

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

In the Matter of the Determination of Prices,                    )  
Terms, and Conditions of Certain Unbundled                    )       Case No. TO-2001-438  
Network Elements.    )

**SBC MISSOURI'S APPLICATION  
FOR RECONSIDERATION AND/OR REHEARING,  
AND ALTERNATIVE MOTION TO HOLD IN ABEYANCE**

SBC Missouri,<sup>1</sup> pursuant to 4 CSR 240-2.160, respectfully requests reconsideration and/or rehearing of the final rates filed May 30, 2003,<sup>2</sup> that result from the Missouri Public Service Commission's ("Commission's") August 6, 2002 Report and Order.

Alternatively, SBC Missouri moves the Commission for a short abeyance in adopting final rates in this proceeding until the Federal Communications Commission ("FCC") releases its final order in the Triennial Review proceeding and a determination is made on how the FCC's TELRIC<sup>3</sup> clarifications -- particularly with respect to cost of capital and depreciation -- impact the rates being set in this proceeding.

**INTRODUCTION**

During the phase of this case in which SBC Missouri's revised rates were being reviewed for compliance with the Commission's August 6, 2002 Report and Order, the FCC announced in a February 20, 2003 News release, appended at Attachment 2, that it had concluded its Triennial Review proceeding and was providing clarification on the cost of capital and depreciation

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<sup>1</sup> Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri" or "SBC."

<sup>2</sup> A chart comparing these final rates to the rates SBC Missouri originally proposed is appended as Attachment 1.

<sup>3</sup> The FCC's Total Element Long Run Incremental Cost methodology is abbreviated as "TELRIC."

components of the TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs. Specifically, the FCC clarified that:

- The risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market.
- The use of an accelerated depreciation mechanism may present a more accurate method of calculating economic depreciation.

The FCC's clarification on these two key components of the TELRIC pricing rules confirms the concerns SBC Missouri expressed in its August 15 and September 20, 2002 Applications for Rehearing: The Commission misapplied TELRIC principles in setting rates in this proceeding. As explained in those Applications, these determinations are unlawful, unjust and unreasonable and, as shown in Attachment 1, have resulted in rates that are substantially below what is required by a proper application of the TELRIC methodology. SBC Missouri therefore renews its request that the Commission grant rehearing or reconsideration.

Alternatively, SBC Missouri requests the Commission to temporarily hold its adoption of final rates in this proceeding in abeyance until after the release of the FCC Triennial Review order. Although the order has still not been released, it is expected that such release is imminent. At this point, however, the FCC has made available only its press release (along with an attachment, and separate FCC Commissioner statements). But based on the information contained in the FCC's press release, it is readily apparent that the FCC's TELRIC clarifications, particularly with respect to cost of capital and depreciation, will significantly impact the rates being set in this proceeding. Adoption of final rates in this proceeding should therefore be held in abeyance until the FCC's Triennial Review order is released and sufficiently analyzed so that the final rates in this proceeding can be reexamined to ensure that they are consistent with the FCC's directives on TELRIC in these two areas. A brief abeyance for this purpose should not

inordinately delay the imposition of final rates in this proceeding. All of the work in this case (i.e., the entire discovery and hearing process) has been completed.

### **PROCEDURAL BACKGROUND**

After an evidentiary hearing conducted December 3 through December 6, 2001, and full briefing, the Commission issued a Report and Order in this case on August 6, 2002, in which it made specific findings about the factors SBC Missouri used to prepare its cost studies for various unbundled network elements (“UNEs”). The order directed SBC Missouri to rerun its cost studies, incorporating the changes ordered by the Commission, and to prepare revised prices for the Commission’s consideration.

SBC Missouri filed a timely Application for Reconsideration and/or Rehearing of the August 6, 2002 Report and Order on August 15, 2002, which the Commission denied on September 10, 2002. When SBC Missouri submitted its revised cost information and prices on September 20, 2002, it again applied for Reconsideration and/or Rehearing concerning the revised UNE costs and rates. The Commission denied SBC Missouri’s second Application for Reconsideration and/or Rehearing on November 14, 2002.

Following SBC Missouri’s September 20, 2002 submission of revised costs and prices, the Commission’s Staff and the Joint Sponsors respectively filed comments on November 1 and 4, 2002, concerning SBC Missouri’s revised costs and prices. The Joint Sponsors raised approximately 30 issues, and Staff raised seven issues. SBC Missouri replied to the Joint Sponsors and Staff’s comments concerning the revised cost studies and prices on November 22, 2002.

