



3. On March 4, 2004 the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), vacated and remanded aspects of the *TRO*.

4. On August 20, 2004 the FCC released an Order and Notice of Proposed Rulemaking.<sup>2</sup> In that order the FCC invited parties to comment as to how it should promulgate permanent unbundling rules that respond to the decision of the United States Court of Appeals. The Order and Notice of Proposed Rulemaking became effective September 13, 2004, upon publication in the Federal Register. Initial comments must be submitted to the FCC by October 4, 2004; reply comments in that proceeding are due October 19, 2004.

5. The Order and Notice of Proposed Rulemaking states, at paragraph 15, that:

Given that our inquiry raises complex issues, and proceedings that state commissions initiated to implement the *Triennial Review Order* developed voluminous records containing information potentially relevant to our inquiry, we anticipate that parties might wish to submit much of that same factual evidence to support their positions here. To be sure, the state commissions' dedication in executing the difficult tasks set out for them in our Triennial Review Order was impressive, and we appreciate their efforts.

The FCC also stated therein that it encourages state commissions and parties to file summaries of the state proceedings, and that they should coordinate with one another regarding the filing of that information. The parties, however, are to provide a

complete recitation in their current filings of any arguments or data that they wish the [FCC] to consider. Moreover, parties making factual submissions shall provide the

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<sup>2</sup> Order and Notice of Proposed Rulemaking in *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket Nos. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179.

underlying data, analysis and methodologies necessary to enable the [FCC] and commenters to evaluate the factual claims meaningfully, including the basis upon which data were included or excluded.

*Id.*

6. As referenced by the FCC, the Commission went to great efforts to compile and facilitate the compilation of a complete record of current competitive activity in the State of Missouri, with the intention of determining, pursuant to the *TRO*, the extent to which mass markets switching, including combinations of switching, loops and common transport (the “UNE-P”), would continue to be made available by ILECs to CLECs in discrete markets throughout the State.

7. Now that that *USTA II* decision has placed the unbundling determination with the FCC, that agency should fully and sufficiently consider the Commission’s entire record in determining the extent to which unbundling will occur in the State. MCI does not request the Commission to attempt to create a summary of the record in this proceeding. As a practical matter, there is not sufficient time for the parties and the Commission to reach consensus and devise a structure for presenting or summarizing the data to the FCC. Moreover, the Commission has not made findings of fact or conclusions of law in this proceeding other than the definition of the relevant market and the DSO cutover, which were done in Phase I of this proceeding, and, given *USTA II* and the FCC Notice of Proposed Rulemaking, it is impracticable for the Commission to do so now.

8. Accordingly, the better course is to submit the entire record of the Commission’s proceeding to the FCC, but also enable the parties to use the record developed in this proceeding, prior to suspension of litigation, including data gathered in

discovery and other relevant materials, to reference the factual, legal and policy arguments they deem appropriate in their filings with the FCC.

9. The Commission has taken action to ensure the continued confidentiality of information in documents submitted in Case No. TO-2004-0207. On November 6, 2003, the Commission issued its *Order Establishing Protective Order* in this case, which requires the parties to abide by the Nondisclosure Agreement, shown as “Appendix ‘A’” to that order. Pursuant to that *Order* and Nondisclosure Agreement the parties have exchanged confidential documents.

10. The Commission’s Protective order states that “[a]ll persons who are afforded access to information under the terms of this Protective Order shall neither use nor disclose such information for purposes of business or competition or any other purpose other than the purpose of preparation for and conduct of this proceeding and then solely as contemplated herein, and shall keep the information secure and in accordance with the purposes and intent of this order.” Protective Order, Paragraph S.

11. The FCC, recognizing the need for continued confidential treatment of documents submitted to it by parties and state commissions, by separate Order released August 20, 2004, adopted comprehensive and sufficient procedures to maintain the confidentiality of the protected information previously submitted to the Commission in Case No. TO-2004-0207.

12. Accordingly, MCI requests that the Commission issue an order re-opening this case, certifying and transmitting, in its entirety, its record of this proceeding to the FCC for inclusion in the proceedings pursuant to the Order and Notice of Proposed Rulemaking, and that the Commission designate as confidential those documents

submitted to it for protection, pursuant to the requirements of the FCC's protective Order dated August 20, 2004. MCI also requests that the Commission facilitate access to the record of this proceeding by parties intending to provide or reference confidential data from this proceeding to the FCC, by approving the use of confidential information from this case in the FCC proceeding. MCI respectfully submits that such an order should provide that persons obtaining access to confidential information under the terms of the Protective Order herein may use such information pursuant to the FCC's Order and Notice of Proposed Rulemaking, arising from the *USTA II* decision, subject to the FCC's protective order in those proceedings. Such order should prevent any disagreement as to whether parties may use non-public data from this proceeding in their FCC comments.

13. MCI also requests expedited treatment of this Motion, given the deadlines imposed for submitting evidence to the FCC, as well as the public interest in ensuring that Missouri's opportunity to fully and fairly document the status of competition in the State is realized in the FCC's rulemaking proceeding. MCI requests that the Commission order interested parties to respond hereto within five business days of the filing and service of this pleading, and that the Commission issue its order granting the requested relief by October 15, 2004 so that parties may use the information in their reply comments to the FCC on October 19, 2004. Expedited action will avoid the harm that would attend inability to fully inform the FCC and likewise will be beneficial to the public interest. There will be no negative effect from expedited action. MCI has filed this pleading as soon as possible under the circumstances.

WHEREFORE, MCI requests the Commission, on an expedited basis, and for the reasons stated herein, to re-open this case, certify and transmit its record of proceedings

in this docket to the FCC, amend its protective order as described herein, and for such and further orders as are just and reasonable.

CURTIS, HEINZ,  
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

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**Certificate of Service**

A true and correct copy of the foregoing was served as required by Commission Order in this case on this 1st day of October, 2004 by e-mail transmission.

/s/ Carl J. Lumley

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