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March 15, 2005

Mrs. Blanca S. Bayó
Director, Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 041269-TL
In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Consolidate and Response in Opposition to Petitions for Emergency Relief which we ask that you file in the above captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith E Mays/RH

Meredith E. Mays

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
577029

CERTIFICATE OF SERVICE
Docket No. 041269-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx this 15th day of March, 2004 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	Docket No. 041269-TL
Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law	)	
Emergency Petition of AmeriMex Communications Corp.	)	Docket No. 050170-TP
Emergency Petition of Ganoco Inc. d/b/a American Dial Tone, Inc.	)	Docket No. 050171-TP
	)	Filed: March 15, 2005

BELLSOUTH TELECOMMUNICATIONS INC.'S MOTION TO CONSOLIDATE AND RESPONSE IN OPPOSITION TO PETITIONS FOR EMERGENCY RELIEF

INTRODUCTION AND MOTION TO CONSOLIDATE

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") deny emergency petitions filed by: MCI, Supra, AmeriMex Communications Corp. ("AmeriMex") and Ganoco Inc. d/b/a American Dial Tone ("American Dial Tone").[1] As an initial matter, BellSouth respectfully requests that the Commission consolidate emergency petitions filed by AmeriMex and American Dial Tone in Dockets 050170 and 050171 into Docket 041269-TP. The petitions of AmeriMex and American Dial Tone are substantially similar to previous petitions filed by MCI and Supra. While BellSouth disagrees that the emergency relief requested by these parties is appropriate, there is

[1] This Response specifically cites to arguments raised in MCI's Emergency Petition, but also addresses the Petition and Request for Emergency Relief filed by Supra on March 4, 2005 in this docket, the Emergency Petition of AmeriMex filed in Docket No. 050170-TP on March 4, 2005, and the Emergency Petition of Ganoco Inc. d/b/a American Dial filed in Docket No. 050171-T on March 7, 2005. BellSouth is also aware of the following letters filed in Docket No. 0401269: February 25, 2005 by ITC^DeltaCom Communications, Inc.; March 3, 2005 by XO; March 4, 2005 by the Competitive Carriers of the South ("CompSouth"); March 7, 2005 by US LEC; and March 11, 2005 by AT&T. This Response addresses those letters as well. BellSouth also notes that the first "emergency" petitions filed by MCI was filed almost three weeks after BellSouth's February 11, 2004 Carrier Letter Notification, which MCI complains of.

no value in duplicating the Commission's effort by addressing the same issue in different proceedings. Moreover, because all of these petitions have been recently filed, no party would be harmed or prejudiced by consolidating all requests for "emergency" relief into a single proceeding. For this reason, BellSouth requests that these requests be considered in Docket No. 041269-TP.

The various "emergency" petitions filed by CLECs misread binding federal rules, and should be rejected. Because of the delay in the filing of "emergency' petitions by MCI and others, and to allow this and other Commissions time to have a full and adequate opportunity to consider the Federal Communications Commission's ("FCC's") ruling in the Triennial Review Remand Order ("TRRO"), as described further herein, BellSouth issued Carrier Notification Letter SN91085061 on March 7, 2005.[2] In that letter, BellSouth stated its intention to continue to accept competitive local exchange carrier ("CLEC") orders for these "new adds" until the earlier of (1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. By voluntarily extending the time during which BellSouth will accept these "new add" orders, BellSouth does not abandon its legal position, which is addressed in detail below and will continue to refer to March 11 as the legally binding date after which the FCC has authorized Bell to no longer accept new adds.[3]

BACKGROUND

On February 4, 2005, the FCC released its permanent unbundling rules in the *TRRO*. The *TRRO* identified a number of former Unbundled Network Elements ("UNEs"), such as

[2] Attached as Exhibit 1.

[3] This response also reiterates and supplements arguments that BellSouth previously raised in its Response in Opposition to NuVox, Xspedius, KMC III, and KMV V ("Joint Petitioners") filed in this Docket on March 4, 2005.

switching, for which there is no section 251 unbundling obligation.[4] In addition to switching, former UNEs include high capacity loops in specified central offices,[5] dedicated transport between a number of central offices having certain characteristics,[6] entrance facilities,[7] and dark fiber.[8] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers ("ILECs"), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[9] In each instance, the FCC unequivocally stated that the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[10]

Although the FCC explicitly addressed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC took a different direction with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" [11] controls. Instead of requiring that the ILECs continue to allow CLECs to order more of the former UNEs during the transition period, the FCC provided that no "new adds" would be allowed. For example, with regard to switching, the FCC explained "[t]his transition period shall apply only to the embedded customer base, and *does not permit competitive LECs to add new customers using unbundled access to*

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[4] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." (footnote omitted).

[5] *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).

[6] *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).

[7] *TRRO*, ¶ 137 (entrance facilities).

[8] *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).

[9] *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).

[10] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).

[11] *TRRO*, ¶3.

local circuit switching."[12] The FCC made similar findings concerning certain transport routes and certain high capacity loops.[13] The FCC specifically found: "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order."[14]

The FCC clearly intended these provisions regarding "new adds" to be self-effectuating. First, the FCC specifically stated that "[g]iven the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 ...."[15] Second, the FCC expressly stated that its order would not ". . . supersede any alternative arrangements that carriers voluntarily have negotiated *on a commercial basis . . .*,"[16] conspicuously omitting any similar intent not to supercede conflicting provisions of existing interconnection agreements. Consequently, in order to have *any* meaning, the *TRRO*'s provisions precluding the ordering of "new adds" must have effect as of March 11, 2005.

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[12] *TRRO*, ¶ 199 (emphasis supplied); *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). The new local switching rule makes clear that the prohibition against new UNE-Ps applies to new lines. Switching is defined to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO,* ¶ 200. When a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. *TRO,* at 433; the TRRO retained this definition (TRRO, n. 529). Thus, the switching UNE means the port and functionalities on a per-line basis, and the prohibition against new adds applies to the *element* itself – consequently, the federal rule applies to lines.

[13] *TRRO,* ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not required to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements). BellSouth previously filed in its March 4, 2005 response to the Joint Petitioners its letter to the FCC in which it specified the nonimpairment wire centers. BellSouth stated plainly that "[t]o the extent any party is concerned about the methodology BellSouth has employed or the wire centers identified on the enclosed list in which the nonimpairment thresholds have been met, it should bring that concern to the [FCC's] attention." Thus, BellSouth is not seeking "unilaterally" to determine where no obligation to unbundle high-capacity loops, transport, and dark fiber exists.

[14] *TRRO*, ¶ 227 (footnote omitted).

[15] *TRRO*, ¶ 235.

[16] *TRRO*, ¶ 199 (emphasis supplied). *Also* ¶¶ 148, 198.

MCI cannot circumvent the FCC's intention by relying on paragraphs 227 and 233 of the *TRRO*. MCI acknowledges that paragraph 227 provides that "[t]he transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." MCI then cites to paragraph 233 of the *TRRO*, which paragraph addresses changes to interconnection agreements. MCI's attempt to bootstrap paragraph 233 onto paragraph 227 must fail.

In citing paragraph 227, MCI ignored footnote 627, which modifies the "except as otherwise specified" clause. Footnote 627 makes clear that when the FCC stated "except as otherwise specified in the Order," it was referring to continued access to shared transport, signaling, and call-related databases; it was not making an implicit reference to the change of law process.

In addition, the clear meaning of the "except as otherwise specified" language in paragraph 227 is obvious from the very next paragraph of the *TRRO*. In paragraph 228, the FCC held that the "transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." The availability of *voluntarily* negotiated interconnection agreements for interested carriers is also "otherwise specified in the Order," but it has no impact on the prohibition against new adds. Consequently, if a CLEC and an ILEC had voluntarily negotiated an agreement pursuant to which the ILEC voluntarily agreed to provide UNE-P or switching, the FCC did not intend to interfere with that voluntarily adopted obligation. For instance, BellSouth has agreed to provide switching to customers with four lines or more in certain Metropolitan Statistical Areas (e.g., enterprise customers) at a market rate of $14. By including the "except as

otherwise specified" in paragraph 227 and acknowledging carriers' ability to freely negotiate alternative arrangements in paragraph 228, the FCC made clear that it did not intend to override provisions such as that one.

Likewise, MCI's focus on the interconnection agreement portion of the sentence in paragraph 233 ignores the "consistent with our conclusions in this Order" clause. To be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, but the prohibition against new UNE-Ps is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO,* whether self-effectuating or via change of law.

Thus, by filing its Petition, MCI has ignored the FCC's clear statement of intent, and its complaint concerning BellSouth's announced intent to reject orders for these former UNEs on March 11, 2005 is meritless.

MCI's Petition raises three arguments. First, MCI argues that BellSouth has an obligation under the parties' existing interconnection agreement to continue to accept orders for these former UNEs until those interconnection agreements are changed. Second, MCI asserts that BellSouth has an obligation under state law to continue to provide the UNE-P. Finally, MCI contends that BellSouth has a continuing responsibility under section 271 of the Telecommunications Act of 1996 ("the Act") to continue to provide these UNEs. The Commission should reject these arguments.

ARGUMENT

A. The FCC's Bar On "New Adds" Is Self-Effectuating And Relieves BellSouth Of Any Obligation Under Its Interconnection Agreements To Provide These Former UNEs To MCI.

BellSouth does not dispute that the parties are operating under an interconnection agreement that contains change of law provisions. Despite MCI's focus on the contractual language in that agreement, that is not the issue here. If the FCC had held that MCI could continue to add more former UNEs until the interconnection agreements were changed pursuant to the change of law provisions found in interconnection agreements, or even if it had been silent on the question of "new adds," then presumably no dispute would exist between MCI and BellSouth. Neither situation is the case here, however, and MCI's petition disregards what the FCC actually said in the *TRRO*.

The new rules unequivocally state that carriers *may not obtain new UNEs*, and the FCC said unequivocally that there would be a transition period for *embedded* UNEs that would begin on March 11, 2005 and that would last 12 months: "[W]e adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[17] The FCC made almost identical findings with respect to high-capacity loops and transport, holding that its transition rules "do not permit competitive LECs to add new [high capacity loops and transport on an unbundled basis] . . . where the Commission has determined that no section 251(c)(3) unbundling requirement exists."[18] The FCC also said unequivocally that this "transition period shall apply only to the

[17] *TRRO*, ¶199.

[18] *TRRO*, ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements).

embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[19]

How much clearer could the FCC be?

MCI contends that notwithstanding the clear language of the *TRRO* -- there will be a transition period, it will begin on March 11, 2005, and there will be no "new adds" during that transition period -- the FCC really didn't mean what it said. Evidently, MCI believes that BellSouth is obligated to continue to provide new UNE-Ps until its contract with BellSouth is amended pursuant to change of law provisions therein. MCI's belief is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules.[20]

First, the FCC understood that existing interconnection agreements often contain "change of law" provisions. For instance, the FCC specifically contemplated that the contract provisions for the transition of the *embedded base* of former UNEs would be effectuated through the change of law process. Further, the FCC provided that throughout the 12-month transition period (during which the FCC clearly said there would be no "new adds") CLECs would continue to have access to the embedded UNE-Ps during the transition period, but at the commission-approved TELRIC rate "plus one dollar", until the migration of the embedded base was complete.[21] Finally, the FCC made the increase in the rates of the former UNEs retroactive to the effective date of the order to preclude gaming by the CLECs during the negotiation process.[22]

The FCC's obvious reason for making the increased rates retroactive is to keep CLECs from unnecessarily delaying the amendment process and gaming the system by postponing the

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[19] *Id.*

[20] Notably, MCI's Petition is devoid of a single reference to the *rules* themselves.

[21] *Id.*

[22] *TRRO*, n. 630. Thus, if MCI ultimately executed a interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and MCI would need to make a true-up payment to BellSouth.

date for the higher rates applicable to the embedded base of UNE-Ps. It is equally clear that the FCC did not directly address amending existing interconnection agreements to eliminate any requirement that ILECs provide new UNE-Ps. If the FCC had intended to allow CLECs to continue to add new UNE-Ps until the interconnection agreements were amended, it could have easily said so. It did not. Instead, it made specific provision that the transition period did not authorize new adds.[23] The only reasonable, logical, and legally sound conclusion is that the provisions prohibiting new adds was intended by the FCC to be self-effectuating.

There is no question that the FCC has the legal authority to create a self-effectuating change to existing interconnection agreements as it has done here. Indeed, in the TRO, the FCC decided not to make its decisions self-executing. *See TRO*, ¶ 700 ("many of our decisions in this order will not be self-executing"). The FCC's authority to make self-effectuating changes exists under the *Mobile-Sierra* doctrine, which allows the FCC to negate any contract terms of regulated carriers so long as the FCC makes adequate public interest findings. Thus, "[f]or all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'" *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).[24]

The FCC was very clear in the *TRRO* that access to UNEs without impairment was contrary to the public interest and must stop. Notably, the FCC held that "it is now clear . . . that,

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[23] BellSouth will permit feature changes on the embedded base; the FCC was clear, however, that CLECs could not continue to *increase* its embedded base. *See* 51.319(d)(2)(iii).

[24] *Citing, in turn, FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) *and United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential.").

in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment."[25] Also, the FCC held, "we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[26] Likewise, the FCC held that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives."[27]

The FCC has applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed before the Act in light of the reciprocal compensation provisions of §251(b)(5) of the Act. In relevant part, citing *Western Union Tel. Co. v. FCC*, the FCC explained that "[c]ourts have held the Commission has the power ... to modify ... provisions of private contracts when necessary to serve the public interest." *First Report and Order,* 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).[28]

That these interconnection agreements are filed with and approved by the state commissions, rather than the FCC, has no impact on the FCC's ability to change these contracts when it is in the public interest to do so. While *Cable & Wireless P.L.C. v. FCC* applied to "all contracts filed with the FCC,"[29] the reference to "filing" means that decision applies to all contracts and other agreements *that are subject to the FCC's authority and not just contracts actually filed with the FCC.* See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 380, 381 (1999). Thus, as the Supreme Court made clear in *Iowa Utilities Bd.,* state commissions perform their

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[25] *TRRO,* ¶ 218.

[26] *TRRO,* ¶ 218.

