BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

NUVOX COMMUNICATIONS OF MISSOURI, INC., ET AL.,	)	
V.	)	Case No. TC-2004-0600
SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC MISSOURI.	)	

RESPONSE OF SBC MISSOURI TO COMPLAINT
AND REQUEST FOR IMMEDIATE ORDERS

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") hereby responds to the Complaint and Request for Immediate Orders of the Joint CLECs[1] seeking an order requiring SBC Missouri to continue providing access to UNEs affected by the D.C. Circuit's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), following the issuance of the mandate in that decision on June 16, 2004.

The request for immediate orders should be denied and the complaint dismissed. Contrary to the Joint CLECs' groundless assertions, SBC Missouri never stated that, in the wake of the D.C. Circuit's mandate, it would take unilateral action in disregard of its existing, effective interconnection agreements. On the contrary, the SBC ILECs have made clear that, upon issuance of the mandate, they would continue to adhere to its existing, effective interconnection agreements, including applicable change of law provisions, and that is exactly what they have done to date.[2] Moreover, the SBC ILECs issued an Accessible Letter – applicable in each of the

[1] The Complaint and Request for Immediate Orders was filed by NuVox Communications of Missouri, Inc., Victory Communications, Inc., Socket Telecom, LLC, MCImetro Access Transmission Services, LLC, The Pager Company, Birch Telecom of Missouri, Inc., Xspedius Communications, LLC, TCG St. Louis, Inc., TCG Kansas City, Inc., and AT&T Communications of the Southwest, Inc. ("Joint CLECs").

[2] The SBC ILECs' commitment to adhere to their existing, effective interconnection agreements, including any applicable change of law provisions, should not be construed as a waiver of any rights they may have under the D.C. Circuit's ruling. Indeed, SBC has consistently reserved its rights to seek any relief that might be available under any legal rulings, including but not limited to *USTA II*, and including any rights SBC may have arising from the federal courts' determination that the FCC's unbundling rules were never lawful.

13 states in which services as an ILEC are provided, including Missouri -- indicating that, at least through the end of the year, they will not unilaterally increase rates for mass-market UNE-P or DS1 or DS3 loops or transport between SBC offices. And, in several instances, in response to these commitments, CLECs have attempted to *withdraw* requests for orders similar to what the Joint CLECs seek here, on the express grounds that SBC's statements eliminated the basis for their claim. In fact, on June 14, 2004, after the Missouri Public Service Commission ("Commission") determined that SBC Missouri need not respond to the complaint on an expedited basis, the Joint CLECs filed a Withdrawal of Motion for Expedited Treatment. In light of the CLECs' own actions – which make clear that even they understand that the SBC ILECs intend to take no precipitous action now that the D.C. Circuit's mandate has issued – it is impossible to understand why these same parties are wasting resources with a filing that claims what they know to be untrue.

The fact is that SBC Missouri is committed to an orderly process for implementing any changes resulting from the *USTA II* mandate. In addition, the FCC has made clear that, now that the mandate has issued, it expects to issue new rules expeditiously.[3] Particularly in light of SBC's Missouri's express commitments to ensure stability in the market, the Commission should refrain from taking any action that could potentially interfere with its own and the parties' ability to implement these forthcoming rules.

I. The Complaint and Request Identifies No Controversy That Requires the Commission's Intervention.

The Complaint and Request seeks "immediate orders" to relieve the Joint CLECs from what they breathlessly describe as "SBC's unlawful, abusive and anticompetitive threats to

[3] Mark Wigfield, *FCC's Powell to Begin Work 'Immediately' on Phone Rules*, Dow Jones News Service (June 10, 2004); *see also* Margaret Boles, *Powell Aims for FCC To Draft New Unbundling Rules By Year-End*, TR Daily (June 10, 2004).

terminate UNE services" in the wake of the *USTA II* mandate. Compl. ¶ 1. Yet when it comes time to substantiate these hyperbolic assertions, the Joint CLECs are utterly silent.

