BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

SBC MISSOURI'S PHASE I BRIEF

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SBC Missouri[1] respectfully requests that the Missouri Public Service Commission ("Commission"), in connection with its analysis required under the Federal Communication Commission's ("FCC's") Triennial Review Order ("TRO"):[2] (1) use Metropolitan Statistical Areas ("MSAs") to define the geographic markets for the purpose of the mass market switching analysis; and (2) adopt a DS0 cutoff of four DS0s, so that a customer with four or more DS0s at a location would be part of the enterprise market, while a customer with three or fewer DS0s would be in the mass market.

In making these determinations, the Commission should disregard suggestions of parties that have chosen to ignore the FCC's directives in order to produce their desired result: perpetuating the availability of below-cost UNE-P.[3] The FCC's directive is to conduct an impairment analysis as required by the federal Act, not to gerrymander the market to retain a regulatory boon. As the FCC has recognized, "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."[4] In conducting the analysis delegated to it under the Triennial

[1] Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri."
[2] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, et al., Report and Order on Remand and Further Notice of Proposed Rulemaking, released August 21, 2003 (Triennial Review Order or TRO).
[3] "UNE-P" or the Unbundled Network Element Platform is the combination of unbundled switching and an unbundled loop. It also includes access to shared transport. Fleming T. 381.
[4] TRO, para. 3.

Review Order, the Commission should be guided not by the demands of various carriers, but by the specific rules and mandates set out by the FCC in the Triennial Review Order.

In applying these standards, the Commission will quickly recognize that the proposals offered by the CLECs and Staff do not comply with the FCC's rules. For example, the wire center and exchange proposals for a market definition do not comply with the FCC's mandate to account for economies of scope and scale. An efficient CLEC entering a market with its own switch will seek to spread the cost of providing service using that switch over a broad number of potential customers, such as over the target MSAs as proposed by SBC Missouri. That is precisely what has occurred in Missouri as switch-based CLECs provide switch-based services throughout the target MSAs.

The CLECs' flawed recommendation to ignore data revenues when analyzing the DS0 cutoff provides another example of the CLECs' disregard for the FCC's rules. The CLECs would have the Commission ignore real-world decision making for some artificial and contrived analysis that clearly does not take into account the manner in which companies would actually go about deciding whether or not to use a DS1 to serve customers. Obviously, a company is going to consider all the potential revenues, including data revenues, it could derive from using one technology over another. While these are only a couple of examples of the flaws in the CLECs' and Staff's proposals, they are indicative of those parties' desire to have this Commission ignore the FCC's directives.

ARGUMENT

Issue 1 **For purposes of examining whether there is "non-impairment" in the provision of unbundled local switching to service mass market customers, what are the relevant geographic markets within the state of Missouri?**

I. The Legal Standard.

The FCC promulgated a binding federal rule that specifies the three factors that a state commission must consider in order to define the markets:

> Market definition. A state shall define the markets in which it will evaluate impairment by determining the relevant geographic area to include in each market. In defining markets, a state commission shall take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation and factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies. A state commission shall not define the relevant geographic area as the entire state.[5]

And the FCC imposed an additional mandate: "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."[6]

II. MSAs Best Meet the FCC's Criteria for a Geographic Market.

The Commission should adopt SBC Missouri's service territory in the Kansas City, St. Louis and Springfield Metropolitan Statistical Areas ("MSAs") to define the geographic markets for the purpose of the mass market switching analysis.[7] MSAs best meet the FCC's criteria[8] for a geographic market because the evidence demonstrates that CLECs are actually serving Missouri mass market customers throughout the MSA;[9] there is little variation across the MSAs in factors

[5] 47 C.F.R. Sec. 51.319(d)(2)(i).
[6] TRO, para. 495.
[7] SBC Ex. 3 (Fleming Direct), pp. 5-10; SBC Ex. 1 (Tardiff Direct), pp. 7-22; SBC Ex. 2 (Tardiff Rebuttal), p. 7.
[8] 47 C.F.R. Sec. 51.319(d)(2)(i).
[9] SBC Ex. 3 (Fleming Direct), pp. 10-19.

that might substantively affect a competitor's ability to serve mass market customers;[10] and where CLECs have entered an MSA using their own switches, they have the ability to use them to serve mass market customers in most, if not all, of the MSA if they choose.[11]

CenturyTel and Sprint (which opposes SBC Missouri on the core impairment issue) both support the MSA-based market definition.[12] And Staff, while advocating an exchange-based approach, favors the MSA-based approach over those proposed by other parties.[13] Staff also testified that grouping various exchanges together may make sense and that the MCA, which reflects previous Commission community of interest determinations, would be a good basis for such a grouping.[14]

A. MSAs reflect communities of interest and commerce.

An MSA is a county or group of counties with a large clustered population, including adjacent areas having a high degree of community of interest with the core population center. Specifically, the federal Office of Management and Budget ("OMB") defines an MSA as a county or group of counties with (1) a city of population 50,000 or more or (2) an urbanized area (as defined by the Census Bureau) of population at least 50,000, consisting of one or more counties. According to the OMB:

> The general concept of a Metropolitan Statistical Area or a Micropolitan Statistical Area is that of an area containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus.
>
> Metropolitan Statistical Area. A Core Based Statistical Area associated with at least one urbanized area that has a population of at least 50,000. The Metropolitan Statistical Area comprises the central county or counties containing the core, plus

[10] SBC Ex. 3 (Fleming Direct), pp. 20-24.
[11] SBC Ex. 3 (Fleming Direct), pp. 11-19; SBC Ex. 4 (Fleming Rebuttal), pp. 42-43; SBC Ex. 1 (Tardiff Direct), pp. 21-24.
[12] CenturyTel Ex. 5 (Martinez Direct), p. 7; Sprint Ex. 7 (Harper Direct), p. 4.
[13] See, Staff's Position Statement for Phase I: "Of the market definitions proposed by the other parties in this case, it is the Staff's position that those portions of the Metropolitan Statistical Areas established by the federal Office of Management and Budget that are located in the state of Missouri would provide the most appropriate definition."
[14] Thomas T. 858, 945-947.

> adjacent outlying counties having a high degree of social and economic integration with the central county as measured through commuting.[15]

MSAs are carefully developed to reflect demographic and commercial reality based on the application of OMB standards to census data (including commuting patterns). MSAs have a "high degree of integration" with a recognized population nucleus and recognized "economic linkages between urban cores and outlying, integrated areas."[16]

Within each of these integrated areas of population, the portions of SBC Missouri's service territory that falls within the Kansas City, St. Louis and Springfield MSAs constitute appropriate geographic markets for purposes of analyzing mass market switching impairment.[17] As explained below, these geographic areas account for the locations of mass market customers already served by competitors, and reflect the variation in factors affecting competitors' ability to serve customers, as well as their ability to target and serve specific markets profitably and efficiently. Additionally, SBC Missouri's service territory within each of these MSAs reflects the economic markets in which competitors serve customers using their own switches, in light of the efficiencies of scale and scope available from serving markets of that geographic scope.

B. CLECs are actually serving Missouri mass market customers throughout the MSAs.

The Commission should give substantial weight to evidence concerning the locations of current CLEC mass market customers served by self-provisioned switching. These locations are the result of real-world business and investment decisions made by new entrants, presumably after rational consideration of the same sort of cost, revenue, and

[15] OMB, *Standards for Defining Metropolitan and Micropolitan Statistical Areas*, 65 Fed. Reg. 82,238 (Dec. 27, 2000). Currently defined MSAs are based on application of the 2000 standards (which appeared in the Federal Register on December 27, 2000) to Census 2000 data and were announced by OMB effective June 6, 2003.
[16] 65 Fed. Reg. 82,228 (2000).
[17] In the very few cases where an SBC Missouri wire center falls both within and without an MSA (because wire center boundaries may not precisely follow the county boundaries upon which MSAs are based), SBC Missouri proposes that the entire wire center be included in the relevant geographic market where SBC Missouri's switch is located. SBC Ex. 3 (Fleming Direct), p. 7.

demographic factors identified by the FCC.[18] As the FCC held, "the existence of a competitor serving the mass market with its own switch provides evidence that the mass market can be served effectively."[19] The fact that that a competitor is actually serving customers in those locations with its own switch provides substantial evidence that those locations are part of the geographic area that the new entrant's scale and scope economies allow it to serve economically.[20]

The Areas Actively Being Served by CLECs. In Missouri, the customers that competitors currently serve via self-provisioned switching are spread throughout the Kansas City, St. Louis and Springfield MSAs. Over 20 CLECs have deployed over 40 digital central office switches to provide service in Missouri.[21] Each of these switches has at least one NXX code assigned to it and should be capable of serving CLEC customers throughout the MSA. Many of these switches are serving mass market customers.[22]

The wire centers in MSAs where CLECs are using their own switching facilities and SBC Missouri unbundled loops to serve mass market customers account for over 76% of SBC Missouri's total access lines in those MSAs. The fact that competitors have established a presence in such a large proportion of SBC Missouri's territory within each of these MSAs demonstrates that "competitors' ability to use self-provisioned switches . . . to serve various groups of customers" is not substantially limited within any of these MSAs by technological constraints or by whatever variations might exist within SBC Missouri's service territory in each MSA.[23]

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[18] See TRO, paras. 495-496.
[19] TRO, para. 510.
[20] SBC Ex. 1 (Tardiff Direct), pp. 15-17.
[21] SBC Ex. 3 (Fleming Direct), p. 22, Schedule GAF-3.
[22] Id., p. 11.
[23] See TRO, para. 495.

