BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC MISSOURI'S PETITION FOR COMPULSORY ARBITRATION OF UNRESOLVED ISSUES FOR A SUCCESSOR AGREEMENT TO THE MISSOURI 271 AGREEMENT ("M2A")	))))))	**Case No. TO-2005-0336**

CLEC COALITION'S RESPONSE TO SBC MISSOURI'S MOTION FOR CLARIFICATION AND CORRECTION AND APPLICATION FOR REHEARING

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SBC MISSOURI'S MOTION FOR CLARIFICATION AND CORRECTION
AND APPLICATION FOR REHEARING

Big River Telephone Company; Birch Telecom of Missouri, Inc. and ionex communications, Inc.; NuVox Communications of Missouri, Inc.; Socket Telecom, LLC; XO Communications Services, Inc., formerly known as and successor by merger to XO Missouri, Inc. and Allegiance Telecom of Missouri, Inc., and Xspedius Management Co. Switched Services, LLC, dba Xspedius Communications, LLC ("The CLEC Coalition") respond as follows to the "Motion for Clarification and Correction and Application for Rehearing" filed in this proceeding by SBC Missouri ("SBC Motion").

INTRODUCTION

1. SBC's Motion should be denied in all respects. SBC's Motion offers the Commission no substantive reason for changing any of its decisions in the July 11, 2005 Arbitration Order. Moreover, as discussed herein, SBC's unfounded attacks on the CLEC Coalition are not grounded in the facts. Overall, SBC's complaints can be summarized as follows: SBC believes that it did not win on enough issues. SBC is not, however, the only party to this proceeding that did not get everything it wanted. As the CLEC Coalition noted at page 3 of its "Comments on the Final Arbitrator's Report" filed June 24, 2005, of the 142 rulings in the Arbitrator's Report on issues raised by the CLEC Coalition, the Coalition's position prevailed in full on only 43% of the issues. The majority of arbitrated issues were resolved in SBC's favor or reflected compromises incorporating portions of each party's position. Moreover, it is the Commission's responsibility to apply state and federal law, consistent with sound public policy, to reach

legally appropriate results in this arbitration. Depending on what issues are teed up for arbitration, there should be no expectation from either side of a "50/50" result.

2. The CLEC Coalition responds to the issues raised in SBC's Motion in the order they were presented by SBC.

RURAL LOOP RATES

3. SBC's Motion attacks the CLEC Coalition for raising the issue of rate increases for Rural UNE Loops, but does not disagree with the outcome ordered by the Commission. On the substance of the issue, the Commission need take no action based on SBC's Motion: apparently all parties agree that Rural UNE Loop rates should remain at the levels established in the M2A.

4. The Coalition strongly objects to SBC's hyperbolic allegation that the Coalition "invented" this issue "to place SBC Missouri in a bad light."[1] As the Commission is aware, the Coalition did not raise a large number of issues in its Comments on the Arbitrator's Report, and only raised issues that were of substantial importance to the member companies of the Coalition. The Rural UNE Loops issue arose due to the language in the Arbitrator's Report rejecting the Coalition's arguments that M2A rates would be continued in the M2A successor agreement. This decision of the Arbitrator raised concerns that Rural UNE Loop rates could return to their extremely high pre-M2A level. It was the language in the Arbitrator's Report, affirming SBC's position and reasoning on UNE rate issues, that raised the concerns expressed in the Coalition's comments on the Rural UNE Loop issue. As explained in the CLEC Coalition's Comments on the Arbitrator's Report, and at oral argument, such an outcome

[1] SBC Motion, at 3.

would have a tremendous negative impact on facilities-based competition in rural areas. It was extremely important to CLEC Coalition companies to make certain that rate increases for Rural UNE Loops would not result from the Commission's decisions in this proceeding.