[27] *TRRO,* ¶ 199.

[28] In the *Local Competition Order,* the FCC modified pre-existing agreements as of the effective dates of its new rules – **just as it did in the *TRRO.***

[29] *Cable & Wireless,* 166 F.3d at 1231.

functions subject to FCC rules designed to implement the statute and establish the public interest. The FCC has enacted new rules designed to further the public interest by finding "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives."[30] As a matter of national public policy, unbundled switching adversely impacts the public by creating disincentives for the creation of facilities-based competition, which competition has been found to be the fundamental objective of the Act. The FCC has spoken; MCI cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules to address the national public policy and the objectives of the Act.

The FCC has full authority to issue a self-effectuating order that eliminated CLECs' ability to add new UNE-P customers after March 11, 2005. That existing interconnection agreements have not been formally modified to implement that finding is irrelevant. Through the *TRRO,* the FCC has exercised its authority in a manner that trumps MCI's individual contract. Consequently, BellSouth has no obligation to provide new UNE-Ps to MCI on or after March 11, 2005.

B. MCI is Not Entitled to UNE-P Under State Law.

MCI claims that BellSouth is obligated to continue providing UNE-P after March 11, 2005 under state law. MCI's state law argument fails. First, even if the state law were not preempted by federal law, the Commission has not conducted the impairment analysis necessary

[30] The Petitioners have relied upon *IBD Mobile Communications, Inc. v. COMSAT Corp*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n. 50 (2001) in other jurisdictions, contending, "Sierra-Mobile analysis does not apply to interconnection agreements." This reliance is misplaced. *IBD Mobile* is distinguishable from the facts presented here, where the FCC's current order, by its own terms, appears to dictate a different requirement. Indeed, if one simply tallies the number of times both the *TRRO* and the resulting rules preclude new adds, there are a total of *thirteen* instances. *See TRRO,* pp. 4-5 (¶ 5); p. 80 (¶ 142); p. 107 (¶ 195); pp. 127-128 (¶ 227); p. 147 (¶ 147); p. 148 (rules relating to DS3 loops, dark fiber loops, and switching); pp. 150-152 (rules relating to DS1 transport, DS3 transport, and dark fiber transport).

to order unbundling; and second, the FCC's national policy on switching preempts any state commission from ordering unbundled switching under section 251.

1. The Commission has not conducted the impairment analysis required to unbundle network elements.

MCI's reliance upon Sections 364.161 and 364.162, Florida Statutes ignores the point that any unbundling authority the Commission may have must be exercised such that it does not conflict with the federal unbundling statute, namely 47 U.S.C. §251.

In section 251, the federal law explicitly requires that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] *shall* consider, at a minimum whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." In other words, neither the FCC, nor this Commission, can order unbundling of a particular element unless it conducts an impairment analysis and the element meets the "necessary and impair" standard. Ordering the provision of the UNE-P without applying any impairment test would violate the basic tenant of the D.C. Circuit's opinion in *USTA II* that the FCC "may not 'loftily abstract [ ] away from all specific markets' . . . but must instead implement a 'more nuanced concept of impairment.'"

Section 251(d)(3) shows that any state statute requires an impairment analysis prior to any unbundling. Section 251(d)(3) provides in relevant part that:

> ... the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that - ...
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Obviously, a state order requiring unbundling of a network element without the requisite impairment analysis would not be consistent with the requirements of section 251 and would "substantially prevent implementation of the requirements of this section." *See* § 251(d)(3). As the D.C. Circuit held, "After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate." *USTA II*, at 31. Rather, the purpose of the federal regime is to unbundle elements only to the extent necessary to prevent impairment.

Thus, even assuming for purposes of discussion that the Commission could require additional unbundling, it has not conducted the specific impairment analysis required in order to reconcile any purported state unbundling law with the federal law. This impairment analysis would be required in order for BellSouth to provide new UNE-P circuits after March 11, 2005, even if the matter were not otherwise preempted.

2. The FCC has issued a national policy on switching that preempts the field.

An order obligating BellSouth to continue to provide new UNE-P circuits after March 11, 2005 under state law would directly conflict with federal law and, therefore, would be preempted. In its Final Rules, the FCC held that CLECs are not impaired without access to unbundled switching. The FCC further concluded that CLECs were not entitled to place new UNE-P orders after March 11, 2005. Any state requirement to provide unbundled local switching would directly conflict with the national finding of no impairment. This conflict necessitates preemption of the state law by the federal law to avoid the state thwarting the governing federal policy.

The FCC itself has explicitly outlined the preemptive effects of its unbundling rules. In papers filed with the D.C. Circuit, the FCC explained, "[i]n the UNE context . . . a decision by

the FCC not to require an ILEC to unbundled a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element," and "*[a]ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption.*"[31] Thus, as to UNEs, the FCC's rules establish a line from which states may not deviate.

C. MCI Is Not Entitled To UNE-P Under Section 271.

MCI also alleges that the Commission should perpetuate the UNE-P because "section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth ...." *MCI Petition*, at 35. This argument also misses the mark. While BellSouth is obligated to continue to provide unbundled local switching under section 271, section 271 switching (1) is not combined with a loop; (2) is subject to the exclusive jurisdiction of the FCC; and (3) is not provided via interconnection agreements. Thus, MCI is not entitled to new UNE-P orders after March 11, 2005 under section 271 of the Act.

1. BellSouth is not obligated to combine Section 251 and Section 271 elements.

The most fundamental fallacy in MCI's section 271 argument is that MCI wants to buy the UNE-P (a loop combined with local switching), despite the fact that BellSouth is not obligated to combine section 271 elements with other section 271 elements or to combine section 271 elements with section 251 UNEs.

With respect to combining 271 elements, the FCC held in the TRO that "[w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under Section 251." *TRO*, at fn. 1990. The FCC went on to hold that "[u]nlike Section 251(c)(3), items 4 – 6 and 10 of section 271's competitive checklist contain no mention

[31] Exhibit 2 (excerpt from the Brief for Respondents FCC and United States in No. 00-1012 and Consolidated Cases, at 92-93) (D.C. Cir. Dec. 31, 2003).

of 'combining' and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3)." *Id.*

Likewise, the FCC has held that BOCs are not obligated to combine 271 and 251 elements. In the errata to the TRO, the FCC explicitly removed any requirement to combine 271 elements with non-271 elements by removing the clause "any network elements unbundled pursuant to Section 271" from paragraph 584. *Errata*, at ¶ 27. MCI recognizes that it is not entitled to a combination of 271 and 251 elements in its own Petition. *MCI Petition*, at ¶ 37 ("[a]lthough the FCC in the TRO declined to require Bellsouth to combine section 271 local switching with other UNEs pursuant to section 251(c)(3) ....").

For these reasons, MCI's claim that it is entitled to UNE-P under section 271 has no merit. While BellSouth is obligated under section271 to provide local switching, it has no obligation to provide a UNE-P combination.

2. BellSouth is not obligated to provide elements at TELRIC rates under 271.

MCI claims not only that is it entitled to UNE-P under section 271, but that it is also entitled to new UNE-P orders at the TELRIC rates set forth in the interconnection agreements. *MCI Petition*, at ¶ 39. This argument is fatally flawed because it mixes apples and oranges. The FCC and the D.C. Circuit have clearly held that the 251(d) pricing rules do not apply to section 271 elements. *See TRO*, at ¶ 656-657; *USTA II,* at 52-53. Rather, 271 elements are priced under the *federal* section 202 pricing standard of "just and reasonable." Section 271 elements, therefore, are not priced at TELRIC. *USTA II,* at 52-53. To the extent MCI argues that "just and reasonable" under state law equates with TELRIC, that finding would be pre-empted under federal law. In short, there is no authority under which the Commission can require BellSouth to provide new UNE-P circuits at TELRIC rates after March 11, 2005.

3. Section 271 elements fall within the exclusive jurisdiction of the FCC.

Last, the Commission does not have authority to enforce obligations under section 271. Section 271 enforcement rests solely with the FCC. Section 271(d)(6). Consequently, even were BellSouth obligated to provide new UNE-P orders under Section 271 (which it is not), such a claim must be made to the FCC and not to a state commission. This Commission has no jurisdiction to order performance under Section 271.[32]

D. Other State Commissions, Consistent With the TRRO, Have Not Required New UNE Adds After March 11, 2005.

Consistent with the *TRRO's* explicit ban on new UNE-Ps, a number of state regulatory commissions have rejected CLECs' attempts to seek sanction to continue to order UNE-Ps.[33] For example, on March 9, 2005, the Indiana Utility Regulatory Commission refused to order SBC to accept orders for new UNE-P customers after March 10, 2005, finding that

> [W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements.[34]

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[32] MCI cannot rely on Section 271 to make BellSouth negotiate and include Section 271 elements in a Section 252 Agreement. The Act "lists only a limited number of issues on which incumbents are mandated to negotiate [under Section 251 (b)(c)]." *MCI Telecommunications, Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002); *see also Coserv Limited Liab. Corp. v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003) ("[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has to duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252.").

[33] There are also state commissions that have accepted CLECs' arguments. In BellSouth's region, the state commissions of Georgia, Kentucky, and Mississippi have required BellSouth to follow the change of law process. BellSouth has filed an appeal of the decision of the Georgia Public Service Commission. The court has set a hearing on BellSouth's Emergency Motion for Preliminary Injunction on April 6, 2005 (March 14, 2005 Order, U.S.D.C., N.D. Ga.; *BellSouth Telecommunications Inc. v. MCI et al.,* No. 1:05-CV-674-CC). BellSouth has not attached copies of its appellate pleadings due to their volume; BellSouth will furnish copies to the Commission upon request. BellSouth plans to appeal the decisions of the Kentucky and Mississippi commissions.

[34] *See Complaint of Indiana Bell Telephone Company for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission-Approved Interconnection Agreements*, Cause No. 42749, Order (Indiana URC March 9, 2005), at 7. The Indiana Commission subsequently issued a further order on March 10, 2005 addressing high capacity loops and transport (*See* Exhibit 3 for both orders).

Likewise, the State Corporation of the State of Kansas held:

> [T]he Commission agrees with SWBT that the FCC is clear in that as of March 11, 2005, the mass market local switching and certain high capacity loops are not longer available to CLECs on an unbundled basis for new customers . . . . It does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist . . . . any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated.[35]

Similarly, on March 8, 2005, the Rhode Island Public Utilities Commission unanimously adopted, on an interim basis, Verizon's tariff revision that implements the *TRRO's* no-new UNE-Ps directive, and rejected the CLPs' requests that that Commission ignore the FCC's clear mandate.[36] On March 9, 2005, the Texas PUC declined to require SBC to accept new UNE-P customer orders, although it did require SBC to provide new lines to the embedded customer base.[37] Similarly, the Ohio Public Utilities Commission found that "the FCC had very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching...would no longer apply to serve new customers, " and declined to require SBC to continue to add new UNE-P customers.[38]

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[35] *See* Order Granting In Part and Denying In Part Formal Complaint and Motion for an Expedited Order, Docket No. 04-SWBT-73-GIT (March 10, 2005) (Exhibit 4).

[36] Open Hearing, *Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005,* Docket 3662, (March 8, 2005) (http://www.ripuc.org/eventsactions/docket/3662page.html). (*See* Exhibit 5).

[37] *See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement,* Docket No. 28821, Proposed Order on Clarification (Texas PUC March 9, 2005), at 1-2. (*See* Exhibit 6).

[38] *See In re Emergency Petition for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders,* Case No. 05-298-TP-UNC, Entry (Ohio PUC March 9, 2005), at 5-6. The Ohio PUC did, however, require SBC to continue to provision new lines for the "embedded customer base" for an interim period. *Id. (See* Exhibit 7).

The state commissions of Maryland and Massachusetts have refused CLECs' attempts to convert implementation of the *TRRO* into as an emergency requiring commission intervention. While the Maryland PSC would allow petitioner CLPs to, in the normal course of things, file "*individualized* petitions based upon their *particular* interconnection agreements and *specific* provisions of the *TRRO,*" it reminded the parties that "the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules."[39] That is, whatever the CLECs' particular grievance, the FCC's ban on new UNE-P orders by CLECs would take effect March 11, 2005. Similarly, in Massachusetts, the state commission declined to take emergency action to block implementation of the UNE-P ban on March 11, 2005, but would only consider the issues as part of ongoing arbitration proceedings. [40]

E. If BellSouth Is Ordered To Provide New UNEs After March 11, 2005, It Is Entitled To A Retroactive True-Up To An Appropriate Rate.

For all the reasons set forth in this pleading, BellSouth is not obligated to provide new UNE-P circuits (or other specified UNEs) after March 11, 2005. If, however, the Commission is inclined to grant MCI any relief (which it should not do), the Commission should explicitly direct that if MCI orders new UNE-P circuits on or after March 11, 2005, MCI must compensate BellSouth for those UNE-P orders at an appropriate rate retroactive to March 11, 2005.[41]

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[39] *See In re Emergency Petition from MCI for a Commission Order Directing Verizon to continue to Accept New Unbundled Network Element Platform Orders*, ML No. 96341, Letter (Md. PSC March 10, 2005). The PSC granted MCI's request to withdraw, and held CLECs petitions to intervene mooted. It allowed the parties to pursue their dispute in Case No. 9026 under a typical hearing schedule. (*See* Exhibit 8)

[40] *See Petition of Verizon New England for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 and the TRO,* Case No. 04-33, Briefing Questions to Additional Parties, (Ma. DTE March 10, 2005). (*See* Exhibit 9).

[41] If a CLEC places orders for new UNE-P circuits after March 11, 2005, the appropriate true-up rate should be the resale rate based on the tariff rates in effect for the analogous service. For a UNE-P with no features, the analogous retail service is a 1FR, for a UNE-P including features, the analogous retail service is Complete Choice. If a CLEC places orders for high capacity loops and transport in relief areas (pursuant to the FCC's

The retroactive payment is important not only as a legal matter but as a policy matter. The FCC was unequivocal in its holding that no CLEC is entitled to new UNE-P circuits after March 11, 2005 (nor is a CLEC entitled to new high capacity loops or transport in relief areas after March 11, 2005). Short of an order denying MCI's petition, the *only* way for the Commission to comply with the FCC's order is to require MCI to pay BellSouth the difference between the UNE-P rate and an appropriate rate back to March 11, 2005. Other states have adopted true-ups. For instance, as mentioned above, the Texas Commission adopted an interim agreement that does not require SBC to add new UNE-P customer orders and includes a true-up provision.[42] The Michigan Commission has decided to complete expedited proceedings in 45 days, during which new orders can apparently be issued subject to a true-up.[43] A true-up is the only way to equalize the risk between the parties – if ordered to provision new UNEs after March 11, BellSouth unquestionably is bearing the risk associated with the continuation of an unlawful unbundling regime. MCI should bear the risk of a true-up if its position is determined to be wrong.