On November 25, 2002, the Commission issued an order scheduling a settlement conference for December 9, 2002 to identify the issues that needed to be resolved by the

Commission. At SBC Missouri and the Joint Sponsors' request, the Commission postponed the December 9, 2002 settlement conference indefinitely because of witness unavailability and the parties' desire to continue discussing the outstanding issues. SBC Missouri and the Joint Sponsors filed joint reports on the status of negotiations on January 17 and 30, 2003. At SBC Missouri and the Joint Sponsors' recommendation, the Commission on February 4, 2003, issued an order establishing a further procedural schedule calling for the filing of a list of outstanding issues and Initial and Reply Briefs to resolve the remaining issues.

On March 7, 2003, the Joint Sponsors and SBC Missouri advised the Commission that as a result of a series of good faith negotiations, they resolved the remaining compliance issues<sup>4</sup> and would not be filing briefs (resolution of these issues also resolved Staff's remaining issues). At SBC Missouri and the Joint Sponsors' request, the Commission on March 24, 2003, adopted a further procedural schedule. Pursuant to that schedule, SBC Missouri submitted revised rates on April 25, 2003.<sup>5</sup> On May 16, 2003, Staff filed comments indicating it had no issues with the rates SBC Missouri filed. With the exception of two rates, the Joint Sponsors indicated in their May 16, 2003 comments that they did not object to the revised rates. With respect to those two rates, the recurring installation rates for the two-wire and four-wire dedicated transport cross-

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<sup>4</sup> SBC Missouri and the Joint Sponsors resolved all of the compliance cost study issues raised by the Joint Sponsors as a settlement limited to this particular case, under which neither party concedes its position or is otherwise prejudiced from asserting its position in another proceeding. The parties' resolution of these issues is contingent on their being accepted strictly as settlements to avoid further litigation on those issues and is not reflective of any substantive position. See, e.g., the parties' jointly filed List of Remaining Issues, filed February 21, 2003 in Case No. TO-2001-438.

<sup>5</sup> After making this filing, SBC Missouri discovered that its revised rate sheet still contained references to "TO-97-40" and "T2A" rates and corrected those references in an April 30, 2003 resubmission.

connect elements, the Joint Sponsors stated that they believed that there may be some confusion whether the rates correctly reflected the parties' settlement of their original dispute over proper implementation of the Commission's decision on Issue 158.

In its May 30, 2003 Response, SBC Missouri stated that upon further review, it concurred with the Joint Sponsors that the revised rates for these two elements do not fully reflect the resolution reached. Accordingly, SBC Missouri revised these two rates and incorporated them into a second revised compliance rate schedule it filed with its May 30, 2003 Response.

### **ISSUES FOR RECONSIDERATION AND/OR REHEARING**

Although the majority of the Commission's rulings in this case were adverse from its perspective, SBC Missouri, as indicated in its prior Applications for Rehearing, will not further contest in this proceeding the vast majority of the Commission's determinations as applied to the UNEs being examined in this case.<sup>6</sup>

There are, however, four core decisions that so significantly affect the rates that they must be revised to ensure proper application of TELRIC principles. With respect to two of the issues (Issue 46 – Depreciation Asset Lives, and Issue 85 –Target Capital Structure), the FCC in a February 20, 2003 News Release announced clarifications to its TELRIC pricing rules that will materially impact the final rates for all of the UNEs at issue in this case. This Application sets out below the FCC's clarifications and explains their impact. The FCC, however, has provided no additional clarification or guidance with respect to the remaining two issues (Issues

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<sup>6</sup> SBC Missouri reserves the right, however, to seek appropriate resolution of these issues in future proceedings, including where the decision indicates a misunderstanding of the evidence or indicates the Commission's desire for additional evidence.

140 and 183 – Fiber Fill Factor, and Issue 305 – Fall Out Rate for Automated Systems).

Accordingly, this Application, in the interest of judicial economy, below incorporates by reference the points made on these issues in SBC Missouri's prior Applications for Reconsideration and/or Rehearing.

If these four decisions are not revised, the rates established will be substantially below those required by a proper application of the TELRIC methodology. The Commission's findings on these issues represent either a radical and unexplained departure from prior Commission determinations in such areas, and/or a misapplication of applicable FCC rules. As such, these determinations are unlawful, unjust and unreasonable. With respect to these four issues, SBC Missouri would respectfully request the Commission to reconsider the findings and conclusions it made or to grant rehearing so that these matters may be further explored and an appropriate and lawful resolution reached.

