

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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| <b>Illinois Commerce Commission</b>        | ) |                               |
| <b>On Its Own Motion</b>                   | ) |                               |
|  | ) | <b>ICC Docket No. 03-0595</b> |
| <b>Implementation of the Federal</b>       | ) |                               |
| <b>Communications Commission's</b>         | ) |                               |
| <b>Triennial Review Order with respect</b> | ) |                               |
| <b>to Potential Non-Impairment</b>         | ) |                               |
| <b>Determinations Regarding Unbundled</b>  | ) |                               |
| <b>Local Switching for Mass Market</b>     | ) |                               |
| <b>Customers in Specific Markets</b>       | ) |                               |

**THE CLEC COALITION'S RESPONSE TO SBC ILLINOIS'  
MOTION TO STRIKE AND REQUEST FOR EXPEDITED RULING**

AT&T Communications of Illinois, Inc. ("AT&T"), TCG Chicago, TCG Illinois, Access One, Inc., Bullseye Telecom, Inc., CIMCO Communications, Inc., Forte Communications, Inc. and Globalcom, Inc. ("The CLEC Coalition") respectfully submit their opposition to SBC Illinois's *Motion To Strike* ("Motion to Strike") dated February 6, 2004.

**I. INTRODUCTION**

SBC's Motion to Strike makes it abundantly clear that SBC intends to finally eliminate competition – once and for all – on the count of three. On the count of three carriers providing five or more mass market lines anywhere in the Chicago MSA, SBC asks this Commission to end consumer choice, end lower prices, put competitive local exchange carriers ("CLECs") out of business, decrease jobs – the list of ill effects is a long one. That result would violate the spirit and the text of the Telecommunications Act of 1996 (the "1996 Act") and the Federal Communication Commission's ("FCC")

Triennial Review Order (“TRO”)<sup>1</sup>, and the Commission must deny SBC’s Motion to Strike all information that is not to its liking and that it does not want the Commission even to consider in making the competitively crucial determinations the FCC has delegated to it in the TRO.

In fact, SBC is so determined to relegate this Commission’s charge to a simple math exercise that it is asking to erase from the record any hint of testimony that undermines its case -- no matter how relevant -- despite the fact that this information is critical to the Commission’s consideration of whether Illinois CLECs are impaired without access to unbundled local switching. Moreover, it is information that the FCC has directed this Commission to consider and it is information that directly rebuts evidence provided by SBC’s witnesses.

SBC has presented its case based on *its* interpretation of the TRO and how *it* believes the Commission should define the market and conduct the “trigger” analysis for mass market switching. While SBC is certainly entitled to do that, the CLECs are similarly entitled. However, SBC, presuming its interpretation is the correct one in advance of the due process required by law, seeks to have the CLECs’ and the government and consumer interveners’ alternative interpretations and information regarding the facts and policies surrounding the important decisions the Commission must make in this proceeding banished from the record. Rather than allow this Commission to evaluate *all* the evidence to determine *how* to define the markets and *how*

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<sup>1</sup> *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Federal Communications Commission, CC Docket No. 01-338 Released August 21, 2003 (hereafter referred to as the “Triennial Review Order” or “TRO”), ¶¶ 464-75

to apply the triggers, SBC seeks to preempt reasoned decision making and substitute in advance its own judgment for that of the Commission.

In short, SBC would have this Commission strike all testimony that asks the Commission to do more than count to three triggers (as SBC defines the market and qualifying triggers, of course). SBC, under the guise of conserving strained resources and limiting the issues, has taken the FCC's trigger analysis to an absurd and illogical conclusion. When boiled down to its crux, SBC's view is that any evidence or economic theory that goes beyond identifying whether a CLEC has any UNE-L lines in the Chicago MSA (as SBC defines the market) must be stricken.

If the FCC had limited the trigger analysis to this simplistic, rudimentary inquiry, however, the FCC could have performed it itself, and would have had no need to call upon the states for assistance. The FCC did not intend the approach SBC advocates, the 1996 Act does not abide it, and the TRO does not prescribe it. Contrary to SBC's Motion to Strike, the plain language of the FCC's TRO demonstrates that the FCC did, in fact, intend to confer the states with discretion in determining the appropriate geographic market. The TRO also explicitly directs states to consider whether providers "are currently *offering* and *able to provide service*, and are *likely to continue to do so*."<sup>2</sup> Additionally, providers must not only be offering service, they must be "*actively* providing voice service to mass market customers."<sup>3</sup> None of these elements of the trigger analysis can be met with a mere counting exercise. They all require the Commission to consider the type of evidence SBC is attempting to strike. *How* the

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<sup>2</sup> TRO ¶ 500.

