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 IN OPPOSITION TO SBC MISSOURI'S MOTION FOR CLARIFICATION OR REHEARING

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, and Covad Communications Company (herein collectively referred to as "CLECs"), pursuant to 4 CSR 240-2.080(15) and for their Response in Opposition to SBC Missouri's "Motion for Clarification and, in the Alternative, Application for Rehearing" state to the Commission that there is no need for clarification of the Report and Order issued December 28, 2004 and there is no justification for rehearing in this matter.

In opposition to SBC's requests for clarification and rehearing, CLECs state to the Commission:

1. The Commission recites the procedural history of this case and related prior proceedings in its Report and Order at page 2. SBC nonetheless starts its pleading with yet another attempt to revise history, mashing the separate cases together into one with unmistakably intentional imprecision, and thereby demonstrating again the lack of merit to its arguments. SBC's agenda is clear - continue to gloss over fact and law in an effort to extract additional monies from CLECs to which it is not entitled under the applicable interconnection agreements or the law.

2. Contrary to SBC's pleading (para. 1), "this proceeding" was not initiated in conjunction with approval of the M2A. Further, contrary to SBC's implication (para. 2), the Commission did not simply make an "initial decision" in Case No. TO-2001-438. Instead, the Commission issued a final decision in Case No. TO-2001-438 setting permanent rates, thereby triggering both the one-time retroactive true-up under the provisions of the M2A-based agreements as well as SBC's appeal. Neither the true-up nor the appeal could have occurred, had the Commission not set final rates. SBC has admitted the rates were final (including as discussed below). After the appeal, the Commission opened this case to address the remanded issues, and has now addressed those issues in its Report and Order. The Commission should recognize the inaccuracies in SBC's pleading, stand by the Report and Order, and deny clarification and rehearing.

3. SBC also erroneously describes the evidence regarding appropriate capital structure. But despite SBC's efforts to manipulate the record and distort the testimony, the Commission has already recognized that it would not be legitimate to ignore the clear problems with SBC's proposed capital structure. (Report and Order, p. 8-9).

4. SBC admits that Mr. Hirschleifer's testimony was "admissible and relevant evidence", citing him as one of two sources of information regarding capital structure. But then SBC falsely asserts that Hirschleifer did not recommend a capital structure with an equity component of less than 80%. This attempt to rewrite and co-opt Mr. Hirschleifer's testimony is simply ridiculous. SBC next tries to build upon this false foundation, erroneously claiming that "there is absolutely no record evidence that supports the Commission's determination of a 70% equity capital structure." (SBC Motion, para. 5).

5. The Commission has already rejected these arguments. In its Report and Order, it correctly observed that Hirschleifer provided evidence that the 80/20 capital structure of a group of companies "was not a measurement of the capital structure of a company that exclusively provides unbundled network elements." Further, the Commission cited his testimony that the hypothetical UNE provider "would face less risk" and "could use more relatively cheap debt in its capital structure."[1] SBC witness Avera also conceded that there is a difference between the "incumbent LEC's critical network elements" used by CLECs versus other services. (Ex 1 Avera Direct, Attachment p. 14, Tr. p. 125-26). He acknowledged that the risks are different, yet chose to simply ignore those differences. (Tr. p. 131). Based on such evidence and the FCC's requirements, the Commission correctly concluded that the 80/20 capital structure had to be adjusted, and based on the record it used its discretion to adjust that structure to 70/30. (Report and Order, p. 7-9).

6. SBC continues to try to cram an inappropriate 80/20 (or worse 86/14) capital structure down the Commission's throat, by arguing that all the evidence regarding the impropriety of such a structure, and the FCC's requirements, should be ignored. But just as judge and jury can quantify subjective testimony regarding an issue such as pain and suffering, so too the Commission properly used its discretion to quantify subjective critiques of the 80/20 capital structure.

