BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

COMMENTS OF SAGE TELECOM, INC.

INTRODUCTION

In anticipation of the oral argument scheduled for July 8, 2004, Sage Telecom Inc. ("Sage") respectfully submits these Comments supporting review and approval by the Missouri Public Service Commission ("Commission") of the Amendment of the interconnection agreement between Sage and SBC Communications, Inc.[1] ("SBC") filed on May 4, 2004.

ARGUMENT

I. THE COMMISSION SHOULD APPROVE THE AMENDMENT TO THE SAGE/SBC INTERCONNECTION AGREEMENT

On May 4, 2004, Sage and SBC filed for the Commission's approval pursuant to Section 252(e) the "Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Sections 251/252 of the Telecommunications Act of 1996" (the "Amendment") to their interconnection agreement in Missouri. Under Section 252(e)(2)(A), the Commission must approve the Amendment unless it makes one of two findings:

> (i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

[1] SBC Communications, Inc. is the corporate parent of Southwestern Bell Telephone, L.P. d/b/a SBC Missouri.

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

As shown below, neither of these two conditions is present here. The Commission must therefore approve the Amendment.

A. The Amendment Does Not Discriminate Against a Non-Party Carrier

The Amendment does not discriminate against another carrier for the simple reason that it is available to any other CLEC, through adoption pursuant to Section 252(i). The LWC Agreement has not been filed with the Commission and whether its terms are discriminatory is not an issue in this docket because it is not before the Commission and is not "interdependent and intertwined" with the Amendment as alleged by the Staff.[2] The Staff rests its conclusion that the Amendment and LWC Agreement are "interdependent and intertwined" on the fact that the Amendment becomes void in the event the LWC Agreement becomes inoperative. However, there is no logical reason why that fact should cause the Amendment and the LWC Agreement to be considered a single intertwined agreement.

Contracts often contain references to factors outside the contract that could cause the contract to become void. For example, Force Majeure provisions often state that in the event of a labor disruption, a party may declare a contract void. It has never been held, however, that the existence of such a clause would mean that the contract and the collective bargaining agreements which govern the parties' relationships with their respective employees are "inseparable." Likewise, although acquisition agreements are often contingent on the purchasing party being able to consummate a loan agreement with a lender, no one would think that the loan agreement was an integral part of the acquisition agreement.

[2] Staff's Recommendation to the Commission, at ¶ 10 (May 26, 2004).

There is no nefarious scheme underlying the reference to the LWC Agreement in Section 6.6 of the Amendment. This reference is necessary because Sage was concerned that for any of a number of reasons, the fairly novel LWC Agreement might be voided, in which case Sage needed a "contingency plan" in order to be able to continue serving its customers. The contingency plan was that Sage would then have the right to go back to the interconnection agreement, as it existed prior to the Amendment or as otherwise amended by the parties pursuant to the Commission's standard process.

In crafting its discrimination argument, the CLEC Coalition fails to recognize that the Amendment contains all of the provisions of the agreement between SBC and Sage that must be filed and made available for adoption by CLECs under Sections 251(a)(1), 252(h) and (i) of the 1996 Act.[3] Rather, the CLEC Coalition argues that the Local Wholesale Complete provisions and other provisions of the LWC Agreement must be filed and available for adoption under Sections 252(h)-(i) merely because they constitute a replacement for UNE-P functionality, which was required to be unbundled under Section 251 prior to *USTA II*.[4]

To justify its position, the CLEC Coalition erroneously states that the conclusion that UNE-P need no longer be unbundled at TELRIC rates pursuant to Section 251 "is not supported by any reading of *USTA II*."[5] The CLEC Coalition misconstrues *USTA II*. In *USTA II*, the D.C. Circuit Court of Appeals vacated the FCC's national impairment finding and the FCC's rules requiring SBC and other ILECs to provide UNE-P for mass market customers.[6] Contrary to the CLEC Coalition's suggestion in ¶ 21 of its Comments, Section 251(c)(3) of the Act is not self-

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[3] This issue is discussed more fully in Section I.B of Sage's Reply Comments filed in Case No. TO-2004-0576 on the same day as this filing.

[4] Comments of CLEC Coalition, at ¶ 10.

[5] Comments of CLEC Coalition, at ¶ 15.

[6] *USTA II*, 359 F.3d 568-571.

executing and imposes no obligation upon ILECs to unbundle network elements in the absence of a valid impairment finding. Specifically, Section 251(d)(2) provides that "[i]n determining what network elements should be made available for the purposes of" Section 251(c)(3), the FCC must consider "at a minimum" whether "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier" to provide services that it seeks to offer.[7] The D.C. Circuit Court vacated the FCC's impairment finding for mass market UNE-P, which is a prerequisite under Section 251(d)(2) of the Act for requiring unbundling of any network element. Thus, SBC and other ILECs have no Section 251 obligation to provide mass market UNE-P and hence no obligation to file, obtain Commission approval or make available to others such non-Section 251 terms.[8]

Both SBC and Sage recognize that the terms of an agreement that pertain to ongoing obligations under Section 251(b) and (c) must be filed.[9] In conformance with this obligation, the parties have filed the Amendment, which contains all of the Section 251 provisions agreed to by Sage and SBC. The 1996 Act does not, however, require that SBC or Sage file for Commission review or approval or make available to CLECs under Sections 251(a)(1), 252(h) or 252(i), other non-Section 251 arrangements in their agreement including, but not limited to, a commercial, non-Section 251 functional UNE-P replacement service. Section 252(i) by its expressed terms limits the agreements that must be made available for adoption to those that

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[7] 47 U.S.C. § 251(d)(2).

