BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

BRIEF OF SAGE TELECOM, INC.

Pursuant to the request of the Missouri Public Service Commission ("Commission") during the July 8, 2004 hearing, Sage Telecom Inc. ("Sage") respectfully submits this Brief supporting approval of the Amendment to the interconnection agreement between Sage and SBC Communications, Inc.[1] ("SBC"), filed on May 4, 2004 (the "Amendment"), and opposing any requirement that Sage's non-Section 251 commercial agreement with SBC (the "LWC Agreement") be filed pursuant to Section 252.

EXECUTIVE SUMMARY

A March 2, 2004 appellate court ruling abruptly eliminated (subject to a brief stay that expired on June 16, 2004) SBC's obligation to provide CLECs such as Sage the UNE-P service, previously required under the Telecommunications Act of 1996 ("1996 Act"), on which Sage and many other CLECs were totally dependent. Without this underlying service (or some substitute), Sage would be unable to continue to provide its more than 500,000 customers (the

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

vast majority of whom are residential) with local exchange service. Other CLECs who served their customers through the use of the UNE-P service that ILECs such as SBC had previously been required to provide to CLECs at cost-based rates established by regulators were likewise at risk. The FCC, as the federal agency responsible for administering the market-opening provisions of the 1996 Act, responded to the impending crisis by calling for ILECs and CLECs

> to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. Ongoing litigation has unsettled the market. To address this uncertainty, we ask all carriers to begin a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements.[2]

After years of litigation over ILECs' legal obligation to provide UNE-P service to CLECs at cost-based rates, SBC and Sage recognized that a consensual agreement free of the seemingly never-ending litigation process might be in their mutual interest. Sage and SBC had already been discussing such a commercial agreement prior to the FCC's call, and entered into one within days thereafter. The new agreement (known as the "LWC Agreement") would provide Sage with services that go significantly beyond UNE-P, and are customized to Sage's particular needs, but at a price higher than Sage had paid for the UNE-P service that had previously been mandated by regulations.

Because Sage and SBC desired that the commercial agreement govern their relationship without regard to what might happen to the FCC's UNE-P rules on further appeal to the U.S. Supreme Court or on remand to the FCC, it was necessary to modify the parties' existing interconnection agreements accordingly. Therefore, Sage and SBC entered into amendments to their interconnection agreements in Missouri and the ten other states in which they have

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[2] Press statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004, attached as Exhibit B hereto.

interconnection agreements. The Missouri amendment was filed with this Commission on May 4, 2004 and is the subject of Case No. TO-2004-0584.

In the body of this brief, Sage discusses in detail the following critical issues that are before this Commission:

I. The Commission Should Approve the Amendment Filed in Case No. TO-2004-0584

- Under § 252(e)(2) of the 1996 Act, the Amendment must be approved unless it "discriminates against a telecommunications carrier not a party" or is inconsistent with "the public interest" (see p. 10, below).

- The Amendment (and the pre-existing interconnection agreement of which it is a part) does not discriminate against a carrier that is not a party, because such carriers may adopt the Amendment and associated M2A-based interconnection agreement. The fact that § 6.6 of the Amendment references the LWC Agreement does not preclude another carrier from adopting the Amendment under § 252(i). SBC, which is the only party that could object to a § 252(i) adoption, has agreed (at the July 8, 2004 hearing and in its July 13, 2004 brief) that the reference to the LWC Agreement would not preclude adoption, and has explained that the adopting carrier's amendment would be affected by a voiding of the LWC Agreement in the same way as Sage's Amendment (see pp. 11-12, below).

- The Amendment is in the public interest because it will allow Sage to continue to offer Missouri consumers a competitive choice in their local phone services, will facilitate Sage's rollout of new data and Internet services to currently-deprived residential consumers in rural and suburban areas, and will enable Sage and SBC to enter into precisely the type of commercial agreement that the FCC Commissioners unanimously agreed were "in the best interests of America's telephone consumers" (see p. 16, below).

- If for any reason, the Commission does not wish to affirmatively approve the Amendment, it has the option under § 252(e)(4) to allow it to go into effect on August 2, 2004 through inaction (see p. 16, below).

II. The LWC Agreement Need Not Be Filed

A. Contracts between ILECs and CLECs need only be filed to the extent that they involve arrangements under § 251(b) or (c)

- Under the FCC's *Qwest ICA Order*, a contract between an ILEC and a CLEC need only be filed to the extent that it involves arrangements under § 251(b) or (c) (see p. 20, below).

- This is consistent with § 251(c)(1), providing that ILECs must negotiate agreements under § 252 "to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection" (see p. 22, below).

- It would be illogical to interpret § 252 as requiring the filing of arrangements that are not required in the first place (see p. 22, below).

- Imposing an unnecessary filing requirement would impose cost, delay, and uncertainty, thus chilling commercial negotiations (see p. 23, below).

- The FCC's March 31 Press Release indicated that the FCC anticipated that "commercial agreements" such as the LWC Agreement would not be subject to §§ 251 and 252, because it asked CLECs and ILECs "to enter into agreements that would restore certainty" in the face of "ongoing litigation." The only way this could be done would be to enter into an agreement that would *not* be subject to "ongoing litigation." That means that the agreement would not be affected by the results of the litigation over the FCC's *Triennial Review Order*, which means that it would not be affected by changes in the FCC's rules interpreting Sections 251 and 252. The only way for it not to be affected by changes in the Rules interpreting Sections 251 and 252 would be if the agreement were not *subject to* Sections 251 and 252 (see pp. 24-25, below).

B. To the extent, if any, the Commission finds that the LWC Agreement actually includes provisions required under § 251(b) and (c), Sage and SBC complied with the filing requirement of § 252 by filing those provisions with the Commission for approval as part of the Amendment

- The Amendment covers all matters that fall under § 251 (b) and (c), such as reciprocal compensation and loop pricing (see p. 25, below).

- Under the DC Circuit Court of Appeals decision in *USTA II*, UNE-P is no longer required to be provided. While the statutory obligation to provide network elements remains, § 251(d)(2)(B) of the statute requires that only those elements be provided as to which the FCC has found that the failure to provide access to the elements would "impair the ability of the telecommunications carrier requesting access to provide the services that it seeks to offer." The Court of Appeals vacated that finding as to two of the elements of UNE-P: unbundled switching and associated shared transport; as a result, there is no obligation to provide UNE-P (see pp. 8-9, 27, below).

- Even if a requirement to provide UNE-P still existed, the LWC service that SBC provides to Sage is not traditional UNE-P; rather, it is a service customized to Sage's needs. Elements of the LWC service have never been required to be provided under § 251 (b) or (c) (see p. 28, below).

