

**BEFORE MISSOURI THE PUBLIC SERVICE COMMISSION**

In the Matter of a Commission Inquiry into	§	
the Possibility of Impairment without	§	Case No. TO-2004-0207
Unbundled Local Circuit Switching When	§	
Serving the Mass Market	§	

**AMENDED RESPONSE TO SBC'S MOTION TO DISMISS**

NuVox Communications of Missouri, Inc. ("NuVox"), Birch Telecom of Missouri, Inc. ("Birch"), Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. Kansas City, LLC ("Xspedius"), and AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc. ("AT&T") (collectively herein "CLECs"), hereby respond pursuant to 4 CSR 240-2.080(15) to Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Motion to Dismiss. For the reasons stated herein, SBC's Motion should be denied. SBC's assertion that the issuance of the *USTA II*<sup>1</sup> mandate now requires termination of this case is erroneous. Instead of terminating the instant case, CLECs respectfully urge that the appropriate course of action is for this Commission to continue to suspend the case.

The Commission established this case to consider a variety of issues concerning unbundling of network elements. The Commission completed the first phase and rendered its decision on February 24, 2004, determining that the exchange is the appropriate geographic market in which to analyze impairment of CLECs ability to provide services without access to local switching and that the appropriate cutoff between mass markets and enterprise markets is 10 DS0 lines. Moreover, the staff and all other

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<sup>1</sup> *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

parties expended significant effort and expense in conducting discovery and preparing testimony for the purpose of creating a record regarding local switching, hot cuts, high-capacity loops, and transport. The parties were engaged in intense litigation over these matters from the creation of the case in early November, 2003 through the suspension of proceedings in March, 2004. Currently, by order dated March 18, 2004, the case remains suspended until further order

In support of its Motion, SBC claims there is no longer “any lawful basis” for this proceeding because the D.C. Circuit determined in *USTA II* that the FCC’s subdelegation to the states was unlawful. SBC Motion to Dismiss at p. 4. Contrary to SBC’s claims, even after *USTA II* -- or, perhaps more to the point, especially after *USTA II* -- this Commission still has a critical, ongoing role in developing an accurate, granular picture of the extent of competition in Missouri, and in conveying that picture to the FCC in its future rulemaking proceedings. Preservation of the current status of this case is necessary to help fulfill that role. Neither the Commission nor the parties should have to abandon the results of all the prior efforts in this case when they may still build upon those results in providing necessary and important information to the FCC. Just as importantly, such results will also serve as a baseline for evaluating and maintaining the UNE/UNE-P access obligations imposed on SBC in any future state proceeding. Accordingly, the Commission should not take any action that causes the effort that has been undertaken in these dockets to go to waste, and it should ensure that the information remains available both to it and the parties for whatever future use it may be called upon to serve.

Preserving the current status of this proceeding is consistent with the view that the information developed herein will be very valuable to both the Commission and the FCC

in the coming months. Various members of the FCC have indicated that the state commissions may be called upon to provide the FCC with information from fact-based state records. Speaking at NARUC shortly after *USTA II* was decided, FCC Commissioner Kevin Martin told state regulators: “I am confident that, irrespective of the final outcome, the relevant data and factual information you have and will gather as part of the competitive market analysis will be vital to advancing the cause of local competition in the next phase of the Commission’s process.”<sup>2</sup> “The gathering of the factual information is important in implementing whatever standard gets applied,” he reportedly said, adding that the FCC’s limited resources would make it “almost impossible” for the Commission to gather state-specific competition data on its own.<sup>3</sup>

Just recently, Commissioner Copps of the FCC, speaking before the Southeastern Association of Regulatory Utility Commissioners, stated:

But as we face the new world of transitional rules, the work you’ve done before becomes even more relevant. Many of you responded to our call for state analysis of the availability of switching, high capacity loops and transport. Now you need to help us [the FCC] again. If you’ve collected information—bring it on. If you’ve gathered facts—show us. *If you’ve amassed data and analyzed it based on operational and economic facts—let us see what you’ve learned. State commission knowledge about the state of truly local competition can be so much better than anything we cook up far away in Washington.*<sup>4</sup>

It is important that the Missouri PSC, with the continuing assistance of the parties, be able to forward, when appropriate, the information (and its analysis and recommendations based upon its review of the record) to the FCC. The Missouri record -

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<sup>2</sup> See <http://www.fcc.gov/commissioners/martin/documetns/NARUC3-8-04.pdf>.

<sup>3</sup> Telecommunications Reports State News Wire, March 9, 2004.

