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

PHASE I INITIAL POST HEARING BRIEF

COMES NOW Sprint Missouri, Inc. and Sprint Communications Company. L.P. ("Sprint") and hereby provides its Initial Post Hearing Brief.

BACKGROUND

The Commissioned established this Case on November 5, 2003, to address issues delegated to the state commissions by the Federal Communication Commission's Triennial Review Order.[1] On December 1, 2003, the Commission established a procedural schedule for this case and tri-furcated the proceeding into three separate phases. Phase I of this case was established to define (a) particular geographic markets and the (b) appropriate multi-line DS0 customer cross-over between the mass and enterprise markets. The parties to this case identified only two issues for Phase I:

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

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1 REPORT AND ORDER AND ORDER ON REMAND AND FURTHER NOTICE OF PROPOSED RULEMAKING, Released August 21, 2003 in Federal Communications Commission docket numbers 01-338, 96-98, and 98-147.

Sprint witness Mr. Mark Harper provided testimony supporting the use of the MSA (metropolitan statistical area) as the appropriate geographic market definition for the purpose of examining whether there is non-impairment in the provision of unbundled local switching. Additionally, Sprint witness Mr. James M. Maples provided the Commission with a straight-forward analysis consistent with FCC findings that indicated 10 DS-0s must be supplied before a customer should be considered an enterprise customer rather than a mass market customer. Both of these issues are discussed fully below.

As discussed by both Sprint witnesses, Sprint brings a unique balance to this case. Sprint is one of the large incumbent local exchange carriers ("ILEC") providing basic telephone service in Missouri, but Sprint is also a competitive local exchange carrier ("CLEC") in Missouri and in many other states throughout the country, providing basic local service to hundreds of thousands of residential and business customers nationwide. Therefore, Sprint is situated to understand the needs of both *providers* and *purchasers* of unbundled network elements, and to understand the competitive impacts of the availability—or lack of availability—of unbundled elements on both providers and purchasers. In the process of arriving at the policy positions that form the basis of its testimony, Sprint is required to balance, internally, the same competing interests that policymakers must balance in proceedings such as this one. Consistent with the TRO and the resulting rules, these positions are provided by Mr. Harper and Mr. Maples.

<u>Issue No. 1 – Relevant Geographic Markets</u>

With respect to defining the geographic markets in Missouri, the FCC delegated to the state commissions the determination of the relevant geographic market for the purposes of examining whether there is "non-impairment" in the provision of unbundled local switching to serve mass-market customers. The Missouri commission must first define the relevant geographic markets in accordance with the FCC's guidelines. Specifically, paragraph 495 of the TRO states:

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

The record in this case reflects several options for different geographic markets for the Commission to consider in Phase I. Sprint, SBC-Missouri, and CenturyTel all recommend the use of Missouri's MSAs as the proper geographic unit for analyzing impairment in the provision of unbundled local switching to serve mass market customers. AT&T and the CLEC coalition recommended Missouri's Local Access and Transport Areas (LATA). Finally, Staff, MCI, and Sage proposed the use of ILEC wire centers and/or exchanges. In addition, Commissioner Murray inquired during the hearing about Missouri's three Metropolitan Calling Areas (MCA): Kansas City, St. Louis, and Springfield.

As mentioned above, Sprint supports the MSA as the relevant geographic market definition for analyzing impairment in the provision of unbundled local switching to serve mass market customers. Sprint witness Mr. Harper testified that the MSA is appropriate and meets the FCC's direction. Specifically, Mr. Harper provided four key components which support the use of the MSA as the appropriate geographic definition in this case:

(1) MSAs represent subsets of the entire state. By definition, MSAs meet the requirement that the appropriate market definition cannot encompass the entire state.

(2) MSAs tend to reflect the market from the entrant's view point as they represent an economic community of interest and generally reflect the geographic reach of newspapers, radio, and television advertising. This point is important in so much as it meets the FCC's requirements that the appropriate market definition must take into consideration the *competitor's* ability to serve customers economically and efficiently.[2]

(3) MSAs also considers the "variation in factors" that allow a carrier to serve groups of customers. MSAs are generally defined "narrowly enough so that competitive conditions within each area are reasonably similar" which supports the concept of an economic community of interest.[3] From an economic point of view this characteristic is particularly relevant because economists tend to define markets (geographically) based on the region within which market forces operate.[4]

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2 Tr. at (Vol. 4) at p. 595, Ex 7, Harper's Direct at p. 7, l. 1-10.

3 Fifth Report and Order and Further Notice of Proposed Rulemaking, Access Reform Docket, CC 96-262, "Pricing Flexibility Order," released August 27, 1999, paragraph 71.

