

**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.)

**SBC MISSOURI'S RESPONSE TO
STAFF RECOMMENDATION**

SBC Missouri¹ strongly disagrees with Staff's May 26, 2004 Recommendation that the Sage²/SBC Missouri Commercial Agreement should be submitted to the Commission for review as an interconnection agreement under Sections 251 and 252 of the federal Telecommunications Act of 1996 ("the Act")

Staff's Recommendation is contrary to the plain language of the Act and the Federal Communications Commission's ("FCC's") national policy of encouraging the negotiation of private commercial agreements in the wake of the Triennial Review Order's reversal. The filing requirement recommended by Staff would unquestionably chill the negotiation of further such agreements. At a minimum, the Commission should await a decision by, and defer to, the FCC, which is currently considering this very issue.

**NO BASIS EXISTS FOR REQUIRING FILING OF THE
SAGE/SBC MISSOURI PRIVATE COMMERCIAL AGREEMENT
AS AN INTERCONNECTION AGREEMENT**

1. Only Section 251 Terms Must be Filed and SBC Missouri Has Done So. Staff bases its Recommendation on the appearance of some Section 251 terms and conditions in the Commercial Agreement and its view that the Commercial Agreement and the Amendment to the

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

² Sage Telecom, Inc. will be referred to in this pleading as "Sage."

existing Sage/SBC Missouri Interconnection Agreement³ are so “interdependent and intertwined” that they “constitute a single interconnection agreement subject to review under sections 251 and 252 of the Telecommunications Act of 1996.”⁴

Contrary to Staff’s analysis, the fact that the Commercial Agreement contains certain Section 251 terms and references to the Amendment does not require these two agreements to be treated as a single interconnection agreement under Sections 251 and 252 of the Act. Staff’s superficial analysis simply ignores what is actually being provided to Sage and how the contractual documents were structured to achieve the objective of reaching a private commercial resolution.

As SBC Missouri explained in its Response to Order to Show Cause, SBC-affiliated ILECs will provide Sage with a range of wholesale products and services for a period of seven years under the Sage/SBC Commercial Agreement. Certain of those products and services relate to the implementation of Section 251 obligations, including provisions addressing Section 251(b)(5) reciprocal compensation and provisions setting forth the price, terms and conditions of the provision of unbundled loops which the FCC has mandated pursuant to Section 251(c)(3). The parties recognized that matters pertaining to Sections 251-252 are within the Commission’s purview. Accordingly, Sage and SBC Missouri filed these terms as an Amendment with the Commission for approval on May 4, 2004.⁵

The other arrangements between the parties, however, including provisions establishing a replacement for the UNE-P, were not negotiated under the auspices of Section 251, nor did they purport to implement any ongoing Section 251 obligation (the “Local Wholesale Complete

³ On May 4, 2004, SBC Missouri filed an Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Sections 251 and 252 of the Telecommunications Act of 1996. A copy of this Amendment was appended to SBC Missouri’s May 17, 2004 Response to Order to Show Cause as Attachment 1.

⁴ Staff’s Recommendation, pp. 1, 5.

⁵ See, SBC Missouri’s Response to Show Cause, p. 3.

Agreement”). As this aspect of Sage and SBC Missouri’s agreement was outside the purview of Sections 251 and 252, there is no requirement that it be submitted to the state commission for review and approval.

2. Section 252(a)(1) Filing Requirements Have Not Been Triggered. Under Section 252(a)(1), an agreement between an ILEC and a CLEC must be submitted to a state commission for approval only to the extent it pertains to “a request for interconnection, services, or network elements pursuant to Section 251.” While Staff cited this statutory section and provided a partial quote, it omitted this operative language. A full reading of this section makes clear that Congress intended to tie the scope of Section 251’s filing requirements to a request for services or facilities that must be provided under Section 251.

Here, the statutory filing requirement was not triggered because the SBC-Sage Local Wholesale Complete Agreement does not involve “interconnection, services or network elements pursuant to Section 251.” The Local Wholesale Complete arrangements, which include provision of UNE-P functionality, as well as other matters, do not relate to Section 251 obligations because, once USTA II is effective, unbundled local switching and UNE-P are not required by that Section. Rather, these arrangements establish a business-to-business relationship on certain matters outside of Sections 251 and 252. Thus, even under the standards outlined in the Qwest decision Staff cites, there is no requirement to file the Sage/SBC Missouri private commercial agreement.

