BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.	)))	Case No. TO-2004-0576

COMMENTS OF CLEC COALITION IN SUPPORT OF REQUIRING COMMISSION REVIEW AND APPROVAL OF TELECOMMUNICATIONS SERVICES AGREEMENTS BETWEEN SBC MISSOURI AND SAGE TELECOM

COME NOW, Nuvox Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, AT&T Communications of the Southwest, Inc. and Birch Telecom of Missouri, Inc. (collectively, the "CLEC Coalition") and file their Comments in support of the Commission requiring SBC Missouri ("SBC") and Sage Telecom, Inc. ("Sage") to file, in their entirety, the agreements recently entered into between SBC and Sage (as defined more fully in ¶ 5 below, the "SBC-Sage Agreements"). For their Comments, the CLEC Coalition states as follows:

The SBC-Sage Agreements

1. The terms, conditions, and rates for interconnection, provision of switching, loops, transport, and other services between SBC and Sage in Missouri are governed by an Interconnection Agreement approved by this Commission (the "SBC-Sage Interconnection Agreement"). The SBC-Sage Interconnection Agreement is based on the Missouri 271 Agreement ("M2A").[1]

2. On April 3, 2004, SBC issued a press release that stated, in part, the following:

[1] On December 27, 2001, Sage submitted to the Commission its Notice of Adoption of the M2A.

A. It announced that SBC and Sage had reached a "seven-year commercial agreement for SBC to provide wholesale local phone service to Sage covering all 13 states comprising SBC's local phone territory."

B. It stated that "the seven-year pact will replace the regulatory mandated UNE-P with a private commercial agreement."

C. It advised that "SBC has offered to negotiate comparable terms and conditions with any similarly-situated competitor."

3. The recent agreements between SBC and Sage consist of at least two changes to the existing SBC-Sage Interconnection Agreement. On May 4, 2004, SBC filed with the Commission a document entitled "Amendment Superseding Certain 251/252 Matters To Interconnection Agreements Under Sections 251 and 252 of the Telecommunications Act of 1996 (the "Superseding Amendment").[2] At Section 6.6 of the Superseding Amendment, SBC and Sage represent that "[c]ontemporaneously with this Amendment, the Parties are entering into a Private Commercial Agreement for Local Wholesale Complete ('LWC Agreement'). The LWC Agreement contains provisions that may render it inoperative in one or more states."[3] The LWC Agreement has not been filed with this Commission to the knowledge of the CLEC Coalition, but redacted versions of the LWC Agreement have been filed with the Michigan and Texas Commissions. On information and belief, the Superseding Amendment and the contemporaneously executed LWC Agreement, are dated April 30, 2004. Information from Michigan and Texas indicates that the LWC Agreement includes (a) a 100% purchase

[2] The Commission assigned the Superseding Amendment File No. VT-2004-0050 for tracking purposes. Staff has filed an application to open a case to review the Superseding Amendment, which has been assigned Case No, TO-2004-0584. The CLEC Coalition supports Staff's application.

[3] Superseding Amendment, Section 6.6, p. 6. Copy attached to SBC's Response to the Order to Show Cause.

commitment for all circuit switched (or similar) services; (b) an agreement not to buy UNE-P, Total Service Resale ("TSR"), UNEs that must be offered under section 271 of the federal Telecommunications Act ("271 UNEs"), UNE-L or any wholesale services from any other source, (c) a waiver of commingling rights, (d) a waiver of performance measures and penalties, and (e) purported restrictions on rights of others under the "pick and choose" aspects of Section 252(i) and related FCC rules. Copies of the Texas filings are attached hereto.

4. Based on filings at the Texas Commission, the CLEC Coalition is aware that there are certain other agreements between SBC and Sage entered into during the same time period (*i.e.*, since the *USTA II* decision on March 2, 2004). SBC and Sage have thus far claimed these are "settlement agreements" not subject to state commission jurisdiction. The CLEC Coalition is not aware of the issues addressed by these "settlement agreements" or the contents of the agreements. There are also questions pending in Texas regarding changes that apparently have been made to the SBC-Sage Agreements since the original press release.

