BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Commission Inquiry into the Possibility of Impairment Without Unbundled Local Circuit Switching When Serving the Mass Market	))))	Case No. TO-2004-0207

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI'S REPLY TO ALL PARTIES' RESPONSES TO THE MISSOURI PUBLIC SERVICE COMMISSION'S ORDER SUSPENDING SCHEDULE AND DIRECTING FILING

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, and for its Reply to All Parties' Responses to the Missouri Public Service Commission's ("Commission's") Order Suspending Schedule and Directing Filing, states as follows:

Executive Summary

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") ruled that the Federal Communications Commission's ("FCC's) Triennial Review Order ("TRO") is unlawful in numerous respects, including the FCC's "subdelegation to state commissions of decision making authority over impairment determinations."[1] Because the Commission initiated and is conducting these Triennial Review proceedings pursuant to the role delegated to it by the FCC's rules -- a role and rules that have now been declared unlawful[2] -- the Commission should continue to stay these proceedings until the later of the denial of any petition for rehearing or rehearing en banc or until May 1, 2004 (60 days from March 2, 2004, the date of the D.C. Circuit's decision).[3]

[1] USTA v. FCC, Nos. 00-1012 (consolidated), D.C. Circuit, March 2, 2004, slip opinion at page 61 ("USTA II").
[2] Id. at 61-62.
[3] This is the same period for which the D.C. Circuit delayed the issuance of its mandate.

Nothing has changed since the D.C. Circuit issued its opinion. USTA II became the governing law the moment that the decision was issued and it remains the governing law unless and until the D.C. Circuit or the United States Supreme Court directs otherwise. While it is certainly conceivable that the FCC may ask state commissions to assist it in some manner, it would be wasteful and imprudent for this Commission to continue these proceedings until it is clear what that hypothetical state commission role may be. Further, if the FCC asks state commissions to assist it in some manner, the role and associated tasks delegated to state commissions will likely be very different - indeed, even AT&T, TCG, Birch, and Z-Tel concede that "the questions the TRO asks this and other state Commissions to answer may be different than the questions posed by new or revised federal rules."[4] In a similar vein, the Chief of the FCC's Wireline Competition Bureau recently noted: "[S]ome of the facts that have been developed in the state records may not be responsive to what the ultimate impairment standard could be."[5] It, therefore, makes no sense for the Commission and the parties to expend now, before the FCC has developed unbundling rules (or mounted a successful challenge to USTA II), the significant amount of time and resources required to prepare and file testimony, conduct further discovery, hold hearings, and prepare and file briefs and analyses, all in an attempt to apply rules declared unlawful and invalid by a unanimous Court of Appeals. Rather, the Commission should continue its temporary suspension of these proceedings.

Argument

On March 2, 2004, the D.C. Circuit issued its opinion in USTA II, vacating the

[4] See The CLEC Coalition's Comments in Favor of Proceeding with the Case, page 2.
[5] March 9, 2004 Remarks of FCC Wireline Competition Bureau Chief Bill Maher to NARUC (quoted in "Bureau Chief outlines FCC's prep work in response to Court's unbundling ruling," TR Daily (March 9, 2004)).

FCC's delegation of its responsibilities under §251(d)(2) to the state commissions. In its March 5th Order Suspending Schedule and Directing Filing ("Order"), the Commission acknowledges that the Court's decision "may, if upheld in whole or part, have a significant impact on this case. If the portion of that decision invalidating the FCC's subdelegation to the states is upheld, there will be no need to proceed further in this case."[6] The Staff of the Missouri Public Service Commission ("Staff") supports staying these proceedings, noting that "continuing with the case will require a significant expenditure of the Commission's and the parties' time and other resources on issues the Commission ultimately may lack authority to decide."[7] The CLECs' responses to the Order meet neither of these clearly valid points.

