COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)	CASE NO. 2004-00427

PETITION OF CINERGY COMMUNICATIONS FOR DECLARATORY RULING REGARDING TREATMENT OF UNE ORDERS OF EMBEDDED BASE CUSTOMERS DURING TRANSITION PERIOD

Cinergy Communications Company ("Cinergy"), by counsel, hereby moves this Commission for a declaratory ruling regarding the treatment to be given unbundled network element ("UNE") orders submitted on behalf of Cinergy's embedded customer base during the transition period ordered by the Federal Communications Commission ("FCC"). *See In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (Feb. 4, 2005) (the "Triennial Review Remand Order," or "TRRO"). In support of its motion, Cinergy states as follows:

INTRODUCTION AND BACKGROUND

On April 22, 2005, the United States District Court issued a preliminary injunction prohibiting enforcement of certain Orders of this Commission that had required BellSouth Telecommunications, Inc. ("BellSouth") to negotiate with competing local exchange carriers

("CLECs") such as Cinergy new contractual provisions to replace interconnection terms no longer mandated by the FCC. The preliminary injunction clearly enables BellSouth to refuse to accept UNE orders for new customers submitted pursuant to 47 U.S.C. § 251 and immediately to demand much higher prices for equivalent means to serve new customers. The effect of the preliminary injunction on Section 251 UNE orders submitted by CLECs to serve their *existing* customers was, however, unclear.

Consequently, Cinergy filed with the Court a request for clarification of the intended effect of the Court's order upon UNE orders submitted on behalf of customers that are not new customers, but that are already a part of Cinergy's "embedded customer base." Although the TRRO indicates that Section 251 UNEs are to remain available to serve CLEC "embedded base" customers, portions of the Court's order were ambiguous on the point and were likely to be interpreted by BellSouth to mean that it is not required to process *any* new orders – even those submitted on behalf of customers who are in Cinergy's embedded customer base.

On June 3, 2005, the court entered its Order granting Cinergy's motion for clarification ["June 3 Order," Exhibit 1 hereto]. Specifically, the court found that its April 22 Order may have been unclear on the point and clarified that references to "new customers" and "new orders" in the order referred to "all those customers or orders not included in the transition plan as interpreted by" the TRRO [June 3 Order at 3-4]. The court concluded that, as the PSC Orders at issue did not include a decision as to whether the TRRO transition plan included new orders from existing customers, the court's April 22 order did not address the issue. The court declined to decide the question, noting that "this issue is pending before the PSC and is yet to be determined" [June 3 Order at 4].

Thus, the court has now indicated that its April 22 Order did not prevent the Commission from determining whether new orders for "embedded base" customers should be honored by BellSouth. Accordingly, Cinergy respectfully requests the Commission to address the issue and, based on the argument below, issue its ruling declaring that BellSouth must continue to accept Section 251 UNE orders submitted to serve Cinergy's embedded customer base until a new agreement is negotiated between the parties or until the FCC-mandated transition period expires, whichever occurs first.

ARGUMENT

THE TRRO DOES NOT PERMIT BELLSOUTH TO REFUSE SECTION 251 UNE ORDERS SUBMITTED FOR THE PURPOSE OF SERVING CUSTOMERS IN A CLEC'S "EMBEDDED CUSTOMER BASE."

The Court ruled, in its Order of April 22, that BellSouth may refuse orders from CLECs for unbundled switching previously available pursuant to 47 U.S.C. § 251 to serve ***new*** customers. The Court has now clarified that its April 22 order does not address whether BellSouth may refuse orders to serve *existing* CLEC customers who are in the "embedded customer base" for whom the FCC provided a one-year transition period. This Commission should interpret the FCC Order according to its plain language and intent, preserving Section 251 UNEs for existing CLEC customers and thereby avoiding the disruption for which the FCC provided the transition period in the first place.

Explicit in the FCC's explanation that its one-year transition period includes continued provisioning of UNE-P at TELRIC plus one dollar for embedded "customers" is the intention that **"*customers,*"** rather than **"*lines*,"** are to be given the benefit of the one-year transition period:

> 199…. 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***… 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.
>
> …
>
> 216. We also note that concerns about incumbent LECs' ability to convert the ***embedded base of UNE-P customers*** in a timely manner are rendered moot by the transition period we adopt in this order….within that twelve-month [transition] period, incumbent LECs must continue providing access to mass market unbundled local circuit switching at a rate of TELRIC plus one dollar for the competitive LEC to ***serve those customers*** until the incumbent LECs successfully convert ***those customers*** to the new arrangements.

TRRO at ¶¶ 199, 216 (emphasis added).

See also id. at ¶ 29 (noting that CLECs are on notice that they may not "add new *customers* at these [Section 251] rates").

Numerous utility commissions, while ending CLEC access to Section 251 UNEs for *new* customers, have nonetheless ordered incumbent carriers to continue providing mass-market local circuit switching and UNE-P combinations, including moves, adds, and changes, to serve CLECs' *existing* customers. Excerpts from utility commission orders follow:

> Finally, there is the question of how far the ban on "new adds" should extend as applied to the embedded customer base. The Commission believes the better view is that ILECs like BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process….[T]he Commission believes that the bright line that the FCC was drawing was between those *inside* the embedded customer base and those *outside* of it. After all, the TRRO focuses on the "embedded customer base," not on existing access lines. The Commission does not believe that it was the FCC's intent to impede or otherwise disrupt the ability of CLPs to adequately serve their existing base of customers in the near term…. [T]hese [business] customers would be

> baffled and impatient if they were to discover that adding a new line or even simply a new feature in the near term was impossible with their current provider. They may very well lose confidence in that provider. This is not good for competition which is the overarching purpose of the Telecommunications Act.