5. As used in these Comments, the term "SBC-Sage Agreements" means any and all agreements between SBC and Sage (including their affiliates), including the Superseding Amendment, the LWC Agreement, and any other agreements executed prior to or after the April 30, 2004 date of the Superseding Amendment and LWC Agreement, as well as the full content of any understandings, oral agreements, or side agreements that may have a bearing on such agreement(s) that address, in whole or in part, the terms, conditions, or pricing in Missouri for resale, interconnection, network elements, provision of local loops, local transport, or local switching by SBC to Sage, and access to databases and associated signaling necessary for call routing and completion.

The SBC-Sage Agreements Constitute Amendments to Interconnection Agreements That Must be Filed With And Approved By This Commission

6. SBC and Sage have resisted requests and Orders from state commissions (as well as from NARUC) calling for the SBC-Sage Agreements to be filed for approval by the state commissions in SBC's 13-state service territory. In fact, on May 3, 2004, SBC filed its "Emergency Petition For Declaratory Ruling, Preemption And For Standstill Order To Preserve The Viability Of Commercial Negotiations" (the "SBC Preemption Petition") with the Federal Communications Commission ("FCC"), the purpose of which is to persuade the FCC to attempt to preempt state commissions from requiring the filing and approval of the SBC-Sage Agreements. SBC noted the filing of its Preemption Petition in its May 17, 2004 response to the Commission's Order to Show Cause in this case. Members of the CLEC Coalition have opposed SBC's Preemption Petition.[4] Notwithstanding SBC's Preemption Petition, state commissions have authority under Section 252, authority other state commissions have acted pursuant to and the FCC has specifically recognized, and state law authority to require the filing of the Agreements. Thus, there is no reason for the Commission to await the resolution of SBC's Preemption Petition.

7. Besides this Commission, four other states have acted already on this issue. The California Public Utilities Commission and Michigan Public Service Commission have ordered the SBC-Sage Agreements be filed. The staff of the Kansas Corporation Commission, on April 28, 2004, issued a request for "show cause" filing to which SBC responded on May 5, 2004. Another CLEC Coalition (with many of the same members) filed a Petition to Require Commission Review and Approval of the SBC-Sage Agreements with the KCC on May 13,

[4] See letter dated May 10, 2004 directed to the commissioners of the FCC, attached hereto.

2004 that is similar in substance to these comments. Also on May 13, 2004, the Texas Public Utility Commission voted 3-0 to require the SBC-Sage Agreements be filed. Notably, the Texas action, like this Commission's Order To Show Cause, was taken after the filing of the SBC Preemption Petition, and neither commission was persuaded by SBC's argument that the FCC should address the issue before state commissions act. Again, as discussed above, the Act confers specific and independent authority on state commissions to review and approve interconnection agreements. In addition, the Missouri Commission has independent state law authority to require the filing of these Agreements.

8. SBC has taken the novel position that certain provisions of the SBC-Sage Agreement are "non-251 arrangements" and thus outside state commission authority under Section 252. These purportedly "non-251" items identified by SBC are among the issues that remain among the most important, controversial, and competitively sensitive issues in telecommunications, "including but not limited to," according to SBC, "provisions establishing a replacement for the UNE-P."[5] Commercial negotiations are a positive development, and in fact commercial negotiations are the foundation for the structure of the federal Telecommunications Act, which requires commercial negotiation leading to interconnection agreements (as opposed to the traditional "tariffed rate" structure of ILEC offerings). State commissions have always played a role in approving all interconnection agreements (even fully negotiated agreements), to ensure that there is no anti-competitive discrimination by an ILEC or CLEC against other competitors. The commercial negotiations going on in today's environment are no different.

[5] SBC Preemption Petition, at 2-3. SBC Response to Order to Show Cause, p. 4.

