

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

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.)	

**SBC MISSOURI'S MOTION TO STRIKE PORTIONS OF THE
PREFILED REBUTTAL TESTIMONY OF JOSEPH GILLAN**

COMES NOW Southwestern Bell Telephone, L.P. d/b/a SBC Missouri ("SBC Missouri") and for its Motion to Strike Portions of the Rebuttal Testimony of Joseph Gillan, states as follows:

1. The Missouri Public Service Commission ("Commission") issued its Order Establishing Procedural Schedule in this case on December 1, 2003. In this Phase I concerning geographic markets and the DS1 crossover point, the Commission ordered only two rounds of prefiled testimony (Direct and Rebuttal) unlike the subsequent Phase II and Phase III proceedings, which contemplate three rounds of testimony (Direct, Rebuttal and Surrebuttal). The parties proposed, and the Commission adopted, two rounds of testimony in Phase I based on the understanding that all parties who wished to present an affirmative position on the appropriate geographic market and DS1 and DS0 crossover point would do so in direct testimony. This is, of course, consistent with the provisions of 4 CSR 240-2.130(7)(A) which defines Direct testimony as including all testimony and exhibits asserting and explaining the party's entire case-in-chief. See: Motor Carriers' Service Tariff Bureau, Case No. T-52, 475, 26 Mo. P.S.C. 392 (Nov. 28,

1983) granting motion to strike. All parties would then be permitted to present their response to the affirmative proposals in the Rebuttal phase.

2. All of the parties to Phase I presented their affirmative positions on the geographic market in Direct testimony except for Joseph Gillan on behalf of the CLEC Coalition (AT&T, Birch and Z-Tel). In his Direct testimony, Mr. Gillan affirmatively stated that he would not make a specific geographic market or crossover recommendation based on his theory that it should be SBC Missouri's obligation to do so. Gillan Direct, pp. 4-5. All other parties, however, presented their affirmative positions to the Commission on the appropriate geographic market, recommending either a Metropolitan Statistical Area ("MSA") or wire center approach. The only exception to this was Staff, which was permitted by the express terms of the Order Establishing Procedural Schedule to file its testimony after reviewing the Direct testimonies of other witnesses, but prior to the filing of Rebuttal so that all parties would have an opportunity to react to Staff's proposals.

3. Now, at this late date, Mr. Gillan attempts to interject a new proposal for establishing a geographic market, i.e., use of the LATA. No other party proposed to utilize LATAs as the geographic market in their Direct testimony and, accordingly, no party presented any testimony concerning LATAs in their Rebuttal testimony other than Mr. Gillan. As a result, no party has the opportunity to present any testimony regarding the pros and cons of utilizing a LATA approach to defining the geographic markets in Missouri.

4. It is wholly inappropriate for one party to assert that it is entitled to special privileges that no other party may have. The CLEC Coalition is not entitled to present its

case in Rebuttal testimony to which no party has an opportunity to respond. The CLEC Coalition is not entitled to special treatment in this regard. SBC Missouri's rights to procedural due process are violated by this end run of the procedural order, and the Commission cannot countenance such a result. See: Ahlstrom Construction Corp v. The Empire District Electric Corp., Case No. EC-95-28, 4 Mo. P.S.C. 3d 187 (Nov. 8, 1995) striking purported surrebuttal that attempted to inject a new request for relief.

5. SBC Missouri anticipates that the CLEC Coalition will attempt to justify its conduct on the basis that SBC Missouri has the burden of proof and thus should be required to make the initial proposal. That position is nonsense. First, that was not the proposal arising out of the prehearing conference which led to the adoption of the procedural schedule in this case, as demonstrated by the fact that all other parties made their affirmative market proposals in their Direct testimony. Second, if that were the case, Rebuttal testimony should then be limited to an explanation of why SBC Missouri's geographic market definition should not be adopted rather than an assertion that LATAs are the appropriate market. Third, there is nothing in the FCC's Triennial Review Order which imposes a burden of proof on SBC Missouri to define the market. Rather, it is the duty of the Commission to determine the appropriate market and then to evaluate the parties' evidence concerning whether the triggers or potential deployment test has been met in each market.

6. The portions of Mr. Gillan's Rebuttal testimony which should be stricken are as follows: page 3 line 4 through page 4 line 2, page 7 line 17 through page 10 line 14 and page 13 line 7 through page 16 line 3 and Schedules 4-6.

WHEREFORE, for all the foregoing reasons, SBC Missouri respectfully requests the Commission to issue an Order striking the portions of Mr. Joseph Gillan's Rebuttal testimony identified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document was served to all parties by e-mail on January 23, 2004.


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