Attachment 2

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May 4, 2004

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: SBC Communications Inc. Emergency Petition for Declaratory Ruling, Preemption, and for Standstill Order to Preserve the Viability of Commercial Negotiations – Filed May 3, 2004.

Dear Secretary Dortch:

On behalf of Sage Telecom, Inc. ("Sage"), enclosed for filing is an original and four (4) copies of Sage's Memorandum in Support of the above referenced Emergency Petition. Please date-stamp the extra copy of this filing for return to us.

Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned.

Respectfully submitted

Eric J. Branfman
Counsel to Sage Telecom, Inc.

Enclosures

cc: Robert McCausland, Sage

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
SBC Communications Inc.	)	
	)	WC Docket No.
Emergency Petition for Declaratory Ruling, Preemption, and For Standstill Order To Preserve the Viability of Commercial Negotiations	)	

MEMORANDUM OF SAGE TELECOM, INC. IN SUPPORT OF EMERGENCY PETITION OF SBC COMMUNICATIONS, INC. FOR DECLARATORY RULING, PREEMPTION, AND FOR STANDSTILL ORDER TO PRESERVE THE VIABILITY OF COMMERCIAL NEGOTIATIONS.

Sage Telecom, Inc. ("Sage") respectfully submits this memorandum in support of the emergency petition, filed May 3, 2004 by SBC Communications, Inc. ("SBC"), for immediate declaratory ruling. These actions are urgently required in order to prevent the possibility of irreparable harm to Sage, one of the principal providers of competitive telephone services to primarily residential customers in areas of eleven states where SBC is the ILEC. Sage urges the Commission to grant SBC's petition for the following reasons:

1 Until the present, Sage's business has relied solely on the UNE-P model, enhanced with Sage's own back-office, customer care and billing systems, and with certain intelligence-based feature applications which Sage operates on its own platforms that are interconnected with SBC UNE-P services and SS7 signaling. Without UNE-P or a suitable substitute, Sage cannot continue to operate.

In its March 2, 2004 *USTA II* decision, the Court of Appeals for the District of Columbia Circuit vacated, subject to a stay that is now scheduled to expire on June 15, 2004, all the rules

pursuant to which UNE-P is offered.[1] This ruling placed in jeopardy the network platform on which Sage has exclusively relied to serve its customers. Absent a substitute such as that which Sage negotiated with SBC, Sage is at risk of being unable to serve its customers. Likewise, Sage's customers are at risk of losing the competitive alternative that Sage provides.

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

Since the passage of the Telecommunications Act of 1996, it has proven impossible for ILECs and CLECs to agree upon pricing or terms for many of the key unbundled elements defined therein, particularly with respect to UNE-P. This is due in part to the fact that the pertinent wholesale services offered by the ILECs have been subject to "pick and choose" requirements that inherently inhibit significant customization. Sage and SBC ultimately recognized, however, that the parties to a private commercial agreement can negotiate customized terms that could help bridge the price gap between them by providing additional value to Sage with respect to other parts of the agreement. That is exactly what Sage and SBC have done through their commercial agreement.

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

2. As SBC argues, public disclosure of competitively-sensitive aspects of the Sage/SBC agreement, including those that concern arrangements between Sage and SBC that are not required under section 251, would cause competitive harm to Sage.[2] CLECs have different strategies for seeking and achieving commercial success. The disclosure of Sage's competitive strategies to its competitors would undermine the likely success of those strategies.[3] Such unnecessary disclosure of non-251 aspects of the agreement will, in turn, reduce the willingness of Sage and other CLECs to enter into such non-251 agreements. The Commission, having emphatically and unanimously urged CLECs and ILECs to enter into commercial agreements,[4] should not undermine such agreements by permitting that they be required to be disclosed in full detail to competitors.

3. Sage recognizes that it is possible for orders to be issued in an attempt to preserve the confidentiality of competitively-sensitive portions of the agreement. There is, however, an ever-present risk that such orders can be modified or overturned, or that confidential information can be leaked. Thus, the fact that such agreements must be filed, even if under seal, can act as a disincentive to entry into such agreements. While it may be argued that there is no need to require the filing of such portions of the agreements in the first place, it is more important to

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[2] It is noteworthy that the Michigan Public Service Commission has ordered that the Sage/SBC agreement be filed "in its entirety" even though some of the provisions cover facilities not required to be unbundled under *USTA II*. The Sage/SBC agreement also contains provisions that are outside section 251 quite apart from *USTA II*.

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

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

note that the very innovation that commercially-negotiated agreements offer would be stifled if competitors could simply copy rather than create. Clearly, such a situation would not be in the public interest. The Commission should not allow the creation of an atmosphere in which confidential and sensitive commercial information that is not otherwise required to be disclosed must be placed in jeopardy of being made public simply because it happens to reside in a document that contains other information that is required to be made public. The legitimate goal of making public the portions of the Sage/SBC agreement that may fall within section 251 is best achieved by the narrower approach of the filing of an amendment covering the section 251 aspects of the Sage/SBC agreement, as the parties plan to do shortly.

4. A filing requirement for agreements, such as the Sage/SBC agreement, that include both section 251 and non-251 provisions, will create substantial problems regarding the ability of CLECs to "pick-and-choose" provisions pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809. The Sage/SBC agreement was negotiated as a whole, and covers all 13 states in which SBC is an incumbent LEC. There are necessarily trade-offs, such as region-wide pricing, which may benefit Sage in some respects and benefit SBC in others. If the agreement is approved pursuant to section 252 in any one state, then CLECs can be expected to adopt the agreement in that state under section 252(i), without necessarily agreeing, as Sage did, to take the same agreement in another state, where the terms are less advantageous to a CLEC. Alternatively, a CLEC may seek to adopt the non-251 portion of the agreement in a state without adopting the 251 portion, or may endeavor to mix and match non-251 provisions with 251 provisions. Making these agreements subject to state commission approval will induce CLECs to wait for other CLECs to enter into such agreements, and then adopt only the most desirable portions. Understandably, CLECs will not want to be among the first, and success will not be achieved

through commercially-negotiated agreements within the local telecommunications industry the way that it is achieved elsewhere throughout the American economy.

Respectfully Submitted,

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