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

REPLY COMMENTS OF SAGE TELECOM, INC.

INTRODUCTION

In anticipation of the oral argument in this proceeding scheduled for July 8, 2004, Sage Telecom Inc. ("Sage") respectfully submits these Reply Comments in response to the May 20, 2004 Comments of the CLEC Coalition[1] supporting Missouri Public Service Commission ("Commission") review and approval of the LWC Agreement[2] between Sage and SBC Communications, Inc.[3] ("SBC") and the Staff of the Commission's Recommendation of May 26, 2004.

Sage believes that there are two critical questions facing the Commission in this proceeding. The first of these questions is whether, given the effectiveness of the decision of the Court of Appeals for the District of Columbia in *USTA II*,[4] an agreement for the supply of a commercial substitute for the UNE-P product that the law no longer requires SBC to provide, as well as other services that SBC was never required to provide (the LWC Agreement), should be

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[1] The CLEC Coalition is comprised of Nuvox Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, AT&T Communications of Southwest, Inc., and Birch Telecom of Missouri.

[2] On April 3, 2004, SBC issued a press release stating that consistent with the FCC's call to industry to negotiate commercial agreements it had reached a Private Commercial Agreement for Local Wholesale Complete with Sage that, among other items, provided a seven-year commercial agreement for SBC to provide wholesale local phone service to Sage covering all thirteen states comprising SBC's local telephone service territory. This agreement is referred to herein as the "LWC Agreement."

[3] SBC Communications, Inc. is the corporate parent of Southwestern Bell Telephone, L.P. d/b/a SBC Missouri.

[4] *United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

subjected to the same scrutiny that is reserved for agreements covering elements and services that SBC is required to provide under mandate of Section 251 of the Telecommunications Act of 1996 ("1996 Act").[5]

The second critical question facing the Commission (one that it need not reach unless it answers the first question in the affirmative) is whether it should seek to force Sage and SBC to make public highly sensitive and innovative provisions of the LWC Agreement, even though those provisions relate to matters that are not required to be provided under Sections 251 and 252 of the 1996 Act. Sage believes that requiring public disclosure (or even disclosure to counsel for other CLECs who might use that knowledge to Sage's detriment) would not only impose commercial injury upon Sage, but would also deter the entry by CLECs into innovative commercial agreements as called for by the FCC.

Sage urges the Commission to conclude that the Commission need not further consider the LWC Agreement between Sage and SBC.[6] Should the Commission require that the LWC Agreement be filed and approved, Sage exhorts to Commission to permit Sage and SBC to file the redacted portions under seal, not to be accessed by any persons other than the commission and its Staff, except as agreed by Sage and SBC.[7] In a companion filing, submitted today in

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[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. ("1996 Act"). The Telecommunications Act of 1996 amended the Communications Act of 1934, 47 U.S.C §§ 151 *et seq*. ("the Act").

6 A redacted copy of the LWC Agreement was filed by the CLEC Coalition with its May 20 Comments in this case.

[7] The redacted portions of the LWC Agreement are described in general terms in the Affidavit of Robert McCausland, provided as Exhibit A to these Reply Comments.

Case No. TO-2004-0584, Sage urges the Commission to approve the Amendment to its interconnection agreement with SBC.[8]

ARGUMENT

I. SAGE AND SBC SHOULD NOT BE REQUIRED TO FILE THE LWC AGREEMENT FOR APPROVAL UNDER SECTION 252

For the reasons set forth below, Sage and SBC should not be required to file the LWC Agreement for approval under Section 252 of the 1996 Act.

A. It is Premature for the Commission to Rule as to Whether the LWC Agreement Must Be Filed Under Section 252 While the Matter Is Before the FCC

On May 3, 2004, SBC filed an Emergency Petition with the FCC seeking, *inter alia*, a declaratory ruling that commercially negotiated agreements that do not implement the requirements of Section 251 are not required to be filed with state commissions for approval under Section 252.[9] Sage supported SBC's filing.

A requirement that Sage and SBC file the LWC Agreement for approval is premature until the FCC has had an opportunity to rule on the SBC Emergency Petition. The FCC is charged by the 1996 Act to be the preeminent agency to implement and enforce the requirements of the 1996 Act. No possible harm can come from waiting for the FCC's decision.

