

STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

**IN THE MATTER OF THE AGREEMENT BETWEEN SBC
COMMUNICATIONS, INC. AND SAGE TELECOM, INC.**

Case No. TO-2004-0576

ORAL ARGUMENT

VOLUME 1

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Oral Argument

July 8, 2004
Jefferson City, Missouri
Volume 1

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

DALE HARDY ROBERTS, presiding,
Chief Regulatory Law Judge
STEVE GAW, Chairman,
CONNIE MURRAY,
ROBERT M. CLAYTON, III,
JEFF DAVIS,
LINWARD "LIN" APPLING,
Commissioners

REPORTED BY:
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PROCEEDINGS

JUDGE ROBERTS: On the record, please. Good afternoon, ladies and gentlemen, my name is Dale Roberts. I am not the judge to whom this case is assigned. Judge Mills is unavailable today and I am sitting in his place. I'm presiding over the hearing. I believe he will resume control over this case upon his return tomorrow or Monday. We're here in the matter of TO-2004-0584 and a companion case TO-2004-0576. This case was ordered -- back up.

The Commission issued an Order, I believe, on July 1st setting this case for oral argument on certain legal issues having to do with the document filed, I believe, in 0576. And the question appears to be is that document a part -- is it an interconnection agreement -- is it a part of an interconnection agreement -- is it part of an interconnection agreement, or if not, I'm not sure it matters what it is because if it's neither of those two things, I'm not sure it's anything that concerns the Commission. That remains to be seen.

Before we start on the case and before -- the Commissioners are still in agenda upstairs voting out Orders on other cases and taking care of other Commission matters, and I will go for them shortly. Before we get to that, I want to take up any preliminary matters.

And I will tell you, in case you haven't seen

1 it, a Motion was filed on July 7th by Mark Comley on behalf
2 of AT&T Communications and Birch Telecom of Missouri. Is
3 Mark here?

4 MS. MARTIN: Judge, Mark is not here, I'm
5 Cathleen Martin. I'm from Mark's office, and I'm here on
6 behalf of Birch & At&T.

7 JUDGE ROBERTS: Okay. Thank you. A Motion
8 was filed yesterday in which parties asked the Commission to
9 reschedule oral argument, it would appear only on the case
10 which ends with 0576. The reason for the request is the
11 unavailability of an attorney who represents those parties.

12 The Commission will deny that Motion to
13 Reschedule the Oral Argument. The -- I think for several
14 reasons; one, it was just filed yesterday and there's been no
15 time for the other parties to respond. I understand in the
16 Applicant's defense that this hearing was only set eight days
17 ago, eight calendar days ago, so it's been a short time
18 period.

19 But the problem which we all face is the fact
20 that the Commission must act on the 0584 case not later than
21 August 2nd, and if the Commission is going to act on it at
22 one of its regularly scheduled agendas, as it usually
23 conducts its business, that means it needs to act on this
24 case not later than July 29th.

25 And I am not convinced that there's any way in

1 which the commission can sever the two cases and hear one now
2 and one later, and for those reasons, perhaps among others,
3 the Commission is denying the Request to Reschedule the
4 Hearing.

5 Are there any other motions or -- excuse me.
6 Before I ask that, let me go ahead and take entries of
7 appearance starting with staff, if you would, please.

8 MR. HAAS: Good afternoon, my name is William
9 Haas. I'm appearing on behalf of the Staff of Public Service
10 Commission. Our address is Post Office Box 360, Jefferson
11 City, Missouri, 65102.

12 JUDGE ROBERTS: Public Counsel is not present
13 and I have not seen any Pleadings from the Public Counsel,
14 and assuming that's the case, I'm going to -- I tell you
15 what, I would like to start with Sage, if I may, if you would
16 enter your appearance, please.

17 MR. STEWART: Charles Brent Stewart with the
18 law firm of Stewart & Keevil, LLC, 4603 John Garry Drive,
19 Suite 11, Columbia, Missouri, 65203, appearing on behalf of
20 Sage Telecom as local counsel.

21 And Judge Roberts, yesterday I filed, in both
22 cases, both case numbers, a request for admission pro hoc
23 vice for Mr. Eric J. Branfman of the Swindler Berlin law firm
24 in Washington, D.C. I believe we've complied with the most
25 current Supreme Court rule and the Commission rule on those

1 in our applications for admission pro hoc vice and would
2 like, I guess, I would move for a ruling on whether he can
3 appear, and if so, I'll introduce him.

4 JUDGE ROBERTS: He may. I will grant your
5 motion, Mr. Branfman, if you would like to enter your
6 appearance, please.

7 MR. BRANFMAN: Thank you. Eric J. Branfman of
8 Swindler, Berlin, Shereff, Friedman, LLP, 3000 K Street
9 Northwest, Washington D.C., 20007.

10 JUDGE ROBERTS: Welcome to Missouri.

11 MR. BRANFMAN: Yes. Thank you. And I'm
12 appearing here, of course, on behalf of Sage Telecom.

13 JUDGE ROBERTS: Thank you. Southwestern Bell,
14 if you would, please.

15 MR. LANE: Thank you, your Honor. My name is
16 Paul Lane, and I'm appearing here today on behalf of
17 Southwestern Bell Telephone, LP, doing business as SBC
18 Missouri. Our address is 1 SBC Center, Room 3520, St. Louis,
19 Missouri, 63101.

20 JUDGE ROBERTS: Let's see, and you're
21 appearing on behalf of AT&T?

22 MS. MARTIN: Yes.

23 JUDGE ROBERTS: Is that correct?

24 MS. MARTIN: That is correct. My name is
25 Cathleen Martin. I'm an attorney at Newman, Comley, Ruth,

1 P.O. Box 537, Jefferson City, Missouri, 65102, appearing on
2 behalf of AT&T Communications of the Southwest, Inc. and
3 Birch Telecom of Missouri, Inc.

4 JUDGE ROBERTS: Thank you. Mr. Lumley, go
5 right ahead.

6 MR. LUMLEY: Good afternoon, Judge. Carl
7 Lumley appearing on behalf of NuVox Communications of
8 Missouri, Inc. and MCI Metro Access Transmission Services,
9 LLC, 130 South Bemiston, Suite 200, Clayton, Missouri, 63105.

10 JUDGE ROBERTS: I'm sorry. Ms. Young.

11 MS. YOUNG: Thank you, Judge. Mary Ann Young
12 with the law firm William D. Steinmeier, P.C., PO Box 104595,
13 Jefferson City, Missouri, 65110, appearing today on behalf of
14 the two Xspedius companies doing business as Xspedius
15 Communications and the other corporate names as stated on my
16 written entry of appearance.

17 JUDGE ROBERTS: Thank you. And is there
18 anyone else? Hearing nothing, I would like to make sure
19 we're clear on the order of appearance. I have had one or
20 two requests that Sage be allowed to go first. Is that
21 correct? No objection to that. That's fine with me. Is
22 there any preference on going second? I would assume it
23 would be Southwestern Bell.

24 MR. LANE: Yes, your Honor.

25 JUDGE ROBERTS: All right. Thank you. And

1 then staff.

2 MR. HAAS: That's fine.

3 JUDGE ROBERTS: And Office of Public Counsel
4 is not here. Other interveners, do you have any preference?

5 MR. LUMLEY: Judge, I believe I'll be making

6 --

7 JUDGE ROBERTS: I'm not sure that microphone
8 is on. I can hear you, but --

9 MR. LUMLEY: I believe I'll be making the
10 substantive comments, so I should go first, I believe.

11 JUDGE ROBERTS: All right. And --

12 MS. MARTIN: That's correct, AT&T and Birch
13 can go after Mr. Lumley.

14 MS. YOUNG: I'll be last.

15 JUDGE ROBERTS: Everyone has jumped in in
16 front of you, is that all right?

17 MS. YOUNG: That's perfectly fine. Thank you.

18 JUDGE ROBERTS: All right. Now, at the risk
19 of -- and of course, I'm not -- I can't tell you for sure.
20 The Commissioners may ask questions as you go along, they may
21 ask questions when you each finish your comments, or they may
22 wait until you are all finished. And I'm sure you're
23 accustomed to that.

24 They are -- I mentioned this off-the-record
25 just in passing with one attorney. I wanted to tell you all

1 what I said, and that was I was pondering the burden of proof
2 in this case and anytime I deal with the Telecommunications
3 Act of 1996, I -- I have to sit and think there are -- there
4 are areas that are, I believe, undecided. The
5 interconnection agreement was submitted by Bell; is that
6 correct or jointly submitted by Bell and Sage?

7 MR. LANE: Yes, your Honor.

8 JUDGE ROBERTS: All right. The challenge to
9 it, I believe, comes from Staff. Staff filed a Motion asking
10 that a case be established to review this matter; is that
11 correct, Mr. Haas.

12 MR. HAAS: Yes, we filed a Motion concerning
13 the interconnection agreement amendment.

14 JUDGE ROBERTS: I -- this is not a binding
15 decision. I am speculating that Staff might have the burden.
16 I would encourage you to address that in your comments, any
17 or all of you, so that at the end of the day, if there's
18 difficulty determining where we are, we at least have some
19 idea of who believes -- whom we believe has the burden of
20 proof.

21 Are there any questions or motions that we
22 have not addressed? I will remind you when we begin, your
23 arguments will be made from the podium and most of -- I think
24 most of the questions may come while you're at the podium.
25 If you do address the bench from your seat, please do be sure

1 to turn on your microphone. We can oftentimes hear you in
2 here, but you have to understand that we webcast these
3 proceedings, which means they are broadcast through the
4 Internet to the outside world, and that process always also
5 captures the video and audio file for us to review later when
6 we're reviewing this case. And if you don't turn on your
7 microphone at the table on the webcast and on the permanent
8 file, there's nothing, and we sometimes like to hear what you
9 had to say, so I would encourage you to remember to do that,
10 and I might interrupt you and ask you to if you don't.

11 Hearing nothing further, we're going to go off
12 the record. I'll go upstairs and see if I can get the
13 Commissioners to break free from their other duties and come
14 to the bench. Thank you. We're off-the-record.

15 (A BREAK WAS HAD.)

16 JUDGE ROBERTS: Good afternoon, ladies and
17 gentlemen. The Commissioners have joined us and I have
18 already taken the entries of appearance and denied the
19 request for rescheduling or continuance on behalf of AT&T and
20 Birch. The order of argument this afternoon is going to
21 begin with Sage Telecommunications, and then move to
22 Southwestern Bell, then to the Staff, then to NuVox MCI, and
23 then to AT&T and Birch and then to Xspedius; is that correct?
24 And as I mentioned earlier, OPC has not entered an appearance
25 this afternoon, so with that, we're ready to begin with Sage

1 Telecommunications. Sir, if you would like to come to the
2 podium, you may begin.

3 MR. BRANFMAN: Thank you, your Honor. Good
4 afternoon. I'm Eric Branfman, and on behalf of Sage Telecom,
5 Inc. And I would like to begin, since Sage is not a
6 household name the way Southwestern Bell and AT&T and MCI,
7 some of the other parties here are, give you a very brief
8 background on who Sage is and what it does.

9 Sage is a CLEC, a competitive entrant offering
10 local exchange service in 11 states in which SBC is the
11 incumbent LEC, including Missouri. Its customer base is
12 nearly exclusively residential. In Missouri, 94 percent of
13 its customers are residential. The rest of its customer base
14 is very small businesses. In Missouri, Sage has
15 approximately 32,700 customers. Of these, 61 percent are
16 rural and suburban, so it's following a somewhat different
17 business plan than most CLECs in that it's heavily
18 residential and also heavily rural and suburban.

19 Sage, up to this point, has provided service
20 to its customers through the purchase of UNE-P from
21 Southwestern Bell, or SBC is how I'll refer to them. Just to
22 briefly digress, UNE-P is a platform consisting of all the
23 components of local telephone service that are provided in a
24 combined form to a CLEC so that a CLEC can, even if it has no
25 facilities at all, offer local exchange service to its

1 customers.

2 UNE-P has had a very checkered past. It's
3 been subject of litigation for eight years now. Up to this
4 point UNE-P has been permitted, and in fact required.
5 However, on March 2nd of this year, the Court of Appeals for
6 the D.C. circuit ruled vacating all of the FCC's rules
7 subject to a stay, which expired in June. So at this point,
8 UNE-P is not required, there are no rules requiring UNE-P to
9 be provided.

