Matilda Sanders ORIGINAL

From: Barclay, Lynn [Lynn.Barclay@BellSouth.com]
Sent: Friday, April 01, 2005 11:56 AM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: 041269-TL and 050171-TP BellSouth Bayó Letter requesting Commission take official notice
Attachments: 041269; 050171.pdf

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

Docket No. 050171-TP: Emergency Petition of Ganoco Inc. d/b/a American Dial Tone, Inc.

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COM _____
CTR _____
ECR _____
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OPC _____
RMS _____
RCA _____
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by to each dkt
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C. BellSouth Telecommunications, Inc.
on behalf of Meredith Mays

D. 44 pages total

E. Letter to Blanca S. Bayó requesting Commission take official notice.

<<041269; 050171.pdf>>

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117

ORIGINAL

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April 1, 2005

Ms. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket Nos. 041269-TL; 050171-TP

Dear Ms. Bayó:

Enclosed are additional material that supports BellSouth Telecommunications, Inc.'s Response in Opposition to Emergency Petitions filed in the above-listed dockets; this letter serves as BellSouth's Motion for Official Recognition, pursuant to Florida Statutes, Section 120.569(2)(i).

- Exhibit A is a portion of the transcript from the Delaware Public Service Commission showing that Commission voted to deny a petition for emergency relief filed by a CLEC, which petition is analogous to the petitions filed in the above-listed dockets . A written order from Delaware is not yet available.[1]

- Exhibit B is a copy of an order issued by the Michigan Public Service Commission on March 29, 2005. The Michigan Commission had previously ordered ILECs to continue to provide certain services to CLECs; in the March 29, 2005 order, however, that Commission reversed course, finding that "CLECs no longer have a right under Section 251(c)(3) to order UNE-P and other UNEs ...."

- Exhibit C is a copy of an order from the Virginia State Corporation Commission, which denied petitions of various CLECs seeking to prevent Verizon from ending the offering of certain UNEs and combinations. That

[1] *But see* March 23, 2005 action taken by the Louisiana Public Service Commission, which voted on this issue in favor of the CLECs' positions. No written order from Louisiana is yet available.

Commission directed the CLECs to the FCC for any remedy.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith Mays (JD)
Meredith Mays

Enclosures

cc: Parties of Record
Nancy White

579573

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 1ST day of April, 2005 to the following:

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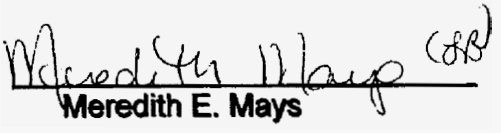

Meredith E. Mays

CERTIFICATE OF SERVICE
Docket No. 050171-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 1ST day of April, 2005 to the following:

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Meredith Mays
Meredith E. Mays

EXHIBIT A

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
VOLUME 1

IN RE: IN THE MATTER OF THE COMPLAINT OF A.R.C. NETWORKS, INC., D/B/A INFOHIGHWAY COMMUNICATIONS, AND XO COMMUNICATIONS, INC., AGAINST VERIZON DELAWARE INC., FOR EMERGENCY DECLARATORY RELIEF RELATED TO THE CONTINUED PROVISION OF CERTAIN UNBUNDLED NETWORK ELEMENTS AFTER THE EFFECTIVE DATE OF THE ORDER ON REMAND (FCC 04-290 2005) (FILED MARCH 7, 2005)	PSC DOCKET NO. 334-05

Public Service Commission Hearing taken pursuant to notice before Gloria M. D'Amore, Registered Professional Reporter, in the offices of the Public Service Commission, 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware, on Tuesday, March 22, 2005, beginning at approximately 1:29 p.m., there being present:

APPEARANCES:

On behalf of the Public Service Commission:
ARNETTA McRAE, CHAIR
JOSHUA M. TWILLEY, VICE-CHAIRMAN
DALLAS WINSLOW, COMMISSIONER
JAY LESTER, COMMISSIONER
JOANN CONAWAY, COMMISSIONER

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1400 French Street Wilmington, DE 19801
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APPEARANCES CONTINUED:

On behalf of the Public Service Commission Staff:
GARY A. MYERS, ESQUIRE

On behalf of the Public Service Commission Staff:
BRUCE H. BURCAT, EXECUTIVE DIRECTOR
CONNIE S. McDOWELL, CHIEF OF TECHNICAL SERVICES
KAREN J. NICKERSON, SECRETARY

On behalf of the Office of the Public Advocate:
JOHN CITROLO

On behalf of Verizon Delaware Inc.:
ANTHONY E. GAY, ESQUIRE
SHARI SMITH

On behalf of A.R.C. Networks, Inc.:
BARRY M. KLAYMAN, ESQUIRE
PAULA BULLOCK

CHAIR MCRAE: All right. Item 7. This is the complaint of A.R.C. Networks against Verizon.

Is A.R.C. here?

MR. MYERS: There is a representative from A.R.C. Networks. And Mr. Gay is here for Verizon.

MR. KLAYMAN: Good afternoon. My name is Barry Klayman. I am with the law firm of Wolf, Block, Schorr and Solis-Cohen. I'm here on behalf of InfoHighway Communications.

