

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Southwestern Bell Telephone, L.P., d/b/a)	
SBC Missouri's Petition to Amend)	
The Section 251/252 Interconnection)	
Agreements between SBC Missouri and Various)	
Competitive Local Exchange Carriers.)	
)	
Southwestern Bell Telephone, L.P., d/b/a)	
SBC Missouri,)	
)	
Petitioner,)	
)	
vs.)	Case No. TO-2005-0117
)	
1-800-RECONEX, Inc., Adelphia Business)	
Solution Operations, Inc., now known as TelCove)	
Operations, Inc., BullsEye Telecom, Inc., Global)	
Crossing Local Services, Inc., Global Crossing)	
Telemanagement, Inc., Granite)	
Telecommunications, L.L.C., Intermedia)	
Communications, Inc., Level 3 Communications,)	
L.L.C., Now Acquisition Corporation, Phone-Link,)	
Inc., U.S. West Interprise America, Inc.,)	
Now Known as Qwest Interprise America, Inc. and)	
Winstar Communications, L.L.C.)	
)	
Respondents.)	

**SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI'S
APPLICATION FOR REHEARING PURSUANT TO SECTION 386.500, RSMO.**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and, for its Application for Rehearing pursuant to Section 386.500, states as follows:

1. On January 25, 2005, the Missouri Public Service Commission ("Commission") issued its Order Dismissing Petition ("Order") in the above-referenced proceeding. SBC Missouri respectfully requests the Commission to grant rehearing of its Order on the basis that it is unlawful, unjust, and unreasonable.

2. In reviewing a motion to dismiss, the Commission must determine if the facts pleaded and the inferences reasonably drawn therefrom state any grounds for relief.¹ A motion to dismiss for failure to state a claim upon which relief can be granted is solely a test of the adequacy of plaintiff's petition.² For purposes of the motion, all averments in the petition are assumed to be true and are construed liberally and favorably to the plaintiff.³ No effort is made to weigh any of the factual allegations to determine whether they are credible or persuasive.⁴ Rather, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.⁵

3. In its Order, the Commission states:

SBC's petition asks the Commission to amend twelve different interconnection agreements with twelve different CLECs. Each of those interconnection agreements presumably contains a change of law provision, as well as an agreed upon dispute resolution process. SBC's petition does not, however, indicate what specific provisions may exist in

¹ Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996).

² Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

³ Murphy v. A.A. Mathews, 841 S.W.2d 671, 672 (Mo. 1992); Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

⁴ Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

⁵ Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

the particular interconnection agreements that it is asking the Commission to amend.⁶

4. At the outset, SBC Missouri notes that there is no Missouri Rule of Civil Procedure that requires SBC Missouri to plead the specific provisions that exist in each particular interconnection agreements that it is asking the Commission to amend. In fact, to SBC Missouri's knowledge, there are only two rules in the Missouri Rules of Civil Procedure which specifically address pleadings involving written instruments: Rule 55.22 and Rule 55.23. Rule 55.22 provides:

When a claim or defense is founded upon a written instrument, the same may be pleaded according to legal effect, or may be recited at length in the pleading, or a copy may be attached to the pleading as an exhibit.

It is well-established that the use of the word "may" is generally held to be permissive, not mandatory.⁷ Thus, although this case involves twelve separate interconnection agreements, pursuant to Rule 55.22 of the Missouri Rules of Civil Procedure, SBC Missouri was not required to: (1) plead the interconnection agreements according to legal effect; (2) recite the interconnection agreements at length in the pleading; or (3) attach a copy of the interconnection agreements to the pleading as an exhibit. Although there was no legal requirement that SBC Missouri do so, SBC Missouri did state its claim according to legal effect. Specifically, SBC Missouri stated that: "the interconnection agreements between SBC Missouri and each of the named CLECs contain provisions requiring modification of the agreement to conform changes in applicable law, and also contain provisions expressly authorizing the Commission to resolve any dispute over

⁶ See Order, p. 4.

