

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**SOUTHWESTERN BELL TELEPHONE, L.P.,
D/B/A SBC MISSOURI'S MOTION TO DISMISS
TRIENNIAL REVIEW PROCEEDINGS**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), and for its Motion to Dismiss Triennial Review Proceedings, states as follows:

The United States Court of Appeals for the D.C. Circuit ruled that the FCC's Triennial Review Order ("TRO") is unlawful in numerous respects, including the FCC's "subdelegation to state commissions of decision-making authority over impairment determinations."¹ On June 16, 2004, the D.C. Circuit issued its mandate to the FCC formally vacating the rules that it held unlawful in its March 2, 2004 ruling. Because this Commission initiated and is conducting these Triennial Review proceedings pursuant to the role delegated to it by the FCC's rules – a role and rules that have been declared unlawful and have now been vacated – SBC Missouri respectfully requests that the Commission dismiss these proceedings.

The FCC released the TRO, its third attempt to formulate unbundling rules that comply with federal law, on August 21, 2003. In the TRO, the FCC made a national finding of impairment with respect to mass market switching, certain high-capacity loops, and certain forms of dedicated transport, but also concluded that impairment with respect

¹ USTA v. FCC, 359 F.3d 554, 594 (D.C. Cir. 2004) ("USTA II").

to these network elements may not exist in particular geographic markets. Thus, the FCC delegated to the state commissions the tasks of examining impairment with respect to these network elements on a more granular, market-specific basis. The FCC required that state commissions complete these proceedings within nine months of the TRO's effective date of October 2, 2003. On November 5, 2003, the Commission instituted this Triennial Review proceeding to undertake the responsibilities delegated to the states by the FCC in its TRO.²

On March 2, 2004, the D.C. Circuit held that the portions of the TRO and the FCC's rules concerning mass market switching, high-capacity loops, and dedicated transport – the same portions under which the Commission is acting in these proceedings – are unlawful. In particular, the D.C. Circuit made several findings that directly impact the Commission's Triennial Review proceeding:

- a. First, the Court held that the FCC's delegation to the state commissions of the authority to conduct the nine-month impairment proceedings with respect to mass market switching, high-capacity loops, and dedicated transport is unlawful and vacated that delegation: "We therefore vacate, as an unlawful subdelegation of the [FCC's] §251(d)(2) responsibilities, those portions of the [TRO] that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements."³ Thus, the delegated authority pursuant to which the Commission was conducting this proceeding no longer exists;

² See Order Creating Case and Establishing Initial Filing Deadlines.

³ Id. at 568.

- b. Second, the Court vacated as unlawful and remanded to the FCC and the FCC's national finding of mass market switching "impairment." The Court stated that the FCC's "impairment" finding due to hot cuts could not stand because, among other reasons:
1. The FCC "implicitly conceded that hot cut difficulties could not support an undifferentiated nationwide impairment finding,"⁴ and
 2. the FCC must consider more "narrowly-tailored alternatives to a blanket requirement that mass market switches be made available as UNEs," such as rolling access;⁵
- c. Third, the Court vacated as unlawful and remanded to the FCC the FCC's dedicated transport rules. The Court stated that those rules were unlawful because, among other reasons, the FCC:
1. arbitrarily and irrationally defined each point-to-point transport route as a separate "market,"⁶ and
 2. refused to "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired," contrary to the 1996 Act.⁷
- d. Finally, the Court vacated as unlawful the FCC's attempt to delegate authority to state commissions to conduct nine-month proceedings regarding high-capacity loops. The Court expressly "vacate[d], as an unlawful subdelegation of the [FCC's] §251(d)(2) responsibilities, those

⁴ Id. at 570.

⁵ Id.

⁶ Id. at 575.

⁷ Id. at 577.

portions of the [TRO] that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements,”⁸ and “vacate[d] the [FCC’s] subdelegation to state commissions of decision-making authority over impairment determinations,”⁹ which includes the FCC’s attempted subdelegation of the high-capacity loop impairment determination.

On March 5, 2004, the Commission acknowledged that the Court’s decision “may, if upheld in whole or in part, have a significant impact on this case. If the portion of that decision invalidating the FCC’s subdelegation to the state is upheld, there will be no need to proceed further in this case.”¹⁰ Now, the D.C. Circuit has issued its mandate. Moreover, the Chief Justice of the Supreme Court denied all requests to stay the D.C. Circuit’s mandate. Thus, the portions of the TRO and the FCC rules that delegated the Commission the authority to undertake these proceedings have been vacated. The FCC rules that these proceedings were instituted to apply have also been vacated. In short, there is no longer any lawful basis for these proceedings. Thus, the Commission should dismiss these proceedings.


⁸ 359 F.3d at 568.

⁹ Id. at 594.

¹⁰ See Order Suspending Schedule and Directing Filing, p. 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on all counsel of record by e-mail on June 21, 2004.


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