

**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 )	

**MCI's COMMENTS REGARDING PROCEDURAL SCHEDULE**

COME NOW, MCImetro Access Transmission Services, LLC, Intermedia Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. (herein "MCI") pursuant to 4 CSR 240-2.080(15) and for their Response to Staff's pleading regarding the proposed procedural schedule respectfully state to the Commission the following:

1. As part of the nine-month proceeding, the Commission must define the relevant geographic area to include in each market. In defining markets, the Commission must consider the following factors: 1) the locations of mass market customers *actually* being served<sup>1</sup> (if any) by competitors, 2) the variation in factors affecting competitors' ability to serve each group of customers, and 3) competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies.

Triennial, Rule 51.319(d)(2)(i).

2. The Commission must determine the definition of a market for various proceedings, including this one. The FCC has set forth certain parameters as to how the states must determine the proper market definition. The FCC has mandated that states conduct a thorough factual examination before arriving at a definition:

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<sup>1</sup> As discussed further herein below, the FCC made it clear that it is not sufficient to identify isolated instances of service, but rather carriers that are "operationally ready and willing to provide service to all customers in the designated market." Triennial, para. 499.

The triggers and analysis described below must be applied on a granular basis to each identifiable market. State commissions must first define the markets in which they will evaluate impairment by determining the relevant geographic area to include in each market. State commissions have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state. Rather, state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies. While a more granular analysis is generally preferable, states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commission must use the same market definitions for all of its analysis. [Triennial, ¶ 495 (footnotes omitted)]

3. The FCC also noted that economic impairment may be especially likely in wire centers below a specific line density. Before finding 'no impairment' in a particular market, therefore, state commissions must consider whether entrants are likely to achieve sufficient volume of sales within each wire center, and in the entire area served by the entrant's switch, to obtain the scale economies needed to compete with the incumbent. (Triennial, ¶ 520)

4. Accordingly, the Commission needs to examine evidence submitted by the parties on each of the issues identified above, and there should be hearings on this before the Commission makes its determination. While the FCC states that the "State commissions must first define the markets in which they will evaluate impairment," in context, this appears to only state the obvious -- that before any state commission can

determine whether there is impairment in a market, the state commission must first define the market.

5. This is also similar to how the FCC addresses the geographic market issue in analyzing mergers. “[T]he first step in analyzing a merger is to define the relevant product and geographic markets.” *I/M/O the Merger of MCI Communications Corporation and British Telecommunications PLC*, GN Docket No. 96-245, FCC 97-302, (rel. September 24, 1997). at ¶35. Even though the FCC states the “first step” is to define the geographic markets, it does not bifurcate the proceeding. Instead, in the same order in which it determines the geographic markets it also applies this definition of the geographic market so that the proceeding has a single order in this regard.

6. The wording here about “first determining” the geographic market is also similar to the wording which the FCC used in its rules on the batch hot cut issue, Rule 319(d)(2)(A), which requires states in establishing the batch hot cut process to "first determine the appropriate volume of loops that should be included in a 'batch.'" Similar to the geographic market definition, the determination on the batch hot cut issue cannot be made in a vacuum and is interrelated to the other issues that the state commission will be examining. In the final state commission order which addresses batch hot cuts, however, the volume will be, by rule, the first conclusion reached. One would not expect the batch hot cut evidence or proceeding to be bifurcated to first determine the volume in one phase and to then have evidence and argument on the remaining issues in a second or later phase. Similarly, a reasonable person would not expect the market definition issue to be bifurcated from the rest of the pertinent evidence.

7. The FCC, in prior rulings, has provided further clarification on how to define a geographic market. "The geographic market is more accurately defined as a series of point-to-point markets. We can consider, as a whole, groups of point-to-point markets where customers face the same competitive conditions. We therefore treat as a geographic market an area in which all customers in that area will likely face the same competitive alternatives for a product." (In re: applications of Ameritech and SBC for consent to Transfer Control of Corporations, CC Docket No. 98-141, FCC 99-279, note 147.) In essence, under this FCC methodology, a geographic market is determined in a bottom-up manner: start looking at the point-to-point evidence and, if appropriate based on this evidence, combine groups of point-to-point markets to determine the geographic market. This can only be done based on a granular examination of the evidence. This is similar to the approach that the FCC has taken in other parts of the Triennial order, such as by requiring that the market for a loop be a specific customer location and that the market for transport be a specific point-to-point route. The primary difference is that for loops and transport no further aggregation of markets is necessary or allowed, but with switching the evidence in the state proceedings will determine if further aggregation is appropriate.

