

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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.)	

CLECS' PROPOSED PROCEDURAL SCHEDULE
AND SUPPORTING SUGGESTIONS

COME NOW NuVox Communications of Missouri, Inc., XO Missouri, Inc., Allegiance Telecom of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, LLC, AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City (herein collectively referred to as "CLECs"), pursuant to Commission order, and for their Proposed Procedural Schedule and Supporting Suggestions state to the Commission:

1. CLECs' proposed procedural schedule appears at the end of this pleading. The proposed schedule necessarily includes additional testimony and hearings in this matter, for the following reasons:

a. the results of this proceeding can only apply prospectively, and to comply with TELRIC requirements new forward-looking data must be considered; and

b. additional testimony is required before the Commission can comply with the federal court decision regarding the Commission's ability to consider book values in the process of determining the appropriate weighted average cost of capital and resulting rates.

2. The Commission issued its Report and Order in Case No. TO-2001-438 on August 6, 2002. Therein, the Commission made decisions regarding various inputs to and

aspects of SBC cost studies, including the weighted average cost of capital.¹ The Commission's decision regarding weighted average cost of capital involved a determination of three closely related inputs - specifically: cost of equity, cost of debt, and target capital structure. The Commission then applied those inputs to an integrated formula: (cost of equity times percentage of equity in capital structure) plus (cost of debt times percentage of debt in capital structure) equals weighted average cost of capital. The Commission directed SBC to rerun its cost studies based on the decisions set forth in the Report and Order - including the determination of weighted average cost of capital - and to file the results of the rerun cost studies and the resultant new UNE prices for approval. On June 17, 2003 the Commission approved the new compliance UNE rates for inclusion in the model M2A.

The proceedings in Commission Case No. TO-2001-438 originated from SBC's request for a favorable recommendation from the Commission in connection with SBC's application for authority from the FCC to provide interLATA telecommunications in Missouri under Section 271 of the Telecommunications Act of 1996. SBC obtained that favorable recommendation from the Commission in large part by proposing a model interconnection agreement, called the Missouri 271 Agreement or M2A, which it promised to make available to CLECs. In response to legitimate objections lodged pursuant to Section 271 that noted that the M2A contained some UNE rates that had never been reviewed by the Commission for determination of compliance with TELRIC standards, SBC agreed to make those particular rates interim subject to replacement by permanent rates to be set by the Commission in Case No. TO-2001-438.²

¹ As stated by SBC in its Suggestions to the federal court in Case No. 03-04148-CV-C-NKL (the case that led to this remand proceeding). "The cost of capital factor is a critical input in nearly all UNE rates because, once the cost of capital is calculated, it is applied as a multiplying factor to all investments to ensure proper cost recovery."

² See Case No. TO-99-227.

Upon the model M2A becoming available, some CLECs adopted it in totality in making their interconnection agreements with SBC and others adopted portions of it (including the UNE provisions) into their agreements with SBC. These CLEC-specific contracts are distinct from the generic model agreement, in that there is no party to the model but there are parties to the specific contracts that have contractual rights that are legally enforceable and protected from government impairment under the state and federal constitutions.

After the Commission approved the compliance rates in Case No. TO-2001-438 in June 2003, those permanent rates were incorporated into the M2A-based individual agreements of Missouri CLECs in place of the interim rates pursuant to the terms of the parties' M2A-based interconnection agreements. Further, as expressly provided in the M2A-based agreements, there was a six-month retroactive true-up and, therefore, SBC and CLECs exchanged monies based on whether in total the amounts charged a CLEC by SBC during the six months preceding the incorporation of the permanent rates into the agreements were less or greater than the amounts that would have been charged had the permanent rates previously been in effect.

In addition to implementing the rate changes under the applicable contract language, SBC sought judicial review of several specific aspects of the Commission's Report and Order with regard to its impact on the model M2A. It did not seek a stay of the Commission's decision. It did not seek judicial review of any specific CLEC interconnection agreement under Section 252.