10 Sage anticipated that, and entered into some
11 commercial negotiations, which came to a head about a month
12 after the D.C. circuit ruling and entered into a -- a
13 replacement agreement that would enable it to continue
14 offering service to its customers. And that agreement, of
15 course, was with SBC. And that -- that's what's brought us
16 here today.

17 Briefly, there are, as I see it, three
18 significant issues before the Commission. First, is the
19 question which is presented in Case 0584 of approval of the
20 amendment to the interconnection agreement between Sage and
21 SBC.

22 Second, there is a Motion in docket 0576 by
23 the Staff to consolidate that docket with 0584, and briefly
24 docket 0576 is an application -- arising out of an
25 application by the Staff to consider what the Commission

1 should do about the agreement, which I'll refer to as the LWC
2 agreement for Local Wholesale Complete, that Sage and SBC
3 entered into, which is separate and apart from the amendment
4 that was filed by Sage and SBC for approval.

5 And then the third issue is the intervention
6 motions by five of the CLECs who are represented in this room
7 who have asked to intervene in Case 0576, but not in Case
8 0584. I'll try to take up these questions one at a time.

9 First, we believe that the Commission should
10 approve the amendment to the Sage and SBC interconnection
11 agreement as filed. Briefly, Sage and SBC have had an
12 agreement for several years. That agreement permitted Sage
13 to purchase UNE-P as part of the movement from -- by Sage
14 from the UNE-P arrangement, which was faltering in being
15 eradicated to a new arrangement. The parties agreement that
16 Sage would not any longer purchase UNE-P from SBC.

17 And so an amendment was entered into which
18 terminates Sage's right to purchase UNE-P from SBC, and it
19 also includes all of the aspects of the LWC agreement that
20 Sage and SBC believe are subject to Section 251 of the Act.
21 So what Sage and SBC did, in effect, was take the longer
22 agreement, the LWC agreement, extract and duplicate the
23 portions that related to Sections 251 and 252, placed them in
24 an amendment, filed that amendment in docket 0584, and is
25 seeking the Commission's approval of that amendment, which

1 would alter Sage's rights under the existing interconnection
2 agreement.

3 Now, in considering whether that -- that
4 amendment should be approved, I think it's undisputed that
5 the standard is set forth in Section 252(e)(2)(a), and that
6 the Commission must approve the amendment unless one of two
7 findings is made. And we believe that neither of these
8 circumstances is present here, and therefore, the Commission
9 must approve the amendment.

10 And I'll digress for a moment, Judge Roberts
11 did ask us to address the question of burden of proof, and we
12 believe that because of the phraseology of Section
13 252(e)(2)(a), which says that the Commission must approve a
14 proposed agreement or amendment except where one of two
15 circumstances apply, the burden would be on the opponent to
16 prove that one of those two circumstances apply here.
17 And we believe, of course, they don't apply.

18 Now, the two circumstances, No. 1, is if the
19 agreement, or in this case the amendment, discriminates
20 against a non-party carrier, then the Commission is permitted
21 to reject the amendment. We believe that the amendment does
22 not discriminate against a non-party carrier because any
23 other carrier can adopt it under Section 252(i).

24 That would not be the case, for example, if
25 the amendment required SBC to -- to withhold this agreement

1 from another carrier or to discriminate it against another
2 carrier. There's nothing of that type in here and any other
3 carrier can adopt the agreement as amended freely under
4 Section 252(i).

5 Now, the CLEC coalition has argued that the
6 amendment is discriminatory, but we disagree because all of
7 the provisions that are required to be filed under 251 and
8 252 have been filed as part of this amendment and they're
9 available under 252(i).

10 Now, the LWC agreement, which customizes a --
11 the UNE-P product in a way that is not required by the Act
12 but which is -- is something that Sage desires and negotiated
13 with SBC and is present in the LWC agreement, it is not
14 required to be filed. And the fact that it hasn't been filed
15 doesn't result in discrimination, and that's because UNE-P
16 arrangements are no longer required to be made available on
17 an unbundled basis as a result of the D.C. circuit decision
18 on March 2nd that I referred to before, which is known as the
19 USTA-II decision. USTA being United States Telecom
20 Association, which was the appellant in that case. And
21 because UNE-P is no longer required to be provided under
22 Sections 251 and 252, SBC is not obligated to file, make
23 available, or obtain PSC approval of such service
24 arrangements.

25 Additionally, because the arrangements that

1 set forth in the LWC agreement is different from a UNE-P
2 arrangement, its customized to Sage's needs and contains
3 features that are not required to be made available, were not
4 even required to be made available when UNE-P was available.
5 It simply is not something that is required to be -- to be
6 filed, and therefore, the absence of this from the amendment
7 is -- is no basis for arguing that there's discrimination
8 going on.

9 And then the second point, the second basis on
10 which the Commission could reject an amendment is if it were
11 found to be contrary to the public interest. Here, we
12 believe that the amendment is very much in the public
13 interest. After the USTA-II decision, the FCC Commissioners
14 came out unanimously and urged CLECs and ILECs to negotiate
15 private commercial agreements.

16 That's exactly what Sage and SBC have done.
17 They've negotiated an agreement which enabled Sage to
18 continue serving the customers it's been serving with UNE-P,
19 despite the absence of UNE-P, and enables them to serve their
20 customers much better because of the customized features that
21 Sage is negotiated.

22 And as a result, Sage is able to avoid
23 disrupting service to its -- to its customers. There are
24 over five hundred -- over 500,000 customers across the -- its
25 region and over 32,000 in Missouri, as I've indicated before.

1 Those customers will continue to get service and be able to
2 get new features and functionalities as a result of this
3 agreement.

4 And I submit that that's much more in the
5 public interest than what, for example, AT&T has done, which
6 is to announce that it's, as a result of these legal
7 developments is going to exit the residential market in
8 Missouri and quite a few other states. And there are other
9 CLECs as well. Detail is a very well known UNE-P provider
10 that is exiting service in quite a number of states.

11 So there are two reactions that CLECs who are
12 dependent on UNE-P can take. One is to just give up.
13 Another one is the one that Sage has taken, which is to
14 negotiate a commercial agreement with SBC that enables it to
15 keep serving its customers and serve them even better.

16 Now, there is a third alternative, which is to
17 become more facilities based. That is a very difficult
18 alternative at this point to undertake. It would result in
19 substantial disruptions. The FCC has found that the hot cup
20 process, which is necessary to convert a customer that's
21 presently on SBC's network to a CLEC network, is not -- is
22 not working well for mass -- mass conversions and as a
23 result, this is a -- a very difficult process to undertake,
24 and particularly with Sage's rural and suburban customer
25 base, it would be very, very difficult economically to expect

1 that Sage could get enough customers to make it worthwhile to
2 build out facilities to these widely dispersed customers.

3 And now I would like to move on to the second
4 point, which is the question of consolidation. The purpose,
5 presumably, of consolidation of the dockets is -- is because
6 there's a -- a supposed need to consider the LWC agreement in
7 connection with the application for approval of the
8 amendment. We disagree.

9 The Commission has all the information it
10 needs to approve the amendment. All of the provisions that
11 are required to be filed under 251 and 252 have been filed in
12 docket 584, and there's no need to consolidate docket 576
13 with that docket. There's no reason for further delay in the
14 form of additional and unnecessary filing requirements.

15 The LWC agreement is outside the scope of 251.
16 As I've said before, and in particular, the Staff has argued
17 that the two agreements are intertwined because the parties
18 have agreed that the amendment would be void if the LWC
19 agreement becomes inoperable, and let me explain why we did
20 that.

21 As I indicated before, the amendment takes
22 away Sage's right to purchase UNE-P, and then the reason is
23 because Sage is going to go to a different service, which is
24 the one in the LWC agreement. Now, obviously if Sage, for
25 any reason, doesn't have available to it the LWC service, it

1 needs to have something to serve its customers.

2 And so what the parties agreed to is that in
3 the event that the LWC agreement was inoperable, they would
4 go back to where they are today, which is that Sage could --
5 could avail itself of its rights under the existing
6 interconnection agreement without the amendment.

7 Contracts frequently refer to events that are
8 outside of the contract itself that could cause the contract
9 to become void. For example, a force major provision in a
10 typical contract may state that a party can declare the
11 contract null and void in the event of a labor dispute.
12 Well, the -- that wouldn't make the contract in the
13 collective bargaining agreement intertwined. They would
14 still be separate, even though they would be a legal
15 relationship between the two in the sense that an event under
16 one could -- could trigger an event under the other.

17 This cross reference simply reflects Sage's
18 contingency plan. In the amendment, Sage is giving up its
19 rights to order UNE-P because it's expecting to be able to
20 serve its customers with the LWC agreement. And to protect
21 against that eventuality that the LWC agreement might be
22 invalidated, Sage needed a back-up plan, which is that the
23 parties would go back to the interconnection agreement.

24 Additionally, it would be premature to require
25 filing of the LWC agreement until the FCC rules on a -- an

1 emergency petition for declaratory ruling that SBC filed
2 about two months ago asking the FCC to provide guidance as to
3 the need to file the LWC and similar agreements. The FCC has
4 not acted yet, and it may act to preempt state commissions
5 from requiring filing.

6 We believe that requiring disclosure would
7 chill the commercial negotiations that the FCC has urged the
8 industry to engage in, and the FCC should be given a chance
9 to decide SBC's Petition before this Commission steps in and
10 renders a potentially conflicting ruling.

11 And then it's also been argued that the LWC
12 agreement must be filed under Missouri state law. The CLEC
13 coalition made that argument and the statutory provision it
14 cites does not require filing of agreements between carriers.
15 It only gives the Commission discretion to impose a filing
16 requirement and the Commission did not do so in its Order in
17 this case, and to our knowledge, the Commission has never
18 imposed a filing requirement for contracts. Only for
19 tariffs. So as a policy matter, the CLECs have presented no
20 reason for the Commission to part from this practice now.

21 The CLEC coalition also suggests that there's
22 a requirement to file the LWC agreement in Section 271 of the
23 Act. We think that's wrong. Nothing in Section 271 requires
24 that SBC provide UNEs in combined form, which is what UNE-P
25 is. And there's no requirement, while they each have to be

1 provide separately in the USTA-II decision, the -- the FCC's
2 Order that they don't have to be provided in combined form
3 was upheld.

4 So if -- even if one were to construe the LWC
5 agreement as the provision of UNEs in combined form, it's not
6 required under Section 271, so this is something that goes
7 beyond Section 271 and could not be required to be filed. In
8 addition, Section 271 doesn't require that they -- that UNEs
9 be provided by a contract. It could be provided in a tariff
10 or in an ascot.

11 And lastly, nothing in 271 requires the filing
12 of anything or State Commission approval of any arrangements.
13 And in addition, there's no reason to require the filing of
14 the LWC agreement, which includes a highly proprietary
15 sensitive and innovative decision that Sage does not wish to
16 make public.

17 Sage will suffer irreparable harm if it must
18 disclose this information to its competitors. Nothing is
19 more confidential to -- to a company than its competitive
20 commercial strategies and future business plans. It has
21 been, in this industry, a first mover in negotiating this
22 agreement, the very first commercial agreement that's come
23 out.

24 And disclosure of what Sage's plans are would
25 eliminate this first mover advantage that motivated Sage to

1 enter into the agreement, the LWC agreement, in the first
2 place. And there are further details about the harm and
3 about the confidentiality that are set forth in the Affidavit
4 of Mr. McCausland, which we filed yesterday.

5 And finally, a filing is required, the
6 confidentiality of the proprietary portions must be
7 protected. The parties must be allowed to make any filing
8 under seal. The redacted version of the LWC agreement has
9 already been made a part of the record, and if the parties
10 are required to file the redacted portions, they should be
11 filed under seal, and any viewing of the agreement should be
12 restricted to the Commission and the Staff, except to the
13 extent that Sage and SBC both agree to any additional
14 disclosure.

15 Finally, I'd like to address the third issue,
16 which is the intervention requests. And again, their only
17 requests are in the -- in Case 576, not in Case 584. We
18 believe that the approval of the amendment can be
19 accomplished on the present record. The Commission need not
20 delay this matter further or encourage the involvement of
21 third parties in a private voluntary commercial agreement
22 that was not negotiated under Sections 251 and 252.