Conversely, SBC and Sage could face irreparable harm if the Commission requires the entire SBC/Sage LWC Agreement to be publicly filed. Indeed, there is no practical way to "unscramble" the effects of such a requirement "and return to the current status quo."[10] First,

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[8] On May 4, 2003, SBC and Sage filed for approval by the Commission their "Amendment Superseding Certain 251/252 Matters to Interconnection Agreements Under Sections 251/252 of the Telecommunications Act of 1996 (hereinafter "Amendment").

[9] WC Docket No. 04-172.

[10] *See Ameritech Teaming Agreement Standstill Order*; *AT&T Corp., et. al., v. Ameritech Corp.*, 1998 WL 325242 (N.D. Ill., June 10, 1998) ¶ 24.

there is no practical way to eliminate the risk of disclosure of competitively sensitive information once that information is no longer in the sole control of the parties, *i.e.,* once it is submitted to a regulatory body. The potential harm presented by the risk of disclosure is substantial: there is perhaps no more confidential information than a company's prospective business plans and competitive commercial strategies.[11]

More fundamentally, there is no practical way to reverse the chilling effect on the ongoing commercial negotiations called for by the FCC and thus the harm to the public interest if the Commission requires the entire LWC Agreement to be filed. A requirement that non-section 251 arrangements must be submitted to state commissions would thwart commercial negotiations. The FCC declared that negotiated agreements are critical to preserving "competition in the telecommunications market."[12] And the FCC further decreed that commercial agreements are "in the best interests of consumers."[13] Clearly, the public interest is not served by action or inaction that has a deleterious effect on both consumers and competition.

If the FCC ultimately determines that non-Section 251 arrangements must be filed, the Commission will have sufficient opportunity to fulfill its duties consistent with the requirements of Section 252.

B. The Portions of the LWC Agreement that Are Required to Be Filed Under Section 252 Have Been Filed in the Amendment

The CLEC Coalition and the Commission Staff both fail to recognize that the Amendment contains the only provisions of Sage's Agreements with SBC that are required to be approved by the Commission. Both SBC and Sage recognize that those terms of an agreement

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[11] Affidavit of Robert W. McCausland, Appendix A, at ¶ 4.

[12] FCC News Release March 31, 2004.

[13] *Id.*

that pertain to ongoing obligations under section 251 of the Act must be filed. Accordingly, on May 4, 2004, Sage and SBC filed the Amendment with the Commission for approval and included all appropriate provisions of the agreement that address the rates, terms, and conditions under which the parties purport to meet their obligations under Section 251, including provisions relating to reciprocal compensation and unbundled access to POTS loops, and provisions requiring Sage to forego unbundled access to local switching, tandem switching, and shared transport pursuant to Section 251.[14] The Act does not, however, require that SBC or Sage file for Commission review or approval of *non-251 arrangements* in their agreement. Any such requirement would be an *expansion* of the scope of Section 252, an expansion that is not only without legal foundation, but contrary to the very concept and spirit of voluntary commercial negotiations.

Under Sage's Agreements with SBC, SBC will provide Sage with a range of wholesale products and services for a period of years. Those wholesale products and services that relate to the implementation of Section 251 obligations, such as provisions addressing Section 251(b)(5) reciprocal compensation and provisions setting forth the price, terms, and conditions of unbundled POTS loops, are included in the Amendment.

The products and services included in the LWC Agreement relate to items that are not required under Section 251. These other items, including but not limited to provisions establishing a replacement for the UNE-P, were not negotiated under the auspices of Section 251, nor, given the *USTA II* decision, striking down the requirement to provide UNE-P, do they purport to implement any ongoing Section 251 obligation.[15] Rather, they were negotiated on a

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[14] Amendment, at ¶¶ 2, 3.

[15] In *USTA II*, the D.C. Circuit Court of Appeals vacated the FCC's national impairment finding and the FCC's rules requiring SBC and other ILECs to provide UNE-P for mass market customers. Accordingly, the FCC has not made any impairment finding for mass market UNE-P which is a prerequisite under Section

strictly *voluntary and commercial* basis – the very type of arrangement the FCC has expressly sought to encourage. The LWC Agreement is not, as the Staff maintains "so interdependent and intertwined" with the Amendment that the two documents "together constitute a single interconnection agreement subject to review under sections 251 and 252" of the 1996 Act.[16] Further, the LWC Agreement does not "on a standalone basis" constitute an interconnection agreement within the meaning of section 252(e) as alleged by the Staff.[17]

Like any private commercial arrangement negotiated between two parties, the LWC Agreement reflects a series of trade-offs. SBC made concessions, and so did Sage. Terms that, in and of themselves, may not have been acceptable to one of the parties were deemed acceptable because of some other term(s) of the LWC Agreement. Indeed, since the LWC Agreement is a *region-wide* agreement and not a state-specific agreement, tradeoffs were made, not only among different provisions, but also among different states. Thus, terms that SBC or Sage may not have accepted in one or another state when viewed in isolation were deemed acceptable when applied uniformly across the entire SBC region.