⁷ State ex re. Dresser Industries, Inc. v. Ruddy, 592 S.W.2d 789, 794 (Mo. 1980).

implementation of changes in law.”⁸ Thus, SBC Missouri went above and beyond the requirements of the Missouri Rules of Civil Procedure by pleading the interconnection agreements according to legal effect. Thus, the Commission’s conclusion that SBC Missouri’s petition “does not, however, indicate what specific provisions may exist in the particular interconnection agreements that it is asking the Commission to amend”⁹ is not a basis on which to dismiss SBC Missouri’s Amended Petition and the Commission’s decision is, therefore, unlawful, unreasonable, and unjust.¹⁰

5. Moreover, the Commission’s conclusion that SBC Missouri’s Amended Petition does not indicate what specific provisions may exist in the particular interconnection agreements that it is asking the Commission to amend is factually inaccurate. SBC Missouri specifically indicates that each of the interconnection agreements contains provisions requiring modification of the agreement to conform to changes in applicable law, i.e. change in law provisions, and also contains provisions expressly authorizing the Commission to resolve any dispute over implementation in changes in law, i.e. dispute resolution provisions. Both the parties to the interconnection agreements and the Commission are fully aware of what the change in law and dispute resolution provisions provide as the parties either agreed to or arbitrated the provisions in their interconnection agreements and the Commission approved each interconnection

⁸ See SBC Missouri’s Amended Petition, page 5.

⁹ See Order, page 4.

¹⁰ Rule 55.23 of the Missouri Rules of Civil Procedure provides: “When any claim or defense is founded upon a written instrument and the same shall be set up at length in the pleading or a copy attached thereto as an exhibit, the execution of such instrument shall be deemed confessed unless the party charges to have executed the same shall specifically deny the execution thereof.” Although SBC Missouri did not set up each interconnection agreement at length or attach a copy of each interconnection agreement to its Petition, no party charged to have executed any of the interconnection agreements denies the execution of an interconnection agreement.

agreement. Moreover, both the parties and the Commission have a copy of each interconnection agreement in their possession to review. There is no legal requirement that SBC Missouri attach each change of law and dispute resolution provision to the Amended Petition and it would be a futile and unreasonable effort since each party and the Commission already knows what the interconnection agreements provide. Thus, the Commission's Order dismissing SBC Missouri's Amended Petition is both unlawful, unreasonable, and unjust.

6. The Commission then states:

SBC does not plead any specific information regarding what steps it has taken with the individual CLEC to attempt to resolve its disputes with that CLEC. SBC pleads in general terms that it has attempted to negotiate with the CLECs but has been rebuffed. However, the amended petition offers no specific information regarding negotiations with the individual CLECs.¹¹

There is no requirement that SBC Missouri offer specific information regarding negotiations with the individual CLECs. In its Amended Petition, SBC Missouri stated: “[f]or almost a year, SBC Missouri has attempted to engage the CLECs on an individual basis to achieve the amendment of their interconnection agreements pursuant to their change in law provisions, but without success.”¹² SBC Missouri explained the steps that it took:

First, in the wake of the *Triennial Review Order*, and again in the wake of *USTA II*, SBC Missouri provided notice to the CLECs of the need to include conforming changes in the parties' interconnection agreements. SBC Missouri made available to the CLECs at least three proposed contract amendments designed to quickly modify the interconnection agreements in accordance with the *Triennial Review Order* and the *USTA II* decisions (the “TRO Amendment,” the “Lawful UNE Amendment,” and the “Post-USTA II Amendment”). In its early written

¹¹ See Order, page 4.

¹² See Amended Petition, page 3.

correspondence, SBC Missouri made efforts to establish timelines for amending these agreements.¹³

SBC Missouri also stated that its efforts were futile: “[t]he CLECs, however, made no constructive response, notwithstanding the facts that their agreements expressly call for revisions to take account of governing federal law, and notwithstanding the fact that the FCC in the *Triennial Review Order* specifically ‘admonish[ed]’ that ‘refus[al] to negotiate *any* subset of the rules’ adopted in that order would be considered ‘bad faith.’”¹⁴

7. SBC Missouri then explained, based on these pleaded facts, that the Commission had three bases upon which to base its jurisdiction. First, the interconnection agreements between SBC Missouri and each of the named CLECs contain provisions requiring modification of the agreement to conform changes in applicable law, and also contain provisions expressly authorizing the Commission to resolve any dispute over implementation of changes in law.¹⁵

8. Second, numerous courts and the FCC have determined that state commissions have the authority to interpret interconnection agreements not only based on provisions contained in the interconnection agreements, but also under Sections 251 and 252 of the Telecommunications Act of 1996.¹⁶ In *BellSouth v. MCI Metro Access Transmission Services*,¹⁷ the 11th Circuit noted that “[n]o court has held or suggested that a state commission does not have the authority to interpret and enforce interconnection

¹³ Id.

¹⁴ Id. citing *Triennial Review Order*, paragraph 706 (Emphasis added).

¹⁵ See Amended Petition, page 5.

¹⁶ Id.