23 The terms of the LWC agreement apply only to
24 Sage and SBC and don't implicate any duties, rights, or
25 obligations of other CLECs. The other CLECs are free to

1 negotiate their own commercial agreements with SBC. The 1996
2 Act does not require the filing of voluntarily negotiated
3 agreements such as the LWC agreement. And it certainly
4 doesn't authorize the intervention here.

5 And the Commission has historically not
6 allowed intervention in arbitration cases involving only two
7 parties. The same rationale applies here. Allowing
8 intervention would unnecessarily protract this case and
9 increase Sage's cost, which would unjustifiably strain Sage's
10 limited resources. One of the reasons for entering into a
11 commercial agreement was to save money on litigation in
12 regulatory proceedings across the country.

13 Allowing intervention would also complicate
14 the confidentiality issues. If intervention is permitted and
15 filing required, CLECs should not be permitted to review the
16 proprietary portions of the LWC agreement. As CLEC counsel
17 are often the very same people who negotiate interconnection
18 agreements on behalf of their clients and provide business
19 advice to their clients, and there would be harm -- severe
20 harm would befall Sage if its competitors were able to see
21 what its strategy was and mimic that strategy.

22 And then finally, I did talk about burden of
23 proof in docket 576, I'm sorry, 584. With respect to 576, we
24 believe that the Staff has the burden of proof on its Motion
25 to Consolidate and the interveners have the burden of proof

1 on their Motions to Intervene.

2 Thank you.

3 JUDGE ROBERTS: Commissioner Murray, do you
4 want to inquire at this time?

5 COMMISSIONER MURRAY: Just one question. I
6 just saw something that the FCC has eliminated pick and
7 choose. Is that -- would you comment on that and how did
8 that come about and does that affect your position on filing
9 of the agreement?

10 MR. BRANFMAN: Well, you know, it's my
11 understanding, and I've just gotten word this morning that
12 the FCC did change its position and eliminate pick and
13 choose. The -- there was an NPRM, a Notice of Proposed Rule
14 Making, that triggered an inquiry and the parties in the
15 industry had an opportunity to file comments and is on the
16 basis of that record, the FCC has -- has taken away the right
17 to pick and choose, as I understand it.

18 One of the reasons that the CLECs gave for
19 requiring the agreement, the LWC agreement, to be filed, was
20 that they wanted the right to be able to pick and choose from
21 it. We felt that that was inappropriate because the only
22 things, even when pick and choose was the love of the land,
23 the only things you can pick and choose are things that are
24 enumerated in Section 252(i); which is three things,
25 interconnection, resale, and unbundled network elements.

1 And it seems like the CLECs that wanted to
2 pick and choose were wanting to pick and choose some of the
3 other provisions that don't fall into that category.

4 If there's no pick and choose, they would have to take the
5 whole agreement or none at all. But we don't believe that
6 the LWC agreement would be appropriate for adoption, pick and
7 choose or otherwise, because it's not the kind of agreement
8 that can be adopted.

9 Only an agreement under 252 -- 251 and 252 can
10 be adopted if, for example, SBC enters into an agreement to
11 sell Sage ten of its old trucks, nobody would argue that they
12 then had to enter into an agreement to sell every other CLEC
13 ten trucks, too. And while -- while this isn't quite as
14 obvious a case, the services that are provided in the LWC
15 agreement do go beyond what's required in 251 and 252, and
16 therefore, should not be available for adoption except to the
17 extent that they are provided in the amendment.

18 Because what's available in the -- in the --
19 what the portions of the LWC agreement that relate to 251 and
20 252 are in the amendment, so they're there available for
21 adoption, either subject to pick up and choose or not,
22 depending on -- on what the law is, and I guess as soon as
23 they have FCC's new Order becomes available, pick and choose
24 will be out.

25 COMMISSIONER MURRAY: So adoption would only

1 -- whether it's for the whole agreement or pick and choose
2 would only apply to those things that are required under 251
3 and 252?

4 MR. BRANFMAN: Yes.

5 COMMISSIONER MURRAY: And I am assuming that
6 that would have no effect on your confidentiality concerns
7 either.

8 MR. BRANFMAN: That's right. Our concerns
9 would be the same whether they could be picked and chosen or
10 not.

11 COMMISSIONER MURRAY: Thank you.

12 JUDGE ROBERTS: Commissioner Clayton?

13 COMMISSIONER CLAYTON: I would like to wait.

14 JUDGE ROBERTS: Commissioner Appling.

15 COMMISSIONER APPLING: No questions.

16 JUDGE ROBERTS: Thank you, sir.

17 MR. BRANFMAN: Thank you.

18 JUDGE ROBERTS: Mr. Lane.

19 MR. LANE: Good afternoon. My name is Paul
20 Lane, and I represent Southwestern Bell Telephone, LP, doing
21 business as SBC Missouri. I'll be brief and won't repeat the
22 arguments that Mr. Branfman has made, but I'll try to give a
23 quick summary of our position on the issues.

24 There are two cases in front of the
25 Commission, TO-2004-0584, where you're considering the

1 amendment to the Sage/SBC Missouri interconnection agreement.
2 Second case is TO-2004-0576, a case that the Commission
3 initiated on its own Motion to consider whether the private
4 agreement that Mr. Branfman has characterized appropriately
5 as the LWC, or local wholesale complete agreement, must be
6 filed with and approved by the Commission.

7 I'll start with a summary of what I think is
8 the appropriate action for the Commission to take. With
9 regard to the 2004-0584 case where you're considering the
10 amendment to the interconnection agreement, we think that you
11 should approve that. The agreement is subject to approval
12 under Section 252 of the Act.

13 Unless the Commission were to find that it is
14 either discriminatory or contrary to the public interest,
15 it's deemed approved within 90 days if the Commission takes
16 no action. So from a burden of proof perspective, I would
17 agree with Mr. Branfman that the burden of proof is on those
18 who wish to contend that the agreement is either
19 discriminatory or contrary to the public interest.

20 I don't think any party has demonstrated that,
21 and I think the Commission should approve the agreement or
22 let it go into effect, either way. It will become subject to
23 whatever the rules are with regard to 252(i) in terms of the
24 ability of other carriers to adopt, and the FCC's new pick
25 and choose rules will apply to that and it will be available

1 under those new rules to those carriers that want to opt into
2 a similar arrangement.

3 With regard to the other docket, from our
4 perspective, we think the best result would be for the
5 Commission to find that the local wholesale complete
6 agreement need not be filed with nor subject to approval by
7 the Commission for all the reasons that Mr. Branfman has
8 given to you already and I won't repeat them.

9 In the alternative, if the Commission is not
10 comfortable with taking that position now, we would recommend
11 that the Commission, instead, delay and take no action in
12 that case. You can still allow the amendment to go into
13 effect either by directly approving it or by the passage of
14 90 days from its filing on May 4 without impacting your
15 ultimate decision if you come to the conclusion a month, two
16 months, some period of time in the future that something is
17 in the local wholesale complete agreement requires it to be
18 filed with and approved by the Commission.

19 And you won't have impacted that decision by
20 approving the amendment because there's a specific provision
21 in the amendment that's in Section 6.6 that says that if the
22 local wholesale complete agreement is determined to be
23 inoperative in any state or in this state, then the amendment
24 itself goes away. And so approval of the amendment or
25 allowing the amendment to go into effect without

1 simultaneously making a decision on the local wholesale
2 complete agreement in docket 0576 is an appropriate strategy
3 for the Commission to follow.

4 And if the Commission were ultimately against
5 our views find that it -- that the local wholesale complete
6 agreement need be filed with and approved by the Commission,
7 you're not hampered in that ultimate decision by allowing the
8 amendment to go into effect.

9 Why is it appropriate to let the other one go?
10 The 0576 case, the local wholesale complete agreement? The
11 FCC, after the USTA-II decision made it very clear that it
12 wanted carriers to negotiate private commercial agreements to
13 resolve the regulatory uncertainty that overhung the
14 provision of elements that the D.C. circuit court have found
15 need not be provided under Section 251 of the Act.

16 That agreement, then, was reached between Sage
17 and SBC in the various SBC states where we operate, and we
18 also filed with the Commission, with the FCC, a Petition for
19 declaratory ruling for emergency relief and a standstill
20 order asking that the Commission, FCC, tell the State
21 Commissions that this was an area that they should not be
22 involved in.

23 The FCC hasn't taken action on that, and we
24 think the best position for this Commission to take is to
25 await FCC action, follow their determination when they make

1 it, and if the FCC ultimately finds that such agreements are
2 subject to review, approval by the Commissions, State
3 Commissions, then obviously we would comply and come back and
4 do that. But in the meantime, we would recommend the
5 Commission not take action and instead await the FCC.

6 The reason that this particular agreement need
7 not be filed is that it does not involve items that are
8 within Section 251, and it is only those items that are
9 within Section 251 that need to be filed with and approved by
10 the Commission. Staff cites the Quest case that the FCC
11 issued in 2002 as support for its view that the agreement
12 ought to be filed.

13 We disagree with their analysis of that case,
14 and we'd point out that Paragraph 8, Footnote 26, seems to
15 resolve this, and it says, quote, we therefore disagree with
16 the parties that advocate the filing of all agreements
17 between an incumbent LEC and a requesting carrier. Instead
18 we find that only those agreements that contain an ongoing
19 obligation relating to Section 251(b) or (c) must be filed
20 under Section 252(a)(1).

21 In this case, any elements that relate to
22 251(b) or (c) have been filed with the Commission for
23 approval. That's what's at issue in the amendment to the
24 interconnection agreement. The other terms of the local
25 wholesale complete agreement involve items that are not

1 covered by Section 251, and accordingly, need not be filed
2 with and approved by the Commission.

3 With regard to the contention that Section 271
4 nevertheless requires agreements like this to be filed with
5 the Commission, we would point out a couple of items. First,
6 as Mr. Branfman indicated, both the TRO and the USTA-II
7 decision made clear that there is no obligation to combine
8 unbundled network elements under Section 271.

9 Therefore, this agreement, which covers
10 combination of such -- of items need not be filed with and
11 approved by -- is not covered by Section 271 in the first
12 instance. Even if it were something that were covered by
13 Section 271, however, that's not a matter for this Commission
14 to consider.

15 The only role that this Commission has under
16 Section 271 is a consultative role in the decision whether to
17 recommend to the FCC that we get into the long distance
18 business. That's a role that you've already exercised and
19 the FCC has already granted that approval. And the
20 Commission does not have any ongoing jurisdiction under the
21 Act, under 271, to consider or require the filing or approval
22 of any agreements, even if they were covered by Section 271.

23 I'd also point out that there was one case
24 which this Commission has considered. It is not a hundred
25 percent on point, but I think it is certainly constructive,

1 and that would be your decision in Case No. TM-2002-232.
2 That involved the application by GTE doing business as
3 Verizon in which they sold certain of their assets to
4 CenturyTel of Missouri.

5 In connection with that, Fidelity Telephone
6 sought to intervene in the case because it was concerned
7 about what would happen to its interconnection agreement that
8 it had had with Verizon. They entered into a memorandum of
9 understanding with CenturyTel in that case that provided that
10 the interconnection agreement would continue in force, and
11 that certain changes and how orders would be submitted would
12 be made, and they asked the Commission in that case to
13 approve the memorandum of understanding.

14 In its Report and Order on May 21st of 2002,
15 the Commission addressed the memorandum of understanding
16 between CenturyTel and Fidelity, and the Commission stated
17 that the joint movements did not, in their motion, cite --
18 quote, the joint movements did not, in their motion, cite the
19 Commission to any source of authority that empowers the
20 Commission to approve private agreements, such as the
21 memorandum of understanding. The Commission has reviewed the
22 memorandum of understanding and concludes that approval or
23 other action by the Commission is not necessary, unquote.

24 And I think that's the situation that we're
25 dealing with here. We have a private commercial agreement,

1 one that was recommended by and all parties were encouraged
2 to by the FCC as a result of the USTA-II decision. It's not
3 one that's within the confines for the provisions of Section
4 251, and it's not required to be filed with the Commission,
5 and this Commission has found that similar private agreements
6 need not be filed with or approved by the Commission if they
7 don't have the authority to do so.

