BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements. Consideration Upon Remand from the United States District Court.	))))	Case No. TO-2005-0037

CLECS' REPLY TO SBC AND STAFF REGARDING PROCEDURAL SCHEDULE

COME NOW NuVox Communications of Missouri, Inc., XO Missouri, Inc., Allegiance Telecom of Missouri, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, LLC, AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City (herein collectively referred to as "CLECs"), pursuant to 4 CSR 240-2.080(15) and for their Reply to SBC's Proposed Procedural Schedule and Supporting Suggestions and Staff's Motion to Establish Procedural Schedule, state to the Commission:

Reply to SBC

1. The federal court issued a general remand for "reconsideration of the appropriate capital structure and resulting rates." Reconsideration is not a word of limitation. As used by the court, it is synonymous with rehearing. When a court remands a Commission matter for further action, under Section 386.510 RSMo. that includes further hearings. See, e.g., State ex rel Anderson Motor Service Co. v. PSC, 134 SW2d 1069, 1079 (Mo App 1939), 154 SW2d 777 (Mo. 1941). "Reconsider" means "to consider again", which allows for the same due process on reconsideration as on first consideration.

2. Contrary to SBC's self-serving contentions, it is the absence of specific directions in the federal court's mandate that makes it a general remand instead of specific one. The court did not in any way prohibit the Commission from holding further hearings. The court did not in

any way prohibit the Commission from gathering further evidence. To the contrary, the Court left it to the Commission to determine how to proceed to an "appropriate" decision. When a court mandate does not "import a direction of specified things", it is a general one that simply calls for further proceedings in accordance with the opinion. See, e.g., Associated Industries v. Director of Revenue, 918 SW2d 780, 782 (Mo. 1996). See also Lombardo v. Lombardo, 120 SW3d 232, 243 (Mo. App. 2003). When presented with a general mandate, the lower court (or here the Commission) retains discretion as to the procedures to follow, the mechanics to employ. See, e.g., Student Loan Marketing Assn v. Raja, 914 SW2d 825, 829 (Mo. App. 1996).

3. The only restriction placed on the Commission by the federal court is the ruling that it violated 47 CFR 51.505(d)(1) in determining the target capital structure. As stated in the cases cited above, further proceedings herein must comply with that determination.

4. Otherwise, the court broadly authorized the Commission to "reconsider the appropriate capital structure and the resulting rates." As indicated in CLECs' suggestions in support of their proposed procedural schedule, the court clearly and properly recognized that the Commission's new decision would be prospective in effect (and could be moot). Accordingly, the court did not in any way restrict the Commission from obtaining new evidence through further hearings in order to "reconsider the appropriate … resulting rates."

5. As explained in CLECs' prior suggestions, the Commission cannot issue a lawful and reasonable decision on new "appropriate rates" that comply with TELRIC standards without hearing new evidence. Nor can the Commission lawfully and reasonably calculate a new weighted average cost of capital by combining old figures for cost of equity and cost of debt with new figures only for target capital structure. Instead, the circumstances require new evidence before a new and prospective decision can be made regarding the appropriate capital structure

and resulting rates. As stated in Lightfoot v. City of Springfield, 236 SW2d 348, 353 (Mo. 1951), "The Commission fixes rates prospectively and not retroactively. Our courts do not fix rates. Our courts may only review, and affirm or set aside or reverse and remand the Commission's rate-fixing orders. Our courts cannot make the Commission do retroactively and our courts cannot retroactively do that which the Commission, or other rate-making body, only does prospectively."

6. The Commission cannot simply go back and review the old record consisting of 1999 data - with or without the assistance of a round of briefs - and determine a new 2004 prospective and forwarding-looking WACC that complies with FCC rules. And that was the mandate of the court: make a new decision that complies with FCC rules.

7. SBC conveniently fails to advise the Commission that not only must it act within any restrictions placed on it by the mandate of the court, it also must do all that the mandate requires. "Any proceedings in the trial court contrary to the mandate are null and void. **Conversely**, a trial court also risks error in doing less than the mandate requires." Edmison v. Clarke, 61 SW3d 302, 310 (Mo. App. 2001)(emphasis added, citations omitted). "By failing to address all of the issues returned to the trial court upon remand, there is a substantial danger that the resulting judgment will lack finality." Id. See also Lombardo, supra. Accordingly, the Commission must fully and lawfully reconsider the "appropriate … resulting rates" to comply with the court mandate.

