

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,	)	
to review the costs of telecommunications services	)	Case No. U-13531
by <b>SBC MICHIGAN.</b>	)	
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At the May 17, 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 DENYING REHEARING**

On September 21, 2004, the Commission approved a total element long run incremental cost (TELRIC) study for SBC Michigan (SBC) with certain modifications. Among other things, the September 21 order required SBC to file cost studies and tariffs within 45 days that complied with the Commission's findings and conclusions in the order. The Commission also directed SBC to file the resulting unbundled network element (UNE) and interconnection prices in an illustrative pricing schedule amendment to SBC's interconnection agreements. The order further provided that revised prices resulting from the approved cost studies would become effective the day after SBC made its compliance filing. The Commission permitted the competitive local exchange providers (CLECs) to object to SBC's compliance filing within 45 days, based only upon a failure to properly implement the Commission's order.

Petitions for rehearing of the September 21 order were filed by October 21, 2004. On December 21, 2004, the Commission issued an order denying those petitions for rehearing.

On November 5, 2004, SBC made its compliance filing, including revised cost studies, revised tariffs, and an illustrative interconnection amendment with a summary of UNE and interconnection prices resulting from the approved cost studies. Talk America Inc. (Talk America), and a group of CLECs referred to as the Joint CLECs filed objections to SBC's compliance filing. On January 10, 2005, SBC responded to those objections. Thereafter, on January 25, 2005, the Commission issued an order approving the compliance filing as modified by the order to bring the filing into compliance with the September 21, 2004 order. The Commission further approved a pricing schedule and an interconnection agreement amendment, both attached to the order. The Commission further stated:

SBC is directed to prepare and submit a CLEC-specific joint application and amendment, including the pricing schedule approved herein, to each CLEC with which it has a pending or approved interconnection agreement consistent with the September 21 order. Each CLEC shall be required to execute and return to SBC a joint application and amendment within 21 days of receipt. SBC shall immediately file the executed joint application and amendment with the Commission for approval.

January 25 order, p. 9.

On February 24, 2005, TelNet Worldwide, Inc., CMC Telecom, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, and Grid 4 Communications, Inc., (Collectively CLEC petitioners) filed a petition for rehearing of the January 25, 2005 order and a motion for partial stay related to the portion of the Commission's order requiring amendment of SBC's interconnection agreements. On the same day, Talk America and MCImetro Access Transmission Services LLC (MCI) filed petitions for rehearing seeking a determination with regard to batch hot cuts. On March 17, 2005, SBC filed responses to the petitions for rehearing and motion for partial stay.

## Amendment of Interconnection Agreements

The CLEC petitioners assert that the Commission may not lawfully order that new pricing be incorporated into all interconnection agreements, effective November 6, 2004. They argue that because contracts are involved, the Commission cannot and should not override the terms and conditions of those contracts. They argue that interconnection agreements serve no useful purpose if the Commission may “unhesitatingly disregard their terms and mandate the conditions by which the parties should interact.” CLEC petitioners petition for rehearing, p. 3. In the CLEC petitioners’ view, the mandated amendment negates the intentions of the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*, which, they argue, requires the give and take of negotiations to establish the terms and conditions of interconnection agreements. The CLEC petitioners argue that interconnection agreements are the result of numerous trade offs and the Commission should not upset the balance reached by the parties to those various agreements.

Further, the CLEC petitioners argue that one of the most important provisions in any commercial contract is pricing. They assert that the Commission has previously held that specific terms and conditions set forth in the specific interconnection agreement will determine if and when contract pricing is required to change. They argue that ordering an earlier change in pricing than contemplated by a particular interconnection agreement affects the CLEC’s ability to survive, and impinges on the underlying purpose of an interconnection agreement – to provide financial stability.

The CLEC petitioners argue that the federal courts have recognized the sanctity of interconnection agreements finding that once an interconnection agreement is approved by the state commission, it need not satisfy the requirements of Sections 251(b) and (c). *Global NAPs v Verizon New England*, 2005 WL 100772 (CA 1, 2005). Likewise, the CLEC petitioners argue,

interconnection agreements do not have to provide that the pricing will change on the date that the Commission approves a new cost study for an incumbent local exchange carrier (ILEC).

The CLEC petitioners go on to say that even the Federal Communications Commission (FCC) required the parties to use change of law provisions in their interconnection agreements rather than altering immediately the terms of those agreements in the *Triennial Review Order (TRO)*<sup>1</sup> or the *Triennial Review Remand Order (TRRO)*<sup>2</sup>, among others.

