

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of on the Commission's own motion,)
to consider Ameritech Michigan's compliance with) CC Docket No. U-12320
the competitive checklist in Section 271 of the)
federal Telecommunications Act of 1996.)
_____)

COMMENTS OF MCLEODUSA

McLeodUSA Telecommunications Service Inc. ("McLeodUSA")¹ submits these comments concerning the above-captioned Application by SBC Communications, Inc., Ameritech Michigan, and Ameritech Long Distance (collectively "SBC" or "Ameritech") for Provision of In-Region, InterLATA Services in Michigan ("Application").

I. INTRODUCTION

In its application for authority to provide in-region, interLATA service in Michigan, SBC asserts that "local competition has taken root and is growing rapidly in Michigan,"² and also indicates that "any CLEC can obtain from Ameritech Michigan the facilities and services it needs to provide local service in Michigan, no matter what mode

¹ McLeodUSA is a competitive local exchange carrier ("CLEC"), providing integrated telecommunications services, including local service, to business and residential customers in first, second, third and fourth tier markets in a total of 25 states. McLeodUSA is primarily a facilities-based provider, with 396 ATM switches, 50 voice switches, approximately 1.1 million local access lines, and more than 10,000 employees. McLeodUSA has been offering competitive local services via resale since 1994. McLeodUSA has been providing facilities-based services since 1997. In Michigan, McLeodUSA serves 53 markets, employs over 600 people and has installed approximately 1700 route miles of fiber optic cable. McLeodUSA serves over 8,500 business customers and over 21,000 residential customers in Michigan.

² Draft Brief in Support of Application by SBC Communications Inc. et. al. for Provision of In-region, InterLATA Services in Michigan, page i.

of entry the CLEC selects.”³ SBC obviously has a problem with geography. Clearly, SBC is talking about Fantasyland, not the current state of affairs in the state of Michigan. As noted by the Michigan Public Service Commission (“MPSC” or “Commission”) itself:

The marketplace for local telecommunications services in Michigan continues to be dominated by Ameritech Michigan and GTE (now Verizon) and a truly competitive marketplace remains a goal, not a reality.⁴

The stranglehold which ILECs, in particular Ameritech, have on local competition in Michigan, is showcased by Ameritech Michigan’s recent massive service quality problems. During the year 2000, the MPSC staff processed a record number of customer complaints directly related to problems with Ameritech service to its customers.⁵ Despite the fact that Ameritech’s service problems to its customers rose almost 30% in the year 2000, Ameritech lost no appreciable market share to CLECs. Indeed, as this Commission has reported, by the end of 2000 CLECs operating in Michigan in total had less than 4% of the total number of access lines.⁶

A. Legal Standards

The ability of a Regional Bell Operating Carrier (“RBOC”) to provide in-region, interLATA services is conditioned on strict compliance with section 271 of the Telecom Act. Thus, SBC should not be authorized to provide in-region, interLATA service under Section 271 unless it is able to demonstrate that: (1) it satisfies the requirements for Track A or B entry;⁷ (2) it has *fully implemented and is currently providing* all of the items set

³ Id. at page 9.

⁴ Michigan Public Service Commission, 2000 Annual Report and Annual Report of the Status of Competition in Services in Michigan, issued April 2001, page 15.

⁵ Id. at page 12.

⁶ Id. at page 15.

⁷ RBOCs may enter an application based on one of two “tracks” established under Section 271(c)(1). Track A requires the RBOC to prove the presence of an unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers. Section 271(c)(1)(A)(I). Track B

forth in the competitive checklist; (3) the requested authorization will be carried out in accordance with Section 272; and (4) its entry is consistent with the public interest, convenience and necessity. Telecom Act §271(d)(3). As to the “*is current providing*” standard, the FCC has found that promises of “*future*” performance have no probative value in demonstrating “*present*” compliance.⁸ To support it’s application, an RBOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.⁹

The fact that SBC has been granted interLATA entry in Texas, Oklahoma and Kansas should have no bearing on whether SBC should be granted interLATA entry in the state of Michigan. Each application made by an ILEC for interLATA entry must be examined independently on its own merits, and the issue of whether an ILEC has satisfied its section 271 obligations must be determined on a case by case basis after review of a totality of circumstances of that particular application.¹⁰ This is especially true where the RBOC in question is a complete separate entity from the entity which received prior approval.

B. SBC Has Failed To Meet The Standards Set Forth In The Telecom Act And In FCC Orders.

Specifically:

requires the RBOC to prove that no unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers has requested access and interconnection to the RBOC network within certain specified time parameters. Section 271(c)(1)(A)(II). SBC is applying under Track A.

⁸ FCC New York Order, ¶37. States have also adopted this standard, see *In re BellSouth Telecommunications, Inc.’s entry into InterLATA services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U, (Ga. P.S.C. Oct. 15, 1998).

⁹ *Id.*

¹⁰ *Application of Bell Atlantic Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in New York*, CC Docket No. 99-295 Memorandum Opinion and Order, (December 21, 1999) (“hereinafter, “FCC New York Order”), ¶46, and *In the Matter of Application by SBC Communications, Inc., /Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, CC Docket No. 00-65 Memorandum Option and Order, FCC 00-238 (rel. Jun. 30, 2000) (hereinafter, “FCC Texas Order”), ¶46.

- a. SBC fails to provide interconnection in accordance with the requirements of Section 251(c)(2) and 252(d)(1);
- b. SBC fails to provide nondiscriminatory access to its network elements including its operations and support systems (“OSS”);
- c. SBC fails to provide nondiscriminatory access to unbundled loops including DSL capable loops as required by the FCC’s UNE remand and line sharing orders;¹¹
- d. SBC does not make telecommunications services available for resale in accordance with the requirements of the Telecom Act.

Besides failing to satisfy numerous items of the competitive checklist, SBC’s Application fails to meet the public interest test set forth in Section 271(d)(3)(C) of the Telecom Act. Specifically SBC has engaged in a significant level of anti-competitive conduct that has greatly restricted facilities-based competition in Michigan and has greatly restricted the competitive choices for Michigan consumers. As a result, SBC’s Application should be denied.

