

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
 Robert E. Krehbiel
 Michael C. Moffet

In the Matter of the Application of Sage)
Telecom, Inc. for Approval of the K2A) Docket No. 01-SWBT-1099-IAT
Interconnection Agreement Under the)
Telecommunications Act of 1996 with)
Southwestern Bell Telephone Company.)

ORDER

NOW COMES the above matter for consideration and determination by the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records and being duly advised in the premises, the Commission finds and concludes as follows:

Preliminary

1. On May 4, 2004, Southwestern Bell Telephone, L.P. (SWBT) filed an application requesting the Commission approve a modification to SWBT's interconnection agreement with Sage Telecom, Inc. (Sage). SWBT notes the modification "supercedes [sic], amends and modifies applicable 251/252 provisions currently contained in the Agreement." The modification addresses unbundled network elements (UNEs), reciprocal compensation, and intervening law or changes of law.

2. At section 6.6 of the modification, the parties note that they are "entering into a Private Commercial Agreement for Local Wholesale Complete" (LWC Agreement).

3. On July 26, 2004, Commission staff (Staff) submitted a memorandum to the Commission recommending the Commission approve the May 4, 2004 modification (May 4 modification) filed by SWBT. Staff made several other recommendations, all of which the Commission will address in detail later in this order.

Background

4. As noted by Staff in its July 26 memorandum, media reports in April 2004 indicated that SBC and Sage had negotiated an agreement that would enable Sage to continue to pursue its business plan during a time of uncertainty about the availability of certain UNEs at total long run incremental cost (TELRIC) pricing. Staff indicates that, in response to those reports, Staff met with SWBT to discuss the new agreement. At that meeting, Staff informed SWBT that the new agreement must be filed with the Commission pursuant to K.S.A. 66-1,190 and that it may need to be filed pursuant to Section 252 of the Act. As a follow-up to that meeting, Mr. Don Low, the Commission's Director of Utilities, sent a letter to SWBT reiterating Staff's position and concerns regarding the need for filing and approval of the new agreement between SWBT and Sage.

5. Mr. Low also noted Staff was aware SWBT had declined to file the new agreement with the California Public Utilities Commission because SWBT believed the new agreement was a "commercial arrangement" of the kind encouraged by the FCC and was not an interconnection agreement under Section 252 of the Act.

6. SWBT provided a response to Mr. Low on May 5, 2004. SWBT acknowledged that certain portions of the agreement pertain to Sections 251 and 252 of the Act and, as a result, require filing and approval by the Commission. SWBT indicated, however, that "non-251 arrangements" are not required by the Act to be filed and that the "commercial agreement" contains the parties' confidential business plans; further, the new agreement itself requires the parties to use their best efforts to maintain confidentiality of the terms of the agreement. SWBT attached to the letter a copy of its May 3, 2004 Emergency Petition filed with the FCC in which SWBT asked the FCC to determine that non-251 arrangements are not subject to the state

approval process under Section 252 of the Act, to preempt any conflicting state requirement, and to issue a “standstill” order enjoining enforcement of any such requirement. SWBT also indicated its belief that K.S.A. 66-1,190 applies to only “retail jurisdictional services,” and, as such, did not believe it obligated SWBT to provide the new agreement to the Commission pursuant to Kansas law.

7. On May 13, 2004, AT&T Communications of the Southwest, Inc., Birch Telecom of Kansas, Inc., Brooks Fiber Communications of Missouri, Inc., KMC Telecom, MCImetro Access Transmission Services, LLC, Nuvox Communications of Kansas, Inc., TCG Kansas City, Inc., The Pager Company, and Xspedius Communications, LLC (collectively, the CLEC Coalition) filed a petition requesting the Commission require SWBT and Sage file, “in their entirety, the agreements recently entered into between [SWBT] and Sage.” The CLEC Coalition argued that the agreement between SWBT and Sage constituted an interconnection agreement and, as such, should be filed with and approved by state commissions pursuant to section 252 of the Act.

8. On May 18, 2004, the Citizens’ Utility Ratepayer Board (CURB) filed a Petition to Intervene in this docket. The Commission granted the CURB and CLEC Coalition Petitions to Intervene on July 27, 2004.

