BEFORE MISSOURI THE 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

RESPONSE TO SBC'S REPLY AND NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING SBC'S MOTION TO DISMISS

NuVox Communications of Missouri, Inc. ("NuVox"), Birch Telecom of Missouri, Inc. ("Birch"), Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. Kansas City, LLC ("Xspedius"), and AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc. ("AT&T"), and Covad Communications Company ("Covad")(collectively herein "CLECs"), hereby respond pursuant to 4 CSR 240-2.080(15) to Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Reply and Notice of Supplemental Authority Regarding its Motion to Dismiss. For the reasons stated herein and in CLECs' prior Responses, SBC's Motion should be denied. SBC's assertion that the issuance of the USTA II[1] mandate now requires termination of this case is erroneous. Instead of terminating the instant case, CLECs respectfully urge that the appropriate course of action is for this Commission to continue to suspend the case.

I. IT WOULD NOT BE PRUDENT TO DISMISS THIS CASE

1. SBC admits in its Reply that "the FCC may … call upon state commissions to provide data and input in its remand proceeding." (SBC Reply, p. 2).

[1] *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

SBC further admits that the record in this case could "turn{} out to be relevant and useful to what the FCC asks of the Commission." (Id.).

2. SBC further admits that the most appropriate course of action is to "wait to see what the FCC asks of the Commission." (Id.).

3. CLECs agree that it would be most prudent for this Commission to take a "wait and see" approach. However, contrary to SBC's argument, such an approach would not involve an abrupt termination of this case and dismantling of the significant amount of information assembled by the parties. Rather, a prudent course of action would simply consist of continued suspension of these proceedings pending further action by the FCC. There is nothing legitimate to be gained by dismissing the proceedings prematurely, but there are efficiencies and other advantages for all involved that can certainly be lost as discussed in CLECs' prior Response. Dismissal of the proceeding would trigger requirements under the Protective Order that, unless changed, would compel the return and/or destruction of information developed during the proceedings - steps that could not be easily or quickly undone if related proceedings subsequently resume.

4. SBC continues to overplay the impact of the USTA II decision. The statutes remain in effect, the court did not itself eliminate or "de-list" any UNEs, and the FCC is working apace to adopt new rules regarding UNE obligations. Section 251(d)(2) of the Act requires a factual determination from the FCC regarding impairment, and the D.C. Circuit did not usurp the FCC's statutory duties to consider whether CLECs are impaired without access to UNEs under 251(c). It is only because ILECs such as SBC have made various threats to discontinue provision of UNEs pending completion of the FCC's rulemaking efforts that there has been a sense of crisis in the industry.

5. The FCC has continued to make it clear that it wants and needs information from state commissions in connection with its remand proceedings. It has been reported by Telecommunications Report (TR State News Wire, 7/13/04) that when speaking at the summer meeting of the National Association of Regulatory Utility Commissioners in Salt Lake City, William Maher, chief of the FCC's Wireline Competition Bureau, said the federal agency "will work very quickly" to put in place an interim plan to replace its "triennial review" order (TRO) so that there are no service disruptions. It was reported that he also said the FCC wants input from the states on what they found while conducting their own investigations and that it would be most helpful if states filed focused summaries with the agency. "What would be relevant is factual findings and factual statements on elements and sub-elements," he said. He said the FCC's goal is to have permanent unbundled network element rules finished by the end of the year.

6. It was also reported by the same source (7/14/04) that FCC Commissioner Michael Copps stated at the NARUC summer meeting that state commissions must continue to remain in the policy process if they want to make sure competition will thrive. It was reported that he said now was not the time for states to throw in the towel. Commissioner Copps said that is particularly true in the area of competition, where he said the federal appeals court ruling "short-circuited all the good work you (state commissions) did." Commissioner Copps said he is interested in receiving information gathered by the states during their "triennial review" order investigations that could help the FCC as it attempts to create new permanent rules by the end of the year. "If you have

gathered facts, share them with us. We can still find ways to work together to [ensure] local competition," he said. "We need you to fulfill your roles."

7. Thus, it remains clear that the Commission may very well need to take quick action to develop recommendations to assist the FCC. While the Commission can continue to wait for clear instructions from the FCC, it will undoubtedly be hampered in the process if it prematurely closes out this proceeding.