II. SBC HAS FAILED TO COMPLY WITH NUMEROUS COMPETITIVE CHECKLIST REQUIREMENTS

A. Section 271(c)(2)(B)

In its evaluation of past Section 271 applications the FCC has mandated that an RBOC demonstrate that it “is providing” each of the offerings enumerated in the 14-point competitive checklist codified in Section 271(c)(2)(B).¹²

¹¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Notice of Proposed Rulemaking*, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) (“UNE Remand Order”) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, and Fourth Report and Order*, 14 FCC Rcd. 20902 (“Line Sharing Order”)

¹² See Application of *BellSouth Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, *Memorandum Opinion and Order*, 13 FCC Rcd. 539, ¶78 (1997) (citing *Ameritech Michigan Section 271 Order*, ¶1110).

In enacting the competitive checklist, Congress recognized that unless an RBOC has *fully* complied with the checklist, competition in the local market will not occur.¹³ Thus SBC must provide the FCC with “actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.”¹⁴

The FCC has steadfastly held that applications under Section 271 should be granted only when the local market in a state has been fully and irreversibly opened to competition.¹⁵ Furthermore, each and every checklist item is significant. The FCC has clearly indicated that failure to comply with even a *single* checklist item constitutes independent grounds for denying an application for 271 authority.¹⁶ Thus, strict compliance with each requirement of Section 271 is necessary to ensure that sustainable competition will be realized in local markets. Compliance with the competitive checklist does not end the analysis, however. An RBOC must demonstrate that granting its application will serve the public interest, convenience and necessity.

B. Checklist Item 1: Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).

To meet the required showing that it has “fully implemented” the competitive checklist under Section 271, the RBOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.¹⁷ The Commission has determined that to comply with this standard, for those functions that are analogous to the functions a BOC provides itself, the BOC must provide access to

¹³ *Ameritech Michigan Section 271 Order*, ¶18.

¹⁴ *Id.*, ¶55.

¹⁵ FCC Texas Order ¶417; FCC New York Order, ¶423.

¹⁶ FCC Texas Order ¶418; FCC New York Order ¶424.

¹⁷ *FCC New York Order*, ¶44.

competing carriers in, “substantially the same manner” as it provides itself.¹⁸ The Commission has further specified that this standard requires an RBOC to provide access that is equal (*i.e.* substantially the same as) the level of access that the RBOC provides itself, its customer or its affiliates, in terms of quality, accuracy, and timeliness.¹⁹

As discussed more fully in the discussion of checklist item 2 below, SBC has fails to meet this checklist item.

C. Checklist Item 2: Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

SBC fails to provide nondiscriminatory access to network elements in numerous ways.

1. Operational Support Systems and UNE Provisioning

The importance of SBC’s operational support systems (“OSS”) to competitors can hardly be underscored enough. Without adequate access to SBC’s OSS, competing carriers are placed at an extreme competitive disadvantage. As to the importance of OSS generally, the FCC has indicated that:

If competing carriers are not able to perform the functions of pre-ordering, provisioning, maintenance and repair, and billing for network elements in substantially the same time and manner as the incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded all together, from fairly competing.²⁰

McLeodUSA has experienced significant problems with SBC’s OSS.

a. Ameritech consistently misses commitment times for making repairs when McLeodUSA customers have no dial tone

When a customer loses dial tone it presents a very serious situation, not only for the customer but also for the customer’s service provider as well. The direct experience

¹⁸ *Id.*

¹⁹ *FCC New York Order, citing Ameritech Michigan Order*, 12 FCC Rcd. At 20618-19.

²⁰ Line Sharing Order, ¶172

of McLeodUSA with Ameritech is that Ameritech's performance in repairing no dial tone trouble tickets is abysmal. Ameritech routinely fails to repair no dial tone trouble tickets on commitment date causing delays in some cases of several days beyond the date by which Ameritech was supposed to complete the repair.²¹ Additionally, Ameritech also frequently dispatches technicians prior to the date and or time for the vender meet and then refuses to send technicians on a new dispatch.²²

b. Ameritech refuses to provision UNE-P service to McLeodUSA customers without unnecessary and dilatory multiple conversions.

As a result of requirements imposed by Ameritech, in order for McLeodUSA to bring up a new customer on UNE-P, or add a new line for an existing customer who was already on UNE-P, McLeodUSA must first provision the customer via 1FB resale, wait an entire 30-day billing cycle, and then make a second order converting the customer from 1FB resale to UNE-P.²³ As a result, McLeodUSA is forced to incur extra order fees, is forced to incur extra internal work. Additionally, and most importantly, the customer is required to go through a second, unnecessary, conversion which greatly increases the chance of the customer experiencing service problems.²⁴ There is no technical justification for Ameritech's requirement that any new UNE-P order must be first brought up via 1FB resale, left in purgatory for an entire 30-day billing cycle and then go through an entire second conversion process. When a customer switches service from Ameritech to McLeodUSA and McLeodUSA desires to provision the service via UNE-P, what this amounts to is nothing more than a billing change for Ameritech. This

²¹ Affidavit of Diane Bowers, attached hereto as Exhibit A.

²² Id.

²³ Id.

²⁴ Id.

is demonstrated by the fact that other RBOC's, notably QWEST, do not engage in such conduct. As language placed directly on QWEST's website indicates:

To enable greater simplicity for the co-provider, order processing will be managed with strong similarity to resale. For example, local service request forms will be used, and the co-provider's specific rates will be loaded to product and billing databases after the interconnection or resale agreement amendment has been executed. Please allow approximately 3-4 weeks after the amendment has been executed for the accurate loading of UNE-P to the QWEST billing system. Rather than process these conversions as two service orders (a disconnect of the finished service and a new connect of the applicable elements), QWEST will be handling the conversion with a single LSR order.

The only reason that Ameritech would not agree to such terms is that it desires to thwart competition. Ameritech first attempted to explain its requirement of two conversions to McLeodUSA by suggesting that its systems were technically limited and required same.²⁵ McLeodUSA has subsequently learned that this is not the case, as McLeodUSA has discovered examples of its customers that were converted from Ameritech retail directly to McLeodUSA on the UNE-P product.²⁶ Furthermore, in the states of Oklahoma, Kansas and Texas, where SBC has already received 271 approval, SBC has made an exception to this practice.

c. Ameritech's OSS is insufficient for enabling McLeodUSA to evaluate loops for the capability of providing DSL service

In order to provide DSL service, McLeodUSA is required to pre-qualify the applicable loop to determine whether it is suitable for providing DSL service. In order to determine whether a particular loop is suitable for DSL service, McLeodUSA, and other CLECs are dependent upon access to Ameritech's OSS for information necessary to make that determination. The OSS which Ameritech provides to McLeodUSA and other

²⁵ Id.

