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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
  
TRANSCRIPT OF PROCEEDINGS  
  
Hearing  
  
January 27, 2004  
Jefferson City, Missouri  
Volume 3

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

LEWIS MILLS, Presiding,  
DEPUTY CHIEF REGULATORY LAW JUDGE.

CONNIE MURRAY,  
ROBERT M. CLAYTON, III,  
COMMISSIONERS.

REPORTED BY:  
  
KELLENE K. FEDDERSEN, CSR, RPR, CCR  
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1 P R O C E E D I N G S

2 JUDGE MILLS: We're on the record this morning  
3 for a hearing in Phase 1 of Case No. TO-2004-0207, which is  
4 filed in the matter of a Commission inquiry into the  
5 possibility of impairment without unbundled local circuit  
6 switching when serving the mass market.

7 As I discussed before we went on the record,  
8 we're going to jump immediately into opening statements in  
9 the order that the parties have agreed upon.

10 If you would, please, when you come to the  
11 podium to give your opening statement, make your entry of  
12 appearance and then proceed with your opening statement.  
13 And to the extent you can, let's try to move through these  
14 fairly quickly, because the Commissioners have a meeting at  
15 9:30 and I'm sure they'd like to see as much of the opening  
16 statements as they can.

17 Without further ado, let's go to SBC Missouri.

18 MR. LANE: Thank you, your Honor. Paul Lane  
19 and Leo Bub on behalf of Southwestern Bell Telephone LP,  
20 doing business as SBC Missouri. Our address is One SBC  
21 Center, Room 3520, St. Louis, Missouri 63101.

22 This is the first phase of a three-part  
23 proceeding to implement the FCC's Triennial Review Order or  
24 TRO. The FCC's TRO is the FCC's third attempt to identify  
25 the network elements that ILECs, including SBC Missouri,

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1 must make available to CLECs, competitive local exchange  
2 companies. The first two attempts to identify network  
3 elements were found to be unlawful and in violation of the  
4 1996 Act.

5 Under the Act, network elements are to be made  
6 available only if CLECs are impaired without access to those  
7 elements. The Act requires an impairment analysis for a  
8 very good reason. The Act is designed to encourage  
9 facilities-based competition, and if the list of network  
10 elements which must be unbundled for competitors is too  
11 broad, it robs both the CLECs and the ILECs of the incentive  
12 to invest, and that was specifically noted by the FCC in its  
13 TRO in paragraph 3, among other places.

14 And that's what we've seen, a dramatic drop in  
15 investments by both ILECs and CLECs. Why should CLECs  
16 invest when they can buy at rock-bottom prices? Why should  
17 ILECs invest when they have to give it away at those same  
18 rock-bottom prices? So the FCC has tried again to develop a  
19 lawful impairment standard. SBC and other ILECs believe  
20 that the FCC has failed again and the matter is now pending  
21 in the district -- DC Circuit Court of Appeals with oral  
22 argument scheduled for tomorrow on an expedited basis.

23 But for now the task is to implement the FCC's  
24 TRO until and unless it is declared unlawful. Why is this  
25 background important? For two reasons. First is the

1 Commission can't properly implement the TRO unless it  
2 understands the purpose behind it, and the second is that,  
3 in this proceeding, all of the CLECs and Staff are  
4 approaching the TRO from the wrong direction.

5 CLECs and the Staff are only interested in  
6 preserving the so-called UNE-P, the unbundled network  
7 element platform that allows them to use all unbundled  
8 network elements and not provide any of their own  
9 facilities. They're not interested in conducting the  
10 independent and unbiased impairment analysis that the TRO  
11 requires.

12 And they're not subtle about it. They're very  
13 blatant, saying they want to continue the UNE-P and the  
14 Commission should act in a way that ensures that will  
15 happen. They want to gerrymander the market definition and  
16 the DS1 cutover solely to preserve the unbundled network  
17 element platform.

18 In the TRO, the FCC made certain decisions on  
19 impairment and delegated others to the states. From a state  
20 perspective, the FCC has directed the state to conduct an  
21 analysis of impairment for unbundled local switching for  
22 mass market customers, for high capacity loops, and for  
23 unbundled transport. This Phase 1 of this proceeding  
24 concerns the first step, concerns unbundled local switching  
25 and when that needs to be made available to serve mass

1 market customers. There's two aspects to the process that  
2 you're about today.

3 First is, under the TRO, the Commission is to  
4 determine the appropriate geographic market. And second,  
5 the Commission is to determine the DS1 crossover.  
6 Essentially that means determining the point by which to  
7 separate mass market customers on the one hand from  
8 enterprise customers on the other.

9 The FCC has already determined that for  
10 enterprise customers they are not impaired without access to  
11 unbundled local switching. And that's -- no one's  
12 challenged that, and that's binding on everyone. And when  
13 we set the DS1 crossover point, those customers with lines  
14 below that point are considered mass market customers, and  
15 you will analyze the impairment in the next phase.

16 In the next phase you'll be looking at whether  
17 the triggers that the FCC has set have been met and, if not,  
18 whether a potential deployment analysis shows that no  
19 impairment exists.

20 With regard to the geographic market  
21 definition, the FCC has given the states some direction, but  
22 it's not unlimited. The geographic market can't be the  
23 entire state, and it has to be large enough that it gives  
24 the CLECs recognition for the appropriate scale and scope  
25 economies. Scale economies, of course, is the number of



1 customers that can be served by the switch, and scope  
2 economies refers to serving both residential and business  
3 customers, since the same switch can and is used to serve  
4 both types of customers.

5               The FCC also gave some factors to be  
6 considered when setting a geographic market. One is where  
7 are the competitors providing service? Note that it's not  
8 where the competitors are using UNE-P, as some would have  
9 you think, but it's where they're providing service  
10 utilizing their own switch.

11              That obviously makes sense if you're going to  
12 analyze whether they're impaired without access to unbundled  
13 local switching. You have to look at where they're using  
14 their switches today and how they're serving the customer  
15 today. You don't look at those that aren't using their own  
16 switch.

17              With regard to geographic markets, you have  
18 four proposals, and I have here a map that's typically used  
19 in Missouri, the incumbent local exchange carriers, and it  
20 shows the various exchanges that are served. The MSA  
21 approach, in particular, looks at -- in the impairment phase  
22 in the next step we're going to look at St. Louis, Kansas  
23 City and Springfield. It's in those areas that SBC will  
24 show that there is no impairment without access to unbundled  
25 local switching.

1                   MSAs in St. Louis are reflected by the black  
2 line. The same in Kansas City and also in Springfield. So  
3 you can see that it's not the entirety of the state that  
4 we're talking about. The MSAs cover the major urban areas  
5 and their surrounding territories.

6                   Why is the MSA appropriate? These areas  
7 reflect common social and economic ties. These are also  
8 areas that reflect where CLECs place their own switches and  
9 how they provide service to customers using their own  
10 switches. The MSAs also are areas where mass market  
11 advertising through media is appropriate and can be done for  
12 those CLECs that choose to do that. Newspapers and  
13 television typically reach throughout the MSA areas.

14                  Second approach is wire centers. That's  
15 recommended by MCI and others. There are more than 200 wire  
16 centers in SBC Missouri's territory alone. CLECs do not  
17 enter markets on a wire center basis. They don't place  
18 their switch to serve single wire centers, and no one will  
19 tell you that they do. All of the evidence shows that  
20 they're actually using their own switches in areas that are  
21 much, much larger than a wire center.

22                  The wire center approach does not square with  
23 the FCC's TRO which requires the geographic market to be set  
24 large enough to reflect size and scope economies. You don't  
25 get that from a wire center approach.

1                   The third approach is LATAs. This is the AT&T  
2 approach. I'll address it, even though we have a motion to  
3 strike pending. There's four LATAs in Missouri, although  
4 AT&T only wants you to consider three, because the fourth  
5 one is not large enough to suit their purposes. But these  
6 LATAs contain multiple MSAs and include also metropolitan  
7 statistical areas. They're much larger than what most  
8 people consider to be the market for purposes of entering  
9 and providing telephone service utilizing your own switch.  
10 AT&T hasn't shown that there's social and economic areas  
11 that are tied together, nor have they shown that those are  
12 the appropriate areas compared to MSAs for determining where  
13 CLECs provide service using their own switch.

14                   The fourth approach is the exchange approach.  
15 This is the Staff approach. The Staff recognizes that the  
16 wire center approach is inappropriate but, in fact, the  
17 Staff's approach results in utilizing a wire center approach  
18 in the vast majority of cases. SBC Missouri has  
19 160 exchanges in which it provides local service in  
20 Missouri. 149 of these, 93 percent are single wire center  
21 areas. So Staff tells you wire centers are too small, but  
22 their proposal means that 93 percent of the time they're  
23 using the wrong approach.

24                   Even in exchanges with multiple wire centers,  
25 the Staff's proposal is too narrow. In the urban areas the

1 CLECs enter and use their own switch to serve an area much  
2 larger than the exchange itself. Let me use a map and  
3 demonstrate some of that to you. This map depicts the  
4 St. Louis, Missouri MSA. Outlined in red are the confines,  
5 the contours of the MSA. Outlined in blue are the contours  
6 of the MCA, the metropolitan calling area plan that this  
7 Commission adopted back in 1992. The tan area here right  
8 around St. Louis is the St. Louis exchange. That's what  
9 Staff wants you to look at.

10 Staff doesn't want you to look at all of the  
11 other exchanges that are in the -- even in the MCA where the  
12 Commission's already found common social and economic ties,  
13 and it's very appropriate to look at these areas in addition  
14 to these areas that are in the tan, in the exchange itself.

15 A single wire center approach doesn't make  
16 sense -- or an exchange approach doesn't make sense because  
17 it requires you to look at places like Chesterfield,  
18 Manchester and Fenton as if those are stand-alone markets  
19 where CLECs can provide service. That's not how CLECs enter  
20 markets.

21 They're today serving Chesterfield,  
22 Manchester, Fenton and other places within the MCA,  
23 utilizing their own switch. Often it's the same switch. It  
24 may be located in downtown, it may be located in  
25 Chesterfield, but it serves the entire area, and it goes

1 with the scale and the scope economies that we talked about  
2 earlier.

3           The gray areas, just for clarification, are  
4 areas that are not in Southwestern Bell's territory. Some  
5 other ILEC serves those areas. We're not asking for any  
6 determination of impairment in those areas from the next  
7 phase. It's only the areas that we serve that are at issue.

8           Next is the Kansas City MSA and, again, the  
9 red shows the geographic boundaries of the MSA and, again,  
10 in blue depicts the contours of the MCA, the metropolitan  
11 calling area plan that the Commission adopted. Again, the  
12 tan area reflects the Kansas City exchange, which is what  
13 Staff wants you to look at for purposes of this case. And  
14 you can see that, as far as SBC Missouri is concerned, that  
15 using the Kansas City exchange doesn't leave out as many  
16 areas as St. Louis.

17           Again, the gray areas are those that we don't  
18 serve. Somebody else serves it. But not following this --  
19 following the Staff proposal to use the Kansas City exchange  
20 leaves out a number of Southwestern Bell exchanges that  
21 should be included, both because they're within the MCA, as  
22 well as because they're within the MSA itself.

23           The final area is Springfield. As before, the  
24 red shows the outlines of the MSA; the blue shows the  
25 outlines of the MCA, the metropolitan calling area plan. In

1    this case the Springfield exchange is shown in green, and  
2    Staff's proposal would leave out several SBC Missouri  
3    exchanges that are within the MCA, as well as within the  
4    MSA. And for those that are familiar with those areas, I  
5    think you'd understand that those are typically considered  
6    part of the same market. The Commission thought so when it  
7    set the MCA plan.

8                   And it does -- and CLECs do utilize their own  
9    switch to serve not just the Springfield exchange in green,  
10   but these other exchanges as well. And again, the areas in  
11   gray depict areas that are served by other ILECs, not SBC  
12   Missouri, and our proposal won't affect those areas at all.  
13   They will continue to operate as they do today.

14                   With respect to the DS1/DS0 crossovers, you  
15   have three proposals in front of you. SBC's proposal is to  
16   say that customers using four lines and above are to be  
17   considered in the enterprise market, where the FCC, as I  
18   told you, has already found no impairment with regard to  
19   access to unbundled local switching. Three lines and below  
20   we would place in the mass market, which you will examine  
21   for impairment in the next phase.

22                   Why is SBC's proposal to use this dividing  
23   line for the mass market customers appropriate? There's  
24   several reasons. The first is that it's consistent with the  
25   FCC's default rule, which is contained in the TRO and

1 provides that four lines and above in the top 50 MSAs, the  
2 Zone 1 density already utilizes the four-line cutoff unless  
3 there is significant evidence to the contrary. We don't  
4 think there is significant evidence to the contrary here.

5 Second, four lines and above is supported by a  
6 study sponsored by Mr. Fleming on behalf of SBC Missouri.  
7 The study shows the economic crossover point where it makes  
8 sense to use DS1 service instead of multiple DS0s or voice  
9 line -- voice grade services. The study shows that it's  
10 economic to do so, to utilize the DS1, when the customer  
11 generates \$80 to \$100 in data revenues, depending on where  
12 they are in the state.

13 In fact, CLECs do offer data services to their  
14 customers, and they charge at or above the \$80 to \$100 level  
15 that I described.

16 The CLECs' own advertising and service offers  
17 are built around combining voice and data services with  
18 customers with four lines and above. They ought to be  
19 served through DS1s because most businesses of this size do  
20 have data needs. Do all of them? No. Do most of them?  
21 Yes.

22 Sprint proposes a 10-line crossover and AT&T  
23 proposes a 13-line crossover. I'll treat these together,  
24 since they have some common attributes.

25 Both of these are supported by studies that

1 purport only to look at the cost side of the equation. They  
2 look only at what does it cost to buy a DS1 from SBC, what  
3 does it cost to buy DS0s from SBC? Divide those and you  
4 come up with the answer. It's a little more complicated,  
5 but essentially it's only looking at the cost side of it.

6           There's problems with the inputs in the study,  
7 both of them, and we'll get to those in the course of  
8 cross-examination, but there's an overriding problem with  
9 that, and that is that it's flatly inconsistent with the  
10 requirements of the TRO because it does not consider revenue  
11 opportunities that are gained when you move from serving  
12 with DS0 voice grade to the DS1 pipe, which is a faster,  
13 higher speed pipe and the increased revenue opportunities,  
14 an area where the FCC has mandated that the Commission  
15 consider this when they're setting the DS1/DS0 crossover  
16 point.

17           Both AT&T and Sprint failed to factor in the  
18 increased revenue opportunity, saying it doesn't really  
19 exist because you shouldn't consider data revenues, but  
20 that's contrary to the precise and exact words of the TRO,  
21 which expressly note that data revenues are to be considered  
22 in a potential deployment analysis. In the same section of  
23 the rules where they tell you how to do the DS1/DS0  
24 crossover point, they tell you that data revenues are to be  
25 considered.



1                   It's also contrary to how CLECs market to  
2 customers. They sell service that combine both voice and  
3 data over the DS1 pipe. Many call it integrated access  
4 service, meaning that voice and data are integrated into the  
5 same pipe. It's designed for customers four to six lines  
6 and more. If multi-line customers didn't have data needs,  
7 those CLECs wouldn't have specific offers directed to them.

8                   None of them talk about those offerings, not  
9 in their direct or their rebuttal, and that's very telling.  
10 They don't want to focus on the real market, because the  
11 real market does support use of the crossover point at four  
12 lines as SBC Missouri recommends.

13                  The geographic market and the DS1/DS0 cutoff  
14 are all that's at issue in this phase of the proceeding.  
15 Phase 2 is for the application of the triggers and the  
16 potential deployment test which the FCC has directed you to  
17 use in measuring impairment for mass market customer  
18 switching, but several parties have attempted to interject  
19 issues that we don't believe belong here.

20                  Some tell you to disregard small business  
21 customers when you examine the triggers. Others tell you  
22 that if all of the wire centers in the geographic market  
23 area that you picked aren't currently served by customers  
24 utilizing their own switch, that won't meet the FCC's  
25 requirement.

1                   Both these claims are best addressed in the  
2   second phase, if at all, and I say "if at all" because these  
3   proposals are flatly contrary to the requirements of the  
4   TRO. But even if the FCC hadn't specifically said how  
5   you're to apply the impairment analysis, common sense would  
6   tell you that their proposal doesn't make sense. You can't  
7   set a market for residential and small business customers  
8   and then ignore half the market, i.e., business customers,  
9   when you're deciding whether impairment exists or not.

10                  You can't ignore that CLECs can and do provide  
11   their own switching in the market simply because they've  
12   chosen not to serve a particular part of it. They're not  
13   impaired because they are actually utilizing their own  
14   switches in the markets. These positions are invented in a  
15   transparent attempt to preserve the unbundled network  
16   element platform, but if they're not impaired under the  
17   requirement of the TRO, they're not entitled to unbundled  
18   local switching at TELRIC prices.

19                  That's not to say that unbundled local  
20   switching won't still be available to them if you find no  
21   impairment. At least as to SBC Missouri, we also have to  
22   comply with Section 271 of the Act, and the FCC has made  
23   clear that we still have to provide unbundled local  
24   switching to customers, even when you find no impairment  
25   under Section 251, but we don't have to do so at TELRIC

1 based rates. Instead, the FCC has said that we apply  
2 federal law and we must be just and reasonable under  
3 Sections 201 and 202 of the Act.

4 So they will still have, for those who want  
5 it, unbundled local switching under Section 271 in SBC  
6 Missouri's territory or they can utilize their own switches  
7 to provide service in those territories.

8 I would also note that the transition, if you  
9 find non-impairment, is not immediate under the TRO.  
10 Customers aren't left without the ability to provide  
11 service. Instead, they're given a 27-month transition  
12 period to move off of unbundled local switching at the  
13 TELRIC prices.

14 In summary, SBC Missouri would ask the  
15 Commission to follow the TRO and not the gerrymandered  
16 approach recommended by Staff and the CLECs. Those  
17 approaches are designed solely to preserve UNE-P, which is  
18 clearly improper under the FCC's TRO and would be subject to  
19 reversal. Instead the market should be set at the MSAs in  
20 Missouri, and the DS1 crossover points should be set at four  
21 lines and above.

22 Thank you.

23 JUDGE MILLS: Thank you. CenturyTel?

24 MR. DORITY: Good morning. May it please the  
25 Commission, my name is Larry DORITY with the firm Fischer &

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1 Dority, PC, and our address is 101 Madison, Suite 400,  
2 Jefferson City, Missouri. Our firm represents Spectra  
3 Communications Group, LLC, doing business as CenturyTel, and  
4 CenturyTel of Missouri, LLC, collectively referred to as  
5 CenturyTel in this proceeding.

6 As I anticipated, Mr. Lane has provided you  
7 with a comprehensive overview of the FCC's Triennial Review  
8 Order, or TRO, the background of this particular proceeding  
9 and the scope or purpose of this Phase 1 of the case that we  
10 are now addressing. I appreciate the Judge's admonition  
11 this morning relative to our time constraints, and I will  
12 try not to be repetitive.

13 I would like to underscore that Phase 1 is  
14 limited to determining the relevant geographical market  
15 definition for this Commission's analysis of the FCC's  
16 impairment findings. The FCC's TRO calls on state  
17 commissions to define the markets in which it will evaluate  
18 impairment by determining the relevant geographic area to  
19 include in each market.

20 Issues concerning the impairment analysis  
21 process, including the application of mass market switching  
22 triggers, will be addressed in Phase 2 of this proceeding,  
23 consistent with this Commission's order establishing  
24 procedural schedule. And as previously mentioned, this  
25 phase of the proceeding will also address the appropriate

1 number of DS0 lines that must be supplied to a multi-line  
2 DS0 customer before that customer will be considered to be  
3 an enterprise customer rather than a mass market customer.

4 Direct and rebuttal testimony for this phase  
5 of the proceeding has been filed on behalf of CenturyTel by  
6 Mr. Arthur Martinez, director of government relations.  
7 Consistent with CenturyTel's initial pleading filed in this  
8 case, its November 12 response to order directing filing,  
9 Mr. Martinez supports the position that metropolitan  
10 statistical areas or MSAs are the relevant geographic market  
11 within the state of Missouri for purposes of examining  
12 whether there is not impairment in the provision of  
13 unbundled switching to serve mass market customers.

14 In addition to CenturyTel, SBC Missouri,  
15 through its witnesses Gary Fleming and Timothy Tardiff, and  
16 Sprint, through their witness Mark Harper, also recommend  
17 that this Commission adopt MSAs to define the geographic  
18 markets for the purpose of mass market switching analysis.

19 As the evidence will show, the MSAs reflect a  
20 geographical area which competitors do enter or are capable  
21 of entering when they decide to expand their operations in a  
22 new geographic market area. Again, Mr. Lane explained some  
23 of the bases for supporting the MSA proposals, and I will  
24 not repeat them here.

25 Regarding the second issue to be addressed in

1 this phase, CenturyTel, like SBC, proposes to utilize the  
2 FCC's default rule for the DSL cutover, which it has  
3 determined to be four lines or more in Zone 1 of the top 50  
4 MSAs. As a result, those multi-line customers served by  
5 three DS0 loops or fewer would be considered to be part of  
6 the mass market, while those multi-line customers served by  
7 four or more DS0 lines would be considered part of the  
8 enterprise market.

9 As the evidence will show, this crossover is  
10 representative of the multi-line customers constituting the  
11 mass market, as opposed to the higher crossover proposals  
12 designed as Mr. Lane suggested to perpetuate the UNE-P  
13 regime. In addition, as he pointed out, those proposing  
14 these higher crossover proposals do not adequately factor in  
15 the revenue component as specifically contemplated by the  
16 TRO.

17 Thank you very much for your attention.

18 JUDGE MILLS: Thank you. Sprint?

19 MS. HENDRICKS: Good morning. Lisa Creighton  
20 Hendricks, 6450 Sprint Parkway, Overland Park, Kansas 66251.  
21 Good morning, Commissioners and Judge. In this case, I  
22 represent Sprint Missouri, Inc., an ILEC, and Sprint  
23 Communications Company, LP, a CLEC.

24 Despite the fact that I represent an ILEC,  
25 Sprint Missouri, Inc. in this case will not be requesting

1 the Commission remove the national finding of impairment for  
2 mass market switching in its territory. Alternatively,  
3 Sprint will ask this Commission to keep the national finding  
4 of impairment in SBC's and CenturyTel's territories, subject  
5 to the Commission's review in this case.

6                   However, before we get to the impairment  
7 analysis, the Commission has asked the parties in this phase  
8 of the case to submit testimony on two issues, and those two  
9 issues as identified by the parties who went before me are,  
10 one, the definition of the market within which impairment  
11 will be evaluated, and two, the line that separates  
12 enterprise customers from mass market customers.

13                   With respect to both issues, Sprint feels it's  
14 vitally important that this Commission understand how their  
15 definition and their determination will be used in  
16 subsequent phases of this proceeding.

17                   With respect to the first issue, the market  
18 definition, it will be used to define the area in which you  
19 will analyze whether the existence of actual competition and  
20 the extent of that competition provides clear evidence that  
21 the source of impairment identified by the FCC in its TRO  
22 have been overcome. In essence, this is an area in which  
23 you, the Commission, will determine if the competitive  
24 providers who use UNE-P, the Sprints, the AT&Ts of the  
25 world, can continue offering competitive opportunities to

1 residential and small business customers without deploying a  
2 switch in Missouri.

3                   Because your decision in this case will  
4 directly impact competition for residential and small  
5 business customers, the Commission must ensure that the  
6 market it defines is a market in which it is truly  
7 evaluating impairment. While the parties have presented  
8 several options that the Commission could adopt for a market  
9 definition, Sprint believes that the MSA is the best of all  
10 the options.

11                   While Sprint does not agree with every  
12 argument presented by SBC as to why the MSA complies with  
13 the FCC criteria, Sprint strongly believes that the MSA is  
14 the market the FCC was seeking to define in the TRO, because  
15 it is precisely the market in which impairment exists or  
16 does not exist.

17                   This is primarily because it is the market  
18 that new entrants seek to serve when entering the mass  
19 market, the residential and small business markets on a  
20 UNE-L basis. Consistent with what is contained in the FCC's  
21 TRO order, a facilities-based provider requires an area  
22 large enough to take advantage or to achieve the economies  
23 of scale and scope needed to justify deploying a switch to  
24 serve mass market and residential and small business  
25 customers.



1                   Individual wire centers and exchanges do not  
2   allow providers to take advantage of economy of scale and  
3   scope as required by the TRO, nor for that matter do wire  
4   centers and exchanges create such a great variation between  
5   them that they're seen as separate and distinct markets.  
6   For example, CLECs do not develop business plans to mass  
7   market customers, residential and small business customers  
8   only in the Plaza area of Kansas City or only in the Hill  
9   area of St. Louis. Alternatively, they develop plans to  
10  serve the Kansas City area or the St. Louis area.

11                  To provide another example, there's two wire  
12  centers in Jefferson City. A CLEC does not realistically  
13  deploy a switch to serve half of the residential and small  
14  business customers in Jeff City without intentions of  
15  serving the other half.

16                  The MSA, as mentioned before, represents an  
17  integrated economic unit. It represents a geographic reach  
18  of newspapers, television ads, radio ads, all of which  
19  enhance the economies of scale and scope because they allow  
20  a new entrant to advertise throughout the MSA. Further, and  
21  as stated earlier, most importantly, because new entrants  
22  see the mass market on an MSA basis, regardless of how the  
23  Commission defines markets in this case, the Commission will  
24  remove from the MSA from non-facility-based competition if  
25  no impairment is found anywhere in the MSA.

1                   For example, the economies to serve the  
2   St. Louis MSA are no longer present if the provider cannot  
3   offer services in the wire centers that generate the highest  
4   revenues for the mass market customers, residential and  
5   small business customers. Therefore, while the Commission  
6   may believe that it's removing UNE-P from the Fenton or the  
7   Chesterfield exchanges, what, in fact, it is doing is  
8   removing UNE-P throughout the St. Louis market, the  
9   St. Louis MSA.

10                  Further, and equally as concerning, to the  
11   extent that any UNE-L mass market customers are identified  
12   by SBC in the Fenton or Chesterfield exchanges, for example,  
13   they likely are only incidental to the market that the UNE-L  
14   provider truly serves, the enterprise market. Therefore,  
15   the Commission would be taking residential and small  
16   business competition out of the MSA without a true  
17   alternative that can serve mass market customers throughout  
18   the MSA.

19                  Based on this, Sprint strongly believes and  
20   encourages the Commission to ensure that the market  
21   definition selected truly reflects the market impacted by  
22   your decisions. As demonstrated by Sprint's witness  
23   Mr. Harper, only the MSA truly reflects the markets that you  
24   will be impacting.

25                  On the second issue, the question you're

1 seeking to answer is at what point is it economic to serve a  
2 customer who takes voice services over a DS1 versus multiple  
3 DS0s. The impact of answering this question is that you,  
4 the Commission, will be deciding when a customer becomes an  
5 enterprise customer. Because of this, it is important to  
6 identify the true economic point at which it makes sense for  
7 a regulator to step in and set a standard for market.

8           To do this, and to assist you in doing this,  
9 Sprint objectively identified the cost of serving customers  
10 in Missouri with DS0s and the cost of serving customers with  
11 a DS1. Using these costs, Sprint demonstrated that the  
12 economic point is reached at 10 DS0s. After ten DS0s, it is  
13 economic to serve a customer with a DS1. This analysis is  
14 provided by Sprint's witness, Mr. Maples. Sprint's analysis  
15 is not result driven, not intended to advantage or  
16 disadvantage Sprint. Alternatively, it's focused on  
17 providing the most objective, best answer for this  
18 Commission as it seeks to set a bright line when the market  
19 has not.

20           Now, as demonstrated by SBC's opening, SBC  
21 will attack Sprint's analysis, for it alleges that Sprint  
22 did not consider the increased revenue opportunities that  
23 may be secured if a customer has a large amount of data  
24 needs. While Sprint did not consider a consumer with a  
25 large amount of data needs, Sprint did, in fact, factor in

1 the increased revenue opportunity a provider secures from a  
2 group of customers who, as the FCC clearly describes, order  
3 voice services.

4 The increased revenue opportunity is the  
5 additional revenue that comes with the additional voice  
6 line. Therefore, Sprint's model is consistent with any and  
7 all direction provided by the TRO.

8 However, importantly, this criticism  
9 highlights the importance between the approaches taken by  
10 Sprint versus SBC. Sprint sought to identify the point at  
11 which it is economic to serve a voice customer with DS0s.

12 On the other hand, SBC sought to identify the  
13 point at which it would be economic to force customers to  
14 take a large amount of data services 100 percent of the  
15 time. In doing this, SBC starts with results, four lines,  
16 and provided the assumption that achieved the results.

17 Not surprisingly, the assumptions are not  
18 supported by the record. Nothing in the record will support  
19 a finding that customers over four lines take a large amount  
20 of data services only from their telecommunications  
21 providers, not from the Covads or the data suppliers of the  
22 world  
23 100 percent of the time.

24 And also note that SBC assumes this large  
25 amount -- for this large amount of data services, a customer

1 pays up to \$108 a month, whereas SBC has competing offers  
2 for \$26 a month themselves. Because SBC's analysis are  
3 merely -- is result driven, Sprint does not believe that  
4 this Commission should accept it or can accept it.

5 Alternatively, as all the parties agree,  
6 except CenturyTel and SBC, Sprint's analysis is consistent  
7 with the TRO and Sprint urges this Commission to accept its  
8 position that the mass market cutoff should be ten lines or  
9 greater. Thank you for your time.

10 JUDGE MILLS: Thank you. Mr. Comley?

11 MR. COMLEY: Your Honor, the record will  
12 reflect the entry of appearance of Mark W. Comley, Newman,  
13 Comley & Ruth, 601 Monroe Street, on behalf of AT&T  
14 Communications of the Southwest, Inc., AT&T Local Services  
15 on behalf of TCG St. Louis and TCG Kansas City, Birch  
16 Telecom of Missouri and ZTel Communications, Inc., and those  
17 companies have been abbreviated for reference as the CLEC  
18 Coalition.

19 There have been other attorneys who have  
20 entered their appearance as well, one of which is the  
21 gentleman to my right. His name is Bill Magness. Bill is  
22 an attorney from Texas, Casey & Gentz, LLP, 919 Congress  
23 Avenue, Austin, Texas. He's presented a motion to appear  
24 before the Commission, which was granted on November the  
25 18th.

1                   Mr. Magness will be the lead attorney during  
2   this phase of the proceeding for the CLEC Coalition, and I  
3   wanted him to be reintroduced to the Commission.

4                   JUDGE MILLS: Thank you.

5                   MR. MAGNESS: Thank you, Mr. Comley. If it  
6   please the Commission, Judge Mills, as Mr. Comley says, my  
7   name is Bill Magness. I'm with the firm of Casey & Gentz in  
8   Austin, Texas, and after the long, hot summer we had down in  
9   Texas, I look at these maps and it looks very familiar to me  
10  from the very oddly shaped redistricting maps that we saw  
11  produced. And that was kind of a different way of doing  
12  redistricting, and I promise if there had been a third house  
13  of the Legislature, they would have taken refuge in  
14  Missouri. I'm sure of it.

15                  And this is a different kind of proceeding.  
16  The Commission has faced many unfunded federal mandates  
17  since the passage of the Telecom Act. The Act, of course,  
18  has always relied on state commissions to arbitrate  
19  interconnection agreements, to resolve disputes that arise  
20  in the interconnection context and to ensure that the  
21  pro-competitive purposes of the 1996 Telecom Act are  
22  enforced, both under state and federal law.

23                  This Commission and commissions around the  
24  country have been required to undertake those  
25  responsibilities, and a Triennial Review Order, or TRO,

1 gives this Commission another opportunity, if you'd like to  
2 put it that way, to exercise those responsibilities. But  
3 this proceeding is different even from those.

4               When the Act first passed, I'll tell you I was  
5 on the Texas Staff at that time and we went through the  
6 whole machinery, the interconnection arbitrations, figuring  
7 out how to do them and getting them done. Those cases were  
8 about the fact that competition is legal now in a local  
9 exchange for the first time, what should be the terms and  
10 conditions under which it operates, how is it going to  
11 function in the real world now in the marketplace, and to  
12 move competition forward.

13              The next sort of big roll-through of  
14 proceedings that staffs everywhere and commissioners  
15 everywhere had to deal with were the 271 long distance  
16 proceedings. Certainly my clients and SBC and others  
17 squabbled in many states, including this one, about whether  
18 the conditions were right in the local marketplace to allow  
19 the very powerful -- and it's proven to be very powerful --  
20 entry of a company like SBC into the long distance  
21 marketplace.

22              When you cut it down to its essentials, that  
23 case too was about whether a new form of competition should  
24 be introduced into the telecommunications marketplace and  
25 under what conditions. Now as these triennial review cases

1 begin to roll through -- and I'll tell you this is, as I'm  
2 sure you know, one of the first hearings that has been held  
3 in the country on this issue that has been pending now for  
4 so long.

5                   The issue's different. The issue really is  
6 when do we take away competition? And not only when do we  
7 take away competition but, in fact, one of the key forms of  
8 competition that was used to justify long distance entry in  
9 the 271 cases. This case is about unbundled local  
10 switching. And I completely agree with Mr. Lane,  
11 controversy about unbundled local switching is really a  
12 controversy about the unbundled network element platform, or  
13 UNE-P, and its availability.

14                   Under the Act, requesting carriers, as they're  
15 called in the legalese, are requesting access to the ILEC  
16 network because they're impaired without it when they're  
17 serving mass market customers. That's the position of my  
18 clients, and I think it's what the facts are going to show  
19 when all the evidence is in in this case, that for the mass  
20 market, as that market is defined, as we're defining it  
21 particularly in Phase 1, impairment exists and the unbundled  
22 network element platform is still justified under the Act.

23                   And it is the Act itself, Congress itself that  
24 created the availability of several entry mechanisms, and  
25 all of them were made available under the Act. And to the



1 extent there is impairment, UNEs are supposed to be still  
2 available to customers.

3 Well, unbundled network switching or unbundled  
4 local switching rather, is about UNE-P, and I think it's  
5 safe to say UNE-P is about getting mass market POTS  
6 customers a choice and a choice everywhere, here in Missouri  
7 and in other states. And the touchstone in looking at  
8 whether that's true or not is to look at the data, to  
9 actually examine the granular data and information the  
10 parties need to present in these factual investigations.

11 We have entered into evidence and -- will  
12 attempt to enter into evidence anyway. We filed as prefiled  
13 testimony in the testimony of Mr. Gillan some information  
14 where we show you the competitive profile of UNE-P, and I  
15 don't have this blown up, but I don't think I really need  
16 to. What this shows is the distribution of wire centers in  
17 Missouri, from the very smallest in the most rural areas to  
18 the very largest, and what it shows is the UNE-P succeeds at  
19 some level everywhere.

20 Are there more UNE-P customers in the big wire  
21 centers in the big cities? Well, yes, there's more people  
22 there. There's more opportunities there. But are there  
23 UNE-P customers out in the rural areas, where the UNE-L  
24 market plans haven't succeeded? Yes, there are, and the  
25 data shows it. And it's not just data from AT&T or ZTel or

1 Birch. SBC, as you know, is the wholesale provider for  
2 UNE-P carriers. This is just the data that shows from SBC  
3 where it is they're providing those wholesale services to  
4 CLECs.

5                   So this isn't a debate whether UNE-P is  
6 providing broad coverage or not. It is. I don't think  
7 that's contested. I think the fact that it is providing  
8 broad coverage is partly why there's so much controversy. I  
9 think the fact that UNE-P is having some success, quite a  
10 bit of success in some states where, the longer it's in  
11 place, the more we see competitors making choices, the fact  
12 that it's having some success, getting a foothold not just  
13 in the business market where we've seen competition flourish  
14 a bit, but in the residential market and the very small  
15 business market, that fact, I would say, is a good bit of  
16 the reason why we're here in front of you today.

17                   And not implementing an FCC order, because the  
18 FCC made a finding of impairment for mass market switching  
19 and took it to the states, the state commissions that are  
20 closer to the action, that are closer to their markets to  
21 determine before we take competition away, particularly  
22 competition that's focused on residential and small business  
23 customers, we might ought to have the states really look at  
24 the facts. And that's what we ask you to do.

25                   The penetration of UNE-P in Missouri is

1 approximately 6 percent, the evidence will show, of the mass  
2 market customers in the state. In other states where it's  
3 been in effect for longer, it is higher. But the evidence  
4 shows that, like elsewhere, when customers are offered an  
5 alternative -- and remember, we're talking about  
6 residential, small business customers -- a lot of them are  
7 interested. The Act was not just passed to serve big  
8 business customers. The Act was passed to try to encourage  
9 competition everywhere.

10 Why do they want an alternative? It could be  
11 price. It could be new services. It could be they feel  
12 like they get better customer service from a new entrant.  
13 It could be they just want something new.

14 This Commission doesn't need to decide that.  
15 The Triennial Review Order does a lot of things, but it  
16 doesn't require regulators to psychoanalyze the people whom  
17 they serve. You don't have to decide why they want it or do  
18 they want data, does that guy want data now or does he not  
19 want data now. Customers decide that. And the structure of  
20 the TRO doesn't require you to do any psychoanalysis of the  
21 customers. It requires you to look at the facts and look at  
22 the data.

23 Now, that said, the application of this TRO,  
24 even though we're in the early stages of it, isn't always  
25 the easiest task. I'm sure the staffers who have had to

1 immerse themselves in it, as well as yourselves, understand  
2 that it's a difficult document. And as Mr. Lane referenced,  
3 not only SBC but just about everybody -- all the private  
4 parties, anyway, in this room, I think, have some problem  
5 with it. They're not the same problems, but the DC  
6 Circuit has got its plate full trying to figure out what to  
7 do with this order.

8 But we're here to apply it. We're to apply it  
9 as it stands today. It is still the law of the land. And  
10 there are many difficulties in the Order. My favorite, I  
11 think, reminds me of what the -- you know, the Zen Buddhists  
12 have a word "colon," which is one of those "what's the sound  
13 of one hand clapping?" You know, kind of a riddle you can't  
14 answer.