A true-up is also necessary in the interests of fairness. The FCC has also been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes.[44] BellSouth

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threshold impairment tests and BellSouth's wire center list filed with the FCC on Feb. 18, 2005), the appropriate true-up will be to special access service or the resale rate for the analogous private line product.

[42] *See* Exhibit 6.

[43] *See* Exhibits 10 for orders from the Michigan Commission. *But,* the United States District Court, E.D. Mich. issued an Order on March 11, 2005 granting a preliminary injunction against SBC. (Exhibit 11).

[44] Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004; *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

has successfully negotiated, to date, 100 commercial agreements with CLECs for the purchase of a wholesale local voice platform service. If this Commission disregards the self-effectuating portion of the *TRRO,* the progress BellSouth has achieved in reaching commercial agreements could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration process is completed, which can take up to twelve months under the *TRRO*, they will have no reason to pay more than TELRIC by entering into a commercial agreement at this juncture. Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. Carriers that entered into commercial agreements will be forced to compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates, unless this Commission requires a true-up.

CONCLUSION

For the reasons set forth therein, the Commission, in accordance with the Final Rules, should not order BellSouth to provide new UNE circuits after March 11, 2005. If, however, the

Commission requires new UNEs after March 11, 2005, the Commission should order a retroactive true-up back to March 11, 2005.

Respectfully submitted this 15th day of March, 2005.

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EXHIBIT 1

BellSouth Interconnection Services
675 West Peachtree Street
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Carrier Notification
SN91085061

Date: March 7, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Interconnection/Contractual and Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

On February 11, 2005, BellSouth released Carrier Notification letter **SN91085039**, in which BellSouth set forth its understanding of the TRRO, particularly as it affected BellSouth's obligations to provide a number of former Unbundled Network Elements ("UNEs") after March 11, 2005. Specifically, BellSouth acknowledged that there would be a transition period for the embedded base of these former UNEs, but concluded that the FCC had intended to stop all "new adds" of these former UNEs effective March 11, 2005.

BellSouth posted this Carrier Notification letter on February 11, 2005, in order to provide the CLECs with as much lead time as possible in order to allow the CLECs to take whatever steps were necessary to adjust to the new situation created by the TRRO. Unfortunately, the step chosen by a number of CLECs in response to the clear language of the FCC dealing with "new adds" has been to ask various state commissions to order BellSouth to continue to accept such "new adds." Indeed, this approach has, to date, been successful in at least one jurisdiction, Georgia.

Furthermore, notwithstanding the fact that BellSouth's Carrier Notification SN91085039 was posted on February 11, 2005, various CLECs continue, as recently as March 3, 2005, to file requests with state commissions that have not addressed this question. These requests remain pending before state commissions and it is not clear, because of the delay in filing of these requests by the CLECs, that all state commissions will have a full and adequate opportunity to consider the important issue of whether the FCC actually meant what it said in its order when it indicated that there would be no "new adds." Indeed, at the present time there are at least two commissions in BellSouth's region that have scheduled consideration of the CLECs' requests at a date beyond March 11, 2005, the effective date of the TRRO, and the date that BellSouth had established to prevent unlawful "new adds."

Because of these events, BellSouth herewith revises the implementation date contained in Carrier Notification SN91085039 in the following respects. BellSouth will continue to receive, and will not reject, CLEC orders for "new adds" as they relate to the former UNEs as identified by the FCC for a short period of time. BellSouth will continue to accept CLEC orders for these "new adds" until the earlier of (1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. By doing this, BellSouth intends to allow those commissions who have not had the opportunity to fully and carefully consider the requests of the CLECs and the responses of BellSouth, to do so in a measured way, rather than via various "emergency" proceedings created by the dilatory tactics of a number of CLECs.

By extending the time during which BellSouth will accept these orders, BellSouth does not abandon its legal position that the clear words of the FCC mean exactly what they say. BellSouth will continue to pursue that position before the state commissions, and to the extent that a commission has ruled adversely to BellSouth's position, in the courts. Specifically, BellSouth will be asking the appropriate courts to stay any such adverse order we receive.

In addition, BellSouth hereby puts the CLECs on notice that it intends to pursue the various CLECs who place orders for "new adds" after March 10, 2005 to the greatest extent of the law, in an effort to recover the revenue that BellSouth loses as a result of the placement of these unlawful orders. Should any state commission be inclined to ignore the plain language of the FCC's TRRO, and to order BellSouth to continue accepting "new adds" until the issue is fully resolved, BellSouth will ask that commission to require CLECs to compensate BellSouth, in the event BellSouth ultimately prevails in its legal claim, for any former UNE added after March 10, 2005, in an amount equal to the difference in the rate paid by the CLEC and the appropriate rate BellSouth should have collected (either commercial or resale, depending on which service option the CLEC ultimately elects).

As noted in Carrier Notification SN91085039, CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-Platform (UNE-P), BellSouth is offering CLECs these options:

- Short Term (3-6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements. With regard to the former high capacity loops and transport UNEs, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service.

Finally, as stated in Carrier Notification letter **SN91085032** concerning the availability of a long term commercial agreement, through March 10, 2005, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's market rate for mass market platform services. Beginning March 11, 2005, BellSouth will offer a DS0 Agreement, but the existing transitional discounts will not be available.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT 2

Nos. 04-12, 04-15 and 04-18

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

AT&T CORP., ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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elements after similarly considering whether those rules would unduly discourage the development of facilities-based competition. *Verizon*, 535 U.S. at 501-523. Moreover, Congress commanded the FCC to promote broadband investment. Section 706 of the 1996 Act directs the Commission to "encourage the deployment * * * of advanced telecommunications capability to all Americans" by utilizing "regulating [sic] methods that remove barriers to infrastructure investment." 110 Stat. 153 (47 U.S.C. 157 note). The Commission determined in the *Triennial Order* that it could best foster broadband investment and facilities-based competition by relieving ILECs of certain unbundling obligations with respect to broadband facilities. That determination does not merit further review.

2. *Line Sharing and Preemption*

a. The court of appeals correctly upheld the FCC's decision to phase out line sharing requirements, under which ILECs had been required to provide access to the high-frequency portion of their copper loops to CLECs for the provision of broadband services. Pet. App. 45a-47a.

In attacking that aspect of the *Triennial Order*, the state commissions focus principally on the FCC's finding that broadband service provided over cable television systems ("cable modem service") is a competitive alternative to broadband services that are provided over ILEC networks. 04-18 Pet. 14-17; 04-12 Pet. 28; see Pet. App. 331a-332a. The state commissions contend that cable modem service is not widely available in every State. Even assuming that to be true, however, it is irrelevant here. The Commission made clear—and the court of appeals understood—that the competitive alternative provided by cable modem

service was not the "dispositive" factor in the agency's decision to end line sharing. *Id.* at 46a, 332a. Rather, the Commission determined that continuing the ILECs' line sharing obligations was unnecessary under Section 251(d)(2) because CLECs could economically provide broadband service by leasing the entire loop (not just the high-frequency portion) from an ILEC. Applying its impairment standard, which takes into account all potential revenues from a loop's various uses (including voice, data, video, and other services), the Commission concluded that the revenues from those services *collectively* "would offset the costs associated with purchasing the entire loop." *Id.* at 45a; see *id.* at 327a-328a. The state commissions do not seriously contest that fact-bound conclusion.

The Commission also found substantial evidence on the record before it that, even if ILECs did not have to share their loops with CLECs in line sharing arrangements, in light of the rules adopted in the *Triennial Order*, CLECs could lease entire unbundled loops and enter into "line-splitting" arrangements with other CLECs—under which one CLEC provides broadband service using the high-frequency capabilities of the loop, while another CLEC (rather than the ILEC, as in line sharing) uses the low-frequency portion of the loop to provide voice service. Pet. App. 45a, 328a-329a. In light of all those factors, the Commission reasonably decided to discontinue mandatory line sharing. The agency's conclusion about the significance of the record evidence raises no issue that would warrant review by this Court.

b. To address the legitimate business concerns of CLECs that have used line sharing arrangements to provide broadband service to their customers, and to protect those customers from service disruption or

drastic rate changes, the Commission adopted a three-year plan for phasing out the ILECs' line sharing obligations and phasing in associated price increases in annual increments. California contends that the Commission's formula for setting rates for transitional line sharing during this three-year period impermissibly preempts state ratemaking authority. 04-18 Pet. 20-23. Because it appears that no party raised that issue before the FCC, the issue cannot be raised on judicial review of the *Triennial Order*. See 47 U.S.C. 405; *Bartholdi Cable Co.* v. *FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997). This preemption issue, moreover, received so little attention in the briefs below that the court of appeals did not even address it. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."). In any event, the issue concerns a three-year transition period, of which one year already has run. It therefore lacks ongoing importance.

Finally, California's ratesetting-preemption claim lacks merit. The FCC has authority to adopt pricing methodologies for unbundled network elements, which the States then apply. *AT&T*, 525 U.S. at 377-385. Like the pricing rules at issue in *AT&T* and *Verizon*, the Commission's transitional pricing rules for line sharing do not set specific rates. Rather, they require that line sharing rates reflect certain percentages of the full loop rate that is set by the relevant State. Consistent with the statutory division of responsibilities between the FCC and the States, the FCC has established a methodology and the States will "implement that methodology, determining the concrete result in particular circumstances." *Id.* at 384. Furthermore, the States' past efforts to establish line sharing rates justified the FCC's decision to place limits on the

States' discretion to set transitional rates. As the court of appeals observed, most States had previously set line sharing rates "at approximately zero," which "distorted competitive incentives." Pet. App. 45a-46a. The Commission's transitional rate formula was reasonably designed to address that problem.

c. California contends that the FCC unlawfully preempted state authority to require line sharing when it is not required under FCC rules. 04-18 Pet. 23-28. The court of appeals correctly ruled that that contention is not ripe in the instant proceeding. Pet. App. 63a-64a. Contrary to California's suggestion, the *Triennial Order* does not include final FCC action preempting any state line sharing rule or other unbundling requirement. In paragraph 195 of the *Triennial Order*, the Commission invited parties to seek declaratory rulings from the FCC if they believe that a particular state unbundling obligation is inconsistent with the limits on state authority in 47 U.S.C. 251(d)(3) and the FCC's rules. Pet. App. 272a. The Commission predicted that if States require line sharing or unbundling of elements that the FCC has determined not to subject to mandatory unbundling under Section 251, such state requirements are "unlikely" to be found consistent with the 1996 Act. *Id.* at 63a, 272a. But the Commission did not preempt any state rules, and it is uncertain whether the FCC ever will issue a preemption order of this sort in response to a request for declaratory ruling. See *Alascom, Inc.* v. *FCC*, 727 F.2d 1212, 1218-1220 (D.C. Cir. 1984). There also is no urgency to review that issue before a concrete controversy involving a particular state ruling is presented. Under the circumstances, California's preemption claim is not ripe for review. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-812 (2003);

Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726, 732-737 (1998).

Even if California's preemption claim were ripe, California is wrong in arguing (04-18 Pet. 24-26) that the FCC's unbundling rules lack preemptive effect. This Court has long recognized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). Accordingly, "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

California incorrectly contends that Section 251(d)(3), which preserves some state authority, effectively nullifies the preemptive power of the FCC's unbundling regulations. Unless Congress expressly provides otherwise, a statutory "saving clause" such as Section 251(d)(3) does not diminish the preemptive force of federal regulations. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000). Section 251(d)(3) is essentially a "conflict-preemption" provision and is, therefore, limited in scope. It does not preserve all state network-access requirements, but only preserves those state regulations that are "consistent with the requirements" of Section 251 and do "not substantially prevent implementation" of those requirements. 47 U.S.C. 251(d)(3)(B) and (C). Because Congress authorized the Commission to set standards governing the determination of "what network elements should be made available," 47 U.S.C. 251(d)(2), state laws or rulings inconsistent with the FCC's unbundling regulations would be inconsistent with the congressionally authorized "implementation of the requirements of

[Section 251]," 47 U.S.C. 251(d)(3)(C), and hence preempted.

d. The National Association of Regulatory Utility Commissions and the Arizona Corporation Commission (collectively NARUC) make a similar preemption claim concerning the pricing of facilities or services for which the FCC has determined not to continue unbundling obligations under 47 U.S.C. 251(c)(3). 04-12 Pet. 29-30. The Bell companies must continue to provide some facilities or services under the separate requirements of 47 U.S.C. 271, the statute that governs the Bell companies' entry into the long-distance market. In the *Triennial Order*, the FCC ruled that the cost-based pricing standard prescribed by 47 U.S.C. 252(d)(1) does not apply to those facilities or services that must be made available only under Section 271, rather than under Section 251. The Commission stated that, in that situation, rates must comply with the "just and reasonable" pricing standard in Sections 201 and 202 of the Communications Act of 1934, 47 U.S.C. 201, 202. Pet. App. 758a-764a. The Commission also stated that determining a Bell company's compliance with that pricing standard for a particular facility or service requires "a fact-specific inquiry" that the agency will undertake, if necessary, "in an enforcement proceeding brought pursuant to section 271(d)(6)." *Id.* at 764a.

NARUC claims that the FCC's "pricing proposal" under Section 271 intrudes on the States' authority to set rates for network elements. 04-12 Pet. 29-30. That issue was not prominently raised in the briefs below, and the court of appeals did not address it. The issue is unripe for consideration by this Court for another reason as well. As petitioners acknowledge, 04-12 Pet. 29, the FCC has made only a pricing "proposal." The Commission has yet to apply its announced "just and

reasonable" approach to rates in any State. Unless and until the Commission conducts an enforcement proceeding under Section 271(d)(6) to review rates in a particular State, there is no final agency action for a court to review, nor any concrete injury to NARUC.

