

**BEFORE MISSOURI THE PUBLIC SERVICE COMMISSION**

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 )

**MCI's RESPONSE TO ORDER DIRECTING FILING**

COME NOW, MCImetro Access Transmission Services, LLC, Intermedia Communications, Inc., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. (herein "MCI") pursuant to Commission order and 4 CSR 240-2.080(15) and for their Response to SBC's Response<sup>1</sup> to Order Directing Filing respectfully state to the Commission the following:

1. Defining the Market. The Metropolitan Statistical Areas ("MSAs") proposed by SBC are inappropriate or are at least premature. As part of the nine-month proceeding, the Commission must define the relevant geographic area to include in each market. In defining markets, the Commission must consider the following factors: 1) the locations of mass market customers *actually* being served<sup>2</sup> (if any) by competitors, 2) the variation in factors affecting competitors' ability to serve each group of customers, 3) competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies. Triennial, Rule 51.319(d)(2)(i).

The Commission must determine the definition of a market for various proceedings, including this one. The FCC has set forth certain parameters as to how the

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<sup>1</sup> To the extent CenturyTel's Response overlaps SBC's Response, MCI's position is the same.

<sup>2</sup> As discussed further herein below, the FCC made it clear that it is not sufficient to identify isolated instances of service, but rather carriers that are "operationally ready and willing to provide service to all customers in the designated market." Triennial, para. 499.

states must determine the proper market definition. The FCC has mandated that states conduct a thorough factual examination before arriving at a definition:

The triggers and analysis described below must be applied on a granular basis to each identifiable market. State commissions must first define the markets in which they will evaluate impairment by determining the relevant geographic area to include in each market. State commissions have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state. Rather, state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies. While a more granular analysis is generally preferable, states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commission must use the same market definitions for all of its analysis. [Triennial, ¶ 495 (footnotes omitted)]

The FCC also noted that economic impairment may be especially likely in wire centers below a specific line density. Before finding 'no impairment' in a particular market, therefore, state commissions must consider whether entrants are likely to achieve sufficient volume of sales within each wire center, and in the entire area served by the entrant's switch, to obtain the scale economies needed to compete with the incumbent. (Triennial, ¶ 520)

Accordingly, the Commission needs to examine evidence submitted by the parties on each of the issues identified above, and there should be hearings on this before the Commission makes its determination. While the FCC states that the "State commissions must first define the markets in which they will evaluate impairment," in context, this

appears to only state the obvious -- that before any state commission can determine whether there is impairment in a market, the state commission must first define the market.

This is also similar to how the FCC addresses the geographic market issue in analyzing mergers. “[T]he first step in analyzing a merger is to define the relevant product and geographic markets.” *I/M/O the Merger of MCI Communications Corporation and British Telecommunications PLC*, GN Docket No. 96-245, FCC 97-302, (rel. September 24, 1997). at ¶35. Even though the FCC states the “first step” is to define the geographic markets, it does not bifurcate the proceeding. Instead, in the same order in which it determines the geographic markets it also applies this definition of the geographic market so that the proceeding has a single order in this regard.

The wording here about “first determining” the geographic market is also similar to the wording which the FCC used in its rules on the batch hot cut issue, Rule 319(d)(2)(A), which requires states in establishing the batch hot cut process to “first determine the appropriate volume of loops that should be included in a ‘batch.’” Similar to the geographic market definition, the determination on the batch hot cut issue cannot be made in a vacuum and is interrelated to the other issues that the state commission will be examining. In the final state commission order which addresses batch hot cuts, however, the volume will be, by rule, the first conclusion reached. One would not expect the batch hot cut evidence or proceeding to be bifurcated to first determine the volume in one phase and to then have evidence and argument on the remaining issues in a second or later phase. Similarly, a reasonable person would not expect the market definition issue to be bifurcated from the rest of the pertinent evidence.

