

**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
RESPONSE TO STAFF'S MOTION TO SUSPEND PROCEDURAL SCHEDULE
AND TO ORDER SUSPENDING SCHEDULE AND DIRECTING FILING**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, and for its Response to Staff's Motion to Suspend Procedural Schedule ("Motion") and to Order Suspending Schedule and Directing Filing ("Order"), states as follows:

Executive Summary

SBC Missouri fully supports the Staff of the Missouri Public Service Commission's ("Staff's") Motion. The United States Court of Appeals for the District of Columbia Circuit ("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 Because the Missouri Public Service Commission ("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 now been declared unlawful² -- the Commission should continue to stay these proceeding until the later of the denial of any petition for rehearing or rehearing en banc or until May 1, 2004 (60 days from March 2, 2004, the date of the D.C. Circuit's decision).³

¹ USTA v. FCC, Nos. 00-1012 (consolidated), D.C. Circuit, March 2, 2004, slip opinion at 61 ("USTA II").

² Id. at 61-62.

³ This is the same period for which the D.C. Circuit stayed the issuance of its mandate.

SBC Missouri submits that in light of the D.C. Circuit's decision, it would be wasteful and imprudent for the Commission and the parties to continue these proceedings at this time. Indeed, it makes no sense for the Commission and the parties to expend now, before the FCC has developed unbundling rules (or mounted a successful challenge to USTA II), the significant amount of time and resources that preparing and filing testimony, conducting discovery, holding hearings, and preparing and filing briefs and analyses would require, all in an attempt to apply rules declared unlawful and invalid by a unanimous Court of Appeals. As is explained below, USTA II became the governing law the moment that the decision was issued and it remains the governing law unless and until the D.C. Circuit or the United States Supreme Court directs otherwise. Thus, continued suspension of these proceedings remains appropriate even though the D.C. Circuit's mandate has not yet been issued. Moreover, no party will be harmed or prejudiced by a continued temporary delay of the proceedings at that time. If the FCC's TRO is somehow revived, the Commission will be able to recommence the proceeding immediately.

Argument

1. On March 4, 2004, Staff filed its Motion. In the Motion, Staff notes that on March 2, 2004, the D.C. Circuit issued its opinion on the appeal of the Triennial Review Order ("TRO")⁴, vacating the FCC's delegation of its responsibilities under 47 U.S.C. §251(d)(2) to the state commissions.⁵ Staff further notes that the D.C. Circuit temporarily stayed the vacatur until no later than the later of: (a) the denial of any petition

⁴ Report and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, August 21, 2003.

⁵ See Staff's Motion to Suspend Procedural Schedule, page 1.

for rehearing or rehearing en banc; or (b) 60 days from the March 2, 2004 (May 1, 2004).⁶ Additionally, Staff notes that it is unlikely that the Court will reverse its conclusion that the FCC lacks the authority to delegate its responsibilities under §251(d)(2) to the state commissions and it is also unlikely that the Supreme Court will review the Court of Appeals' decision.⁷ Finally, Staff notes that the status of the authority delegated to the state commissions will remain uncertain until the Court of Appeals issues the mandate or, in the event the Supreme Court determines that it will take the case on review, until the Supreme Court issues an opinion.⁸ In its Motion, Staff recommends that the Commission suspend the procedural schedule indefinitely.⁹ Staff notes that: "continuing with the case will require a significant expenditure of the Commission's and the parties' time and other resources on issues the Commission may ultimately lack authority to decide."¹⁰ In the alternative, Staff recommends that the Commission suspend the procedural schedule for sixty days, which would suspend the case until the earliest date by which the D.C. Circuit will issue the mandate.¹¹ Staff also recommends that the Commission direct the parties to file recommendations as to whether the case should remain suspended or be continued.¹² Staff notes that the Commission can restart a procedural schedule should the recommendations convince the Commission to continue with the case or the Commission can continue with the indefinite (or 60-day) suspension until the fate of the TRO is known.

2. On March 5, 2004, the Commission entered its Order. In its Order, the

⁶ Id.