15 Well, the TRO in paragraph 500 says, you can't  
16 consider a CLEC bankruptcy in considering whether it's a  
17 trigger or not, but you have to consider whether that CLEC  
18 is likely to continue to be serving in the future.

19 I'm sure you'll hear lots of debate about  
20 paragraph 500. How could there not be a lot of debate about  
21 paragraph 500 when it's written in that way? But  
22 nevertheless, this 600-page order -- I say nevertheless, but  
23 it's not nevertheless. I think it's really because.  
24 Because this 600-page order is 600 pages and includes so  
25 many subtleties, so many shadings and nuances, it has to be

1 read thoroughly, it has to be read carefully and it has to  
2 be applied fully. And that's the task, of course, facing  
3 all of us, and most especially you, as the people who have  
4 to decide.

5 Now, the good news is, at least for the next  
6 day or if it has to be another day, we'll see, in this  
7 Phase 1, the relevant standards that the Commission needs to  
8 look at are relatively compact, I guess I'd say. The rules  
9 on market -- the rule on market definition is stated at  
10 CFR 51.319(d)(2), little i, or romanette i, the rule on  
11 multi-line DS0 end users, which is called the crossover or  
12 the cutoff or the cutover, different things in the order is  
13 at 51.319(d)(2), three little iii's, romanette 3, capital  
14 B4.

15 And the provisions in the order which, of  
16 course, must be read in tandem with the rule, are  
17 paragraphs 495 and 496 on the market definition, and  
18 paragraph 497 on this cutover or multi-line DS0 issue. Now,  
19 obviously, there are other paragraphs cited in the  
20 testimony, there are other paragraphs that influence and  
21 other rules that influence the arguments here, but I think  
22 we can safely say that there are some rules we can look at.  
23 There's a little bit of something to hang onto in this part  
24 of the Triennial Review Order.

25 But nevertheless, I think you'll find and I

1 think you found as you read the testimony that the issues  
2 are inextricably, unavoidably interrelated. It always seems  
3 to be the case in telecom and it seems to be the case here,  
4 and that is why our coalition has consistently asked  
5 throughout this proceeding that any decision made in an  
6 introductory phase be made tentatively.

7               The only other state that has taken this issue  
8 up separately from the rest of the issues in the TRO, that's  
9 Ohio, made its decision tentative and subject to further  
10 review as more data, as more discovery, as more argument is  
11 had in the larger body of the case.

12              So as you examine these standards, obviously  
13 my clients urge you to go their way. We are presenting  
14 testimony on the market definition issue from Mr. Joe  
15 Gillan. Mr. Gillan recommends a LATA approach, as you have  
16 heard, and in addition to that recommendation, I think he  
17 strongly recommends, as you'll see in the testimony, that  
18 any market definition, whether you accept his wise counsel  
19 or others, be made tentative until the rest of this Phase 2  
20 in this case is heard.

21              On the issue of the DS0 or DS1 cutoff or  
22 multi-line cutoff, Mr. John Finnegan of AT&T is providing  
23 testimony, and Mr. Gillan testifies on that issue as well.  
24 And Mr. Finnegan's specific recommendation is that a 12-line  
25 cutoff be introduced. He had testified in his written

1 testimony to a 13-line. Mr. Finnegan -- and we'll get into  
2 this when we get into the evidence -- is going to amend the  
3 testimony because he read the rebuttal testimony of SBC's  
4 witness, found one thing that needed to be corrected. So  
5 he's going to correct it on the record. So his  
6 recommendation is 12 lines, and he'll explain to you the  
7 issue as to that.

8                   Also here for these companies,  
9 Mr. John Ivanuska and Ms. Rose Mulvaney are here from Birch  
10 from Kansas City. Ms. Becky DeCook, another counsel for  
11 AT&T, is here as well.

12                   Let me tell you just a bit about these  
13 companies and this coalition, because we will be referred to  
14 as CLEC Coalition throughout, and just give you a sense of  
15 who we are. Ztel is a Florida-based company that provides  
16 UNE-P service in about 48 states. ZTel started as a  
17 software company and had a lot of interesting service  
18 application software they wanted to use in the telecom  
19 industry and for various reasons have morphed into a service  
20 provider as well as a service developer. And they serve  
21 residential and small business here and elsewhere, as I say,  
22 in about 48 states.

23                   And ZTel I think is an example, perhaps call  
24 it a counter-example, as to what you often hear about UNE-P,  
25 these companies don't invest. ZTel invests in software,

1 ZTel invests in intellectual property and ZTel provides  
2 brand-new, innovative services that their customers like,  
3 based on those investments. ZTel invests in service  
4 quality. ZTel invests in a billing system that is friendly  
5 to its customers and a bill that can be read and absorbed by  
6 its customers, and when a customer calls ZTel with a  
7 complaint, they know that their service is provided by that  
8 company and that company is responsible for solving their  
9 problem.

10 So there is a great deal of investment going  
11 on by these companies. It is rather archaic, in fact, to  
12 think the only investment that occurs in the telecom  
13 industry is if you buy a Western Electric Lucent 5E switch.

14 Birch, I think you're more familiar with  
15 perhaps, is a Kansas City-based company. They have done  
16 UNE-L; they've done UNE-P. They do both now, and outside  
17 the regulatory context it would not be a big surprise that  
18 they use UNE-L when it makes economic sense. They serve  
19 larger enterprise customers using that market entry  
20 mechanism, and they use UNE-P in the mass market and with  
21 smaller businesses where it makes sense.

22 And they have a lot of experience, and you'll  
23 hear a lot about it in Phase 2, as to how the marketplace  
24 really works for these two entry mechanisms.

25 And AT&T, I think everyone's familiar with



1 AT&T. I guess I just -- I don't need to, you know, further  
2 introduce them, but will just tell you, as much as you have  
3 experienced after about five minutes at the Commission the  
4 squabbling that goes on and the fussing and fighting between  
5 SBC and AT&T, do you really believe that AT&T wants to rely  
6 on SBC for its network, that it wants to buy anything more  
7 than it has to from SBC?

8 AT&T uses UNE-P and AT&T's used UNE-L, and  
9 AT&T is impaired for the same reasons that ZTel and Birch  
10 are impaired without local switching. And that's what the  
11 evidence is going to demonstrate.

12 On the specific issues, just to very quickly  
13 summarize it, there is a ton of testimony out there. On the  
14 DS1 or DS0 multi-line issue, this is one where, luckily for  
15 the people trying to decide it, it's a fairly limited  
16 question and it really resolves itself into a math problem.  
17 This isn't a question about, as I said, psychoanalyzing  
18 customers, you know, like that barber would want data. No,  
19 he wouldn't. That barber wouldn't want data. Well, you  
20 know, that five-man law firm would want data. No, you don't  
21 need to do that. In fact, you shouldn't do that the way the  
22 rule is written.

23 You should be looking at when a multi-line  
24 customer, when it's going to make sense for a carrier to  
25 serve that customer on a DS1 high-capacity loop instead of

1 on a bunch of DS0s. If he wants data, he can buy data. If  
2 he wants data and he wants enough of it that he wants to buy  
3 a T1 or a DS1, he's an enterprise customer. If he's a  
4 customer -- if he's a one-person shop and he wants enough  
5 data that he needs a DS1, he's an enterprise customer. If  
6 he's a one-line customer and he just wants POTS, maybe a  
7 little dial up, he's a mass market customer.

8                   There are easy cases. The hard case is where  
9 you have -- where you have a customer using several POTS  
10 lines and that's all they want, at a certain point you just  
11 have to decide when do we call this mass market and when do  
12 we call this enterprise? When does it cost more to do one  
13 than the other? When does it make economic sense? That's  
14 what you've got to look at.

15                   It's a fairly limited question, and I will  
16 deny vehemently these accusations that we did not consider  
17 the provisions of the rule. I think what you'll find the  
18 evidence to show is that our witnesses did include data  
19 revenues. It's just that they said, you know, if you're  
20 going to include data revenues, you've got to put them on  
21 both sides of the equation. You've got to balance the scale  
22 out. You'll hear a little bit more about that from the  
23 witnesses.

24                   On the market definition question, as you've  
25 heard, as you will hear more on, the CLECs are not all

1 singing from the same song sheet in this case. Very few  
2 people are singing from exactly the same song sheet on both  
3 issues, in fact, and the key consideration here as far as  
4 the CLEC Coalition is concerned is that you select an area  
5 that is really large enough to reflect how CLECs enter the  
6 market using all entry mechanisms, including UNE-P, and that  
7 you don't create the kind of marketplace that chops up the  
8 market -- these maps, as we've seen here -- that chops it up  
9 in such a way that you create Swiss cheese.

10                   You know, punching the holes in the  
11 marketplace isn't going to make for a real good marketing  
12 map. Removing the places where competition has actually  
13 succeeded using UNE-P most highly and taking that out of the  
14 mix isn't going to help competition, because those  
15 marketplaces allow UNE-P carriers to go into the rural and  
16 suburban areas where, as you see, they are now, but if you  
17 compare this, the UNE-P penetration to the UNE-L  
18 penetration, it's remarkable.

19                   UNE-L penetration isn't ready. It's not going  
20 to be able to replace what would be taken away. So this  
21 issue must be looked at carefully, and the area must be  
22 large enough to achieve that, because if John Ivanuska's got  
23 to go back to Kansas City and tell his CEO that, you know,  
24 here is my Swiss cheese map of where we can market now,  
25 business people are pretty unsentimental about that. Their

1 word for a marketing map like that is, next. This ain't  
2 going to work. So we urge you not to create something  
3 that's not going to work.

4 And as to the LATA, the LATA was created for  
5 telecom in the MFJ. I mean, when Judge Green created that  
6 term LATA, which didn't -- as far as I know didn't exist  
7 before, he was actually looking for a market area that  
8 replicated many of the social and economic characteristics  
9 that Mr. Lane talked about in the MSA.

10 The thing is, though, that the MSA, because  
11 it's not telecom specific, leaves out lots of rate centers,  
12 wire centers that otherwise should be included. And again,  
13 factual issues for the witnesses to discuss with you, as I'm  
14 sure they will in today's hearing.

15 But the key thing, again, is just if UNE-P is  
16 to be eliminated, if impairment is to be found not to exist  
17 in this state, the key thing is to be sure before you  
18 eliminate the thing that's working that you consider  
19 carefully, is there something there to replace it?

20 So we urge you to dispassionately look at the  
21 data, and remember that when the FCC said granular, they  
22 didn't mean everything gets smaller and tiny, they meant you  
23 really have to look carefully, and you have to look at data  
24 specific to this state, to these markets.

25 And we believe that the evidence is going to

1 show that when you do that, the TRO doesn't require you to  
2 get rid of UNE-P, and the facts simply don't support it.  
3 Thank you.

4 JUDGE MILLS: Does AT&T have a separate  
5 opening statement?

6 MR. MAGNESS: No, sir, we don't.

7 JUDGE MILLS: MCI?

8 MR. LUMLEY: Good morning. I knew when you  
9 said 9:30 that that would be my time to start. Carl Lumley  
10 representing Nuvox, XO, Big River, Socket, Covad, MCImetro,  
11 MCI WorldCom, Brooks and Intermedia. Good morning, your  
12 Honor.

13 Rather than duplicate much of what has been  
14 said, first I'd like to point out that if you look at  
15 paragraphs 459 through 497, which Mr. Magness just referred  
16 to, one of the most important points, and it's not even been  
17 mentioned once this morning, is that the FCC specifically  
18 instructed all state commissions to attempt to distinguish  
19 between markets where different findings of impairment are  
20 likely. It said it several times.

21 I submit that the reason you haven't heard  
22 that so far is that everyone that's gone before me is  
23 willing to take an all-or-nothing approach to the market  
24 definition, and even parties that are supporting the same  
25 market definition are actually proposing different results.

1   What some are saying is, if we can show you portions of the  
2   MSA have sufficient competition, then the whole MSA goes  
3   away. And others are saying, if we can show you portions of  
4   the MSA that don't have competition, then it shouldn't go  
5   away at all.

6                   What MCI and Sage and the Staff are saying is  
7   it's not supposed to be an all-or-nothing approach. The FCC  
8   has specifically told us, take a look at what you think the  
9   results are likely to be to define your markets so that you  
10  get those results.

11                   The FCC also gives very specific instructions  
12  that underscore the need to look at the market on a wire  
13  center basis. They told this Commission to consider the  
14  location of mass market customers actually served, and they  
15  indicated in Footnote 1537, which is part of these three  
16  paragraphs, that if only certain areas are served and again,  
17  as Mr. Lane said, actually by the CLEC's own switches, then  
18  consider making those separate markets.

19                   Again, it's not supposed to be an  
20  all-or-nothing approach. The FCC said you should consider  
21  variations in many factors that affect the ability to serve  
22  each group of customers; variations in retail rates,  
23  variations in where higher revenue customers are located,  
24  costs specifically related to the differences in wire center  
25  sizes and locations, collocation opportunities on a wire

1 center basis, hot cut processes whether isolated or batch,  
2 on a wire center basis, use of switches, population and line  
3 densities in wire centers, and differences in UNE loop  
4 rates, which obviously vary across large aerial such as the  
5 MSA.

6                   The FCC specifically instructed this  
7 Commission to consider CLECs' ability to target and serve  
8 specific markets profitably and efficiently. They said you  
9 should look at the cost of transport from the customer back  
10 to the switch. In other words, recognize that the further  
11 you get from the switch, the less economic it is to serve  
12 through that switch. And again, they said to look at sets  
13 of customers, wire centers and rate zones. The bottom line,  
14 differentiate areas where different results are likely in  
15 your impairment analysis.

16                   The MCI companies present the testimony of  
17 Dr. Ankum, an expert regarding the economics of  
18 telecommunications. He testifies that the wire center is  
19 the most appropriate starting point, a building block for  
20 the geographic part of the market definition. He explains  
21 how it affords the accuracy and practicality that the FCC  
22 requires, that it allows consideration of the variations in  
23 costs and operational issues that the FCC expressly observed  
24 varied by wire center, that the wire center is a natural  
25 market, that this is the way the data is collected on a wire

1 center basis.

2 He explains why the MSA approach is  
3 ill-suited, how it ignores wide variations in revenues,  
4 costs, operational issues, how as other parties have  
5 observed, it's not a telecommunications construct, it  
6 doesn't match wire center boundaries. So if they start to  
7 refine their proposals, when we get to the edges we're going  
8 to kind of ignore what the MSA boundary actually is. MSAs  
9 cross state lines and they say, well, ignore that, you'll  
10 just ignore the part of the MSA that crosses state lines.  
11 MSAs cross ILEC service areas and so they try to refine the  
12 position.

13 Well, we're really only talking about parts of  
14 the MSAs. And as has been pointed out, MSAs leave gaps all  
15 over the state. And again, when you look through the  
16 testimony and you hear the witnesses and the  
17 cross-examination, there's not a group that's unanimously  
18 supporting MSA to get to the same result. It's MSA versus  
19 MSA on an all-or-nothing basis.

20 The openings that have preceded would, I  
21 think, mislead the Commission into believing that somehow  
22 our approach is, there's just this one wire center and so  
23 it's this little area versus their big MSA. And that's not  
24 the approach. It's each wire center. Look at each one from  
25 that -- build them together to find the actual area where



1   you expect one impairment decision, versus the rest of their  
2   area where you expect another.

3                   And our witnesses point out, if the evidence  
4   supports it, you can ultimately build those wire centers all  
5   the way up to the MSA, although I think you'll see in the  
6   testimony that's not a likely result.

7                   You can likewise build the same result through  
8   the Staff's exchange-by-exchange approach, and there's  
9   essentially no difference between our approaches. As  
10  Mr. Lane pointed out, in the vast majority of cases, an  
11  exchange is a wire center. We believe that ours is a little  
12  bit more granular as the FCC requires. It allows you to  
13  break down exchanges with multiple wire centers, but in all  
14  likelihood, you'll build to the same result either way.

15                  Dr. Ankum also explains the need to consider  
16  possible limitations on the ability to serve certain wire  
17  centers as an entirety, such as those posed by FCC's growing  
18  use of integrated digital loop carrier. In those instances,  
19  you must have access to UNE-P or you cannot serve the  
20  customer.

21                  Furthermore, Dr. Ankum explains that there's  
22  also a product side to the market definition, it's not just  
23  a geographic analysis, that there are potential differences  
24  between residential and small business customers that must  
25  be taken into account, and that we should only be

1 considering truly comparable and alternative services and  
2 not things like cable and wireless.

3 He advises the Commission to focus on the  
4 likely results, as does the FCC, to clearly define markets  
5 so when you apply the trigger analysis or potential  
6 deployment analysis, you get the right result. Don't  
7 improperly lump areas together in a non-granular way at the  
8 risk of leaving customers without competitive choices.

9 Big River, Socket and Covad don't have  
10 witnesses, but they agree that the MSA is inappropriate and  
11 support the wire center building block approach. XO and  
12 NuVox take no position on the issue.

13 On the second point about the cutover, the  
14 Commission is to establish the maximum number of DS0 loops  
15 that carriers can serve through unbundled switching when  
16 serving multi-line end users as a single location. As  
17 Mr. Magness indicated, that's 319(d)(2), iii B4, and  
18 paragraph 497 makes it clear that the determination is to be  
19 when is it economic to provide voice service over a DS1  
20 rather than multiple DS0s?

21 Mr. Lane made the point that the FCC stated  
22 that they expect the four-line cutover to remain, absent  
23 significant evidence to the contrary, and they did say that,  
24 but only in the density one zone in the top 50 MSAs. They  
25 did not imply that it was to apply across the State, and

1 they still left room for the fact that evidence will show  
2 that that's the wrong cutover even in the density one areas.  
3 And that evidence is being presented to you, and Dr. Ankum  
4 supports the approach taken by Staff and AT&T and Sprint to  
5 identify a specific economic break-even point. He agrees  
6 that it's in the range of 8 to 12 DS0s.

7 But he also points out that it's not  
8 appropriate to apply it all to residential customers. And I  
9 think SBC's opening makes that clear, because residential  
10 customers are not going to have \$80 to \$100 a month in data  
11 revenues. Everybody's talking about business customers, but  
12 this cutover is going to apply to everybody, and you have to  
13 be careful to be specific that you don't end up depriving  
14 residential customers of choice.

15 For if a CLEC can't serve by DS0 with  
16 unbundled switching and it's uneconomic to serve it by DS1,  
17 then the customer won't have a competitive choice, so it's  
18 important to get the right number. It's also important to  
19 note that it can vary across areas. The FCC did not mandate  
20 a single number for statewide application, although most  
21 parties have indicated if the differences are fairly subtle,  
22 it's okay to average it out. Big River, Socket and Covad,  
23 again, agree, and XO and Nuvox take no position on this  
24 issue.

25 Thanks for your time, your Honor.

1 JUDGE MILLS: Thank you. Sage?

2 MS. MUDGE: Good morning, Judge. My name is  
3 Katherine Mudge with the law Smith, Majcher & Mudge,  
4 816 Congress Avenue, Suite 1270, Austin, Texas 78701. With  
5 me also is Brent Stewart, who is Sage's local counsel with  
6 Stewart & Keevil, 4603 John Garry Drive, Suite 11, Columbia,  
7 Missouri 65203.

8 I represent and will be lead counsel for Sage  
9 Telecom and, your Honor, just for -- briefly, I want to  
10 ensure that we understand who Sage is because Sage  
11 realistically is different from most of the UNE-P or any of  
12 the other CLEC providers that you've already heard from  
13 today.

14 Sage is a UNE-P provider. We make no bones  
15 about it. It has enabled us to provide competitive choices  
16 to approximately 32,000-plus customers within the state of  
17 Missouri and, in an 11-state area, over 500,000 customers  
18 are enjoying Sage's provision of service.

19 But frankly, your Honor, that is where the  
20 similarities end between Sage and some of the other CLECs.  
21 Unlike other CLECs, Sage provides service today only to mass  
22 market customers, and we define mass market customers as  
23 those customers who are provided service using analog or DS0  
24 facilities.

25 Those are residential customers. Those are

1 very small business customers. None of them have data  
2 services. 94 percent are residential, 6 percent are small  
3 business. And what you cannot glean from Sage's customer  
4 base is the notion that all CLECs do is go out and  
5 cherry-pick the most lucrative customers. That we do not.  
6 We are dedicated to the provision of service to residential  
7 and small business customers and we provide voice services  
8 only.

9                   You will also find the customer base is a  
10 little bit different because it is disaggregated. It is not  
11 located within a specific populated area, and if you look at  
12 the actual data, you will see that Sage's UNE-P customers  
13 are, in fact, found across the state. And again, you will  
14 not find the concentration in an MSA, within a LATA and, in  
15 fact, you will find Sage in multiple wire centers.

16                   You will also find that Sage perhaps is a  
17 UNE-P provider that is misconceived in that there is no  
18 investment. As Mr. Magness talked about the investment of  
19 ZTel, Sage likewise invests in billing systems. It invests  
20 in voicemail systems. It invests in those things that are  
21 necessary to meet the customer demand for a competitive  
22 choice and to provide it on an economic basis. And today  
23 that is the type investment that we have.

24                   Now, why is that important? It's important  
25 because the two issues that are before this Commission

1 today, first with respect to geographic market, and second  
2 with respect to the crossover, will significantly determine  
3 ultimately even in Phase 2 whether Sage will be able to  
4 continue to provide competitive choices to customers who  
5 currently have and want the services provided by Sage.

6 Issue No. 1 with respect to the geographic  
7 market is obviously important. Everybody has talked to you  
8 already about that the significance of the geographic market  
9 is that then, when we go to Phase 2, you will look at that  
10 specific geographic market to determine if any competitors  
11 meet the triggers, which Sage will submit that in Phase 2  
12 there will be none. But nonetheless, the size and  
13 definition of the geographic market is critical.

14 From Sage's perspective, the most important  
15 thing to glean from the evidence is if the geographic market  
16 is defined too large, then, by definition, if there is a  
17 facilities-based competitor that is actually providing  
18 service to a -- to the mass market in one wire center within  
19 that area, then if you look at the maps that SBC provided  
20 you, the entire MSA goes away for purposes of ability for  
21 Sage to retain unbundled local switching at TELRIC prices.

22 And that is the harm, and that is the  
23 potential detriment of defining a geographic market too  
24 large. The distinction that I'm trying to make is very  
25 important because that is exactly what SBC and the other

1 ILECs want you to do. They want you to define that  
2 geographic market so large that you do not look at the  
3 specific data. And the data is on a wire center basis. The  
4 data will talk about not only location of switches, but what  
5 are those switches used for and what type of customers are  
6 they used for?

7 SBC points to the use of those switches to  
8 provide service to customers, quote, unquote. In fact, the  
9 data will show that those customers are, in fact, large  
10 enterprise customers that are not the mass market customers.

11 And if you look at an MSA, you will not look  
12 at the data with respect to the actual use of the  
13 collocation space that SBC wants you to rely on, because  
14 again, in fact, the use of that collocation space is used  
15 for provision of not only voice services, but also data  
16 services, and more importantly, there is a true distinction  
17 between the provision of use of those facilities for use of  
18 residential versus business customers.

19 The reason this distinction is important is  
20 because SBC will talk to you, even in this phase, about  
21 potential deployment or just the switches are used to  
22 provide service to customers, versus what the CLECs provide  
23 you, and that is evidence with respect to the actual  
24 deployment, what are those facilities used for, all of which  
25 is important in the -- even in the analysis of the

1 geographic market.

2                   And that is the reason that Sage proposes the  
3 geographic market be used as a wire center or be defined as  
4 a wire center. It suits the available data relative to  
5 market entry. It is the actual starting point for an  
6 analysis, and you can look at the technical ability of any  
7 service provider to provide on a wire center basis, as  
8 opposed to too large of an area.

9                   Sage asks the Commission in making its  
10 decision that you also must weigh the credibility of the  
11 witnesses.

12                  Sage presents you two witnesses with respect  
13 to both Issues 1 and 2. Issue 1, however, is addressed by  
14 Robert McCausland, who has over 30 years experience in the  
15 telecom business, and most importantly, he's worked for  
16 CLECs. He understand CLEC's market entry. He understands  
17 and has implemented CLEC decisions as to where it is more  
18 appropriate for geographic purposes to serve customers.

19                  You also have before you testimony from  
20 Michael Starkey, who approaches it not only from a subject  
21 matter expert and an economist perspective, but most  
22 importantly, takes actual Sage data and applies the TRO and  
23 ultimately comes to the conclusion it is appropriate  
24 geographic definition to be the wire center, as opposed to  
25 SBC internal witnesses who have never worked for a CLEC, who



1 have never actually, from what I can tell, done any CLEC  
2 work with respect to business entry, market entry or  
3 business planning.

4 The second issue is likewise just as important  
5 because, again, it will significantly implicate Sage's  
6 ability to pro-- continue service to its own customers.  
7 And, of course, that is the DS crossover, where it's  
8 economical to serve customers with multiple lines.

9 But again, you need to look at Sage's -- if  
10 you look at Sage's actual customer base, the answer is  
11 there, and we will submit, as Mr. McCausland testifies and  
12 Mr. Starkey testifies that Sage's customers, every single  
13 one of them is a mass market customer. They are all served  
14 using analog voice services, and there is no differentiation  
15 between the fact that they're a residential customer or a  
16 very small business.

17 Sage's customer base shows that we do have  
18 customers with multiple lines, up to 12 multiple lines, but  
19 what's important is that those customers have chosen Sage  
20 and said, from my perspective as a customer, it is  
21 economical -- more economical for me to obtain my voice  
22 service from Sage than any other carrier. So, therefore,  
23 from our perspective, the notion that the mass market  
24 customers are those that are served by any DS0 loop is  
25 consistent with the TRO as specifically outlined by

1 Mr. Starkey and Mr. McCausland.

2 In contrast, SBC suggests that you should use  
3 an FCC default, notwithstanding the clear language that gave  
4 the states the authority to look at the actual data and,  
5 No. 2, apply it on an appropriate geographic market basis.  
6 And we will submit that it is inappropriate to use the four  
7 lines because it is not consistent with the data. Again,  
8 the critical distinction between the CLEC evidence in this  
9 case and the SBC evidence in this case is based on actual  
10 versus hypothetical.

11 SBC posits a typical, quote, unquote, business  
12 customer, and that business customer, according to SBC, must  
13 have data. Well, if you look at the Sage customer base,  
14 Sage's small business customers don't require data, or at  
15 least they don't require it from Sage because they can't get  
16 it, and yet those customers are the ones that you should be  
17 looking at in terms of their characteristics. Again, the  
18 distinction is actual versus hypothetical.

19 So what SBC really wants this Commission to do  
20 is to forget about the mass market customer. Let's see if  
21 we can minimize the mass market customers and let's see if  
22 we can get some of those business customers over into the  
23 enterprise segment of discussion of the TRO, so that we  
24 don't even have to consider them for purposes of impairment.  
25 And that's the reason that SBC wants that number as low as

1 possible.

2 But we will submit to you that the evidence  
3 shows that that approach is inconsistent with the TRO and  
4 with the evidence, and more importantly, this Commission  
5 would fail the mass market customers today who are able to  
6 obtain UNE-P. They're able to have competitive choices not  
7 because of facilities-based competition, as Mr. Magness  
8 pointed out, the penetration of the UNE-L. It is because of  
9 UNE-P.

10 At the end of the day, it's easy to get lost  
11 in the trees for the forest, but what we're really here  
12 today is to continue to bring competitive alternatives to  
13 customers, not to do away with competitive alternatives.

14 And today the evidence that will be in this  
15 record shows that hundreds of thousands of customers in  
16 Missouri today enjoy competitive alternatives to SBC  
17 services. They are mass market customers, whether they're  
18 residential or small business customers, and they enjoy  
19 those competitive alternatives because of UNE-P, not  
20 facilities based.

21 The FCC says that where there is actually --  
22 an actual trigger, then -- that provides service to mass  
23 markets, then it's time to transition away from UNE-P, but  
24 what it does not say that all competition within an area and  
25 all competition for those customers go away, and that is

1    what happens if this Commission adopts an MSA as a  
2    geographic market, and that is what happens if the cutover  
3    does not recognize that mass market customers are  
4    residential and very small business customers, because they  
5    are served by DS0 loops, regardless of the number of lines.

6                   Therefore, Sage asks this Commission to start  
7    small. This is the first opportunity that this state as  
8    well as other states has to review what is impaired and what  
9    is not. We ask this Commission to start small, to be  
10   conservative, because if we go too large, then it will  
11   basically tell the consumers in Missouri, you no longer can  
12   have Sage as your residential provider. And that is not  
13   what is suggested or required by the FCC's TRO or of the  
14   Act.

15                   Thank you, Judge Mills, for your time.

16                   JUDGE MILLS: Thank you. Staff?

17                   MR. WILLIAMS: May it please the Commission,  
18   Nathan Williams appearing on behalf of the Staff of the  
19   Public Service Commission of Missouri, P.O. Box 360,  
20   Jefferson City, Missouri 65102.

21                   The Staff believes that the best geographic  
22   market to employ in this case is at the exchange level.  
23   That provides sufficient granularity to conduct the type of  
24   analysis that the FCC's requiring, and yet leaves in place  
25   the available scale and scope economies.

1                   Additionally, the Staff believes that the  
2   Commission should go forward with making a decision with  
3   rapidity on this phase of the case in order to provide the  
4   parties with a foundation upon which they can prepare their  
5   testimony on the impairment analysis in the following phase.

6                   By defining the markets on an exchange basis,  
7   the available scale and scope economies in the major  
8   metropolitan areas will be addressed; Kansas City, St. Louis  
9   and Springfield.  Additionally, it will en-- by using  
10   exchange level, the unbundling rules will be implemented at  
11   the most accurate level possible, while still preserving  
12   administrative practicality.

13                  Also, by using the exchange level, the  
14   Commission will have established a definition that would  
15   apply statewide.  They will not have to supplement its  
16   definition at some future date, and it will not leave  
17   portions of the state undefined in terms of market scope.

18                  If the Commission were to use the MSA, as  
19   proposed by SBC, in fact, what it would be doing is defining  
20   an area that includes SBC Missouri's exchanges within  
21   St. Louis, Kansas City and Springfield, MSAs that lie wholly  
22   within -- or let me rephrase that.

23                  If the Commission were to accept the position  
24   that SBC Missouri has adopted in the area encompassed by the  
25   St. Louis MSA, the Kansas City MSA and the Springfield MSA,

1 SBC is saying that the impairment finding would apply only  
2 to those exchanges that lie wholly or partly within those  
3 MSAs within the State of Missouri. The Staff believes that  
4 that level of granularity is insufficient, that the analysis  
5 should be more granular than that.

6 As to the cutoff analysis, the Staff agrees  
7 with the approaches that have been taken by AT&T, Sprint and  
8 other parties that the analysis should be to look at the  
9 costs that a carrier would incur to serve the multi-line  
10 DS0 user, which is analog voice grade, how many of those  
11 lines -- the cost it would take to serve multiple lines to  
12 the extent that equates with alternatively serving that  
13 same customer with a digital DS1 line.

14 And Staff believes that -- at least based on  
15 the direct testimony as prefiled, that the analysis done by  
16 Mr. Maples is the best analysis that's been presented to the  
17 Commission at this point in time.

18 Staff believes that the parties have  
19 adequately addressed the other matters and explained  
20 positions. Nothing further.

21 JUDGE MILLS: Thank you.

22 At this point we're going to take a ten-minute  
23 recess. We'll come back and we'll take up a couple of  
24 procedural matters, and then we'll begin with our first  
25 witness. We're off the record.

1 (A BREAK WAS TAKEN.)

2 (EXHIBIT NOS. 1 THROUGH 22 WERE MARKED FOR  
3 IDENTIFICATION BY THE REPORTER.)

4 JUDGE MILLS: Let's go back on the record.  
5 Before we get to our first witness, there are -- actually  
6 there's two outstanding procedural matters that I want to  
7 address. One I think I can resolve, and the other one I  
8 think I'll defer until a later time.

9 The first -- and let me ask this: I haven't  
10 seen anyone. Is there anyone here representing the  
11 Communications Workers of America? The CWA filed an  
12 application to intervene on January 22nd. That application  
13 was filed past the deadline for interventions in this case  
14 and does not meet the requirements of Commission Rule  
15 4 CSR 240-2.075, and it will be denied. Of course, should  
16 the CWA want to, they can refile an application to intervene  
17 in compliance with that rule and the Commission would  
18 consider at that point. The presently pending application  
19 to intervene does not comply with the Commission's rules on  
20 intervention and it will be denied.

21 The second procedural matter is a little more  
22 thorny. It has to do with an SBC motion to strike portions  
23 of the rebuttal testimony of Mr. Gillan. I had not yet had  
24 a chance to go through line by line and word by word that  
25 testimony to make a determination as to whether to grant or

1 deny, or grant in part, deny in part that motion to strike.  
2 I will do so before we get to Mr. Gillan's appearance on the  
3 stand, so that we won't be handicapped as we go through the  
4 proceeding.

5 In terms of the other witnesses, certainly in  
6 his direct testimony Mr. Gillan put the concept of using the  
7 LATA as a geographic market into play. It certainly is much  
8 more detailed in his rebuttal testimony, but I don't think  
9 anybody will be prejudiced in his cross-examination if I  
10 don't rule on that until a little later in this proceeding.

11 I think that's all we have to do before we get  
12 to our first witness. So at this time if Mr. Tardiff will  
13 step forward, please. Raise your right hand, please.

14 (Witness sworn.)

15 JUDGE MILLS: Thank you. You may be seated.

16 TIMOTHY J. TARDIFF testified as follows:

17 DIRECT EXAMINATION BY MR. LANE:

18 Q. Dr. Tardiff, would you state your complete  
19 name for the record, please.

20 A. Timothy J. Tardiff.

21 Q. Dr. Tardiff, by whom are you employed?

22 A. National Economic Research Associates,  
23 commonly known as NERA, N-E-R-A.

24 Q. And what is your position with NERA?

25 A. I'm vice president.



1           Q.     And, Dr. Tardiff, are you testifying in this  
2 proceeding on behalf of SBC Missouri?

3           A.     That's correct.

4           Q.     And have you prepared direct testimony that  
5 has been marked as Exhibit No. 1?

6           A.     Yes.

7           Q.     Have you also prepared rebuttal testimony  
8 that's been marked as Exhibit No. 2?

9           A.     Yes.

10          Q.     Do you have any changes to either your direct,  
11 Exhibit 1, or your rebuttal, Exhibit 2?

12          A.     No.

13          Q.     If I were to ask you the same questions today  
14 as are contained in direct testimony, Exhibit 1, and  
15 rebuttal testimony, Exhibit 2, would your answers be the  
16 same?

17          A.     They would.

18          Q.     And are those answers true and correct to the  
19 best of your knowledge and belief?

20          A.     They are.

21                 MR. LANE: Your Honor, at this time we would  
22 offer Exhibit 1 and 2 into evidence and tender Dr. Tardiff  
23 for cross-examination.

24                 JUDGE MILLS: Exhibit 1 and 2, the direct and  
25 rebuttal testimony of Dr. Tardiff, have been offered. Is

1    there any objection to the admission of these exhibits?  
2                               (No response.)  
3                               JUDGE MILLS:   Hearing none, they will be  
4    admitted.  
5                               (EXHIBIT NOS. 1 AND 2 WERE RECEIVED INTO  
6    EVIDENCE.)  
7                               JUDGE MILLS:   Cross-examination?   First is  
8    CenturyTel.  
9                               MR. DORITY:   Your Honor, I have no  
10   cross-examination.  
11                              JUDGE MILLS:   Sprint?  
12                              MS. HENDRICKS:  No questions, your Honor.  
13                              JUDGE MILLS:   Some of you are at tables  
14   without microphones.   For those of you that do have  
15   microphones, could you be sure that they're turned on,  
16   because we're not only transcribing this, but we're  
17   recording it to disk and actually streaming it live to the  
18   worldwide web, and if you don't use the microphones, while  
19   we can hear you in the room, the broader audience may miss  
20   your comment.  
21                              Public Counsel is not here this morning.  
22   Staff?  
23                              MR. WILLIAMS:   Yes.  
24   CROSS-EXAMINATION BY MR. WILLIAMS:  
25        Q.       Good morning, Mr. Tardiff.

1           A.       Good morning.

2           Q.       I'd like to direct your attention to your  
3 direct testimony at page 6. Beginning on line 5 there you  
4 state, on the demand side in terms of the familiar standard  
5 of the DOJ/FTC Horizontal Merger Guidelines, purchasers of  
6 mass market DS0 services would not shift their demands to  
7 high capacity facilities in response to a, quote, small but  
8 significant, closed quote, increase in the price of their  
9 current services, because the minimum monthly cost  
10 high-bandwidth enterprise services far exceeds the cost of  
11 meeting their needs with mass market DS0 services.  
12 Symmetrically, a reduction in the price of DS0 services  
13 would not induce customers to switch because they would  
14 still find it cheaper to supply their needs with DS1 and  
15 higher bandwidth services.

16                   My question for you is, are you saying in that  
17 language that for both mass market and enterprise customers,  
18 demand is more sensitive to the cost of service than the  
19 technology that is used to provide that service?

20           A.       That statement doesn't necessarily say that.  
21 It basically is focusing only on price and what you get for  
22 that price. So in general, the demand for a service is  
23 determined by price and features of the service. That's a  
24 general proposition. This particular statement was only  
25 focusing on the price effect.

1           Q.       Would you agree that for both mass market and  
2     enterprise customers demand is more sensitive to the cost of  
3     service than the technology that is used to provide that  
4     service?

5           A.       Not in general. I'd have to know more about  
6     what the technology offered in terms of different  
7     characteristics of the service, because it's not only the  
8     price but it's what the service can do, and the technology  
9     is a determinant of what the service can do.