9. Many CLECs, including those in the CLEC Coalition, are actively engaged in negotiations (with SBC as well as other ILECs around the nation) regarding these contentious issues. SBC appears to be using the FCC's extremely productive call for negotiations over UNE issues, however, as an opportunity to attempt to unravel federal statutory requirements, and very recent FCC rulings, about what constitutes an "interconnection agreement" and the states' role in preventing discrimination by ILECs and in protecting the public interest. This is extremely unfortunate, especially because SBC's reluctance to file the Sage agreements has created a legal sideshow that is detracting from the negotiations that are the focus of this important period.

10. SBC does not have a sustainable legal justification for this attempt to avoid its legal obligations. Rather, SBC urges that by calling a UNE-P agreement a "private commercial agreement" rather than an "interconnection agreement," SBC and a CLEC partner can evade state commission review. While SBC concedes that what was negotiated was a "replacement for UNE-P" and a "provision of UNE-P functionality",[6] it claims that the replacement is not subject to state commission review – even though the arrangement it replaces is subject to such review. Moreover, SBC argues that the "voluntary" nature of the agreement skirts Telecom Act requirements[7] even though voluntary agreements and amendments are explicitly subject to state review under section 252 of the Act.[8] SBC's position is reminiscent of what Humpty Dumpty famously told Alice: "When I use a word, it

[6] SBC Response to Order to Show Cause, at 4 and 6.

[7] *Id.*at 4.

[8] As detailed below, Telecom Act § 252(a)(1) contemplates "voluntary negotiations," § 252(e)(1) provides that voluntarily negotiated agreements must be submitted for approval by state commissions, and §252(e)(2)(A) sets forth the standards for approving or rejecting voluntarily negotiated agreements.

means just what I choose it to mean, neither more nor less."[9] This type of wordplay should not be permitted to eviscerate Commission jurisdiction over whether telecommunications services arrangements are discriminatory or contrary to the public interest. Nor should they be allowed to create an end around state law filing and public notice requirements.

11. ILEC-CLEC agreements must be submitted to and approved by the Commission under federal law. Section 252(a)(1) of the Act allows parties to enter into negotiated agreements regarding requests for interconnection, services, or network elements. Section 252(a) provides that any interconnection agreement adopted by negotiation shall be submitted for approval to the State commission under subsection 252(e). Section 252(e)(1) in turn provides that:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which such an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

12. FTA Section 252(e)(2) provides that the State commission may only reject the negotiated agreement if it finds that "the agreement (or portion thereof) *discriminates* against a telecommunications carrier not a party to the agreement" or that "the implementation of such agreement (or portion thereof) is *not consistent with the public interest, convenience, and necessity*" (emphasis supplied). Section 252(e)(4) provides that the agreement shall be deemed approved if the State commission fails to act within 90 days after submission by the parties. Sections 251(c)(2) and 251(c)(3) prohibit the ILEC from discriminating in the provision of interconnection and access to UNEs.

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[9] Lewis Carroll, *Through The Looking Glass*. Mr. Dumpty's full exchange with Alice can be found at http://sundials.org/about/humpty.htm. "When I use a word, Humpty Dumpty said, in a rather scornful tone, "it means what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things."

13. Section 252(h) of the Act requires a State commission to make a copy of each agreement approved under subsection (e) "available for public inspection and copying within 10 days after the agreement or statement is approved."

14. FTA Section 252(i) requires a local exchange carrier to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

15. In addition, Section 271(c)(2)(B) of the Act requires that SBC provide access to interconnection in accordance with the requirements in 251(c)(2) and 252(d)(1) and nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1). Moreover, even if network elements no longer needs to be provided pursuant to section 251, a conclusion that is not supported by any reading of *USTA II*, provision of several network elements is required by the section 271 "competitive checklist." Most pertinent here, the checklist requires RBOCs like SBC to offer switching, loops, transport, and access to databases at just and reasonable rates. Section 271(c)(2)(B) provides:

> (B) COMPETITIVE CHECKLIST - Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: . . .
>
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
>
> (vi) Local switching unbundled from transport, local loop transmission, or other services . . .

