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BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

April 6, 2005

VIA HAND DELIVERY

Hon Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re. *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No 04-00381

Dear Chairman Miller

The CLECs seeking an emergency ruling[1] from the Authority have failed to notify the Authority that the Georgia Commission's ruling upon which they relied in their motions has been enjoined by a Federal Court in Atlanta On April 5, 2005, the U S District Court in Atlanta entered a preliminary injunction against the Georgia Commission's March 9, 2005 Order The Court stated:

> Bellsouth has a high likelihood of success in showing that, contrary to the conclusion of the [Georgia] PSC, the FCC's *Order on Remand* does not permit new UNE orders of the facilities at issue [fn omitted] BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the court with decisions from 11 state commissions that support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.
>
> The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs.

[1] Many CLECs, including AT&T, have successfully negotiated commercial agreements with BellSouth and therefore have no need to file motions seeking emergency rulings

> The FCC's decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the [Georgia] PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.
>
> [T]he Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC As discussed, the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest The FCC explained that its prior, overbroad unbundling rules had 'frustrate[d] sustainable, facilities-based competition,' *Order on Remand* ¶2, that its new rules would 'best allow[] for innovation and sustainable competition,' *id* , and that it would be 'contrary to the public interest' to delay the effectiveness of the *Order on Remand* for even a 'short period of time,' *id* , ¶236 [2]

On April 5, 2005, the Florida Public Service Commissioners voted unanimously in support of BellSouth's position on the "no new adds" issue The Florida Commission's April 5, 2005 vote was held in Dockets 050172, 04269 and 050171. BellSouth will file a copy of the transcript as soon as it becomes available

Finally, in an order dated March 29, 2005, the Michigan Commission held that "CLECs no longer have a right under Section 251(c)(3) to order UNE-P and other UNEs ."[3]

The clear weight of Authority across the country is in support of BellSouth's position that the FCC's Triennial Review Remand Order means what it says By our count, there are now 13 state decisions (California, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, New York, Ohio, Rhode Island, Texas and Florida)

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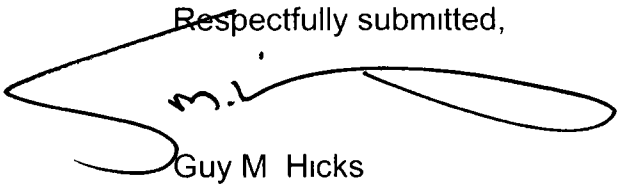
[2] *Order*, dated April 5, 2005, *BellSouth v MCI, et al* , (USDC NDGA), at pp 2,3,4, and 9 (emphasis in original) A copy of the Federal Court's Order is attached as Exhibit A

[3] *See* pp 8-9 of the March 29, 2005 Michigan Order, attached as Exhibit B

supporting Bellsouth's position and only four decisions in effect supporting the Petitioners' view (Illinois, Kentucky, Louisiana and Mississippi) [4]

Respectfully submitted,



Guy M Hicks

GMH nc

[4] As stated, the Georgia Commission's decision has been enjoined The New Hampshire Commission's order submitted to the Authority by the petitioning CLECs on April 5, 2005, does not even address the de-listing of UNE-P, much less provide support for the CLEC's tortured interpretation of the *TRRO*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Plaintiff,	)	No. 1:05-CV-0674-CC
v.	)	
MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, et al.,	)	
Defendants.	)	

ORDER

Before the Court is the Emergency Motion for a Preliminary Injunction filed by plaintiff BellSouth Telecommunications, Inc. ("BellSouth"). Having reviewed the motion, the opposing memoranda, and the extensive record material that has been filed, and having heard argument on April 1, 2005, the Court finds that BellSouth has satisfied each aspect of the four-prong test for preliminary injunctive relief. *See, e.g.*, *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir. 2003); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998).

Accordingly, the Court grants BellSouth a preliminary injunction against the March 9, 2005 Order of the Georgia Public Service Commission ("PSC") in Docket

No. 19341-U to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element ("UNE") as well as new orders for loops and transport as UNEs (in instances where the Federal Communications Commission ("FCC") has found that unbundling of loops and transport is not required). Consistent with the FCC's ruling in the *Order on Remand*[1] at issue here, to the extent that a competitor has a good faith belief that it is entitled to order loops or transport, BellSouth will provision that order and dispute it later through appropriate channels.

