BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

BRIEF OF SBC MISSOURI

COMES NOW Southwestern Bell Telephone, L.P. d/b/a SBC Missouri ("SBC Missouri") and in response to the Missouri Public Service Commission's ("Commission's") directive issued at the close of Oral Arguments on July 8, 2004, submits the following Brief:

SUMMARY OF POSITION

With regard to Case No. TO-2004-0584, SBC Missouri recommends that the Commission either approve the amendment to the existing SBC/Sage Interconnection Agreement or allow it to be deemed approved 90 days after filing pursuant to the provisions of Section 252 (e)(4) of the federal Telecommunications Act of 1996. With regard to Case No. TO-2004-0576, the Commission should either issue an Order finding that the Private Commercial Agreement between SBC Missouri and Sage Telecom need not be filed or, in the alternative, the Commission should take no action until the FCC has considered the issue of whether such agreements need be filed with the states. No party will be harmed by this course while Sage will be able to continue to compete in the marketplace where its primary focus is on serving residential customers in rural and suburban Missouri.

This approach is entirely consistent with the FCC's unanimous endorsement of private commercial agreements in the aftermath of USTA II.[1] It would assure the continued availability of a customized UNE-P replacement service even after the FCC's rules have been declared unlawful. Private commercial agreements such as the SBC Missouri-Sage Telecom agreement have the opportunity to move this industry beyond the litigation-bound quagmire that has existed for nearly 8 years since the 1996 Telecommunications Act was passed. Encouraging parties to negotiate mutually-beneficial arrangements with the assurance that such agreements will remain private will foster the type of negotiations that work in other competitive markets and will facilitate competition and maximize customer benefits. There is much to lose and little to gain from requiring such agreements to be subject to filing with and approved by the Commission, and such a drastic step should not be undertaken.

The approach recommended by SBC Missouri is also entirely consistent with the proper construction of the 1996 Telecommunications Act. The position of the Staff and the CLEC intervenors rests upon the faulty premise that, despite the USTA II decision, the provision of a customized UNE-P replacement service is nevertheless within the ambit of Section 251(c) of the Act. (T. 43, Staff; T. 65-66, CLEC Intervenors). The claim by Staff and the CLEC intervenors that the USTA II decision is of no effect is absurd on its face. Having lost before the D.C. Circuit Court of Appeals, and having failed to obtain an extension of the stay of the mandate, the CLEC intervenors now claim the USTA II decision changes nothing. That premise is quite clearly wrong. Contrary to the position espoused by Staff and the CLEC intervenors, a network element must be provided only if the FCC first finds, as to non-proprietary elements under Section 251 (d)(2)(B), that CLECs would be impaired in their ability to provide to provide services without such access. The USTA II decision rejected the FCC's impairment analysis and

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

vacated the rules requiring the provision of unbundled circuit switching. Now that the mandate has issued in USTA II, there is no obligation to provide unbundled circuit switching (or the other elements vacated by the USTA II decision). As a result, there is no question that the provisions of the Private Commercial Agreement pertaining to unbundled local switching (and other elements vacated by the USTA II decision) are not required under Section 251. Both the Act (Section 252(a)) and the FCC's interpretation of the Act in the Qwest[2] decision make clear that only agreements relating to Sections 251(b) or (c) need be filed with and subject to approval by state commissions. The Private Commercial Agreement between SBC Missouri and Sage Telecom does not meet this requirement and need not be filed with or subject to approval of the Commission.

INTRODUCTION

1. In Case No. TO-2004-0584, SBC Missouri and Sage Telecom, Inc. ("Sage") submitted an amendment to their Interconnection Agreement ("Amendment") for the Commission's review and approval under Section 252(e) of the federal Telecommunications Act of 1996 ("the Act"). The amendment for which approval is sought relates to those portions of the Private Commercial Agreement for Local Wholesale Complete ("Private Commercial Agreement") entered into by SBC Missouri and Sage which pertain to items enumerated in Sections 251(b) and (c) of the Act. Under Sections 252(e)(2) and (4) of the Act, any such interconnection agreement entered into on a voluntary basis is deemed approved with 90 days after submission by the parties unless the Commission determines that (1) the agreement discriminates against a telecommunications carrier not a party to the agreement or (2) the

[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, footnote 26.

implementation of the agreement is not consistent with the public interest, convenience and necessity.