3. The Commission Should Encourage Private Commercial Agreements Consistent With FCC Policy. In recommending that the Commercial Agreement be filed, Staff completely dismisses the FCC’s policy of encouraging the negotiation of private commercial agreements,

claiming that the “FCC’s call for carriers to enter into commercial negotiations . . . does not take agreement made as a result of those negotiations outside the purview of the . . . Act.”⁶

Staff’s view is over-simplistic. In accordance with the FCC’s directives, Sage and SBC Missouri worked diligently toward and successfully completed a private commercial agreement that comprehensively resolved the issues between them to enable the continued provisions of wholesale services. In order to achieve this resolution, a series of tradeoffs and concessions were made by both parties that relate to matters both in and outside the purview of Sections 251-252. And tradeoffs were made not only among different provisions, but among provisions affecting different states as well. As with any private commercial arrangement, terms that may not have been acceptable in isolation were deemed acceptable because of such trade-offs and concessions made in other parts of the agreement.

Negotiation of such commercially negotiated agreements, which are tailored to the business needs of the parties, would unquestionably be chilled by an automatic requirement to file them under Sections 251-252 of the Act. The possibility that a State commission may insist that a commercial arrangement be changed as a precondition to approval under Section 252 would adversely impact the parties since they could not be confident that the many tradeoffs made in the negotiation process would ultimately be preserved. Even if the commercial arrangement was ultimately approved without any change, contentious proceedings may well precede such approval, thereby creating regulatory uncertainty and regulatory costs. And the parties’ incentive to negotiate would be further chilled by the possibility that a requirement to file the entire commercial agreement would lead other parties to claim that the non-section 252(b) and (c) obligations are now subject to a “pick and choose” arrangement under Section 252(i).

⁶ Staff’s Recommendation, p. 9.

THE COMMISSION SHOULD DEFER TO THE FCC’S RESOLUTION OF THESE ISSUES

In keeping with current FCC policy, the Commission should endorse and foster the negotiation of private commercial wholesale agreements by refraining from asserting jurisdiction over the non-sections 251-252 terms of such agreements. At a minimum, the Commission should await decision by, and defer to, the FCC on this issue. As SBC Missouri indicated in its May 17, 2004 Response to Order to Show Cause, this very issue is squarely before the FCC now.

On May 3, 2004, SBC filed an Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations (“SBC Emergency Petition”) with the FCC because possible state commission efforts to assert jurisdiction over non-Section 251 arrangements threaten to derail the private commercial negotiation process which the FCC has strongly and unanimously urged. In its Petition, SBC, which has been joined by Sage,⁷ has asked the FCC to:

- First, issue an immediate declaratory ruling that an agreement or portion thereof that does not purport to implement any of the requirements of Section 251 is not subject to the requirements of Section 252, including the filing requirements of Section 252(e)(1) and the provisions of Section 252(i);
- Second, preempt the states from requiring the filing and approval of non-251 agreements under the auspices of state law; and
- Third, issue a standstill order enjoining the enforcement of any other state filing requirement for non-251 arrangements pending a final decision on the Emergency Petition.

⁷ Sage filed a Memorandum In Support of Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations with the FCC on May 4, 2004. In its Memorandum, Sage urges the FCC to grant the Petition filed by SBC stating that “[t]hese actions are urgently required in order to prevent the possibility of irreparable harm to Sage.” Sage Memorandum, p. 2. (A copy of Sage’s Memorandum was appended to SBC Missouri’s May 17, 2004 Response to Order to Show Cause as Attachment 2).

Before taking any action that would likely chill negotiation of additional private commercial agreements, the Commission should await and defer to the FCC's ruling on SBC's Emergency Petition.

CONCLUSION

The agreement between Sage and SBC Missouri is subject to filing and approval by the Commission only to the extent it involves obligations covered by Sections 251(b) or (c) of the Act. Sage and SBC Missouri have complied with this obligation by filing the amendment pertaining to Sections 251(b) or (c) with the Commission for approval. Those matters outside of the Sections 251(b) and (c) obligations, however, are not required to be filed with the Commission for approval, nor would such a requirement be sound public policy even if it were permissible from a legal perspective. Accordingly, SBC Missouri respectfully requests the Commission not to require the filing of the Sage/SBC Missouri Local Wholesale Complete arrangements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail or first-class, postage prepaid U.S. Mail on June 7, 2004.



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