- The services that have been redacted from the publicly filed version of the LWC Agreement also have never been required to be provided under § 251 (b) or (c) (see p. 33, below).

C. Other issues

- In light of SBC's pending petition to the FCC for clarification that commercial agreements need not be filed under § 252, it is premature for this Commission to rule that they must be filed under § 252 (see p. 17, below).

- Filing is not required under Missouri law Section 392.220.1, which gives the Commission the authority to require filings. The Commission has not exercised that authority in this or (to our knowledge) any other case involving contracts; rather it is reserved for tariff filings (see p. 30, below).

- Filing is not required under § 271. Section 271 does not require SBC to provide combinations of UNEs, does not require that SBC provide anything by contracts (as opposed to SGATs or tariffs), and does not include a filing or approval requirement. Likewise, the § 252 filing requirement applies only to services and facilities required under § 251, not § 271 (see p. 31, below).

III. If Filing of the LWC Agreement Is Required, the Redacted Portions Should Not Be Disclosed Outside of the Commission

- Sage will suffer commercial harm from disclosure of innovative trade-secret provisions *not required under § 251* that it negotiated in order to offer additional choices to consumers and to provide Sage a "first mover" advantage (see p. 34, below).

- The Commission's standard protective order is inadequate, since it would allow counsel for other CLECs -- the very individuals who negotiate agreements with SBC—to view the redacted portions of the LWC Agreement. There would be no way to prevent such counsel from using their knowledge of Sage's LWC Agreement trade secrets in their own negotiations (see pp. 34-35, below).

IV. CLEC Intervention Should Be Denied

- The Commission has denied intervention in similar cases (see p. 36, below).

- CLECs are not affected because they can enter into their own commercial agreements with SBC or adopt Sage's interconnection agreement as amended (see p. 36, below).

- The purpose of the intervention motions appears to be the CLECs' desire to view the innovative provisions of Sage's LWC Agreement, provisions not required by the 1996 Act in an agreement over which the Commission lacks jurisdiction (see p. 36, below).

- Intervention will complicate and increase the cost of the proceeding, undermining one of Sage's key reasons for entering into a private commercial agreement and in a manner inconsistent with the FCC's calling for commercial agreements to reduce litigation and uncertainty (see p. 37, below).

- Absent intervention, CLECs have had a more than adequate opportunity to present briefs and argument, thus achieving all of their legitimate goals (see p. 37, below).

BACKGROUND

Sage is a competitive local exchange carrier serving primarily residential customers in areas of Missouri and ten other states where SBC is the ILEC. Sage provides local exchange service, intraLATA toll service, and interLATA long distance services in areas throughout Missouri in which SBC is the ILEC, serving approximately 32,700 customers. Of Sage's Missouri customers, approximately 94% are residential and approximately 6% are very small business customers. Sage's Missouri customers are approximately 9% rural, approximately 52% suburban, and approximately 39% urban.

Until the present, Sage's business has relied solely on the Unbundled Network Element Platform ("UNE-P") model, enhanced with Sage's own back-office, customer care and billing systems, and with certain intelligence-based feature applications which Sage operates on its own platforms that are interconnected with SBC UNE-P services and SS7 signaling. UNE-P is a platform consisting of all of the major components of local telephone service including, but not limited to, local switching, a local loop, and a telephone number, that are provided in a combined form to a CLEC so that the CLEC can, even if it has no facilities at all, offer local exchange service to its customers. Without UNE-P or a suitable substitute, Sage cannot continue to operate.

In its March 2, 2004 *USTA II* decision, the Court of Appeals for the District of Columbia Circuit vacated the FCC rules requiring ILECs to provide unbundled switching and associated

shared transport and the FCC's national finding of impairment for switching and transport.[3] This ruling placed in jeopardy the UNE-P network platform on which Sage has exclusively relied to serve its customers. Absent a substitute agreement such as the LWC Agreement that Sage negotiated with SBC, Sage is at risk of being unable to serve its customers. Likewise, Sage's customers are at risk of losing the competitive alternative that Sage provides.

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

A. The Amendment Is Necessary to Fulfill the Transition of Sage From UNE-P

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. The Amendment is necessary to fulfill the transition of Sage from the use of UNE-P service, because the *USTA II* decision vacated the rules and impairment finding obligating SBC to provide unbundled mass market switching to CLECs such as Sage. Without this underlying service (or some substitute), Sage would not be able to continue to provide its more than 500,000 customers (the vast majority of whom are residential) with local exchange service.

1. The Amendment Includes All of the Provisions of the Sage Agreement That Are Required to Be Filed Under the 1996 Act

Both SBC and Sage recognize that the terms of an agreement that govern ongoing obligations under Section 251(b) and (c) must be filed with the Commission.[4] In conformance

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[3] *United States Telecom. Ass'n v. F.C.C.*, 359 F.3d 554, (D.C. Cir. 2004) ("*USTA II*").

[4] 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*").

with this obligation, the parties have filed the Amendment, which contains all of the Section 251 provisions agreed to by Sage and SBC. As discussed in Part II, *infra*, 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), the non-Section 251 arrangements embodied in the LWC Agreement.

2. The Provisions Related to the LWC Service Are Not Required To Be Filed

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. 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*.[5]

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*."[6] 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.[7] Contrary to the CLEC Coalition's suggestion in ¶ 21 of its Comments, Section 251(c)(3) of the Act is not self-executing and imposes no obligation upon ILECs to unbundle network elements in the absence

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[5] Comments of CLEC Coalition, at ¶ 10 (May 20, 2004).

[6] Comments of CLEC Coalition, at ¶ 15 (May 20, 2004).

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

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.[8] 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.[9]

The 1996 Act does not 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), 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 express terms, limits the agreements that must be made available for adoption to those that 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]

B. The Amendment Must Be Approved Unless Shown to (1) Discriminate Against Another Carrier, or (2) Be Inconsistent With The Public Interest

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[8] 47 U.S.C. § 251(d)(2).

[9] 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.

[10] 47 U.S.C. § 252(i).

[11] 47 U.S.C. § 252(h).

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
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> (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. Under governing federal law, the Amendment is deemed approved if not rejected by the Commission within ninety days of submission by the parties.[12] From these standards and processes, it follows that the burden of proof is on proponents of rejection of the Amendment. They have not met their burden.

1. 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 these dockets because it is not before the Commission and is not "interdependent and intertwined" with the Amendment as alleged by the Staff.[13] 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, unlike the relationship between the Amendment and the underlying interconnection agreement, the relationship between the Amendment and the LWC Agreement is substantially limited.

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[12] 47 U.S.C. § 252(e)(4).

