

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

In the Matter of the Determination of Prices)
of Certain Unbundled Network Elements.) Case No. TO-2002-397

**SBC MISSOURI’S BRIEF REGARDING THE
IMPACT OF THE TRIENNIAL REVIEW ORDER**

SBC Missouri,¹ pursuant to the Missouri Public Service Commission’s (“Commission’s”) September 18, 2003 Order Directing Filing, respectfully submits this Brief explaining that the Federal Communications Commission’s (“FCC’s”) Triennial Review Order² will have a substantial impact on unbundled network elements (“UNEs”) at issue here and that the Commission should complete its implementation of the FCC’s Triennial Review Order before proceeding with this case.

1. Impact on the Scope of the Case.

This case was initially established to review rates for the unbundled network elements (“UNEs”) that were at issue in Case No. TO-2002-222 (i.e., loops, switching, daily usage feed, local disconnect report and LIDB rates). Subsequently, some parties raised the issue whether the scope of this case should be expanded beyond those UNEs. When the FCC in February 2003 issued its News Release announcing its decision in the Triennial Review proceeding, the Commission correctly perceived the emerging threshold issue of whether the elements from Case No. TO-2002-222 are even appropriate for a pricing review as UNEs.

¹ Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as “SBC Missouri” or “SBC.”

² In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-33; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 CC Docket No. 96-98; and Deployment of Wireline Services Offer Advanced Telecommunications Capacity, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, released August 21, 2003 (“Triennial Review Order”).

With the FCC's release of its Triennial Review Order on August 21, 2003, the Commission's suspicions have now been confirmed. In its Triennial Review Order, the FCC made determinations that certain elements involved in this proceeding are not UNEs and established a 9-month review process to determine whether other elements involved in this proceeding are not UNEs.

Specifically, the FCC made national findings of no impairment for certain elements such as local circuit switching for customers served by high-capacity loops; certain enterprise and mass market loops; packet switching; and access to signaling and call related databases (like LIDB) under certain circumstances. While the FCC found that impairment may exist in certain markets for mass market switching, dark fiber, DS3 and DS1 loops, the FCC delegated the states to complete a more granular review within nine months from the effective date of its order to identify where carriers are not impaired without unbundled access to these elements.

(a) Impact on Unbundled Local Circuit Switching Serving the Enterprise Market. In the Triennial Review Order, the FCC determined that competitive local exchange carriers ("CLECs") are not impaired if not given access to unbundled local switching of ILECs to serve customers utilizing high-capacity loops at the DS1 and above level.³ But, while making a national finding that no impairment exists, the FCC left open the possibility for state commissions to petition the FCC to waive the finding of non-impairment within 90 days of the

³ Triennial Review Order, para. 451.

effective date of the order, provided that any state commission wishing to do so must make an affirmative finding of impairment utilizing the operational and economic criteria set forth by the FCC.⁴

On September 22, 2003, the Commission established case No. TW-2004-0148 seeking comment on whether it should initiate a proceeding to determine whether the Commission should petition the FCC to overturn its national finding that CLECs are not impaired if not given access to incumbent local exchange company (“ILEC”) unbundled local switching for serving customers using high-capacity loops (DS1 and above).

Since no party filed comments recommending that the Commission institute a proceeding to petition the FCC to overturn its national finding of non-impairment (and no CLEC even claimed impairment in this area), it does not appear either necessary or appropriate to establish a 90-day proceeding for this purpose. However, until this issue is resolved (either by a Commission determination against conducting a 90-day proceeding; the Commission conducting a 90-day proceeding and then determining that no impairment exists; or, upon the Commission’s finding of impairment, its petitioning the FCC to overturn its national finding, and the FCC resolving the issue), it makes little sense to devote substantial amounts of time and resources to a pricing proceeding on enterprise market switching elements at this time.

(b) Switching for Mass Markets. In the Triennial Review Order, the FCC stated that it found, on a national basis, that competing carriers are impaired without unbundled local circuit switching when serving the mass market due to operational and economic barriers associated with the incumbent LEC hot cut process.⁵ The FCC required state commissions to establish an

⁴ Triennial Review Order, para. 455.

