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May 17, 2004

Missouri Public Service Commission
Attn: Secretary of the Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102-0360

FILED²

MAY 17 2004

Missouri Public
Service Commission

Re: Case No. TO-2004-0576
SBC/Sage Telecom, Inc.

Dear Mr. Roberts:

Please find enclosed for filing in the above-referenced case an original and eight (8) copies of Sage Telecom, Inc.'s Response To Order To Show Cause. A copy of this filing has been sent this date via electronic transmission to counsel for all parties of record.

Sincerely,


Brent Stewart

CBS/bt

Enclosure

cc: Counsel for all parties of record

FILED²

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

MAY 17 2004

Missouri Public
Service Commission

In the Matter of the Agreement Between)
SBC Communications, Inc., and)
Sage Telecom, Inc.)

Case No. TO-2004-0576

**RESPONSE OF SAGE TELECOM, INC.
TO ORDER TO SHOW CAUSE**

COMES NOW Sage Telecom, Inc. ("Sage"), by and through local counsel, and for its response to the *Order To Show Cause* issued by the Commission in the above-captioned case on May 11, 2004,¹ respectfully states as follows:

Background

Sage is a competitive local exchange carrier serving primarily residential customers in areas of Missouri and 10 other states where SBC is the incumbent local exchange carrier ("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 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

¹ In the Matter of the Agreement Between SBC Communications, Inc., and Sage Telecom, Inc., Case No. TO-2004-0576, *Order to Show Cause*, (Mo. PSC May 11, 2004) ("*Show Cause Order*").

UNE-P services and SS7 signaling. 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, subject to a stay that is now scheduled to expire on June 15, 2004, all the rules pursuant to which UNE-P is offered.² This ruling placed in jeopardy the network platform on which Sage has exclusively relied to serve its customers. Absent a substitute agreement such as that which 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.

Sage and SBC had been in conceptual discussions for a number of months prior to the *USTA II* decision about possible replacement arrangements for UNE-P. However, the *USTA II* ruling added additional urgency to the necessity of Sage exiting the UNE-P regime and negotiating a private agreement that could serve as the basis of a mutually agreeable and sustainable model for competition. After the *USTA II* decision was issued, several weeks of intensive negotiations resulted in an agreement. The old regime under which Sage currently operates will no longer be viable based upon *USTA II*. Even if the ruling is appealed, and the stay is further extended, the extreme uncertainty of the UNE-P approach would still exist and substantial litigation-related costs unrelated to the provision of customer service would continue to be incurred.

Since the passage of the Telecommunications Act of 1996, it has proven impossible for ILECs and CLECs to agree upon pricing or terms for many of the key unbundled elements defined therein, particularly with respect to UNE-P. This results in part from the fact that the pertinent wholesale services offered by the ILECs have been subject to "pick and choose"

² *United States Telecom. Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

requirements that inherently inhibit significant customization. Sage and SBC ultimately recognized, however, that the parties to a private commercial agreement can negotiate customized terms that could help bridge the price gap between them by providing additional value to Sage with respect to other parts of the agreement. That is exactly what Sage and SBC have done through their private commercial agreement.

In its *Order To Show Cause*, the Commission requested that the parties both explain the nature of their agreement and demonstrate why the agreement should not be filed with the Commission.³ Sage urges the Commission to find that no such filing of the agreement is necessary for the reasons stated herein.

The Commission Should Coordinate Action With the FCC

SBC's Emergency Petition for Declaratory Ruling, Preemption, and for Standstill Order to Preserve the Viability of Commercial Negotiations, filed with the FCC and supported by Sage, requests that the FCC provide relief from request or orders of state regulatory bodies, regarding commercial agreements reached by carriers, as is the case with Sage and SBC. Principles of comity dictate that this Commission refrain from taking any action that would require the filing of the agreement until the FCC acts on SBC's Petition. Comity aside, the Federal Telecommunications Act of 1996 establishes the FCC as the primary agency to implement and enforce its requirements.

Confidentiality Issues Militate Against Requiring the Filing of the Entire Agreement

Section 251 requires that an agreement be submitted to a state commission only if it pertains to a request for "interconnection, services, or network elements pursuant to Section

³ As explained herein, the relevant portions of the agreement that involve Section 251 obligations were filed with the Commission on May 4, 2004.

251.” Those portions of the SBC/Sage agreement that are related to the “Local Wholesale Complete” arrangements do not involve the network elements, interconnection, and services covered by Section 251 and are therefore outside the scope of the statute and of the state commission’s submission requirement. Other areas of the parties’ agreement do involve Section 251 obligations and these portions of the agreement were filed with the Commission on May 4, 2004.

