

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to )	
investigate and to implement, if necessary, a batch )	Case No. U-13891
cut migration process. )	
_____ )	

At the December 21, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

**ORDER**

By order dated June 29, 2004 in this proceeding, the Commission approved a batch cut migration process<sup>1</sup> on an interim basis.

On July 29, 2004, Talk America Inc. filed a petition for rehearing. Answers to Talk America's petition were filed on August 19, 2004 by MCImetro Access Transmission Services LLC (MCImetro) and SBC Michigan (SBC). On September 8, 2004, Talk America filed a request for consideration of supplemental authority. On September 15, 2004, SBC filed a response to Talk America's supplemental authority.

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<sup>1</sup> A batch cut migration process is defined as a process by which an incumbent local exchange carrier (ILEC) simultaneously migrates two or more loops from one carrier's local circuit switch to another carrier's local circuit switch, giving rise to operational and economic efficiencies not available when migrating loops from one carrier's local circuit switch to another carrier's local circuit switch on a line-by-line basis.

In its petition for rehearing, Talk America insists that subsequent to the close of the evidentiary record, real world experience garnered by Talk America after undertaking the extensive process of converting residential customers from unbundled network element platform (UNE-P) service to service provided by the use of Talk America's own switch combined with unbundled network element-loop (UNE-L) indicates that the Commission must modify its order to (1) increase the size or volume of lines in a batch, (2) eliminate "negotiated projects" for larger standardized batches with meaningful performance metrics and penalties, (3) reduce the price for batch migrations to reflect cost-efficiencies, and (4) clarify that the Commission is imposing the batch cut migration process under both federal and state law.

Talk America states that it is in the process of installing switching equipment necessary to convert as much of its base currently served via UNE-P to UNE-L as is technically and economically feasible. Talk America hopes to convert a minimum of 125,000 customer lines in Michigan to its own switches by June 2005. To meet this goal, Talk America maintains that the limitations set forth in the interim order for batch sizes must be revised. According to Talk America, in order to convert its UNE-P customer base to its own switch in any meaningful time frame, Talk America will need to have SBC process as many as 500 lines per central office per day. Because the current interim process places a limit of 100 cutovers per competitive local exchange carrier (CLEC) per central office per day as well as a maximum limit of 200 cutovers per central office per day, Talk America maintains that the interim order process is far too restrictive.

Although acknowledging that it has been able to negotiate to some degree with SBC for bulk project orders of up to 150 lines per day per central office, Talk America insists that the maximum size of the batch needs to be increased and the availability of the maximum size of the batch needs

to be certain and not subject to a negotiated process in order for Talk America to quickly transit its customer base to its own switches. According to Talk America, for it to transition its residential customer base, the size of the batch must be increased to 500 lines per CLEC per end office with up to 3,000 per end office aggregated among all CLECs. Talk America states that if the Commission is unwilling to impose this increase immediately, then the Commission should specifically direct that the collaborative promptly address increasing the size of the batch.

To ensure that all mass market customers, particularly residential customers, maintain dial tone throughout the batch cut migration process, Talk America insists that the Commission must impose meaningful performance measures that apply to all lines regardless of the size of the batch or whether the line was designated as part of a “project.” Talk America argues that all lines must be included in any measure and no exclusions should exist for large batches because the loss of dial tone has been a significant problem confronting Talk America in the batch cut migration process. Talk America maintains that in June 2004, SBC’s processes caused 7.9% of Talk America’s batch migrations to fail as a result of provisioning repairs for UNE-L transitioning, including the loss of dial tone on over 4% of its customer’s lines. Talk America believes SBC is trying to improve its performance, but Talk America contends that the pace of SBC’s improvement is unsatisfactory. Talk America insists that only with stringent performance metrics in place, will SBC be properly motivated. Toward this end, Talk America maintains that the Commission should adopt a performance measure for provisioning repairs at less than 1% and loss of dial tone at less than .5%. In addition, to ensure hot cuts are conducted in a timely fashion, Talk America argues that the Commission should adopt a performance measure for batch hot cuts that requires SBC to complete at least 500 scheduled hot cuts per CLEC per end office on each business day for which a CLEC requests such number. According to Talk America, the

Commission should be prepared to impose substantial penalties and remedies for the breach of these performance measures. Moreover, Talk America believes that the Commission should require the collaborative established in the June 29 order to engage in a schedule to reach a resolution of this issue within three months or have this dispute resolved on an expedited basis by the Commission.

Next, Talk America maintains that the June 29 order established a price for batch cuts that is excessive when compared to the cost of an initial order for UNE-P. Talk America represents that the current cost of a UNE-P line, including loop, port, and switch is \$13.89 averaged across all zones in Michigan, whereas the cost of a single hot cut is \$29.15, including over \$11 in service order charges. Talk America argues that a single hot cut should cost no more than \$5. Likewise, citing their anticompetitive nature, Talk America contends that there should be no costs associated with service orders.

Finally, Talk America argues that it would assist the parties to the collaborative process if the Commission were to clarify that in creating the interim batch cut migration process, the Commission was acting under both federal and state law.<sup>2</sup>

In reply, SBC contends that the evidence newly discovered by Talk America was, in fact, known to Talk America before the hearing, and that Talk America should have presented it to the Commission earlier. SBC stresses that Talk America failed to submit any testimony at the hearing and also failed to file either a brief or a reply brief on the subject. Specifically, SBC argues that Talk America's request to increase batch hot cuts to a maximum of 500 lines per CLEC per end office per day and 3,000 per end office per day is untimely, unnecessary, and inappropriate. According to SBC, Talk America could provision 100 lines per day at up to 60 central offices, for

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<sup>2</sup> MCImetro supported the positions taken by Talk America.

up to 6,000 lines per day. Further, SBC maintains that this number could be increased even further through special arrangements that would allow Talk America to increase the number of batches processed to up to 150 lines in a single day per central office. For this reason, SBC contends that Talk America has insufficient justification for seeking to increase the batch size. Finally, SBC argues that it is technically infeasible and would increase the risk of service interruption or other problems to unacceptable levels to attempt to increase the number of hot cuts to 3,000 per day.