<sup>3</sup> TRO ¶ 499 (emphasis added).

markets should be defined and *how* triggers should be applied on a granular basis therefore requires an understanding of legal issues as well as economic theory (some of which is cited at length in the TRO), economic facts and network architecture /operational issues.

SBC does not want the Commission to hear about, much less consider and give weight to, these issues. Instead, it proposes that the Commission decide these mixed issues of law and fact in a vacuum, without the facts, merely by counting to three. That simply cannot happen. The stakes in this proceeding are too high for such a mindless and unthinking approach. Contrary to SBC's suggestion, if there was ever a time that CLECs – whose futures in the local market are on the line – should have their “day in court” (SBC Motion, p. 2), this is that time. In fact, it is the CLECs – not SBC – who have nothing to gain and who only stand to lose rights in this proceeding. They are therefore entitled to due process in every aspect and at every turn of this proceeding. This Commission should not preliminarily preempt the CLECs' and the government and consumer interveners' ability to create a complete and robust evidentiary record upon which the Commission will make one of the most competition-impacting decisions in its history.

## **II. BACKGROUND**

The CLECs and SBC agree that the TRO trigger analysis requires a finding of no impairment in any geographic market where there are three or more competitive carriers that appropriately qualify as self-provisioning triggers. They do, however, disagree about *how* to define the market and *which* competitive carriers actually constitute self-provisioning triggers under the FCC's trigger guidelines. SBC contends that any CLEC

should count as long as it has five mass market lines (as SBC defines the mass market) over which it provides local service using its own switch. According to SBC, this test is absolute and requires no additional thought or context. SBC seeks to strike any CLEC and government/consumer testimony that provides context or provides the Commission with information relevant to how the geographic market should be defined or what characteristics a CLEC must possess to qualify as a triggering CLEC.

This is no time for short cuts; SBC's myopic approach must be rejected. The plain text of the TRO reveals that these inquiries require discretion on the part of the states and demand a much more complete and considered analysis, including information regarding the realities of the market place and the network architecture that carriers use today.

Contrary to SBC's claims, admitting the evidence SBC seeks to strike will not vitiate the benefits of the trigger analysis or turn the trigger analysis into a full-blown potential deployment case. Specifically, it will not require this Commission to fully examine the hurdles an "efficient" CLEC would face if it attempted to enter the market nor will it require the creation of a business case or even a business model as part of this proceeding. Rather, the CLEC testimony SBC seeks to strike focuses (as does the trigger analysis) on the *facts of actual* deployment, including important information and expert opinion necessary to provide the Commission with the granular information and analysis required to apply the requirements of the TRO in a well-informed and well-reasoned manner.

### **III. GENERAL OVERVIEW**

SBC fundamentally misunderstands the purpose of the testimony it seeks to strike. It characterizes the CLECs testimony as an effort to show the inadequacy of the FCC's trigger or to have this Commission find impairment even when the triggers have been met. That is not the case. This case, even though confined by SBC to the trigger analysis, involves complex economic and factual issues. The CLECs have submitted testimony that will assist the Commission by providing background and giving context to the analysis it must perform. Second, and more importantly, the CLEC testimony relates directly to understanding *how* markets should be defined, *how* the trigger analysis should be performed and *which* CLECs should count as trigger candidates.

#### **A. THE RELATIONSHIP AMONG MARKET DEFINITION, THE TRIGGERS AND POTENTIAL DEPLOYMENT.**

SBC's request that the Commission view the trigger analysis in a vacuum ignores the logic and reasoning of the TRO. The TRO makes clear that geographic market definition, triggers and potential deployment are all related. For example, the TRO requires state commissions to define a geographic market, but explains that the same market definition must apply to both the potential deployment and trigger analyses. Although SBC is not pursuing a potential deployment case, it presents a significant amount of testimony about how CLECs enter the market, including why CLECs choose to enter certain markets – all of this in addressing market definition. Other factors are relevant to market definition, such as barriers to entry that cause CLECs to enter markets in certain ways.<sup>4</sup> Thus, SBC itself draws the connection between potential deployment