8 That's all I have, unless there's any
9 questions I can answer.

10 JUDGE ROBERTS: Commissioner Murray.

11 COMMISSIONER MURRAY: I'd like to ask Mr. Lane
12 with the interconnection agreements that SBC filed or has
13 filed, do they only contain provisions required by Section
14 252 or 251?

15 MR. LANE: You know, Commissioner, I have not
16 reviewed every one of those agreements, and I don't know that
17 I could tell you absolutely a hundred percent that that's
18 correct, but in general, I would say that that is true, yes,
19 that they only deal with those matters that are 251 related.

20 COMMISSIONER MURRAY: Does the FCC's
21 determination that pick and choose will no longer be required
22 or no longer be allowed, however you want to say it, does
23 that affect SBC's position on filing a commercially
24 negotiated agreement?

25 MR. LANE: No, it does not, Commissioner.

1 Obviously, it doesn't affect the amendment issue, which the
2 Commission either has to approve or disapprove. It will
3 affect what happens with those that want to take the
4 amendment, assuming that the Commission approves it or allows
5 it to go into effect.

6 With regard to the local wholesale complete or
7 private commercial agreement, it does not change our position
8 that the Commission doesn't have the authority over those and
9 can't and shouldn't require them to be filed with or approved
10 by the Commission.

11 I will say that, you know, if the Commission
12 -- that one of our concerns is that we don't want the
13 agreement to be subject to a pick and choose relationship
14 that was -- was a 13-state agreement, the SBC ILECs decided
15 that it was acceptable to have something that applied on a
16 13-state basis. There's some provisions that we wouldn't do
17 here or other states that we agreed to do because they were
18 part of an overall larger agreement.

19 So having -- if the pick and choose rules are
20 changed in a manner that we consider favorable, that helps
21 alleviate one of the concerns that we'd have with getting the
22 agreement filed with and approved by the Commission, but it
23 certainly doesn't change the fact that the Commission doesn't
24 have the authority, the jurisdiction in our view, to require
25 the agreement to be filed or to approve the agreement if it

1 is filed. And it certainly, from a policy perspective, it
2 doesn't impact at all the parties concerns about
3 confidentiality.

4 COMMISSIONER MURRAY: Does it impact your
5 concerns about taking away an incentive to enter into
6 commercially negotiated agreements?

7 MR. LANE: Requiring the agreement to be filed
8 with and approved by the Commission?

9 COMMISSIONER MURRAY: Yes.

10 MR. LANE: If that were required, that does
11 significantly impact, if not eliminate, the incentive to
12 enter into the type of agreement that we entered into here.

13 COMMISSIONER MURRAY: Even if pick and choose
14 no longer applied?

15 MR. LANE: Yes, even if pick and choose no
16 longer applied. Again, pick and choose is part of the
17 concern with entering into the agreement like that, and I
18 don't want to mislead you, but it's not the only factor
19 that's out there, and the decision to enter into these
20 private commercial agreements, it is one that, you know, we
21 took into account what Sage was looking to accomplish, and
22 entered into an agreement with them for that.

23 And if those type of agreements were filed --
24 subject to filing and approval by, and I don't know exactly
25 what the new pick and choose will consist of, but if we would

1 be required to -- to perform items that are outside of 251 or
2 any kind of basis that would make it unattractive, then the
3 pick and choose rules wouldn't necessarily alleviate all, and
4 certainly not -- it might eliminate part, but certainly not
5 all, of the concerns that we have.

6 COMMISSIONER MURRAY: And I would assume that
7 part of the reason a company would enter into a privately
8 negotiated agreement, commercially negotiated agreement,
9 would be to address individual concerns of the parties, and
10 that you might -- you might arrive at different negotiated
11 terms for different parties depending on the circumstances.

12 MR. LANE: That's absolutely correct, yes.
13 And that's really what happened here is that Sage had some
14 concerns, issues, plans, that they were very interested in
15 pursuing, and we came to an agreement on that that I think is
16 clearly outside of 251, and it's the type of thing that, from
17 their perspective, they are legitimately concerned with
18 having that filed with and approved by the Commission because
19 they don't want to divulge their plans to their competitors,
20 and we have some plans in there that we believe are
21 confidential as well.

22 COMMISSIONER MURRAY: Thank you.

23 JUDGE ROBERTS: Commissioner Clayton.

24 COMMISSIONER CLAYTON: Good afternoon,
25 Mr. Lane. I just want to ask a couple of questions to make

1 sure that I'm -- that I understand each of these pieces that
2 you've discussed before we move into all the other arguments
3 by the parties.

4 The amendment to the SBC/Sage interconnection
5 agreement is a part of the overall LWC agreement that was
6 negotiated in full. Is that a fair statement or is that an
7 incorrect statement?

8 MR. LANE: I think that's a fair statement.
9 Those portions of the local wholesale complete agreement that
10 deal with Section 251 matters were put into the separate
11 amendment and filed --

12 COMMISSIONER CLAYTON: So basically the
13 amendments to the existing interconnection agreement are part
14 of the overall negotiation that also includes the portions
15 that should not be filed as part of that amendment in the --
16 what you called the LWC agreement?

17 MR. LANE: Yes.

18 COMMISSIONER CLAYTON: Okay. Just so I
19 understand, and I just -- just to let everyone know how
20 dangerous I can be, I've got my copy of the
21 Telecommunications Act here, just I brought in and I'm going
22 to go through these provisions, but could you give me some
23 examples of types of subject matters that would be part of an
24 LWC that sets it apart from the provisions of Section 251?
25 And I'm not asking for specific provisions, but.

1 MR. LANE: Okay.

2 COMMISSIONER CLAYTON: Not specific
3 provisions, but just the type of agreements that would be
4 part of that.

5 MR. LANE: Okay. And I'm not going to get
6 into anything --

7 COMMISSIONER CLAYTON: If that's a problem for
8 confidentiality, then obviously I'm not --

9 MR. LANE: Right, I'll give an example that is
10 in the agreement, and it's in the redacted version that I
11 believe one of the -- or the joint CLEC coalition filed in
12 this case, and that's the discussion of the provision of
13 essentially a UNE-P type replacement on a more customized
14 replacement for Sage, that's not something that's required
15 under Section 251 any longer as a result of the USTA-II
16 decision.

17 COMMISSIONER CLAYTON: Okay.

18 MR. LANE: And I'll give another one that
19 isn't in there, but it would fall in with what Mr. Branfman
20 indicated that had an in the agreement, we'll also sell you
21 some trucks, well, that would be a non-251 item as well.

22 COMMISSIONER CLAYTON: You're sure that
23 wouldn't be part of none-251 discussions?

24 MR. LANE: Maybe I misspoke.

25 COMMISSIONER CLAYTON: You don't have to

1 answer that. And also, with regard to adoption by other
2 entities, it would be your position that the -- that the
3 amendment to the existing interconnection agreement would --
4 that another party could adopt it in full; is that correct?

5 MR. LANE: It is subject to Section 252(i) of
6 the Act.

7 COMMISSIONER CLAYTON: Okay.

8 MR. LANE: Yes, and those -- that's where we
9 get into what the new FCC pick and choose rules, what those
10 may be.

11 COMMISSIONER CLAYTON: I understand.

12 MR. LANE: I don't know what they are, so I'm
13 not sure I can answer your question a hundred percent, but I
14 will say that the amendment and the underlying agreement,
15 certainly in combination, are subject to Section 252(i), and
16 they are the underlying agreement in this case.

17 COMMISSIONER CLAYTON: And then the provision
18 that you suggested relating to trucks would not be -- it
19 would not be adoptable by another company?

20 MR. LANE: Right.

21 COMMISSIONER CLAYTON: Okay. Thank you.

22 JUDGE ROBERTS: Thank you, sir.

23 MR. LANE: Thank you.

24 JUDGE ROBERTS: I believe next we'll hear from
25 Staff. Mr. Haas.

1 MR. HAAS: Good afternoon, my name is William
2 Haas, I'm appearing on behalf of the Staff in this matter.
3 We, the parties, did not have an agreed upon list of issues,
4 so I may be asking different questions or phrase my questions
5 differently than the other parties did, but I've broken my
6 presentation down into several basic questions.

7 The first one is the amendment superseding
8 Section 251 and 252 matters a Section 251 and 252 agreement?
9 The answer is yes. And SBC recognized this fact when it
10 submitted the amendment for Commission review in filing
11 CT-2004-0050.

12 Is the commercial agreement a 251, 252
13 agreement? Staff answers yes. In the Quest case cited in
14 Staff's recommendation, Case No. TO-2004-0576, the FCC held
15 that an agreement that creates an ongoing obligation
16 pertaining to resale, number portability, dialing parity,
17 access to rights of way, reciprocal compensation,
18 interconnection, unbundled network elements for colligation
19 is an interconnection agreement that must be filed pursuant
20 to Section 252(a)(1).

21 As Staff points out in Paragraph 9 of that
22 Pleading, the commercial agreement between Southwestern Bell
23 and Sage creates an ongoing obligation pertaining to resale
24 of such things as basic analog switching, basic analog loops,
25 line information database, and/or calling name database,

1 operation support systems, operator services directory
2 assistance, and alternate billed services.

3 The agreement -- the commercial agreement also
4 creates an ongoing obligation concerning reciprocal
5 compensation and carrier reciprocity, a dispute resolution
6 and escalation processes. It includes a detailed schedule
7 itemized charges for the services and products offered in the
8 agreement, including charges for two-wire analog loops and
9 service orders.

10 The commercial agreement includes provisions
11 addressing the rates, terms, and conditions of processes
12 applicable to the provisioning of what is being deemed a
13 local wholesale complete package offered by SBC 13 state.
14 So yes, the commercial agreement is an interconnection
15 agreement.

16 Are the amendments and the commercial
17 agreement, together, one agreement? Yes. The amendment
18 notes that the commercial agreement is being entered into
19 contemporaneously with the amendment. And the commercial
20 agreement, including, quote, the obligation of each party and
21 its affiliates to support and defend the indivisible nature
22 of this agreement and related ICA amendments, unquote. The
23 amendment that we're talking about here is an interconnection
24 agreement amendment that's referred to in that document.

25 Who should make the decision as to whether

1 these documents are 251 and 252 interconnection agreements?
2 SBC and Sage say trust us, we've included everything that's
3 required by Section 251 and 252. But in the Quest case,
4 which I just mentioned before, the FCC said, quote, based on
5 their statutory role and their experience to date, State
6 Commissions are well positioned to decide on a case-by-case
7 basis whether a particular agreement is required to be filed
8 as an interconnection agreement. And, if so, whether it
9 should be approved or rejected. That's end quote.

10 But what about the FCC press release urging
11 companies to begin commercial negotiations? First off, press
12 release is not a rule, a statute, or an order. Secondly, the
13 press statement reads, in part, the Communications Act
14 emphasizes the role of commercial negotiations as a tool in
15 shaping a competitive communications marketplace. The FCC,
16 in its press release, realized that these commercial
17 agreements would be a part of and come under the
18 Communications Act.

19 But didn't the D.C. Court of Appeals USTA-II
20 decision eliminate the obligation for SBC to provide UNEs?
21 No. The decision invalidated some FCC rules on how to
22 implement unbundling. The decision did not invalidate the
23 statute.

24 Section 251(c)(3) provides, in part, that each
25 incumbent local exchange company has the duty to provide to

1 any requesting telecommunications carrier for the provision
2 of a telecommunication service non-discriminatory access to
3 network elements on an unbundled basis at any technically
4 feasible point on rates, terms, and conditions that are just,
5 reasonable, and non-discriminatory.

6 The question was raised today could the
7 Commission restrict access to the commercial agreement to
8 itself and Staff. No. Section 252(h) provides that the
9 State Commission must copy and make available an agreement
10 for public inspection and copying within ten days after the
11 agreement is approved.

12 At the beginning of the -- today's hearing,
13 the Law Judge asked us who has the burden of proof or address
14 that question. Section 252(e)(1) provides that any
15 interconnection agreement adopted by a negotiation or
16 arbitration shall be submitted for approval to the State
17 Commission. SBC and Sage, as the proponents seeking approval
18 of the amendment, have that burden of proof.

19 So finally, should this amendment be approved?
20 Section 252 provides a two-part test. It says that the
21 Commission may only reject an agreement adopted by a
22 negotiation, and this is an agreement adopted by a
23 negotiation, if it finds that, one, the agreement or a
24 portion, discriminates against a telecommunications carrier
25 not a party to the agreement, or two, the implementation of

1 such an agreement is not consistent with the public interest,
2 convenience, and necessity.