<sup>4</sup> *Remarks of Commissioner Michael J. Copps*, Southeastern Association Of Regulatory Utility Commissioners Charleston, South Carolina (June 15, 2004) (emphasis added).

as it currently exists and as it may yet be further developed by the staff and other parties - can provide the FCC with valuable insight regarding the level and type of competition that exists in this state at a granular level.<sup>5</sup>

Granting SBC's Motion to Dismiss would deny to both the Commission and the parties the ability to use key portions of their files and the record in the future. Much of the Missouri-specific factual information produced either in discovery or testimony was designated as confidential or highly sensitive confidential by the parties. Under the protective order in place in this proceeding,

Within 90 days after the completion of this proceeding, including judicial review thereof, all designated information, testimony, exhibits, transcripts, or briefs in the possession of any party other than Staff or the Public Counsel shall be returned to the party claiming a confidential interest in such information and any notes pertaining to such information shall be destroyed.<sup>6</sup>

If the Commission were to grant SBC's Motion and dismiss this proceeding, SBC will presumably waste no time in taking the position that the proceeding has been completed, and demanding the return of all proprietary or highly confidential documents. But such action would be premature, given that the Commission may well determine in the near future that the parties should be able to use such information in completing a record to provide information to the FCC, as well as to provide a basis for this Commission to make recommendations to the FCC.<sup>7</sup>

Nor is SBC's discussion of the impact of *USTA II* correct. SBC's Motion grossly overstates the reach of the *USTA II* decision. That decision did not invalidate the

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<sup>5</sup> Moreover, the factual material submitted by the parties in this case may prove valuable to the Commission in considering unbundling issues under state law as well. While this is not the time for the commission to address such unbundling issues on the merits, the Commission has authority to adopt unbundling requirements under state as well as federal law.

<sup>6</sup> Protective Order, Section V (November 6, 2003).

Telecommunication Act's basic "impairment" standard for unbundling. Nor did it invalidate the granular approach the FCC must use to assess impairment. To the contrary, any impairment analysis the FCC undertakes pursuant to the *USTA II* remand must continue to be "granular" under the requirements of *USTA I*.<sup>8</sup> In *USTA I*, the D.C. Circuit Court of Appeals found that the Act requires "a more nuanced concept of impairment than is reflected in findings ... detached from any specific markets or market categories."<sup>9</sup> It reaffirmed this requirement throughout *USTA II*. As a result of the Court's findings in *USTA I*, the FCC adopted an impairment standard that relied on a "granular analysis informed by consideration of the relevant barriers to entry, as well as a careful examination of the evidence, especially marketplace evidence. . . ."<sup>10</sup> Nothing in *USTA II* found that such a granular analysis of impairment is improper.<sup>11</sup>

At a minimum, therefore, in developing any new unbundling rule the FCC must look at Missouri-specific data before making any "nuanced" impairment decisions regarding the availability of unbundled elements in the state. And regardless of the test it applies, the FCC certainly will need granular evidence of the type gathered in this case to make its decision consistent with the requirements of *USTA I* and *USTA II*.

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<sup>7</sup> And CLECs understand that SBC would be able to retain the confidential information it has obtained during the course of this proceeding, so there is nothing one-sided about CLECs' opposition to the Motion to Dismiss.

<sup>8</sup> *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

<sup>9</sup> *USTA I*, 290 F.3d at 426.

<sup>10</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking*, No. FCC 03-36, released August 21, 2003 ("*TRO*"), ¶84.

<sup>11</sup> The principal finding in *USTA II* is that, in the Court's view, to the FCC may not permit the states to have the final say on whether the granular impairment test has been met.

Furthermore, the FCC may lawfully make future unbundling decisions based upon state commission policy recommendations arising from state proceedings. The D.C. Circuit said that “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decision itself.”<sup>12</sup> Hence, delegation of investigatory and recommending roles to the states remains lawful. The best source for that advice and policy recommendation remains this Commission and the evidence it has developed -- and will continue to develop -- concerning impairment in Missouri.

Finally, the Commission should preserve the current status of this case so that it may build thereon as it considers in the future SBC's hot cut procedures. The USTA II decision did not affect the FCC's determinations regarding hot cuts and states still have an important role in making certain that SBC has appropriate hot cut procedures and charges appropriate rates for them.

### **CONCLUSION**

It is premature to speculate on the precise form that the use of the information developed in the instant docket may take under federal auspices. It cannot be doubted, however, that such information will ultimately (and may soon) be needed by the FCC and this Commission. It is both necessary and appropriate, therefore, that the Commission not issue an order that would prevent review and further use of the information. Accordingly, CLECs respectfully request that the Commission deny SBC's Motion to Dismiss Triennial Review Proceedings. Instead, CLECs respectfully urge the Commission to allow the case to remain in its present state, to wit, suspended pending further order.

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<sup>12</sup> *Id.* at 568.

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**Certificate of Service**

A true and correct copy of the foregoing was served as required by Commission Order in this case on this 1st day of July, 2004 by e-mail transmission.

/s/ Carl J. Lumley

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