9. On May 28, 2004, SWBT filed its response to the petition of the CLEC Coalition, after having requested, and received, an extension of time to file its response. The Order granting SWBT’s request for extension of time also indicated the Commission would consider the CLEC Petition as a Petition to Intervene in this docket and requested SWBT comment on the petitions to intervene. SWBT’s response requested the Commission not act until its FCC Petition had been ruled upon. SWBT also asserted the new agreement is not subject to Section

252 filing requirements, K.S.A. 66-1,190 does not apply to this agreement, “good public policy should encourage private agreements,” and intervention by the CLEC Coalition and the Citizens’ Utility Ratepayer Board (CURB) are not “warranted.” SWBT stated in its response, at paragraph 25, “[t]o adequately protect the confidentiality of the contract, the Commission staff can perform a review of the document if it is furnished to the staff at SBC’s place of business. The parties will make the contract available whenever staff wishes to view it, and as often as staff may request such viewing.”

10. Also on May 28, 2004, Sage filed its response to the petition of the CLEC Coalition. Sage also urged the Commission to await the FCC’s ruling on SWBT’s FCC Petition, asserted that “confidentiality issues militate against requiring the filing of the entire agreement,” and requested the Commission deny the petition of the CLEC Coalition for “cost reasons.” Sage asserted significant “pick and choose” problems would be created if the agreement were filed.

11. Staff filed a reply on June 7, 2004. Staff noted since it had not been able to review the LWC Agreement it could not adequately address whether the LWC Agreement needed to be filed pursuant to Section 252. Staff’s position, however, was that the LWC Agreement must, without a doubt, be furnished to Staff and the Commission pursuant to K.S.A. 66-1,190 and noted that SWBT routinely submits billing and collection agreements to the Commission for review and approval pursuant to K.S.A. 66-1,190.

12. Staff’s memorandum indicates SWBT and Sage have now provided Staff an unredacted copy of the LWC agreement. SWBT and Sage noted they were not furnishing, and did not intend to “furnish” the agreement pursuant to any requirements under state or federal law. Staff met several times with SWBT and Sage, both together and separately, to discuss details of the May 4 modification and the LWC Agreement, including the portions claimed confidential by

SWBT and Sage. Staff also discussed with SWBT its intent regarding whether the services encompassed by the LWC Agreement would be available or offered to other competitive local exchange carriers (CLECs).

Applicable Federal law

13. Section 252 of the Act governs procedures for negotiation, arbitration, and approval of interconnection agreements. Section 252(e) states:

(1) Approval required. - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. - The State commission may only reject -

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that -

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

14. Further, Section 252(i) provides that a “local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.”

15. Previously, the FCC had determined that this provision required an incumbent local exchange carrier (ILEC) such as SWBT to allow a CLEC to “pick and choose” among the various provisions of an interconnection agreement and adopt only those provisions the CLEC wanted from an agreement. The FCC’s “pick and choose” rules did not require the CLEC to adopt an entire agreement. However, on July 13, 2004, the FCC released its *Second Report and*

Order in CC Docket No. 01-338, FCC 04-164, in which the FCC revised its “pick and choose” rules to determine a new approach it deemed the “all or nothing” rule in which a CLEC must take all provisions of an interconnection agreement; not just the ones most favorable to it.

Staff’s Memorandum

16. Staff’s memorandum contains an excellent synopsis of the May 4 modification and the Commission does not believe it necessary to repeat it here. Staff indicates the first issue the Commission must determine is whether the entire, unredacted LWC Agreement must be reviewed in order for the Commission to determine whether the May 4 modification should be approved, as requested. Staff believes both the May 4 modification and the LWC Agreement must be reviewed as a complete package because the agreements are inextricably intertwined. As Staff notes, it is clear Sage would not have agreed to the May 4, 2004 modification to the existing interconnection agreement without concurrently entering into the LWC Agreement. Staff advises the Commission to await FCC action on SWBT’s petition to the FCC requesting guidance on whether the LWC Agreement is an interconnection agreement that must be filed and approved.

17. Staff’s memorandum continues with a lengthy and comprehensive discussion of the LWC Agreement, discussing confidential and redacted portions of the LWC Agreement in general terms. Staff notes Section 1.2 of the LWC Agreement describes the LWC product as:

technology packages, operational support capabilities, and certain ancillary services comprising dial tone capabilities, and Basic Analog Switching (as defined herein) cross-connected to a Basic Analog Loop (as defined herein), in conjunction with other network capabilities, provided by SBC-13STATE. Both the Basic Analog Switching and Basic Analog Loop are integral and mandatory parts of LWC . . .

The LWC Agreement contains several definitions and two provisions that have been designated by SWBT and Sage as confidential; portions of the definitions for Basic Analog Switching and

Basic Analog Loop are so designated; references to these two provisions in other portions of the LWC Agreement are also designated confidential.

