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January 26, 2004

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

FILED

JAN 26 2004

**Missouri Public
Service Commission**

Re: Case No. TO-2004-0207

Dear Judge Roberts:

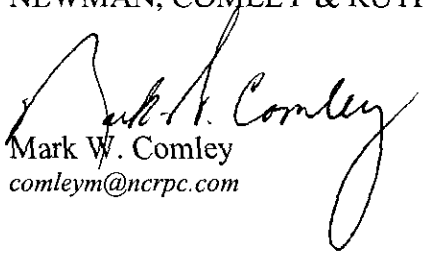
Please find enclosed for filing in the referenced matter the original and five copies of the CLEC Coalition Response to SBC Missouri's Motion to Strike Portions of the Prefiled Rebuttal Testimony of Joseph Gillan.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


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comleym@ncrpc.com

MWC:kjh

Enclosure

cc: Office of Public Counsel
General Counsel's Office
Rebecca DeCook
Bill Magness
Counsel of record

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED
JAN 26 2004

Missouri Public
Service Commission

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.)

**CLEC COALITION RESPONSE TO SBC MISSOURI'S MOTION
TO STRIKE PORTIONS OF THE PREFILED
REBUTTAL TESTIMONY OF JOSEPH GILLAN**

COME NOW AT&T Communications of the Southwest, Inc., AT&T Local Services on behalf of TCG St. Louis, Inc. and TCG Kansas City, Inc., Birch Telecom of Missouri, Inc., and Z-Tel Communications, Inc. ("CLEC Coalition") and file the following response to the Motion filed by SBC Missouri on Friday, January 23, 2003, to strike portions of the prefiled rebuttal testimony of CLEC Coalition witness Mr. Joseph Gillan (the "SBC Motion").

1. The SBC Motion requests that the Commission strike certain portions of Mr. Gillan's rebuttal testimony regarding Issue No. 1, the "geographic market" question before the Commission in this proceeding.¹ SBC's Motion complains that Mr. Gillan failed to make a recommendation in his direct testimony, and that his recommendation of the Missouri Local Access and Transport Areas ("LATAs") as the relevant geographic market therefore should be set aside. SBC's assertions are incorrect on a number of fronts, and its Motion should be denied in its entirety.

2. Mr. Gillan's Direct Testimony includes an extensive discussion of his position on Issue 1. Mr. Gillan affirmatively sets forth his position that the Commission should adopt a "relatively large area for impairment evaluation (such as a LATA), so that the Commission not mistake some limited entry in a relatively small area as evidence of non-impairment." Gillan

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

Direct, at 19, ln. 4-6. Mr. Gillan states his specific positions on the “appropriate geographic area for the evaluation of impairment” in a discussion that accounts for over eight pages of his direct testimony.² Notably, much of Mr. Gillan’s testimony focuses on the need for the geographic “impairment zones” to be large enough to facilitate proper application of the TRO’s impairment analysis, a view shared by SBC Missouri’s witnesses. Mr. Gillan emphasizes throughout his direct testimony, however, that he recommends the Commission adopt only a “tentative market definition in this phase of the proceeding, given the potential importance of other information ... that is not easily developed within the accelerated time frame of this phase.” Gillan Direct, at 18, ln. 11-17 (emphasis in original).

3. Mr. Gillan’s direct testimony put the Commission and all parties on notice of the CLEC Coalition’s positions regarding Issue 1. SBC’s witness Mr. Fleming understood that Mr. Gillan is suggesting “that consideration of UNE-P competition prompts the consideration of relatively large geographic market areas such as the LATA.” SBC Fleming Rebuttal, at 4, ln. 12-14. Moreover, Mr. Gillan’s direct testimony on geographic impairment analysis provided the primary fodder for six pages of rebuttal prepared testimony by SBC witness Dr. Tardiff. SBC Tardiff Rebuttal, at 17-22. Mr. Gillan did not hide his positions and the reasons supporting them. Rather, he noted in his direct testimony that SBC must explain “*why* and *where* impairment does not exist” (Gillan Direct, at 4, ln. 13), and that the data SBC provided would shape any final recommendation to the Commission. One of the Coalition’s key positions, as reflected in Mr. Gillan’s direct testimony, is that additional consideration of Missouri-specific data is needed before the Commission should definitively define geographic impairment zones. Without question, Mr. Gillan’s testimony gave the parties “notice of the claims, contentions and evidence