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<sup>4</sup> The FCC explained that states have broad discretion in the factors they may consider in defining the markets, including retail rates, hot cut performance and other meaningful economic factors. *See* TRO ¶ 495.

factors and market definition even though it has not presented a potential deployment case for Commission consideration.<sup>5</sup>

SBC's approach to its testimony — as opposed to its Motion -- is the correct one. Under the TRO, market definition is central to both the potential deployment analysis and the trigger analysis.<sup>6</sup> Moreover, the trigger analysis and potential deployment analyses are logically linked: They approaches are two different ways of conducting the same impairment analysis. This is one reason the FCC concluded that the same market definition should apply to both tests. The FCC explicitly found that the trigger analysis makes sense because “actual competitive deployment is the best *indicator* that requesting carriers are not impaired.”<sup>7</sup> Thus, if the trigger analysis reveals that CLECs are not impaired, then -- the FCC postulates -- the potential deployment analysis ought to reveal the same.

If, on the other hand, the trigger analysis shows that impairment exists, SBC may pursue a potential deployment case to more fully analyze whether impairment exists. Absent the kind of analysis that potential deployment entails, there is no assurance that a trigger analysis resulting in a finding of no impairment is correct. To provide greater

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<sup>5</sup> SBC's concern about the purity of the record is wholly disingenuous. For example, SBC submitted the Direct Testimony of Harry M. Shooshan III, who discusses the policy framework mandated by the 1996 Act and the FCC's implementing orders for analyzing whether and where an efficient new entrant would be unimpaired without unbundled access to local circuit switching for mass market customers. Harry M. Shooshan III, Direct Testimony (December 2, 2003) (“Shooshan Direct Testimony”). Mr. Shooshan also discusses his views on incentives incumbents have to invest in new facilities (at 11), what competitive entrants “typically” bring to a new market (at 11-12) and trends in capital spending (at 11). This testimony is no different in terms of subject matter from the testimony of AT&T's witness Mr. Gillan that SBC seeks to strike.

<sup>6</sup> See e.g. TRO ¶ 21 (noting that the Commission “Held that the “‘impair’ analysis considers the cost, timeliness, quality, ubiquity, and operational issues associated with the use of an alternative.”); see also TRO ¶ 495 n.1540 (“[T]he market definitions used for the analysis of the triggers must also be used for the second step of the analysis, if the triggers are not satisfied.”)

<sup>7</sup> TRO ¶ 506.

assurance that the time-saving trigger analysis is accurately applied, the relationship between the trigger analysis and the potential deployment analysis must be kept firmly in mind. Much of the testimony SBC seeks to strike explores this relationship and draws connections among market definition, the triggers and potential deployment. It would be nonsensical – and at the very least premature -- to strike this testimony as irrelevant.

**B. THE TRO REQUIRES MUCH MORE THAN AN MECHANICAL, BRIGHT LINE MATH EXERCISE**

SBC contends that the trigger analysis is so simple that there is no need for context or to understand the relationships among trigger analysis, market definition and potential deployment. In fact, SBC contends that the analysis this Commission need undertake is an “objective”, “automatic” counting exercise that requires nothing more than the application of bright line rules. SBC’s contention is fundamentally flawed and patently incorrect.

In its motion, SBC cites a brief the FCC submitted to the D.C. Circuit for the proposition that application of the triggers requires “automatic” elimination of unbundled switching in any market where the triggers have been met. SBC Motion, p. 9. What SBC fails to reveal, however, is that automatic elimination occurs only *after* a full and complete fact-specific analysis has been undertaken and it has been determined that the triggers have, in fact, been met.

That is, the only “objective” or “automatic” part of the analysis is the end result if the Commission finds that the triggers are satisfied, barring the granting of a waiver or in the case of exceptional circumstances. There are no “objective”, “automatic” or “bright line” rules, however, in determining whether a CLEC is actively targeting and providing local service to mass market customers in the geographic market and is likely to continue

to do so such that it qualifies as a trigger under the FCC's TRO. That is the *reasoned* analysis this Commission is charged with undertaking, and the testimony the CLECs and the government/consumer interveners provide is vital to performing that analysis.