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

The Staff and CLEC Coalition allege that the Amendment is discriminatory because Section 6.6 of the Amendment references the LWC Agreement and the LWC Agreement is not available for adoption.[14] Further, the CLEC Coalition argues that Section 6.6 provides that the parties to the Amendment are also parties to the LWC Agreement and because no other carrier can meet this requirement the Amendment is discriminatory.[15] The Staff and CLEC Coalition misconstrue the purpose and effect of Section 6.6 of the Amendment.

There is no nefarious scheme underlying the reference to the LWC Agreement in Section 6.6 of the Amendment. This reference is necessitated by Sage's concern that it would not be able to continue to serve its customers, if, for some reason, the LWC Agreement were to be voided. In other words, it is a form of "contingency plan." 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.

The cross reference to the LWC Agreement in Section 6.6 of the Amendment does not preclude adoption of the Amendment by other carriers who do not have an LWC Agreement. At the July 8, 2004 hearing, SBC, the only party that could object to adoption of the Amendment under Section 252(i), agreed that the reference in the Amendment to the LWC Agreement would not preclude or disqualify another carrier from adopting the Amendment as alleged by the CLEC Coalition.[16]

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[14] Transcript, July 8, 2002, at 45:3-11, 45:25-47:2, 55:6-12.

[15] Transcript, July 8, 2002, at 63:18-22.

[16] Transcript, July 8, 2004, at 72:18-73:12; Brief of SBC, at ¶ 7 (July 13, 2004).

Moreover, a reference to another agreement does not make the Amendment discriminatory, nor does it make it unavailable to another party. Another carrier can opt into the amendment and the underlying interconnection agreement under Section 252(i). If this Commission subsequently found that the LWC Agreement must be filed and approved by the Commission and then rejected the LWC Agreement, then the terms of the Amendment would apply equally to Sage and all carriers that had adopted the Amendment. At such stage, the Amendment would become inoperative as to Sage and any CLEC that had adopted it. Thus, Sage and the adopting carrier would be treated the same, if this Commission ultimately determined that the LWC Agreement must be filed and later rejected it.[17]

Further, the fact that Section 6.6 of the Amendment voids the Amendment in the event that the LWC Agreement becomes "inoperative" does not make the LWC Agreement part of the Amendment. 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.

On July 8, 2004, Staff counsel conceded in an exchange with Commissioner Clayton that the Staff's sole discrimination concern was based on the cross reference at Section 6.6 between

[17] Transcript, July 8, 2002, at 72:18-73:25.

the Amendment and the LWC Agreement.[18] As shown above, however, references to contingencies in other agreements that could cause a contract to become void do not make one agreement part of another, as alleged by Staff.

2. The Non Discrimination Provisions Relied Upon by the CLEC Coalition Are Inapplicable to Non-Section 251 Agreements

The non-discrimination provisions of Sections 251(c)(2)(D), 251(c)(3) and 252(i), on which the CLEC Coalition purports to rely in its Comments, 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.[19] 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 short, 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.[20] Other CLECs will

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[18] Transcript, July 8, 2002, at 45:24-46:21 (Haas Response: "If the amendment simply said there's going to be a $20 rate, which is one of the items in that amendment, and that's all it said, *then we probably would not be here today*. But it does include the reference to [the LWC Agreement].") (emphasis added).

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

[20] The FCC issued a new rule on July 13, 2004 that is intended to replace its "pick-and-choose" rule. The new rule provides in the relevant passage that an ILEC "shall make available without unreasonable delay to any requesting telecommunications carrier any agreement *in its entirety* to which the [ILEC] is a party *that* (Cont'd)

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 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).

3. It Is in the Public Interest for Sage to Be Able to Compete Despite *USTA II*

It is in the public interest for Sage to be able to continue to compete in the residential market in Missouri and serve its customers seamlessly, especially at a time when AT&T and other CLECs that have relied on UNE-P have determined to exit from the residential market in Missouri and other states. 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 unanimously urged the entire CLEC community to do. The FCC, as the agency principally responsible for

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is approved by a state commission *pursuant to section 252* of the Act . . . . Thus, as was the case under the prior rule, only those interconnection agreements that must be approved under Section 252 (*i.e.*, agreements containing Section 251(b) and (c) obligations) must be made available for adoption under the new rule. Moreover, requesting carriers must take all of the Section 251 provisions or none at all under the new rule. Furthermore, the FCC makes it clear that its new "all-or-nothing" rule makes available only terms from "an interconnection agreement," and not non-Section 251 terms. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164 at ¶ 1, Appendix B (rel. July 13, 2004) ("*Pick-and-Choose Order*").

administering the market opening measures of the 1996 Act, responded to the impending crisis by calling for CLECs and ILECs:

> to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. Ongoing litigation has unsettled the market. To address this uncertainty, we ask all carriers to begin a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements.[21]

As a result of years of litigation over ILECs' legal obligation to provide UNE-P service to CLECs at cost-based rates, Sage and SBC recognized that a consensual agreement free from the seemingly never-ending litigation process might be in their mutual interest. Sage and SBC had already been discussing such a commercial agreement, and entered into one within days of the FCC's call. 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 market.[22] 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.[23] It is clearly in the public interest for the

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[21] FCC News Release, March 31, 2004, attached hereto as Exhibit B. While Staff argues that the press release shows that the Communications Act applies, Sections 251 and 252 do not comprise the entire Communications Act. These agreements fall within the purview of Sections 201 and 202 *etc.*

[22] See p. 6, *supra*.

[23] *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 C. Sage understands that AT&T may be addressing the loss of (Cont'd)

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. Moreover, approval of the Amendment by the Commission is in the public interest because it will allow Sage to continue to offer Missouri consumers a competitive choice in their local phone services, will facilitate Sage's rollout of new data and Internet services to currently-deprived residential consumers in rural and suburban areas, and will enable Sage and SBC to enter into precisely the type of commercial agreement that the FCC Commissioners unanimously agreed were "in the best interests of America's telephone consumers"

As shown above, neither Staff nor the CLEC Coalition has demonstrated that the Amendment is "not consistent with the public interest, convenience, and necessity." To the contrary, Sage has demonstrated that the Amendment is in fact "consistent with the public interest, convenience, and necessity." Accordingly, the Commission should approve the Amendment. If for any reason, the Commission does not wish to affirmatively approve the Amendment, it has the option under § 252(e)(4) to allow it to go into effect on August 2, 2004 through inaction.

II. THE LWC AGREEMENT NEED NOT BE FILED

A. The Burden of Proof Is on the Proponents of Filing the LWC Agreement

Under governing federal law, the Amendment is deemed approved if not rejected by the Commission within ninety days of submission by the parties.[24] From these standards and

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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.

[24] 47 U.S.C. § 252(e)(4).

processes, it follows that the burden of proof is on those who seek rejection of the Amendment. They have not met their burden.