Instead, CLECs urge the Commission to roll the dice and move forward now on a gamble that the Supreme Court will later stay and then reverse the D.C. Circuit's decision.[8] CLECs' recommendation makes no sense because, on the one hand, it would lead to tremendous waste if CLECs' "confident" prediction does not pan out, and on the other, it is utterly unnecessary even if CLECs' prediction does prove accurate.[9] No party has asked the Commission to permanently shut down these proceedings or destroy the

[6] See Order at page 1.
[7] See Staff's Motion to Suspend Procedural Schedule, page 2.
[8] See CLECs' Suggestions in Support of Resumption of Proceedings, page 2. CLECs argue: "CLECs are confident that the D.C. Circuit's decision will be stayed and reversed. As a result, the Missouri TRO proceedings should move forward." See also The CLEC Coalition's Comments in Favor of Proceeding with the case, page 3. "The CLEC Coalition is highly optimistic that the Supreme Court, which issued a very strong opinion in support of competition, will accept this case and affirm the FCC's findings and rules, as well as the right of the states to implement rules critical to support telecommunications competition, especially (but not exclusively) for mass market customers. The CLEC Coalition is equally optimistic that the D.C. Circuit's decision will be stayed, in no small part because of the marketplace confusion and consumer harm that would likely result if the decision were allowed to become effective before the Supreme Court has the opportunity to review it."
[9] There is little point in debating the probability of a Supreme Court reversal, but anyone who claims to be "confident" that the Supreme Court will reverse a unanimous decision of a Court of Appeals in an area is the Court's special expertise, particularly when there is no conflict with a decision of another Court of Appeals, is engaging in transparent puffery.

work completed to date; rather, any stay would be temporary, and the Commission would remain free to resume the proceedings at a later date if the circumstances make resumption appropriate. Thus, if the Commission were to stay these proceedings now, but the Supreme Court subsequently stayed or reversed the D.C. Circuit's decision, the Commission could simply pick up the proceedings where it left off.

Neither the Commission nor any party would be prejudiced by such a delay. The possibility that the Commission will somehow be prejudiced by a stay with respect to any deadlines to complete its investigation (whether USTA II is ultimately reversed or whether it stands and the FCC formulates some new role for state commissions) is remote. In order for the FCC to assume jurisdiction over a Triennial Review Order proceeding – if USTA II is stayed or reversed – some party would have to ask the FCC to do so and the FCC would have to agree to do so within *90 days* (three months) after the request. 47 C.F.R §51.320. As Staff pointed out, it is unlikely that USTA II will be stayed or reversed. But even if that happens, the probability is miniscule at best that such a stay or reversal would be unaccompanied by an extension of the original July 2, 2004 deadline. And it is even less likely that a party to these proceedings would ask the FCC to intervene because the Commission failed to meet that deadline and of the FCC actually concluding (notwithstanding that the Commission would have had those additional ninety days to complete the proceedings) that Missouri and all the other states that stayed their Triennial Review proceedings thereby forfeited their authority to resume them.[10]

[10] If the Commission stays these proceedings, SBC Missouri will not assert that the absence of a final resolution of this proceeding by July 2, 2004, constitutes a Commission failure either to exercise its authority or to act under 47 C.F.R. §51.320. Beyond that, SBC Missouri does not forsee having occasion to argue in the future that this Commission has failed to exercise its authority or has failed to act under that rule or under any successor to that rule, and has no intention of arguing in any context that the granting of this stay (or the fact of the stay) supports a contention that the Commission has been guilty of any such failure.

Some CLECs also assert that Missouri's Triennial Review proceedings must continue because the D.C. Circuit "stayed" its decision, and therefore, "the TRO is the prevailing telecommunications law of the country, and state commissions are authorized to conduct their granular analyses on impairment."[11] Those CLECs are wrong. The states' participation in TRO-related proceedings has been voluntary from the start. And, in any event, the D.C. Circuit's decision became the law the moment it was issued, notwithstanding that the mandate has not yet been issued.

The courts have made clear that "once a published opinion is filed, it becomes the law of the circuit [[12]] until withdrawn or reversed by the Supreme Court or an en banc court," and expressly rejected the argument that appellate decisions are "not binding precedent until the mandate issues in th[e] case." Chambers v. United States, 22 F.3d 939, 942 n.3 (9th Cir. 1994), *vacated and remanded on other grounds*, 47 F.3d 1015 (9th Cir. 1995). See also Yong v. INS, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority"). Other published decisions consistently have reached the same conclusion.