**Issue 46      Should SWBT use the latest FCC-approved asset lives?**

Until the Commission changed positions in its August 6, 2002 Report and Order in this case, it had previously refused to employ FCC-prescribed asset lives in TELRIC cost studies and instead had adopted a set of shorter and more accelerated economic asset lives specifically for use in SBC Missouri's TELRIC studies.<sup>7</sup> The FCC's recent TELRIC clarifications confirm that this change in position is inappropriate and results in a misapplication of TELRIC. In its February 20, 2003 News Release, the FCC stated:

Clarification of TELRIC Rules - - The order clarifies two components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs . . . the Order declines to mandate the use of any particular

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<sup>7</sup> Report and Order, Case No. TO-97-40, Attachment C, Costing and Pricing Report, pp. 5, 101-102, issued July 31, 1997.

set of asset lives for depreciation, but clarifies that the use of an accelerated depreciation mechanism may present a more accurate method of calculating economic depreciation.<sup>8</sup> By ordering use of longer-duration FCC-prescribed depreciation lives<sup>9</sup>, however, the

Commission's August 6, 2002 Report and Order goes the exact opposite direction. In adopting a set of depreciation lives today that is longer than those previously adopted by the Commission five years ago in Case No. TO-97-40, the Commission completely ignores all technological advancement in telecommunications equipment, which drives such decreases in values. Technological obsolescence has shortened the useful life of telecommunications equipment such as circuit equipment and digital switches. Certainly, economic useful lives have not grown longer, as the Commission's decision errantly presumes.

In its shift to the FCC's prescribed rates in this case, the Commission improperly focuses on the fact that "the FCC has continued to use those lives and parameters for its own purposes," and erroneously concludes that it can "be assumed that the FCC considers those depreciation lives and parameters to be reasonable."<sup>10</sup>

But the FCC's use of prescribed lives "for its own purposes" has little bearing on SBC Missouri's interstate access rates and absolutely no relationship to a proper application of TELRIC.

As the Costing and Pricing Report from the Commission's order in TO-97-40 explained, "prescribed rates provide little value as a comparison . . . a reasonable assumption is that TELRIC telephone plant will probably not be able to be depreciated over as long a life as embedded plant. . . ."<sup>11</sup>

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<sup>8</sup> See, Attachment to FCC Triennial Review Press Release, issued February 20, 2003, at p. 4, (emphasis added).

<sup>9</sup> August 7, 2002 Report and Order, pp. 36-37.

<sup>10</sup> Report and Order, p. 36.

<sup>11</sup> Report and Order, Case No. TO-97-40, Attachment C, Costing and Pricing Report, p. 101, issued July 31, 1997.

In the FCC's setting of interstate rates, TELRIC is not the standard. At the FCC, SBC Missouri's interstate access rates are not determined via an application of TELRIC principles, and the FCC does not prescribe depreciation rates based on TELRIC principles.

Moreover, FCC-prescribed depreciation parameters are not forward-looking and do not purport to be. And in fact, even before the Triennial Review decision was announced, the FCC rejected claims that states are required to use FCC prescribed depreciation lives in setting rates under Section 252 of the Act.<sup>12</sup> Rather, the FCC's rules state: "the depreciation rates used in calculating forward-looking economic cost of elements shall be economic depreciation rates."<sup>13</sup> In its Reply Brief filed at the U.S. Supreme Court in the TELRIC appeal, the FCC stated that it would defer to state public utility commissions to determine how best to adopt "specific depreciation rate adjustments that reflect expected asset values," including, where relevant, "expected declines in the value of capital goods. . . ."<sup>14</sup>

As is clear from its Final Arbitration Order in Case No. TO-97-40, the Commission previously had done just that in setting Missouri-specific asset lives and other depreciation parameters. The summary from the Commission's Costing and Pricing Report in that case reflects that the Commission grounded its economic lives on an exhaustive and thorough analysis of forward-looking economic depreciation performed by its Staff:

Depreciation Use the economic asset lives proposed by Staff. These economic lives are based predominately upon bench-marking a composite of SWBT's proposed depreciation rates against implied depreciation rates of 19 likely competitors and other companies using similar technologies as SWBT. All the implied rates indicate a large

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<sup>12</sup> Memorandum Opinion and Order, Joint Application by SBC Communications Inc., et al., for Provision of In-region, interLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, FCC 01-29, & 76 (rel. Jan 22, 2001).

<sup>13</sup> 47 C.F.R. Section 51.505(b)(3) (emphasis added).

<sup>14</sup> See, Reply Brief for Petitioner United States and the Federal Communications Commission, filed July 2001 in Verizon Communications v. FCC, Case Nos. 00-511, 00-555, 00-587, 00-590 and 00-602, p. 11. (The FCC also reiterated that "in the local competition context, the FCC has not prescribed particular depreciation schedules for network elements.")



range, SWBT's economic depreciation rates puts SWBT sixth for the lowest in the pool of 19 bench-marked companies and 28 implied depreciation rates.