On June 17, 2004, the United States District Court for the Western District of Missouri denied SBC's challenges, except for its challenge of the Commission's decision regarding the input of target capital structure used in the calculation of weighted average cost of capital. On that point, the court vacated the Commission's determination of capital structure and remanded the case for "reconsideration of the appropriate capital structure and resulting rates." See Order

and Judgment in a Civil Case, Case No. 03-04148-CV-C-NKL. The court did not direct that any rate change occur prior to Commission action on remand, hence the rates approved in TO-2001-438 currently remain in the model M2A. The court also did not take any action regarding any specific M2A-based interconnection agreement between a CLEC and SBC.

Once the Commission makes a decision on remand, presumably the affected rates in the model M2A will change. But there is no provision in the CLEC-specific agreements that would allow the Commission to change those agreements in the course of this proceeding. The CLEC agreements only provide for the one retroactive true-up that has already been implemented by SBC and the CLECs. The CLECs did not agree to any additional retroactive true-up after incorporation of the permanent rates into their contracts. The pertinent language is set forth in Exhibit 1 to Appendix Pricing UNE:

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. These include rates for UNEs/Services for which the Commission set interim rates in Case No. TO-98-115 and rates for listed UNEs for which the Commission has not set rates, including unbundled local transport rates. The rates listed in the following Appendix Pricing UNE Schedule of Prices that are interim are subject to true up to the permanent rates established by the Public Service Commission, in Case No. TO-2001-438 or another appropriate case. Any refund or additional charges due as a result of true up shall be paid within thirty days of the effective date of the Commission's order adopting permanent rates. The time period subject to true up shall be limited to six months, retrospectively from the effective date of the Commission's final order adopting permanent rates, but shall not include any period prior to the effective date of this agreement with CLEC.

The contract language provides that interim rates are to be replaced on a one-time basis by permanent rates set by the Commission. Further, the contract calls for a single true-up. There is no provision in this part of the contract for the permanent rates themselves ever to be treated as interim rates or for any additional true-up to occur, and specifically this part of the contract does

not call for any change to occur in the event there is a court challenge regarding the Commission's decision that set the permanent rates. The CLECs did not agree to any such additional true-up procedures. Accordingly, the permanent rates set in Case No. TO-2001-438 remain the effective "permanent" rates in the CLEC-specific interconnection agreements and are not subject to retroactive change or true-up under the provisions of Exhibit 1 to Appendix Pricing UNE.

On the other hand, the M2A-based agreements do have change of law provisions that arguably will come into play as a result of Commission action following the federal court remand regarding the appropriate capital structure and resulting rates. Specifically, Section 18.4 of the General Terms and Conditions provides that if any rates are modified by subsequent legal actions, the change shall be effective immediately (not retroactively) consistent with the regulatory action upon written request of a party to the contract. Negotiations and dispute resolution procedures are the means identified for fulfilling such a request. There is no provision for a true-up process or any retroactive application of a change in rates pertinent to this proceeding.³

³ Section 18.4 does refer to a retroactive true-up process contained in Sections 14.3.2 and 14.4.2 of Attachment 6 Unbundled Network Elements. Those provisions of Attachment 6 concern modifications of the TELRIC methodology, not disputes over implementation of the methodology such as SBC's successful challenge to the Commission's determination regarding target capital structure. The federal court decision was based upon FCC regulations that were in effect at the time the Commission made its decision in Case No. TO-2001-438 and the FCC's explanations of those regulations. It was not based upon any change in regulation or the TELRIC methodology. Moreover, this true-up process could not reach back prior to a decision that did modify the TELRIC methodology.

