

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Agreement between)	
SBC Communications, Inc. and Sage)	Case No. TO-2004-0576
Telecom, Inc.)	
)	
In the Matter of an Amendment)	
Superseding Certain 251/252 Matters)	Case No. TO-2004-0584
between Southwestern Bell Telephone,)	
L.P., and Sage Telecom, Inc.)	

**SBC MISSOURI'S APPLICATION FOR REHEARING
AND/OR CLARIFICATION**

SBC Missouri,¹ respectfully requests rehearing of the Missouri Public Service Commission's ("Commission's") July 27, 2004 Order rejecting the Amendment to the interconnection agreement between SBC Communications Inc. and Sage Telecom, Inc. ("Sage Telecom"). Alternatively, SBC Missouri respectfully requests clarification from the Commission on the basis upon which it rejected the Agreement.

Application for Rehearing

In its July 27, 2004 Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention, the Commission found that approval of the Amendment to the existing interconnection agreement between SBC Missouri and Sage Telecom was not in the public interest and therefore rejected it. This decision was unlawful, unjust and unreasonable on the following grounds:

1. In rejecting the Amendment because it found it "clearly related" to the Private Commercial Agreement between SBC Missouri and Sage Telecom, which was not filed with the Commission for approval, the Commission's Order fails to recognize that the provisions of Section 252 of the Act do not apply to all agreements between an ILEC and a CLEC. To the

¹ Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri."

contrary, Section 252(a)(1) pertains only to agreements that result from “a request for interconnection, services, or network elements pursuant to Section 251.” The FCC has expressly endorsed this view in the Qwest decision:

We therefore disagree with the parties that advocate the filing of all agreements between an incumbent LEC and a requesting carrier. Instead, we find that only those agreements that contain an ongoing obligation relating to Sections 251(b) or (c) must be filed under Section 252(a)(1).²

The provisions of the Private Commercial Agreement, however, do not relate to Sections 251(b) or (c). Instead, those provisions relate to the provision of a customized UNE-P replacement service that is based upon analog circuit switching that is no longer required to be provided under Section 252(c) of the Act. That agreement is therefore not subject to Sections 251/252 or the Act and was appropriately not submitted to the Commission for approval.

2. The Commission’s Order fails to recognize that there is no longer a requirement to provide circuit switching as an unbundled network element under Section 251(c)(3) as a result of the vacatur of the FCC’s rules in USTA II.³ Section 251(c)(3) does not require the provision of any network element without qualification. To the contrary, Section 251(c)(3) specifically provides for the duty to provide access to network elements only “in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.” Section 251(d) provides that the FCC may establish the network elements which must be made available for purposes of Section 251(c)(3).

But before a network element must be made available, the FCC must, with regard to non-proprietary elements like circuit switching, make a determination that “the failure to provide access to such network element would impair the ability of the telecommunications carrier

² In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling, U.C. Docket No. 02-89, Memorandum, Opinion and Order, October 4, 2002 (“Qwest decision”), para. 8, fn. 26.

³ United States Telecom Association v. FCC, 359 F. 3d 554 (D.C. Cir. 2004) (“USTA II”).

seeking access to provide the services that it seeks to offer.”⁴ In USTA II, the D.C. Court of Appeals determined that the FCC had failed to properly apply the impairment standard contained in Section 252(d) and vacated the FCC rules which required the provision of unbundled local switching (and certain other elements) as a network element. As a result of the vacatur, there is no valid, binding rule from the FCC which lawfully finds CLECs are impaired without access to unbundled local switching.

Accordingly, there is no requirement to provide unbundled local switching under Section 251(c)(3) of the Act. The Private Commercial Agreement, therefore, does not pertain to items required under Sections 251(b) or (c) of the Act and need not be filed with or approved by the Commission. All of the provisions of the Private Commercial Agreement which pertain to services provided in conjunction with local circuit switching (e.g. 800 Database, LIDB-CNAM, ABS, E911/Emergency Services, etc.) are outside of the ambit of Section 251(c)(3) and thus outside of the requirement for filing under Section 252 of the Act.