In addition, NARUC is wrong to suggest that the FCC's pricing proposal forecloses the States from setting rates for facilities or services that are provided solely to comply with Section 271. In the *Triennial Order*, the FCC expressed no opinion as to precisely what role the States would play in establishing rates under Section 271. Until the Commission expressly addresses that question, the matter is not suitable for judicial review.

In any event, NARUC's challenge to the FCC's pricing discussion rests on a flawed legal premise. NARUC suggests that Section 252 of the Act gives state commissions exclusive authority to set rates for network elements and equivalent facilities and services under all circumstances. 04-12 Pet. 29-30. That is incorrect. Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1). The statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3). The FCC reasonably concluded that it is authorized to review the rates for those facilities or services, because the statute elsewhere expressly empowers the FCC to enforce compliance with

the requirements of Section 271. See 47 U.S.C. 271(d)(6).[2]

3. *Narrowband Unbundling.* Finally, all of the petitioners seek review of the D.C. Circuit's vacatur of the agency rules requiring the unbundling of mass-market switching and dedicated transport. 04-15 Pet. 22-30; 04-12 Pet. 15-28; 04-18 Pet. 29. The court of appeals vacated those rules on the grounds that: (1) the FCC lacked authority for its delegation to the States of responsibility for deciding whether the FCC's unbundling standards would allow an ILEC to obtain relief for particular facilities in particular geographic areas; and (2) without that state-based exception process, the FCC's nationwide findings of impairment with respect to mass-market switching and dedicated transport were overly broad. Pet. App. 8a-27a.

The D.C. Circuit's analysis of the FCC's nationwide impairment findings is inconsistent in some respects with the applicable principles of deferential judicial review. As this Court has recognized, the 1996 Act is a complex statute replete with ambiguity, and Congress "is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T*, 525 U.S. at 397; see *Verizon*, 535 U.S. at 539 ("The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing

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[2] This case does not involve the question whether state commissions may arbitrate issues outside the scope of Section 251(c) when parties voluntarily include those issues within negotiations toward an interconnection agreement. See generally *Coserv Limited Liability Corp.* v. *Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

Nevertheless, the court of appeals did not purport to apply the statutory impairment standard conclusively to particular facts. The court instead stated that it was making "general observations" about its understanding of the impairment standard and required the Commission to conduct "a re-examination" of impairment issues on remand and "implement a lawful scheme." Pet. App. 21a, 22a, 27a. As noted, the FCC intends quickly to issue new network-unbundling rules that comply with the court of appeals' decision. In light of that intention, and for the other reasons stated above, the United States and the FCC have concluded that this aspect of the court of appeals' decision does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS	))))))	**CAUSE NO. 42749**

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

1. **Background**. On February 25, 2005, the following competitive local exchange carriers ("CLECs") and Respondents in this proceeding: Acme Communications, Inc., eGIX Network Services, Inc., Cinergy Communications Company, Midwest Telecom of America, Inc., MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc, Intermedia Communications, Inc., Trinsic Communications, Inc., and Talk America Inc. (collectively "Joint CLECs") filed a *Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana"), which is an incumbent local exchange carrier ("ILEC"), has stated that it intends to take action on or before March 11, 2005, to reject Joint CLECs' unbundled network element platform[1] ("UNE-P") orders. Such action, according to the Joint CLECs, will cause them irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreements with the Joint CLECs. The Joint CLECs request that the Commission, on or before March 7, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective interconnection agreements and (2) comply with the change of law provisions of the interconnection agreements in implementing the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO").[2]

[1] The unbundled network element platform consists of a complete set of unbundled network elements (local circuit switching, loops and shared transport) that a CLEC can obtain from an ILEC in order to provide an end-to-end circuit.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Based on Joint CLEC's allegation that an emergency situation exists, a Docket Entry was issued on March 1, 2005, that modified the times, as found in 170 IAC 1-1.1-12, for SBC Indiana to file a Response to the Motion and for Joint CLECs to file a Reply to a Response. A Response and a Reply were timely filed on March 2 and March 4, 2005, respectively.

The Motion is in response to a statement in recent SBC Indiana Accessible Letters to Joint CLECs that, beginning March 11, 2005, SBC Indiana will no longer accept UNE-P orders. According to SBC Indiana, its plan to no longer accept UNE-P orders beginning March 11, 2005, is in compliance with that part of the FCC's February 4, 2005 TRRO which states that, as of the effective date of the TRRO (March 11, 2005), CLECs are not permitted to add new UNE-P arrangements using unbundled access to local circuit switching. Joint CLECs argue that such action by SBC Indiana would be a unilateral action in violation of SBC Indiana's interconnection agreements with the Joint CLECs.

2. **Joint CLECs' Position**. Joint CLECs point to the provision in each interconnection agreement that requires SBC Indiana to provide UNE-P to the CLEC at specified rates. Joint CLECs further state that any modification to an interconnection agreement made necessary by a change in law requires adherence to each agreement's specified change of law process which typically includes notice, negotiation and, if necessary, dispute resolution. Therefore, according to the Joint CLECs, SBC Indiana is required to continue to provide UNE-P to the Joint CLECs until such time as each agreement's change of law process has been fulfilled with respect to the change of law directive in the TRRO.

Joint CLECs contend that adherence to change of law processes will be substantive undertakings with respect to the TRRO's ruling that ILECs are no longer required to provide unbundled switching, because SBC Indiana is under obligations independent of Sections 251/252 of the federal Telecommunications Act of 1996[3] ("Act") to provide UNE-P to the Joint CLECs. Joint CLECs posit that, notwithstanding the TRRO's finding that ILECs are no longer required to make UNE-P available to CLECs, State statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order*[4] require SBC Indiana to continue to make UNE-P available to the Joint CLECs. The Joint CLECs also argue that the TRRO itself requires carriers to implement the findings in the TRRO by implementing appropriate changes to their interconnection agreements.

Joint CLECs point not only to the terms of their interconnection agreements and language in the TRRO as requiring adherence to the requisite change of law provisions, but also to our January 21, 2005 Docket Entry in this Cause that, in denying certain Motions to Dismiss filed by certain CLEC Respondents, stated we would require factual

[3] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[4] *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).

evidence relevant to each interconnection agreement's change of law provisions in order to determine if Commission intervention was an appropriate remedy. Joint CLECs conclude that it is appropriate for the Commission to preserve the status quo as to all of the issues raised in the applicable Accessible Letters by requiring SBC Indiana to engage in the relevant change of law processes that are mandated by the parties' interconnection agreements, by the FCC in the TRRO, and in our January 21, 2005 Docket Entry in this Cause.

3. SBC Indiana's Position. SBC Indiana contends that the language of the TRRO is unambiguous and even repetitive in its express forbiddance of new UNE-P orders as of March 11, 2005. SBC Indiana claims, therefore, that the provisions of the Accessible Letters that are the subject of Joint CLECs' Motion are merely SBC Indiana's plan to implement, and are in full compliance with, the TRRO. SBC Indiana further argues that implementation of the FCC's clear prohibition against new UNE-P as of March 11, 2005, does not require negotiations between carriers that have entered into interconnection agreements.

SBC Indiana also contends that the Commission lacks jurisdiction to stay an action of the FCC; that only the FCC itself or a federal court of appeals has such jurisdiction. As a result, according to SBC Indiana, any dispute with the FCC's bar on continued access to UNE-P as of March 11, 2005, must come as a challenge to the FCC order itself and not SBC Indiana's planned implementation of it.

4. The TRRO. In a further attempt to adopt rules implementing the Act's requirement that the FCC determine those unbundled network elements to which CLECs "at a minimum" need access in order to compete, the FCC issued its Triennial Review Order[5] ("TRO") on August 21, 2003. Among other things, the TRO found that CLECs were competitively impaired without unbundled access to ILECs' circuit switching for the mass market. The FCC determined that this impairment was primarily due to delays and other problems associated with ILECs' hot cut[6] processes. Accordingly, all state commissions, including this Commission, were directed to either determine that there was no such impairment in a particular market or develop a "batch" hot cut process that would efficiently provision multiple CLEC orders for circuit switching. As a result, this Commission initiated three Causes to address the directives of the TRO, including one proceeding devoted to developing a batch hot cut process.

Major parts of the TRO were almost immediately challenged in the Federal District Court of Appeals for the D.C. Circuit, which eventually vacated major portions of the TRO. In the end, appeals to the U.S. Supreme Court to reverse the D.C. Circuit were unsuccessful. Among other findings, the D.C. Circuit vacated the rules that allowed states to conduct impairment analyses and the FCC's national finding of impairment for

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[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

[6] The physical process by which a customer is removed from the switch of one carrier and added to the switch of another carrier is referred to as a "hot cut."

mass market switching. The Court remanded those vacated parts of the TRO back to the FCC to make findings consistent with the Court's determinations. The result of that remand is the FCC's TRRO.

5. The TRRO's Reasoning for Eliminating UNE-P. In ruling to eliminate UNE-P, the FCC determined, based on the record developed during the TRO remand proceeding, that CLECs:

> . . . . not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order's* stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)'s "at a minimum" authority.[7]

The FCC elaborated on its concern that unbundling of mass market circuit switching has created a disincentive for CLECs to invest in facilities-based competition, by stating:

> Five years ago, the Commission [FCC] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. . . . The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches. . . . . Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their long-term business strategy. Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases. Some

[7] *TRRO*, ¶ 199.

> competitive LECs have openly admitted that they have no interest in deploying facilities. Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.[8]

6. Discussion and Findings. As noted above, the Joint CLECs have argued not only that the TRRO's change of law with respect to unbundling mass market circuit switching must be effectuated through the change of law provisions found in the parties' interconnection agreements, but also that Indiana statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order* independently require unbundling. In its Response to the Motion, SBC Indiana devotes a lengthy discussion to its refutation of each of these independent authority arguments. However, the Joint CLECs make clear in their Reply that they are not asking the Commission to resolve the issue of the applicability of these independent authorities. Instead, the Joint CLECs state that they raise these other authorities to demonstrate the sort of issues that must first be negotiated between SBC Indiana and the Joint CLECs and, if necessary, brought to dispute resolution.

The main issue we face in ruling on the Motion is whether the requirement of the FCC's TRRO prohibiting new UNE-P orders as of March 11, 2005, must be effectuated through the provisions of the parties' interconnection agreements regarding change of law, negotiation and dispute resolution, resulting in the possible and likely availability of new UNE-P orders after March 10, 2005, or if the FCC's intent is an unqualified elimination of new UNE-P orders as of March 11, 2005.

The FCC is clear in its decision to eliminate UNE-P: "Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."[9] This determination in the TRRO is then incorporated in the accompanying FCC rules: "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."[10]

The one qualification that the FCC makes with respect to this clear directive is to allow a one year transition period for existing UNE-P customers.

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and

[8] *Id.* at ¶¶ 218, 220.

[9] *Id.* at ¶ 199.

[10] 47 C.F.R. § 51.319(d)(2)(i).

> does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.[11]

Joint CLECs do not address the ramifications of the relief sought in their Motion vis-à-vis the stated transition directives of the TRRO. One reading of the TRRO is that the embedded base is a snapshot of those customers being served by UNE-P, and those customers for whom a request to be served by UNE-P has been made, as of March 10, 2005. If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined? We assume Joint CLECs would contend that new UNE-P customers added after March 10, 2005, would be added to the embedded base. If so, are these post-March 10th customers also subject to transitioning off of UNE-P by March 11, 2006? The Joint CLECs, however, might consider these questions premature in light of their primary assertion, as stated in the Motion: "Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates."[12]

We do not find Joint CLECs' position to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. For some purposes, pursuant to sections 251/252 of the Act, interconnection agreements exist so parties can implement the unbundling requirements of the Act. If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.

We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005. In its clear directive to eliminate future UNE-P, and eventually UNE-P that serves the embedded customer base, the FCC wants to ensure that existing UNE-P customers are not abruptly removed from the network. Therefore, the FCC creates a one-year transition period, the purpose of which is to allow CLECs to make alternative arrangements for these customers. We read the TRRO to say that as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers. In addition, as of March 11, 2006, all UNE-P customers in

[11] *TRRO*, ¶ 199.

[12] Motion, p. 10.

existence and all customer orders pending for such service as of March 10, 2005, must be transitioned off of UNE-P. Of course, ILECs and CLECs are free to negotiate the continued provisioning of UNE-P-like service.

As noted above, the TRRO creates the transition period by stating: "Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[13] The effective date of the TRRO is March 11, 2005. The FCC then goes on to state: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[14] We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and even though UNE-P can continue to exist during this one-year transition period with respect to an embedded customer base, CLECs are not permitted to add new UNE-P customers during the transition period. We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005.

Clearly, too, the TRRO requires ILECs and CLECs to negotiate their interconnection agreements consistent with the findings in the TRRO:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.[15]

However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to

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[13] *TRRO*, ¶ 199.

[14] *Id.*

[15] *Id.* at ¶ 233.

return to the transition timetable established in the TRRO. Had the FCC remained silent on the timing and pricing for the transition of the CLEC embedded customer base, it is more plausible that the parties would need to negotiate, and this Commission possibly arbitrate, the continued availability of UNE-P for new customers. Instead, the FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs. For these reasons, we find our conclusion herein to be consistent with our finding in the January 21, 2005 Entry in this Cause that we will look to the parties' interconnection agreements in reviewing change of law issues. The elaboration that this Entry provides is that we cannot ignore the requirements of the changed law itself. The TRRO sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the TRRO, we must look to the FCC's directives in the TRRO for the elimination of UNE-P for new customers.

In their Motion, Joint CLECs raised some practical concerns about the effects of their inability to obtain UNE-P after March 10, 2005. Therefore, we find it appropriate to use this Entry to provide guidance on some of the disagreements that may arise as a result of this Entry's ruling. Joint CLECs express the concern in their Motion that ". . . if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request."[16] We disagree. We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customers, and those customers for which UNE-P has been requested, as of March 10, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require the immediate imposition of rates higher than the transition pricing established in the TRRO.[17] We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled

[16] *Motion*, p. 9.

[17] 47 C.F.R. § 51.319(d)(2)(iii) provides the following pricing requirements for UNE-P during the transition period: "The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element."

to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning and the associated reasons for transition pricing cease.