3 The Commission should rejects the amendment.
4 It discriminates against parties who are not parties to the
5 agreement. Other entities may not opt into the amendment.
6 Section 6.6 of the amendment says contemporaneously with this
7 amendment, the parties are entering into a private commercial
8 agreement for local wholesale complete, LWC agreement. Other
9 parties may not opt into the LWC agreement. It -- so
10 therefore, this amendment discriminates against those other
11 parties.

12 As regards the second part of the test, the
13 Commission should also reject the amendment as being against
14 the public interest. The Commission is being asked to
15 approve a document where they are only being shown a part of
16 that document. That cannot be in the public interest.

17 I believe that concludes my remarks. Thank
18 you.

19 JUDGE ROBERTS: Commissioner Murray, do you
20 wish to inquire?

21 COMMISSIONER MURRAY: I don't believe so at
22 this time. Thank you.

23 JUDGE ROBERTS: Commissioner Clayton.

24 COMMISSIONER CLAYTON: The basis of Staff's
25 position with regard to rejection of the amendment in the

1 0584 case is that it is discriminatory because it makes
2 reference to the LWC agreement and that is not available to
3 other parties, correct?

4 MR. HAAS: Yes.

5 COMMISSIONER CLAYTON: Now, if SBC and Sage
6 had actually, instead of entering into one complete contract
7 or one complete agreement, which in this case is part a
8 subject to Section 252 and part is not, according to their
9 position.

10 If they would have entered into two completely
11 unrelated contracts, and then filed the amendment as they did
12 in this case, and there's no reference to another commercial
13 agreement anywhere, would Staff still be in a position to --
14 to seek rejection of that amendment? And if it's not a fair
15 question, you can answer it that way.

16 MR. HAAS: If the amendment simply said
17 there's going to be a \$20 rate, which is one of the items
18 which is in that amendment, and that's all it said, then we
19 probably wouldn't be here today. But it does include the
20 reference to this other document.

21 COMMISSIONER CLAYTON: So I guess -- I guess
22 the way I could have taken a very simple question, what I
23 should have done is just asked if there was the elimination
24 of that reference to the overall LWC agreement, then Staff
25 would have no basis to oppose the amendment, correct?

1 MR. HAAS: I think that's correct, but the
2 other agreement would still be a 251 and 252 agreement.

3 COMMISSIONER CLAYTON: I understand. I
4 understand. I just want to make sure there are no other
5 problems other than that reference to the overall agreement.

6 MR. HAAS: I believe that's it.

7 COMMISSIONER CLAYTON: Okay. I think I'm
8 going to leave it at that for right now. Thank you,
9 Mr. Haas.

10 JUDGE ROBERTS: Thank you, sir. I've had a
11 request for a short break, and I think it seems appropriate
12 for the amount of time we've been on the record. I think ten
13 minutes should be plenty, which by the clock on the wall
14 brings us back at straight up 3 o'clock. We're
15 off-the-record, please.

16 (A BREAK WAS HAD.)

17 JUDGE ROBERTS: Back on the record, please.
18 Thank you, we're back after a brief recess, and it's time, I
19 believe, Mr. Lumley, were you getting ready to come up?
20 Thank you, if you would, please.

21 MR. LUMLEY:. Thank you, Judge.

22 JUDGE ROBERTS: Yes, please proceed.

23 MR. LUMLEY: Carl Lumley for Nuvox and MCI
24 Central. With regard to the burden of proof question, I
25 would point out that the Commission opened the 576 docket

1 with a Show Cause Order that's not been closed, and so I
2 would submit that by that Order, SBC and Sage still have the
3 burden of proof of addressing the issues of that Order, which
4 is is the agreement subject to Section 252.

5 Scientists of various capabilities have
6 speculated from time to time that there might be parallel
7 universes, and I suppose in one of those parallel universes,
8 Vietnam actually was a police action and ketchup may have
9 been a vegetable, and Moises Alou actually caught the foul
10 ball. But even in that parallel universe, it's not a close
11 call.

12 People that work with these agreements on a
13 daily basis like me know them when we see them. SBC and Sage
14 protest way too much, a lot of effort has been wasted. These
15 proceedings would probably be completed one way or the other
16 if they would have simply submitted these documents as they
17 should have from the beginning.

18 The Telecom Act requires that the terms of
19 interconnection unbundling and resale be actual and available
20 and non-discriminatory. We use the short phrase
21 interconnection agreement, but it covers interconnection,
22 unbundling and resale. And the Commission knows from
23 approving a wide variety of agreements that these are the
24 types of subjects covered.

25 252(h) makes it absolutely clear that these

1 agreements must be public documents. Section 252(i) makes it
2 equally clear that these agreements must be available to
3 others. Section 252(e) requires the Commission to reject
4 agreements that are discriminatory or against the public
5 interest.

6 What are the specific subjects of these
7 agreements. If we look to Section 251, Section A talks about
8 interconnection of facilities and equipment, network
9 features, functions, and capabilities. Section B speaks to
10 resale and unreportability, dialing parity, right of way
11 access, and reciprocal compensation. And 251(c), which
12 applies specifically to incumbent LECs, like SBC and even
13 more detail to unbundled elements, resale, the openness of
14 changes to the network, notification exchanges and
15 publication.

16 Specifically with regard to unbundled access
17 to elements, Section 251(c)(3) refers to both individual
18 elements and combinations of those elements. It's in the
19 statute. Use of individual elements in combinations thereof
20 to provide telecommunications services.

21 Network element is defined in Section 13 sub
22 45, facilities or equipment used to provide service including
23 features functions and capabilities like telephone numbers,
24 databases, signaling, and information used for billing and
25 collection, and routing of traffic. Resale, likewise, is

1 developed under 251(c)(4), as the wholesale availability of
2 retail services without restrictions.

3 Agreements regarding these subjects must be
4 submitted to State Commissions for approval under 252(e).
5 They must be public under subsection H, they must be
6 available to others under subsection I. The FCC stressed the
7 importance of these provisions as the key provisions of the
8 Telecom Act and it's in the Quest decision that's been cited
9 by others already.

10 252(a) expressly provides that voluntary
11 agreements made without regard to the requirements of Section
12 251 and 252 still must be submitted. When parties
13 voluntarily negotiate on these subject matters, it is
14 irrelevant whether they are simply complying with the legal
15 requirements or they go beyond them. They still must submit
16 these agreements.

17 In response to a question that Commissioner
18 Murray has already asked today, the M2A has the position that
19 it includes provisions that it did not have to agree to, that
20 it was not required to do, and yet it's part of the agreement
21 submitted for approval. In addition to these federal
22 authorities, the Missouri Statute 392.220.1 authorizes this
23 Commission to look at any contract between carriers regarding
24 the telecommunications facilities anytime it wants to see
25 them.

1 Now, let's dig into the agreement itself.
2 There's no reason to be afraid of it. We rip the covers off
3 of it, we look at it. The recitals say that this is an
4 agreement by which Sage will obtain technology packages,
5 operational support capabilities, and ancillary services from
6 SBC as its preferred network provider in order for Sage to
7 provide local exchange services. Recitals further say that
8 it discusses the operational interactions between these
9 companies on a wholesale basis, and that the agreement is an
10 indivisible whole, as Mr. Haas has already mentioned.

11 We look at Section 1, the introductory
12 section, specifically 1.1. This agreement addresses all the
13 requirements for basic analog switching and loops or the
14 equivalent therefore. Section 1.2 gets into the specifics of
15 what are these technology packages and operational support
16 packages and ancillary services. Well, they call it local
17 wholesale complete, which is dial tone capability using basic
18 switching, cross-connected to basic loops or the equivalent
19 thereof with other network capabilities.

20 What are those? Let's look at Section 4.27
21 and following. Telephone numbers, directory listing,
22 transport, vertical services, SS7, CNAM, LIDB, and that's
23 C-N-A-M and L-I-D-B, 911, 800, and D-U-F, the DUF. Section
24 3.1 incorporates the appendices on 800 database, alternate
25 ABC, operational support systems, OSS, 911, switching, and

1 transport, the DUF, service assurance plan and operator
2 assurances and directory assistance.

3 In other words, this local wholesale complete
4 either is a combination of elements or a wholesale package of
5 retail services includes numbering, databases, signaling,
6 number portability, routing, and information used for billing
7 and collection.

8 In other words, all the subjects of Sections
9 251 that I've already addressed. It doesn't matter what SBC
10 and Sage say at a superficial level. When we dig into the
11 document, it's addressing all of these things. They also
12 agree and say in the agreement in Section 1.3 that these
13 things are provided in lieu of UNE-P and co-mingling with
14 services with tariff services and resale and the 271
15 checklist and third-party sources.

16 They say UNE-P is not required anymore. I
17 submit that that's not true, but it's a debate for another
18 day. It's irrelevant. It's still a combination of network
19 elements to provide telecommunication services. It's basic
20 switching cross-connected to basic loops. It's a voluntary
21 offering without the regards to the standards of 251,
22 according to them.

23 252(a) expressly says it must be submitted.
24 If we look at Section 8.1, it says there's two faces to this
25 agreement. Under phase one, we're going to continue to use

1 existing UNEs and resale. That sounds like an agreement that
2 should be submitted for approval.

3 Phase two, we're going to change the billing
4 codes to this LWC. Reading between the lines, what that
5 means is there is no substantive difference, it's just a
6 billing difference. Furthermore, the conversion process of
7 phase one to phase two, how a CLEC would shift from a UNE-P
8 regime to a new regime for free sounds like something this
9 Commission should approve and determine whether or not it's
10 available to other carriers that might have to make the same
11 transition.

12 Section 16, expressly deals with reciprocal
13 compensation and specifically billing keep in lieu thereof
14 but under those provisions. Section 178.1 establishes the
15 terms, and as Staff Counsel has pointed out, makes it clear
16 that this is an ongoing agreement regarding these matters,
17 thereby fitting what FCC described in the Quest decision as
18 requiring state approval.

19 When we look at the general terms and
20 conditions, if you laid them next to any other
21 interconnection agreement you've approved, you would see it's
22 the same subjects. And as Staff has pointed out, these
23 documents are presented between the parties as an integrated
24 whole.

25 And in Section 53.1, the parties say this is

1 the entire agreement including all reference documents,
2 meaning the amendment that they have voluntarily submitted
3 the agreement that they're amending. It's all one thing.

4 The recital, as I pointed out, says that this
5 is an indivisible whole and the parties agree to defend it
6 that way as Staff Counsel quoted to you. And the ICA that
7 they submitted expressly links itself back to this other
8 document in Section 6.6 as has been discussed already this
9 afternoon.

10 These provisions alone, combined with the
11 process that we're engaged in so far, are contradictory. We
12 have one indivisible and separate agreement, and yet the
13 parties submit that they have two separate processes. The
14 FCC has rejected such partial filings in the Quest case.
15 Even SBC and Sage knew that there was a problem here.

16 When you look at Section 52.2, they say that
17 we're stating our position that this doesn't have to be
18 submitted for approval, however, knowing that people are
19 going to challenge that, and on and on it goes. They knew
20 that this fight was coming when they made it. It wasn't made
21 in good faith, they're just taking their best shot.

22 From our perspective, we're not here today
23 arguing whether the submitted partial agreement is good or
24 bad, because the Commission hasn't even ruled on Staff's
25 motion to open the case yet, which is why we haven't filed to

1 intervene in it yet. But if that is the subject, then as
2 Staff has pointed out, it should be rejected.

3 First of all, you can't approve a part without
4 considering the whole, but secondly, as Counsel for Sage has
5 said, what they're calling a private agreement is expressly
6 not available for adoption by others. By its terms, if they
7 were made to allow another carrier to use the agreement, the
8 agreement terminates. Yet, we see in the filed amendment,
9 the one that they have submitted for approval, in Section
10 6.6, you can't have that agreement if you're not a party to
11 what they're calling the private local wholesale complete.

12 It is discriminatory. No other carrier could
13 adopt this amendment because they can't be party to the
14 inseparable private agreement, which includes secret
15 provisions that other carriers can't even see. All we
16 have is a redacted version. We don't even know what the
17 whole thing says. We couldn't even make a decision whether
18 we wanted to adopt it yet without knowing that.