That should come as no surprise. Since the D.C. Circuit released its *USTA II* decision on March 2, 2004, the SBC ILECs have made clear in every conceivable forum that they would not take unilateral, "self-help" action upon issuance of the mandate.[4] Indeed, as the Joint CLECs concede, on May 25, 2004, in response to a CLEC complaint akin to the complaint at issue here, SBC Michigan explained to the Michigan PSC that, in the wake of the *USTA II* mandate, "it w[ould] adhere to the applicable provisions, including change-of-law provisions, of its existing, effective interconnection agreements."[5] Subsequently, in response to a motion for a stay of the mandate brought by all CLECs that were parties to the *USTA II* case, SBC again explained to the D.C. Circuit that after the mandate issued, it would "abide by the terms of its existing, effective interconnection agreements including any applicable change of law provisions in those agreements."[6] A week later, in response to the decision by the U.S. Solicitor General not to seek review of the *USTA II* decision, SBC issued a press release stating that, upon issuance of the mandate, its "wholesale services w[ould] continue as before without disruption."[7] SBC further committed that the issuance of the *USTA II* mandate would result in "no unilateral increase" in the prices that apply to mass-market UNE-P and DS1 and DS3 loops and transport between SBC

[4] The complaint wrongly asserts that *USTA II* leaves intact the FCC's rules with respect to high-capacity loops. Compl. ¶ 14 n.6. In fact, the Court vacated "those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired," 359 F.3d at 568, a statement that encompasses high-capacity loops. *See Triennial Review Order* ¶¶ 328-342. Moreover, the FCC's analysis of high-capacity loops was virtually identical to its analysis of transport, and the Court included within its discussion of high-capacity facilities "transmission facilities dedicated to a single customer," which is how the FCC defines a "loop," *see* 359 F.3d at 573; 47 C.F.R. § 51.319(a). Finally, the two substantive flaws the Court identified with respect to the FCC's analysis of high-capacity facilities – considering impairment on a route-specific basis and the failure to consider the availability of special access, *see* 359 F.3d at 575, 577 – apply equally to the FCC's determinations as to both loops and transport. *See Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

[5] SBC Michigan's Response In Opposition to Complainants' Request for Emergency Relief Order at 2, Case No. U-14139 (Mich. PSC filed May 25, 2004).

[6] *See* Declaration of Glen Sirles, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C. Cir. filed June 1, 2004) (Attachment A hereto).

[7] *See* SBC Press Release, *SBC Applauds Solicitor General's "No Appeal" Decision; SBC Pledges to Hold the Line on Wholesale Prices for 2004* (June 9, 2004) (Attachment B hereto).

offices at least through the end of 2004.[8] SBC then sent an open letter to FCC Chairman Michael Powell once again confirming that it "will continue providing to our wholesale customers the mass-market UNE-P, loops and high-capacity transport between SBC offices and will not unilaterally increase the applicable state-approved prices for these facilities at least through the end of this year."[9] Finally, the SBC ILECs reiterated this commitment to rate stability in an accessible letter issued June 10, 2004.[10] These commitments -- each of which was made publicly, and each of which the Joint CLECs were or should have been aware of -- squarely refute the notion that SBC Missouri will attempt to avail itself of some unilateral, "self-help" remedy now that the *USTA II* mandate has issued.

For their part, the Joint CLECs identify no evidence, or even make any concrete allegation, to the contrary. That in itself is dispositive. "No justiciable controversy exists and no justiciable question is presented unless an actual controversy exists between persons whose interests are adverse in fact." *County Court of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo. 1983) (en banc). Joint CLECs have alleged neither the existence of an "actual controversy" nor that its interests are "adverse in fact" from SBC Missouri. Moreover, Joint CLECs fail to "present a state of facts from which [they have] present legal rights against" SBC Missouri. *Id.* Nor will the mere possibility of such facts or legal rights suffice: "Ripeness does not exist when the question rests solely on a probability that an event will occur." *Local 781 Int'l Ass'n of Fire Fighters v. City of Independence*, 947 S.W.2d 456, 460 (Mo. Ct. App. 1997).

In fact, numerous CLECs have conceded that the SBC ILECs' commitment to an orderly process in the wake of the *USTA II* mandate moot the claim of injury asserted by Joint CLECs

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[8] *Id*.
[9] *See* Letter from SBC Chairman and CEO Edward C. Whitacre to FCC Chairman Michael K. Powell (June 9, 2004) (Attachment C hereto).
[10] *See* Accessible Letter CLECALL04-095, *SBC Announces UNE-P Rate Stability Through the End of 2004* (June 10, 2004) (Attachment D hereto).

here. SBC ILECs have faced similar complaints in other states. In response to SBC's representations, the CLECs sought to *withdraw* their requests for immediate relief in three states, including this one. Any conceivable grounds for relief, the CLECs have explained, "dissipated" once SBC explained that it would take no precipitous action following issuance of the *USTA II* mandate.[11] The same is true of the Joint CLECs' complaint. The request for immediate orders should be denied and the complaint dismissed.