Staff also recommends the use of MO-specific salvage values and the use of the Vintage Group (VG) method of depreciation recovery.<sup>15</sup>

And the Commission's firm rejection of AT&T's proposal to use FCC prescribed lives in that case<sup>16</sup> similarly rested on Staff's analysis that such rates did not reflect a forward-looking approach:

Staff desires to caution the Commission from relying heavily, if at all, on the FCC's ranges to reach its decision in these depreciation matters based on how parameters underlying those ranges were determined. To derive the ranges, the FCC relied upon simple averages of the then approved parameters by all FCC regulated companies. The ranges were calculated by rounding to within one standard deviation plus and minus from the mean. From experience, Staff is aware that not all, and perhaps many, parameters the FCC used in its averages do not represent true plant mortality experience. Rather, those parameters are many times settled upon at triennial depreciation rate review meetings by the FCC Staff, PUC Staff, and company representatives for expediency, sometimes involving compromise, in order to reach mutual agreement.<sup>17</sup>

In abruptly shifting to the FCC's prescribed asset lives and other depreciation parameters in its August 6, 2002 Report and Order, the Commission unjustly and unreasonably departed from fundamental determinations it previously made. This decision is not based on substantial and competent evidence and unlawfully ignores mandatory FCC rules regarding the application of the TELRIC methodology. SBC Missouri respectfully requests the Commission to reconsider its requirement to now move to FCC prescribed asset lives and to instead reaffirm the continued appropriateness of economic lives as previously established by the Commission.

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<sup>15</sup> See, Final Arbitration Order, Case No. TO-97-40, Issued July 31, 1997, Attachment C, Costing and Pricing Report, p. 5, Summary of Staff's Proposed Modification to SWBT Cost Studies.

<sup>16</sup> The Commission recently reaffirmed this result both making the UNE rates determined in Case No. TO-97-40 the permanent rates for the M2A in Case No. TO-99-227 and in finding that those rates continued to be appropriate in the most recent AT&T Arbitration, Case No. TO-2001-455 (where AT&T's witness filed nearly the exact same testimony as in this case). Ex. 3, Naughton Surrebuttal, pp. 3-4.

**Issue 85    What target capital structure should be used for the UNE leasing business?**

The FCC's recent TELRIC clarifications confirm that the Commission's August 6, 2002 Report and Order improperly disregards the forward-looking mandates of the FCC's TELRIC rules in adopting the book value capital structure proposed by Staff's outside consultant.<sup>18</sup> In its February 20, 2003 News Release, the FCC stated:

Clarification of TELRIC Rules - - The order clarifies two components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs. First, the order clarifies that the risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market. The order also reiterates the Commission's finding from the *Local Competition Order* that the cost of capital may be different for different UNEs.<sup>19</sup>

But in adopting the 46% debt to 54% equity ratio proposed by Staff's outside consultant in this case, the Commission's August 6, 2002 Report and Order did just the opposite by ignoring the risks associated with a competitive market:

Staff's witness, Dr. Ben Johnson, testified that an appropriate capital structure for the hypothetical UNE wholesale provider could best be determined by using book value rather than market value for SBC's equity. This has the advantage of measuring the value of the equity that has actually been invested in SBC's telephone network rather than more recent market fluctuations. The use of a book value capital structure permits the approximation of a capital structure that more closely reflects the monopolistic wholesale provisioning of UNEs rather than the riskier business undertaken by telephone holding companies in the modern competitive environment. Using this method, Johnson arrived at a 46 percent debt to 54 percent equity ratio. The Commission concludes that the use of the 46 percent debt to 54 percent equity ratio advocated by Staff is appropriate.<sup>20</sup>

The resulting cost of capital of 10.32% is even lower than the 10.36% cost of capital the Commission set in Case No. TO-97-40. Clearly, ILECs bear substantial increased risk as a

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<sup>17</sup> See, pp. 101-102 of the Costing and Pricing Report, which the Commission adopted in its July 31, 1997 Final Arbitration Order, quoted in Ex. 3, Naughton Surrebuttal, pp. 4-5.

<sup>18</sup> August 6, 2002 Report and Order, p. 69.

<sup>19</sup> See, Attachment to FCC Triennial Review Press Release, issued February 20, 2003, at p. 4, (emphasis added).

result of developments in the telecommunications sector in recent years. It is beyond reason for the Commission to adopt a cost of capital value reflecting lower (or even comparable) risk than the value approved in Case No. TO-97-40. On its face, this capital structure determination is unlawful, unjust and unreasonable because it is rooted in an improper view of the provision of UNEs as a monopolistic endeavor, and is based on embedded book value in violation of the FCC's TELRIC rules. Moreover, the decision is unreasonable in that it is not based on substantial and competent evidence, and is arbitrary and capricious.

