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ORIGINAL

February 13, 2004

Missouri Public Service Commission
Attn: Secretary of the Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102-0360

Re: Case No. TO-2004-0207
Mass Market Impairment Inquiry

Dear Mr. Roberts:

Please find enclosed for filing in the above-referenced case an original and eight (8) copies of the Phase I Post-Hearing Brief of Sage Telecom, Inc.

A copy of this filing has been sent this date via electronic mail to counsel for all parties of record.

Sincerely,


Brent Stewart

CBS/bt

Enclosure

cc: Counsel for all parties of record
Katherine Mudge

FILED

FEB 13 2004

Missouri Public
Service Commission

**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)**

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PHASE I POST-HEARING BRIEF

OF SAGE TELECOM, INC.

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the Possibility of Impairment without) **Case No. TO-2004-0207**
Unbundled Local Circuit Switching When)
Serving the Mass Market)

PHASE I POST-HEARING BRIEF OF SAGE TELECOM, INC.

COMES NOW Sage Telecom, Inc. (“Sage”), by and through its Counsel of record, and files its Post-Hearing Brief for Phase I of this proceeding with the Missouri Public Service Commission (“Commission”).

I. Overview and Summary of Argument

The Commission has two decisions to make in this Phase – both of which will have significant impacts in Phase II of the docket and on Missouri consumers. As a result, the Commission must take great care to avoid unintended consequences.

The Phase I hearing highlighted two unmistakable realities. *First*, the ultimate definition of the relevant geographic market and the determination of the cross-over point which may be used by the Commission in conjunction with the other defining characteristics that the Federal Communications Commission (“FCC”) set out within its *Triennial Review Order*¹ to differentiate between mass market and enterprise customers are significantly intertwined with the impairment analysis that will take place in Phase II. In other words, the Commission should not and cannot decide the issues in Phase I in a vacuum without considering the implications on the analysis to be performed in Phase II.

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC Docket No. 01-388, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36 (rel. Aug. 21, 2003)(“*Triennial Review Order*”).

Second, the decisions made in this Phase will affect consumers. As a result, the Commission should ensure that decisions reached in this Phase do not doom the potential for meaningful and existing competition that Missouri consumers currently enjoy and competitive choices that consumers could enjoy in the future.

As for the two issues to be decided in this Phase, Sage submits that the appropriate geographic market for purposes of the impairment analysis for Phase II is the wire center, and that any cross-over point decided by the Commission should be used in conjunction with the FCC's other defining characteristics within the granular analysis conducted in Phase II.² The evidence supports use of the wire center for a number of reasons. Just as important, the record exemplifies why the use of Metropolitan Statistical Areas ("MSA") is not reasonable and is inconsistent with the guidelines outlined by the Federal Communications Commission in the *Triennial Review Order*. With respect to the second issue, the evidence reflects the real implications of setting the cross-over point too low – not only as to the impairment analysis for Phase II, but the actual impact it will have on customers who currently are served via the unbundled network platform ("UNE-P") and who, if improperly applied, will have to be treated as enterprise customers on a going forward basis. The impacts are real and should serve as rationale for a conservative and pro-competitive approach by the Commission.

² Sage also requested that the Commission grandfather existing customers from application of the cross-over point to ensure that those customers are not unduly burdened by the decisions in this proceeding. See Ex. 20 (McCausland Rebuttal) at 12, 14. Sage will develop this issue further in Phase II once it becomes clearer as to the scope and impact of the Phase I decisions.

II. The Commission Must Make Consumer Impacts Central To Its Determination

It would be a disservice to consumers of the State to ignore the customer implications of any decisions reached in this docket. As a result, it is prudent to minimize the customer impact, a charge that this Commission was created to fulfill. For each decision made in this Phase (and in Phase II), there is evidence in the record that identifies the customer impact, and in some cases quantifies the impact. Simply put, the importance of such information provides the Commission with context and perspective to assist it in making the decisions delegated by the FCC.

With respect to the first issue – defining the geographic market – the evidence in this record clearly underscores the critical implications of the definition. There are collectively thousands of customers currently being provided competitive services via UNE-P³; Sage's customer base in Missouri is approximately 32,700.⁴ The definition of the geographic market will determine in what areas customers can continue to enjoy the benefits of competitive choices brought by UNE-P. From Sage's perspective, the smaller the geographic area as a starting point, the better because basically customer and carrier impact will be lessened in the event of a finding of non-impairment; conversely, the larger the geographic area, the larger the possibility that customers will be denied competitive choices via UNE-P even if there are no other competitive options available.⁵ In sharp contrast, SBC Missouri's proposal invites the Commission to define the

³ Sage will not divulge the exact or even approximate number of customers that SBC, at least, identifies as being served via UNE-P in the specific MSAs identified by SBC as non-impaired. *Please see* Ex. 3HC (Fleming Direct), Sch. GAF-2HC (last column in document); Ex. 21HC (Thomas Rebuttal), Sch. 2-1 thru 2-5 and Sch. 3-1 thru 3-3 (last columns) which identify the number of UNE-P customers that will be affected.

