

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of an Interconnection)
Agreement between Southwestern Bell)
Telephone, L.P., and Sage Telecom, Inc.)

Case No. TO-2005-0287

BRIEF OF **NUVOX COMMUNICATIONS OF MISSOURI, INC.**

COMES NOW NuVox Communications of Missouri, Inc. and for its Brief states to the Commission as follows:

Introduction

Section 252(e) requires Commission approval of interconnection agreements. Section 252(i) allows companies to adopt interconnection agreements. Just as CLECs are precluded from "picking and choosing" which parts of an interconnection agreement they want to adopt, ILECs are also precluded from "picking and choosing" which parts of an integrated agreement that they submit for approval. Only by reviewing all interdependent parts of an agreement can the Commission determine that the standards of Section 252(e) are satisfied.

Argument

Issue 1

Is the Local Wholesale Complete Agreement (LWC) subject to review by the Missouri Public Service Commission pursuant to Section 252(e)?

The Answer to Issue 1 is an emphatic "yes". As indicated by Staff in its Application in this case, the provisions of the ICA and LWC make it clear that the two documents are a single indivisible agreement.

Section 2 of the ICA is entitled "LWC Agreement". The provisions of Section 2 are as follows:

- 2.1 Subject to Sections 2.3 and 4¹ hereof, **attached and incorporated herein** as an exhibit is the "Private Commercial Agreement for Local Wholesale Complete" (including its attachments) between SBC Missouri and other SBC ILECs and CLEC² ("LWC Agreement"), and one amendment to that LWC Agreement ("LWC Amendment") (collectively, the LWC Agreement and the LWC Amendment are referred to herein as the "LWC Documents").
- 2.1.1 **In the event** that, as a result of an action by the Federal Communications Commission or a court of competent jurisdiction, the LWC Documents need not have been filed with or approved by the Commission pursuant to 47 U.S.C. § 252, the LWC Documents shall be automatically deemed **deleted from this Amendment**, as of the effective date of such action. Such deletion shall not in any way affect the effectiveness and enforceability of the LWC Documents between SBC Missouri and CLEC, in accordance with its terms.³
- 2.2 The LWC Agreement contains provision that may render it inoperative in one or more states, including in Missouri (e.g., under Section 18 of the LWC Agreement). **Should the LWC Agreement become inoperative (and thus make the LWC Amendments inoperative as well) in the State of Missouri, this Amendment shall immediately become null and void** for all purposes in the State of Missouri and the Parties agree to submit a further amendment immediately to the Commission so reflecting this fact. Such further amendment will be effective retroactively to the time that the LWC Agreement became inoperative. In addition, in the event that at the time that the LWC Agreement becomes inoperative in the State of Missouri, CLEC does not have in effect any agreement in such state pursuant to 47 U.S.C. § 252, CLEC may adopt such agreement pursuant to § 252(i) or may purchase under tariff or SGAT or enter into any other arrangement of CLEC's choosing available to it under 47 U.S.C. § 251 and/or 252 at that time, and such arrangement will be deemed effective as of the time that the LWC Agreement became inoperative in the State of Missouri and SBC Missouri shall cooperate fully in CLEC's exercise of its rights under this Section, provided that the Parties shall have no retroactive monetary true-up compensation obligation to each other for the provision of products and other offerings from the date from the Amendment Effective Date until the date the LWC Agreement became inoperative.

¹ Section 4 concerns reciprocal compensation.

² In the ICA and LWC, "CLEC" refers to Sage.

³ By stipulation, the text of Section 2.1.1 is to be clarified, but its impact concerning the relationship of the documents will not change.

2.2.1 If the LWC agreement is terminated or invalidated under Section 18.7 of the LWC Agreement, then Section 18.7.3 of the LWC Agreement shall **control** to the extent inconsistent with Section 2.2

2.3 In entering into this Amendment and carrying out the provisions herein, neither Party waives, but instead expressly reserves, all of its rights, remedies and arguments with respect to the Order⁴ and any remands thereof, including its right of appeal and/or review. This Amendment does not in any way prohibit, limit, or otherwise affect either Party from taking any position with respect to the Order, or from raising and pursuing its rights, remedies and arguments with respect to the Order or any other Commission order or any issue or subject addressed or implicated therein, or any legislative, regulatory, administrative or judicial action with respect to any of the foregoing.

These provisions incorporate the LWC into the ICA (Section 2.1), allow subsequent changes in the status of the LWC to render the ICA null and void (Section 2.2), and allow provisions of the LWC to override provisions of the ICA (Section 2.2.1).