5. If a potential increase in Rural UNE Loop rates was not an issue, as SBC contends, the CLEC Coalition gladly would have agreed to withdraw the issue. Coalition companies have worked diligently with SBC to settle issues throughout the negotiation and arbitration process. If there were no dispute over Rural UNE Loop rates, there would have been no purpose in discussing the issue before the Commission during oral argument. In fact, the Coalition gladly would have accepted an assurance from SBC that it had no intention of interpreting the Arbitrator's Report in a way that permitted increases in Rural UNE Loop rates.

6. The Coalition included the Rural UNE Loops issue in its Comments on the Arbitrator's Report, and SBC had access to the Coalition's Comments prior to oral argument before the Commission. If SBC believed there was no "live" dispute on the issue, SBC could have contacted the Coalition to request the issue be withdrawn before oral argument. SBC could have identified the issue in its extensive oral argument as one that did not require further Commission consideration.[2] SBC chose not to take any such actions. SBC should not now be heard to complain that it was caught by surprise by the

[2] The Commission will recall that SBC and the CLECs were permitted during oral argument to advocate both for the issues on which they requested changes in the Arbitrator's Report and against the requests for changes raised by other parties. The Commission provided SBC ample opportunity over two days of oral argument to rebut the Coalition's comments on the Rural UNE Loop rate issue.

Arbitration Order. SBC presents no substantive reason to change the terms of the Arbitration Order, and the request for relief in SBC's Motion should be rejected.

SECTION 271 CHECKLIST ITEMS AND INTERIM RATES

7. No single issue was discussed and briefed as extensively in this proceeding as the question of how Section 271 checklist items should be reflected in SBC's interconnection agreements. The CLEC Coalition will not repeat the points made at oral argument and in briefs and testimony on the inclusion of Section 271 items in the interconnection agreements. SBC's repetitive arguments on that point should, again, be rejected by the Commission.

8. In its Motion, SBC complains about the Commission's establishment of interim rates for Section 271 checklist items. SBC requests reversal of the Commission's decision to establish interim rates, or, in the alternative, clarification of the status of the interim Section 271 rates. For three reasons, SBC's requests for relief should be denied.

9. First, SBC's request that the interim rates decision be reversed relies on arguments that have already been heard and rejected regarding the Commission's authority to establish Section 271 rates. As discussed at length in the Coalition's Post-Hearing Brief, in the testimony of Coalition witness Ms. Mulvany Henry, and at oral argument before the Commission, state commissions have the authority to establish rates for Section 271 elements as part of the Section 252 arbitration process. As the Commission correctly ruled in its Arbitration Order, Section 271 checklist items must be included in SBC's interconnection agreements approved under Section 252. Just as this Commission is responsible for establishing rates for Section 251 elements under the TELRIC standards established by the FCC, it is also responsible for determining rates for

Section 271 items using the "just and reasonable" standard enunciated by the FCC. The FCC *has not* taken such rate-setting authority (which is grounded in state commissions' Section 252 jurisdiction) away from state commissions. Moreover, the FCC has taken no actions that question state commission authority to establish rates under Section 271.[3] In addition, the FCC's failure to establish any Section 271 rates to date corroborates the argument that they are leaving this issue to the states. *See* fn. 3.

10. Second, SBC's Motion requests relief that would leave the parties with interconnection agreements that do not include Section 271 rates. This would leave CLECs in an untenable position: they would have a legal right to obtain Section 271 checklist items, but no rate at which they may actually purchase them. Such a result would make access to Section 271 checklist items completely illusory, and make near-term business planning for CLECs highly uncertain. Leaving the parties in "limbo" on such a critical issue will inevitably result in disputes and further proceedings that can be avoided if interim rates are established.