First, BellSouth has a high likelihood of success in showing that, contrary to the conclusion of the PSC, the FCC's *Order on Remand* does not permit new UNE orders of the facilities at issue.[2] BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the Court with decisions from 11 state commissions that

[1] Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No 04-313, CC Docket No 01-338, FCC 04-290 (FCC rel Feb 4, 2005)

[2] In evaluating the merits of BellSouth's legal argument, this Court owes no deference to the PSC's understanding of federal law. *See, e g , MCI Telecomms Corp v BellSouth Telecomms , Inc* , 112 F. Supp. 2d 1286, 1291 (N D Fla 2000), *aff'd*, 298 F.3d 1269 (11th Cir. 2002).

support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.

The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. The FCC held that there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* ¶ 204. The FCC's new rules thus state that competitors "may not obtain" switching as a UNE. 47 C.F.R. § 51.319(d)(2)(iii) (App. B. to *Order on Remand*); *see also* 47 C.F.R. § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."); *Order on Remand* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); *id.* ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide"). The FCC likewise established that competitive LECs are no longer allowed to place new orders for loops and transport in circumstances where, under the FCC's decision, those facilities are not available as UNEs. *Id* ¶¶ 142, 195.

The FCC also created strict transition periods for the "embedded base" of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 more months and at higher rates than they were paying previously. *See id* ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied only to the embedded base and that competitors were "not permit[ed]" to place new orders. *Id.* ¶¶ 142, 195, 199. The FCC's decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.

In arguing for a different result, the PSC and the other defendants primarily rely on paragraph 233 of the *Order on Remand*, which they contend requires BellSouth to follow a contractual change-of-law process before it can cease providing these facilities That provision, however, states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *Order on Remand* ¶ 233. In conflict with that language, the PSC's reading of the FCC's

order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order*[3] at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive . . . that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id*

Finally, the Court notes that the PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that

[3] Order Implementing TRRO Changes *Ordinary Tariff Filing of Verizon New York Inc to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005) ("*New York Order*")

it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNE- Platform orders must be pursued on direct review of the FCC's order, not before this Court.

In concluding that BellSouth has a substantial likelihood of success on the merits, the Court does not reach the issue whether an "Abeyance Agreement" between BellSouth and a few of the defendants authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it.

Second, BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision. BellSouth has shown that as a

direct result of the PSC's decision, it is currently losing retail customers and accompanying goodwill. For instance, BellSouth has demonstrated that it is losing approximately 3200 customers per week to competitors that are using the UNE Platform. The defendants do not seriously dispute that BellSouth is losing these customers; on the contrary, MCI confirms that it is using the UNE Platform to sign up 1500 BellSouth customers per week Under Eleventh Circuit precedent, losses of customers are irreparable injury. *See, e g , Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (holding that loss of customers is irreparable injury and agreeing with district court that, if a party "lose[s] its long-time customers," the injury is "difficult, if not impossible, to determine monetarily") (internal quotation marks omitted); *see also Iowa Utils. Bd v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm where FCC rules implementing this same statute "will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue"). BellSouth has therefore demonstrated the existence of very significant immediate and irreparable injury.

Third, the Court finds that BellSouth's injury outweighs the injury that will be suffered by the private defendants. The Court concludes that, although some

competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy. In particular, paragraph 218 of the *Order on Remand* states that the UNE Platform "hinder[s] the development of genuine, facilities-based competition," contrary to the federal policy reflected in the Telecommunications Act of 1996. Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth's injury. *See, e.g., Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (holding that private interest in avoiding arbitration could not count as evidence of "irreparable harm," because such a holding "would fly in the face of the strong federal policy in favor of arbitrating disputes"). Moreover, the Court notes that competitive LECs have been on notice at least since the FCC's August 2004 *Interim Order*[4] that soon they might well not be able to place new orders for these UNEs.

[4] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

Fourth, the Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC. As discussed, the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition," *Order on Remand* ¶ 2, that its new rules would "best allow[] for innovation and sustainable competition," *id.*, and that it would be "contrary to the public interest" to delay the effectiveness of the *Order on Remand* for even a "short period of time," *id* ¶ 236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶ 236 (emphasis added). Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here

* * *

As BellSouth has satisfied the test for preliminary injunctive relief, it is hereby ORDERED AND ADJUDGED that Plaintiff's Emergency Motion for Preliminary Injunction is GRANTED. The Court hereby preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking

to enforce the PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport.