⁵ Triennial Review Order, paras. 459, 475.

incumbent LEC batch hot cut process, or make a detailed finding that such a process is not necessary.⁶ If a determination is made that a batch cut process is necessary, the Commission must approve processes and prices for such a batch cut process.⁷

However, the FCC recognized that a more geographically-specific record may identify particular markets where there is no impairment and thus required the states to apply FCC-defined triggers measuring existing switch deployment serving this market and, if necessary, consider whether competitive switches could be deployed by examining operational and economic barriers to switch deployment to serve this market. If states conclude there is impairment in a particular market, they must consider whether the impairment can be cured by requiring unbundled switching on a rolling basis (*i.e.*, for a limited time), rather than making unbundled switching available for an indefinite time.⁸

Initially, the Commission must “define the markets” in which the objective triggers and economic and operational impairment criteria will be applied “by determining the relevant geographic area to include in each market.”⁹ For every such geographic market, the Commission must follow a two-step process to determine impairment. First, the Commission is to determine if there are at least three CLECs presently using their own switches to serve the market,¹⁰ or if there are at least two wholesale providers of switching serving the market.¹¹ If either trigger is met, then the Commission shall find that CLECs are not impaired without access to unbundled local circuit switching in that market and there is no need for further analysis.

⁶ Triennial Review Order, para. 488.

⁷ Triennial Review Order, paras. 488-490.

⁸ Triennial Review Order, paras. 493, 494.

⁹ Triennial Review Order, para. 495.

¹⁰ Triennial Review Order, para. 501.

¹¹ Triennial Review Order, para. 504.

If neither trigger is satisfied, the second step of the process requires the Commission to find that CLECs are not impaired without access to local circuit switching where it determines that self-provisioning of local switching is economic based on evidence of actual deployment and evaluation of certain economic and operational criteria.¹² In markets where triggers are not satisfied and the Commission concludes that impairment exists, the Commission must then consider whether that impairment would be cured by transitional or “rolling” access to unbundled switching, for a period of 90 days or more.¹³ Additionally, as part of its economic analysis, the FCC has ruled that the Commission shall establish a “DS0 cutoff” – *i.e.*, the appropriate “cross over point...where it makes economic sense for a multi-line customer to be served via a DS1 loop.”¹⁴ This cross over point will be used to define the DS0 enterprise and mass markets.

Until these issues are resolved with respect to mass market switching, it makes little sense to devote substantial amounts of time and resources to a pricing proceeding on these elements.

(c) Packet Switching. In its Triennial Review Order, the FCC found that ILECs are not required to unbundle packet switching, including routers and digital subscriber line access multiplexers (DSLAMS) as standalone network elements. The order eliminates the current requirement for unbundling of packet switching.¹⁵ Accordingly, these elements are not appropriate for inclusion in this UNE pricing proceeding.

¹² Triennial Review Order, paras. 476-485, 507-520.

¹³ Triennial Review Order, para. 524.

¹⁴ Triennial Review Order, para. 497.

¹⁵ Triennial Review Order, para. 537.

(d) Enterprise Market Loops. In its Triennial Review Order, the FCC determined that incumbent LECs are no longer required to unbundle OCn loops. While the FCC stated that incumbent LECs must offer unbundled access to dark fiber loops, DS3 loops (limited to 2 loops per requesting carrier per customer location) and DS1 loops, the FCC indicated that state commissions must also apply triggers and conduct other analysis in the nine-month review proceeding to identify customer locations where CLECs are not impaired without unbundled access to these elements.¹⁶ At customer locations satisfying the triggers or meeting the other specified conditions, incumbent LECs will not be required to provide these elements as UNEs.

Until these issues are resolved, it makes little sense to devote substantial amounts of time and resources to a pricing proceeding on enterprise loop elements.

(e) Mass Market Loops. In its Triennial Review Order, the FCC stated that incumbent LECs must offer unbundled access to stand alone copper loops for the provision of narrowband and broadband services. However, subject to a grandfathered provision and a transition period, incumbent LECs do not have to provide unbundled access to the high-frequency portion of their loops.¹⁷ Incumbent LECs must offer unbundled access to the Time Division Multiplexing (“TDM”) features, functions, and capabilities of their hybrid copper/fiber loops, but do not have to offer unbundled access to the packet switching features, functions, and capabilities of these hybrid loops.¹⁸ Similarly, in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops, the incumbent LEC must offer unbundled

¹⁶ Triennial Review Order, paras. 339, 417.

¹⁷ Triennial Review Order, para. 248.

¹⁸ Triennial Review Order, paras. 200, 213.

access to those fiber loops for narrowband services only.¹⁹ Incumbent LECs are not required to offer unbundled access to new build, or “greenfield,” fiber loops.²⁰

(f) Signaling Networks. The FCC in its Triennial Review Order found that ILECs are only required to offer unbundled access to their signaling network in instances in which incumbent LECs will be required to provide access to switching as a UNE. In all other cases, however, the FCC determined that there are sufficient alternatives in the market such that CLECs are no longer impaired without access to such networks as UNEs for all markets.²¹ SBC Missouri submits that until the Commission resolves the UNE switching issues, it is premature to conduct a pricing proceeding on signaling elements.