The Areas Not Being Served by CLECs. The locations where mass market customers are *not* being served by competitors using their own switches must also inform the decision on how to partition the State for purposes of the impairment analysis. This is what the FCC had in mind when it stated that the defining of geographic markets "should attempt to distinguish among markets where different findings of impairment are likely."[24]

Here, the data shows that competitors are using their own switches to serve mass market customers in SBC Missouri's service territory in the Kansas City, St. Louis and Springfield MSAs. And it also shows that they conspicuously are not doing so in other MSAs (e.g., Columbia, Joplin, and St. Joseph) or in any of the Micropolitan Statistical Areas (e.g., Cape Girardeau, Farmington and Hannibal).[25] While there are a few isolated wire centers within the three MSAs in which CLECs do not yet appear to be utilizing the switches they have deployed, this reflects the disincentive below-cost UNE-P creates for CLECs to use the switches they own (this can also be seen from the use of UNE-P by CLECs to serve customers in wire centers where they have already secured collocation, aggregation equipment and transport back to their own switch).

Given that CLEC switches are technologically and operationally capable of serving customers across entire states, and even in multiple states, the fact that competitors are choosing to use their switches to target only particular MSAs, and not other MSAs or Micropolitan areas, shows that those targeted MSAs constitute appropriate geographic markets for purposes of analyzing mass market switching impairment.[26]

Collocation. Collocation data corroborates the conclusion driven by the locations of mass market customers served by CLEC switches. When a CLEC collocates in a central office, it can

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[24] TRO, para. 495.
[25] SBC Ex. 3 (Fleming Direct), Sch. GAF-2. "Micropolitan Statistical Area" is defined as: "A Core Based Statistical Area associated with at least one urban cluster that has a population of at least 10,000, but less than 50,000. The Micropolitan Statistical Area comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county as measured through commuting." 65 Fed. Reg. 82,238 (December 27, 2000). (Fleming Direct), p. 9, n. 5.
[26] SBC Ex. 1 (Tardiff Direct), pp. 17-19, figure 1.

access the local loops served by that central office and direct traffic from those loops to the CLEC's own switch. In Missouri, CLECs have collocated or acquired EELs[27] in the majority of the SBC Missouri central offices in each of the "trigger" MSAs identified above: Kansas City (19 of 23 offices), St. Louis (42 of 51), and Springfield (10 of 13).[28] In numerous instances, more than three competitors have established collocation in each of these central offices.[29] The presence of collocation in multiple offices within an MSA indicates that competitors have the capability and the intent to provide service throughout the MSA. And when multiple CLECs collocate in multiple offices across an MSA, that indicates that those CLECs view the relevant competitive market in much the same way -- as that MSA.[30]

Ported Numbers. Ported number data also confirms that CLECs using self-provisioned switching serve geographic areas that correspond to SBC Missouri's service territory in each of the relevant MSAs. With local number portability, an end user's telephone number is "ported" from SBC Missouri's switch to the CLEC's switch when the end user changes service providers. Thus, each ported number represents a line served by a CLEC self-provisioned switch. In the

[27] An "Enhanced Extended Link" or "EEL" consists of a combination of an unbundled loop, multiplexing/concentrating equipment and dedicated transport. The EEL allows new entrants to serve customers without having to collocate in every central office in the incumbent's territory. SBC Ex. 3 (Fleming Direct), p. 13, n. 9.

[28] SBC Ex. 3 (Fleming Direct), p. 18.

[29] Id.

[30] The collocation data does not distinguish between collocations to serve DS0 customers, collocations to serve DS1 customers and collocations to serve both groups. The same is true of the ported number data and the NXX data discussed below.

To the extent the data reflects provision of switching services to enterprise customers, the locations where CLECs are currently serving DS1 customers – here, throughout the "trigger" MSAs identified above – is further proof of the appropriateness of the MSA as the appropriate geographic market definition. The fact that switch-based CLECs are serving such customers throughout the "trigger" MSAs means that those MSAs reflect significant economies of scope in serving both mass market and high revenue enterprise customers using self-provisioned switching. See TRO at n.1496 ("[A] competitor may have already set up collocation and transport . . . for a particular end office, and installed its own switch, in order to serve business customers in that end office. Some competing carriers also have established extensive fiber transport networks in metropolitan areas. Use of these facilities would potentially reduce or eliminate the costs of collocation, transmission equipment, backhaul, and switching. In these cases, the cost of these facilities would have already been recovered by the revenues recovered in connection with these other services, and thus the carriers would be taking advantage of the scope economies available from the facilities' other uses." (citations omitted)). See also TRO para. 508.

MSAs at issue here, CLECs have ported numbers in 20 of the 23 central offices in the Kansas City MSA, 46 of 51 offices in the St. Louis MSA, and 10 of 13 offices in the Springfield MSA.[31]

NXX Assignments. Finally, NXX assignments also show that CLECs are using their switches to serve local customers throughout the relevant MSAs. In addition to "porting" an end user's existing telephone number, a CLEC serving customers with its own switch may also assign new telephone numbers to its end users from the "NXX" codes (or central office codes) assigned to its switch by the North American Numbering Plan ("NANP") CO Code Administrator.[32] To obtain an NXX code, a CLEC must document that it is or will be capable of providing service within 60 days of the time the assigned numbers are activated. Each NXX code is associated with a "rate exchange area" served by an incumbent LEC. Thus, the geographic areas that CLECs serve or are capable of serving with their own switches can be determined by the NXX codes that CLECs have obtained. And in Missouri, numerous CLECs have obtained dozens of NXX codes in each of the MSAs at issue here.[33]

In sum, the evidence of the locations of current CLEC mass market customers served via self-provisioned switching demonstrates that SBC Missouri's service territory within each of the MSAs at issue here constitute appropriate geographic markets. This actual marketplace evidence shows that competitors that have decided to invest in their own switching facilities view MSAs as the geographic market those switches serve.

C. Little variation exists in factors affecting competitors' ability to serve each group of customers.

The second criterion that the Commission must consider in defining the appropriate geographic markets is "the variation in factors affecting competitors' ability to serve each group of

[31] SBC Ex. 3 (Fleming Direct), Sch. GAF-2HC.
[32] SBC Ex. 3 (Fleming Direct), pp. 16-17
[33] SBC Ex. 3 (Fleming Direct), Sch. GAF-4.

customers."[34] For purposes of determining the appropriate geographic markets for evaluating impairment, the relevant "factors affecting competitors' ability to serve each group of customers" are those factors that affect an efficient new entrant's costs of providing service via self-provisioned switching and the new entrant's revenue opportunities. The geographic market analysis focuses only on *variations* in impairment-related factors. Where variations between different geographic areas are substantial enough that different impairment findings are likely in those areas, those areas may constitute different geographic markets.

CLECs' self-provisioning of service. Here, however, there are few, if any, variations in the factors that would substantively affect a CLEC's ability to service mass market customers in MSAs.[35] As shown above, new entrants are currently serving mass market customers via self-provisioned switching throughout each of the relevant MSAs. The actual investment and business decisions of these entrants show that, within these Missouri MSAs, competitors are able to serve customers across the MSA notwithstanding any variations that may exist. But that should come as no surprise, given the efficiencies of scale and scope that are available from serving a broad geographic area with a self-provisioned switch.

Retail rates. With respect to the potential revenue opportunities of an efficient new entrant that self-provisions switching, the FCC held that state commissions may consider "how retail rates vary geographically."[36] Such variation in rates can be a factor because a new entrant must compete with those rates, and thus those rates can affect a new entrant's revenue opportunities.[37] Here, any variation that exists in SBC Missouri's retail rates across the MSAs at issue is immaterial. In the Kansas City and St. Louis MSAs, over 94% of SBC access lines are located within the two highest

[34] 47 C.F.R. Sec. 51.319(d)(2)(i).

[36] TRO, para. 496.
[37] See Id. n.1498 ("Likely revenues depend on the prevailing retail rate . . . .").

retail rate groups.[38] In addition, over 76% of SBC access lines in those MSAs are in retail group D, the highest retail group.[39] And in the Springfield MSA, 97% of the access lines are located within the highest retail rate zone in the MSA.[40]

UNE loop rates. The FCC has also indicated that state commissions may consider "how UNE loop rates vary across the state."[41] But like SBC Missouri's retail rates, there is little material variation in UNE loop rates within the three MSAs. In the Kansas City and St. Louis MSAs, fewer than six percent of the lines are in the highest UNE rate zone (Zone 3). Indeed, 76% of the lines are in the lowest zone (Zone 1). And even for the highest area, CLECs are serving customers in wire centers that account for 63% of SBC Missouri's lines in the "trigger" MSAs.[42] Further, the potential for increased revenues from optional Metropolitan Calling Area ("MCA") service in those portions of UNE rate zones 2 and 3 located in the optional MCA areas would effectively offset the higher UNE loop rates in those areas.[43] Clearly, the patterns of competitive entry in Missouri indicate that such variations are insufficient to overcome the efficiencies of MSA-wide entry.

Thus, the variation in UNE loop rates that exists in these MSAs has little effect on the ability of a new entrant to self-provision switching throughout the MSA. This same marketplace evidence also shows that, in light of available revenues, whatever variation exists in wire center-specific costs within these MSAs does not affect the proper definition of the geographic markets.

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[38] There are four retail rate groups, A – D, in SBC Missouri's service territory (with some subgroups within a few of the rate groups, D1, D2 and C1). From highest to lowest, the retail rate groups are: D2, D1, D, C1, C, B and A. SBC Ex. 3 (Fleming Direct), p. 20.
[39] SBC Ex. 3 (Fleming Direct), p. 20.
[40] SBC Ex. 3 (Fleming Direct), p. 20. Retail rate group C is the highest retail rate group in the Springfield MSA. Id.
[41] TRO, para. 496.
[42] SBC Ex. 3 (Fleming Direct), p. 20. There are four UNE loop rate zones in SBC Missouri's service territory. From highest to lowest, the UNE loop rate zones are: 3, 2, 4 and 1. Id.; SBC Ex. 1 (Tardiff Direct), p. 21.
[43] SBC Ex. 3 (Fleming Direct), p. 21. In St. Louis and Kansas City, these rates range from $12.35 to $32.50 per month for residential customers and $24.80 to $70.70 per month for business customers. In Springfield, the rates are $11.45 for residential customers and $21.75 for business customers. Id.