With me is Paula Bullock, who is the Director of Regulatory Affairs for the company.

InfoHighway Communications is a Competitive Local Exchange Carrier. It serves small businesses with telecommunication services in Delaware.

In order to provide those services, InfoHighway Communications needs to be able to provide end-to-end service, as you all know. And to do that, InfoHighway needs access to Unbundled Network Elements such as, essentially, local loops, local switching and interoffice transport facilities.

We have filed a petition seeking emergency declaratory relief from the Commission. In response to Verizon's stated intent to discontinue accepting and processing orders for Unbundled Network Elements, under the terms of its Interconnection Agreements with Competitive Local Exchange Carriers, such as InfoHighway Communications, beginning on March 11th. That's why we sought the emergency relief.

Essentially, we asked for two forms of relief from the Commission. One is a declaration or an order that requires Verizon to continue to accept these -- to accept and process orders for the Unbundled Network Elements pursuant to their Interconnection Agreements with various Competitive Local Exchange Carriers, including InfoHighway Communications. And to require Verizon to comply with a change of law provision that is contained in the Interconnection Agreements, when they go about implementing the FCC's Triennial Review Remand Order.

As I understand it, Verizon, pursuant to their interpretation of the FCC's Triennial Remand Order, they have advised Competitive Local Exchange Carriers that they will reject these orders after March 11th, and they seek unilaterally to impose an interim agreement on these carriers of charges that they have set by themselves without any negotiations with the local carriers and without any process being afforded to the Competitive Local Exchange Carriers.

We argue in the petition that we have filed that there are three reasons why Verizon cannot do what it has been asked -- it intends to do.

First, we have argued that the other provisions of the Telecommunications Act requires Verizon

to continue to provide these Unbundled Network Element services to Competitive Local Exchange Carriers. And we cite, specifically, to Section 271 of the Telecommunications Act, which imposes the former bell operating companies, we believe, an obligation to continue to provide the Unbundled Network Elements until such time that certain conditions are met, which have not yet been met.

Second we argue that pursuant to the terms of the Verizon GTE Merger Agreement, there is an independent obligation that Verizon assumed to provide these Unbundled Network Elements to Competitive Local Exchange Carriers pursuant to the terms of that agreement. And that the FCC Triennial Remand Order does not impact, in anyway, on that obligation and that still remains.

But, finally, we come to, I think what is probably the strongest argument, which is the Interconnection Agreement that Verizon has with my

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client. That has in it a rather standard change in applicable law provisions and provides, basically, that if there's going to be any material -- any material change to a provision of the agreement -- that the parties have to re-negotiate in good faith to amend the agreement in writing. And if they are unable to do that, the agreements provide that the parties may pursue remedies available to them, including but not limited to, instituting appropriate proceedings before this Commission, the FCC, or a court of competent jurisdiction.

Essentially, what it requires is that Verizon has to negotiate in good faith with InfoHighway about the provision of services going forward, as opposed to just announcing that they are going to terminate the provisions and unilaterally setting up an interim rate structure. And failing if those negotiations are not able to be concluded, there are remedies available to both parties, if they are unable to reach agreement and to reduce that agreement to writing.

We see nothing in the FCC's Triennial Review Remand Order that authorizes Verizon to merely disregard the Interconnection Agreement that they have with InfoHighway.

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We believe that they need to comply with the Interconnection Agreement. And as a result, they are required to negotiate with us. And absent an agreement, then, perhaps, come back to the Commission, again, to have the matter resolved.

Thank you.

CHAIR McRAE: Mr. Gay.

MR. GAY: Good afternoon. Madam Chair and Commissioners.

Once again, Anthony Gay for Verizon. Quite simply, what Mr. Klayman stated is not the case.

The issue before you is quite simple and quite straightforward, and, I believe, in a nutshell, Verizon is implementing terms of the FCC Triennial Review Remand Order.

Now, by way of background, the TRRO is the FCC's order that is a response to a D.C. Circuit Court of Appeals decision that, in essence, found that

the FCC had never had valid and lawful unbundling rules. And what I mean by that is, rules requiring certain elements of Verizon's network to be leased to Competitive Local Exchange Carriers like A.R.C..

That decision was attempted by carriers like A.R.C. to be appealed to the Supreme Court. The

Supreme Court denied review of the D.C.'s Circuit decision, and, therefore, it's the law of the land.

On February 4th, the FCC issued rules complying with the law of the land. And this is what they said in that February 4th decision.

As of March 11, 2005, CLECs are not permitted to add new UNE P arrangement using unbundled access to local service switching.

Now, what are a UNE P arrangement is a fancy word for, basically, allowing someone to use part of Verizon's network to provide service. That is one way you can do things. The FCC determined that there are other ways you can provide phone service. And, in essence, they felt that UNE P was such an addictive mechanism for CLECs to, instead of investing facilities to provide true competition, like Comcast provides competition now with Voice Over IP. Or like, Cavalier provides competition with UNE L loops. I'm kind of surprised that they're not a UNE P provider in Delaware.