8. Given that the states must use the same definition of geographic market for the impairment analysis as for the triggers for switching, and given that the economic impairment analysis and the traditional FCC approach to defining markets requires analysis at the wire center or even more granular level, the state commission must at least receive and review all of the wire center (and sub-wire-center) level evidence which is part of the economic impairment case before determining what, if any, level of

aggregation of wire centers must be made in determining the geographic markets in the state. The type of evidence required in the potential deployment analysis is what the FCC wants the states to look at in defining the market, so states and parties need to gather all of the evidence relating to triggers and potential deployment, and then decide issues. The ruling on the appropriate definition should only be made at the end of the case when the state commission also rules on impairment.

9. The FCC also noted that sufficiently similar customer classes should be considered together (Triennial, para. 123), and further noted that there is an obligation “to determine which customers could not be served by carriers without the UNEs in question, and, where practical, require unbundling only for those customers.” (Triennial, para. 125). The FCC noted that in the mass market, “. . . revenues are small, customers are typically served in large groups, using uniform technologies and mass marketing and provisioning techniques to minimize the cost of serving each customer.” (Triennial, para. 309). Accordingly, when addressing switching for the mass market, it is essential that state commissions only look to mass market customers being served.

10. The FCC specifically noted that, depending on the granular facts in specific states, it may not be proper to include some very small businesses in the analysis of mass market switching. (*See* Triennial footnote 432: “Very small businesses typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner. Therefore, we will usually include very small businesses in the mass market for our analysis. We note, however, that there are some differences between very small businesses and residential customers. For example, very small businesses usually pay higher retail rates, and may be more likely to purchase

additional services such as multiple lines, vertical features, data services, and yellow page listings. Therefore, we may include them with other enterprise customers, where it is appropriate in our analysis.”)

11. Also, determining which types of customers competitive carriers are addressing on a facilities basis is critical to the trigger analysis. For example, if a facilities-based carrier is ONLY serving business customers with its facilities, it cannot be counted toward the trigger. There is a critical distinction between residential and small business markets based on the smaller volume of customers, the type of loop plant, and larger revenue per line associated with small business. If the Commission were to erroneously rely on small business carriers to show that a trigger had been met, then the Commission would be effectively taking away unbundled switching to the entire "mass market" - including residential customers (who are the great majority of the “mass market”), even though no single CLEC serves<sup>2</sup> a single residential customer with its own switching and economic and operational barriers do indeed exist for residential customers. That cannot be a proper outcome of the trigger analysis.

12. It is also critical that the Commission, in looking at similarly situated customers, determine and group customers according to whether they are being served via copper loops or via IDLC. If any customers are being served via all fiber loops or via hybrid fiber/copper DSL-capable loops, that should also be noted. Operationally, there are critical differences between serving a customer via copper and attempting to serve a customer who is presently being served via IDLC. For example, assume that in a given market 40% of the customers are served via IDLC and 60% of the customers are being served via copper. Assume that in this market, no CLEC provides switching to those

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<sup>2</sup> See supra note 1.

customers presently served via IDLC (because of operational impediments) and assume that there are three CLECs who self-provision switching to those customers in the copper service area. It would be erroneous for the Commission to rule that the Self-Provisioning trigger had been met for the entirety of the market, because 40% of the customers would have no competitive choice for services because of the operational barriers created by the use of the IDLC technology. Similarly, for customers who want a bundle of services that includes both voice and DSL—an increasing percentage of customers—the Commission must recognize that the FCC has precluded competitive access to hybrid fiber/copper loops, and therefore CLECs will not have access to that potential customer base either.