8. SBC also misses the mark with its "law of the case" argument. This matter does not concern a retroactive adjudication regarding a closed set of facts in dispute. This is a prospective ratemaking action. While the Commission is certainly bound herein (and herein alone) by the court's decision regarding capital structure under the doctrine of the law of the case,

the Commission otherwise retains full jurisdiction to examine current evidence and set a new set of prospective "appropriate resulting rates" for the model M2A.[1] The Commission is a policy-making administrative agency and is not bound by *stare decisis*. See, e.g. Mitchell v. City of Springfield, 410 SW2d 585 (Mo. App. 1966); City of Columbia v. Missouri State Board of Mediation, 605 SW2d 192, 195 (Mo. App. 1980). The Commission should not, and indeed cannot, be limited by prior decisions as it addresses new circumstances. See, e.g. In re Capital City Water Co., 850 SW2d 903 (Mo. App. 1993). As demonstrated in CLECs' prior Suggestions, the Commission's 2003 rate decision was not stayed or made subject to refund, nor is there any contractual arrangement for any retroactive change in rates at this time. CLECs did not agree to accept the risks and uncertainty of a retroactive true-up of indeterminable length, like the one that SBC now seeks to unilaterally impose on them. Indeed, the Commission expressly limited the applicability of the true-up to protect CLECs from uncertainty.[2]

9. In effect, SBC seeks a retroactive stay of the Commission's order approving the rates. SBC seeks to recalculate rates from the unknown date of a future Commission order herein all the way back to six months prior to the approval of rates in TO-2001-438 in June 2003. This is not a remedy that is available under the law to SBC.

[1] As explained in CLECs' prior Suggestions, rates in the model M2A can only be changed prospectively, in that they can only operate upon a new adoption of the model or upon incorporation of the change into an actual agreement under change in law provisions.

[2] The Commission's Order Regarding Recommendation on 271 Application in Case No. TO-99-227 confirms that there was to be only one retroactive true-up to protect CLECs from uncertainty. "The interim rates contained in the M2A are subject to a limited true-up. The Commission has four cases pending to determine permanent prices, terms and conditions for the interim prices subject to true-up in the M2A. **Because of the concern of the lack of certainty for the CLECs to establish a business plan, the Commission finds that a limited true-up period is reasonable.** Therefore, the Commission determines that a true-up period that is six months retrospectively from the date of the Commission's order establishing a permanent rate is appropriate. The true-up period that has been included in the M2A is consistent with these Commission findings." 10 Mo PSC 3d 150, 170 (2001)(emphasis added).

10. Hence, only a new and prospective rate decision is in order. See also Lightfoot, supra. And to comply with TELRIC and FCC rules, a new forward-looking capital structure must be combined with new forward-looking figures for cost of equity and cost of debt to re-determine WACC and to reconsider the appropriate resulting rates. CLECs are not arguing that prior decisions were right or wrong, only that current inputs are required. Identifying and applying current inputs consistent with prior determinations is not in any event a violation of "the law of the case" notwithstanding SBC's contrary assertions.

Reply to Staff

11. Staff in large part proposes the same schedule as CLECs. Staff contends that the court precluded the Commission from looking at cost of equity and cost of debt, yet cannot point to any such restriction. Staff appears to rely upon the fact that the M2A has a fixed term, but overlooks the other provisions of the model contract (and the specific party contracts based thereon) that preclude any retroactive change in rates in this proceeding. Staff offers no explanation as to how it could be appropriate to use 1999 information to set new rates in 2004.[3] Nor does it attempt to reconcile the use of a new capital structure with old cost of equity and debt figures. Yet these figures must also be updated to derive "appropriate resulting rates" given the indisputable fact the WACC calculation follows a single integrated formula.

12. Staff does agree that further hearings are in order and proposes a similar schedule. Staff does not allow time for pre-hearing depositions, which CLECs still suggest as a means of making the hearings more efficient given the very detailed nature of the testimony of cost of capital experts.

Additional Suggested Schedule Component in Reply to Staff

13. CLECs also suggest that the Commission would be well-served to call the parties back together for a settlement conference. As Staff notes, the M2A-based agreements have a fixed term. The model M2A and the specific CLEC interconnection agreements are currently set to expire on March 6, 2005 subject to provisions for extension in conjunction with renegotiation. Hence, the Commission's prospective decision herein will only be in effect for a relatively short period of time and could become moot. It would seem to be in the interests of all involved to make a strong effort to resolve this matter by settlement.

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

Respectfully submitted,

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[3] This is not an academic point. Cost of equity and cost of debt has plummeted since 1999. In current proceedings around the country figures around 9% for cost of equity and 2 to 4% for cost of debt are being considered.

Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 10th day of September, 2004 by placing same in the U.S. Mail, postage paid.

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