The FCC, in prior rulings, has provided further clarification on how to define a geographic market. "The geographic market is more accurately defined as a series of point-to-point markets. We can consider, as a whole, groups of point-to-point markets where customers face the same competitive conditions. We therefore treat as a geographic market an area in which all customers in that area will likely face the same competitive alternatives for a product." (In re: applications of Ameritech and SBC for consent to Transfer Control of Corporations, CC Docket No. 98-141, FCC 99-279, note 147.) In essence, under this FCC methodology, a geographic market is determined in a bottom-up manner: start looking at the point-to-point evidence and, if appropriate based on this evidence, combine groups of point-to-point markets to determine the geographic market. This can only be done based on a granular examination of the evidence. This is similar to the approach that the FCC has taken in other parts of the Triennial order, such as by requiring that the market for a loop be a specific customer location and that the market for transport be a specific point-to-point route. The primary difference is that for loops and transport no further aggregation of markets is necessary or allowed, but with switching the evidence in the state proceedings will determine if further aggregation is appropriate.

Given that the states must use the same definition of geographic market for the impairment analysis as for the triggers for switching, and given that the economic impairment analysis and the traditional FCC approach to defining markets requires analysis at the wire center or even more granular level, the state commission must at least receive and review all of the wire center (and sub-wire-center) level evidence which is part of the economic impairment case before determining what, if any, level of

aggregation of wire centers must be made in determining the geographic markets in the state. The type of evidence required in the potential deployment analysis is what the FCC wants the states to look at in defining the market, so states and parties need to gather all of the evidence relating to triggers and potential deployment, and then decide issues. The ruling on the appropriate definition should only be made at the end of the case when the state commission also rules on impairment.

The FCC also noted that sufficiently similar customer classes should be considered together (Triennial, para. 123), and further noted that there is an obligation “to determine which customers could not be served by carriers without the UNEs in question, and, where practical, require unbundling only for those customers.” (Triennial, para. 125). The FCC noted that in the mass market, “. . . revenues are small, customers are typically served in large groups, using uniform technologies and mass marketing and provisioning techniques to minimize the cost of serving each customer.” (Triennial, para. 309). Accordingly, when addressing switching for the mass market, it is essential that state commissions only look to mass market customers being served.

The FCC specifically noted that, depending on the granular facts in specific states, it may not be proper to include some very small businesses in the analysis of mass market switching. (*See* Triennial footnote 432: “Very small businesses typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner. Therefore, we will usually include very small businesses in the mass market for our analysis. We note, however, that there are some differences between very small businesses and residential customers. For example, very small businesses usually pay higher retail rates, and may be more likely to purchase

additional services such as multiple lines, vertical features, data services, and yellow page listings. Therefore, we may include them with other enterprise customers, where it is appropriate in our analysis.”)

Also, determining which types of customers competitive carriers are addressing on a facilities basis is critical to the trigger analysis. For example, if a facilities-based carrier is ONLY serving business customers with its facilities, it cannot be counted toward the trigger. There is a critical distinction between residential and small business markets based on the smaller volume of customers, the type of loop plant, and larger revenue per line associated with small business. If the Commission were to erroneously rely on small business carriers to show that a trigger had been met, then the Commission would be effectively taking away unbundled switching to the entire "mass market" - including residential customers (who are the great majority of the “mass market”), even though no single CLEC serves<sup>3</sup> a single residential customer with its own switching and economic and operational barriers do indeed exist for residential customers. That cannot be a proper outcome of the trigger analysis.

It is also critical that the Commission, in looking at similarly situated customers, determine and group customers according to whether they are being served via copper loops or via IDLC. If any customers are being served via all fiber loops or via hybrid fiber/copper DSL-capable loops, that should also be noted. Operationally, there are critical differences between serving a customer via copper and attempting to serve a customer who is presently being served via IDLC. For example, assume that in a given market 40% of the customers are served via IDLC and 60% of the customers are being served via copper. Assume that in this market, no CLEC provides switching to those

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<sup>3</sup> See supra note 1.

customers presently served via IDLC (because of operational impediments) and assume that there are three CLECs who self-provision switching to those customers in the copper service area. It would be erroneous for the Commission to rule that the Self-Provisioning trigger had been met for the entirety of the market, because 40% of the customers would have no competitive choice for services because of the operational barriers created by the use of the IDLC technology. Similarly, for customers who want a bundle of services that includes both voice and DSL—an increasing percentage of customers—the Commission must recognize that the FCC has precluded competitive access to hybrid fiber/copper loops, and therefore CLECs will not have access to that potential customer base either.