The FCC said, Look, we find that there should be a nationwide bar on UNE P. That's what they said in February 4th order to comply with the D.C. Circuit's what's called institute remand.

That is what is at issue here. We are

implementing what the FCC said Verizon should do. It said, as of March 11th, no new UNE P arrangements. For existing customers, they need to be off the network -- Verizon's network by March 11, 2006, within 12 months.

What A.R.C. is asking you to do today, what they're trying to persuade you to do today is stay an FCC order.

First of all, I would submit the Commission should not and cannot do that. This is binding law. As I said, it has been up to the steps of the Supreme Court. The Supreme Court declined to overturn what was the D.C. Circuit's decision, which is the FCC is trying to implement now.

I would also say that the majority of commissions that have seen similar petitions by A.R.C. and other CLECs have denied it. It includes the New York commission, the New Jersey commission, the Maryland commission. Several other commissions.

And I just want to get into what are really the key points here.

First of all, as I said before, this is binding law.

Second of all, A.R.C. is trying to persuade you to stay binding law by saying we are

violating our Interconnection Agreements.

I will quote for you in a moment applicable language in our Interconnection Agreement, which says, in essence, notwithstanding anything else in these agreements, if we provide 30 days notice in the judicial or regulatory order that says we can stop

providing a frequent service. It also says, in some instances, specifically, UNE P services.

CHAIR McRAE: Are you speaking of Section 4.6 and 4.7, those two provisions?

MR. GAY: I am glad you raised that, Madam Chair.

A.R.C. raised what we believe is a red herring. We believe the agreement they are operating under is the Conectiv agreement. They have raised another breach in the Z-TEL agreement.

To answer your question, I think you're referring to the Z-TEL agreement?

CHAIR McRAE: Well, I guess my question ultimately was going to be what agreement. I'm not exactly clear. Are you talking about something other than Z-TEL, when you are referring to the contract language?

MR. GAY: Madam Chair, I would say it's

0011

irrelevant, because both agreements have language which allow us to terminate services. In this instance, the FCC said we do not have to provide upon 30 days written notice. But let's go with the Z-TEL agreements --

CHAIR McRAE: Well, both agreements have the same two provisions that you're referring to?

MR. GAY: And I would like to read one that particularly deals with what is at issue here today.

I'm referring to Section 4.7 of the Z-TEL agreement. I think A.R.C. referred to Section 4.6.

MR. MYERS: I got copies.

CHAIR McRAE: I think it would be helpful. What other agreement are we talking about, for my own benefit?

MR. GAY: Well, Madam Chair. There is the Conectiv agreement, also. Again, I believe this is a red herring. I think very quickly --

CHAIR McRAE: Well, so we are all on the same page, it would be helpful if we could agree as to which document, even though the language may be the same, and maybe I could look to InfoHighway. Because I do recall there was a bit of back and forth between the two companies about who said what, when it was received and acted upon and the like. And so, that seems to be still

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somewhat unclear.

So, which agreement are you referring to?

MR. KLAYMAN: We believe that the applicable agreement is the Z-TEL agreement. And that there was an adoption by InfoHighway of that agreement. There was an exchange of paperwork with Verizon.

And it is my understanding, I think that Verizon failed to file anything with the commission. But I don't think that that effects the contract, the terms of the contract that control as between InfoHighway and Verizon.

CHAIR McRAE: Well, I interrupted Mr. Gay. I'm sure he has a different characterization of what took place with that, from what I read in the documents. So, I mean, if you will continue. At least I know we're talking for purposes of the discussion of Z-TEL.

MR. GAY: Madam Chair, I do discourage

that recollection of the facts here.
Z-TEL did not elect to sign the adoption agreement, or, excuse me, A.R.C. did not elect to sign the adoption agreement for the Z-TEL agreement until after the agreement expired. In our papers we said, we

sent them an adoption agreement. In that adoption agreement, it said that this agreement expires on June 1, 2003. They sent in their adoption in July of 2004. So, more than a year later.
But if they want the Z-TEL agreement -- for purposes of this discussion, I don't want to get waylaid. The language is the same. As a matter of fact, the language in the Z-TEL agreement specifically says, Without limiting Verizon's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a UNE or a Combination, if the commission or FCC or court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNE's or Combination, Verizon may terminate its provision of such UNE's or Combination to Z-TEL for new customers. That is Section 1.5 of the Z-TEL agreement.
CHAIR McRAE: There is another provision that says, the parties shall negotiate if something occurs. I'm not sure how they interact with each other.
MR. GAY: Well, I would say the language is clear. It says, Without limiting Verizon's rights pursuant to Applicable Law, or any other section of this agreement. And then 4.7 says, Notwithstanding anything

in this Agreement to the contrary, if, as a result of any legislative, judicial decision or governmental decision, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise, provided to Z-TEL hereunder, Verizon may discontinue the provision of any such, Service, payment or benefit.
So, the language here, and, again, I think we need to start with, what is the law. And I think the FCC was clear, as of March 11, 2005, there will be no new UNE adds and all customers -- existing customers would be off of UNE's by March 11, 2006. That's where you have to start. That's mandatory law.
CHAIR McRAE: If we take that, I would just note, that's, at least the application of it is by no means clear because I'm looking at you named New Jersey, New York. There's Michigan, Illinois. Both sides of the table have kind of looked at what you are setting forth is absolute, almost black letter has, apparently, being addressed at the state level different ways.
MR. GAY: I would say, the overwhelming majority of the states, and I can read them for you, have denied these petitions and said they are going to follow governing law.