Provisions of Section 5 of the ICA require the CLEC to take positions regarding the LWC. Section 5.1 provides:

5.1 In entering into this Agreement and carrying out the provisions herein, and except as may be inconsistent with Sections 3⁵ and 4 of this Amendment and the term of its effectiveness, neither Party waives, but instead expressly reserves, all of its rights, remedies and arguments with respect to any orders, decisions, legislation or proceedings and any remands thereof and any other federal or state regulatory, legislative or judicial action(s), including, without limitation, its intervening law rights (including intervening law rights asserted by either Party via written notice predating this Amendment) relating to the following actions, which the Parties have not yet fully incorporated into the current ICA or which may be the subject of further government review: The United States Supreme Court's opinion in *Verizon v. FCC*, et al., 535 U.S. 467 (2002); the D.C. Circuit's decision in *United States Telecom Association, et al. ("USTA") v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, the D.C. Circuit's March 2, 2004 decision in *USTA v. FCC*, Case No. 00-1012 (D.C. Cir. 2004); the FCC's Triennial Review Order, released on August 21, 2003, In the Matter of Review of the Section 251 Unbundling

⁴ Section 6.2 of the ICA defines the "Order" as this Commission's July 27, 2004 order, which refers to Case Nos. TO-2004-0576 and TO-2004-0584. In that order, the Commission rejected the previous version of the ICA now at issue and determined that such documents collectively constituted a single agreement.

⁵ Section 3 of the ICA concerns UNEs.

Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 (FCC 03-36) and the FCC's Biennial Review Proceeding which the FCC announced, in its Triennial Review Order, is scheduled to commence in 2004; the FCC's Supplemental Order Clarification (FCC00-183) (rel. June 2, 2000), in CC Docket 96-98; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001) ("ISP Compensation Order"), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), and as to the FCC's Notice of Proposed Rulemaking on the topic of Intercarrier Compensation generally, issued In the Matter of Developing a Unified Intercarrier Compensation Regime, in CC Docket 01-92 (Order No. 10-132), on April 27, 2001 (collectively "Government Actions"). Notwithstanding anything to the contrary in the current ICA (including this and any other amendments to any of them), SBC Missouri shall have no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and CLEC's own elements or UNEs in Commingled Arrangements beyond those required by the Telecommunications Act of 1996 ("Act"), including the lawful and effective FCC rules and associated FCC and judicial orders. Further, unless subsequently agreed to in writing between the Parties, neither Party will argue or take the position before any state or federal regulatory commission or court that any provisions set forth in this Amendment **or the LWC Documents** constitute an agreement or waiver relating to the appropriate routing, treatment and compensation for Voice Over Internet Protocol traffic and/or traffic utilizing in whole or in part Internet Protocol technology; rather, each Party expressly reserves any rights, remedies, and arguments they may have as to such issues including but not limited, to any rights each may have as a result of the FCC's Order *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (rel. April 21, 2004). Notwithstanding anything to the contrary in the current ICA and this Amendment and except to the extent that SBC Missouri has adopted the FCC ISP terminating compensation plan ("FCC Plan") in Missouri, and the Parties have incorporated rates, terms and conditions associated with the FCC Plan into the current ICA, these rights also include but are not limited to SBC Missouri's right to exercise its option at any time to adopt on a date specified by SBC Missouri the FCC Plan, after which date ISP-bound traffic will be subject to the FCC Plan's prescribed terminating compensation rates, and other terms and conditions, and seek conforming modifications to the current ICA except Section 4 of this Amendment shall apply with respect to Traffic that originates from and/or terminates to an end office switch used by CLEC when SBC Missouri is the entity providing the use of the end office switch (e.g., switching capacity) to CLEC. If any action by any state or federal regulatory or legislative body or court of competent jurisdiction invalidates, modifies, or

stays the enforcement of laws or regulations that were the basis or rationale for any rate(s), term(s) and/or condition(s) ("Provisions") of the current ICA and this Amendment (excluding the LWC Documents) and/or otherwise affects the rights or obligations of either Party that are addressed by the current ICA and this Amendment (excluding the LWC Documents), specifically including but not limited to those arising with respect to the Government Actions, the affected Provision(s) shall be immediately invalidated, modified or stayed consistent with the action of the regulatory or legislative body or court of competent jurisdiction upon the written request of either Party ("Written Notice"). With respect to any Written Notices hereunder, the Parties shall have sixty (60) days from the Written Notice to attempt to negotiate and arrive at an agreement on the appropriate conforming modifications to the current ICA. If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the Written Notice, any disputes between the Parties concerning the interpretation of the actions required or the provisions affected by such order shall be resolved pursuant to the dispute resolution process provided for in the current ICA or future interconnection agreement(s).

