

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

In the Matter of the Agreement between	)	
SBC Communications, Inc. and Sage	)	Case No. TO-2004-0576
Telecom, Inc.	)	

**RESPONSE OF SBC MISSOURI TO  
ORDER TO SHOW CAUSE**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Response to the Order to Show Cause issued by the Missouri Public Service Commission ("Commission") on May 11, 2004 ("Show Cause Order") states as follows:

**Executive Summary**

1. The Federal Communications Commission ("FCC") issued its Triennial Review Order on August 21, 2003.<sup>1</sup> In United States Telecom. Ass'n v. FCC, 359 F. 3d 554 (D.C. Cir. 2004) ("USTA II"), the United States Court of Appeals for the District of Columbia issued its Order invalidating certain portion of the FCC's Triennial Review Order, including the provisions addressing the unbundling of mass market switching. In response to that Order, the FCC issued a letter to SBC Communications (and similar letters to other telecommunications carriers) urging that voluntary commercial agreements be reached in light of the USTA II decision.<sup>2</sup>

2. Subsequent to the USTA II decision, SBC-affiliated incumbent local exchange companies ("SBC ILECs") engaged in commercial negotiations with various competitive local exchange carriers ("CLECs"). The SBC ILECs reached a private commercial agreement with

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<sup>1</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Further Notice of Proposed Rulemaking (released August 21, 2003) ("Triennial Review Order").

<sup>2</sup> Letter from Chairman Michael K. Powell, et al., FCC to Edward Whitacre, SBC Communications, March 31, 2004 ("March 31 Letter").

Sage Telecom, Inc. (“Sage Telecom”) which is applicable in each of the states served by the SBC ILECs.

3. The Agreement between SBC Missouri and Sage Telecom, Inc. is a commercial agreement which is separate from the Sections 251-252 process set forth in the Telecommunications Act of 1996 (“the Act”). This Commission should not require the SBC Missouri-Sage Telecom Agreement to be filed with the Commission for consideration under the provisions of Sections 251-252 of the Act. Instead, any action by this Commission should await the outcome of an Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations filed by SBC Communications with the FCC on May 3, 2004 (“SBC Emergency Petition”). Awaiting such action by the FCC is consistent with the FCC’s directive to ILECs and CLECs to negotiate commercial agreements, a goal which is not likely be reached if such agreements are required to be submitted for approval under Sections 251-252 of the Act.

4. To the extent that SBC Missouri and Sage Telecom have entered into an arrangement concerning issues which remain within the parameters of Sections 251-252 of the Act, those provisions have already been submitted to the Commission for review and approval. On May 4, 2004, SBC Missouri filed an Amendment Superseding Certain 251/252 Matters To Interconnection Agreements under Sections 251 and 252 of the Telecommunications Act of 1996 (“May 4 Amendment”) (Attachment 1). The commercial arrangement, on the other hand, deals with non-Section 251 matters.

### **Background Information**

5. The USTA II Court issued its decision invalidating substantial portions of the Triennial Review Order rules on March 2, 2004. The USTA II decision vacated certain aspects

of the FCC's Triennial Review Order rules which deemed mass market switching and other services as mandatory unbundled network elements under Section 251 of the Act. The USTA II decision vacates, effective June 15, 2004, portions of the FCC's Triennial Review Order rules, including rules which have the effect of requiring the continued provision of the Unbundled Network Element Platform ("UNE-P") through which CLECs could acquire all of the network elements necessary to provide service to residential and business customers.

6. Subsequent to the USTA II decision, the SBC ILECs began to engage in discussions with various CLECs to determine if the parties could reach commercial agreements outside of the parameters of Sections 251-252 of the Act. Those negotiations continued after the FCC issued its March 31 Letter strongly encouraging ILECs to negotiate commercial agreements with CLECs in light of the USTA II decision.

7. On April 3, 2004, Sage Telecom and SBC announced that they had reached a commercial agreement consistent with the FCC's March 31 Letter. In a joint statement, Sage and SBC stated, among other matters:

The seven-year pact will replace the regulatory mandated UNE-P with a private commercial agreement. Given the proprietary nature of the agreement, most terms were not released, but the average monthly price over the life of the contract is expected to be below \$25 per line.

The commercial agreement between SBC and Sage is expected to take effect on July 1, 2004, after the vacatur of the FCC's rules.

8. Under the SBC/Sage Agreement, SBC-affiliated ILECs will provide Sage Telecom with a range of wholesale products and services for a period of seven years. Certain of those products and services relate to the implementation of Section 251 obligations, including provisions addressing Section 251(b)(5) reciprocal compensation and provisions setting forth the price, terms and conditions of the provision of unbundled loops which the FCC has mandated

pursuant to Section 251(c)(3). The agreement on matters pertaining to continued Sections 251-252 matters is within the purview of this Commission and was filed with the Commission for approval on May 4, 2004. (See, Attachment 1). The other arrangements between the parties, however, including provisions establishing a replacement for the UNE-P, were not negotiated under the auspices of Section 251, nor did they purport to implement any ongoing Section 251 obligation (the “Local Wholesale Complete Agreement”). Rather, they were negotiated on a strictly voluntary and commercial basis. As with any private commercial arrangement, the SBC/Sage Local Wholesale Complete Agreement reflects a series of tradeoffs. Both SBC and Sage made concessions. Terms that, by themselves, may not have been acceptable to one of the parties were deemed acceptable because of other terms in the agreement. Since the agreement covered all of the SBC ILEC states and was not a state-specific agreement, tradeoffs were made not only among different provisions, but among different states as well. Accordingly, terms that either SBC or Sage may not have accepted in some states were deemed acceptable when applied uniformly across the SBC ILEC states.