⁴ Ex. 19 (McCausland Direct) at 3. Of this total, 52% are suburban customers and 39% are urban customers. *Id.* at 3-4. All of Sage's customers are served exclusively via UNE-P using SBC Missouri facilities. *Id.* at 4.

geographic market at the Metropolitan Statistical Area (“MSA”) and enter a finding of non-impairment throughout the entire MSA if three or more self-provisioning switched based competitors are serving a single wire center within the MSA. Under SBC Missouri’s definition, even if the Commission found a single wire center to be insufficient for a finding of non-impairment, that entire MSA would be declared “non-impaired.” Furthermore, a geographic market definition at the MSA level would force the Commission to ask itself: how much competition is sufficient for a finding of non-impairment? Additionally, an MSA market definition will negatively impact customers currently being served by CLECs within that geographic area via UNE-P facilities. Specifically, a non-impairment finding for a geographic area affects customers in the following ways: (1) a customer may be faced with its current competitive provider determining that it can no longer economically provide telecommunications service in the customer’s area due to the lack of availability of unbundled local switching (“ULS”) as part of the ability to provide service.⁶ (2) A customer may be faced with proposed rate increases for existing CLEC services due to increased costs of providing service via UNE-L (e.g., purchase of switch equipment, obtaining collocation arrangements, use of transport) or obtaining ULS from a third-party. The regulatory uncertainty surrounding SBC Missouri’s switching offering made pursuant to Section 271 of the Act provides little, if any protection to these competitors.⁷ (3) A customer may be faced with a request to invest in premise equipment to support DS1 facilities or higher (e.g., equipment, more expensive rate plans) to obtain telecommunications service solely due being defined by the Commission as an “enterprise” customer (from imposing a non-impairment finding

⁵ Ex. 19 (McCausland Direct) at 8; Ex. 17 (Starkey Direct) at 16; 7 Tr. 992-93.

⁶ 4 Tr. 419-20.

on that customer), which again is an increased cost⁸ to the consumer. Or, (4) a customer may be forced to go back to SBC Missouri for its telecommunications service (thereby eliminating again competitive choices).⁹ While Sage recognizes that there is a possibility for these customer impacts to occur regardless of how the Commission defines the geographic market, it should be clear that the impacts can and should be minimized by defining the market as granularly as necessary to protect the consumer.¹⁰ Moreover, as established in the record, if this Commission defines the market too broadly and ultimately makes findings of non-impairment for the entire market mistakenly, customers in less densely populated wire centers within a larger geographic market will be without adequate competitive alternatives, as UNE-P would no longer be available to serve these customers.¹¹ Once the CLEC loses those customers, the CLECs are likely never to return to the market as customer relationships are difficult to rekindle once they have been severed.¹² The end result is competitive “haves” and “have nots” within a defined market. To suggest that these implications are not important or should not be considered, as SBC Missouri does, is disingenuous and would thwart the Commission’s ability to carry out its statutory duties to facilitate and promote competition in this State.¹³

⁷ *Id.* at 532-33; Ex. 17 at 31-32; Ex. 18 at 43.

⁸ *See e.g.*, Ex. 3HC (Fleming Direct), Schedule GAF-6 (lists facility components a customer would have to purchase).

⁹ Ex. 17 at 35.

¹⁰ Sage also acknowledges that notion that even if a wire center (or exchange) is the geographic market, and if the Commission finds non-impairment in only one or two wire centers (which Sage does not believe the record in Phase II will support), customers outside of those particular wire centers may be affected. But, the impact on those customers will hopefully be minimal (particularly since Sage does not believe that the evidence in Phase II will garner CLECs that actually meet the triggers after a thorough and detailed analysis).

¹¹ *Id.* at 34-35.

¹² Ex. 17 at 35-36.

¹³ Mo. Rev. Stat. § 392.185 (1)-(3) (2003); MPSC Mission Statement (“establish standards so that competition will maintain or improve the services provided to Missourians.”)

