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' RESPONSE TO SBC AND STAFF REPLIES 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 Response to SBC's and Staff's Replies regarding the pending Procedural Schedule proposals, state to the Commission:

1. SBC and Staff have injected new issues in their Replies that require further response from CLECs so that the Commission is fully informed when it makes its procedural rulings herein. CLECs do not mean to restate their prior pleadings, which they incorporate herein by reference.

Reply to SBC

2. Contrary to SBC's new argument, Section 536.140.4 does not apply to these proceedings. Court review of Commission decisions is governed solely by Section 386.510. The legislature expressly stated that judicial review under sections 536.100 to 536.140 does not apply when "some other provision for judicial review is provided by statute." See also, e.g., State ex rel City of St. Louis v. PSC, 245 SW2d 851 (Mo. 1952). Moreover, SBC misreads the provisions of 536.140.4 and 386.510 (to the extent it may somehow have intended its argument

actually to reach to the applicable statute). These review statutes both have provisions regarding what the court may do when it finds fault with Commission proceedings on matters of evidence - but those provisions do not apply here. In this case the court ruled that the Commission misinterpreted applicable law. And in such circumstances, both statutes authorize the court to remand the matter for "further action" or "reconsideration", meaning for rehearing as discussed in CLECs' prior pleadings filed herein. See Sections 386.510 and 536.140.5. Furthermore, unlike the instant case, none of the cases cited by SBC involved a prospective ratemaking decision that required new evidence to comply with applicable law.

3. In making its new arguments, SBC continues to ignore the fact that the Commission cannot engage in retroactive ratemaking. Even if the court's order were to reach back and invalidate the rates as charged for prior periods, that would not authorize the Commission to do more than set new prospective rates. The result of SBC's argument would simply be that under the "change in law" provisions of the M2A-based interconnection agreements, it would owe a refund of all amounts paid under the prior true-up because the true-up to unlawful rates was itself unlawful.

4. Contrary to SBC's contentions, Commission action pursuant to the court decision will in fact be a change of law under Section 18.4 of the General Terms and Conditions of the M2A-based contracts. By their express terms, the "change in law" provisions will apply because "any of the rates … herein [in the agreement]" have been "invalidated" by a "court of competent jurisdiction." The rates set by the Commission in TO-2001-438 were incorporated into the interconnection agreements (in SBC's own words, "replacing rates designated in the M2A as interim")[1] - SBC itself filed the amendments. Hence, SBC quoted the operative language out of

[1] SBC Reply p. 10.

Section 18.4, but apparently failed to read it. Under the contracts, Commission action setting new rates because of the court decision must be dealt with as a change in law, while this case itself only concerns the prospective terms of the model M2A.

5. SBC's new arguments totally fail, for SBC ignores the fact that no party sought or obtained a stay of the rates. Accordingly, the rates applied - and still apply - until new prospective rates are set under the change-in-law provisions of the contracts. Likewise, the one-time true-up stands as well. No one sought to stay the true-up pending court review and further Commission action pursuant thereto.

6. CLECs note that SBC also misreads Staff's proposal regarding the proceedings herein. Like CLECs, Staff recognizes that the Commission needs to allow new testimony at a hearing. This is abundantly clear from Staff's pleadings.

Reply to Staff

7. Staff explains that it proposes to present 1999 data in new testimony for rates to be set in 2004-2005. Likewise SBC wants to use old data. But neither Staff nor SBC offers an explanation as to why it would be lawful or appropriate to set prospective rates based on such stale data. While the rates indeed would not be subject to prospective change in the absence of the court decision, that does not mean that the Commission can act unlawfully or unreasonably as it proceeds to change them prospectively because of the court decision.

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,

CURTIS, HEINZ,
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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 20th day of September, 2004 by placing same in the U.S. Mail, postage paid.

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