10          Q.       Let's limit it to obtaining voice grade  
11     service.

12          A.       Price is -- I mean, again, I'd have to know  
13     the features of how these various technologies were  
14     provided. This is just a general statement focusing on  
15     price. I haven't studied the details of providing voice  
16     grade. Furthermore, Mr. Fleming's testimony gets into the  
17     fact that, at least with respect to the higher bandwidth  
18     service, DS1, it does more than just voice.

19          Q.       Thank you. On page 10 at line 7 to 11 of your  
20     direct testimony, you state that the MSA approximates how  
21     mass market services are sold through mass market  
22     advertising and how they are provided through a switch that  
23     serves a large geographic area.

24          A.       Could you direct me to where you're --

25          Q.       Page 10.

1           A.     Any particular lines?

2           Q.     7 through 11.

3           A.     Yes, I see that.

4           Q.     Are you aware of Sage Witness McCausland's

5 direct testimony, have you reviewed that?

6           A.     I believe I looked at it at some point, yes.

7           Q.     You recall that on page 4 he discusses Sage's

8 service offerings and market strategies?

9           A.     I'd have to review the testimony. I haven't

10 looked at it in --

11          Q.     You don't recall his testimony?

12          A.     I do recall it, but it was what he said on

13 page 4, I'd have to take a look.

14          Q.     I'm not asking you specifically what he said

15 on page 4, just that general topic. Do you recall he

16 discussed it?

17          A.     Yeah, I recall generally he talked about that

18 kind of issue.

19          Q.     And do you recall that in particular, on

20 page 7 at lines 8 to 10 -- and I'm not asking you to recall

21 that it's on that page -- but that he states that Sage does

22 not use either mass media or door-to-door approaches in

23 marketing?

24          A.     I have a recollection of that, but again, Sage

25 is -- is one particular carrier. My testimony in

1 particular, and I believe the TRO in general, talks about  
2 not a particular CLEC strategy but what efficient CLECs that  
3 are entering on the basis of providing mass market services  
4 for their own switch and UNE loops would do. So I mean, I  
5 have no particular knowledge of what Sage does, but here I  
6 was talking to a general proposition.

7 Q. Do you have any specific support for your  
8 statement that MSAs approximate how mass market services are  
9 sold and provisioned, beyond that you provided in your  
10 pre-filed testimony?

11 A. Well, I made a number of references there, and  
12 Mr. Fleming referred to some as well, but in general, for  
13 example, I believe paragraph 309, the FCC TRO order referred  
14 to mass market customers being what they are because --  
15 because they're mass marketed to, if you will, and that's  
16 consistent with determinations the FCC has made in other  
17 proceedings as to how you define the geographic scope of the  
18 market, i.e., the scope of advertising and media do come  
19 into play in the determination.

20 So it was based on the evidence cited in  
21 Mr. Fleming's testimony and my testimony, plus previous  
22 determinations that have been made as to what the geographic  
23 scope of a market is.

24 Q. I'm going to refer you to your testimony at  
25 page 17, line 3 through 8.

1           A.       Okay.

2           Q.       There you identify that CLECs use their own  
3   switches to serve mass market customers that are located in  
4   wire centers that account for 76 percent of SBC Missouri's  
5   lines in the St. Louis, Kansas City and Springfield MSAs.  
6   Do you know what percentage of the wire centers located in  
7   those MSAs where CLECs are using their own switches to serve  
8   mass market customers?

9                    Let me restate the question, because I put the  
10   emphasis on the wrong word. Do you know what the  
11   percentages of the wire centers located in those MSAs where  
12   CLECs are using their own switches to serve mass market  
13   customers?

14          A.       I don't think I understand the question.

15          Q.       Where CLECs are using their own switches to  
16   serve their mass market customers located in these MSAs, do  
17   you know what the percentage of wire centers is where the  
18   CLECs are doing that?

19          A.       The percentage of wire centers?

20          Q.       You provided a percentage for the switch --  
21   the percentage of lines. Can you do the same percentage  
22   based on switches? Wait a minute.

23                    You've identified a percentage of switches.  
24   I'm asking you to identify a percentage of wire centers  
25   within those same MSAs.

1           A.       So the question, I believe, is that if  
2       hypothetically there were ten wire centers in an MSA, are  
3       you asking out of which of those ten the CLECs are  
4       providing -- serving mass markets with their own switches?

5           Q.       Yes.

6           A.       I haven't done that calculation. I believe  
7       that can be done with some of the -- one of the exhibits in  
8       Mr. Fleming's testimony. I personally haven't done that  
9       calculation.

10          Q.       So you think the information's available but  
11       the calculation hasn't been done?

12          A.       That's my understanding.

13          Q.       What about the same question applying to  
14       exchanges as opposed to wire centers?

15          A.       So in other words, you're asking if -- if  
16       you're able to organize the wire centers into exchanges  
17       instead of MSAs, could the kind of calculation we're talking  
18       about be done?

19          Q.       Within the MSAs, what would be the percentage  
20       of exchanges that are being -- where CLECs are serving mass  
21       market customers with their own switches?

22          A.       I would suggest that, you know, the kind of  
23       data that would be necessary to do that is -- the kind of  
24       data is what Mr. Fleming assembled. I would suggest maybe  
25       this question be better directed to him as to whether the



1 data could be organized in a way that would allow him to do  
2 this calculation.

3 Q. So you don't know?

4 A. I don't know personally, no.

5 Q. Are you familiar with HC Schedule 3 that's  
6 attached to the rebuttal testimony of Staff Witness Thomas?

7 A. I believe I've seen it. I haven't studied it  
8 in detail.

9 Q. I have a copy of it with me.

10 MR. WILLIAMS: May I approach?

11 JUDGE MILLS: Yes, you may.

12 BY MR. WILLIAMS:

13 Q. Do you recognize what I handed to you?

14 A. These are highly confidential, correct?

15 Q. Correct.

16 A. I'm not sure I do because, just as a matter of  
17 process, I believe I received the public versions of these  
18 things first, and I'm not sure that this might have been  
19 sent to me. I'm not sure I've actually looked at these  
20 numbers, though. Point being that I didn't receive, you  
21 know, these particular tables in the first delivery of the  
22 testimonies.

23 Q. Would you just take a look at that schedule?

24 JUDGE MILLS: Before we get too far into that,  
25 let me just remind both the witness and the attorney that

1 we're in open session here.

2 MR. WILLIAMS: I don't plan to ask any  
3 confidential information be disclosed.

4 JUDGE MILLS: Okay. Thank you.

5 THE WITNESS: Yes, I've looked at it.

6 BY MR. WILLIAMS:

7 Q. Would you direct your attention to lines 6  
8 through 8 on page 18 of your direct testimony. There you  
9 say, here CLECs with their own switches are primarily  
10 serving the major MSAs, which thus constitutes their own  
11 market, using the FCC's criteria?

12 A. Right.

13 Q. Well, my question to you is, based upon the  
14 schedule that is attached to -- Schedule 3 that's attached  
15 to rebuttal testimony of Chris Thomas, which is an HC  
16 document, isn't it true that CLECs with their own switches  
17 are primarily serving the Kansas City, St. Louis and  
18 Springfield exchanges?

19 A. Well, what I see in these exhibits is that  
20 overall CLECs have presence, including mass market UNE  
21 loops, not only in the exchanges you mentioned, which I take  
22 it to be the shaded area in each of these --

23 Q. Correct.

24 A. -- but also in areas outside of that. So  
25 that's what I see in these exhibits.

1           Q.       My question, though, is, isn't it true that  
2       CLECs with their own switches are primarily serving the  
3       St. Louis, Kansas City and Springfield exchanges, not  
4       exclusively?

5           A.       This chart indicates they have a larger  
6       presence within the exchanges, but they still have a  
7       presence on the various metrics that Mr. Fleming assembled  
8       outside those exchanges as well.

9           Q.       And doesn't that schedule purport to show the  
10      exchanges that are for each of the three MSAs that SBC has  
11      cited, which are St. Louis, Kansas City and Springfield?

12          A.       I understand this to be the particular set of  
13      wire centers, i.e., the exchange within each of the three  
14      MSAs. I mean, that's my understanding of what this chart  
15      purports to do. Again, I'm not sure I saw it before now,  
16      but that's my understanding what the chart does.

17                   MR. WILLIAMS: May I approach to get the  
18      exhibit?

19                   JUDGE MILLS: Yes, you may.

20      BY MR. WILLIAMS:

21          Q.       On page 21 of your direct testimony, at  
22      lines 13 to 17, you state, the geographic coverage of CLEC  
23      switches, the geographic coverage of radio, television and  
24      print media and the existence of collocation throughout the  
25      MSA, as well as the CLEC-owned NXX codes, show that CLECs

1     could easily expand into other areas in the MSA, paren, and  
2     likely will do so even if SBC Missouri's retail prices  
3     remain the same, closed paren.

4                     Have you done any analysis beyond what's in  
5     your testimony to support your assertion that CLECs will  
6     likely expand their service offerings throughout the MSA?

7             A.       No, other than the facts that I cited in these  
8     lines.

9             Q.       On page 24 of your direct testimony at line 2,  
10    you make reference to an FCC concern with the possibility  
11    of, quote, uneconomical, closed quote, pockets warranting  
12    the use of smaller geographic markets.

13                    Wouldn't the Staff's proposal defining markets  
14    on an exchange basis reduce the likelihood of existence of  
15    such pockets when compared to SBC Missouri's proposal to use  
16    the MSAs?

17             A.       Everything else being equal, the answer would  
18    be yes.  However, that would ignore the fact that the FCC  
19    also talks about looking at locations of customers being  
20    served and the ability of CLECs to take advantage of scale  
21    and scope economies.  So, I mean, you have to look at  
22    everything and not just that one factor.

23                    MR. WILLIAMS:  No further questions for this  
24    witness at this time.

25                    JUDGE MILLS:  Thank you.  Mr. Magness?

1                   MR. MAGNESS: Thank you, your Honor.

2           CROSS-EXAMINATION BY MR. MAGNESS:

3           Q.       Good morning, Dr. Tardiff.

4           A.       Good morning.

5           Q.       First I'd like to understand how your

6           testimony or more properly the combination of your testimony

7           and Mr. Fleming's testimony is structured. As I understand

8           it -- and please correct me if I've got it wrong -- he

9           assembled certain data for analysis. He conducted some of

10          that analysis himself, and he provided that data to you

11          which was the basis for your additional analysis; is that

12          correct?

13          A.       Yes.

14          Q.       Do you have Mr. Fleming's testimony there with

15          you?

16          A.       Yes, I do.

17          Q.       I direct you to Mr. Fleming's direct testimony

18          at page 18, line 26. And if you could let me know when

19          you're there and have had an opportunity to read it, I'd

20          appreciate it.

21          A.       Are you asking me to read the whole Q and A,

22          or just that one --

23          Q.       I'm sorry. Let me give you a more specific

24          reference. Actually, let me -- I'm looking at lines 26

25          through 29 where actually the question begins on line 23.

1 For the record, the question is, does SBC Missouri have  
2 other data which can be used to demonstrate where CLECs are  
3 serving the mass market today? And the an--

4 A. I see that.

5 Q. I'm sorry?

6 A. I see that.

7 Q. And the answer beginning on line 26 that I'm  
8 referring to is, yes, UNE-P residential lines, while  
9 addressing only a portion of the mass market, also can be  
10 used to demonstrate where CLECs have targeted and are  
11 serving mass market customers. UNE-P lines are in use in  
12 offices throughout Missouri, which clearly shows that the  
13 geographic area for the mass market is large.

14 Is that a correct reading of Mr. Fleming's  
15 testimony?

16 A. That's what it says.

17 Q. Do you agree with Mr. Fleming that UNE-P  
18 residential lines are a measure of where CLECs are serving  
19 the mass market in Missouri?

20 A. It's a measure of where CLECs are pursuing  
21 that strategy or serving the mass market, yes.

22 Q. Well, when I say a measure, I'm looking for  
23 something a little bit more specific. Is that a measure  
24 that is appropriate in the examination of a geographic  
25 market under the Triennial Review Order?

1           A.       That particular measure -- I believe that the  
2       appropriate measure of locations being served are the  
3       locations of customers, CLEC customers being served by CLECs  
4       who have their own switches. For purposes of defining the  
5       market as per the TRO rule, I would not look at the location  
6       of UNE-P customers.

7           Q.       Okay. So Mr. Fleming, who says UNE-P  
8       residential lines -- and I'll paraphrase -- clearly show  
9       that the geographic area for the mass market is large, would  
10      you disagree with Mr. Fleming's use of that data in his  
11      discussion of why a particular market should be adopted by  
12      the Commission?

13          A.       No. I think he would just -- you have to ask  
14      him, you know, about this particular measure, but my  
15      interpretation was it was just an indication of the  
16      proposition that the scope of the markets can be large. It  
17      was not put forward as a measure of how big the market is  
18      pursuant to the TRO's rules.

19          Q.       So in this question and answer, it wasn't put  
20      forward as an example of data which can be used to  
21      demonstrate where CLECs are serving the mass market today?

22          A.       It's illustrative of that, but it's not part  
23      of the market definition step pursuant to the TRO rule.

24          Q.       So I guess I'll certainly ask Mr. Fleming what  
25      I need to ask him, but I'm asking you, do you agree with him

1     that this was an appropriate Q and A to even put in this  
2     testimony?

3             A.       I think it's fine for what it does.

4             Q.       What does it do?

5             A.       You know, basically it's an indication of  
6     where mass market customers can be.

7             Q.       And why is that relevant to this case? Does  
8     it have anything to do with market definition?

9             A.       This particular measure?

10            Q.       Yes, in this particular case.

11            A.       Not in this case, I wouldn't say.

12            Q.       Okay. If I could direct you to your rebuttal  
13   testimony.

14            A.       All right.

15            Q.       In the question that begins on page 13,  
16   line 13, you say, Mr. Gillan -- I'm sorry. You're asked,  
17   Mr. Gillan discusses geographic market definition issues.  
18   Please provide your observations concerning his discussion.

19                    I took your discussion here as a bit more  
20   dynamic than you just gave us concerning the use of UNE-P.  
21   On line 17, you say, further, as I discuss in detail below,  
22   Mr. Gillan's attempts to link market definition or any other  
23   aspect of an impairment analysis to how competitors  
24   currently use UNE-P is both irrelevant and misleading.

25                    So again I'd ask, do you and Mr. Fleming



1 disagree about the use of that factor or not?

2 A. I don't believe either one of us used the  
3 precise locations of UNE-P customers to define the market.

4 Q. If I could ask you to look at Mr. Fleming's  
5 direct again, there's a schedule he includes that's called  
6 GAF-2.

7 A. Right.

8 Q. And let me know when you're there and you've  
9 had a chance to get to it. And I'm looking at a highly  
10 confidential version of GAF-2, so I just want to admonish  
11 you, I'm not going to ask you questions about the highly  
12 confidential material and I hope you won't reference them.

13 Is the data in GAF-2 part of the data that  
14 Mr. Fleming provided you? I'm sorry. You're not there?

15 A. Yes, I am.

16 Q. Okay. Did Mr. Fleming provide you this data  
17 in prep-- in assisting you to prepare for your testimony?

18 A. Yes.

19 Q. And is it a fair summary of GAF-2 -- and, of  
20 course, I'll let the testimony speak for itself -- but a  
21 fair summary that these are various factors that one should  
22 consider when one is considering a geographic market?

23 A. So the question is, are you asking me to  
24 interpret what GAF-2 was or how I used GAF-2?

25 Q. Well, I really -- I guess I'm most interested

1 in how you used it. As I understand it -- and again,  
2 correct me if I'm misinterpreting the data -- but this  
3 identifies MSAs, it identifies wire centers, wire center  
4 names. It identifies the number of collocated CLECs in a  
5 wire center, the number of CLECs with EELS, the number of  
6 CLECs with ported telephone numbers, the total ported  
7 telephone numbers, a number that's called mass market UNE  
8 loops and a number that's called UNE-P res, is that fair?

9 A. Yes.

10 Q. And do you know -- when you were given this  
11 data, did you have any idea what you were to make of it, how  
12 it had to do with anything in this case?

13 A. Yes. I mean, basically what I was doing with  
14 this data in interpreting the rules is focusing on the  
15 second-to-the-last column, which was mass marketing loops,  
16 and that gets at what the rule and the accompanying  
17 paragraphs are talking about when they're talking about that  
18 state commissions should look at the locations of customers  
19 being served by CLECs with their own switches.

20 Q. Okay.

21 A. So I focused on that particular column.

22 Q. Okay. Well, then, let's look at that rule.  
23 Do you have a copy of the Triennial Review Order there with  
24 you?

25 A. Yes.

1           Q.       I know none of us go anywhere without it. And  
2 the rule I'm referring you to in the Triennial Review Order  
3 is 51.19(D) (2) (i). And let me know when you're there,  
4 please.

5                   MR. LANE: For clarification, you meant 319?

6                   MR. MAGNESS: I meant 51.319 and the following  
7 alphabet soup, yes. And I'm directing the witness to the  
8 portion of the Triennial Review Order. The subpart I  
9 referenced is entitled market definition.

10 BY MR. MAGNESS:

11           Q.       Are you there, Dr. Tardiff?

12           A.       This would be on page 19, I believe, of that  
13 section.

14           Q.       Yes, sir.

15           A.       Yes, I'm there.

16           Q.       Okay. The second sentence in the market  
17 definition I read as saying, in defining markets, a state  
18 commission shall take into consideration the locations of  
19 mass market customers actually being served, paren, if any,  
20 close paren, by competitors, the variation of fac--  
21 variation in factors affecting competitors' ability to serve  
22 each group of customers and competitors' ability to target  
23 and serve markets profitably and efficiently using currently  
24 available technologies. Is that a correct reading?

25           A.       Yes.

1           Q.       Okay. Does the text of the FCC rule  
2 distinguish between competitors who use different methods of  
3 market entry?  
4           A.       The text of what you just read?  
5           Q.       Yes.  
6           A.       The answer is no, but I think someone  
7 suggested in opening statements that you take the rules in  
8 conjunction with the explanatory paragraphs, being in this  
9 case 495 and 496. And my reading of the explanatory  
10 paragraphs indicated that the locations that were relevant  
11 were the locations of customers being served by CLECs with  
12 their own switches.  
13          Q.       Okay. So it's always important for us to look  
14 at the explanatory paragraphs as well as the rule when  
15 interpreting the Triennial Review Order, correct?  
16          A.       As a general proposition, the answer would be  
17 yes.  
18          Q.       When is it not important?  
19          A.       I can't think of -- I can't think of an  
20 example where it would not be important.  
21          Q.       Okay. Please take me to the paragraphs in the  
22 Order that you say work in the words -- I guess you were  
23 saying competitors using their own switches.  
24          A.       Well, I'm looking at paragraph 495.  
25          Q.       Uh-huh.

1           A.       And the -- I believe it's the fourth sentence  
2   of that paragraph reads, rather state commissions must  
3   define each market on a granular level and in so -- and in  
4   doing so, they must take into consideration the locations of  
5   customers actually being served, if any, in parens, by  
6   competitors, and then it goes on. But then there's a  
7   footnote that, you know, that references locations of  
8   customers being served by competitors,

9           Q.       Could you please identify the footnote for me?

10          A.       Footnote 1537.

11          Q.       Uh-huh. And that -- I'm sorry. Go ahead,  
12   sir.

13          A.       And that footnote refers to competitors with  
14   their own switches.

15          Q.       Well, now, doesn't it say, for example, if  
16   competitors with their own switches are only serving certain  
17   geographic areas, the state commission should establish --  
18   I'm sorry -- should consider establishing those areas to  
19   constitute separate markets.

20                    Isn't competitors modified there with  
21   competitors who own their own switches, and there are some  
22   competitors who do and some who don't? And isn't it a good  
23   reading of the footnote that this specifically refers to the  
24   ones who do?

25          A.       Yes, but it's a footnote modifying locations

1 of customers being served by competitors.

2 Q. And so they didn't put it in the text or in  
3 the rule, but they used a modifier in a footnote that we  
4 should read into the rule and the text, correct? Is that  
5 your view, I should say?

6 A. That's my view, yes.

7 Q. Okay. I'd like you to again -- no. I'm  
8 sorry. Let me just ask you a question. Isn't most of the  
9 competition, mass market competition that's been developing  
10 in Missouri over, say, the past couple of years attributable  
11 to the growth of UNE-P?

12 A. Are you talking about the difference in  
13 competition between what it was at some time in the past  
14 versus what it is now? Is that the question?

15 Q. Let me try it this way. Let me direct you to  
16 Mr. Fleming's rebuttal at page 48. Let me know when you're  
17 there and you've had an opportunity to read that. I'm  
18 sorry. Not read the whole page. I apologize. Let me give  
19 you a more specific reference. Page 48, line 17.

20 A. You're referring to the sentence that begins  
21 there?

22 Q. I think I am. Let me -- I'll let you know  
23 when I get there. I'm sorry, Dr. Tardiff.

24 Yes, page 48. It's a simple declaratory  
25 statement on line 17. In fact, competitors are serving more

1 customers today than they were then. And I do have to read  
2 the previous sentence to put it in context. It says -- I'll  
3 start at line 14, second, as the Commission may recognize,  
4 these warnings are not unlike the warnings of the dire  
5 consequences that would befall CLECs and consumers if this  
6 Commission granted SBC Missouri's 271 petition, but as we  
7 all know, that has not happened. In fact, competitors are  
8 serving more customers today than they were then.

9               So I'll reference you to then being when SBC  
10 Missouri was granted 271 authority in Missouri. That's the  
11 then. Today's the now. Has most of the competition for  
12 mass market services that's developed in Missouri been  
13 attributable to UNE-P?

14           A.       It would help if -- do you have an approximate  
15 date as to when the then was? Two years ago or --

16           Q.       Let's just say it's two years ago. Let's say  
17 it was January 26th of the year 2002. Let's just put a date  
18 on it.

19           A.       Okay. Well, my understanding is -- I've  
20 looked more at national trends, but my understanding is that  
21 the general trend, as reflected, for example, in FCC data is  
22 that over roughly that time period, the bulk in the growth,  
23 if you take CLEC access lines as a measure of growth, the  
24 bulk of that growth is -- in most places has been  
25 attributable to -- to UNE-P.

1                   But, you know, I think perhaps Mr. Fleming was  
2     saying something else here. You can ask him. But basically  
3     he was indicating that another interpretation of what he was  
4     saying is that CLECs, you know, have been resourceful in  
5     growing the market, and one does not necessarily have to  
6     assume that an out -- an outcome from their perspective  
7     that's fair, a UNE-P is a prerequisite for remaining in the  
8     market or growing that volume.

9           Q.       So that's your interpretation of Mr. Fleming  
10    saying that there's more competition than there was when we  
11    got 271? It's a rather elaborate explanation of one  
12    sentence.

13          A.       Well, he was -- the previous thing that you  
14    read talked about the warnings that the competition would  
15    dry up, and this is a statement about perhaps the  
16    resourcefulness of CLECs as circumstances change.

17                   All I'm saying is that the circumstances do  
18    change with regard to both regulation and the state of  
19    competition. And as time unfolds, one prediction could be  
20    that the CLECs won't lose the drastic amounts of market  
21    share, you know, in a situation where the FCC rules have  
22    determined that unbundled switching is not a factor that  
23    impairs them.

24          Q.       Okay. Just to be sure we kind of put a final  
25    point on it, do you have any dispute with the idea that most



1 of the growth in Missouri in the mass market has been  
2 through UNE-P?

3 A. Well, I think I answered that that would be --  
4 that would parallel my understanding in the rest of the  
5 country. I'm just qualifying that way because I haven't  
6 really studied Missouri in detail. But I have no basis to  
7 dispute that. I would not be surprised if Missouri followed  
8 the trend in the rest of the country and, therefore, most of  
9 the growth has likely been due to UNE-Ps.

10 Q. Could I ask you to look again at FCC data  
11 that's in Schedule GAF-2 --

12 A. Right.

13 Q. -- HC. Are you still there?

14 A. Yes.

15 Q. Do you have it there?

16 That last column UNE-P res, just taking a look  
17 through GAF-2, would you say it's fair that there's a lot  
18 more numbers in UNE-P res than there are in mass market UNE  
19 loop?

20 A. By more numbers do you mean more of the cells  
21 being populated?

22 Q. Yes. That's fair enough.

23 A. Yes.

24 Q. Would that confirm your, I guess, lack of  
25 surprise in finding that maybe Missouri is like the rest of

1 the country as far as the dispersion of UNE-P?

2 A. This is certainly not inconsistent with that.

3 Q. Okay.

4 A. I mean, it's just a snapshot in time, but how  
5 it got there is not inconsistent with the idea that it might  
6 have been growing over the last couple years.

7 Q. Is there anything misleading or untrustworthy  
8 about GAF-2 being a snapshot in time? Should we be looking  
9 at something else?

10 A. No. I mean, it is there for the purpose, and  
11 I believe that the analysis requires a snapshot, but you  
12 were trying ask for another interpretation of the numbers,  
13 and sometimes a snapshot doesn't tell the whole picture.

14 Q. On page 22 of your rebuttal, you have a quote  
15 at the top of the page that carries over from the prior page  
16 from the Triennial Review Order. Do you see that? Do you  
17 see the block quote?

18 A. Yes. That's paragraph 3 of the Triennial  
19 Review Order.

20 Q. Okay. Then on line 8 you say, unfortunately  
21 recent data suggests that when such UNEs and the UNE-P  
22 continue to be available at current rates, facilities-based  
23 competition is harmed in the process. In particular, the  
24 recent surge in UNE-P volumes that the CLEC witnesses tout  
25 has been accompanied by a virtual recession in the growth of

1 other forms of CLEC deployment. Is that a correct reading?

2 A. With the exception that I said cessation

3 rather than recession.

4 Q. I have cessation.

5 A. Yeah. You said recession.

6 Q. Oh, I did? I'm sorry. Let me reread the

7 sentence. In particular, the recent surge in UNE-P volumes

8 that the CLEC witnesses tout has been accompanied by a

9 virtual cessation in the growth of other forms of CLEC

10 deployment; is that correct?

11 A. That's what it says, yes.

12 Q. Does this mean that fewer CLECs in Missouri

13 are actively providing service to mass market customers

14 using their own switches?

15 A. I haven't looked at -- this is a statement

16 about what the national trend shows. So I don't know

17 whether Missouri follows the exact pattern or not.

18 Q. Well, if nationally there's been a cessation

19 in the deployment, as you put it, in CLEC deployment, are

20 you finding as you look at data nationally that there are

21 fewer CLECs actively providing service to mass market

22 customers using their own switches?

23 A. No. What the data shows is there are fewer

24 stand-alone loops being used by CLECs to provide -- to

25 provide local exchange service.

1           Q.       So there's fewer -- okay. I understood your  
2 answer.

3                   Does this -- and given this apparent cessation  
4 you've noticed or reduction, shouldn't the Commission be  
5 very careful in examining a self-provisioning switch trigger  
6 CLECs that are identified by your clients to ensure they are  
7 still actively providing service?

8           A.       I think perhaps that question is best directed  
9 at Mr. Fleming, because I think it's really a data question.  
10 And my understanding is that the -- he takes a recent  
11 snapshot of active CLECs. I mean, so this is not a  
12 statement that they're not serving. The statement is that  
13 there are fewer lines being provisioned nationwide with UNE  
14 loops.

15           Q.       Okay. Let me ask you your opinion, then, and  
16 I'll ask on a national basis, since you don't seem to have  
17 Missouri data in mind. These trends, the reduction in DS0  
18 loop use by CLECs, when the Commission looks at the analysis  
19 required by the TRO, isn't it important in trying to find  
20 out if they're actively providing when -- not only how many  
21 loops in a snapshot in time have been ordered, but what it's  
22 looked like over time, to see if the number's ramping up,  
23 the number's ramping down? Is that an important part of the  
24 trigger analysis, I'd ask you?

25           A.       My answer is no. And I believe one of the

1 paragraphs talks about what the state commission should look  
2 at in terms of the CLECs that qualify. And I believe one of  
3 the indications is whether or not they've announced plans to  
4 go out of business, but I didn't see anything with regard to  
5 the pattern of -- of the number of loops or things like  
6 that.

7 Q. Well, short of going out of business, a  
8 reduction in the number of loops provided by CLEC switches  
9 to the mass market would have some impact on the trigger  
10 analysis, wouldn't it?

11 A. I don't believe so.

12 Q. None at all?

13 A. Not in terms of what I interpret the FCC's  
14 rules being.

15 Q. Okay. Well, say a CLEC didn't go out of  
16 business but they quit marketing in an MSA so they weren't  
17 in the MSA anymore. They sold their switch to somebody else  
18 who wanted to use it, they're out of that market. And you  
19 looked at data that said, you know, they used to have X  
20 number of DS0s, now it's X minus everything.

21 A. Well, if they had nothing, then they wouldn't  
22 show up in the data, I don't believe.

23 Q. So they'd have to have nothing to not be a  
24 trigger? They'd have to have no DS0 loops to not be a  
25 trigger? If they have one left, that's enough. Is that

1 your interpretation of the order?

2 A. We can look at the paragraph to see what it  
3 says.

4 Q. Okay.

5 A. I mean --

6 Q. And to be -- I don't want to be cagey about  
7 this. I was quoting from paragraph 498, the actively  
8 providing standards. So if there's something else there or  
9 elsewhere that we should be looking at, I'm happy to  
10 complete the record on that.

11 A. This is 498?

12 Q. Yes, sir.

13 A. It does say actively providing.

14 Q. Uh-huh.

15 A. And in paragraph 500, it says that the  
16 Commission should look at nothing else. That's where it  
17 refers to the financial stability of --

18 Q. I'm not even talking about financial  
19 stability. I'm talking about a company that used to like to  
20 market in Missouri, but now they've decided Missouri wasn't  
21 working out, we're going to market in Oklahoma, Arkansas and  
22 Tennessee. That's not going out of business, is it? That's  
23 just not serving a particular market where you're asserting  
24 there's no impairment. Wouldn't it make a difference that  
25 they'd exited a particular MSA?

1           A.       May I -- I don't know what the definition of  
2       exited an MSA is.

3           Q.       Okay.  When you make a statement about a  
4       cessation in the growth of other forms of CLEC deployment,  
5       do you contend there's not been enough investment capital  
6       expended on telecom facilities since the Telecom Act was  
7       passed in 1996?

8           A.       That there has not been enough investment?

9           Q.       Yes.  Enough investment capital invested on  
10      telecom facilities since the Act was passed.  Is that your  
11      opinion?

12          A.       Since -- I mean, there was investments in  
13      telecom facilities, and there's been a lot less recently.

14          Q.       Well, has there now -- are we now to a state  
15      where there's not been enough?

16          A.       In total or recently?  I mean --

17          Q.       What's the difference to you?

18          A.       Well, the difference is that, you know,  
19      basically one of the objectives of the Act is -- and the TRO  
20      for that matter is to facilitate investments, and by  
21      facilitate, you mean going forward, so I think the only  
22      thing that the public policy can be concerned about now is  
23      incentives going forward.  I think you need to be very  
24      concerned about whether there's the right kind of incentives  
25      going forward.

1           Q.       And your biggest concern about incentive as it  
2 affects UNE-P is about the rate for UNEs, is that correct,  
3 that the rate -- I guess I heard in openings the rate is  
4 rock bottom, the rate is so low that that's the core problem  
5 with unbundled local switching. Is that a fair statement or  
6 not, or do you just not like the idea of an unbundled local  
7 switch in UNE at all in no circumstances?

8           A.       No. The big issue, and I think the court  
9 pointed out, the DC Circuit, was that pricing is a big issue  
10 here.

11          Q.       And you referenced that when you say the DC  
12 Circuit, are you talking about the USTA decision?

13          A.       Yeah, from May of 2002.

14          Q.       And you reference that several times in your  
15 testimony, correct?

16          A.       A number of times, yes.

17          Q.       And are -- do you consider yourself generally  
18 familiar with the major cases that go on in telecom, major  
19 judicial decisions in the federal courts?

20          A.       A number of them that impinge on areas, you  
21 know, that have to do with the implementation of the Act. I  
22 mean, there are other major cases that I'm not as familiar  
23 with.

24          Q.       Are you familiar with the Supreme Court's  
25 decision in Verizon vs. FCC, U.S. Supreme Court decision? I



1 have a copy.

2 MR. MAGNESS: Could I approach the witness,  
3 please, your Honor?

4 JUDGE MILLS: Yes, you may show it to him.

5 BY MR. MAGNESS:

6 Q. This is a full copy of the U.S. Court's  
7 version, and what I've done for ease of reference is the  
8 part that I would like to discuss with you I've highlighted.  
9 It's page 45 of the opinion, and I believe 46. Have you  
10 read this opinion before, Dr. Tardiff? Is this the first  
11 time you've ever seen it?

12 A. Let me ask you, before I answer this question,  
13 can I point out that I believe that every other page has  
14 been copied on this?

15 Q. Well, mine says 2, 3, 4, 5, 6 up at the top.

16 A. Mine goes from 44 to 47.

17 Q. That's because I have page 45 and 46 up front,  
18 because that was the area I wanted to actually discuss with  
19 you.

20 A. So it's not in my copy?

21 Q. I'm sorry.

22 A. Oh, I see what you're saying. Okay. I went  
23 to the --

24 Q. Right. There's a highlighted portion.

25 A. Oh, I see. Okay.

1           Q.       What I tried to do for your convenience, but I  
2     put it up front just so -- I mean, I certainly want you to  
3     be able to see if I've left out anything in the opinion, but  
4     this is the part I was interested in discussing with you.

5           A.       Yeah. I understand now.

6           Q.       Have you read this before?

7           A.       This decision?

8           Q.       Yeah.

9           A.       Yes.

10          Q.       Okay. And this decision concerned the U.S.  
11     Supreme Court's interpretation of the TELRIC pricing rules,  
12     did it not?

13          A.       Well, my understanding is it -- it dealt with  
14     the U.S. Supreme Court's ruling on whether the FCC's  
15     interpretation of those rules was consistent with the '96  
16     Act.

17          Q.       That's a very good distinction, and they  
18     upheld the FCC's interpretation, did they not?

19          A.       They upheld the interpretation. I don't think  
20     they actually ruled as an expert body as to whether that was  
21     the best way to do it or the only way or any other such  
22     determination.

23          Q.       Did they strike down the TELRIC rules as being  
24     inconsistent with the Act?

25          A.       They upheld the TELRIC rules.

1           Q.       Okay. Does page 45, which I've directed you  
2 to -- it takes us to an issue you and I have just been  
3 discussing, at least in my mind. And I'll just read you the  
4 highlighted portion. This is from page 45.535 U.S. 2002,  
5 the Verizon opinion. At the end of the day, theory aside,  
6 the claim that TELRIC is unreasonable as a matter of law  
7 because it stimulates but does not produce facilities-based  
8 investments founders on fact. The entrants have presented  
9 figures showing they have invested in new facilities to the  
10 tune of \$55 billion since the passage of the Act through  
11 2002 -- I'm sorry -- through 2000. And then there are a  
12 number of citations. Do you see those, Dr. Tardiff?

13           A.       Yes.

14           Q.       And then the next sentence begins, the FCC  
15 statistics indicate a substantial resort to pure and partial  
16 facilities-based competition among the three entry  
17 strategies. And I'm not sure that I actually highlighted  
18 all this. Let me just go ahead and read the paragraph for  
19 completeness. I'm sorry. I'm reading more than I need to.  
20 I'm sorry.

21                   Using their own facilities, 23 -- 33 percent  
22 of entrants were using their own facilities, 23 percent were  
23 reselling services and 44 percent were leasing network  
24 elements, paren, 26 percent of entrants leasing loops for  
25 switching, 18 percent without switching, close paren, and

1 then they give another citation. Then it carries on, the  
2 incumbents do not contradict these figures but merely  
3 speculate the investment has not been as much as it could  
4 have been under other ratemaking approaches, and they note  
5 that investment has more recently shifted to non-facilities  
6 entry options.

7                   We, of course, have no idea whether a  
8 forward-looking pricing scheme would have generated even  
9 greater competitive investment than the \$55 billion that the  
10 entrants claim. It suffices to say that a regulatory scheme  
11 that can boast such substantial competitive capital spending  
12 over a four-year period is not easily described as an  
13 unreasonable way to promote competitive investment in  
14 facilities.

15                   Is that a complete, accurate reading of that  
16 paragraph?

17           A.       Yes.

18           Q.       Okay. So at least as the Supreme Court found  
19 it in 2002, there had not been insufficient investment in  
20 the telecom industry; is that fair?

21           A.       Yes. What they were commenting on in May of  
22 2002 was the amount of investment that had taken place  
23 probably since, you know, in roughly the time frame of end  
24 of 2000, 2001. And as I described in my testimony, there  
25 has been a reversal of the patterns that -- I shouldn't say

1 a reversal, but a change in the patterns in the FCC data  
2 that the Supreme Court cited.

3 Q. And that accounts for what you say is the --  
4 the growth of UNE-P has been accompanied by a virtual  
5 cessation in growth of other forms of CLEC deployment; is  
6 that what you meant?

7 A. Right. For example, you read something about  
8 the FCC statistics indicate 33 percent using their own  
9 facilities, 23 percent were reselling and 44 percent were  
10 leasing network elements. Those would undoubtedly be  
11 different, moving away towards facilities and -- facilities  
12 and the use of network elements, that is the unbundled loop  
13 with CLEC switches, which does involve some investment, and  
14 toward a UNE-P, which does not involvement investment in  
15 switching or in loops.

16 Q. Okay. When you talk about the cessation in  
17 growth of CLEC deployment, are you just talking about  
18 switched deployment investments?

19 A. Yes, because that was the statement about the  
20 fact that the total number of UNE loops standing alone had  
21 actually declined between the end of 2002 and the middle of  
22 2003.

23 Q. And has the CLEC investment in loops  
24 diminished as well?

25 A. In their own loops?

1 Q. Yes.

2 A. I think one can infer that, because I also

3 said in that same paragraph that --

4 Q. One can infer from what?

5 A. Well, I'll just read the sentence that while

6 the volume of UNE-P has more than quadrupled since the end

7 of 2002, the number of CLEC-owned loops, excluding those

8 owned by intramodal cable television providers, declined by

9 over 20 percent in that same time period. That is since the

10 end of 2002.