⁷ Id. at 1-2.

⁸ Id. at 2.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id. at 3.

Commission notes that the decision of the D.C. Circuit may, if upheld in whole or part, have a significant impact on this case.¹³ Specifically, if the portion of the decision invalidating the FCC's subdelegation to the states is upheld, there will be no need to proceed further in this case.¹⁴ The Commission, thereafter, directed the parties to submit pleadings stating and explaining the parties' positions on whether to proceed with this case while the D.C. Circuit's decision is stayed or under appeal.¹⁵ Further, pending the Commission's determination on whether or how to proceed with this case, the Commission suspended all activity on this case (including testimony filings and hearings on discovery disputes).¹⁶

3. As both Staff's Motion and the Commission's Order reflect, the D.C. Circuit has ruled that the FCC's TRO is unlawful in numerous respects, including the FCC's "subdelegation to state commissions of decision-making authority over impairment determinations."¹⁷ Because the Commission initiated and is conducting this proceeding pursuant to the role delegated to it by the FCC's rules--a role and rules that have now been declared unlawful--the Staff requested that the Commission suspend the procedural schedule indefinitely (or alternatively for sixty days) and the Commission suspended all activity in this matter until it determines whether or how to proceed with this case. SBC Missouri believes it is appropriate to temporarily stay or abate this proceeding until the later of sixty days from the D.C. Circuit's opinion or the date of the denial of any petition for rehearing or rehearing en banc. In support of its position, SBC Missouri states:

¹³ Order at page 1.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ USTA II at page 61.

a. 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 to these network elements may not exist in particular geographic markets. Thus, the FCC delegated to the state commissions the task 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.

b. On November 3, 2003, the Commission instituted this Triennial Review proceeding to undertake the responsibilities delegated to the states by the FCC in its TRO.

c. 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 this proceeding—are unlawful. In particular, the D.C. Circuit made three findings that directly impact this proceeding:

1. 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, with no remand back to the FCC: "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.”¹⁸

2. Second, the Court vacated as unlawful and remanded to the FCC 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: (a) the FCC “implicitly conceded that hot cut difficulties could not support an undifferentiated nationwide impairment finding”¹⁹; and (b) 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.²⁰

3. 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: (a) arbitrarily and irrationally defined each point-to-point transport route as a separate “market”²¹; and (b) refused to “consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired,” contrary to the 1996 Act.²²

d. Because this proceeding was instituted and is being conducted pursuant to authority delegated by the FCC in the TRO, which delegation has been declared unlawful, and because this proceeding was instituted and is being

¹⁸ Id. at 18.

¹⁹ Id. at 21.

²⁰ Id. at 21-22.

²¹ Id. at 28-29.

²² Id. at 33.

conducted to apply FCC rules that also have been declared unlawful, the Commission should maintain its temporary stay of these proceedings at least until the later of sixty days from the D.C. Circuit Court's order or the denial of all petitions for rehearing or rehearing en banc that may be filed. At that time, the Commission can again assess the status of the TRO appellate proceedings and determine whether the stay of proceedings before this Commission should be continued.

e. The CLEC Coalition urges the Commission to continue with these proceedings in order to engage in a "fact finding" mission.²³ This proposal makes little sense, not only because the subdelegation of authority to the states has been declared to be unlawful, but also because the standards which the FCC has ordered to be applied have also been declared to be unlawful. Once the vacatur becomes effective, there will be no rules or standards in place and any "fact finding" would be unproductive since there will be no rules or standards that spell out what facts should be assessed and how they should be applied.²⁴ Consequently, Staff is quite correct in concluding that "continuing with this case will require a significant expenditure of the Commission's and the parties' time and other resources on issues the Commission ultimately may lack authority to decide."²⁵ For example, with respect to dedicated transport, the current proceedings are premised on the TRO's trigger rules, which define each

²³ See The CLEC Coalition's Opposition to Staff's Motion to Suspend Procedural Schedule, pages 2-3.

