

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)
On Its Own Motion)
) 03-0595
Implementation of the Federal Communications)
Commission's Triennial Review Order with)
respect to Potential Non-Impairment)
Determinations Regarding Unbundled Local)
Switching for Mass Market Customers in Specific)
Markets)

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.'S
MOTION TO STAY PROCEEDINGS

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") hereby moves that all proceedings in this docket be stayed as a result of the decision of the United States Court of Appeals for the District of Columbia Circuit issued March 2, 2004, in *United States Telecom Ass'n v. FCC*, No. 00-0012 ("*US Telecom*"), pending the final resolution by the federal courts of the lawfulness of the delegations made by the Federal Communications ("FCC"), in its *Triennial Review Order* ("TRO"), to state commissions to make certain determinations including those determinations that are the subject of this docket. In support of this motion, McLeodUSA states as follows:

1. The Commission initiated this docket by order issued September 30, 2003, in response to directives in the FCC's TRO.¹ The Commission noted that in the TRO:

[W]ith respect to other network elements, namely switching, certain high capacity loops and dedicated transport, the FCC made nationwide findings of impairment or non-impairment, but delegated to state commissions the authority to engage in additional fact finding and make alternative impairment findings based on a more granular impairment analysis in accordance with FCC-established guidelines consisting primarily of actual deployment "triggers" and specific economic and operational criteria. (*Order Initiating Proceeding* (Sept, 30, 2003), p. 1, citing

¹The TRO is *Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-0338, 96-98 and 98-17, released August 21, 2003.

TRO ¶¶ 7, 189, 202, 307, 314, 321-322, 327, 328-338, 424, 461-463, 494 and 498-520 and notes 635, 930, 951 and 1365.)

The *Order Initiating Proceeding* stated that this particular docket would address issues related to the FCC's requirement that state commissions complete proceedings necessary to satisfy the requirements in Section 51.319 of the FCC's rules, as adopted in the TRO, with respect to mass market switching determinations ("this proceeding would generally address any assertion that requesting carriers are not impaired without access to local switching for mass market customers in specific markets"), within nine months following the effective date of the TRO. *Id.*, p. 3, citing 47 C.F.R. §§ 51.319(d)(2) and 51.319(d)(5). The Commission further noted that "the purpose of this proceeding is to consider and analyze evidence submitted in support of and in opposition to attempts to rebut the FCC's national impairment finding for mass market switching in specific markets." *Order Initiating Proceeding*, pp. 5-6. Thus, the *Order Initiating Proceeding* directed:

IT IS THEREFORE ORDERED that an investigation be initiated in order to address any assertion that requesting carriers are not impaired without access to local switching for mass market customers in specific markets, including consideration of an appropriate DS0 crossover point, to be completed within nine months of the effective date of the *Triennial Review Order*. (*Order Initiating Proceeding*, p. 11)

2. Various parties filed petitions for review of the TRO in various federal courts.

These petitions for review ultimately were consolidated in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

3. On March 2, 2004, the D.C. Circuit issued its decision in *US Telecom*. On the issue, raised by various petitioners, of the lawfulness of the FCC's "subdelegations" of authority to state commissions to make various determinations, the D.C. Circuit held that the FCC had no authority to make delegations such as the one that was the premise for this docket:

We therefore hold that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary

congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so. (*US Telecom*, slip op. at 14)

The D.C. Circuit also vacated the specific delegation that gave rise to this docket:

We therefore vacate, as an unlawful subdelegation of the Commission’s § 251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements, and in particular we vacate the Commission’s scheme for subdelegating mass market switching determinations. (*Id.*, slip op. at 18)²

In the Conclusion section of its opinion, the D.C. Circuit stated:

To summarize: 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 schedule established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission’s nationwide impairment determinations with respect to these elements. (*Id.*, slip op. at 61)

* * * * *

As to the portions of the Order that we vacate, we temporarily stay the vacatur (i.e., delay issue of the mandate) until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from today’s date. (*Id.*, slip op. at 62)

4. The *US Telecom* decision holds unlawful the FCC’s “sub-delegations” to state commissions to make non-impairment determinations, and expressly vacates the FCC’s “sub-delegations” to state commissions to make determinations relating to mass market switching, thereby declaring unlawful the FCC’s “sub-delegation scheme” on which *this* proceeding is premised. Therefore, based on the substantive decision and holding of *US Telecom*, there is no basis or reason for this Commission to continue with this proceeding.

5. The D.C. Circuit did stay issuance of its mandate with respect to its vacatur of the FCC’s subdelegations of decisionmaking authority to state commissions until the later of the

²In addition, the D.C. Circuit vacated the FCC’s national impairment finding with respect to mass market switching. *US Telecom*, slip op. pp. 18-19, 22.

denial of petitions for rehearing or rehearing *en banc* or 60 days from the date of the *US Telecom* decision. However, it would be a massive waste of the resources of this Commission and of the parties to this docket to continue with this proceeding until the DC Circuit's mandate is actually issued. First, although issuance of the mandate is stayed, the D.C. Circuit's decision holds the FCC's sub-delegation scheme to be unlawful. Further, based on preliminary review of the *US Telecom* decision, it appears extremely unlikely that any petitions for rehearing to that court would be successful on the fundamental portions of the decision impacting the FCC's sub-delegations, and thus this proceeding. Additionally, any revisions made to the TRO by the FCC in response to the *US Telecom* decision could eliminate the need for this proceeding, or at the very least materially change the determinations to be made by state commissions. Finally, even if the *US Telecom* decision were reversed or modified, and the TRO ultimately emerged in its original form and content, it is highly unlikely that the FCC or the courts would continue to hold state commissions to the July 2, 2004 deadlines originally imposed by the TRO for the various state commission determinations.

6. McLeodUSA also calls the following to the attention of the parties and the Administrative Law Judge: On March 3, 2004, TDS Metrocom, LLC filed a similar motion to stay proceedings in Docket 03-0593, the Commission's docket initiated pursuant to the TRO's directives concerning ILEC batch hot cut processes. At a hearing on March 3 in Docket 03-0593, Administrative Law Judge Moran ruled that there was sufficient merit in the motion to suspend hearings in that Docket, and she did so. ALJ Moran continued Docket 03-0593 generally, and set the following schedule on the motion to stay: March 9 for any responses to the motion to stay and March 12 for any replies thereto. ALJ Moran expressed the view that it would be appropriate that any similar motions filed in Dockets 03-0595 or 03-0596 be placed on

the same schedule so that all such motions in these TRO-related dockets could be presented to the Commission on March 17, 2004.

WHEREFORE, McLeodUSA Telecommunications Services, Inc., respectfully requests issuance of an order staying all proceedings in this docket pending the final resolution by the federal courts of the lawfulness of the delegations made by the Federal Communications (“FCC”), in its *Triennial Review Order*, to state commissions to make certain determinations including those determinations that are the subject of this docket.

Dated: March 3, 2004

Respectfully submitted,

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.

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