4 Tr. at (Vol. 4) at p. 595, Ex 7, Harper's Direct at p. 7, l. 12-22.

(4) Finally, the MSA is large enough for the entrant to take advantage of scale economies but not so large as to potentially lead to diseconomies of scale.[5]

Based on the above, Sprint supports the Commission selecting the MSA as the appropriate geographic market.

As stated above, Staff, MCI, and Sage advocate the use of the ILEC wire center and/or exchange as the relevant geographic definition for mass market switching impairment. However, there are critical flaws associated with the rationale for use of wire centers or the exchanges for this cause. Wire centers and exchanges alone do not represent unique economic communities of interest.[6] This is because wire centers and exchanges (which typically are the same) are essentially meaningless to end-users.[7] Further, wire centers and exchanges do not present the economies of scale and scope required by the TRO.[8]

Another critical flaw with the use of wire centers or exchanges is that they fail to recognize the true market that will be impacted by the Commission's decision in this case. It is highly likely that once one or two major and/or profitable wire centers of a metropolitan area are deemed non-impaired, then for all practical purposes the CLECs who serve mass markets through UNE-P will exit the entire market. For example, any CLEC providing mass market service over UNE-P and utilizing mass market media for advertising and customer acquisition would no longer be able to do so if one or two of the major wire centers are removed from the overall market. Therefore, Sprint believes that it is important that the Commission accurately define the market that will be impacted by its impairment decision so the Commission fully appreciates the market it is evaluating

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5 Tr. at (Vol. 4) at p. 595, Ex 7, Harper's Direct at p. 8, l. 6-10
6 Tr. at (Vol. 4) at p. 595, Ex 7, Harper Direct at p. 10, l. 3-6.
7 *Id.*
8 Tr. at (Vol. 4) at p. 595, Ex 7, Harper Direct at p. 9, l. 18-24.

from removal of UNE-P based competition. The MSA is the true market that will be impacted.

Issue No. 2 -- Cross-over

In the TRO, the FCC has tasked state commissions with identifying the cross – over between mass market customers and enterprise customers. The TRO provides definitions for both these groups of customers. In footnote 1296, the FCC defines enterprise customer as:

> We define "DS-1 enterprise customers" for our impairment analysis as customers for which it is economically feasible for a competing carrier to provide ***voice service*** with its own switch using a DS-1 or above loop. We find that this includes all customers that are served by the competing carrier using a DS-1 or above loop. After the state commission conducts a "multiline DS-0 cut-off" inquiry, it includes customers who could be served by the competing carrier using a DS-1 or above loop. *See infra* para. 497. (Emphasis Added)

Later in the TRO, the FCC again defines 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."[9] The FCC repeatedly defines mass market customers "as voice analog customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops. Some mass market customers (i.e., very small businesses) purchase multiple DSOs at a single location." [10] Within the context of these two definitions, the FCC has instructed the Commission to identify "the

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[9] See TRO at footnote 1376 (Emphasis Added).
[10] See TRO at Paragraphs 459 and 497.

cross over point where it makes economic sense for a multi-line customer to be served via a DS1 loop."[11] For the purpose of the potential deployment analysis that SBC may or may not submit in this case, guidance is provided in 47 C.F.R. 51.319(d)(2)(iii)(B)(4) which provides:

> 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.

In order to assist the Commission in defining a bright line between enterprise and mass market customers, the parties in this case submitted various recommendations. Sprint submitted an analysis that was based on the statewide average cost for DSO and DS1 Loops.[12] Consistent with the definitions and directions of the FCC in the TRO, Sprint identified the point at which it is economically feasible for a competing carrier to provide voice service with its own switch using as DS1 or above loop. Sprint's analysis demonstrates that it remains economical to serve a customer with up to ten DS-0 lines at a customer location. After ten DS-O lines, the DS-1 line becomes the most cost effective means of providing voice service to a customer.

Sprint's analysis used the (a) monthly recurring charges of the unbundled network element DS-1 loops, (b) the unbundled network element non-recurring charges for DS-1 loops, and (c) the monthly costs of a channel bank installed at the customer's premises

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[11] TRO at Paragraph 497.

[12] Tr. (Vol. 4) at P. 623, Exhibit 9, Maples Direct at p. 7, l. 6-11.

used to multiplex multiple voice channels onto a DS-1 loop facility.[13] The analysis compares these DS-1 cost with DS-0 costs including (a) the monthly recurring charges of the unbundled network element DS-0 loops and (b) the non-recurring charges for unbundled network element DS-0 loops. The non-recurring charges reflect the charges for the initial DS-0 loop and each additional loop ordered, assuming that all of the loops are installed at the same time.[14] Sprint's analysis also considered the increased revenue opportunity associated with voice services and held this factor constant, as the increased revenue is the same for both voice services over DS-1 as well as voice services over a DS-0 line.[15]

In its analysis, Sprint used UNE rates from the current interconnection rates offered in Missouri by the three largest ILEC in Missouri: SBC, CenturyTel and Sprint Missouri, Inc. Further, Sprint used a weighted average cost of capital input for amortizing the non-recurring charges. The non-recurring unbundled network element charges for establishing DS-0 or DS-1 services are amortized over a 24 month period using Sprint's weighted cost of capital.[16] The analysis unquestionably demonstrates that in Missouri ten (10) DS-0 lines represents the economic cross over point between mass market customer and enterprise customers. The analysis is straight-forward, objective and does not require the Commission to make any assumption not supported by the facts in this case.