²⁴ Moreover, the lack of any rules and standards that can be applied with reasonable certainty will undoubtedly generate significant discovery disputes, as parties will inevitably take opposing stands regarding what discovery requests are "reasonably calculated to lead to the discovery of admissible evidence." Similarly, it would be difficult to conduct a focused hearing when no one knows what facts would be considered "relevant" or how the facts should be analyzed in the absence of known standards.

²⁵ See Staff's Motion to Suspend Procedural Schedule, page 2.

individual transport route as a separate “market” and look at only the actual presence of competitive facilities deployed by multiple carriers on a particular route. Thus, the evidence that has been presented to the Commission concerns only the particular routes where multiple carriers have deployed facilities.²⁶ However, the D.C. Circuit found that the FCC’s market definition (and thus its trigger rules) are unlawful, as they “ignore facilities deployment along similar routes when assessing impairment.”²⁷ Therefore, even if on remand the FCC asks the state commissions to assist the FCC in some manner with respect to dedicated transport, the focus of this current proceeding may be both under-inclusive and over-inclusive. Moreover, the current proceeding does not address what is perhaps one of the most significant issues with which the FCC must grapple: whether and to what extent the competitive fiber currently deployed in nearly every major metropolitan area demonstrates non-impairment throughout those metropolitan areas and/or in markets with similar characteristics.

f. The issues relating to the mass market switching case are on equally shaky ground. Again, even if the FCC asks the state commissions to assist in some manner in the mass market switching impairment determination, the issues will likely be very different than those currently before the Commission. For instance, to determine whether competitors are “impaired” without access to unbundled local switching to serve mass market customers, the D.C. Circuit has stated that the FCC must be more specific in identifying when entry into a market is “uneconomic.” The FCC also must, among other things,

²⁶ While SBC Missouri is pursuing a “potential deployment” case for dedicated transport, that case is limited to the same particular routes that SBC Missouri is pursuing under the trigger tests.

²⁷ USTA II at page 29.

examine more “narrowly-tailored alternatives” to blanket unbundling for any markets where impairment might otherwise exist.²⁸ These issues (and other issues that the FCC must consider as well) are not part of the current proceeding before this Commission.

g. As the Chief of the FCC’s Wireline Competition Bureau recently told NARUC: “the D.C. Circuit called into question not only the specifics of the TRO but at least some aspects of the general impairment standard. . . .What that means is some of the facts that have been developed in the state records may not be responsive to what the ultimate impairment standard could be.”²⁹

h. In short, because the D.C. Circuit has declared the FCC’s subdelegation to the states unlawful, and because the impairment issues that the FCC must now address were not part of this proceeding, it would likely serve no useful purpose for the Commission to continue further with this proceeding at this point, before the FCC formulates its new unbundling rules. SBC Missouri further notes that some states, including Colorado, Minnesota, Nebraska, Oregon, and Utah, suspended their Triennial Review proceedings even before the D.C. Circuit’s opinion issued, and numerous states, including Arizona, Arkansas, Delaware, Florida, Illinois, Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, Utah, Virginia, Washington, Wisconsin, and of course, Missouri, as well as the District of Columbia, have similarly suspended their Triennial Review proceedings or

²⁸ Id. at 21-22.

²⁹ March 9, 2004 Remarks of FCC Wireline Competition Bureau Chief Bill Maher to NARUC (quoted in “Bureau Chief outlines FCC’s prep work in response to Court’s unbundling ruling,” TR Daily (March 9, 2004)).

hearing schedules on a temporary basis as a result of the D.C. Circuit's decision. Like these other states, the Commission should conserve its resources and the resources of the parties until such time as it is clear what, if any, role the FCC will ask the Commission to take.³⁰

i. SBC Missouri further notes that the only parties that could possibly be prejudiced if the Commission maintains its stay (as it should) are SBC Missouri and CenturyTel because only the ILECs stand to gain from the TRO-related proceedings delegated (unlawfully) by the FCC to the states, where the issue is determining where the FCC's nationwide findings of "impairment" do not apply. (In that connection, it is important for the Commission to understand that this proceeding has not been designed to investigate whether there is or is not impairment in the first instance, because the FCC already purported to make that determination. Thus, assuming that USTA II is affirmed, these proceedings could not be used to fill the gap created by the vacatur of the FCC's impairment rules.)