Likewise, the determination of a cross-over point, in conjunction with other FCC defining characteristics, distinguish between the mass market and enterprise market customers will have significant implications. Sage urges the Commission to define the mass market customer as any customer served by a DS0/voice grade equivalent loop, regardless of the number of lines to a single location.¹⁴ As will be described in more detail below, Sage's definition is consistent with the FCC's guidelines. But for purposes of considering the customer impact, Sage has provided actual data to show some of the effects of that cross-over point finding may have – particularly when a customer, residential or very small business, that is clearly not large enterprise is suddenly re-categorized as an enterprise customer even though its characteristics have not changed.¹⁵ As the Commission makes its cross-over determination, it is crucial for the Commission to consider the reality that consumers will face direct and immediate effects. The cross-over point will automatically put certain customers in the unenviable position of having to make the decisions outlined above because they can then be deemed as “enterprise” customers and become subject to UNE-related restrictions; decisions that are real and will cause problems for that customer.¹⁶

One of the primary reasons that Sage is participating in these proceedings is to ensure that the customer impacts are taken into consideration in each and every decision

¹⁴ Ex. 19 at 10; Ex. 18 at 52, 55, 60; 5 Tr. 807-08, 901.

¹⁵ Ex. 18HC at 57, Table 6. The Commission should not look at the line counts provided by Sage and simply determine that the impact is *de minimis*. There should not be any minimum threshold of customers being impacted before the Commission considers the customer impact. The importance of looking at these numbers is to recognize that actual customers will be affected by any cross-over point, which is inherently arbitrary, and the Commission should take that into consideration when setting the cross-over point.

¹⁶ The ironic and discriminatory reality of the cross-over point decision is that SBC Missouri will be allowed to continue to provide service to customers using multiple lines (up to 24) to one location using DS0/voice grade facilities, while CLECs will not. See Ex. 24HC (number of SBC Missouri customers served using DS0/voice grade facilities with multiple lines).

reached in these proceedings. While Sage is equally concerned about the Hobson's choices that it will face as a CLEC when the Commission makes its decisions, Sage's (and other CLEC's) consumers who have or potentially may have competitive alternatives should be considered in this very uncertain time. There is no record evidence to indicate that there will be no customer impact. The Commission's task in decision-making should be to minimize customer impacts and disruptions. By approaching the geographic market narrowly (wire center) or the cross-over point (using a range for a granular review), Sage submits that customer impacts can be minimized and viable competitive choices can remain for Missouri consumers.

III. The Geographic Market Should Start With The Wire Center

There are four proposals for geographic market on the table – wire center, exchange, MSAs, and LATAs.¹⁷ Sage proposes use of the wire center as the appropriate geographic market. Groups of wire centers make sense only so long as each wire center has been individually analyzed and determined to be non-impaired – an approach that differs from that of Staff. Sage objects to the use of the MSAs. Sage has concerns about the LATA proposal for the same reasons of the use of MSAs, if the LATA proposal is decided conclusively in this Phase.¹⁸ Sage will attempt to concisely state its rationale as detailed in its testimony and further explained at the hearing.

¹⁷ During the hearing, there was some discussion about the Metropolitan Calling Area or "MCA", but no party proposed use of the MCA. At this juncture, there is very little analysis or evidence to support use of the MCA. Sage opposes use of the MCA for all of the same reasons that will be listed for MSAs. The use of a broad area that still encompasses wire centers and areas with varied population densities and varied CLEC or competitive activity should not be used by the Commission. The MCA suffers in large part from these same infirmities.

¹⁸ As the record developed in Phase I, Sage understands the LATA proposal not to be limited to simply a LATA approach, but rather it is use the LATA for geographic market *and* accept the triggers and impairment analysis that will be presented in Phase II. Sage does not take a position on this overall approach.

At the outset, however, another aspect that the Commission should keep in mind is that the FCC established a national finding that competing carriers are impaired without access to ULS when serving mass market customers.¹⁹ This finding is one that SBC wants to ignore, and, instead, suggests that the FCC was telling the state commissions that they need to define the geographic markets in ways to ensure that non-impairment is found.²⁰ Sage wholeheartedly disagrees with such a reading and requests that the Commission reject such a notion. The FCC's national impairment finding was based primarily on the actual barriers to entry facing CLECs when attempting to use a UNE-Loop entry strategy to compete.²¹ The FCC stated that these barriers include "increased cost due to non-recurring charges and high customer churn rates, service disruptions, and incumbent LEC's inability to handle a sufficient volume of hot cuts."²² Yet, the FCC delegated to the state commissions the ability to be fact-finders to identify where CLECs would not be impaired without access to ULS²³, and at least provided some guidance on how to define the market. To contend that the FCC language can be read to push the Commission toward defining geographic markets in such a manner to ensure that non-impairment findings are made is nonsensical, when considered in light of the FCC's national finding of impairment, and is clearly inconsistent with the Commission's "public interest" charge. The market definition must be defined in such a way as to make sure that a finding of no impairment takes place only where real competitive alternatives exist for mass market customers.²⁴

¹⁹ *Triennial Review Order*, ¶ 459.