No party to this case challenged Sprint on the accuracy of the UNE rates it used in its analysis. Indeed, SBC limited its challenge to the fact that the rates Sprint used in its

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[13] Tr. (Vol. 4) at P. 623, Exhibit 9, Maples Direct at P. 7, l. 20 p. 8, l. 2.
[14] Tr. (Vol. 4) at P. 623, Exhibit 9, Maples Direct at P. 8, l. 6-10.
[15] Tr. (Vol. 4) at P. 623, Exhibit 9, Maples Rebuttal, P. 8, l. 6-9.
[16] Tr. (Vol. 4) at P. 623, Exhibit 9, Mr. Maples Direct at P. 9, l.15-19.

analysis represents a state-wide average rather than company-specific results. However, Sprint developed a state-wide average cost rather than company-specific results because the Commission is charged in the TRO with establishing the cut over for multiple carriers-- in Missouri this includes SBC, CenturyTel and Sprint. Further, while SBC challenges Sprint's state-wide average, no where in the record did anyone submit a carrier specific cross-over for CenturyTel, an ILEC also challenging impairment in this case. Also, the market definitions that both SBC and CenturyTel advocate, the MSA, contains multiple carriers, including the three used by Sprint in its analysis. Finally, the record reflects that there is no reason to believe that the cross over would be markedly different if carrier specific cost were used. This is demonstrated in Mr. Maples' Rebuttal testimony where he calculated a cross over by UNE zone using SBC specific cost provided by SBC in this case.[17] The cross-over point using SBC specific cost and inputs is from 9-12 DS-0 lines.[18] Therefore, Sprint's inclusion of a state-wide average most accurately provides the Commission with the cross-over it must decide for the markets it may ultimately define in this case and for the carriers challenging impairment in this case.

SBC made other unsuccessful attempts to challenge a few of the other inputs, such as cost of capital and recovery life. However, a closer review of these attempts demonstrates the weakness in SBC's arguments. First, while Sprint used a 12.56% that reflects only Sprint's weighted cost of capital, Sprint testified that it should be representative of the combined results of the three companies' cost of capital in

[17] Tr. (Vol. 4) at P. 623, Exhibit 9, Mr. Maples Rebuttal at P. 3, l.3-4.
[18] *Id.*

Missouri.[19] Further, the cost of capital Sprint used is between SBC's cost of capital (10.32%) and what SBC is advocating for CLECs in this case (16%). Finally, substituting a specific company's data would not have a material impact on the resultant cross-over figure.[20] Next, SBC questioned Sprint's use of a two year recovery period. However, as testified by Sprint, this period is from Sprint's own CLEC experience.[21] Further, Sprint's experience is consistent with the CLEC experience that the FCC relied on in finding impairment. Specifically, at Paragraph 471 of the TRO, the FCC noted that "Z-Tel estimates that at least four percent of its lines turn over each month. Because of this, Z-Tel asserts that carriers in a competitive market cannot expect to keep any particular customer for more than 18-24 months." SBC, on the other hand would like this Commission to believe that a CLEC can keep a customer in a competitive market for 8 years. Such an assumption has no basis in fact. Finally, as mentioned previously, if Sprint were to use SBC's cost inputs and run its analysis, the result is a crossover of from 9 to 12 DS-0 lines, which is consistent with Sprint's recommendation of 10 DS-0 lines.[22] Therefore, there have been no sustainable challenges to Sprint's analysis by any party to this case.

Further, and very telling, is the fact that the record reflects that there is a market in Missouri for precisely the market identified by Sprint's analysis --a small business offering of voice services up to ten lines. This is strongly reflected in Exhibit 23, SBC's Business Unlimited offering featuring voice services for business from ***1-10 lines***.[23] SBC's offering consists of local, long distance, and all for one limited, monthly rate.

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19 Tr. (Vol. 4) at P. 623, Exhibit 9, Mr. Maples Direct at P.9, l. 10-13, footnote 5.
20 Tr. (Vol. 4) at P. 623, Exhibit 9, Mr. Maples Rebuttal at P. 3, l.3-4; *see also* Tr. .(Vol. 4) at p. 655, l. 9-22.
21 Tr. (Vol. 4) at p. 658, l. 1-10.
22 Tr. (Vol. 4) at P. 623, Exhibit 9, Mr. Maples Rebuttal at P. 3, l.3-4.
23 Tr. (Vol. 3) at p. 240, Exhibit 23.