With respect to cost of capital, the FCC's TELRIC rules unequivocally require the use of a forward-looking methodology: "The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element."<sup>21</sup> And the FCC's rules explicitly state that embedded book values are not to be considered:

Factors that may not be considered. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) Embedded Costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of account.<sup>22</sup>

Consistent with the FCC's TELRIC rules, SBC Missouri cost of capital witness Dr. William Avera explained why use of embedded book value is inappropriate for determining the proper capital structure of companies in competitive markets. As Dr. Avera testified, capital is raised in the market, where the value of a company's equity is not tied to book value. Accordingly, he based SBC Missouri's 12.19% cost of capital on market-value capital structure

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<sup>20</sup> August 6, 2002 Report and Order, p. 69, internal citations omitted, and emphasis added.

<sup>21</sup> 47 C.F.R. Sec. 51.505(b)(2).

<sup>22</sup> 47 C.F.R. Sec. 51.505(d)(1).

weights of 86% equity and 14% debt, which is the average capital structure for a group of comparable LECs for which market data is available.<sup>23</sup>

Not surprisingly, the 12.19% weighted average cost of capital Dr. Avera proposes here is an increase from the 10.69% he supported for use in SBC Missouri's 1996 studies (which the Commission, based on an extensive analysis by Staff, reduced slightly to 10.36%).<sup>24</sup> That increase has been driven by increased risk and competition, which has been detailed in numerous investor reports and national investor publications such as "Standard & Poor's," and "Value Line"<sup>25</sup> and which is even clearer today.<sup>26</sup> As Dr. Avera explained, the transition to competition has greatly amplified the perceptions of risk already created by the profound technological and regulatory changes in the telecommunications industry. Investors have many choices when deploying their capital. When the risk and uncertainty of a business increase as dramatically as they have for LECs, then those services must offer returns commensurate with that risk. Otherwise, investors will move their capital elsewhere.<sup>27</sup> Dr. Avera's capital structure analysis is forward-looking and has appropriately taken investor's perception of this risk into account.

Accepted legal and economic standards require that a regulated utility be allowed an opportunity to earn a return sufficient to fairly compensate capital investment, attract new capital, and maintain financial integrity. These same standards apply to regulatory decisions on cost of capital in the environment mandated by the Act. As Dr. Avera testified, if the company is not allowed a return sufficient to attract investors -- who necessarily measure their investment in

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<sup>23</sup> Ex. 1, Avera Direct, Sch. 2, pp. 16-17, 21-22.

<sup>24</sup> See, Final Arbitration Order, Case No. TO-97-40, issued July 31, 1997, Attachment C, pp. 5, 90-96.

<sup>25</sup> Ex. 2, Avera Surrebuttal, pp. 23-25.

<sup>26</sup> For example, Standard and Poor's recently lowered SBC's corporate credit and senior unsecured debt ratings primarily to reflect the effect of heightened business risk experienced in the local telephone industry. See, "S&P Cuts SBC Communications Corporate Credit Ratings," Reuters, May 28, 2003.

<sup>27</sup> Ex. 1, Avera Direct, Sch. 2, p. 4.

the company on market value -- the legal and economic standards will not be met. Clearly, where the market value of company's equity differs significantly from its book value, the standards require the regulatory authority to base its cost-of-capital determination on the market value of the company's capital.<sup>28</sup>

Accordingly, SBC Missouri would respectfully request the Commission to reconsider its adoption of the book value capital structure proposed by Staff's outside consultant and instead direct the use of a market value capital structure approach consistent with the FCC's TELRIC rules.

#### **Issues 140 & 183      Fiber Fill Factor**

The Commission inappropriately increased SBC Missouri's fill factor for fiber interoffice facilities from 40% to 90%.<sup>29</sup> As SBC Missouri previously expressed in its August 15 and September 20, 2002 Applications for Rehearing<sup>30</sup>, requiring use of a 90% fill factor on interoffice fiber is unlawful, arbitrary and unreasonable. By this reference, SBC Missouri incorporates these points into this Application and respectfully requests the Commission to reconsider its adoption of a 90% fiber fill factor and to instead adopt SBC Missouri's proposed 40% fill factor, which is an appropriate forward-looking fiber fill factor that provides reasonable and efficient capacity to accommodate maintenance needs and future demand for service.

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<sup>28</sup> Ex. 1, Avera Direct, Sch. 2, p. 5.

<sup>29</sup> August 6, 2002 Report and Order, p. 93.

<sup>30</sup> See, SBC Missouri's August 15, 2002 Application for Reconsideration and/or Rehearing filed in Case No. TO-2001-438 at pp. 9-11; and SBC Missouri's September 20, 2002 Application for Reconsideration and/or Rehearing filed in Case No. TO-2001-438 at pp. 5 – 7.