The scope of the Section 252 filing requirement is addressed in Section 252(a)(1)--the provision that establishes that requirement. That provision contains limits on the types of agreements to which it applies. Specifically, Section 252(a) states that, "upon receiving a request for interconnection, services or network elements pursuant to section 251," an ILEC "may negotiate and enter into a binding agreement with the requesting telecommunications carrier without regard to the standards set forth in subsections (b) and (c) of Section 251."[18] It then

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251(d)(2) of the Act for requiring unbundling of a network element. Thus, SBC and other ILECs have no Section 251 obligation to provide mass market UNE-P. *USTA II*, 359 F.3d 568-571.

[16] Staff's Recommendation to the Commission, at 1 and ¶ 10 (May 26, 2004).

[17] Staff's Recommendation to the Commission, at 1 (May 26, 2004).

[18] 47 U.S.C. § 252(a)(1).

provides that any such agreement "shall be submitted to the State commission."[19] Accordingly, based on the language of Section 252(a) itself, the only agreement that must be filed with a state commission is one that is triggered by "a CLEC request for interconnection, services or network elements pursuant to Section 251."[20]

Therefore, to the extent that an agreement purports to address the rates, terms, and conditions under which the parties will fulfill their obligations to provide interconnection, services, or network elements under Section 251, those provisions must be filed. Conversely, to the extent a commercial arrangement relates to products or services not clearly covered by Section 251 and thus does not purport to implement Section 251, Section 252(a)(1) does not require that it be filed with a state commission.[21]

Importantly, as to facilities and services that must be offered under Section 251, filing and review continues to be necessary even if the parties decide, in a particular instance, to depart from the rates, terms, and conditions (for example, TELRIC pricing) typically found in Section 252 interconnection agreements. Section 252(a)(1) contemplates that, as to such facilities, services, or interconnection, the parties may negotiate "without regard to the *standards* set forth in subsections (b) and (c) of section 251," but that does not change the fact that these are services or network elements being offered "pursuant to section 251." Accordingly, *all* of the rates, terms, or conditions under which the parties agree to provide interconnection, services, or network elements pursuant to subsections (b) or (c)—including those rates, terms, or conditions

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[19] *Id.*

[20] *Id.* (Emphasis added).

[21] Although Section 252(a)(1) requires the filing of "agreements," not various terms of agreements, any analysis of the Section 252(a)(1) filing requirement ultimately must rest on the terms that must be filed. It cannot be the case that the scope of the filing requirement hinges not on the substance of the provision at issue, but on its packaging. If that were the rule, parties would simply segregate all non-Section 251 terms of their agreements and place them in separate agreements. To rule, therefore, that a term that would otherwise not have to be filed becomes subject to Section 252(a) if it is packaged in the same agreement with terms that do have to be filed would exalt form over substance.

that deviate from the required *standards* for meeting those obligations—must be filed. However, requiring the filing and review of terms that deviate from the "standards" set forth in subsections (b) and (c) is not the same thing as requiring the filing and review of terms for products and services that fall *outside* the scope of subsections (b) and (c) altogether. The former must be filed; the latter need not be.

That Section 252(a) requires the filing only of those rates, terms, and conditions under which the parties address their Section 251(b) and (c) obligations is buttressed by Section 251(c)(1) of the Act. That section provides that ILECs must negotiate under Section 252 "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection."[22] To the extent that a particular element need not be unbundled under Section 251(d)(2), it falls outside the scope of the ILEC's duty to negotiate under Section 251(c)(1). It is reasonable to conclude that an agreement that results from such negotiations is likewise outside the scope of the Section 252 filing and review requirement.