B. It is Premature for the Commission to Rule as to Whether the LWC Agreement Must Be Filed Under Section 252 While the Matter Is Before the FCC

On May 3, 2004, SBC filed an Emergency Petition with the FCC seeking, *inter alia*, a declaratory ruling that commercially negotiated agreements that do not implement the requirements of Section 251 are not required to be filed with state commissions for approval under Section 252.[25] Sage supported SBC's filing.

A requirement that Sage and SBC file the LWC Agreement for approval is premature until the FCC has had an opportunity to rule on the SBC Emergency Petition. The FCC is charged by the 1996 Act to be the preeminent agency to implement and enforce the requirements of the 1996 Act. No possible harm can come from waiting for the FCC's decision.

Conversely, SBC and Sage could face irreparable harm if the Commission requires the entire SBC/Sage LWC Agreement to be publicly filed. Indeed, there is no practical way to "unscramble" the effects of such a requirement "and return to the current status quo."[26] First, there is no practical way to eliminate the risk of disclosure of competitively sensitive information once that information is no longer in the sole control of the parties, *i.e.*, once it is submitted to a regulatory body. The potential harm presented by the risk of disclosure is substantial: there is

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[25] WC Docket No. 04-172.

[26] *See Ameritech Teaming Agreement Standstill Order*; *AT&T Corp., et. al., v. Ameritech Corp.*, 1998 WL 325242 (N.D. Ill., June 10, 1998) at ¶ 24.

perhaps no more confidential information than a company's prospective business plans and competitive commercial strategies.[27]

Additionally but importantly, there is no practical way to reverse the chilling effect on the ongoing commercial negotiations called for by the FCC and thus the harm to the public interest if the Commission requires the entire LWC Agreement to be filed. A requirement that non-section 251 arrangements must be submitted to state commissions would thwart commercial negotiations. The FCC declared that negotiated agreements are critical to preserving "competition in the telecommunications market."[28] And the FCC further decreed that commercial agreements are "in the best interests of consumers."[29] Clearly, the public interest is not served by action or inaction that has a deleterious effect on both consumers and competition.

If the FCC ultimately determines that non-Section 251 arrangements must be filed, the Commission will have sufficient opportunity to fulfill its duties consistent with the requirements of Section 252.

C. The Only Provisions of An Agreement That Are Required to Be Filed Are Those Governing Obligations Arising Under Sections 251(b) and (c) Of the Act

The only provisions of the Agreements between Sage and SBC that are required to be filed under the Act are those provisions that govern provision of services or facilities that are mandated under Sections 251(b) and (c) of the Act. The scope of the Section 252 filing requirement is addressed in Section 252(a)(1)--the provision that establishes that requirement. That provision contains limits on the types of agreements to which it applies. Specifically,

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[27] Affidavit of Robert W. McCausland, Exhibit A, at ¶ 4.

[28] FCC News Release March 31, 2004, Exhibit B.

[29] *Id.*

Section 252(a) states that, "upon receiving a request for interconnection, services or network elements pursuant to section 251," an ILEC "may negotiate and enter into a binding agreement with the requesting telecommunications carrier without regard to the standards set forth in subsections (b) and (c) of Section 251."[30] It then provides that any such agreement "shall be submitted to the State commission."[31] Accordingly, based on the language of Section 252(a) itself, the only agreement that must be filed with a state commission is one that is triggered by "a CLEC request for interconnection, services or network elements pursuant to Section 251."[32]

Therefore, to the extent that an agreement purports to address the rates, terms, and conditions under which the parties will fulfill their obligations to provide interconnection, services, or network elements under Section 251, those provisions must be filed. Conversely, to the extent a commercial arrangement relates to products or services not clearly covered by Section 251 and thus does not purport to implement Section 251, Section 252(a)(1) does not require that it be filed with a state commission.[33]

Importantly, as to facilities and services that must be offered under Section 251, filing and review continues to be necessary even if the parties decide, in a particular instance, to depart from the rates, terms, and conditions (for example, TELRIC pricing) typically found in Section 252 interconnection agreements. Section 252(a)(1) contemplates that, as to such facilities,

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[30] 47 U.S.C. § 252(a)(1).

[31] *Id.*

[32] *Id.* (Emphasis added).

[33] Although Section 252(a)(1) requires the filing of "agreements," not various terms of agreements, any analysis of the Section 252(a)(1) filing requirement ultimately must rest on the terms that must be filed. It cannot be the case that the scope of the filing requirement hinges not on the substance of the provision at issue, but on its packaging. If that were the rule, parties would simply segregate all non-Section 251 terms of their agreements and place them in separate agreements. To rule, therefore, that a term that would otherwise not have to be filed becomes subject to Section 252(a) if it is packaged in the same agreement with terms that do have to be filed would exalt form over substance.

services, or interconnection, the parties may negotiate "without regard to the *standards* set forth in subsections (b) and (c) of section 251," but that does not change the fact that these are services or network elements being offered "pursuant to section 251." Accordingly, *all* of the rates, terms, or conditions under which the parties agree to provide interconnection, services, or network elements pursuant to subsections (b) or (c)—including those rates, terms, or conditions that deviate from the required *standards* for meeting those obligations—must be filed. However, requiring the filing and review of terms that deviate from the "standards" set forth in subsections (b) and (c) is not the same thing as requiring the filing and review of terms for products and services that fall *outside* the scope of subsections (b) and (c) altogether. The former must be filed; the latter need not be.

This result is also consistent with the FCC's *Qwest ICA Order*.[34] In that Order, the FCC determined that ILECs have an obligation to file with state commissions all contracts that "create[] an ongoing obligation *pertaining to* resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, *unbundled* network elements, or collocation," *i.e.*, the requirements of Sections 251(b) and (c).[35] At the same time, noting that requiring filing of all agreements would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs," the FCC made clear that its Order does not require the filing of "all agreements between an incumbent LEC and a requesting carrier."[36] Moreover, the FCC specifically premised this conclusion on its holding that "only

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[34] 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*") (emphasis added).

[35] *Qwest ICA Order*, at ¶ 8 (emphasis added).

[36] *Id.* at ¶ 8 and n 26.

those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[37]

Thus, for example, the FCC determined that dispute resolution and escalation clauses "relating to the obligations set forth in sections 251(b) and (c)" must be filed, because "the means of" resolving and escalating such disputes effectuate the Act's requirement of providing the items required by Sections 251(b) and (c) on a non-discriminatory basis.[38] Similarly, in its subsequent *Notice of Apparent Liability for Forfeiture* (*"NAL"*) against Qwest, the FCC specifically mentioned Qwest's failure to file agreements concerning specific section 251(b) and (c) obligations, as well as administrative and procedural provisions pertaining to those obligations, as violating section 252's requirements as interpreted by the FCC in its *Qwest ICA Order*.[39] These decisions are fully consistent with the conclusion that Section 252 requires filing with a state commission of only those arrangements that are themselves required under sections 251(b) or (c). Because the parties have filed all aspects of their agreement that are subject to these provisions, the parties have fully met their filing obligations under the 1996 Act.