### **Issue 305 Fall Out Rate for Automated Systems**

The Commission inappropriately reduced fall out rates in SBC Missouri's cost for automated systems to 2%. As SBC Missouri previously expressed in its August 15 and September 20, 2002 Applications for Rehearing<sup>31</sup>, requiring use of a 2% standard, based on the performance of an unrelated system that handles unrelated activities, is unlawful, arbitrary and unreasonable. By this reference, SBC Missouri incorporates these points into this Application and respectfully requests the Commission to reconsider its requirement to reduce the fallout rate for automated UNE orders to 2%, and to instead adopt either SBC Missouri's proposed forward-looking fallout rates or a rate based on the established performance measures that have been accepted both at the state and federal levels as the benchmark for future performance.

### **ALTERNATIVE MOTION TO HOLD IN ABEYANCE**

In the event the Commission does not grant reconsideration or rehearing, SBC Missouri alternatively moves the Commission to hold adoption of final rates in this proceeding temporarily in abeyance until the FCC releases its final order in the Triennial Review proceeding and a determination is made on how the FCC's TELRIC clarifications with respect to cost of capital and depreciation impact the rates being set in this proceeding.

SBC Missouri had hoped that the FCC would have released its final order in the Triennial Review proceeding prior to the filing of this Application. At this point, however, the FCC has made available only its press release (along with an attachment, and separate FCC Commissioner statements). But as set out in the Application for Rehearing and/or Reconsideration above, it is

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<sup>31</sup> See, SBC Missouri's August 15, 2002 Application for Reconsideration and/or Rehearing filed in Case No. TO-2001-438 at pp. 11-13; and SBC Missouri's September 20, 2002 Application for Reconsideration and/or Rehearing filed in Case No. TO-2001-438 at pp. 3 – 5.

readily apparent from the information in the FCC's press release that the FCC's TELRIC clarifications will significantly impact the rates being set in this proceeding. Adoption of final rates in this proceeding should therefore temporarily be held in abeyance until the FCC's Triennial Review order is released and sufficiently analyzed so that the final rates in this proceeding can be reconciled with the FCC's directives on TELRIC. As the discovery and hearing phases of this case have been completed, and a decision from the FCC is expected shortly, it is appropriate to hold this proceeding in abeyance.

### **CONCLUSION**

In this Application, SBC Missouri seeks reconsideration and/or rehearing on four core decisions concerning depreciation, cost of capital, fiber fill and fallout in the Commission's August 6, 2002 Report and Order that so significantly affect the rates set in this proceeding that these decisions need to be revised to ensure proper application of TELRIC principles.

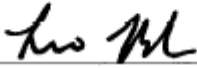
If these decisions are not revised, the rates established will be substantially below those required by a proper application of the TELRIC methodology. As displayed on Attachment 1, many of the rates have been driven so artificially low that it is obvious under TELRIC - - or any other costing standard - - that SBC's opportunity to recover its costs and a reasonable profit in providing these UNEs is being denied. A wholesale arrangement under which the wholesaler loses money with every sale is not just, reasonable or sustainable. SBC Missouri therefore respectfully requests the Commission to reconsider its findings and conclusions on these issues, or to grant rehearing so that these matters may be further explored and an appropriate and lawful resolution reached.

Alternatively, SBC Missouri moves the Commission for a short abeyance in adopting final rates in this proceeding until the FCC releases its final order in the Triennial Review

proceeding and a determination is made on how the FCC's TELRIC clarifications impact the rates being set in this proceeding.

Respectfully submitted,

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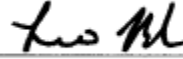
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing document were served on the following parties by e-mail on May 30, 2003.



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Attachment 2

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).

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FOR IMMEDIATE RELEASE:  
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## FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

### *Greater Incentives for Broadband Build-Out and Greater Granularity in Determining Unbundled Network Elements Are Key Commission Actions*

Washington, D.C. – The Federal Communications Commission (Commission) today adopted rules concerning incumbent local exchange carriers' (incumbent LECs) obligations to make elements of their networks available on an unbundled basis to new entrants. The new framework provides incentives for carriers to invest in broadband network facilities, brings the benefits of competitive alternatives to all consumers, and provides for a significant state role in implementing these rules.