In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order, Docket No. P-55, Sub 1550, at 12 (North Carolina Utilities Commission April 25, 2005) [Exhibit 2 hereto].

> The CLEC Coalition argues the "embedded customer base" referred to in the TRRO to which the transition period applies refers to customers, not existing lines. … SWBT takes the opposite position, arguing that the embedded customer base to which the transition period applies does not permit the CLEC to add new elements…. The commission agrees with the CLEC Coalition regarding the meaning of "embedded customer base." … [B]ased on the language of the regulation adopted by the FCC's TRRO… it is the intent of the FCC that the transition period apply to customers, not lines.

In the Matter of a General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, Also Known as the K2A, Docket No. 04-SWBT-763-GIT, at 5 (Kansas State Corporation Commission, March 10, 2005) [Exhibit 3 hereto].

> ILECs must honor new orders to serve a CLEC's embedded customer base.

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 (and consolidated cases), at 9 (Mich. P.S.C. March 29, 2005) [Exhibit 4 hereto].

> …[U]ntil a final determination of this issue, SBC Texas shall have an obligation to provision new UNE-P lines to CLECs' embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations.

Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Docket No. 28821 (TX P.U.C. March 9, 2005) [Exhibit to BellSouth Motion for Preliminary Injunction; Exhibit 5 hereto].

> We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Complaint of Indiana Bell Telephone Company, Inc. d/b/a SBC Indiana for Expedited Review of a Dispute With Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements, Cause No. 42749 (Indiana Utility Regulatory Commission, March 9, 2005).

As the North Carolina Utilities Commission so succinctly explained, interim provisioning for existing CLEC customers is necessary to prevent the very disruption the FCC sought to avoid with its one-year transition period for the "embedded customer base." Without that transition period, even the smallest change to a CLEC customer's existing service – for example, a customer's hiring of a new employee and a resulting need for a new line for that employee – would require a CLEC serving that customer to refuse to provide the line or to surrender the customer. Similar disruption would result if a customer moves to a new address – even if it is only next door.

BellSouth is likely to argue that there would be no disruption for an existing business customer for whom a CLEC cannot obtain additional UNE-P arrangements, because a CLEC

can simply order an additional line on a resale basis. This is not true. Businesses, almost without exception, subscribe to a feature known as "hunting." If this feature is used, a busy signal on the main line causes an incoming call to roll to the next successive line – or "hunt." Thus, the calling business prospect does not receive a busy signal. Although there is no technical limitation to justify it, BellSouth's policies forbid "hunting" between UNE-P and resale lines. Therefore, if a CLEC attempted to provide its customer with a resale line, that new line would be stranded from the main business number advertised and published in directories by the business. In short, the additional line would be largely useless to the customer, and provision of a resale line to supplement its service is simply not an option.

Nor is conversion of all the customer's lines to resale. Cinergy loses money on the resale platform. Thus, if it is unable to obtain UNE-P to serve existing customers over the transition period, Cinergy will be forced to surrender many of its existing customers to BellSouth.

Such disruption is unnecessary; it is anti-competitive; and it is in violation of the FCC's explicit instruction in the TRRO to continue for one year Section 251 UNE-P access for CLECs' "embedded customer base."

CONCLUSION

For the foregoing reasons, Cinergy respectfully requests that this Commission enter its Order declaring that, pursuant to the plain language of the TRRO, as well as to the FCC's policy to avoid disruption to CLECs and to their "embedded customer base" during the specified transition period, BellSouth may not refuse to process Section 251 UNE orders to serve Cinergy's embedded customer base.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion Of Cinergy Communications was served by electronic mail upon Dorothy Chambers, counsel for BellSouth Telecommunications, Inc., and has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 13th day of June, 2005.

/s/ Douglas F. Brent
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EXHIBIT

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ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Plaintiff,	)	Civil Action No. 3:05-CV-16-JMH
v.	)	
CINERGY COMMUNICATIONS CO., a/k/a CINERGY COMMUNICATIONS, CORP., ET AL.	)	**ORDER**
Defendants.	)	

** ** ** ** **

Defendant, Cinergy Communications Corp. ("Cinergy"), moved the Court to clarify the April 22, 2005 Order granting the plaintiff, BellSouth Telecommunications, Inc. ("BellSouth"), a preliminary injunction [Record No. 108]. Defendant, Kentucky Public Services Commission ("PSC"), moved in support of Cinergy's motion [Record No. 115] and the plaintiff responded [Record No. 120]. The time for reply has passed and the motion is now ripe for decision.

On February 4, 2005, the Federal Communications Commission ("FCC") issued the Order on Remand that, among other things, banned the requirement that incumbent local exchange carriers ("ILECs") provide unbundling services for switching to competitive local exchange carriers ("CLECs"). The Order on Remand created a transition plan for the CLECs' embedded base of customers. The transition period would last for twelve months, during which time

the CLECs and ILECs would negotiate the ban on unbundling through the change of law provisions in the interconnection agreements. During the transition period, the ILECs would be paid a set rate that was higher than the rate previously set for unbundling services.

On February 11, 2005, in reaction to the issuance of the FCC's Order on Remand, BellSouth sent letters to the CLECs with which it provided unbundling services. The letters stated that BellSouth would no longer be accepting orders for "new adds" for UNE-P switching.