For the same reasons as those set forth above with respect to this Court's grant of preliminary injunctive relief to BellSouth, the Joint Defendants' Motion for Stay is DENIED.

BellSouth's motion for preliminary injunction having now been considered and determined, all Defendants are DIRECTED to answer or otherwise respond to BellSouth's Complaint within seven (7) days of the date of this Order. Any answers or responses already submitted to the Court by Defendants shall be deemed filed as of the date of this Order for all purposes under the Federal Rules of Civil Procedure and the local rules of this Court.

ORDERED this 5th day of April 2005.

s/ *CLARENCE COOPER*

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of competitive local exchange carriers to initiate a Commission investigation of issues related to the obligation of incumbent local exchange carriers in Michigan to maintain terms and conditions for access to unbundled network elements or other facilities used to provide basic local exchange and other telecommunications services in tariffs and interconnection agreements approved by the Commission, pursuant to the Michigan Telecommunications Act, the Telecommunications Act of 1996, and other relevant authority	Case No U-14303
In the matter of the application of **SBC MICHIGAN** for a consolidated change of law proceeding to conform 251/252 interconnection agreements to governing law pursuant to Section 252 of the Communications Act of 1934, as amended	Case No U-14305
In the matter of the application of **VERIZON NORTH INC. and CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS,** for a consolidated change-of-law proceeding to conform interconnection agreements to governing law	Case No U-14327
In the matter on the Commission's own motion, to resolve certain issues regarding hot cuts	Case No U-14463

At the March 29, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan

PRESENT Hon J Peter Lark, Chairman
Hon Robert B Nelson, Commissioner
Hon Laura Chappelle, Commissioner

Exhibit B

ORDER

On September 30, 2004, the Competitive Local Exchange Carriers Association of Michigan (CLEC Association), LDMI Telecommunications, Inc (LDMI), MCImetro Access Transmission Services LLC (MCI), XO Michigan, Inc (XO), AT&T Communications of Michigan, Inc (AT&T), TCG Detroit, TDS Metrocom, LLC (TDS), Talk America Inc , TelNet Worldwide, Inc , Quick Communications, Inc , d/b/a Quick Connect USA, Superior Technologies, Inc , d/b/a Superior Spectrum, Inc , Grid 4 Communications, Inc , CMC Telecom, Inc , C L Y K Inc , d/b/a Affinity Telecom, Inc , JAS Networks, Inc , Climax Telephone Company, and ACD Telecom, Inc (ACD), (collectively, the CLEC coalition), petitioned the Commission to conduct an investigation pursuant to its authority under the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484 2101 *et seq* , to investigate the effect, if any, in Michigan of the *vacatur* of the rules promulgated by the Federal Communications Commission (FCC) in its Triennial Review Order[1] and the effect of the FCC's August 20, 2004 interim order on remand [2] To the extent that these developments are determined by the Commission to constitute a change of law, the CLEC coalition seeks a decision from the Commission on the appropriate procedures for modification of the terms in current tariffs and interconnection agreements The CLEC coalition also requests the Commission to order SBC Michigan (SBC) and Verizon North Inc and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), to show cause why the Commission should not order

[1]Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984 (2003) (*TRO*), vacated in part, *United States Telecom Assn* v *FCC*, 359 F3d 554 (DC Cir 2004) (*USTA* II)

[2]In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No 04-313, CC Docket No 01-338, FCC 04-179 (rel'd August 20, 2004)

them to continue to provide competitive local exchange carriers (CLECs) with nondiscriminatory access to network elements and facilities as currently required by tariffs and interconnection agreements approved by the Commission pursuant to the MTA and Sections 251 and 252 of the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq* , at cost-based rates

On the same day, SBC filed an application requesting that the Commission convene a proceeding to ensure that SBC's interconnection agreements adopted under Sections 251 and 252 of the FTA remain consistent with federal law In so doing, SBC alleged that its existing interconnection agreements continue to include network elements that the FCC previously required incumbent local exchange carriers (ILECs) to provide on an unbundled basis, but which are no longer required to be unbundled by FCC order or judicial decision SBC asserted that, by addressing all out-of-compliance interconnection agreements in a single proceeding, the Commission could fulfill the FCC's goal of a speedy transition, while preserving the scarce resources of the Commission, SBC, and the CLECs

