

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of an Interconnection Agreement        )  
between Southwestern Bell Telephone, L.P.        ) Case No. TO-2005-0287  
and Sage Telecom, Inc.                                )

**CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY**

In its order, the Commission voted to approve an Interconnection Agreement between Southwestern Bell Telephone Company, L.P. (SBC Missouri) and Sage Telecom, Inc. (Sage). The Commission found that the Interconnection Agreement consisted of the "Missouri Amendment Superseding Certain 251/252 Matters to Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996" (the Amendment) and the "Private Commercial Agreement for Local Wholesale Complete" (LWC Agreement). While I voted in favor of the Order because it was the result of a stipulation and agreement between the parties, I am writing separately to state my opinion that the LWC Agreement does not fall within the scope of the § 252 filing and review requirements.<sup>1</sup>

The necessary provisioning of various network elements under § 251 of the 1996 Telecommunications Act (the Act) has been in dispute since the Act went into effect and the Federal Communications Commission (FCC) began issuing rules and orders to implement the Act. Most recently, a federal district court rejected the FCC's impairment

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<sup>1</sup> SBC Missouri and Sage have disputed the need to file the LWC Agreement as part of an ICA in Missouri and many of the other states where SBC and Sage intend to operate under the LWC Agreement. See *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, and *In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584. The Amendment and the LWC Agreement cover a thirteen-state territory. Many of the commissions in states where these agreements will go, or have already gone into effect reached the same conclusion as this Commission.

analysis as a basis for requiring the provisioning of certain network elements and vacated the rules requiring ILECs to provide unbundled network switching under § 251.<sup>2</sup> Following this reversal, the FCC called for carriers to negotiate private commercial agreements while the FCC began work on a remand order.<sup>3</sup> The FCC's "Order on Remand," released February 4, 2005, also includes comments encouraging carriers to negotiate private agreements during the transition period.<sup>4</sup>

Because of the need for continuity in light of a rapidly shifting regulatory scheme, and because of the encouragement of the FCC, SBC Missouri and Sage began negotiating an agreement to provide the necessary network elements required pursuant to § 251, as well as an agreement that provided network elements that are not required under the Act. This second agreement provided Sage with network elements that, under existing federal law, SBC Missouri is not required pursuant to § 251 to provide. By requiring the LWC Agreement to be filed and approved as part of an ICA, this Commission now makes mandatory the provisioning of network elements that are not requested pursuant to § 251 and that federal law does not require because SBC Missouri now has an ICA on file that can be adopted by any and all CLECs who are interested. Regulatory policy such as this hinders the development of procompetitive business arrangements.

It is my opinion that requiring private commercial agreements to be filed with the Commission for review under § 252 of the Act, when those agreements do not involve

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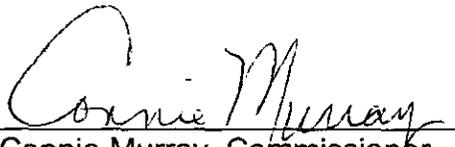
<sup>2</sup> See *United States Telecom Association v. F.C.C.*, 359 F.3d 554 (D.C.Cir. 2004) (*USTA II*).

<sup>3</sup> See *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, Staff's Recommendation to the Commission, Appendix A (FCC News Release dated March 31, 2004, states: "Today, we sent a letter to telecommunications carriers and trade associations urging them to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market.")

<sup>4</sup> See *Order on Remand*, CC Docket No. 01-338, WC Docket No. 04-313, released February 4, 2005, (for example, review the recommendation for the transition period, ¶ 228).

network elements or services required under the Act, will have an adverse impact on carriers' willingness to negotiate such agreements in the future. The provisioning of services and elements not otherwise required under the Act should be left to private give and take between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties.

**Respectfully submitted,**

  
Connie Murray, Commissioner

Dated at Jefferson City, Missouri  
on this 11<sup>th</sup> day of May, 2005.