2. Case No. TO-2004-0576 was initiated by the Commission on May 6, 2004, to consider an investigation into the Private Commercial Agreement between SBC Missouri and Sage. On May 11, 2004, the Commission issued an Order to Show Cause directing SBC Missouri and Sage to explain why the Private Commercial Agreement between those companies should not be filed with, and be subject to approval by, the Commission. As reflected in the Commission's case file, various CLECs ("CLEC intervenors") have asked to intervene in Case No. TO-2004-0576. In addition, the Missouri PSC Staff has filed a Motion to Consolidate Case Nos. TO-2004-0576 and TO-2004-0584.

3. On July 1, 2004, the Commission issued an Order Scheduling Oral Argument in both Case Nos. TO-2004-0584 and TO-2004-0576. At the conclusion of the Oral Argument on July 8, 2004, the Commission directed the parties to submit Briefs to restate their various positions. The Order made clear that any Briefs need not restate all of the arguments previously advanced by the parties in various pleadings which are already included in the Commission's case file. With that directive in mind, SBC Missouri will focus its comments on the matters addressed at the oral argument.

SBC MISSOURI'S RECOMMENDATION TO THE COMMISSION

4. With regard to Case No. TO-2004-0576, SBC Missouri requests the Commission to issue an Order finding that the Private Commercial Agreement between SBC Missouri and Sage is not required to be filed with the Commission for its review and approval pursuant to the provisions of Sections 251 and 252 of the Act. SBC Missouri notes that those items which are subject to Sections 251 and 252 of the Act are contained in the Amendment which has been filed

with the Commission pursuant to the requirements of Section 252(e). The remaining provisions of the Private Commercial Agreement do not involve matters which are subject to Sections 251 and 252 of the Act and, accordingly, need not be filed with or approved by the Commission. In the alternative, SBC Missouri recommends that the Commission take no action with regard to the Private Commercial Agreement, but instead wait until the Federal Communications Commission ("FCC") has considered and determined an Emergency Petition for Declaratory Ruling Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations filed by SBC Communications with the FCC on May 3, 2004 ("SBC Emergency Petition"). Awaiting such action by the FCC is consistent with the FCC's directives to ILECs and CLECs to negotiate commercial agreements, a goal which is not likely to be reached if such agreements are required to be submitted for approval under Sections 251-252 of the Act. If the Commission determines that the Private Commercial Agreement is not subject to filing with and approval by the Commission, the Commission should deny the intervention requests submitted by the various intervenors. If the Commission determines to wait until the FCC has addressed the SBC Emergency Petition, the requests for intervention may also be held in abeyance.

5. With regard to the Amendment to the Interconnection Agreement that is the subject of Case No. TO-2004-0584, the Commission should, pursuant to Section 252(e) of the Act, either issue an Order approving the Amendment or allow the Amendment to be deemed approved with the passage of 90 days from its submission. Contrary to the views expressed by the Staff and the CLEC intervenors, the Amendment is neither discriminatory nor violative of the public interest. With such approval, or deemed approval with the passage of 90 days from submission of the agreement, Staff's Motion to Consolidate should be denied.

THE AMENDMENT SHOULD BE APPROVED

6. Under Section 252(e) of the Act, an amendment to an interconnection agreement becomes effective on approval or, if the Commission does not act, the agreement is deemed approved 90 days after filing, unless the Commission determines that it is discriminatory or contrary to the public interest. With regard to the burden of proof, it is clear that the burden falls on the party seeking rejection, as inaction results in automatic approval 90 days after the agreement is filed.[3] Neither the Staff nor the CLEC intervenors have advanced any legitimate rationale that would justify rejection of the Amendment under the provisions of Sections 252(e) of the Act. The Staff claims that the reference to the Private Commercial Agreement between SBC Missouri and Sage in the Amendment is somehow "discriminatory" and justifies rejection. But the mere reference to another agreement does not make the Amendment "discriminatory" and Staff advances no rationale on why or how a mere reference to another agreement is discriminatory. Staff and the CLEC intervenors carry the argument one step further, however, arguing that the agreement is discriminatory and contrary to the public interest in that other telecommunications carriers may not opt into the amendment because they are not parties to the Private Commercial Agreement. (T. 45, Staff; T. 55, CLEC Intervenors). But that claim is simply wrong. Once the Amendment is approved, or deemed approved by the passage of time, the Amendment and its underlying Interconnection Agreement (the M2A) will be available to other CLECs pursuant to the provisions of the Section 252(i) of the Act. CLECs wishing to opt into the Amendment and the underlying Interconnection Agreement do not need to be parties to the Private Commercial Agreement to exercise their rights they have under Section 252(i) of the Act.

