BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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

PHASE I BRIEF SUBMITTED BY MCI, BIG RIVER, AND SOCKET

COME NOW Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., Intermedia Communications, Inc., and MCImetro Access Transmission Services, LLC, (herein collectively "MCI"), Big River Telephone Company, LLC, ("Big River"), and Socket Telecom, Inc. ("Socket"), and submit their Phase I Brief regarding: (1) the market definition that is required to be established under 47 CFR 51.319(d)(2)(i); and (2) the appropriate maximum number of DSO loops (cutover point) that can be served at a single location by means of unbundled switching, that is required to be determined under 47 CFR 51.319(d)(2)(iii)(B)(4). As discussed more fully herein, the Commission should use wire centers as the market definition. Additionally, the Commission should set a DS0/DS1 cutover somewhere in the range of 8-12 loops for business customers and recognize that all residential customers are mass market customers. Such decisions in this phase will best position the Commission to undertake the next tasks assigned to it by the FCC's Triennial Review Order.

INTRODUCTION

The FCC's Triennial Review Order assigns many tasks to this Commission. Two of these tasks are at issue in the first phase of this proceeding.

First, under 47 CFR 51.319(d)(2)(i), the Commission is directed to define markets for the purpose of evaluating the impairment of CLECs' ability to offer their services to end users utilizing DS0 capacity (voice grade) loops without access to unbundled local circuit switching

from the ILECs. The impairment analysis is required under 47 USC 251(d)(2)(B). It is a question of whether market entry is uneconomic. TRO, para. 84. It is not an academic exercise, for an incorrect determination of non-impairment for a market would undoubtedly deprive mass market customers in that area of competitive choice.

The FCC specifically instructed the Commission to attempt to distinguish between markets where different findings of impairment are likely. TRO, para. 495. In accordance with this instruction, MCI and Staff respectively have proposed that the Commission should use either wire centers or exchanges as the market definition, in order to be able to distinguish precisely between any areas of non-impairment and areas of impairment. In contrast, other parties have proposed "all or nothing" market definitions ranging from noncontiguous segments of MCAs or MSAs to full LATAs. It is clear from the record (indeed the parties made no bones about it), that under such "all or nothing" approaches, either smaller areas of non-impairment would have to be ignored because of an overall finding of impairment for a large area, or large areas of impairment would have to be ignored because of a finding of non-impairment for a smaller encompassed area. Hence, only the wire center and exchange proposals allow the precise market differentiation required by the FCC. Only the wire center and exchange proposals will allow distinctions between markets where different findings of impairment are likely.

The second task under the TRO that the Commission is to perform in this phase of the proceeding, as set forth in 47 CFR 51.319(d)(2)(iii)(B)(4), is to establish the maximum number of analog/DS0 loops that a CLEC can serve using unbundled switching when serving a multiline end user at a single location. Again, it is a question of economics - specifically a determination of when it is economic to provide voice service over DS1 facilities rather than analog/DS0 voice

facilities. TRO para. 497. Again, it is not an academic exercise, because if the number is incorrectly set too low, small business and residential customers will not be able to choose to be served by CLECs, in that CLECs will not be able to serve them through unbundled DS0 level switching obtained from the ILEC (it will not be available) or through DS1 facilities (it will be cost prohibitive).

Staff, AT&T and Sprint have presented evidence demonstrating that the appropriate cutover point, or maximum number of analog/DS0 loops, lies in a range from 8-12 for business customers. These parties provide the economic analysis suggested by the FCC. Naturally, all residential customers are mass market customers. On the other hand, SBC and CenturyTel arbitrarily propose to use a maximum number of three loops, based on an FCC "default" figure that has never been in effect in Missouri and based on unsubstantiated assumptions about new revenues that would supposedly be available if customers with four or more lines were theoretically able to be served by DS1 facilities.