In response, various CLECs filed two complaints with the PSC to force the plaintiff to effectuate the Order on Remand's ban on unbundling through the parties' interconnection agreements instead of effectuating the change of law immediately for new adds. BellSouth argued that the Order on Remand's ban on unbundling was effective immediately for new adds for unbundling services.

In two identical orders, the PSC held that "BellSouth shall follow its contractual obligation to negotiate the effect of changes of law on its interconnection agreements regarding the discontinuation of unbundled network elements."

Subsequently, the plaintiff filed a complaint and a motion for a preliminary injunction, seeking to enjoin the PSC orders. On April 22, 2005, the Court granted the plaintiff's motion for a preliminary injunction, holding that the defendants were enjoined

from enforcing the PSC orders. Specifically, the Court held that the defendants were enjoined from enforcing the PSC orders "that require BellSouth to continue to process new orders for UNE-P switching."

At issue currently is Cinergy's motion to clarify said April 22, 2005 Order. Specifically, Cinergy seeks clarification as to whether the Order included new orders from existing customers in the transition period or whether these orders may be denied by BellSouth immediately pursuant to the injunction. Essentially, the defendant is asking the Court to state that when the opinion refers to "new orders" or "new customers" as being subject to the injunction, the Court is not referring to new orders from existing customers because these are included in the transition plan. The PSC filed a response in support of clarification and stated that the issue of whether existing customers with new services are included in the transition plan is still pending before the commission.[1]

The Court acknowledges that the April 22, 2005 Order granting a preliminary injunction may be unclear as to whether the injunction forbids the PSC from forcing the plaintiff to accept new

[1] The plaintiff argues that when the Court refers to new orders or new customers, the Court is including new orders from existing customers in the injunction. It supports this contention with language in the FCC's Order on Remand, other courts' rulings on the issue, and policy considerations. The Court does not have to reach the plaintiff's substantive arguments because this issue is still pending before the PSC.

orders for UNE-P services from existing customers because the Court's order interchanges the terms "new orders" and "new customers". As is made clear below, when the Court refers to "new orders" or "new customers" in the April 22, 2005 Order, the Court is referring generally to all those customers or orders not included in the transition plan as interpreted by the Order on Remand.

The PSC orders merely force BellSouth to effectuate the change of law (i.e., the ban on unbundling requirements for switching) through the change of law provisions in the interconnection agreements. The PSC did not decide whether the transition plan included new orders from existing customers or whether these orders would be effective immediately. Our Order, as stated above, merely enjoins enforcement of the PSC orders which did not decide what orders or customers are included in the transition plan. Thus, the Court declines to decide which customers or orders are included in the transition plan because this issue is pending before the PSC and is yet to be determined.

Accordingly, and for the foregoing reasons, **IT IS ORDERED** that the defendant's motion for clarification of the Court's April 22, 2005 Order [Record No. 108] be, and the same hereby is, **GRANTED**. The Court's Order of April 22, 2005, be, and the same hereby is, **CLARIFIED** such that the Order shall be construed to enjoin enforcement of the PSC orders. Any reference in the Court's Order

to "new orders" or "new customers" should be understood to mean those customers or orders not included in the transition plan of the FCC's Order on Remand.

This the 3rd day of June, 2005.

Signed By:

Joseph M. Hood

United States District Judge

EXHIBIT

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(NC)

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1550

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order	)))))	ORDER CONCERNING NEW ADDS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, Wednesday, April 6, 2005.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding
Chair Jo Anne Sanford
Commissioner J. Richard Conder
Commissioner Lorinzo L. Joyner
Commissioner James Y. Kerr, II
Commissioner Howard N. Lee
Commissioner Robert V. Owens, Jr.

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BY THE COMMISSION: On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO), FCC Docket No. WC-04313 and CC 01-338. The *TRRO* identified a number of former Unbundled Network Elements (UNEs), such as switching, for which there is no Section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving

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

2 *TRRO*, ¶ 174 (DS3 loops), 178 (DS1 loops).

3 *TRRO*, ¶ 126 (DS1 transport), 129 (DS3 transport).

4 *TRRO*, ¶ 137 (entrance facilities).

5 *TRRO*, ¶ 133 (dark fiber transport), 182 (dark fiber loops).

arrangements.[6] In each instance, the FCC stated that the transition period for each of these former UNEs — loops, transport, and switching — would commence on March 11, 2005.[7]

On February 28, 2005, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a letter with the Commission that it had sent to BellSouth Telecommunications, Inc. (BellSouth) on February 21, 2005, on behalf of itself and Business Telecom, Inc. (BTI). The letter responded to a BellSouth carrier notification letter dated February 11, 2005, in which BellSouth outlined actions it planned to take in light of the FCC *TRRO*. DeltaCom argued that the *TRRO* did not allow BellSouth to refuse UNE-P orders associated with the embedded base of UNE-P customers or orders for new UNE-P customers on its effective dates.

On March 1, 2005, MCImetro Access Transmission Services LLC (MCI) filed a Motion for Expedited Relief Concerning UNE-P Orders that set forth similar arguments to those advanced by DeltaCom in its February 28, 2005, letter. MCI asked the Commission to order BellSouth to continue to accept and process MCI's UNE-P orders after March 11, 2005.