Specifically, Section 18.4 provides:

This agreement is entered into as a result of the Missouri Public Service Commission's Order in Case No. TO-99-227, reviewing SWBT's compliance with Section 271 of the Federal Telecommunications Act of 1996, and incorporates some of the results of arbitrations by the Commission. In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction, including but not limited to any decision of the Eighth Circuit relating to any of the costing/pricing rules adopted by the FCC in its First Report and Order, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (e.g., Section 51.501, et seq.), upon review and remand from the United States Supreme Court, in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999) or *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999), the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party. In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate conforming modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement. The Parties acknowledge and agree that by executing this Agreement, neither Party waives any of the rights, remedies, or arguments with respect to such decisions and any remand thereof, including its right to seek legal review or a stay pending appeal of such decisions or its rights under this Intervening Law paragraph. Nothing herein is intended to modify the rights and obligations contained in Attachment 6, Sections 14.3.2; 14.4.2; 14.8 and Section 18.2 of these General Terms and Conditions. The Parties agree that any rates contained in Attachment 6, Unbundled Network Elements which are invalidated, modified or stayed or otherwise affect by such governmental action will remain unaffected during the time periods referenced in Attachment 6, Sections 14.3.2 and 14.4.2, respectively, but will become interim, subject to true up retroactive to the dates specified as the "beginning as of" date in each of the referenced Sections.

The provisions of Section 18.4 have not yet been triggered. The federal court did not change any rates, terms or conditions of the agreement, nor did it change any laws or regulations

that were the basis for rates, terms or conditions of the agreement. Rather, the court determined that the Commission erred in deciding upon an input to a calculation, the results of which are themselves an input into various cost studies, which in turn identify various rates that were and are subject to Commission approval. Until the Commission completes this remand proceeding by re-determining the inputs and calculations, and SBC reruns its cost studies and obtains approval of new rates, there is no change in law to implement under Section 18.4. And again, once there is such a change in law, the contract only calls for prospective implementation.

Accordingly, the purpose of this proceeding is to determine new, prospective rates for the same rate elements that were at issue in Case No. TO-2001-438 (more specifically, such elements as were determined in part by the cost of capital calculation). Contrary to SBC's assertions at the prehearing conference, the decision in this proceeding cannot be applied retroactively. There is absolutely no provision for any retroactive true-up all the way back to the summer of 2003 when the rates approved in TO-2001-438 were incorporated into the CLEC-specific agreements. The provisions of Exhibit 1 to Appendix Pricing UNE concerning a one-time six month true-up have already been fully implemented and cannot be re-invoked by SBC. And the provisions of Section 18.4 and the sections of Attachment 6 cross-referenced therein do not provide for any retroactive true-up to the date of either the court decision or the Commission's decision on remand, because there has been no triggering change in TELRIC methodology (as required by those sections) that pertains to this proceeding.

Given that there is no contractual provision authorizing a retroactive rate change or true-up, the Commission can only make a prospective rate decision. See, e.g., State ex rel. Kansas City v. Public Service Commission, 228 SW2d 738 (Mo. 1950). The federal court itself recognized that a decision by the Commission on remand would be prospective only, as it went

so far as to speculate that SBC's challenges may have become moot as a result of the USTA II decision by the D.C. Circuit Court of Appeals that was issued shortly before the court acted. (Order, p. 2, note 1). Only a prospective decision could be rendered moot.

The record in Case No. TO-2001-438 only consists of information that was available at the time of the hearings, which were held in December 2001. Evidence regarding weighted average cost of capital and the involved inputs of cost of equity, cost of debt and target capital structure was as old as 1999 information.⁴ This old information cannot properly be used by the Commission as it makes its prospective decisions in this remand proceeding.

To comply with applicable FCC regulations, the Commission must determine a "forward-looking cost of capital." 47 CFR 51.505(b)(2).⁵ Given that the Commission must make a prospective decision, that means it must determine a forward-looking cost of capital as of the date of new hearings. It does not mean the Commission should now determine a forward-looking cost of capital as of December 2001 based on information from 1999.⁶ Thus, in order to obtain contemporaneous information and make a new decision concerning SBC's forward-looking cost of capital, the Commission needs to hold hearings to take new evidence.

