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

SBC MISSOURI'S REPLY

COMES NOW, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and respectfully submits this Reply to the CLEC Coalition[1] and Covad Communications Company's ("Covad's") oppositions to SBC Missouri's Motion to Dismiss Triennial Review Proceeding ("Motion to Dismiss").

I. CONTINUING THE *TRO* PROCEEDINGS WOULD SERVE NO USEFUL, OR LAWFUL, PURPOSE

The Missouri Public Service Commission ("Commission") has already considered the impact of the *USTA II*[2] decision. In its Order Continuing Suspension, issued on March 17, 2004, the Commission noted: "If the position of that decision invalidating the Federal Communications Commission's subdelegation to the states is upheld, there will be no need to proceed further in this case." Id. at 1. The Commission stated that it would review the stay after May 1, 2004. Id. At this juncture, the Federal Communications Commission's ("FCC's") Triennial Review Order (*TRO*) subdelegation to the states has been declared unlawful, all requests for stays have been denied, and the mandate making that order effective has been issued.

In opposing the dismissal of the *TRO* proceeding as premature, the CLEC Coalition and Covad suggest that the FCC, in its remand proceeding, may call upon state commissions to

[1] The CLEC Coalition consists of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., Birch Telecom of Missouri, Inc. and Z-Tel Communications, Inc.
[2] *United States Telecom Association v. FCC*, No. 00-1012, slip op. (D.C. Cir. March 2, 2004) (*USTA II*").

provide information or advice, and that dismissing the *TRO* proceedings now would somehow cause all the information that has been collected in this proceeding to be lost.[3] These concerns are misplaced.

The oppositions to the Motion to Dismiss are based on two assumptions, neither of which has been shown to be correct: (1) that the FCC will request that the states, including Missouri, submit data and/or analysis to it and (2) that the data and analysis collected to date will be relevant to the standards adopted by the FCC on remand of the *USTA II* decision.

The FCC may or may not call upon state commissions to provide data and input in its remand proceeding. No such decision has yet been made by the FCC, and there certainly has been no indication of what type of information might be requested from the states. The FCC may, for instance, ask for recommendations regarding matters that have not even been addressed in the current state proceedings. If the FCC does ask state commissions to provide input in its remand proceeding, the Commission can then open a new proceeding to collect the facts the FCC asks for -- *and could consider whether it is appropriate to import the record from this case into the new proceeding* (to the extent that record turns out to be relevant and useful to what the FCC asks of the Commission).

The most appropriate course of action here would be to close these *TRO* proceedings and wait to see what the FCC asks of the Commission. The Oregon Commission recently chose a similar course, closing its *TRO* docket, but noting the concern of some parties "with the ability of the Commission to initiate a new docket without delay if the FCC issues revised unbundling rules or other circumstances arise requiring Commission action."[4] The Oregon Commission concluded that "[g]iven that the *USTA II* mandate has taken effect, there is no reason to continue

[3] *See, e.g.,* CLEC Coalition Amended Response, p. 2; Covad Response, p. 2.
[4] A copy of the Oregon Commission's order is attached hereto as Attachment 1.

this proceeding. If events arise requiring Commission action, a party may request that a new docket be opened." Nevada has also closed its TRO proceedings, and other states are considering doing so.

The CLEC Coalition, although noting that this is not the time for a decision on the merits, suggests in a footnote that the material submitted by the parties in this case "may prove valuable to the Commission in considering unbundling issues under state law as well."[5] While SBC Missouri disagrees with the CLEC Coalition's claim that Missouri law authorizes unbundling, their argument is irrelevant here. The purpose of these *TRO* proceedings was to apply the FCC's trigger and self-provisioning rules in Missouri. Those rules have now been vacated and there is no need to proceed further in this case.

II. *USTA II* VACATED THE FCC'S HIGH-CAPACITY LOOP RULES

Covad asserts that *USTA II* did not vacate the FCC's high-capacity loop rules.[6] This assertion is incorrect.

In its "Conclusion," the D.C. Circuit stated that "[w]e vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations . . . . *So ordered.*"[7] The FCC's high-capacity loop rules constitute one of the FCC's subdelegated impairment determinations, and those rules were thus vacated.