¹⁷ *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270, 1276 (11th Cir. 2003).

agreements after they have been approved.” The 11th Circuit, thereafter, held: “we conclude that the Georgia Public Service Commission has the authority under federal law to interpret and enforce the interconnection agreements at issue between the parties.”¹⁸ Other circuits similarly recognize that state commissions have the authority to interpret interconnection agreements. See also *Bell Atlantic of Maryland, Inc. v. MCI WorldCom*¹⁹ (wherein the Fourth Circuit noted that: “The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements – we believe they do – but whether these decisions are to be reviewed by State court or federal courts.”); see also *Southwestern Bell Telephone Company v. PUC*²⁰ (wherein the Fifth Circuit noted that “the Act’s grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved”); see also *Southwestern Bell Telephone Company v. Brooks*²¹ (wherein the Tenth Circuit deferred to the FCC’s conclusion that state commissions have the authority to interpret and enforce interconnection agreements); see also *Illinois Bell Telephone Company v. WorldCom Techs., Inc.*²² (wherein the court stated that, in deciding a dispute between a CLEC and an ILEC over whether ISP calls were local traffic, the state commission “was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements”).

¹⁸ *Id.* at 1279.

¹⁹ *Bell Atlantic of Maryland, Inc. v. MCI WorldCom*, 240 F.3d 279, 304 (4th Cir. 2001).

²⁰ *Southwestern Bell Telephone Company v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000).

²¹ *Southwestern Bell Telephone Company v. Brooks Fiber Communication of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000).

²² *Illinois Bell Telephone Company v. WorldCom Techs, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999).

Further, as noted above, the FCC has clearly stated that state commissions have the authority to interpret and enforce interconnection agreements.²³ Specifically, the FCC held that a determination of whether ISP traffic was subject to reciprocal compensation under an interconnection agreement was a determination that a state commission was required to make under §252(e)(5). The FCC noted that it “must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states’ ‘responsibility’ under section 252.”²⁴ The FCC held that interpretation and enforcement of interconnection agreements were responsibilities of the states under section 252, citing Southwestern Bell²⁵ and Illinois Bell²⁶ for support.

9. And third, this proceeding is expressly contemplated and approved by the FCC in its response on remand of the *USTA II* decision.²⁷ The FCC’s *Interim Order* contemplates that the ILECs will initiate proceedings before state commissions to modify interconnection agreements to prepare for the issuance of the FCC’s forthcoming final rules, “[i]n order to allow a speedy transition” once the FCC adopts final rules.²⁸ The FCC “expressly preserve[d] incumbent LECs’ contractual prerogatives” to petition state commissions to modify their existing agreements.²⁹ Indeed, the FCC went so far as to instruct state commissions, in ruling on change in law requests, to “presum[e] an ultimate

²³ *In re. Starpower*, 15 F.C.C.R. 11277.

²⁴ *Id.*

²⁵ *Southwestern Bell Telephone Company v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000).

²⁶ *Illinois Bell Telephone Company v. WorldCom Techs, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999).

²⁷ *See* Amended Petition, page 5.

²⁸ *Interim Order*, ¶ 22.

²⁹ *Id.*

Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements.”³⁰ Thus, SBC Missouri invoked the jurisdiction of the Commission and it did not need to offer specific information regarding negotiations with the individual CLECs. The Commission’s Order dismissing SBC Missouri’s Amended Petition is, therefore, unlawful, unreasonable, and unjust.

10. Moreover, the Commission’s conclusion that it “cannot assume that SBC’s reports of attempts to negotiate with one or two CLECs would apply to the others” is legally incorrect. As indicated above, SBC Missouri pled that it “attempted to engage the CLECs on an individual basis to achieve the amendment of their interconnection agreement pursuant to their change in law provisions, but without success.”³¹ The law is well-settled; all averments in the petition are assumed to be true and are construed liberally and favorably to the plaintiff.³² Thus, contrary to the Commission’s position, the Commission was required to assume that SBC Missouri attempted to negotiate with each CLEC and each attempt was unsuccessful. When a hearing is conducted in this matter, SBC Missouri will produce evidence consistent with the allegations in its Amended Petition, i.e. that SBC Missouri complied with applicable contract provisions regarding notice and informal dispute resolution efforts, such as negotiation, and that those efforts were fruitless and the agreements remain unamended. For all of these

³⁰ Id. (Emphasis added).

³¹ See Amended Petition, page 3.

³² Murphy v. A.A. Mathews, 841 S.W.2d 671, 672 (Mo. 1992); Pulitzer Publishing Company v. Missouri State Employees’ Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

reasons, the Commission's Order dismissing SBC Missouri's Amended Petition is unlawful, unjust, and unreasonable.

