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JOINT CLEC PETITION FOR A  
 RULING RELATIVE TO THE  
 NEED FOR PUBLIC REVIEW AND  
 APPROVAL BY THE  
 COMMISSION OF THE APRIL 3,  
 2004 TELECOMMUNICATIONS  
 SERVICES AGREEMENT  
 BETWEEN SBC TEXAS AND SAGE  
 TELECOM

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PUBLIC UTILITY COMMISSION

OF TEXAS

PUBLIC UTILITY COMMISSION  
 FILING CLERK

### ORDER DIRECTING SBC AND SAGE TO PROVIDE AGREEMENT

This Order directs Southwestern Bell Telephone, L.P., d/b/a SBC Texas ("SBC Texas") and Sage Telecom, Inc. ("Sage") to provide four (4) copies of the agreement that SBC Communications, Inc. ("SBC"), the corporate parent of SBC Texas, announced between SBC and Sage on April 3, 2004.<sup>1</sup> These four copies will be provided under seal directly to the undersigned ALJ. Also, in accordance with the detailed instructions provided in this Order, SBC Texas and Sage shall designate the portions of these four (4) copies of the Agreement that are public, those that SBC and Sage believe to be confidential, and those that SBC and Sage believe to be highly confidential.

Additionally, provisions that SBC and Sage deem public shall be filed publicly pursuant to P.U.C. Procedural Rule 22.71.

SBC and Sage shall complete all of these required actions by noon on Monday, May 17, 2004.

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<sup>1</sup> There is some confusion regarding whether more than one agreement exists. For example, SBC and Sage apparently filed an agreement dated April 30, 2004, in response to a similar order from the California Commission. *See generally* Letter from Mr. Randolph L. Wu, California Public Utilities Commission, to Ms. Cynthia Marshall, SBC, dated Apr. 21, 2004, at 1 ("*California Filing Order*"). SBC Texas and Sage are therefore ordered to file the April 3, 2004 agreement, as well as any other agreements negotiated in the last two months that impact the relationship between SBC Texas and Sage (collectively referred to as "the SBC-Sage Agreement" or "the Agreement").

## I. Background

On March 2, 2004, the D.C. Circuit vacated<sup>2</sup> the vast majority of the FCC's *Triennial Review Order*<sup>3</sup> decisions regarding regulatory wholesale unbundling requirements for loops, switches and transport, but stayed the vacatur until May 2, 2004.<sup>4</sup> On March 31, 2004, all five FCC Commissioners urged ILECs and CLECs "to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market," and also announced that the FCC would ask the D.C. Circuit to extend its stay for an additional 45 days past May 2 to provide additional time for such negotiations to occur.<sup>5</sup> Two weeks later, the D.C. Circuit granted the FCC's request, and the vacatur of these portions of the *Triennial Review Order* is now stayed until June 15, 2004.<sup>6</sup>

On April 3, 2004, SBC announced that it had reached a "commercial agreement for SBC to provide wholesale local phone services to Sage covering all 13 states comprising SBC's local[-]phone territory."<sup>7</sup> SBC stated that "[t]he seven-year pact will replace the regulatory mandated UNE-P [unbundled network element-platform] with a private commercial agreement" that has a "proprietary nature."<sup>8</sup> Therefore, SBC Texas and Sage have declined to file the new SBC-Sage Agreement as an interconnection agreement pursuant to section 252(a)(1) of the Federal Telecommunications Act (FTA).<sup>9</sup> Rather, SBC Texas and Sage have stated an intent to amend their existing T2A-based agreement to change "terms and conditions governing reciprocal

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<sup>2</sup> *U.S.T.A. v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

<sup>3</sup> *In re review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets Nos. 01-338, 96-98, 98-147, Report & Order & Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (2003), *as amended by Errata*, FCC 03-227, 18 FCC Rcd 19020 (2003) ("TRO").

<sup>4</sup> *USTA II*, 359 F.3d at 594.

<sup>5</sup> Press Statement of Chairman Michael K. Powell & Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin, & Jonathan S. Adelstein on *Triennial Review Next Steps* (rel. Mar. 31, 2004) at 1.

<sup>6</sup> Order in Docket No. 00-1012, *United States Telecom Ass'n v. F.C.C.* (D.C. Cir. Apr. 13, 2004).

<sup>7</sup> SBC Press Release, Attachment A to Joint CLEC Petition, at 1 (announcing the SBC-Sage Agreement).