While the D.C. Circuit did not separately address the FCC's high-capacity loop rules, that is because the Court lumped the FCC's findings for "DS1, DS3, and dark fiber" together, including both high-capacity loops and dedicated transport, and addressed both under the hybrid moniker "high-capacity dedicated transport."[8] Notwithstanding the D.C. Circuit's reference to

[5] CLEC Coalition Response, p. 4, fn. 5.
[6] Covad Response at p. 3.
[7] *USTA II*, 359 F.3d at 594-95.
[8] Id. at 573.

dedicated transport, it is apparent that its holding applies equally to high-capacity loops. The D.C. Circuit flatly held that "the Commission may not subdelegate its § 251(d) authority to state commissions."[9] Thus, the Court held, "[w]e therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme."[10] The FCC's "national impairment findings with respect to DS1, DS3, and dark fiber," of course, include both its high-capacity loop and dedicated transport rules. Moreover, the Court included within its discussion of high-capacity facilities "transmission facilities dedicated to a single customer," which is how the FCC defines a "loop."[11]

Covad's suggestion that the FCC's high-capacity loop rules were somehow unaffected by *USTA II* simply makes no sense. The D.C. Circuit held that the FCC may not subdelegate its authority under section 251(d) to state commissions, and expressly vacated such subdelegations. Covad's suggestion that this ruling could somehow apply only to the FCC's trigger and potential deployment rules for mass market switching and dedicated transport, but not its identically-structured trigger and potential deployment rules for high-capacity loops, defies common sense. The FCC made clear that its high-capacity loop rules "delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled high-capacity loops,"[12] just as its dedicated transport rules "delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled transport,"[13] and just as its mass market switching rules "delegate[] a role to state commissions in identifying impairment for unbundled circuit switching."[14]

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[9] Id. at 574.
[10] Id.
[11] *See* 359 F.3d at 573; 47 C.F.R. § 51.319(a).
[12] *TRO*, ¶ 328.
[13] Id., ¶ 394.
[14] Id., ¶ 534.

III. *USTA II* VACATED THE FCC'S BATCH CUT RULES

Covad claims that SBC Missouri "incorrectly assumes that the FCC's batch hot cut rules are unlawful because "they were part of the FCC's attempted delegation to state commissions of the authority to make market-by-market impairment determinations" and "were not part of any impairment determination delegated to the states" and "d[o] not require state commissions to make any impairment determinations."[15] Covad is incorrect.

The FCC made clear that its batch cut rules required state commissions to "approve and implement a batch cut migration process . . . or to issue detailed findings that a batch cut process is unnecessary in a particular market because incumbent LEC hot cut processes *do not give rise to impairment in that market*."[16] In other words, the FCC's batch cut rules directed state commissions to make *impairment* determinations – precisely what the D.C. Circuit held the FCC's rules could not do.[17]

Moreover, Covad's own filings in this case undercut its suggestion that the batch cut rules "d[o] not require state commissions to make any impairment determinations." In arguing that SBC Missouri's batch hot cut proposal was insufficient, Covad focused on impairment:

> CLECs will continue to be impaired without access to unbundled local switching even should state commissions conclude that SBC's proposed BHC process is sufficient (which it is not) because SBC's proposed BHC does not support: (a) migrating an end user from a line splitting arrangement incorporating unbundled local switching (UNE-P) to a line splitting arrangement incorporating self-provisioned local switching (UNE-L), or (b) establishing line splitting arrangements incorporating self-provisioned local switching (UNE-L).[18]

In short, the FCC's batch cut rules were clearly part of the "impairment determination delegated to the states" and "require[d] state commissions to make . . . impairment

[15] Covad Response at pp. 3-4.
[16] *TRO*, ¶ 423 (emphasis added).
[17] *USTA II*, 359 F.3d at p. 570.
[18] Covad Response to SBC's Response to Order Directing Filing, Case No. TO-2004-0207, filed November 17, 2003 at p. 5.

determinations."[19] Thus, those rules were vacated by *USTA II*, which vacated all FCC "subdelegation[s] to state commissions of decision-making authority over impairment determinations," including "the subdelegation scheme established for mass market switching."[20] Accordingly, this case should be dismissed.

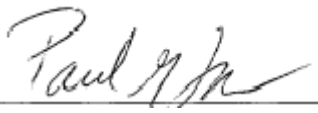
IV. CONCLUSION

Now that the D.C. Circuit has issued its mandate and the Chief Justice of the Supreme Court has denied all requests to stay that mandate, there is no longer any lawful basis for these proceedings. The portions of the *TRO* and the FCC rules that delegated the Commission the authority to undertake these proceedings have been vacated. And the FCC rules that these proceedings were instituted to apply have also been vacated.

