BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Big River Telephone Company, LLC, Birch Telecom of Missouri, Inc., Ionex Communications, Inc., NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., and Xspedius Communications, LLC,	)	
	)	Case No. TC-2005-0294
Complainants,	)	
v.	)	
Southwestern Bell Telephone, L.P. d/b/a SBC Missouri,	)	
Respondent.	)	

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI'S
ANSWER AND RESPONSE TO MOTION FOR EXPEDITED TREATMENT

COMES NOW, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), pursuant to 4 CSR 240-2.070(8), and files this Answer and Response to the Motion for Expedited Treatment filed by the CLEC Coalition on March 3, 2005.[1] For its Answer and Response, SBC Missouri respectfully shows the Missouri Public Service Commission ("Commission") as follows:

I. EXECUTIVE SUMMARY

1. This case involves a last-ditch effort by the CLEC Coalition to preserve a regulatory regime of maximum unbundling that the federal courts, including the Supreme Court, have ruled unlawful on three separate occasions. Moreover, the FCC itself has finally acknowledged that unlimited unbundling imposes severe costs on consumers and

[1] The CLEC Coalition includes Big River Telephone Company, L.L.C.; Birch Telecom of Missouri, Inc.; Ionex Communications, Inc.; NuVox Communications of Missouri, Inc.; Socket Telecom, L.L.C.; XO Communications Services, Inc.; and Xspedius Communications, LLC.

the industry in the form of decreased incentives to invest in facilities-based competition. Although it has been almost nine years since the FCC first required ubiquitous unbundling of the UNE-Platform (or "UNE-P") and high-capacity loops and transport in 1996, those determinations have never once survived judicial review.

2. In its February 4, 2005 *Triennial Review Remand Order* ("*TRRO*"),[2] the FCC at long last has recognized that CLECs do not need the UNE-P to compete in the mass-market and they do not need unbundled access to high-capacity loops and transport in wire centers located in the densest metropolitan areas. Moreover, the FCC further held that making these network elements available at cost-based rates had significantly harmed consumers by discouraging carriers from undertaking the sort of infrastructure investments that the 1996 Act was designed to foster. The FCC accordingly put in place a "nationwide bar" on the UNE-P that, by its express terms, "does not permit competitive LECs to add new UNE-P arrangements" after the effective date of the order – *i.e.*, after March 11, 2005. *TRRO* ¶¶ 204, 227. Similarly, the FCC concluded that, as of the effective date, its rules "do not permit competitive LECs to add" either new dedicated transport UNEs or new high-capacity loop UNEs "pursuant to section 251(c)(3) where the [FCC] has determined that no section 251(c) unbundling requirement exists." *Id.* ¶¶ 142, 195.

3. Having repeatedly failed in the courts and at the FCC, the CLEC Coalition asks this Commission to intervene at the eleventh hour to preserve this unlawful unbundling regime. The CLECs have known for more than six months (at least since the

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, 2005 WL 289015 (FCC Feb. 4, 2005). ("*TRRO*"), *petition for review pending*, *USTA v. FCC*, No. 05-1058 (D.C. Cir.).

FCC's *Interim Order*[3] in August 2004) that they would be precluded from submitting new orders once the transition period begins. They certainly knew three weeks ago, when SBC explained on February 11, 2005, exactly how it intended to implement the *TRRO*. Yet, barely one week before the transition period goes into effect, the CLEC Coalition files this "expedited" motion seeking emergency relief – an emergency entirely of their own creation.

4. The Commission should reject this extraordinary request. SBC Missouri concedes that, with respect to implementing the FCC's new unbundling requirements, carriers must negotiate (and, if necessary, arbitrate) relevant modifications through the change-of-law provisions within their existing agreements or, when negotiating a new agreement, through the section 252 process. Likewise, SBC Missouri may not collect the mandatory increase in rates for the "embedded base" – *i.e.*, customers who were obtained under existing interconnection agreements and whose terms of service are accordingly dictated by those agreements – until those interconnection agreements are amended. But during the transition period between March 11, 2005, and the date by which these new or revised interconnection agreements go into effect, CLECs may not obtain *additional* network elements pursuant to agreements that were negotiated and approved pursuant to unlawful rules. Rather, the FCC's "transition plan applies only to the embedded base, and does not permit competitive LECs to add" new elements in the absence of

[3] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements*, 19 FCC Rcd 16783, ¶ 29 (2004) ("*Interim Order*") (the proposed transition plan would allow CLECs, "[f]or the six months following . . . the effective date of the [FCC's] final unbundling rules," to continue to use UNE-P to serve their *existing* customers at the applicable TELRIC rate plus one dollar; however, "this [proposed] transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates.").

impairment. *TRRO* ¶ 5.