My knowledge is only four commissions have determined otherwise. That is Georgia, Illinois, Michigan.
CHAIR McRAE: What is the other one? California is on the other side. I think there were four in your filing identified.
MR. KLAYMAN: I believe the states that

have gone in our favor include, also, Alabama, Illinois, Georgia, Kansas, Kentucky, Michigan, Missouri and Ohio.
MR. GAY: No. Kansas has not gone --
MR. KLAYMAN: I stand corrected.
CHAIR McRAE: Let's just note, it is not as cut and dry as it appears on the surface that the states have been somewhat divided on these issues.
With that said, moving on.
MR. GAY: Madam Chair, as I said, I have three points.
First of all, the law that has been up to the steps of the Supreme Court is binding law. I would just say, as you know, and as other commissioners know, we are at the end of a long road that began in 2003 with the TRO. It went to D.C. Circuit.
The FCC, in August of 2004, came back and indicated we will follow the findings of the D.C.

0016

Circuit, that, in essence, the D.C. Circuit said after eight years, the FCC had failed to issue any laws of unbundling rules.
And in their August 2004 order, they indicated that they were going to follow the FCC rules, or D.C. Circuit's rules as they must.
In December of 2004, in its news release, you can't get much clearer than this, December 15, 2004, the FCC said, The incumbent LEC's have no obligation to provide competition LEC's unbundled access to mass market local switching. Again, pretty clear.
Then, on February 4, 2005, this past February they said that, as of March 11th, there should be no new UNE adds.
So, this is, governing law. I believe that the commission's own statute, Title 26 of the Delaware code, gives the Commission, basically, some clear instructions. I will just read Section 7034. The Commission is authorized in power to take -- and in power to take such action and enter such order that is permitted or required by State commissions under the Telecommunication Act of 1996.
The FCC is the body that is charged with interpreting that Act. With the guidance of the court,

0017

the D.C. Circuit has provided guidance.
So, this is binding law. We cited case law, Supreme Court case law that says, Contractual arrangements remain subject to subsequent legislation. That's Supreme Court case law. It's a pretty simple point. You can't contract around the law. You can't contract and do something that's unlawful.
I think we have been through the Interconnection Agreement. I don't want to belabor you. And, I think, at the structural level, again, you have to look to mandatory law. As I said, we are complying with the Interconnection Agreements. The Interconnection Agreements say, Without regard to anything else in these contracts, if we provide 30 days written notice of implementing a valid regulatory or judicial decision, we can, then, terminate provision of that service. These contracts say, Without regard to anything else. So, we are filing the Interconnection Agreement, that is applicable, whichever one A.R.C. picks because both ones have the same terms. We are following the terms of that

agreement.

Now, A.R.C. has come before you to say, there is some emergency here. I don't think that beers with facts.

As I mentioned before, this goes back, at least, to when the D.C. Circuit clearly said that the FCC had failed to implement any lawful unbundling rules.

To bring it back a little bit closer, in December of 2004, the FCC said that the ILEC's have no obligation to unbundle mass market switching, which is what is at issue here.

February 4th, they made clear in their review order, their order to be consistent with federal law, they were given guidance by the D.C. Court of Appeals that as of March 11th, it is the end of UNE P. Make other arrangements.

And in making the determination here that CLEC's need to move away from UNE P, they did so on two grounds. Number one, they found that it is a disincentive for investment of true competition. And also, they found that it's time. It's over. The use of UNE P is defunct. It is an unlawful business model.

So, there is no emergency here, other than A.R.C.'s creation of an emergency, but in determining that UNE P was over, the FCC found in the TRRO, that there are alternative arrangements to one means of providing telephone service, which is UNE P. The FCC determined that there is Voice Over IP. There is cable. There are other providers that can get service.

So, to make it seem that UNE P is the only option is just incorrect. And The FCC has already determined that ILEC's need to get off of that. They are saying, no new customers as of March 11th. And then they are saying, get everyone else off within a year.

So, to claim some armor that there are no alternative, the FCC has already decided this. These arguments have raised before the FCC numerous times and have been before you numerous times.

I will stop there for any questions you might have.

CHAIR McRAE: That's very good of you. Thank you. I understood you clearly to say, many times, how clearly the FCC said what it said. And yet, we have this extensive record of rehashing what the FCC said and the division around that. This is not to take away from the merits of the argument that you made. It's just, I think, pretty well established that clear is not altogether clear. At least from the record that has been established over several years we have been dealing with these TELCOM issues.

But I certainly heard the basis of your points here.

Mr. Klayman, you might want to respond before we open it to the Commissioners for questions.

MR. KLAYMAN: The only point I would make, the emergency comes from unilateral imposition of an internal agreement by Verizon under these circumstances.