Even ignoring the supporting language in the TRO, common sense dictates that *some* reasoned analysis of trigger candidates is required. For example, using SBC's simplistic counting approach, a CLEC that provides mass market service to five lines using non-ILEC switching in the Chicago MSA automatically qualifies as a trigger candidate. According to SBC's objective test, if there are fifteen mass market access lines (five lines each provided by a different CLEC) in the Chicago MSA, CLECs are no longer be impaired without access to local switching and UNE-P availability would end for all the remaining hundreds of thousands of end users in the MSA, who would be left without a choice of local service provider.

Fortunately, the plain language of the TRO guards against the draconian results posed by SBC's objective theory. The language of the TRO itself makes clear that the analysis the Commission must undertake to determine whether CLECs qualify as triggers for purposes of rebutting the national finding of impairment is anything but mechanical and unthinking. For example, at ¶498 of the TRO, in the beginning of its discussion of the triggers, the FCC indicates that "substantial weight" ought be given to actual commercial deployment by CLECs. At fn. 1549, the FCC indicates that state commissions shall "consider" intermodal carriers as qualifying triggers, providing further guidance that "[i]n deciding whether to include intermodal alternatives for purposes of these triggers, states *should consider* to what extent services provided over these intermodal alternatives are comparable in cost, quality, and maturity to incumbent LEC

services.” (emphasis supplied). At fn. 1560, the FCC indicates that if a competitive provider is using its own loops rather than loops leased from an incumbent in conjunction with its own switching, this evidence may “bear less heavily” in the trigger analysis. The use of the phrases “substantial weight”, “bear less heavily” and “consider” in conjunction with determining whether the FCC’s triggers have been satisfied indicates that the question of whether a particular CLEC qualifies as a trigger is anything but “objective”, “bright line” or “automatic,” and that it in fact must be based upon considered and reasoned judgment.

In addition, the FCC stated that the key consideration in the trigger analysis is whether the providers “are currently offering and able to provide service, and are likely to continue to do so.”<sup>8</sup> Thus, two crucial issues arise: is the candidate “*offering*” service rather than just providing service, and is it “*able to provide*” service. This is the question on which SBC place the majority of its focus. SBC assumes that if a CLEC is providing service, the inquiry ends. It does not. Issues remain regarding the type of service being provided, to whom the carrier is currently providing the service and whether the carrier is actively providing the service.

Additionally, as the FCC made very clear, the trigger candidate must be “*likely to continue*” to offer service. TRO, ¶500. The FCC further requires that the trigger candidates must be unaffiliated with the ILEC and must be using their own switches. Significantly, the FCC states that the candidates should be “*actively providing voice service to mass market customers.*”<sup>9</sup> The FCC’s decision to use the adverb “actively”

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<sup>8</sup> TRO ¶ 506.

<sup>9</sup> TRO ¶ 499 (emphasis added).

must also be given meaning — CLECs must be doing more than just providing service. They must be *actively* providing service. Issues such as network architecture, barriers to entry, how UNE-P is used and how specific carriers provide service are all necessary to provide meaning to the FCC’s words and to be sure the FCC’s guidance is properly applied. Thus, it is beyond dispute that something more than just provisioning five access lines using a non-ILEC switch is necessary in order for a CLEC to count as a self-provisioning trigger.

**C. SBC ITSELF HAS RAISED ISSUES BEYOND ACTUAL DEPLOYMENT OF MASS MARKET SWITCHING, INCLUDING WHETHER CLECS ARE ABLE TO SERVE MASS MARKET CUSTOMERS IN AREAS WHERE THERE IS NO ACTUAL DEPLOYMENT.**

The foregoing discussion highlights the difference between SBC’s and the CLECs’ positions on *how* the trigger analysis ought be conducted. Implementing the TRO requires more than mere interpretation of its language. It involves understanding the economic theory as well as the architectural and operational issues underlying the analysis. A review of SBC’s Motion to Strike, however, would mistakenly lead this Commission to believe that “the triggers look *solely* at evidence of actual deployment, and not evidence regarding alleged operational or economic barriers” (SBC Motion, p. 8) and that, as such, SBC’s testimony is limited to actual deployment. That is not so. In fact, in arguing that the Chicago-Naperville-Joliet MSA is the relevant geographic market, SBC provides testimony regarding those areas which, in its view, CLECs actually serve mass market customers *and areas where, in its view, CLECs are also able to or are expected to be able to economically and operationally serve mass market customers.*