5. The CLECs' claims of irreparable injury are fanciful. They assert, with no elaboration or support, that absent relief they "will suffer imminent and irreparable harm" and that "Missouri consumers relying on CLEC Coalition members' services will be harmed if SBC Missouri is permitted to implement its announced plan." Complaint ¶ 31. But the CLECs have ample alternatives that they can use to serve new customers – indeed, the availability of such alternatives was precisely the reason that the FCC concluded that CLECs were not impaired without unbundled access to the UNE-P and to certain high-capacity loops and transport elements. Moreover, the CLECs' conclusory claims of injury ignore the harms – in terms of lost customers and goodwill – that SBC Missouri would incur if it were forced to continue to subsidize CLEC entry. And the public interest – which the FCC has held is *harmed* by the "continued availability" of UNE-P (*TRRO* ¶ 210) – likewise counsels against preventing SBC Missouri from implementing the FCC's order.

6. Finally, this Commission lacks authority to order the relief demanded by the CLEC Coalition. It is well settled that this Commission has no general equity jurisdiction; in the absence of an express grant of legislative authority, the Commission may not enjoin SBC Missouri from implementing the *TRRO*. Section 386.310, on which the CLEC Coalition purports to rely, is clearly inapplicable. That provision authorizes the Commission to require a "public utility to maintain and operate its line, plant, system, equipment, apparatus, and premises in such a manner as to promote and safeguard the health and safety of its employees, customers, and the public." Mo. Rev. Stat. § 386.310(1). But the CLEC Coalition has not even alleged that SBC Missouri's

implementation of the *TRRO* threatens the public health or safety, much less established that the Commission is authorized to provide the requested relief.

II. BACKGROUND

7. The *TRRO* marks the culmination of nearly a decade of litigation over the FCC's unbundling regime. The first unbundling rules in 1996 were vacated by the Supreme Court, which repudiated the approach of "blanket access" to network elements that had led the FCC in 1996 to create the UNE-P and to require ubiquitous unbundling of high-capacity loops and transport. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999). On remand from the Supreme Court, however, the FCC disregarded the Court's guidance and reinstituted virtually the exact same rules the Court had vacated. The FCC was again reversed by the courts – this time, by the D.C. Circuit. The court held that the FCC's underlying "belief that in this area more unbundling is better" was contrary to the 1996 Act, which limits unbundling to those contexts in which competitors would be "impaired" without cost-based access to the incumbent's facilities. *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-30 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

8. In August 2003, the FCC responded to *USTA I* with its *Triennial Review Order*,[4] which found no impairment, and thus no unbundling, in several situations, such as switching used to serve "enterprise" customers. At the same time, however, the *Triennial Review Order* once again required unbundled access to high-capacity loops and transport, as well as to the UNE-P for mass-market customers. The *TRO* sought to

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *aff'd in part, rev'd in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied, NARUC v. USTA*, 125 S. Ct. 313 (2004).

maintain this regime by making a provisional finding of impairment and delegating the ultimate unbundling decision to the states. On appeal, the D.C. Circuit held that the FCC's attempted delegation of unbundling authority to the states was unlawful. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313 (2004). Further, the Court vacated as unlawful the FCC's provisional findings of "impairment." *Id.* at 570-71. The D.C. Circuit reached the same conclusions with respect to the FCC's rules requiring unbundled access to high-capacity loops and transport, vacating as unlawful the FCC's attempted delegation to the states and holding that the FCC's provisional findings of impairment were not supported by the record. *See id.* at 574-75.