²⁰ For example, see cross-examination questions of SBC Counsel at 4 Tr. 512-13.

²¹ Ex. 17 at 10.

²² *Triennial Review Order*, ¶ 422.

²³ *Id.* at ¶ 493; Ex. 19 at 8.

²⁴ Ex. 17 at 16-18.

A. The Wire Center is the optimal choice for the granular review.

The *Triennial Review Order* requires that competitive alternatives be evaluated within each defined geographic market wherein the incumbent local exchange company (“ILEC”) identifies a carrier (or carriers) as a possible trigger for non-impairment.²⁵ The geographic market must be smaller than the state, yet not narrow enough so that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.²⁶ Sage submits that the evidence in this record supports use of a wire center as the most logical, administratively workable, and granular geographic market to use for the mass market impairment analysis.

The wire center approach should be used as the appropriate geographic market for the following reasons:²⁷

1. Wire centers are the building blocks of local competition; the place where CLEC access to the ILEC’s network takes place through unbundled loops via collocation in order to serve customers via UNE-L.²⁸
2. A UNE-L CLEC²⁹ must make entry decisions at the wire center level, since the costs to interconnect (much of which are fixed and sunk) are incurred on a wire center-by-wire center basis. Therefore, the CLEC will make economic decisions of expected revenue based on customers within each wire center.³⁰ CLECs, such as Sage, do not make entry decisions on an MSA or broad area because of the economic factors that must be taken into consideration at the wire center level.³¹

²⁵ *Id.* at 12.

²⁶ *Triennial Review Order* at ¶ 495.

²⁷ Sage is providing its rationale in concise form for ease of summary, and respectfully suggests that the detailed explanations are found in the cited Exhibits referred to and requests that the Commission review those citations for detailed information and analysis.

²⁸ Ex. 17 at 31; Ex. 18 at 42.

²⁹ Sage uses the UNE-L CLEC in this instance because if there is non-impairment found for a geographic market, then to the extent that the CLEC chooses to continue to provide services, it will have to use, at a minimum, the UNE-L strategy or approach.

³⁰ Ex. 17 at 31; Ex. 18 at 42.

³¹ As Sage witness McCausland explained, Sage and other CLECs do not enter markets on a regional basis. Sage, for example, do not use mass market or mass market media advertising for market entries. Ex. 16 at 5. Sage explained that it enters markets based on identification of NPA-NXXs and potential customer

3. Barriers to entry often vary according to wire centers (*e.g.*, the lack of collocation, a high proliferation of IDLC-served ILEC loops, high UNE loop rates), not larger geographic areas.³²
4. Use of wire centers for the impairment analysis will enable the Commission to recognize the ability to use self-provisioned or third-party provisioned switches varies geographically and can be used to readily distinguished markets where different findings of impairment are likely.³³
5. All data that will be reviewed regarding the trigger analysis is currently tracked on a wire center basis.³⁴ In fact, the geographic boundaries of the each wire center are defined in SBC Missouri's Tariff No. 17.³⁵ Even SBC Missouri's information to support its MSA proposal is shown on a wire center basis because administratively that generally is the way that such data is maintained.³⁶ Therefore, it is a reasonable starting point given the detailed analysis that will have to be performed for each trigger candidate and any economic and/or operational impairment analysis.³⁷

Criticisms of the wire center approach for geographic market are easily dispelled based on record evidence, reasonableness, and logic. *First*, the purpose of use of the wire center definition is not intended to "perpetuate" UNE-P.³⁸ Instead, such a definition will ensure that the Commission reviews the actual data on a sufficient granular basis to analyze the trigger data, as well as the exceptional impairment data to ascertain where there are actual competitive alternatives to the mass market.³⁹

addresses within those NPA-NXXs (with the NPA-NXX being associated with a wire center geographic area). All of this is based on first-hand knowledge of market entry, rather than the SBC's flawed and inaccurate assertions made by SBC witnesses who have never worked with or for CLECs in market entry. Moreover, as came out in cross-examination, SBC's examples of "regional" roll-outs were for business offerings and there is no evidence as to roll-out for mass market customers.