As stated at the beginning of this Brief, the Commission should use wire centers as the market definition. Further, it should set a DS0/DS1 cutover somewhere in the range of 8-12 loops for business customers, while recognizing that all residential customers should remain classified as mass market. Such decisions in this phase will best position the Commission to undertake the next tasks assigned to it by the FCC's TRO.

I. MARKET DEFINITION

Issue No. 1: For purposes of examining whether there is "non-impairment" in the provision of unbundled local switching to serve mass-market customers, what are the relevant geographic markets within the state of Missouri?

Answer: Wire centers.

The wire center and exchange proposals would allow complete analysis of impairment across the entire state.

Despite conscious efforts by the ILECs to create confusion, it is clear from the record that the proposals to define markets based on wire centers or exchanges would allow a complete analysis of impairment across the entire state. It is irrefutable that an analysis of wire centers or exchanges would result in a deliberate assemblage of such building block markets by the Commission into whatever total area of non-impairment may be proven. (Ankum Rebuttal, p. 4, Tr. 749-50; Thomas Rebuttal p. 14, Tr. 864-85). The end result for any part of the state could range from no areas of non-impairment, to a few contiguous wire centers or exchanges, to an MCA, to an MSA, to a LATA. The end results would depend on the evidence presented during the impairment analyses. (Thomas Tr. 989; Ankum Direct p. 36, Rebuttal p. 4, Tr. 771-72).

Thus, the ILEC efforts to contrast the size of a single wire center against an MCA or MSA were of no purpose beyond pure obfuscation. Their witnesses admitted that all wire centers or exchanges could be considered and none would be excluded. (Fleming Tr. 413). In truth, the wire center and exchange proposals provide coverage of the entire state, whereas use of MCAs or MSAs (or the parts thereof actually proposed as "markets" by the ILECs as discussed

below) would not provide such complete coverage. (Ankum Rebuttal, p. 12; Cecil Rebuttal, p. 9).

Likewise, the ILECs admitted the falsity of their suggestions that a wire center or exchange market definition would somehow require CLEC mass market switches[1] in every wire center or exchange under an impairment analysis. (Fleming Tr. 416, Martinez Tr. 454). Although a single switch cannot serve an entire MSA or LATA by itself, as the ILECs acknowledged, the FCC has made it clear that the physical location of mass market switches is irrelevant. See TRO note 1536. Instead, other issues such as the cost of collocations and transport to connect loops in one wire center to a mass market switch in another wire center come into play as stated by the FCC. See TRO note 1536. (Ankum Direct p. 19, 28, Tr. 765-68).

The wire center proposal only differs slightly from the exchange proposal, but offers a significant advantage.

Both wire centers and exchanges are well-defined areas, as shown by all of the witnesses' responses to requests for definitions by the bench and by staff counsel. In most instances, the areas are one and the same. In those instances where an exchange contains multiple wire centers, it seems likely that the end result of impairment analyses would be the same using either market definition. But there is no way to be sure ahead of time. The wire center approach offers the significant advantage of allowing a more granular analysis, to ensure against highly prejudicial incorrect findings of non-impairment. (Ankum Rebuttal, p. 31-32, Tr. 750, Cecil Rebuttal p. 10-11).

[1] Enterprise switches are not to be considered in a trigger analysis. TRO para. 441, note 1354, para. 508. SBC has indicated it is currently only planning to present a trigger case.

SBC and CenturyTel do not actually propose an "MSA" market definition, but rather propose that arbitrary undefined and unsupported collections of exchanges serve as "markets".