Public disclosure of those aspects of the Sage/SBC agreement that concern arrangements between Sage and SBC that are not required under Section 251 would cause significant competitive harm to Sage. CLECs have different strategies for seeking and achieving commercial success. The disclosure of Sage’s competitive strategies and plans to its competitors would undermine the likely success of those strategies and plans.⁴ Such unnecessary disclosure of non-251 aspects of the agreement will, in turn, reduce the willingness of Sage and other CLECs to enter into such non-251 agreements. Given the FCC’s emphatic and unanimous urging of CLECs and ILECs to enter into such commercial agreements,⁵ this Commission should not undermine such agreements by permitting that they be required to be disclosed in full detail to competitors.

Sage recognizes that the Commission’s *Order to Show Cause* states that the Commission will establish the “standard protective order” if disclosure is required and the agreement is

⁴ To the extent that Sage’s strategy depends upon cooperation with SBC in SBC’s role as supplier to Sage, Sage has unavoidably been required to disclose its strategy to SBC. Throughout the business community, suppliers necessarily gain some insight as to their customers’ strategy. The fact that such necessary disclosure is made to Sage’s supplier does not warrant an unnecessary disclosure to Sage’s competitors.

⁵ Letters from Chairman Michael K. Powell, *et al.*, to Edward Whitacre, SBC Communications, Inc. and others (March 31, 2004).

considered proprietary or highly confidential.⁶ However, Sage respectfully notes that any order that the Commission issues regarding confidentiality can be modified or overturned, and confidential information can be leaked. Thus, if the non-251 portions of this type of agreement must be filed, even if subject to a claim of confidentiality, it will act as a disincentive to entry into such agreements.

While the parties have argued that there is no need for such portions of the agreements to be filed in the first place, it is more important to note that the very innovation that commercially-negotiated agreements offer would be stifled if competitors could simply copy rather than create. Clearly, such a situation would not be in the public interest. The Commission should not allow the creation of an atmosphere in which confidential and sensitive commercial information that is not otherwise required to be disclosed must be placed in jeopardy of being made public simply because it happens to reside in a document that contains other information that is required to be made public. The legitimate goal of making public the portions of the Sage/SBC agreement that fall within the purview of Section 251 is best achieved by the narrower approach of the filing of an amendment covering the Section 251 aspects of the Sage/SBC agreement, as was done by the parties on May 4, 2004.

**Filing of the Entire Agreement Would Create Significant Problems
Involving the "Pick-and-Choose" Provisions of the Telecommunications Act**

⁶ *Order To Show Cause* at 2. Sage notes that the Commission's "standard protective order" establishes two categories of confidentiality: "highly confidential" and "proprietary," and provides definitions for each. While Sage believes that its commercial agreement with SBC should not be filed at all, Sage believes that these definitions may not provide adequate protection to its business strategies and plans, which Sage considers to be "highly confidential," both in the ordinary sense of that term and in terms of the need to provide the high level of protection that is set forth in the standard protective order. Thus, Sage reserves the right, should the Commission require that the commercial agreement be filed, to seek greater protection for its business strategies and plans than are provided by the Commission's standard protective order.

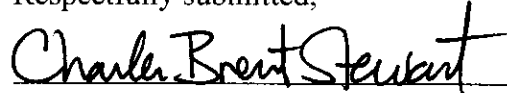
An additional reason exists for the Commission to not require the filing of the remainder of the SBC/Sage agreement, as a filing requirement for agreements that include both Section 251 and non-251 provisions would create substantial problems regarding the ability of CLECs to “pick-and-choose” provisions pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809. The Sage/SBC agreement was negotiated as a whole, and covers all 13 states in which SBC is an incumbent LEC. Included within the agreement are necessarily trade-offs, such as region-wide pricing, which may benefit Sage in some respects and benefit SBC in others. If the agreement is approved pursuant to Section 252 in any one state, then CLECs will be able to adopt such agreement in that state under Section 252(i), without necessarily agreeing, as Sage did, to take the same agreement in another state, where the terms are less advantageous to a CLEC. Alternatively, a CLEC might adopt the non-251 portion of the agreement in a state without adopting the 251 portion, or may endeavor to mix and match non-251 provisions with 251 provisions. Making these agreements subject to state commission approval will induce each CLEC to wait for other CLECs to enter into such agreements, and then adopt only the most desirable portions. Understandably, CLECs will not want to be among the first to enter into commercial agreements, and success will not be achieved through commercially-negotiated agreements within the local telecommunications industry the way it is achieved elsewhere throughout the American economy.

Conclusion

Based on the foregoing, the Commission should decline to require the parties to file the remainder of their commercial agreement with the Commission. Alternatively, the Commission should defer making a ruling on this issue pending a decision from the FCC regarding SBC’s Petition for Declaratory Ruling and /or forbearance pursuant to 47 USC section 160[c] and for

Standstill to Facilitate Commercial Negotiations.

Respectfully submitted,



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LOCAL COUNSEL FOR
SAGE TELECOM, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was sent to counsel for all parties of record in Case No. TO-2004-0576 by depositing same in the United States Mail, first class postage pre-paid, by hand-delivery, or by electronic transmission, this 17th day of May, 2004.