³² *Id.*

³³ *Id.* at 32.

³⁴ *Id.* at 33; 7 Tr. 991-92. *Also see, e.g.* Ex. 3HC, Sch. GAF 2HC; Ex. 21HC, Sch. 2-1 thru 2-5.

³⁵ 5 Tr. 796.

³⁶ *See* Ex. 3, Sch. GAF-2HC.

³⁷ Ex. 17 at 32.

³⁸ Ex. 18 at 45.

³⁹ As Sage noted previously, Sage does not anticipate that after a thorough and rationale review of the "trigger" data, there will be any markets where the triggers are met.

Second, contrary to SBC-result-oriented conclusions, CLEC entry decisions into a geographic market are based on consideration of revenues, costs, demand, and other factors at the wire center level.⁴⁰ Factors affecting a CLEC's ability to serve customers vary by wire center, and therefore, play a large role in determining whether and to what extent a CLEC will deploy facilities to serve that wire center. Variations among wire centers, including both operational and economic, will lead a CLEC to conclude that serving some wire centers is uneconomic or not operationally feasible. Thus, wire centers with active competitions should not be in the same market as wire centers lacking such competition. The only way to do that is to define the geographic market narrowly enough to be able to account for such variations.

Third, use of the wire center will address the scale and scope economies required by the FCC. Adoption of the wire center definition for geographic market does not mean that the Commission will be required to find that a CLEC must collocate a switch in each central office serving the wire center.⁴¹ Instead, use of the wire center definition recognizes that the wire center is the appropriate market where economic decisions are made by a CLEC in determining whether and to what extent to serve customers. The more heavily populated wire centers, the more likely economies of scale and scope exist. But, at the same time, the less dense the population served by a wire center, the more likely diseconomies of scale and scope can occur.⁴² The data already presented by SBC shows that CLECs (with their own switches) are making such decisions on a wire center

⁴⁰ Ex. 17 at 31-32.

⁴¹ 7 Tr. 854.

⁴² 4 Tr. 446-47.

basis in that they are providing actual service in some wire centers (via UNE-L)⁴³, but not all, in a broader geographic area, even though the wire centers are next to one another or in close proximity.⁴⁴

Fourth, use of the wire center definition for a geographic market does not mean that the Commission will have to do an analysis of each wire center within the State of Missouri or even in the MSAs identified by SBC Missouri. Such a concern is nothing more than a “scare tactic” to make the Commission believe that such an analysis will be overwhelming and administratively difficult. But, as explained at the hearing, once the geographic market is identified, then it will be up to SBC Missouri to identify only those wire centers where it believes there are trigger candidates, thus narrowing the list of wire centers to be reviewed.⁴⁵ Moreover, the actual review of such information, which will require more than simply looking at numbers, will be done at the wire center basis for those wire centers where the CLECs oppose or reject SBC Missouri’s assertions.

Fifth, the wire center actually provides community of interests.⁴⁶ Because CLECs must interconnect at each wire center to access the UNE loops served by that wire center, economic decisions (*e.g.*, whether the expected revenue streams from serving this market will outweigh the costs) regarding entry must be made at the wire center level. In fact,

⁴³ Sage underscores that this statement is not an admission that the triggers will be met in certain wire centers simply based on the information presented by SBC Missouri in Phase I. The statement is intended to explain that there are telecommunications services being provided to customers (although the data at this point does not show what types of customers) using UNE-L. At this point, there is no correlation between that information and the trigger and economic/operational impairment analysis that will be performed.

⁴⁴ See Ex. 3HC, Sch. GAF-2HC (compare Eureka with Manchester, Column UNE-L). Also see, Ex. 11 (Gillan Direct), Ex. JPG 4-6 (comparing existence of UNE-L service versus UNE-P service).

⁴⁵ Just a cursory review of the SBC Missouri data in SBC Fleming Schedule GAF-2HC leads to the conclusion that in the St. Louis exchange, for example, at least 24 wire centers should not be included because the customers are being served via UNE-P only, with no collocations or UNE-L ordered or provisioned. Sage would expect SBC to go through each wire center to make an initial determination of whether it wants to pursue non-impairment and would make that determination using sound judgment and reasonableness.

since the ultimate objective is to determine whether and to what extent retail and wholesale alternatives exist to the ILEC's switching, the wire center actually becomes the most important community of interest for the Commission's analysis.

For all of these reasons, then, the Commission should define the appropriate geographic market as the wire center for purposes of the mass market impairment analysis for Phase II.

B. The MSA is unreasonable and should be rejected.

Conversely, the Commission should reject SBC Missouri's proposed use of the MSA as the appropriate geographic market for several real and important reasons.