SBC and CenturyTel do not actually propose an "MSA" market definition at all. Instead, they each propose separate analyses of arbitrary assemblages of exchanges within their respective service territories that happen to lie at least partially within the St. Louis, Kansas City or Springfield MSAs.[2] Mr. Fleming testified for SBC that the market should "be limited to SBC Missouri's service areas", in these three MSAs. (Fleming Direct p. 7, Tr. 309). Further, he stated that "the market would be comprised of those wire centers where the [SBC] switch falls inside the MSA boundary." (Tr. 331). Mr. Martinez ultimately indicated that CenturyTel also proposed that the market for its purposes should be limited to its service areas in these three MSAs, although his testimony was contradictory. (Martinez, Tr. 444-46, 438, 448-49, 455). Both companies propose to exclude portions of MSAs that lie outside Missouri. (Fleming Direct p. 9, Tr. 309, 331, Martinez Tr. 444). SBC expressly proposes to include portions of exchanges that lie outside MSA boundaries if the serving switches are inside the MSA, and to exclude portions of exchanges that lie inside MSA boundaries if the serving switches are outside the MSA. (Fleming Direct p. 8, Tr. 309-10, 355). CenturyTel declined the opportunity to explain this part of its proposal. (Martinez Tr. 445). Neither company ever provided a precise description of the "markets" they were actually proposing.

Hence, the SBC and CenturyTel proposals not only suffer from all the deficiencies attributed to an MSA market definition, discussed below, but also suffer from an even greater deficiency in that they are actually proposing separate arbitrary gerrymandered "markets" that

[2] Sprint's witness Harper kept his discussion of the MSA proposal at a higher level, but confirmed that Sprint agreed that less than a full MSA would be ultimately considered to be the market under its form of the proposal as well. (Harper Rebuttal p. 6).

have little if anything to do with MSAs. The allocation of territories and exchanges between ILECs within today's MSAs was accomplished over a hundred years ago, without any connection whatsoever to factors that would be relevant to the current inquiry. This point is driven home pictorially by an examination of the St. Louis and Kansas City area maps, which show that SBC's service areas are broken up into non-contiguous segments that are unmistakably remote from each other. (Ex.27). Mr. Fleming confirmed that SBC nonetheless proposes to treat these noncontiguous areas as single markets. (Tr. 311).

The ILEC proposal focuses on their own historic service area boundaries, instead of markets established by actual CLEC activity with mass market switches as required by the FCC. See TRO notes 1354 and1537.

The Commission should look past the ILEC efforts to dress up their market definition proposal as being an "MSA" proposal and recognize the truly arbitrary and self-serving nature of the ILEC position. Mr. Fleming admitted that his proposed market was simply his own preferred "grouping of wire centers". (Tr. 317). The ILECs provided no evidence whatsoever that these arbitrary and undefined sub-portions of the three largest MSAs in the state constitute appropriate markets for purposes of the upcoming TRO analyses. Their references to prior FCC use of MSAs for other purposes is not only irrelevant - as they conceded (Tardiff Tr. 200) - in that the FCC did not select MSAs for this purpose (Ankum Direct p. 37-39), but also misleading as they do not even themselves propose to use the actual MSAs.

The wire center and exchange proposals meet the FCC's requirements, whereas the "MSA" proposal does not.

MCI presented the testimony of Dr. August Ankum regarding market definition. He holds a Ph.D in Economics and his area of expertise is telecommunications. Dr. Ankum testified

that wire centers are the appropriate market in which to conduct impairment analyses in order to properly differentiate any areas of non-impairment from areas of impairment as required by the FCC. Further, he identified the many deficiencies of the "MSA" proposal. (Ex. 15, 16).

Dr. Ankum first explained that the Commission should establish a market definition that is most appropriate for the analyses in which that definition will be used. He explained that "the role of market definition in the trigger analysis should be to identify the scope of telecommunications services and locations for which a market participant's switching capacity clearly shows the absence of impairment because customers already have real alternatives." Elaborating, he stated that "only if the qualifying participant has succeeded in overcoming operational and economic barriers to entry into a properly defined market, which recognizes buyers' product and location substitution possibilities, can the Commission be confident that the new entrant offers evidence of no impairment in provision of the specified services at the specified location." Dr. Ankum went on to explain that if the triggers are not satisfied in a market, and a subsequent potential deployment analysis is conducted, then it will be "critical that markets not be defined too broadly; otherwise, the Commission could end up finding non-impairment in many areas in which competitors are in fact impaired, leaving customers with no choice among providers." (Ankum Direct p. 4-9, Rebuttal p. 5-6).