Likewise, on March 2, 2005, NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius Communications LLC (collectively, Joint Petitioners) filed a Petition for Emergency Declaratory Ruling based on similar grounds to those set forth by DeltaCom and MCI. In addition, the Joint Petitioners alleged that they had executed a separate agreement with BellSouth through which BellSouth was required to allow access to all de-listed UNEs after March 11, 2005.

On March 3, 2005, the Commission consolidated these filings in a single docket — Docket No. P-55, Sub 1550— and ordered BellSouth to respond to the MCI and Joint Petitioners' motions by March 8, 2005. The Commission also set the dispute for oral argument on March 9, 2005.

On March 4, 2005, LecStar Telecom, Inc. filed with the Commission its February 24, 2005, responsive letter to BellSouth's February 11 carrier notification letter, and CTC Exchange Services, Inc. (CTC) filed Comments in Support and Request for Expanded Relief. On March 7, 2005, Amerimex Communications Corp. filed an Emergency Petition seeking relief similar to that sought by MCI and the Joint Petitioners, and US LEC of North Carolina, Inc. (US LEC), Time Warner Telecom of North Carolina, LP and XO North Carolina, Inc. filed a Supportive Petition.

On March 8, 2005, BellSouth sought an extension of time within which to both respond in writing to the various filings described above and to appear for oral argument. Attached to BellSouth's motion was a new carrier notification letter issued by

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6 *TRRO*, ¶ 142 (transport), 195 (loops), 226 (switching).

7 *TRRO*, ¶ 143 (transport), 196 (loops) 227 (switching).

BellSouth on March 7, 2005, in which BellSouth extended the deadline for accepting "'new adds' as they relate to the delisted UNEs until the earlier of 1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders, or 2) April 17, 2005."

On March 8, 2005, the Commission issued an order rescheduling the oral argument for April 6, 2005, and granting BellSouth an extension until March 15, 2005, to respond to the various motions, complaints and letters that had been received in this docket.

On March 9, 2005, the Commission received a letter from CTC in which it advised the Commission that it would rely on its written comments and the arguments of other CLPs and accordingly would not participate in the oral argument. On the same date, the Commission received a copy of a letter from Navigator Telecommunications, LLC to BellSouth dated February 28, 2005, in which Navigator objected to BellSouth's proposed implementation of the *TRRO*.

On March 14, 2005, BellSouth moved to strike the filing by Amerimex on the grounds that the filing had not been signed by an attorney licensed to practice in North Carolina. The Commission subsequently concluded that good cause existed to grant the motion unless Amerimex cured the deficiency noted by BellSouth by March 31, 2005. Amerimex withdrew its Emergency Petition on March 22, 2005, stating that it had entered into a commercial agreement with BellSouth that mooted its Petition.

On March 15, 2005, BellSouth filed its responses to the relief sought by MCI, Joint Petitioners and the other parties listed above. On March 16, 2005, AT&T of the Southern States, LLC (AT&T) asked the Commission, to the extent it awarded any relief to the various petitioners, to award the same relief to AT&T. Prior to the oral argument, the Commission received several submissions from the parties conveying "supplemental authority" supporting their various positions.

Oral argument took place as scheduled on April 6, 2005. Counsel for various parties appeared at that time and argued their respective positions before the full Commission. At the conclusion of the argument, the Presiding Commissioner asked the parties to submit post-argument briefs and/or proposed orders. MCI, US LEC, BellSouth, Joint Petitioners, Public Staff, and CTC made post-hearing filings.

On April 15, 2005, the Commission issued a Notice of Decision and Order containing the conclusions set out below.

1. With respect to the provision of UNE-P, DS1, and DS3, the Commission declines to declare that BellSouth must provide "new adds" of these UNEs outside of the embedded customer base. Nevertheless, BellSouth must continue to process orders for the existing base of CLP customers pending completion of the transition process.

2. With respect to the issue of the provision of loop and transport, the Commission finds that the representation of BellSouth at the oral argument that it will follow the procedures outlined therefor in the TRRO renders this issue moot.

POSITIONS OF PARTIES

BellSouth argued that the FCC's ban on "new adds" of former UNEs –i.e., the addition of new customers using unbundled access to local circuit switching—was "self-effectuating" and relieved BellSouth of any obligation under its interconnection agreements to provide such "new adds" to CLPs. *See, e.g.,* TRRO, para. 3. BellSouth relied on what it believed to be the plain language of the TRRO. It argued that the FCC's new rules unequivocally state that carriers may not obtain new UNEs, and noted that the FCC had stated that there would be a transition period for *embedded UNEs* to begin on March 11, 2005, which would last for 12 months. *See,* TRRO, para. 199. The FCC made almost identical findings with respect to high-capacity loops and transport. *See, TRRO*, para. 142, 195, also 47 C.F.R. 51.319(e)(2)(i), (ii),(iii), and (iv) and 51.319(a)(4)(iii), (a)(5)(iii), and (a)(6). The FCC also said that the transition period was to apply only to the embedded customer base and does not permit CLPs to add new customers using unbundled access to local circuit switching. *Id.* There are at least a dozen instances in the TRRO where it is made clear that there are to be no new adds for these UNEs. *See*, paras. 3, 4, 142, 145, 195, 198, 227; Rules at p. 147, 148, and pp. 150-152.