SBC next insists that Talk America's proposed performance measures are inappropriate and erroneous. According to SBC, the Commission declined to analyze performance measurements and instead directed the parties to collaborate on this issue. SBC also states that the data cited by Talk America are erroneous and misleading. Further, because Talk America offered nothing new to justify a reversal of course, SBC insists that the Commission should reject Talk America's petition for rehearing. According to SBC, out of the thousands of hot cuts performed by SBC, Talk America cited only 10 instances in which trouble was noted after the cut. Of these 10, SBC maintains that 2 were late, but found to be trouble free. Seven others required rewiring, but were related to a single isolated problem in a particular central office.

Additionally, SBC argues that Talk America's objections to SBC's rates and prices are misplaced. In so doing, SBC maintains that the 83% decrease from \$29 to \$5 per hot cut is both inappropriate and frivolous. SBC also complains that Talk America has attempted to manipulate SBC's applicable rates in an erroneous manner. According to SBC, Talk America's request that SBC's rates and charges be reduced to \$5 is neither supported by the evidence of record nor by the data offered by Talk America on rehearing.

SBC also argues that the Commission may not now clarify that its prior order was based on both federal and state law as proposed by Talk America. According to SBC, citing MCL 24.271,

any authority relied upon by the Commission must be stated up front, and may not later be “backended”

into the proceeding through a clarification issued after the Commission’s final order. Because the Commission stated in its September 30, 2003 order commencing this proceeding it was conducting this proceeding in response to the Federal Communications Commission’s direction, under federal law and at no point indicated that it was acting independently under state law, the Commission may not now do so. Besides, argues SBC, the relief requested by Talk America is contrary to federal law and must be denied. Finally, SBC contends that, rather than consider Talk America’s petition for rehearing, the most appropriate course of action would be for the Commission to conserve its limited resources by awaiting the outcome of SBC’s challenge to the June 29 order.<sup>3</sup>

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission finds that it does not need to clarify its jurisdictional authority. In both its September 30, 2003 and June 29, 2004 orders in this proceeding, the Commission specifically indicated that its jurisdiction was “pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; the Commission’s Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.; and 47 USC 251 and 252.”

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<sup>3</sup> SBC filed an action in the federal district court for the Eastern District of Michigan (No. 04-60128) seeking review and reversal of the June 29 order.

Likewise, the Commission is not persuaded that it should make any changes regarding proposed performance measures at this time. In the June 29 order, the Commission directed the issue of performance measures should be considered through the collaborative process. The Commission remains convinced that the parties should continue to pursue a collaborative solution to the issue of performance measures.

With regard to the pricing issue, at the time that the Commission issued the June 29 final order, it did not have the benefit of the final order in SBC's cost case, Case No. U-13531, which was issued on September 21, 2004. In that order the Commission adopted the Staff's recommendation for the pricing of non-recurring costs (NRCs). In that case, the Staff proposed:

First, the Commission should use the existing rates from Case No. U-11831, with an "add-on" to increase rates to a level equal to the percentage the average UNE-P recurring rate is allowed to increase. Next, compare the AT&T rates for all NRCs and determine if AT&T proposes a higher rate than what the first step produces. If it does, use the AT&T rate with 20% increase as discussed below. In those instances where there is not a corresponding rate from Case No. U-11831, Staff recommends a 20% increase to AT&T's proposed rates to compensate for labor rates and activity times. However, if this results in a rate that is above the amount requested by SBC, the Commission should use the SBC proposed rate. Finally, if SBC's rate is lower than the existing rate, use the AT&T rate plus 20%.

Order, p. 73.

Because the methodology implemented by SBC pursuant to the interim batch hot cut order is not consistent with the approach approved in the September 21, 2004 order in Case No. U-13531, the Commission is persuaded that it should be revised. Accordingly, SBC is directed to immediately revise its prices for batch hot cuts in accordance with the findings for NRC pricing in Case No. U-13531 (the proposed AT&T rate, plus 20%).

Finally, with regard to the size of the batch, the Commission is persuaded that the maximum limit on the size of a request should be increased from 100 to 200 per CLEC per day per central office. Additionally, the maximum limit on the volume of hot cuts at any particular end office

should be increased from 200 to 250, on a first come-first served basis. This determination is supported by the FCC's decision announced on December 15, 2004 that established a 12-month transition period for transferring UNE-P customers to CLEC switches. Order on Remand, FCC 04-290. Finally, the Commission is persuaded that all affected providers should be urged to fully cooperate in the task of transferring UNE-P customers in the time allotted by the FCC.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.; and 47 USC 251 and 252.

b. The interim batch cut migration processes established in the June 29, 2004 order in this proceeding should be revised as set forth in this order.

THEREFORE, IT IS ORDERED that the interim batch cut migration processes established in the June 29, 2004 order in this proceeding are revised as set forth 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  
issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark  
Chair

( S E A L )

/s/ Robert B. Nelson  
Commissioner

/s/ Laura Chappelle  
Commissioner

By its action of December 21, 2004.

/s/ Mary Jo Kunkle  
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Suggested Minute:

“Adopt and issue order dated December 21, 2004 revising the interim batch cut migration process approved by the June 29, 2004 order, as set forth in the order.”