

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's)
Petition for Compulsory Arbitration of Unresolved Issues) Case No. TO-2005-0336
for a Successor Interconnection Agreement to the)
Missouri 271 Agreement ("M2A"))

**CLEC COALITION RESPONSE TO SBC MISSOURI AND STAFF PLEADINGS
REGARDING TIMELINESS OF PETITION**

COME NOW Big River Telephone Company, LLC, Birch Telecom of Missouri, Inc, ionex communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., and Xspedius Communications, LLC ("Xspedius") (collectively, the "CLEC Coalition"), pursuant to Order dated April 6, 2005 and for their Response to SBC Missouri and Staff pleadings regarding the timeliness of the Petition state:

Executive Summary

The arbitration should proceed. The inquiry regarding the timeliness of the filing of the Petition should be abandoned. No party has raised this issue. Timeliness is not jurisdictional, but rather an affirmative defense. Absent abandonment of the inquiry, the CLEC Coalition reserves the right to supply further information regarding the timeliness of the Petition.

Discussion

1. The CLEC Coalition joins SBC Missouri and Staff in urging the Arbitrator and the Commission to move forward with this proceeding. One cannot even begin to imagine the chaos that would result from an erroneous determination not to move forward. SBC has made it clear that it will not voluntarily agree to an extension of the M2A-based interconnection agreements beyond July 19, 2005. Absent prompt and continued proceedings herein, it is not clear how replacement agreements could be put into effect by July 19, 2005. All concerned have already acknowledged it will be hard enough to meet the target date simply by pressing ahead in this

case. Starting a new proceeding before this Commission or a commercial arbitrator is impracticable under the circumstances.

2. The CLEC Coalition respectfully suggests that the Arbitrator and the Commission should discontinue the inquiry into the purported issue of the timeliness of the Petition. No party has asserted that the Petition was not timely filed. There is no requirement under applicable law that the parties submit allegations or proof of the timeliness of the filing. The statutory timeframes set forth in 47 USC § 252 are limitations periods, not jurisdictional boundaries. Objections based on such limitations periods are affirmative defenses that are waived if not raised by a party. (See, e.g., Missouri Rule of Civil Procedure 55.08, FRCP 8(c)). In the recent decision of the United States Supreme Court in *Scarborough v. Principi*, 124 SCt 1856 (2004), the Court made it clear that such federal time limitations are not jurisdictional, and are subject to the same waiver principles as limitations statutes applicable generally. In explanation, the Court stated: "Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the class of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 124 S.Ct. at 1865.

3. As Staff notes in its Memorandum of Law, there is no judicial precedent to support a conclusion that the timeframes set forth in 47 USC §252 are jurisdictional.

4. The Commission's new rule (4 CSR 240-36.040(2)) simply recites the timeframes from Section 252. The Commission does not have authority to convert by rulemaking the Section 252 federal time prescriptions into jurisdictional constraints. In any event, the Arbitrator or the Commission should exercise authority under 4 CSR 240-36.040(15) to waive the rule to the extent it is deemed somehow to be more restrictive than the federal statute.

5. SBC specifically alleges in the Petition that its filing was timely under Section 252. (See paragraph 10). Again, no party contests the allegation. As directed, SBC made a Supplemental Submission that reiterated that allegation and supplied various documents that had been exchanged between CLECs and SBC. AS SBC indicates, its records are not complete and the CLECs have additional documents that could be supplied. However, the inquiry would not end there, as Section 252 does not require written requests for interconnection. To develop the full story of the process by which CLECs made Section 252 requests for interconnection, the parties would have to either prepare extensive affidavits or supply live testimony. There is no provision for such preliminary proceedings under Section 252, particularly in the absence of any contention by any party that a petition for arbitration was not timely filed. Hence, pending further rulings herein, CLEC Coalition members reserve the right to file additional documents and provide testimony in the event the inquiry into the timeliness issue is not discontinued.

6. The CLEC Coalition agrees with SBC that the parties have complied with the applicable provisions of the M2A and thereby have satisfied the time periods of Section 252 applicable to the filing of an arbitration. The M2A required the parties to give early notification to facilitate the negotiation and arbitration process. The early notifications and continued discussions regarding these proceedings resulted in timely requests for interconnection and a subsequent timely filing by SBC. By agreement of all involved, SBC made a single filing, in lieu of multiple filings by the involved CLECs. Section 252 does not require any specific method for making a request for interconnection and does not in any way preclude the methodology set forth in the M2A, which was approved by the Commission and endorsed by the FCC.

WHEREFORE, the CLEC Coalition urges the Arbitrator and the Commission to end the inquiry into the issue of the timeliness of the filing of the Petition and proceed with this arbitration in accordance with the recently-ordered case schedule. In the alternative, the CLEC Coalition reserves the right to supply additional evidence regarding the timeliness of the filing of the Petition.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

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CERTIFICATE OF SERVICE

A true and correct copy of the forgoing was mailed this 25th day of April, 2005, by email or by placing same in the U.S. Mail postage paid, to the persons listed on the attached service list.

/s/ Carl J. Lumley

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