In their Summary Brief, AT&T and Birch Telecom argue that switching remains a network element, even though it is no longer required to be unbundled under Section 251(c)(3), and therefore, an agreement involving switching is required to be filed with the Commission under the FCC's *Qwest ICA Order*.[40] AT&T's and Birch Telecom's fallacious argument

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[37] *Id.*

[38] *Id.* ¶ 9.

[39] Qwest Corporation Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, 19 FCC Rcd 5169 at ¶ 26 n. 81, 83 (2004).

[40] *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.,* Case No. TO-2004-0576, Summary Brief of AT&T Communications of the Southwest, Inc. and Birch Telecom of Missouri, Inc., at ¶¶ 8, 12 (July 14, 2004).

misconstrues the FCC's *Qwest ICA Order*. The FCC's *Qwest ICA Order* does not require that agreements involving "network elements" be filed. Rather, it requires that agreements involving "*unbundled* network elements" be filed.[41] Switching may well continue to be a network element; however, as a result of *USTA II*, switching is no longer a network element that is required to be unbundled under Sections 251(c)(3) and 252(d)(1). Hence, switching (and therefore UNE-P) is no longer an "unbundled network element" and provisions relating to switching are not required to be filed with the Commission or approved under the FCC's *Qwest ICA Order*.

That Section 252(a) requires the filing only of those rates, terms, and conditions under which the parties address their Section 251(b) and (c) obligations is buttressed by Section 251(c)(1) of the Act. That section provides that ILECs must negotiate under Section 252 "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection."[42] To the extent that a particular element need not be unbundled under Section 251(d)(2), it falls outside the scope of the ILEC's duty to negotiate under Section 251(c)(1). It is reasonable to conclude that an agreement that results from such negotiations is likewise outside the scope of the Section 252 filing and review requirement. It would be illogical to interpret Section 252 as requiring the filing of arrangements that are not required to be offered in the first place.

There is no reason to subject terms for non-Section 251 matters to the same scrutiny as Section 251 matters. In fact, provisions relating to non-Section 251 matters, such as operator services and long distance services, are not subjected to such scrutiny.[43]

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41 *Qwest ICA Order*, at ¶ 8, n.26.

42 47 U.S.C. § 251(c)(1).

43 Transcript, July 8, 2004, at 71:1-9.

It would be contrary to public policy and the market-based goals of the 1996 Act to subject non-Section 251 arrangements to scrutiny under Section 252 because, among other reasons, such a requirement would impose unnecessary costs, delays, and exposure of confidential and innovative business arrangements that are outside of that required by the 1996 Act and that entail "first mover" benefits. If non-Section 251 arrangements of commercial agreements were subject to filing under Section 252 for state review, state commissions might insist that the parties change the terms of the agreements as a precondition to their approval. If carriers cannot be confident that the tradeoffs made in negotiations will be preserved, they are far less likely to enter into such negotiations in the first place. It is precisely because of this risk that one investment analyst warned that some states could end up "destroy[ing] deals that all parties involved believe are advantageous."[44] This risk is accentuated by the fact that private commercial agreements such as the LWC Agreement are region-wide agreements, not state-specific agreements. As such, they are based on a balancing of interests across several states. Rejection of an agreement or a specific term by just one state thus upsets the calculus upon which the entire agreement is based. This was one of the primary reasons that the previously mentioned investment analyst recently described as a "train wreck" the prospect of subjecting non-Section 251 arrangements to Section 252. Specifically, the analyst noted that "a Region-wide agreement such as the SBC-Sage deal could be disrupted if at least one state disapproves of the terms for its own state," and that "an agreement that might make economic sense at a price

[44] *Telecom Regulatory Note – Triennial Negotiations – Headed to a Train-Wreck?* Regulatory Source Associates, LLC, Anna-Maria Kovacs and Kristin L. Burns (Apr. 29, 2004) at 4., attached as Exhibit D.

averaged across thirteen states might make no sense if a major state ruled that the price has to be changed for its state."[45]

Moreover, if commercial agreements must be approved by all applicable state commissions, even if approval is ultimately forthcoming, contentious proceedings could well precede any such approval, thereby undermining two of the main benefits of a commercial deal: the elimination of regulatory uncertainty and delay and reduction in regulatory costs. Certainly after eight years of contentious litigation and three remands, many ILECs and CLECs have a compelling need for business certainty and to direct their resources to running their businesses, rather than fighting regulatory battles. To deny them the ability to address those needs through commercial negotiations is to withhold one of the most important benefits of--and therefore inducements to--a commercial deal. If the Commission truly wants commercial negotiations to succeed, it must allow parties to reap the fruits of a commercial negotiation.

Requiring the filing and approval of non-Section 251 agreements introduces the prospect of a Commission "second-guessing" or rejecting the parties' commercial deal which will have the effect of chilling such commercial negotiations. Also, public filing inhibits the negotiation of innovative business arrangements that are not required by the 1996 Act and that entail "first mover" benefits, because such arrangements would immediately be available to competitors, thereby undermining the principal advantage to the negotiator and inhibiting innovation that would benefit consumers.

The FCC's March 31 Press Release indicated that the FCC anticipated that "commercial agreements" such as the LWC Agreement would not be subject to §§ 251 and 252, because it

[45] *Id.* at 2; *see also id.* at 4 (discussing possibility "that a single state's demand for revision will disrupt the entire multi-state contract.").

asked CLECs and ILECs "to enter into agreements that would restore certainty" in the face of "ongoing litigation."[46] The only way this could be done would be to enter into an agreement that would *not* be subject to "ongoing litigation." That means that the agreement would not be affected by the results of the litigation over the FCC's *Triennial Review Order*, which means that it would not be affected by changes in the FCC's rules interpreting Sections 251 and 252. The only way for it not to be affected by changes in the Rules interpreting Sections 251 and 252 would be if the agreement were not *subject to* Sections 251 and 252.