It is our finding, therefore, that SBC Indiana, pursuant to the clear FCC directives in the TRRO, is not required to accept UNE-P orders for new customers after March 10, 2005. As to the Motion's request that we order SBC Indiana to comply with the change of law provisions of the interconnection agreements in implementing the TRRO, we do not make such an order, but nonetheless express our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. Accordingly, the Motion is denied.

IT IS SO ORDERED.

Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

3-9-05

Date

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COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS

CAUSE NO. 42749

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

On March 8, 2005, NuVox Communications of Indiana, Inc. ("NuVox"), a Respondent in this proceeding, filed its *Motion for Emergency Order to Enforce the Commission's January 21, 2005 Entry and Its Interconnection Agreement with SBC Indiana* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana") has stated that on or after March 11, 2005, it intends to not provision certain orders for DS1 and DS3 loops, DS1 and DS3 transport, and dark fiber. Such action, according to NuVox, will cause it irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreement with NuVox. NuVox requests that the Commission, on or before March 10, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the orders for dark fiber, DS1 loops and transport, and DS3 loops and transport, under the rates, terms and conditions of NuVox's Interconnection Agreement from and between all wire centers in SBC Indiana's operating territory, and (2) comply with the change of law provisions of NuVox's Interconnection Agreement with regard to the implementation of the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO")[1] before implementing the Accessible Letters issued by SBC Indiana. SBC Indiana filed a Response to the Motion on February 9, 2005. This Response has not yet been considered.

It appears that this emergency Motion could have been filed in a timelier manner since the Accessible Letters that are of concern to NuVox were issued by SBC Indiana on February 11, 2005. In any event, the Presiding Officers find that the Motion needs to be fully briefed and considered before ruling on the Motion. Therefore, NuVox's request for a ruling on the Motion within two days of when the Motion was filed is insufficient time for us to consider all of the information necessary to issue a ruling. And even

[1] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

though we issued a Docket Entry in this Cause on March 9, 2005, ruling on a similar emergency motion by other CLEC Respondents on the issue of the continued provisioning of UNE-P in light of the TRRO, we find it appropriate to allow time for the parties to fully present their positions.

Our initial review of the Motion, however, reveals an issue that we think should, at least on an interim basis, be addressed prior to March 11, 2005, in order to avoid the possibility of undue harm to NuVox. The Motion states that SBC has identified to the FCC certain specific wire centers in Indiana for or between which it will not provide DS1/DS3/dark fiber loops or transport. It is our reading of the Motion that NuVox is maintaining that some of these specified wire centers would qualify as impaired pursuant to the criteria established in parts V and VI the TRRO, thereby entitling NuVox to unbundled access to these elements at these wire centers. The TRRO, at ¶ 234, establishes a process whereby a CLEC in requesting unbundled access to dedicated transport and high-capacity loops must self-certify in its request that it is entitled to unbundled access pursuant to the criteria set forth in the TRRO. Upon receipt of such a request the ILEC is required to provision the element, though it can subsequently challenge its obligation to provide access through the dispute resolution process of its interconnection agreement. An ILEC, therefore, is not entitled to deny access to dedicated transport and high-capacity loops based on its determination that unbundled access is not required under TRRO.

Accordingly, as of March 11, 2005, SBC Indiana should not deny a request by NuVox for unbundled access to high-capacity loops or dedicated transport based on a SBC determination that access is not required at the relevant wire center(s). Both SBC Indiana and NuVox should follow the provisioning procedures set forth in ¶ 234 of the TRRO. This interim ruling on the Motion will be further addressed in a final ruling.

In order to provide a reasonable time in which to respond, any additional Response to the Motion should be filed on or before March 14, 2005. Any Reply to the Response should be filed on or before March 17, 2005.

IT IS SO ORDERED.

Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

3-10-05

Date

EXHIBIT 4

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

In the Matter of a General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, Also Know as the K2A.	))))	Docket No. 04-SWBT-763-GIT

ORDER GRANTING IN PART AND DENYING IN PART FORMAL COMPLAINT AND MOTION FOR AN EXPEDITED ORDER

The above captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records, and being duly advised in the premises, the Commission makes the following findings:

Background

1. On March 5, 2004, the Commission opened this docket to provide a proceeding to establish a successor agreement to the Kansas 271 Agreement (K2A). On November 18, 2004, the Commission issued an Order Denying Motion to Abate Arbitrations, Directing Arbitrations to Continue on Certain Issues, and Adopting Certain Terms on an Interim Basis. In this order, the Commission bifurcated the pending arbitrations, ordering the issues regarding UNEs, reciprocal compensation, and performance measurements to be decided in Phase II, and the remaining issues to be decided in Phase I. November 18, 2005 Order, 9-10. On January 4, 2005, the Commission granted SWBT's Petition for

Reconsideration and/or Clarification, and set forth deadlines for the Phase I arbitrator's award of February 16, 2005, and a final Commission order by May 16, 2005. With respect to Phase II, the Commission set the deadline for the arbitrator's award for April 29, 2005. The final Commission order on the Phase II arbitration is scheduled to be issued on June 30, 2005.

2. On March 3, 2005, Birch Telecom of Kansas, Inc., Cox Kansas Telcom, L.L.C., Ionex communications, Inc., NuVox Communications of Kansas, Inc., and Xspedius Communications, L.L.C. (collectively, CLEC Coalition) filed their Formal Complaint and Motion for an Expedited Order (Complaint). The CLEC Coalition in their Complaint sought an order preventing Southwestern Bell Telephone, L.P. (SWBT) from amending or breaching its existing interconnection agreements with the CLEC Coalition members. Complaint, 1. The CLEC Coalition alleged that SWBT intends to amend or breach these interconnection agreements on March 11, 2005. Complaint, 1. On March 8, 2005, Navigator Telecommunications, LLC (Navigator) filed its Application to Join in Complaint Filed by CLEC Coalition. On March 7, 2005, AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. (AT&T) filed its Response to the CLEC Coalition's Complaint. On March 8, 2005, Prairie Stream Communications was added to the CLEC Coalition.

3. On March 4, 2005, the Commission issued its Order Establishing Procedural Schedule, requiring a response from SWBT by March 8, 2005, at 12:00 p.m. and setting the matter for oral argument on March 10, 2005. On March 7, the Staff of the Commission (Staff) filed its Response to Formal Complaint and Motion for Expedited

Order. SWBT filed its Answer and Response to Motion for Expedited Review on March 8, 2005. On March 8, 2005, the Citizens' Utility Ratepayer Board (CURB) filed its Response to the CLEC Coalition's Formal Complaint and Motion for Expedited Order.

4. The Commission heard oral arguments on the Complaint on March 10, 2005.

FCC Background

5. The Federal Communications Commission issued its Order on Remand in CC Docket No. 01-338 (TRRO) following remand in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). In the TRRO, the FCC clarified its unbundling framework under which impairment is to be evaluated. TRRO, ¶ 5. Also, it promulgated new impairment standards for dedicated interoffice transport, high-capacity loops, and mass market local circuit switching. TRRO, ¶ 5. Within the context of the new standards for impairment, the FCC specified various terms of transition for the CLEC's embedded customer base. TRRO, ¶ 5.

Jurisdiction

6. The Commission has jurisdiction over this matter pursuant to 47 U.S.C. § 252(b).

Self-Effectuating Nature of FCC Order

7. The CLEC Coalition argues that changes in the legal landscape effected by the FCC's TRRO should be incorporated into the existing interconnection agreements through negotiation prior to affecting the legal relationship between the CLECs and SWBT. Complaint, 2. This can be done, it maintains, through the section 252 process, which refers to the present arbitrations discussed above. Complaint, 2-3. Therefore, the

CLEC Coalition seeks an order from the Commission declaring that the CLECs can continue to have access to SWBT's network pursuant to existing arrangements until the changes in the TRRO can be negotiated and implemented into new interconnection agreements.

8. SWBT disagrees with the CLEC Coalition's position, maintaining that the TRRO is self-effectuating and immediately bars CLECs from adding new customers based upon a UNE-P basis. Response, 9-10. SWBT explains that it makes no sense to hold otherwise. As the FCC has clearly espoused a desire to move away from UNE-P, it makes no sense to continue to permit CLECs to make these arrangements even on a temporary basis. Response, 10.

9. The Commission agrees with SWBT's position regarding the self-effectuating nature of the TRRO as to serving new customers. First, the CLECs are incorrect to maintain that there is an existing interconnection agreement. Rather, the Commission extended the terms relating to UNEs, intercarrier compensation, and performance measurements on an interim basis. November 18, 2004 Order, 10-11. There is no basis for this Commission to order the parties to maintain a status quo while negotiating a new interconnection agreement within the legal context set forth by the FCC in its TRRO. Rather, as to new customers, the FCC has issued its rules regarding impairment and SWBT and the CLECs must abide by those rules for the simple reason that no contrary agreement exists. While some terms of the interconnection agreement were extended by the Commission, that extension is no longer valid in light of the FCC's order. Second, the Commission agrees with SWBT that the FCC is clear in that as of March 11, 2005, the

mass market local circuit switching and certain high-capacity loops are no longer available to CLECs on an unbundled basis for new customers. TRRO, ¶ 227 ("This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order."). It does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist. Last, any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated.

Embedded Customer Base

10. The CLEC Coalition argues the "embedded customer base" referred to in the TRRO to which the transition period applies, refers to customers, not existing lines Complaint, 9. SWBT takes the opposite position, arguing that the embedded customer base to which the transition period applies does not permit the CLECs to add new elements. SWBT Response, 3.

11. The Commission agrees with the CLEC Coalition regarding the meaning of "embedded customer base." First, the Commission finds that based on the language of the regulation adopted by the FCC's TRRO that it is the intent of the FCC that the transition period apply to customers, not lines. In the final regulations, the FCC ordered that ILECs are not required to provide access to local circuit switching on an unbundled

basis. 47 C.F.R. § 51.319(d)(2)(ii). However as to the "embedded base of end-user customers," the ILEC must provide such access. 47 C.F.R. § 51.319(d)(2)(iii). Consistent with the CLEC Coalition's position, the Commission interprets this language as referring to customers, not lines.

12. Second, the Commission is concerned with matters raised by the counsel for the CLEC Coalition in oral argument suggesting certain technical difficulties associated with mixing services based on a UNE-P basis and services based on a resale or commercial agreement basis for the same customer. Accordingly, the Commission finds that it is the intent of the FCC in its TRRO to permit CLECs to consistently serve its customer base, which includes adding services, lines, and servicing customers at new locations.

13. Last, the Commission finds that SWBT has a clear remedy in monetary terms in the event this Commission's definition of embedded customer base is wrong. Any changes in the arrangements of the parties will be subject to a true up. Therefore, the CLECs may be forced to compensate SWBT for the use of its facilities not at the unbundled rate, but at some other rate based upon resale or a commercial agreement. On the other hand, there is no similar remedy of true down for the CLECs. If the CLECs pay the rate based on a commercial agreement or resale, this arrangement will be outside the jurisdiction of the Commission and not subject to a revision in the future. After balancing the interests of the parties, the extent of injury the parties might suffer, and the interests of the public, the Commission concludes the balance of interests weighs in favor

of the CLECs in interpreting the FCC's intent in using the term "embedded customer base."

CLEC Access to Data Supporting Wire Centers

14. Staff raises an additional point in its response not addressed by the CLEC Coalition. Staff Response, ¶ 8. Staff is concerned that the data supplied by SWBT needed by the CLECs for making decisions on whether to self-certify that they are entitled to orders for dedicated transport and high-capacity loops is not accessible. Staff Response, ¶ 8. SWBT points out that the data supporting its wire center determinations is on file with the FCC and can be viewed, subject to the terms of a protective order. At oral argument, SWBT assured the Commission that, subject to the FCC protective order, the information is now or will be shortly made available in Kansas. If after review, CLECs self-certify in areas SWBT has determined to be ineligible, SWBT must follow the procedures outlined in ¶ 234 by processing the order and contesting the certification at the Commission.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission grants in part and denies in part the Complaint. The FCC's TRRO is to govern the relationship between SWBT and the CLECs as to new customers. As to the embedded customer base of the CLEC, as that phrase is defined and interpreted above, SWBT and the CLECs are ordered to continue working under the terms of Phase I of the arbitration, in addition to those terms extended by the Commission's November 18, 2004 and January 4, 2005 Orders. The final deadline for an arbitrator's award is scheduled for April 29, 2005, at which time it will replace this order and become the

interim order of the Commission until the Commission finally approves the contracts filed pursuant to the Commission's order on the arbitration

B. This Order is to be served by facsimile transmission to the attorneys for SWBT and the CLEC Coalition. Other parties are to be served by mail

C. A party may file a petition for reconsideration of this Order within fifteen (15) days from the date of service of this Order. K.S.A. 66-118b; K.S.A. 2004 Supp. 77-529(a)(1).

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Comm.; Moffet, Comm.

Dated: MAR 10 2005

ORDER MAILED

MAR 11 2005

Susan K. Duffy, Executive Director

Susan K. Duffy
Executive Director

sre

EXHIBIT 5

Docket 3662 - Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005

- Verizon RI proposed tariff filing for effect March 11, 2005 (filed 2/18/05)
- Conversent Communications of RI - comments and objection to Verizon's filing (3/3/05)
- CLECs CTC Communications and Lightship Telecom (collectively "Swidler CLECs") objection (3/4/05)
- CLECs ARC Networks, Covad Communications, Broadview Networks and Broadview NP Acquisition Corp. (collectively "Adler CLECs") comments to Verizon's filing (3/7/05)
- Verizon RI Reply to Comments of CLECs Regarding Proposed Tariff Revision (3/7/05)
- Verizon RI Reply to Comments of the Joint Commentors Regarding Proposed Tariff (3/7/05)
- Division of Public Utilities Summary of Comparison of Parties' (Verizon, Conversent & Division) Positions (3/7/05)
- At open meeting held 3/8/05, the Commisison dopted Verizon's proposed tariff filing on an interim basis, pursuant to RIGL 39-3-12. The tariff would be subject to further investigation to determine if the wording of the proposed tariff needs to be revised and if necessary, the CLECs would be entitled to any refund or compensation for any inappropriate rate or action by Verizon during this interim period.