(g) Call Related Databases. In its Triennial Review Order, the FCC found when a carrier utilizes its own switches (with the exception of 911 and E911 databases), the ILECs are not required to offer unbundled access to call related databases, including, but not limited to the Line Information database (“LIDB”), Toll Free Calling database, Number Portability database, Calling Name (“CNAM”) database, Operator Services/Directory Assistance databases, and the Advanced Intelligent Network (“AIN”) database.²² The FCC, however, stated that in instances where switching remains a UNE, a requesting carrier purchasing the switching UNE will have access to call-related databases that the signaling networks permit the carriers to access.²³ SBC

¹⁹ Triennial Review Order, para. 277.

²⁰ Triennial Review Order, para. 273.

²¹ Triennial Review Order, paras. 544-546.

²² Triennial Review Order, paras. 551-556, 560.

²³ Triennial Review Order, para. 551.

Missouri submits that until the Commission resolves the UNE switching issues, it is premature to conduct a pricing proceeding on access to call related databases.

2. Impact on Application of TELRIC.

The FCC in the Triennial Review Order clarified two key components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs:

(a) Cost of Capital. The Triennial Review Order clarifies that the risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market. The FCC clarified that states should establish a cost of capital that reflects the competitive risks associated with participating in the type of market that TELRIC assumes:

The objective of TELRIC is to establish a price that replicates the price that would exist in a market in which there is facilities-based competition. In this type of competitive market, all facilities-based carriers would face the risk of losing customers to other facilities-based carriers, and that risk should be reflected in TELRIC prices.²⁴

Noting that it had previously recognized, in the Local Competition Order, that increased competition would lead to increased risk, which would warrant an increased cost of capital,²⁵ the FCC in its Triennial Review Order, stated that “it is clear from our discussion of the TELRIC methodology that future competition must be considered in assessing risk.”²⁶

(b) Depreciation. Although the FCC in the Triennial Review Order declined to mandate a particular method of deciding a useful life of an asset for depreciation purposes (e.g., FCC-mandated depreciation lives versus financial lives), the FCC indicated that clarification of its depreciation rules is necessary with respect to the rate at which an asset is depreciated over its

²⁴ Triennial Review Order, paras. 680-681.

²⁵ Local Competition Order, 11 FCC Rcd. at 15846, para. 679.

²⁶ Triennial Review Order, para. 681.

useful life. Noting that the various components of TELRIC rates should be developed using a “consistent set of assumptions about competition,” the FCC stated that in calculating depreciation expense:

The rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. In this way our “economic depreciation” requirement is designed to replicate the results that would be anticipated in a competitive market . . . We clarify that under our “economic depreciation” requirement, a carrier may accelerate recovery of the initial capital outlay for an asset over its life to reflect any anticipated decline in its value.²⁷

CONCLUSION

With the FCC’s release of the Triennial Review Order, it is now abundantly clear that there is a substantial amount of work that needs to be done before any party can determine with certainty which switching, enterprise loops, and other elements are required to be provided as UNEs in Missouri.

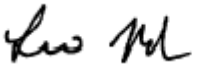
At this point, however, it makes little sense to devote substantial amounts of time and resources to a pricing proceeding, given that it would be necessary to rely on assumptions about unbundling that may later prove to be inaccurate. Accordingly, SBC Missouri recommends that this costing proceeding be postponed until the Commission has had sufficient time to digest the Triennial Review Order and adapt Missouri’s unbundling rules accordingly and the parties have

²⁷ Triennial Review Order, paras. 689-690.

had sufficient time to develop cost studies that adequately take into account the results of the
Triennial Review Order.²⁸

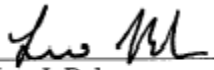
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the
Service List by e-mail on October 9, 2003.


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²⁸ SBC Missouri notes that it makes little sense to pursue this proceeding prior to completion of proceedings contemplated by the Triennial Review Order because the Missouri 271 Interconnection Agreement (“M2A”) rates remain available to CLECs. If the rates were to increase, as SBC Missouri believes a proper application of TELRIC would require, CLECs would continue to opt into the M2A rates which remain available through March 5, 2005 for qualifying UNEs that have not been declassified. If rates were to decrease, a result which SBC Missouri believes inconsistent with the proper application of TELRIC, particularly in light of the FCC clarification of the TELRIC methodology in the Triennial Review Order, CLECs likely would nevertheless continue under the M2A because of the other benefits given by that Agreement that cannot be imposed by the Commission in any arbitration proceeding.

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