² Gillan Direct, at 13-20.

in issue,” and, when read together with his rebuttal testimony, could not possibly create “unfair surprise at the hearing” for any of the participants.³

4. It is telling that the SBC Motion protests that SBC does not have the burden of proof in this case. The Commission recognized early in this proceeding that the structure of the TRO obligates SBC (and other incumbent LECs) to come forward to demonstrate, as Mr. Gillan put it, “why and where” the FCC’s national finding of impairment for unbundled local switching should be overturned. On November 5, 2003, the Commission ordered any carrier in Missouri that “plans to challenge the FCC’s finding of impairment for mass market switching” to file information stating the basic outlines of its contentions regarding non-impairment.⁴ In its Order, the Commission wisely recognized that “if” impairment was to be challenged, then “where” it would be challenged must be defined by the carriers (such as the ILECs SBC and CenturyTel) mounting the challenges to the FCC’s findings.

5. SBC identified its proposed area for impairment analysis as the Metropolitan Statistical Area (“MSA”) in its filing required by the Commission’s Order. As the CLEC Coalition noted in its response to SBC’s filing, however, the “why” of SBC’s claims would require analysis of data in the possession of SBC, including the data it used to justify its positions in testimony.⁵ It was no surprise that SBC could establish its MSA recommendation early in the proceeding: the ILEC knows where its UNE-P and UNE-L competitors are because it sells wholesale services to them. It also knows how deeply competitors have penetrated the customer base served by each ILEC central office, MSA, or LATA. While each CLEC has information

³ Case No. TO-2004-0207, Order Establishing Procedural Schedule, at 2 (Dec. 1, 2003).

⁴ Case No. TO-2004-0207, Order Creating Case and Establishing Initial Filing Deadlines, at 1 (Nov. 5, 2003). Similar initial filing requirements were instituted for the loop and transport impairment cases to be heard in Phase III of this docket.

⁵ “Each ‘market’ must be defined ‘on a granular level’ based on consideration of specific facts itemized in the TRO. The specific facts include the location of CLEC customers. SBC, as provider of wholesale UNE and resale services to CLECs, has the best information available aggregating the number of CLEC customers in its territory in Missouri.” CLEC Coalition Response To SBC Missouri’s and CenturyTel’s Response To Commission Order Directing Filing, at 3 (Nov. 17, 2003).

about its own operations, no CLEC has the ILEC's ability to aggregate competitive data relevant to TRO analysis. Thus SBC could advocate a region-wide position supporting MSAs without reviewing any data from CLECs, because it possessed the best data – and had the data from the day the FCC first introduced the “geographic market” concept back in February 2002. The companies in the CLEC Coalition did not, by contrast, have a pre-fabricated position in place long before data could be reviewed.

6. Moreover, in the discovery process, SBC took positions geared toward preventing a full exploration of alternatives to its MSA proposal.⁶ The CLEC Coalition asked several Discovery Requests (“DRs”) seeking information on the number of lines served statewide by SBC in Missouri in various categories that correlate to lines served by CLECs. For example, SBC was asked to identify the number of lines it served in each central office as well as the number served by CLECs. Mr. Gillan needed data on the total lines served out of each SBC wire center (ILEC as well as CLEC lines), in order to prepare testimony on the highly relevant subject of the relative penetration/market share of UNE-P and UNE-L entry methods in Missouri. This information also is necessary to put in context the data presented by SBC on a wire center-by-wire center basis that identifies only CLEC information.⁷ SBC objected to the relevance of such statewide data, however, agreeing to provide only the number of lines “in each central office in each of the Metropolitan Statistical Areas (‘MSAs’) for which SBC Missouri intends to