9. Further, as is often the case with private commercial agreements that are specifically tailored to address the needs of the negotiating parties, the SBC/Sage Local Wholesale Complete Agreement contains confidential information about the business plans and strategies of the parties -- in particular, information about Sage’s future business plans and strategies. In order to ensure confidentiality, the agreement specifically requires both parties to use their best efforts to maintain the confidentiality of the terms of the agreement. Sage’s President and CEO has publicly stated that the SBC/Sage Agreement “contains provisions specific to Sage’s business strategies and technology requirements,”<sup>3</sup> and that the agreement must therefore be protected from public disclosure for competitive reasons. Indeed, this matter

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<sup>3</sup> TR Daily, April 15, 2004.

“is of such significance that Sage may elect to exercise its right to terminate the new agreement if forced to publicly disclose its confidential business strategies.”<sup>4</sup>

10. In response to actions by various state regulators, particularly the Michigan Public Service Commission, SBC filed its Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations (“SBC Emergency Petition”) with the FCC on May 3, 2004. As set forth in that Petition, state commission efforts to assert jurisdiction over non-Section 251 arrangements threaten to derail the private commercial negotiation process which the FCC has strongly and unanimously urged. Accordingly, the Emergency Petition asks the FCC to:

- First, issue an immediate declaratory ruling that an agreement or portion thereof that does not purport to implement any of the requirements of Section 251 is not subject to the requirements of Section 252, including the filing requirements of Section 252(e)(1) and the provisions of Section 252(i);
- Second, preempt the states from requiring the filing and approval of non-251 agreements under the auspices of state law; and
- Third, issue a standstill order enjoining the enforcement of any other state filing requirement for non-251 arrangements pending a final decision on the Emergency Petition.

11. Sage filed a Memorandum In Support of Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations (“Sage Memorandum”) with the FCC on May 4, 2004 (attached as Attachment 2). In its Memorandum, Sage urges the FCC to grant the Petition filed by SBC stating that “[t]hese actions are urgently required in order to prevent the possibility of irreparable harm to Sage.” (Attachment 2, p. 1).

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<sup>4</sup> Id.

### **The Agreement Is Not Subject To Filing Or Approval**

12. Under Section 252(a)(1), an agreement between an ILEC and a CLEC must be submitted to a state commission for approval only to the extent it pertains to “a request for interconnection, services, or network elements pursuant to Section 251.” Accordingly, an agreement that must be filed with a state commission for approval under Section 251 is one that is triggered by a CLEC request for interconnection, services, or network elements pursuant to Section 251. Congress thus tied the scope of Section 251’s filing requirements to a request for services or facilities that must be provided under Section 251. That statutory limitation must be given effect. The SBC-Sage Local Wholesale Complete Agreement does not involve interconnection, services or network elements pursuant to Section 251. These arrangements establish a business-to-business relationship on certain matters outside of 47 U.S.C. Section 251 and 252. The Local Wholesale Complete arrangements, which includes provision of UNE-P functionality, as well as other matters, do not relate to Section 251 obligations because, once USTA II is effective, unbundled local switching and UNE-P are not required by that Section. On the other hand, those provisions pertaining to Section 251 obligations must be filed with the Commission under Section 252, and SBC Missouri has done so. (Attachment 1).

13. Not only is the Local Wholesale Complete arrangement outside of the obligations imposed by Sections 251-252 of the Act, but public policy also supports the determination that it need not be filed for approval. First, the commercially negotiated agreement is tailored to the business needs of the parties and contains sensitive information that reveals future business plans and strategies of Sage. Disclosure of information concerning service features which Sage plans to provide in the future would result in harm to Sage if its competitors are advised of those provisions. A required filing of the Local Wholesale Complete arrangements under Sections

251-252 of the Act would cause harm to Sage and would unquestionably chill the negotiation process for other commercial agreements which the FCC has sought to encourage. Second, the possibility that a State commission may insist that a commercial arrangement be changed as a precondition to approval under Section 252 would adversely impact the parties since they could not be confident that the tradeoffs made in the negotiation process would ultimately be preserved. Further, even if the commercial arrangement was ultimately approved without any change, contentious proceedings may well precede such approval, thereby creating regulatory uncertainty and regulatory costs. Third, the filing of the commercial agreement could lead parties to later argue that the non-Section 252(b) and (c) obligations are nevertheless subject to a “pick and choose” arrangement under Section 252(i), a possibility that itself chills incentives to negotiate.


14. In summary, the agreement between the SBC Missouri and Sage Telecom is subject to filing and approval by the Commission only to the extent it involves obligations covered by Sections 251(b) or (c) of the Act. SBC Missouri and Sage Telecom have complied with this obligation by filing the amendment pertaining to Sections 251(b) or (c) with the Commission for approval. Those matters outside of the Sections 251(b) and (c) obligations, however, are not required to be filed with the Commission for approval, nor would such a requirement be sound public policy even if it were permissible from a legal perspective. Accordingly, SBC Missouri respectfully requests the Commission not to require the filing of the Local Wholesale Complete arrangements agreed to by SBC Missouri and Sage.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission not to require the submission of the non-Section 251 portions of the SBC-Sage

Agreement, and for such other and further relief as the Commission may deem just and appropriate.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.  
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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail or first-class, postage prepaid U.S. Mail on May 17, 2004.



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