Wire center size. The FCC has also indicated that state commissions may consider "how the cost of serving customers varies according to the size of the wire center and the location of the wire center."[44] This consideration reflects the number of customers available to competitors in a wire center. The evidence shows that here too, any variation that exists is not material. In the Kansas City and St. Louis MSAs, 62 out of 75 total wire centers (over 82% of wire centers) contain more than 5000 lines, and many contain in excess of 20,000 access lines. In the Springfield MSA, approximately 38% of the wire centers (5 out of 13) are larger than 5000 access lines, but those 5 offices account for nearly 90% of the lines in the MSA.[45]

Collocation. The FCC further noted that the variations in the capabilities of wire centers to provide adequate collocation space was a factor that may be considered in determining the appropriate geographic markets. Here, the evidence demonstrates that CLECs have engaged in a large amount of collocation already: 25 different CLECs have obtained a total of 300 collocation arrangements in 51 separate SBC Missouri central offices in the Kansas City, St. Louis and Springfield MSAs, including wire centers serving over 90% of the access lines in these three MSAs. There are no central offices in SBC Missouri's service territory closed to physical collocation. And SBC Missouri offers a variety of physical collocation arrangements, virtual collocation and EELs to meet different CLECs' needs.[46]

SBC Missouri would also note that collocation rates and equipment costs would not vary between wire centers. SBC Missouri's collocation tariff provides statewide rates (i.e., it does not charge any more or any less to provide collocation in a Kansas City central office than it charges

[44] TRO, para. 496.
[45] SBC Ex. 3 (Fleming Direct), p. 21.
[46] SBC Ex. 3 (Fleming Direct), pp. 21-22.

in a St. Louis central office). And a CLEC would pay its vendor the same price for the equipment used in a collocation space, regardless of the location of the SBC central office.[47]

Other entry costs. Moreover, many of the costs an efficient new entrant faces when entering a market with its own switch do not vary across an MSA. For instance, the costs of mass market advertising (a typical component of mass market entry) are often incurred on a broad regional basis, such as a metropolitan area.[48] Service offerings, including offerings of discounted bundled services, are frequently rolled out by individual MSA since that is the geographic area covered by newspapers and local radio, television and cable media.[49] Thus, all potential customers in the MSA are exposed to the same mass-market advertising messages. Indeed, CLECs themselves often describe their operations in terms of the MSAs they serve and, when they announce entry into a given "market," they are often defining that market as the MSA or its rough equivalent.[50]

Other entry costs are also incurred on a broad geographic basis at least as large as an MSA. For instance, an efficient new entrant entering a market with its own switch must secure regulatory approval to offer service, develop and file tariffed rates, terms, and conditions of service, negotiate, implement, and administer interconnection agreements, establish its own "OSS" for retail ordering, billing, and support functions, establish customer care centers, and establish "OSS" and interfaces (both electronic and human) with the incumbent LEC for wholesale functions (e.g., ordering UNE loops). These

[47] SBC Ex. 3 (Fleming Direct), p. 22.
[48] SBC Ex. 1 (Tardiff Direct), p. 21.
[49] In fact, in its discussion of the metropolitan area to be used in the Bell Atlantic/NYNEX merger, the FCC observed that television and radio advertising markets generally encompassed the geographic area it had designated. *Bell Atlantic-NYNEX Order*, para. 55-56.
[50] SBC Ex. 3 (Fleming Direct, p. 19); quoting press releases from Allegiance Telecom ("The Company will serve small and medium-sized businesses primarily in St. Louis County, including service to the following cities: Bridgeton, Kirkwood, Manchester, Overland, St. Charles and St. Louis"); Gabriel Communications (now NuVox) ("Arrival of Gabriel… changes the Way Kansas City does Business," "Arrival of Gabriel… changes the Way St. Louis Does Business," "Arrival of Gabriel… changes the Way Springfield Does Business"); and Birch Telecom ("Birch… announced that it is now offering local and long-distance services to business and residential telephone customers in the St. Louis metropolitan area.")

activities are not performed, and thus these costs are not incurred, on a wire center-by-wire center basis, but on a far broader regional basis at least as large as an MSA.

D. Competitors are able to target and serve the MSAs profitably and efficiently using currently available technologies.

The third mandatory criterion that the Commission must consider in defining the appropriate geographic markets is "competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies."[51] SBC Missouri's proposed geographic markets satisfy this criterion as well. The locations of current mass market customers of competitors that are served via self-provisioned switching conclusively demonstrate that competitors are able to target and serve specific markets at least as large as SBC Missouri's service territory within each MSA using their own switches.

Moreover, the fact that these competitors have targeted the particular "trigger" MSAs at issue here (Kansas City, St. Louis and Springfield) and not other MSAs or any Micropolitan Statistical Areas demonstrates that SBC Missouri's service territory within each of those three MSAs appropriately reflects the efficient geographic scope of competitive entry via self-provisioned switching in those MSAs.

Mass market advertising also allows competitors to effectively target and serve large metropolitan areas. As noted above, mass market (e.g., radio, television, cable and newspaper) advertising is designed to reach large areas of the population, such as socially and economically integrated MSAs. MSAs also reflect the manner in which competitors target customers with their price plans, as many competitors offer service at the same price throughout the relevant MSAs (and throughout SBC Missouri's service territory).

[51] 47 C.F.R. Sec. 51.319(d)(2)(i).

Further, currently available switching technology enables competitors to target and serve large metropolitan regions. At least 20 CLECs have deployed at least 40 digital central office switches in Missouri, including in each of the three MSAs at issue here.[52] Each of these switches should be capable of serving customers throughout an MSA or larger area. And the widespread use of collocation, EELs, ported numbers, and NXXs all demonstrate that CLECs have the facilities they need to economically target mass market customers throughout the three MSAs at issue here.

E. FCC precedents support the use of MSAs.

SBC Missouri's proposed market definitions are also supported by the fact that the FCC has previously used MSAs as market definitions. For instance, in its recently released order allowing customers to port their wireline telephone numbers to wireless carriers, the FCC implemented this new requirement on an MSA basis.[53] This order is especially germane to this proceeding, because, as four of the five Commissioners explicitly observed in their separate statements, one of the major implications of the order is to substantially increase intermodal competition between wireline and wireless services.

Moreover, in its assessment of how the merger of formerly independent incumbent LECs would affect local exchange competition in the merged territories, the FCC identified specific metropolitan areas as the markets subject to a competitive assessment.[54] The FCC also identified the metropolitan scope of advertising markets as a relevant factor in defining the market.[55]

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[52] SBC Ex. 3 (Fleming Direct), p. 11, Schedule GAF-3.
[53] In re Telephone Number Portability, CC Docket No. 95-116, FCC 03-284 (rel. Nov. 10, 2003) at paras. 29-30.
[54] See in re: Applications of Nynex Corporation Transferor, and Bell Atlantic Corporation Transferee, for consent to transfer control of Nynex Corporation and its subsidiaries, File No. NDS-L-96-10, Memorandum Opinion and Order, released August 14, 1997. (*Bell Atlantic-NYNEX Order)*, para. 43.
[55] *Id.* para. 55.

Further, in its order granting ILECs pricing flexibility for certain interstate services, the FCC concluded:

> We will grant pricing flexibility relief for both Phase I and Phase II on an MSA basis. We agree with those commenters that maintain that MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition.[56]

The FCC held that MSAs are defined "narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable."[57]

III. Competing Geographic Market Definition Proposals Should be Rejected.

A. Individual wire centers or exchanges do not satisfy the FCC's market definition rule.

Sage Telecom and MCI assert that the Commission should define each individual SBC Missouri wire center as a separate geographic market.[58] And Staff asserts that exchanges as defined under state law should be used.

These proposals do not comply with the FCC's geographic market rule. Neither wire centers nor exchanges reflect the geographic scope of the mass markets that efficient new entrants can and do serve with their own switches. As explained below, these proposed market definitions fail to appropriately account for the mandatory criteria that the Commission must consider in defining the geographic markets and violate the FCC's directive that "states should not define the market so narrowly that a competitor serving

[56] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services offered by Competitive Local Exchange Carriers, Petition of US West Communications, Inc. for Forbearance from Regulation as a dominant carrier in the Phoenix, Arizona MSA, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63 and CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, released August 27, 1999. (*Pricing Flexibility Order)*, para. 72. (emphasis added)

[57] *Id.*, para. 71.

[58] MCI Ex. 15 (Ankum Direct), p. 13; Sage Ex. 17 (Starkey Direct), p. 6.

that market alone would not be able to take advantage of available scale and scope economies from serving a wider market."

1. The locations of customers actually being served by competitors.

While every CLEC mass market customer is located within one wire center or an exchange, that does not make individual wire centers or exchanges appropriate geographic markets. Every CLEC mass market customer is also located at a particular street address, but that does not make every particular street address its own "geographic market." Rather, the purpose of examining "the locations of mass market customers actually being served (if any) by competitors" with their own switches is to determine the patterns and scope of competitive entry, which provide strong evidence of the economic markets that are (or could be) served by an efficient new entrant with its own switch.[59]

The Commission therefore must examine not just where current CLEC mass market customers served via self-provisioned switching *are* (e.g., individual street addresses and wire centers), but also where they are *not*, and must examine the overall geographic pattern of current customer locations to determine the geographic contours of the appropriate geographic markets. That is why the FCC states that "if competitors with their own switches are only serving certain geographic areas, the state commission should consider establishing those areas to constitute separate markets."[60]

The fact that there are current CLEC mass market customers served via self-provisioned switching in a particular wire center does not suggest that that individual wire center constitutes a geographic market. If the same CLECs are also serving mass market customers with self-provisioned switching in neighboring wire centers, then it is apparent that those CLECs view at least that particular group of wire centers as the market served by

[59] See 47 C.F.R. Sec. 51. 319(d)(2)(i).
[60] TRO, para. 495 n.1537.

their switches. This is precisely the pattern that has emerged within SBC Missouri's service territory in the "trigger" MSAs at issue here.