RI Public Utilities Commission, 89 Jefferson Boulevard, Warwick, RI 02888
Voice: 401-941-4500 • Email: mary.kent@ripuc.org

EXHIBIT 6

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

PROPOSED ORDER ON CLARIFICATION

This Order clarifies Order No. 39[1] regarding the Interim Agreement Amendment applicable to the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs).

The Commission clarifies its intent that, as used in sections 1.3.1 and 1.3.2 of the Interim Agreement Amendment,[2] "embedded base" or "embedded customer-base" refers to existing customers rather than existing lines. The *Triennial Review Remand Order* (*TRRO*)[3] preserved mass market local circuit switching during the transition period for the embedded customer base of UNE-P customers, requiring that "incumbent LECs must continue providing access to mass market local circuit switching . . . for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements."[4] The Commission notes that the conflicting interpretations of "embedded customer-base" will be an issue in Track II of this proceeding. However, until a final determination of this issue, SBC Texas shall have an obligation to provision new UNE-P lines to CLECs' embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations. Any price differential for which SBC Texas may seek true-up shall be addressed in Track II or a subsequent proceeding.

Further, the Commission notes that in view of the FCC's February 4, 2005, letter requesting ILECs to designate wire centers as Tier 1 and Tier 2, Sections 1.5 and 1.5.1 of the Interim Agreement Amendment may require clarification.[5] Accordingly, the Commission

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[1] Order No. 39, Issuing Interim Agreement Amendment (Feb. 25, 2005).

[2] Order No. 39, Issuing Interim Agreement Amendment at 7 (Feb. 25, 2005).

[3] *Unbundled Access to Network Elements* and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 (Feb. 4, 2005) (*Triennial Review Remand Order*).

[4] *Triennial Review Remand Order* at para. 216.

[5] Order No. 39, Issuing Interim Agreement Amendment at 8 (Feb. 25, 2005).

clarifies that, unless the FCC approves the list of wire centers designated by SBC Texas in its February 18, 2005 filing, paragraph 234 of the *TRRO* allows CLECs to self-certify their eligibility for dedicated transport and high-capacity loops and requires ILECs to provision the UNE before submitting any dispute regarding eligibility for the UNE. However, if the FCC approves the wire centers identified by SBC Texas, the PUC clarifies its intent that the FCC's determination shall be dispositive of the disputes regarding eligibility for the UNEs.

SBC Texas shall provide a copy of this Order to those CLECs to which SBC Texas sent the February 11, 2005 Accessible Letters regarding the circumstances in which it intends to deny access to those UNEs addressed in this Order.

SIGNED AT AUSTIN, TEXAS the _____ day of _____ 2005.

PUBLIC UTILITY COMMISSION OF TEXAS

_____

JULIE PARSLEY, COMMISSIONER

_____

PAUL HUDSON, CHAIRMAN

_____

BARRY T. SMITHERMAN, COMMISSIONER

EXHIBIT 7

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Emergency Petition of LDMI Telecommunications, Inc., MCImetro Access Transmission Service, LLC, and CoreComm Newco, Inc. for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders.	)	Case No. 05-298-TP-UNC
In the Matter of the Petition of XO Communications Services, Inc., for an Emergency Order Preserving the Status Quo and Prohibiting Discontinuance of Certain Unbundled Network Element Services.	)	Case No. 05-299-TP-UNC

ENTRY

The Commission finds:

(1) On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand (TRRO) in CC Docket No. 01-338 in response to certain issues that had been vacated and remanded in part back to the FCC by the D.C. Circuit Court in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). Among other things, the FCC in the TRRO put into place new rules applicable to incumbent local exchange carriers' (ILECs') unbundling obligations with regard to mass market local circuit switching, high-capacity loops and dedicated interoffice transport.

Recognizing that it had removed significant unbundling obligations, the FCC directed that, for the embedded customer base, a transition period and transition pricing would apply during which the impacted competitive local exchange carriers (CLECs) would be able to continue purchasing the involved unbundled network elements. During the transition period, the ILECs and the CLECs were directed to modify their interconnection agreements, including completing any change of law processes to perform the tasks necessary for an orderly

transition to alternative facilities or arrangements. The FCC determined the effective date of these new rules to be March 11, 2005.

(2) On February 11, 2005, SBC made available on its CLEC website five accessible letters through which the company outlined the manner in which each of the SBC ILECs would implement the provisions of the FCC's new rules adopted in the TRRO.

(3) On March 4, 2005, MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc. and CoreComm Newco, Inc. filed a petition (Case No. 05-298-TP-UNC) and a motion for emergency relief seeking a declaratory ruling prohibiting SBC Ohio from breaching its existing interconnection agreements and preserving the status quo with respect to unbundled network element orders. Similarly, on that same day, XO Communications Services, Inc. filed its own petition (Case No. 05-299-TP-UNC) seeking an emergency order preserving the status quo and prohibiting discontinuance of certain unbundled element (UNE) services.

The joint petitioners assert that, in order to avoid suffering irreparable damage to their businesses, the Commission must issue a directive no later than March 10, 2005, requiring SBC Ohio to continue accepting and processing the joint petitioners' orders for the UNE-platform, including moves and adds, to the joint petitioners' existing embedded customer base, as well as orders for DS1 and DS3 loops or transport, and dark fiber pursuant to the rates, terms and conditions of their respective interconnection agreements. The joint petitioners further request that SBC Ohio be directed to comply with the change of law provisions of the respective interconnection agreements regarding implementation of the TRRO. As a final matter, the joint petitioners request that the negotiation process contemplated as part of the change of law provisions in the interconnection agreements include the provisions of the TRRO and of the Triennial Review Order that are more favorable to the joint applicants.

(4) SBC Ohio filed responses opposing the joint petitioners' petitions for emergency relief and preserving the status quo on March 8, 2005.

(5) The Commission finds that the petitions filed by the joint applicants should be granted in part and denied in part. The FCC very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching, certain high-capacity loops, and certain dedicated interoffice transport would no longer apply to serve new customers. Just as clearly, however, the FCC also envisioned that, for the embedded customer base, a transition period would apply during which the FCC expected the parties to negotiate and adopt modifications to their interconnection agreements. In addition, the FCC recognized that access to certain UNEs addressed in the TRRO would still be necessary in order to serve the CLECs' embedded base of end-user customers.

In paragraph 233 of the TRRO, the FCC stated that:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* (Emphasis added).

Paragraph 233 clearly indicates that the FCC did not contemplate that ILECs would unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the TRRO. Just as clearly, this Commission was afforded an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Moreover, the Commission was specifically

encouraged by the FCC to monitor implementation of the accessible letters issued by SBC to ensure that the parties do not engage in unnecessary delay.

The centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period to move the CLECs embedded customer base onto alternative facilities or arrangements. To date there have been few negotiations between SBC Ohio and the joint petitioners that would lead to interconnection agreement amendments that conform to the FCC's TRRO. Therefore, in order to afford the parties additional time to negotiate the applicable interconnection agreement amendments necessary to transition the CLECs embedded customer base as contemplated by the TRRO, SBC Ohio is directed to continue processing CLEC orders for the embedded base of unbundled local circuit switching used to serve mass market customers until no later than May 1, 2005. Accordingly, SBC Ohio is directed to not unilaterally impose those provisions of the accessible letters that involve the embedded customer base until the company has negotiated and executed the applicable interconnection agreements with the involved CLECs. During this negotiation window, all parties, both ILECs and CLECs, are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC-ordered rule changes. Staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

It is, therefore,

ORDERED, That the petitions filed on March 4, 2005, are granted in part and denied in part in accordance with finding 5. It is, further,

ORDERED, That a copy of this entry shall be served upon MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc., CoreComm Newco, Inc., XO Communications Services, Inc., SBC Ohio, their respective counsel and upon all other parties of interest in this matter.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JRJ/ct

Entered in the Journal

MAR 09 2005

Reneé J. Jenkins
Secretary

EXHIBIT 8

STATE OF MARYLAND

ROBERT L. EHRLICH, JR.
GOVERNOR

MICHAEL S. STEELE
LIEUTENANT GOVERNOR

COMMISSIONERS

KENNETH D. SCHISLER
CHAIRMAN

J. JOSEPH CURRAN, III
HAROLD D. WILLIAMS
ALLEN M. FREIFELD

PUBLIC SERVICE COMMISSION

ML# 96341

March 10, 2005

Carville B. Collins, Esquire
DLA Piper Rudnick Gary Cary US LLP
6225 Smith Avenue
Baltimore, Maryland 21209

Michael A. McRae, Esquire
MCI
2200 Loudoun County Parkway
Ashburn, Virginia 20147

David A. Hill, Esquire
Vice President & General Counsel
Verizon Maryland Inc.
One East Pratt Street, 8E/MS06
Baltimore, Maryland 21202

Re: Emergency Petition of MCI for a Commission Order Directing Verizon to Continue to accept New Unbundled Network Element Platform Orders

Dear Counsel:

On March 1, 2005, MCImetro Access Transmission Services, LLC ("MCI") petitioned the Public Service Commission ("Commission") for an order directing Verizon Maryland Inc. ("Verizon") to comply with the "change of law" provisions contained in the parties' interconnection agreement ("ICA"). Furthermore, MCI seeks a directive to Verizon that it continue to accept and process unbundled network element platform ("UNE-P") orders until such time as it has concluded the change of law process. On March 7, 2005, a Petition to Intervene and Comments in Support of MCI's Emergency Petition was filed on behalf of Allegiance Telecom of Maryland, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, SNiP LiNK LLC, and XO Maryland LLC (hereinafter referred to collectively as "Petition Supporters"). On March 8, 2005, Verizon filed its Opposition to the Emergency Petition of MCI. Subsequently, on March 10, 2005, MCI filed a letter withdrawing, without prejudice, its Emergency Petition stating that it had reached a commercial agreement with Verizon that resolved the issue raised in its Petition.

As a general matter, the Commission is pleased to see parties resolve their differences outside of formal adjudication. The Commission encourages the parties to continue to work together in the future to similarly address disputes that may arise. MCI's request to withdraw its Emergency Petition is hereby granted.

With respect to the Petition Supporters, the Commission notes that given MCI's withdrawal of its Petition, the issue of intervention becomes moot. As such, the Commission hereby denies the request of the Petition Supporters to intervene in the MCI/Verizon interconnection agreement dispute. To the extent the Petition Supporters believe that their specific interconnection agreements, or the *Triennial Review Remand Order*[1] itself, do not support any proposed action of Verizon the Petition Supporters may file individualized petitions based upon their particular interconnection agreements and specific provisions of the *Triennial Review Remand Order* for the Commission's consideration. For this purpose, the Commission will designate Case No. 9026 as the vehicle for parties to file such petition. Additionally, the Commission would remind MCI, Verizon and the Petition Supporters that the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules, including those specifying the procedures to be employed when orders for unbundled loops or transport are disputed. At this point in time, the Commission is not aware of any actual disputes regarding loop or transport orders. If any such disputes arise, Verizon and the ordering carrier are directed to abide by the FCC's direction in the *Triennial Review Remand Order* to fill the order and to then bring the dispute to the Commission, which will resolve the matter expeditiously. We note in this regard Paragraph 234 of the *Triennial Review Remand Order* which provides that "the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."

By Direction of the Commission,

O. Ray Bourland
Executive Secretary

cc: Andrea Pruitt Edmonds, Esquire, Counsel for Petition Supporters
Parties of Record, Case No. 9026

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

EXHIBIT 9

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

TO: D.T.E. 04-33 Service List (via first class mail and email)

FROM: Tina W. Chin, Arbitrator
Jesse S. Reyes, Arbitrator

DATE: March 10, 2005

RE: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order - D.T.E. 04-33

Briefing Questions to Additional Parties

CC: Mary Cottrell, Secretary

On March 1, 2005, the Department issued a set of briefing questions to Verizon Massachusetts ("Verizon") and to a list of CLECs, whose interconnection agreements Verizon claims to contain change of law provisions that are self-executing. That is, Verizon claims that, with respect to such interconnection agreements, it had the right to implement changes of law prior to the conclusion of this proceeding. On March 4, 2005, certain CLECs[1] jointly filed a Petition for Emergency Declaratory Relief seeking a declaratory ruling that Verizon may not unilaterally implement the terms of the Triennial Review Remand Order, which is effective on March 11, 2005, and that (1) Verizon must continue to accept orders for UNEs no longer required to be unbundled by the Triennial Review Remand Order under the rates, terms, and conditions of its existing interconnection agreements, and that (2) Verizon must comply with the change of law provisions of its interconnection agreements with regard to implementation of the Triennial Review Remand Order. Verizon filed its Opposition on

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[1] The petitioners include BridgeCom International, Inc., Broadview Networks, Inc., Broadview NP Acquisition Corp., A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corp., DSCI Corp., XO Massachusetts, Inc., and XO Communications, Inc.. The Department received comments in support of the petition from Covad Communications Company, RNK, Inc. d/b/a RNK Telecom, and PAETEC Communications, Inc.

March 9, 2005, arguing that the FCC established a 12-month transition period beginning on the effective date of the Triennial Review Remand Order, after which date "requesting carriers may not obtain" certain network elements as UNEs. Therefore, Verizon claims that it may implement the Triennial Review Remand Order on March 11, 2005.

Verizon's claim that it may implement the Triennial Review Remand Order on March 11, 2005, without first negotiating new interconnection agreement terms, potentially affects the rights of all parties to this proceeding, not simply those whose agreements Verizon claims to contain self-executing change of law provisions. Therefore, the Arbitrators issue the following briefing questions to Verizon and to each individual CLEC party that was not already named in Attachment A of the March 1, 2005 briefing questions, so that the Department may consider the issues raised by the CLECs in their Petition for Emergency Declaratory Relief and determine in the final order of this proceeding the applicable rights and remedies of all parties according to their interconnection agreements. Briefs on these questions shall be submitted along with the parties' briefs on the open arbitration issues. Initial briefs are due April 1, 2005. Reply briefs are due April 15, 2005.