Interpreting Section 252(a)(1) in this manner is also consistent with the core purposes of the 1996 Act. Sections 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition. It would make sense, therefore, that Congress would insist that the terms under which carriers endeavor to meet these requirements be reviewed by state commissions. Conversely, there would appear to be no reason why Congress would subject arrangements for other services and facilities to the same scrutiny. Since Congress did not deem such arrangements important enough to require them in the first place, it would be odd to

[22] 47 U.S.C. § 251(c)(1).

construe the Act as requiring state approval of the terms on which a carrier purports to provide such arrangements.

This reading also gives substance to the most favored nation ("MFN") provisions in Section 252(i). Section 252(i) does not require that *all* of the terms of an interconnection agreement be made available. Rather, it requires only that incumbent LECs "make available any interconnection, service, or network element provided under an agreement approved under this section … upon the same terms and conditions as those provided in the agreement."[23] By filing the rates, terms, or conditions that the parties negotiate to meet an obligation to provide interconnection, services, or network elements required by Section 251--even if those rates, terms, or conditions deviate from the required standards of subsections (b) and (c)--an ILEC will be ensuring that all CLECs are able to exercise their MFN rights. Section 252(i) requires no more.

This result is also consistent with the FCC's *Qwest ICA Order*.[24] In that Order, the FCC determined that ILECs have an obligation to file with state commissions all contracts that "create[] an ongoing obligation *pertaining to* resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, unbundled network elements, or collocation," *i.e.*, the requirements of Sections 251(b) and (c).[25] At the same time, noting that requiring filing of all agreements would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs," the FCC made clear that its Order does not require the filing of "all agreements between an incumbent LEC and a requesting

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[23] 47 U.S.C. § 252(i).

[24] Memorandum Opinion and Order, *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of he Duty to File and Obtain Prior Approval of Negotiated Contract Arrangements under Section 252(a)(1),* 17 FCC Rcd 19337, FCC 02-276, at ¶ 8 (2002) ("*Qwest ICA Order*") (emphasis added).

[25] *Qwest ICA Order*, at ¶ 8.

carrier."[26] Moreover, the FCC specifically premised this conclusion on its holding that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[27]

Thus, for example, the FCC determined that dispute resolution and escalation clauses "relating to the obligations set forth in sections 251(b) and (c)" must be filed, because "the means of" resolving and escalating such disputes effectuate the Act's requirement of providing the items required by Sections 251(b) and (c) on a non-discriminatory basis.[28] Similarly, in its subsequent *Notice of Apparent Liability for Forfeiture* (*"NAL"*) against Qwest, the FCC specifically mentioned Qwest's failure to file agreements concerning specific section 251(b) and (c) obligations, as well as administrative and procedural provisions pertaining to those obligations, as violating section 252's requirements as interpreted by the FCC in its *Qwest ICA Order*.[29] These decisions are fully consistent with the conclusion that Section 252 requires filing with a state commission of only those arrangements that are themselves required under sections 251(b) or (c). Because the parties have filed all aspects of their agreement that are subject to these provisions, the parties have fully met their filing obligations under the 1996 Act.

C. Requiring that Non-Section 251 Arrangements Be Subject to Section 252 Would Frustrate the Market-Based Goals of the Act and the FCC's Call for LWC Negotiations

The conclusion that non-Section 251 arrangements of private commercial agreements are not subject to Section 252 is not only consistent with the language of the 1996 Act; it also fully comports with the underlying goals of the Act. In particular, requiring the filing of such terms

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[26] *Id.* at ¶ 8 and n 26.

[27] *Id.*

[28] *Id.* ¶ 9.

[29] Qwest Corporation Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, 19 FCC Rcd 5169 at ¶ 26 n. 81, 83 (2004).

for state review would frustrate the market-based goals of the 1996 Act generally, as well as the specific call by all of the FCC Commissioners for negotiations as to commercially acceptable arrangements between ILECs and CLECs.