j. The D.C. Circuit stayed the issuance of its mandate until the denial of any petition for rehearing or rehearing en banc or 60 days.³¹ While some parties might assert that a stay of this Commission's Triennial Review proceeding

³⁰ Moreover, and as explained more thoroughly in paragraph n below, immediately following the D.C. Circuit's opinion, SBC Communications, Inc. extended an offer to its UNE-P customers for direct, one-on-one talks to negotiate commercially reasonable pricing for SBC's UNE-P product and to continue to offer each UNE-P customer the same UNE-P services for the next 90 days at Commission-approved rates. In his recent remarks to NARUC, FCC Chairman Powell called upon "competitors and incumbents. . .to work earnestly to arrive at commercially negotiated rates for access," and "urge[d] states to encourage these negotiations." March 10, 2004 Remarks of Chairman Powell to NARUC, Washington, D.C., at 2, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-244737A1.pdf. Maintaining the Commission's stay of these proceedings (at least unless and until the opponents of the D.C. Circuit's decision secure a stay from the Supreme Court) would provide SBC and its CLEC customers the opportunity to discuss and negotiate SBC's very progressive and unique new wholesale UNE-P offering. Through this offer, SBC is seeking a negotiated, private commercial contractual arrangement that will eliminate uncertainty in the telecommunications industry with respect to the availability of UNE-P.

³¹ Id. at 62.

is not warranted because the D.C. Circuit's mandate has not yet issued, that assertion would be wrong as a matter of law. The D.C. Circuit's decision became governing law the moment it issued, notwithstanding that the mandate has not yet issued.

k. The courts have made clear that "once a published opinion is filed, it becomes the law of the circuit³²] until withdrawn or reversed by the Supreme Court or an en banc court," and it expressly rejected the argument that appellate decisions are "not binding precedent until the mandate issues in th[e] case." Chamber v. United States, 22 F.3d 939, 942 n. 3 (9th Cir. 1994), *vacated and remanded on other grounds*, 47 F.3d 1015 (9th Cir. 1995). See also Young v. INS, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000)("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit's decision as binding authority"). Other published decisions consistently have reached the same conclusion. Finberg v. Sullivan, 658 F.2d 93, 97 n. 5 (3d Cir. 1981)(en banc) ("For most purposes, the entry of judgment, rather than the issuance of the mandate, marks the effective end to a controversy on appeal"); McCellan v. Young, 421 F.2d 690, 691 (6th Cir. 1970); AT&T Communications v. BellSouth Telecommunications, Inc., C/A No. 3:97-2164-17, slip op. at 14 (D.S.C. Aug. 14, 2000). Thus, the D.C. Circuit's holding that the FCC's

³² Because the D.C. Circuit was acting as a Hobbs Act reviewing court (see 28 U.S.C. §2341(1)), its decision is binding on every other court in the country except for the Supreme Court of the United States. See 28 U.S.C. §2349(a) ("The court of appeals in which the record on review is filed * * * has *exclusive* jurisdiction to make and enter * * * judgment determining the validity of * * * the order of the agency.") (Emphasis added). Indeed, even indirect collateral attacks on any aspect of the TRO reviewed by the D.C. Circuit, or on the D.C. Circuit's decision itself, are strictly forbidden. FCC v. ITT World Communications, 466 U.S. 463, 468 (1984) (suit barred where "in substance" it "raises the same issues" being considered in the Hobbs Act court challenge).

“subdelegation to state commissions of decision-making authority over impairment determination” is “unlawful”³³ constitutes binding precedent from the day it was issued, and it will remain governing law unless and until the D.C. Circuit or the Supreme Court directs otherwise.