1. Notwithstanding the carrier's substantive arguments in this proceeding regarding proposed rates, terms, or conditions for any specific service, for each carrier's individual interconnection agreement, please identify each and every term that is relevant to whether or not the interconnection agreement's change of law or dispute resolution provisions permit the parties to implement changes of "applicable law" without first executing an amendment to the interconnection agreement. In providing your response, please quote the relevant interconnection agreement provisions, citing them by section, and provide highlighted copies of the relevant language.

2. Indicate whether a change of law or dispute resolution provision has been triggered and state the date on which each condition precedent or party obligation (*e.g.*, notice requirements) was met, if applicable, with regard to the implementation of the Triennial Review Remand Order, or any other statutory, judicial, or regulatory change, state or federal, that you claim did modify the parties' rights under the interconnection agreement.

Responses to the foregoing questions should also be summarized in tabular form for each individual carrier. Responses for different carriers may be grouped together where the relevant operative provisions of the carriers' interconnection agreements have identical legal effect.

Finally, please add Jesse Reyes [jesse.reyes@state.ma.us] to your service lists for this proceeding. If you have any questions, please contact Tina Chin at (617) 305-3578 or Jesse Reyes at (617) 305-3735.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England , Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order.	)	D.T.E. 04-33

REVISED PROCEDURAL SCHEDULE
March 10, 2005

April 1, 2005	Initial Position Statements/Briefs on non-rate issues due.
April 15, 2005	Reply Position Statements/Briefs on non-rate issues due.
June 30, 2005	Final Order to be issued.

EXHIBIT 10

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by **SBC MICHIGAN** and **VERIZON**.	))))	Case No. U-14447

At the March 9, 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

ORDER

On February 28, 2005, the Commission commenced a collaborative process for implementation of "Accessible Letters" issued by SBC Michigan (SBC) and Verizon. The collaborative was instituted after a number of competitive local exchange carriers (CLECs), including Talk America Inc. (Talk), and XO Communications, Inc. (XO), filed objections to certain proposals and pronouncements made in five Accessible Letters dated February 10 and 11, 2005 by SBC, which is an incumbent local exchange carrier (ILEC) under the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*

Accessible Letter No. CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p. 1. Accessible Letter No. CLECALL05-017 and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC

will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a $1 surcharge for mass market ULS and UNE-P. Accessible Letter No. CLECALL05-019 and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005, SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.[1]

On March 7, 2005, Talk and XO filed a joint emergency motion requesting the Commission to address certain issues that have arisen during the initial phases of the collaborative that they allege demand immediate attention. According to Talk and XO, at the first collaborative meeting, SBC reiterated its intent to act unilaterally on March 11, 2005 pursuant to its Accessible Letters. Talk and XO insist that SBC's threatened and impending actions would violate the plain language of the Federal Communications Commission's (FCC) February 4, 2005 order regarding unbundling obligations of ILECs.[2] Talk and XO have identified the following issues due to their effect on the

[1]The Commission became aware that Verizon had issued at least two similar Accessible Letters. Because the arguments raised by the CLECs with regard to SBC's proposed actions applied with equal force to the actions proposed by Verizon, the Commission included Verizon in the collaborative process. However, the Commission notes that the motion filed by Talk and XO does not include any requested relief with regard to Verizon.

[2]*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. *(TRO Remand Order).*

CLECs and because these matters appear to be contrary to the direction of the FCC in the *TRO Remand Order*:

1. Citing Paragraph 234 of the *TRO Remand Order*, Talk and XO argue that SBC has threatened not to provision high-capacity loops and transport on and after March 11, 2005 even where a CLEC has undertaken a reasonably diligent inquiry and, based on that inquiry, self-certifies that, to the best of its knowledge, its request is consistent with the requirements of the *TRO Remand Order*. Instead, they maintain that SBC has threatened to reject any such orders that SBC believes does not satisfy the *TRO Remand Order*.

2. Talk and XO contend that SBC has threatened to cease providing access on and after March 11, 2005 to unbundled local switching to CLECs seeking to serve their embedded base of end-user customers as required by 47 CFR 51.319(d)(2)(iii) during the 12-month transition period. Instead, they maintain that SBC has stated that it will reject all move, add, and change orders[3] submitted by CLECs to serve their embedded base of end-user customers.

3. Citing footnote 398 in Paragraph 142 of the *TRO Remand Order*, Talk and XO insist that SBC intends to self-implement rule changes that favor SBC while at the same time refusing to implement rule changes from the FCC's 2003 Triennial Review Order (*TRO*)[4] that were unaffected by United States Circuit Court of Appeals' decision in *United States Telecom Assn v Federal Communications Comm*, 359 F3d 554 (DC Cir 2004) (*USTA II*) or the *TRO Remand Order*, despite the fact that the *TRO Remand Order* recognized that the *TRO* rule changes should be implemented to minimize the adverse impact of the *TRO Remand Order* on CLECs.

Additionally, citing Paragraphs 233, 143, 196, and 227 of the *TRO Remand Order*, Talk and XO argue that SBC intends to implement these and other changes without regard to the "change of law" provisions in their existing interconnection agreements with SBC. Talk and XO state that

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[3]A move order is submitted by a CLEC to an ILEC when an existing CLEC customer moves to a new address. An add order is submitted when an existing customer seeks to add an additional line to his service. A change order is submitted when an existing customer seeks to add or delete a feature, such as three-way calling.

[4]*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, 17145, para. 278 (2003).

they filed this motion to seek a Commission order requiring SBC, at minimum, to abide by the terms of the *TRO Remand Order*. Accordingly, Talk and XO request that the Commission grant their emergency motion and order SBC to continue provisioning additional UNE-P access lines to serve a CLEC's embedded base of end-user customers. Talk and XO also assert that the Commission must order SBC to provision moves and changes in UNE-P access lines in a manner that will allow a CLEC to serve the needs of its embedded base of end-user customers during the 12-month transition period of the *TRO Remand Order*.

Talk and XO insist that SBC must be ordered to continue to process requests for access to a dedicated transport or high capacity loop UNE upon receipt of a self-certification from the requesting provider, that to the best of its knowledge, the requesting provider believes to be consistent with the requirements of the *TRO Remand Order*. Talk and XO contend that the Commission should order that SBC may not refuse to process such requests based solely on SBC's belief the requesting provider's self-certification is defective or that the provider did not engage in a reasonably diligent inquiry. Talk and XO maintain that, before implementation of the *TRO Remand Order* rules, SBC should be directed to implement the *TRO* rules unaffected by *USTA II* or the *TRO Remand Order*, such as (1) routine network modifications to unbundled facilities, including loops and transport, at no additional cost or charge, where the requested transmission facilities have already been constructed [*See*, 47 CFR 51.319(a)(8), 51.319(e)(5)], (2) commingling an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a CLEC has obtained at wholesale [*See*, 47 CFR 51.309(e) and (f) and 51.318], and (3) the CLEC certification regarding the qualifying service eligibility criteria for each high-capacity enhanced extended loop/link (EEL)[5] circuits [*See*, 47 CFR 51.318(b)].

[5]A loop to a connection between two or more central offices.

At a session of the collaborative held on March 7, 2005, Orjiakor Isiogu, Director of the Commission's Telecommunications Division, who was designated by the Commission to oversee the collaborative, announced that responses to Talk's and XO's motion had to be filed no later than 5:00 p.m. on March 8, 2005, which is permitted pursuant to Rule 335(3) of the Commission's Rules of Practice and Procedure, R 460.17335(3), and that the Commission intended to act on Talk's and XO's motion on March 9, 2005.

Responses in support of the motion were filed by the Commission Staff, Attorney General Michael A. Cox, AT&T Communications of Michigan, Inc., and TCG Detroit, LDMI Telecommunications, Inc., TDS Metrocom, LLC, MCImetro Access Transmission Services LLC, McLeodUSA Telecommunications Services, Inc., and TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., CMC Telecom, Inc., Grid 4 Communications, Inc., Zenk Group, Ltd., d/b/a Planet Access, CTS Communications, Inc., and Global Connection Inc. of America. In the interests of time, the Commission simply notes the general agreement of these parties with the positions taken by Talk and XO.

SBC and Verizon filed responses in opposition to the motion.[6] SBC urges the Commission to reject the attempt to delay its lawful and appropriate implementation of the FCC's new rules. In so doing, SBC maintains that the Commission's previous determinations concerning adherence to change of law provisions in interconnection agreements and claims that ILECs are forcing contract terms on CLECs are not at issue in this proceeding. Rather, SBC insists that the motion asks for relief of an extraordinary nature that the Commission has no authority to grant. SBC complains that the motion is bereft of any reference to the Commission's authority to entertain the motion.

[6]Verizon's comments are consistent with the comments filed by SBC.

According to SBC, it would be wrong for the Commission to act in haste or without carefully examining its authority to do so.

Next, SBC calls upon the Commission to question whether the relief requested by Talk and XO should be granted in the absence of some showing by the CLECs that they will ever place an order with SBC that SBC will reject. According to SBC, Talk and XO simply failed to assert that they will be harmed. SBC explains that it has already disclosed a list of wire centers that meet the *TRO Remand Order* non-impairment thresholds for high capacity loop and dedicated transport facilities. *See*, Exhibit A to SBC's response. After citing a portion of Paragraph 234 of the *TRO Remand Order*, SBC asserts that:

> SBC Michigan does not believe it will be possible for any CLEC to make the required "reasonably diligent inquiry" and then to certify that it is entitled to high-capacity dedicated transport between two offices that are on the list SBC submitted to the FCC, or that it is entitled to a high-capacity loop in a wire center that is on the list SBC submitted to the FCC. That is especially so in view of the fact that the CLECs also have access, subject to protective order, to data SBC has filed with the FCC underlying the list SBC has submitted. Accordingly, consistent with the *TRRO*, SBC Michigan does not expect to receive or process after March 11, 2005, any CLEC orders for high capacity loops or dedicated transport involving wire centers that are on those lists.

SBC's response, p. 5. Moreover, SBC contends that the failure of Talk and XO to affirmatively allege that they will suffer harm by SBC's implementation of its determinations is reason enough to reject their motion.

With regard to new UNE-P arrangements, SBC stresses that the FCC has instituted a nationwide bar on UNE-P. Citing myriad paragraphs of the *TRO Remand Order*, including Paragraphs 5, 204, 210, 227, and 228, SBC insists that the FCC only required UNE-P to be made available during the transition period to the embedded base of lines, not the embedded base of customers, as alleged by Talk and XO. According to SBC, as of March 11, 2005, it has been relieved of the obligation to provision new UNE-P arrangements of any kind. SBC argues that the

FCC would not have intended the interpretation proffered by Talk and XO because it would perpetuate earlier illegal attempts to broadly define impairment. SBC also argues that an unscrupulous CLEC might even attempt to evade the FCC's ban on new UNE-P deployment by disconnecting existing lines and ordering new ones.

Finally, in response to the change of law argument raised by Talk and XO, SBC contends that the operative language in their interconnection agreements provides an ample basis for rejecting their positions. According to SBC, even apart from what the *TRO Remand Order* provides, the plain language of Talk's and XO's interconnection agreements invalidates any contractual obligation by SBC that is inconsistent with those new rules as of March 11, 2005.

The Commission finds that the relief requested by Talk and XO should be granted and that the Commission has the authority to do so. In so doing, the Commission rejects SBC's position that the Commission has no authority to address the merits of Talk's and XO's motion. In Paragraph 233 of the *TRO Remand Order*, the FCC stated that ILECs and CLECs must implement changes to their interconnection agreements consistent with the *TRO Remand Order*. The FCC also stated that the ILECs and CLECs are obligated to negotiate in good faith under Section 251(c)(1) of the FTA regarding any rates, terms, and conditions necessary to implement the rule changes. Indeed, the FCC explicitly observed that "[w]e encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." Paragraph 233 of the *TRO Remand Order*. As first noted in the February 28 order, the quoted portion of Paragraph 233 indicates that the FCC does not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order. It also indicates that the Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. In Paragraph

233, the FCC stated that Section 251(c)(1) applies to the efforts of the ILECs and CLECs to implement changes to their interconnection agreements. Section 251(c)(1) specifically requires that such negotiations are governed by Section 252 of the FTA. Additionally, notwithstanding whether the negotiations are voluntary under Section 252(a)(1) or subject to compulsory arbitration under Section 252(b)(1), Congress has required that the resulting interconnection agreement is subject to approval by this Commission. Moreover, the Commission notes that the Legislature specifically granted the Commission "the jurisdiction and authority to administer ... all federal telecommunications laws, rules, orders, and regulations that are delegated to the state." MCL 484.2201. Therefore, the Commission finds that there is no merit to SBC's claim that the Commission lacks jurisdiction to entertain Talk's and XO's motion.

The Commission also rejects SBC's procedural and policy complaints about Talk's and XO's motion. To begin with, contrary to SBC's argument, the motion does not involve "an affirmative injunction of apparent indefinite duration." SBC response, p. 2. In setting up the collaborative, the Commission directed that "the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days." February 28 order, p. 6. Beyond the time necessary for the completion of the work of the collaborative, it was the FCC that established the duration of the transition period for implementation of the *TRO Remand Order*. While SBC may be dissatisfied with the length of the transition period, that issue is not before the Commission. Rather, Talk's and XO's motion concerns the fact that SBC is threatening to violate the FCC's *TRO Remand Order* by denying access to essential UNEs that they allege the FCC required ILECs to provision for the duration of the transition period.

Likewise, the Commission does not conclude that its decision to take up this matter on an expedited basis is objectionable. The motion filed by Talk and XO raised a matter of extreme

urgency. The Commission's motion pleading rules, which are set forth at R 460.17335, specifically allow for the shortening of the time for the filing of responsive pleadings, which was communicated to participants at the March 7, 2005 collaborative meeting. The Commission finds that even a cursory examination of the volume and quality of the responses filed by the parties contradicts SBC's bare allegation that the notice was "absurdly short." SBC's response, p. 2.

Turning to the merits of the motion, the Commission is persuaded that SBC's position with regard to its ability to review and reject a CLEC's self-certification for the purposes of Paragraph 234 of the *TRO Remand Order* is inconsistent with the clear and unambiguous language used by the FCC. Paragraph 234 of the *TRO Remand Order* states:

> We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). **Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.**

Paragraph 234 of the *TRO Remand Order.* (Emphasis added, footnotes deleted).