For example, SBC witness Dr. Taylor states at page 11 of his Direct Testimony – SBC Illinois Ex. 2.0:

Given the MSA-wide coverage of major media outlets and the CLECs' desire to use fixed investment to full capacity, this geographic scope of entry is exactly what one would expect, *and CLECs can be expected to continue expanding the scope and extent of their facilities-based services throughout the MSA.*

And at page 16, Dr. Taylor, after acknowledging the fact that paragraphs 495-496 of the TRO refer to other factors a state commission may consider in defining the geographic market – a point that undermines SBC's assertion that the analysis here is "automatic" and capable of "bright line" resolution -- states:

All in all, however, the most significant factor is where CLECs have chosen to enter and compete for mass-market customers through their own switches and the areas that they do serve *and could serve via those switches.*

And again, at page 17, Dr. Taylor states:

Therefore, the geographic areas in which CLECs actually serve *or readily could serve mass-market customers* using their own switching facilities are – at least – areas in which CLECs would not be impaired by the absence of unbundled switching.

Finally, at page 20 of his Direct Testimony, Dr. Taylor states that:

a relevant geographic market for purposes of competitive analysis includes not only where competitors currently serve customers, *but also where they readily could serve customers.* The geographic coverage of CLEC switches, the geographic coverage of radio, television and print media, and the existence of collocation and CLEC-owned NXX codes throughout the MSA show that *CLECs could easily expand into other areas in the MSA*

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What matters for determining the scope of the geographic market in which CLECs and ILECs compete is that CLECs have already incurred the fixed costs (switch location and mass-market advertising) necessary to offer mass-market services in these wire centers *so that CLECs can serve mass-*

*market customers – if they choose and if there are any – in those wire centers.*

SBC witness Mr. Deere is in accord, indicating at page 6 of his Direct Testimony that he will explain that certain Illinois CLECs “have deployed their own switches and use them to serve customers throughout most of the Chicago MSA, *and could readily serve the entire MSA if they chose.*” Deere Direct (SBC Illinois Ex. 1.0), p. 6.

While the CLEC Coalition disagrees with the above statements for the reasons stated in its testimony, it is beyond question that SBC’s testimony is not limited to only those locations where CLECs actually serve mass market customers – as defined by SBC. To support its geographic market designation of the Chicago MSA, SBC cannot rely on actual deployment only because the result it wants to reach – satisfaction of the triggers -- would not be achieved. To support its position, SBC must argue that the CLECs can “readily serve” areas and customers that they currently do not. The CLECs’ testimony simply explains why they disagree with SBC’s assertion that they can “readily serve” these areas.

**D. SBC’S MOTION TO STRIKE MR. GILLAN’S TESTIMONY SHOULD BE DENIED.**

SBC seeks to strike certain portions of Mr. Gillan’s testimony. For example, SBC seeks to strike page 87, line 4 through page 101, line 18. As SBC summarily states, Mr. Gillan’s testimony “addresses ‘false tension between unbundling and facilities-deployment,’” and, according to SBC, “is nothing more than a policy puff piece regarding the alleged competitive ‘benefits’ of UNE-P.” SBC Motion to Strike, page 15.

Two points are critical here. First, the Commission must be fully armed with knowledge of the history and the status of competition in Illinois, the forms it takes, how

the various forms interrelate and what is likely to result if the market is defined in such a way as to find non-impairment in any of SBC's service territory. In sum, this Commission is charged with making crucial policy decisions in this proceeding, and it must ensure that it is fully equipped with the knowledge and information it needs to make them.

Second, Mr. Gillan does, in fact, discuss the false tension between unbundling and facilities deployment and, using various examples of the differences between CLEC and ILEC network architectures, explains why unbundling actually encourages – and does not discourage – facilities-based investment. Specifically, Mr. Gillan discusses how UNE-P promotes efficient investment, and these concepts, in turn, relate to why certain criteria Mr. Gillan applies are appropriate. It also is important testimony because it reemphasizes that only a correct application of the triggers will promote the goals of the 1996 Act.