⁶ The CLEC Coalition served its first set of DRs to SBC on November 25, 2003, prior to the Commission's determination that Issues 1 and 2 would be heard in a separate phase. In light of timelines expected to be tight, however, the CLEC Coalition requested that responses be provided on an expedited basis (by December 8), but SBC refused. *See* SBC Objections to CLEC Coalition DRs (General Objection No. 3). The Commission entered its Order on the “phased” schedule on December 1, and required direct testimony be filed December 18. The CLEC Coalition received its first discovery responses from SBC after business hours on December 15, leaving an extremely short turnaround time for examination of the Missouri data prior to the filing of direct testimony. The Coalition served a second set of DRs December 16, 2003, and received responses on January 6, 2004. Mr. Gillan relied on this additional discovery (particularly in conclusions concerning the suitability of LATAs versus the MSA proposal) in preparing his rebuttal testimony filed January 16, 2004.

⁷ *See, e.g.,* SBC Direct Testimony of Gary Fleming, Exhibit GAF-2 (presenting information on CLEC UNE-P and UNE-L entry for each Missouri wire center).

demonstrate that CLECs are not impaired without access to unbundled local switching.”⁸ SBC used its position on the geographic market “offensively” in discovery, as if its MSA determination limited the range of alternatives that could be considered. Determining whether MSAs are the proper geographic analytical unit, however, was the very issue that was the subject of the discovery requests. How could CLECs be expected to complete their analysis of MSA alternatives when SBC contended that information including data about other alternatives was not relevant?

7. The CLEC Coalition is not attempting to use this Response to resolve discovery issues, but points out these issues to emphasize that SBC’s actions made it difficult for CLECs to make final determinations about market areas based on Missouri-specific data within the confines of the procedural schedule. Nevertheless, Mr. Gillan thoroughly analyzed Issue 1 in his direct testimony, and provided even more complete analysis of the alternatives before the Commission in his rebuttal testimony. Neither Mr. Gillan nor the CLEC Coalition is asking for “special privileges” as alleged in the SBC Motion.

8. The CLEC Coalition would, however, be extremely prejudiced if the portions of Mr. Gillan’s testimony identified by SBC are stricken from the record. SBC’s Motion seeks to remove the an enormous amount of substantive analysis of Issue 1 from the record, and would leave the CLEC Coalition parties unable to either advocate their position, or to rebut the positions stated in other parties’ direct testimony.

9. The SBC Motion would strike testimony that demonstrates to the Commission “the serious consequences that could come from the dual errors of defining the relevant market too narrowly and/or erroneously concluding that some small and geographically limited entry is sufficient to prove that carriers are not impaired without access to UNE-P to serve the much

⁸ SBC Missouri’s Objections To The CLEC Coalition’s First Set of Data Requests (Objections to DR Nos. 1-1, 1-5).

broader mass market.” (Gillan Rebuttal, at 14, ln. 11-15). SBC has every right to challenge such testimony through cross-examination and argument at hearing. The SBC Motion, however, attempts to keep evidence from getting before the Commission based on baseless allegations belied by the facts before the Commission. The CLEC Coalition urges that this effort to eliminate critical portions of Mr. Gillan’s testimony be rejected, and that the SBC Motion be denied.

WHEREFORE, the CLEC Coalition respectfully requests the Commission deny SBC Missouri’s Motion To Strike Portions of the Prefiled Rebuttal Testimony of Joseph Gillan be denied in its entirety, and that the CLEC Coalition be granted any other relief to which it is entitled.


Respectfully submitted,

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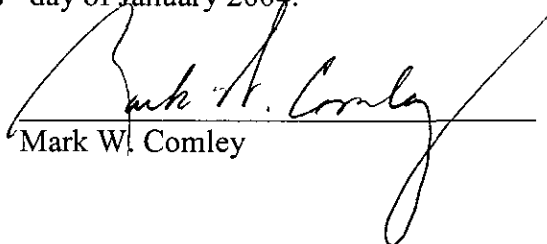
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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 26th day of January 2004.



Mark W. Comley