²⁶ Id.

CLECs, for determining the suitability of loops for DSL service, however, is deficient. Ameritech does not provide CLECs with access to the same OSS utilized by the retail operation in evaluating the suitability of loops for DSL service but, rather, only provides access to a system in which much of the pertinent data has been filtered out or is not completely accurate. As a result, the ability of McLeodUSA to provide DSL service to its customers is significantly inhibited. If Ameritech's OSS issues a false negative, indicating that a particular loop is not suitable for DSL when in fact it really is, McLeodUSA loses the opportunity to market DSL services to that particular customer. On the other hand, if Ameritech's OSS issues a false positive, indicating a particular loop is DSL capable even though it is not, McLeodUSA ends up wasting resources and incurring frustration from its customers by being induced to market DSL service or same is not truly available. In order for CLECs to have a meaningful opportunity to compete, the FCC has required ILECs to provide CLECs with all of the OSS features and capabilities required.²⁷ The FCC has recognized that full access to OSS is crucial to a CLEC's ability to provide DSL services, because OSS represents a bottleneck, essential facility under the exclusive control of the ILEC.²⁸ Thus the FCC requires that CLECs have access to all loop provisioning data contained in Ameritech's OSS,²⁹ and that Ameritech provide access to the same data and OSS functionality and in the same time frame that it provides itself.³⁰

With respect to the level of OSS necessary in the specific context of advance services, the FCC has indicated that ILECs:

²⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, FCC-325, CC Docket No. 96-98, rel. Aug 8, 1996 ("First Report and Order"), at ¶31.

²⁸ Line Sharing Order, ¶172

²⁹ UNE Remand Order, ¶428,430

³⁰ First Report and Order, ¶505

Must provide the requesting carrier with non-discriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install.³¹

Ameritech's OSS in Michigan simply fails to comply with the FCC's orders and clearly fails to comply with checklist item #2.

2. McLeodUSA Experiences Significant Problems with SBC's Order Provisioning.

Approximately 15-20% of McLeodUSA orders to SBC that are submitted and accepted through the automated LEX system are electronically rejected by SBC's order writers without a valid reason.³² SBC personnel have proven extremely uncooperative toward McLeodUSA in its efforts to obtain an explanation of the basis for the rejection.³³ McLeodUSA typically has to make several additional unsuccessful attempts at submitting the order to SBC until the order is finally escalated to an SBC manager.³⁴ Even more frustrating is the fact that the SBC manager typically accepts the order as first submitted by McLeodUSA, but not before McLeodUSA has experienced much delay and frustration in submitting the order.³⁵ Additionally, many orders submitted correctly to SBC by McLeodUSA are incorrectly entered by SBC order writers.³⁶ This type of error occurs in approximately 10-15% of all orders submitted by McLeodUSA to SBC for 1FB and UNE-P.³⁷ The impact to McLeodUSA and its customers is harmful. The customers of McLeodUSA experience significant service impacting issues such as loss of features,

³¹ UNE Remand Order, ¶427

³² Affidavit of Eric Fowler, Attached hereto as Exhibit B.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

loss of long distance access, along with the resulting delays occasioned by SBC requiring McLeodUSA to resubmit the order.³⁸ SBC also routinely fails to properly execute supplemental change order dates, such that when a new McLeodUSA customer seeks to change its cut-over date from SBC to a new date, SBC fails to recognize the change and cuts the customer's service on the original cut-over date, thus causing immense customer confusion and frustration for the new McLeodUSA customer.³⁹ This problem happens on approximately 50-75% of all supplemental change order dates, and causes huge competitive problems for McLeodUSA, as its new customer typically perceives this as a problem caused by McLeodUSA, when in fact it is solely the fault of SBC.

2. Performance Measurements

The evidence presented in this case demonstrates that SBC's OSS and provisioning of resale and UNE service is not sufficient and, as a result, adversely affects the ability of CLECs to compete with SBC in Michigan markets. The performance data presented demonstrates that SBC's performance is substandard, continuing, and even deteriorating, in many areas.

First impressions of customers are critical to a CLEC's ability to compete against incumbent monopolists like SBC. One of the most crucial components of a CLEC's first impression on a customer is how quickly and smoothly a CLEC can provision service to the customer. Pursuant to the parties' interconnection agreement, SBC is required to complete UNE installations for McLeodUSA customers within three days. However, SBC, as recent as April 2001, has taken nearly six times that long to complete these orders for wholesale customers.⁴⁰ In fact, over the last six months, Ameritech Michigan

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ April 2001 CLEC aggregate performance result for UNE DS1 Loop including PRI.

has not once met the 3-day benchmark for 2 Wire Analog, Digital or DS1 Loop orders for the CLEC aggregate.⁴¹ Furthermore, Ameritech Michigan has caused up to 3 times as many missed due dates for the aggregate of all CLECs compared to its due dates for its own retail customers. See Table 1 below.⁴²

A common refrain from SBC in response to questions concerning missed due dates is that facilities are not available. Ameritech Michigan repeatedly fails to install service on the customer's original due date because of the lack of facilities. Once again, however, the required facilities tend to be amazingly more readily available for SBC's own retail customer's than for its wholesale customers. As noted for measure #60 in Table 1 below, SBC consistently, month after month, had facilities available for its retail customers far more often than it did for its wholesale customers. In fact, the December 2000 results show SBC missing due dates due to lack of facilities nearly three times as often for wholesale orders compared to its own retail orders.⁴³

Perhaps McLeodUSA's biggest concern with the lack of facilities issue surrounds the actual length of the delay in completing the orders affected. Referring to measure #61 as noted in Table 1 below, SBC has not only consistently delayed wholesale orders for a longer period of time than they have for their own retail customers, but worse yet, the degree of discrimination has drastically increased over just the last two reporting months.⁴⁴ Specifically, the wholesale performance result has escalated from 11 days to 23 days to 24 days for February, March and April 2001, respectively, while over the same period, SBC's retail performance shows 9 days to 8 days to 9 days.⁴⁵ Clearly a delay of

⁴¹ November 2000 through April 2001 CLEC aggregate performance results for UNE 2 Wire Analog, Digital and DS1 Loop orders.