With the issuance of the Errata of September 17, 2003, there is also cause to comment on the Errata changes to paragraphs 499 and 519 of the Triennial. In paragraph 499, which addressed the mass market switching triggers, the FCC changed some of the wording, including deleting this sentence: “They [(identified competitive switch providers)] must be operationally ready and willing to provide service to all customers in the designated market.” In paragraph 519, which addressed economic barriers under the potential deployment analysis, the FCC deleted the following sentence: “State commissions must ensure that a facilities based competitor could economically serve all customers in the market before finding no impairment.”

These Errata changes have the effect of correcting the Triennial order. Before these Errata changes were made, these two paragraphs had literally meant that any identified competitive switch provider had to be ready, willing, and economically able to serve all of the customers in the market. The “all” standard would certainly have been a very tough standard to meet. To serve “all” customers would require the identified

competitive switch provider to be able to serve 100% of the customers in the market at the same time. This would require a very large collocation in the central office in the defined geographic market (and large collocations in all of the central offices in the geographic market if the market consisted of more than one central office). This would also require enough capacity on each of the identified competitive switch providers to serve 100% of the customers in the market at the same time.

It is clear that the Errata, with these changes, was replacing the stated “all customers” concept with an “every part of the market” concept. This “every part of the market” concept was kept in paragraph 510 of the Triennial, which states in pertinent part as follows: “The existence of a competitor that is serving the local exchange mass market with its own switch provides evidence that the mass market can be served effectively. The state commission should consider whether the entire market could be served by this switch.” (Triennial, ¶510). In other words, only if a switch can serve any portion of the market, and thus cover the entire market, should this switch then be counted.

Footnote 1552 of the Triennial, which applies to the trigger analysis for mass market switching, was left intact, but was added to by the Errata. That portion of this footnote that was left intact provides further support to the “every part of the market” concept. This provision states in pertinent part as follows: “In circumstances where switch providers (or the resellers that rely on them) are identified as currently serving, or capable of serving, only part of the market, the state commissions may choose to define that portion of the market as a separate market for purposes of its analysis.” This provision further clarifies that it is important that a switch provider serve every part of the market in order to be counted. The FCC, in this provision, clearly gave the states the

ability to narrow the geographic range of the market to ensure that a competitive switch be counted. If it were not necessary that a competitive switch serve every part of the market to be counted, then there would have been no need for this language in footnote 1552.

This interrelationship, as to whether a competitive switch serves every part of a market, and the authority given by the FCC to the state commissions to narrow the definition of the geographic market to take into account the serving capability of a competitive switch, provides further support that a state should not attempt to define the geographic markets until it has all of the applicable evidence at hand to make a fully informed decision.

The geographic market determination, like the analysis to see to it that dissimilar customers are not considered together, is all part of the overall analysis. In other words, the trigger and potential deployment determinations must be done at the end point of ultimate decision making in the state, based on the granular review of facts and:

- A) The geographic market determination;
- B) The analysis to see to it that dissimilar customers are not considered together; and
- C) A showing that each proposed triggering company is offering service to mass market customers in every part of the defined market.

By approaching the issue in this way, the Commission would also have information available to it showing the extent to which impairment would be found using different possible definitions of the relevant geographic market before locking in any given definition. This would thus result in a better-informed Commission decision on

impairment. Furthermore, there are no other reasonable alternatives given the likely case schedule and given the totality of the information which the FCC has mandated that the Commission consider before making its determination as to the definition of market.

For the same reasons, the mass market switching triggers cannot and should not be decided upon until the potential deployment review has been conducted. The relevant markets for the trigger review must be the same as those used in the potential deployment review. Deciding upon the triggers before all of the impairment evidence has been collected necessarily requires an early decision on market definition. For the reasons MCI discusses above, markets should not be defined until all of the evidence in the case has been considered. On a preliminary basis, MCI submits that wire centers should be used for purposes of market definition.

2. The Appropriate DSO/DS1 Crossover. MCI agrees that the TRO stated that the PSC is to determine the appropriate DSO cutoff. MCI disagrees that the four-line default prescribed by the FCC—and supported by SBC—is dispositive of whether an end user is a mass market customer or an enterprise customer.

3. Geographic Area of Non-Impairment, Mass Market Switching. MCI disagrees with SBC's position that CLECs are not impaired in the St. Louis, Kansas City, and Springfield MSAs. MCI believes that a more granular approach to defining the market is needed and that SBC's position that CLECs are not impaired in the MSA is wholly without merit.