13. With the issuance of the Errata of September 17, 2003, there is also cause to comment on the Errata changes to paragraphs 499 and 519 of the Triennial. In paragraph 499, which addressed the mass market switching triggers, the FCC changed some of the wording, including deleting this sentence: “They [(identified competitive switch providers)] must be operationally ready and willing to provide service to all customers in the designated market.” In paragraph 519, which addressed economic barriers under the potential deployment analysis, the FCC deleted the following sentence: “State commissions must ensure that a facilities based competitor could economically serve all customers in the market before finding no impairment.”

14. These Errata changes have the effect of correcting the Triennial order. Before these Errata changes were made, these two paragraphs had literally meant that any identified competitive switch provider had to be ready, willing, and economically able to serve all of the customers in the market. The “all” standard would certainly have been a very tough standard to meet. To serve “all” customers would require the identified

competitive switch provider to be able to serve 100% of the customers in the market at the same time. This would require a very large collocation in the central office in the defined geographic market (and large collocations in all of the central offices in the geographic market if the market consisted of more than one central office). This would also require enough capacity on each of the identified competitive switch providers to serve 100% of the customers in the market at the same time.

15. It is clear that the Errata, with these changes, was replacing the stated “all customers” concept with an “every part of the market” concept. This “every part of the market” concept was kept in paragraph 510 of the Triennial, which states in pertinent part as follows: “The existence of a competitor that is serving the local exchange mass market with its own switch provides evidence that the mass market can be served effectively. The state commission should consider whether the entire market could be served by this switch.” (Triennial, ¶510). In other words, only if a switch can serve any portion of the market, and thus cover the entire market, should this switch then be counted.

16. Footnote 1552 of the Triennial, which applies to the trigger analysis for mass market switching, was left intact, but was added to by the Errata. That portion of this footnote that was left intact provides further support to the “every part of the market” concept. This provision states in pertinent part as follows: “In circumstances where switch providers (or the resellers that rely on them) are identified as currently serving, or capable of serving, only part of the market, the state commissions may choose to define that portion of the market as a separate market for purposes of its analysis.” This provision further clarifies that it is important that a switch provider serve every part of the market in order to be counted. The FCC, in this provision, clearly gave the states the



ability to narrow the geographic range of the market to ensure that a competitive switch be counted. If it were not necessary that a competitive switch serve every part of the market to be counted, then there would have been no need for this language in footnote 1552.

17. This interrelationship, as to whether a competitive switch serves every part of a market, and the authority given by the FCC to the state commissions to narrow the definition of the geographic market to take into account the serving capability of a competitive switch, provides further support that a state should not attempt to define the geographic markets until it has all of the applicable evidence at hand to make a fully informed decision.

18. The geographic market determination, like the analysis to see to it that dissimilar customers are not considered together, is all part of the overall analysis. In other words, the trigger and potential deployment determinations must be done at the end point of ultimate decision making in the state, based on the granular review of facts and:

- A) The geographic market determination;
- B) The analysis to see to it that dissimilar customers are not considered together; and
- C) A showing that each proposed triggering company is offering service to mass market customers in every part of the defined market.

19. By approaching the issue in this way, the Commission would also have information available to it showing the extent to which impairment would be found using different possible definitions of the relevant geographic market before locking in any given definition. This would thus result in a better-informed Commission decision on

impairment. Furthermore, there are no other reasonable alternatives given the likely case schedule and given the totality of the information which the FCC has mandated that the Commission consider before making its determination as to the definition of market.

20. For the same reasons, the mass market switching triggers cannot and should not be decided upon until the potential deployment review has been conducted. The relevant markets for the trigger review must be the same as those used in the potential deployment review. Deciding upon the triggers before all of the impairment evidence has been collected necessarily requires an early decision on market definition. For the reasons MCI discusses above, markets should not be defined until all of the evidence in the case has been considered.

21. Finally, in addition to the foregoing, MCI observes that the proposal for a separate, initial hearing phase concerning only market definition and cutover would not only require the Commission to make these important decisions without having heard all the evidence required, but also would force the Commission into rushing into a decision very early in the proceedings. If the Commission was not committed to making such a rushed and uninformed decision, there would obviously be no point at all in having the separate hearing.

WHEREFORE, MCI requests that the Commission approve the procedural schedule submitted by the parties that calls for only two phases of hearings - one phase regarding mass market switching, including market definitions and cutover definitions, and a second phase regarding loops and transport.

Respectfully submitted,

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**Certificate of Service**

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