9. Soon after the *USTA II* mandate issued, the FCC released its *Interim Order* that required incumbent LECs, notwithstanding *USTA II*'s vacatur of the FCC's switching and high-capacity loop and transport rules, to continue providing those elements for a maximum of six months, pursuant to the terms of their existing interconnection agreements, regardless of whatever contractual rights the incumbent LECs might have had to cease such provisioning. *See Interim Order* ¶ 21.

10. On February 4, 2005, the FCC issued its order on remand from *USTA II*. This time, the FCC found that CLECs were not impaired without access to unbundled switching and the UNE-P, and it accordingly concluded that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." *TRRO* ¶ 5. The accompanying FCC rule unconditionally states that "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii).

11. The FCC reached this conclusion for two reasons. First, it reviewed extensive evidence showing that "competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets." *TRRO* ¶ 199. Based on that evidence, the FCC "determine[d] not only that competitive LECs are not impaired in the deployment of switches, but that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation." *Id*. ¶ 204.

12. Second, the FCC found "that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives." *Id*. ¶ 210. The FCC explained that "UNE-P has been a disincentive to competitive LECs' infrastructure investment." *Id*. ¶ 218. The FCC then "conclude[d] that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." *Id*. ¶ 204. As the FCC explained, such a bar is warranted "where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *Id*. ¶ 218.

13. Similarly, with respect to high-capacity loops and transport, the FCC foreclosed unbundling in wire centers meeting certain criteria, reasoning that "competitive . . . facilities have been or can be deployed" in those centers and that unbundling would accordingly diminish incentives for facilities-based competition. *E.g.*, *id.* ¶¶ 130, 174.

14. The FCC adopted a transition plan that tracked the proposed plan it had laid out in the *Interim Order* but that gave the CLECs an additional six months to convert their embedded base. Thus, the FCC granted CLECs a total of twelve months, starting from the effective date of the order, to "submit orders to convert their UNE-P customers to alternative arrangements." *TRRO* ¶ 199.[5] The FCC reasoned that "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversion." *Id.* ¶ 227. The parties, therefore, have twelve months to negotiate modifications to "their interconnection agreements, including completing any change of law processes." *Id.* The FCC also ruled that incumbent LECs would be entitled to receive additional compensation – that is, one dollar over the applicable TELRIC rate – for any UNE-P lines still in service. "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." *Id.* ¶ 228 n.630.

15. As it had pledged to do in the *Interim Order*, the FCC made clear that the transition period applies *only* to the "embedded customer base." *Id.* ¶ 227. CLECs are not permitted to add any *new* UNE-P arrangements after the effective date of the *TRRO*. As the FCC held, the transition plan "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to

[5] The transition period for dark fiber facilities is 18 months, rather than 12 months. *See TRRO* ¶¶ 142, 195.

section 251(c)(3)." *Id.*; *see id.* ¶ 5; *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("Requesting carriers may not obtain new local circuit switching as an unbundled network element."). Moreover, the FCC concluded that its rules "do not permit competitive LECs to add" either new dedicated transport UNEs or new high-capacity loop UNEs "pursuant to section 251(c)(3) where the [FCC] has determined that no section 251(c) unbundling requirement exists." *TRRO* ¶¶ 142, 195.

16. In addition, the FCC took the unusual step of accelerating the effective date of its order to March 11, 2005. Ordinarily, the FCC explained, its rules take effect "30 days after publication in the Federal Register." *TRRO* ¶ 235. The FCC found "good cause," however, to "render [its] order effective sooner," reasoning that such action was necessary to avoid "disrupt[ion] to the market." *Id.* ¶¶ 235-236. "Given the need for prompt action," *id.* ¶ 236, the FCC accelerated the effective date of the order to minimize any further harm to the industry.

17. Within a week of the *TRRO*, SBC Missouri advised all CLECs in the state that, consistent with the FCC's order, it would no longer accept new UNE-P orders (or new orders for high-capacity loop and transport in the affected wire centers) after March 11, 2005. At the same time, SBC Missouri reiterated its desire to reach alternative, commercial arrangements with the CLECs that would provide them access to a commercial substitute for UNE-P. For almost three weeks, the CLECs did nothing. Then, almost a month after the FCC released its order – and barely a week prior to its effective date – the CLEC Coalition filed a complaint with the Commission.