[3] In a response to a question from Commissioner Clayton, Staff conceded that it would have no basis to recommend rejection of the Amendment but for the reference to the Private Commercial Agreement in Section 6.6. Transcript of July 9, 2004 ("T.") Oral Argument, pp. 46-47.

7. The only provision of the Amendment to which the Staff and intervenors object is paragraph 6.6. That paragraph references the Private Commercial Agreement and notes that the Amendment shall immediately become null and void in any state where the Private Commercial Agreement is determined to be inoperative. Paragraph 6.6 then includes provisions ensuring that Sage will have an interconnection agreement available to it in the event the Amendment becomes null and void. Contrary to the CLEC intervenors' claim,[4] Section 6.6 does not require that a CLEC be a party to the Private Commercial Agreement to exercise its rights under Section 251(i). Instead, Section 6.6 makes clear that the Amendment will become null and void if the Private Commercial Agreement becomes inoperative. The reference to the Private Commercial Agreement does not preclude any CLEC from exercising its rights under Section 252(i) of the Act. To the contrary, CLECs are able to exercise those rights and to opt into the Amendment and the underlying interconnection agreement and will be treated under that Amendment the same as Sage. If the Private Commercial Agreement becomes inoperative in Missouri, the Amendment will become null and void for Sage and for any CLEC which has opted into it under Section 252(i). Both Sage and any CLEC opting into the underlying interconnection agreement will have the same options available to it in the event that the Amendment becomes null and void. Accordingly, there is no basis to the claim that the Amendment should not be approved because it is discriminatory or contrary to the public interest.

8. As discussed above, SBC Missouri recommends that the Commission approve the Amendment even if it decides to hold Case No. TO-2004-0576 in abeyance until the FCC has considered the SBC Emergency Petition. SBC Missouri notes that no CLEC will be disadvantaged by approving the Amendment while delaying consideration of whether the Private Commercial Agreement needs to be filed with and subject to approval of the Commission. If,

[4] T. 62-63.

contrary to SBC Missouri's position, this Commission ultimately determines that the Private Commercial Agreement is required to be filed with and approved by the Commission, the provisions of Section 6.6 could take effect. In the event the Private Commercial Agreement becomes inoperative, the Amendment would become null and void and subject to a further amendment that reflects that it became null and void retroactively to the time the Private Commercial Agreement became inoperative. That provision would apply equally to Sage and to any CLEC which exercises its rights under Section 252(i) to opt into the amendment and the underlying interconnection agreement (the M2A). Accordingly, no advantage is given to Sage and no detriment is suffered by any CLEC that would differ in any respect from Sage. Under these circumstances, it is clear that the Amendment can be approved (or deemed approved) even if the Commission determines it should wait to consider whether the Private Commercial Agreement should be filed with and subject to approval by the Commission.

THE PRIVATE COMMERCIAL AGREEMENT IS NOT SUBJECT TO SECTIONS 251-252 OF THE ACT

9. The provisions of Section 252 of the Act do not apply to all agreements between an ILEC and a CLEC. To the contrary, Section 252(a)(1) clearly provides that it is only 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). Id. at para. 8, fn. 26.

The FCC's directive in this regard is clear and unequivocal; an agreement need be filed with and subject to approval by the Commission only if it relates to an ongoing obligation relating to Sections 251(b) or (c). The agreement is not subject to Sections 251/252 or the Act, and it has

not been submitted to the Commission for approval. The burden of proof falls on the party or parties contending the agreement must be filed with the Commission.

10. The Amendment to the interconnection agreement that is the subject Case No. TO-2004-0584 does relate to Section 251 of the Act and is subject to filing with and approval by this Commission. The remaining 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. The position of the Staff and the CLEC intervenors rests upon the faulty premise that, despite the USTA II decision, the provision of a UNE-P substitute is nevertheless within the ambit of Section 251(c) of the Act. (T. 43, Staff; T. 65-66, CLEC Intervenors). The claim by Staff and the CLEC intervenors that the USTA II decision is of no effect is absurd on its face. Having lost before the D.C. Circuit Court of Appeals, and having failed to obtain an extension of the stay of the mandate, the CLEC intervenors now claim the USTA II decision changes nothing. That premise is quite clearly wrong.