D. The Portions of Sage's Agreements with SBC that Are Required to Be Filed Under Section 252 Have Been Filed in the Amendment

The CLEC Coalition and the Commission Staff both fail to recognize that the Amendment contains the only provisions of Sage's Agreements with SBC that are required to be approved by the Commission. Both SBC and Sage recognize that those terms of an agreement that pertain to ongoing obligations under section 251 of the Act must be filed. Accordingly, on May 4, 2004, Sage and SBC filed the Amendment with the Commission for approval and included all appropriate provisions of the agreement that address the rates, terms, and conditions under which the parties purport to meet their obligations under Section 251, including provisions relating to reciprocal compensation and unbundled access to POTS loops, and provisions requiring Sage to forego unbundled access to local switching, tandem switching, and shared transport pursuant to Section 251.[47] The Act does not, however, require that SBC or Sage file for Commission review or approval of *non-251 arrangements* in their agreement. Any such requirement would be an *expansion* of the scope of Section 252, an expansion that is not only

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[46] FCC News Release, March 31, 2004, Exhibit B.

[47] Amendment, at ¶¶ 2, 3.

without legal foundation, but contrary to the very concept and spirit of voluntary commercial negotiations.

Under Sage's Agreements with SBC, SBC will provide Sage with a range of wholesale products and services for a period of years. Those wholesale products and services that relate to the implementation of Section 251 obligations, such as provisions addressing Section 251(b)(5) reciprocal compensation and provisions setting forth the price, terms, and conditions of unbundled POTS loops, are included in the Amendment.

The products and services included in the LWC Agreement relate to items that are not required under Section 251. These other items, including but not limited to provisions establishing a replacement for the UNE-P, were not negotiated under the auspices of Section 251, nor, given the *USTA II* decision, striking down the requirement to provide unbundled elements critical to Sage's business plan, do they purport to implement any ongoing Section 251 obligation.[48] Rather, they were negotiated on a strictly *voluntary and commercial* basis – the very type of arrangement the FCC has expressly sought to encourage. The LWC Agreement is not, as the Staff maintains "so interdependent and intertwined" with the Amendment that the two documents "together constitute a single interconnection agreement subject to review under sections 251 and 252" of the 1996 Act.[49] Further, the LWC Agreement does not "on a

[48] 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. Accordingly, the FCC has not made any impairment finding for mass market UNE-P, which is a prerequisite under Section 251(d)(2) of the Act for requiring unbundling of a network element. Thus, SBC and other ILECs no longer have any Section 251 obligation to provide mass market UNE-P. *USTA II*, 359 F.3d 568-571.

[49] Staff's Recommendation to the Commission, at 1 and ¶ 10 (May 26, 2004).

standalone basis" constitute an interconnection agreement within the meaning of section 252(e) as alleged by the Staff.[50]

Like any private commercial arrangement negotiated between two parties, the LWC Agreement reflects a series of trade-offs. SBC made concessions, and so did Sage. Terms that, in and of themselves, may not have been acceptable to one of the parties were deemed acceptable because of some other term(s) of the LWC Agreement. Indeed, since the LWC Agreement is a *region-wide* agreement and not a state-specific agreement, tradeoffs were made, not only among different provisions, but also among different states. Thus, terms that SBC or Sage may not have accepted in one or another state when viewed in isolation were deemed acceptable when applied uniformly across the entire SBC region.

As discussed in Section I.A.2 above, the CLEC Coalition misconstrues *USTA II* by erroneously stating 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*."[51] Contrary to the CLEC Coalition's position, 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.[52] 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.[53]

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[50] Staff's Recommendation to the Commission, at 1 (May 26, 2004).

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

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

[53] 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.

E. Other Provisions of the LWC Agreement That Are Not Incorporated in the Amendment Are Not Required Under Section 251

At the hearing on July 8, 2004, Mr. Lumley and Mr. Haas suggested that the LWC Service provided under the LWC Agreement is the same as the formerly required UNE-P service.[54] They are mistaken. The LWC Service defined under the LWC Agreement includes features and services that are not part of a traditional UNE-P offering and has been customized to suit Sage's needs by incorporating provisions and features that were never required to be provided under Section 251. Moreover, UNE-P is no longer required by Section 251, Section 271 or any other provision of law. Thus, a commercially priced product offering (*i.e.*, non-TELRIC priced) providing many of the same functions as UNE-P is by definition not a Section 251 UNE product and not the equivalent of UNE-P. In fact, one of the key differences between a commercial service (such as special access services) and its nearest Section 251 UNE functional equivalent (for example, dedicated transport) is in fact the non-TELRIC price.[55]

Mr. Haas also argued that because the LWC Agreement to some extent addresses use of CNAM, LIDB, and 800 databases, SS-7 signaling, switching, shared transport, Operations Support Systems ("OSS") and operator services and directory assistance that it is a Section 251 interconnection agreement.[56] In the *Triennial Review Order* ("*TRO*"), however, the FCC determined that since "competitive carriers have alternative providers available and are not impaired without access to unbundled signaling, competitive carriers are also not impaired

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[54] Transcript, July 8, 2004, at 52:16-22.

[55] Similar to the LWC Service, special access services may include components that are not offered as part of UNEs such as diversity, enhanced reliability and other options.

[56] Transcript, July 8, 2004, at 51:20-25.

without access to call-related databases."[57] The FCC specifically held in the *TRO* that CLECs are not impaired without access to ILEC CNAM, LIDB, LNP and Toll Free Calling databases and access to operator services and directory assistance.[58]

Further, the only OSS that ILECs are required to offer pursuant to Section 251 are those systems and processes that are necessary for the CLEC to order, provision, maintain, and repair items that are required to be provided under Section 251. ILECs are not required to provide OSS in the abstract, divorced from any requirement to provide the underlying services or network element. As set forth above, SBC no longer has an obligation under Section 251 (or Section 271) to provide mass market UNE-P (*i.e.*, switching and associated shared transport); therefore, SBC no longer has an obligation to provide the OSS associated with mass market UNE-P functionality under Section 251. Thus, those network elements and services cited by Mr. Haas are no longer required to be unbundled and provided under Section 251. Accordingly, an agreement encompassing these items is not a Section 251 agreement that need be filed with and approved by the Commission.

Moreover, since there was no request by Sage for services and network elements "pursuant to Section 251," all of the provisions in the LWC Agreement constitute non-Section 251 services and commercial products that need not be filed with the Commission. Finally, if some provisions in the LWC Agreement were somehow construed to relate to Section 251(b) or (c) obligations, the fact that non-Section 251 provisions were in the same agreement as some

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[57] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, at ¶ 551 (rel. August 21, 2003) (the "*TRO*").

[58] *TRO*, at ¶¶ 554-555, 560.