3. Both the Oklahoma and Kansas Corporation Commissions approved virtually identical amendments to the interconnection agreements between SBC and Sage Telecom for the states of Oklahoma and Kansas.⁵

In the Oklahoma Order, the Oklahoma Corporation Commission approved the interconnection agreement between SBC and Sage Telecom stating:

The Commission finds that the Agreement is consistent with §§ 251 and 252 of the Federal Act, and OAC 165:55; is consistent with the public interest,

⁴ Section 251(d)(2)(B).

⁵ Application of Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma Seeking Approval of an Amendment to the Interconnection Agreement Between Southwestern Bell and Sage Telecom, Final Order Approving Amendment to Interconnection Agreement, Cause No. PUD 200400194, Order No. 492764, issued July 28, 2004 (“Oklahoma Order”). A copy of the Oklahoma Order is appended as Attachment 1. In the Matter of the Application of Sage Telecom, Inc. for Approval of the K2A Interconnection Agreement Under the Telecommunications Act of 1996 with Southwestern Bell Telephone Company, Docket No. 01-SWBT-1099-IAT, Order, issued August 2, 2004 (“Kansas Order”). A copy of the Kansas Order is appended as Attachment 2. The Michigan Public Service Commission also granted approval, subject to conditions. A copy of the Michigan Commission’s Order, issued August 3, 2004 is appended for reference as Attachment 3.

convenience and necessity; does not discriminate against a telecommunications service provider not a party to the Agreement; and is consistent with the pro-competitive aims of the Federal Act and the Commission's rules governing local exchange competition.⁶

Relying on a review performed by its Staff of both the Amendment and the Private Commercial Agreement, the Kansas Commission found neither the Amendment nor the Private Commercial Agreement to be discriminatory.⁷ The Kansas Commission agreed with its Staff's conclusion that it "cannot state that it would not be in the public interest to approve this agreement in light of the uncertainties regarding ILEC obligations under Section 251 and the FCC encouragement of 'commercial' agreements."⁸ Although it required SBC Kansas to "furnish" the Private Commercial Agreement to the Commission pursuant to a specific state statute that required all contract between carriers pertaining to jurisdictional services to be provided to the Commission, the Kansas Commission deferred making a decision as to whether the Private Commercial Agreement was an interconnection agreement subject to filing and approval under Section 252 of the federal Act. The Kansas Commission indicated that it would revisit these issues once the FCC rules on SBC's Emergency Petition regarding the treatment and classification of non-Section 251 commercial agreements such as the Private Commercial Agreement with Sage.⁹

SBC Missouri respectfully encourages the Commission to approve the Amendment to the interconnection agreement between SBC Missouri and Sage Telecom and to hold any action on the Private Commercial Agreement until the FCC completes its review and renders a decision on the matter.

⁶ Oklahoma Order, p. 2.

⁷ Kansas Order, p. 7.

⁸ Id., p. 8.

⁹ Id., p. 9.


Request for Clarification

In the event the Commission denies SBC Missouri's Application for Rehearing, SBC Missouri respectfully requests the Commission to clarify the basis for its rejection of the interconnection agreement between SBC Missouri and Sage Telecom. Specifically, SBC Missouri requests the Commission to clarify whether in rejecting the Amendment, it was purporting to assert jurisdiction under Section 252(e) over the non-Section 251/252 elements of the Private Commercial Agreement between SBC Missouri and Sage Telecom; or, having found that the Amendment and the Private Commercial Agreement were "clearly related,"¹⁰ it rejected the Amendment because it was unable to confirm that the Private Commercial Agreement contained no Section 251/Section 252 terms or conditions eligible for review under Section 252(e).

WHEREFORE, SBC Missouri respectfully requests the Commission to grant rehearing as outline above. In the alternative, SBC Missouri requests the Commission to clarify the basis for its rejection of the Amendment to the interconnection agreement between SBC Missouri and Sage Telecom.

Respectfully submitted,

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¹⁰ MoPSC July 27, 2004 Order, p. 3.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on August 3, 2004.



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