11. The position of Staff and the CLEC intervenors is that circuit switching remains an unbundled network element under Section 251(c)(3) despite the vacatur of the FCC's rules on this point in USTA II. Contrary to Staff and the CLEC intervenors' position, however, 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 seeking access to provide the services that it seeks to offer." (Section 251(d)(2)(B)). 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, accordingly, 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.

12. The other arguments advanced by the Staff and CLEC intervenors are equally inapt. At the oral argument, Staff and the CLEC intervenors maintained that the USTA II decision did not invalidate the statute. (T. 43, Staff; T. 59 CLEC Intervenors). While that is of course true, it is also irrelevant. The USTA II decision did invalidate and vacate the FCC rules concerning the provision of unbundled local circuit switching (and other elements) and that decision is binding on this Commission.

13. At the oral argument, the CLEC intervenors maintained that Section 252(h) requires the filing of the Private Commercial Agreement. That is an inaccurate reading of the statute. Filing is required only of those agreements which are approved under Section 252(e).[5] If the agreement is not subject to approval under Section 252(e), it need not be filed. As demonstrated above, the terms of the Private Commercial Agreement relating to unbundled local switching are not subject to approval under Section 252(e). Accordingly, Section 252(h) does not apply to the Private Commercial Agreement.

14. At oral argument, the CLEC intervenors also maintained that Section 252(a) requires items which are negotiated on a voluntary basis to be submitted to the Commission for approval even if they do not involve matters required under Sections 251(b) or (c). (T. 65-66). That contention, of course, is directly contrary to the FCC's decision in Qwest, which made clear that the only agreements which must be filed are those which pertain to ongoing obligations under Sections 251(b) or (c).[6] The CLEC intervenors rely upon the provisions of Section 252(a) which states that an incumbent and a requesting carrier may enter into a binding agreement "without regard to the standards set forth in subsections (b) and (c) of Section 251." The CLEC intervenors misinterpret this provision of the Act. Under their expansive interpretation, any agreement between an ILEC and a CLEC would come within the provisions of Section 252(a), even if the agreement is wholly unrelated to the subjects contained in Section 251(b) or (c). The expansive interpretation of Section 252(a) is simply incorrect. Section 252(a) does not enlarge the items covered by Sections 251(b) and (c) of the Act. Instead, Section 252(a) provides that the parties may negotiate agreements based on standards which are different from the standards for the items covered by subsections (b) and (c). But the list of items covered by Sections 251(b)

[5] "A state commission shall make a copy of each agreement approved under subsection (e). . . ." Section 252(h).
[6] See paragraph 9, supra.

and (c) cannot be enlarged by agreement. Pursuant to Section 252(d)(2)(A), state commissions still have limited review authority over those differing standards and may reject voluntary agreements based on those different standards if they are discriminatory or inconsistent with the public interest, convenience and necessity. That authority to reject agreements, however, extends only to voluntarily negotiated agreements regarding the matters covered by subsections (b) and (c) -- i.e. resale, number portability, dialing parity, access to right-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation. (See 47 U.S.C. Section 251(b)-(c)). The Commission's review authority under Section 252 has no application to an agreement regarding capabilities, services and products not covered by Section 251 at all.

15. The interpretation proposed by the CLEC intervenors would lead to absurd results. Under this analysis, any agreement between SBC Missouri and Sage would be subject to Commission approval, even one having nothing to do with telecommunications or information services. Under the CLECs' analysis, the Commission would have authority to reject any agreement regarding, for example, the sale of trucks no longer utilized by SBC Missouri in its provision of telecommunications services. The absurdity of that position is readily apparent.

16. The CLEC Intervenors next contend that the Private Commercial Agreement is subject to filing with and approval by the Commission under Section 271 of the Act. Contrary to this claim, Section 271 of the Act does not provide the Commission with the authority to require filing approval of the Private Commercial Agreement. In the first place, Section 271 imposes no obligation on an ILEC to provide combinations of unbundled network elements as is provided in the Private Commercial Agreement. Section 271 does not, accordingly, encompass any obligation to provide the UNE-P, which is a combination that constitutes the entire platform of services needed to provide basic telephone service. In USTA II, the D.C. Circuit Court upheld

the FCC's determination that the unbundling obligations in Section 271 "didn't include a duty to combine network elements." (359 F. 3d at 589). UNE-P, and its replacement in the Private Commercial Agreement, are combinations of network elements and, as such, are not covered by the Section 271 obligations.