1. The D.C. Circuit established this 60-day time limit for its stay of the mandate to enable the FCC, should it choose to do so, to implement new unbundling rules and/or to seek from the Supreme Court a stay of the D.C. Circuit’s decision. There may be room for disagreement about the merits of the D.C. Circuit’s decision, but there can be no dispute that continuing Missouri’s Triennial Review proceedings would require a substantial commitment of time and resources by the Regulatory Law Judge, the Commission, its Staff, and all of the parties involved. And there can also be no dispute that if the D.C. Circuit’s decision is ultimately upheld, the continuation of these proceedings would result in an enormous waste of public and private resources. The Commission should not continue on the current schedule based on the CLEC Coalition’s³⁴ hopeful assertions of Supreme Court review, particularly when the Supreme Court itself previously has reversed the FCC for misapplying the necessary and impair standard.³⁵ In any event, the balance weighs heavily in favor of a stay of this proceeding. No party can deny that it would be a tremendous waste of time, money, and resources if the parties file hundreds of pages of testimony, continue with hearings, and file briefs addressing the FCC’s now invalid rules, and the D.C. Circuit decision stands. On the other hand, if these proceedings are stayed

³³ USTA II, at pages 18 and 61.

³⁴ See CLEC Coalition’s Opposition to Staff’s Motion to Suspend Procedural Schedule, March 4, 2004.

³⁵ See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 389-390 (1999).

but the opponents of the D.C. Circuit's decision secure from the Supreme Court a stay of the D.C. Circuit's decision, the Commission and the parties can easily pick up right where the proceedings left off and go forward from there.

m. Moreover, with, at a minimum, a significant number of states already suspending their Triennial Review-related proceedings, it is unthinkable that, in the unlikely event that the TRO is ultimately upheld, the FCC or any other court would hold that those states would forfeit their authority to complete their TRO-related proceedings if not completed by the original deadline, without any extension for the period between the issuance of the D.C. Circuit's decision and the final disposition of the TRO appeals.³⁶ And if USTA II stands, it is unthinkable that the FCC would formulate and announce a new state commission role but refuse to give states time to complete that role.

n. Finally, SBC notes that in an effort to provide CLECs with the certainty of multi-state, multi-year commercial agreements that include the continued availability of the UNE-P at mutually agreeable market-based rates, SBC Missouri issued Accessible Letter CLECALL04-037, on March 3, 2004. In that letter, SBC Missouri stated that it stands ready to work with the CLEC community to develop a viable solution to ensure that none of their customers' service is disrupted on account of the D.C. Circuit decision. Specifically, SBC is


³⁶ Pursuant to paragraphs 190 and 527 of the TRO, the FCC will assume jurisdiction in the event of a "state commission failure to act: only upon the petition of an aggrieved party, and only where the FCC "agrees that the state has failed to act." It is unlikely, to say the least, that in the event the TRO is ultimately upheld the FCC would act under this provision to usurp the role of the significant number of states that have already suspended or stayed their Triennial Review proceedings and that would undoubtedly miss the original July 2, 2004 deadline. Further, if the Commission continues to suspend its Triennial Review proceeding, SBC Missouri will not argue (and in fact would oppose any argument) that the FCC should take jurisdiction over these matters as a result of the Commission missing the July 2 deadline due to time lost during the stay.

prepared, without prejudice to any party's legal position, to continue to offer all CLECs their mass market UNE-P service arrangements at PUC-approved rates for 90 days from the date of the Accessible Letter. During that 90 day period, SBC will negotiate an orderly transition from its existing interconnection agreement to a private commercial arrangement that would enable each CLEC to continue to receive the UNE-P based upon a mutually acceptable market-based rate. SBC noted that it is prepared to negotiate a multi-state agreement. A copy of Accessible Letter CLECALL04-037 is attached hereto and marked as Exhibit A.

WHEREFORE, SBC Missouri prays that the Commission temporarily suspend or abate this proceeding until the later of 60 days from the D.C. Circuit Court decision vacating the FCC's TRO decision in several respects or until any requests for rehearing or rehearing en banc are ruled upon. Thereafter, the Commission should again request the parties to file comments on whether the proceeding should remain suspended, together with such further or additional relief the Commission deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on all counsel of record by e-mail on March 11, 2004.


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