II. The Question of What SBC Missouri's Interconnection Agreements Require in the Wake of *USTA II* Is Not Properly Before the Commission

The Joint CLECs appear to recognize that the M2A by its terms authorizes SBC Missouri to re-price network elements covered by the agreement if the FCC (or this Commission) decides that such elements need not be unbundled pursuant to section 251(c)(3) of the 1996 Act. At the same time, however, the Joint CLECs take great pains to assert that, after *USTA II*, SBC Missouri remains obligated under the M2A to provide access to the UNEs affected by *USTA II*, at least until the FCC (or this Commission) affirmatively makes such a determination. Compl. ¶¶ 33-34. This claim too is plainly unripe.

According to the Joint CLECs, SBC has asserted that the M2A gives *SBC Missouri* (rather than the FCC) the unilateral right to determine what is (and is not) a UNE. But a careful reading of the Complaint reveals the utter absence of any actual allegation that SBC Missouri has made such an assertion. Indeed, the Complaint says nothing *at all* about what SBC Missouri has said as to its agreements in Missouri. Instead, it asserts that SBC Texas has supposedly taken this position in Texas. That plainly will not do. Because the Joint CLECs have identified no evidence

[11] *See* Motion to Withdraw, Without Prejudice, the Request for Emergency Relief, Case No. U-14139 (Mich. PSC filed June 1, 2004) (Attachment E hereto); *see also* Notice of Voluntary Withdrawal of Complaint and Petition, Docket No. 04-0419 (Ill. Commerce Comm'n June 10, 2004); Withdrawal of Motion for Expedited Treatment, *NuVox Communications of Missouri, Inc. v. SWBT*, Case No. TC-2004-0600 (Mo. PSC filed June 14, 2004).

-- or even made a bona fide allegation -- that SBC Missouri interprets the M2A to eliminate unbundling solely on the basis of *USTA II*, it should be dismissed.[12]

III. The Relief Requested Exceeds the Commission's Jurisdiction

Apart from being wholly unnecessary, the relief sought by the Joint CLECs is beyond this Commission's authority. Joint CLECs seek a Commission Order "to preserve the status quo by precluding SBC from discontinuing or re-pricing UNE services. . . ."[13] And even though they have withdrawn their Motion for Expedited Treatment, Joint CLECs continue to request that the Commission "direct SBC not to take any steps to alter or terminate the provision of any unbundled network element services to Joint CLECs (including a directive to continue processing of any new or change orders in due course), or to change prices for such elements."[14]

This Commission, however, has no authority to grant the injunctive relief Joint CLECs seek. The interconnection agreements under which the UNEs at issue are currently being provided were negotiated pursuant to and approved under the 1996 Act. Nothing in the Act empowers the Commission with injunctive authority.

Apparently recognizing the absence of a federal basis for their complaint, Joint CLECs assert that "harm to life" is "imminent," and they point to Missouri Revised Statutes Section 386.310, claiming this statute "authorizes the Commission to take such action without notice or hearing, given the facts presented herein."[15] But Section 386.310 provides no basis for the Joint

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[12] Although the import of the point is not entirely clear, the Joint CLECs contend in passing that this Commission has the authority to order unbundling under the 1996 Act. *See* Compl. ¶ 46. That is incorrect. For present purposes, however, the more important point is that this assertion is irrelevant. As noted at the outset, the SBC ILECs have made numerous and repeated commitments to ensure certainty and stability in the wake of the *USTA II* mandate, and, for its part, the FCC has pledged to move quickly to promulgate new rules. The question of SBC's unbundling obligations in the absence of FCC rules (if any) is therefore not properly before the Commission.

[13] Compl. ¶¶ 2, 57; *see also id.* ¶ 18 (requesting the Commission preserve the status quo "by ordering SBC to take no action to cease providing any UNE or to change the price of any network element now available under the M2A"); *id.* at 30 (paragraph (2)) (praying for order "directing SBC not to take any steps to alter or terminate the provision of any unbundled network element services to Joint CLECs . . . or to change the prices for such elements").

[14] Joint CLECs' Withdrawal of Motion for Expedited Treatment, filed June 14, 2004, p. 4.