8. SBC's "Notice of Supplemental Authority" adds nothing to the discussion. In the cited order, the FCC simply observed that states do not need additional time to meet the FCC's deadlines for impairment decisions, because the states no longer need to make those substantive decisions. The order does not contradict other communications from the FCC indicating that state commissions will nonetheless play an important role in remand proceedings as recommending bodies, separate and apart from the time sensitive decision-making role previously envisioned under the TRO.

II. USTA II DID NOT VACATE THE FCC'S HIGH-CAPACITY LOOP RULES.

9. As predicted in Covad's Response to SBC's Motion to Dismiss, SBC makes the false argument that the D.C. Circuit vacated the FCC's rules regarding high capacity loops. But as Covad pointed out in its Response, the court did not take such action. SBC goes so far as to misrepresent the court's decision by omitting language that clearly and unmistakably contradicts its argument. (SBC Reply, page 3). What the court actually (and completely) said was, "We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, **which in the context of this Order applies to the subdelegation scheme established for mass**

market switching and certain dedicated transport elements (DS1, DS3, and dark fiber)." (emphasis added)[2]. Further, contrary to SBC's contention, the court used the language of the definition of dedicated transport from the FCC's rules, and did not use the very different language of the definition of dedicated loop.[3] The court simply did not include high capacity loops within the scope of its decision regarding transport facilities. It is irrelevant what SBC may think makes sense - FCC rules cannot be vacated unilaterally by a private party's attempt to apply a court order to a different set of facts beyond the express ruling of the court. The court's order did not vacate the FCC's rules regarding high capacity loops; therefore, those rules remain in place unless and until the FCC decides differently.[4]

III. USTA II DID NOT ALTER THE PORTION OF THE TRO THAT REQUIRED STATE COMMISSIONS TO INVESTIGATE A BATCH HOT CUT MIGRATION PROCESS.

10. While there are more than ample grounds to continue to suspend this proceeding, one further reason not to close this proceeding is the Commission's obligation to investigate and implement a batch hot cut process to facilitate the transition from UNE-P to unbundled loops. In its Reply, while acknowledging the obligations imposed upon state commissions in the TRO relating to implementation of a batch hot cut process, SBC denies that state commissions have any further delegated role, and instead claims that USTA II vacated the FCC's Batch Cut Rules. Specifically, SBC asserts that the:

[2] 359 F3d 554, 594.
[3] 359 F3d 554, 573. Compare 47 CFR 51.319(e)(1) to 51.319(a).
[4] The court was clearly aware of the difference between loops and transport. The portion of the opinion that SBC relies upon solely addressed transport. But in the EELs section, the court discussed loop and transport combinations. 359 F3d 554, 590.

> FCC's batch cut rules were clearly part of the 'impairment determination delegated to the state' and 'require[d] state commissions to make . . . impairment determinations.' Thus, those rules were vacated by USTA II, which vacated all FCC 'subdelegations to state commissions of decision-making authority over impairment determination,' including' the subdelegation scheme established for mass market switching.'[5]

11. Again, SBC overplays the impact of the USTA II ruling on the FCC's batch hot cut rules. As detailed below, the Court in USTA II did not "vacate" the portion of the *Triennial Review Order* directing the state commissions to undertake a factual investigation of batch hot cut processes. As noted, USTA II expressly approved delegation of fact finding to state commissions and "vacate[d]" only "the Commission's subdelegation to state commissions of decision-making authority over impairment determinations which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber)." *Id.* at 594. This is the conclusion that both the Michigan and California commissions reached when both commissions recently continued their investigations into SBC's batch hot cut process. Indeed, given that SBC and the other ILECs did not even challenge the non-impairment determinations related to batch hot cut in the TRO and that they affirmatively argued that the potential development of batch hot cut processes were a basis for eliminating unbundled switching,[6] there was no basis upon which the D.C. Circuit could issue the ruling SBC now erroneously claims it made.