4. Competitors that Satisfy the Triggers. MCI does not and has not provided local mass market switching in the St. Louis, Kansas City or Springfield MSAs, notwithstanding the assertions of SBC to the contrary.

5. Impairment for Dedicated Transport. MCI has no firsthand knowledge of whether the triggers are satisfied for dedicated transport and, therefore, denies SBC's assertions. SBC's allegations are in any event vague, as it fails to separate various types of transport that are subject to different standards and it fails to identify specific carriers with specific routes. It is not appropriate to generally list carriers, and it is not appropriate to include MCI on such a general list.

6. Impairment for High Capacity Enterprise Local Loops. MCI has no firsthand knowledge of whether the triggers are satisfied for high capacity enterprise local loops and, therefore, denies SBC's assertions. SBC's allegations are in any event vague, as it fails to separate various types of loops that are subject to different standards and it fails to identify specific carriers with specific locations.

7. Batch Hot Cuts. SBC is participating in a region-wide batch hot cut workshop conducted by the Texas Public Utility Commission. MCI filed comments in that workshop, Project No. 27605, which are attached hereto as MCI's response to SBC's proposal. The Texas PUC has ordered SBC to consider revisions to its proposal and directed it to file such revisions by December 15, 2003.

8. MCI reserves the right to respond to any change in position presented by SBC under the various reservation of rights found throughout SBC's Response. Further, given the high-level perspective offered by the legal conclusions in SBC's Response, MCI reserves the right to respond to any more specific arguments that may be presented.

Respectfully submitted,

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**Certificate of Service**

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 17th day of November, 2003 by placing same in the U.S. Mail, postage paid.

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## **PROJECT NO. 27605**

### **Outline of MCI's Response to SBC Texas Proposed Batch Hot Cut Processes**

November 11, 2003

At the November 7, 2003 workshop in Project No. 27605 before the Public Utility Commission of Texas, the parties agreed to furnish comments to SBC concerning its SBC Southwest Proposed Batch Hot Cut Process. The parties agreed that these proposed changes to the SBC proposal would be reviewed and considered by SBC as part of a 13-state effort to develop an SBC region-wide Batch Hot Cut process.

MCI provides the following comments on SBC's proposed Batch Hot Cut ("BHC") process, and reserves the right to provide additional comments as the 13-state process continues. The MCI notes that similar comments were presented by MCI in response to the SBC Midwest proposed BHC process presented at the November 5-6, 2003 workshop in Ohio. Those comments apply to the SBC Southwest proposal to the same extent as to the SBC Midwest proposal, and thus are repeated here and adopted by MCI.

#### **Comments**

1. MCI remains hopeful that procedures and practices eventually emanating from the SBC Batch Hot Cut process will help to facilitate the transition of a significant portion of its current, or embedded, UNE-P-based mass market customers to services provided over unbundled loop facilities purchased from SBC and switching facilities owned and/or controlled by MCI itself. It is MCI's expectation that any processes designed to facilitate such a migration will be efficient, economical and, most importantly, non-customer impacting. MCI does not believe, however, that the mere *identification* – as distinguished from the designing, testing, implementation and on-going performance – of a Batch Hot Cut process is sufficient to address questions of impairment.

2. MCI encourages SBC, the Commission and its Staff, and all other Parties involved in this on-going collaborative to recognize that the establishment or modification of a Batch Hot Cut processes must be considered along with all other affected systems, procedures and practices in order to verify that each such system, procedure and practice will effectively perform their designed functions simultaneously. Also, a Batch Hot Cut process which has been discussed in these collaboratives does not address other areas of impairment relating to other types of hot cuts - such as CLEC to CLEC migrations, CLEC to ILEC migrations which will occur after the embedded base of a given has been transitioned to UNE-L in a given geographic market or the migration of customers who have CLEC data services from UNE-P line splitting to UNE-L line splitting.