III. DISCUSSION

A. SBC MISSOURI'S ACCESSIBLE LETTERS ARE FULLY CONSISTENT WITH THE *TRRO*

18. The CLEC Coalition's Complaint is directed at SBC Missouri's announcement that it would no longer accept new orders for UNE-P and specific high-capacity loops and transport after the FCC's March 11, 2005 deadline. But the CLECs do not dispute that the FCC has now definitively held that the UNE-P is no longer available under section 251(c)(3) and that certain high-capacity loops and transport no longer need to be unbundled. They claim, however, that the implementation date of the FCC's "nationwide bar" depends on the vagaries of their various interconnection agreements and, in particular, on how long they can drag out the change-of-law process that they claim is triggered by the FCC's ruling. The FCC, however, said precisely the contrary. As explained above, the *TRRO* puts in place a carefully delineated transition plan to allow "competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition" *away* from UNE-P and the high-capacity loops and transport for which no impairment has been found. Critically, as the FCC repeatedly emphasized, that plan "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)." *Id.* ¶ 227; *see also id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add new switching UNEs"); 47 C.F.R. § 51.319(d)(2)(iii) ("Requesting carriers may not obtain new local switching as an unbundled network element."); *id.* § 51.319(a)(4)(iii), (5)(iii) ("Where incumbent LECs are not required to provide [DS1 or DS3 loops], . . . requesting carriers may not obtain new [DS1 or DS3 loops] as unbundled network elements"); *id.* § 51.319(e)(2)(ii)(C), (iii)(C) (same for dedicated DS1 and DS3 transport). The FCC thus clearly and unambiguously adopted the common-sense proposition that a transition plan intended to move *away* from the

unbundling of certain network elements would not allow CLECs to keep adding the very unbundling arrangements that the FCC has found to be unlawful. On March 9, 2005, the Indiana Utility Regulatory Commission, when rejecting identical CLEC claims in its state, stated as follows: "We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and even though UNE-P can continue to exist during this one-year transition period with respect to an embedded base, CLECs are not permitted to add new UNE-P customers during the transition period."[6]

19. This reading is confirmed, moreover, by the FCC's step of accelerating the effective date of the *TRRO*. Recognizing the need for "prompt action" in order to minimize or avoid any further harm to the marketplace or the industry, the FCC rejected its normal procedure of making the effective date 30 days after publication in the Federal Register. The FCC's sense of urgency makes clear that the "nationwide bar" against adding these new unbundled elements is self-effectuating. Any other interpretation would run contrary to the FCC's extraordinary steps in expediting the effective date of the order and the reasons underlying that urgency.

20. Notwithstanding this clear and immediate bar, the CLEC Coalition contends that the FCC's transition plan *does* permit them to add new UNE-P and high-capacity loop and transport arrangements for which impairment has not been found. *See* Complaint ¶¶ 22-27. In the view of the CLEC Coalition, paragraph 233 of the *TRRO* provides that carriers must implement the FCC's findings pursuant to the section 252

[6] Order, *Complaint of Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements*, Cause No. 42749, at 7 (IURC Mar. 9, 2005) ("*Indiana Order*").

process, thereby allowing the CLECs to drag out the change-of-law process for as long as possible, all the while ensuring that they can continue to order new unbundling arrangements under their unlawful but yet-to-be amended interconnection agreements. According to the CLEC Coalition, therefore, when the FCC said that its transition plan applies only to the embedded base, and does not permit competitive LECs to add new UNE arrangements, it really meant that its plan *does* permit CLECs to continue to add UNEs without limitation.

21. The CLEC Coalition's position makes no sense. The CLECs' existing UNE-P customers were obtained pursuant to *unlawful* unbundling rules – rules that had been in place without any legal basis for more than eight years and that had been declared invalid three times by the courts. That is why the *TRRO* requires CLECs to make alternative arrangements to serve them within twelve months of the effective date of the order. It is absurd to think that, even as the FCC was forcing CLECs to move their "embedded base" off of the unlawful UNE-P and off of the high-cap loops and transport for which no impairment is found, the FCC would simultaneously permit CLECs to continue to add *new* unbundling arrangements without limitation. As the Indiana Utility Regulatory Commission recently asked, "[i]f CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined?"[7]

22. The CLEC Coalition's reading is inconsistent with the *TRRO* itself. As noted, the order repeatedly and expressly states that the transition plan does *not* permit

[7] *Indiana Order* at 6.