On October 26, 2004, Verizon petitioned the Commission to approve amendments to the interconnection agreements between itself and certain CLECs According to Verizon, the agreements of these CLECs could be interpreted to require amendment before Verizon may cease providing unbundled network elements (UNEs) eliminated by the TRO or *USTA II* Verizon insisted that absent the Commission's intervention, "the CLECs will not conform their agreements to governing law, despite the FCC's directives to do so and contractual requirements to undertake good faith negotiation of contract amendments " Verizon application, ¶ 16, p 7 Verizon also maintained that a number of CLECs have sought to impede and delay the process by asking this Commission to investigate the legal effect of the *USTA II* mandate and the FCC's interim order Verizon contended that its proposed interconnection amendment makes clear that Verizon's

unbundling obligations will be governed exclusively by Section 251(c)(3) of the FTA, 47 CFR Part 51, and the FCC's interim order Further, the proposed language indicates that, when federal law no longer requires unbundled access to particular elements, Verizon may cease providing such access upon appropriate notice

Given the commonality of the issues raised by these three applications, in an order dated November 9, 2004, the Commission consolidated these matters and set a schedule for the filing of comments and reply comments by December 22, 2004 and January 18, 2005, respectively

On December 22, 2004, the Commission received initial comments from SBC, Sprint Communications Company, L P , Allegiance Telecom of Michigan, Inc , MCI, the CLEC Association, ACD Telecom, Inc , Talk America, TDS and XO, the Commission Staff (Staff), and Verizon

On January 18, 2005, the Commission received reply comments from SBC, Verizon, the CLEC Coalition, Talk America, TDS, and XO, and the Staff

On February 4, 2005, the FCC issued its order on remand[3] adopting new rules governing the network unbundling obligations of ILECs in response to *USTA II*, which overturned portions of the FCC's UNE rules announced in the *TRO* Because the new rules issued by the FCC in the *TRRO* appeared to significantly affect the outcome of this proceeding, the Commission provided that all interested persons should be given an additional opportunity to submit comments and reply comments by February 24, 2005 and March 3, 2005, respectively Those parties filing such additional comments or replies include SBC, Verizon, the CLEC Coalition, MCI, AT&T and TCG Detroit, Clear Rate Communications, Inc , and the Staff

[3]In the Matter of Unbundled Access to Network Elements, WC Docket No 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No 01-338, rel'd February 4, 2005 (*TRRO*)

Thereafter, the Commission determined in an order dated February 24, 2005, that the parties should be given an opportunity to present oral argument directly before the Commission It therefore scheduled a public hearing for March 17, 2005, at which the parties were invited to present their positions and respond to questions posed by the Commission The Commission stated its intent to issue an order in these proceedings by March 29, 2005

On March 15, 2005, Attorney General Michael A Cox (Attorney General) filed comments [4]

On March 17, 2005, the Commission was present for a public hearing during which the following parties acted on the opportunity to present oral argument and to respond to the Commission's questions SBC, Verizon, the CLEC Coalition, LDMI, Talk America, TDS and XO, the CLEC Association, MCI, AT&T, CIMCO Communications, Inc , CoreComm Michigan, Inc , and PNG Telecommunications Inc , and the Attorney General

Discussion

Certain critical issues arise in these proceedings First, the parties dispute whether the Commission may or should require the ILECs to continue providing unbundled network element platform (UNE-P) or other elements for which the FCC has found no impairment A finding of impairment is necessary to require provision of any UNE pursuant to Sections 251 and 252 of the FTA Second, they do not agree on the appropriate method for transitioning ILEC/CLEC contractual relations from where the Michigan industry is now and where it must be by the FCC's deadline of March 11, 2006 Third, MCI raises issues regarding the availability and process of hot cuts to transition UNE-P customers to other service platforms

[4]SBC initially objected to the filing of those comments as untimely, but withdrew the objection at the March 17, 2005 public hearing

Provision of UNEs

The CLECs argue that the Commission has the authority and the responsibility to require that the ILECs continue to provide UNEs pursuant to state law, which authority, they argue, is expressly preserved by the FTA They argue that, pursuant to Section 355 of the MTA, MCL 484 2355, at a minimum, the ILECs must unbundle the loop and the port of all telecommunications services The Commission's authority to require this unbundling, they argue, is preserved by §§251(d)(3), 252(e)(3), and 261(c) of the FTA They quote the United States Court of Appeals for the Sixth Circuit (Sixth Circuit), as follows

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of the [FTA] " 47 USC 261 Additionally, Section 251(d)(3) of the Act states that the [FCC] shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act
>
> The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act "

Michigan Bell v MCIMetro Access Transmission Services Inc, 323 F3d 348, 358 (CA 6, 2003).