[15] Compl. ¶¶ 2, 47.

CLECs' complaint. Section 386.310 is merely a safety statute. It gives the Commission the power:

> to require every person, corporation, municipal gas system and public utility to *maintain and operate its line, plant, system, equipment, apparatus and premises in such manner as to promote and safeguard the health and safety* of its employees, customers and the public, and to prescribe, among other things, the installation, use, maintenance and operation of *appropriate safety and other devices* or appliances, to establish uniform or other standards or equipment, and to require the *performance of any other act which the health or safety of its employees, customers or the public may demand*, including the power to minimize retail distribution electric line duplication for the sole purpose of providing for the safety of employees and the general public in those cases when, upon complaint, the Commission finds that a proposed retail distribution electric line cannot be constructed in compliance with commission safety rules.[16]

Even if this statute could be stretched to authorize the Commission to grant the injunctive relief sought, no health or safety issues exist here that would come close to triggering relief. The Joint CLECs' complaint contains no allegation that service to customers is going to be discontinued or disrupted, and their astonishing suggestion that loss of life is imminent (*see* Compl. ¶ 2) is wholly conclusory. The Joint CLECs' concern is a matter of pricing (*e.g.*, "imminent loss of access to UNE-P and high-capacity loop and transport UNEs *at TELRIC rates*").[17] Such concerns, even assuming them to be substantiated, are insufficient on their face to support the extraordinary relief requested.

The Commission is a creature of statute and can only exercise powers expressly conferred upon it.[18] Here, nothing in federal or state law authorizes the Commission to grant injunctive relief directing an incumbent LEC to continue providing particular UNEs at particular rates where the FCC rules requiring the provision of such UNEs have been vacated. Indeed, courts have uniformly held that the Commission does not have the authority to do equity or grant equitable relief:

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[16] Mo. Rev. Stat. § 386.310 (emphasis added).
[17] Compl. ¶ 18 (emphasis added).
[18] *Utilities Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979) (en banc).

> [The Commission] may not perform the judicial function. It has no power to determine damages, award pecuniary relief, declare or enforce any principle of law or equity.[19]

Most recently, the Missouri Court of Appeals affirmed a Commission determination that even though it had authority to set rates, it could not "direct" an electric utility to "recalculate its rates for electrical service already rendered, or to be rendered" because "to do so would constitute a form of equitable relief."[20] And the Commission on many previous occasions has declined on a jurisdictional basis to entertain injunctive relief.[21] That same result is warranted here. Because no jurisdictional basis exists for the injunctive relief Joint CLECs seek, their request should be denied.

ANSWER AND MOTION TO DISMISS

Except to the extent otherwise expressly stated in this pleading, SBC Missouri denies each and every allegation set forth in the Complaint and Request and demands strict proof of each allegation. Further, for the reasons set forth above, the request for immediate orders should be denied and the complaint dismissed.

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[19] *Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. Ct. App. 1980) (holding PSC has no power to determine interests of persons claiming proceeds from sale of utility); *Wilshire Const. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971) (prohibiting PSC from requiring an accounting or rendering a judgment for a rate overcharge); *May Dep't Stores v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937) (denying PSC the power to enforce, construe or annul a contract).

[20] *GS Tech. v. Pub. Serv. Comm'n.*, 116 S.W.3d 680, 696 (Mo. Ct. App. 2003) (affirming the Commission's conclusion that it could not "direct KCPL to recalculate its charges to GST for electric service").

[21] *Ozark Border Electric Cooperative*, 1996 MoPSC LEXIS 19 at *7 ("Ozark requests the Commission to order the City to remove facilities -- in essence, a mandatory injunction -- which is beyond this agency's jurisdiction"); *Kroeck Construction Co. v. West Elm Place Corp.*, 1983 MoPSC LEXIS 35 at *2 (August 22, 1983) (finding no jurisdiction to direct building commissioner to issue a building permit and no authority to grant injunctive or ex parte relief); *Kansas City Public Service Company v. Overland Interstate Bus Corp.*, 17 MoPSC 87, 88 (July 27, 1928) (denying authority to issue an order restraining or prohibiting anyone operating as a motor carrier).

CONCLUSION

The request for immediate orders should be denied and the complaint dismissed.

Respectfully submitted,

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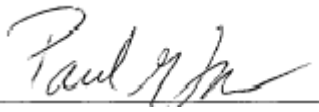
BY: 

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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 on July 9, 2004.

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