Apart from confidentiality concerns, which are discussed below, if non-Section 251 arrangements of commercial agreements were subject to filing under Section 252 for state review, state commissions might insist that the parties change the terms of the agreements as a precondition to their approval. If carriers cannot be confident that the tradeoffs made in negotiations will be preserved, they are far less likely to enter into such negotiations in the first place. It is precisely because of this risk that one analyst warned that some states could end up "destroy[ing] deals that all parties involved believe are advantageous."[30] This risk is accentuated by the fact that private commercial agreements such as the LWC Agreement are region-wide agreements, not state-specific agreements. As such, they are based on a balancing of interests across several states. Rejection of an agreement or a specific term by just one state thus upsets the calculus upon which the entire agreement is based. This was one of the primary reasons that the previously mentioned analyst recently described as a "train wreck" the prospect of subjecting non-Section 251 arrangements to Section 252. Specifically, the analyst noted that "a Region-wide agreement such as the SBC-Sage deal could be disrupted if at least one state disapproves of the terms for its own state," and that "an agreement that might make economic sense at a price averaged across thirteen states might make no sense if a major state ruled that the price has to be changed for its state."[31]

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[30] *Telecom Regulatory Note – Triennial Negotiations – Headed to a Train-Wreck?* Regulatory Source Associates, LLC, Anna-Maria Kovacs and Kristin L. Burns (Apr. 29, 2004) at 4., attached as Exhibit B.

[31] *Id.* at 2; *see also id.* at 4 (discussing possibility "that a single state's demand for revision will disrupt the entire multi-state contract.")

Moreover, if commercial agreements must be approved by all applicable state commissions, even if approval is ultimately forthcoming, contentious proceedings could well precede any such approval, thereby undermining two of the main benefits of a commercial deal: the elimination of regulatory uncertainty and reduction in regulatory costs. Certainly after eight years of contentious litigation and three remands, many ILECs and CLECs have a compelling need for business certainty and to direct their resources to running their businesses, rather than fighting regulatory battles. To deny them the ability to address those needs through commercial negotiations is to withhold one of the most important benefits of--and therefore inducements to--a commercial deal. If the Commission truly wants commercial negotiations to succeed, it must allow parties to reap the fruits of a commercial negotiation.

A requirement that non-251 arrangements be filed with state commissions also raises the concern that, under Section 252(i), other CLECs could "pick-and-choose" parts of an agreement, even though those parts do not implement any Section 251 obligations.[32] That is a risk that would chill incentives to negotiate by both ILECs and CLECs. The negotiation process involves a series of "gives" and "takes" between negotiating parties. As in any commercial negotiation, this give and take process--and in particular the balance struck by the parties between the "gives" and the "takes"--is critical to voluntary negotiations. No incumbent will offer a "give" if that "give" can be uncoupled from the "take" during a subsequent negotiation. Conversely, no CLEC will make a concession in exchange for a term that it deems favorable, if another CLEC--its competitor--can obtain that same favorable term without the concession. Thus, the application of "pick and choose" to non-Section 251 arrangements would effectively kill the give and take that is so essential to the negotiation of voluntary, commercially viable wholesale arrangements.

[32] Sage does not comment herein as to the effect or consequences of applying “pick and choose” to agreements entered into under Section 251 of the 1996 Act.

Finally, requiring that innovative private commercial agreements such as the LWC Agreement be filed opens the door for costly litigation over confidentiality, rights to "pick and choose," and other matters, and thereby undermines one of the fundamental benefits that prompted Sage to enter into such an agreement. As the Commission is well aware, during the eight years in which the 1996 Act has been in effect, CLECs and ILECs alike have incurred enormous litigation costs, battling over countless issues. One of Sage's principal motivations for entering into the LWC Agreement was avoiding the cost and distraction of management time entailed in such litigation. If entering into private agreements fails to free CLECs from such litigation, CLECs will be reluctant to enter into such agreements, and the cycle of regulatory warfare will continue.

D. Filing of the LWC Agreement Is Not Required Under the Missouri Law

The CLEC Coalition argues that the LWC Agreement is required to be filed under Missouri law Section 392.220.1.[33] The CLEC Coalition's reliance on Section 392.220.1 is misplaced. Section 392.220.1 provides in the relevant part that:

> Every telecommunications company shall file with the commission *as and when required by it* a copy of any contract, agreement, or arrangement in writing with any other telecommunications company or with any other corporation, association, or person relating in any way to the construction, maintenance, or use of telecommunications facilities or service by or rates and charges over or upon any facilities.[34]

Section 392.220.1 only requires filing of tariffs and also certain contracts "when required by" the Commission (*i.e.*, a requirement that a contract be filed is within the discretion of the Commission). The Commission did not rely upon this discretionary authority in its "Order

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[33] CLEC Comments at ¶¶ 31-32.

[34] Mo. Rev. Stat. § 392.220.1 (2003).