In particular, as SBC Missouri demonstrated, competitors are currently serving mass market customers via their own switches throughout SBC Missouri's service territory in each of the MSAs at issue here. And competitors are *not* broadly serving mass market customers via their own switches in the smaller MSAs or in any Micropolitan Statistical Area.[61] Thus, the overall geographic *pattern* of current mass market customer locations reveals that SBC Missouri's service territory in the relevant MSAs constitutes appropriate geographic markets.

2. Variations in factors affecting competitors' ability to serve each group of customers.

Sage and MCI assert that wire centers are appropriate geographic market definitions because various impairment-related factors such as "loop densities," "loop rate[s]," "[t]he availability and cost of collocation," "the availability and price of transport," and the "use of ILDC or ULDC loop concentration technology" can vary by wire center.[62] But it is not enough to simply point out that these variations may exist. Sage admits that it does not use its own switch anywhere in Missouri,[63] and is hardly the appropriate party to analyze whether the MSA reflects variations that adversely affect a party using its own switch from provisioning service.[64] Moreover, the actual entry pattern of CLECs demonstrates that these variations do not impact the ability of CLECs to serve.

Even where revenue opportunities and the costs of serving customers via self-provisioned switching differ within a group of wire centers, those differences are

[61] SBC Ex. 3 (Fleming Direct) Sch. GAF-2HC.
[62] Sage Ex. 17 (Starkey Direct), pp. 31 – 32; MCI Ex. 15 (Ankum Direct), pp. 27- 28.
[63] Sage Ex. 19 (McCausland Direct), p. 4.
[64] And AT&T, which does provide such service, admitted that variations in UNE rates do not adversely affect CLECs.

immaterial to the geographic market definition unless they are significant enough that they are likely to lead to different impairment findings.[65] Thus, the ultimate issue is whether, within SBC Missouri's service territory in the MSAs at issue here, any such variations are significant enough to warrant smaller market definitions. As the actual marketplace evidence demonstrates, they are not.

Competitors have already made the investment and business decision to deploy switches to serve broad geographic areas that correspond to MSAs, notwithstanding any wire center-level variations within those MSAs.[66] For instance, competitors using their own switches provide service in the majority of wire centers in each "trigger" MSA, demonstrating that differences in loop rates do not affect the economically appropriate geographic market definitions.[67] Similarly, there is no evidence that any differences in the availability of collocation exists. In fact, the evidence shows that collocation, which is offered under standard tariff rates, remains available in all SBC Missouri central offices throughout the three MSAs.[68] Tellingly, no CLEC has claimed to ever have been denied collocation in any of the wire centers in the MSAs at issue.

3. Competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies.

Individual wire centers and exchanges also fail to accurately account for "competitor's ability to target and serve specific markets profitably and efficiently using currently available technologies."[69] As numerous CLECs have confirmed, current switch technology enables competitors to efficiently serve broad geographic areas, such as an

[65] See TRO, para. 495 (the goal is to "distinguish among markets where different findings of impairment are likely").
[66] SBC Ex. 3 (Fleming Direct) Sch. GAF-3.
[67] SBC Ex. 3 (Fleming Direct), pp. 20-21.
[68] Id., p. 22.
[69] 47 C.F.R. Sec. 319(d)(2)(i).

entire LATA or state, with a single switch.[70] As explained further below, an efficient new entrant that enters a market with its own switch simply would not serve only an isolated wire center or exchange, in light of the efficiencies of serving a broader market.

Sage states that it "does not utilize either a mass media or door-to-door marketing approach" or market its UNE-P based services on the basis of MSAs.[71] Instead, it targets customers using an analysis that looks at NPA/NXXs within rural and suburban zones, "supplemented with results of a zip-code and exchange boundary analysis."[72] However, nowhere does Sage testify that it markets services or targets specific markets on a wire center-by wire center basis. Indeed, it is apparent that Sage's marketing efforts are based on geographic areas broader than individual wire centers. Further, the fact that a single competitor does not market on an MSA-wide basis is not determinative.[73] That is particularly true with regard to a CLEC that does not employ its own switch.

The geographic market analysis focuses on the geographic area that constitutes the market served by an efficient new entrant that enters that market with its own switch, and not the marketing plans of an individual UNE-P CLEC like Sage. Finally, unlike Sage, other CLECs do utilize regional advertising, and announce their market entry plans in terms of metropolitan areas.[74]

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[70] SBC Ex. 3 (Fleming Direct), p. 12 – 13, quoting AT&T testimony in Missouri PSC Case No. TO-2001-455: "The AT&T switches shown serve our local AT&T Local customers throughout the state . . . For example, the AT&T switches located in Kansas City serve the 521, 522 and 524 LATAs and in St. Louis, the AT&T switches serve the 520 and 521 LATAs." Id., Sch. GAF-5. See also TRO para. 436.

[71] Sage Ex. 19 (McCausland Direct), p. 7; Sage Ex. 20 (McCausland Rebuttal), pp. 3-4.

[72] Sage Ex. 15 (McCausland Direct), p. 6.

[73] TRO para. 115 ("We will not… evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs… such a subjective, individualized approach could give some carriers access to elements but not others, and could reward those carriers that are less efficient on whose business plans simply call for greater reliance on UNEs. Providing UNEs to carriers with more limited business strategies would also disregard the availability of scale and scope economies gained by providing multiple services to large groups of customers").

[74] SBC Ex. 3 (Fleming Direct), pp. 19-20. See also Ex. 30P, showing that Sprint has a switch in Kansas City through which it intends to offer retail local service as a CLEC in several exchanges within the Kansas City MSA; and Ex.

4. The Commission cannot properly define individual wire centers or exchanges as geographic markets because the FCC has directed the States not to "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."

The FCC held that in defining the appropriate geographic markets, "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."[75] The proposed wire center and exchange-based definitions violate this requirement. Competitors do not enter the market on a single wire center basis. Even Staff acknowledged CLECs typically install a switch in anticipation of serving multiple exchanges.[76]

An efficient carrier using its own switch to serve the mass market would not enter a single, isolated wire center, but would base its investment and business decision on a far broader market. While a new entrant may expand the reach of its switch one wire center at a time, establishing collocation and backhaul arrangements for each wire center served by its switch, that does not mean that each wire center is a separate geographic market. As MCI told the FCC,

> Switching, for example, has high fixed costs that must be spread over a large number of customers if a competitive carrier is to achieve cost efficiencies similar to those enjoyed by the incumbent LECs. To use its switch effectively, a competing carrier must therefore be able to aggregate traffic from customers served out of multiple incumbent LEC central offices. . . .[77]

31HC, showing that Sprint has entered into arrangements to use the unbundled switching of another CLEC to offer retail local service as a CLEC in several exchanges within the St. Louis MSA. Harper T. 614-616.

[75] TRO, para. 495.

[76] Thomas T. 1009.

[77] Letter from Donna Sorgi, Senior Vice President of Federal Advocacy for WorldCom, Inc., to William F. Maher, Chief of the Wireline Competition Bureau of the Federal Communications Commission, CC Docket No. 01-338 (UNE Triennial Review) (filed Jan. 8, 2003), at 3. Quoted in SBC Ex. 4 (Fleming Rebuttal), pp. 11 – 12.

Staff similarly testified that a "rational CLEC" would deploy a switch to serve multiple exchanges because it "would give it the scale and scope economies necessary to make that a good business decision."[78]

The FCC itself has noted that "switches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies."[79] As Sprint explained:

> In many cases wire centers are situated such that an entrant could, for example, collocate in one wire center and use extended enhanced loops ("EELS") to serve another wire center at an overall lower per unit cost than if the two wire centers were served separately. This is precisely the type of scale economy that is available when the market is defined as something larger than a single wire center. The same can be said for many other costs of entering a market aside from network costs, including advertising, billing, ordering, etc.[80]

B. LATAs do not constitute appropriate geographic markets.

The CLEC Coalition proposes that the Commission use LATAs as the market definition for the mass market switching impairment analysis.[81] This proposal is not appropriate for Missouri.

On its face, the CLEC Coalition's proposal fails to take into account the FCC's mandatory criteria that the Commission must consider in determining the appropriate geographic markets. 47 C.F.R. Section 51.319(d)(2)(i) requires the Commission to

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[78] Thomas T. 1007 – 1009

[79] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, released November 5, 1999 (UNE Remand Order), para. 261.

[80] Sprint Ex. 8 (Harper Direct), pp. 9-10.

[81] CLEC Coalition Ex. 11 (Gillan Direct), p. 19. On February 2, 2004, Deputy Chief Regulatory Law Judge Mills ruled that the CLEC Coalition violated Mo. PSC Rule 4 CSR 240-2.130(7) by failing to include its full direct case on the geographic market issue in pre-filed direct testimony. As a result, the CLEC Coalition was precluded from using the material in Mr. Gillan's Rebuttal testimony regarding use of the LATA as the geographic market for the purpose of supporting a direct case. T. 460 – 461.

examine three factors. To the extent it is supported at all, the CLEC Coalition's proposal is based *solely* on the first factor (the location of current mass market customers). The CLEC Coalition completely ignored the remaining two factors.[82] That alone requires rejection of the proposal.

Even with respect to the single criterion that the CLEC Coalition did purport to analyze, its analysis is legally flawed. The CLEC Coalition's proposal is based on the locations of CLEC *UNE-P* customers, which it asserts show uniform UNE-P penetration throughout the LATAs. However, this proceeding is designed to consider the degree of mass market entry by switch-based CLECs, not UNE-P based business plans.[83] The impairment analysis required an examination of where CLECs provide service using their own switch; it is nonsensical to determine impairment by focusing on where CLECs do not use their own switch.