12. In the TRO, the FCC found that "inherent" limitations in the way in which voice grade loops are cut over from ILEC switches to CLEC switches prevented CLECs

[5] SBC Missouri's Reply, pp, 5-6.
[6] *See* Brief for ILEC Petitioners and Supporting Intervenor, USTA v. FCC, Nos. 00-1012, 00-1015, 03-1310, 03-1424 et al., pp. 20-21; Reply Brief for ILEC Petitioners and Supporting Intervenor, USTA v. FCC, Nos. 00-1012, 00-1015, 03-1310, 03-1424 et al., pp. 7-8.

from using their own switches to provide local telephone services. TRO, ¶ 469. As the FCC found, manual hot cuts are a "labor intensive[]" process requiring "highly trained workers" and "substantial . . . resources." *Id.* ¶ 464. The impact of the hot cut process on service quality is dramatic. Existing hot cut processes "lead to provisioning delays and service outages" that prevent CLECs "from providing service in a way that mass market customers have come to expect." *Id.* ¶¶ 465-66. In reaching these conclusions, the FCC relied on evidence that CLECs had attempted to deploy their switches and connect them to ILEC loops but that these efforts had failed because of hot cut problems. *Id.* ¶ 468.

13. However, the FCC also found that the factors, including the viability of hot cuts, which prevented CLECs from self-deploying their own switches, might vary by geography and in some discrete markets that ILEC hot cut performance might be sufficient to permit CLECs to self-deploy switches. Because the FCC found that the record was not sufficient to permit it to make these granular determinations, id. ¶¶ 188, 493, it "delegated" its authority under § 251(d)(2) to the state commissions to (1) make findings of fact as to whether the hot cut processes and other factors are sufficient to permit competitive entry absent access to the incumbents' local switches; (2) assess and implement improvements to the hot cut processes – including "batch hot cuts" that would ultimately make access to unbundled switching unnecessary;[7] and (3) make an ultimate determination as to whether competitors are currently impaired without access to local switching. Id.

[7] *Id.* ¶¶ 487-492. In particular, the FCC directed the state commissions to investigate the viability of "bulk hot" cuts. If bulk hot cuts – also called "batch hot cuts" or "batch migrations" – were viable, then unbundled switching could be eliminated and CLEC customers' loops could be cut over *en masse*. Such a cut over could occur at a time when customers would not be expected to need telephone service, and thus would not incur any inconvenience. *Id.* ¶¶ 487-92, 521-24.

14. On appeal, the D.C. Circuit in USTA II only struck down the third instruction that called upon state commissions to make an ultimate determination as to whether competitors are currently impaired without access to local switching. Contrary to SBC's assertions, the court held that the FCC had authority to delegate fact finding to state commissions, 359 F.3d at 568, and concluded only that the FCC could not delegate the ultimate "impairment" determination under § 251(d)(2) to the state commissions, id. at 566. The court further found that the fact that deficiencies in current hot cut processes might generally prevent self-deployment of switches but could not support a national unbundling rule. Id. at 570-71. In particular, the court agreed with the ILECs that "bulk" hot cut procedures might ameliorate existing hot cut impairment and the FCC failed to take this into account in making impairment findings. Id. at 571.

15. Thus, it cannot be seriously disputed that USTA II expressly permits state commissions to investigate and implement, if necessary, an appropriate batch hot cut process.[8] USTA II only "vacated" the FCC's delegation of certain impairment determinations to state commissions.

CONCLUSION

As indicated in CLECs' prior Responses, it remains premature to speculate on the precise use that may be made of the information developed in the instant docket in connection with the FCC's TRO remand proceedings. It cannot be doubted, however, that such information will soon be needed by the FCC and this Commission. It is both

[8] Although the Commission need not reach this issue, even absent express, FCC-delegated authority, the 1996 Act delegates authority to state commissions to ensure that unbundled elements are provisioned in a just, reasonable and nondiscriminatory manner, which includes authority to investigate and regulate the batch hot cut process (states are required by the 1996 Act to ensure that SBC's provision of loops is just, reasonable, nondiscriminatory, and consistent with the public interest pursuant to 47 U.S.C. § 251(c)(1) and (3) and state commission can conduct such investigations pursuant to independent state law authority.

necessary and appropriate, therefore, that the Commission not issue an order that would prevent review and further use of the information. And opportunities remain for the Commission to examine high capacity loops and SBC's batch hot cut migration processes. Accordingly, CLECs respectfully continue to request that the Commission deny SBC's Motion to Dismiss. Instead, CLECs respectfully urge the Commission to allow the case to remain suspended pending further order.

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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 22nd day of July, 2004 by e-mail transmission.

/s/ Carl J. Lumley