CLECs "to add new switching UNE-P arrangements" at all, *TRRO* ¶¶ 5, 227, nor does it allow CLECs to add new dedicated transport UNEs or high-capacity loop UNEs in wire centers or on routes where the FCC has found no impairment, *id.* ¶¶ 142, 195. The CLEC Coalition asserts that paragraph 233 supports its view that the *TRRO* is not "a self-effectuating order" and that, before implementing the transition rules, SBC Missouri must negotiate, arbitrate, and then modify its interconnection agreement through the change-of-law process. *See* Complaint ¶ 26. But paragraph 233 simply requires that the ultimate conclusions reached in the *TRRO* be implemented by way of modifications to existing interconnection agreements. "We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." *TRRO* ¶ 233. SBC Missouri does not dispute that the FCC's new rules must be implemented through negotiation. Indeed, even with respect to the UNE-P, which it has no obligation to provide at all (other than to the embedded base during the transition period), SBC Missouri has made clear from the very beginning that it "stands ready to negotiate a commercial substitute for unbundled switching in combination with DS0 loops," Accessible Letter CLECALL05-017 (Feb. 11, 2005).

23. Paragraph 233 has nothing to do with the transition period during which these negotiations presumably will be taking place. The transition plans are intended to "govern the migration *away from* UNEs where a particular element is no longer available on an unbundled basis." *TRRO* ¶ 57 (emphasis added). The CLEC Coalition's reading of paragraph 233 – *i.e.*, requiring that the transition plan (as opposed to the final rules) be negotiated, arbitrated, and incorporated into existing interconnection agreements through the change of law process – would render meaningless the FCC's language restricting the

transition plan to the "embedded base." If the CLECs were correct that they may continue to add new UNE-P and high-capacity loop and transport arrangements (without limitation) until their agreements are amended, then what could the FCC possibly have meant when it said seven separate times that the transition plans apply only to the "embedded customer base" and do not permit CLECs to "add new" UNEs in the absence of impairment? *TRRO* ¶¶ 5 (three times), 142, 195, 199 & 227. If the transition plans had to wait to go into effect until after the parties amended their interconnection agreements to implement the FCC's new rules, then the new agreements themselves would have prevented CLECs from adding the new UNE arrangements. There would have been no need for the FCC to state repeatedly that, under the transition plan, CLECs are not "permit[ted] . . . to add new UNE-P arrangements." *TRRO* ¶ 227.[8] The CLEC Coalition does not and cannot explain why the FCC would have included that language, had it intended indefinitely to permit CLECs to continue adding unlawful UNE arrangements after the effective date of the order. *See also Indiana Order* at 6 ("We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005.").[9]

[8] The Indiana Utility Regulatory Commission put it this way: "[W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to return to the transition timetable established in the TRRO. . . . [T]he FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs." *Indiana Order* at 7-8.

[9] The Indiana Commission is not alone in this conclusion. On March 11, 2005, the New Jersey commission unanimously denied the petition of various CLECs to require Verizon to continue accepting UNE-P orders. *See* Open Hearing, *In the Matter of the Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705 (N.J. BPU March 11, 2005). That

24. Nor, finally, can there be any serious argument about the *authority* of the FCC to put an end to these new UNE arrangements as of the effective date of the order, regardless of the terms of any interconnection agreement. "An agency, like a court, can undo what is wrongfully done by virtue of its order."[10] Just like a court, a federal agency has "general discretionary authority to correct its legal errors,"[11] and the immediate implementation of transition rules – like the striking of an offending provision within a particular agreement – clearly falls within that broad discretionary field. The interconnection agreements on which the CLEC Coalition places so much reliance are a direct result of the FCC's failure to implement the 1996 Act in a manner consistent with the will of Congress and binding judicial decrees. The result is that incumbent LECs, including SBC, have lost millions of customers and incalculable revenues. As the FCC acknowledged with respect to the UNE-P,