In advancing its LATA-based definition, the CLEC Coalition is improperly attempting to re-define the "impair" standard. The CLEC Coalition asserts that the TRO's "basic structure" is to "look at the areas being served by a particular network element and determine whether an alternative could reasonably produce the same result," and that the impairment analysis requires the Commission to evaluate "the extent of competition made possible with access to a network element, and to *contrast* that competition to the competition that would result if access to that element were denied."[84] In short, the CLEC Coalition argues that the impairment analysis should consist of a comparison of UNE-L to UNE-P.[85] This contention is completely contrary to the FCC's binding interpretation of the impairment standard, and violates the 1996 Act.

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[82] CLEC Coalition Ex. 11 (Gillan Direct), pp. 13-20.
[83] See, e.g., TRO n. 1537 ("For example, if competitors with their own switches are only serving certain geographic areas, the state commission should consider establishing those areas to constitute separate markets").
[84] CLEC Coalition Ex. 11 (Gillan Direct), p. 14.
[85] Id.

In the TRO, the FCC held that "a requesting carrier [is] impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[86] This federal definition of the "impairment" standard of section 251(d)(2)(B) of the 1996 Act (47 U.S.C. Sec. 251(d)(2)(B)) is binding nationwide; state commissions are not free to reject the FCC's impairment standard or to invent their own interpretations of section 251(d)(2)(B). The FCC's current impairment standard simply does not assess whether the "same result" would occur in an area with and without a particular UNE. Rather, it asks whether, in light of available revenues and likely costs, an efficient new entrant could enter a market without access to a particular UNE. Under this binding test, it is simply irrelevant whether a particular CLEC would find it easier or more profitable to serve customers using UNE-P or some other entry strategy.

The United States Supreme Court *has already held* that the CLEC Coalition's interpretation of "impairment" is patently unlawful. In its very first attempt to define the "impair" standard (in its 1996 First Report and Order), the FCC held that the impairment test requires a comparison of UNE and non-UNE alternatives.[87] The CLEC Coalition is now attempting to resurrect that same impairment standard here, arguing that the Commission should compare the UNE and non-UNE alternatives to local switching (UNE-P and UNE-L) to see if the UNE-L entry strategy will deliver the same scale and scope in the absence of UNE-P, and that there is "impairment" if UNE-L entails higher costs that affect a competitor's ability to enjoy the same scale and scope of UNE-P entry. But as the Supreme Court conclusively held, that interpretation of "impairment" is unlawful because the "assumption that any increase in cost (or decrease in

[86] TRO, para. 84.
[87] TRO, para. 12 (quoting First Report and Order, ¶ 285). Specifically the FCC stated that "the 'impairment' standard requires 'the Commission . . . to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.'" Id.

quality) imposed by denial of a network element . . . causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of th[at] term[]."[88]

The CLEC Coalition's re-interpretation of the "impair" standard also bears a suspiciously close resemblance to the FCC's second interpretation, which was held unlawful by the U.S. Court of Appeals for the D.C. Circuit. In its UNE Remand Order, the FCC concluded that a requesting carrier is "impaired" without access to a network element if "'lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.'"[89] Similarly, the CLEC Coalition now suggests that it is "impaired" if lack of access to unbundled local switching in any way diminishes what it can achieve using UNE-P. The D.C. Circuit, however, held that this interpretation violated the 1996 Act noting that "[i]f competition performed with ubiquitously provided ILEC facilities counts [i.e., UNE-P], the more unbundling there is, the more competition."[90] But Congress "did not authorize so open-ended a judgment" as the conclusion that "more unbundling is better."[91]

The CLEC Coalition's proposal is nothing more than a desperate attempt to hold onto its undeserved regulatory gains and delay the day it has to comply with the law, by perverting the FCC's new rules into the same old unlawful rules that both the Supreme Court and the D.C. Circuit have held are unlawfully permissive. For years, SBC Missouri has been forced to provide UNEs to CLECs under two unlawful unbundling regimes that first the Supreme Court in Iowa Utils. Bd. and then the D.C. Circuit in USTA held are unlawfully permissive towards CLECs. After the last ruling, the FCC did not appeal, but went back to the drawing board to come up with new rules. The result is the new rules of the Triennial Review Order. In its attempt to nullify

[88] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 389-90 (1999).
[89] TRO, para. 21 (quoting UNE Remand Order, para. 51).
[90] United States Telecom Ass'n v. FCC, 290 F.3d 415, 424 (D.C. Cir. 2002) ("USTA").
[91] Id. at 425.

those new rules, the CLEC Coalition now argues in effect that there is "impairment" if the same competitive results are not achieved as under the FCC's prior unlawful rules. That circular argument is unlawful and must be rejected.

The CLEC Coalition asserts that under the FCC's geographic market rule, in this phase of the proceeding, the Commission must determine over what geography does the mass market exist. Such an assertion would be ludicrous. The FCC did not need the state commissions' help in determining where the mass market exists. As the CLEC Coalition notes, the mass market is "as geographically dispersed as the state's population."[92] If that is what the FCC meant by the "geographic markets," it would have simply defined each State as a market. Instead, it directed the States to undertake a more *granular* analysis, and expressly forbid the States from defining the entire State as a geographic market.[93]

Further, the CLEC Coalition admits that "UNE-L is far more geographically limited" than UNE-P, and that UNE-L entry is "absent entirely from more than 80% of the wire centers in the state."[94] From this, they conclude that UNE-L is not a viable substitute for UNE-P across the entire mass market.[95] While SBC Missouri does not agree, the point here is that in *this* phase the task before the Commission is not to make any ultimate (and totally unsupported) conclusions about the viability of UNE-L, but is to define the geographic markets in which to analyze the ability of an efficient new entrant to self-deploy switching to serve mass market customers. And the CLEC Coalition's observation – that UNE-L entry is more geographically limited than UNE-P entry and is absent from many wire centers – is precisely why the CLEC Coalition's proposed geographic market, which is based solely on the characteristics of UNE-P, is improper. The actual entry patterns of competitors using self-provisioned switching demonstrate that the geographic

[92] CLEC Coalition Ex. 12 (Gillan Rebuttal), p. 5.
[93] 47 C.F.R. Sec. 51.319(d)(2)(i).
[94] CLEC Coalition Ex. 11 (Gillan Direct), p. 18.
[95] Id., p. 16.

markets served by such competitors in Missouri consist of areas smaller than an entire LATA. Instead, those competitors have targeted particular MSAs.[96] The CLEC Coalition's proposed market definition, on the other hand, is completely divorced from the areas where numerous competitors already have established switches, collocation arrangements, and backhaul facilities that they use to serve mass market customers.

In sum, the Commission should reject the CLEC coalition's proposed geographic markets. This proposal is divorced from any reasoned application of the FCC's mandatory geographic market criteria. Instead, it reflects an unlawful interpretation of "impairment" and of the FCC's mass market switching rules, and is designed to preserve UNE-P "without regard to the state of competitive impairment in any particular market" in violation of the 1996 Act.[97]

IV. The FCC's Rules Define the Relevant Product Market as Local Services Provided to DS0-Level Customers and Foreclose State Commission Redefinition of the Product Market.

MCI and Sage suggest that the Commission should define separate markets for residential and small business customers.[98] The FCC, however, has defined the product market that is the subject of this proceeding, and its rules do not allow a state commission to redefine that market. The FCC determined that for purposes of the trigger and potential deployment analyses, the product or customer market is "end users using DS0 capacity loops." It is for the purpose of serving those customers and only those customers -- "end users using DS0 capacity loops" -- that Rule 319(d)(2) requires incumbent LECs to provide unbundled local circuit switching to requesting carriers if neither the trigger test in Rule 319(d)(2)(iii)(A) nor the potential deployment test in Rule 319(d)(2)(iii)(B) is satisfied. The line drawn by the Rule has nothing to do with

[96] SBC Ex. 2 (Fleming Direct), pp. 10-18.
[97] USTA, 290 F.3d at 422.
[98] MCI Ex. 15 (Ankum Direct), pp. 31-36; Sage Ex. 17 (Starkey Direct), pp. 38-42.

whether the customer is residential or business -- all that matters is whether the customer is served by DS0 loops (up to the cut-off number) or by DS1 (or higher capacity) loops.

The discussion underlying the Rule in the text of the TRO speaks in terms of "mass market " and "enterprise" customers, but nothing in that discussion suggests that the States are authorized to refine the line drawn by the Rule, or to draw a new or different line. To the contrary, the text of the TRO states that "mass market" customers "are analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops."[99] That classification does not distinguish between residential and business customers, but expressly includes within a *single* product market *all* residential and business customers that can only be economically served via DS0 loops.[100] Thus, the FCC has already defined the product market for purposes of this proceeding. For that reason, its rules do not ask, or allow, a state commission to examine the product market, but instead direct state commissions to "define the markets . . . by determining the *relevant geographic area* to include in each market."[101] The FCC's rules do not permit a state commission to re-define the product markets upon which the FCC's impairment analysis and resulting binding federal rules are based.