Even the Triennial Review Remand Order required the Incumbent Local Exchange Carriers and the

Competitive Local Exchange Carriers to negotiate in good faith regarding any rates, terms and conditions that were necessary to implement the rule change. That is what we say that the Interconnection Agreements require, as well.

All we are asking is that the status quo be maintained while the parties negotiate in good faith regarding the implementation of these orders.

Thank you.

CHAIR McRAE: Commissioners.

COMMISSIONER LESTER: Well, as Mr. Gay said, sufficient notification that as of March 11th.

Correct?

MR. GAY: We provided it February 10th.

COMMISSIONER LESTER: Well, even before that, it was provided. You are not excluding the CLEC's from Interconnection Agreements.

0021

Correct?

MR. GAY: No. Interconnection Agreements --

COMMISSIONER LESTER: But they will be at the new terms?

MR. GAY: I think there are two things we need to keep in mind.

As of March 11th, there should be no new UNE P arrangements. That is in the FCC's order. It would be unlawful for us to come back with a contract saying, unless we can privately negotiate something, but not for UNE P. We might be able to negotiate alternative UNE P type arrangements. And what they are trying to do is ask you to override federal law by saying, Hey, we will keep providing to our A.R.C. UNE P after March 11th.

So, there has been plenty of notice. I would say, notice went back to March of last year when the D.C. Circuit said the FCC's unbundling rules were unlawful.

CHAIR McRAE: Other questions. I would continue to say, we're dealing with an interpretation of federal law. But some of the concerns that I have around here that makes me question the urgency of this order is the fact that this is not, frankly, a new matter. I do

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believe that notice was given that what was going to occur, with respect to the UNE P, the UNE Platform agreement. And an alternative was offered. I forgot the language that you used for this other arrangement that is a substitute.

MR. GAY: There are two alternatives. There's the wholesale advantage program and interim UNE service plan for CLEC's, also. There is an interim one and then there is a more long term one, wholesale advantage.

CHAIR McRAE: I do know that there exist, at least, two alternative plans that were identified. And I do agree that it is unequivocal that as of March 11, 2006, it is fully expected that everybody is going to be off of these UNE P arrangements. So, it becomes arguable what is the benefit of going into this process now, particularly when there are alternative arrangements present, as to why we should grant the emergency petition in this matter.

And I, frankly, have not found compelling basis for that. I'm just one Commissioner

here. I just have not identified anything that supports the position that you're foreclosed from alternative arrangements.

And my understanding is that the ultimate goal is to redirect parties to alternative arrangements as technology is moving, and there is alternative offering.

So, while I can't say I fully agree with Mr. Gay on the clarity of all of when this occurs, I have not seen a case to support why we should not proceed to move away from UNE at this juncture. And, actually, looking at the language of the agreement, although it does raise some issue in terms of two provisions together, I do believe it is also a good argument to be made that there is a notice provision that says with a change that they are permitted to do those things.

So, I really have not seen anything or heard anything that really runs counter to that at this point.

MR. KLAYMAN: Madam Chair, we did submit with our papers an affidavit from a representative of InfoHighway that was directed at the issue of harm to InfoHighway from the imposition of these changes. And we would rest on the papers that we submitted in that regard.

CHAIR McRAE: Yes. I did see that. It seemed to me, how many lines are we talking about here?

MR. KLAYMAN: We have 670 lines currently.

CHAIR McRAE: Currently. So this effects new. So, we're not talking about all of those lines. Some of that is already in place?

MR. KLAYMAN: Correct.

CHAIR McRAE: What are we talking about in terms of new?

MR. KLAYMAN: I can't tell you in terms of lines. Obviously, what Verizon is proposing is 40 percent increase in the rate, which we think will dramatically impact our ability to add any lines in Delaware.

CHAIR McRAE: Well, it is a very tough call. From what I see, I honestly cannot defend a continuation. I don't see immediately a basis for this commission to approve this petition for emergency relief.

VICE CHAIRMAN TWILLEY: Madam Chair. May I ask some questions.

CHAIR McRAE: By all means.

VICE CHAIRMAN TWILLEY: The end result of what Verizon is doing is to increase your cost by 40 percent.

Is that what you are saying?

MR. KLAYMAN: Correct.

VICE CHAIRMAN TWILLEY: So you can still get the Unbundled Network Elements. It is just going to cost you 40 percent move?

MR. KLAYMAN: Correct.

VICE CHAIRMAN TWILLEY: So you are not out of business?

MR. KLAYMAN: We're not out of business in that sense. But that's all the more reason why we

believe that Verizon should be required to negotiate those new rates with us to negotiate in good faith, rather than merely announce them and present them as a fait of accompli to the Competitive Local Exchange Carriers.

VICE CHAIRMAN TWILLEY: So, you knew a long time ago, that March 11th was a cut off time?

MR. KLAYMAN: I think we knew that. I don't know that we knew what the interim agreement would be that was going to be proposed by Verizon.

VICE CHAIRMAN TWILLEY: You mean, Verizon had not yet said what their new rates were going to be?

MR. KLAYMAN: Correct. It had not undertaken any negotiations with any of the Competitive

0026

Local Exchange Carriers to discuss what those new arrangements might be.