Section 5.4 provides:

- 5.4 The LWC Documents are not subject to Sections 5.1-5.3, inclusive thereof, nor are the LWC Documents subject to any "change of law," "intervening law," "successor rates" and/or any similarly purposed provisions in the current ICA or future interconnection agreement(s)."

These provisions again make clear that the documents are a single agreement.

The provisions of Section 7 of the ICA likewise demonstrate that the ICA (including the incorporated LWC, see Section 2.1) is an indivisible agreement.

Section 7.1 provides:

- 7.1 This Amendment contains provisions that have been negotiated as part of an entire Amendment and integrated with each other in such a manner that each provision is material to every other provision.

Section 7.2. provides:

- 7.2 The Parties agree that each and every rate, term and condition of this Amendment is legitimately related to, and conditioned on, and in consideration for, every other rate, term and condition in this Amendment. The Parties agree that they would not have agreed to this Amendment except for the fact that it was entered into on a Missouri-specific basis due

to the Order, and included the totality of rates, terms and conditions listed herein, and that it is an indivisible whole, intended to bind SBC Missouri and CLEC (including, as defined, its current and future Affiliates) under the current ICA(s) and any future interconnection agreement(s), unless the Parties expressly agree otherwise in accordance with Section 1.2 of this Agreement.

The provisions of Section 7.6 allow the LWC to control over any conflicting or inconsistent provisions of the underlying interconnection agreement. Section 7.6 states:

7.6 To the extent there is a conflict or inconsistency between the provisions of this Amendment and the LWC Documents (including all of their accompanying Appendices), the provisions of this Amendment shall control in the State of Missouri and apply but only to the extent of such conflict or inconsistency. To the extent there is a conflict or inconsistency between the provisions of this Amendment and the provisions of the Agreement (including all incorporated or accompanying Appendices, Addenda and Exhibits to the Agreement but excluding the LWC Documents or this Amendment), the provisions of this Amendment shall control and apply but only to the extent of such conflict or inconsistency. **To the extent there is a conflict or inconsistency between the provisions of the LWC Documents and the provisions of the Agreement (but excluding this Amendment), the provisions of the LWC Documents shall control and apply but only to the extent of such conflict or inconsistency.** As used in this Section, "this Amendment" excludes the LWC Documents.⁶

By allowing the LWC to control, it is made clear that it is part of the amendment and underlying agreement.

Provisions of the LWC make it equally clear that the documents are to be read as one agreement. One of the "Whereas" clauses states:

WHEREAS, both Parties are willing to agree only on the basis of the entirety of this Private Commercial Agreement being an indivisible whole.

Section 1.4 of the LWC states:

For the Term, SAGE agrees to (i) a rate for an unbundled 2-wire analog loop (or a facility that is being used to provide the equivalent transmission capacity) equal to those prices noted in the LWC Pricing Schedule (which

⁶ Reciprocally, as used everywhere else in the ICA besides Section 7.6, "this Amendment" includes the LWC Documents.

pricing and commitment shall be included in the Related ICA Amendments
....

Section 5.3.2 of the LWC states:

5.3.2 the provisions of this Agreement have been negotiated as part of an entire, indivisible agreement and integrated with each other in such a manner that each provision is material to every other provision;

Section 5.5 of the LWC states:

The Parties have concurrently negotiated an ICA amendment(s) to effectuate certain provisions of this Agreement ("Related ICA Amendments"). The Related ICA Amendments provide for, among other things, the deletion of certain unbundled local switching with shared transport offerings, changes to unbundled analog loop rates, and waiver of certain of SAGE's statutory rights under 47 U.S.C. § 252(i) and of SBC-13STATE's obligations under 47 U.S.C. §§ 251 and 252. The Related ICA Amemdnts shall be executed by authorized representatives of each Party, and filed with the appropriate State commissions for approval under Sections 251/252 of the Act.