1. Use of the MSA is too broad of a geographic market and, depending on the impairment analysis, could lead to vast areas of the State of Missouri being found to be non-impaired if the Commission finds that a carrier within a wire center meets the triggers.⁴⁷ For Phase II, defining a market too broadly could cause the Commission to find no impairment in some geographic areas wherein consumers do not enjoy the competitive services of three facilities-based providers or two wholesale providers.⁴⁸ Therefore, within an MSA, densely populated wire centers with potentially higher level of competitive switching deployed where it could be argued impairment is absent could "trigger" other wire centers where there are actually few, if any alternate providers.⁴⁹ The customer impact and actual impact to competition will be devastating because the Commission will not conduct a granular review to ascertain in what areas retail or wholesale competitive alternatives for mass market customers actually exist.
2. Use of the MSA, or any larger market definition, is simply an aggregation of individual wire centers averaged to some larger, non-homogenous grouping. As a result, criteria that are critical to sustainable entry, and which vary amongst individual wire centers will be lost in the averaging process required to arrive at a larger geographic market definition.⁵⁰ MSAs take into account economic integration measured by commuting

⁴⁶ Ex. 18 at 48.

⁴⁷ Ex. 17 at 34-35; Ex. 18 at 10-11.

⁴⁸ Ex. 17 at 24; 7 Tr. 992-93.

⁴⁹ *Id.*

⁵⁰ Ex. 18HC and 28-33(HC).

ties, and has no relationship to common interest for telecommunications services.⁵¹

3. For purposes of a granular impairment analysis for telecommunications services, MSAs are essentially arbitrary aggregations of counties that are in no way related to the provision of telecommunications services.⁵² Even the Office of Management and Budget (“OMB”) states that the MSAs classifications do not equate to an urban-rural classification, yet such terminology and analysis is used in analyzing telecommunications services.⁵³
4. MSAs are unworkable because they do not match up with wire center or any other boundaries used for telecommunications services. In fact, SBC Missouri suggests work-arounds to “fix” this mismatch using wire center boundaries.⁵⁴ Moreover, use of the MSAs will not cover the entire State of Missouri and could not be consistently used in future proceedings.
5. The population in counties within MSAs vary significantly and, thus, the granular analysis cannot be performed to ascertain similarity in economic characteristics or location of where the customers are being provided service.⁵⁵ The population densities within the St. Louis MSA, for example, vary from less than 2,000 persons per square mile to 5,623 persons per square mile. The same type of population density variance is found in the Kansas City MSA and, to a lesser extent, Springfield MSA.⁵⁶ Since the economics of telecommunications is driven to a large extent by population densities, it is inappropriate to ignore these differences and basically to treat every county in the MSA as having the same impairment characteristics as every other county in the MSA.
6. SBC Missouri’s “economic” rationale for use of MSAs is faulty and inaccurate. CLECs do not roll out services on an MSA basis.⁵⁷ CLECs do not necessarily purchase mass market media packages that cover a whole MSA, nor did SBC witnesses tie general mass market advertising theory to provision of telecommunications services.⁵⁸

⁵¹ Ex. 18 at 13.

⁵² Ex. 17 at 9-10.

⁵³ *Id.* at 9-10.

⁵⁴ *Id.* at 10-11; Ex. 3 at 8; Ex. 18 at 10-11.

⁵⁵ *Id.* at 13-21. Sage provided extensive analysis of the population density variations within each MSA and demonstrated that variations in population densities within each MSA are extreme and therefore, would not result in a reasonable and granular approach as required by the FCC. *Id.*; also see *Triennial Review Order*, ¶ 495.

⁵⁶ *Id.* at 13-21.

⁵⁷ Ex. 18 at 23-25; Ex. 20 at 4-16. In fact, no SBC witness identified a single service offering or CLEC that has rolled out *mass market* services based on an MSA basis.

⁵⁸ Ex. 18 at 24-26.

7. Use of the MSA without considering the individual wire center data would fail to take into account the variations in factors affecting competitors' ability to service each group of customers as required by the *Triennial Review Order*.⁵⁹
8. The FCC's previous use of MSAs in various proceedings is not dispositive or even applicable to the type of analysis that is required to be performed in this proceeding. What is most telling about the weakness of SBC Missouri's argument on this issue is that the FCC had the opportunity to define the geographic market as the MSA, but did not. Instead, the FCC specifically instructed the state commissions to define the geographic markets based on specific factors. Thus, it would be inaccurate and inappropriate to suggest that the FCC's past use of MSAs is appropriate in this instance.⁶⁰

The record in this Phase demonstrates the danger of using the MSA or a broader market definition. Customers in one part of the MSA that do not have competitive alternatives will be swept together with those that do (assuming that such a showing can be made at all) and all of the customers will be treated the same – no more provision of economical and viable alternatives for mass market-type telecommunications services. The FCC's guidance on this issue simply does not allow for such a broad view, and, in fact, the lack of granular analysis would be contrary to the FCC's guidance. Accordingly, the Commission should reject SBC Missouri's proposal of MSAs.