17. Even if the provision of combined network elements was covered by Section 271, this Commission has no authority to enforce Section 271. Instead, the Act provides the Commission with only a consultative role with regard to whether SBC Missouri should be allowed into the long distance market in the first instance, a role which the Commission exercised years ago. (Section 271(2)(B)). The Act does not give the Commission any continuing authority over Section 271 obligations, nor does it impose any type of filing or approval requirements before state commissions.

18. In summary, none of the arguments advanced by the Staff or the CLEC intervenors support the claim that the Private Commercial Agreement is subject to filing with and approval by this Commission. Accordingly, the Commission should either issue an Order finding that the Private Commercial Agreement is not subject to its review and approval under Section 252 of the Act, or take no action in this case pending the FCC's consideration of the SBC Emergency Petition.

19. The Private Commercial Agreement is entirely consistent with the FCC's unanimous endorsement of Private Commercial Agreements in the aftermath of USTA II. It would assure the continued availability of a customized UNE-P replacement arrangement even after the FCC's rules have been declared unlawful. In the face of substantial regulatory uncertainty, both SBC Missouri and Sage have reached an agreement that meets these business needs and ensures the continued availability of local service from a CLEC that is focused on

serving residential customers primarily in rural and suburban areas of the state. It also contains unique provisions sought by Sage that reveal highly confidential information from which its competitors could deduce and duplicate its competitive strategies and business plans. There is much to lose and little to gain from requiring such agreements to be subject to filing with and approved by the Commission, and such a drastic step should not be undertaken.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission (1) approve the amendment to the interconnection agreement (or allow it to go into effect by operation of law), (2) either issue an Order stating that the Private Commercial Agreement is not subject to filing with or approval by the Commission under Section 252 of the Act or delay taking any action until after the FCC has considered the SBC Emergency Petition, (3) deny Staff's Motion to Consolidate Case No. TO-2004-0584 and TO-2004-0576 and (4) deny the CLECs application to intervene in Case No. TO-2004-0576 or in the event the Commission determines to wait until the FCC has considered the SBC Emergency Petition, to hold a ruling on whether to grant the intervention until after the FCC acts.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI

BY _____

PAUL G. LANE #27011
LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
MIMI B. MACDONALD #37606
Attorneys for SBC Missouri
One SBC Center, Room 3520
St. Louis, Missouri 63101
314-235-4300 (Telephone)/314-247-0014 (Facsimile)
pl6594@momail.sbc.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on July 13, 2004.

Paul G. Lane

GENERAL COUNSEL
DANA K. JOYCE
MISSOURI PUBLIC SERVICE COMMISSION
PO BOX 360
JEFFERSON CITY, MO 65102

PUBLIC COUNSEL
MICHAEL F. DANDINO
OFFICE OF THE PUBLIC COUNSEL
PO BOX 7800
JEFFERSON CITY, MO 65102

CHARLES BRENT STEWART
STEWART & KEEVIL, L.L.C.
4603 JOHN GARRY DRIVE, SUITE 11
COLUMBIA, MO 65203

ERIC J. BRANFMAN
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K STREET, N.W., SUITE 300
WASHINGTON, DC 20007

WILLIAM D. STEINMEIER
MARY ANN (GARR) YOUNG
WILLIAM D. STEINMEIER, P.C.
P.O. BOX 104595
JEFFERSON CITY, MO 65110

MARK W. COMLEY
NEWMAN, COMLEY & RUTH P.C.
601 MONROE STREET, SUITE 301
PO BOX 537
JEFFERSON CITY, MO 65102

REBECCA B. DECOOK
AT&T COMMUNICATIONS OF THE SOUTHWESTS, INC.
1875 LAWRENCE STREET, SUITE 1575
DENVER, CO 80202

ROSE M. MULVANY
BIRCH TELECOM OF MISSOURI, INC.
2020 BALTIMORE AVE.
KANSAS CITY, MO 64108

CARL J. LUMLEY
LELAND B. CURTIS
CURTIS OETTING HEINZ GARRETT & SOULE, P.C.
130 S. BEMISTON, SUITE 200
ST. LOUIS, MO 63105

STEPHEN F. MORRIS
MCI TELECOMMUNICATIONS CORP.
701 BRAZOS, SUITE 600
AUSTIN, TX 78701

CAROL KEITH
NUVOX COMMUNICATIONS
16090 SWINGLEY RIDGE ROAD, SUITE 500
CHESTERFIELD, MO 63017