[8] SBC has voluntarily committed to the FCC to continue to offer UNE-P through the end of 2004. This voluntary commitment does not constitute an obligation under Section 251.

[9] Memorandum Opinion and Order, *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of he Duty to File and Obtain Prior Approval of Negotiated Contract Arrangements under Section 252(a)(1),* 17 FCC Rcd 19337, FCC 02-276, at ¶ 8 (2002) ("*Qwest ICA Order*").

must be "approved under" Section 252.[10] Section 252(h) limits the agreements that must be filed with state commissions to those agreements that must be "approved under" Section 252(e) and those SGATs that are approved under Section 252(f).[11] As discussed more fully in Part I.B of Sage's Reply Comments in Case No. TO-2004-0576, Section 252(a)(1) does not require filing or approval of provisions that do not relate to obligations under Section 251.

The non-discrimination provisions, on which the CLEC Coalition purports to rely, are inapplicable to non-Section 251 agreements. The CLEC Coalition underscores that Section 252(i) is "'a primary tool of the 1996 act for preventing discrimination *under section 251'*", and notes that the "prohibition against discrimination with respect to interconnection is reflected in Section 251(c)(2)(D)," and there is a non-discrimination requirement for UNEs in Section 251(c)(3) of the 1996 Act.[12] The CLEC Coalition fails, however, to acknowledge the fact that none of these non-discrimination provisions applies in the absence of a Section 251 obligation or agreement. Thus, none of these provisions applies to the LWC Agreement.

In sum, the non-discrimination requirements relied upon by the CLEC Coalition apply to the Amendment filed with the Commission but not to the LWC Agreement which is not required to be filed and is not before this Commission in the first instance. Section 252(i) does not apply to *every* contractual undertaking between a CLEC and an ILEC. Rather, it applies *only* to services and facilities that are required to be provided under Section 251.[13] Other CLECs will have the right to adopt Sage's long-standing interconnection agreement, including the Amendment. This encompasses the entirety of Sage's agreement with SBC for Section 251

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[10] 47 U.S.C. § 252(i).

[11] 47 U.S.C. § 252(h).

[12] Comments of CLEC Coalition, at ¶¶ 22, 25 (emphasis added).

[13] *See* Section I.B of Sage's Reply Comments filed in Case No. TO-2004-0576 on the same day as this filing.

elements and services. To the extent that the LWC Agreement provides Sage with additional services, those services are not required to be provided under Section 251, and hence are not available for adoption under Section 252(i).

B. Implementation of the Amendment Would Not Be Inconsistent with the Public Interest

As a result of an adverse judicial determination, Sage found itself in the position of losing the legal right under Section 251 to obtain access to the wholesale service that it needed to serve its customers, nearly all of whom are residential customers. It took the very logical step of negotiating a non-Section 251 arrangement with the only available supplier, for a substitute service that would enable it to continue to serve those customers. In negotiating a commercial agreement with SBC to replace the UNE-P service to which it was no longer entitled as a matter of law, it did precisely what the FCC urged the entire CLEC community to do, unanimously recognizing, just days before Sage and SBC entered into their agreement, that commercial agreements are "needed now more than ever" and that such agreements are in the "best interests of America's telephone consumers . . . ."[14] Such a step, designed to enable Sage's more than 500,000 customers to continue using the telephone service of their choice, was eminently in the public interest.

Both AT&T and MCI (members of the CLEC Coalition) serve large numbers of customers through means other than UNE-P, and unlike Sage, are increasingly targeting business customers who are more economically reached through CLEC facilities than are residential customers, particularly the rural and suburban residential customers that constitute Sage's target

[14] FCC News Release, March 31, 2004, attached hereto as Exhibit A.

market.[15] At a time when AT&T and other CLECs that have been relying on UNE-P are announcing their exit from the residential market, Sage has reaffirmed its commitment to the residential market, based upon its LWC Agreement.[16] It is clearly in the public interest for the Commission to permit Sage to provide service to customers in the Missouri residential market at a time when other providers are withdrawing from this market. Accordingly, the Commission should approve the Amendment.

Respectfully submitted,

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[15] Approximately 94% of Sage's Missouri customers are residential, while the other 6% are very small businesses. Sage's Missouri customers are approximately 9% rural, approximately 52% suburban, and approximately 39% urban.

[16] *See* Sage June 24, 2004 press release, available at http://www.sagetelecom.net/ViewNews.asp?NewsID=74; AT&T June 23, 2004 press release, available at http://www.att.com/news/item/0,1847,13121,00.html; June 23, 2004 *Communications Daily* article regarding Z-Tel. All of these documents are attached hereto as Exhibit B. Sage understands that AT&T may be addressing the loss of UNE-P through the use of VoIP (Voice over Internet Protocol) service. This is a technological "workaround" the loss of UNE-P. Sage has elected a different workaround—one entailing a business arrangement with SBC.

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