Directing Submission of Agreement" in the present case.[35] Significantly, although this section has been in effect since long before the 1996 Act, the Commission has, to our knowledge, never used it to require the filing of agreements such as the LWC Agreement.[36] It would not be good policy to depart from this practice at this juncture. Moreover, the CLEC Coalition has failed to demonstrate that considerations of federal pre-emption, such as those raised in Part I.A, above, do not apply and require the Commission to desist from utilizing state law to accomplish a result that is inconsistent with federal law.

E. Filing Is Not Required Under Section 271 of the 1996 Act

The CLEC Coalition suggests in its Comments that Section 252(a)(1) requires the filing of agreements that implement obligations under Section 271.[37] There is, however, nothing either in Section 271 or in Section 252(a)(1) to support a filing requirement.

The CLEC Coalition correctly argues that as a Bell Operating Company ("BOC"), SBC is required to provide loops, transport, and switching to CLECs under Section 271, even if such elements are not required to be provided under Section 251. But under the FCC's *Triennial Review Order*, as upheld in *USTA II*, Section 271 does not require SBC to provide those elements in combined form.[38] Moreover, nothing in Section 271 requires that these elements be made available in the form of contracts (as opposed to, for example, tariffs or SGATs), nor is

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[35] *In the Mater of the Agreement Between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, Order Directing Submission of Agreement.

[36] Rather, this provision has most often been utilize to scrutinize tariff filings. *See, e.g.*, *Southwestern Bell Telephone, L.P. dba SBC Missouri*, Case No. TT-2004-0245, Order Rejecting Tariff (Feb. 6, 2004) ("The Commission also finds that the tariff should be rejected because the footnotes do not comply with Section 392.220, RSMo, requiring 30-days notice to the Commission."); *In the Matter of Tariff Nos. 2 and 3 of KMC Telecom V, Inc.*, Case No. CT-2004-0462 (Effective March 18, 2004) (Section 392.220 "refers to tariffs proposing new services, and allows the Commission to suspend such a tariff for a period not to exceed 60 days.").

[37] CLEC Comments, at ¶¶ 15-16.

[38] *USTA II*, 359 F.3d at 589.

there any requirement that if these elements are made available by contracts, the contracts need be approved by the applicable state commission(s).

Finally, while provision of such Section 271 elements is subject to Sections 201 and 202 of the Communications Act, that fact in no way requires that if they are provided via an agreement, the agreement must be filed and approved by a state commission. Indeed, SBC Missouri and other BOCs enter into numerous agreements every year that are subject to Sections 201 and 202 (but not Sections 251 and 252) without filing them with state commissions. To the extent that such agreements may be thought to violate Sections 201 or 202, carriers can (and, sometimes do) vindicate their rights by bringing a complaint case before the FCC or in federal district court under Sections 207 and/or 208.

II. IF THE COMMISSION REQUIRES THAT THE LWC AGREEMENT BE FILED, THE CONFIDENTIALITY OF THE REDACTED PORTIONS SHOULD BE PRESERVED

As discussed in Part I, *supra*, Sage urges the Commission not to require that the LWC Agreement be filed with the Commission. If, however, the Commission nonetheless determines that filing of the entire LWC Agreement is necessary, Sage exhorts the Commission to preserve the confidential nature of the redacted portions.[39] Such protection is absolutely necessary because the redacted portions of the LWC Agreement (1) relate to matters that are not within the purview of Section 251 and (2) contain highly sensitive business information about Sage's innovative plans and competitive strategies.

A. The Redacted Portions of the LWC Agreement Relate to Matters That Are Not Within the Purview of Sections 251/252

[39] The redacted portions of the LWC Agreement are described in general terms in the Affidavit of Robert W. McCausland, Exhibit A, at ¶¶ 8-13.

The redacted portions of the LWC Agreement involve issues that were not negotiated under the auspices of Section 251 and do not involve any Section 251 obligations. Instead, the redacted portions of the LWC Agreement were negotiated on a purely voluntary and commercial basis, and reflect contractual business arrangements between the parties that have nothing do with Section 251. Sage's position that the redacted portions of the LWC Agreement do not have to be filed with the Commission is consistent with the FCC's findings in the *Qwest ICA Order* and subsequent *NAL* against Qwest. As discussed fully in Part I.B, *supra*, contrary to the unfounded arguments of the CLEC Coalition, Section 252 requires filing with a state commission of only those arrangements that are themselves required under Sections 251(b) and (c). The parties have fully met their filing obligation under the 1996 Act because, by filing the Amendment, they have already publicly submitted to the Commission all aspects of the LWC Agreement that are subject to those provisions.