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.[10]

16. In March 2004, the FCC again broadly construed this filing and approval requirement, finding that " . . .any 'agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).'"[11] The FCC did not limit those topics by reference to whether they are being provided pursuant to section 251, 271, or "voluntarily" in a negotiated agreement. When the enumerated critical competitive issues are involved, the anti-discrimination and public interest requirements of the Act call for filing of the ILEC-CLEC agreement.

17. The FCC has recognized only four narrow exceptions to the filing requirements, none of which apply here: (1) agreements addressing dispute resolution and escalation provisions, to the extent that the information is generally available to carriers, (2) settlement agreements, (3) forms used to obtain service, and (4) certain agreements entered into during bankruptcy.[12] According to the FCC, the "settlement agreements" exception includes only agreements that provide for "backward-looking consideration," *e.g.*, in the form of a cash payment or cancellation of an unpaid bill. To the extent that a settlement agreement resolves disputes that affect an incumbent LEC's ongoing obligations under §251, that agreement –

[10] Section 271(c)(2)(B).

[11] Qwest Corp. Apparent Liability for Forfeiture, File No. EB-03-0IH-0263, ¶ 23 (rel. March 12, 2004) (FCC 04-57) ("Qwest NAL"), at ¶ 23.

[12] Qwest NAL, ¶ 23.

whether labeled a "settlement agreement" or "private agreement" – must be filed with the State commission for approval.[13]

18. Under federal law, the public filing of such agreements is extremely important. "Section 252(a)(1) is not just a filing requirement. Compliance with section 252(a) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[14] As the FCC has noted elsewhere, if there is any doubt regarding whether an agreement must be filed, the States are to resolve such disputes in the first instance. "Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected."[15]

19. The SBC-Sage Agreements clearly are agreements that are required to be filed and approved by State commissions under federal law. First, SBC and Sage had a previous agreement that SBC and Sage jointly requested the Commission to approve pursuant to the Act, *i.e.*, the SBC-Sage M2A-based Interconnection Agreement. The previous agreement that defined the terms and conditions under which Sage accessed SBC's network was the M2A interconnection agreement that Sage opted into pursuant to Section 252(i) of the Act. That agreement unquestionably provided Sage with interconnection and access to Unbundled Network Elements and combinations of Unbundled Network Elements, including UNE-P,

[13] Qwest Declaratory Ruling, 17 FCC Rcd 19337, ¶ 12 (2002).

[14] Qwest NAL ¶ 46.

[15] Qwest Declaratory Ruling ¶¶ 10-11. *See also*, Section 252(e) which provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3). In order to apply such state law requirements, however, the statute necessarily assumes that such agreements will be submitted to the state commission for "its review."

pursuant to the requirements of the Act. The SBC-Sage Agreements, as revealed by the filings in Michigan and Texas, provide that the seven-year pact will replace the regulatory mandated UNE-P with a "private commercial agreement" for the same UNE-P functionality. Because the SBC-Sage Agreement replaces the previous agreement that provides for interconnection and access to UNEs and UNE combinations that the Commission approved pursuant to Section 252, it necessarily follows that the SBC-Sage Agreement also is an interconnection agreement as defined by the Act.