> [s]ince its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where –

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same day, the Maine commission unanimously concluded that CLECs are not entitled to order new UNEs discontinued under section 251 and found that the FCC clearly intended no contract amendment would be required to give the March 11, 2005 deadline legal effect. *See* Open Hearing, *Request for Commission Investigation for Resold Services (PUC#21) and Unbundled Network Elements (PUC#20)*, Docket No. 2002-682, Consideration of Motions for Emergency Relief (Maine PUC March 11, 2005). Also on March 11, 2005, the Massachusetts commission unanimously approved Verizon's new tariff implementing the *TRRO's* UNE-P ban. Similarly, on March 8, 2005, the Rhode Island Public Utilities Commission unanimously adopted on an interim basis Verizon's tariff revision implementing the *TRRO*'s "no new UNE-P" directive, rejecting CLEC requests to ignore that FCC mandate. *See* Open Meeting, *Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005*, Docket 3662 (Mar. 8, 2005) (http://www.ripuc.org/eventsactions/docket/ 3662page.html).

[10] *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965).

[11] *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (recognizing the "general principle of agency authority to implement judicial reversals").

> as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.

TRRO ¶ 218. Given these conclusions, it is entirely reasonable for the FCC to forbid the CLECs from continuing to make use of these discredited unbundling rules.

25. The CLEC Coalition also argues that SBC Missouri's plans to implement the FCC's rules for determining which wire centers meet the criteria for limiting or eliminating unbundling of high-capacity loops and transport are inconsistent with paragraph 234 of the *TRRO*. *See* Complaint ¶ 22. According to the CLEC Coalition, paragraph 234 requires SBC Missouri to accept and provision every high-capacity loop and transport order that a CLEC may submit, regardless of whether the requested loop or transport facility must be unbundled according to the FCC's rules. This is incorrect. As paragraph 234 makes clear, it is the requesting CLEC that has the burden to "undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed" in the provisions of the *TRRO* governing high-capacity loops and dedicated interoffice transport. *TRRO* ¶ 234.

26. The CLEC Coalition does not even acknowledge that, ten days before the CLEC Coalition filed its Complaint with this Commission, SBC filed with the FCC a list identifying precisely which wire centers and transport routes satisfy the non-impairment triggers adopted in the *TRRO*. SBC has posted this information on its CLEC-Online website. *See* Accessible Letters CLECALL05-027 (Feb. 22, 2005) & CLECALL05-031 (Feb. 22, 2005) (attached). In light of this information, no CLEC could reasonably certify that any order for a high-capacity loop in one of the identified wire centers or for dedicated transport along one of the identified routes is consistent with the requirements

for unbundling in the *TRRO*. The FCC's rules clearly provide that where an incumbent LEC is not required to provide unbundled access to a high-capacity loop or dedicated transport, requesting carriers may not obtain such loop or transport as an unbundled network element. *See* 47 C.F.R. § 51.319(a)(4)(iii) (DS1 loops); *id.* § 51.319(a)(5)(iii) (DS3 loops); *id.* § 51.319(a)(6)(ii) (dark fiber loops); *id.* § 51.319(e)(2)(ii)(C) (DS1 transport); *id.* § 51.319(e)(2)(iii)(C) (DS3 transport); and *id.* § 51.319(e)(2)(iv)(B) (dark fiber transport).

27. SBC has now filed with the FCC, under seal, the data supporting its determinations of which wire centers fall within the FCC's unbundling eligibility criteria. The data can now be viewed, subject to the terms of a protective order, by representatives of the CLECs, so they may fulfill their obligation to "undertake a reasonably diligent inquiry." *See* Accessible Letter CLECALL05-037 (Mar. 3, 2005) (attached). If the CLEC Coalition has a legitimate dispute about the wire center information that SBC submitted to the FCC, it has yet to bring such a dispute to SBC's attention or to that of the FCC.

28. SBC has now identified the wire centers in Missouri in which it no longer has an obligation to provide unbundled access to high-capacity loops and/or dedicated transport facilities. On March 11, 2005, SBC issued an Accessible Letter (CLECALL05-039) (attached), in which it provided a means by which a CLEC may self-certify pursuant to paragraph 234. Specifically, if a CLEC believes that it is entitled to high capacity loops and/or transport in wire centers that SBC has identified as ineligible for further unbundling, the CLEC may complete a "Self-Certification of Non-Impaired Wire Centers" form. The CLEC is requested to provide, as an attachment to that form, a list of

the wires centers in which it will be requesting high capacity loops and/or transport, and it is also asked to include the factual or other basis for its belief that it is entitled to the requested UNEs in each of those wire centers, notwithstanding the data supporting SBC's list of non-impaired wire centers.