Further, they argue, the Sixth Circuit expressly rejected SBC's argument that a requirement would be inconsistent with federal law if it merely were different They state that the Court determined that a state commission may enforce state law regulations "even where those regulations differ from the terms of the Act " *Id* at 359 The CLECs take the position that as long as the disputed state regulation promotes competition, it is not inconsistent with the federal Act Therefore, they argue, the Commission is not preempted by the FCC's orders from requiring the ILECs to provision UNEs pursuant to the terms and conditions in the Commission-approved interconnection agreements They urge the Commission to take prompt action to prevent SBC

from acting unilaterally to either withdraw its wholesale tariffs for UNEs or to alter the interconnection agreements to exclude these UNEs

Moreover, the CLECs argue, SBC has a duty to provide unbundled loops, transport, and switching pursuant to Section 271 of the FTA MCI and AT&T agree and argue that irrespective of the ILECs' duties under Section 251, SBC must comply with the conditions required for the FCC's approval of its application pursuant to Section 271 Thus, these parties argue, SBC may not unilaterally remove local switching, loops, or transport from its interconnection agreements or its tariffs Rather, it must negotiate pursuant to the provisions of its interconnection agreements any amendments, including pricing Although the FCC provided a procedure for SBC to request forbearance from enforcement of its Section 271 obligations, MCI argues, SBC has not yet taken any of the steps laid out to obtain such a ruling

Further, MCI argues, if a carrier believes a state law requirement is inconsistent with the federal Act, it must seek a declaratory ruling to that effect from the FCC It argues that the FCC's brief to the United States Supreme Court in opposition to the petitions for *certiorari* from *USTA II* reflects that the FCC has not preempted any state law on unbundling In that brief, the FCC denied that it had preempted any state unbundling rule, and stated that it "is uncertain whether the FCC ever will issue a preemptive order of this sort in response to a request for declaratory ruling " Brief at 20

Verizon and SBC argue that the Commission is preempted from requiring the ILECs to provide any UNE for which the FCC has found there is no impairment They argue that the Commission should promptly approve their respective proposed amendments to bring interconnection agreements into conformity with the FCC's *TRO* and *TRRO* Because the FCC's orders preempt the Commission, they argue, there is no reason to waste time considering whether the

Commission may re-impose unbundling obligations that the FCC has eliminated Therefore, they argue, the Commission should dismiss the CLECs' application and approve the ILECs' proposed amendments

SBC and Verizon further argue that the Commission's authority under state law may be lawfully exercised only in a manner that is consistent with the federal Act and FCC rules and regulations MCL 484 2201 In their view, the Commission may not require the ILECs to provide UNEs that the FCC has found are not required to alleviate impairment

SBC adds that the FCC is the sole enforcer of any obligations pursuant to Section 271 of the federal Act Thus, it argues, this proceeding is not an appropriate forum for a Commission determination as to whether SBC is required to provide certain UNEs solely under Section 271, without reference to the duties imposed under Sections 251 and 252 of the FTA

The Commission is not persuaded that it is preempted by either the federal Act or the FCC's orders from requiring the ILECs to provide UNEs under authority granted by the MTA and preserved in the FTA The Commission's authority to impose requirements on telecommunications carriers in addition to, but consistent with, those prescribed by the FCC is preserved in the FTA sections cited by the CLECs Moreover, that authority has been affirmed by the Sixth Circuit as argued by the CLECs Thus, the Commission finds that it also possesses the authority necessary to appropriately direct the resolution of the method of industry transition as addressed in the following section However, the Commission notes that Section 201(2) of the MTA, MCL 484 2201(2), requires Commission action to be consistent with the FTA and the FCC's rules and orders Requiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan for transition in the *TRO* and *TRRO*

Moreover, at this time, the Commission is not persuaded that competition would be advanced by exercising its authority to require the provision of UNEs in addition to those that the FCC has found must be provided pursuant to 47 USC 251(c)(3) Such a finding likely would lead to further litigation and promote confusion rather than competition, which would be inconsistent with the intent of the MTA as well as the FTA If a CLEC believes that the FCC has erroneously found no impairment on a particular UNE, it may take steps provided by law to seek a change in that ruling

