understand you're reserving  
16 all rights to dispute existing bills and any bills  
17 issued for service rendered during the 45-day period.  
18 We're not suggesting you're binding yourself in any  
19 manner with regard to how much you owe or if you owe  
20 anything.

21 MR. FAIN: I understand.

22 JUDGE HOPKINS: Okay. Mr. Fain, if you'll be  
23 seated now.

24 Does anybody else have any further questions  
25 of -- of Mr. --



1               COMMISSIONER CLAYTON: I have a question,  
2 Judge.

3               JUDGE HOPKINS: Mr. Clayton?

4               COMMISSIONER CLAYTON: Forgive me. I -- I  
5 don't want to throw any gasoline on this situation  
6 here, but I do have a question.

7               MR. LUMLEY: Yes, sir.

8               COMMISSIONER CLAYTON: Basically the limit  
9 that I think is what you're saying -- what this  
10 Commission -- this Commission's involvement in this  
11 agreement is basically that there's disagreement of  
12 45 guaranteed days of service, and basically that it  
13 will be cut off, correct?

14              MR. LUMLEY: Correct. With our understanding  
15 that the parties --

16              COMMISSIONER CLAYTON: And the parties --

17              MR. LUMLEY: -- are very actively engaged in  
18 seeking a new provider, so it shouldn't be an  
19 interruption of service situation. We're -- we're  
20 giving them the time that they felt they needed to  
21 change providers.

22              And, you know, I don't even know that it's  
23 accurate to say that we're asking the Commission to  
24 participate. I mean, officially what we're asking the  
25 Commission to do is to approve the dismissal of the

1 case, but to provide assurances to Tri-Lakes -- I  
2 wanted to go on the record and provide, you know,  
3 essentially the substitute for a written signed  
4 document -- you know, a commitment to this Commission  
5 as to how long they have service so that they have  
6 something there to rely on.

7 COMMISSIONER CLAYTON: Okay. Thank you.

8 JUDGE HOPKINS: All right. Any further  
9 questions?

10 COMMISSIONER GAW: No.

11 JUDGE HOPKINS: Thank you.

12 Now, Mr. Fain, do you have anything you need  
13 to say, sir?

14 MR. FAIN: Well, if -- if it please the  
15 Commission.

16 JUDGE HOPKINS: If you want to say something,  
17 come over here and speak clearly into the microphone,  
18 please.

19 MR. FAIN: It's good to be with you  
20 Commissioners again. It's been a long time.

21 I think that the agreement has been made  
22 in -- in good faith by Mr. Lumley and by our people. I  
23 believe that it is understood -- it is my understanding  
24 that the question of who owes what and how it  
25 was -- how it was -- how it was arrived at will not be

1 settled by a -- by a dismissal of this -- of this  
2 complaint.

3 In other words, it would not be a dismissal  
4 with prejudice on any of the facts that might be  
5 present in this case. But that they will continue to  
6 give service, based upon the -- the -- the proper  
7 contracts and the proper tariffs. And as to whether  
8 those are correct or not would be something that would  
9 have to be resolved in the future.

10 But for the 45 days my client would be able to  
11 get service under the present tariffs and the -- the  
12 current contracts that have been made.

13 JUDGE HOPKINS: Thank you.

14 Any questions from any of the Commissioners?  
15 Commissioner Simmons?

16 COMMISSIONER SIMMONS: No, I don't have any.

17 JUDGE HOPKINS: Commissioner Murray?

18 COMMISSIONER MURRAY: No.

19 JUDGE HOPKINS: Commissioner Gaw, no -- no  
20 questions?

21 COMMISSIONER GAW: Yes, I have a question.

22 JUDGE HOPKINS: I'm sorry. I beg your pardon.  
23 I didn't know what that meant.

24 COMMISSIONER GAW: I did it -- I just -- just  
25 for purposes of making sure that everybody's on the

1 same page one more time.

2 Mr. Lumley, is that -- is that your  
3 understanding as well? Did you just hear  
4 anything -- did you hear anything that was any  
5 different than what you said earlier?