Further, the testimony of Michael Starkey, on behalf of Sage telecom, Inc, reflects that Sage, a company that offers only voice services to residential and small businesses over DS-0 lines, serves customers consistent with Sprint's analysis.[24] Therefore, the record clearly supports the fact that Sprint's analysis was correct – the point at which it is economically feasible for a competing provider to provide voice service using a DS-1 line is above ten lines. This conclusion is also endorsed by the Staff and various other parties in this case.

Despite the overwhelming evidence supporting Sprint's analysis, SBC maintains that the Commission should classify a customer as a enterprise DS-1 customer at four lines. SBC's position is based on what SBC calls a "4 line default."[25] According to SBC, a 4-line default arises out of a sentence from Paragraph 497 of the TRO that reads "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 cutoff will be four lines absent significant evidence to the contrary." This sentence is footnoted with a requirement for all state commissions to make a finding of whether the 4 line carve out was in effect. With respect to the carve out, the record reflects that the area in which impairment is being challenged is much larger than the area where the carve out could be applied. Further, and most importantly, the record reflects that SBC **never** applied the 4 line carve area even in the limited area where it could have.[26] Indeed, SBC itself admits that the conditions to qualify for the 4-lone carve out were so "onerous" that it never sought to qualify.[27] However, in this case, it is trying to backdoor the 4-line carve out without

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24 Tr. at (Vol. 5) at p. 793, Ex. 18HC, Starkey Rebuttal at p. 56, l.12-13.
25 See Tr. (Vol. 3) at p. 223, Ex. 3, Fleming Direct at p. 26, l. 3-8.
26 See Tr. (Vol. 3) at p. 282, l. 7-10; (Vol. 4) at p. 400, l.. 24- p. 401, l. 3.
27 Tr. (Vol. 4) at p. 425, Ex 28.

complying with the conditions that made it applicable in the first instances. Therefore, this Commission cannot, and should not, find that the 4 line carve out applies in Missouri. This finding in and of itself, provides the sufficient evidence that the 4-line carve out is not applicable to Missouri.

In an attempt to overcome the fact that the carve out does not apply in Missouri, SBC maintains that if the Commission assumes that CLECs can secure a certain amount of data revenue from a customer with four lines, then the Commission should still find that the enterprise market begins at four lines. The amount of revenue the Commission would need to assume that could be acquired on the average for every CLEC customer to get to the four line default, varies by UNE zone from $108.00 to $86.73. These date revenue numbers are just the numbers that happen to get the Commission to four lines given the costs of multiple DS-0s and a DS-1. These assumptions are not based on any market study or any statistical study of any form.[28] Indeed, the SBC witness supporting SBC's cross-over testified that he had not investigate the data offerings of the largest competitor in Missouri, SBC, before concluded what date revenues a competitor in Missouri could successfully secure.[29] Finally, while SBC cites to offerings of CLECs that include data beginning at 6 lines and up, (and in most cases fails to also include the price), SBC misses the point of the Commission's determinations in this case. The customers served by the offerings put in the record by SBC are already enterprise customers and are not the ones the Commission is seeking to define. The Commission's task is to look at those who remain on DSOs and who take voice service and identify the point at which it is economic to serve those customers with a DS1. At that point, the

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[28] See Tr. (Vol. 3) at p. 248, l. 9-14; p. 334, l. 2-13.

[29] See Tr. (Vol. 3) at p. 231, l. 22- p. 232, l. 8.

DSO customer becomes an enterprise customer and can no longer be served with UNE-P. To assume, without any demonstration that it is even remotely likely, that the customers who have already declined a CLEC's integrated voice data offering and chosen to remain on DSOs for voice services is somehow likely to rethink their decision just because it works for SBC's desired cross over result, is an assumption that this Commission cannot make. Therefore, SBC's cross over position is unsupported by the record.

Alternatively, the Commission should adopt Sprint's cross over position of ten DS0 lines which is fully supported by the testimony and analysis of Mr. Maples and endorsed by several parties in this case. Sprint's analysis contains an objective measurement of costs CLECs in Missouri face in provision service to mass market customers. Sprint's analysis unquestionably reflects that the economic cross over between mass marker customers and enterprise customers is ten lines.

CONCLUSION

WHEREFORE, for the above reasons, Sprint requests that the Commission adopt the MSA as the appropriate geographic market definition for the purpose of examining whether there is non-impairment in the provision of unbundled local switching and adopt Sprint's suggested ten line cross over point.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served on each of the following parties by electronic mail this 13th day of February, 2004:

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