For instance, in Southwestern Bell Telephone Co. v. Missouri Public Service

[11] See CLECs' Suggestions in Support of Resumption of Proceedings, pages 1-2. See also McLeodUSA's Response to Order Suspending Schedule, page 1 (McLeodUSA argues "the decision of the Court is not yet effective.") See also The CLEC Coalition's Comments In Favor of Proceeding with the Case, pages 1-4.

[12] Because the D.C. Circuit was acting as a Hobbs Act reviewing court (see 28 U.S.C. §2342(1)), its decision is binding on every other court in the country except for the Supreme Court of the United States. See 28 U.S.C. §2349(a) ("the court of appeals in which the record on review is filed * * * has *exclusive* jurisdiction to make and enter * * * judgment determining the validity of * * * the order of the agency." (Emphasis added). Indeed, even indirect collateral attacks on any aspect of the TRO reviewed by the D.C. Circuit's decision itself, are strictly forbidden. FCC v. ITT World Communications, 466 U.S. 463, 468 (1984) (suit barred where "in substance" it "raises the same issues" being considered in the Hobbs Act court challenge).

Commission, 236 F.3d 922 (8th Cir. 2001) ("SWBT"), the Eighth Circuit too held that the stay of a mandate does not affect the prevailing law. In SWBT, the Eighth Circuit held that, notwithstanding the fact that the mandate in IUB II (in which the Eighth Circuit held certain FCC rules unlawful)[13] had been stayed, IUB II was still the law, and required the court to vacate and remand a state commission arbitration decision that was based on the FCC rules that had been held unlawful. The Court's language could not be clearer:

> We should also note that, after the opinion in Iowa Utilities II was filed on July 18, 2000, the panel granted the FCC's motion to stay the mandate. . . .Notwithstanding this turn of events, our decision in Iowa Utilities II is not vacated, remains the law, and requires the vacatur of the §252 agreement reached in this case. 236 F.3d at 924 n.4.[14]

Thus, the D.C. Circuit's holding that the FCC's "subdelegation to state commissions of decision-making authority over impairment determinations" is "unlawful"[15] constitutes binding precedent as of March 2, 2004, and it remains so unless and until the D.C. Circuit or the Supreme Court directs otherwise.

While some of the CLECs assert that they are "confident" that USTA II will be reversed, these same CLECs attempt to hedge their bet by asserting that these proceedings should continue because if USTA II stands and "the FCC is compelled to re-analyze the impairment issue. . ., it will need to base any further findings on granular, market-specific factual findings."[16] But such "confidence" is rank speculation, and it offers no basis to lift the stay in this case.

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[13] Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 200) ("IUB II").
[14] See also Finberg v. Sullivan, 658 F.2d 93, 97 n. 5 (3d Cir. 1981) (en banc) ("For most purposes, the entry of judgment, rather than the issuance of the mandate, marks the effective end to a controversy on appeal"); McCellan v. Young, 421 F.2d 690, 691 (6th Cir. 1970); AT&T Communications v. BellSouth Telecommunications, Inc., D/A No. 3:97-2164-17, slip op. at 14 (D.S.C. Aug 14, 2000).
[15] USTA II, at 18 and 61.
[16] See The CLEC Coalition's Comments in Favor of Proceeding with the Case, page 5; see also Sage Telecom, Inc.'s Comments on Order Suspending Schedule, page 2; see also Ameritel Missouri, Inc.'s Response to Order Suspending Schedule, page 1.

While it is certainly possible that the FCC may ask state commissions to assist the FCC in some manner, it would be wasteful and imprudent to continue these proceedings until it is clear what that hypothetical state commission role will be. At this point, it is far from certain what, if any, role state commissions will have in determining impairment questions under the FCC's revised rules. Pursuing this matter as it is currently postured will certainly result in significant waste of resources and time.