Dr. Ankum emphasized the importance of not adopting an overly broad market definition. He pointed out that the FCC had specifically stated at TRO note 1537 that "if competitors with their own switches are only serving certain geographic areas, the state commission should consider establishing those areas to constitute separate markets." In contrast, he testified that lumping together areas that are served by CLECs with their own switches and

areas that are not so served would contradict the FCC's TRO and inappropriately eliminate access to unbundled switching. (Ankum Direct p. 17-18, 29-30).

Next, Dr. Ankum addressed how a wire center market definition meets the FCC's requirements. He testified that wire centers are the natural market because CLECs must make their decisions on the economics of gaining access to ILEC loops on a wire center by wire center basis. (Mr. Fleming concurred that CLECs deploy their facilities on a wire center basis, Tr. 344). Dr. Ankum indicated that a wire center definition meets the FCC requirements of accuracy and practicality, set forth in TRO para. 130. Data is available on a wire center basis. Wire centers allow an appropriately granular distinction between areas "actually being served" by competitors on a mass market basis without unbundled switching, from areas that are not so served, as required by the FCC's rule. Wire centers allow consideration of "the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies", as required by the FCC's rule. As expressly recognized by the FCC in TRO para. 496, many of the pertinent factors vary from wire center to wire center, because the cost of serving customers varies by wire center size and location, availability of collocation space in specific wire centers, and hot cut capacities in specific wire centers. Likewise, other important factors identified by the FCC in para. 495-97 of the TRO vary from wire center to wire center, such as the cost of transport to connect loop and switch facilities (i.e. from a wire center without a mass market switch to a proximate wire center with such a switch), retail rates, number of high revenue customers, use of switches, population and line densities, and UNE loop rates. (Ankum Direct p. 10-13, 19, 25, 27-28, Rebuttal p. 6-7, Tr. 738-39, 769-71). Mr. Thomas echoed these points. (Tr. 991-93).

Dr. Ankum testified that he concluded that wire centers generally provide the appropriate level of granularity. He noted that because "costs of providing service vary widely from one wire center to another, it is not possible to draw conclusions about one wire center from an analysis of another wire center." Further, he observed that "once a CLEC is serving some customers in a wire center, it will face relatively lower cost of serving other customers in the same wire center, compared to the cost of entering a new wire-center market." He elaborated that the combined costs of switching and transport can preclude the use of a CLEC mass market switch in one wire center to serve loops in other wire centers as distances increase. Dr. Ankum also explained that other operational costs - such as collocation -could preclude expanded use of a single switch to more and more wire centers, irrespective of advertising opportunities improperly relied upon by SBC witnesses. And again, he observed that the availability of data on CLEC activity and costs on a wire center basis makes it administratively feasible to use a wire center market definition. (Ankum Direct p. 13, Rebuttal p. 28-30).

Dr. Ankum also explained that there are other aspects to the market that must be considered in the upcoming impairment analyses besides the geographic boundaries of the wire centers. Residential and business product markets may need to be distinguished due to significant retail price differences - CLECs may not be able to serve residential customers without unbundled switching even in areas where they may not be impaired as to business customers. Further, deployment of IDLC systems precludes service without access to unbundled local switching, which may require an analysis at a level more granular than the wire center in some instances. And only services comparable in "cost, quality and maturity" to ILEC retail services should be considered as indicated by the FCC in TRO para. 97. Hence, CMRS, fixed

wireless and cable telephony should be excluded consistent with the FCC's analysis in TRO para. 310, 439-440. 446. (Ankum Direct p. 20-23, 31-36, Rebuttal p. 7-8, Tr. 937).