19 The action before the Commission, as we see
20 it, is to grant Staff's motion to open the case regarding the
21 filed amendment. In the 576 docket, to rule that SBC and
22 Sage have not shown cause and should file what they called
23 their private commercial agreement for local wholesale
24 complete. In any other agreement, and we stress that, the
25 Commission should specify in its Order, if there's any other

1 agreement related to these subjects, that they should be
2 filed so that the Commission can look at them.

3 And if SBC and Sage have some document that
4 they think is questionable and they want to file it in camera
5 first, that's understandable. Before you, this Commission,
6 given these circumstances, should be assured that the entire
7 package of agreements is being presented to it.

8 And then you should start your 90-day clock
9 over, should say we're not bound by 90 days when somebody
10 files part of a document. The 90 days starts when its entire
11 document is presented to us for review. And if you can't do
12 that, you should reject the partial one and start all over
13 that way.

14 The FCC has acknowledged in the Quest decision
15 that it's not in charge of these matters. It is acknowledged
16 that State Commissions are in the best position to review
17 specific agreements and determine whether they should be
18 filed and whether they should be approved. There's no reason
19 to delay and wait for the FCC to consider SBC's filing.

20 As Staff Counsel pointed out, the FCC did, by
21 press release, invite voluntary negotiations and urge them,
22 as does the Telecommunications Act. It said nothing about
23 secret deals that wouldn't be made public and wouldn't be
24 made available to other carriers.

25 If there is any burden of proof on Staff and

1 on CLECs as being lined up with Staff's position, in either
2 of these cases, we submit that on the face of the agreement,
3 we've made our prima facie case, and any burden would shift
4 back to SBC and Sage.

5 They don't have a legitimate right to
6 negotiate away the requirements of Sections 251 and 252.
7 They don't have any right to have discriminatory provision
8 such as the exclusivity clause in Section 18 of the local
9 wholesale complete that says only Sage can have it. They
10 don't have any right to discriminate with regard to the
11 number of lines they're willing to serve as in Section 4.1 or
12 in secret loop architectures that are redacted from the
13 agreement or secret prices that are redacted from the
14 agreement or MFM pricing or free UNE-P conversion or a
15 requirement that the judge in Illinois took issue with, that
16 requires a carrier under this agreement to commit 95 percent
17 of their business to SBC.

18 Further, Sage and SBC have no legitimate of
19 privacy about these matters. The Telecom Act makes it
20 absolutely clear that these are private matters, so all their
21 arguments about whether it hurts them or not miss the point.
22 You have to have a legitimate expectation of privacy before
23 you have the right to argue about such matters. So the
24 Commission should open a case to contract amendment, should
25 require the filing of the other documents to have a complete

1 agreement in front of it, consolidate the cases to deal with
2 these matters as a whole, should grant the interventions they
3 were timely filed.

4 They meet the Commission's rules, it's
5 customary to grant such interventions in these sort of
6 matters that do have impact on others when we're asserting
7 our rights to make sure that our agreements are made public
8 and available to us. It's not an arbitration, has nothing to
9 do with that precedent.

10 And again, one way or another, the Commission
11 should start the 90-day clock over so it has a full and fair
12 opportunity to examine the entire agreement and make its
13 determination as to whether it should be approved or not.
14 Thank you.

15 JUDGE ROBERTS: Commissioner Murray, would you
16 like to inquire?

17 COMMISSIONER MURRAY: Just a couple. Thank
18 you. Mr. Lumley, you stated that the FCC had state -- that
19 State Commissions are in the best position to determine
20 whether the agreement should be filed. That indicates to me
21 that there are agreements that do not have to be filed. Is
22 that your understanding?

23 MR. LUMLEY: I would certainly agree that
24 there can be contracts between telephone companies,
25 telecommunications companies, that don't have anything to do

1 with Sections 251 and 252 and that process, yes.

2 COMMISSIONER MURRAY: And what is it about
3 this commercially negotiated agreement specifically that is
4 required by Section 251 and 252, in your opinion?

5 MR. LUMLEY: Well, again, the subject that I
6 identified, and I can go over them again, if we look at
7 Section 1.2, it describes what this package is and what local
8 wholesale complete is, and it's dial tone capability, using
9 basic switching, cross-connected to basic loops with other
10 network capabilities. And when we go to Section 4 --

11 COMMISSIONER MURRAY: And where does that
12 apply in Section 251 or 252?

13 MR. LUMLEY: These are unbundled elements of
14 the network combined together.

15 COMMISSIONER MURRAY: Okay. And the USTA-II
16 decision that says that the unbundling requirements are no
17 longer effective, how does that apply?

18 MR. LUMLEY: The USTA-II decision vacated FCC
19 rules that it did not impact the statute at all. The statute
20 says that unbundled elements are individual elements and
21 combinations thereof, and goes into more specifics about what
22 an element constitutes. And Section 251(a) specifically says
23 when parties voluntarily address these subjects, even if they
24 go beyond what's absolutely required, it must be submitted.

25 COMMISSIONER MURRAY: So anytime -- your

1 position is any time a carrier offers an unbundled network
2 element, they have to offer it to -- they have to offer the
3 agreement that that is contained in to every other carrier?

4 MR. LUMLEY: Correct. You know, as other
5 Counsel, I'm not familiar with the details of what the FCC is
6 going to do with pick and choose, but certainly the entire
7 agreement must be available.

8 COMMISSIONER MURRAY: And yet if the Court has
9 told the FCC that -- never mind, I've not thought through
10 that question well enough to phrase it.

11 In terms of discrimination against other
12 carriers, would you agree that that -- that prohibition
13 against discrimination applies only to agreements that are
14 required to be filed under Section 251 or 252?

15 MR. LUMLEY: Well, the specific provisions
16 that I'm referring to, which are in 252(e), and would be your
17 standards to whether to approve or reject an agreement, yes,
18 certainly they would. There are other provisions in -- in
19 both federal and state law referring to discrimination that
20 might apply to specific situations, but the concept of
21 non-discrimination that I'm referring to, yes.

22 COMMISSIONER MURRAY: I see. All right.
23 That's all I have right now. Thank you.

24 JUDGE ROBERTS: Commissioner Clayton.

25 COMMISSIONER CLAYTON: Just for clarification

1 on position. It is your position that we should reject the
2 amendment in the 0584 case?

3 MR. LUMLEY: If you're forced to consider it
4 alone, then yes.

5 COMMISSIONER CLAYTON: Okay. And then require
6 the filing of the entire LWC agreement, the entire agreement
7 required to be filed pursuant to Section 251 and 252, and
8 then the Commission approve or reject it, correct?

9 MR. LUMLEY: Correct.

10 COMMISSIONER CLAYTON: And then do you have an
11 opinion whether we should approve offer reject it?

12 MR. LUMLEY: Well, it's hard to make that
13 opinion when I've not been allowed to see the entire
14 agreement.

15 COMMISSIONER CLAYTON: So you haven't seen the
16 entire agreement?

17 MR. LUMLEY: No, there's provisions there that
18 have been redacted, that are not available. I think there
19 are some Commissions or Commission Staff across the country
20 that may have been privy to them. I think your Staff has
21 seen the non-disclosed provisions, but my clients haven't, I
22 haven't, so we're not in a position to evaluate the agreement
23 as a whole.

24 COMMISSIONER CLAYTON: And I apologize, who
25 are you representing here today?

1 MR. LUMLEY: Nuvox Communications of Missouri,
2 and MCI Metro Access.

3 COMMISSIONER CLAYTON: Okay. Have there been
4 any other confidential agreements such as this with any of
5 the other arbox around the country that you're aware of?

6 MR. LUMLEY: Well, there was a bunch of
7 agreements regarding Quest which led up to the FCC's Order
8 and Quest has been fined in a number of states for not filing
9 agreements.

10 COMMISSIONER CLAYTON: Okay. Okay. Thank
11 you.

12 JUDGE ROBERTS: Mr. Lumley, I just wanted to
13 ask, you're confident that the Commission has the authority
14 to reject this under. I think it's 252(e)(4)? I mean, I
15 think it's pretty clear 90 days is 90 days, and in fact, I
16 think the federal court has said so. So that when we hit
17 that deadline, it's either reject it or it goes into effect
18 by operation of law. So it's your position that the
19 Commission must reject it and that it does have the authority
20 to do so under the provision that says, I mean, we would have
21 to find that it's either -- it discriminates against
22 telecommunications carrier or it's not consistent, and you
23 think those conditions exist?

24 MR. LUMLEY: It fails both tests, your Honor.
25 It's discriminatory to others because it's not available to

1 thin else because it expressly requires that the carrier
2 that's party to what they have submitted to you also be party
3 to a private agreement that isn't available to anyone else,
4 so this would not be available to anyone else. It would be
5 the only -- and you would be converting an M2A based
6 agreement by this amendment into a document that's not
7 available to any other carrier would be the only
8 interconnection agreement in this state that would not be
9 available to other carriers, so I think it fails that test.

10 I think it fails the public interest test
11 because you're being asked to approve an admitted part of an
12 indivisible whole.

13 JUDGE ROBERTS: And in fairness, something you
14 just said as an interconnection, I mean, that argument is
15 based upon the agreement that it -- that it is an
16 interconnection agreement, and if -- if that document -- and
17 I know you say it is.

18 MR. LUMLEY: No, but it's not based on that.
19 The submitted amendment in Section 6.6 says that the parties
20 to this amendment are party to the local wholesale complete
21 agreement. No other carrier will qualify for that provision,
22 no other carrier will meet that provision.

23 It then says if there is no such agreement
24 between the parties, the amendment is void. So it's
25 impossible for any other carrier to adopt the isolated

1 amendment that's been submitted to you. And further when you
2 get to the substance of that amendment, it's virtually all of
3 it is a relinquishing of rights under the M2A in return for
4 what you get under the local wholesale complete, so it's not
5 available to anyone else.

6 JUDGE ROBERTS: All right. Thank you.

7 COMMISSIONER MURRAY: I have a couple more.

8 JUDGE ROBERTS: I'm sorry, Commissioner
9 Murray, I apologize.

10 COMMISSIONER MURRAY: Mr. Lumley, in reading
11 Section 252 -- first, let me ask you, is it possible, in your
12 opinion, to receive -- for an incumbent to receive a request
13 for interconnection services for interconnection services or
14 network elements that is not pursuant to Section 251?

15 MR. LUMLEY: No.

16 COMMISSIONER MURRAY: And in terms of other
17 carriers' ability to adopt the amendment, don't -- isn't it
18 true that other carriers have the ability to enter into
19 similar agreements with the ILEC to relinquish certain UNEs
20 and enter into a commercially negotiated agreement as well in
21 exchange for entering into their own agreement?

22 MR. LUMLEY: I would agree that you could
23 hypothesize a situation where another carrier is -- places
24 itself in a similar situation to Sage, but that's not the
25 pertinent question.

1 The pertinent question is is this agreement
2 going to be made public and available to others. And at the
3 end of the day, no one else may want it, but the Telecom Act
4 doesn't allow the parties to the agreement to make that
5 decision. They allow the other carriers to make that
6 decision by looking at it and evaluating it.

7 COMMISSIONER MURRAY: So after the unbundling
8 requirements of Section 251 are gone, what does 252 require?

9 MR. LUMLEY: When you say -- you mean when the
10 statute's repealed? I don't follow your question.

11 COMMISSIONER MURRAY: No, I mean if the
12 carrier -- if the ILEC is no longer required to offer
13 unbundled network elements under 251, what is the remaining
14 requirement of Section 252?

15 MR. LUMLEY: If -- excuse me, I'm -- if I'm
16 following your question, if it sounds like I'm not, please
17 let me know, but if there was a determination by the FCC
18 through its rule making authority that the prevailing
19 circumstances of the day were that it was no longer
20 necessary, there was no impairment of CLECs to have any
21 access to any network element whatsoever, then certainly the
22 ILECs at that point would not be obligated to make them
23 available.

24 COMMISSIONER MURRAY: All right.

25 MR. LUMLEY: Nonetheless, if they chose to go

1 beyond the FCC's rules and make network elements available,
2 the statute would still require that agreement to be
3 submitted. They could say no, we won't discuss it with you,
4 it's not available. But if they voluntarily go down that
5 road, 252(a) says once you address these subjects, even if you
6 go beyond what's required, you must submit it.