VICE CHAIRMAN TWILLEY: Well, how much advance notice did you have of the new rates?

MR. KLAYMAN: I'm not sure I know the answer to that. I'm sorry. I don't know the answer to that. Perhaps Mr. Gay does.

MR. GAY: Commissioner Twilley, I think they had a lot of advance notice of the wholesale advantage package. Since the original Triennial Review Order came out in 2003, we have been trying to negotiate that with CLECs.

Now, several have come to the table more recently when the FCC made its announcements. I won't disagree with the Chair and say that was clear, although I think the terms are quite simple. The wholesale advantage has been out there since the original TRO Order, which came out in 2003. And Verizon followed that pretty quickly.

CHAIR McRAE: There was some communication between the two of you. It didn't come out in that communication. I thought I saw reference -- was it February. I could be wrong.

MR. GAY: We sent industry notice

0027

letters back on February 10th.

CHAIR McRAE: That's February 10th is what came to my mind. I think that is responsive to Commissioner Twilley's question. Frankly, as I recall, from the record, at least that's what I read.

VICE CHAIRMAN TWILLEY: So, basically, they had, at least, a month's notice?

MR. GAY: Yes. To answer your question direct, at least a month's notice. We believe more.

VICE CHAIRMAN TWILLEY: Did you do anything during this month?

MR. KLAYMAN: I'm not sure I can answer that question. I'm sorry.

I'm sorry. I'm not able to answer that question. I don't know the answer to that question factually.

VICE CHAIRMAN TWILLEY: Thank you.

CHAIR McRAE: Other questions from Commissioners?

COMMISSIONER CONAWAY: No.

COMMISSIONER LESTER: Not at this point.

CHAIR McRAE: If there are not any

questions, someone suggest an action here.
VICE CHAIRMAN TWILLEY: Madam Chair, may

I make an observation. If I'm not correct, please anybody correct me.

But it seems to me that for the last couple of years, at least, we have been hearing loud and clear from Verizon, and, I guess, the other baby bells, too, that the rates they had to charge, in order to encourage competition, have been way below cost?

CHAIR McRAE: Yes.

VICE CHAIRMAN TWILLEY: And they are losing lots of money that way, and they want to terminate them. There has been no doubt about the loud and clear, shouting and screaming from Verizon that they are, basically, subsidizing competition because the rates are too low. So, that has been known all along. It's no secret.

CHAIR McRAE: It has been said all along. I will, certainly, acknowledge that it has been said all along. I have not seen the books.

VICE CHAIRMAN TWILLEY: Of course. And since Verizon was the only carrier that had these elements, there wasn't anybody else who could provide them.

Now, I gather, if I'm hearing it correctly, the FCC has said that there are alternative

ways for these companies to get the services they need. And the original decision to require Verizon to provide these things at what Verizon calls below cost is no longer correct. And so, it's terminated on March 11th. That's, basically, where it is, after you cut through all of the complicated crap -- that 25 pages of argument provided.

CHAIR McRAE: I generally would agree with you that that is what it says. It is abundantly clear with respect to March 11, 2006 being the absolute end point. And with the way technology is evolving and various alternatives currently available, yes, it is certainly the position that --

VICE CHAIRMAN TWILLEY: But there is a dilemma here.

CHAIR McRAE: There is a cost issue.

VICE CHAIRMAN TWILLEY: The dilemma that I see is that we don't believe the FCC. We don't believe that there are alternative ways to get the services at a price that can permit competition in the arena.

So, we would like to help, but the FCC, basically, has vetoed that, or the courts, I guess, or both.

CHAIR McRAE: Well, this whole

regulatory aspect, as Mr. Gay has alluded to, with respect to the background of this telecommunications, I don't think there has been ever been any really clear articulation. The FCC has said something. The District Court has responded. We have been back and forth.

What has been arguably clear has not been to the extent that states have evolved in very different ways of looking at this from a state interest standpoint. So, states want to ensure that you have as much competition as possible. So, I think the measures

by some states have lead to interpreting what the FCC and the court said in one way. And another set of states, I think we just heard a list on both sides. So, when you suggested it is cut and dry, clearly states have viewed this in two different perspective.

I have expressed mine that under this current set of facts, I really cannot justify granting the relief that's requested because I do believe that an alternative is available. And it is now an issue of cost, which the parties are going to have to work out, independent of our role in this Commission. That's my personal perspective. But, I think, depending on who you talking to, you might get different view around clarity when it comes to telecommunication. It is somewhat the

0031

state of affairs.

VICE CHAIRMAN TWILLEY: Madam Chair, but overriding all of this, and not really irrelevant, but overriding it all, is the fact that telecommunication in this country is changing so fast, that these issues that we are hassling with today are rapidly becoming irrelevant themselves. And Verizon is losing its business pretty fast. Not to these kind of competitors, but to Cell phones. Because even in our own area of knowledge, we have friends now who have disconnected from the landlines altogether and used Cell phones as a way to communicate. And that's causing Verizon to continue to lose business and it's going to lose business in the future as well. So, it's faced not only with that, but with this other --

CHAIR McRAE: This is the second time here.