BellSouth also argued that the FCC has the legal authority to implement self-effectuating changes to existing interconnection agreements. This is implied by the FCC's decision in the TRO *not* to make its decisions in that order self-executing and is recognized by case law, notably *Cable & Wireless, PLC v. FCC,* 166 F.3d 1224, 1231-32 (D.C. Cir. 1999)(*Cable and Wireless) (quoting Western Union Tel. Co. v. FCC,* 815 F.2d 1495, 1501 (D.C. Cir. 1987). *See, also, United Gas Improvement Co. v. Callery Properties, Inc.* 382 U.S. 223, 229 (1965)(*Callery Properties*)(agencies can undo what is wrongfully done by virtue of their orders). The FCC had also made the requisite public interest findings under the *Mobile-Sierra* doctrine[8] inasmuch as the FCC in various places noted that certain unbundling proposals constituted a disincentive to CLP infrastructure investment. Even apart from the *Mobile-Sierra* doctrine, the FCC has the authority to create a self-effectuating change because interconnection agreements are not truly "private contracts," but rather arise within the context of ongoing federal and state regulation. Numerous state commissions have rejected the relief sought by the CLPs (Ohio, Indiana, New York, California, Texas, Kansas, New Jersey, Rhode Island, Maine, Massachusetts, Delaware, Michigan, Maryland, Florida, Virginia and Pennsylvania). On April 5, 2005, the United States District Court for the North District of Georgia entered a preliminary injunction against enforcement of the Georgia Public Service Commission's order favorable to the CLPs on the same subject matter, finding a significant likelihood that BellSouth would prevail on the merits. The Court found that reliance on the *Mobile-Sierra* doctrine was unnecessary because, among other things,

[8] Under the *Mobile-Sierra,* doctrine the FCC may modify the terms of a private contract if the modification will serve the public interest.

the FCC "was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs." Order, *BellSouth Telecommunications, Inc. v. MCIMetro Transmission Services, Inc.* No. 1:05-CV-0674-CC (April 5, 2005) (Georgia District Court Order).

BellSouth further maintained that CLPs are not entitled to UNE-P under state law because, even if North Carolina were not preempted by federal law, the Commission has not conducted the required impairment analysis. In any event, CLPs are not entitled to UNE-P under Section 271 of the Telecommunications Act because, among other things, there is no obligation for BellSouth to combine Section 251 and Section 271 elements, much less at TELRIC rates. Section 271 elements fall within the exclusive jurisdiction of the FCC.

As for the Abeyance Agreement between BellSouth and the Joint Petitioners (Nuvox, KMC, and Xspedius), this was a procedural agreement between BellSouth and those parties entered into in July, 2004. It provided that, during their arbitration proceeding, BellSouth would afford the Joint Petitioners "full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such...agreements are replaced by new interconnection agreements...." This Agreement does not restrict BellSouth's rights under the TRRO. The Abeyance Agreement is limited in application to "changes of law," and the FCC's bar on new adds beginning on March 11, 2005, does not trigger the parties' "change of law" obligations under current interconnection agreements because it is self-effectuating. Moreover, the implementation of the TRRO is not covered by the Abeyance Agreement. The language of the Abeyance Agreement and the timing of the parties' agreement to hold the change of law process in abeyance both demonstrate that the scope of the agreement was limited only to changes resulting from *USTA II.* It is not reasonable to believe that eight months before the release of the TRRO, BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the TRRO or any other FCC Order that could be tangentially related to *USTA II.* BellSouth also noted that the deadline to add new issues under the Abeyance Agreement expired on October 2004. This means that, while parties could add issues arising out of *USTA II*, they could not add issues arising out of the TRRO because it had not been issued. As for the phrase in the Abeyance Agreement, "*USTA II* and its progeny," the term "progeny" cannot refer to the TRRO because "progeny" means a line of opinions that succeed a leading case and could therefore only refer to opinions of a court or a state commission reaffirming or restating the D.C. Circuit's decision in *USTA II.*

Public Staff identified the major issue as being whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P adds as of March 11, 2005, or whether it intended for such provision to cease after the ILEC and the interconnecting CLP had arrived at a new agreement through the change of law provisions of their existing interconnection agreement. The Public Staff believes that the FCC did intend that ILECs no longer be compelled to provide new adds after March 11, 2005. This is based upon a reading of the TRRO as a whole. The TRRO states some fifteen times that

there will be no new adds. While the TRRO does refer to the change of law process in Paragraph 227, the reference comes immediately after discussion of the transition process for the embedded base of UNE-P customers. At the oral argument, the CLPs placed much reliance on their reading of the *Mobile-Sierra* doctrine, specifically that the FCC may modify a contract only if it has made particularized findings that the public interest demands such modification. The CLPs appear to make two alternative arguments: either the failure to meet the standards for application of the doctrine shows that the FCC did not intend to modify interconnection agreements to disallow new adds until the conclusion of any change of law negotiation or, if the FCC did intend to modify the contracts, it did so improperly by failing to make particularized findings that the public interest demanded the abrogation of interconnection agreements. While it is not clear why the FCC did not address the application of the *Mobile-Sierra* doctrine, this omission is not persuasive evidence that the FCC intended anything other than to eliminate the requirement to provide new UNE-P adds. The proposition that the Commission should reject the FCC's attempt to abrogate private interconnection agreements because it failed to comply with the *Mobile-Sierra* doctrine should also be rejected. The role of the Commission is generally not to determine whether an FCC Order complies with the law but rather to interpret and apply FCC Orders as best it can. Federal courts are in a much better position to determine if the FCC exceeded its authority or complied with all applicable law than the Commission. Finally, the Public Staff argued that it would be illogical for the FCC to prescribe a 12 month period to perform tasks for an orderly transition and at the same time require BellSouth to provide new UNE-P arrangements until the end of the 12 months or the conclusion of the change of law process, whichever comes sooner. This would undermine the orderly transition process prescribed by the FCC. Also, CLPs are not left without alternatives to new UNE-P adds, since they can negotiate commercial agreements or serve the customer through resale or UNE-L.