Not only is this testimony relevant to the policy decisions this Commission is entrusted with making here, it directly responds to the Direct Testimony of SBC witness Mr. Shooshan. In fact, if SBC thinks Mr. Gillan's testimony is a "policy puff piece" (SBC Motion to Strike, p. 15), Mr. Shooshan's combined legal brief and policy piece is even "puffier." Mr. Shooshan is not shy about discussing his view of the policies underlying the 1996 Act and the TRO and the implications of those policies to this proceeding:

The purpose of my testimony is to discuss the policy framework mandated by the 1996 Act and the FCC's implementing orders for analyzing whether and where an efficient new entrant would be unimpaired without unbundled access to local circuit switching for mass market customers. This framework is dictated by both the FCC's Triennial Review Order and the series of decisions by courts that have reviewed previous FCC unbundling orders. If the Commission follows this required framework,

and accepts the evidence submitted by SBC Illinois, I believe it will find that SBC Illinois has effectively overcome the national findings of impairment and that competition is not impaired by the elimination of unbundled mass market switching in the Chicago Metropolitan Statistical Area (“MSA”). (SBC Ex. 3.0 (Shooshan) at 2-3 (footnote omitted))

Mr. Shooshan trusts that if the Commission “follows this required framework and accepts the evidence submitted by SBC Illinois” the Commission will find no impairment. It should be no surprise to SBC that Mr. Gillan and the CLECs disagree with Mr. Shooshan’s view of the “policy framework” and what the outcome of the case should be. But rather than allow the Commission to decide based on the full story, SBC asks the Commission to strike the CLECs’ position while leaving Mr. Shooshan’s “policy framework” standing.

According to Mr. Shooshan, “the long-term goal of the Act is to promote facilities-based competition.” Shooshan Direct, p. 4. According to Mr. Shooshan, “[t]he FCC has recognized the importance of facilities-based competition.” *Id.* According to Mr. Shooshan, “consumers benefit when carriers invest in their own facilities.” *Id.* According to Mr. Shooshan, “[t]he courts have also emphasized the importance of facilities-based competition.” Shooshan Direct, p. 5. And according to Mr. Shooshan, state commissions should make determinations that “set[] the foundation” for “investment in modern telecommunications networks.” *Id.* Mr. Shooshan then goes on to argue how he believes these principles should inform the trigger analysis. It is therefore clear that SBC’s objection is not to the topics Mr. Gillan covers – if it were, then SBC would not have filed testimony on the same topics addressed by Mr. Gillan. Rather, what SBC objects to are the conclusions Mr. Gillan reaches.

The lack of competition from UNE-L to date and how UNE-P has functioned in Illinois are important facts for understanding why SBC's proposed trigger approach would lead to erroneous results. Ironically, SBC seeks to strike Mr. Gillan's testimony, even though its witness, Mr. Shooshan, discusses many of the same issues in his Direct Testimony. SBC disingenuously derides Mr. Gillan addressing the fact that unbundling of network elements does not and has not discouraged facilities-based investment, yet SBC witness Mr. Shooshan quotes AT&T's former CEO, C. Michael Armstrong, for the proposition that UNE-P hampers investments in new facilities.

Whether Mr. Gillan, the economist, or Mr. Shooshan, the lawyer, is correct about the economic implications of the Act and the TRO, however, is an issue for the Commission to decide after hearing from both parties. It is not something that should be pre-judged by buying into merely one theory of this proceedings as presented by SBC striking Mr. Gillan's testimony. For SBC to move to strike the testimony of Mr. Gillan, which explains how unbundling does, in fact, encourage and foster network investment, is both inappropriate and hypocritical. SBC's Motion to Strike must be denied.

SBC also moves to strike pages 22-24 of Mr. Gillan's testimony. At those pages, Mr. Gillan points out that the batch hot cut process – which, no matter how implemented, still involves manual provisioning and movement of mass market customers' loops from the ILEC switch to the CLEC switch – will not eliminate the impairment that exists without access to ILEC switching. Mr. Gillan points out that there are a number of other factors that contribute to the state of impairment and that the Commission must consider these factors in determining whether the alleged trigger CLECs are able to provide mass market service in those geographic areas in which SBC alleges they are able to self-

provide switching to mass market customers. This information is clearly relevant to the CLECs' ability to "target and serve specific markets economically and efficiently using currently available technology", which the TRO (§495) requires the Commission to consider.