11 Q. And has there been a reduction in CLEC

12 investment in operational support systems?

13 A. I don't have any data on that.

14 Q. How about their investments in customer

15 service infrastructure?

16 A. I haven't seen that kind of data.

17 Q. Anything about any other investment that

18 they've made besides pipes or switches, pipes in ground or

19 switches in the CO?

20 A. I haven't seen that, but the pipes in the

21 ground and switches in the CO are a substantial part of the

22 cost structure of the telecommunications industry.

23 Q. Does the Act's facilities-based competition

24 encouraging provisions speak only of switches and pipes in

25 the ground?

1           A.       No, but I believe the FCC's concern in  
2 paragraph three about facilities-based competition was since  
3 the unbundling rules deal with those kind of facilities,  
4 expressed a concern for that kind of investment.

5           Q.       Take you to your rebuttal at page 21. I think  
6 it's right where we were before, line 13 and 14.

7           A.       Yes.

8           Q.       I'll let you read now. I've read enough.  
9 Would you read that sentence there?

10          A.       The question, I believe, is are there other  
11 reasons why using UNE-P volumes as a benchmark is  
12 counterproductive? Is that where you are?

13          Q.       Yes. I'm sorry. That's the question. I may  
14 have you on the wrong page. I'm sorry. Actually, it's the  
15 prior page --

16          A.       Okay.

17          Q.       -- where you have the long block quote, and  
18 you say the long block quote, which is from paragraph 3 of  
19 the TRO; is that right?

20          A.       Right. That's on -- that's two lines down  
21 from the question that I just read.

22          Q.       And tell me again what paragraph 3 says, what  
23 the import of paragraph 3 is for our inquiry here.

24          A.       Well, I quoted from paragraph 3 in that long  
25 block quote, and my interpretation of that paragraph is the

1 FCC expressing itself on the importance of facilities-based  
2 competition.

3 Q. And you quoted the first half of paragraph 3,  
4 correct?

5 A. I'll take a look at it.

6 Q. Roughly the first half. I didn't count the  
7 sentences.

8 A. It's in the first half of paragraph 3.

9 Q. Could you read the second half of paragraph 3,  
10 which begins with the sentence, the effect of unbundling on  
11 investment incentives? Could you read it to us in the  
12 record?

13 A. I see.

14 Q. The rest of the paragraph?

15 A. It says, the effect of unbundling on  
16 investment incentives is particularly critical in the area  
17 of broadband deployment since incumbent LECs, L-E-C with a  
18 small S, are unlikely to make the enormous investment  
19 required if their competitors can share in the benefits of  
20 these facilities without participating in the risk inherent  
21 in such large scale capital investment. At the same time,  
22 continued unbundling of network elements provided over  
23 current facilities appears to be necessary in many areas  
24 under Section 251 of the Act, especially with respect to  
25 mass market customers.



1           Q.       So the FCC referenced the importance of  
2 unbundling as well as concerns about unbundling in that  
3 paragraph, didn't it?

4                   Let's talk about the mass market. Didn't they  
5 say, as they said throughout the Order, that continued  
6 unbundling may be necessary in the mass market, and that's  
7 why we're here going through this analysis?

8           A.       Yes, it may be necessary, and that's directed  
9 the states to make a determination of whether or not it is.

10                   MR. MAGNESS: Okay. Thank you. That's all I  
11 have, your Honor.

12                   JUDGE MILLS: Thank you. MCI, Mr. Lumley?

13                   MR. LUMLEY: Thank you, your Honor.

14 CROSS-EXAMINATION BY MR. LUMLEY:

15           Q.       Looking first at page 13 of your direct  
16 testimony, sir, beginning at that point, you engage in a  
17 discussion where you are identifying examples where the FCC  
18 has used MSA as a market definition in other circumstances,  
19 correct?

20           A.       That's correct.

21           Q.       But you would agree with me that the FCC did  
22 not select the MSA as the market definition for these  
23 purposes, but instead referred it as a matter for the  
24 Commission to decide in Missouri?

25           A.       That's correct.

1           Q.       Looking at page 17 next, you were discussing  
2       this testimony with counsel for Staff a little while ago,  
3       and you indicated that you had not performed the calculation  
4       in terms of percentages of wire centers, but you would agree  
5       with me that you're stating here the flip side of what you  
6       said is that there are wire centers in the MSAs accounting  
7       for 24 percent of SBC's lines where CLECs have not entered?

8           A.       Not entered as measured by providing mass  
9       market UNE loops in those wire centers. They've entered in  
10      other ways in some of those.

11          Q.       Right. But the flip side is that there's wire  
12      centers in the MSAs that account for 24 percent of SBC's  
13      access lines in those areas where CLECs have not entered on  
14      a UNE loop base?

15          A.       They're not providing mass market UNE loops  
16      out of those wire centers, as far as Mr. Fleming's data  
17      indicates.

18          Q.       Thank you. At page 19, at the top of the  
19      page, you acknowledge that the FCC indicated that this  
20      Commission should attempt to distinguish among markets where  
21      different findings of impairment are likely, correct?

22          A.       Yes, that's a paraphrase from the rules.  
23      Well, actually the paragraph's explaining the rules.

24          Q.       And it's not a paraphrase, it's a quote there  
25      in your testimony, correct?

1           A.       Yes, it is.

2           Q.       Thank you. And while we have a disagreement  
3 about what the boundaries are, nonetheless you're saying  
4 that the distinction should be where is it likely that  
5 there's CLEC entry and where is it unlikely? That's what  
6 you're following up, correct?

7           A.       Where is it likely that CLECs can provide mass  
8 market service, services or local exchange services using  
9 their own switches. And I think the important thing is  
10 different findings of impairment being likely are not, you  
11 know, that conditions vary per se but whether the variation  
12 of those conditions is sufficient to cause a different  
13 finding of impairment. So that's one of the reasons why I  
14 object to the wire center being --

15          Q.       I didn't ask you about wire centers, sir. I  
16 think if I could ask the judge to cut you off at that point,  
17 he's going beyond my question.

18                   JUDGE MILLS: I think you've already cut him  
19 off.

20 BY MR. LUMLEY:

21          Q.       I would never do that. Rebuttal testimony,  
22 sir, page 6, line 6, you say -- actually lines 5 and 6, you  
23 say, once they have entered within a particular MSA, CLECs  
24 generally serve throughout the MSA. Do you see that?

25          A.       Yes.

1           Q.       But, in fact, as we just saw, your data  
2       indicates that there are wire centers accounting for  
3       24 percent of Southwestern Bell's access lines where they  
4       have not entered on a UNE loop basis, correct?

5           A.       They are currently not providing mass market  
6       UNE loops in wire centers with that percentage.

7           Q.       Thank you.

8           A.       But 76 percent, I think, supports the  
9       general, generally state adjective or adverb.

10          Q.       And that's why you included the word  
11       generally, because it wouldn't be a true statement to say  
12       that they're actually all the way throughout the MSAs. You  
13       had to put that qualifier in, correct?

14          A.       So if I would have said they're serving  
15       everywhere in the MSA --

16          Q.       That would have been incorrect?

17          A.       Yes, but my understanding is the FCC itself  
18       doesn't require CLECs to serve --

19          Q.       I didn't ask you that. It would be an  
20       incorrect statement to say unqualifiably that they are  
21       serving throughout MSAs using UNE loops?

22          A.       Mass market customers.

23          Q.       Correct.

24          A.       Yeah, the numbers speak for themselves.

25               MR. LUMLEY: Thank you.

1 JUDGE MILLS: Sage?

2 CROSS-EXAMINATION BY MS. MUDGE:

3 Q. Dr. Tardiff, in the preparation of your  
4 testimony, let me first make sure that I understand. First  
5 of all, any data or identification of CLEC activities is  
6 based on information that's been provided to you by  
7 Mr. Fleming?

8 A. By CLEC activities, you mean in the state of  
9 Missouri?

10 Q. Correct.

11 A. Yes.

12 Q. And so you didn't go out and make any  
13 independent review of CLEC advertising, for example, or  
14 marketing strategies in the state of Missouri?

15 A. I did some -- I may have observed things  
16 like -- I wouldn't say it's a scientific survey, but I  
17 looked at things like, you know, web pages and  
18 advertisements and things like that to see how CLECs were  
19 characterizing themselves and media like that.

20 Q. So you looked at web pages, but with respect  
21 to the actual advertising in the state of Missouri, is it  
22 accurate that you did not go through and look at what actual  
23 CLECs were advertising in the state of Missouri?

24 A. Again, I saw some advertisements of that  
25 nature, but it was not -- you know, it was not a systematic

1 study.

2 Q. And am I correct -- after looking at your  
3 resume, which is very extensive, and I appreciate you  
4 providing us with a list of your articles, am I correct that  
5 you have not actually participated or been employed by a  
6 CLEC with respect to working on business entry plans or  
7 marketing plans?

8 A. That's correct.

9 Q. Would you agree with me, sir, that it is  
10 important, however, to look at what CLECs are actually doing  
11 with respect to advertising or marketing in the context of  
12 your testimony?

13 A. I would say in a general way, and what I did  
14 in the testimony was to rely on not necessarily what's  
15 happening in Missouri but other places and how the FCC  
16 has viewed the importance of advertising. In fact, in  
17 paragraph 309 they talk about mass marketing as  
18 distinguishing the mass market.

19 Q. So it would be important, then, to see what a  
20 CLEC is actually doing in the state of Missouri with respect  
21 to advertising in business entry, would you agree with me?

22 A. CLECs in general, I think. I think the TRO in  
23 a couple places cautions against looking at any particular  
24 CLEC.

25 Q. But, in fact, even in your testimony and

1 Mr. Fleming's testimony, you pull out specific examples of  
2 what a specific CLEC is doing, correct?

3 A. Examples, you know, to illustrate a general  
4 pattern.

5 Q. Right. So the fact of what a specific CLEC is  
6 doing or not doing is still a fact to be considered in  
7 conjunction with all the facts; is that correct?

8 A. Yeah, in the sense that it's one observation,  
9 one piece of data on the subject at hand.

10 Q. Okay. And is it also true, based on your  
11 view -- let's see. I want to make sure I paraphrase it  
12 correctly. If I don't, please correct me. But in your  
13 review of websites and other advertising, is it correct that  
14 you did not review Sage-specific advertising or marketing  
15 information?

16 A. This is in the context of preparing this  
17 testimony?

18 Q. Yes, sir.

19 A. I don't recall seeing Sage-specific  
20 advertising.

21 Q. Okay. Thank you very much.

22 Now, you have, as I recall -- you said you had  
23 in front of you Mr. Fleming's testimony, and I believe  
24 you've already been asked some questions about Schedule  
25 GAF-2; is that correct?

1                   And, again I'm not going to ask you with  
2   respect to any numbers or to disclose any of that type of  
3   information, but you do have that in front of you, do you  
4   not, sir?

5           A.       Yes.

6           Q.       Now, if you will hold on to that and then  
7   turn, please, sir, to page 4 of your rebuttal. Are you  
8   there, sir?

9           A.       Yes.

10          Q.       And specifically let me address you to  
11   lines 3 through 8 of your rebuttal testimony.

12          A.       Okay.

13          Q.       And without necessarily reading it into the  
14   record, as I understand it, what you are doing here is  
15   listing the specific factors for purposes of defining what  
16   the appropriate geographic market is, correct?

17          A.       The factors as enumerated in the TRO?

18          Q.       Yes, sir.

19          A.       Yes.

20          Q.       And, in fact, there are three of them,  
21   correct?

22          A.       Yes.

23          Q.       Now, is it true, sir, if we applied each of  
24   those three factors to specific wire centers that are listed  
25   on Schedule GAF-2, if we just took one, for example -- and I



1 believe the name Chestnut has been made public and so I'll  
2 just do that. Would you agree with me that if you applied  
3 those three specific factors to individual wire centers,  
4 that you would come up with a -- you would come up with  
5 different results as to whether or not that is a -- that  
6 particular wire center met all three of those factors?  
7 Would you agree with me on that?

8 A. Well, the factors are things that the  
9 commissions are directed to look at. They're not  
10 necessarily -- there's not necessarily a score on, you know,  
11 plus or minus, pass/fail score on those. The question is do  
12 wire centers vary with regard to some of these factors. The  
13 answer is yes.

14 Q. Okay. Thank you.

15 A. The question is --

16 Q. That was my question, sir. Thank you.

17 MR. LANE: Your Honor, I'd ask that the  
18 witness be permitted to complete his answer.

19 JUDGE MILLS: I agree with that generally. I  
20 think he had completed that particular answer. If I'm  
21 mistaken, you may continue.

22 THE WITNESS: I can continue?

23 JUDGE MILLS: If you had more to answer that  
24 question. It sounded like you were done.

25 MS. MUDGE: Well, I thought he had answered my

1 question with respect to the specific wire centers and  
2 application, and that's all I asked him. I didn't ask him  
3 his opinion, then, as to whether or not it was appropriate.

4 JUDGE MILLS: Actually you asked him a  
5 question that he didn't answer and then he rephrased the  
6 question on his own and answered it. And I think since he  
7 posed the question, he's free to continue answering it.

8 MS. MUDGE: That's fine.

9 THE WITNESS: But the important thing in the  
10 FCC's rules whether the variations are sufficient to lead to  
11 different findings of impairment in defining the market.

12 BY MS. MUDGE:

13 Q. Okay. Now, I also understand that with  
14 respect to this schedule that I believe you testified that  
15 the column that you specifically focused on in large part  
16 was the column entitled mass market UNE loops?

17 A. That's correct.

18 Q. And again, I'm not going to ask you with  
19 respect to any specific numbers, but is it true that this  
20 column does not differentiate what those loops are being  
21 used for, what types of customers they are being used to  
22 serve?

23 A. It's my understanding -- and if you want  
24 further enlightenment, Mr. Fleming could probably answer  
25 more. But my understanding is that it's based on the number

1 of loops, UNE loops at a location. So that's all that's  
2 saying. So as far as the type of customer, the type of  
3 business or what have you, I don't believe there's any  
4 information conveyed with regard to that.

5 Q. And so it does not differentiate -- this  
6 particular column does not differentiate between loops that  
7 are being used for residential customers or loops, for  
8 example, that are being used for a large business customer;  
9 is that correct? This column does not do that; is that  
10 correct?

11 A. My understanding is that it tells you the  
12 number of loops that are used at a location. And in terms  
13 of the TRO's definition of what the mass market is, that's  
14 the criteria. So it's focused on a location and it asks how  
15 many loops are there at a location, and if it's below a  
16 certain number, then it by definition is a mass market loop.  
17 So based on the FCC's definition, I don't think you're going  
18 to pick up any big businesses as they define them.

19 Q. Let me ask you the question one more time, and  
20 let me see if I can just get a real -- it's either a yes or  
21 no. With respect to this column, is it correct that this  
22 column does not differentiate as to what the loops and the  
23 types of customers that are being served by those loops; is  
24 that correct? Yes or no?

25 A. Those loops -- that count as I understand it

1 is based on location and all the locations where there are  
2 fewer than the cutoff number of UNE loops being supplied to  
3 that location. So that's what it does, and --

4 Q. And, Dr. Tardiff, it does not differentiate  
5 between a loop that is being provided to a residential  
6 customer or to a business customer? This column does not do  
7 that, correct?

8 A. No. No.

9 Q. Okay. Thank you.

10 Now, last question, if I could, if I could  
11 take you to page 2 of your rebuttal, and I believe, sir, you  
12 also said that you do have Mr. Fleming's testimony, and I'm  
13 going to refer you -- by the way, Mr. Fleming's testimony is  
14 Exhibit 3, if you will also go ahead and turn to page 6 of  
15 Mr. Fleming's testimony. Are you there, sir?

16 A. 2 of my testimony, rebuttal, and 6 of  
17 Mr. Fleming's direct?

18 Q. Yes, sir. Thank you.

19 A. Yes.

20 Q. Now, on Footnote 2 of your rebuttal  
21 testimony --

22 A. Footnote 2?

23 Q. Yes.

24 A. I'm on page 2. I don't see a Footnote 2 on  
25 that -- on page 2.

1 Q. I'm sorry. Footnote 7, excuse me.  
2 A. Okay.  
3 Q. I apologize. You say there that -- I believe  
4 in the second sentence that your review of Mr. McCausland's  
5 testimony is that he provides a different market definition  
6 that would produce geographic markets much wider than single  
7 wire centers? Do you see that?  
8 A. Right.  
9 Q. Did I read that correctly?  
10 A. Right.  
11 Q. First of all, let me turn you to Mr. Fleming's  
12 testimony at page 6.  
13 A. His direct testimony?  
14 Q. Yes.  
15 A. Okay.  
16 Q. Well, let me ask you this, because I  
17 apologize, I have the wrong number in my notes. Do you  
18 recall that Mr. Fleming actually explains that his reading  
19 of Mr. McCausland's testimony is the same with respect to  
20 the recommendation; that is, that Sage recommendation is the  
21 wire center. Do you recall that testimony in Mr. Fleming's?  
22 A. I read Mr. Fleming's. He has a lot of details  
23 in both testimony. He may have said that. I don't recall.  
24 Q. Okay. All right. And do you have in front of  
25 you Mr. Starkey's or Mr. McCausland's testimony?

1           A.       Which testimony?

2           Q.       Direct.

3           A.       I have it somewhere. Not right -- it might

4 be -- if you have it might be helpful if you can share with

5 me your copy.

6           Q.       That would be fine.

7                    MS. MUDGE: Your Honor, may I approach?

8                    JUDGE MILLS: Yes, you may.

9                    MS. MUDGE: Thank you.

10 BY MS. MUDGE:

11           Q.       Dr. Tardiff, what I've handed you has been

12 marked only as Exhibit No. 19, which is Bob McCausland's

13 testimony. Do you see it, sir?

14           A.       Yes.

15           Q.       And I believe I've directed you to page 9; is

16 that correct?

17           A.       Yes.

18           Q.       And I have underlined at the bottom of that

19 page some line numbers. What line numbers are those?

20           A.       Looks like it's 22 and 23.

21           Q.       All right, sir. And would you read those into

22 the record, please?

23           A.       Well, it starts at the partial sentence.

24           Q.       Sure.

25           A.       Will yield the result that the individual SBC

1 Missouri wire center is the appropriate geographic market  
2 for the mass market determined analysis.

3 Q. So Mr. McCausland's testimony also indicates  
4 that his recommendation is the use of the wire center for  
5 purposes of defining the geographic market; isn't that  
6 correct?

7 A. That's what that says. I was -- I was reading  
8 and my reference was to -- that's what it says, but I'm --  
9 my interpretation of what Mr. McCausland was saying was two  
10 lines above, says, it is Sage's position that this  
11 Commission should take the geographic market definition  
12 standard as set forth in the Triennial Review Order and  
13 overlay them onto actual CLEC network deployment to  
14 determine mass market geographic boundaries in Missouri.  
15 And I was interpreting the consequence of what that would  
16 yield.

17 Q. Right. But further below, what you just read  
18 in terms of the underlying portion, his recommendation is to  
19 use the wire center as the appropriate geographic market;  
20 isn't that correct?

21 A. Yes, but his analysis indicates -- I believe  
22 it would result in a very different result that would be a  
23 broader area. The consequences of what he said should  
24 happen, in my mind, do not necessarily imply the conclusion  
25 that he drew.

1           Q.       But nonetheless, the conclusion is it's a wire  
2 center?

3           A.       That was his conclusion.

4                   MS. MUDGE: Thank you very much.

5                   Thank you, Judge.

6                   JUDGE MILLS: It's five minutes 'til noon. I  
7 think before we move on we'll take the noon recess. That's  
8 all the cross-examination, I believe, for Dr. Tardiff.  
9 We'll come back. If the Commissioners are available we'll  
10 continue with questions from the Bench. Otherwise we'll go  
11 to redirect, and then perhaps come back with Mr. Tardiff  
12 later in the day. But as of right now, we're off the  
13 record.

14                   (A BREAK WAS TAKEN.)

15                   JUDGE MILLS: Let's go back on the record.  
16 Dr. Tardiff, if you'll take the stand again, we'll get  
17 started again.

18                   The Commissioners when last I checked were  
19 still in agenda, so we're going to continue with Dr. Tardiff  
20 to redirect examination. And when the Commissioners come  
21 down here, at an appropriate breaking point we'll recall  
22 Dr. Tardiff for questions from the Bench. And, of course,  
23 following that we'll have further cross-examination based on  
24 those questions and a final round of redirect examination  
25 based on those questions. Right now, let's go with



1     redirect, please.

2     REDIRECT EXAMINATION BY MR. LANE:

3             Q.       Dr. Tardiff, you were asked some questions  
4     about the impact of the Verizon decision, the Supreme Court  
5     decision and its discussion of the investment that was made  
6     by CLECs in their own facilities. Do you recall that?

7             A.       Yes, I do.

8             Q.       And after the Verizon decision, was there a  
9     subsequent DC Court of Appeals decision which looked at  
10    investment in terms of the impact on -- excuse me -- that  
11    looked at the impact of broad unbundling obligations on CLEC  
12    investment?

13            A.       Yes. That was -- that came up, I recall,  
14    maybe 11 days later. It's what's been referred to as the  
15    USTA case, I believe, earlier today.

16                   MR. LANE: Your Honor, may I approach witness?

17                   JUDGE MILLS: Yes, you may.

18    BY MR. LANE:

19             Q.       Dr. Tardiff, showing you case of U.S. Telecom  
20    Association v FCC that is contained at 290 F 3rd 415 DC  
21    Circuit 2002. Is this the decision to which you referred?

22             A.       Yes, it is.

23             Q.       And what was the date of that decision?

24             A.       It was May 24 of 2002.

25             Q.       And with regard to page 425 of that decision,

1 would you tell me whether the District Court of Columbia had  
2 any comments on the impact on investment of broad unbundling  
3 obligations?

4 A. They did.

5 Q. Can you summarize what they said?

6 A. Well, there's a paragraph that refers to the  
7 same total level investment or a similar figure that the  
8 Supreme Court decision referred to, and after noting  
9 that, after noting the fact that the FCC referred to the  
10 total level of investment made by CLECs, it noted -- and  
11 I'll read it -- but the existence of investment of a  
12 specified level tells us little or nothing about incentive  
13 effects. The question is how such investment compares with  
14 what have occurred in the absence of the prospect of  
15 unbundling. Then it cites some -- some previous court  
16 cases.

17 So what they were saying is that especially  
18 important going forward is that what matters is not the  
19 absolute level but what it would have been if the world had  
20 been different.

21 And what's happened, by the way, since the  
22 2001 investment figures that everyone's referring to, both  
23 the Supreme Court decision and this, was that a number of  
24 states, more than a few have significantly lowered UNE-P  
25 prices. So some of the -- some of the increase in UNE-P

1     since that time is undoubtedly related to the price being  
2     lower.

3                     And so, in a sense, whatever incentive effects  
4     existed at the time that the Supreme Court commented on the  
5     matter have been -- in a sense, the incentive to go with  
6     UNE-P and not invest has been -- has been strengthened since  
7     that time as reflected in the -- in the numbers that I cited  
8     in my testimony.

9             Q.       Is your opinion on the incentive to invest as  
10    it relates to the broad unbundling requirement consistent  
11    with what the DC Court of Appeals said in the USTA case that  
12    you referred to?

13            A.       Yes, I believe it is.

14            Q.       And has the FCC itself -- since that USTA  
15    case, have they commented upon the impact on investment with  
16    regard to a broad unbundling requirement?

17            A.       With regard to both the broad unbundling  
18    requirement and favorably priced TELRIC rates, yes. One of  
19    them was the paragraph 3 that we were discussing earlier  
20    this morning you mentioned in your opening comments and  
21    conversation with counsel on that.

22                     The other, by the way, is the fact that after  
23    the TRO was released, the FCC itself is reexamining TELRIC  
24    rules to see whether some reform is needed there. And in  
25    that order as well, there's a concern about incentive

1 effects.

2 Q. From too low prices for TELRIC services?

3 A. Correct.

4 Q. There was also some discussion about the  
5 columns in Schedule 2 to Mr. Fleming's direct testimony that  
6 listed both mass market UNE loops and UNE-P pro -- or UNE-P  
7 arrangements by exchange. Do you recall those questions  
8 generally?

9 A. Yes.

10 Q. And from your perspective, what's the  
11 relationship between the UNE-L mass market loops and  
12 displaying the CLEC UNE-P arrangements?

13 A. Well, the UNE-L mass market loops are directly  
14 responsive to the issue of where CLECs with switches are  
15 currently serving customers. That's something that's  
16 mentioned in both the rule itself and the explanatory  
17 paragraphs, you know, but that -- that gets you the first  
18 part, but you also have to ask the question, within a given  
19 market, in defining the market, is the potential to serve  
20 more customers? And UNE-P was listed in Mr. Fleming's  
21 testimony as another indicator, along with things like  
22 whether CLECs are in offices and have collocation, whether  
23 they provision EELS.

24 And the data show that with respect to  
25 measures like that, where they've actually established a

1 location that they're in somewhat more offices, then they  
2 actually provide mass market UNE loops, indicating that they  
3 have potential to expand beyond the customer base they're  
4 serving now with UNE loops.

5 Q. Let me use an example in the St. Louis MSA.  
6 Imagine that there's a CLEC which has a switch located in  
7 Ladue, which is in the St. Louis exchange, and that they're  
8 using that today to provide unbundled -- in conjunction with  
9 unbundled loops, their own switching to provide service in  
10 Chesterfield. Imagine also a CLEC that is utilizing UNE-P,  
11 that same CLEC in the Manchester exchange next door,  
12 adjoining it.

13 In your opinion, would the CLEC -- if  
14 non-impairment were found, would the CLEC be able to utilize  
15 that switch located in Ladue, not only to serve customers in  
16 Chesterfield, as it's doing today, but also to serve  
17 customers that are in Manchester that the CLEC is choosing  
18 to use to serve via UNE-P today?

19 A. It would -- in a sense it would depend on the  
20 specifics of that particular CLEC, but in general, there's a  
21 high likelihood that this is an example of the kind of  
22 economies of scale and perhaps scope, depending on who  
23 they're serving in that adjoining wire center that the FCC  
24 market definition rule speaks to.

25 Q. And if that same CLEC with the switch in Ladue

1 is using it to serve what we'll call the enterprise market,  
2 whatever that cutoff is, in Chesterfield today, could that  
3 also be -- that same switch be utilized to provide service  
4 to the mass market group in Chesterfield, whoever that's  
5 ultimately defined by the Commission?

6 A. Again, that would depend on the specifics, but  
7 I mean, certainly the FCC thought that was a distinct  
8 possibility in that, you know, I believe it's paragraph 508,  
9 it spoke to the possibility, even the likelihood that a CLEC  
10 employing a switch to serve enterprise customers could also  
11 serve the mass market with that cust-- with that switch as  
12 well.

13 Q. And does Mr. Fleming provide additional  
14 information on how that's done?

15 A. His --

16 Q. Mechanics that a CLEC would go through to  
17 extend service to an area where they're now serving via  
18 UNE-P?

19 A. Well, he would be the one to talk to about  
20 that.

21 MR. LANE: Thank you. That's all I have,  
22 Dr. Tardiff.

23 JUDGE MILLS: Thank you. Dr. Tardiff, you may  
24 step down. As I said earlier, you're subject to being,  
25 recalled for questions from the Commissioners later today.

1                   MR. LANE: And, Judge, would it be possible  
2 to -- I don't know where we'll be in the schedule when the  
3 Commissioners come down, but if it's possible to move  
4 Dr. Tardiff back to take any questions from the Bench, I'd  
5 appreciate it. He's not able to be here next week for the  
6 remainder of the hearing.

7                   JUDGE MILLS: I understand that, and we will  
8 at the earliest opportunity that we have a normal breaking  
9 point in the proceedings, we'll get him back on.

10                  MR. LANE: Okay. Thank you.

11                  JUDGE MILLS: If the Commissioners even have  
12 questions, and I don't know for sure that they do. Thank  
13 you.

14                  Okay. Mr. Fleming, please.

15                  Could you raise your right hand, please.

16                  (Witness sworn.)

17                  JUDGE MILLS: Thank you. Please proceed.

18                  MR. BUB: Thank you, your Honor.

19 GARY ALLEN FLEMING testified as follows:

20 DIRECT EXAMINATION BY MR. BUB:

21                  Q. Mr. Fleming could you please state your full  
22 name for the record.

23                  A. It's Gary Allen Fleming.

24                  Q. Are you the same Gary Fleming that caused to  
25 be filed in this case direct testimony that's been marked as

1 3HC and 3NP?

2 A. Yes.

3 Q. And also you caused to be filed rebuttal

4 testimony that's been marked as 4HC and 4NP; is that

5 correct?

6 A. Yes.

7 Q. Do you have any changes that you need to make

8 to either piece?

9 A. No.

10 Q. If I were to ask you the same questions in

11 these four pieces of testimony, would your answers be the

12 same today?

13 A. Yes.

14 Q. And are your answers true and correct to the

15 best of your knowledge and belief?

16 A. Yes.

17 MR. BUB: With that, your Honor, we'd like to

18 offer Exhibits 3HC and 3NP and 4HC and 4NP into evidence and

19 tender Mr. Fleming for cross-examination by the parties.

20 JUDGE MILLS: Is there any objections to

21 admission of Exhibit 3 and 4, including the highly

22 confidential versions?

23 (No response.)

24 JUDGE MILLS: Hearing none, they will be

25 admitted.



1 (EXHIBIT NOS. 3HC, 3NP, 4HC AND 4NP WERE  
2 RECEIVED INTO EVIDENCE.)

3 MR. BUB: Thank you, your Honor.

4 JUDGE MILLS: Thank you. Cross-examination  
5 goes first to CenturyTel.

6 MR. DORITY: Judge, I have no questions at  
7 this time. Thank you.

8 JUDGE MILLS: Sprint?

9 CROSS-EXAMINATION BY MS. HENDRICKS:

10 Q. Good afternoon, Mr. Fleming.

11 A. Good afternoon.

12 Q. I have a few questions for you. I'd like to  
13 start with your direct, and I have page 34, and lines 4  
14 through, I think, 12.

15 A. Okay.

16 Q. On those lines, you have identified, I  
17 believe, certain assumptions that you placed into your  
18 analysis that support your position or SBC's position that  
19 four lines should be the cutoff for the mass market  
20 customers; is that correct?

21 A. Actually, at this place in my testimony I  
22 believe what I'm talking about is the results of the outcome  
23 of that analysis.

24 Q. Okay.

25 A. If I'm looking at the same place. Would you

1 say again where it is I'm supposed to be looking?

2 Q. It's on page 34, lines 4 through 12 of your  
3 direct.

4 A. That starts results, first word is results?

5 Q. Correct.

6 A. Okay.

7 Q. Well, then, let's make sure we're talking on  
8 the same page. In order to get the results of four lines,  
9 you would have to assume that a customer in Zone 1 of the  
10 MSA always took \$108 worth of data revenue; is that correct?

11 A. No, ma'am.

12 Q. And why is that incorrect?

13 A. Because we're not looking at a single customer  
14 and what they'd always take. We're not looking at this as  
15 an obligation, but instead an opportunity for a CLEC. So  
16 rather than saying every customer would have to do this,  
17 what I'm saying with this is if you look at the market as a  
18 whole -- and we can talk about what that consists of -- but  
19 if you look at the market as a whole, the question is, is it  
20 reasonable to expect that a CLEC changing the way they're  
21 serving a customer and serving them with a loop that is  
22 capable of data could see on the average this kind of  
23 revenue.

24 Q. So on the average, 100 percent of the time, a  
25 customer is receiving approximately \$108 worth of data

1 services; is that correct?

2 A. That's a hard question to answer, on average  
3 100 percent of the time. But on average, that's what they  
4 could expect to get. Is it 100 percent of the time that  
5 they'd get it? No, I don't think so, because we're in a  
6 competitive marketplace. So that would be what they could  
7 expect, however.

8 Q. Now I want to talk about the competitive  
9 market, just so I understand. So does your model assume  
10 that in 75 percent of the chances on the average a CLEC can  
11 secure in Zone 1 \$108 worth of data?

12 A. In what?

13 Q. Your model that got to the results.

14 A. Ask again. I'm sorry.

15 Q. Does your model then assume that in 75 percent  
16 of the cases, that on the average a CLEC can secure \$108 per  
17 month for customers in Zone 1?

18 A. The model, the actual model determines the  
19 cost differences, where we vary. And the other witnesses  
20 did cost models, although we varied some in some of our  
21 assumptions and our methods. Basically it's a cost model  
22 that looks at the cost differences. The results, then, show  
23 that cost difference.

24 What we said is, if you assume that you're  
25 looking at having four customers, four DS0 customers, what

1 would be the amount of cost that you'd need to make up for  
2 that to be economical.

3 Q. Okay. Here's my question.

4 A. Okay. I may not be getting you. I'm sorry.

5 Q. Right. In arriving at your results -- and  
6 this will go a lot faster if we concentrate on the question  
7 being asked. But in arriving at the results that you have  
8 of four lines, does your model assume that in 75 percent of  
9 the chances -- or the cases a CLEC can secure on the average  
10 \$108 per month in Zone 1 of the MSA?

11 A. The model actually doesn't have any assumption  
12 in it about that. The model just looks at the cost. And I  
13 know -- I'm trying to answer your question. The model does  
14 not have an assumption in it about the percentage of times  
15 that one would achieve this or not.

16 Q. Maybe I'm a little confused. What relevance,  
17 if any, does \$108 per month on the average that a CLEC,  
18 according to you, can secure in Zone 1?

19 A. Okay. That's a fair question. What the Order  
20 said is that you needed to consider increased revenues and  
21 the point at which those increased revenues made it  
22 economical. So the model identifies the cost, and if you  
23 use the FCC's default value of four, then it says basically,  
24 if using four DS0s, this is the amount of revenue that it  
25 would take. Then someone has to decide -- and it'll be this

1 Commission's point. We have an opinion about that, but SBC  
2 believes that \$108 is reasonable, looking at what CLECs are  
3 charging for data across the marketplace.

4 Q. And let me understand. So the \$108 is part of  
5 your model. It's one of the assumptions that gets you to  
6 the results of four lines?

7 A. No, ma'am. It's at the end of the model. The  
8 \$108 is the result of the model, not an assumption that we  
9 start with in the model.

10 Q. Okay. So your model's done this way: You go  
11 up and you get the cost to serve DS0s, multiple DS0s. You  
12 measure it against the cost of DS1s, and at that point you  
13 take the results of the cost and you figure in enough  
14 revenue that the results make sense that it's economic at  
15 four lines to switch over to DS1. Is that --

16 A. Not of the model. The model itself is a cost  
17 model that does what you said earlier. It looks at the cost  
18 of providing service on a DS0 basis, using individual DS0s  
19 for a multi-line customer. Then it looks at the cost for  
20 serving that customer using a DS1.

21 Q. Okay.

22 A. So once you've got those costs, we said at the  
23 default value of four, what would be the amount of economic  
24 difference, the cost differential that you'd need to make up  
25 in revenue, and then the assessment is, is that reasonable?

1 I mean, for example, let me give you --

2 Q. Just a second. My question is not if it's

3 reasonable. I'm trying to understand the role of the

4 revenue in your model. And I would -- as I understand it,

5 you basically had the results you want, four lines, and you

6 went up and got the cost and then you figured out the amount

7 of revenue that makes that result four lines, the point at

8 which it's economic to switch over to a DS1? Just yes or

9 no.

10 A. No.

11 Q. Is that how you approached it?

12 A. No.

13 Q. Okay. Then let me see if I can identify

14 myself how you approached it. Once again we have the cost,

15 just like Sprint, AT&T did, we've got the cost of serving

16 multiple DS0s versus the cost of serving a customer over

17 DS1. At that level you agree that you can identify the cost

18 in various different ways on both sides of the equation,

19 both for the DS0 and the DS1?

20 A. As long as it's clear that I don't agree with

21 the way AT&T and Sprint approached it, but I do agree that

22 you can identify the cost.

23 Q. And you've got the cost over here and you've

24 got the result over here?

25 A. Okay.

1           Q.       You've got the cost and you want your result  
2   to be four lines; is that correct?

3           A.       No.   We don't want the result to be four  
4   lines.   What we did is we looked at the cost.   We said at  
5   the default value of four lines, what's the revenue that you  
6   need to make up?

7           Q.       Okay.   So let's say if the default was nine  
8   lines, what would be the revenue, do you know?

9           A.       Actually -- well, I could put it in the model  
10   and I could answer that.   Off the top of my head, I can't  
11   answer that.

12          Q.       Okay.   And I guess I'm just a little confused  
13   because I thought you said that revenue wasn't part of the  
14   model.   So I'm trying to understand how that --

15          A.       Well, the reason why I can't answer that is I  
16   haven't gone through the cost analysis at nine to see if  
17   there would be any incremental revenue needed.   My  
18   assumption would be that, with our model, based on what I  
19   see there, 108, and if you assume -- it would depend on  
20   which zone you were in.

21          Q.       Okay.   And let me --

22          A.       But if you assumed, for example, that the  
23   total cost of a DS0 was \$20 -- and I'm not saying that is,  
24   I'm just saying if you assume that, you had 108, you'd have  
25   a difference of five DS0s roughly.

1           Q.       Now, and let me talk about the incremental  
2 revenue needed. So that's really where the \$108 comes in,  
3 is that's the incremental revenue needed to get to the four  
4 lines, as far as that being an economic point.

5           A.       Okay. That's fair.

6           Q.       Okay. Now, in going out and identifying the  
7 incremental revenue, the \$108 in Zone 1 that comes solely  
8 from the data services, I assume that you went about  
9 evaluating the market in Missouri to see what the  
10 alternatives for the CLECs are?

11          A.       Basically what I did is take a look -- I took  
12 a look at a variety of different data offerings to see  
13 basically what those data prices were and to see whether  
14 this fell in that range. And basically what I found is  
15 anything from -- and the prices were described in  
16 advertisements as starting at -- and we all know what that  
17 means generally when we go out to buy something that's  
18 starting at this price -- but they were starting at around  
19 \$65, \$70 and going up as high as \$1,000, depending on the  
20 kind of speeds and whether you wanted symmetric or  
21 asymmetric-type service.