US LEC argued that the interconnection agreements between BellSouth and the CLPs are valid and enforceable and have not been changed in a self-effectuating manner by the TRRO. Rather, it is contemplated both in the interconnection agreements and in the TRRO that the change-of-law process will be observed, including in the matter of new adds.

US LEC maintained that the Commission has the authority to rule on matters pertaining to the enforcement of interconnection agreements. It observed that the FCC does not set the terms of interconnection agreements, but rather such agreements are the product of negotiations between the parties and, in some cases, arbitration by state commissions. These agreements are neither filed nor approved by the FCC and the FCC plays no role in their enforcement. The principal connection of the agreements with the FCC is that the FCC's rules provide the back-drop for the parties' negotiations and the decisions of state commissions. Parties can negotiate and agree to terms that deviate from the rules established by the FCC. Thus, it does not follow that any changes to the FCC's rules of interconnection automatically and by operation of law override contrary provisions of negotiated and approved interconnection agreements. Specifically, the change-of-law provisions in BellSouth's interconnection agreements

have not been abrogated by the TRRO. The FCC has stated plainly that the *Mobile-Sierra* doctrine does not apply to interconnection agreements. *See In the Matter of IDB Mobile Communications, Inc. v. Comsat Corp.*, FCC 01-173 (released May 24, 2001) (*IDB Mobile*). US LEC also noted that the FCC had specifically refused to overrule provisions of interconnection agreements in the TRO. The *Mobile-Sierra* doctrine is not mentioned anywhere in the TRRO, nor are there any words in the TRRO definitively stating as such an intent to override change-of-law provisions. BellSouth's various citations to that effect in the TRRO are inapposite and fall far short of a clear statement. In any event, the *Sierra-Mobile* doctrine is not applicable to state-approved agreements. Even if it were, it would require factual findings not present in the TRRO to support explicit findings of the public interest determination.

US LEC further maintained that BellSouth's position as to loop and transport provisioning is inconsistent with the express provisions of the TRRO. This, too, BellSouth wishes to deny as to new adds. The TRRO sets up a self-certification procedure by CLPs, which the ILECs must accept but could challenge through dispute resolution procedures. US LEC did note that BellSouth had backed off this position at the oral argument, where it stated that it would follow the procedures set forth by the TRRO with respect to high capacity loops and dedicated transport.

US LEC pointed out that, if BellSouth's views are countenanced, there would be controversy over the meaning of "embedded customer." The TRRO text speaks repeatedly of the "embedded customer," while the new rule adopted in the TRRO speaks in terms of embedded lines and loops. It is unknown at this point what interpretation BellSouth will take with respect to this question. Perhaps BellSouth will tell CLPs that they can no longer serve an "embedded customer" because they seek a change to an embedded line or because they seek a new line. These are the types of disruptions that the change-in-law negotiations are intended to prevent.

Joint Petitioners rejected BellSouth view that aspects of the TRRO are self-effectuating. To the contrary, any change in law must be incorporated into interconnection agreements before becoming effective. The TRRO has expressed no clear intent that existing interconnection agreements should be abrogated, and the legal doctrine on which BellSouth relies does not apply to interconnection agreements. Even if it did, the TRRO does not contain the analysis required to invoke the doctrine.

With respect to the "self-effectuating language" in Para. 3, Joint Petitioners noted that this was the single use of this term in the TRRO. It means nothing more than that the FCC adopted an impairment test that did not require delegation to the states for specific impairment findings. The test itself is self-effectuating. The importance attached by BellSouth to the March 11, 2005, "effective date" is also misplaced. All FCC rules have an effective date, but this does not mean that they are automatically incorporated into interconnection agreements as of this date.

Joint Petitioners maintained that the *Mobile-Sierra* doctrine does not apply to interconnection agreements under Section 252. *See, IDB Mobile.* The doctrine only

applies to contracts *filed* with the FCC and does not extend to contracts that are construed to be subject to the FCC's jurisdiction. *See, Cable and Wireless.* In any event, the TRRO contains none of the analysis required under *Mobile-Sierra.*

Joint Petitioners also responded to the rhetorical question at oral argument as to what public interest would be served by permitting new adds by pointing to the sanctity of contracts. The question is not whether the Commission has authority under North Carolina law to invalidate certain anticompetitive contracts but whether the integrity of contracts can be violated by the FCC absent proper application of the *Mobile-Sierra* doctrine. The *Callery Properties* case, which BellSouth cited for the proposition that an agency "can undo what is wrongfully done by virtue of its order," is not apposite. It pertained to the Federal Power Commission and concerned the making of refunds. It does not suggest that the FCC may abrogate privately negotiated contractual provisions with no reflection in the record of its intent to do so or that such action is in the public interest.

Significantly, the FCC refused to override the negotiation process in the TRO, and indeed the language of the TRRO obligates BellSouth to negotiate (Para. 233). The language relied upon by BellSouth simply says that the transition period does not allow new adds, but the FCC did not prohibit new adds under existing interconnection agreements. The TRRO does not preclude new adds before a transition plan is adopted, but it clearly contemplates that a transition plan will be incorporated into existing interconnection agreements for delisted UNEs. The TRRO does expressly state that the parties are free to negotiate alternatives to the transition plan included in the Order. *See,* Para. 145. Fundamental fairness requires BellSouth to follow the Section 252 process.