The *TRRO* provides a period of transition to the UNEs available under its new final rules from the UNEs now available pursuant to the current interconnection agreements, which were negotiated and arbitrated under previous determinations concerning what elements must be provided by the ILECs pursuant to Section 251(c)(3) of the FTA For most of the UNEs that were available, but are no longer under that subsection, the *TRRO* provides a 12-month transition period For dark fiber related elements, the FCC provided 18 months During the transition, the FCC directed that ILECs must permit CLECs to serve their embedded customer base with UNEs available under their interconnection agreements, but with an increased price. However, the FCC stated that CLECs would not be permitted to expand the use of UNE-P or the use of other UNEs no longer required to be made available pursuant to Section 251(c)(3)

In the March 9, 2005 order in Case No U-14447, the Commission found that ILECs must honor new orders to serve a CLEC's embedded customer base The Commission stopped short of stating that CLECs were not entitled to new orders of UNEs for new customers At this time, the Commission affirmatively finds that the CLECs no longer have a right under Section 251(c)(3) to order UNE-P and other UNEs that have been removed from the list that must be offered to serve new customers This does not, however, foreclose any right that may exist pursuant to Section 271 for a CLEC to order these UNEs Moreover, the Commission notes that although certain UNEs

are no longer required to be provided pursuant to Section 251(c)(3), parties may negotiate for provision of those same facilities and functions on a commercial market basis

Transition

SBC and Verizon propose that the Commission review and approve their respective proposed amendments to the interconnection agreements and then impose those amendments on the CLECs where necessary [5] These parties point to the provisions in the *TRO* and *TRRO* that indicate the FCC's intent that the transition away from the provision of the elements no longer required should be swift

Verizon notes that the Commission has already initiated a collaborative to address the transition issues concerning the amendments of interconnection agreements to conform to federal law It argues that the Commission need not consider those same transitional questions here

In its reply comments, Verizon recognizes that many of the changes wrought by the *TRO* and the *TRRO* require the parties to negotiate amendments, which are being addressed in the Case No U-14447 collaborative process However, it argues, the prohibition on CLECs obtaining new UNE-Ps or high-capacity facilities no longer subject to unbundling does not depend on the particular terms of any interconnection agreement and should be implemented immediately Verizon argues that the transition rules bar CLECs from ordering new UNEs that are no longer subject to unbundling under section 251(c)(3), without regard to the terms of any agreement

SBC argues that the Commission is legally bound to implement the FCC's determinations, consistent with the pertinent court rulings including *USTA II* for all ILECs and CLECs It argues that the Commission should move quickly to ensure that the unbundling rights and obligations of

[5] Verizon asserts that only the interconnection agreements with the CLECs named in Verizon's application are at issue here The remaining agreements, according to Verizon, need no amendment to comply with federal law

all carriers operating in Michigan comport with governing law and mandates of the FCC It argues that it is appropriate for the Commission to ensure compliance with the federal unbundling regime in a single consolidated proceeding, pursuant to Section 252(g) of the FTA, 47 USC 252(g), instead of on a carrier-by-carrier basis

The CLECs argue that the FCC explicitly contemplated that parties would negotiate amendments to their interconnection agreements pursuant to their change of law or dispute resolution provisions They argue that the FCC could not and did not order a unilateral change to contracts that the parties currently have in place They argue that the Commission should dismiss the applications by SBC and Verizon to approve their proposed amendments, and require instead that the parties negotiate in good faith in light of the change in law that the *TRO* and *TRRO* represent The CLECs propose that the Commission adopt a process that allows parties initially to attempt to negotiate implementation of the *TRRO* and the resulting new unbundling rules However, if negotiations fail on some issues, consistent with the terms and conditions for dispute resolution, the Commission should resolve disputes that arise in the most efficient manner available

AT&T recommends the following steps to preserve the CLEC's right to negotiate under the FTA, and to promote uniformity and efficiency

1 Consistent with the terms of their respective interconnection agreements, following the effective date of the FCC's rules (March 11, 2005) carriers shall attempt to negotiate any required changes to their interconnection agreements As required by the *TRRO*, these negotiations should proceed without "unreasonable delay "[6]