22          Q.       Now, I want to talk to you about something  
23 that I'm assuming that you checked, and that was the offers  
24 that SBC extends to business customers for data services in  
25 Missouri.



1           A.       No, I did not.

2           Q.       So while you have testified that the  
3 incremental revenue that the CLEC you modeled for Missouri  
4 would need to be \$108 in Zone 1, you're not prepared to  
5 testify about the offers that that CLEC competes against  
6 coming for SBC to serve those same customers?

7           A.       I didn't look at what SBC's charges were,  
8 their products were, no.

9           Q.       Okay. Do you have any knowledge that SBC  
10 offers a business package of 26.95 for data services to  
11 business customers in Missouri?

12          A.       No, I didn't.

13          Q.       And you also have no knowledge that SBC offers  
14 a package of 36.95 for business customers in Missouri?

15          A.       I don't know whether that's true or it's not  
16 true. I do not know.

17          Q.       And just so I understand, in doing your model,  
18 then, the offers that the CLEC that you modeled must compete  
19 against are not all that important; is that correct?

20          A.       I'm sorry?

21          Q.       It's not important to know that the main  
22 competitor in the market, SBC, it's not important for your  
23 conclusions at arriving at incremental revenue to know what  
24 SBC offers in competition to this hypothetical CLEC you've  
25 identified?

1           A.       What I looked at, again, was to see what kind  
2   of prices were being charged by CLECs out there, to get an  
3   idea of what kind of revenue they might expect. I assume  
4   that they set their prices to be competitive with whoever's  
5   out there in the marketplace, and that they wouldn't set  
6   prices that were below the mark that SBC or any other big  
7   competitor has for like products.

8                    So since I haven't seen what you're talking  
9   about for SBC, I don't know if it's a fair comparison or not  
10  of the products that I'm talking about that CLECs sell.

11           Q.       And so you don't believe that SBC offers a  
12  product for 26.95?

13           A.       I just told you I don't know what that product  
14  is. I don't know what you're talking about. I have not  
15  seen that.

16           Q.       Okay. Now I'd like to talk a little bit about  
17  your rebuttal on page 18 is the first point. Let me get a  
18  line for you. The first question and answer series where  
19  you refer to a response from Allegiance, and that's line 1  
20  through 6. And you indicate that Allegiance's view of  
21  enterprise customers, which I think you are testifying is  
22  consistent with SBC's, do you see that?

23           A.       Yes.

24           Q.       I just want to make sure that when you say  
25  that Allegiance's view is consistent with SBC's view of the

1 world, you mean SBC's view of the world for purposes of this  
2 case, not how they treat their wholesale customers outside  
3 of this case; is that correct?

4 A. Say that again. I'm sorry.

5 Q. What I mean to say is if a wholesale customer,  
6 let's say Sage, comes to you and says, I want five DS0s at  
7 this location, SBC's going to give it to them, aren't they?  
8 They're not going to say, hey, wait a minute, you need to  
9 have a DS1?

10 A. I would assume so. That's fair.

11 Q. You assume that they would give it to them?

12 A. If the customer said that's what they want. I  
13 don't --

14 Q. Right. So you're not testifying that SBC is  
15 not out there offering their wholesale customers up to ten  
16 lines, if not more, at one location of, say, DS0s when they  
17 come to SBC for service?

18 A. I'm missing the point. I'm sorry. When you  
19 say our wholesale customers, are you talking about CLECs  
20 coming to us and wanting to --

21 Q. Correct.

22 A. -- get unbundled loops?

23 Q. Correct.

24 A. When the CLEC orders an unbundled loop, we  
25 give them what they order.

1 Q. And even if it's part of a UNE-P product, if  
2 they want ten DS0s at that location, they get ten DS0s. SBC  
3 doesn't say, wait a minute, there's a default of four lines,  
4 we're only going to give you four?

5 A. Not at this point in time, no.

6 Q. Now, my next question is on page 35, and it's  
7 really the question and answer that goes from line 8 to 18.  
8 On line 13, you're saying, I'm unaware of residential  
9 customers or very small businesses that typically require  
10 10 or 12 telephone lines. By way of clarification, do you  
11 mean that you do believe it's typical up to 9, it's just  
12 that 10 and 11 you think is atypical to require?

13 A. No.

14 Q. So are you meaning to say that you're unaware  
15 of small businesses or residential customers that require  
16 anything above four lines?

17 A. What I'm saying is the FCC described the mass  
18 market as consisting of residence and very small business,  
19 and what it talked about very small business, it said these  
20 are going to be businesses that look a lot like residence.  
21 When you start getting in those ranges, they don't look like  
22 residence. A residence doesn't have nine or ten lines.  
23 Residence very seldom has more than three lines.

24 Q. So what you really mean to say is that you  
25 think it's atypical to have anything more than four lines,

1 10 or 12 just happens to be a number you put down there?

2 A. 10 or 12 was responsive to the Sprint and AT&T

3 proposal.

4 MS. HENDRICKS: Okay. I have an exhibit,

5 actually two, I'll go ahead and mark. I don't know what

6 numbers we're on.

7 JUDGE MILLS: I believe we're up to 23.

8 MS. HENDRICKS: So I have 23 and 24. 24 will

9 be an HC exhibit.

10 (EXHIBIT NOS. 23 AND 24HC WERE MARKED FOR

11 IDENTIFICATION BY THE REPORTER.)

12 BY MS. HENDRICKS:

13 Q. Mr. Fleming, I placed two exhibits in front of

14 you. One is marked Exhibit 23 and the other is marked

15 Exhibit 24HC.

16 JUDGE MILLS: I don't have either of those.

17 MS. HENDRICKS: I'm sorry, your Honor. I'm

18 just making sure I've got the numbers correct.

19 BY MS. HENDRICKS:

20 Q. Okay. Mr. Fleming, now that I've got everyone

21 an adequate number of copies, I've placed two copies in

22 front of you. One I've marked 23 and one I've marked 24.

23 I'd like to discuss 23 briefly with you.

24 A. Which one is 23?

25 Q. That is the SBC advertisement.

1           A.       It appears to be an advertisement from the  
2 Internet, from the website that's listed at the bottom.

3           Q.       And do you understand this to be an SBC  
4 offering for voice services only up to 10 lines?

5           A.       Give me a moment.

6           Q.       Okay.

7           A.       This is a little bit of a test for an old guy.  
8 Yeah, that appears to be what it's saying.

9           Q.       And in particular I'd like to draw your  
10 attention to at the bottom it says, if your business has one  
11 to ten lines, get SBC business unlimited. So, in fact, SBC  
12 offers voice line services for up to ten lines; is that  
13 correct?

14          A.       This promotion they offer up to ten lines, it  
15 appears, yeah.

16          Q.       Now I'd like to direct your attention to 24,  
17 which is an HC exhibit, so I caution you not to disclose any  
18 of the numbers.

19          A.       Okay.

20          Q.       Now, can you identify that exhibit for me?

21          A.       It's a response to, it appears, Staff's  
22 request. It's RFI-5, page 1 of 1, and page -- it's page 1  
23 of 1, is the request, and then you have an attachment that's  
24 a response to it.

25          Q.       Okay. Now, would you agree with me the

1 request is asking how you serve, and this is business  
2 customers in Missouri, and for SBC to identify those who  
3 have from one DS0 up to 24 DS0s provisioned to them; is that  
4 correct?

5 A. Well, it's asking for the ones that have 24 or  
6 fewer analog lines.

7 Q. And then if you turn to the attachment  
8 there --

9 A. And it's business customers. Excuse me.

10 Q. If you turn to the attachment, you've got a  
11 listing of customers who have the number of analog lines 1  
12 to 24 that are serviced by SBC; is that correct?

13 A. It has the number of locations, is what it  
14 says at the top of that.

15 Q. I have one chart that says, number of analog  
16 lines, number of business locations; is that correct?

17 A. Yes, the chart on the left. The number of  
18 analog lines under that column is the different categories,  
19 and then it has the number of business locations on the  
20 right for those various amounts of analog lines.

21 Q. And if we look at -- I think the cutoff you  
22 suggested was four. If you look at the number of analog  
23 lines, the five and above, you will see that, in fact, with  
24 respect to these customers, SBC doesn't switch every one to  
25 a DS1; is that correct?

1           A.       I don't -- this doesn't talk about the serving  
2     vehicle necessarily. But let me correct one thing. The  
3     cutoff -- when you talk about the default cutoff from the  
4     FCC's perspective, it's defining the floor of the enterprise  
5     market. Three or less is what defines the mass market.

6           Q.       And what I'm trying to get at is really your  
7     statement that it's not typical to serve small businesses or  
8     residential with anywhere from, I guess, above four lines,  
9     is what you're saying?

10          A.       I don't think I've made that statement. Could  
11     you direct me to my testimony?

12          Q.       Well, I was on page 35, lines 13 through 16,  
13     where you said, I'm unaware of any residential or very small  
14     businesses that typically require 10 to 12 telephone lines.

15          A.       And I don't see those as analogous statements.

16          Q.       So the customer with the one business line is  
17     really a large business customer in this?

18          A.       If I can finish my answer.

19          Q.       Okay.

20          A.       I wasn't saying in my testimony anything about  
21     a serving arrangement. What I was comparing is whether  
22     these customers looked like business customers or they  
23     looked like residential customers.

24          Q.       Okay.

25          A.       And what I was saying is that I didn't see



1 10 to 12 lines looking like a residential customer.

2 Q. But you -- small business is not in the

3 definition of mass market. Am I correct or incorrect on

4 that?

5 A. Very small business is in the FCC's

6 definition.

7 Q. Okay. And so just so the record is clear, in

8 fact, there are businesses that SBC serves with separate

9 analog lines instead of a DS1; is that correct?

10 A. I don't know that that's what this is saying.

11 The question was -- let me look at the question again, if I

12 can.

13 Q. Okay.

14 A. I didn't respond to this particular DR. It is

15 asking for the delineated customers by the number of such

16 analog lines. I don't exactly know how to interpret it. I

17 didn't prepare it. But you could interpret it that way, I

18 assume.

19 MS. HENDRICKS: Okay. I move for the

20 admission of Exhibits 23 and 24HC into the record at this

21 time.

22 JUDGE MILLS: Are there any objections to the

23 admission of Exhibits 23 and 24HC?

24 (No response.)

25 JUDGE MILLS: Hearing none, they will be

1 admitted.

2 (EXHIBIT NOS. 23 AND 24HC WERE RECEIVED INTO  
3 EVIDENCE.)

4 MS. HENDRICKS: No further questions at this  
5 time.

6 JUDGE MILLS: Thank you. Staff?

7 CROSS-EXAMINATION BY MR. WILLIAMS:

8 Q. Good afternoon, Mr. Fleming.

9 A. Good afternoon.

10 Q. Are you familiar with HC Schedule 3 that's  
11 attached to the rebuttal testimony of Staff Witness Thomas?

12 A. I looked at it briefly when the testimony came  
13 out.

14 Q. Would it assist you if I provided you with a  
15 copy of that exhibit?

16 A. It would.

17 MR. WILLIAMS: May I approach?

18 JUDGE MILLS: Yes, you may.

19 Before you go on, let me just reemphasize how  
20 important it is to speak into the microphone. I just had  
21 reports that for people viewing the live broadcast, if  
22 you're even just a few inches away from the microphone at  
23 the podium, we lose your voice. So make a conscious effort  
24 to try to keep it very close to your mouth. That will help  
25 things out. Thank you.

1 BY MR. WILLIAMS:

2 Q. Based on that schedule, would you agree that  
3 it's true that CLECs that own their switches -- that CLECs  
4 with their own switches are primarily serving the Kansas  
5 City, St. Louis and Springfield exchanges?

6 A. No.

7 Q. Do you disagree with the exchanges that have  
8 been identified as being -- or the wire centers that have  
9 identified as being in the St. Louis, Kansas City and  
10 Springfield exchanges in that exhibit?

11 A. I think in my rebuttal testimony we had a  
12 couple of differences. I can look at -- look for those, if  
13 you'd like me to.

14 Q. Would you please do that?

15 A. I believe what we said is that --

16 Q. Could you identify for me where in the  
17 rebuttal testimony?

18 A. Yes. Page 15, starting at line 6, the  
19 question is, are there any corrections that need to be made  
20 to the schedules attached to Staff's testimony?

21 Q. All right. And then what questions or  
22 responses do you have, corrections do you show there?

23 A. I show that Mr. Thomas's Schedules 1HC, 2HC  
24 and 3HC show that Fairgrove, Nixa, Republic, Rogersville and  
25 Willard wire centers as separate exchanges, so they should

1 be included in the Springfield exchange. Similarly, three  
2 other wire centers are shown as their own exchanges rather  
3 than part of another exchange. The Blue Springs wire center  
4 is part of the Kansas City exchange. The Weldon Springs  
5 wire center is part of the Harvester exchange, and the  
6 Sunrise Beach wire center is part of the Gravois Mill  
7 exchange.

8 Q. Now, if those changes were made to  
9 Schedule 3HC to Mr. Thomas's testimony, would that change  
10 your answer to my question as to whether or not it's true  
11 that CLECs with their own switches are primarily serving the  
12 St. Louis, Kansas City and Springfield exchanges?

13 A. Give me a second if I can. I want to make  
14 some notes here.

15 Q. Sure.

16 A. The answer would still be no. Let me qualify  
17 that if I could, if you'd like me to explain.

18 Q. Certainly.

19 A. You're right that in Springfield, the exhibit  
20 that you show as 3-2, it includes -- it adds four more wire  
21 centers into the Springfield, and each one of those shows  
22 that it's -- that they have ported numbers, which a ported  
23 number is indicative that a customer is being served by a  
24 CLEC switch.

25 However, there's also, even in that case, that

1 leaves, let me see, one, two, three, four, five other wire  
2 centers. Out of those five -- did I count that correctly?  
3 Yeah, at least five other wire centers. Out of the five,  
4 three of the five also have ported numbers, so three of the  
5 five that have CLECs providing service.

6 If you look at the St. Louis -- and I haven't  
7 counted these, so bear with me -- there certainly are a lot  
8 of ported numbers within the shaded area there that you  
9 shaded to show the St. Louis area, but then there's a number  
10 of ported numbers throughout the MSA, which would indicate  
11 that CLECs are using their switches to provide service to  
12 customers throughout the MSA.

13 Q. I guess I should refine my question a little  
14 more. What I was actually trying to drive at, which I  
15 believe you may have picked up on, is aren't the majority of  
16 the CLECs with their own switches within an MSA providing  
17 service within the St. Louis, Kansas City and Springfield  
18 exchanges within that MSA?

19 A. With due respect, no. I don't believe so. In  
20 the case of St. Louis, which I believe is three of three --  
21 is that correct? The St. Louis MSA is three of three?

22 Q. That's correct.

23 A. If you look at the area outside the shaded,  
24 there's practically as many lines that are filled on ported  
25 numbers as there are for -- within the area that's shaded.

1 Now, it does show that within the area that's shaded, every  
2 one of the lines is filled -- shows ported numbers, but  
3 outside it's still the great -- the great majority of wire  
4 centers outside that exchange also show that they have  
5 ported numbers there, which would be indicative of a CLEC  
6 providing service using the switch.

7 Q. What about the Springfield MSA?

8 A. The Springfield MSA, out of the five wire  
9 centers that are outside, three of them have ported numbers.

10 Q. And for the Kansas City MSA?

11 A. Kansas City, and I don't think -- just a  
12 moment. I've got to make the corrections here. Out of five  
13 that are outside, correcting for Blue Springs, two out of  
14 the five had ported numbers.

15 Q. I want to turn your attention now to page 9 of  
16 your direct testimony. On line 9 you state, however,  
17 geographic market definitions for these areas outside of the  
18 MSAs in Missouri should be addressed at a later date and are  
19 not discussed in this testimony.

20 Is SBC Missouri proposing that the Commission  
21 define the geographic markets to be those portions of the  
22 metropolitan statistical areas located in Missouri now, and  
23 then later define the geographic areas in Missouri that lie  
24 without those MSAs at a future time?

25 A. Yes. The TRO said that the Commission needs

1 to find the market areas that it's going to use to consider  
2 impairment and consider any assertions, like the assertions  
3 by SBC, of non-impairment. And since SBC is only asserting  
4 non-impairment in three MSAs, the Commission has no  
5 obligation to try to set market areas for the rest of the  
6 state when it's not going to use it at this point in time.

7 Q. So you're saying that any such market area, if  
8 they come into question for impairment analysis, the market  
9 area should be defined at that future point in time?

10 A. Yes.

11 Q. I'd like to direct your attention to page 14,  
12 at line 8 through 10. There you identify that CLECs serve  
13 mass market customers with their own switches located in  
14 wire centers that account for 76 percent of SBC lines in the  
15 three largest MSAs, St. Louis, Kansas City and Springfield.

16 Do you know what the percentage of wire  
17 centers that are located in those MSAs is where CLECs are  
18 using their own switches to serve their mass market  
19 customers?

20 A. It's a little less than 45 percent. It's 38  
21 of 88 wire centers.

22 Q. What about the same calculation for exchanges?

23 A. I don't have any idea. I did not look at it  
24 on an exchange basis. Another thing that I need to add here  
25 is that -- and we'll get into this as SBC submits testimony

1 for the next phase of this. The counts that I've got in the  
2 mass market -- and I think that's what you were asking me  
3 about, right, the mass market column?

4 Q. Yes.

5 A. Those are extremely conservative. They  
6 understate -- we believe that they understate the serving  
7 mass market considerably. They don't, for example, include  
8 any ADSL-type loops. They only include voice grade loops.  
9 We know that certainly carriers can use ADSL loops and also  
10 provide voice over those loops. We excluded those, just  
11 because we couldn't determine for sure they were using those  
12 to provide voice. So we've excluded a large number from  
13 that perspective.

14 I know in another state, comparing discovery  
15 against our records, I found that we were only identifying  
16 only about 10 percent of the loops for that particular  
17 carrier, so it could be significantly understated that way.

18 In addition, we only counted customer  
19 addresses. For example, if we had three sets of loop going  
20 to the same customer address, we did not count that three  
21 times, because even though we had different customer names,  
22 just an attempt to make sure that we were being very  
23 conservative and not double counting in our data. So this  
24 is an understatement of the actual competition out there.  
25 Also doesn't provide any self-provided loops.



1           Q.       I'd like to turn your attention to lines 11  
2 through 20 on page 22 of your direct testimony.

3           A.       Which lines? I'm sorry.

4           Q.       11 through 20. There's a question and answer.

5           A.       Okay.

6           Q.       In that testimony you state that you evaluated  
7 for variability between wire centers within the Missouri MSA  
8 two of the costs CLEC incurs in provisioning service to mass  
9 market customers, the cost of the collocation arrangement  
10 and collocation equipment costs.

11                   Are there any other CLEC costs that may vary  
12 from wire center to wire center within an MSA?

13          A.       I think what I said is I didn't perform any  
14 kind of cost study, but we have a tariff, I believe, in  
15 Missouri for collocation costs. That tariff is the same no  
16 matter what wire center you're in. Similarly, if you're  
17 buying a switch, they don't ask where you're buying it from.  
18 So, no, I didn't look at any other costs than that.

19          Q.       I'd like to turn your attention to page 27 of  
20 your direct testimony. Roughly in that part of your direct  
21 testimony you identify product bundles that are offered in  
22 the market today and include specific examples. In  
23 particular on page 33 at lines 23 to 27, you describe a  
24 series of services that may be bundled by a CLEC.

25          A.       Would you say the page again? I'm sorry.

1 Q. 43.  
2 A. I was still reading 27. Which lines?  
3 Q. 23 to 27.  
4 A. Okay.  
5 Q. You described the CLEC you assumed and the  
6 services being provided.  
7 A. This is describing the typical CLEC that was  
8 assumed in the analysis that was performed.  
9 Q. Have you done any analysis to show how many  
10 four DS0 line customers purchased bundles such as you  
11 described today?  
12 A. No, we haven't asked for that. That would  
13 require data from the CLECs. I don't believe we sent a DR  
14 out requesting that data yet.  
15 Q. And would your answer be the same if I changed  
16 number of DS0 lines to ten? Have you done the same in that?  
17 Your answer was that you have not done the analysis for  
18 four. Have you done the analysis for ten?  
19 A. And you're asking me -- let make sure I  
20 understand what you're asking.  
21 Q. I'll rephrase the question.  
22 A. No, no. It's okay. I just want to clarify,  
23 if I can. Are you asking me how many -- whether I've  
24 checked to see how many lines CLECs are serving in this  
25 manner using an IE-type service?

1           Q.       I'm asking whether or not you've done an  
2     analysis to determine how many ten DS0 line customers  
3     purchase such bundles today, the bundles you describe on  
4     page 33?

5           A.       No, I don't know how many are being -- being  
6     purchased from CLECs.

7           Q.       Sorry. I ended up being longer when I took a  
8     shortcut.

9           A.       That's okay. That's okay.

10          Q.       I'd like to turn your attention to your  
11     rebuttal testimony, in particular page 29. Direct your  
12     attention to lines 9 through 11.

13          A.       Okay.

14          Q.       There you state, it is not reasonable to  
15     exclude revenues because they are uncertain. Didn't you  
16     just testify that you have not done any analysis to  
17     demonstrate how many four DS0 line customers purchase the  
18     service bundles you identified in your direct testimony?

19          A.       What I was speaking to in this, the question  
20     is, is it unreasonable to exclude revenues because they're  
21     uncertain? And I was specifically talking about  
22     Mr. Thomas -- criticism of the SBC model because we looked  
23     at revenues that were uncertain. If you exclude revenues  
24     that are uncertain in this business, then you exclude all of  
25     them, because there's none of them that are certain. That's

1 the point I was making there.

2 Q. Is it possible that the uncertainty in the  
3 revenue stream available to CLECs that Staff Witness Thomas  
4 was referring to page 6 at line 4 of his rebuttal testimony  
5 is the uncertainty in how many customers today subscribe to  
6 such bundles and not to imply that revenues are uncertain?

7 A. I didn't read it that way.

8 Q. I'd like to direct your attention to page 30  
9 of your rebuttal testimony, in particular lines 21 to 23  
10 where you state, also as noted in a footnote, it is not  
11 inconceivable that such small business would have needs for  
12 high-speed Internet access as well.

13 My question to you is, what types of  
14 high-speed services do you expect small business customers  
15 to use?

16 A. I think the needs would vary with the  
17 customer. I mean, I heard earlier today a question or a  
18 comment about the barbershop, and, you know, just from a  
19 pragmatic perspective, you just don't walk into a business  
20 today hardly that you don't see a PC there. The SBA study,  
21 that's Small Business Administration study that I included  
22 in my direct testimony indicated that roughly  
23 57 percent of small businesses -- now, these are very small  
24 businesses practically, they're 9 employees and less -- use  
25 the Internet, and even have websites. They have used PCs in

1 the business and have websites.

2 So I think there's a variety of different  
3 kinds of businesses, even barbershops. We found an example  
4 of a barbershop -- I'm trying to find it here, if you'll  
5 give me a second.

6 Q. Sure.

7 A. In fact, we found an example of two different  
8 barbershops. One is Great Clips, that has a web page.  
9 Another is Fantastic Sam's that has a web page. So even in  
10 the case of barbershops, which one wouldn't think of as high  
11 tech, some of them are using the Internet as well.

12 Q. You specifically reference high-speed Internet  
13 access. Is that -- is your answer responsive to that?

14 A. High-speed references something other than  
15 dialup.

16 Q. So you're saying those examples you provided  
17 deal with high-speed Internet access?

18 A. Yes.

19 Q. Or just Internet?

20 A. I would say this: If you're going to have a  
21 website and it's going to be an interactive website, you're  
22 not going to want to try to deal with that. Not only are  
23 you not want to try to deal with, probably, on a dialup  
24 basis, I think it was Birch's website when they were talking  
25 about one of their offerings, which is an ADSL, which is

1 asymmetric, which means it's fine downstream from the  
2 Internet to the customer, but going back upstream, it's  
3 pretty low speed. And they said if you've got a business  
4 that's really using a website and web hosting, any of those  
5 kinds of things, they're going to need probably SDSL, which  
6 is a higher priced -- it's symmetrical both ways, speeds go  
7 both ways.

8 Q. I'd like to direct your attention to page 35  
9 of your rebuttal testimony, in particular lines 4 through 6.  
10 There you state that the FCC's default value of four DSL  
11 lines for the cutover point is fully supported by the  
12 record, yet you are really stating that you have not done  
13 any analysis to demonstrate how many four DSL line customers  
14 purchase the service bundles that you identified in your  
15 direct testimony.

16 Don't the parties disagree as to how much data  
17 revenue is available to CLECs from their small business  
18 customers?

19 A. I'm sorry. I'm not sure I understand the  
20 question. Don't the parties disagree?

21 Q. Do the parties disagree about how much data  
22 revenue is available to CLECs from their small business  
23 customers?

24 A. Well, I -- I don't know what the other parties  
25 think. They didn't include any data revenues. So I assume,

1 based on that, you could say that they assumed that there  
2 was none.

3           You need to understand, there's three kinds of  
4 customers that you're looking at here as potential  
5 competitive targets. There's customers -- and you've heard  
6 them mischaracterized, I think, as four POTS lines that have  
7 no need for data, don't want data and someone's going to  
8 force it on them, which isn't the case. As I indicated,  
9 Small Business Administration report indicated that over  
10 half of small businesses today, nine employees or less, not  
11 only have  
12 computers but they have websites.

13           Second, that's not the -- that's not in the  
14 title -- excuse me -- the total universe of customers.  
15 You've also got to include -- and I can't remember who said  
16 it. One of the speakers earlier today talked about  
17 customers that have their voice from one company and they  
18 get their data from another company. Well, that's also a  
19 target that you've got a possibility of incremental revenues  
20 by winning the voice customer and winning their data service  
21 as well. Then you've got customers out there that have  
22 voice and data from the same provider, and as you're looking  
23 at that as a potential target, that's also incremental  
24 revenue.

25           So basically all three of those provide the

1 opportunity for incremental revenue. I don't know that  
2 anybody else has looked at the increased revenue potential.  
3 It certainly wasn't in their testimony that I could see.

4 Q. Have you calculated the number of voice grade  
5 lines that would be needed to serve a very small business as  
6 the SBA defines that term?

7 A. No, I haven't gone backwards. You're talking  
8 about -- I guess you're asking about the use of the tables  
9 to do that?

10 Q. Yes.

11 A. No, I have not.

12 Q. Have you calculated the number of voice grade  
13 lines that would be needed to serve a very small business as  
14 defined by the Yankee Group?

15 A. No. I looked at both of those. Restate. I  
16 looked at both of those, but I cannot remember exactly what  
17 the number is and I don't have it written down here with me.

18 Q. Would you agree that an estimate of an average  
19 seven voice grade lines would be reasonable if you applied  
20 the SBA definition of 15 or fewer employees for a very small  
21 business?

22 A. I just don't know. I'm sorry.

23 MR. WILLIAMS: No further questions at this  
24 time.

25 JUDGE MILLS: Thank you. Mr. Magness?



1 MR. MAGNESS: Thank you, your Honor.

2 MR. WILLIAMS: Judge, may I approach the

3 witness?

4 CROSS-EXAMINATION BY MR. MAGNESS:

5 Q. Good afternoon, Mr. Fleming.

6 A. Good afternoon, Mr. Magness.

7 Q. Sorry to keep you waiting.

8 A. That's all right. I didn't mind.

9 Q. If we could start in reverse order of the

10 issues with this multi-line DS0 issue, Issue No. 2. You

11 know what I'm talking about?

12 A. Wherever you'd like to start.

13 Q. Okay. The DS0/DS1 cutover for multi-line mass

14 market customers, I want to try and -- I hope not to cover

15 any ground that's already been covered. I just want to talk

16 about a few examples on the -- as you understand it, the

17 enterprise versus mass market distinction, as it is written

18 up by the FCC. Are you with me so far?

19 Just to be clear about this part, some

20 background, does SBC explicitly sell services using these

21 categories?

22 A. No.

23 Q. So --

24 A. Let me qualify that. Not to my knowledge.

25 I'm not in the retail business for SBC. So not to my

1 knowledge.

2 Q. Okay. So to your knowledge, for example,  
3 there's not a mass market service tariff or enterprise  
4 service tariff?

5 A. These terms -- this may be what you're getting  
6 to. These terms have been used, I guess, in the industry  
7 for some time, but everybody uses them a little bit  
8 differently. And you're right, we don't have a -- we've got  
9 business and residence. We don't have a mass market tariff  
10 that I know of.

11 Q. So when we talk about the enterprise/mass  
12 market distinction, this cutover question is really one  
13 that's posed for us by the federal regulators, that is the  
14 FCC. It's a regulatory question posed to the state  
15 regulators to be resolved in these regulatory proceedings?

16 A. It is posed to them for the purpose of  
17 conducting the impairment analysis.

18 Q. So you're not having salesmen out on the  
19 street now since the TRO marketing mass market services or  
20 enterprise services?

21 A. As far as I know.

22 Q. In your experience at SBC, have you ever been  
23 involved in sales or marketing?

24 A. No.

25 Q. Okay. You're a more network and regulatory

1     guy, right?

2             A.       Yes.   That's correct.

3             Q.       Okay.  Now, let me get to the examples.

4             A.       Okay.

5             Q.       A residential customer who uses a single POTS

6     line, is he or she mass market or enterprise?

7             A.       Residential customers using a single line?

8             Q.       That's all they're buying.

9             A.       I assume that's a mass market.

10            Q.       Okay.  Now, a residential customer that has

11     two lines, they use one for their voice service, dial tone

12     service, they use one for their dialup Internet service?

13            A.       Mass market.

14            Q.       Okay.  And if I gave you a business example

15     for either one of those -- let me just run them for the

16     record to make it clear.  If you're a business customer, you

17     have a single POTS line, are you a mass market or

18     enterprise?

19            A.       Mass market.

20            Q.       And again, if you're a business customer with

21     two lines, one you use for dialup data, one you use for your

22     voice, are you mass market or enterprise?

23            A.       Mass market.

24            Q.       Now, take my residential example.  Let's say

25     this customer decides he's got more data needs than he can

1     satisfy with his current service.  He decides he needs DS1  
2     into his house.

3             A.       Okay.

4             Q.       Okay.  He wants the big fat pipe.  He wants to  
5     drink from the firehose, right?  When that -- well, let me  
6     ask, when that big DS1 pipe gets connected and he's got that  
7     DS1 service at his house, is he a mass market customer or  
8     enterprise customer, according to the FCC?

9             A.       I would assume that he would be an enterprise  
10    customer.

11            Q.       Okay.  And SBC or any carrier that likes  
12    making money would happily sell him the higher capacity DS1  
13    service if he demanded it, wouldn't they?

14            A.       I imagine if someone wanted that, that anybody  
15    would sell it to them.

16            Q.       And the same is true, same example again, just  
17    to flesh it out, one person shop on the business side.  
18    Since it's the only business I know, let's say he's a law  
19    firm.  He decides that he just -- he wants that channel bank  
20    equipment in his life.  He has to have a DS1.

21            A.       Let me clarify something.

22            Q.       Uh-huh.

23            A.       Because I don't want to misspeak here.

24            Q.       Uh-huh.

25            A.       If a single line residence customer who had,

1 let's say, typical -- let's say they had a voice line and,  
2 as you say, maybe had an additional line or had maybe what  
3 we've seen take over a lot of those additional lines, they  
4 had a cellphone. And then they had a T1 data line which  
5 came to their house, which is a more likely scenario,  
6 frankly. Then that would not be the enterprise market,  
7 because they've just got a data line. They're not serving  
8 voice over that.

9                   So I believe that the FCC's definition is that  
10 they're getting their voice service over that. So as long  
11 as we change that hypothetical and somewhat imaginative  
12 example to say that they've got a T1 and they're going to  
13 use one channel on that T1 for voice and the rest of the  
14 channel for data, then in my opinion that would be -- would  
15 fall into the FCC's definition.

16           Q.       Okay. Well, I don't want to change my  
17 hypothetical, but I'm willing to work with yours, too.

18           A.       Okay.

19           Q.       So in my hypothetical the answer is still the  
20 same. If the residential customer took a DS1 and got all  
21 its service off that DS1, whatever kind of service he's  
22 sipping up out of the firehose, is he an enterprise customer  
23 under the FCC's classification?

24           A.       Just to clarify, he's getting voice and data  
25 services over that?

1 Q. Uh-huh.

2 A. Okay. Yes, he'd be enterprise.

3 Q. Similarly as an example, I understand it's

4 probably not going to happen that way, but he would be

5 enterprise, correct?

6 A. Correct.

7 Q. And the customer you just described, let's say

8 he does what I imagine you would think is wise, he wants his

9 voice POTS service. He goes to SBC to get DSL for his data.

10 Is that customer still a mass market customer? I think

11 that's your -- some variant on your counterexample. Is that

12 mass market?

13 A. Yes.

14 Q. Okay. Now, on the other hand, let's say that

15 the lawyer didn't want a DSL.

16 A. It's turned into a lawyer now?

17 Q. I'm sorry. Law firm. One person shop. That

18 was my last example, was my one-person law firm.

19 A. Okay.

20 Q. As I say, it's the only business I know, so

21 I've got to work with it.

22 A. Okay.

23 Q. Now, he -- all he does is he does DWIs and

24 divorces at the Jackson County Courthouse. He, you know,

25 doesn't care about data. Doesn't even need to do a lot of

1 legal research. Whatever the reasons, he wants to keep his  
2 POTS line. So you have a one-person law firm. He has a  
3 POTS line. He's still mass market in your view, right, his  
4 business, I should say?

5 A. Yes.

6 Q. Okay. Now, let's say he doesn't have that  
7 DS1. He's got that same attitude towards the future. He's  
8 a Luddite; I'll admit. He's got the same attitude, but he  
9 does add new staff. So he joins forces with four other  
10 lawyers who do nothing except DWIs and divorces in the  
11 Jackson County Courthouse. They all want their voice  
12 service. They'll do their web surfing at home if they want  
13 to. So they want five POTS lines for voice service.

14 Now, in that example your testimony is that  
15 business would be enterprise?

16 A. If the cutoff was set, and the cutoff to  
17 define the enterprise market was set at four, then that  
18 business would fall in the enterprise market.

19 Q. Okay. Well, you are advocating such a cutoff,  
20 are you not?

21 A. That's correct.

22 Q. Okay. So if your analysis was accepted, that  
23 five-person law firm with just voice service would be an  
24 enterprise customer?

25 A. It would fall in that category of the market,

1 yes.

2 Q. Okay. So we would -- okay. I'm sorry.

3 That's fine.

4 So in each of these examples, if the  
5 customer's data needs are such that the customer decides he  
6 or she wants a DS1, then enterprise customer, correct?

7 A. In all of these examples, customers are going  
8 to make decisions. There's a tendency to mischaracterize  
9 this as SBC's analysis, as it's forcing customers that don't  
10 want data to take data. That's not the case, as I explained  
11 earlier. There may be some customers that don't have any  
12 need and don't want, like you said, the Luddites that don't  
13 want any data.

14 As I explained earlier, basically what it says  
15 when you look across the market as a whole and consider all  
16 the customers out there, is it reasonable to expect that you  
17 could average this kind of incremental revenue, looking at  
18 the market as a whole?

19 Q. Okay. And for all purposes, though, the real  
20 import of the answer is a regulatory question that needs to  
21 be answered in these proceedings, correct?

22 A. If we go back to your original question, do we  
23 use mass market and enterprise in the business prior to TRO  
24 coming out in this way? No, we did not.

25 Q. Okay. So for example, if your analysis was



1     accepted and we had that five-line voice-only law firm that  
2     was then categorized as enterprise, we would have to, in a  
3     way, pretend that they want data, even though in the real  
4     world they're not buying any?

5             A.       No, you wouldn't pretend anything.  Basically  
6     it just segments the market to do the impairment analysis.

7             Q.       But if they were in a market where there was a  
8     finding of no impairment, that would make the determination  
9     whether they could receive UNE-P based service, would it  
10    not?

11            A.       If they were in a market with a finding of no  
12    impairment, it wouldn't make any difference whether they had  
13    five lines or two lines.

14            Q.       Okay.  What if there was a finding of  
15    impairment, would it make a difference?

16            A.       In a market where there was a finding of  
17    impairment, the five-line would be part of enterprise with  
18    that cutoff.

19            Q.       So they wouldn't be able to buy UNE-P at that  
20    point, right?

21            A.       Well, the customer doesn't buy it, but the  
22    CLEC wouldn't be able to provide service to that customer  
23    using UNE-P.  They might be able to use unbundled -- I mean,  
24    271 -- and I'm not a lawyer and I know there's a lot of  
25    discussion about that, but in the TRO, they did indicate --

1 the FCC did indicate that we have a continuing obligation to  
2 provide unbundled access to switching.

3 Q. Under Section 271, is your understanding?

4 A. Yes.

5 Q. Okay. So the -- I think a lot of these have  
6 been relatively -- these examples have been relatively  
7 straightforward, in that you have one line, two lines,  
8 et cetera. I mean, isn't the hard case that the FCC asked  
9 the commissions to consider in making a cutover decision  
10 where you have, say, 15 lines, the multi-line customer who  
11 has 15 lines?

12 Say it's my same example of the law firm,  
13 except now instead of 5 lawyers practicing together, we've  
14 got 15. And there is some point at which you get to a  
15 certain number, whatever it is, and it's going to be more  
16 economical to serve them on a DS1, even if they still just  
17 want the voice. Is that your understanding of how it works?

