STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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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.
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> * * * * *
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> (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