Today's action resolves various local phone competition and broadband competition issues and addresses a May 2002 decision by the U.S. Court of Appeals for the District of Columbia which overturned the Commission's previous Unbundled Network Elements (UNE) rules. Following is a brief summary of the key issues resolved in today's decision (a more detailed summary of today's action is attached):

1. **Impairment Standard** – A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. Such barriers include scale economies, sunk costs, first-mover advantages, and barriers within the control of the incumbent LEC. The Commission's unbundling analysis specifically considers market-specific variations, including considerations of customer class, geography, and service.
2. **Broadband Issues** – The Commission provides substantial unbundling relief for loops utilizing fiber facilities: 1) the Commission requires no unbundling of fiber-to-the-home loops; 2) the Commission elects not to unbundle bandwidth for the provision of broadband services for loops where incumbent LECs deploy fiber further into the neighborhood but short of the customer's home (hybrid loops), although requesting carriers that provide broadband services today over high capacity facilities will continue

to get that same access even after this relief is granted, and 3) the Commission will no longer require that line-sharing be available as an unbundled element. The Commission also provides clarification on its UNE pricing rules that will send appropriate economic signals to carriers.

3. **Unbundled Network Element Platform (UNE-P) Issue** – The Commission finds that switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding. For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings within 9 months. Upon a state finding of no impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.
4. **Role of States** – The states have a substantial role in applying the Commission’s impairment standard according to specific guidelines tailored to individual elements.
5. **Dedicated transport** – The Commission finds that requesting carriers are not impaired without Optical Carrier (or OCn) level transport circuits. However, the Commission finds that requesting carriers are impaired without access to dark fiber, DS3, and DS1 capacity transport, each independently subject to a route-specific review by states to identify available wholesale facilities. Dark fiber and DS3 transport also each are subject to a route-specific review by the states to identify where competing carriers are able to provide their own facilities.

With today’s action, the Commission also opened a Further Notice of Proposed Rulemaking (FNPRM) seeking comment on whether the Commission should modify the so-called pick-and-choose rule that permits requesting carriers to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements.

Action by the Commission February 20, 2003, by Report and Order and Further Notice of Proposed Rulemaking (FCC 03-36). Chairman Powell approving in part and dissenting in part, Commissioner Abernathy approving in part and dissenting in part, Commissioner Copps concurring in part and dissenting in part, Commissioner Martin approving, and Commissioner Adelstein concurring in part and dissenting in part. Chairman Powell, Commissioners Abernathy, Copps, Martin, and Adelstein issuing separate statements.

-FCC-

Docket No.: CC 01-338

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News about the Federal Communications Commission can also be found

on the Commission’s web site [www.fcc.gov](http://www.fcc.gov).

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## **ATTACHMENT TO TRIENNIAL REVIEW PRESS RELEASE**

### **Order on Remand**

- Local Circuit Switching – The Commission finds that switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding. For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings (including the approval of an incumbent LEC batch hot cut process) within 9 months. Upon a state finding of no impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.
- Packet Switching – Incumbent LECs are not required to unbundle packet switching, including routers and DSLAMs, as a stand-alone network element. The order eliminates the current limited requirement for unbundling of packet switching.
- Signaling Networks – Incumbent LECs are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching. The signaling network element, when available, includes, but is not limited to, signaling links and signaling transfer points.
- Call-Related Databases – When a requesting carrier purchases unbundled access to the incumbent LEC's switching, the incumbent LEC must also offer unbundled access to their call-related databases. When a carrier utilizes its own switches, with the exception of 911 and E911 databases, incumbent LECs 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.

- OSS Functions – Incumbent LECs must offer unbundled access to their operations support systems for qualifying services. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. The OSS element also includes access to all loop qualification information contained in any of the incumbent LEC's databases or other records.
- Loops
  - Mass Market Loops
- \* Copper Loops – Incumbent LECs must continue to provide unbundled access to copper loops and copper subloops. Incumbent LECs may not retire any copper loops or subloops without first receiving approval from the relevant state commission.
- \* Line Sharing – The high frequency portion of the loop (HFPL) is not an unbundled network element. Although the Order finds general impairment in providing broadband services without access to local loops, access to the entire stand-alone copper loop is sufficient to overcome impairment. During a three-year period, competitive LECs must transition their existing customer base served via the HFPL to new arrangements. New customers may be acquired only during the first year of this transition. In addition, during each year of the transition, the price for the high-frequency portion of the loop will increase incrementally towards the cost of a loop in the relevant market.
- \* Hybrid Loops – There are no unbundling requirements for the packet-switching features, functions, and capabilities of incumbent LEC loops. Thus, incumbent LECs will *not* have to provide unbundled access to a transmission path over hybrid loops utilizing the packet-switching capabilities of their DLC systems in remote terminals. Incumbent LECs must provide, however, unbundled access to a voice-grade equivalent channel and high capacity loops utilizing TDM technology, such as DS1s and DS3s.
- \* Fiber-to-the-Home (FTTH) Loops – There is no unbundling requirement for new build/greenfield FTTH loops for both broadband and narrowband services. There is no unbundling requirement for overbuild/brownfield FTTH loops for broadband services. Incumbent LECs must continue to provide access to a transmission path suitable for providing narrowband service if the copper loop is retired.
  - Enterprise Market Loops
- \* The Commission makes a national finding of no impairment for OCn capacity loops.