18 A. No, not exactly.

19 Q. Okay.

20 A. Not at least the way that you set the  
21 question.

22 Q. Okay.

23 A. Certainly if all you want to do is a cost  
24 analysis rather than economic analysis, you can look at the  
25 cost point basically, where it says you ought to serve this

1 way versus that way, regardless of what the customer wants.  
2 And that may be what you're implying, but --  
3 Q. I'm really not.  
4 A. Okay.  
5 Q. I don't mean to take you off on a wrong  
6 direction. What I'm asking is, Phase 2 -- I'm sorry --  
7 Issue 2 of Phase 1 that we're talking about is dedicated to  
8 a particular section of the Triennial Review Order and the  
9 analysis required therein, and why don't we just turn to the  
10 rule that it's about?  
11 A. Okay.  
12 Q. We have to characterize it to each other, and  
13 I believe, for the record, that is 51.319(D)(2), romanette  
14 3, and it's on page 22 of the rules. And they're printed in  
15 the order. Are you there, sir?  
16 A. It's (D)(2)iii B4.  
17 Q. B4. And what's this rule called? What's the  
18 title of it?  
19 A. Multi-line DS0 end users.  
20 Q. Does that give you any sense that perhaps what  
21 the FCC was concerned about was figuring out the cutover  
22 question as it applies to the multi-line DS0 example?  
23 A. Say that again.  
24 Q. They entitled the rule multi-line DS0 end  
25 users, correct?

1           A.       That's correct.

2           Q.       Okay.  And isn't the problem that they are  
3   trying to solve one of figuring out when it makes more  
4   economic sense to serve the multi-line DS0 user with a DS1  
5   or not?

6           A.       What they're trying to do is divide these two  
7   markets, enterprise and mass market, for the purpose of  
8   impairment analysis.  The way they want to do that, they  
9   said, we know what enterprise is in one way, but it also  
10  includes potential and that is customers that could  
11  potentially be served that way in an economic fashion.  And  
12  those economics include what you said earlier, the cost  
13  economics, but it also includes increased revenue potentials  
14  from serving with a -- with a pipe that has higher capacity.

15          Q.       Well, now, in the rule they tell the states  
16  specifically in establishing this cutoff, the state  
17  commission shall take into account the point at which the  
18  increased revenue opportunity at a single location is  
19  sufficient to overcome impairment, and the point at which  
20  multi-line end users could be served in an economic fashion  
21  by higher-speed capacity loops and carriers own switching  
22  and thus be considered part of the DS1 enterprise market; is  
23  that right?

24          A.       You read it well.

25          Q.       Okay.  Very good.  So the ultimate question

1 is, an economic analysis that the Commission must undertake  
2 in order to decide for this multi-line example what's the  
3 cutoff, what's the cutover, correct?

4 A. That's true.

5 Q. Okay.

6 A. Says as a part of its economic analysis, and  
7 it refers us back up to -- up to the paragraph before this  
8 one.

9 Q. Okay. But for many, many examples of making a  
10 distinction between enterprise and mass market, we don't  
11 even need this rule, do we?

12 A. I'm sorry. I'm not --

13 Q. For example, when I ask you about the one-line  
14 residential customer, you don't need to do the math work  
15 that's involved in this rule in order to know under the  
16 other provisions of the order that that's mass market?

17 A. Actually, I don't know if that's true or not.  
18 You were asking me, and I thought you were asking me based  
19 on SBC's recommendation, so all I was looking at in each of  
20 those cases was whether it's three or less or four or more.

21 Q. Isn't SBC's recommendation based on SBC's --  
22 and I would take it yours, since you're testifying here --  
23 understanding of what you're supposed to do under the  
24 Triennial Review Order?

25 A. It's based on the analysis that we've done and

1 the recommendation we have for that DS0 cutoff.

2 Q. And the analysis you undertook was to try to  
3 tell the Commission what it ought to do under the provisions  
4 of the Triennial Review Order?

5 A. That's correct.

6 Q. Okay. And there were other provisions of the  
7 Triennial Review Order besides this that inform you, for  
8 example, that a one-line residential customer is a mass  
9 market customer. You didn't go thumbing back here to this  
10 and say, oh, let's see, right? You know from other  
11 provisions of the order that that's the case?

12 A. And in the UNE remand where it talks about --  
13 I think it's paragraph 293 of the UNE remand, when it talks  
14 about why they selected four lines, they had a series of  
15 explanations that they thought three lines and less  
16 generally was going to capture all of the residential  
17 market.

18 Q. Okay. So when I ask you that question about a  
19 one-line customer, you had to go back to the UNE remand to  
20 know?

21 A. No. That's just an example. They also in the  
22 TRO, they talk about some of the same things about the  
23 difference between the mass market and the enterprise  
24 market.

25 Q. And you reference the UNE Remand Order, which

1 was vacated?

2 A. Portions of. I don't -- I don't know the  
3 answer to that. I'm sorry.

4 Q. Okay. Well, UNE Remand Order. Did you, in  
5 your analysis of how to apply this rule, try to replicate  
6 the analysis that was conducted by the FCC and the UNE  
7 Remand Order to get to this four-line rule, three-line rule,  
8 whichever you call it?

9 A. No.

10 Q. You didn't?

11 A. No.

12 Q. Do you believe that what the FCC did in the  
13 UNE Remand Order is relevant to the Commission's activity in  
14 doing the calculation under this rule?

15 A. In that this Commission references that and  
16 gives instructions and expectations relative to what the  
17 Commission had decided there, yes, it's relevant.

18 Q. You mean the FCC decided that? You said this  
19 Commission.

20 A. I'm sorry.

21 Q. Okay.

22 A. This FCC Commission referenced what an earlier  
23 FCC Commission did --

24 Q. Okay.

25 A. -- in that decision.

1           Q.       Is that decision and the reference to it  
2 mentioned in the rule anywhere, where we're told how to  
3 conduct the multi-line DS0 end user analysis?

4           A.       Not to my knowledge. It's back in the body of  
5 the order.

6           Q.       Okay. Just to be sure, is it in the rule?  
7 The rule's right in front of you. You said not to my  
8 knowledge, but --

9           A.       No. No. Well, I haven't -- I don't know if  
10 it's anyplace in the rule, but it certainly isn't here.

11          Q.       Focusing on the multi-line DSL end user?

12          A.       Right. It's not there.

13          Q.       Okay. So it takes us back to the order then,  
14 correct?

15          A.       That's correct.

16          Q.       So let's go to the order.

17          A.       Okay.

18          Q.       Paragraph 497 I think is most likely where  
19 you're talking about. If you're not, please let me know.  
20 Is that right?

21                   And when I say what you're talking about, what  
22 I meant was, you made this reference to the UNE Remand Order  
23 and its implications. So is paragraph 497 where you were  
24 thinking of?

25          A.       497 does have a reference to that, yes.



1           Q.     Okay. Are there any others that we should be  
2 looking at?

3           A.     I don't know at this time. I don't recall  
4 whether there are or not. This one does have one.

5           Q.     When you did your analysis, what did you look  
6 at in the Triennial Review Order besides this paragraph?

7           A.     For this particular part of it, I read the  
8 whole order, but I'm just saying that I don't recall any  
9 other areas. That doesn't mean there absolutely aren't any  
10 other areas in this order. As you pointed out earlier, it's  
11 600 pages. I don't know that I remember every page.

12          Q.     And that's a hard definitive statement to  
13 make. But you're not aware of any, are you?

14          A.     No, I'm not.

15          Q.     Okay. Now, let me ask you two things about  
16 paragraph 497. First is -- now I'm going to paraphrase  
17 paragraph 497, and I hope that you'll, if I've done anything  
18 misleading, fill in the blanks or fill in the ellipses,  
19 perhaps.

20          A.     I'll try.

21          Q.     But on this idea of what the analysis is  
22 about, in the second sentence of paragraph 497 it says, some  
23 mass market customers, i.e., very small businesses, purchase  
24 multiple DS0s at a single location. Okay? And then you  
25 skip down about four or five lines, and the sentence says,

1 at some point customers taking a sufficient number of  
2 multiple DS0 loops could be served in a manner similar to  
3 that described above for enterprise customers. Okay?

4 And then we go to, therefore, as part of the  
5 economic and operational analysis discussed below, a state  
6 must determine the appropriate cutoff for multi-line DS0  
7 customers as part of its more granular review. And then it  
8 goes on to describe the UNE remand, which we'll talk about  
9 in just a minute. And that analysis is the one that links  
10 back to the rule we just talked about, correct?

11 A. That's correct.

12 Q. So a state must conduct this analysis. If a  
13 state relied on the UNE remand rule and didn't conduct this  
14 analysis, would that state have violated this provision?

15 A. I would guess so. It says as part of the  
16 economic and operational analysis discussed below. Back in  
17 the rule when it talks about this particular thing, it says  
18 as part of the economic analysis above, and that's talking  
19 about the potential deployment analysis.

20 Q. Okay. So you started that with a yes, is that  
21 still your position?

22 A. Yeah, I believe so.

23 Q. Okay. Okay. So the state needs to do this  
24 analysis regardless of what the prior rule was. Let's talk  
25 a little bit about the prior rule. Okay?

1           A.       Okay.

2           Q.       One of those sentences I didn't read I'll read  
3 now. Down at the second-to-the-last line from the bottom on  
4 page 316, we expect that in those areas where the switching  
5 carveout was applicable, paren, i.e., Density Zone 1 of the  
6 top 50 MSAs, closed paren, the appropriate cutoff will be  
7 four lines, absent significant evidence to the contrary.  
8 Did I read that correctly?

9           A.       Yes.

10          Q.       And the next sentence says, we are not  
11 persuaded, based on this record, that we should alter the  
12 Commission's previous determination on this point.

13          A.       Okay.

14          Q.       End of sentence. Okay. And then they  
15 authorize the states to conduct a crossover analysis in the  
16 last sentence. Is that all a fair reading?

17          A.       Sure seems to be, yes.

18          Q.       Okay. So they say, we expect in those areas  
19 where the switching carveout was applicable. Let's start  
20 there.

21          A.       Okay.

22          Q.       Was the switching carveout -- and let me back  
23 up a minute. When they talk about switching carveout, they  
24 being the FCC, they're talking about the UNE remand that you  
25 were talking about earlier?

1           A.       That's correct.

2           Q.       In those areas where the switching carveout  
3 was applicable, was the switching carveout in effect in  
4 Springfield, Missouri?

5           A.       No, it was not one of the top 50 MSAs. Only  
6 Kansas City and Missouri -- excuse me -- Kansas City and  
7 St. Louis were in the top 50 MSAs in Missouri.

8           Q.       Okay. Was the switching carveout in effect in  
9 Kansas City, Missouri and St. Louis, Missouri?

10          A.       Yes, it was in Density Zone 1.

11          Q.       And was it actually implemented by SBC in  
12 those two markets?

13          A.       I don't know.

14          Q.       So you don't know if it was -- that they were  
15 actually -- the carveout ever actually got employed?

16          A.       I haven't been in the wholesale or retail  
17 sales organization, so I don't know any what they did.

18          Q.       Okay. Does it matter any to your  
19 characterization of this rule as a quote, unquote, default  
20 for the cutover?

21          A.       No. I just referenced it as the FCC's  
22 default.

23          Q.       Okay. Well, let's see if it's the FCC's  
24 default. They said that we expect any areas where the  
25 switching carveout was applicable. You've identified

1 St. Louis and Kansas City and, here in Missouri, the  
2 appropriate cutoff will be four lines, absent significant  
3 evidence to the contrary. So in the future, the four-line  
4 carveout would only ever be applicable where it was in  
5 effect before; isn't that right?

6 A. Say that again.

7 Q. Okay. I'll just read you the sentence. We  
8 expect that in those areas where the switching carveout was  
9 applicable, i.e., Density Zone 1 of the top 50 MSAs, the  
10 appropriate cutoff will be four lines, absent significant  
11 evidence to the contrary.

12 A. Okay.

13 Q. Okay. So let's see if we can narrow this a  
14 little bit. The UNE remand provision only applies, and  
15 since we're here in Missouri and we care about Missouri, it  
16 only applies potentially in St. Louis and in Kansas City,  
17 Kansas City, Missouri; is that right?

18 A. That's -- that's correct.

19 Q. Okay. And so -- and it only applies in  
20 Density Zone 1 of those two MSAs?

21 A. That's correct.

22 Q. Potentially. Okay. But would you agree with  
23 me that it only applies if it was in effect?

24 A. No.

25 Q. No. Okay. Let's look a little bit more at

1    this couple sentences.  They say, we are not persuaded,  
2    based on this record, that we should alter the Commission's  
3    previous determination on this point, which unless you  
4    disagree with me, I would characterize as referencing the  
5    sentence that came right before it.

6           A.       I guess that same thing, yeah.

7           Q.       There's not many safe things to assume, but we  
8    agree that's one of them.

9           A.       We can probably do that.

10          Q.       They say this point, and they add one of their  
11   many illuminating footnotes, No. 1545.  And they say,  
12   because the previous carveout only applied where new EELS  
13   were made available and because this Commission allowed  
14   state commissions to require switching to be unbundled, even  
15   in areas where the carveout test was met, it appears the  
16   four-line carveout was adhered to in very few areas of the  
17   country, and it cites to that for authority SBC reply at 30.

18                   Do you know that in the SBC reply that they're  
19   referencing SBC told the FCC that they've never implemented  
20   the carveout?

21          A.       I didn't know, no.

22          Q.       So you don't know whether SBC ever really  
23   implemented a carveout or not, right?

24          A.       That's what I said earlier, yes.

25          Q.       Okay.  But it would make an impact on whether

1 the carveout has anything whatsoever to do with this case,  
2 wouldn't it?

3 A. I'm sorry. But I read the footnote just like  
4 you read, including the last sentence, but in my opinion, it  
5 was whether it applied or not, and it applied to those,  
6 whether they implemented it or not.

7 Q. Okay. So this last sentence says, as part of  
8 their analysis, we expect states to make a finding of  
9 whether or not the carveout was in effect, and you're saying  
10 that the carveout was in effect because the FCC approved it?  
11 Is that what you're saying?

12 A. I'm saying the carveout was applicable whether  
13 the company did or did not activate it in their practices or  
14 not.

15 Q. Okay. So they said -- in the text they said,  
16 we expect in those areas where the switching carveout was  
17 applicable. That's your word, right?

18 A. Uh-huh.

19 Q. Applicable. That it applied because of its  
20 Density Zone 1. That's what applied means. But then in the  
21 footnote they tell us the state needs to make a finding of  
22 whether it was in effect. Are you saying those things mean  
23 the same thing?

24 A. No. I'm saying in the footnote it says, we  
25 expect states to make a finding of whether or not the

1 carveout was in effect. It didn't say what to do with it.  
2 Just said we expect the states to determine it. I don't  
3 think it said whether they should make a decision relative  
4 to whether it's still of value or whether they -- the FCC  
5 still expects the same thing out of them or not. In other  
6 words, I don't see that it necessarily modifies that, but  
7 maybe I'm missing something.

8 Q. Okay. Well, let's look in Footnote 1546,  
9 where the majority writing the footnote says, Commissioner  
10 Abernathy claims that our decision not to preserve the  
11 previous Commission's four-line carveout -- the majority  
12 saying we didn't preserve that rule -- continue the quote,  
13 represents a potentially passive expansion of unbundled  
14 switching. And they cite to her statement. This claim  
15 makes no sense. If the state finds that the appropriate  
16 cutoff for distinguishing enterprise from for mass market  
17 customers in density Zone 1 of the top 50 MSAs is four  
18 lines, there will be no more unbundled switching available  
19 than there was under the previous carveout.

20 Doesn't it seem to make a difference to the  
21 FCC whether the previous carveout made a difference as to  
22 the availability of switching?

23 A. I'm not following you. I'm sorry. Maybe I'm  
24 just dense on this.

25 Q. Well, it's --



1           A.       What's your question?

2           Q.       And I guess that's the troubling part,

3   Mr. Fleming, is you're recommending to the Commission that

4   they accept, and I think it's fair to say, basically begin

5   their analysis -- the Commission here -- with this

6   four-line, which you call a default or the default the FCC

7   selected, and when we read the text, we find that not only

8   did they not select it, they told you you'd be in violation

9   of the rule if you didn't apply the new rule. And you don't

10   know whether SBC ever implemented the old rule, which is the

11   only thing that would give them a shot at using it again.

12          A.       I guess -- I guess we disagree on that point.

13          Q.       Okay.

14          A.       First -- if I recall the points that you made

15   just now, first what I said is that we use the default

16   value. That's true. We use the default value, but the

17   language of the order is clear that they are to do the

18   economic analysis as you've pointed out. But even with the

19   economic analysis, they expect, absent evidence to the

20   contrary, significant evidence to the contrary that in these

21   areas they'd use the FCC's default. If they find

22   significant evidence to the contrary, they're free to use

23   whatever they wish.

24          Q.       And do you have any knowledge of what the

25   basis of that expectation is?

1           A.       The basis of their expectation?

2           Q.       Uh-huh.

3           A.       You mean, why did they say, we expect that

4   you'll use that?

5           Q.       Uh-huh.

6           A.       I guess because they thought the previous

7   Commission's carveout was something that they should uphold

8   at this point.

9           Q.       But they didn't do that, did they? They told

10   the states to go do another kind of analysis?

11          A.       They told them to do another analysis, but

12   then they had a modifier on that that said, hey, where the

13   FCC made this decision before, we expect in those areas that

14   you're going to come up with the same decision, unless you

15   have data that's significantly different than that, that the

16   evidence shows something significantly different.

17          Q.       And the obligation of the state to make a

18   finding whether or not the carveout was in effect, is it

19   your testimony that Missouri should make a finding that in

20   Missouri the carveout -- that SBC had the carveout in

21   effect?

22          A.       No. It's my testimony that it was applicable

23   to those areas in Missouri.

24          Q.       Okay. Well, how's the Commission going to

25   make this finding that the FCC says they're supposed to make

1 about whether it was in effect or not? You're SBC. I think  
2 you're in a position to know.

3 A. Again, it doesn't say that they expect states  
4 to make a finding on the 4 -- on the DS0 cutoff based on  
5 whether it was in effect. It just says they make a finding  
6 of whether or not it was in effect.

7 Q. Was it in effect?

8 A. You have told me, and I'll take for granted  
9 that you're not lying to me, that in the TRO it's indicated  
10 that SBC did not implement --

11 Q. Okay.

12 A. -- the four-line carveout.

13 Q. Okay. Let's move along to the issue No. 1.

14 JUDGE MILLS: Before you do that, we're going  
15 to take a ten-minute recess. Off the record.

16 (A BREAK WAS TAKEN.)

17 JUDGE MILLS: Let's go back on the record.

18 We had just finished up with the first portion  
19 of the CLEC coalition cross-examination of Mr. Fleming.  
20 Let's move on to the second half.

21 MR. MAGNESS: Just to ease everyone's minds, I  
22 don't think it will be another half. It will be fairly  
23 short.

24 BY MR. MAGNESS:

25 Q. I mentioned before the break, Mr. Fleming, I

1 wanted to discuss with you some of the testimony you put in  
2 on market definition related issues. And I'd ask you first  
3 to look at your direct testimony. On page it's Roman i,  
4 little i, it's actually your table of contents, and you have  
5 a heading Roman number III, capital C, support for MSAs is  
6 the proper geographic market; is that correct?

7 A. Yes.

8 Q. Okay. And is it -- when you put this  
9 together, did you mean to be communicating that items 1  
10 through 7 were information that provided support for the  
11 proper geographic market?

12 A. Ask that again, please, if you would. I'm  
13 sorry.

14 Q. You had a heading that says, support for MSAs  
15 is the proper geographic market, and then you have seven  
16 items listed under that heading?

17 A. Yes.

18 Q. CLEC deployment of their own switches, ported  
19 numbers, NXX codes, CLEC collocation arrangements, unbundled  
20 loops, CLEC provided information, and potential variation in  
21 ability to serve customers.

22 A. Yes, sir, I see that.

23 Q. Was it your intention -- I shouldn't say  
24 intention. Is it your belief that the data on those items  
25 provides support under the TRO for the MSA as the proper

1 market definition?

2 A. Yes.

3 Q. So they're all important factors? It's SBC's

4 position they're all important factors in looking at this,

5 correct?

6 A. In my testimony I tie them all back to that,

7 yes.

8 Q. Well, you tie them all back to being important

9 to SBC?

10 A. To being support for the MSAs, for the

11 definition of MSAs.

12 Q. And if we could look at some of the data that

13 I believe you rely on in those sections, I think it would be

14 probably fastest and easiest, instead of trying to go

15 through the text, if I took you to your attachments or

16 exhibits.

17 A. Okay.

18 Q. What did you call them?

19 A. Schedules.

20 Q. Schedules. Okay. In Schedule GAF-1, and let

21 me know when you're there.

22 A. I'm there.

23 Q. Okay. You list metropolitan statistical

24 areas. GAF-1, page 2 is a map of Missouri. Do you see

25 that?

1           A.       Yes.

2           Q.       Okay. And then you get to GAF-3, and you

3 have -- as you know, I discussed this a bit with Dr. Tardiff

4 earlier. Did you prepare this schedule? I'm sorry. GAF-3.

5           A.       GAF-3. I didn't know that you discussed that

6 with Dr. Tardiff, but that's the CLEC switches serving

7 Missouri. Are we looking at the same thing?

8           Q.       Well, actually, mine is entitled Missouri

9 central offices. Is that still part of 2?

10          A.       I think that's Schedule GAF-2 HC.

11          Q.       I'm sorry. I had a hole punch right where the

12 number was in mine. I apologize. So this is still part of

13 GAF-2?

14          A.       It is the -- it is only GAF-2. The other one

15 is Schedule GAF-1, page 1 and page 2.

16          Q.       I'm sorry. I misspoke there. So this is

17 GAF-2?

18          A.       Yes.

19          Q.       The title is Missouri central offices, is that

20 right, just to make sure --

21          A.       Yes.

22          Q.       -- for the record?

23          A.       Yes.

24          Q.       And as you reference, this is a highly

25 confidential document. So, you know, again I'd admonish you

1 not to identify anything that's highly confidential in SBC's  
2 designation without raising that first. Okay?

3 A. Okay.

4 Q. Now, in this attachment or rather schedule,  
5 you have a column called number of CLECs collocated in WC.  
6 I assume that's number of CLECs collocated in wire center?

7 A. That's correct.

8 Q. And the -- and it was your testimony in the  
9 text that the number of CLECs collocated in the wire center  
10 may be an indicator of whether any of those CLECs are  
11 providing mass market service. Was that your testimony?

12 A. Not exactly. My testimony was a couple of  
13 things, and I can turn to it if that would be helpful.

14 Q. That would be fine. You know, Mr. Fleming, I  
15 think I can probably save us some time.

16 A. If you know where it is, you can direct me  
17 there.

18 Q. I may be able to save more time than that. I  
19 really have a general question that applies to number of  
20 CLECs collocated in wire center, to the category called  
21 number of CLECs with EELS in wire center, the category  
22 called number of CLECs with ported TNs or telephone numbers,  
23 category called total ported TNs, the category called mass  
24 market UNE loops.

25 A. Okay.

1           Q.       And if you feel like you need to go to your  
2     text, please do. But is it accurate to say that each one of  
3     these you believe is an important indicator of whether CLECs  
4     are competing in a market, each one of these categories of  
5     information?

6           A.       I used this information to indicate two things  
7     in the criteria that the FCC identified for defining the  
8     mass market. One was the locations where CLECs are serving  
9     customers. Another one there's two factors after that, and  
10    I'm going to try to get them right, but if I don't we can go  
11    to the rule and try to get them straightened out. In fact,  
12    that might be the best thing for me to do, just make sure  
13    that I don't --

14          Q.       Really the general question I just had,  
15    though, was -- I don't mean to keep you from the rule, but  
16    really the only point I was asking was, in your view, these  
17    are important factors in making a determination in this case  
18    on market definition?

19          A.       They are important factors in making that  
20    determination, yes. Thanks for simplifying it.

21          Q.       And you believe, as you said in your heading  
22    to this section, that --or to that section in the testimony,  
23    that they provide support for your market definition  
24    recommendation?

25          A.       That's correct.



1 Q. Okay. Now, the -- just a second. Sorry.  
2 Make sure I have the right document in front of me. Thank  
3 you for being willing to save us some time.  
4 One other question on all of those categories.  
5 Does the presence of a number in any of these cells, okay,  
6 all across this GAF exhibit -- let's just take the first one  
7 that shows up, and again, I'm not going to identify either  
8 the carrier or the number, but in the Joplin, Missouri  
9 MSA --  
10 A. I'll just say there's no carriers identified  
11 in this, but some of it is -- it's highly confidential  
12 because it contains numbers that are significant, so --  
13 Q. You make a good point. That's correct. The  
14 Joplin, Missouri MSA, the wire center CLLI code is not  
15 confidential, is it?  
16 A. No, as long as we're not going to relate  
17 numbers to it.  
18 Q. Okay. And I'm going to just say for the  
19 record the one I'm looking at is NESHMOGL. Do you see where  
20 I am?  
21 A. Yes, I do.  
22 Q. And then there's a number under the category  
23 CLEC -- numbers of CLECs -- I'm sorry -- number CLECs with  
24 ported TNs?  
25 A. Yes.

1 Q. You see that number?

2 A. Yeah.

3 Q. We're not going to say the number. But I'm

4 asking you generally about that number and the others --

5 A. Okay.

6 Q. -- in any of these categories. Do any of them

7 tell us for certain that say this CLEC in Joplin that has --

8 that has total ported numbers --

9 MR. MAGNESS: And if you could strike the

10 reference to the number, I would appreciate it.

11 JUDGE MILLS: Yes, you may do that.

12 MR. MAGNESS: I'm sorry for that, after all

13 that trouble.

14 BY MR. MAGNESS:

15 Q. The reference to the number, does that number

16 indicate that that CLEC is providing mass market services in

17 that location?

18 A. If you'd give me just a second, please.

19 Q. Sure.

20 A. A number in a category may or may not. In

21 that particular category, is that what you're limiting the

22 question to?

23 Q. No. Actually, if you could answer as to all

24 the categories.

25 A. A number in the category called mass market

1 loops would be definitively indicative that a CLEC is  
2 serving a mass market customer using their own switch based  
3 on the default definition that SBC has recommended. Okay.

4 But let me go on to answer your question. On  
5 page 15 of my testimony, beginning on line 18 -- well,  
6 actually, beginning on 16, it says, does this ported number  
7 data include both mass market and enterprise customers? I  
8 think that was your question, was it not? You were asking  
9 if it's only mass market customers?

10 Q. Not exactly. I think I was asking sort of  
11 more generally, does the fact that there is a number there  
12 demonstrate definitively that there is a mass market  
13 customer being served? Let's ask it that way.

14 A. It demonstrates that there is a customer being  
15 served by a CLEC switch. In some cases it definitively  
16 identifies it as a mass market customer. No other ones it  
17 does not.

18 Q. And is it your contention that this mass  
19 market UNE loops is a definitive?

20 A. It is.

21 Q. Okay. And is a -- when you say mass market  
22 UNE loop, I understand that you're using the four line  
23 default?

24 A. Mass market is three lines or less.

25 Q. Okay. You're using your recommendation to

1 define mass market?

2 A. That's correct.

3 Q. Now, when you define UNE loop, do you mean a  
4 two-wire analog loop?

5 A. It is a two-wire analog loop. There are a lot  
6 of criteria that we used. As I indicated in response to an  
7 earlier question, that's a very conservative number. It  
8 doesn't include, for example, it doesn't include ADSL or  
9 DSL-capable loops.

10 Q. And it doesn't include four-wire loops?

11 A. That's correct.

12 Q. Okay. I want to show you what --

13 MR. MAGNESS: I intend to introduce this, your  
14 Honor. Would you like me to go ahead and mark it?

15 JUDGE MILLS: Please.

16 MR. MAGNESS: And I believe it's 25; is that  
17 correct, your Honor?

18 JUDGE MILLS: Yes, that's correct.

19 MR. MAGNESS: And once I am done marking it,  
20 Ms. DeCook is distributing copies to the parties, and this  
21 is -- I should say before I get started, this is a highly  
22 confidential exhibit. The first page is not highly  
23 confidential. It is a cover page to a discovery response,  
24 but it notes that all the following information is  
25 classified highly confidential.

1                    (EXHIBIT NO. 25HC WAS MARKED FOR  
2   IDENTIFICATION BY THE REPORTER.)  
3   BY MR. MAGNESS:  
4            Q.        Mr. Fleming, as we're marking this, you have  
5   been handed a copy of what's been marked as Exhibit 25; is  
6   that correct?  
7            A.        That's correct.  
8            Q.        Okay. Could you take a moment --  
9                    JUDGE MILLS: Excuse me. For purposes of the  
10   record, we're going to call this 25HC.  
11                    MR. MAGNESS: Thank you.  
12                    JUDGE MILLS: Because it's a highly  
13   confidential exhibit.  
14   BY MR. MAGNESS:  
15            Q.        And for the record, you have 25HC,  
16   Mr. Fleming. Could you take a look at this document while  
17   we're finishing the marking?  
18            A.        Yes, I will.  
19            Q.        Okay. I'm going to just read for the record  
20   the discovery response. The heading from this case is on  
21   here. It is CLEC Coalition Request No. 1, DR No. 1-21d(i),  
22   and then it says in bold capital letters UPDATED, page 1 of  
23   1. The DR, the question is, for each carrier listed in  
24   1-20, that is RFI 1-20 -- and if you'll indulge me,  
25   Mr. Fleming, I can tell you those are the identified trigger

1 candidate companies, and I think if you examine this you can  
2 confirm that for me or not here in Missouri identified as  
3 trigger candidates.

4               So for clarity, for each trigger candidate  
5 company listed, please provide for each switch ILEC claims  
6 is used for self provisioning: Capital D, the number of  
7 loops by type (i.e., analog UNE, DS1 UNE, analog special  
8 access, DS1 special access, et cetera) provisioned to each  
9 collocation: And then the little i part is within the last  
10 three months.

11              And then SBC provides a spreadsheet which is  
12 marked as confidential, and the answer to the question is,  
13 the spreadsheet provides updated, in bold, loop quantities  
14 by wire center/CLLI, CLLI, for those carriers identified in  
15 response to DR 1-20. And the responsible person listed is a  
16 Toni, T-o-n-i, Welch-Jones, 7220 Kennedy Avenue, Floor 1,  
17 Hammond, Indiana 46323.

18              Now, again, I've done another accurate  
19 dramatic reading of the document, I hope. Is that accurate?

20           A.       Sounds accurate.

21           Q.       Okay. And SBC provided a response -- I'm  
22 sorry. Do you know when this data response was provided to  
23 the CLEC Coalition?

24           A.       I don't see a date on here. No, I don't.

25           Q.       Okay. I'll just represent for the record, and

1 I have a printed e-mail if I need to, we received it last  
2 Friday, and it updated a response received previously.

3 And is this -- if you look at the spreadsheet  
4 that's attached, again, don't want to identify anything  
5 confidential, me or you.

6 A. We'll both do our best.

7 Q. Okay. So you have CLEC names, and these are  
8 the companies identified by SBC as triggers, and then there  
9 are CLLI codes and then there's a column called speed, and  
10 it tends have two-wire, 2W. That means two wire, doesn't  
11 it?

12 A. I would guess so, yes.

13 Q. DS1 means, we've been saying it all day, DS1?

14 A. Well, let me back up just a moment. I see --  
15 this is the first time I've seen this document. In some of  
16 it has 2W, and then the next line it says two-wire. Okay.  
17 It's analog, digital. I didn't see the next column.

18 Q. Okay. The two-wire in your understanding of  
19 the network and the terminology, that would refer to the  
20 two-wire analog loop that you said is what a CLEC's going to  
21 be using if it's serving mass market customers?

22 A. That's what I would -- well, no. Let's  
23 clarify. What I said is, in the count that I had on that  
24 other document, we had filtered out a number of things. One  
25 of the things that we filtered out was ADSL-capable loops.

1 ADSL-capable loops can still be used to serve the mass  
2 market.

3 In fact, that's what line sharing was all  
4 about, using an ADSL-capable loop for one carrier to provide  
5 voice and one carrier to provide DSL. One carrier can  
6 provide both over an ADSL loop or two carriers could line  
7 split and share that. But nevertheless, we have not  
8 included those loops in that count.

9 Q. Okay. That's interesting. The two-wire  
10 analog loop that's referenced there, though, is if the -- I  
11 mean, we just went through this a minute ago. If the CLEC  
12 is providing mass market services using its own switch, the  
13 thing we want -- your claim is that if they're providing a  
14 two-wire loop to collo, that's most likely mass market?

15 A. I wouldn't know that from this, frankly.

16 Q. Okay. Okay. But what you would know is a  
17 count of the, I guess as you put it in your exhibit, the --  
18 you would have at least some information on the mass market  
19 UNE loops that you reference in your schedule?

20 A. This wouldn't necessarily have much relation  
21 to that. What I've got in my schedule might be a subset of  
22 this. Again, I haven't looked at this document other than  
23 when you just handed it to me now.

24 But, in essence, this -- if I understand this  
25 correctly, and we won't talk about numbers. So I'm just



1 saying that so it keeps us both honest and away from that.

2 Q. Sure.

3 A. But for this particular carrier and for this  
4 particular CLLI code, for example, in a 2W analog, let's  
5 say, for example, that it was AD2. Let's say that that's  
6 what it said for that first entry in September.

7 Q. Uh-huh.

8 A. This is to a collocation site; is that  
9 correct? That's your understanding as well?

10 Q. Yes.

11 A. The mass market loops that I included in my  
12 2HC, Schedule 2HC is based on customer locations, and it's  
13 limited to no more than three to a customer location. So we  
14 looked at three, two and one loops going to a single  
15 customer location. It had nothing to do with going to a  
16 collocation site.

17 Q. Okay. But you did designate them by wire  
18 center, did you not?

19 A. By where -- yes, it was by wire center, but it  
20 was by wire center to customer locations that were located  
21 in that wire center. So it would not encompass all of these  
22 loops by any means, I wouldn't think.

23 Q. And where did you get your data?

24 A. The data was originally pulled out of the  
25 wholesale billing system. I didn't pull it out directly.

1 Some people did that.

2 Q. Do you know who did?

3 A. It was -- in some of the responses, it's

4 Industry Markets is the group, the wholesale group which has

5 access to that data, pulled it out, and I was able to use

6 basically a pull from that.

7 What we did is we filtered that data further

8 to make sure that it was going to be extremely conservative

9 and that we weren't going to double count anything. As a

10 result, we ended up undercounting.

11 Q. And the main thing you don't want to double

12 count in this context, you've been testifying, is the

13 two-wire analog loop?

14 A. Well, we wouldn't want to double count, for

15 example, if you had a strip shopping center and it all

16 showed up at the same address and yet there were four

17 different customers shown on the record, and let's say

18 customer A had three loops, customer B had two loops,

19 customer C had three loops. Because it all went to the same

20 address, we would only use one of those.

21 Q. Okay. I'm going to show you -- and I didn't

22 make copies of this because it is also HC, and I'm not

23 intending to offer it, but I can if at the Commission's

24 pleasure I need to.

25 I'm going to show you what was the original

1 answer prior to the update.

2 MR. MAGNESS: If I could approach the witness?

3 JUDGE MILLS: You may.

4 BY MR. MAGNESS:

5 Q. Now, if you'll look at the -- and I'm just  
6 directing you to the -- to the spreadsheet. If you could  
7 look at the spreadsheet, the updated spreadsheet versus this  
8 one. Just, for example, on the first page, there is a CLEC  
9 identified, a CLEC identified, right?

10 A. Uh-huh.

11 Q. Okay. And let's just call that CLEC 1. Okay?

12 A. Okay.

13 Q. All right. CLEC 1 is identified and we have a  
14 listing of these loops. Now, in the original one, the data  
15 was provided for September '03, July '03, March '03,  
16 September '02. Do you see that?

17 A. Yes, I see the column headings.

18 Q. Okay. And then the updated one, the data was  
19 for September '02, March '03, June '03, September '03. So  
20 it's essentially reversed. You see what I mean?

21 A. Okay. I see what you're saying.

22 Q. The date order is reversed. Okay. Then  
23 there's one month that's different. In the original one --  
24 I'm sorry. In the update it is June '03, and in the  
25 original the data was provided for July '03.

1           A.       Okay.

2           Q.       You follow me?

3           A.       Uh-huh.   Yes.

4           Q.       Now, if you look in the CLLI number that is

5 MNCHMO59?

6           A.       Yes.

7           Q.       For CLEC No. 1, two-wire analog, there is a

8 number for July '03 in the original.  Is that the same

9 number as shows up for June '03?

10          A.       These are the ones you're comparing?

11          Q.       Yes.

12          A.       No.

13          Q.       And is the June '03 updated number higher or

14 lower?

15          A.       This is the update here?

16          Q.       Yes.

17          A.       The June '03 number is higher.

18          Q.       Okay.  Then when we get to the total for CLEC

19 1, if you could flip the page, you see where I am with the

20 total for CLEC 1?

21          A.       Again, you're pointing to the --

22          Q.       July.

23          A.       -- column July '03?

24          Q.       Yes.  Please compare that to the June '03

25 data.

1           A.       Okay.

2           Q.       Okay. Is the updated number a lower number or  
3 a higher number than the original one?

4           A.       The updated is a lower number than the  
5 original.

6           Q.       Okay. Now, I'd ask you if you could examine  
7 those two columns for CLEC No. 2. I think you'll need to  
8 flip the page. And I'm talking about the total. So we're  
9 looking at CLEC No. 2. That is the second one that's listed  
10 on the confidential exhibit. We're comparing July '03  
11 versus June '03.

12          A.       Okay.

13          Q.       Now, is the July '03 number that was provided  
14 originally larger than the June '03 number?

15          A.       Yes.

16          Q.       Is it approximately twice the number?

17          A.       Yes.

18          Q.       Okay. So in the update you reported two-wire  
19 analog loops that were half what you reported in the first  
20 data response that asked the same question, correct?

21          A.       By you?

22          Q.       SBC.

23          A.       Yes. I didn't -- I didn't send either one of  
24 these. So again, I've only seen these now.

25          Q.       And you never reviewed two-wire analog loop

1 data in preparing your testimony?

2 A. I reviewed two-wire analog loop data that was  
3 filtered, as I indicated to you earlier, and I'll be talking  
4 more about exactly how that was filtered when we get into  
5 the next phase.