IV. The Cross-over Analysis Should Not Be Used to Eliminate Consumers' Competitive Choices

As Sage explained earlier, the Commission should recognize that its decision on the proper cross-over point will impact customers and CLECs at the outset, even before any impairment analysis. Regardless of how parties explain the importance of the cross-

⁵⁹ *Id.* at 32.

⁶⁰ *Id.* at 35-40. Mr. Starkey succinctly distinguishes the FCC's previous use of the MSA in other proceedings, such as *Wireless Number Portability Order*, *Bell Atlantic/Nynex Merger Order*, *Pricing Flexibility Order*, and *UNE Remand Order*. Sage will not repeat the focused analysis here, but rather requests that the Commission review the testimony at the cited locations. Importantly, the Commission should not simply accept SBC Missouri's representations about prior use of the MSA by the FCC as any evidence to support use of the MSA in this proceeding.

over point, the bottom line is that the cross-over analysis will be used by the Commission to determine if a particular trigger candidate is providing service to mass market customers, and will also be used as a demarcation that CLECs will no longer be able to provide telecommunications services to “enterprise customers” using UNE-P. Both have significant implications.

Sage initially asks the Commission to set the definition of mass market customer versus enterprise customer based on the type of facility used to provide service to a customer (regardless of the number of lines at a single location), rather than set an arbitrary cross-over point. Sage defines mass market as the base of customers served by any DS0/analog/voice grade loop.⁶¹ Based on its reading of the *Triennial Review Order*, all of Sage’s customers, comprised only of residential and very small business customers, are mass market customers.⁶² The characteristics of Sage’s customers are consistent with the FCC’s guidance on the definitions of mass market customers. For example,

- All of Sage’s customers are residential and small business customers whose premises are served through DS-0/voice grade level facilities.⁶³ Most of these customers have a single line, although there are some with multiple lines. Sage does not have any enterprise customers.
- Sage’s telecommunications service offerings provide POTS services, including local and long distance services, vertical services, and a variety

⁶¹ Ex. 19 at 10.

⁶² *Id.* at 10-11.

⁶³ The FCC noted, “mass market customers consist of residential customers and very small business customers.” *Triennial Review Order*, ¶ 127 (“mass market customers consist of residential and very small business customers.”).

of bundled calling plans.⁶⁴ But Sage's offerings do not include any data services. As Sage explained, as a UNE-P carrier, it cannot provide data services due to SBC Missouri's resistance and/or refusal to enable Sage to do so.⁶⁵

- Sage provides the competitive services solely over DS0/voice grade level loops and does not provide any services over DS1 or higher loops.⁶⁶

As Sage explained, it makes more sense to make a workable and realistic definition of mass market and enterprise customers, rather than set a cross-over point that does not take into consideration the actual type of services provided by the CLEC. Sage's definition will also ensure that *all* mass market customers are included within the established definition. The danger of not capturing all of the mass market customers appropriately is clear – inclusion of small and medium enterprise markets, and potentially even large enterprise markets and facilities in an analysis of mass market providers, customers, and competition, will basically make the trigger analysis to be more easily met.⁶⁷ Inclusion of enterprise customers, however, would be inconsistent with the trigger requirement, which includes, for example “when three or more unaffiliated competing carriers each is *servicing mass market* customers in a particular market with the use of their own switches.”⁶⁸ In addition, by establishing a cross-over point that may include enterprise customers, the Commission is basically ignoring the customer's choice in obtaining services from a CLEC even with multiple lines at a single location. At the

⁶⁴ Ex. 18 at 53; Ex. 19 at 4-5; compare to *Triennial Review Order*, ¶ 127 (“mass market customers typically purchase ordinary switched service (Plain Old Telephone Service or POTS) and a few vertical features.”).

⁶⁵ Ex. 20 at 13, fn. 13. Also see 5 Tr. 828.

⁶⁶ Ex. 18 at 53, compare to *Triennial Review Order*, ¶ 497 (“mass market customers are analog voice customers that . . . can only be economically serviced via DS0 loops.”).