Finally, the Joint Petitioners argued that BellSouth's refusal to process new adds is contrary to the Abeyance Agreement. The Joint Petitioners, among other arguments, placed particular stress on the provision that the parties "have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA and it progeny.* (Abeyance Agreement at 2, emphasis added). BellSouth's reading of the term "progeny" is too narrow. It is not limited to court or state commission decisions but has the wider meaning of "offspring." Surely, the TRRO is the "offspring" of *USTA II.* Moreover, the parties had anticipated this contingency because of the reference in the Joint Issues Matrix submitted in October 2004 concerning "Final Rules," defined as "an effective order of the FCC adopted pursuant to the Notice of Proposed rulemaking [NPRM], WC Docket No. 04-313, released August 20, 2004, and effective September 13, 2004." The NPRM referenced in this definition is the *Interim Rules Order.* The "Final Rules" referenced in the revised matrix cannot refer to anything other than the TRRO, which is the order promulgating "Final Rules."

Lastly, the Joint Petitioners argued that the weight of authority from other jurisdictions favors Joint Petitioners' position. This is especially so in the BellSouth region.

MCI echoed many of the arguments made by the other CLPs. MCI particularly stressed that the FCC had nowhere expressed an intent to abrogate existing contracts and, even if it had, it had nowhere discussed or met the high standards for abrogation under the *Sierra-Mobile* doctrine. BellSouth appears to argue that the FCC's intent to abrogate was implied, but this runs afoul of the relevant standards that must be met. Notably, the Georgia District Court Order did not discuss the *Mobile-Sierra* doctrine. BellSouth's citation to the public interest involved in the demise of UNE-P—that it does not promote investment—is insufficient to justify sidelining the interconnection agreement change-of-law process. There are serious questions as to whether the FCC has the authority to abrogate interconnection agreements (*IDB Mobile),* or whether it can abrogate contracts over which it lacks exclusive authority (*Cable & Wireless). Callery Properties* is inapposite because it was not the unbundling conclusions *per se* that were found to be wrongful, but rather there was no longer impairment because of changed circumstances. Indeed, the principal "wrong" found by the court in *USTA II* was the FCC's sub-delegation scheme. Thus, the TRRO cannot be said to be "undoing" anything "wrongfully done." MCI also stated that there had been numerous decisions, especially in the BellSouth region, that have favored the CLPs. MCI also argued in its Motion that it should be entitled to UNE-P under Section 271.

CTC made a supplemental filing setting out various issues that there were to negotiate when the TRRO clearly eliminated certain UNEs. Such issues include combining multiple DS1 circuits to DS3 circuits, revising EEL conversion language, combining resale and UNE service on the same account, developing shared collocation arrangements, combining special access and UNE services, implementing a methodology for resolving disputes regarding UNE obligations, and working out connections to shared transport.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

1. New Adds

After careful consideration of the arguments and filings of all parties, the language of the TRRO, the decisions of other state commissions, and the practical implications of this decision, the Commission concludes that good cause exists to decline to declare that BellSouth must provide "new adds" of UNE-P, DS1, and DS3 UNEs outside of the embedded customer base after March 11, 2005, but that BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process.

The principal question before the Commission is whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P, DS1, and DS3 adds as of March 11, 2005, or whether it intended such provision to cease only after the ILEC and

the interconnecting CLP had arrived at new contractual language through the change of law provisions of the interconnection agreement.

As has been remarked by others, the TRRO is not in all respect a model of clarity. That is why there is a disagreement on the question of "new adds." However, one thing is clear about the TRRO. It is the culmination of a long and tortuous process in which the FCC has examined unbundling and has frequently made decisions concerning this subject that have repeatedly been found wanting by the federal courts, most recently by the D.C. Circuit in *USTA II*. The TRRO was the FCC's attempt to conform itself to the demands of that decision. In doing so, it de-listed certain UNEs and crafted a transition period for the embedded customer base for the purpose of providing an orderly transition to other arrangements.

The Commission is persuaded that the sounder reading of the TRRO is that the FCC intended that "new adds" outside the embedded customer base should go away immediately—i.e., as of March 11, 2005—for the reasons as generally set forth by BellSouth and the Public Staff. The alternative reading is too strained and involves the creation of various anomalies and even absurdities. For example, if "new adds" outside of the embedded customer base were allowed, how does this assist in an orderly transition *away* from such arrangements, which, however obscure the FCC may have been in other matters, was its plain intent here? How sensible is it to have the question of "new adds" outside the embedded customer base to be the subject of negotiations in the transition period when that question has already been decided in the TRRO?

At the oral argument and in their filings, the CLPs argued that the FCC did not meet the requirements of the *Mobile-Sierra* doctrine said to be necessary for the FCC to abrogate contract provisions. Broadly speaking, this doctrine states that the FCC may modify the terms of private contracts if the modification serves the public interest. Essentially, the CLPs maintained that the FCC's intent to abrogate was less than plain and its public interest finding was not expressed with sufficient particularity.

The Commission is not convinced that the *Mobile-Sierra* doctrine is the only avenue by which the FCC can abrogate contract provisions. For example, an agency may abrogate a contract provision when it is undoing "what is wrongfully done by virtue of a previous order." *Callery Properties*, cited with approval in the *Georgia District Court Order.* The context here is important, since in *USTA II,* the D.C. Circuit made harsh observations about the FCC's "failure, after eight years, to develop lawful unbundling rules."