18. Staff states it is initially concerned with SWBT's claims the LWC Agreement is not subject to approval pursuant to Section 252(i) coupled with designation of entire portions of the LWC Agreement as confidential. Staff further suggests that, with respect to the LWC Agreement, it will be difficult for the industry to monitor for discriminatory agreements when the terms and conditions of an agreement have been designated "confidential." Staff hopes that its general summation of the LWC Agreement will sufficiently enable other CLECs to determine whether SWBT is acting in a discriminatory manner with respect to those provisions and thus be able to file a complaint or arbitration request. Staff has further reviewed both agreements with an eye towards detecting onerous terms in the agreements, such terms being designed to prevent other CLECs from taking an otherwise desirable interconnection agreement. Staff has not identified any terms in the May 4 modification or the LWC Agreement that have no reasonable relationship to furthering Sage's business plan or that could be construed as onerous.

19. Staff further notes the LWC Agreement is a seven year agreement and informs the Commission that the FCC's July 13, 2004 *Second Report and Order* finds volume and term discounts to be appropriate under its new "all or nothing" rule. Staff states that there is nothing inherently discriminatory about term and/or volume discounts and does not find anything discriminatory with the specific terms of the LWC Agreement.

20. The Commission, consistent with Staff's recommendation, finds that neither the May 4 modification nor the LWC Agreement is discriminatory.

21. Pursuant to Section 252(e)(2)(ii) of the Act, a State commission may reject an interconnection agreement if it determines that approval of the agreement is not in the public

interest. The Commission notes Staff “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.” The Commission agrees and cannot find that the May 4 modification and the LWC Agreement are not in the public interest, consistent with Staff’s recommendation.

Should the LWC Agreement be filed pursuant to K.S.A. 66-1,190?

22. Mr. Low’s April 28, 2004 letter to SWBT indicated Staff believed the LWC Agreement must be filed pursuant to K.S.A. 66-1,190; the CLEC Coalition argues the same in its May 13, 2004 Petition, independent of any claim that the LWC Agreement is not subject to Sections 251/252 of the Act. SWBT argues, however, that due to amendments in the statute in the mid-1990s, K.S.A. 66-1,190 does not apply to agreements such as the LWC Agreement. SWBT states K.S.A. 66-1,190 only applies to jurisdictional services and that the LWC Agreement is “not for ‘services’ jurisdictional to the Commission.” SWBT then goes on to argue that, even assuming the LWC Agreement is covered by K.S.A. 66-1,190, it is only required to be “furnished” to the Commission - not “filed.” Staff suggests that the Commission require SWBT to file an unredacted copy of the LWC Agreement, to be kept confidential, and a public, redacted copy.

23. Staff suggests the Commission wait for the FCC to rule on SWBT’s Emergency Petition before the Commission determines whether the LWC Agreement must be approved pursuant to K.S.A. 66-1,190 or filed and approved subject to Section 252 of the Act. If the FCC determines that the LWC Agreement must be filed and approved pursuant to the Act, then it can be treated as an interconnection agreement at that time. If the FCC determines that the LWC

Agreement is not subject to the Act, then the Commission may revisit the issue of whether approval of the LWC Agreement is required under Kansas law.

24. The Commission finds Staff's recommendations to be well taken and generally adopts them. The Commission orders SWBT and Sage to furnish the LWC Agreement in both a redacted form and in its complete, unredacted and confidential form. The Commission recognizes that the parties have requested protections of confidentiality of what they deem to be competitively sensitive portions of the LWC Agreement. The Commission will, at this time, respect those claims of confidentiality; the redacted form will be publicly available - the unredacted LWC Agreement will not. See K.S.A. 66-1220a.

25. The Commission further finds that the May 4 modification to the interconnection agreement between SWBT and Sage shall be approved; the Commission cannot make any findings that the modification is either discriminatory or contrary to the public interest.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. SWBT's May 4, 2004 application for modification to the interconnection agreement between it and Sage is approved. The LWC Agreement must be furnished to the Commission in a redacted and a confidential version. The Commission will wait until the FCC rules on SWBT's Emergency Petition before it determines whether it must approve the LWC Agreement.

B. The parties have fifteen days, plus three days if service is by mail, from the date the order was served in which to petition the Commission for reconsideration of any issues decided herein. K.S.A. 66-118; K.S.A. 2003 Supp. 77-529(a)(1).

C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order as it may deem necessary.

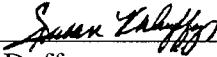
BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated: AUG 02 2004

ORDER MAILED

AUG 02 2004



Susan K. Duffy
Executive Director

CRH