6 Q. Okay. Now, if we go to -- just cut to the end  
7 of this exhibit.

8 A. Again, I need to make another distinction.

9 Q. Uh-huh.

10 A. In the testimony that I gave, the schedule  
11 that I had, I'm talking about loops at customer locations.  
12 This, the question -- the question here or the request for  
13 information was asking for loops that terminate at  
14 collocation. Those are two very different numbers  
15 potentially.

16 Q. Okay. If you go to the end of the exhibit,  
17 and you still have the original one and the updated one  
18 before you, don't you?

19 A. Yes, I do.

20 Q. Okay. If you get to the last page, there is a  
21 line that says grand total.

22 A. I see it.

23 Q. And if you compare June '03 to the now  
24 updated -- and I'm not sure what it means by updated. One  
25 is June and one's July. But if you look at the number that

1 was provided Friday, is it correct -- and again, not using  
2 the numbers, is it correct that there are less than half the  
3 UNE loops served by CLEC switches identified in the update  
4 than there were in the original?

5 A. Yes.

6 Q. Okay. So you've talked to us about how you  
7 tried to be conservative and you tried to undercount. Data  
8 provided by SBC indicates a doubling from information  
9 provided to the CLECs in discovery. Do you know what to  
10 account this to?

11 A. No. Again, I haven't seen this until today.  
12 But just looking at this data, you're talking about one  
13 column on the data.

14 Q. Uh-huh.

15 A. And that's June '03 versus what's labeled as  
16 July '03. If you look at September '03, which I guess is  
17 the most recent, is that correct?

18 Q. September '03 would be, yes.

19 A. The numbers are identical. So apparently --  
20 apparently in one of those columns something happened and  
21 they've corrected it.

22 Q. Okay.

23 A. But in the most recent data, it appears that  
24 it was accurate the first time and it's accurate the second  
25 time in the update.

1           Q.       Let me ask you, Mr. Fleming, and I will agree.  
2   I will represent having reviewed this that the numbers for  
3   the other months are correct. But June is replaced with  
4   July, and the numbers are -- I mean, would you agree with me  
5   they are substantially different?

6           A.       Just in the things that you presented to me  
7   and had me look at, yes, there's a significant difference in  
8   the two.

9           Q.       Okay. Such as the grand total being half what  
10   it was originally reported?

11          A.       As we said earlier, yes.

12          Q.       You consider that significant, don't you?

13          A.       Yes.

14          Q.       Okay. Would you have any reason to believe  
15   that the difference between June and July explains that  
16   difference in the number of loops being reported? I mean,  
17   was June a hot month and July a slow month or does that make  
18   any sense to you?

19          A.       Sir, I have no idea. Again, I didn't provide  
20   any of this data, I hadn't seen any of this data, so I don't  
21   know what happened.

22          Q.       As --

23          A.       But apparently somebody found something and  
24   they decided to update it because they had more accurate  
25   data.



1           Q.     Okay. Do you consider a correction of this  
2 magnitude an update?

3           A.     I don't know what else you would call it.

4           Q.     Okay. As a witness testifying on behalf of  
5 SBC, does this sort of thing raise any concern for you about  
6 the integrity of the data you've been reviewing on the  
7 number of mass market UNE loops?

8           A.     No, it does not.

9           Q.     Why is that?

10          A.     Well, what you've asked me to look at is  
11 something, No. 1, that I didn't prepare, that wasn't  
12 prepared for me on my behalf.

13                   No. 2, you've showed me a document that SBC on  
14 its own has corrected and provided to you the updated  
15 numbers. So I would say that it indicates that in the first  
16 version an error was made. I don't know what the nature of  
17 that error was. They found it and they corrected it. And I  
18 would also point out that the other three were correct, and  
19 so --

20          Q.     Three out of four ain't bad?

21          A.     No. I just don't know -- well, that's a bit  
22 flippant, but I would just say that they found the problem  
23 that they had and corrected it.

24                   Certainly -- certainly I feel that the data  
25 that I've used is not only accurate but it's extremely

1 conservative. Again, the two are only related by the fact  
2 that we're talking about loops. We're talking about them in  
3 very different ways.

4 Q. Well, and loops are one of the critical  
5 determinants of whether there's mass market competition,  
6 aren't they?

7 A. Loops are when you get to a customer at a  
8 location. It's a customer served by those loops at the  
9 location. But you can't use them in general and just say  
10 loops and prove anything.

11 Q. And as -- does a discrepancy of this  
12 magnitude, would it cause you to want to perhaps review the  
13 accuracy or adequacy of the data that you present under the  
14 mass market UNE loops?

15 A. Well, No. 1, the data that I've presented  
16 under there so far is only for us determining, in essence,  
17 part of the market definition. So we're always looking at  
18 the data trying to make sure that the data that we've got is  
19 correct, but I'm very confident of the data that I'm going  
20 to be proposing for this next phase and the data that I've  
21 showed you here is correct.

22 Again, it understates. So is it complete?  
23 No, it understates. And, in fact, I found instances where  
24 because we limit it to analog loops where we're not  
25 accurately showing the picture of what's happening out

1     there, that there's actually more competition than what I'm  
2     showing.

3             Q.       Now, a two-wire analog loop provisioned to a  
4     collocation, that is a -- the loop itself is an SBC service,  
5     is it not, or an SBC unbundled network element, correct?

6             A.       That's correct.

7             Q.       SBC provides that to the CLEC, right?

8             A.       That's correct.

9             Q.       You would -- would you presume that SBC has  
10    accurate data concerning loops that it provides to CLECs?

11            A.       I would assume so, yes.

12            Q.       And would you presume that when one talks  
13    about the number of two-wire analog loops, are there two  
14    different sets of books of the two-wire analog loops. Why  
15    would the data be any different?

16            A.       Again, I didn't prepare this data, so I can't  
17    answer that question.

18            Q.       Fair enough.

19                    MR. MAGNESS: Your Honor, I'd move that we  
20    enter Exhibit 25.

21                    JUDGE MILLS: Exhibit 25HC has been offered.  
22    Are there any objections?

23                    (No response.)

24                    JUDGE MILLS: Hearing none, it will be  
25    admitted.

1 (EXHIBIT NO. 25HC WAS RECEIVED INTO EVIDENCE.)  
2 MR. MAGNESS: And that's all I have, your  
3 Honor.  
4 JUDGE MILLS: Just for the record, Mr. Lane  
5 and Dr. Tardiff, it does not appear that there are any  
6 questions from the Commissioners for Dr. Tardiff. So he's  
7 free to go.  
8 MR. LANE: Thank you, your Honor.  
9 JUDGE MILLS: We'll continue with  
10 cross-examination of Mr. Fleming with Mr. Lumley.  
11 MR. LUMLEY: Thank you, your Honor.  
12 CROSS-EXAMINATION BY MR. LUMLEY:  
13 Q. Sir, if you'd turn first to page 4 of your  
14 direct testimony. Lines 5 and 6, you're making reference to  
15 the FCC's national finding of impairment regarding local  
16 circuit switching for the mass market, and you make  
17 reference to the FCC having acted based solely on alleged  
18 hot cut related costs and difficulties. Do you see that  
19 statement?  
20 A. Yes.  
21 Q. Would you agree with me that in paragraph 475  
22 of the Triennial Review Order the FCC specifically concluded  
23 that hot cut problems posed an insurmountable disadvantage  
24 to CLECs?  
25 A. I have to check. Just a second. 475, is that

1     what you said?

2             Q.       Correct.

3             A.       Your question is whether 475 says that hot cut

4     process creates an insurmountable disadvantage?

5             Q.       That the FCC stated that they concluded that

6     it did.

7             A.       Yes. And they went on to say that they find

8     the present impairment can be mitigated by an improved loop

9     provisioning process.

10            Q.       I understand. You go on in your testimony

11    talking about -- and you're quoting from the Order. I think

12    you're quoting from paragraph 461, if I'm reading your

13    footnote correctly, but that the FCC is saying that a more

14    granular analysis may reveal different conclusions, but

15    that's after a state commission also addresses whether or

16    not a batched hot cut process is required; is that correct?

17            A.       Yes, I'd assume so.

18            Q.       On page 7, just to gain a further

19    understanding of your proposal regarding the market

20    definition, at the bottom of the page when you're saying

21    that you're really -- you're really not talking about MSAs

22    generically, right? You're actually narrowing it down and

23    refining it further; is that right?

24            A.       Well, I am talking about MSAs in Missouri, and

25    since SBC can't represent what's happening in territories

1 outside themselves, we're talking about the SBC territories  
2 within that MSAs, but I'm not changing the MSAs. They are  
3 what they are.

4 Q. I understand. But you're really not talking  
5 about the entire MSA for your purposes, you're talking  
6 about --

7 A. For our purposes for -- again, this is all  
8 being done in order for an impairment analysis to be  
9 conducted. For that impairment analysis, we would say that  
10 the portion of the MSA that we will assert on impairment has  
11 got to be in our territory.

12 Q. And you're excluding portions of MSAs that are  
13 in other states, correct?

14 A. I would assume that the Commission wouldn't  
15 entertain hearing about evidence about the portions in other  
16 states.

17 Q. And you're proposing a variation in the  
18 boundaries if a wire center boundary crosses over the MSA  
19 boundary, correct?

20 A. I think that's a mischaracterization. The MSA  
21 boundary stays the same. What we're saying is that a wire  
22 center goes as its switch goes. It's no different than what  
23 we did in L&P when we implemented L&P because you were  
24 having to modify switches.

25 Q. I think you misunderstood my question. I'm

1 just trying to understand your position.

2 A. Okay.

3 Q. I wasn't suggesting you were changing the MSA  
4 boundaries. Your market definition would not rely solely on  
5 the MSA boundary, but it would also take into account  
6 whether or not there was a wire center that overlapped that  
7 boundary?

8 A. Actually, it does -- it does rely solely on  
9 the MSA boundary. It's the switch location that determines  
10 whether that wire center is considered part of the MSA or  
11 not.

12 Q. But you would include in that hypothetical  
13 wire center that has a switch in the MSA but has a portion  
14 outside the MSA?

15 A. A portion of the wire center area outside the  
16 MSA, sir?

17 Q. Right. You would include that outside area in  
18 your market?

19 A. Yes, that's true. That's fair. Okay.

20 Q. Now, would you agree with me that within the  
21 MSAs SBC has service areas that are not contiguous with each  
22 other? For example, if you look at the St. Louis --

23 A. If some that's true. In some it's not true.  
24 For example, the pictures that you have there behind you,  
25 the large charts, that might even be instructive on your

1 last question. You asked a question about a wire center.  
2 If you see the one down there in kind of the brownish color.  
3 Q. I'm color blind.  
4 A. Oh, are you? This is not going to help you a  
5 whole lot, is it? The one -- can you see red and brown?  
6 Can you differentiate the broad line that goes around it?  
7 Q. Down here?  
8 A. Yes. You can see the area that comes up just  
9 a little bit in that wire center that's in the -- yes, that  
10 area right there. I can't read. You're color blind and I'm  
11 just blind. I can't read it from here.  
12 Q. The DeSoto exchange?  
13 A. Okay, DeSoto exchange. You've got an area  
14 there that I think you were referencing before. You were  
15 talking about contiguous. If you look at that, you'll see  
16 that the wire centers for the most part are contiguous. I  
17 think there's one exception to that in the MSA. Is that the  
18 one exception? Yes. And I don't know, the other two I'd  
19 have to look at in order to respond to you.  
20 Q. And you have a map in your testimony, but I'm  
21 just trying to understand. Your proposal would count these  
22 noncontiguous areas that are within the same MSA as one  
23 market; is that correct?  
24 A. It would include in the portion of the market  
25 that we're -- that we're talking about with the Commission



1 with trying to demonstrate nonimpairment, it would include  
2 only the SBC wire centers.

3 Q. Whether or not they're contiguous?

4 A. That's correct.

5 Q. On page 8 at the bottom, you indicate that --  
6 or you propose an alternative that the Commission could  
7 freeze market boundaries. Do you see that statement?

8 A. Yes.

9 Q. Are you indicating that there's some way in  
10 which the Commission can somehow preclude future commissions  
11 from making a different decision?

12 A. No. No. What I'm saying is that if the  
13 Commission puts out an Order, they could choose, I would  
14 assume -- I'm not a lawyer. I'm sure you can help me with  
15 that portion of it. But I would assume that the Commission  
16 could say the MSA is -- that we're defining, the market area  
17 that we're defining is the boundary as of a certain date.

18 Q. Okay. So you're not purporting to ask them to  
19 try and bind future commissions by that statement?

20 A. I honestly just don't know the answer to that.

21 Q. Okay. On page 14, you're discussing your  
22 Schedule GAF-2HC which you had been going over in some  
23 detail earlier, and in part you're relying on your data as  
24 to whether or not there are ported numbers in the exchange;  
25 is that correct? That's one of the things you're looking

1 at?

2 A. Ported numbers are one indicator that a CLEC  
3 is serving an area with a switch, yes.

4 Q. All right. And you're counting -- when you  
5 then aggregate these wire centers to come up with your wire  
6 centers that then comprise 76 percent of the SBC access  
7 lines, when you're aggregating those wire centers, you count  
8 a wire center even if there was only one or two ported  
9 numbers, correct?

10 A. I did it all with an automated count from an  
11 Excel sheet, and I assume that it looked at all of them that  
12 had a number in it. However, I do have to mention that this  
13 doesn't represent all of those, because ported numbers are  
14 only those indications where a CLEC customer actually ported  
15 their number.

16 Additional lines or perhaps even a customer  
17 that didn't necessarily want to retain their number would  
18 have a number from the CLEC's NPA/NXX and wouldn't be  
19 reflected in this.

20 Q. But you would agree with me that there are  
21 exchanges that only have a very small number of ported  
22 numbers on your schedule, and wherever there was a number  
23 bigger than zero, you then pulled the entire wire center  
24 into your calculation and came up with this 76 percent  
25 figure?

1           A.       Wait just one moment, please.  No, I don't  
2   agree with that.  And let me try to explain.  The 76 percent  
3   figure is for the question before that, and that had to do  
4   with unbundled local loops, not ported numbers.

5                   Actually ported numbers, if I'm on the right  
6   page with you, Mr. Lumley, ported numbers comprise --  
7   99.9 percent of all the ported numbers actually occur in the  
8   MSAs, which is one of the reasons why SBC supported MSAs.  
9   In addition to that, around 86 percent of the wire centers  
10  in the MSA have ported numbers, not 76.  That number that  
11  you're seeing, 76, is that from line 10, is that where  
12  you're seeing that, sir?

13          Q.       Yes.

14          A.       That has to do -- if you follow that question  
15  back and it says, please explain why this information is  
16  relevant to this proceeding.

17          Q.       Uh-huh.

18          A.       It goes back to page 13, and the title of that  
19  is unbundled loops.  What information does SBC Missouri have  
20  about UNE loops that each CLEC buys?  So that is responding  
21  to unbundled loops, not ported numbers.

22          Q.       So the 76 percent only takes into account that  
23  column of information --

24          A.       Yes.

25          Q.       -- from your schedule?

1           A.     Yes, sir.

2           Q.     I misread that. Thank you.

3                   On page 15, and this is probably what confused

4 me. I'm sure it was my fault. I don't mean to say it was

5 your fault. You say, line 6, you're talking about ported

6 numbers, correct?

7           A.     Yes. Starting at line 3, yes.

8           Q.     When you say in a majority of wire centers,

9 there you're -- if there's anything more than zero on your

10 chart, you count that wire center?

11          A.     Right. That was -- that was part of the

12 number that I just quoted to you, the 86 percent of the --

13 over 86 percent of the wire centers have a ported TN.

14 Again, I did it from a count option on Excel, and it looks

15 at any value in there.

16          Q.     On page 33, line 14, and you were discussing

17 this issue a while ago, do you recall during prior cross you

18 testified that -- I'm not sure if you were stating your view

19 or your understanding of the FCC, but that a cutover at

20 three would capture virtually all residential customers? Do

21 you recall saying something to that effect?

22          A.     I was -- yes. I was talking about what the

23 FCC had said in UNE remand about their rationale for setting

24 the default at four.

25          Q.     When you're discussing potential revenues,

1 revenue opportunities, you're looking at business customers,  
2 aren't you?

3 A. Yes, I assume that that's going to be business  
4 customers.

5 Q. Are you really proposing to apply your  
6 standard to the, say hypothetically at least, the unusual  
7 residential customer that happens to have more than three  
8 lines, somebody like me that has four children?

9 A. You have my sympathy. What I would say is the  
10 order is the order. The order is going to define the mass  
11 market and enterprise market, and the FCC has given us the  
12 vehicle to do that.

13 Q. So the Commission would need to somehow take  
14 into account the fact that an analysis that looks only at  
15 business, they would want to try and make sure they're not  
16 accidentally impacting residential customers in a way they  
17 don't intend?

18 A. No, I don't believe that's true. I believe  
19 the FCC said this is the way I want you to determine the  
20 cutoff which will define the mass and enterprise markets,  
21 and then we will look in the mass market to see, because  
22 we've already defined enterprise market as not being  
23 impaired, and then that will be the subject of the  
24 impairment analysis.

25 And I don't think after you make that cutoff

1     that they make any distinction between very small business  
2     and residence. They lump those together in the mass market.

3             Q.       Are you saying that you think the FCC  
4     instructed this Commission to ignore potential impacts on  
5     residential customers?

6             A.       I think it's not part of this proceeding.

7             Q.       On page 16 of your rebuttal testimony, I'm  
8     correct that at the bottom of the page you make the  
9     statement that SBC continues to believe that MSAs provide  
10    the appropriate grouping of wire centers, correct? You make  
11    that statement?

12            A.       Yes.

13            Q.       On page 47 you're addressing testimony from  
14    Mr. Starkey and Dr. Ankum regarding integrated digital loop  
15    carrier, IDLC. Do you see that?

16            A.       Yes, it's the -- it's part of my answer on  
17    that.

18            Q.       Right.

19            A.       So actually the question starts on page 46,  
20    answer starts on 46.

21            Q.       But the general subject of your answer is that  
22    that part of their testimony, you're responding to that,  
23    correct?

24            A.       The question was, does IDLC present a  
25    significant problem to CLECs as Mr. Starkey, page 38, and

1 Mr. Ankum, page 35, indicate in their testimony?

2 Q. And you're testifying on page 47 that the

3 overall use of IDLC is de minimus, correct? You make that

4 statement?

5 A. That's correct.

6 Q. Do you agree with me that it's growing?

7 A. No.

8 Q. Do you agree that it's projected to grow?

9 A. No.

10 Q. Do you have familiarity with those kind of

11 projections or you just don't know?

12 A. I haven't seen any projections one way or the

13 other, but in general there's no reason to believe that it's

14 growing.

15 MR. LUMLEY: All right. That's all my

16 questions.

17 JUDGE MILLS: Thank you. For Sage.

18 CROSS-EXAMINATION BY MS. MUDGE:

19 Q. Good afternoon, Mr. Fleming.

20 A. Good afternoon, Ms. Mudge.

21 Q. You are aware, sir, that I represent Sage

22 Telecom in this case, are you not?

23 A. Yes, ma'am.

24 Q. And am I correct, sir, that in the context of

25 your 30 years of telecommunications experience, which I

1 believe you talked about at the beginning of your testimony,  
2 am I correct, sir, that basically up until 2001 all of your  
3 work had been with SBC or Southwestern Bell in one form or  
4 another?

5 A. With the exception of four years where I  
6 worked for Bell Communications Research in the North  
7 American Plan Administration.

8 Q. And is it also correct, sir, that in the -- in  
9 all of your term of working in telecommunications, that you  
10 have not actually worked for a competitive local exchange  
11 carrier?

12 A. I have never been employed by a CLEC, that's  
13 correct.

14 Q. And is it also correct, sir, that in that  
15 context you have not participated in business entry strategy  
16 with a competitive local exchange company?

17 A. Not exactly. I mean, in a couple regards.  
18 First, I was on the initial teams doing the first  
19 interconnection negotiations with CLECs, so we certainly got  
20 into extended discussions on what they needed from us to  
21 assist them in their startup strategies.

22 Q. Let me correct -- just make sure, let me  
23 clarify. On this interconnection team that you're talking  
24 about, you were on that interconnection team that negotiated  
25 on behalf of Southwestern Bell; is that correct?



1           A.       That's right, and I was the network  
2     representative. So what we were doing is we were talking  
3     about their network needs, how they wanted to deploy and  
4     what they needed for us to go with that.

5           Q.       And that was from a network and operational  
6     need; is that correct?

7           A.       It was from a network and operational need,  
8     but it kind of fit with my background, having spent five  
9     years in network planning where I did that same kind of  
10    thing myself. I looked at economic analysis switch and  
11    transport, fiber, conduit, cable, that type deployment to  
12    make recommendations for our own company.

13                    The networks -- what we found is if we could  
14    get -- no offense intended, but if we could get the lawyers  
15    and the policymakers out of the room, the network people  
16    could generally talk with each other pretty well because we  
17    talk the same language.

18          Q.       And no offense taken. And I also understand,  
19    though, that in the context of those type of discussions,  
20    there would not have been discussions as to advertising  
21    strategy for purposes of entry level; is that correct?

22          A.       Yeah, that's fair to say. Certainly not --  
23    not from my portion of the interconnection negotiations.

24          Q.       Okay. Thank you very much.

25          A.       You're welcome.

1           Q.       Now, in the preparation of your testimony, did  
2 you look at the customer mix and the actual types of  
3 customers that Sage has in the state of Missouri?

4           A.       No. I looked at their testimony, but I did  
5 not -- I don't have access to their customer records to know  
6 that kind of information.

7           Q.       Didn't necessarily look, then, or ask for the  
8 characteristics of the type of Sage customers in terms of,  
9 for example, the number of lines that a single customer  
10 would use?

11          A.       No. I saw their testimony on that, and I do  
12 under-- I've heard some things about Sage, but, you know, do  
13 I have detailed knowledge of their customer base and that  
14 sort of thing? No, outside of the testimony, I don't.

15          Q.       Okay. And based on the testimony that you  
16 read, one of the things -- and correct me if I'm wrong --  
17 one of the things that you probably read is that that all of  
18 Sage's customers, whether they're residential or business,  
19 are all served using DS0 loops or voice grade equivalent  
20 lines, is that correct, based on just what you've read in  
21 the testimony?

22          A.       My understanding is that they're all served  
23 using UNE-P. So it's the combination of the platform of a  
24 DS0 grade loop and switching.

25          Q.       So as a result, just to make clear, there

1 would be no use of a DS1 loop or higher; is that correct?

2 A. That's my understanding, yes, Ms. Mudge.

3 Q. Do you also recall in the testimony, rebuttal

4 testimony that Sage has put forth that there are customers,

5 in fact, that have multiple lines that are basically voice

6 grade lines?

7 A. Yes. My recollection is that they said by and

8 large their customers were less than four, but there were

9 some scattered instances of being more than that.

10 Q. In fact, there are instances, are there not,

11 from your recollection of the testimony? And this is not a

12 test. I'm just trying to make sure.

13 A. Well, you'd have to grade me at probably a low

14 C, then, because I don't recall exactly that they gave

15 numbers. I just recall saying that the vast majority of

16 those fell in the three and below, but there were some

17 exceptions to that.

18 Q. No problem. So for those customers that --

19 and I'll even use your terminology -- that don't fall in the

20 vast majority, that, in fact, obtain services from Sage,

21 multiple lines, four or more, would you agree with me, sir,

22 that those particular customers have made the choice that

23 Sage is the most economical carrier for their purposes?

24 A. I don't know what the basis for their choice

25 was.

1           Q.       Would you -- would you believe that the  
2     customer choice is an important aspect of the analysis that  
3     this Commission needs to take into consideration in the TRO  
4     proceeding?

5           A.       Could you restate that or ask it again? I'm  
6     not sure that I followed it. I'm sorry.

7           Q.       Sure. Do you believe or is it SBC's position  
8     that customer choice, the customer's choice of their carrier  
9     has any bearing in the context of the review that this  
10    Commission is taking, and let's first of all start off in  
11    Phase 1?

12          A.       Let me qualify this. I believe that this  
13    proceeding is ultimately in Phase 1 is leading to a  
14    determination of impairment, and that determination of  
15    impairment is limited to CLECs who are serving mass market  
16    customers using their own switches.

17                 Now, to the extent that we're talking about  
18    those customers and their selections, I think it's relevant.  
19    To the extent that we're talking about other customers and  
20    their selections, I don't think it is relevant.

21          Q.       So the end user's choice of having Sage  
22    provide them with multiple lines or four or more from your  
23    viewpoint is not something that this Commission should take  
24    into consideration in the context of this proceeding?

25          A.       I think that there's some people that want to

1 talk about preservation of UNE-P as being what the  
2 Commission should be considering. I think the Order is  
3 fairly clear what we're talking about is whether CLECs are  
4 impaired or not.

5 Q. Okay. So from your perspective, then, the  
6 customer choice or the end user -- I'll use that term as  
7 opposed to customer.

8 A. Okay.

9 Q. The end user's choice is not something that  
10 you believe this Commission should take into consideration  
11 in the context of the review in this proceeding?

12 A. Let me qualify that. I'm going to try to  
13 answer you.

14 Q. Because I don't think you have yet. I'm just  
15 trying to get an answer from you.

16 A. Let me qualify this. I think to the extent  
17 that in the market definition, that that information could  
18 be relevant in defining a market, because I've included some  
19 UNE-P data that I've considered to be helpful in trying to  
20 set the market.

21 In the next phase where we're looking at  
22 impairment, I think it's not relevant at all.

23 Q. Now, let's talk a little bit about you  
24 utilized NXX codes --

25 A. Okay.

1 Q. -- as one of the data points that you use for  
2 purpose of support that the Commission should use or  
3 identify the MSA as the appropriate geographical market,  
4 correct?

5 A. It's one of the factors that I used, yes.

6 Q. And I believe you even have an exhibit, and  
7 it's GAF-4, correct? Do you want to turn to that?

8 A. Yes, I will.

9 Q. Thank you, sir.

10 A. Okay. I'm there.

11 Q. Now, what GAF-4 -- and correct me if I'm  
12 wrong, Mr. Fleming, but this particular document is not  
13 highly confidential, is it?

14 A. That's correct, it's not.

15 Q. And what this schedule is intended to show is  
16 simply the number of NXX codes that is assigned or are  
17 assigned to a particular competitive provider in each of the  
18 MSAs that are identified, correct?

19 A. That's correct.

20 Q. Now, you were involved in sort of the  
21 evolution of the number portability concept, of interim  
22 number portability and permanent number portability; is that  
23 correct?

24 A. That's correct.

25 Q. And would you agree with me, sir, that in the

1 context of the evolution of number portability, that the NXX  
2 code doesn't necessarily tie to a specific geographic  
3 location any longer because of the ported numbers?

4 A. No, I wouldn't agree with that.

5 Q. With respect to an individual ported number  
6 that a customer is using, you don't believe that to be true  
7 anymore?

8 A. No, I don't agree with that.

9 Q. Okay.

10 A. And let me explain if I can.

11 Q. Sure.

12 A. Just to make sure that -- NXXs are assigned to  
13 a CLEC based on -- they can request them for a rate center  
14 area. The rate center area could be potentially comprised  
15 of a single wire center area or it could be comprised of  
16 several wire center areas. So it's still going to define an  
17 area.

18 A customer is not supposed to be able to port  
19 their number and move out of a rate center and retain their  
20 number. So to the extent that people are following the  
21 rules, it still defines a geographic area.

22 Q. Okay. Now, the data that you have here in  
23 terms of the NXX that are assigned, that just simply shows  
24 the codes that were assigned to a CLEC; is that correct?

25 A. It shows the quantity of codes that are

1 assigned, yes.

2 Q. And it doesn't show, then, for example, the  
3 type of service that is provided using a particular NXX  
4 code, does it?

5 A. That's correct.

6 Q. And this document also does not show the type  
7 of customers for which the NXX codes are used; is that  
8 correct?

9 A. That's correct, and I noted that in my  
10 testimony.

11 Q. Yes, sir. And you will agree with me, would  
12 you not, sir, that if I look at -- let's say I'll use the  
13 St. Louis, Missouri MSA. Do you have that there, sir?

14 A. Yes, I do.

15 Q. And would agree with me, sir, that there's a  
16 variance of 1 to 15 NXX codes assigned to the different  
17 competitors?

18 A. There are. There's 115 total, which is about  
19 a little over a million telephone numbers that are available  
20 to be used.

21 Q. Right. And you've anticipated my next  
22 question, and I appreciate that, and that is, how many  
23 NXX -- or how many actual numbers are in an NXX code?

24 A. There's 10,000 numbers.

25 Q. And these numbers that you have on GAF-4 do



1 not show the actual number of NXX numbers that are being  
2 used by each CLEC for which there's been assigned an NXX  
3 code?

4 A. No, they don't show the utilization because I  
5 don't have that information. But I will say that the codes  
6 are not assigned lightly, that a CLEC is supposed to be able  
7 to demonstrate that they intend to use those codes. And if  
8 they don't use them or if they acquire codes through  
9 consolidation, some of the consolidation that we see in the  
10 industry, if they're not using those codes, they're  
11 encouraged to return them so that we can avoid having to do  
12 MPA relief, which nobody likes.

13 Q. Again, let me make sure, however, that this this  
14 representation, this table does not show the actual number,  
15 nor is it intended to show the actual number of numbers that  
16 are assigned in each NXX code?

17 A. No, it's not speaking about the quantities  
18 that are actually assigned to end user customers. What it's  
19 talking about is the potential a CLEC has, it's another  
20 facility that they have in order to serve mass market  
21 customers.

22 Q. Okay.

23 A. Because one of the things they'd need, they've  
24 got to have NXX, they've got to have telephone numbers, so  
25 they've got those.

1           Q.       Okay.  Let's talk a little bit about CLEC  
2   entry and your use of CLEC provided information, and I  
3   believe that's on page 19 of your direct testimony.  Would  
4   you mind turning to that, please, sir.  Are you there?

5           A.       Yes, I am.

6           Q.       And in your -- in your footnotes, you actually  
7   give us some examples, I guess, so to speak, some headlines,  
8   if you will, of examples of carriers that are bringing  
9   service to particular areas within the state of Missouri,  
10  correct?

11          A.       Yes.

12          Q.       Now, first let me ask you, sir, with respect  
13  to Footnote 13, and that deals with Gabriel Communications,  
14  do you see those quotations?

15          A.       Yes, I do.

16          Q.       In each of those instances, and I believe  
17  there are three of them, and I stand to be corrected, those  
18  three, those all deal with bringing services to businesses;  
19  is that correct?

20          A.       Let me check the footnote, if I can go back.

21          Q.       Absolutely.  I'm happy to highlight those  
22  portions of it, but I'm going to let you look at it, too.

23          A.       No, I'll be glad.  Basically what they say  
24  is -- I'm sorry.  I'm looking at the wrong one.  Let me get  
25  there.

1 Q. Footnote 13.

2 A. Yeah. It threw me off because I saw NuVox,  
3 and Gabriel is now NuVox. But it said Gabriel  
4 Communications, Inc. is bringing the future  
5 telecommunications to St. Louis businesses, so you're right.

6 Q. And also it says Kansas City businesses,  
7 correct, and Springfield businesses, correct?

8 A. That's correct.

9 Q. And then look back up, then, at Footnote 12,  
10 if you would, and there you give us a highlight from  
11 Allegiance, correct?

12 A. Yes.

13 Q. And that one also deals with Allegiance  
14 bringing service to small and medium-sized businesses,  
15 correct?

16 A. Yes.

17 Q. One of the great things about being at the  
18 very end is you have to go through a lot that's already been  
19 taken care of.

20 A. I appreciate that.

21 Q. So if you'll bear with me so I'm not  
22 duplicative of things that have been asked.

23 Could you turn to page 8 of your direct  
24 testimony, please, and tell me when you're there, sir.

25 A. I'm there.

1           Q.       Now, as I read page 8 of your testimony, you  
2     propose certain work-around solutions to account for  
3     problems caused by situations where the MSA boundary lines  
4     do not match up with the state lines or wire center  
5     boundaries, correct?

6           A.       I wouldn't characterize it as work-around, no,  
7     ma'am.

8           Q.       But you propose how the Commission should  
9     handle it?

10          A.       I propose the exchanges, the SBC exchanges or  
11     portions of the MSA that we will be asserting nonimpairment.

12          Q.       Sure. And would you agree with me, sir, that  
13     this proposed solution, which is specifically found on  
14     lines 13 and 14, for example, of page 8 of your testimony,  
15     wouldn't you agree with me that this proposed solution  
16     requires an examination of a geographic area that is more  
17     granular than MSA? Tells you to look at it with respect to  
18     a wire center basis, isn't that correct, sir?

19          A.       No, I don't think that's what it's saying.  
20     I'm saying that the market would be comprised of those wire  
21     centers where the switch falls inside the MSA boundary, SBC  
22     wire center.

23                    Maybe we're talking past each other. But if I  
24     understand what you're saying, the MSA is the line -- if we  
25     can use that as an example, the chart behind you, would it

1 be helpful?

2 Q. Uh-huh.

3 A. The MSA is the bright red line. We're talking  
4 about the St. Louis, Missouri MSA is the bright red line  
5 around that. The areas that are shaded are the SBC  
6 exchanges that would be included in the market definition  
7 for the purpose of impairment analysis.

8 As we said earlier, the DeSoto exchange, the  
9 boundary doesn't exactly match the MSA boundary, but the  
10 switch is located inside the MSA boundary. So the DeSoto  
11 exchange would be considered part of the market.

12 Q. And when you use the term DeSoto exchange,  
13 you're talking about the DeSoto wire center, correct?

14 A. That's what I meant. Thank you for the  
15 correction.

16 Q. Now, let's turn our attention, if we can, to  
17 just a few questions with respect to the crossover if we  
18 could.

19 A. Okay.

20 Q. I believe -- and again, I'm not trying to  
21 mischaracterize your testimony, but in general part of your  
22 testimony in large part is based on what you have referred  
23 to as the CLEC integrated access analysis; is that correct?

24 A. No. It's not integrated access. I'm sorry.  
25 You're talking about my testimony and whether the model is

1 called the CLEC integrated access analysis?

2 Q. Right.

3 A. Okay. Yes. I'm sorry. I was going down a  
4 different path.

5 Q. I promise, I wasn't trying to test you or trip  
6 you up. I was really trying to characterize it accurately.

7 A. I know. I just was not following you.

8 Q. And your model assumes that the type of CLEC  
9 that you're talking about provides service to business  
10 customers in both the mass market and enterprise markets,  
11 correct?

12 A. The assumption was a typical CLEC might serve  
13 all three, might be an enterprise, mass market business and  
14 residence. But certainly we -- for this purpose we're  
15 assuming they are serving both mass and enterprise market,  
16 business.

17 Q. Business, correct?

18 A. Yes.

19 Q. And I believe you also say that the CLEC may  
20 provide service to a residential customer?

21 A. Yes, they sure could.

22 Q. Okay. Now, am I correct, sir, that while your  
23 model looks at an increased revenue opportunity, there is no  
24 comparable or any type of analysis with respect to the  
25 demand for that particular type -- those particular type of

1 services that you use in your hypothetical?

2 A. As I explained earlier, this portion of the  
3 analysis, the actual model itself looks at the cost, and so  
4 it compares the cost of a DS0 versus a DS1 service vehicle.  
5 And then, based on the default value of four DS0s, it says  
6 what would you need to gain, what would a CLEC need to gain,  
7 because this is from the CLEC perspective, the rule is, what  
8 would they need to realize in increased revenue in order to  
9 make this economic.

10 Q. Right. And it does not look, then, at what  
11 type of demand there would be for the type of services that  
12 you have used in the context of your model; is that correct?

13 A. The model itself does not look at demand.

14 Q. Okay. Now, if I could ask you, and if you  
15 don't have it in front of you, you were asked by Sprint  
16 counsel Exhibit 24HC.

17 MS. MUDGE: And, your Honor, if I may  
18 approach, I'd be happy to give Mr. Fleming an extra copy.

19 JUDGE MILLS: Sure.

20 THE WITNESS: That would probably be the  
21 quickest for both of us.

22 BY MS. MUDGE:

23 Q. Just so you know, I'm going to do a really  
24 good job of not saying anything identifying any particular  
25 numbers with respect to this.

1                   Let me ask you, but you do recall that you had  
2   some discussion with respect to this exhibit, correct?  
3           A.       Yes, I do.  
4           Q.       Now, the way I read this, what this document  
5   is intended to explain is to provide the number of business  
6   customers using 24 or fewer analog lines served by SBC.  
7   Would you agree with me?  
8           A.       That's what I read it to say as well.  
9           Q.       And would you -- if we look at the attachment,  
10   and again without going into any numbers, would you agree  
11   with me that this chart demonstrates that SBC is finding it  
12   economical to serve customers with more than three DSL  
13   loops?  
14          A.       I don't think I can make that conclusion. I  
15   can make -- I don't know the basis behind this. I could  
16   make a conclusion that -- well, we can't talk about the  
17   numbers.  
18          Q.       Correct.  
19          A.       I can make a conclusion that there are  
20   numbers, from analog lines 1 to 24 there are numbers in the  
21   column next to those.  
22          Q.       So it does show that SBC -- let me put it to  
23   you this way. It does show that SBC is providing loops --  
24   or I'm sorry -- multiple lines to customers using DS0 loops  
25   of four or more?



1           A.       That's what appears to show, it sure does.

2           Q.       Now, let's assume that the Commission

3 establishes a DS0 cutover at three loops as you've

4 recommended.

5           A.       Okay.

6           Q.       Is it your position that in that type of

7 market the Commission should prohibit CLECs from utilizing

8 SBC's unbundled local switching to serve a customer with

9 more than three DS0s at a particular location?

10          A.       That's the way I understand the TRO, yes.

11          Q.       Would SBC continue to serve the customers

12 shown in this attachment that have three or more lines --

13 I'm sorry -- with four or more lines, would SBC continue to

14 provide service with those customers even after the

15 Commission set a cutover for CLECs?

16          A.       I mean, that's kind of an open-ended question.

17 I think SBC's intention would be to continue to serve these.

18 However, if a CLEC using their own switch won those

19 customers, they could serve them as well.