⁴² January 2001 CLEC aggregate performance results for UNE BRI Loop without Test Access orders.

⁴³ December 2000 CLEC aggregate performance results for UNE BRI Loop without Test Access orders.

⁴⁴ March and April 2001 CLEC aggregate performance results for UNE 8 dB Loop orders.

⁴⁵ February, March and April 2001 CLEC aggregate performance results for UNE 8 dB Loop orders

9 days compared to 24 days is blatant discrimination. Most significant is the fact that both the performance trending and the degree of discrimination is worsening in recent months.

Another critical component of a customer's first impression is the stability of service in the first 30 days. Customers who experience trouble in the first 30 days with their service provider, understandably so, point the finger at their new provider, regardless of whether their new provider was at fault, or whether the fault lies with the wholesale provider, such as SBC. SBC's performance indicates that the latter is the case more often than not.⁴⁶ Consider measure #59 in Table 1 below. This demonstrates that SBC's performance is far superior for its own retail customers than for its wholesale customers. In fact, over the last 6 months, this has been the case every single month.⁴⁷ More importantly, similar to measure #61 mentioned above, the most recent performance represents the largest degree of discrimination, where over 17% of wholesale orders experienced trouble in the first 30 days, while SBC 's retail customers only experienced trouble 5% of the time for their similar orders.⁴⁸

Table 1. Ordering and Provisioning examples of discriminatory performance:

Measure #	Measure	Performance History Range (11/00 – 4/01)
29	Percent of Ameritech Caused Missed Due Dates for POTS Business customers – Field Work	CLEC Aggregate: 7.5 to 14.6%. Ameritech Retail: 6.6 to 9.1%
35	Percent of Trouble Reports within 30 days of Installation for POTS Business customers – Field Work	CLEC Aggregate: 15.0 to 21.2%. Ameritech Retail: 8.4 to 10.5%

⁴⁶ November 2000 through April 2001 CLEC aggregate performance results for UNE BRI Loops without Test Access orders.

⁴⁷ November 2000 through April 2001 CLEC aggregate performance results for UNE BRI Loops without Test Access orders.

⁴⁸ April 2001 CLEC aggregate performance results for UNE BRI Loops without Test Access orders.

55	Average Installation Interval for UNE 2 Wire Analog Orders with 1-10 loops. (days)	CLEC Aggregate: 4.5 to 6.4 days Benchmark is 3.0 days.
55	Average Installation Interval for UNE Digital Orders with 1-10 loops. (days)	CLEC Aggregate: 4.4 to 10.8 days Benchmark is 3.0 days.
55	Average Installation Interval for UNE DS1 Loop Orders that include PRI. (days)	CLEC Aggregate: 6.9 to 25.0 days Benchmark is 3.0 days.
56	Percent of Installations Completed within 3 Days for UNE 2 Wire Analog Loop Orders with 1-10 loops.	CLEC Aggregate: 57.9 to 79.8%. Benchmark is 95.0%
56	Percent of Installations Completed within 3 Days for UNE Digital Loop Orders with 1-10 loops.	CLEC Aggregate: 46.3 to 73.3%. Benchmark is 95.0%
58	Percent of Ameritech Caused Missed Due Dates for UNE BRI Loop Orders without Test Access	CLEC Aggregate: 13.1 to 31.0%. Ameritech Retail: 6.1 to 10.2%.
58	Percent of Ameritech Caused Missed Due Dates for UNE DSL Loop Orders without Line Sharing	CLEC Aggregate: 12.2 to 24.2%. Benchmark is 5.0%
59	Percent of Trouble Reports within 30 days of Installation for UNE BRI Loops without Test Access	CLEC Aggregate: 9.9 to 17.3%. Ameritech Retail: 4.5 to 6.5%
60	Percent of Ameritech Caused Missed Due Dates Due to Lack of Facilities for UNE BRI Loops without Test Access	CLEC Aggregate: 7.0 to 18.6%. Ameritech Retail: 4.9 to 8.4%
61	Average Delayed Days for Missed Due Dates Due to Lack of Facilities for UNE 8dB Loop Orders	CLEC Aggregate: 10.8 to 24.3 days. Ameritech Retail: 7.8 to 12.1 days.

Service after the sale

Not only has Ameritech Michigan failed to provision orders in a timely manner for its wholesale customers, the discrimination continues after service installation. Two of the biggest reasons why customers may become frustrated with their competitive

service providers (and revert back to an incumbent provider) are repeat service troubles and the integrity of the service provider's commitments. In both of these areas, SBC clearly discriminates against CLECs.

An example is Repeat Trouble Report Rate performance for POTS business customers by SBC, as demonstrated in Table 2 below. Not only has SBC discriminated against wholesale customers, its performance overall has been at unacceptable levels overall for both retail and wholesale customers. In fact, wholesale business customers experienced nearly 1 out 5 troubles being a repeat.⁴⁹

A similar situation exists with SBC's failure to honor trouble ticket commitment dates. Not only have SBC's technicians failed to honor their commitments for both wholesale as well as retail customers, they have clearly failed far more for wholesale customers than they have for their own retail customers.⁵⁰ Even worse yet, SBC's performance for wholesale customers has steadily backslid over the last six months.⁵¹ Specifically, in November 2000, performance for Missed Repair Commitments was less than 7% while April 2001 performance was worse than 22%.⁵² Performance is clearly backsliding in the wrong direction for an indicator that closely affects the customer.

Table 2. Maintenance and Repair examples of discriminatory performance:

Measure #	Measure	Performance History Range (11/00 – 4/01)
41	Repeat Trouble Report Rate for POTS Business Customers	CLEC Aggregate: 10.5 to 17.4%. Ameritech Retail: 9.4 to 14.7%.
66	Percent of Missed Repair Commitments for UNE 2 Wire Analog 8dB Loops	CLEC Aggregate: 6.5 to 22.6%. Ameritech Retail: 7.0 to 9.4%.

⁴⁹ February 2001 CLEC aggregate performance results for POTS business customers.

⁵⁰ January through April 2001 CLEC aggregate performance results for UNE 2 Wire Analog 8 dB Loop customers.

⁵¹ November 2000 through April 2001 CLEC aggregate performance results for UNE 2 Wire Analog 8 dB Loop customers.