The language used by the FCC does not indicate that an ILEC may unilaterally take any action to reject the effort of a CLEC to self-certify impairment for the purposes of the provisioning of access to dedicated transport and high-capacity loops. Rather, the FCC required ILECs to accept that such representations are facially valid and only subject to after-the-fact scrutiny. Accordingly,

SBC may not reject a CLEC's request to provision high capacity loops and transport without a review by this Commission.

Likewise, the Commission finds that Talk and XO have correctly interpreted the intent of the *TRO Remand Order* with regard to move, add, and change orders necessary ***to meet the needs of its embedded customer base*** during the transition period established by the FCC. Paragraph 199 of the *TRO Remand Order* is typical of the provisions made for the transition period by the FCC:

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.

Paragraph 199 of the *TRO Remand Order*, pp. 109-110. (Footnote deleted).

During the 12-month transition period an ILEC is required to provide unbundled local switching to a CLEC to allow the CLEC to serve its embedded base of end-user customers as shown by Rule 51.319(d)(2)(i) and (iii), which in relevant part, provides:

> (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.
>
> * * * * *
>
> (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers.

AL-18 sets forth SBC's position that on and after March 11, 2005, the *TRO Remand Order* allows SBC to decline to provide any "New" LSRs for "new lines being added to existing Mass

Market Unbundled Local Switching/UNE-P accounts" or any "Migration" or "Move" LSRs for Mass Market Unbundled Local Switching/UNE-P accounts. AL-18, p. 1. SBC insists that its interpretation is supported by Paragraphs 5 and 227 of the TRO Remand Order, which refer to UNE arrangements, not customers. SBC's position might be more persuasive had the FCC specified that on and after March 11, 2005, the embedded base that should benefit from the transition period was limited to existing lines and UNE arrangements. However, the FCC did not take such a limited approach in its rules. Rather, the FCC chose to require that an ILEC "shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve **its embedded base of end-user customers**." Rule 51.319(d)(2)(iii). (Emphasis added). The distinction between the embedded base of *lines* versus the embedded base of end-user *customers* is critical and recognizes that the needs during the transition period of an existing CLEC customer may well go beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied.[7]

Finally, the Commission is persuaded by the arguments of Talk and XO to the effect that it would be contradictory for SBC to assert the right to unilaterally implement the requirements of the *TRO Remand Order* while it refuses to implement provisions approved by both the *TRO* and *USTA II* that are favorable to the CLECs, such as clearer EEL criteria, the ability to obtain routine network modifications, and commingling rights. However, these issues are not sufficiently momentous to require emergency consideration. Rather, the Commission finds that such

[7]*See, TRO Remand Order*, p. 128, paragraph 226 and footnote 626, which indicate the FCC's concern that its transition plan be implemented in a way that avoids harmful disruption in the telecommunications markets.

arguments are more properly considered in Cases Nos. U-14303, U-14305, and U-14327, which are scheduled for oral argument before the Commission on March 17, 2005.

In its February 28, 2005 order, this Commission recognized that "the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order." February 28 order, p. 5. Further, the Commission stated that the change of law provisions contained in the parties' interconnection agreements "must be followed." February 28 order, p. 6. As a result, the Commission finds that SBC shall not unilaterally implement its interpretation of the *TRO Remand Order,* which the Commission has determined to be erroneous. Rather, SBC may only implement the *TRO Remand Order* changes through the change of law provisions contained in the parties' interconnection agreements in the manner described in the Commission's February 28 order in this proceeding.

In the February 28 order, the Commission indicated that SBC could bill the CLECs at the rate effective March 11, 2005. However, the Commission further provided that SBC could not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there would be no undue benefit to the CLECs or harm to SBC due to the delay associated with the collaborative process, the Commission also provided that there would be a true-up proceeding at the end of the collaborative process. The Commission wishes to emphasize that these provisions remain in effect.

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. The relief requested in the March 7 motion filed by Talk and XO should be granted in part and deferred in part, as more fully explained in this order.

THEREFORE, IT IS ORDERED that:

A. SBC Michigan shall provision high-capacity loops and transport on and after March 11, 2005 where a competitive local exchange carrier has self-certified that, to the best of its knowledge, the competitive local exchange carrier's request is consistent with the requirements of the Federal Communications Commission's February 4, 2005 *TRO Remand Order*.

B. SBC Michigan shall provision local service requests for mass market unbundled local switching, unbundled network element-platform, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops on or after March 11, 2005, consistent with the requirements of this order.

C. SBC Michigan shall comply with the requirements of both this order and the Commission's February 28, 2005 order in this proceeding.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 9, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 9, 2005.

Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996.	Case No. U-12320
In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon.	Case No. U-14447

At the February 28, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER COMMENCING A COLLABORATIVE PROCEEDING

On February 16, 2005, MCImetro Access Transmission Services LLC (MCImetro), which is a competitive local exchange carrier (CLEC) pursuant to the federal Telecommunications Act of 1996, 47 USC 251 et seq. (FTA), filed objections to certain proposals and pronouncements made in five "Accessible Letters" dated February 10 and 11, 2005 by SBC Michigan (SBC), which is an incumbent local exchange carrier (ILEC) under the FTA. Other CLECs quickly followed suit.

On February 18, 2005, LDMI Telecommunications, Inc. (LDMI), also filed objections to the five Accessible Letters.

On February 23, 2005, Talk America Inc., filed objections to one of the five Accessible Letters.

On February 23, 2005, TelNet Worldwide, Inc., Quick Communications, Inc. d/b/a Quick Connect USA, Superior Technologies, Inc. d/b/a/ Superior Spectrum, Inc., CMC Telecom, Inc., Grid4 Communications, Inc., and Zenk Group Ltd. d/b/a Planet Access filed comments in support of the objections raised by MCImetro and LDMI.

On February 23, 2005, XO Communications, Inc. (XO), filed objections to one of the five Accessible Letters.

On February 23, 2005, SBC filed its response to the objections filed by MCImetro and LDMI.

Accessible Letter No. CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p.1. Accessible Letter No. CLECALL05-017 (AL-17) and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a $1 surcharge for mass market ULS and UNE-P. Accessible Letter No. CLECALL05-019 (AL-19) and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005 SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be

charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.[1]

The CLECs maintain that SBC has no unilateral right to change its wholesale tariffs. According to them, the Commission established a procedure in Case No. U-12320 whereby SBC must provide the CLECs with a 30-day notice of its intent to change any of its tariff provisions. The CLECs also point out that the Commission allowed a CLEC to object to SBC's proposed actions within two weeks of SBC's notice. In short, the CLECs insist that SBC may not unilaterally revise the rates, terms, and conditions under which SBC provisions wholesale telephone services. The CLECs seek a Commission order (1) establishing a proceeding to address the changes proposed by SBC, (2) prohibiting SBC from withdrawing its wholesale tariff until completion of this proceeding, (3) compelling SBC to honor its tariffs and interconnection agreements as they presently exist, (4) barring SBC from enforcing or implementing the Accessibility Letters until issuance of a final order in this proceeding, (5) directing SBC to continue to accept and provision new, migration, or move LSRs for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) until further order of the Commission, (6) directing SBC to continue to accept and provision new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission, and directing SBC not to increase the rates it charges for UNE-P, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission.

[1]Although not contained in the record of the Case No. U-12320 docket, which is limited to consideration of issues related to Ameritech Michigan's compliance with the competitive checklist in Section 271 of the FTA, the Commission is also aware that Verizon has issued at least two similar Accessible Letters. The arguments raised by the CLECs with regard to SBC's proposed actions apply with equal force to the actions proposed by Verizon.

SBC responds by arguing that the modifications set forth in its Accessibility Letters are fully consistent with the Federal Communications Commission's (FCC) recent February 4, 2005 order regarding unbundling obligations of ILECs[2] and must therefore be honored by the CLECs and the Commission. According to SBC, the CLECs' objections are directly contrary to the recent rulings of the FCC. SBC states that the FCC has established a nationwide bar on unbundling as follows:

1. An ILEC 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. 47 C.F.R. § 51.319(d)(2)(i).

2. Requesting carriers may not obtain new local switching as an UNE. *Id.* § 51.319(d)(2)(iii).

3. ILECs have no obligation to provide CLECs with unbundled access to mass market local circuit switching. *TRO Remand Order* ¶ 5.

4. The FCC's transition plan does not permit CLECs to add new switching UNEs. *Id.*

5. The FCC did not impose a Section 251 unbundling requirement for mass market local circuit switching nationwide. *Id.* ¶ 199.

6. The FCC found that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling. *Id.* ¶ 204.

7. The FCC found that continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore determined not to unbundle that network element. *Id.* ¶ 210.

8. The FCC found that unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. *Id.* ¶ 218.

According to SBC, the FCC's unbundling bar applies with equal force to network elements, such as shared transport, which can only be provided in conjunction with switching. SBC also

[2]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. *(TRO Remand Order).*

asserts that the FCC reached a similar result with regard to signaling (¶ 544) and for certain databases used in routing calls (¶ 551). Therefore, SBC maintains that, given the FCC's bar on unbundled switching, it cannot be forced to provide unbundled access to any switch-related UNEs.

SBC next argues that the Commission should reject the CLECs' efforts to link their objections to Case No. U-12320 and Section 271 of the FTA. According to SBC, the Commission has no decision making authority under Section 271. Further, SBC maintains that Section 271 focuses on "just, reasonable, and non-discriminatory" pricing rather than on total element long run incremental cost (TELRIC) pricing, which it claims will be perpetuated by adoption of the CLECs' objections. Further, SBC insists that Section 271 provides no support for continuing its required provision of UNE combinations. Finally, SBC argues that the Commission and the CLECs are powerless to ignore the FCC's holdings or otherwise delay SBC's implementation of the FCC's pricing determinations.

The Commission finds that the objections filed by the CLECs have merit. In Paragraph No. 233 of the FCC's February 4 order, the FCC stated:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. *Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.* We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* Paragraph No. 233 (Emphasis added).

The emphasized portion of Paragraph No. 233 indicates that the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order. It also clearly indicates that

this Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Indeed, the Commission was specifically encouraged by the FCC to monitor implementation of the Accessible Letters issued by SBC and Verizon to ensure that parties do not engage in unnecessary delay. In addition, Paragraph No. 234 of the FCC's order indicates that SBC must immediately process a request for access to a dedicated transport or high capacity loop UNE and it can challenge the provision of such UNEs "through the dispute resolution procedures provided for in its interconnection agreements."

Given the urgency of the circumstances, the Commission finds that it should immediately commence a collaborative process for implementation of Accessible Letters issued by SBC Michigan and Verizon. In so doing, the Commission observes that the change of law provisions contained in the parties' interconnection agreements must be followed.

To avoid confusion, the Commission finds that a new proceeding that is devoted specifically to its monitoring and facilitating of the implementation of the Accessible Letters issued by SBC and Verizon should be commenced. Docket items 6, 7, 8, 9, 10, 11, 12, and 13 that currently appear in Case No. U-12320 should be placed into the docket file for Case No. U-14447. All additional pleadings related to implementation of Accessible Letters issued by SBC and Verizon should also be placed solely in the docket for Case No. U-14447.

The Commission intends that the collaborative proceeding should be limited in scope and duration. The Commission has selected the Director of its Telecommunications Division, Orjiakor Isiogu, to oversee all collaborative efforts. The Commission also directs that the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days.

During the time that the collaborative process is ongoing, the Commission directs that SBC and Verizon may bill the CLECs at the rate effective March 11, 2005, however, the ILECs may

not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there will be no undue benefit to the CLECs or harm to the ILECs due to the delay associated with the collaborative process, the Commission will also direct that there will be a true-up proceeding at the end of the collaborative process that will determine how rates and charges will be adjusted retroactively to March 11, 2005.[3]

The Commission has selected Case No. U-14447 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 the 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

[3]See, Paragraph 228 and footnote 630 of the FCC's February 4, 2005 order.

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. A collaborative process should be commenced in Case No. U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC and Verizon.

c. Pending completion of the collaborative process, SBC and Verizon may bill the CLECs a the rate effective March 11, 2005, however, SBC and Verizon may not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005.

d. Following completion of the collaborative process, a true-up proceeding should be conducted to adjust rates and charges retroactively to March 11, 2005.

THEREFORE, IT IS ORDERED that:

A. A collaborative process is commenced in Case No. U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC Michigan and Verizon.

B. Pending completion of the collaborative process and further order of the Commission, SBC Michigan and Verizon shall refraining from collecting any billed rate arising from implementation of any of the changes described in their Accessible Letters.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of February 28, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of February 28, 2005.

Its Executive Secretary

EXHIBIT 11

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MCIMETRO ACCESS TRANSMISSION SERVICES LLC, Plaintiff, v. MICHIGAN BELL TELEPHONE COMPANY, d/b/a SBC MICHIGAN, Defendant.	)	Civil Action No. 05-70885 Hon. Arthur J. Tarnow Magistrate Judge Pepe

ORDER GRANTING PRELIMINARY INJUNCTION

Before the Court is the Motion for a Temporary Restraining Order and Preliminary Injunction filed on March 8, 2005 by plaintiff MCImetro Access Transmission Services LLC's ("MCI"). MCI's Motion seeks a preliminary injunction against defendant Michigan Bell Telephone Company, d/b/a SBC Michigan ("SBC"). The Court, having reviewed MCI's Motion and supporting papers and SBC's response in opposition, and having heard argument from both MCI and SBC on MCI's Motion on March 11, 2005, hereby **ORDERS** as follows:

IT IS HEREBY ORDERED THAT MCI's motion is **GRANTED**, and :

(1) SBC, as well as its agents, successors, assigns, and all those acting in concert with them, are hereby **ENJOINED**, pending further Order of this Court, from rejecting orders placed by MCI to establish telephone service for new MCI customers in Michigan using the services set forth in Appendix XXIII (the "UNE" Appendix) including but not limited to "NEW UNE-P" as set forth in section 16.5 of the UNE Appendix, under the terms and conditions set forth in the parties' interconnection agreement;

(2) The Court will issue a written opinion setting forth specific findings regarding the preliminary injunction factors forthwith.

IT IS SO ORDERED THIS 11TH DAY OF MARCH, 2005, 11:55 p.m.

United States District Judge

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY: Cathe A. Pickles
DEPUTY CLERK