

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

In the Matter of the Determination of Prices,)	
Terms, and Conditions of Certain Unbundled)	Case No. TO-2005-0037
Network Elements: Consideration Upon Remand)	
From the United States District Court.)	

**REPLY OF SBC MISSOURI TO CLECS'
RESPONSE IN OPPOSITION TO SBC MISSOURI'S
MOTION FOR CLARIFICATION OR REHEARING**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Reply to CLECs' Response In Opposition to SBC Missouri's Motion for Clarification or Rehearing ("Joint CLECs' Response") states as follows:

1. The Joint CLECs follow a typical pattern of increasing the acidic tone of their rhetoric when neither the facts nor the law support their position. A review of the record demonstrates that SBC Missouri's Motion for Clarification and, In the Alternative, Application for Rehearing ("SBC Missouri's Motion") should be granted with regard to both points: (a) there is no valid evidentiary support for the Missouri Public Service Commission's ("Commission's") determination that the appropriate capital structure should be composed of 70% equity and 30% debt and (b) the Commission should clarify or revise its assertion that the new rates to be established under the remand directed by the U.S. District Court's Opinion may be accomplished only through change of law process rather than being implemented on the effective date of the Order as expressly provided in the contracts between SBC Missouri and various CLECs.

2. Contrary to the Joint CLECs' Response, SBC Missouri's Motion accurately described the procedural history of this case. (Joint CLECs' Response, para 1.) Joint CLECs do not explain how SBC Missouri misstates the procedural history. Except for the explanation that this case had its origin in the process leading to the Commission's approval of the Missouri 271 Interconnection Agreement ("M2A"), SBC Missouri's Motion tracks the December 28, 2004 Report

and Order in this case. SBC Missouri's explanation of the relationship of this case to the M2A is precisely accurate. As is clearly reflected in Case No. TO-99-227,¹ as well as in the Report and Order in Case No. TO-2001-438,² this case arose out of the Commission's approval of the M2A which contained a number of rates for unbundled network elements ("UNEs") which had not previously been established by the Commission. Pursuant to the Commission's Order in Case No. TO-99-227, interim rates were established in the M2A along with a process by which revised rates would be adopted. The Joint CLECs' claim that SBC Missouri's description of the history of this case is in any respect inaccurate utterly lacks credibility.

3. With regard to the appropriate capital structure, SBC Missouri has not engaged in "efforts to manipulate the record and distort the testimony" as asserted by the Joint CLECs. (Joint CLECs' Response, para. 3.) To the contrary, it is the Joint CLECs' which seek to play fast and loose with the facts. The Joint CLECs' erroneously claim that SBC Missouri has admitted that Mr. Hirschleifer's testimony was "admissible and relevant evidence" and that SBC Missouri "falsely asserts that Hirschleifer did not recommend a capital structure with an equity component of less than 80%." The Joint CLECs' claim is intentionally misleading and inaccurate. As the Commission is fully aware, and as is reflected in the Commission's Report and Order, Mr. Hirschleifer utilized an 80% market value equity ratio which he then averaged with a book value capital structure. This proposal to adjust market value by reference to book value capital structure was expressly rejected by the U.S. District Court, and the Commission appropriately recognized it could not be used here. (Report and Order, pp. 7-8.) Given the U.S. District Court's Order, the only relevant and admissible capital structure proposed by Mr. Hirschleifer is the market value structure comprised of 80% equity. His capital structure based on book value, and his proposal to

¹ Case No. TO-99-227, March 15, 2001 Order, p. 34 ". . . the Commission has established Case No. TO-2001-438 to set permanent prices, terms and conditions for these UNEs."

² Case No. TO-2001-438, Report and Order, August 6, 2002, p. 4, "This case has its origins in Case No. TO-99-227. . ."

averaged book and market values, were properly rejected as out of compliance with the U.S.

District Court Order. (Case No. TO-2005-0037, Report and Order, December 28, 2004, pp. 7-8.)

