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
In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.	)))	Case No. TO-2004-0584

POST-ARGUMENT BRIEF OF
NUVOX COMMUNICATIONS OF MISSOURI, INC. AND
MCImetro ACCESS TRANSMISSION SERVICES, LLC

COME NOW NuVox Communications of Missouri, Inc. ("NuVox") and MCImetro Access Transmission Services, LLC ("MCI"), pursuant to the directions of the Commission at the Oral Argument held July 8, 2004 (Tr. 84-86), and for their Post-Argument Brief state to the Commission[1]:

1. SBC and Sage seek to turn the Telecommunications Act upside down. Their arguments are based on a fundamental misunderstanding (being charitable) or misrepresentation (not being charitable) of the law. In their vision for the telecommunications market, SBC would be empowered to decide which CLECs it would allow to obtain certain unbundled elements, methods of interconnection, prices, and other terms and conditions, and it would likewise be empowered to decide which CLECs it would not allow to obtain such items. In short, SBC would be allowed to decide which CLECs would be able to remain in business and which would not be able to survive.

[1] The Commission most likely did not take seriously Sage's proposal for ex parte discussions regarding these matters (Tr 69), but out of an abundance of caution NuVox and MCI request equal opportunity should any such discussions occur.

2. Fortunately - and understandably - Congress did not share SBC's and Sage's twisted vision for the telecommunications market. Instead, Congress expressly legislated that SBC cannot discriminate between and among CLECs. The FCC recognized from the outset "the 1996 Act's prime goals of nondiscriminatory treatment of carriers and promotion of competition."[2] Contrary to SBC's and Sage's arguments, the FCC has not now endorsed secret and discriminatory deals. In Section 251, Congress expressly mandated "nondiscriminatory" access to services for resale (subsection (b)(1)) and to network elements (subsection (c)(3)). In Section 252(e), Congress required the rejection of discriminatory agreements. In Section 252(h), Congress mandated that all interconnection agreements must be public documents. In Section 252(i), Congress mandated that any CLEC must be allowed to have access to "any interconnection, service, or network element provided under an agreement approved under this section … upon the same terms and conditions as those provided in the agreement."[3] In other words, if one CLEC has access to any interconnection, service, or network element, all CLECs must have access to it. Under these provisions, there can be no secret deals and SBC cannot favor one CLEC over another.

3. Accordingly, all of the arguments put forth by SBC and Sage (such as at Tr 21-24, 36-37, 77, 82-83), regarding their desire to preserve the confidentiality of their agreement, to preserve a "first mover" advantage for Sage, and to avoid "chilling

[2] *Local Competition, First Report and Order*, 11 FCC Rcd at 16138, para. 1315.
[3] As briefly discussed at the oral argument, the FCC has announced the repeal of its current rule under 252(i), which has been called the "pick and choose" rule, and the adoption of an "all or nothing" rule instead. The rules have not yet been formally changed, although the order has issued. However, as has unfortunately been the case with many of the FCC's rulemaking efforts, this one is doomed to be invalidated by the courts. The FCC previously found that its "pick and choose" rule was compelled by the statute, 11 FCC Rcd at 16138, para. 1310, and the US Supreme Court agreed, 525 US at 396. But regardless of whether Section 252(i) means a CLEC must have access to parts of agreements (as it says) or only whole agreements, the underlying principle of nondiscrimination remains a key component of the Telecommunications Act.

negotiations", were rejected in 1996 when Congress enacted Sections 251 and 252. The Commission should not allow itself to be distracted by all of SBC's and Sage's sound and fury, for it signifies nothing. SBC and Sage had no legitimate expectation of achieving their stated desires.