7 COMMISSIONER MURRAY: But would that still be
8 pursuant to Section 251?

9 MR. LUMLEY: Yes, because 251 still addresses
10 network elements. That language is not going away unless the
11 statute is repealed.

12 COMMISSIONER MURRAY: Okay. Thank you.

13 JUDGE ROBERTS: Commissioner Clayton? Thank
14 you, sir.

15 MR. LUMLEY: Thank you.

16 JUDGE ROBERTS: Ms. Martin on behalf of AT&T
17 and of Birch.

18 MS. MARTIN: Good afternoon. I'm Cathleen
19 Martin appearing on behalf of AT&T of the Southwest, and
20 Birch Telecom of Missouri. To keep things brief and in light
21 of the inability of the retained counsel, Bill Mangus from
22 Texas for these companies who had wanted to be here, who is
23 out of the country, and also Mark Comley from our office who
24 is unable to be here, I would like to just briefly state on
25 behalf of AT&T and Birch Telecom, that those companies fully

1 support the arguments made on behalf of Nuvox and his other
2 clients by Mr. Lumley.

3 In addition, we have submitted joint comments
4 that are also part of the Commission's record, and we would
5 request, in light of the inability of the experienced counsel
6 that we had proposed and hoped to actually bring before you,
7 that AT&T and Birch be given an opportunity to submit written
8 argument. We would propose that if we would be allowed to
9 even do that by July the 15th, a week from today, that any
10 further response that we might have by those counsel could be
11 made by that time.

12 JUDGE ROBERTS: Any commissioner -- I'm sorry,
13 any questions? Commissioner? We will, at the end of this
14 hearing, establish a procedural for briefs -- procedure for
15 briefs, and I know we're going to expedite the transcript, so
16 we'll address your request at that time. Thank you.

17 Ms. Young, on behalf of Xspedius.

18 MS. YOUNG: Yes, thank you, Judge. My name is
19 Mary Ann Young with the law firm William D. Steinmeier, PC,
20 appearing today as local counsel for the two certificated
21 entities doing business as Xspedius Communications, and I
22 would simply like to concur in the comments of Mr. Lumley
23 today on behalf of Xspedius companies.

24 JUDGE ROBERTS: Thank you. Thank you very
25 much.

1 We've completed the round of arguments.
2 There, obviously, was not unanimity in terms of who or where
3 the burden of proof lies or with whom. I would be willing to
4 offer an extremely brief period of time, I think to either
5 Sage or Southwestern Bell, and also to Staff, if you have any
6 rebuttal comments to sort of clean up before we start any
7 other questioning from the bench. But I would emphasize
8 three minutes. I mean, I don't know if there are any loose
9 ends that you think need to be addressed at this time. I'll
10 go first to Sage.

11 MR. BRANFMAN: Thank you. Both Staff and
12 CLECs argue that under 252(a), even if there weren't any
13 UNEs, a request could be made that would require it be --
14 require it be filed. I respectfully disagree. That would
15 read the words under 251 and 252(a) right out of the statute.

16 252(a) only applies -- and 252 itself only
17 applies where there's a request for UNEs interconnection or
18 resale under 251. And if 251 has been interpreted by the
19 courts as to not provide for UNEs, then it would be
20 impossible to ask for UNEs under 251.

21 251 is not a self-effectuating statute. It
22 requires an impairment analysis be performed before UNEs are
23 UNEs. Nothing is a UNE just because somebody says it is. It
24 has to be found on an impairment analysis by the FCC to
25 qualify as a UNE. And the FCC's impairment analysis

1 regarding switching is reversed by the -- the D.C. circuit in
2 the USTA-II decision, and therefore, at this point, switching
3 is simply not a UNE, and therefore, UNE-P cannot exist.

4 Now, also, there was some discussion about the
5 fact that the Commission, or in particular, the Commissioners
6 as opposed to the Staff, have not seen the redacted portions
7 of the agreement. I believe that we're willing to subject to
8 appropriate protective treatment, perhaps meet one-on-one
9 with the Commissioners to -- to show them the redacted
10 portions so that they could satisfy themselves as to whether
11 or not these portions required filing, and as to -- also as
12 to the need for continued confidential treatment.

13 Also, there was a lot of discussion on the
14 part of both Staff and the CLECs about Section 6.6 in the --
15 in the amendment in saying that, well, because CLECs couldn't
16 have an LWC agreement, they couldn't enter into the
17 amendment. What 6.6 does is it -- is it invalidates the
18 amendment under sections relating to the LWC agreement.
19 If they didn't have an LWC agreement, then they couldn't
20 invalidate the amendment. And therefore, I think it's
21 exalting form over substance to say that -- that the absence
22 of the ability to have an LWC agreement would mean that they
23 couldn't enter into the amendment.

24 And then I think -- I think that's it for now.

25 Thank you.

1 JUDGE ROBERTS: Commissioner Murray.

2 COMMISSIONER MURRAY: Yes, a couple questions,
3 I'm sorry. Under 252(a), upon receiving a request for
4 interconnection services or network elements pursuant to
5 Section 251, what -- are there any network elements that
6 would be a request pursuant to Section 251 if unbundled
7 network elements were no longer required under 251?

8 MR. BRANFMAN: I would say the answer is no.

9 COMMISSIONER MURRAY: And what services are --
10 would be requested pursuant to Section 251?

11 MR. BRANFMAN: Well, for example, resale could
12 be requested pursuant to 251.

13 COMMISSIONER MURRAY: Okay. And
14 interconnection services, would that encompass -- it seems
15 like that's kind of all encompassing.

16 MR. BRANFMAN: Well, I think it's more
17 narrowly interpreted in this context. It would be things
18 like traffic exchange and co-location. Those are two
19 interconnection services within the meaning of that term, as
20 I would interpret it.

21 COMMISSIONER MURRAY: Okay. And give me an
22 example of a request for interconnection that would not be
23 pursuant to Section 251.

24 MR. BRANFMAN: I'm not sure I can think of one
25 at this time, but there might be one.

1 COMMISSIONER MURRAY: How about services,
2 request for services.

3 MR. BRANFMAN: Operator services, for example,
4 have been found not to be encompassed within 251, long
5 distance service would not be within 251.

6 COMMISSIONER MURRAY: And bundled network
7 elements would not be pursuant to 251; is that right?

8 MR. BRANFMAN: Not if the bundle includes
9 switching, as of today.

10 COMMISSIONER MURRAY: All right. Thank you.

11 JUDGE ROBERTS: Commissioner Clayton? Thank
12 you, sir.

13 MR. BRANFMAN: Thank you.

14 JUDGE ROBERTS: Mr. Lane.

15 MR. LANE: Let me cover just a couple of
16 points, if I could. One is the impact of the USTA-II
17 decision. The Staff indicated that that decision didn't
18 invalidate the statute, and of course, that's true, but it
19 invalidated the FCC's rules.

20 And the specific rules have been validated,
21 including the ones that require the provisions of unbundled
22 local switching. Apparently the argument is is that
23 253(c)(3), unbundled access to network elements means that
24 whether the, according to them, whether it's an unbundled
25 network element as prescribed by the FCC network or not, it

1 still has to be submitted to this Commission for approval,
2 and that's clearly not the case.

3 253(c)(3), by its own terms, said that that
4 has to be in accordance with the terms and conditions of the
5 agreements and the requirements of this section and Section
6 252. One of the requirements in Section 251(d)(2) is that
7 before an element can be considered to be a network element
8 that is subject to unbundling, there has to be an impairment
9 finding.

10 And in the case of switching and sheer
11 transport and some of the other items, the FCC rules have
12 found that impairment existed and those had to be provided as
13 unbundled network elements was vacated by the USTA-II court.
14 And so under 251(c)(3), those are not unbundled network
15 elements, an agreement with regard to them does not have to
16 be submitted under Section 252. I think that's abundantly
17 clear.

18 The other argument that we heard is that the
19 amendment is -- should not be approved because it's
20 discriminatory and it's discriminatory because it references
21 the LWC agreement. A reference to another agreement doesn't
22 make it discriminatory, nor does it make it unavailable to
23 another party.

24 Again, another party would certainly be able
25 to opt into the amendment and the underlying agreement under

1 Section 252(i). If another party opts into the amendment and
2 the underlying agreement under 252(i), and this Commission
3 subsequently determines that the local wholesale complete
4 agreement must be filed with and approved by the Commission
5 and they don't approve it, then the terms of the amendment
6 apply equally to Sage and to whoever opts into it, and it
7 provides that the amendment become inoperative at that stage.

8 So it's available to them, and they're treated
9 the same as Sage would be treated under it, if and when this
10 Commission ultimately determines, contrary to our views, that
11 the local wholesale complete agreement does require approval
12 and it isn't approved ultimately by the Commission.

13 Last point is that the list of items that
14 Mr. Lumley referred to in the local wholesale complete
15 agreement is a list of both items that were related to 251
16 and those that are not. Those that were related to 251 are
17 included in the amendment; those that are not related to 251
18 are not included in the amendment. And it's very simple to
19 distinguish between the two.

20 Anything that relates to the unbundled local
21 switching aspects of it and the databases associated with it,
22 the FCC rules which were vacated no longer apply, and those
23 services no longer need to be provided, but we've agreed with
24 Sage to provide those services pursuant to the local
25 wholesale complete agreement. It's not a 251 agreement. It

1 doesn't cover the matters that are 251 related. It doesn't
2 need to be submitted to or approved by the Commission.

3 And I think the entire analysis that they have
4 is based upon the inaccurate statement that something that
5 is, I'll call it, delisted UNE one that the FCC rules have
6 been vacated on, nevertheless is still 251 related and still
7 has to be submitted to and approved by the Commission. That
8 is an inaccurate statement of what the law provides, is an
9 inaccurate representation of what's provided in Section
10 251(c) and 252.

11 And accordingly, I think their argument can be
12 easily rejected and the Commission can easily find one that
13 the amendment can be approved. It's not discriminatory, not
14 contrary to the public interest, and two, the other agreement
15 need not be filed because it does not relate to Section 251.

16 Thank you.

17 JUDGE ROBERTS: Commissioner Murray. Thank
18 you, sir.

19 JUDGE ROBERTS: Staff, would you also like
20 three minutes?

21 MR. HAAS: Yes, thank you. Commissioner
22 Murray had asked for examples of some things that would not
23 be in interconnection agreements, and in the Quest case, the
24 FCC declined to address all possible hypothetical situations,
25 but they did give a couple of examples.

1 They said that they agreed with Quest that
2 those settlement agreements that simply provide for backward
3 looking consideration, that is, the settlement of a dispute
4 in consideration for a cash payment or the cancellation of an
5 unpaid bill need not be filed as an interconnection
6 agreement.

7 The FCC also said that it agreed with Quest
8 that forms completed by carriers to obtain service pursuant
9 to terms and conditions set forth in an interconnection
10 agreement do not constitute either an amendment to that
11 interconnection agreement or a new interconnection agreement
12 that must be filed under Section 252(a)(1).

13 Those are all the comments I had unless there
14 were further questions.

15 COMMISSIONER MURRAY: Would you repeat that
16 last cite from the FCC?

17 MR. HAAS: It's -- it's in the matter of Quest
18 Communications International.

19 COMMISSIONER MURRAY: I'm sorry, I didn't mean
20 the cite, would you just repeat the quotation, please?

21 MR. HAAS: We agree with Quest that forms
22 completed by carriers to obtain service pursuant to terms and
23 conditions set forth in an interconnection agreement do not
24 constitute either an amendment to that interconnection
25 agreement or a new interconnection agreement that must be

1 filed under Section 252(a)(1).

2 COMMISSIONER MURRAY: Thank you.

3 JUDGE ROBERTS: Thank you. Commissioner
4 Murray, any questions for any?

5 COMMISSIONER MURRAY: Give me a minute or two.

6 JUDGE ROBERTS: Commissioner Clayton.

7 COMMISSIONER CLAYTON: All yours.

8 COMMISSIONER MURRAY: I guess I would pose a
9 question to both Sage and SBC. If -- if this Commission took
10 the position that the agreement -- the LWC had to be filed,
11 the impact of that, I think, is at a minimum, and correct me
12 if I'm wrong, would be that any other carrier could opt into
13 the entire commercial agreement as well as the amendment that
14 you filed under the other case number; is that right?