<sup>8</sup> *Id.*

<sup>9</sup> 47 U.S.C. § 252(a)(1) (providing that negotiated agreements for "interconnection, services, or network elements pursuant to section 251 ... shall be submitted to the State commission under subsection (e) of this section"); *see also id.* § 252(e)(1).

compensation, and switching and shared transport, as well as loop pricing” in keeping with the SBC-Sage Agreement.<sup>10</sup>

At least four state commissions have addressed the SBC-Sage Agreement, two of which have ordered that the Agreement be filed, and two of which have required SBC and Sage to show cause why the Agreement should not be filed:

**California:** On April 21, 2004, the California Public Utilities Commission ordered SBC and Sage to file the new agreement “in its entirety with the Commission for review,” but allowing initial filing under seal of any particular provisions that SBC and Sage believed to contain “commercially sensitive information that should remain confidential.”<sup>11</sup>

**Kansas:** On April 28, 2004, the Kansas Corporation Commission asked SBC to provide “a detailed explanation of SBC’s position regarding filing of the agreement. In particular, please explain the basis for a ‘commercial arrangement’ exception in Section 252.”<sup>12</sup>

**Michigan:** Also on April 28, 2004, the Michigan Public Service Commission ordered SBC and Sage “to file their recently negotiated agreement in its entirety with the Commission for review. ... To the extent that SBC and Sage believe that a provision of the interconnection agreement contains commercially sensitive information that should remain confidential, they should identify each such provision and shall initially file them [under seal].”<sup>13</sup>

**Missouri:** On May 11, 2004, the Missouri Public Service Commission ordered SBC and Sage “to make a filing or filings to explain why they believe the agreement should not be filed and

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<sup>10</sup> SBC Texas’ Response to the Joint CLEC Petition for Expedited Ruling Regarding the Filing of the SBC/Sage Agreement (“SBC Response”), at 6-7; *see also* Response of Sage Telecom, Inc. to the Joint CLEC Petition for Expedited Ruling Regarding the Filing of the SBC/Sage Agreement (“Sage Response”), at 8.

<sup>11</sup> *California Filing Order* at 1.

<sup>12</sup> Letter from Mr. Don Low, Kansas Corporation Commission, to Ms. Cyndi Gallagher, SBC, dated Apr. 28, 2004, at 2.

<sup>13</sup> *In re, On the Commission’s Own Motion, to Require SBC Communications, Inc. & Sage Telecom, Inc. to Submit their Recently Negotiated Agreement for the Provision of Telecommunications Services in Michigan for Review & Approval*, Order, Mich. P.S.C. Case No. U-14121 (Apr. 28, 2004), at 3.

considered by the Commission under the provisions of §251 and §252 of the Telecommunications Act of 1996.”<sup>14</sup>

This docket began on April 28, 2004, when the Joint CLECs<sup>15</sup> petitioned the Commission to investigate why the SBC-Sage Agreement has not been filed for approval with the Commission, to require SBC Texas and/or Sage to file the Agreement, and to do so on an expedited basis.<sup>16</sup> SBC Texas responded on May 6, arguing that the SBC-Sage Agreement was partly a private, commercially sensitive arrangement that they did not intend to file, and partly an amendment to SBC Texas and Sage’s existing section 251 interconnection agreement.<sup>17</sup> SBC Texas pledged that the amendment terms would be filed later this month, with an effective date of July 1, 2004.<sup>18</sup> In a related proceeding, SBC filed a petition with the FCC on May 5, 2004, asking the FCC to preempt state commissions from requiring SBC and/or Sage to file those portions of the Agreement that SBC and Sage view as “non-251 arrangements.”<sup>19</sup> Sage has filed documents in this docket and in the SBC FCC docket supporting SBC’s position.<sup>20</sup>

## II. Discussion

FTA Sections 252(a)(1) and 252(e)(1) requires negotiated interconnection agreements to be publicly submitted for approval by the relevant state commission,<sup>21</sup> and once approved, to be publicly posted so that other interested carriers can exercise the “most favored nation” rights that the FTA grants to them.<sup>22</sup> This Commission’s rules similarly require interconnection agreements

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<sup>14</sup> *In re Agreement Between SBC Communications, Inc. & Sage Telecom, Inc.*, Order to Show Cause, Mo. P.S.C. Case No. TO-2004-0576 (May 11, 2004), at 1-2.

<sup>15</sup> The Joint CLECs are: AT&T Communications of Texas, L.P. and affiliates; Birch Telecom of Texas, LTD, LLP; Bullseye Telecom, Inc.; ICG Communications; MCI Metro Access Transmission Services LLC; Xspedius Communications, LLC; nii communications, Ltd.; Westel, Inc.; Western Communications, Inc. d/b/a Logix Communications; and 20 of the 21 members of the Competitive Telecommunications Group.