⁶⁷ Ex. 19 at 13.

same time, an arbitrary cross-over point that inappropriately includes mass market customers in the enterprise market would force these customers to either purchase premise equipment sufficient to support services via DS1 from those competitors who provide DS1 service (which Sage does not) and/or return to SBC Missouri for their telecommunications services.

Sage reluctantly acknowledges that the FCC instructed the Commissions to set a cross-over point where it makes economic sense to serve a customer using a DS1 facility. Sage submits that the Commission could still use the “DS0/voice grade level = Mass Market; DS1 and higher = Enterprise” definition for purposes of the granular trigger analysis because the Commission can state that the evidence shows that at the DS1 and higher level, there are likely economic reasons to serve an enterprise customer. In use of this simple “cross-over point”, the Commission will be recognizing that the customer has chosen at what point it is economic for the customer to be served with DS1 facilities, rather than DS0.⁶⁹ In the event, however, that the Commission sets the cross-over point based on a customer purchasing multiple lines, Sage proposes that the Commission set a range of lines using the cross-over analysis performed by the parties (e.g., 4-11) that can be used in the impairment analysis, but to do so only in conjunction with the other defining characteristics set forth in the *Triennial Review Order* (e.g., includes both residential and very small business customers). Then, the parties, and ultimately the Commission, could take the FCC’s defining characteristics combined with the range of DS0/voice grade level lines and actually investigate for each trigger candidate the types

⁶⁸ *Id.*, citing *Triennial Review Order*, ¶ 501.

⁶⁹ The perspective advocated by Sage is consistent with the actual rule adopted by the Commission regarding establishment of a cross-over point. See *Triennial Review Order*, ¶ 497 (“This cross over point may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop.”)

of services provided to customers, thereby tailoring the analysis on a more granular basis to reflect the actual type of customer that is being served.

As part of its proposed definition of mass market customers, Sage requests that the Commission consider grandfathering Sage's existing customer base from the effects or applicability of the cross-over point. Sage will develop this request further in Phase II when the Commission can see the actual number of customers that will be affected in each wire center that is found, if any, to be non-impaired. The primary reason that Sage will seek this relief is to minimize the impact of the cross-over point on existing customers, all of which are mass market customers. These customers, many of whom have multiple lines, have chosen Sage as their telecommunications provider. They have made the choice and decision that it is more economical for their needs to be served by Sage using voice only services. The customer choice should mean something and should be respected. Accordingly, as this proceeding evolves in Phase II, Sage will develop its request to grandfather existing customers that might otherwise be declared "enterprise" customers when, in fact, they are strictly and only mass market customers.

V. Conclusion

The Commission must be judicious, cautious, and focused in making the initial decisions related to definition of geographic market and the cross-over point. As illustrated herein, the implications of each decision are huge affecting both consumers and CLECs. This Commission is imbued with the responsibility to promote competition within this State, and is now delegated with the responsibility to determine in which portions of the State that competition will remain. The first step is to define the geographic market in such a manner as to enable the Commission to perform meaningful

analysis for triggers and economic/operational impairment, rather than treat all consumers in a large area the same. That is the reason that the Commission should define the geographic market at the wire center level. The second step, then, is to accurately define the difference between the mass market and enterprise customer. From Sage's perspective, that definition is easy and straightforward. Any customer served via DS0/analog/voice grade loops is a mass market customer, irrespective of the number of lines used by that customer. Any customer served via DS1 loops or higher is an enterprise customer. This definition will ensure that the trigger analysis is not skewed by improper inclusion of enterprise customers in the mass market or mass market customers in the enterprise market. The evidence in this record then explains the next steps to be taken by the Commission in the trigger analysis, but it will be difficult, if not impossible to "get it right" if these initial determinations are not made fairly and accurately.

Moreover, the Commission should take into consideration the consumer impacts of its decisions, even with respect to these initial decisions. The record is replete with examples and actual data to illustrate the true competitive impacts of either defining the geographic market too broad or setting the cross-over point too low. At the end of the day, the consumers of this State need to retain competitive choices that currently exist today and they deserve the opportunity to benefit from competitive choices in the future. Those competitive choices are available because of the existence of UNE-P (and the ability of CLECs to obtain ULS as part of the UNE-P). Sage respectfully requests that the Commission ensure that competitive choices remain for the consumers in Missouri by defining the geographic market and cross-over points fairly and reasonably.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the counsel of record via hand-delivery, first-class mail, or telecopier to all parties of record on this the 13TH day of February, 2004.


Charles Brent Stewart