But even if *Mobile-Sierra* is the appropriate approach to contract modification, the Commission believes that the FCC has expressed its belief as to the overriding public interest with sufficient particularity given the general nature of the subject-matter, which is the broader subject of the availability of certain classes of UNEs. The public interest the FCC expressed is related to the investment in infrastructure and the efficient allocation of resources in the economy.

In any event, the contracts that are being modified are not strictly private in nature but are rather contracts which, if negotiated, are approved by government, and, if not negotiated, are arbitrated by government. The entire process, from start to finish, is implicated in a regulatory process which, while formally conducted by state commissions (or by the FCC in default of state action), must examine in the first instance FCC orders and rules. *Accord., E.spire Communications, Inc. v. N.M. Pub. Regulation Comn.,* 392 F.3d. 1204 (10th Cir., 2004); *Verizon Md., Inc. v. Global Naps, Inc.,* 377 F.3d. 356 (4th Cir., 2004) (interconnection agreements are a "creation of federal law" and are the "vehicles chosen by Congress to implement the duties imposed by Sec. 251"). It is therefore entirely reasonable that the FCC can abrogate contract provisions found not to be in the public interest given the underlying legal structure.

Finally, there is the question of how far the ban on "new adds" should extend as applied to the embedded customer base. The Commission believes the better view is that ILECs like BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process. Although this decision, like many others, is likely to be controverted, and colorable arguments can be adduced on either side, the Commission believes that the bright line that the FCC was drawing was between those *inside* the embedded customer base and those *outside* of it. After all, the TRRO focuses on the "embedded customer base," not on existing access lines. The Commission does not believe that it was the FCC's intent to impede or otherwise disrupt the ability of CLPs to adequately serve their existing base of customers in the near term. The Commission notes that the CLPs now serve thousands of customers, many of them business customers, with these de-listed UNE arrangements. Given the vital importance of fast telecommunications access in a highly dynamic economy, these customers would be baffled and impatient if they were to discover that adding a new line or even simply a new feature in the near term was impossible with their current provider. They may very well lose confidence in that provider. This is not good for competition, which is the overarching purpose of the Telecommunications Act.

Thus, we believe that, through a planned, orderly, and nondisruptive transition process under state commission supervision, the FCC intended that the CLPs should retain the ability to adequately serve their customers during the transition period. The Commission has already established a docket with respect to BellSouth in Docket No. P-55, Sub 1549 to deal with the transition.

2. Abeyance Agreement

The same analysis applicable to "new adds" also applies to the Abeyance Agreement between BellSouth and the Joint Petitioners. Under the Agreement's terms, the existing, underlying interconnection agreement is to be carried forward until the new interconnection agreement is reached. Although the Joint Petitioners have the better of the argument that the phrase "*USTA II* and its progeny" includes the TRRO, this is not determinative. What is determinative is that the FCC reached out and negated certain existing provisions of all interconnection agreements to the extent that they allow "new

adds" outside of the embedded customer base. This applies *pari passu* to the existing agreement between BellSouth and the Joint Petitioners.

3. Loop and Transport

BellSouth indicated at oral argument that it would continue to provision loop and transport in accordance with the self-certification/protest process outlined in the TRRO. BellSouth's announcement renders this issue moot.

4. State Law UNEs

In this docket there has been some discussion as to whether or not delisted UNEs could nevertheless be revived under state law. This is an interesting discussion, but this discussion is ultimately irrelevant to the issue before the Commission in this docket. Although G.S. 62-110(f1) allows the Commission to order the "reasonable unbundling of essential facilities, where technically and economically feasible," the Commission has not made the findings necessary to require the provision of delisted UNEs under state law.

5. Section 271 UNE-P

MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 25th day of April, 2005.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

dl041805.01

EXHIBIT

3

(MICH)

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

In the Matter of a General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, Also Know as the K2A.

Docket No. 04-SWBT-763-GIT

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

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

Background

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

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

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

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

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

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

FCC Background

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

Jurisdiction

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

Self-Effectuating Nature of FCC Order

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

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

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

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

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

Embedded Customer Base

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

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

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

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

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

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

CLEC Access to Data Supporting Wire Centers

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

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

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

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

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

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

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

BY THE COMMISSION IT IS SO ORDERED.

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

Dated: MAR 10 2005

ORDER MAILED

MAR 11 2005

Susan Duffy Executive Director

Susan K. Duffy
Executive Director

sre

EXHIBIT

4

(KANSAS)

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

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[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.

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[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

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 29, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

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

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 29, 2005.

Its Executive Secretary

EXHIBIT

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(TEXAS)

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MEETING DATE:	03//09/05
DATE DELIVERED:	03/08/05
AGENDA ITEM NO.:	6
CAPTION:	Docket No. 28821 – Arbitration of Non-Costing Issues for Successor Interconnection Agreement to the Texas 271 Agreement.
ACTION REQUESTED:	Discussion and possible action

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DOCKET NO. 28821

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

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PROPOSED ORDER ON CLARIFICATION

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

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

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

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

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

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

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

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

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

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

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

PUBLIC UTILITY COMMISSION OF TEXAS

_____

JULIE PARSLEY, COMMISSIONER

_____

PAUL HUDSON, CHAIRMAN

_____

BARRY T. SMITHERMAN, COMMISSIONER

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