3. MCI encourages SBC, the Commission and its Staff, and all other Parties involved in this ongoing collaborative to remain focused on the long-term objectives involved with the establishment of an efficient Hot Cut process and to consider not only the short-term, manual modifications, but the longer term possibilities including, for example, the wider implementation of GR303 capable Digital Loop Carrier systems which would allow for the unbundling of DLC based loops without migration to “other facilities,” which often times contributes to additional manual process, delay and error. The use of automated, or robotic, frames should also be contemplated as a longer-term solution, particularly in unmanned COs similar to those in which such technologies have already been tested, proven and are currently operational.
4. Consideration should be given to a competitively neutral cost recovery mechanism for all costs.

#### **Requests for information**

1. MCI requests that SBC provide details regarding its current Hot Cut processes (CHC and FDT). Specifically, process flows, LSOR guidelines and sample orders should be made available. Moreover, to the extent performance metrics and flow-through rates are available, such information should be made available to the collaborative for review.
2. MCI requests that each “proposed” Batch Hot Cut process be defined clearly, in writing/flow charts, such that all interested parties are able to easily identify and compare/contrast with existing Hot Cut processes, at a minimum, the following:
  - types of orders to be included
  - types of orders to be excluded (e.g. CLEC to CLEC loop?, Line Sharing, etc..)
  - minimum and maximum provisioning intervals
  - minimum and maximum lines per LSR
  - minimum and maximum LSRs that can be sent to SBC per day, per carrier
  - minimum and maximum number lines per CO which will be cut per carrier per day as well as per CO per day (inclusive of the whole industry)
  - LSOR guidelines pertaining to each such proposed Hot Cut process
  - sample LSRs for each order type included in each proposed hot cut process
  - for each such proposed Hot Cut process, identification of OSS changes which will be required and an estimate as to when LSOR guidelines will be updated as well as an estimate as to when

changes will be implemented such that carrier to carrier testing can begin

- identification of the procedures carriers will be required to utilize when accessing the proposed “reservation system” identified as part of the proposed “defined batch cut” process
- written description of the specific system or human event with triggers an unlock of 911 records with Intrado
- written explanation of ICA modification process, including proposed amendment and identification of adoption/implementation timelines as well as a discussion as to whether ICA type issues must be resolved prior to the CLECs testing with SBC’s OSS personnel
- applicable prices

### **Recommended Modifications to SBC’s proposed processes**

At this time, MCI continues to review SBC’s proposals, but has tentatively identified a number of areas of concern. To address these concerns, MCI recommends that any Batch Hot Cut processes emanating from this collaborative include, in addition to those features and capabilities initially proposed by SBC, the following:

- a. 5 day intervals instead of 13-day intervals (for the “Defined Batch” process)
- b. Processes for Line Sharing and Line Splitting
- c. EEL based connectivity options including (flow charts for these scenarios should also be provided):
  1. Loop connected to CLEC transport
  2. Loop connected to SBC provide transport
  3. Loop connected to other carrier transport
- d. SBC must facilitate EEL based Hot Cuts even where it has requested – or been granted - a finding of non-impairment regarding transport originating and/or terminating at CO if the requesting CLEC is not collocated in that CO.
- e. Due-date reservations for all Hot Processes, including the existing processes for single and multiple lines (i.e., SBC’s proposed “reservation tool” should be available in any of the three SBC proposed hot cut scenarios).
- f. Reservation tool applied to Frame Due Time cutovers as well as real time, mechanized status reports, presumably through the upgraded PWS tool.
- g. An option whereby CLECs can elect to have SBC’s OSS automatically effectuate the completion of the number porting process (activate the customers number now residing on the CLECs switch within the database), thus eliminating the two-step process currently in place.

h. SBC to unlock the 911 database at the completion of the physical provisioning step (the port) rather than after the order is closed to billing.

i. Mechanisms whereby the “pending order” issue can be resolved. MCI recommends that a set of exceptions to the current pending order rules be developed so that customers in the process of migrating to a UNE-L carrier could migrate to another carrier of their choice prior to the UNE-L order completing.

j. Identified performance metrics with financial incentives.

k. Link between performance metrics and the immediate, dynamic reversal of any non-impairment finding where such finding may exist. For any time period during which Hot Cut performance is substandard, UNE-P would be available at TELRIC rates and such lines activated in these periods would be grandfathered to UNE-P or, at the CLEC’s option, cut to CLEC’s switch free of charge when Hot Cut performance is back within compliance. This should include commercial testing.

m. Need appropriate rates as quickly as possible for review

n. SBC should propose an appropriate testing process other than an “internal test bed” option.