⁵² November 2000 through April 2001 CLEC aggregate performance results for UNE 2 Wire Analog 8 dB Loop customers.

Parity of Poor Performance

Interestingly enough, SBC's performance for one of the highest customer impacting measures is not only at unacceptable levels for wholesale customers, but for its own retail customers as well. Note examples in Table 3 below, where the average service outage for both retail and wholesale business customers were in excess of 56 hours.⁵³ Moreover, these are average results for the reporting month, which clearly means that there were business customers that were without basic dial tone service for much longer than 56 hours. Average intervals for residential customers were as high as 79 hours for wholesale customers while retail customers were spared little in comparison at nearly 72 hours.⁵⁴

A common standard for measuring out of service conditions is whether a carrier can clear 95% of service outages in 24 hours. SBC's performance over the past six months indicates that it has repeatedly failed to meet this performance measure, and has failed miserably, clearing as little as 34% in one month.⁵⁵ In fact, for the customer set of residential POTS wholesale customers, SBC's performance would only peak at 68% before backsliding again to 60% in April 2001.⁵⁶ Business POTS wholesale customers would see a peak of 74% before backsliding again to 64% in April 2001.⁵⁷ Neither

⁵³ January 2001 CLEC aggregate and Ameritech retail performance results for dispatched POTS business out of service troubles.

⁵⁴ January 2001 CLEC aggregate and Ameritech retail performance results for dispatched POTS residential out of service troubles.

⁵⁵ January 2001 CLEC aggregate performance results for POTS residential out of service troubles.

⁵⁶ November 2000 through April 2001 CLEC aggregate performance results for POTS residential out of service troubles.

⁵⁷ November 2000 through April 2001 CLEC aggregate performance results for POTS business out of service troubles.

SBC's own residential or business customers would fare much better with a peak performance at 74% before backsliding again to as low as 64% in April 2001.⁵⁸

Table 3: Examples of Ameritech's recent poor performance for both wholesale and retail customers:

Measure #	Measure	Performance History Range (11/00 – 4/01)
39	Out of Service Troubles Receipt to Clear Duration for POTS Business Customers - Dispatched	CLEC Aggregate: 23.5 to 56.6 hours. Ameritech Retail: 25.6 to 56.5 hours.
39	Out of Service Troubles Receipt to Clear Duration for POTS Residential Customers - Dispatched	CLEC Aggregate: 27.7 to 79.2 hours. Ameritech Retail: 27.8 to 71.9 hours.
40	Percent of Out of Service Troubles Cleared within 24 hours for POTS Business Customers.	CLEC Aggregate: 47.7 to 73.7%. Ameritech Retail: 51.2 to 70.9%.
40	Percent of Out of Service Troubles Cleared within 24 hours for POTS Residential Customers.	CLEC Aggregate: 34.0 to 68.2%. Ameritech Retail: 48.3 to 73.4%.
68	Percent of Out of Service Troubles Cleared within 24 hours for POTS Residential Customers.	CLEC Aggregate: 79.3 to 94.0%. Ameritech Retail: 33.7 to 65.0%.

3. Improper "Special Construction" Charges

SBC has a history in Michigan of imposing discriminatory construction charges on CLECs when SBC claims there are no spare copper loop facilities available to provision a loop to an end user. It was Ameritech's reliance on the BFR process that was first challenged by CLECs in Michigan. See BRE Communications, L.L.C. d/b/a Phone Michigan v. Ameritech Michigan, Case No. U-11735 (Feb. 9, 1999) *slip op.* at 30, 1999 W.L. 135128, *16 (Mich.P.S.C. 1999). State regulators in Illinois, Ohio and Indiana have continued to reach the conclusion that assessing special construction charges to CLECs to provision UNE loops is unlawfully discriminatory under the Telecom Act. After rulings in Michigan and Illinois that Ameritech's practice was unlawful, SBC-

⁵⁸ November 2000 through April 2001 Ameritech retail performance results for POTS business out of service troubles.

Ameritech unilaterally modified its policy to eliminate use of the BFR process, but still attempts to impose unnecessary costs on CLECs.

For example, McLeodUSA has just been informed by SBC that it will not provision unbundled loops out of its remote switches. SBC has indicated that it will now require CLECs to collocate in all remote switches. SBC provided McLeodUSA with no Accessible Letter or other form of notice regarding this new policy; instead SBC merely stopped processing orders for UNE loops. By requiring McLeodUSA to collocate in a remote switch, SBC makes it cost-prohibitive for McLeodUSA to serve many Michigan customers.

SBC's requirement is a violation of checklist item 2 of the Competitive Checklist and of cost principles established by the FCC. The FCC has determined that prices for unbundled network elements ("UNEs") must be based on the total element long run incremental cost ("TELRIC") of providing those elements.⁵⁹ SBC's applicable cost models do not include remote switches. Indeed a remote switch cannot exist in a cost model based on forward-looking cost principles. Thus, SBC is attempting to impose extra charges on McLeodUSA for an embedded cost in violation of TELRIC principles.

4. SBC improperly refuses to allow McLeodUSA to purchase from its wholesale unbundled local switching and unbundled local transport tariffs

In 1998 SBC was ordered by the United States District Court for the Western District of Michigan⁶⁰ to file wholesale tariffs for unbundled network elements. In October and November of 2000 SBC finally filed such tariffs. However, when

⁵⁹ *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. for authorization to provide in-Region, InterLATA services in Massachusetts*, CC Docket No.01-9, Memorandum, Opinion and Order, FCC 01-130 (Apr 16, 2000) ("Verizon MA 271 Order").

⁶⁰ *Michigan Bell Telephone Company v. Strand*, 26 F.Supp.2d 803 (W.Dist. Mich. 1998).