B. THE CLEC COALITION'S CLAIMS OF HARM ARE TRANSPARENTLY INSUFFICIENT

29. The CLEC Coalition asserts that its "members will be irreparably harmed and Missouri consumers will suffer" if SBC Missouri is allowed to comply with the FCC's *TRRO*. *See* Complaint ¶ 42. Of course, as noted above, this unsupported assertion completely ignores the many other avenues that CLECs can use to serve new customers. As the FCC has stressed, "it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation." *TRRO* ¶ 204. And, for those CLECs that wish to continue using SBC Missouri' network, they are free to enter into an alternative commercial arrangement or resell services pursuant to section 251(c)(4). Indeed, it was precisely because CLECs do *not* need unbundled switching – *i.e.*, that they are *not* impaired without access to that network element – that the FCC put in place a "nationwide bar" on UNE-P, *TRRO* ¶ 204, and limited the availability of high-capacity loops and transport UNEs.

30. Moreover, the relief the CLEC Coalition seeks would impose considerable harm on SBC Missouri. SBC Missouri has already lost hundreds of thousands of customers – and incalculable revenues – to the synthetic competition created by the unlawful unbundling regime that has been in place since 1996. Granting the requested relief would ensure that those losses would continue and even permit them to accelerate. As the CLECs continue to drag out the negotiations over new interconnection agreements

– indeed, as the FCC clearly recognized, if the CLECs can continue to add new UNE arrangements throughout the transition period, what incentive do they have to negotiate new agreements in a timely manner? – SBC Missouri will continue to suffer the loss of even more customers and goodwill, which constitutes irreparable harm. *See, e.g.*, *Medicine Shoppe International, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (applying Missouri law and concluding that "[l]oss of intangible assets such as reputation and goodwill can constitute irreparable injury"); *see also International Casings Group Inc. v. Premium Standard Farms Inc.*, Case No. 04-1081-CV-W-NKL, 2005 U.S. Dist. LEXIS 3145, at *32 (W.D. Mo. Feb. 9, 2005).

31. The public interest likewise militates against the CLEC Coalition's requested relief. As explained above, the FCC has squarely held that "the continued availability of [UNE-P] would impose significant costs in the form of decreased investment incentives," *TRRO* ¶ 199, thereby undercutting the facilities-based competition that is the true objective of the 1996 Act. The CLEC Coalition, however, seeks to perpetuate the UNE-P indefinitely, to the long-term detriment of consumers and the industry alike.

C. THE COMMISSION HAS NO JURISDICTION TO ENFORCE SECTION 271, WHICH IN ANY EVENT DOES NOT SUPPORT CONTINUED ACCESS TO UNES AT TELRIC RATES OR TO UNE COMBINATIONS

32. Although the CLEC Coalition suggests at the end of its Complaint that SBC's refusal to accept new orders for UNE-P and certain high-capacity loop and transport UNEs "would violate the terms of the § 271 competitive checklist, which requires those elements be made available to CLECs statewide," Complaint ¶ 33, it recognizes that this argument depends on a "*total denial of access to such elements*," *id.* (emphasis added). Given that SBC Missouri does or will offer all of these elements –

either through a commercial agreement, a stand-alone switching offer, or existing special access tariffs – the CLEC Coalition has no choice but to concede that it "does not presume SBC to be threatening such a total denial of access," *id.*

33. In any case, this Commission has no authority to administer or enforce section 271. A section 271 application is submitted to the FCC (47 U.S.C. § 271(d)(1)), and it is the FCC that approves or denies it (*id.* § 271(d)(3)). During the application process, section 271 does not set forth any state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). And the statute provides the state commission no role at all, consultative or otherwise, once the approval process is over. As the Seventh Circuit has held, a state commission may not "parley its limited role in issuing a recommendation under section 271" to impose substantive requirements under the guise of section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