B. The Redacted Portions of the LWC Agreement Contain Highly Sensitive and Confidential Material Regarding Sage's Innovative Business Strategies

As is demonstrated in the Affidavit of Mr. McCausland of Sage that is provided as Exhibit A hereto, the parties have compelling reasons to protect the confidentiality of the redacted portions of the LWC Agreement. Sage cannot, in this public filing, discuss the details of the redacted parts of the LWC Agreement, but respectfully requests that the Commission and Staff consider them as described in Exhibit A. The redacted sections of the LWC Agreement, which are not extensive, contain confidential information about the business plans of the parties--in particular, information about Sage's future competitive business strategies and plans.[40] No business would deem disclosure of such information to its competitors acceptable, and Sage is no exception. Accordingly, the LWC Agreement specifically requires both parties to use their best

[40] Affidavit of Robert W. McCausland, Exhibit A, at ¶¶ 4, 8-13.

efforts to maintain the confidentiality of the terms of the agreement, and Sage urges the Commission not to require the filing of the entire LWC Agreement. Requiring such disclosure would contravene the public interest by discouraging innovation-spurring negotiations and inhibiting the actions of carriers who would otherwise pursue agreements that contain novel competitive strategies if the risk of disclosure of such confidential information were at risk.

If, however, the Commission nonetheless determines that filing of the entire LWC Agreement is necessary, Sage strongly urges the Commission to preserve the confidential nature of the redacted portions. The CLEC Coalition suggests only as an afterthought that SBC and Sage can make a request for confidentiality in accordance with Missouri law and that "any confidential treatment (if any is warranted) should at a minimum permit any CLEC to review the [LWC Agreement] subject to a protective order."[41]

Sage does not share the CLEC Coalition's cavalier attitude toward the highly confidential information that is the lifeblood of its business. Allowing access to Sage's confidential competitive business strategies and technology plans by "any CLEC," whether or not such access is cloaked in a protective order, is precisely what Sage seeks to avoid in order to safeguard its highly proprietary and competitive information. If the Commission were to require filing of the entire LWC Agreement and not preserve the confidentiality of the redacted portions, SBC and Sage will face irreparable harm.[42] There is no practical way to eliminate the risk of disclosure of competitively sensitive information once that information is no longer in the sole control of the parties, *i.e.*, once it is publicly submitted to a regulatory body. The potential harm presented by the risk of disclosure is substantial: there is perhaps no more confidential information than a company's prospective business plans and competitive strategies. Sage therefore urges the

[41] Comments of CLEC Coalition, at ¶ 36.

[42] Affidavit of Robert W. McCausland, Exhibit A, at ¶¶ 4, 8-13.

Commission to preserve the confidential nature of the redacted portions of the LWC Agreement in the event it finds that such provisions must be filed.

If, despite all of the evidence counseling in favor of the opposite result, the Commission finds that the entire LWC Agreement must be filed, a comprehensive protective order must be crafted to govern the terms and conditions of disclosure to third parties. In particular, even inside and outside counsel to other CLECs should not be provided access to the redacted portions of the LWC Agreement. Such counsel are the very individuals who advise and represent their clients with respect to interconnection matters with SBC. They and their clients should not be able to take advantage of Sage's trade secret information in their own negotiations with SBC. At most, other CLEC counsel should be permitted to view the redacted portions of the LWC Agreement subject to a protective order only if the terms of the protective order have been agreed to by SBC and Sage.[43]

CONCLUSION

For the foregoing reasons, Sage urges the Commission to rule that the LWC Agreement need not be submitted for approval under Section 252. In the alternative, if the Commission should require that the LWC Agreement be approved, Sage respectfully requests that the Commission require that the redacted portions be made available only to the Commission and its Staff. Other participants, if any, in any proceeding concerning the LWC Agreement, should be accorded access only as agreed to by Sage and SBC.

Respectfully submitted,

[43] Should the Commission determine that disclosure is required and that a protective order will be entered, Sage requests that it be given an opportunity to comment on the language and parameters of the protective order and specifically reserves all rights to do so.

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