2 At the end of such negotiations, the parties should submit amendments to their interconnection agreements for Commission approval or file petitions identifying their individual dispute To the extent necessary, and consistent with any notice and due process requirements, the Commission may entertain any filed disputes in party-to-party and or consolidated proceedings

[6] *TRRO*, ¶ 233

3 To the extent the Commission believes necessary, it should schedule collaboratives to identify the common and unique issues in the individual petitions for dispute resolutions At that time, the Commission should also establish an efficient framework for resolving the identified issues

4 Nothing in this proposal should be construed to prohibit individual parties from requiring that the individual terms and conditions of the change of law and/or dispute resolution provisions of their respective interconnection agreements continue to apply, including any right to seek bilateral arbitration of disputes by the Commission Similarly, nothing in this proposal should be construed to prohibit individual parties from negotiating amendments to an interconnection agreement in a time frame shorter than what is proposed herein, and the Commission should make this statement in any order issued

AT&T Supplemental Comments, pp 7-8

In its initial comments, the CLEC coalition proposed a framework that contemplated significantly more time It argued that the CLECs should be given 45 days after March 11, 2005 to study the new rules and prepare proposed amendments to their interconnection agreements Thereafter, the CLEC coalition noted that most interconnection agreements have a 60- or 90-day time frame for negotiations before dispute resolution procedures begin Then, according to the CLEC coalition, the parties should have a two-week window to either submit an amendment or file petitions identifying their individual disputes Finally, the CLEC coalition proposed that the Commission should entertain any filed disputes in a consolidated docket, with time limits for submitting those disputes

The Commission finds that the most appropriate process for moving the industry through the transition period provided in the *TRRO* is to close these three cases and open up the interconnection agreements for negotiation, within the collaborative initiated in Case No U-14447 The parties will be provided 60 days from the date of this order[7] to complete the requirements of their change of law and dispute resolution provisions, and to negotiate for and submit a joint application

[7]The 45-day period established for the collaborative is, therefore, extended

for approval of an amendment to their interconnection agreements to bring their contracts into compliance with the requirements of the *TRO* and the *TRRO* During that same 60-day period, the parties in the collaborative shall work to establish no more than four versions of an amendment to the interconnection agreements All parties to the collaborative that have not otherwise agreed to an amendment, must agree to one of the four or fewer versions established in the collaborative If the parties to a single contract do not agree which of the versions should be included in the interconnection agreement, the parties shall submit that disagreement to the Commission, which will determine the appropriate amendment through baseball-style arbitration

Hot Cuts

MCI argues that in the *TRRO*, the FCC ruled that for purposes of Section 251, there is no impairment without unbundled local switching That ruling, according to MCI, was based on the availability of batch hot cut processes See, *TRRO*, ¶¶ 211, 217 Thus, MCI argues, batch hot cuts must be included in any amendments to the interconnection agreement to comply with the FCC's recent rulings Moreover, MCI argues, the FCC explicitly indicated that forums to address concerns about the sufficiency of batch hot cut processes include state commission enforcement processes and Section 208, 47 USC 208, complaints to the FCC

MCI acknowledges the January 6, 2005 order in *Michigan Bell* v *Lark et al* (ED MI, Southern Division, Case No 04-60128, Hon Marianne O Battanni) prevents the Commission from enforcing the Commission's June 28, 2004 order in Case No. U-13891 regarding batch hot cuts However, it insists that Judge Battanni's order does not prevent the Commission from addressing and resolving disputes about batch hot cuts as part of the amendment process to interconnection agreements It says that the basis of Judge Battanni's ruling was that the Commission was acting on unlawfully delegated authority from the FCC in determining whether impairment existed with

respect to unbundled switching Because the FCC has now made its determination concerning impairment, the Commission is free to act on batch hot cut issues It says that the exact process to be used and the rates will need to be addressed in the interconnection agreement amendments

SBC responds that, in the *TRRO*, the FCC approved the hot cut processes presented by SBC as adequate to avoid a finding of impairment It argues that parties are free to negotiate mutually acceptable "refinements" in batch hot cut processes However, SBC argues, batch hot cut processes have nothing to do with conforming the parties' interconnection agreements to the requirements of federal law