34. Moreover, there is simply no basis for the CLEC Coalition to rely on section 271 as support for its claim to continued access (at TELRIC rates) to UNEs for which no impairment has been found. The price for unbundled access under section 251 is based on "cost," which the FCC has interpreted to require the TELRIC methodology. Under section 271, however, "the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the federal Communications Act. *Triennial Review Order* ¶ 663. The FCC has further held that sections 201 and 202 require only that "the market price should prevail" – "as opposed to

a regulated rate" of the type that the CLEC Coalition seeks for these elements.[12] The FCC has also stated that a Bell company may satisfy any pricing requirements for elements that must be made available under section 271 simply by showing that the rate is consistent with those in "arms-length agreements with other, similarly situated purchasing carriers" or is "at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff." *Id.* ¶ 664.

35. The FCC has unequivocally rejected TELRIC pricing for section 271 items, on the ground that such pricing would "gratuitously reimpose the very same requirements that another provision (section 251) has eliminated." *Id*. ¶ 659. The D.C. Circuit upheld this FCC decision, finding that "the CLECs have no serious argument" in opposition to the FCC's reading of the statute. *USTA II*, 359 F.3d at 589.

36. Equally dispositive, moreover, is the fact that the FCC has rejected any attempt "to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." *Triennial Review Order* ¶ 655 n.1989. As the FCC explained, "[u]nlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of 'combining' and . . . do not refer back to the combination requirement set forth in section 251(c)(3)." *Id*. Here too, the D.C. Circuit upheld the FCC's ruling. *USTA II*, 359 F.3d at 589. Any suggestion that continued access to UNE-P – which is, after all, nothing but a "leased *combination* of the

[12] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 473 (1999), *rev'd and remanded in part sub. nom. United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 123 S. Ct 1571 (2003).

loop, local switching and shared transport UNEs," *Triennial Review Order* ¶ 41 n.130 (emphasis added) – is required under section 271 is precluded by the FCC's interpretation of the unbundling obligation.

D. THE COMMISSION LACKS AUTHORITY UNDER MISSOURI LAW TO GRANT THE REQUESTED EQUITABLE RELIEF

37. This Commission "does not have the authority to do equity or grant equitable relief." *Missouri ex rel. GS Techs. Operating Co. v. Public Serv. Comm'n*, 116 S.W.3d 680, 696 (Mo. Ct. App. 2003); *American Petroleum Exch. v. Pub. Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943). Yet that is precisely what the CLEC Coalition is requesting – an injunction to preserve the status quo and "[p]rohibiting [d]iscontinuance of [c]ertain UNE [s]ervices." Complaint (preamble).

38. Section 386.310 of the Missouri Revised Statutes does not provide the Commission with the legislative authority to grant the equitable relief that the CLEC Coalition seeks. The CLEC Coalition asserts that "[s]ection 386.310 authorizes the Commission to take such action without notice or hearing, given the facts presented herein regarding the threat of serious harm to members of the CLEC Coalition and their customers." Complaint ¶ 38. But the CLEC Coalition does not even allege – nor could it -- that "the health and safety of . . . the public" is threatened by SBC Missouri's implementation of the FCC's order to prevent CLECs from ordering new UNE-P lines or new high-capacity loops and transport in wire centers where no impairment has been found. The Commission's limited authority to enjoin conduct where "the failure to do so would result in the likelihood of imminent threat of serious harm to life or property" is entirely inapplicable to the CLEC Coalition's request that it be allowed to continue receiving subsidized access to SBC Missouri's network. This Commission is without

authority to grant the requested relief.

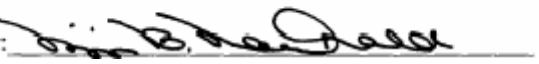
IV. ANSWER

39. Except to the extent otherwise expressly stated in this pleading, SBC Missouri denies each and every allegation set forth in the Complaint and demands strict proof of each allegation.

WHEREFORE, for the foregoing reasons, the Complaint should be dismissed and the Motion for Expedited Treatment should be denied in its entirety.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

By: 

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CERTIFICATE OF SERVICE

Copies of this document were served on all counsel of record by e-mail on March 14, 2005.


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