(Cell phone ringing.)

VICE CHAIRMAN TWILLEY: There goes one out the door.

CHAIR McRAE: There is one hiding in the background who was responsible before.

VICE CHAIRMAN TWILLEY: I guess what I'm saying here is that, I no longer regard Verizon as the

0032

Ma Ma of it all. Verizon is rapidly shrinking.

CHAIR McRAE: I am sure they will be glad to hear you say that.

We have a matter before us. I, certainly, recognize the point you are making. In fact, in some arenas, the argument is not that we are just talking voice, we are talking communications and various modes. You got Voice Over IP. Any number of new technologies. Voice is not the dominant discussion point. And all of that is going to play out over time. And I do agree that we are transitioning away from what we traditionally know as phone service. Perhaps, for you, it's one leap for mankind. I'm still kind of marching along. But, yes, change is occurring. And I do believe we all have to recognize that point and part of the basis for my feeling here.

COMMISSIONER WINSLOW: I move that the A.R.C. Networks, Incorporated petition for emergency declaratory relief be denied.

VICE CHAIRMAN TWILLEY: I second it.

CHAIR McRAE: All in favor.

Yea.

COMMISSIONER LESTER: Yea.

COMMISSIONER CONAWAY: Yea.

COMMISSIONER WINSLOW: Yea.
VICE CHAIRMAN TWILLEY: Yea.
CHAIR McRAE: Opposed? Thank you.
MR. CITROLO: Madam Chair, I would like to point out something while Verizon is still here.
Last week I got a call from one of the governor's cabinet members about services from Verizon. And I just want to say that they addressed it and resolved it very quickly. I want to thank them for making me look like I know what I am doing.
(The Public Service Commission Hearing was concluded at, approximately, 2:10 p.m.)

C E R T I F I C A T E

STATE OF DELAWARE:
:
NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing Public Service Commission Hearing, was taken before me, pursuant to notice, at the time and place indicated; that the statements of said parties was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the Public Service Commission Hearing is a true record of the statements given by the parties; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 27th day of March A.D. 2005.

_____

GLORIA M. D'AMORE
REGISTERED PROFESSIONAL REPORTER
CERTIFICATION NO. 119-PS

EXHIBIT B

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

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

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

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

ORDER

On September 30, 2004, the Competitive Local Exchange Carriers Association of Michigan (CLEC Association), LDMI Telecommunications, Inc. (LDMI), MCImetro Access Transmission Services LLC (MCI), XO Michigan, Inc. (XO), AT&T Communications of Michigan, Inc. (AT&T), TCG Detroit, TDS Metrocom, LLC (TDS), Talk America Inc., TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Grid 4 Communications, Inc., CMC Telecom, Inc., C.L.Y.K. Inc., d/b/a Affinity Telecom, Inc., JAS Networks, Inc., Climax Telephone Company, and ACD Telecom, Inc. (ACD), (collectively, the CLEC coalition), petitioned the Commission to conduct an investigation pursuant to its authority under the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484.2101 *et seq.*, to investigate the effect, if any, in Michigan of the *vacatur* of the rules promulgated by the Federal Communications Commission (FCC) in its Triennial Review Order[1] and the effect of the FCC's August 20, 2004 interim order on remand.[2] To the extent that these developments are determined by the Commission to constitute a change of law, the CLEC coalition seeks a decision from the Commission on the appropriate procedures for modification of the terms in current tariffs and interconnection agreements. The CLEC coalition also requests the Commission to order SBC Michigan (SBC) and Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), to show cause why the Commission should not order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

Provision of UNEs

The CLECs argue that the Commission has the authority and the responsibility to require that the ILECs continue to provide UNEs pursuant to state law, which authority, they argue, is expressly preserved by the FTA. They argue that, pursuant to Section 355 of the MTA, MCL 484.2355, at a minimum, the ILECs must unbundle the loop and the port of all telecommunications services. The Commission's authority to require this unbundling, they argue, is preserved by §§251(d)(3), 252(e)(3), and 261(c) of the FTA. They quote the United States Court of Appeals for the Sixth Circuit (Sixth Circuit), as follows:

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

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

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

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

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

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

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

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

SBC and Verizon further argue that the Commission's authority under state law may be lawfully exercised only in a manner that is consistent with the federal Act and FCC rules and regulations. MCL 484.2201. In their view, the Commission may not require the ILECs to provide UNEs that the FCC has found are not required to alleviate impairment.

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

The Commission is not persuaded that it is preempted by either the federal Act or the FCC's orders from requiring the ILECs to provide UNEs under authority granted by the MTA and preserved in the FTA. The Commission's authority to impose requirements on telecommunications carriers in addition to, but consistent with, those prescribed by the FCC is preserved in the FTA sections cited by the CLECs. Moreover, that authority has been affirmed by the Sixth Circuit as argued by the CLECs. Thus, the Commission finds that it also possesses the authority necessary to appropriately direct the resolution of the method of industry transition as addressed in the following section. However, the Commission notes that Section 201(2) of the MTA, MCL 484.2201(2), requires Commission action to be consistent with the FTA and the FCC's rules and orders. Requiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan for transition in the *TRO* and *TRRO*.