15 And if neither Sage nor SBC wants to respond,
16 I think somebody might.

17 MR. BRANFMAN: Yes, I'll take that one. I
18 would think -- I'm assuming, Commissioner, that you meant not
19 merely that they be filed but also approved.

20 COMMISSIONER MURRAY: Yes.

21 MR. BRANFMAN: Because if it weren't approved,
22 then it couldn't be opted into.

23 COMMISSIONER MURRAY: That's what I meant,
24 thank you.

25 MR. BRANFMAN: But if it were filed and if

1 were approved, then Section 252(i) would apply. Of course,
2 we certainly hope, as I've argued before, that if it is
3 required to be filed, which we think it shouldn't be, that we
4 be permitted to file the redacted portions under seal.

5 COMMISSIONER MURRAY: I understand. I was
6 just asking you from your standpoint, worst case scenario, if
7 it were required to be filed -- the entire agreement were
8 required to be filed and approved, that would leave it
9 subject to opt in by any other carrier, would it not?

10 MR. BRANFMAN: Right, and that's a concern for
11 Sage, because Sage feels that it has invested a lot of time
12 and effort into -- into making an -- entering into an
13 agreement that would give it a first-mover advantage, and
14 others could free ride on it. It would certainly discourage,
15 I think, anyone from trying to -- to do that.

16 And I guess another -- a premise, an
17 underlying premise in your question, is that if the agreement
18 were to be required to be filed and approved, the premise is
19 that the -- that the provisions are under Section 251,
20 because if they're not under 251, they couldn't be required
21 to be filed and approved.

22 But going beyond that, under Section 252(i),
23 the only provisions that may be adopted are those that relate
24 to resale interconnection and UNEs, so if you had an
25 agreement that had some 251 elements and some non-251

1 elements, for example, the example of the trucks that I gave
2 before, I would argue that, yes, you could opt into the 251
3 elements, but you still can't opt into the provision about
4 buying trucks, even if it happens to be lurking in an
5 agreement with which includes 251 elements.

6 COMMISSIONER MURRAY: So the elimination of
7 pick and choose does not mean that agreements can only be
8 adopted in their entirety?

9 MR. BRANFMAN: That would be -- my position
10 would be that you can still only adopt something that is
11 resale interconnection or UNEs, and of course, the associated
12 provisions in the Quest case.

13 For example, one of the issues was the dispute
14 resolution clause. Well, if you're going to buy anything,
15 then you may well want to have a dispute registration clause
16 that relates to disputes over what you're buying. So the
17 dispute resolution clause would go with a UNE or with a
18 resale in case we have a dispute over the UNEs or dispute
19 over the resale, so you would be able to take the dispute
20 resolution clause, the limitation of liability clause, the
21 term clause, and a host of other clauses that are really
22 ancillary, would go with it, but something that is distinct
23 like the trucks would not.

24 COMMISSIONER MURRAY: And have any of the
25 other 13 states required filing and approval?

1 MR. BRANFMAN: The Texas Commission has issued
2 an Order and Sage and SBC have sought and obtained a
3 temporary restraining order against that. The matter is now
4 pending in Federal District Court in Texas.

5 COMMISSIONER MURRAY: And have any of the
6 other 13 states issued an order that it is not -- or a
7 statement that it is not required to be filed and approved?

8 MR. BRANFMAN: Let me consult for a moment, if
9 I might. Not to my knowledge, but SBC's counsel may know. I
10 know there were several states that have given us favorable
11 responses, but I'm not sure that it's gotten to the stage of
12 an approval, for example.

13 COMMISSIONER MURRAY: Thank you. I think
14 Mr. Lane would like to respond.

15 MR. LANE: Well, and I don't know that I have
16 the specific answer to the way you phrased the question, but
17 I will say that there's five states where the local wholesale
18 complete agreement has gone into effect and is operative.
19 And if that was the thrust of your question, the answer is
20 yes.

21 In those five states, I don't know whether or
22 not the State Commission issued an Order to that effect or
23 simply looked at it and recognized it for what it was, a
24 non-251 agreement that didn't need to be filed with or
25 approved by without issuing an Order to that affect.

1 COMMISSIONER MURRAY: So it has not been filed
2 and approved in any state?

3 MR. LANE: No.

4 COMMISSIONER MURRAY: All right.

5 MR. LANE: And if I may on the 252(i), the
6 question that you asked earlier, the specific provision of
7 252(i) is that the local exchange carrier must make available
8 any, quote, interconnection service or network element
9 provided under an agreement approved under this section.

10 And so I think the answer to that is if this
11 were required to be filed with and approved by the
12 Commission, it would heighten the concern about opting in,
13 but the Commission, I think, would still ultimately need to
14 determine whether or not those -- what we say are non-251
15 items are nevertheless interconnection service or network
16 element.

17 If your question was assuming that the
18 Commission had decided that those things were a network
19 element, were a service, were interconnection, then the
20 answer would be yes. But if the Commission required it to be
21 filed without deciding that, then the opting in provision
22 would have to be determined subsequently. I don't know if I
23 made that more or less confusing.

24 COMMISSIONER MURRAY: Or it could argued, I
25 would think, that it was -- any one of -- any part of the

1 agreement was provided under an agreement approved under the
2 section before you did have it filed and approved.

3 MR. LANE: That would be the argument,
4 certainly, that would be advanced, and I'm certain that the
5 others on behalf of CLECs would argue that they could take
6 all aspects of it, but I think it depends on whether the
7 Commission would find that those other aspects are
8 interconnection service or network elements, but it would
9 obviously heighten the concern that we would have, and filing
10 in itself would cause the concern about confidentiality that
11 we've expressed, too.

12 COMMISSIONER MURRAY: Other than
13 confidentiality, I would like SBC and Sage just to briefly
14 summarize, if you could, why it is so important to you that
15 this be treated as a privately negotiated commercial
16 agreement rather than as an agreement that has to be filed
17 and approved by the State Commissions.

18 MR. LANE: Well, Commissioner, we're always
19 concerned about the extent of the Commission's jurisdiction,
20 and if it's a matter that is, in our opinion, beyond the
21 Commission's jurisdiction, then we believe that it is not
22 appropriate to have us file it with the Commission or have it
23 approved by the Commission.

24 The issue can arrive in many contexts later
25 on, we have the opt in issue, obviously, that we've talked

1 about, depending on what the FCC Commission does with pick
2 and choose, and then we have issues about can the -- can the
3 Commission then, in an arbitration proceeding order us to do
4 some things that go far beyond what was included in the Sage
5 agreement on the basis that, well, you did that in Sage, and
6 so we're going to make you go beyond that here.

7 I mean, all of those things become of
8 significant concern to us. And there are provisions in the
9 local wholesale complete agreement that give the parties the
10 right to terminate the agreement in certain circumstances if
11 the Commission requires filing and approval and so forth. So
12 those are matters that would have to be addressed if the
13 Commission issues an order like that.

14 COMMISSIONER MURRAY: And Sage?

15 MR. BRANFMAN: Yes, Commissioner, I guess
16 first of all, confidentiality is primary, and then secondly,
17 we have the issue of innovation and creativity here. Sage
18 has gone out on a limb.

19 It's paying -- agreeing to pay more money to
20 SBC than it has paid under the UNE-P regime in exchange for
21 getting a highly customized agreement that -- that suits the
22 Sage's needs, that has innovative provisions that others
23 don't seem to have thought of yet. If they've thought of it,
24 they haven't executed yet, and Sage doesn't want to lose that
25 first-mover advantage that is the reward for the investment

1 it's made in working out this arrangement and then defending
2 it all around the country.

3 COMMISSIONER MURRAY: Would requirement of
4 filing an approval with the State Commissions chill your
5 desire to enter into these innovative agreements?

6 JUDGE ROBERTS: And before you answer, could
7 you make sure your microphone is on? I'm not sure the sound
8 system is picking it up for the permanent record.

9 MR. BRANFMAN: Right, I'm sorry. Yes, I think
10 it would -- it would chill the interest of both Sage, and as
11 a lawyer that represents great many CLECs, I think other
12 CLECs as well in trying to negotiate something that is
13 customized to their particular needs because other people
14 could be free riders later on.

15 They just sit around and wait and want to be
16 the last one, take a look at what everybody else has entered
17 into, and then just opt into the one that suits them best
18 rather than taking advantage, you know, as -- a lot of CLECs
19 don't have a lot of money and it costs money to go out and
20 creatively negotiate something like this.

21 I can say from a lot of experience negotiating
22 with SBC isn't the easiest thing in the world, and Sage
23 invested in that and got an agreement that it liked, and
24 others have been sitting on their hands, and if they can reap
25 the same rewards and also basically take a look into -- get a

1 free look into SBC's -- to Sage's innovative business
2 planning and be able to mimic it, that really is a
3 disincentive to do that. And I think that disincentive would
4 be equally applicable to any CLEC, because each one would
5 want to wait for the other one to go first and then just hop
6 on board free.

7 COMMISSIONER MURRAY: I believe that's all I
8 have. Thank you.

9 JUDGE ROBERTS: Commissioner Clayton? No
10 further questions from the bench, then I'll ask for -- we'll
11 take a five-minute recess, and then talk about briefing
12 schedule and any other matters. We'll go off the record,
13 please.

14 (A BREAK WAS HAD.)

15 JUDGE ROBERTS: Back on the record, please. I
16 believe that the Commission, as I eluded to previously, we're
17 under some significant scheduling constraints in terms of the
18 90-day deadline, assuming it applies, or if there's going to
19 be a rejection, whatever action has to take place.

20 And for that reason, I believe the Commission
21 is going to try to take this up at its July 15th agenda
22 meeting. For that reason, first of all, I'm going to ask the
23 company to expedite the transcript, and we can do that
24 off-the-record, I think, by Monday.

25 And the order or the -- what the parties will

1 be allowed is one round of briefs. I would prefer, and
2 actually the Judge who's handling this has e-mailed me once
3 or twice during the hearing. I would prefer to have them by
4 the 13th, and I know that's not going to work for AT&T, and
5 that's not much time for anybody.

6 I'm not sure if you all can answer this. Are
7 you able to receive the -- have any of you worked with our
8 court reporters and are you able to receive the transcript
9 electronically. So that if the transcript is ready by -- let
10 me ask this, and I don't know if you can answer on the
11 record. Can the transcript be ready tomorrow?

12 COURT REPORTER: I can try my best to have it
13 to you tomorrow, but definitely by Monday.

14 JUDGE ROBERTS: The best we can do, then, is
15 the transcript should be ready on Monday. And that means I
16 will make the deadline for the briefs Wednesday, July 14th.
17 Now, obviously, if you can get them in earlier, it will be
18 helpful because the Judge is going to be trying to prepare
19 for an agenda discussion the next day. And if you want
20 thoughtful consideration of your brief, the earlier it gets
21 here, the more attention it might get for that particular
22 day. I'm not saying a decision will be made on that day.

23 But in any event, the deadline for the briefs
24 will be Wednesday, July 14th, and there was some question
25 about whether briefs were really needed, so I think the word

1 of the wise is brief means brief. You know, if you want to
2 tie up some loose ends and, you know, consolidate your
3 argument, that's not bad, but we've had Commissioners before,
4 we don't have one now, at least none of them have said this.

5 We've had Commissioners in the past who have
6 said, well, I'll read the first few pages of the brief, so
7 you don't want to lose your reader, but there's some
8 challenging issues here. It's not black and white clear to
9 me who has the burden of proof, and obviously, there were
10 even more complex issues than that. So I understand this is
11 not going to be a two-page brief, but do what you can. Are
12 there any questions?

13 MR. BRANFMAN: Yes.

14 JUDGE ROBERTS: Yes, on behalf of Sage.

15 MR. BRANFMAN: Yes, should we assume that the
16 brief -- everybody in here, I think, has already filed at
17 least one brief. Should we assume that those briefs will be
18 read or?

19 JUDGE ROBERTS: Absolutely.

20 MR. BRANFMAN: And should not repeat what
21 we've already said.

22 JUDGE ROBERTS: I would say that's absolutely
23 -- that's correct.

24 MR. BRANFMAN: Thank you.

25 JUDGE ROBERTS: Any other questions? Motions?

1 Nothing at all? In that case, thank you very much. The case
2 is submitted. We'll go off-the-record.

3 WHEREUPON, the recorded portion of the oral
4 argument was concluded.

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