7. SBC's arguments are contrary to FCC requirements. In the TRO in August 2003, the FCC clarified that "a TELRIC-based cost of capital should reflect the risks of a competitive market." Additionally, while the FCC indicated that different costs of capital could be considered for different unbundled network elements, it also stated the "parties should continue

[1] Staff witness Johnson also supplied such subjective evidence, which the Commission did not have to ignore. (Ex

to have the option to propose (and states should have the option to adopt) a single cost of capital for all UNEs that appropriately reflects the risks associated with competitive markets for the services provided over incumbent LEC networks." (TRO, para. 683-84). But despite the FCC's requirement that cost of capital (and therefore capital structure) reflect the risks related to UNEs and not the risks of other lines of business, SBC continues to endorse unadjusted numbers that even its witness admitted do not reflect the appropriate level of risk.

8. In truth, SBC should count itself fortunate. It had the burden of proof according to FCC Rule 47 CFR 51.505(e). The Commission would have been well within its authority to accept the critiques of the 80/20 and 86/14 capital structures, but instead of adjusting those numbers simply continue to use the capital structure of 58% equity and 42% debt previously incorporated into the M2A rates from the decision in Case No. TO-97-40. This was Staff's secondary recommendation regarding capital structure, based on the grounds that there had been no dramatic changes in debt and equity costs at the time. (Ex 24 Johnson Rebuttal p. 82-83).[2]

9. The Commission's Report and Order is supported by the record. It is not arbitrary and capricious. It complies with FCC rules and the TELRIC methodology. SBC has not provided sufficient reason for a rehearing as required by Section 386.500. Accordingly, SBC's application for rehearing must be denied.

10. Likewise, there is no legitimate basis for SBC's motion for clarification. The Commission correctly determined that this case concerns the model M2A and not specific interconnection agreements based thereon. (Report and Order, p. 14). SBC's latest pleading also acknowledges the distinction in para. 2. Even the "accessible letter" that SBC attached to its pleading acknowledges the distinction between the model M2A and "signed and approved"

24, Johnson Rebuttal, p. 80-81).

agreements. The letter does not say that the Commission's decision in TO-2001-438 was self-effectuating, but rather indicates that SBC was "in the process" of amending the individual agreements to effectuate the order. The letter also admits that the Commission set **"final UNE rates"** in Case No. TO-2001-438 and discusses the applicable one-time retroactive six-month true-up. Notably, while the letter suggests the possibility of revisions in rates down the road as a result of potential appeals, it does not make any assertion regarding potential retroactivity of such future revisions. No matter how hard it tries, SBC cannot rewrite history and convert the final rates that were established in Case No. TO-2001-438 into something else.

11. The interconnection agreements established separate methods for addressing rate changes resulting from the admittedly final decision in Case No. TO-2001-438 versus any future mandated rate changes. The former were to be addressed by a replacement of interim rates with permanent rates and an associated one-time six-month retroactive true-up. The latter are to be addressed under change-in-law provisions. The former provisions have been fully implemented, while the latter provisions remain available to address the results of this case. The Commission acknowledged these change-of-law provisions in the Report and Order, and properly recognized that it cannot address such matters in this case. (Report and Order, p. 14).

12. There is no basis for SBC's feigned concern about purportedly inequitable results. CLECs have acknowledged the provisions of their agreements that address changes in law. CLECs will abide by the express terms and conditions of their contracts. SBC has no right to expect or request anything more.

WHEREFORE, the Commission should deny SBC's requests for clarification and rehearing.

---

[2] The Commission was not required to ignore this part of Staff's testimony.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)
clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

Attorneys for 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, TCG Kansas City, and Covad Communications Company

Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 14th day of January, 2005 by placing same in the U.S. Mail, postage paid.

/s/ Carl J. Lumley

Dana K Joyce
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102

John B Coffman
P.O. Box 2230
200 Madison Street, Suite 640
Jefferson City, MO 65102

Leo J Bub
SBC Missouri
One Bell Center, Room 3518
St. Louis, MO 63101

Mark W Comley
Birch Telecom of Missouri, Inc.
601 Monroe Street, Ste. 301
Jefferson City, MO 65102

Paul H Gardner
Sprint Missouri, Inc. d/b/a Sprint
131 High Street
Jefferson City, MO 65101

Sheldon K Stock
Fidelity Communication Services III, Inc.
2000 Equitable Building
10 South Broadway
St. Louis, MO 63102

Mary A Young
McLeodUSA Telecommunications Services, Inc.
P.O. Box 104595
Jefferson City, MO 65101