<sup>16</sup> Joint CLEC Petition at 2.

<sup>17</sup> SBC Response at 6-7; *In re SBC Communications Inc. Emergency Petition for Declaratory Ruling, Preemption, & for Standstill Order to Preserve the Viability of Commercial Negotiations*, Petition of SBC Communications Inc., FCC WC Docket No. \_\_ (filed May 5, 2004) (“SBC FCC Petition”) at 3-4.

<sup>18</sup> SBC Response at 6-7; SBC FCC Petition at 3-4.

<sup>19</sup> SBC FCC Petition at 3-4, 6.

<sup>20</sup> Sage Response, *passim*.

<sup>21</sup> 47 U.S.C. §§ 252(a)(1), 252(e)(1).

<sup>22</sup> *Id.* § 252(i).

to be publicly filed and approved.<sup>23</sup> As the FCC has noted, these filing and review requirements are “the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.”<sup>24</sup> Two months ago, the FCC further stated that state commissions are in the best position to make threshold determinations about “whether a certain type of agreement does not require filing.”<sup>25</sup>

Pursuant to these pronouncements, SBC Texas and Sage are directed to: (a) provide four (4) copies of the SBC-Sage Agreement directly to the undersigned ALJ; and (b) file the public portions of the Agreement, by noon on Monday, May 17, 2004, in accordance with the following paragraphs.

### III. Ordering Paragraphs

It is ORDERED that:

1. **Designation of Confidential Materials.** When providing the four (4) complete copies of the SBC-Sage Agreement, SBC and Sage shall designate all portions of the Agreement as public, as confidential (“Confidential Materials”), or as highly confidential (“Highly Sensitive Confidential Materials”), as appropriate. Portions designated “public” shall also be filed publicly pursuant to P.U.C. Substantive Rule 22.71.
2. **Materials Excluded from Confidential Materials Designation.** Confidential Materials shall not include any information or terms contained in the public files of the Commission or any other federal or state agency, court, or local governmental authority subject to the Texas Public Information Act. Confidential Materials also shall not include terms or information which at the time of, or prior to disclosure in a proceeding, is or was public knowledge, or which becomes public knowledge other than through disclosure in violation of this Order.

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<sup>23</sup> P.U.C. PROC. R. 21.97(a); P.U.C. PROC. R. 21.97(a)(4); P.U.C. PROC. R. 21.101(a).

<sup>24</sup> *In re Qwest Communications Int’l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File & Obtain Prior Approval of Negotiated Contractual Arrangements under §252(a)(1)*, Memorandum Opinion & Order, FCC 02-276, 17 FCC Rcd 19337 (2002) (“*Qwest Declaratory Ruling*”), at ¶ 46.

<sup>25</sup> *In re Qwest Corp. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 04-57, 2004 WL 486232 (Mar. 12, 2004) (“*Qwest NAL*”), at ¶ 34.

3. **Procedures for Designation of Confidential Materials.** SBC and Sage shall: (i) inform the Commission of any and all exemptions to the Public Information Act, TEX. GOV'T CODE ANN., Chapter 552, claimed to be applicable to the alleged Confidential Materials; (ii) inform the Commission of the reasons supporting SBC's and Sage's claim that specific Agreement terms are exempt from public disclosure under the Public Information Act and subject to treatment as protected materials; and (iii) confirm that counsel for SBC and Sage have reviewed the relevant terms sufficiently to state in good faith that the information is exempt from public disclosure under the Public Information Act and merits the Confidential Materials designation.
4. **Highly Sensitive Confidential Material Described.** The term "Highly Sensitive Confidential Materials" is a subset of Confidential Materials and refers to Agreement terms or information that SBC and/or Sage claim is of such a highly sensitive nature that making copies of such terms or information or providing access to such terms to employees of any party to this docket would expose SBC and/or Sage to unreasonable risk of harm. Notwithstanding the distinction that SBC and Sage must make between Confidential Materials and Highly Sensitive Confidential Materials, all such Materials will be reviewed under seal by Commission personnel only, pending further determinations by the Commission.

SIGNED AT AUSTIN, TEXAS on the 13<sup>th</sup> day of May 2004.

PUBLIC UTILITY COMMISSION OF TEXAS



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MICHAEL E. FIELD  
DIRECTOR, DOCKET MANAGEMENT  
POLICY DEVELOPMENT DIVISION