Verizon responds that it has not named MCI as a party to its application to conform its contracts to federal law, and MCI does not mention Verizon in its hot cuts discussion However, Verizon argues that the FCC did not instruct states to address hot cuts in *TRRO* amendments (or elsewhere) It argues that the FCC expressly found that the ILECs' hot cut processes—pointing in particular to Verizon's—were sufficient and that the concerns about the ILECs' ability to convert the embedded base of UNE-P customers in a timely manner are rendered moot by the transition period *TRRO* ¶ 216 Verizon argues that no authority cited by MCI permits the Commission to ignore a federal court decision forbidding it to pursue adoption of batch hot cut processes

The Commission is persuaded that it should promote settlement of hot cut process issues and doing so does not contravene Judge Battani's order To that end, the Commission opens a new docket for resolving those issues, Case No U-14463, in which all filings and actions related to hot cuts will be determined The Commission finds that within 14 days of the date of this order, the CLECs shall submit to the ILECs the number of lines that need to be moved via hot cut and a plan for those moves, i e , from and to what configuration and the process desired Within 14 days after receipt of the plan, if the parties cannot agree on the process or price, they shall submit their last

best offer to Orjiakor Isiogu, Director of the Commission's Telecommunications Division, who will act as mediator Within 30 days of receipt of those last best offers, Mr Isiogu shall submit his recommended plan to the Commission The parties will have seven days to object However, any objection must in good faith assert that the recommendation is technically infeasible or unlawful Without timely objections, the mediator's recommendation will be final If the parties are able to agree, no filing need be made

The Commission has selected Case No U-14463 for participation in its Electronic Filings Program The Commission recognizes that all filers may not have the computer equipment or access to the Internet necessary to submit documents electronically Therefore, filers may submit documents in the traditional paper format and mail them to the Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P O Box 30221, Lansing, Michigan 48909 Otherwise, all documents filed in this case must be submitted in both paper and electronic versions An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at http //efile mpsc cis state mi us/efile/usersmanual pdf The application for account and letter of assurance are located at http //efile mpsc cis state mi us/efile/help. You may contact Commission staff at (517) 241-6170 or by e-mail at mpscefilecases@michigan gov with questions and to obtain access privileges prior to filing

The Commission FINDS that

a Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484 2101 *et seq* , the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

et seq , 1969 PA 306, as amended, MCL 24.201 *et seq* , and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460 17101 *et seq*

b Case No U-14303, Case No U-14305, and Case No U-14327 should be closed

c The parties should be directed to negotiate amendments to their interconnection agreements consistent with the discussion in this order, within the Commission-initiated collaborative proceeding in Case No U-14447

d Case No U-14463 should be opened for the purpose of resolving issues concerning hot cuts

THEREFORE, IT IS ORDERED that

A Case No U-14303, Case No U-14305, and Case No U-14327 are closed

B The parties are directed to negotiate amendments to their interconnection agreements consistent with the discussion in this order, within the Commission-initiated collaborative proceeding in Case No U-14447

C Case No U-14463 is opened for the purpose of resolving issues concerning hot cuts, as discussed in this order

The Commission reserves jurisdiction and may issue further orders as necessary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462 26

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J Peter Lark
Chairman

(S E A L)

/s/ Robert B Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 29, 2005

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462 26

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 29, 2005

Its Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2005, a copy of the foregoing document was served on the following, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
Nashville, TN 37219-8062
hwalker@boultcummings.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

James Murphy, Esquire
Boult, Cummings, et al
1600 Division Street, #700
Nashville, TN 37219-8062
jmurphy@boultcummings.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

Ed Phillips, Esq.
United Telephone - Southeast
14111 Capitol Blvd
Wake Forest, NC 27587
Edward.phillips@mail.sprint.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823
don.baltimore@farrar-bates.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

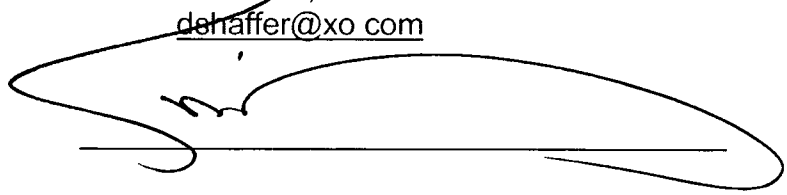
John J. Heitmann
Kelley Drye & Warren
1900 19th St., NW, #500
Washington, DC 20036
jheitmann@kelleydrye.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219
cwelch@farrismathews.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

Dana Shaffer, Esquire
XO Communications, Inc.
105 Malloy Street, #100
Nashville, TN 37201
dshaffer@xo.com



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