6 MR. LUMLEY: No, sir.

7 COMMISSIONER GAW: All right. That's all.

8 Thank you, Judge.

9 JUDGE HOPKINS: Mr. Bates, do you have  
10 anything?

11 MR. BATES: Bruce Bates on behalf of the Staff  
12 of the Missouri Public Service Commission.

13 No, Your Honor. This is -- Staff feels this  
14 is a complaint case. This is a case belonging to the  
15 parties. If they've reached an agreement that they  
16 believe is mutually satisfactory, then that is  
17 satisfactory to Staff.

18 JUDGE HOPKINS: Thank you.

19 I need this stipulation and agreement as soon  
20 as possible, but I know that I won't get it as fast as  
21 I want it. So when -- when will I have that,  
22 Mr. Lumley or Mr. Fain?

23 MR. LUMLEY: I should be able to have a  
24 document prepared for them to examine this afternoon  
25 when I return to my office in St. Louis. It should be

1 fairly short and sweet. But I'm not even sure that  
2 it's necessary. I mean, if the parties have committed  
3 to dismiss the proceedings, I think the Commission can  
4 just accept that dismissal. And we have a written  
5 record should a dispute arise.

6 I mean, I -- I really wasn't proposing to do  
7 anything beyond that, although we can certainly submit  
8 written memorandum formally dismissing.

9 But whatever the Commission's pleasure is, I'm  
10 happy to try and comply.

11 COMMISSIONER GAW: Judge, if I might.

12 It -- it strikes me that -- that we have a  
13 request to dismiss this case without prejudice from  
14 both parties with -- with complaints and  
15 countercomplaints.

16 And -- and a statement as to the one issue  
17 that -- that has to do with the cont-- continuance of  
18 services on the record. If there is some complaint  
19 about that service being continued, there would be, I  
20 think, ample reason for a new complaint to be filed  
21 based upon that.

22 And I -- I -- I -- I'm not sure it -- I'm not  
23 sure that it's necessary to do more than what we have,  
24 but whatever you'd like, Judge. I'd just offer it for  
25 my opinion.

1 JUDGE HOPKINS: Our notice of dismissal rule  
2 says that you can't just file a notice of dismissal if  
3 there's been testimony filed and so forth.

4 So it doesn't have to be complicated. If you  
5 just want to list the three issues that, I believe, you  
6 settled and that. I think we need something on the  
7 record and, obviously, it's gonna be dismissed without  
8 prejudice on both sides, so there won't be any  
9 substantive issues resolved.

10 MR. LUMLEY: I -- Judge, I would submit from  
11 our position that you could issue an Order today  
12 dismissing the case, based on the representations of  
13 the parties. Yeah, I -- I could see us --

14 JUDGE HOPKINS: I'll do that.

15 MR. LUMLEY: -- quibbling about a comma or  
16 something and dragging this out unnecessarily.

17 JUDGE HOPKINS: I'll do that, based on the  
18 record.

19 MR. LUMLEY: Thank you.

20 JUDGE HOPKINS: All right. Is there anything  
21 further for any party?

22 (No response.)

23 JUDGE HOPKINS: Seeing nothing --

24 MR. FAIN: If it ple-- please the Court, this  
25 is off the record.

1 JUDGE HOPKINS: No, sir, we're -- we're not  
2 gonna have anything off the record. If you'll speak  
3 into the microphone.

4 MR. FAIN: I just -- I just want to say, Your  
5 Honor, that in working with the -- the -- the -- your  
6 Staff how pleased I am that this Commission is  
7 functioning so well in the public interest.

8 I am -- I am very proud that -- of the -- the  
9 responses and the willingness of your Staff to help  
10 some such as me that have not had much contact with you  
11 for a long time.

12 And -- and I want to know that I think that  
13 your -- your Staff is -- is splendid.

14 JUDGE HOPKINS: Thank you. I -- on behalf of  
15 the Commission I thank you.

16 Now, I will be issuing an Order. And it will  
17 just simply say that the parties have reached an  
18 agreement, and that both petitions for claims are  
19 dismissed without prejudice.

20 Thank you.

21 We're off the record.

22 WHEREUPON, the hearing of this case was  
23 concluded.

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25