Moreover, the MCI and Sage proposal to separately define residential and small business product markets is flatly inconsistent with the operation of the FCC's mass market switching trigger and potential deployment rules. FCC Rule 319(d)(2) states that "[a]n incumbent LEC shall provide access to local circuit switching on an unbundled basis to a requesting telecommunications carrier serving end users using DS0 capacity loops *except* where the state

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[99] TRO, para. 497.
[100] See id. n.1402 ("Mass market customers are residential and very small business customers – customers that do not, unlike larger businesses, require high-bandwidth connectivity at DS1 capacity and above"); id. para. 459 ("The mass market for local services consists primarily of consumers of analog 'plain old telephone service' or 'POTS' that purchase only a limited number of POTS lines and can only economically be served via analog DS0 loops.").
[101] 47 C.F.R. sec. 51.319(d)(2)(i) (emphasis added).

commission has found" that either a trigger test or the potential deployment analysis is satisfied.[102] The FCC has made clear that its tests are mandatory and exhaustive:

> For mass market switches, we make a nationwide finding of impairment and require the states to conduct a more granular analysis by applying mandatory and exhaustive federal triggers. Specifically, where a state commission determines that there are three or more carriers, unaffiliated with either the incumbent LEC or each other, that are serving mass market customers in a particular market using self-provisioned switches, the state must find no impairment in that market . . . . Where neither of these two triggers is satisfied, we establish specific and mandatory criteria that state commissions must apply to determine whether a market allows self-provisioning of switching.[103]

As the FCC has made clear in its recent pleadings with the U.S. Court of Appeals for the D.C. Circuit, if the "objective competitive 'triggers'" are satisfied, "states must find no impairment" and cannot require the unbundling of the ILEC's switching for mass market customers.[104] The very point of the FCC's trigger rules is to use "objective criteria" to "minimize administrative burdens" and "to provide bright-line rules to guide the state commission," on the basis that "the presence of facilities-based competitors is the best indicator that requesting carriers are not impaired."[105]

Under the approach suggested by the CLECs, however, the FCC's "objective competitive 'triggers'" would be turned into a free-for-all economic and operational impairment analysis of each trigger carrier's ability to serve different kinds of mass market customers. That simply does not comport with the FCC's trigger rules.

Finally, the results of MCI and Sage's approach would violate the FCC's rules. The CLECs suggest that where the trigger is satisfied and one (or more) of the trigger carriers provides service chiefly to very small business customers that are part of the mass market, the Commission should still require SBC Missouri to continue to provide unbundled local switching for residential

[102] 47 C.F.R. sec. 51.319(d)(2) (emphasis added).
[103] TRO, para. 428 n.1315 (emphases added).
[104] FCC Br. in Opposition, No.00-1012 *et al*., at 22 (D.C. Cir. filed Oct. 9, 2003) (emphasis added).
[105] TRO, para. 498.

customers. That would violate FCC Rule 319(d)(2), which states that an ILEC is not required to provide unbundled local switching for *any* DS0 capacity loops if the trigger is satisfied by the presence of competitors using their switches to serve any type of mass market customers.

When presented with this same proposal from MCI, the Ohio Utilities Commission flatly rejected it:

> The Commission disagrees with the request to separately analyze markets distinguishing services provided to residential subscribers and small business customers. The Commission notes that in the Triennial Review Order, the FCC defines mass market customers to include residential and small business voice grade customers that "purchase only a limited number of POTS lines and can be economically served via DS0 loops." The Commission stresses that the purpose of the impairment analysis is to assess whether or not CLECs are impaired in providing service to mass market customers if the unbundled local switching element is no longer available to them at TELRIC rates. Therefore, it is the Commission's opinion that once an unaffiliated CLEC is determined by the Commission to be providing service to mass market customers (customers with a limited number of POTS lines regardless of whether they are residential or small business) in a particular geographic market using its own switching equipment, the CLEC will be considered as one of the "three self-provisioners of switching" for the purpose of the trigger analysis.[106]

And the Ohio Commission rejected it again on rehearing:

> …with respect to defining the "market," the FCC has stated that the state commissions must determine the relevant **geographic** area to include in each market. State commissions have the discretion to determine the contours of each geographic market… Unlike the tentative geographic market defined by the Commission, consideration of residential and small business customers within a market is more an issue of a "product market" than that of a geographic market. Rather than reaching a tentative conclusion, the FCC has definitely stated, without distinction, that residential and small business customers ought to be considered mass market customer for the purpose of performing the mass market analysis. [TRO] at para. 495.[107]

The Missouri Commission must do the same.

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[106] In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market, et al., Case No. 03-2040-TP-COI, et al., Opinion and Order, released January 14, 2004 at pp. 33-34 (emphasis added, internal citations omitted).

[107] In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market, et al., Case No. 03-2040-TP-COI, et al, Entry on Rehearing, released February 4, 2004 at page 4 (bold in original, underscore added).

Issue 2 **For purposes of the 47 CFR 51.319(d)(2)(iii)(B)(3) analysis, how many DS0 lines must be supplied to a multi-line DS0 customer before that customer is considered to be an enterprise customer rather than a mass market customer?**

I. The Legal Standard.

The TRO establishes different unbundling rules and standards depending on whether a CLEC would use local circuit switching to serve "mass market" customers or "enterprise" customers. The FCC has ruled that the demarcation point between mass market and enterprise customers would be determined by the number of DS0 lines the customer uses:

> At some point, [mass market] customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above for enterprise customers -- that is, a voice service is provided over one or several DS1s, including the same variety and quality of services and customer care that enterprise customers receive. Therefore, as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multiple-line DS0 customers as part of its more granular review. This crossover point may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop.[108]

The FCC promulgated the following mandatory rule specifically directing state commissions how to go about determining the multi-line DS0 cutoff:

> Multi-Line DS0 end-users. As part of the economic analysis set forth in paragraph d(2)(iii)(B)(3) of this section, the state commission shall establish a maximum number of DS0 loops for each geographic market that requesting telecommunications carriers can serve through unbundled switching when serving multi-line end-users at a single location. Specifically, in establishing this "cutoff," the state commission shall take into account the point at which the increased revenue opportunity at a single location is sufficient to overcome impairment and the point at which multi-line end-users could be served in an economic fashion by higher capacity loops and a carrier's own switching and thus be considered part of the DS1 enterprise market.[109]

In the Triennial Review Order, the FCC defined the mass market as consisting "primarily of consumers of analog 'plain old telephone service' or 'POTS' that purchase only a limited

[108] TRO, para. 497.
[109] 47 C.F.R. Sect. 51.319(d)(2)(iii)(B)(4). (emphasis added)

number of POTS lines and can only economically be served via analog DS0 loops."[110] The FCC also stated that mass market customers "consist of residential and very small business customers."[111]

II. The Four DS0 Cutoff Best Satisfies the FCC's Rules.

The Commission should adopt a DS0 cutoff of four DS0s, meaning that a customer with four or more DS0s at a location would be part of the enterprise market, while a customer with three or fewer DS0s would be in the mass market.[112] This cutoff reflects what the FCC expects for density Zone 1 in the top 50 MSAs. It also best satisfies the FCC's rules,[113] which require the Commission to take into account the point at which the increased revenue opportunity at a single location is sufficient so that multi-lined end-users could be served in an economic fashion by higher capacity loops and a carrier's own switching.[114]

SBC Missouri has based its proposed four-line cutoff on the FCC's expectations as expressed in the TRO; a quantitative analysis of revenue opportunities from serving such customers through high-capacity loops and the CLEC's own switching, and a qualitative analysis of the CLEC offerings to small business customers.[115]

The parties that advocate a higher cutoff point make several errors in their analysis, including the failure to consider the increased revenue opportunities that come with providing service over a DS1 loop, which, under the FCC's rules, is a critical part of the analysis.[116]

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[110] TRO, para. 459.
[111] Id., para. 127.
[112] Fleming Direct, p. 27.
[113] 47 CFR Sec. 51.319(d)(2)(iii)(B)(4).
[114] Fleming Direct, pp. 27-34.
[115] SBC Missouri Ex. 3 (Fleming Direct), p. 27.
[116] Fleming Rebuttal, pp. 3, 18-36.

A. The FCC expects a 4 DS0 cutoff in the top 50 MSAs (density Zone 1).

In the Triennial Review Order, the FCC indicated that it expected that the appropriate cutoff in the top 50 MSAs (density Zone 1) would be four DS0 lines:

> We expect that in those areas where the switching carve out was applicable (i.e., density Zone 1 of the top 50 MSAs), the appropriate cut-off will four lines absent significant evidence to the contrary.[117]

The FCC based this expectation on a conclusion it previously reached in the UNE Remand Order that four lines would provide an appropriate point to separate the mass market from the medium and large business markets. There, the FCC observed that any business that has three or fewer lines is more likely to share characteristics of the mass market customer rather than a medium and large business, and likely to purchase similar volumes and types of telecommunications services as a residential mass market customer. The FCC also noted that virtually all residential customers would be captured by such a threshold. It stated that while an increasing number of American homes are served by second lines, three lines for residential homes are a rarity, and four lines are even more unusual.[118]

Some parties, in an attempt to read the FCC's clear expression of its expectations out of the TRO, point to a footnote in the TRO indicating that "the four-line carve-out was adhered to in very few areas in the country."[119] They claim that in areas where the incumbent did not enforce the carve-out, the carve-out somehow was no longer "applicable." This weak semantical argument fails on the plain language of the TRO. Based on footnote 1545, it is obvious that the FCC was fully aware that incumbent LECs had implemented the carve-out on only a limited basis. Had the

[117] TRO, para. 497.
[118] UNE Remand Order, para. 293. See also, Rule 47 C.F.R. Sec. 51.319(c)(1)(B).
[119] TRO, n. 1545.

lack of implementation caused the four-line carve-out to become "inapplicable," the FCC would have said so. But it didn't.[120]

B. SBC Missouri's CLEC integrated access model quantitatively confirms the four DS0 line cutoff.

In order to gauge the reasonableness of the proposed four DS0 cutoff, SBC Missouri's witness Gary Fleming performed a quantitative analysis to identify the combinations of voice and data services that would make it economic and efficient for a CLEC to use a DS1 to serve small business customers that have as few as four DS0 lines. The analysis compares the economics of a CLEC providing "voice only" over multiple DS0s to the economics of providing both data and voice via a single DS1 loop. The purpose of the analysis was to determine the number of voice lines which, in conjunction with provision of data transmission, would make it economic for the CLEC to serve the customer using a DS1 loop.[121]

Under this analysis, the CLEC is assumed to serve business customers in the mass and enterprise markets and may also serve residential customers. It offers local, long-distance, and vertical services. When providing integrated access, it offers data services including business grade broadband Internet access. As the Internet access provider, the CLEC may also provide other data services including, web site hosting on a virtual private server, provision of IP addresses, support for DNS, and provision of an e-mail server.[122]

The results of this analysis, which depend upon UNE density Zone, show that in Missouri, a DS1 line is cost effective compared to four DS0s, so long as the customers has at least:

a. $109.81 per month of data revenues in Zone 1;
b. $89.48 per month of data revenues in Zone 2; and
c. $86.73 per month of data revenues in Zone 3; and

[120] TRO, para. 497 "We are not persuaded, based on this record, that we should alter the Commission's previous determination on this point." Id.
[121] SBC Ex. 3 (Fleming Direct), p. 33, Sch. GAF-6.
[122] Id., p. 33.

d. $94.20 per month of data revenues in Zone 4.[123]

Based on the product bundles and prices discussed below, which CLECs are offering in the market today, a CLEC can reasonably expect to see these amounts of data services, even to small business customers with only a few DS0 lines.[124] This analysis demonstrates that the FCC's four-lined DS0 cutoff defining the minimum number of DS0 lines in the enterprise market is entirely reasonable for all Missouri zones.