- \* The Commission makes a national finding of impairment for DS1, DS3, and dark fiber loops, except where triggers are met as applied in state proceedings. States can remove DS1, DS3, and dark fiber loops based on a customer location-specific analysis applying a wholesale competitive alternatives trigger.
- \* Dark fiber and DS3 loops also each are subject to a customer location-specific review by the states to identify where loop facilities have been self-deployed.
- Subloops
  - \* See the copper loops summary above. In addition, incumbent LECs must offer unbundled access to subloops necessary for access to wiring at or near a multiunit customer premises, including the Inside Wire Subloop, regardless of the capacity level or type of loop the requesting carrier will provision to its customer.
  - Network Interface Devices (NID) – Incumbent LECs must offer unbundled access to the NID, which is defined as any means of interconnecting the incumbent LEC’s loop distribution plant to the wiring at the customer premises.
  - Dedicated Interoffice Transmission Facilities – The Commission redefines dedicated transport to include only those transmission facilities connecting incumbent LEC switches or wire centers.
- \* The Commission finds that requesting carriers are not impaired without access to unbundled OCn level transport.
- \* The Commission finds that requesting carriers are impaired without access to dark fiber, DS3, and DS1 transport, except where wholesale facilities triggers are met as applied in state proceedings using route-specific review.
- \* Dark fiber and DS3 transport also each are subject to a granular route-specific review by the states to identify where transport facilities have been self-deployed.
- Shared Transport – Incumbent LECs are required to provide shared transport to the extent that they are required to provide unbundled local circuit switching
- Combinations of Network Elements – Competitive LECs may order new combinations of UNEs, including the loop-transport combination (enhanced extended link, or EEL), to the extent that the requested network element is unbundled.
- Commingling – Competitive LECs are permitted to commingle UNEs and UNE combinations with other wholesale services, such as tariffed interstate special access services.
- Service Eligibility – Service eligibility criteria apply to all requests for newly-provisioned high-capacity EELs and for all requests to convert existing

circuits of combinations of high-capacity special access channel termination and transport services. These criteria include architectural safeguards to prevent gaming.

- Certification – Each carrier must certify in writing to the incumbent LEC that it satisfies the qualifying service eligibility criteria for each high-capacity EEL circuit.
  - Auditing – Incumbent LECs may obtain and pay for an independent auditor to audit compliance with the qualifying service eligibility criteria for high-capacity EELs. The incumbent LEC may not initiate more than one audit annually.
- Modification of Existing Network/“No Facilities” Issues – Incumbent LECs are required to make routine network modifications to UNEs used by requesting carriers where the requested facility has already been constructed. These routine modifications include deploying multiplexers to existing loop facilities and undertaking the other activities that incumbent LECs make for their own retail customers. The Commission also requires incumbent LECs to condition loops for the provision of xDSL services. The Commission does not require incumbent LECs to trench new cable or otherwise to construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates, but it clarifies that the incumbent LEC’s unbundling obligation includes all transmission facilities deployed in its network.
  - Section 271 Issues – The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling, under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the “just and reasonable” standard established under sections 201 and 202 of the Act.
  - Clarification of TELRIC Rules – The order clarifies two key components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs. First, the order clarifies that the risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market. The order also reiterates the Commission’s finding from the *Local Competition Order* that the cost of capital may be different for different UNEs. Second, the Order declines to mandate the use of any particular set of asset lives for depreciation, but clarifies that the use of an accelerated depreciation mechanism may present a more accurate method of calculating economic depreciation.
  - Fresh Look – The Commission will retain its prior determination that it will not permit competitive LECs to avoid any liability under contractual early



termination clauses in the event that it converts a special access circuit to an UNE.

- Transition Period – The Commission will not intervene in the contract modification process to establish a specific transition period for each of the rules established in this Order. Instead, as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate the Commission’s rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of the Commission’s rules.
- Periodic Review of National Unbundling Rules – The Commission will evaluate these rules consistent with the biennial review mechanism established in section 11 of the Act. These reviews, however, will not be performed *de novo* but according to the standards of the biennial review process.

#### **Further Notice of Proposed Rulemaking**

- The Commission opens a further notice of proposed rulemaking to seek comment on whether to modify the Commission’s interpretation of section 252(i) – the Commission’s so-called pick-and-choose rule. The Commission tentatively concludes that a modified approach would better serve the goals embodied in section 252(i), and sections 251-252 generally, by promoting more meaningful commercial negotiations between incumbent LECs and competitive LECs.