McLeodUSA subsequently attempted to order from SBC's wholesale UNE tariff, SBC refused to allow McLeodUSA to place such orders, claiming that the prices for such items were contained in the interconnection agreement of McLeodUSA with SBC, and as such, could not be ordered by SBC's tariffs.⁶¹ SBC's tariffed rates for UNE loops and UNE loop switching are significantly more favorable in its wholesale tariff than in its interconnection agreement. SBC's position that McLeodUSA is not able to order from its wholesale UNE tariff filed with this Commission is anti-competitive and extremely disingenuous. The interconnection agreement between McLeodUSA and SBC, in fact, allows McLeodUSA to order under the interconnection agreement or from applicable tariffs! As noted in the interconnection agreement:

Ameritech shall charge[McLeodUSA] the non-recurring and monthly recurring rates for unbundled elements (including but not limited to the monthly recurring rates for these specific Network Elements, service coordination fee and cross-connect charges) as specified in the Pricing Schedule **or in applicable tariffs**. [emphasis added]⁶²

Furthermore, there is obviously no point to requiring SBC to file a wholesale UNE tariff if SBC does not have to make the tariff available generally. Since the majority of carriers operating in Michigan are required to have interconnection agreements with SBC, the majority of carriers operating in Michigan are denied access to SBC's wholesale UNE tariff. SBC's wholesale unbundled local switching and unbundled local transport tariffs are common carrier tariffs that, by definition, should be available to all carriers. SBC's argument to the contrary exemplifies its anti-competitive attitude towards CLECs and its willingness to attempt to force CLECs to jump through numerous legal hurdles just to be

⁶¹ Affidavit of Lorraine Harding, attached hereto as Exhibit C.

⁶² Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, by and between Ameritech Information Industry Services and BRE Communications, L.L.C. d/b/a Phone Michigan, dated Feb. 3, 1997.

able to obtain the basic rights and privileges conferred upon them by the Telecom Act and relevant FCC and state regulations.

5. SBC has failed to make its Remedy Plan available to CLECs

One of the key elements for approval of a section 271 application is adoption of an adequate performance remedy plan to ensure that the incumbent provider maintains a level of performance on key metrics to prevent the incumbent RBOC from disadvantaging CLECs in the local market. To that end, the Michigan PSC issued an order requiring Ameritech to make available a performance remedy plan in Docket U-11830, which by the terms of the order was effective immediately. In its filing in this docket, Ameritech claims it is currently reviewing the impact of this order, but claims it will comply with the order. (Fioretti Affidavit, p. 105).

Shortly after the PSC issued its order, McLeodUSA requested the interconnection amendment from Ameritech Michigan that would be required to implement the approved remedy plan.⁶³ Despite repeated requests, Ameritech Michigan did not supply McLeodUSA a draft interconnection agreement amendment June 18, 2001.⁶⁴

The “Appendix Performance Measurements” (“Appendix”) included with the interconnection agreement amendment provided by Ameritech Michigan purports to implement the Commission’s recent decision in Case No. U-11830 establishing a performance remedy plan for Ameritech. Section 1.6 of the Appendix provides:

In the event that the state commission that approved this Agreement subsequently orders liquidated damages/remedies with respect to performance measures in a proceeding binding on both parties, the parties agree to incorporate commission-ordered liquidated damages/remedies into this Agreement once the decision approving such remedies becomes final, non-modifiable, and any appeals are exhausted. The parties expressly reserve all of their rights to challenge any liquidated damage/remedy award, including but not limited to the

⁶³ Affidavit of Rod Cox, attached hereto as Exhibit D.

⁶⁴ Id.

right to oppose any such order and associated contract provision because remedy/liquidated damage provisions must be voluntarily agreed to and AM-MI does not at this time so agree. (emphasis supplied)⁶⁵

This provision effectively delays implementation of the Appendix for an unknown period of time until the Commission order "becomes final, non-modifiable, and any appeals are exhausted." As such, it is a non-starter for section 271 approval purposes.

The Appendix also allows Ameritech to veto the application of a remedy plan.

The parties expressly reserve all of their rights to challenge any liquidated damage/remedy award, including but not limited to the right to oppose any such order and associated contract provision because remedy/liquidated damage provisions must be voluntarily agreed to and AM-MI does not at this time so agree.

A remedy plan that can be unilaterally vetoed by Ameritech Michigan at any time is, without question, not a remedy plan that this Commission or CLECs can rely on. In light of these concerns with Ameritech Michigan's interconnection agreement amendment, McLeodUSA and AT&T requested that the Commission reopen the record in U-11830 to take into consideration these issues raised by its proffered amendment.⁶⁶

There is no effective performance remedy plan in place today in Michigan. Until Ameritech Michigan unconditionally makes available to CLECs in a timely fashion an unconditional effective remedy plan, the section 271 application of Ameritech Michigan cannot be approved.

C. Checklist Item 3: Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or

⁶⁵ "Appendix Performance Measurement", attachment to Amendment to Interconnection Agreement By and Between Ameritech Michigan and _____.

⁶⁶ Exhibit XXX "Letter to Reopen Record" dated June 28, 2001.

not SBC has met its burden of establishing compliance with this checklist item.

D. Checklist Item 4: Local loop transmission from the central office to the customer's premises, unbundled from switching or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

E. Checklist Item 5: Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

F. Checklist Item 6: Local switching unbundled from transport, local loop transmission, or other services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

G. Checklist Item 7: Nondiscriminatory access to: (I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

H. Checklist Item 8: White pages directory listings for customers of the other carrier's telephone exchange service.

During the course of negotiations pursuant to SBC's proposed 13-state interconnection agreement, McLeodUSA attempted to secure a commitment from SBC to *publish the white pages listings of McLeodUSA customers, similar to the provisions in the current interconnection agreement requiring SBC to publish the white pages directory*

listings for the McLeodUSA customers.⁶⁷ SBC has refused to negotiate any such requirement and has merely directed McLeodUSA to deal directly with SBC's publishing company, Dontec.⁶⁸ By refusing to negotiate with McLeodUSA for directory listings and putting McLeodUSA at the mercy of Dontec, SBC has failed to provide white pages directory listings for the McLeodUSA customers in violation of checklist item #8.

I. Checklist Item 9: Nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

J. Checklist Item 10: Nondiscriminatory access to database and associated signaling necessary for call routing and completion.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

K. Checklist Item 11: Telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible.

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

L. Checklist Item 12: Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

At this time, McLeodUSA is aware of no direct evidence indicating as to whether

⁶⁷ Harding Affidavit.

⁶⁸ Id.

or not SBC has met its burden of establishing compliance with this checklist item.

M. Checklist Item 13: Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)

At this time, McLeodUSA is aware of no direct evidence indicating as to whether or not SBC has met its burden of establishing compliance with this checklist item.

