

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

In the Matter of the Determination	)	
Of Prices, Terms and Conditions of	)	
Certain Unbundled Network Elements	)	<u>Case No. TO-2005-0037</u>
Consideration upon Remand from	)	
the United States District Court	)	

**BRIEF OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

COMES NOW McLeodUSA Telecom Services, Inc., by and through counsel, and for its brief herein states as follows:

This brief is filed in response to the Commission's Order Establishing Briefing Schedule (Order), issued herein on October 21, 2004. The Commission should set a capital structure for SBC which reflects a lower risk than the market-based capital structure of telephone holding companies, and its decision on remand should be implemented on a prospective basis only. The only true-up provided for has already taken place, and no "further true-up" is permitted, provided for, or appropriate.

**CAPITAL STRUCTURE ISSUE**

Regarding the capital structure issue, the Commission must assess the element of risk and adjust for the fact that there is considerably lower risk involved in the leasing of network elements than in operating a telephone holding company. (Ex. 29, Hirshleifer Rebuttal, p. 33). CLEC witness Hirshleifer's testimony was convincing on this point. SBC witness Avera's analysis fails to acknowledge and account for this reduced risk, and must be rejected. The Commission should recall several of the findings it made in its initial Report and

Order in TO-2001-438 which are unaffected by the District Court's findings, remain relevant, and should guide the Commission in addressing the capital structure issue on remand. These findings include:

However, it is not appropriate to simply use the actual capital structure of SBC. Determining the appropriate capital structure is more difficult because under TELRIC standards, the CLECs that purchase UNEs should not be required to pay for risks associated with other aspects of SWBT's business. The Commission is therefore required to determine the cost of capital for a hypothetical company that is only in the business of selling UNEs to CLECs at wholesale. (TO-2001-438, Report and Order, August 6, 2002, at 68)

. . . any target capital structure that the Commission chooses to adopt will be hypothetical. There is no way to know exactly what a company providing only wholesale UNEs to CLECs would look like. (Report and Order, August 6, 2002, at 69).

The Report and Order also correctly states that such hypothetical company would be

. . . operating in a heavily regulated, virtually monopolistic environment (Report and Order at 69).

The Commission should be guided by these still-valid findings in determining an appropriate capital structure on remand.

#### TRUE-UP ISSUE

When SBC took this matter to the Federal District Court, it did not seek or obtain stay of the rates it was challenging. Thus, the rates which took effect as a result of the Commission's June 17, 2003, Order Denying SBC Missouri's Application for Reconsideration or Rehearing and Alternative Motion to Hold in Abeyance and Approving Compliance Rates in TO-2001-438: 1) became the "permanent rates" referenced in the M2A (Exhibit 1 to Appendix Pricing UNE), 2) were the basis for the single true-up provided for in the M2A, and 3) are not

subject to retroactive adjustment when the Commission issues its order on remand. The CLEC customers of SBC had a right to rely on the rates approved in June 2003 as final. CLEC's billed their customers reliance thereon, and any attempt to adjust those rates would be an unconstitutional taking of the property of the CLEC customers of SBC's UNE services. (U.S. Constitution, Article I, Section 10; Missouri Constitution, Article 1, Section 13).

. It would be inappropriate regulatory policy to leave control of the M2A "bargain" in the hands of one party; namely, SBC. It is also difficult to reconcile SBC's insistence on a second bite at the true-up apple to its statement at the October 18 oral argument that the revisions may be too small to justify making changes in rates once the Commission enters its Order on remand (Tr. 64, l. 17-19). The notion of SBC determining "maybe we do what we want on the true-up" (Tr. 64, l. 5), the lack of precedent for "fixing" a prior true-up (Tr. 54-55), and the unconstitutionality of any such action should aid the Commission in rejecting any retroactive application of rates on remand.

The Commission had an opportunity just six months ago to address the inappropriateness of retroactive application of rates determined on remand. In the Missouri-American Water Company rate case remand Report and Order issued May 27, 2004, in Case No. WR-2000-281, the Commission stated:

The Missouri Supreme Court considered this question with respect to a Fuel Adjustment Clause ("FAC") contained in the tariffs of certain electric utilities. The Court concluded that the FAC was illegal and that the Commission had erred in approving the tariffs containing it. Nonetheless, no refund of the monies paid under the illegal FAC was possible, where the funds were paid directly to the utilities and not into the registry of a court:

The Commission has the authority to determine the rate *to be charged*, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery[.] It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

However, the Court reached a different result where money was paid under protest and held in a separate fund by a court pending the resolution of the controversy.

...  
(Report and Order, p. 10, three footnotes within text referring to *State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission of Missouri*, 585 S.W.2d 41, 47 and 56-58 (Mo. banc 1979) deleted)

### CONCLUSION

The Commission should set SBC's capital structure at a level which reflects an appropriate adjustment for the lower risk associated with leasing network elements than would apply to the entire holding company's market-weighted capital structure. In addition, the Commission should order that any new rates resulting from the remand be applied on a prospective basis only.

Respectfully submitted,

/s/ Mary Ann Young

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been served electronically on all parties of record to this case this 29<sup>th</sup> day of November 2004.

/s/Mary Ann Young  
Mary Ann (Garr) Young