4. SBC and Sage seek to vitiate not only the provisions of subsections (h) and (i) of 252, but also subsection (a) as well. SBC and Sage erroneously contend that SBC can somehow lawfully discriminate between CLECs regarding those components of the LWC that are not included in the incomplete amendment document that has been filed for approval, because the FCC rules regarding those components have been vacated.[4] There is a critical fallacy in this SBC/Sage position which is discussed below, but even if the Commission were to accept for sake of argument that SBC is not currently obligated to provide these components to any CLEC, it would not alter SBC's obligation to provide those components to all CLECs once it agrees to provide them to one CLEC. Section 252(a) expressly requires that even when an ILEC like SBC voluntarily makes an agreement "without regard to the standards set forth in subsections (b) and (c) of section 251", the agreement must be submitted for approval. That is why the FCC held in the *Qwest NAL* that <u>any</u> agreement regarding interconnection, services and network elements must be filed.[5] So when SBC makes such items available to one CLEC beyond the legal

[4] SBC and Sage assiduously avoided discussing the details of their agreement during the oral argument, because they could not dispute that these details involve interconnection, services and network elements. One need only flip through the LWC to see that it covers the same matters as the many agreements that have been submitted to the Commission for approval since 1996. These are the matters covered by Section 251, namely interconnection, resale, number portability, dialing parity, right-of-way access, reciprocal compensation, network elements, and collocation.

[5] FCC 04-57 at para. 23 (March 12, 2004). The FCC stated that compliance with 252(a) "is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors." Id at para. 46.

mandates of Section 251,[6] it must submit the agreement for approval under 252(a), which in turn means that the agreement must be public under 252(h) and available to other CLECs under 252(i).

5. Congress could not have achieved the purposes of 252(h) and (i) any other way. Only by requiring all negotiated arrangements regarding interconnection, services and network elements - whether within or without the minimum required offerings - to be submitted for approval, could it prevent ILECs from playing favorites among their aspiring competitors.

6. At oral argument, SBC and Sage accused the CLECs of attempting to read language out of the statutes (Tr. 68, 74), but in fact it is the accusers that ignore the express provisions of the law. The language of 252(a) would have no meaning if it was restricted to terms and conditions that are required under Section 251. And as indicated, subsections (h) and (i) of 252 would likewise be ineffectual under such an interpretation.

7. Moreover, the construction SBC and Sage seek to place upon other language in 252(a) ignores the full provisions of 251. When 252(a) refers to "a request for interconnection, services, or network elements pursuant to section 251", it does not mean only requests for network elements that may be mandated by the FCC under subsection (d). To the contrary, such language clearly refers to any and all requests for access to network elements under section 251, and therefore under subsection 251(c)(3), whether access has been mandated or not. Network elements are defined as any "facility or equipment used in the provision of a telecommunications service" in Section 153(45), without regard to whether the FCC has mandated their availability under 251(d).

[6] It makes no difference that FCC rulemaking regarding network elements is addressed by subsection (d), for such rules expressly relate back to subsections (b) and (c).

Nondiscriminatory access is required under 251(c)(3), whether afforded by agreement or mandate. So whether Sage was requesting elements that SBC had to make available or elements that SBC could choose whether to make available, Sage made "a request for interconnection, network elements and services pursuant to section 251". And whether SBC and Sage made an agreement with or without "regard to the standards set forth in subsections (b) and (c) of section 251", they must file their agreement for approval under Section 252(a), file it publicly under 252(h), and make it available to other CLECs under 252(i).

8. NuVox and MCI would be remiss if they did not briefly address again the critical fallacy that underlies the SBC/Sage argument, even though it is not directly relevant to the present inquiry. Contrary to SBC's and Sage's contentions (Tr 13, 31-32, 39, 72), the vacatur of the FCC TRO rules does not mean that SBC is not obligated to make available to CLECs the network elements that were the subject of those rules. Section 251(c)(3) still requires SBC to make network elements available on a nondiscriminatory basis, individually and in combinations. There is no rule excusing SBC from making available the elements in question. And the FCC has made it clear that it plans to try to adopt rules yet again, and in the immediate future. The USTA II decision did not in anyway narrow the obligations imposed on SBC by Section 251(c)(3). There has been no "delisting" of UNEs or classification of UNEs as "lawful" or "unlawful", notwithstanding SBC's efforts to pass off such labels as matters of fact. (Tr 74).