N. Checklist Item 14: Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

SBC consistently fails to meet firm order commitment dates for the turn-up of service to McLeodUSA resale customers and consistently provisions service faster to its own customers than to McLeodUSA customers.⁶⁹ Additionally, it typically takes SBC 21 days to add a feature or to change a PIC for McLeodUSA, although SBC usually accomplishes these tasks in one day for its own customers.⁷⁰

III. SBC HAS FAILED TO SATISFY THE PUBLIC INTEREST ANALYSIS

A. Section 271(d)(3)(C)

The public interest analysis contained in Section 271(d)(3)(C) of the Telecom Act is an independent element of the 14-point checklist.⁷¹ As indicated by the FCC:

The public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as congress expected. Among other things we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application. Another factor that

⁶⁹ Affidavit of Steve Childers, attached hereto as Exhibit E.

⁷⁰ Id.

⁷¹ FCC Texas Order ¶417; FCC New York Order ¶423.

could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application.⁷²

Thus, the FCC could find that SBC had satisfied each and every item on the 14-point checklist and still deny SBC's Application if the public interest analysis requirements are not met.⁷³

The FCC has indicated that all relevant factors are to be considered in the public interest analysis and has indicated a number of factors as being probative. These factors include: performance monitoring with self executing enforcement mechanisms to ensure compliance, optional payment plans for new entrant CLECs for the payment of non-recurring charges to lessen unreasonably high upfront costs, whether all pro-competitive entry strategies are available to new entrants in different geographic regions in different scales of operation, and whether such strategies are available to other requesting carriers upon the same rates terms and conditions, state and local laws that impact on competition, and the existence of discriminatory or anti-competitive conduct on the part of the RBOC.⁷⁴

The record of this case reflects that it is not in the public interest, for a variety of reasons, to recommend that SBC be granted interLATA authority.

1. Disparate Treatment Of CLECs Regarding Municipal Rights Of Way

⁷² FCC Texas Order ¶416; FCC New York Order ¶423.

⁷³ In addition to the language contained in the FCC's New York and Texas Orders concerning the public interest analysis the FCC has also indicated that "although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to the local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrance after receiving in-region, interLATA authority." Application of *Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd. 20542, ¶30 (1997) ("FCC Michigan Order").

Although SBC is not required to obtain telecommunications franchises from Michigan municipalities before installing or operating its facilities in the public rights of way, McLeodUSA and other CLECs are. McLeodUSA has been the victim of onerous franchise requirements imposed by Michigan municipalities.⁷⁵ McLeodUSA has often been charged excessive franchise fees that have no relationship to the municipality's costs of maintaining the right of way, and has often experienced unreasonable and costly delays in obtaining a franchise.⁷⁶ Since such onerous requirements are not imposed on SBC by Michigan municipalities, local governments are not managing their rights of way on a competitively neutral basis in violation of Section 253(c).

Although not directly part of the fourteen-point checklist, disparate treatment of CLECs regarding municipal rights-of-way relates very directly and significantly to the public interest analysis. Clearly Michigan markets cannot be said to be open, nor guaranteed to remain open, if CLECs are barred from offering service in various municipalities due to onerous franchise requirements and charges.

It has been the experience of McLeodUSA that franchise requirements and charges imposed by many municipalities constitute a barrier to entry for CLECs wishing to do business in many Michigan markets.⁷⁷ McLeodUSA has experienced indefinite

⁷⁴ FCC Michigan Order ¶387, 391, and 393-397.

⁷⁵ Affidavit of Victor Lazzaretti, attached hereto as Exhibit F.

⁷⁶ Id.

⁷⁷ Examples of onerous requirements for right of way access are numerous in Michigan. See Lazzaretti Affidavit. As the Commission is aware, the City of Birmingham has required a \$10,000 application fee, a minimum annual recurring fee of \$10,000 (regardless of the amount or type of fiber or other construction in the City), and reimbursement of all out-of-pocket expenses in addition to the fees. The City also purports to have the ability to pass on the ability of a CLEC to transfer its assets or otherwise pursue the sale, lease, or other transfer of fiber in the ordinary course of its business.

Additional examples include the City of Dearborn, The City of Auburn Hills, Frenchtown Township, the City of East Lansing and the City of Ann Arbor. McLeodUSA has never been able to do business in Dearborn and has specifically had to change its route plans due to the City of Dearborn's demands, which included at the time a gross revenue or per foot fee of \$.65 per foot (at the City's option at any time during the agreement), a requirement that McLeodUSA implement a policy requiring the incorporation of new technical developments in its system within the City to reflect "state of the art"

capabilities, a most favored nation clause for services to the City, and a gift of four (4) dark fibers to the City throughout the entire system for the City's use, including the potential for resale.

The City of Auburn Hills requires a "disruption permit" and an "occupancy permit", the application fee for both was \$5000.00. The application requirements are as follows pursuant to Section 79-33 of the City Code:

2. The applicant's application for a use permit shall include, without limitation, the following information.
 - (a) The name, age and address and phone number of the applicant in the case of a natural person, and if the applicant is not a natural person, and is not a publicly held corporation, the names, addresses and the phone number of each of its officers, directors and partners, as well as the names and addresses of those stockholders holding more than a ten percent interest in the stock of the entity.
 - (b) The name, phone number and address of the person who will serve as the proposed contact person to the applicant, and if different, the resident agent for accepting service of process if the applicant is a corporation or other person required to have a resident agent, and the address of the entity's principal business office and headquarters.
 - (c) The character of the business the applicant engages in and the length of time that the applicant has been engaged in the business of that character and where the business has been conducted.
 - (d) Copies of the Articles of Incorporation of an applicant that is a corporation or a limited liability corporation, as well as copies of the corporation's last three annual reports, and in the case of a partnership, a copy of the Partnership Agreement.
 - (e) Copies of the financial statements of the applicant for the last three years.
 - (f) A statement, description and plans showing and describing in detail the proposed use and occupancy of the right-of-way, with a detailed description of the exact type, kind and amount of the construction, installation, location, use and/or operation of the improvements, including who does and who will own, operate and use the same, and a detailed description of the purpose or purposes for which the improvements are intended to be used.
 - (g) Detailed map and plan showing those City rights-of-way in which the applicant proposes to construct, install, locate, use and/or operate the improvements, and the map and plans shall clearly designate the proposed route and exact location of the same, and shall designate whether the improvements are to be located underground and/or aboveground.
 - (h) A map showing the manner in which the proposed improvements will interconnect with existing and proposed improvements in other municipalities.
 - (i) A schedule and timetable for the construction and installation of the improvements, including the commencement and completion dates for the construction, as well as a commencement date for when the actual operation and use of the improvement in the City right-of-way will begin to take place.
 - (j) A statement of all activities anticipated to be performed within the right-of-way after completion of initial construction.
 - (k) A detailed description of the services to be provided, and the location of known and projected customers i.e. persons to be served.
3. An application shall not be accepted for filing by the City Clerk unless the application is complete, the application fee and use permit fee has been paid and the application contains all the information required by this ordinance.