Section 5.6 of the LWC expressly states that the ICA and LWC are indivisible:

5.6. Each Party and its Affiliates shall support and defend the reasonableness of this Agreement **and the Related ICA Amendments**, including their respective substantive terms and conditions and the commercial nature of the Agreement, publicly and before and with any federal or state governmental entity (including any regulatory agency, court, or legislature and the representatives of each) and regardless of the location, nature, or status of the forum or proceeding. Included within the foregoing is the obligation of each Party and its Affiliates to **support and defend the indivisible nature of this Agreement and Related ICA Amendments**, including against any attempts that could result in treatment contrary to Section 5.4.

Section 53.1 of the LWC also provides that the ICA and all other referenced documents are part of a single agreement with the LWC. This section states:

53.1 The terms and conditions, including pricing, contained in this Agreement and any Appendices, Attachments, Exhibits, Schedules, Addenda, **and other documents or instruments referred to herein** and incorporated into this Agreement by reference, constitutes the **entire agreement** between the Parties with respect to the subject matter hereof, superseding all prior

understandings, proposals and other communications, oral or written between the Parties during the negotiations of this Agreement and through the execution and/or Effective Date of this Agreement. This Agreement shall not operate as or constitute a novation of any agreement or contract between the Parties that predates the execution and/or Effective Date of this Agreement.

In addition to the contents of the contract documents themselves, provisions of the SBC/Sage filing letter also confirm that the ICA and LWC constitute a single agreement. On page two of their letter, Sage and SBC state:

Sage and SBC Missouri note that the Replaced Amendment⁷ and the LWC Agreement contain provisions that have been negotiated as part of an entire agreement and the provisions are integrated with each other in such a manner that each provision is material to every other provision.

SBC and Sage also state in the letter at page one that the ICA is "similar to" the Replaced Amendment.

When the Commission examined a similar set of documents in Case Nos. TO-2005-0576 and TO-2004-0584, it concluded the documents constituted a single indivisible agreement. Specifically, the Commission held:

The amendment is clearly related to the commercial agreement. Each references the other. They were apparently negotiated at the same time, and executed within a few days of each other. The amendment, by its terms, will be void in any state in which the commercial agreement becomes inoperative. Perhaps most tellingly, the commercial agreement itself refers to the "indivisible nature" of the commercial agreement and the amendment. From these facts, the Commission concludes that the two are indeed indivisible; that is, neither one is a stand-alone agreement.

(Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement and Denying Intervention, p. 3, Case Nos. TO-2004-0576 and TO-2004-0584 (July 27, 2004)).

⁷ "Replaced Amendment" refers to the version of the ICA that the Commission rejected in Case Nos. TO-2004-0576 and TO-2004-0584.

SBC and Sage also acknowledge in their submittal letter that the U.S. District Court for the Western District of Texas, Austin Division, reached the same conclusion in October, 2004.

As indicated above, the ICA and LWC expressly remain a single indivisible agreement. The Commission should examine the total package of documents as a single interconnection agreement under Section 252(e).

It is discriminatory against other carriers - and therefore a violation of Sections 252(e) and 252(i) - for an ILEC to withhold portions of an integrated interconnection agreement from other carriers. ILECs must make entire agreements available to CLECs, just as CLECs can only adopt entire agreements.

Conclusion

Subject to the provisions of the Stipulation and Agreement filed by the parties, the Commission should review and approve the total package of documents submitted by SBC and Sage as a single interconnection agreement under Section 252(e).⁸

Respectfully submitted,

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

/s/ Carl J. Lumley

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
Clayton, Missouri 63105
(314) 725-8788
(314) 725-8789 (FAX)
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

Attorneys for NuVox Communications of Missouri, Inc.

Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 22nd day of April, 2005, either by e-mail or by placing same in the U.S. Mail, postage paid.

/s/ Carl J. Lumley

⁸ Should the Commission decide that the LWC is not subject to review, NuVox would call its attention to paragraphs 9 and 10 of the Stipulation and Agreement regarding agreed conditions of approval of the ICA alone.

Dana K. Joyce
Missouri Public Service Commission
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

John B. Coffman
Office Of The Public Counsel
P.O. Box 2230
200 Madison Street, Suite 650
Jefferson City, MO 65102
opcservice@ded.mo.gov

Nathan Williams
Missouri Public Service Commission
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102
Nathan.Williams@psc.mo.gov

Paul Lane
SBC Missouri
One Bell Center, Room 4300
St. Louis, MO 63101
paul.lane@sbc.com

Charles B. Stewart
Sage Telecom, Inc.
4603 John Garry Drive, Suite 11
Columbia, MO 65203
stewart499@aol.com