20          Q.       And that's fine, but I think what you have

21 said is that at least with respect to the implications of

22 the Commission setting a cutover level applicable to CLECs,

23 you don't believe that that would necessarily apply or --

24 apply to SBC, correct?

25          A.       I'm not sure that I'm following. I apologize.

1           Q.       That's okay. I'll really trying to get done  
2     given the amount of cross that's already been done, and I'm  
3     trying to -- I'm just simply trying to ascertain from you,  
4     if you can tell me, whether SBC would continue, as far as  
5     you know, would continue to serve the customers that are  
6     shown of four lines or more that are shown on this  
7     attachment notwithstanding the Commission setting a DS0/DS1  
8     cutoff for CLECs?

9           A.       Yeah. The cutoff -- that's why I'm having  
10    trouble understanding. The cutoff has nothing to do with  
11    what a switch facility provider is serving. I mean, they  
12    can continue to serve whoever they want however they want.  
13    That's not what the cutoff is about. So I'd answer your  
14    question yes.

15                   MS. MUDGE: I believe that's all I have.  
16    Thank you very much.

17                   JUDGE MILLS: Thank you. Questions from the  
18    Bench. Commissioner Murray.

19                   COMMISSIONER MURRAY: Thank you.

20    QUESTIONS BY COMMISSIONER MURRAY:

21           Q.       Good afternoon.

22           A.       Good afternoon.

23           Q.       Determine where I want to start here.

24           A.       That's okay. Take your time.

25           Q.       Let me just start with that last question. Is

1 it accurate that above the cutoff level a CLEC could  
2 continue to serve the customers with four lines or more  
3 without going to DS1 but just that the CLEC would not be  
4 able to get the TELRIC pricing?

5 A. I think all this discussion back and forth has  
6 kind of muddled this issue. The cutoff is solely an issue  
7 for the impairment analysis. A CLEC can choose to serve  
8 however they want. This economic cutoff is just a point to  
9 draw a line between a mass market and an enterprise. It's  
10 not going to dictate to any CLEC how they choose to serve a  
11 specific customer.

12 Q. They could still serve an enterprise customer  
13 any way they want?

14 A. They can serve them -- if they had a customer  
15 out there that had 263 lines and they wished to do it with  
16 DS0 loops, they could do -- and their own switch, they could  
17 do that.

18 Q. It's just a matter of how much the DS0 loops  
19 will cost them?

20 A. That would be an internal evaluation that  
21 they'd have to make. If this Commission finds that, as SBC  
22 asserts, that an area is not impaired, that the market is  
23 not impaired without access to unbundled switching, the only  
24 thing that a CLEC couldn't do is serve customers. And  
25 actually at that point, after you make that determination,

1 the line no longer matters in those markets, because it says  
2 CLECs aren't impaired without access to our unbundled  
3 switching. But they can still serve -- assuming they have  
4 their own switch, they can serve these however they want.

5 And then again, as we talked about earlier,  
6 the FCC said we also continue to have obligations to provide  
7 access to unbundled switching on a forward-going basis.

8 Q. But not at TELRIC-based pricing?

9 A. That part I'd just refer you to somebody else.

10 Q. All right. The questions regarding the  
11 default level for Zone 1 density in the top 50 MSAs --

12 A. Uh-huh.

13 Q. -- is there a reason to treat the zones in the  
14 three -- the other zones in the three MSAs where SBC is  
15 asking us to find nonimpairment differently than the  
16 treatment for Zone 1 density?

17 A. That's a great question. And to answer that  
18 you kind of have to step back to the UNE remand, because it  
19 does provide us some instruction as why they did what they  
20 did.

21 First what they did is they said, we're  
22 picking the top 50 MSAs because there are switches there.  
23 They specifically said the top 50, there's four or more  
24 switches in every one of those MSAs except for two, and  
25 those two MSAs had three or more switches. So that was the

1 basis for them saying the top 50 MSAs if you go back to the  
2 UNE Remand Order.

3                   And if you look at Missouri MSAs, and  
4 specifically the ones that we've recommended that  
5 impairment -- or we're asserting that impairment doesn't  
6 exist, they clearly meet this. Not that it matters in  
7 St. Louis, because we're already talking about those being  
8 in the top 50, but you've got 21 switches serving that area.  
9 Kansas City has 12. Springfield has 5. All of those are  
10 above that level that was the rationale for them picking the  
11 top 50. So it clearly is in sync with the FCC's thinking  
12 there.

13                   And then the questions is, within those, the  
14 Density Zone 1 that relates to the UNE Rate Zone 1, I would  
15 say, or the urban rate zone, and in Springfield the rate  
16 zone there I think is four, which is -- I don't know how  
17 it's classified here in the state, but it's basically  
18 someplace between a suburban and an urban as far as the  
19 rates are. And what we've shown in our analysis, if you  
20 look at our analysis and that Schedule GAF-6, the results,  
21 it shows that the most revenue is required in UNE Zone 1.

22                   So if the FCC said that we found that CLECs  
23 are not impaired in UNE Zone 1 and this cutoff is ripe for  
24 UNE Zone 1, then we've shown that the cost differential is  
25 even smaller in UNE Zone 2, 3 and 4. So it would logically

1 follow that that same default would be good for those zones  
2 as well.

3 Q. Are our findings required to be different for  
4 Zone 1 density and the other parts of the MSAs?

5 A. No. What they asked to do, and they put it  
6 as, in fact, the commissions may choose to consider how UNE  
7 rates vary within the market, and so as you're setting a  
8 market, that is something the Commission may choose to look  
9 at.

10 I've addressed that in my testimony and  
11 demonstrated there that in the Kansas City and St. Louis and  
12 Springfield MSAs the CLECs are in a good position in that  
13 the UNE rate zones in Kansas City and St. Louis, almost  
14 95 percent, if you look at the urban Zone 1 and suburban  
15 Zone 2 in Kansas City and St. Louis, you've got about  
16 94 percent of the access lines represented where they're  
17 serving those particular zones. Let me rephrase that  
18 because I think I'm being less clear than I could be.

19 If you look at those zones, the UNE rate  
20 Zones 1, 2, and you look at Kansas City and St. Louis,  
21 94 percent or between 94 and 95 percent of all the access  
22 lines fall into the urban and suburban zones, which are the  
23 lowest price UNE rate zones. Okay. Those two rate zones,  
24 if you look on the retail side, they coincide with the  
25 retail rate Zones D and B, which are the highest retail rate

1 zones.

2                   So if you're looking at Kansas City and  
3 St. Louis, you've got a positive environment from the  
4 perspective of having the vast majority of the lines fall in  
5 the lowest UNE cost and the highest retail rates. Similarly  
6 in Springfield, which their rate is a little bit lower. I'm  
7 sorry.

8           Q.       May I stop you there instead of going on  
9 further with that?

10          A.       Sure.

11          Q.       Really what I was driving at was whether we  
12 have -- or whether the parties have a different burden as to  
13 those in that the FCC has determined a default rate for  
14 Zone 1 density level --

15          A.       I'm sorry. I wasn't following.

16          Q.       -- that -- and absent a -- I forget the  
17 language, but absent some showing of --

18          A.       Significance evidence, uh-huh, to the  
19 contrary.

20          Q.       Significant evidence to the contrary. That is  
21 the default rate, but then the FCC hasn't made any  
22 determinations about anything other than Zone 1 density as I  
23 understand it; is that right?

24          A.       That's true. That's true. Other than they  
25 made a determination that this Commission must determine

1     what that -- what that cutoff is. The cutoff would be  
2     applicable to the entire market.

3             Q.       Okay.

4             A.       So once it's determined it would be applicable  
5     to all, what they're saying is in this density zone, in  
6     these top 50, we believe, unless you've got significant  
7     evidence to the contrary, that our default makes sense.

8             Q.       So do you have less of a burden there to show  
9     the default rate than you do any other areas?

10            A.       I think we have some guidance to show  
11    whether -- and CLECs and all of us have an obligation to  
12    show whether that's reasonable or not, whether the default  
13    is reasonable or not.

14            Q.       Whether it's reasonable in Zone 1 density or  
15    reasonable period?

16            A.       Certainly whether it's reasonable in Zone 1  
17    density in the top 50 MSAs. But as I said, we think the  
18    same factors apply across the board, and we can show that  
19    those same factors that made them pick the top 50 MSAs in  
20    the density zone are applicable in the other zones as well,  
21    in the other MSAs as well. So we believe that the default  
22    gives good guidance to the Commission.

23            Q.       I want to refer you to page 15 of your direct  
24    testimony, lines 26 and 27. The FCC found in paragraph 508  
25    of the TRO that the existence of switching serving customers



1 in the enterprise market and the wire center to be a  
2 significant indicator of the possibility of serving the mass  
3 market because it demonstrated scale and scope economies.

4 I have a couple of questions about that. One  
5 is, why do you think the FCC referenced wire center?

6 A. Well, I think wire centers are -- you've heard  
7 them described as building blocks, and you've heard that by  
8 several witnesses, CLEC witnesses that have said they're  
9 building blocks, and I would agree with that. From a  
10 network evolution perspective, they're the way you deploy  
11 your network.

12 But there's a confusion about the building  
13 blocks versus the building. The market we believe is the  
14 MSA. The wire centers are the way that a CLEC deploys their  
15 network to provide service in that MSA. And it doesn't make  
16 any sense from our perspective to expect that a CLEC would  
17 on a flash cut on day one deploy their network everywhere in  
18 an MSA. We believe instead that it would be a gradual  
19 deployment.

20 We also feel that that deployment's been  
21 interrupted to a certain extent by the availability of  
22 really low priced UNE-P.

23 Q. Now, also in relation to that statement, it's  
24 talking about the existence of switching serving customers  
25 in the enterprise market being a significant indicator of

1 the possibility of serving mass market.

2 And my question there is, if there is -- if a  
3 CLEC has a switch to serve enterprise customers, does that  
4 same switch provide all that it needs to serve mass market  
5 customers?

6 A. In most cases the answer to that would be yes.  
7 I mean, you need to look at the elements that it takes to --  
8 let's assume that they're going to access and use an SBC  
9 unbundled loop, that they're not providing their loop for  
10 the purposes of this discussion. CLECs need certain things  
11 in order to do that. They need to have a switch, they need  
12 to have some transport, and they need to get access to those  
13 loops, so they'll need some collocation or they can use an  
14 EEL to get access to the loops as well.

15 So if they are serving mass market customers  
16 using their switch, I mean -- excuse me -- if they're  
17 serving enterprise customers using their own switch, then  
18 the same things apply from a network perspective. They  
19 needed to have a switch. They've got that. They needed to  
20 have some kind of transport to the collocation. They needed  
21 to have at the collocation something to get access to the  
22 loops. So they've got all of those elements.

23 And even MCI in Footnote 1568 of the Order,  
24 MCI indicates that the average cost disadvantage, is what  
25 they call it, a competitor labors under relative to the

1 incumbent is significantly lower if the competitor already  
2 has its own switching, collocation and transport facilities.

3 That's what the FCC's talking about. If  
4 you're already using it to serve the enterprise, it's no  
5 great shake to go ahead and use it to serve mass market  
6 customers as well.

7 Q. I'm jumping around quite a bit because I'm  
8 trying to move along time-wise here, but Mr. Starkey on  
9 behalf of Sage had filed direct and rebuttal testimony, and  
10 on page 39 of his direct testimony he speaks about the ILEC  
11 engaging in price discrimination within the wire center and  
12 charges business customers higher prices for the same  
13 service than residential customers.

14 My question to you is, aren't the ILECs forced  
15 into that, quote, price discrimination? In other words,  
16 don't they have to sell to residential customers at a rate  
17 that is subsidized by business customers, or can you explain  
18 that in a --

19 A. The District Court, Court of Appeals noted  
20 that ILECs actually had the freedom to decide who they're  
21 going to serve. So they're not forced into serving either  
22 segment, if they're going to serve residence.

23 Q. ILECs?

24 A. I'm sorry. CLECs. Thank you for the  
25 correction. It's been a long day for me, too. I apologize.

1                   Yes. No, we don't, not that I checked, since  
2 I checked. But yes, CLECs do have the freedom to choose.  
3 Now, to the extent that they're going to compete in the  
4 residential market, I think one of the attorneys pointed out  
5 earlier that they're going to have to compete at prices that  
6 are prevailing.

7                   However, they may change the question some.  
8 For example, it may not be -- it may not be easy to compare  
9 our low rate, flat rate, residential rate, for example,  
10 which I think is somewhere around \$7 -- between 7 and \$8. A  
11 CLEC might not try to compete head to head or might not want  
12 to compete head to head.

13                  They might instead try to identify customers  
14 that use a lot of long distance, a residential customer that  
15 uses a lot of long distance, and to tie those two and bundle  
16 that together where they can have the margins from long  
17 distance and from other features offset the cost.

18           Q.       It's more difficult to compete in an area in  
19 which the rates are low, is it not, because -- or let me put  
20 it this way: Is it more difficult to compete in an area in  
21 which the rates are at or below cost than it is to compete  
22 in an area in which the rates are significantly above cost?

23           A.       Certainly if the rates have been set below  
24 actual cost of providing service, that's going to be  
25 difficult to do if you're only serving that customer and

1   you're not serving other customers that can offset those  
2   costs or you're not, as the court pointed out as well,  
3   offering other services and adding services in there that  
4   could mitigate that basic rate being below the cost.

5                   The FCC, that's part of the reason why in  
6   Sections 506, I believe it is, to 519 when they're talking  
7   about impairment analysis and looking at potential revenues  
8   that you might get, including even subsidy support type  
9   flows.

10           Q.       I want to ask you another question from  
11   Mr. Starkey's testimony. I actually don't have to refer you  
12   to his testimony. I can just refer you to the question that  
13   his testimony raised in my mind.

14                   And since SBC is challenging impairment,  
15   you're the one challenging impairment, is it possible that  
16   SBC does not believe that impairment will ever go away for  
17   those areas that are outside an MSA in Missouri?

18           A.       I really don't know the answer to that. You  
19   know, what we tried to do is to focus on those areas where  
20   we think CLECs are not impaired. We really haven't looked  
21   or tried to project out into the future what might happen or  
22   where we might or might not be able to show impairment.

23                   But I would assume that at a later date that  
24   we might continue to look and see if there's other areas  
25   where we feel CLECs aren't impaired.

1           Q.       And in that you're just asking that the  
2   geographic market be determined on the basis of MSAs and  
3   MSAs don't cover the entire state, I know it's in the  
4   testimony somewhere, but I've forgotten, what is the  
5   rationale, then, to go beyond those MSAs in determining  
6   impairment?

7           A.       The only thing that the Commission's been  
8   asked to do or directed to do by the TRO is, where  
9   impairment is being challenged, you need to define the  
10  market in order to do the impairment analysis.  There's no  
11  need to do anything further for those areas outside.

12                   Now, if SBC were to come back at some point in  
13  time and select another area and say, we believe that CLECs  
14  aren't impaired in this area, then we'd need to look at that  
15  market area and the Commission would need to make sure that  
16  they agreed with that market area definition.

17          Q.       When a CLEC has a certificate of -- has a  
18  switch, generally that switch is located within a wire  
19  center; is that correct?

20          A.       Sure.  I mean, everything is -- wire centers  
21  are geographic areas, and even if they're not ours, there's  
22  another wire center contiguous, so it's going to be within  
23  some wire center, yes.

24          Q.       And how broad is the area that that switch can  
25  serve?

1           A.       Well, it's hard to say how broad it is. Let  
2 me just say that CLECs have testified in front of this  
3 Commission that it, in the case of AT&T, and that's in my  
4 testimony, that AT&T testified that their switches could  
5 cover as much as SBC's tandem switches. So CLECs have  
6 represented themselves that switches can handle large  
7 geographic areas.

8                   We believe, and I think there's places in the  
9 TRO, although I can't -- I can't direct you to the specific  
10 cite, where they've indicated as well that switches have the  
11 capability of serving very large geographic areas, up to and  
12 including perhaps an entire LATA or entire state.

13           Q.       Now to the question of whether we need to be  
14 considering where they actually are serving or just where  
15 they're capable of serving. In the testimony of Mr. Ankum  
16 on page -- actually, I guess there was substitute testimony  
17 filed that had the page numbers, but I have the copy that  
18 does not have page numbers. Anyway, I will read you the  
19 quote. He quoted from the FCC. He said, as the FCC has  
20 observed, if competitors with their own switches are only  
21 serving certain geographic areas, the state commission  
22 should consider establishing those areas to constitute  
23 separate markets.

24                   And that is from the Triennial Review Order,  
25 and I just would like you to comment or respond to that

1 statement.

2           A.       It's an accurate statement from the  
3 perspective that he accurately quoted the TRO. We believe  
4 that that is something the Commission can consider, but we  
5 believe that that would be the wrong thing to do, because it  
6 tends to freeze the market right where it is, and it doesn't  
7 recognize the overall question of whether CLECs are impaired  
8 or not.

9                   The marketplace that you've got right now  
10 where CLECs choose or choose not to serve, the fact that  
11 they're not serving a wire center doesn't mean that they're  
12 impaired in there. It's -- I guess the best analogy to me  
13 is that if I could lease a car below the cost of purchasing  
14 it, I'd probably lease it every time.

15                   So it might indicate that it's cheaper for  
16 them to do that, but it's not an indication that they're  
17 impaired without serving those areas. So SBC believes that  
18 you need to rule in the MSA as the appropriate market, and  
19 it would encompass all the MSAs. It doesn't need to be just  
20 those areas that CLECs are serving today.

21                   I think the analogy I used in my testimony,  
22 that would be like defining geographic areas for Starbucks  
23 to be those seven locations they had years ago instead of  
24 the 7,000 that they have today. It just doesn't recognize  
25 the evolution that is occurring in the industry, the natural



1 growth of the business.

2 Q. And do you think that's true even if we're not  
3 separating out whether they're serving mass market customers  
4 with their switches or enterprise customers only with their  
5 switches?

6 A. I think as the FCC recognized, where they're  
7 serving with mass market is a real clear indicator that they  
8 can easily also serve mass market customers. But the fact  
9 that they're not serving a location, they're not serving  
10 either customer today, either enterprise or mass market, we  
11 still don't think that's an indicator that they're impaired  
12 in those areas.

13 So yes, we do believe that should be included  
14 in the market area to the extent that that's within the MSA.

15 Q. Okay. Would you explain the relevance of NXX  
16 codes to this issue?

17 A. Okay. I'll try to. NXX codes, this falls in  
18 the category, if you look at what -- let me go back to the  
19 rule. The FCC said basically when you're defining the  
20 market, there's three major criteria that need to be taken  
21 into consideration. One is the location of the customers,  
22 mass market customers. Two is the variation in factors  
23 affecting competitors' ability to serve each group of  
24 customers. And the third was the competitors' ability to  
25 target and serve specific markets profitably and efficiently

1 using currently available technologies.

2 NXXs kind of help you in a couple ways. One,  
3 they're not given out lightly. They're pretty stingy with  
4 the allocation of NXXs. So it does show you what CLEC's  
5 intend was, that they've got enough numbers in the St. Louis  
6 area, as I indicated, they've got 1.1 million numbers. If  
7 they ask for those numbers, they had to show intent to serve  
8 those areas.

9 Q. May I ask you there, when an NXX number is  
10 given or an NXX code is given, what areas does it encompass?  
11 How is that geographic area defined?

12 A. It's defined as an SBC or another ILEC's rate  
13 center area. So that could be a single wire center or it  
14 could be a grouping of wire centers. In general, in most  
15 cases it's a single wire center.

16 Q. Okay.

17 A. At least in Missouri I believe that's true.

18 Q. Mr. Lane had an exhibit in his opening  
19 statement showing that there are some areas in, I believe he  
20 was talking about the Springfield MSA. There's some areas  
21 that are in the MCA that are outside of the MSA. Do you  
22 recall that?

23 A. Yes. Mr. Lane is helping us right now by  
24 bringing it back out to jog my memory.

25 Q. And --

1           A.       You're talking about that within the dark blue  
2 line is the MCA?

3           Q.       That's my understanding.

4           A.       That's my understanding as well.

5           Q.       And the MSA is the red line?

6           A.       That's correct.

7           Q.       And there are a couple of areas that are  
8 within the MCA that fall outside of the MSA?

9           A.       Well, yes. There's some areas that you see  
10 are colored areas that are falling out there. I think  
11 there's only one actually wire center that would fall  
12 outside of the MSA that's included in the MCA. And again,  
13 these old eyes can't see it exactly, but it's right down  
14 here at the bottom. It's Marionville. So it's this one  
15 right down here at the bottom, because of the switch  
16 location.

17          Q.       That is a -- that is a wire center that falls  
18 both within the MSA and without the MSA; is that right?

19          A.       It would not be in -- although part of its  
20 area falls within the boundary of the MSA, because the  
21 switch is outside the boundary of the MSA we wouldn't  
22 include it. If you were using the MCAs -- and we're using a  
23 couple acronyms with M and A in them, so -- but if we were  
24 using the MCA, it would include Marionville.

25          Q.       But I thought Mr. Lane's opening statement was

1 speaking about in opposition to Staff's position that we  
2 should be using exchanges rather than wire centers not  
3 being -- not being an adequate geographic area because some  
4 of the -- even some of the MCA area would fall outside of  
5 what Staff would be including in an exchange.

6 A. Right. I believe -- I'm sorry. I believe  
7 that the light green area that you have here is the  
8 exchange. So you see these other colored wire centers?  
9 Those would fall outside that exchange, but they would be  
10 inside the MCA. Am I making sense there?

11 Q. Yes, you are. And that's what I'm getting at,  
12 but even with your analysis it looks like you wouldn't be  
13 including everything that's within the MCA.

14 A. Well --

15 Q. And I'm not talking about areas that SBC isn't  
16 serving. Just say Marionville where --

17 A. With an MSA, that's a correct observation,  
18 Commissioner. The Marionville wire center would not be  
19 included in our MSA definition because the switch for  
20 Marionville lies outside the boundary.

21 Q. Okay.

22 A. But the Ash Grove would be included in its  
23 entirety even though a portion of it lies outside that red  
24 line, the MSA boundary, because the switch is located within  
25 the MSA.

1           Q.       So when Mr. Lane was referencing the problem  
2     with Staff's designation of an exchange, the only problem  
3     there in that Springfield MSA is the Ash Grove area that is  
4     within the MCA but it falls outside of the -- no. I'm  
5     sorry.

6           A.       It would be Marionville.

7           Q.       Well, but you're not including Marionville, so  
8     that's not a problem with Staff's analysis.

9           Q.       Well, Staff is only right here (indicating).  
10    So Staff excludes Cleaver, Billings, Ash Grove and Walnut  
11    Grove.

12          Q.       Okay. All right. So it's --

13          A.       And the MSA would include those if you instead  
14    said, instead of the MSA the MCA should be the boundary,  
15    then it would include those that I said, and it would also  
16    include Marionville.

17          Q.       All right. Thank you. Now I understand that.  
18                    And then I wanted to ask, why is it that SBC  
19    is not asking for MCA as a designation instead of the MSA?

20          A.       When we started this, we started looking at  
21    the different designations that might work from state to  
22    state, and obviously you had some that -- you've heard all  
23    of them here today, from a LATA to a wire center. The MSA  
24    just seemed to be the one that had some external definition  
25    that made sense.

1                   But I'll tell you, from an MCA, from our  
2 perspective, the MCA would also be one that looks reasonable  
3 just from what I've even of it and the drawings that I've  
4 seen, just for the reasons that you pointed out with  
5 Springfield.

6           Q.       Okay. Once again I'm jumping -- I'm trying to  
7 go quickly here. Are there -- in those wire centers where  
8 the -- wire centers that are within the MSAs where CLECs are  
9 not using switches to serve their cust-- or are there  
10 rather -- let me start again.

11                   In those wire centers within MSAs where CLECs  
12 are not using switches to serve customers, are they serving  
13 customers through resale or are they just not serving  
14 customers?

15           A.       They are serving customers using SBC's  
16 facilities. I think -- I don't know what the -- frankly, I  
17 don't know how much resale they're using, but as you've  
18 heard some of the witnesses, heard some of the cross, the  
19 UNE-P would indicate that they're using UNE-P, which is --  
20 as a vehicle to serve those. Now, that doesn't say --  
21 again, that doesn't -- doesn't follow that they're impaired  
22 in those areas, just that they've chosen to lease rather  
23 than use something that they purchased, and that's a price  
24 point issue as far as at least my opinion, that's what that  
25 would be.

1           Q.       And then on page 16 of your rebuttal  
2     testimony, in answering the question does Staff endorse wire  
3     centers as appropriate market areas, and you indicate that  
4     Staff does not, but that ironically their proposal yields  
5     the same kind of limited scale and scope economies for those  
6     wire centers within the metropolitan area yet outside of the  
7     metropolitan exchange, and you -- skipping on down a little,  
8     you say, of the 160 exchanges in SBC Missouri's serving  
9     area, 149 or 93 percent are single wire center exchanges,  
10    demonstrating that Staff's proposal results in a wire center  
11    definition for the majority of the state.

12                   And my question to you is, would it be  
13    possible for us to adopt Staff's geographic market and find  
14    no impairment in each one of those exchanges?

15           A.       It certainly is possible to do that. It is  
16    difficult to do that for a couple of reasons. One, from a  
17    trigger perspective, you'd be looking at in each wire center  
18    obviously whether CLECs are there and whether they have  
19    three or more serving that wire center.

20                   But the other thing is the exact thing that  
21    Staff talks about is a question of whether you could show  
22    scale and scope economies for those ones where a CLEC isn't  
23    there today. And it's our belief that CLECs don't enter the  
24    market on a single wire center basis, and I don't think  
25    anybody believes that they do. And the reason why they

1 don't is because you can't achieve scale and scope  
2 economies.

3                   So it would be difficult to prove a potential  
4 analysis case on an individual wire center basis when you  
5 can't achieve the scale and scope. I mean, the FCC said in  
6 determining the market area or defining the market area that  
7 you can't define it so narrowly that a competitor serving  
8 that market alone couldn't take advantage of scale and  
9 scope.

10                   I can't think of a reasonable -- or I can't  
11 think of any definition that could be more narrow really  
12 than a wire center. And there's no way that a CLEC could  
13 tell you that they can achieve scale and scope economies  
14 serving a single wire center. Switch just is too expensive.  
15 MCI even said themselves, you've got to spread that  
16 switching cost over numerous wire centers in a letter by  
17 their VP federal advocacy to the FCC.

18           Q.       And the threshold that we have to find in  
19 order to find no impairment, would we be then in effect  
20 having to find that in each specific exchange, which in most  
21 instances is a wire center?

22           A.       Yes. I mean, if that's what this Commission  
23 decided to do, then in each one of those individual wire  
24 centers if SBC asserted that CLECs were not impaired, then  
25 you would have to look at each individual wire center as a



1 separate market. If it didn't meet the trigger analysis,  
2 then you would have the potential analysis that would be  
3 conducted for each individual wire center.

4           And just from a practical perspective, and I  
5 said this in my testimony, that does give CLECs an element  
6 of control. On a forward-going basis, prospective basis, a  
7 CLEC could decide now to not go into a wire center. As  
8 another incentive, if I go into that wire center and I serve  
9 it with my switch and start serving the mass market, I know  
10 that I've got the potential that SBC is going to be able to  
11 show that I'm not impaired there.

12           And then they have -- if I don't go in there,  
13 they've got to prove potential, and potential is a bigger  
14 barrier to overcome because you're looking at an individual  
15 wire center and you can't achieve the scale and scope  
16 economies.

17           Q.       We would have to find that it was cost  
18 effective to establish a switch in every wire center, would  
19 we not?

20           A.       In essence -- well, you could use the switch  
21 they've got, but if you assumed individual wire centers,  
22 yeah, it would be -- you wouldn't have the scale and scope  
23 economies of looking at the market as a whole. You'd have  
24 to look at an individual wire center, I assume, on its own,  
25 on its own standing.

1           Q.       Is it generally cost effective to put a  
2 wire -- to put a switch in just one wire center, to serve  
3 just one wire center?

4           A.       From a CLEC perspective, no, I can't imagine.  
5 If you're talking about getting a percentage of market  
6 share, that wouldn't make any sense. AT&T -- in my  
7 testimony, AT&T Dennis Hume's testimony in front of this  
8 Commission said that, in fact, they looked at transport  
9 versus switch cost, and they said it's more economical  
10 considering the cost of the switch to have fewer switches  
11 and more transport to serve broader areas rather than put  
12 switches everywhere.

13                   COMMISSIONER MURRAY: That's all I have.

14 QUESTIONS BY COMMISSIONER CLAYTON:

15           Q.       I just want to ask a couple questions. I had  
16 a whole -- I've got about three pages. No. I'm just  
17 kidding. And I want to thank the judge for giving me the  
18 opportunity at five o'clock here since everyone's excited  
19 about that. I just want to ask a couple of quick questions.  
20 I want to make sure that I understand Bell's position.

21                   First of all, it is -- SBC is challenging  
22 impairment only within MSAs; is that correct?

23           A.       Only within three MSAs.

24           Q.       The three MSAs.

25           A.       Yes.

1 Q. So the exchanges in which Bell is the ILEC  
2 outside of the MSAs are not subject to these proceedings?

3 A. That's correct.

4 Q. Okay. What is the practical difference, then,  
5 between using a LATA geographic area and an MSA area? Is  
6 there a difference?

7 A. Well, there's --

8 Q. An analysis?

9 A. There's some remarkable differences in just  
10 meeting the criteria that the FCC has established. We  
11 actually started looking at the LATA. AT&T and us see  
12 the -- what you have to do to satisfy the trigger very  
13 differently.

14 But when we looked at the LATA, we frankly in  
15 Missouri just couldn't get that to come out and meet the  
16 FCC's criteria. I mean, looking at Hannibal and telling  
17 someone in Hannibal they're in the same market as someone in  
18 Sikeston just doesn't make too much sense.

19 Q. I understand. But since those exchanges  
20 wouldn't be part of this, I guess I'm just trying to  
21 understand. You-all are -- your position is basically  
22 focusing on exchanges within the MSAs, and it would be the  
23 same exchanges within the LATAs, would it not?

24 A. No, sir. If you make the market the LATA, it  
25 would be the entire LATA, all the exchanges within the LATA.

1           Q.       On the -- Vanna, do you mind? I've been  
2       waiting to say that.

3           MR. LANE:   Which one do you want?

4           COMMISSIONER CLAYTON:   Any of the --

5           MR. LANE:   The whole state one?

6           COMMISSIONER CLAYTON:   Actually, I'd prefer  
7       the Springfield one because that's the one we were looking  
8       at.

9       BY COMMISSIONER CLAYTON:

10          Q.       The gray areas within the MSA, are those Bell  
11       exchanges or not?

12          A.       They're not Bell exchanges.

13          Q.       They are not Bell exchanges. So there are no  
14       Bell exchanges within the MSA, other than the colored ones  
15       right there; is that correct?

16          A.       That's correct, one's that are not colored  
17       gray.

18          Q.       Okay. So then there would be -- if we were to  
19       use the LATA for the 417 area code, there would be  
20       additional exchanges for Bell presumably that would be part  
21       of that LATA, and that's --

22          A.       Yes.

23          Q.       Those would be excluded under the MSA  
24       approach?

25          A.       That's correct.

1 Q. Okay. Thank you. I appreciate your turning  
2 of the letters.

3 Is there a definition of what the -- of what  
4 the enterprise market is? We are going to define the number  
5 of DS0 lines, but is there a word definition of enterprise  
6 market that we're supposed to use? Could you direct me to  
7 that?

8 A. If you'll give me a second, let me look back  
9 through here. I apologize for taking so long.

10 Q. That's all right.

11 A. There's several definitions within the TRO of  
12 an enterprise market. We've talked about them here, but I  
13 can find a specific cite either on the record or we can -- I  
14 can provide that in any way that you want. I can continue  
15 looking if you'd like or if you want to --

16 Q. Well, is it a question of economics or a  
17 question of demographics or a question of size? There are  
18 two different methods that are offered by the parties, and I  
19 guess I'm looking for the TRO language that we're supposed  
20 to follow.

21 A. Okay. I'm with you now. Thank you.

22 Q. You do have some language on page 25 of your  
23 testimony, I believe of your direct testimony. That may be  
24 what it is.

25 A. The definition is really -- it's determined by

1 this dividing line that everybody refers to as the DS0  
2 cutoff, and that's the definition that this Commission  
3 really has to focus on is deciding where that dividing line  
4 is. Then above that dividing line is considered enterprise  
5 for the purpose of the mass market impairment proceeding,  
6 and below that is considered mass market for that.

7 Q. Above that is enterprise market, below is mass  
8 market?

9 A. That's correct.

10 Q. Correct. I understand that. I guess what I'm  
11 asking, from your position, what is the language that we're  
12 supposed to use in defining those two markets?

13 A. I think if you look at paragraph 497, it  
14 starts off, for the purposes of the examination described  
15 here, mass market customers are analog voice customers that  
16 purchase only a limited number of POTS lines. If you're  
17 looking for some words around describing these, is that what  
18 you're --

19 Q. So under that definition, it would be our job  
20 to determine what the word limited means, limited number of  
21 POTS lines?

22 A. Yes, from the word perspective, but I don't  
23 think any party here has suggested that you should use  
24 something other than the cutoff to make that determination.  
25 That may not be completely correct.

1 Q. But we have to determine that cutoff, correct?

2 A. That's correct.

3 Q. So I'm getting caught up in some circular

4 reasoning here. You're saying, well, we're supposed to look

5 at the cutoff. Well, yes, but we determine the cutoff. I'm

6 trying to figure out how to get to determine that figure.

7 And in reading your testimony -- and I may be wrong, I've

8 read a lot of testimony -- but Southwestern Bell focuses on

9 the default provision within the TRO, the FCC's default

10 provision of less than four DS0 lines, correct?

11 A. That's correct.

12 Q. And then there's also some language either in

13 your testimony or in Mr. -- is it Tardiff's testimony

14 regarding -- regarding in general a residential or a mass

15 market line isn't going to use more than two or three lines,

16 some very simplistic language in that sense, but I'm -- Bell

17 uses that review while a lot of the other testimonies makes

18 reference to economic arguments and costs and estimates in

19 that regard. I want to see from Bell's perspective what

20 language in the TRO are you-all following in an analysis?

21 A. We're following No. 1, paragraph 497 of the

22 Order, which talks at -- which speaks to specifically the

23 path that we should -- that should be taken in determining

24 when a customer is in the mass market versus when they're in

25 the enterprise market. And it starts, at some point mass

1 market customers taking a sufficient number of multiple DS0  
2 loops. It's that paragraph. So we think that's very  
3 instructive.

4 We've also quoted obviously the rule that  
5 talks about how you determine what that point is.

6 Q. And the rule would be 51.319?

7 A. 51.319.

8 Q. (d) (2) (3) B4? Now I see what you mean about  
9 lawyers.

10 A. That's correct.

11 Q. I understand now.

12 A. For the record, I like them a lot.

13 Q. Yeah. Is it Bell's position that small  
14 business customers would be considered part of the mass  
15 market or part of the enterprise market?

16 A. The FCC defines the mass market as residence  
17 and very small business customers.

18 Q. What is a very small business customer in  
19 terms of DS0 lines?

20 A. In terms of DS0 lines, we believe it's three  
21 or fewer.

22 Q. Three or fewer.

23 COMMISSIONER CLAYTON: Okay. I believe that's  
24 all I have at this time. Thank you very much.

25 JUDGE MILLS: Okay. At this point,



1 Mr. Fleming, I think you have the privilege of returning to  
2 Jefferson City next week for redirect and further  
3 cross-examination based on questions from the Bench.

4 MR. MAGNESS: Your Honor, I'm standing. I  
5 just have one cleanup matter I wanted to address with you  
6 while we were still on the record.

7 I had discussed a discovery response on the  
8 record with Mr. Fleming, and the updated response was marked  
9 as Exhibit 25HC. I'd like to offer -- I have Exhibit 26HC.  
10 That is the one that we went over. I'm happy to show it to  
11 the witness. I just thought to complete the record, since  
12 it was discussed so much, I'd like to offer it as  
13 Exhibit 26HC.

14 JUDGE MILLS: Okay. We'll go ahead and mark  
15 it. Let me check and see, are there any objections to the  
16 admission of Exhibit 26HC?

17 MR. BUB: Your Honor, can we look at it? If  
18 we're going to come back next week, could we have a chance  
19 to compare it?

20 JUDGE MILLS: That way we don't have the take  
21 the court reporter's time and mark it and all that stuff.  
22 We'll take it up next week.

23 Along those lines, Mr. Lane, I'm going to give  
24 you some homework. Your lovely pictures have created such a  
25 stir and been so popular, I'm going to ask you to recreate

1 those in a size and format that we can mark them as  
2 exhibits. I realize it's going to be a little bit hard  
3 because some of the letters are going to have to be very  
4 small. But if you-all could do that, that would be great.

5 MR. LANE: We already have, your Honor, these  
6 three of the St. Louis, Kansas City and Springfield MSAs.

7 JUDGE MILLS: So those are blowups of the ones  
8 that are already in there?

9 MR. LANE: We've got those made and we can  
10 make them an exhibit.

11 JUDGE MILLS: The one of the entire state,  
12 that's not really necessary. The other three I think would  
13 be great if we could get those into the record.

14 MR. LANE: We can do that now or next week.

15 JUDGE MILLS: We'll do it next week. Anything  
16 further?

17 Just for the purposes of those of you who are  
18 traveling, I sort of debated with myself whether to tell you  
19 this or not, but next Wednesday, the 4th, was open and I've  
20 reserved it for this hearing. I hope we don't have cause to  
21 use it, but if we do, it's there. Otherwise, we are  
22 scheduled for Monday and Tuesday, starting 8:30 on Monday.

23 Okay. We're off the record.

24 WHEREUPON, the hearing of this case was  
25 recessed until February 2, 2004.

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