20. In fact, SBC has conceded that Section 252 does require that *some* portions of the Sage agreement be filed - in particular, the portions establishing terms and rates for the provision of unbundled loops in a "UNE-L" arrangement.[16] The FCC has squarely held that ILECs must file the *entire* agreement with the state commission - not just whatever portions of it the ILEC may deem relevant. *Qwest Declaratory Ruling* ¶ 8. In the *Qwest Declaratory Ruling*, Qwest argued that only certain portions of its secret agreements with CLECs were required to be filed. The FCC expressly rejected the argument, and stated that "[c]onsidering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 251(a)(1) can be given the cramped reading that Qwest proposes." *Qwest Declaratory Ruling* ¶ 8. In so holding, the FCC was merely giving effect to the plain terms of the statute, which require the filing of any interconnection "agreement," rather than specific terms in isolation. Indeed, as Congress understood and the FCC has concurred, state commissions must have the entire "agreement"

[16] *See* SBC Preemption Petition, at. 2. (In fact, SBC first filed the UNE-L portion of the agreement with the Michigan Commission and the Michigan Commission informed SBC that the entire agreement must be filed.) Notably, since Sage has described itself as a pure UNE-P carrier, it would have no real interest in obtaining stand alone-loops and, it would appear that the real purpose of this portion of the agreement would be to give SBC an "agreed-to" exorbitant loop rate it can attempt to force on other carriers. From the latest Michigan filing, it now appears that it precisely the case, in that Sage agreed in the previously undisclosed portion of the Agreements, to totally forego UNE-L.

before them, because that is the only way in which the state commission can ensure that ILECs have not cut discriminatory side deals on particular issues in exchange for other concessions that the ILEC is willing to disclose publicly.

21. Even assuming, for the sake of argument, that the *USTA II* mandate goes into effect,[17] SBC will still be required to provide unbundled switching, loops, and transport under the terms of the Act. It is not yet clear precisely which FCC rules the vacatur "vacates." Whatever the vacatur vacates, the CLEC Coalition's point is the same: these agreements must be filed. The critical and undisputed fact is that *the Act itself remains in effect even if the mandate issues.* It is the provisions of section 251 of the Act – not merely FCC rules – that require the provision of UNEs. Similarly, the text of the Act requires filing and approval of interconnection agreement amendments. And, as discussed above, even if particular UNEs were not required to be provided under section 251 (which they still are), the switching, loops, and transport provisions would still need to be reflected in a Section 252 interconnection agreement pursuant to section 271 of the Act. As such, the SBC-Sage Agreements must be filed for approval with the Commission as required by Section 252(e) of the Act.

22. The SBC-Sage Agreements must be filed, approved and made publicly available to avoid discrimination that is prohibited by the Act. The prohibition against discrimination with respect to interconnection is reflected in Section 251(c)(2)(D) of the Act, which imposes a duty on all ILECs to provide interconnection with the local exchange carrier's network interconnection "on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of section 252."

[17] The CLEC Coalition understands the Solicitor General has requested and obtained additional time to seek review at the Supreme Court.

23. The FCC concluded in its 1996 Local Competition First Report and Order (the "First Report and Order") that the term "nondiscriminatory" in the Telecom Act is not synonymous with the term "unjust and unreasonable discrimination" in Section 202(a) of the Communications Act of 1934, but is more stringent.[18] While the FCC found that cost based differences in rates, such as volume and term discounts, are permissible under Sections 251 and 252 of Act, it stressed that non-cost based discrimination, including state regulations that would allow such treatment, are prohibited by the Act.[19]

24. In addition to the prohibition on discriminatory limitations contained in Sections 251(c)(2) and 251(c)(3) of the Act, Section 252(i) of the Act also provides a mechanism for preventing discrimination. Section 252(i) states as follows:

> AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS -- A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

25. In paragraph 1296 of its First Report and Order, the FCC noted that Section 252(i) is "a primary tool of the 1996 act for preventing discrimination under section 251...." As interpreted by the FCC, and eventually upheld by the United States Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), Section 252(i) permits CLECs to choose among individual provisions contained in publicly filed interconnection agreements. A CLEC may choose the entire agreement, or may elect to opt into certain provisions of the agreement. This has been referred to as the FCC's "pick and choose" rule.[20]

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[18] First Report and Order, ¶ 859.

[19] First Report and Order, ¶¶ 860, 862.