11. Next, the Commission states: "SBC simply has not pleaded enough facts to permit the Commission to determine whether the dispute resolution procedures found in the particular interconnection agreements that SBC seeks to amend have been satisfied."³³ The Commission continues: "the Commission cannot determine whether the dispute resolution procedures in those disputed interconnection agreements authorize the Commission to proceed."³⁴ As indicated above, SBC Missouri pled that the interconnection agreements between SBC Missouri and each of the named CLECs contain provisions requiring modification of the agreements to conform changes in applicable law, and also contain provisions expressly authorizing the Commission to resolve any dispute over implementation of changes in law.³⁵ Again, the law is well-settled; all averments in the petition are assumed to be true and are construed liberally and favorably to the plaintiff.³⁶ Thus, by pleading that SBC had attempted to negotiate with CLECs and been unsuccessful, and that each interconnection agreement contains provisions expressly authorizing the Commission to resolve the resulting dispute, SBC Missouri pled sufficient facts properly to invoke the Commission's jurisdiction (and, as indicated above, this was not the only basis for the Commission's jurisdiction).

³³ See Order, page 5.

³⁴ Id.

³⁵ See Amended Petition, page 5.

³⁶ Murphy v. A.A. Mathews, 841 S.W.2d 671, 672 (Mo. 1992); Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

Furthermore, because SBC Missouri pled that the interconnection agreements expressly authorize the Commission to resolve any disputes over implementation of changes in law and all averments in the petition are assumed to be true and are construed liberally and favorably to the plaintiff,³⁷ the Commission's determination that it "is persuaded that SBC's petition must be dismissed because it failed to plead facts sufficient to allow the Commission to determine whether the dispute resolution procedures in the individual interconnection agreements have been satisfied"³⁸ is factually and legally inaccurate. For all of these reasons, the Commission's Order dismissing SBC Missouri's Amended Petition is, therefore, unlawful, unreasonable, and unjust.

10. SBC Missouri directs this Commission's attention to the well-reasoned Order recently released by the Indiana Utility Regulatory Commission in which it denied all pending Motions to Dismiss in SBC's parallel action in Indiana. In its Order, the Commission states:

Both SBC Indiana and Movants have provided examples of how Complainant has or has not attempted to invoke interconnection agreement procedures in an effort to effect the requested change of law amendment. For purposes of filing a Complaint sufficient to withstand the Motions to Dismiss, we should not expect Complainant to recite every fact upon which the claim is based. SBC Indiana's Complaint alleges that it has properly invoked the relevant interconnection provisions to effect a change of law amendment; that the Respondents have refused to engage SBC Indiana in addressing these provisions; and that Commission intervention is now appropriate. Viewing all allegations in a light most favorable to SBC Indiana, we conclude that there could be a set of facts under which SBC Indiana would be entitled to relief. Only by examining the specific, relevant provisions of the individual interconnection

³⁷ Murphy v. A.A. Mathews, 841 S.W.2d 671, 672 (Mo. 1992); Pulitzer Publishing Company v. Missouri State Employees' Retirement System, 927 S.W.2d 477, 479 (Mo. App. 1996); In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Concerning the Kansas Property Tax for Gas in Storage, Case No. GU-2005-0095, November 23, 2004.

³⁸ Id.

agreements and the parties' actions (or inaction) with respect to these provisions, as well as the reasoning behind any action or inaction, can we determine if SBC Indiana is entitled to relief in the form of a Commission order to amend an interconnection agreement. Until we are able to review detailed evidence with respect to each interconnection agreement and the issues relevant to each agreement, it would not be appropriate to dismiss the Complaint as a whole or as to any individual Movant.³⁹

Finally, SBC Missouri notes that only three of the Commissions before which SBC has sought similar relief have ruled on pending motions to dismiss. As indicated above, the Indiana Commission denied all motions to dismiss. Similarly, the Texas Commission denied all motions to dismiss.⁴⁰ SBC Missouri, therefore, respectfully requests this Commission to grant its Application for Rehearing and allow this proceeding to go forward as did the Indiana and Texas commissions.

Wherefore, SBC Missouri prays that the Commission grants its Application for Rehearing, together with any additional or further relief the Commission deems just and proper.

³⁹ See Order, Complaint of Indiana Bell Telephone Company, Incorporated, d/b/a SBC Indiana for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements, Cause No. 42749, January 21, 2005, pages 8-9.

⁴⁰ See Order No. 4, Restyling Case; Granting Motion for Consolidation; Denying Motions to Dismiss; and Partially Abating Proceeding, Petition of SBC Texas for Post-Interconnection Dispute Resolution in a Consolidated Change of Law Proceeding for Non-T2A Interconnection Agreements, January 27, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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