Moreover, the Commission would not be well-served to proceed based simply on the old record, for it would not have the benefit of evidence from its own Staff and other parties that meets the court's standards. The federal court has specifically rejected the initial approach taken by Staff's outside expert witness.⁷ The Commission should allow its Staff to provide additional

⁴ Transcript, 116-17, 123-25, 133-34, 137-78, Case No. TO-2001-438.

⁵ That is what the Commission intended to do the first time, but now it must take action again in light of the federal court ruling.

⁶ Even before the development of the TELRIC standard, the Missouri courts have recognized that it is improper to try to apply forward-looking cost studies retroactively. See State ex rel SWBT v. PSC, 645 SW2d 44, 48 (Mo App 1982).

⁷ CLECs do not concede that the court's decision was correct, or that it has any application beyond the scope of this Case.

evidence that meets FCC regulations as interpreted by the court. Staff made clear at the prehearing conference called by the Commission that it considered the court's ruling unexpected. With the court's ruling now in hand, Staff should be allowed the opportunity to present further evidence to the Commission. Likewise, the other parties should have an opportunity to provide new evidence in light of the court's ruling, in order to comport with the basic tenets of due process. If the parties are not allowed to resubmit testimony in light of the Court's decision, the Commission will not be able to demonstrate that it has complied with the court's order.

Finally, there is also a related issue regarding the appropriate scope of new testimony. CLECs submit that the Commission cannot comply with TELRIC standards and the court's order by only reconsidering SBC's target capital structure. The formula for weighted cost of capital is an integrated calculation. It would not be appropriate to use a newly-determined forward-looking capital structure, but continue to use cost of equity and cost of debt figures determined in 2001 based on 1999 information. All inputs to the calculation should be contemporaneous figures that properly relate to one another. Forward-looking results could not be obtained by using a mismatched hodge-podge of new and old inputs. And the federal court directed the Commission not only to reconsider the "appropriate capital structure", but also to reconsider "the appropriate ... resulting rates" (emphasis added). The court recognized that simply altering the capital structure component of the calculation of cost of capital would not be sufficient. The court also recognized, by stating that the Commission must reconsider "the appropriate resulting rates", that the Commission would need to reconsider the entire calculation⁸ and a rerun of the cost studies. Accordingly, the Commission should direct the parties to provide new testimony regarding all aspects of the cost of capital calculation, not just capital structure.

The Commission could also decide that it should direct SBC to update the other inputs to the involved cost studies, so that the results are totally updated. In that regard, the Commission could consolidate this proceeding with Case No. TO-2002-0397. Such actions certainly would be within the Commission's discretion.

Based on the foregoing, and on the assumption that the scope of the proceedings does not go beyond a re-determination of weighted average cost of capital, CLECs propose the following procedural schedule in this matter:

30 days after issuance of scheduling order	intervention deadline (after due notice)
60 days after issuance of scheduling order	parties submit direct testimony regarding all aspects of weighted average cost of capital
+30 days	simultaneous rebuttal testimony
+15 days	simultaneous surrebuttal testimony
+5 days	pretrial filings (position statements, order of witnesses, order of opening statements, order of cross-examination)
+30 days	complete depositions of witnesses ⁹
+10 days	commence hearings

⁸ The court made clear in its Order that it was familiar with all three of the inputs to the cost of capital calculation. (Order p. 5-6).

⁹ Depositions will make the hearings much more efficient, by eliminating the need for exploratory questions during the hearings.

WHEREFORE, CLECs request the Commission to adopt their proposed procedural schedule in order to allow the parties an appropriate opportunity to adduce new evidence regarding the determination of SBC's forward-looking weighted cost of capital, so that the Commission can make a prospective decision regarding the affected UNE rates that complies with the federal court's order and the FCC's TELRIC standards.

Respectfully submitted,

CURTIS, HEINZ,
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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 3rd day of September, 2004 by placing same in the U.S. Mail, postage paid.

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