[20] SBC's distaste for the "pick and choose" or "MFN" provisions of section 252(i) has a long history and is well-documented. SBC's arguments in its FCC Preemption Petition against public disclosure of the SBC-Sage

26. The right to choose another interconnection agreement -- either in whole or in part -- is a right that exists for all CLECs, regardless of whether a CLEC is already a party to an interconnection agreement with different terms. On this key point, the FCC stated:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nations" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under Section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carrier's obtain access to terms and elements on a nondiscriminatory basis.[21]

27. As stated by the FCC, the goal of Section 252(i) is to prevent incumbent local telephone companies from discriminating against certain CLECs by inserting more favorable terms in agreements with other CLECs. While it remains to be seen whether any CLEC will want to opt-into the SBC-Sage Agreements pursuant to Section 252(i), this provision is nonetheless relevant for the simple reason that CLECs not only have the right to opt-in to an entire agreement, but also they have the right to "pick and choose" the provisions of another CLEC's interconnection agreement in order to prevent discrimination as specified in the FCC's rules. The principles underpinning Section 252(i) are similar to the principles underpinning a tariff, which by definition is a generally-available set of terms and conditions governing the provision of a particular service or product that is available on a nondiscriminatory basis to <u>all</u>

Agreements are nothing more than another chorus from its anti-MFN songbook. The recent calls for negotiations issued by the FCC and state commissions are productive and useful. SBC should not attempt to convert them into an opportunity to settle old scores on unrelated issues such as its complaints about section 252(i).

[21] First Report and Order, ¶ 1316

customers.[22] As noted above, Section 252(h) requires a State commission to make available for public inspection and copying, a copy of each agreement approved under Section 252(e). For all of these reasons, the Commission should declare that the SBC-Sage Agreements must be filed with the Commission for approval and be made publicly available forthwith. To allow SBC-Sage to skirt the requirement that their agreement be filed with and approved by the Commission, and be made publicly available in their entirety, would in essence be to condone unlawful discrimination.[23]

28. Moreover, SBC erroneously asserts at page 6 of its Response to the Order to Show Cause, that the SBC-Sage Agreements reflect the removal of an Unbundled Network Elements (unbundled local switching and UNE-P) that - according to SBC - are no longer required to be provided pursuant to section 251 as a result of the FCC's Triennial Review Order or the D.C. Circuit's decision in *USTA II*.[24] Again, that conclusion is contrary to *USTA II*. Moreover, to remain in compliance with section 271, SBC would be required to negotiate interconnection agreement terms that satisfy the terms of section 271. If SBC fails to negotiate, it falls out of compliance with section 271.

29. More specifically, as the FCC just recently re-affirmed in the TRO, so long as SBC wishes to continue to provide in-region interLATA services under section 271 of the Act,

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[22] *See Fax Telecommunicaciones v. AT&T*, 952 F. Supp. 946, 951 (E.D.N.Y. 1996); *see* generally *MCI Telecommunications Corp v. AT&T Co.*, 512 U.S. 218, 229-30 (1994) (publicly-filed tariffs are essential to preventing discrimination).

[23] Neither the CLEC Coalition nor the Commission can evaluate the concerns expressed by SBC and Sage about the application of "pick and choose" rights until the full agreement is submitted for approval.

[24] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (Contrary to SBC's assertions, *USTA II* merely held that the FCC's rule requiring switching could not be sustained because the FCC had not provided an adequate explanation for the rule. The court leaves open the possibility that, on an appropriate inquiry on remand, the FCC could promulgate a rule requiring switching. *See USTA II*, 359 F.3d at 568-73.

it "must continue to comply with any conditions required for [§271] approval,"[25] and that is so whether or not a particular network element must be made available under section 251.[26] One of the central requirements of section 271 is that a BOC enter into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities."[27] Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist.[28] And, of course, that checklist requires that the agreement must provide for local switching, loops, and transport.[29] Finally, the FCC has recently concluded, to satisfy the requirements of the checklist, the interconnection agreement must provide switching at a rate deemed just and reasonable.[30]