4. Despite the rhetoric advanced by the Joint CLECs, there is no real dispute that the only admissible and relevant capital structures before the Commission utilized either an 80% equity capital structure (Mr. Hirschleifer) or an 86% equity capital structure (Mr. Avera). SBC Missouri's Motion appropriately pointed out that there is no evidentiary basis by which to adjust the capital structures presented in the evidence. The Commission does not have free reign to make an "adjustment" that does not have a proper evidentiary basis. The Commission could not, for example, adopt the exact capital structure that was overturned by the U.S. District Court and claim that its was merely "adjusting" the market value capital structure to reflect its own views of risk. There must be an evidentiary basis to support an adjustment, and in this case there is simply no evidentiary basis. The Commission is not imbued with the authority to make adjustments that have no evidentiary basis under the rubric of Commission "discretion."

5. The Commission would presumably have the authority to adopt a capital structure which reflected either an 80% or an 86% equity component, or potentially a capital structure with an equity component between 80% - 86% based on its evaluation of the evidence submitted. But the Commission simply has no evidentiary basis to pull a number out of the air without evidentiary support and claim that it is within its "discretion." Such an approach does not square with basic principles of administrative law, nor is it consistent with the U.S District Court's mandate. That is the crux of SBC Missouri's Motion and the Joint CLECs simply fail to adequately respond to it. In tacit recognition of the lack of evidentiary basis for the Commission's "adjustment," the Joint CLECs are left to attempt to obfuscate the issue by distorting the evidence and SBC Missouri's position. The Commission should correct its error and issue a decision which properly reflects the relevant and admissible evidence in the case.

6. The Joint CLECs' Response to SBC Missouri's second point fares no better. In its Motion, SBC Missouri explained that the actual provisions of the interconnection agreements in effect between itself and CLECs which have opted into the M2A expressly call for the rates to change upon the effective day of the Commission Order establishing permanent rates. Exhibit 1 to Appendix Pricing-UNE provides:

Each of the rates listed in the following Appendix Pricing-UNE Schedule of Prices that are interim will be in effect only until the effective date of the Missouri Public Service Commission's Order establishing permanent rates, in Case No. TO-2001-438 or otherwise.

7. The Joint CLECs' Response never addressed the actual language of the interconnection agreement between SBC Missouri and the various CLECs. As set forth above, it is unequivocal that the interim rates are to be changed on the effective date of an Order establishing permanent rates in Case No. TO-2001-438 or otherwise. It is beyond question that the U.S. District Court overturned the Commission's capital structure determination in Case No. TO-2001-438 on which the rates were established. It is also beyond question that, on remand, the Commission will ultimately adopt new rates that reflect a revised capital structure determination. Pursuant to the terms of the interconnection agreements that exist between SBC Missouri and each of the CLECs which have opted in to the M2A, the rates are to be changed on the effective date of the Order establishing new rates.

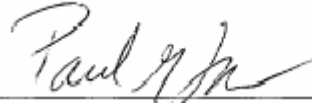
8. SBC Missouri reiterates that the determination of the prospective application of the rates which will be established in this proceeding is a different matter than a retroactive true-up of those rates. While SBC Missouri believes that a retroactive application is necessary and required under the terms of the interconnection agreement, it has not asked for rehearing on that point. But it does seek to ensure that the Commission Order properly permits the new rates to be implemented immediately upon the effective date of the Order setting those rates. No only does the contract require it, but basic fairness demands it. The CLECs received the benefit of lower rates as a result

of the Commission's unlawful adoption of an inappropriate capital structure. They obtained the benefit of those unlawfully low rates both for the true-up called for in the M2A and during the entire period the matter has been up on appeal and on remand. There is nothing left to negotiate or discuss between the parties in any change of law proceedings, nor does the agreement itself contemplate such an arrangement. Once the Commission establishes rates which accurately reflect a revised capital structure determination, those rates apply on a prospective basis from the effective date of the Order adopting the rates. The Commission should clarify or modify its Order in that regard.

WHEREFORE, for all the forgoing reasons, SBC Missouri respectfully requests the Commission to grant the relief sought in its Motion for Clarification and, In the Alternative, Application for Rehearing. The Commission should issue an Order revising its capital structure determination to comport with the evidence in the case and clarify that any Order subsequently establishing rates shall be implemented prospectively as of the effective date of the Order in accordance with the terms of the M2A interconnection agreements.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI

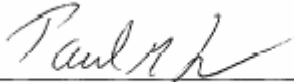
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by electronic mail on January 21, 2005.



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