Section 251 provisions would not somehow transform the nature of the non-Section 251 provisions so that they must be filed and approved in addition to the Section 251 provisions. To hold otherwise would elevate form over substance.[59] For example, if an agreement contained a provision governing SBC's sale of used trucks to a CLEC, the mere presence of terms relating to Section 251(b) and (c) obligations in the same agreement would not subject the provisions regarding the sale of used trucks to scrutiny under Section 252.[60]

F. Filing of the LWC Agreement Is Not Required Under Missouri Law

The CLEC Coalition argues that the LWC Agreement is required to be filed under Missouri law Section 392.220.1.[61] The CLEC Coalition's reliance on Section 392.220.1 is misplaced. Section 392.220.1 provides in the relevant part that:

> Every telecommunications company shall file with the commission *as and when required by it* a copy of any contract, agreement, or arrangement in writing with any other telecommunications company or with any other corporation, association, or person relating in any way to the construction, maintenance, or use of telecommunications facilities or service by or rates and charges over or upon any facilities.[62]

Section 392.220.1 only requires filing of tariffs and also certain contracts "when required by" the Commission (*i.e.*, a requirement that a contract be filed is within the discretion of the Commission). The Commission did not rely upon this discretionary authority in its "Order Directing Submission of Agreement" in the present case.[63] Significantly, although this section

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[59] *See*, n.31, *infra*.

[60] In order to clarify these points, Sage reiterates its offer to permit the Commissioners to review the redacted portions of the LWC Agreement subject to an appropriate protective order agreed to by Sage.

[61] CLEC Comments at ¶¶ 31-32.

[62] Mo. Rev. Stat. § 392.220.1 (2003).

[63] *In the Mater of the Agreement Between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, Order Directing Submission of Agreement.

has been in effect since long before the 1996 Act, the Commission has, to our knowledge, never used it to require the filing of agreements such as the LWC Agreement.[64] It would not be good policy to depart from this practice at this juncture. Moreover, the CLEC Coalition has failed to demonstrate that considerations of federal pre-emption, such as those raised in Part I.A, above, do not apply and require the Commission to desist from utilizing state law to accomplish a result that is inconsistent with federal law.

G. Filing Is Not Required Under Section 271 of the 1996 Act

The CLEC Coalition suggests in its Comments that Section 252(a)(1) requires the filing of agreements that implement obligations under Section 271.[65] There is, however, nothing either in Section 271 or in Section 252(a)(1) to support a filing requirement.

The CLEC Coalition correctly argues that as a Bell Operating Company ("BOC"), SBC is required to provide loops, transport, and switching to CLECs under Section 271, even if such elements are not required to be provided under Section 251. But under the FCC's *Triennial Review Order*, as upheld in *USTA II*, Section 271 does not require SBC to provide those elements in combined form.[66] Moreover, nothing in Section 271 requires that these elements be made available in the form of contracts (as opposed to, for example, tariffs or SGATs), nor is there any requirement that if these elements are made available by contracts, the contracts need be approved by the applicable state commission(s). Indeed, the Commission has no role under

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[64] Rather, this provision has most often been utilize to scrutinize tariff filings. *See, e.g., Southwestern Bell Telephone, L.P. dba SBC Missouri*, Case No. TT-2004-0245, Order Rejecting Tariff (Feb. 6, 2004) ("The Commission also finds that the tariff should be rejected because the footnotes do not comply with Section 392.220, RSMo, requiring 30-days notice to the Commission."); *In the Matter of Tariff Nos. 2 and 3 of KMC Telecom V, Inc.*, Case No. CT-2004-0462 (Effective March 18, 2004) (Section 392.220 "refers to tariffs proposing new services, and allows the Commission to suspend such a tariff for a period not to exceed 60 days.").

[65] CLEC Comments, at ¶¶ 15-16.

[66] *USTA II*, 359 F.3d at 589.

Section 271 except to act as a consultant to the FCC as to whether a BOC's application for interLATA long distance authority has met the requirements of the Act.[67] The Commission completed this action several years ago.[68]

H. The Commission Should Rule That the LWC Agreement Is Not Required to Be Filed

For all the reasons provided above, the Commission should rule that the LWC Agreement need not be submitted for approval under Section 252. Alternatively, the Commission could simply take no action regarding the LWC Agreement at this time and await further developments. As discussed in Part II.B above, while the Commission awaits developments, the FCC may issue a declaratory ruling in response to SBC's Emergency Petition ruling that commercially negotiated agreements that do not implement the requirements of Section 251 are not required to be filed with the state commissions for approval under Section 252. If, during this waiting period the Commission learns that the LWC Agreement is causing harm to consumers or other market participants, then it could take action to ameliorate the harm. Such harm is unlikely, however, as the parties have been operating under the LWC Agreement in five other states and no such problems have arisen.

I. If the Commission Requires that the LWC Agreement Be Filed, the Confidentiality of the Redacted Portions Should be Preserved

As discussed in Part II.C., *supra*, Sage urges the Commission not to require that the LWC Agreement be filed with the Commission. If, however, the Commission nonetheless determines that filing of the entire LWC Agreement is necessary, Sage exhorts the Commission to preserve

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[67] 47 U.S.C. § 271(d)(2)(B).

[68] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, IntraLATA Services in Arkansas and Missouri,* Memorandum Opinion and Order, 16 FCC Rcd. 20719 (rel. Nov. 16, 2001).

the confidential nature of the redacted portions.[69] Such protection is absolutely necessary because the redacted portions of the LWC Agreement (1) relate to matters that are not within the purview of Section 251 and (2) contain highly sensitive business information and trade secrets about Sage's innovative plans and competitive strategies.

1. The Redacted Portions of the LWC Agreement Relate to Matters That Are Not Within the Purview of Sections 251/252

The redacted portions of the LWC Agreement involve issues that were not negotiated under the auspices of Section 251 and do not involve any Section 251 obligations. Instead, the redacted portions of the LWC Agreement were negotiated on a purely voluntary and commercial basis, and reflect contractual business arrangements between the parties that have nothing do with Section 251.[70] Sage's position that the redacted portions of the LWC Agreement do not have to be filed with the Commission is consistent with the FCC's findings in the *Qwest ICA Order* and subsequent *NAL* against Qwest. As discussed fully in Part II.C, *supra*, contrary to the unfounded arguments of the CLEC Coalition, Section 252 requires filing with a state commission only those arrangements that are themselves required under Sections 251(b) and (c). The parties have fully met their filing obligation under the 1996 Act because, by filing the Amendment, they have already publicly submitted to the Commission all aspects of the LWC Agreement that are subject to those provisions.

2. The Disclosure of the Redacted Portions of the LWC Agreement Will Harm Sage Because These Portions Contain Highly Sensitive and Confidential Material Regarding Sage's Trade Secrets and Innovative Competitive Business Strategies

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[69] The redacted portions of the LWC Agreement are described in general terms in the Affidavit of Robert W. McCausland, Exhibit A, at ¶¶ 8-13.

[70] It would be premature to consider the compliance or non-compliance of the LWC Agreement with Section 252(e) at this stage of the proceeding. Accordingly, we are not briefing this issue.