11. Third, SBC's arguments should be rejected because they are incorrect and misleading. SBC's Motion claims that, based on the Arbitration Order, CLECs will obtain UNE-P (and other declassified UNEs) to which they are not entitled after the expiration of the transition period established in the *Triennial Review Remand Order*

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[3] As noted in the CLEC Coalition's Post-Hearing Brief, the Tennessee Regulatory Authority ("TRA") ruled on Section 271 interim rates in 2004. Tennessee Regulatory Authority, Docket No. 03-00119, *Petition for Arbitration of ITC^Deltacom, Inc. with BellSouth Telecommunications, Inc.*, Hearing Transcript (June 21, 2004). The TRA ruled that it had statutory authority under §§ 252 and 271 to adopt "non-§ 251" rates on an interim basis. The TRA's vote to adopt a § 271 interim rate prompted BellSouth to file an "emergency" preemption petition at the FCC. The FCC has had the petition on its docket for over a year, and has taken no action on it. Comments and reply comments in the BellSouth "emergency" docket were all due by August 16, 2004. Nothing the FCC has done on the BellSouth petition indicates the FCC is troubled by a state commission's assertion of authority to establish rates, terms and conditions for § 271 checklist items.

("TRRO"). SBC's argument relies on its factually inaccurate assertion that the TRRO transition rates (which are the basis for the Commission's Section 271 interim rates) are "TELRIC-based." The FCC held that any UNEs that no longer need be available under Section 251 are no longer subject to TELRIC pricing. The FCC's authority to implement transitional rate increases that raised rates significantly *above* TELRIC levels was grounded in its view that the rates for such elements no longer needed to be TELRIC-based.[4] Therefore, there is no merit to SBC's claim that the Commission's interim Section 271 rates – which are indisputably higher than existing TELRIC rates – provide CLECs inappropriate access to TELRIC-priced UNEs. In fact, the Commission's Order explicitly rejects the argument that TELRIC rates should be continued until final "just and reasonable" rates are set.[5] The Commission's actions are completely consistent with the FCC's TRRO transition plan, and provide a path to establishing the final "just and reasonable" rates for Section 271 checklist items that the FCC called for in the TRO.

12. SBC requests that the Commission provide a time period during which Section 271 interim rates apply. The CLEC Coalition urges that such a change to the Arbitration Order is not necessary, and may in fact slow the process of developing final Section 271 rates. If the Section 271 rates "expire" on an arbitrary date, SBC will have no incentive to reach a negotiated settlement with CLECs. If SBC can simply wait for the rates to expire, CLECs again will be left in limbo, with a legal right to obtain

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[4] As a pure matter of semantics, a rate "based on" an existing TELRIC rate could be considered "TELRIC-based," as SBC claims. However, a rate can no longer realistically be considered a "TELRIC-based" rate when the rate is composed of a TELRIC rate *plus* an additive, the amount of which has no grounding in TELRIC standards.

[5] Arbitration Order, at 30.

Section 271 checklist items but no rate at which they can be purchased.[6] Neither SBC nor the CLECs should be given undue advantage in the negotiations leading to permanent Section 271 rates. The best way to keep the playing field level for such negotiations is to do exactly what the Commission did in the Order: implement interim rates in the interconnection agreements and encourage the parties to negotiate rates to apply on a permanent basis.

IP-PSTN INTERCARRIER COMPENSATION

13. The SBC Motion seeks reconsideration of the Commission's decision regarding application of reciprocal compensation for certain IP-PSTN traffic. The record is clear that the Coalition strongly disagrees with SBC's position that the FCC has definitively addressed intercarrier compensation issues related to IP-PSTN (as opposed to PSTN-IP-PSTN) traffic.[7] Moreover, the Coalition agrees with the Commission's decision regarding the application of reciprocal compensation to IP-PSTN traffic in limited circumstances. SBC's Motion attacks the Coalition's request for clarification on this issue, as well as the Commission's Arbitration Order, and urges that clarifications regarding contract language on this issue should not apply to the interconnection agreements of CLECs in the Coalition.

14. SBC's arguments should be rejected. SBC's position would create inconsistent, discriminatory treatment of intercarrier compensation for the same types of traffic. SBC is correct that the Coalition did not offer contract language requesting

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[6] SBC has a Section 271 obligation to provide uninterrupted access to Section 271 elements. Accordingly, SBC could also be in violation of its 271 obligations on the date of such expiration. The Commission should not take any action that would lead to such a result.