C. CLECs providing service through a DS1 loop gain additional revenue opportunities.

The evidence presented in this proceeding shows that CLECs providing service to end-users through a DS1 loop rather than DS0 loops gain increased revenue opportunities. Such opportunities come from the ability to combine the customer's voice and data traffic in an efficient manner on a single high-capacity loop. Rather than providing voice service over analog lines and internet data service, including Internet access, over a separate broadband data line, a CLEC can provide voice and broadband internet data service to small business customers, at very high speeds, over a single DS1 loop. This leads to increased service options for the customer and increased revenue opportunities for the CLEC. Once the CLEC is the customer's data service provider, it can offer additional services (and thus attain additional revenue opportunities) such as hosting the customer's website on a virtual private server, providing an IP address, supporting the customer's domain name server ("DNS"), and providing the customer's email server.[125]

Despite the claims of some parties to the contrary, small businesses have sophisticated telecommunications needs. Studies have shown that small business have rapidly moved online in North America. A June 2000 summary of small business internet use surveys, which included

[123] Id. Schedule GAF-6, p. 8.
[124] Id., p. 34.
[125] SBC Missouri Ex. 3 (Fleming Direct), pp. 27-28.

results from Dun & Bradstreet and Arthur Andersen, found that between 75 and 85% of small and medium businesses have websites.[126] A Gallop survey in 2001 found that 44% of small businesses without a website planned to develop one within the next year.[127] Similarly, a small business administration ("SBA") survey found that 32% of small businesses that are not already on the internet plan to be within the next year.[128]

The business that relies on the circuit-switched network and does not use broadband access is rapidly becoming an anachronism. At the same time, however, very small businesses, such as those with one to three lines, may well be satisfied with basic local telephone service, long distance service, some vertical features (e.g., Call Waiting, Caller ID), and access to the internet. Their needs are more like those of the typical residential customer, which is why such businesses would be part of the mass market.[129]

While large business customers typically have a need for data services beyond basic internet access to operate their businesses, so do small business customers that only have a few voice lines. Examples of such small business customers with data requirements include: franchise customers linking to a corporate or parent computer database; small law firms with large bandwidth needs for research and electronic filing; small retailers providing point of sale credit card processing, small realtors using web-based programs for their listings,[130] and even barbershops.[131]

Both the customer and CLEC can achieve economies if the CLEC serves even the smallest business customers that have such needs using a higher capacity loop in lieu of multiple DS0s.

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[126] Id., p. 28 citing "Internet Use Increases at Small Businesses," *Computer*, available at www.cyberatlas.internet.co/markets/smallbiz/article/0,,10098_897771,00.html.
[127] Id., p. 28, citing Press Release, "Summary:superpages.com/Gallop release results of national small business internet - use survey," http://superpages.com/about/press/press3.html.
[128] Id., p. 28, citing Joanne Pratt, "e-biz: Standard Use For Small Business Success," October, 2002, p. 12.
[129] Id., pp. 28-29.
[130] Id., p. 29.
[131] Fleming T. 251-253.

And by using higher capacity loops, a CLEC gains the opportunity of achieving incrementally increased revenue by providing its customers with bandwidth for their data needs at the same time they provide voice lines, all via the same loops.[132]

The revenue opportunity associated with providing data services to the typical small business is substantial and ranges between $100 and several hundred dollars per month. For example:

- Covad's business class small/home office ADSL service for email and browsing ranges from $69.99 to $149.99 per month. Covad's higher grade data transport services using symmetrical speed SDSL needed for online applications over the internet range from $139.99 to $299 per month.[133]

- Allegiance Telecom markets to businesses that require several phone lines or rapid internet access or combination of both. Its integrated access service provides 1.54 MPS capacity and can be configured in several ways to cost effectively meet the customer's voice, data and internet needs over a single access line. Its lowest priced small business service provides up to six business lines and a 256Kbps data line for $330 per month.[134]

- AT&T has announced that it has made its "business network" products available to meet the needs of small business customers for high-speed data services:

  > To support these increased needs, AT&T has made its entire portfolio of services available to the small business market, services that competitors often reserve for much larger business. In addition to basic services such as local and long distance, the company provides data, hosting, Internet Protocol-Virtual Private Network ("IP-VPN"), business continuity, managed services and much more, all customized to their individual needs.[135]

- McLeod's Preferred Access Integrated Access service "combines voice and data over a single, high speed connection to McLeodUSA's advanced network giving your business unprecedented communications power at affordable rates." It features "six local voice lines and 256k of high speed

[132] SBC Ex. 3 (Fleming Direct), p. 29.
[133] Id., p. 29, citing http://www.covad.com/business/solutions/smalloffice.shtml.
[134] Id., p. 30, citing www.algx.com/business/voice/integrated.jsp.
[135] Id., pp. 30-31, citing AT&T Press Release, "Small Businesses Benefit From Competitive Local and Long Distance Offer." In particular, AT&T's "business network" provides a customized solution for voice, vertical features, data and internet services. Id.

internet access, with the ability to grow in single channel increments."[136] Announcing the launch of this product, McLeod explained that "customers will now have the opportunity to add digital channel increments for additional voice and high speed internet service at a single price for voice or data . . . this flexible product structure is scalable, making it easy to add or delete channels as business needs dictate."[137]

- XO Communications offers Integrated Access service, which combines local, long distance and dedicated internet access over the same facility. It allows the customer to balance the needs for voice lines and data speeds and is suited for any small or growing company with moderate bandwidth and voice requirements. XO offers between six and 23 voice lines, and from 128Kbps to 1,024Mbps of internet access, for between $600 and $900 per month.[138]

- Sprint offers an integrated T1 bundled that provides local, long distance and high speed internet access. This offering allows customers to select from six to 20 voice channels and dedicated internet access with dedicated IP port speeds beginning at 256Kbps.[139]

- MCI offers "MCI Advantage" service which combines unlimited local and long distance calling with high speed internet connectivity by replacing existing analog lines with a single VoIP service - a technology trend that is expanding across the county.[140]

III. The CLEC's Proposed 8-12 DS0 Cutoff Does Not Reflect Market Realities.

The CLEC Coalition advocates a DS0 cutoff that would define the enterprise market as customers with 12 or more DS0 lines.[141] Sprint claims that more than 10 DS0s must be supplied before a customer should be considered an enterprise customer.[142] Staff concurs with Sprint's recommendation.[143] MCI has opined that this "breakpoint is somewhere between 8 and 12

[136] Id., p. 31, citing http://www.mcleodusa.com/productDetail.do?clm.mcleodusa.req.PRODUCT_ID=241500.
[137] Id., citing a January 22, 2003 McLeodUSA Press Release.
[138] Id., p. 31 citing "SME Integrated Access Services and Strategies Assessment" -- Stratecast Partners, May, 2003, p. 136.
[139] Ex. 32.
[140] Id., p. 32, citing http://business.mci.com/_business/local_long_distance/mci/advantage.jsp.
[141] Finnegan, T. 680.
[142] Sprint Ex. 10 (Maples Direct), p. 7.
[143] Staff Position Statement for Phase I, filed January 20, 2004, in Case No. TO-2004-0207, p. 2. Staff indicated that it "did not find the approaches taken by the other parties in direct testimony sufficient or adequately supported." Id.

DS0s."[144] And Sage claims that any customer served by a DS0 should be considered a mass market customer regardless of the number of DS0 lines used.[145]

Of these proposed DS0 cutoff points, only the CLEC Coalition and Sprint attempted to support their proposals with any empirical analysis. But those analyses contained several serious errors, including the failure to consider the increased revenue opportunities that come with providing service over DS1 loop, which the FCC's rules require to be taken into account. As a result, the cutoff point proposed by these parties are grossly overstated and must be rejected.

A. FCC rules require the economic analysis for the cutoff point to take increased revenue opportunity into account.

Both the DS0 cutoff models advanced by the CLEC Coalition and Sprint fail to take into account the increased revenue opportunities, particularly those from providing data services, that come from serving a customer over a DS1 loop rather than multiple DS0s. This approach is flatly inconsistent with the FCC's rules and invalidates these models.