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

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

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

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

Transition

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

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

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

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

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

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

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

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

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

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

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[6] *TRRO*, ¶ 233.

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

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

AT&T Supplemental Comments, pp. 7-8.

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

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

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

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

Hot Cuts

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

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

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

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

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

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

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

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

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

et seq.; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

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

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

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

THEREFORE, IT IS ORDERED that:

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

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

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

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

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Robert B. Nelson
Commissioner

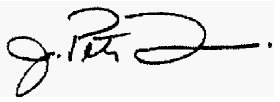
/s/ Laura Chappelle
Commissioner

By its action of March 29, 2005.

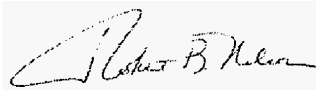
/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

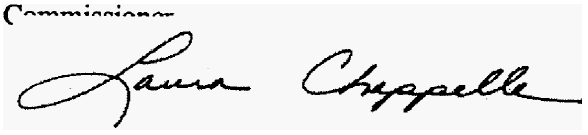
MICHIGAN PUBLIC SERVICE COMMISSION



Chairman

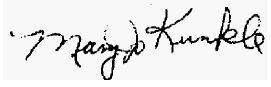


Commissioner



Commissioner

By its action of March 29, 2005.



Its Executive Secretary

EXHIBIT C

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 24, 2005

PETITION OF

A.R.C. NETWORKS INC. d/b/a
INFOHIGHWAY COMMUNICATIONS, INC.,
and XO COMMUNICATIONS, INC.

For a Declaratory Ruling Directing Verizon
to Continue to Provision Certain UNEs and
UNE Combinations

CASE NO. PUC-2005-00042

ORDER DISMISSING AND DENYING

On March 14, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, and XO Communications, Inc. (collectively, "Petitioners"), filed with the State Corporation Commission ("Commission") their "Petition for Emergency Declaratory Relief" ("Petition") seeking an action from this Commission to prevent Verizon Virginia Inc. ("Verizon") "from breaching its interconnection agreements . . . by prematurely ending the offering of certain unbundled network elements ("UNEs") and UNE combinations."

On March 15, 2005, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") filed a motion supporting the Petition and requesting permission to participate in the proceeding.

By this Order, the Commission dismisses the Petition and denies Covad's motion. Petitioners seek a declaratory ruling but do not cite any Commission rule under which the Petition ostensibly is filed or upon which the Commission may grant the requested relief, thus warranting dismissal of the Petition. Furthermore, although not cited by the Petitioners, we note that Covad's motion references 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure ("Rules"), which, at Subpart C, states that "Persons having no other adequate remedy

may petition the commission for a declaratory judgment." That rule also states that any such "petition shall meet the requirements of 5 VAC 5-20-100 B," and the requirements of 5 VAC 5-20-100 B state that the petition shall contain "a certificate showing service upon the defendant." The Petition, however, does not include a certificate showing service upon the defendant. Thus, even if we conclude that the Petitioners implicitly filed for a declaratory ruling under 5 VAC 5-20-100 C, the Petition did not comply with the Rules and accordingly is dismissed.

We find that this matter also should be dismissed if the Petition was properly filed in accordance with 5 VAC 5-20-100 C of the Commission's Rules. Specifically, the Petitioners do not establish that they have "no other adequate remedy," as required by 5 VAC 5-20-100 C. In addition, the Petitioners do not identify the specific contractual provisions that Verizon allegedly intends to breach, and, to the extent that this is a purely contractual dispute, it "may be more appropriately addressed by courts of general jurisdiction."[1] Furthermore, Petitioners assert that Verizon's obligations to continue the provision of certain services arise from the so-called Triennial Review Remand Order recently issued by the Federal Communications Commission ("FCC") in *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005). Thus, insofar as the matters raised by the Petition require construction of this FCC ruling, the parties may have an adequate – and more appropriate – remedy by seeking relief from that agency.

Finally, our dismissal of the Petition renders Covad's motion moot and, thus, it is hereby denied.

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[1] *See Petition of Cavalier Telephone, LLC v. Verizon Virginia Inc., For enforcement of interconnection agreement*, Case No. PUC-2002-00089, Final Order at 2 (Jan. 31, 2003).

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The Petition filed by A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation and XO Communications, Inc., is DISMISSED.

(2) The motion filed by DIECA Communications, Inc., d/b/a Covad Communications Company is DENIED.

(3) This matter is dismissed and the papers herein shall be transferred to the file for ended causes.

AN ATTESTED COPY HEREOF shall be sent by the Clerk of the Commission to: Andrea Pruitt Edmonds, Esquire, Kelley Drye & Warren LLP, 8000 Towers Crescent Drive, Suite 1200, Vienna, Virginia 22182; Eric M. Page, Esquire, LeClair Ryan, P.C., 4201 Dominion Boulevard, Suite 200, Glen Allen, Virginia 23060; Lydia R. Pulley, Esquire, Vice President, Secretary, and General Counsel, Verizon Virginia Inc., 600 East Main Street, Suite 1100, Richmond, Virginia 23219-2441; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Division of Communications.