Dr. Ankum also identified the many deficiencies of an "MSA" definition of the market. First, he indicated that CLECs do not serve full MSAs with their switches, but rather only serve specific wire centers. Even SBC's self-serving evidence confirmed that CLECs are not serving in full MSAs with their own switches, but rather at most 45% of the wire centers in the MSAs (and most or all of that could be enterprise rather than mass market services). (Tr. 201-03, 246, 315). The FCC would require differentiation between these wire centers on such grounds as discussed above, but an MSA approach would preclude such a granular analysis. Second, an MSA approach would preclude consideration of the various wire-center-specific factors that the FCC expressly acknowledged to be important. In particular, the range of population densities across an MSA is significant, showing that MSAs are not the homogenous areas envisioned as markets by the FCC. Third, MSAs are not natural telecommunications markets, as they are established for totally different purposes. Fourth, MSAs do not provide a means of conducting complete impairment analyses for the state, as they only encompass 35 out of 115 counties. Fifth, MSA boundaries are more likely to change than wire center boundaries. (Ankum Direct p. 36-41, Rebuttal p. 9-13, 15-26, Tr. 731).

Staff identified the same problems with the "MSA" approach. (Cecil Rebuttal, p. 9-12, Thomas Rebuttal p. 14).

The flexibility of the wire center approach, as contrasted with the inflexibility of the "MSA" approach, underscores the superiority of the more granular wire center proposal. In theory, using a wire center approach, the Commission could ultimately conclude that there is no impairment throughout an MSA. However, under an "all or nothing" MSA approach, the

Commission will undoubtedly be pressured to render a finding of non-impairment based on competition in very few wire centers, leaving the vast majority of customers in an MSA without any competitive options. (Ankum Rebuttal p. 12-14, Tr. 736, 771-72; Cecil Rebuttal p. 11, Thomas Tr. 993). Even SBC witness Dr. Tardiff reluctantly acknowledged that an exchange or wire center approach would reduce the likelihood of improper conclusions. (Tr. 171).

Thus, the record demonstrates that wire centers are the best choice for market definition.

II. DS0/DS1 CUTOVER

Issue No. 2: For purposes of the 47 CFR 51.319(d)(2)(iii)(B)(3) analysis, how many DS0 lines must be supplied to a multi-line DS0 customer before that customer is considered to be an enterprise customer rather than a mass market customer?

Answer: In the range of 8-12 for business customers. All residential customers are mass market.

As Dr. Ankum explained in his testimony, "determination of the mass-market cutoff level is a critical component of the impairment analysis", because "improper exclusion of residential or small business customers from the mass market would result in those customers being considered part of the enterprise market and subject to the FCC's national finding of no impairment as to [DS1] switching." In other words, those customers would lose their existing competitive options. He recommended that the Commission employ an economic analysis as suggested by the FCC and as described by Staff, Sprint and AT&T, in order to identify where customers are more efficiently served by means of one DS1 rather than by multiple analog/DS0 voice loops. He endorsed the range of results identified by these other parties, from 8 to 12 lines,

for business customers, and explained that all residential customers should be considered mass market. (Ankum Rebuttal p. 2-5, 34-39, Tr. 746-47).

Dr. Ankum joined others in critiquing SBC's arbitrary and unsupported proposal of a cutover level of four lines. (Ankum Rebuttal p. 2, 33-34). SBC's witnesses conceded that they had done no analysis to determine whether the revenues they were including in their analysis were realistic, and had not even considered the likely differences between business and residential customers in terms of "revenue opportunities". (Tr. 249-50, 315-317, 334, 411-12). They were simply proposing a "default" number that has actually never been in effect in Missouri. (Tr. 401, Ex 28). Staff also opposed SBC's analysis. (Tr. 994).

Conclusion

For the reasons stated herein, the Commission should select wire centers as the market definition under 47 CFR 51.319(d)(2)(i). Further, the Commission should set DSO/DS1 cutover point in the range of 8-12 lines for business customers under 47 CFR 51.319(d)(2)(iii)(B)(4), while recognizing that all residential customers are mass market customers.

Respectfully submitted,

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Certificate of Service

A true and correct copy of the foregoing was served upon parties of record via e-mail on the 13th day of February, 2004.

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