47 C.F.R. Section 51.319(d)(2)(iii)(B)(4), which is the FCC's rule regarding the Commission's determination of the DS0 cutoff states:

> (4) Multi-line DS0 end users. As part of the economic analysis set forth in paragraph (d)(2)(iii)(B)(3) of this section, the state commission shall establish a maximum number of DS0 loops for each geographic market that requesting telecommunications carriers can serve through unbundled switching when serving multiline end users at a single location. Specifically, in establishing this "cutoff," the state commission shall take into account the point at which the increased revenue opportunity at a single location is sufficient to overcome impairment and the point at which multiline end users could be served in an economic fashion by higher capacity loops and a carrier's own switching and thus be considered part of the DS1 enterprise market.[146]

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[144] MCI Position Statement, filed January 20, 2004, in Case No. TO-2004-0207, p. 2.
[145] Sage Position Statement filed January 20, 2004 in Case No. TO-2004-0207, pp. 1-2. Sage also indicated that if the Commission decides to establish a crossover point and finds AT&T's calculations supported, then the Commission should use a range of three to 13 lines. But if the Commission is not satisfied with AT&T's supporting documentation, Sprint's proposal of 10 lines could be used to establish upper boundary. Id. at p. 2.
[146] 47 C.F.R. Sec. 51.319(d)(2)(iii)(B)(4) (emphasis added).

As the rule indicates, the determination of the DS0 cutoff is to be made "as part of the economic analysis set forth in paragraph (d)(2)(iii)(B)(3)," which is entitled "Economic Barriers" and is the section of the rules in which the FCC charges the state commissions with the consideration of potential economic barriers in its analysis of potential deployment. In conducting this economic analysis, the FCC in the TRO makes clear that the state commission must consider "all revenues," including data and long distance revenues:

> 519. *Potential Revenues*. In determining the likely revenues available to a competing carrier in a given market, the state commission must consider *all* revenues that will derive from service to the mass market, based on the most efficient business model for entry. These potential revenues include those associated with providing voice services, including (but not restricted to) the basic retail price charged to the customer, the sale of vertical features, universal service payments, access charges, subscriber line charges, and, if any, toll revenues.[1584] The state must also consider the revenues a competitor is likely to obtain from using its facilities for providing data and long distance services and from serving business customers.[1585] Moreover, state commissions must consider the impact of implicit support flows and universal service subsidies on the revenue opportunities available to competitors. Consideration of potential revenues is consistent with our standard, as described in Part V above, and with the guidance of the *USTA* decision.[147]

The FCC did not give the latitude to simply ignore potential revenues from data or other delineated services. Nor did it allow consideration of the impact of the cutoff point on inefficient carriers such as those Staff identifies, stating "The analysis must be based on the most efficient business model for entry rather than to any particular carrier's business model."[148]

Contrary to the positions advanced by some parties to this case, it is not reasonable to exclude revenues simply because they are uncertain. The focus of the FCC rules is on increased revenue opportunities, not guaranteed revenues. No one in business is guaranteed revenues. An efficient business recognizes this is reality and not only accepts these risks, but also takes them into consideration in developing a business plan. Not only is it reasonable to expect an efficient

[147] TRO, para. 519 (emphasis added).
[148] TRO, para. 517

carrier to offer such data services, it is a reality. As demonstrated above, many of the facility-based competitive providers that operate in Missouri are offering integrated data services to small businesses.[149]

The DS0 cutoff models advanced by the CLEC Coalition and Sprint also contain the following defects:

- Sprint incorrectly used a state-wide UNE-loop rate, which inappropriately increased the crossover point.[150] Even the CLEC coalition's witness acknowledged crossover points should be ILEC-specific and based on that ILEC's UNE rates for loops and switch ports.[151]

- The CLEC Coalition's crossover model inappropriately focuses on the costs of UNE-P (rather than the cost of providing service using DS0s) in calculating the DS0/DS1 crossover points. This approach, which purposefully skews the results, is completely inconsistent with the FCC's rule, which directs the calculation of "the maximum number of DS0 loops."[152] Tellingly, Sprint used DS0 costs.[153] And Dr. Ankum, MCI's witness, testified that he also uses DS0 costs when he presents a crossover model.[154]

- The CLEC Coalition inappropriately included an inflated $625 "marketing differential" for marketing to DS1 customers.[155] The FCC's rules require consideration of the cost of serving the customer, not the cost to acquire the customer.[156] No other witness advocated the inclusion of such costs and even the CLEC coalition's witness acknowledged that the amount he used was just an "estimate" and was "not necessarily based on what [he] would have liked to have had for the information."[157]

- With respect to the specifics of the UNE-P-based crossover model, the CLEC coalition witness was unable to explain how one of the essential parts of its model -- local switching usage -- was determined.[158]

- The CLEC Coalition model unrealistically assumes the same churn rate for mass market customers[159] (which, the FCC indicated, were hallmarked by

[149] SBC Ex. 4 (Fleming Rebuttal), p. 29.
[150] Sprint Ex. 10, (Maples Rebuttal), p. 3.
[151] Finnegan, T. 682-683.
[152] SBC Ex. 4 (Fleming Rebuttal), pp. 18-19; 47 C.F.R. Sec. 51.319 (d)(2)(iii)(b)(4).
[153] Ex. 9 (Maples Direct), p. 8.
[154] Ankum, T. 756, 758-759.
[155] Finnegan, Ex. 14, p. 6.
[156] 47 C.F.R Sec. 51.319(D)(2)(iii)(B).
[157] Finnegan, T. 688.
[158] Finnegan, T. 708-712.

their utilization of month-to-month contracts[160]) and enterprise customers, which typically purchase service under long term contracts.[161]

- The CLEC Coalition model includes in the DS1 cost the non-recurring costs for installing channel bank equipment, but erroneously neglects to recognize the receipt of the related non-recurring charges as revenue.[162]

B. FCC rules do not permit the enterprise market to be defined as including only customers currently served by a DS1.

Sage asserts that the mass market and enterprise market definitions be determined based on customers' existing services. Under its proposed definition, the mass market would include customers served by any DS0 loop.[163] The FCC, however, did not provide the states with the option of defining the enterprise market to only include those customers currently served by a DS1 (i.e., at the DS1 level). The TRO states:

> For purposes of determining whether impairment exists according to our standard, we define DS1 enterprise customers as those customers for which it is economically feasible for a competing carrier to provide voice service with its own switch using a DS1 or above loop. We determine that this includes all customers that are served by the competing carrier using a DS1 or above loop, and all customers meeting the DS0 cutoff described below in paragraph 497.[164]

Additionally, the FCC did not base the cutoff determination on economics from the consumer perspective (i.e., how many DS0s the end user customer could purchase to make a DS1 economic), but rather, the economics from the provider perspective, taking into account the relative costs such as those of unbundled DS0 loops versus unbundled DS1 loops, plus increased revenue opportunities.[165]

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[159] Finnegan, T. 715-718.
[160] Finnegan, T 716.
[161] Gillan T. 551.
[162] Finnegan, T. 718-720.
[163] Sage Ex. 19 (McCausland Direct), p. 10.
[164] TRO, n. 1376.
[165] SBC Ex. 4 (Fleming Rebuttal), p. 34.

C. The proposed 8 through 12 cutoff is unrealistic and inconsistent with market data.

In proposing DS0 cutoffs of between 8 and 12 lines, the CLEC Coalition, Sprint and others lose sight of the purpose for which the FCC intended the DS0 cutover to be used: defining where the mass market stops and the enterprise market begins. Throughout the TRO, the FCC refers to mass market customers as including residential and "very small business customers."[166]

Very small businesses, however, typically do not require eight to 12 telephone lines. Using Erlang B tables,[167] the 10 DS0 lines proposed by Sprint as still being part of the mass market could support a business with over 29 employees. AT&T's proposal of 12 DS0 lines could support a business with over 38 employees.[168] These sized businesses do not fit the common understanding of a very small business. The Small Business Administration (SBA) defines a "very small business" (VSB) as one with 15 or less employees.[169] The Yankee Group defines "very small business" as businesses with 2 to 19 employees.[170] By either of these definitions, it is highly unlikely that the typical very small business would need 10 to 12 DS0s.[171]

Moreover, actual market data from CLECs operating in Missouri confirms the unrealistically high nature of the proposed eight to 12 DS0 crossover point. NuVox, which provides service in the Kansas City, St. Louis and Springfield areas, acknowledged in a data request answer to Staff that:

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[166] See, e.g., TRO, paras. 127, 209, 210, 497 and n. 432, 624 and 1402.
[167] The Erlang B formula is a table used within the industry to determine the number of circuits required to meet a specified amount of usage (e.g., using the number of employees in a business, an estimate of the average amount of time those employees will use the telephone and an assumption about the level of service from a blocking perspective that is acceptable, the Erlang B tables will determine the number of lines the customer would need). The tables can also be used in reverse to determine how many employees that a set amount of circuits might support. SBC Ex. 4 (Fleming Rebuttal), p. 36.
[168] Id., p. 36.
[169] www.sba.gov/GC/indexprograms-vsb, cited at id., p. 37.
[170] August 2002 Yankee Group Report, SMB Communications Service Survey 2002: Overview, Page 3, cited at id., p. 37.
[171] Id., p. 37.

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_____.**[172]

Similarly, Allegiance Telecom, which provides service in Missouri, stated: **_____

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CONCLUSION

The Commission should define SBC Missouri's service area in the Kansas City, St. Louis and Springfield MSAs as the geographic markets for the purpose of evaluating mass market switching impairment, with no distinction between residential and business customers (because any such distinction would be inconsistent with 47 C.F.R. Sec. 319(d)(2)).

In addition, the Commission should adopt a DS0 cutoff of four DS0s, so that a customer with four or more DS0s at a location would be part of the enterprise market, while a customer with three or fewer DS0s would be in the mass market.

[172] Ex. 29HC. The entire highly confidential exhibit is appended as Attachment 1 to this Brief for the convenience of the Commission.
[173] This DR response is reproduced as Schedule GAF-3HC to SBC Ex. 4 (Fleming Rebuttal). For the convenience of the Commission, it is appended as Attachment 2 to this Brief.

NP

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document was served to all parties by e-mail on February 13, 2004.

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