9. SBC and Sage have violated Section 252, for they have only submitted a partial document rather than the complete agreement. For that reason alone, the

amendment they have submitted should be rejected as against the public interest under Section 252(e). Moreover, the submitted amendment is discriminatory on its face, for no other CLEC could adopt it.[7] SBC's and Sage's assertions that the amendment only "references" the LWC are absurd. (Tr 20, 72). In section 6.6, the amendment expressly requires that a party to the amendment must simultaneously enter into the LWC or the amendment is void.[8] Section 6.6 states: ""Contemporaneously with this Amendment, the Parties are entering into a Private Commercial Agreement for Local Wholesale Complete ("LWC Agreement")." It further states: "Should the LWC Agreement become inoperative in any one or more state(s), this Amendment shall immediately become null and void for all purposes in such state(s)…."And SBC and Sage make no bones about their contention that no other CLEC can adopt the LWC. (Tr 22-24, 26, 37; LWC Section 18). Until SBC and Sage submit their entire agreement - regardless of how many documents it is broken into - for approval under Section 252, the Commission must reject their incomplete submissions.

10. Finally, NuVox and MCI address the Judge's inquiry regarding the burden of proof. (Tr 9-10). In a proceeding in which no evidence has been offered and no evidentiary hearing held, the concept of burden of proof is not applicable. But as in any legal proceeding, there can be a burden of persuasion. The Commission issued a show cause order, clearly placing the burden of persuasion upon SBC and Sage. And rightly so, for Section 252(a) of the Act places the burden of compliance with filing requirements upon the parties to an agreement. Concerning the incomplete amendment, regardless of where the burden of persuasion lies, the defects in the document that

[7] Sage concedes an exclusive agreement is unlawful. (Tr 15-16).
[8] And as CLECs and Staff have pointed out, the LWC makes clear that all the documents between SBC and Sage are expressly one indivisible agreement.

compel its rejection are evident upon its face. By its express terms, it is incomplete, exclusive and discriminatory; therefore, it is unlawful.

11. NuVox and MCI will heed the advice of the Judge at the hearing and keep this Brief brief. NuVox and MCI incorporate by reference their previously submitted pleadings and oral arguments in these matters. NuVox and MCI urge the Commission to take the following action:[9]

a. Grant their interventions in Case Nos. TO-2004-576 and TO-2004-584.

b. Grant Staff's Motion to Consolidate.

c. Grant Staff's requests to open case and reject the incomplete amendment that is the subject of Case No. TO-2004-584, as discriminatory and against the public interest (acting by the statutory 90 day deadline).

d. Find and conclude that SBC and Sage have failed to show cause as ordered on May 11, 2004 and must file the LWC and all other agreements between them for consideration under Section 252.

e. Grant additional relief as meet and proper in the premises.

[9] There is no reason to wait for action by the FCC on SBC's Emergency Petition. The FCC has acknowledged that these types of issues are matters for state commissions. *Qwest Declaratory Ruling*, para. 10-11. Delay would result in discrimination and violate the Act.

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, MO 63105
(314) 725-8788
(314) 725-8789 (FAX)
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

ATTORNEYS FOR NUVOX COMMUNICATIONS OF MISSOURI, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES, LLC

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 14th day of July, 2004, to the following:

Office of Public Counsel
P.O. Box 2230
Jefferson City, Missouri 65102

Office of General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 651012

Paul Lane
SBC Missouri
One Bell Center, Room 3518
St. Louis, Missouri 63101

C. Brent Stewart
Stewart & Keevil, LLC
4603 John Garry Drive, Suite 11
Columbia, Missouri 65203

Mark W. Comley
Newman, Comley and Ruth
601 Monroe Street, Suite 301
Jefferson City, Missouri 65102

William D. Steinmeier
MaryAnn Young
William D. Steinmeier PC
2031 Tower Drive
Jefferson City, Missouri 65110-4595

/s/ Carl J. Lumley