Thus, Mr. Gillan's testimony regarding the inability of a batch hot cut process to remedy the existing impairment is relevant to the Commission's task of defining the proper market. Specifically, when defining the granular market to which the triggers and the potential deployment cases will be applied, the Commission must consider "the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies." TRO, §495.

Until the geographic and customer markets are clearly defined, the Commission must be aware of and consider the economic and operational issues that affect competitors and their ability to currently offer and provide service and their ability to continue to do so. These considerations *directly* affect the Commission's analysis of *how* it should ultimately define the market area for mass market switching,

While SBC would obviously prefer that the Commission be shielded from learning about the harsh realities that competitors actually face in today's markets, the Commission is entitled to all sides of the "policy debate" which SBC is clearly trying to avoid. SBC Motion, p. 5. But that debate is too important to be approached blindly given the fact that the future of competitive choice for millions of small business and

residential consumers hangs in the balance. Mr. Gillan's testimony informs this debate, and it should not be stricken.

Finally, SBC moves to strike Mr. Gillan's testimony regarding the two follow up proceedings he recommends the Commission initiate at the conclusion of this proceeding. (Gillan Direct, pp. 7-9 and pp. 101-105). Mr. Gillan first recommends that to the extent the Commission applies a finding of non-impairment, it should initiate a proceeding to determine the post Section 251 just and reasonable rate SBC is entitled to charge based on its Section 271 obligation and its state law obligation to provide CLECs with local switching.

SBC contends that Mr. Gillan's testimony should be stricken because the Commission lacks jurisdiction to entertain Mr. Gillan's request since the FCC is the arbiter of such a rate. SBC Motion, pp. 16-17. The authority of the FCC to determine a rate for local switching – an integral element in providing local and numerous other intrastate services – is very much an *issue*, however, notwithstanding SBC's assertion of its position on that issue as an established *conclusion*. SBC also ignores the fact that even if SBC is no longer required to provide unbundled local switching as a national UNE under federal law, SBC remains obligated by Section 13-801 of the Illinois Public Utilities Act to provide local switching as a matter of independent state law so long as SBC continues to elect to be regulated under alternative regulation. Section 13-801(g) requires that SBC provide local switching at cost-based rates and gives the Commission the express authority to establish those rates. Mr. Gillan's testimony is therefore relevant and SBC's Motion to Strike should be denied.

The second follow on proceeding Mr. Gillan requests that the Commission initiate at pages 9 and 104-105 of his testimony is a two-pronged procedural proposal for conducting a periodic review of SBC's unbundling obligations. Not only is this testimony relevant, timely and appropriate, but it responds directly to the FCC's request that "state commissions [] conduct periodic reviews of impairment for unbundled local circuit switching." TRO, ¶424.

#### **IV. CONCLUSION**

There is no question that the CLEC Coalition testimony SBC seeks to strike is relevant to the Commission's determination of the relevant geographic market and whether CLECs qualify as triggers sufficient to rebut the national presumption of impairment for mass market switching in that market. This Commission should deny SBC's Motion to Strike, as did the California Commission when presented with similar motions to strike last month by SBC and Verizon. Specifically, the California Administrative Law Judge concluded:

So that's the framework in which I am going to rule on this motion is looking at the operational and economic evidentiary showing in the context of the application of the trigger and definition of the markets because that's how the CLECs have said they are using that data.

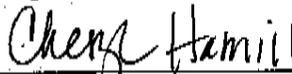
And since that is an area that no one disagrees is within the relevant scope of the proceeding, on that basis I do not find that the evidence on this is outside the scope of the proceeding.

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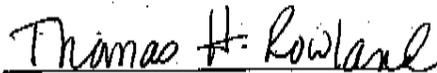
Consistent with that [TRO, ¶495] directive and obligation that the TRO places upon the Commission, I find that the CLECs again should at least be allowed to present evidence that they believe speaks to that; i.e., competitors' ability to target and serve specific markets economically and efficiently.

In making the competitively crucial determinations demanded by this proceeding, the Commission must evaluate all relevant information bearing on whether (and, if so, where) CLECs are impaired without access to unbundled local switching. The Commission must quash any attempt by SBC to unreasonably restrict the scope of the evidence on market definition, and on the factors the Commission is able to consider in determining whether competitors have the ability to target and serve specific markets economically and efficiently using currently available technology, whether they are actively providing service to mass market customers, and whether they are likely to continue to do so.

Respectfully submitted,



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