

**BEFORE THE MISSOURI 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.	§	

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

Covad Communications Company ("Covad") respectfully submits that SBC's Motion to Dismiss is wholly without merit. At the very least, SBC's Motion to Dismiss this proceeding is woefully premature. Therefore, Covad respectfully urges this Commission to refrain from hastily dismissing this proceeding and making waste of the enormous efforts of the parties, the Commission Staff, and the Commission itself. Rather, Covad urges this Commission to pursue a reasoned and prudent course. Specifically, Covad urges this Commission to deny SBC's Motion to Dismiss, with prejudice. In the alternative, Covad urges the Commission to deny SBC's Motion to Dismiss without prejudice, inviting SBC to refile its motion if, and when, appropriate. Such deliberate and cautious steps will ensure that the resources and energies devoted to this proceeding will not be precipitously wasted. Moreover, Covad would respectfully show that the Commission is required to deny SBC's Motion to Dismiss for the reasons set forth below.

## **A. Introduction**

In the interests of preserving residential competition in Missouri, this Commission must not let the efforts of the parties, and the record in this proceeding, go to waste. The *TRO* proceeding that SBC seeks to extinguish is the most comprehensive and up to date examination of the state of competition in Missouri. The parties, Commission Staff, and the Commission itself have spent months collecting evidence and building the record in this proceeding. Specifically, the parties have produced voluminous discovery responses (including highly confidential information), submitted thousands of pages of testimony and evidence, subjected some of that testimony and evidence to extensive cross-examination, and have expended great effort to compile and analyze this evidence in their briefs. Closing this docket prematurely would result in a monumental waste of this effort. Moreover, closing this proceeding even temporarily will trigger a number of things, such as return of parties' confidential information, that could hinder revisiting the issues in this proceeding should the Commission seek to do so under its independent state law authority, or in connection with the development of new FCC impairment rules. Indeed, any new impairment test developed by the FCC will require either the FCC or this Commission to examine the record in these proceedings. Scattering all the information compiled by the Commission and the parties to the wind is expensive, time consuming, unnecessary, and potentially devastating to any future examination of the state of competition in Missouri. Thus, the Commission is better served to hold the case open, without any activity, until the FCC issues its new impairment rules. The Commission should therefore deny SBC's Motion to Dismiss.

**B. SBC's Motion to Dismiss Lacks Merit.**

SBC's Motion to Dismiss must be denied for lack of merit because the D.C. Circuit's decision in *USTA II* did not address (substantively or procedurally) the FCC's impairment determination and delegation with respect to high-capacity loops. Therefore, the FCC's impairment determination and delegation regarding high-capacity loops was not vacated when the mandate in *USTA II* issued. Therefore, the Commission should complete the unbundling analysis required by the *TRO* and issue a Final Order with respect to whether CLECs are impaired without access to high-capacity loops.

SBC will undoubtedly argue that the FCC's impairment determination and delegation with respect to high-capacity loops should have been vacated based on the reasoning employed by the D.C. Circuit to vacate similar delegations of decision-making authority with respect to mass market switching and dedicated transport. What SBC argues should have happened and what actually did happen, however, are two different things. In *USTA II*, the D.C. Circuit did not vacate or even address the high-capacity loop impairment determination and delegation in the *TRO*. Unless and until the FCC changes its rules or a court of competent jurisdiction enters a decision expressly vacating those rules, the FCC's determinations and rules with respect to high-capacity loops stand, and must be carried out by this Commission.

Moreover, SBC incorrectly assumes that the FCC's batch hot cut rules are unlawful because they were *part of* the FCC's attempted delegation to state commissions of the authority to make market-by-market impairment determinations. As an initial matter, the FCC's batch hot cut rules were not part of any impairment determination delegated to the states. To the contrary, the FCC's batch hot cut rules were premised on

the *FCC's blanket, nationwide finding of 'impairment'* with respect to mass market switching. (See *TRO*, ¶ 423). Because the FCC made a “nationwide” finding of impairment based upon insufficient ILEC batch hot cut processes, it necessarily follows that the FCC did not delegate to state commissions the authority to determine whether ILEC batch hot cut processes resulted in impairment without access to mass market switching. Moreover, even if the FCC's batch hot cut rules could somehow be considered to be *part of* the FCC's attempted delegation to state commissions of the authority to make market-by-market impairment determinations, the batch hot cut rules themselves only required state commissions to “approve and implement a batch cut migration process” and did not require state commissions to make any impairment determinations.

Accordingly, as discussed above, SBC's Motion to Dismiss must be denied for lack of merit because (1) the FCC's impairment determination and delegation to state commissions with respect to high-capacity loops was not vacated by *USTA II* and remains binding authority on this Commission; and (2) the FCC's batch hot cut rules were not unlawful for delegating decision-making authority to state commissions.

**C. SBC's Motion to Dismiss is Premature.**

In the alternative, SBC's Motion to Dismiss must be denied for being premature because the factual information collected by the Commission in this proceeding may lawfully inform the impairment determinations that will be made by the FCC once it promulgates new unbundling rules. According to the D.C. Circuit's decision in *USTA II*, the FCC is lawfully authorized to make future unbundling decisions based upon the factual information produced in state *TRO* proceedings. As stated by the D.C. Circuit, “a

federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information.” *USTA II*, 359 F.3d at 567. Furthermore, the FCC is lawfully authorized to make future unbundling decisions based upon state commission policy recommendations arising from state *TRO* proceedings. As further stated by the D.C. Circuit, “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decision itself.” *Id.* at 568.

In the alternative, SBC’s Motion to Dismiss must be denied for being premature because the factual information and policy recommendations produced in connection with the Commission’s batch hot cut investigation will inform both the FCC and this Commission on transitioning end-users from ILEC-switched arrangements to CLEC-switched arrangements if the FCC ultimately finds that CLECs are not impaired without access to unbundled local switching.

Accordingly, SBC’s Motion to Dismiss must be denied for being premature because the FCC and this Commission should be afforded the opportunity to draw upon the factual information and policy recommendations developed therein.

**D. Conclusion.**

For all the reasons set forth above, SBC’s Motion to Dismiss must be denied with prejudice, precluding SBC from refiling the same motion. In the alternative, SBC’s Motion to Dismiss should be denied without prejudice, allowing SBC to refile its motion at such time, if any, when the arguments therein are timely.

Respectfully submitted,

CURTIS, HEINZ,  
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

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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