30. All that being so, assuming that SBC wishes to continue to provide in-region interLATA services in Missouri, it cannot simply remove unbundled local switching and other checklist items from its interconnection agreements. Because SBC presumably wishes to continue providing in-region long distance service, it must first negotiate and incorporate into its interconnection agreements new terms, conditions, and pricing relating to local switching, if it seeks to remove current UNE switching, loops, or transport arrangements from the interconnection agreements it has with CLECs. And under the Act, it must file those agreements for approval with the Commission and make them publicly available. For all of

[25] TRO ¶ 665.

[26] *See generally id*. ¶¶ 653-655

[27] §271(c)(1)(A).

[28] §271(c)(2)(A)(ii).

[29] §271(C)(2)(B)(vi).

[30] TRO, ¶¶ 662-664.

these reasons, the CLEC Coalition submits that in order for the Commission to perform this statutory duty under the Telecom Act, the SBC-Sage Agreements must be formally filed with the Commission and open to review by any interested party.

The SBC-Sage Agreements Should Be Filed With The Commission Pursuant to Missouri State Law

31. Section 392.220.1 requires that "every telecommunications company shall file with the commission as and when required by it a copy of any contract, agreement or arrangement in writing with any other telecommunications company or with any other corporation, association or person relating in any way to construction, maintenance or use of telecommunications facilities or service by or rates and charges over or upon any facilities." The requirements of this provision are straightforward, and the commission should require filing of the SBC-Sage Agreements for the same reasons that the Act contains such requirements. Alternatively, wholesale telecommunications services must be provided pursuant to public tariff under Section 392.480. Either way, the Commission has authority over inter-company arrangements under Section 386.250.

32. The requirement that the SBC-Sage Agreements be filed under Missouri law is independent of any claim that the Agreements constitute "non-251" arrangements under federal law. Missouri law calls for the filing of any "contract, agreement or arrangement in writing with any other telecommunications company or with any other corporation, association or person relating in any way to construction, maintenance or use of telecommunications facilities or service by or rates and charges over or upon any facilities". In its Response to the Order to Show Cause, SBC does not address these requirements.

33. The Commission should be on notice that SBC is striving to create a vehicle by which it can evade Commission jurisdiction merely by choosing new names (*e.g.*, "private

contract") for what have always been interconnection arrangements subject to Commission jurisdiction.

34. The filing of the SBC-Sage Agreements is consistent with not only the letter, but with the clear intent of Section 392.220.1, namely to ensure that the Commission and customers may determine all the terms and conditions associated with the provision of a particular service when necessary. It is extremely important that this purpose be fulfilled with reference to the SBC-Sage Agreements, particularly since they may have a major impact on other CLECs in Missouri and on competition generally.

35. Section 392.220.1 might allow for confidential treatment of filed contracts under appropriate circumstances. However, SBC and Sage have not substantiated that circumstances warrant confidential protections here. In any event, as discussed above, the SBC-Sage Agreements also must be filed pursuant to federal requirements under section 252 of the Telecom Act. Interconnection amendments have never been filed on a confidential basis, even though the agreements could arguably give a CLEC's competitors knowledge of a CLEC's business plans. Confidential treatment of interconnection amendments defeats the public disclosure provisions of the Act and should not be permitted.

36. The CLEC Coalition strongly urges the Commission to treat the SBC-Sage Agreements as interconnection agreements that must be publicly filed and fully available. SBC and Sage made the same confidential claims in Michigan as they made in their responsive filings here. Yet, in their recent filing in Michigan, it appears that despite all the sound and fury from SBC and Sage, both companies concede that, upon closer inspection, very little in the SBC-Sage Agreements is worthy of confidential treatment even in the biased eyes of SBC and Sage. Given this continual shift in position, before the Commission affords any

confidential treatment to the Agreements,the Commission should require a strong justification for shrouding the remaining terms of the Agreements in secrecy, and allow informed argument by counsel for the parties regarding any such purported justification. As noted above, CLECs have the right under the Act to opt into other SBC interconnection agreements, and it is CLECs who may be discriminated against under the terms of the SBC-Sage Agreements. Thus any confidential treatment (if any is warranted) should at a minimum permit any CLEC to review the Agreements subject to a protective order.