The Commission should therefore dismiss these proceedings and await further action from the FCC as to what input, if any, it will seek from the states.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI

BY: 

PAUL G. LANE #27011
LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
MIMI B. MACDONALD #37606
Attorneys for Southwestern Bell Telephone, L.P.
d/b/a SBC Missouri
One SBC Center, Room 3520
St. Louis, Missouri 63101
314-235-4300 (Telephone)/314-247-0014 (Facsimile)
pl6594@momail.sbc.com

[19] Covad Response at pp. 3-4.
[20] *USTA II*, 359 F.3d at p. 594.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document was served to all parties by e-mail on July 12, 2004.

Paul G. Lane

GENERAL COUNSEL
NATHAN WILLIAMS
MISSOURI PUBLIC SERVICE COMMISSION
PO BOX 360
JEFFERSON CITY, MO 65102

PUBLIC COUNSEL
JOHN B. COFFMAN
OFFICE OF THE PUBLIC COUNSEL
PO BOX 7800
JEFFERSON CITY, MO 65102

KENNETH A. SCHIFMAN
SPRINT MISSOURI, INC.
6450 SPRINT PARKWAY, BLDG. 14
MAIL STOP KSOPHN0212-2A253
OVERLAND PARK, KANSAS 66251

REBECCA B. DECOOK
AT&T COMMUNICATIONS OF THE SOUTHWESTS, INC.
1875 LAWRENCE STREET, SUITE 1575
DENVER, CO 80202

CARL J. LUMLEY
LELAND B. CURTIS
CURTIS OETTING HEINZ GARRETT & SOULE, P.C.
130 S. BEMISTON, SUITE 200
ST. LOUIS, MO 63105

STEPHEN F. MORRIS
MCI TELECOMMUNICATIONS CORP.
701 BRAZOS, SUITE 600
AUSTIN, TX 78701

WILLIAM J. COBB, III
COVAD COMMUNICATIONS COMPANY
1100 CONGRESS AVENUE, SUITE 1100
AUSTIN, TEXAS 78701

SHELDON K. STOCK
JASON L. ROSS
GREENSFELDER, HEMKER & GALE, PC
10 SOUTH BROADWAY, SUITE 2000
ST. LOUIS, MO 63102

JAMES M. FISCHER
LARRY DORITY
FISCHER & DORITY, PC
101 MADISON, SUITE 400
JEFFERSON CITY, MO 65101

CHARLES BRENT STEWART
STEWART & KEEVIL, LLC
4603 JOHN GARRY DRIVE, SUITE 11
COLUMBIA, MO 65203

KATHERINE K. MUDGE
JASON WAKEFIELD
SMITH, MAJCHER & MUDGE, L.L.P.
816 CONGRESS AVENUE, SUITE 1270
AUSTIN, TEXAS 78701

MARK W. COMLEY
NEWMAN, COMLEY & RUTH P.C.
601 MONROE STREET, SUITE 301
PO BOX 537
JEFFERSON CITY, MO 65102

CAROL KEITH
NUVOX COMMUNICATIONS
16090 SWINGLEY RIDGE ROAD, SUITE 500
CHESTERFIELD, MO 63017

DAVID WOODSMALL
XSPEDIUS COMMUNICATIONS
555 WINGHAVEN BLVD, SUITE 300
O'FALLON, MO 63366

BILL MAGNES
VALERIE KIRK
CASEY & GENTZ, L.L.P.
919 CONGRESS AVENUE, SUITE 1060
AUSTIN, TEXAS 78701

WILLIAM D. STEINMEIER
MARY ANN (GARR) YOUNG
WILLIAM D. STEINMEIER, P.C.
P.O. BOX 104595
JEFFERSON CITY, MO 65110

ROSE M. MULVANY
BIRCH TELECOM OF MISSOURI, INC.
2020 BALTIMORE AVE.
KANSAS CITY, MO 64108

PATRICK R. COWLISHAW
KATHLEEN LAVALLE
JACKSON WALKER L.L.P.
901 MAIN STREET, SUITE 6000
DALLAS, TX 75202