[7] *See* CLEC Coalition Post-Hearing Brief, at 150-56, for a discussion of the flaws in SBC's arguments regarding application of access charges to various forms of IP-enabled traffic.

reciprocal compensation for IP-PSTN traffic. Rather, the Coalition urged the Commission to reject SBC's contract language, which included provisions subjecting IP-PSTN traffic to access charges. As is clear from the CLEC Coalition's prefiled testimony and Post-Hearing Brief, the issue was hotly contested. The Arbitrator's Report rejected the Coalition's arguments and endorsed the SBC contract proposal. As pointed out in the Coalition's request for clarification, the Arbitrator also ruled in favor of MCI on the application of reciprocal compensation (as opposed to access charges). The Coalition's Comments on the Arbitrator's Report did not seek to raise a new issue for the first time, as SBC implies, but rather asked that the Commission settle an inconsistency in the Arbitrator's Report. As is clear from the Coalition's comments on the issue, the Coalition was prepared to live with the outcome either way, but urged the Commission not to create conflicting intercarrier compensation regimes that varied depending on the carrier that arbitrated the issue.

15. SBC would have the Commission apply different rules to the CLEC Coalition companies than it applies to MCI. From a policy perspective this makes no sense, and in fact raises concerns about discrimination between carriers. The Coalition's requested relief – that the interconnection agreement remain silent on IP-PSTN traffic compensation – was not granted. The only remaining issue is whether the SBC-proposed language on this issue that will appear in the interconnection agreements will be consistent with that in the MCI-SBC agreement. The Commission's determination that the language should be consistent presents the most sensible, business-like outcome on this issue and complies with the Section 252 prohibition of discriminatory agreements. SBC's Motion should be denied on this issue.

CONSIDERATION OF SBC ISSUES

16. The balance of SBC's Motion is devoted to a general allegation that SBC should have been more successful on its requests for relief. The CLEC Coalition reminds the Commission that SBC presented testimony from over 15 witnesses, cross-examined numerous CLEC witnesses at hearing, filed a comprehensive brief, and filed 245 pages of comments on the Arbitrator's Report. SBC was given every opportunity to discuss and debate its disagreements with the Arbitrator's Report during two days of oral argument before the Commission. There is no sense in which SBC can credibly claim it has not been heard on its issues. The issues have been thoroughly presented, and SBC's positions on contract language have been adopted on hundreds of DPL issues. On the issues where SBC's position was not adopted, it is apparent from the Arbitrator's Report and from the Arbitration Award that the Commission has considered SBC's arguments and found them wanting. The fact that SBC's arguments were not persuasive is not sufficient grounds for granting rehearing or reconsideration of any of the Commission's decisions.

17. Finally, the Commission should reject SBC's assertion that the Commission did not address this matter as an "original proceeding." As counsel for MCI noted in MCI's response to the SBC Motion, the Commission stated that it "adopts the Final Arbitrator's Report as its decision on each unresolved issue, except as that Report is expressly modified [in this Order]. The Final Arbitrator's Report is incorporated into this Order by reference."[8] Such action is entirely consistent with rule 4 CSR 240-36.040(24), and such adoption is not inconsistent with the Commission's statement that its

[8] Arbitration Order, at 9.

"proceedings on the Arbitrator's Report, consequently, are not in the nature of an appeal or review. It is, instead, an original proceeding." The Commission's Arbitration Order makes clear that the parties' arguments that the Arbitrator's Report was in error were considered and rejected if not specifically addressed in the Arbitration Order.

CONCLUSION

18. The SBC Motion provides no basis for the Commission to correct, clarify, or rehear the issues addressed in the Arbitration Order. SBC's requests for relief should be denied. The parties' attention at this juncture would be more productively focused on conforming the M2A successor interconnection agreements to the decisions reached by the Commission.

WHEREFORE, for all the reasons stated, the CLEC Coalition urges the Commission to deny SBC Missouri's Motion for Correction and Clarification and Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the forgoing was served this 25th day of July, 2005, by email or by placing same in the U.S. Mail postage paid, to the following persons.

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