The CLEC Coalition cites Michigan Commissioner Nelsons' comment that: "[i]f appropriate, we will assist the FCC in the determinations they will have to make pursuant to [the D.C. Circuit's] ruling."[17] That comment does not help the CLECs here. As the CLEC Coalition itself admits, "the questions the TRO asks this and other state Commissions to answer may be different than the questions posed by new or revised federal rules."[18] Quite simply, no one yet knows whether, or what kind of, state assistance will be "appropriate."

Even assuming that the FCC asks the state commission to engage in a granular collection of objective facts, it is clear that the issues in any such proceeding would be vastly different from those currently before the Commission. As the Chief of the FCC's Wireline Competition Bureau recently told NARUC, "the D.C. Circuit called into question not only the specifics of the TRO but at least some aspects of the general impairment standard. . . .What that means is some of the facts that have been developed in the state records may not be responsive to what the ultimate impairment standard could

[17] See The CLEC Coalitions Comments in Favor of Proceeding with the Case, page 7.
[18] See The CLEC Coalition's Comments in Favor of Proceeding with the Case, page 2.

be."[19] For instance, the current dedicated transport proceeding focuses solely on particular routes where there is already competitive facilities deployment, but the D.C. Circuit has held that that focus is unlawful.[20] The batch cut proceeding does not focus on "a more narrowly tailored rule," such as "rolling hot cuts" using *existing* processes to determine whether or where competitors are "impaired" *now* without access to unbundled mass market switching (the issue confronting the FCC), but instead is solely focused on *future* processes that are premised upon a national impairment finding that was held unlawful.[21] And the current mass market switching proceeding too is premised upon a national impairment finding that was held unlawful, and does not take into account, among other things, the more "narrowly-tailored alternatives" to blanket unbundling that the FCC is required to assess.[22] Moreover, a large portion of the testimony and hearings to date, as well as perhaps the lion's share of the testimony, hearings, and briefings to come should the Commission not stay these proceedings have been and will be devoted to addressing "policy" and legal issues (e.g., interpretation of the FCC's trigger tests).[23] If the states do have a role in the FCC's remand process, however, that role will undoubtedly be limited to certain (as yet undefined) fact-findings, in which these policy and legal issues will have no place. Simply stated, only a portion of what is being done in these proceedings – and virtually none of what would be done in hearings or briefings – is likely to be of any use when and if the FCC does ask the states to play a fact-finding role and, conversely, it is almost certain that if such a request does come, facts that are

[19] March 9, 2004 Remarks of FCC Wireline Competition Bureau Chief Bill Maher to NARUC (quoted in "Bureau Chief outlines FCC's prep work in response to Court's unbundling ruling," TR Daily (March 9, 2004)).
[20] USTA II at pages 28-29.
[21] Id. at pages 21-22.
[22] Id.
[23] Indeed, AT&T, the only CLEC that filed direct testimony in Phase II of this case (loop/transport) devoted extensive treatment to interpreting the FCC's order and implementing rules.

not being gathered in these proceedings will need to be gathered. Under those circumstances, it would be imprudent, to say the least, to continue this process on the theory that facts are being reaped that may be useful some day.

Finally, it is unthinkable that the FCC would announce a new state commission role but refuse to give states time to complete that role. It is also unthinkable that the FCC would penalize the numerous state commissions that have already stayed their Triennial Review proceedings, as if the FCC expected those state commissions to roll the dice, correctly guess their new role, and move forward on the basis of that speculation before the FCC even formulated the new state commission role.

For all of these reasons, as well as those explained in Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Response to Staff's Motion to Suspend Procedural Schedule and to Order Suspending Schedule and Directing Filing, SBC Missouri prays that the Commission temporarily suspend or abate this proceeding until the later of 60 days from the D.C. Circuit Court decision vacating the FCC's TRO decision in several respects or until any requests for rehearing or rehearing en banc are ruled upon. Thereafter, the Commission should again request the parties to file comments on whether the proceeding should remain suspended, together with such further or additional relief the Commission deems just and proper.

Respectfully submitted,

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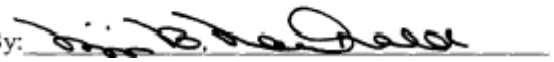
By: 

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CERTIFICATE OF SERVICE

Copies of this document were served on all counsel of record by e-mail on March 15, 2004.


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