If the Commission were to require filing of the entire LWC Agreement and not preserve the confidentiality of the redacted portions, SBC and Sage would face irreparable harm.[71] As is demonstrated in the Affidavit of Mr. McCausland of Sage that is provided as Exhibit A hereto, the parties have compelling reasons to protect the confidentiality of the redacted portions of the LWC Agreement. Sage cannot, in this public filing, discuss the details of the redacted parts of the LWC Agreement, but respectfully requests that the Commission and Staff consider them as described in Exhibit A. The redacted sections of the LWC Agreement, which are not extensive, contain confidential information about the business plans of the parties--in particular, information about Sage's future competitive business strategies and plans.[72] No business would deem disclosure of such information to its competitors acceptable, and Sage is no exception. In fact, many of the provisions of the LWC Agreement negotiated by Sage are innovative and their value lies principally in Sage being the "first mover" regarding these innovations that involve arrangements not required by the 1996 Act. Thus, Sage would lose its first mover advantage and be harmed by any disclosure of these redacted provisions. Sage would suffer such irreparable harm even under the Commission's standard protective order, because CLEC counsel that negotiate agreements with ILECs and advise their clients regarding business matters would have access to the highly confidential information and competitive business strategies contained within the LWC Agreement under the Commission's standard protective order.

Thus if, despite all of the evidence counseling in favor of the opposite result, the Commission finds that the entire LWC Agreement must be filed, a comprehensive protective order must be crafted to govern the terms and conditions of disclosure to third parties. In

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[71] Affidavit of Robert W. McCausland, Exhibit A, at ¶¶ 4, 8-13.

[72] Affidavit of Robert W. McCausland, Exhibit A, at ¶¶ 4, 8-13.

particular, even inside and outside counsel to other CLECs should not be provided access to the redacted portions of the LWC Agreement. Such counsel are the very individuals who advise and represent their clients with respect to interconnection matters with SBC. They and their clients should not be able to take advantage of Sage's trade secret information in their own negotiations with SBC. At most, other CLEC counsel should be permitted to view the redacted portions of the LWC Agreement subject to a protective order only if the terms of the protective order have been agreed to by SBC and Sage.[73]

Counsel for MCI and Nuvox contends that Sage and SBC have no "legitimate expectation of privacy" regarding the redacted portions of the LWC Agreement in light of the filing requirements of Section 252 of the 1996 Act.[74] However, even if Section 252 could somehow be construed to require filing of such provisions, Missouri law requiring the confidential treatment of trade secrets and confidential business information still requires protection of such confidential competitive business information and trade secrets. For example, Section 386.480 of the Missouri Revised Statutes provides as a general rule that "[n]o information furnished to the Commission," except such matters as required to be disclosed by other provisions of Commission statutes, shall be made available absent a Commission order.[75] Violation of this provision by the Commission Staff is a misdemeanor.

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[73] Should the Commission determine that disclosure is required and that a protective order will be entered, Sage requests that it be given an opportunity to comment on the language and parameters of the protective order and specifically reserves all rights to do so.

[74] Transcript, July 8, 2004, at 57:18-23.

[75] Mo. Rev. Stat. § 386.480; *see, e.g., Staff of Missouri Public Service Commission v. Communication Management Systems*, Case No. TC-2004-0344, Order Granting Default, 2004 WL 1257568 (May 25, 2004 Mo. PSC) ("Staff is concerned that unless the Commission orders that the assessment amount may be made public, such disclosure might be improper under Section 386.480.").

III. THE CLEC REQUESTS TO INTERVENE SHOULD BE DENIED

Multiple reasons exist for the Commission to deny the proposed intervention of the third parties who unjustifiably seek to involve themselves in the Commission's evaluation of the private commercial agreement between Sage and SBC. At the outset, Sage notes that the burden of demonstrating the propriety of their request to intervene falls on the proposed intervenors, who have failed to articulate any persuasive basis in support of their request. In fact, the Commission made no provision for the participation of intervenors in its May 11, 2004 *Order to Show Cause*. It merely directed Sage and SBC to explain the nature of their commercial agreement and to describe why it is not necessary for the entire agreement to be filed with the Commission.

The Commission should also deny the requested intervention because it has not traditionally permitted third parties to intervene in arbitration cases involving only two parties as a matter of policy. As explained below, adherence to this policy is particularly crucial in this case, given the highly proprietary and confidential nature of the Sage information that is obviously being sought by the company's competitors.

Furthermore, the parties' agreement is a private, contractual arrangement between Sage and SBC alone. The terms of the agreement apply only to those entities, and the agreement impose no duties or obligations upon any other carrier. If the proposed intervenors wish to obtain their own individual commercial agreements with SBC, they are free to do so. Sage is not required to negotiate an agreement that is suitable for use by the entire CLEC community, and is entitled to craft a business arrangement that meets its own needs.

In fact, proposed intervenors' objective appears to be to gain access to the highly sensitive and confidential Sage information that they would not otherwise be able to obtain. Sage is justifiably concerned that its competitors' desire to intervene in this proceeding may be

motivated by a interest in this information, as the innovative business plans and strategies embodied in the agreement are not required by the 1996 Act and are highly proprietary.

Sage also opposes the proposed intervention for cost reasons. One of its primary motives for entering into the agreement was to be freed from the perpetual and costly stream of litigation necessitated by its negotiations with ILECs such as SBC since passage of the 1996 Act. The unnecessary involvement of multiple third parties at this juncture would complicate and hinder the Commission's review of the agreement, and Sage vigorously objects to the increased costs and expenditure of resources that will be required if additional parties are allowed to participate.

Finally, no formal intervention is called for by the proposed intervenors because they have already had ample opportunity to make their views known to the Commission, and no further input from them is necessary. This is evidenced by the fact that the proposed intervenors have filed briefs that set forth their positions, and the Commission allowed the proposed intervenors to address it at the oral argument. Because the views of these entities have already been brought before the Commission, no additional participation is necessary.

CONCLUSION

For the foregoing reasons, Sage urges the Commission to rule that the LWC Agreement need not be submitted for approval under Section 252, and to act promptly to approve the Sage/SBC interconnection agreement amendment that was submitted to the Commission on May 4, 2004. In the alternative, if the Commission should require that the LWC Agreement be approved, Sage respectfully requests that the Commission require that the redacted portions be made available only to the Commission and its Staff. Other participants, if any, in any proceeding concerning the LWC Agreement, should be accorded access only as agreed to by Sage and SBC.

Respectfully submitted,

/s/ Charles Brent Stewart

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Dated: July 14, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via electronic transmission to counsel for all parties of record, and counsel for intervenor applicants, in Case Nos. TO-2004-0576 and TO-2004-0584 this 14th day of July, 2004.

/s/ Charles Brent Stewart