37. CLEC Coalition companies are sensitive to all companies' needs to maintain the confidentiality of competitive business information. At the same time, with the stakes so high for competition, bald assertions of confidentiality should not be accepted at face value.

38. For example, Sage Telecom has been quite open, very recently, about its business plans and market focus (particularly its reliance on UNE-P) in publicly filed testimony.[31] In its Memorandum filed at the FCC supporting SBC's Preemption Petition, Sage again emphasizes its reliance on UNE-P, and its judgment that "[w]ithout UNE-P or a suitable substitute, Sage cannot continue to operate."[32] Later in the Memorandum (as in previously released materials), however, Sage states "[a]s SBC argues, public disclosure of competitively-

[31] For example, in Case No. TO-2004-0207 (the TRO Mass Market Switching proceeding), Sage Vice-President Mr. McCausland filed the following direct testimony: "Q: What is Sage's market focus?" "A: Sage has identified a particular customer need or niche in today's evolving local exchange market; an area of customer demand Sage is well-equipped to address. Sage's primary business focus is on providing competitive local and interexchange telecommunications services to residential and very small business customers in suburban communities and in some rural and urban areas of Missouri." (p. 3, ln. 4-9) "Q: How does Sage provide services to its customers?" "A: Sage provides basic local exchange service to customers *exclusively* through access to SBC Missouri's UNE-Platform." (p. 4, ln. 4-6). "Q: Does Sage own switches or transmission facilities used to provide service to its own customers?" "A: No. Sage does not own switches or other transmission facilities." (p. 4, ln. 12-14) Mr. McCausland's direct testimony was filed on or about December 18, 2003.

[32] Memorandum of Sage Telecom, Inc. In Support of Emergency Petition of SBC Communications, Inc. for Declaratory Ruling, Preemption, and For Standstill Order To Preserve The Viability of Commercial Negotiations," at 1 (May 4, 2004). Sage Response to Order to Show Cause.

sensitive aspects of the Sage/SBC agreement, including those that concern arrangements between Sage and SBC that are not required under section 251, would cause competitive harm to Sage."[33] Sage reiterates these arguments in its Response to the Order to Show Cause herein. Before cloaking the SBC-Sage Agreements in confidentiality, the Commission should carefully consider what is so "competitively sensitive" about an agreement for a UNE-P substitute called "Local Wholesale Complete," that was not similarly sensitive about UNE-P arrangements that have always been subject to public disclosure.[34]

39. Since local competition began, there has always been a need to balance confidentiality of business plans (which might be revealed in wholesale agreements with ILECs) and the requirements that interconnection agreements be publicly filed (which the law requires as a public interest protection against discrimination). The federal Act and Missouri law have already resolved that balance by determining that public filing is in the public interest. That balance should not be disturbed lightly.

Conclusion

For all the reasons stated, the CLEC Coalition companies respectfully request that this Commission enter the necessary Order(s) to require: (a) that the SBC-Sage Agreements (as defined above in ¶ 5 above) be filed in their entirety with this Commission; and (b) that the SBC-Sage Agreements be made subject to the interconnection agreement review and approval process pursuant to federal and state law.

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[33] *Id.*, at 3.

[34] As noted above, it is the "Local Wholesale Complete" agreement that SBC and Sage refused to file with the California Public Utilities Commission or this Commission when they filed their "251/252 Agreement." Apparently, however, they have now filed a redacted version of it in Michigan and Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, as well as transmitted electronically via electronic mail transmission, this 20th day of May, 2004, to the following:

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