The City of East Lansing, in addition to per foot fees, required McLeodUSA to provide, at no cost to the City, two dark fibers throughout the system in the City, and an annual "maintenance fee" of \$500 to cover the City's "costs," with no explanation as to what those costs were or even a requirement that any costs actually be incurred or documented. Frenchtown Township charges an annual minimum of \$2000 or \$.40 per foot of fiber and also purports to have the lawful authority to deny a transfer of rights or assets, *including the right to review whether a CLEC can grant a security interest in its assets in order to obtain financing*. Frenchtown also required McLeodUSA to waive (i) its right to have a lawyer appear in customer complaint matters in small claims court, (ii) its right to appeal a small claims judgement, and (ii) its right to remove any matter from small claims court. Virtually every agreement or ordinance encountered by a CLEC in Michigan contains some, all, or more of these similar types of provisions.

delays and/or onerous charges to obtain and keep franchises for municipal rights-of-way.⁷⁸ Such conditions make serving such municipalities virtually impossible.⁷⁹ As a result of onerous franchise requirements, McLeodUSA has been forced to completely circumvent some Michigan municipalities.⁸⁰

The right of way ball game is much different for SBC in Michigan, however. Currently, Ameritech/SBC enjoys unfettered and cost-free access to all public right-of-way in the State of Michigan. In *TCG Detroit v City of Dearborn*, 977 F. Supp. 836 (E.D. Mich. 1997), Ameritech argued, and the court agreed, that the Michigan law under which Ameritech was incorporated, and its original franchise granted, *prohibits* the imposition of franchise fees on Ameritech. This ruling was affirmed by the Sixth Circuit Court of Appeals in *TCG Detroit v. City of Dearborn*, 206 F3d 618 (6th Cir. 2000). In its opinion, the court noted:

Possibly, if Ameritech thus enjoys a state-mandated freedom from such fees, its competitive position is strengthened, and it might be able, in theory, to undercut its competition; if it did so, the result might be a barrier to entry by newcomers. Id. at ___. (emphasis added).

This is a gross understatement of dramatic consequence to the CLEC industry in Michigan. It firmly entrenches Ameritech's ability to compete on a completely uneven playing field at the local level in Michigan.

Currently, McLeodUSA pays in excess of \$500,000 per year in recurring ROW fees in Michigan, not to mention application fees, engineering, consultant and attorney fees, and fees for municipal contractors.⁸¹ McLeodUSA also experiences costs associated with delays to market entrance caused by overly burdensome application

⁷⁸Lazzaretti Affidavit.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

requirements that often request information that has already been provided to the MPSC in the certification process.⁸² Often this duplicative application process is used by municipalities in Michigan as a tool to successfully leverage clearly unlawful concessions from a CLEC due to speed to market concerns.⁸³ Historically, municipalities have used the application process as a means to turn the 90-day requirement under the MTA into virtually any time period they desire.⁸⁴ This occurs despite the fact that municipal review of this information is a clear encroachment on the Commission's jurisdiction to interpret the Michigan Telecommunications Act and to regulate the industry in Michigan.

2. SBC's Anti-Competitive Conduct

As discussed above, SBC has engaged in a variety of anti-competitive conduct, including: a) Refusing to allow McLeodUSA to purchase from SBC's Unbundled Local Switching and Unbundled Local Transport tariffs; b) Imposing improper special construction charges, the latest incarnation of which is SBC's new requirement that McLeodUSA collocate in each of SBC's remote switches; c) Failing to make its Remedy Plan available; d) Requiring McLeodUSA to needlessly convert all customers to 1FB resale before converting customers to UNE-P; e) Refusing to include provisions for White Pages listings in its proposed 13-State interconnection agreement; and f) Limiting CLEC access to collocation. In total this anti-competitive conduct has had a significant adverse effect on the ability of McLeodUSA and other CLECs to compete in Michigan. SBC should not be rewarded for its improper conduct with the brass ring of Section 271 approval.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

3. Impact of SBC's Anti-Competitive Conduct

The ability of CLECs to provide facilities-based services in a particular market is essential to the analysis of whether such market is truly open to competition and as to whether such market will remain open. Absent an entire lack of competition in its markets, the next best alternative for SBC is for its competitors to provide resale services, instead of facilities-based services. This is better for SBC financially, since competitors must purchase service from SBC with only a thin margin, if any. It is also better for SBC competitively, since CLECs are forced to sell the same products and services offered by SBC, with only a very limited ability to offer competitive choices to customers. Conversely, a CLEC providing facilities-based services has much better margins and is able to offer its customers significantly greater choices of products and services. It is virtually axiomatic that the resale of an incumbent local exchange carrier's (ILEC) services, though a means to market entry, is not a viable long-term business option for CLECs. SBC understands this. By blocking or delaying the ability of CLECs to provide facilities-based services, SBC undermines the viability of the entire CLEC industry to compete in its markets.

IV. CONCLUSION

The local service markets in Michigan can hardly be said to be irrevocably open to competition. Five years after the passage of the Telecom Act, CLECs have less than a 4% share of the local market. SBC's anti-competitive behavior towards CLECs has contributed significantly to this situation. As discussed above, SBC has failed to comply with Section 271 checklist items in numerous ways. Furthermore, granting SBC 271 approval, given its history of anti-competitive conduct and the low level of CLEC market penetration (which is largely due to that conduct) is clearly not in the public interest.

Thus, for the reasons stated above, McLeodUSA respectfully requests that the Commission deny SBC's Application or, in the alternative, that the Commission withhold approval of SBC's Application until SBC is in compliance with the Competitive Checklist and is able to demonstrate that its provision of interLATA service is in accordance with the public interest.

Respectfully submitted,

/s/

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