The CLEC petitioners state that the Commission does not have the authority to order across-the-board rate adjustments to interconnection agreements. They argue that the pricing schedule attached to the January 25 order is nothing more than a thinly disguised tariff. They argue that *MCI Telecommunications Corp v FCC*, 665 F2d 1300 (CA DC, 1981), supports the proposition that permitting rate filings that are inconsistent with contractual obligations violates the *Sierra-Mobile* doctrine. They argue that the Communications Act of 1934 (the FTA's predecessor) granted the FCC no authority to authorize unilateral changes in agreements. Similarly, the CLEC petitioners argue, the FTA grants the Commission no right to permit, much less require, a unilateral change in the agreements.

The CLEC petitioners go on to argue that the Commission's January 25 order violates the United States Constitution's prohibition against the legislative impairment of contracts. US Const,

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<sup>1</sup>*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), vacated in part, *United States Telecom Assn v FCC*, 359 F3d 554 (DC Cir 2004) (*USTA II*).

<sup>2</sup>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.

Art 1, § 10. They argue that orders of administrative agencies are legislative in nature and thus, fit within the constitutional prohibition.

Moreover, the CLEC petitioners argue, after previous cost cases, the Commission recognized that the terms and conditions of underlying interconnection agreements would dictate the extent to which the newly approved costs would impact contract pricing. For example, in Case No. U-11831, they argue, the Commission instructed Ameritech (SBC's predecessor) that the cost study orders would affect or not affect existing interconnection agreements in accordance with the terms of those agreements. Also, they argue, the United States District Court for the Eastern District of Michigan rejected arguments by SBC that the approval of new costs in a cost docket automatically changes the prices in interconnection agreements. *Michigan Bell Telephone Co v MichTel*, unpublished opinion of the Michigan Court of Appeals, decided August 14, 2002 in Docket Nos. 01-74073 and 01-74075. Thus, the CLEC petitioners argue, the Commission should instruct the parties to negotiate, using the contract change of law provisions, to incorporate the new prices.

SBC responds that the Commission has been delegated the express authority to establish rates for interconnection and UNEs by Section 251(d)(1) of the FTA, 47 USC 251(d)(1). It argues that the FTA contemplates that interconnection arrangements and UNEs will be provided pursuant to an interconnection agreement. Thus, SBC argues, the Commission has the authority to alter the rates incorporated into the interconnection agreements.

Further, SBC argues, the TELRIC-based rates approved by the Commission are no longer subject to dispute before the Commission. Thus, SBC argues, there is no reason to go through a useless process of negotiation and dispute resolution, when the disputes have already been resolved in the cost case. It argues that there has been ample opportunity for participation by the

CLECs, both individually and jointly, to satisfy the substance of any dispute resolution requirement.

Contrary to the CLECs' arguments that prices are a matter of negotiation, SBC states that prices have not been negotiated previously, but rather almost universally have been set in generic proceedings like this cost docket.

SBC goes on to argue that although the CLEC petitioners complain about losing dispute resolution rights, they do not raise any particular dispute that needs to be resolved. It further notes that the CLEC petitioners have not identified any interconnection service or UNE for which even a single CLEC is ready and willing to commence negotiations aimed at setting rates higher than those new rates which were approved by the Commission. Thus, it argues, the request for negotiation and dispute resolution is an empty gesture, the purpose of which is merely to delay implementation of approved rates.

SBC points to several previous proceedings in which the Commission found that its determinations in a cost docket would be implemented in already approved interconnection agreements and are not subject to further dispute resolution in arbitration proceedings. *See*, the March 7, 2001 order in Case No. U-12465, the December 20, 1996 order in Case No. U-11168, and the July 23, 2002 order in Case No. U-13352.

SBC argues that the Commission's January 25 order in this case requiring the amendment of existing interconnection agreements to adopt the approved price schedules is also consistent with actions by other state commissions. In support, SBC cites a decision of the Public Utilities Commission of Ohio.

SBC distinguishes the precedent cited by the CLEC petitioners, stating that the facts and issues were so dissimilar as to negate any precedential or persuasive value. According to SBC,

even the citation to the *TRO* is not apt, as the FCC's decision involved issues of a scope and complexity that were far-reaching. Moreover, it argues the *TRO* would in many cases require changing the manner in which interconnection services and UNEs would be provisioned. It states that given the range of operational and provisioning issues raised by the *TRO*, it was not unexpected that amendments to interconnection agreements would not be mandated by the FCC on a blanket basis.

In contrast, SBC argues, the present case does not involve changes to the very nature of the arrangements under which services would be provisioned to end-users. The changes required by the January 25 order merely related to specific TELRIC-based prices to be charged for interconnection services and UNEs. Thus, there are no operational, provisioning, or technical changes that might legitimately require parties to negotiate the impact of changing law.

SBC further argues that, for two reasons, the Commission must reject the argument that its decision violates any due process rights of CLECs that did not participate in the case. First, SBC argues, the CLEC petitioners lack standing to assert the due process rights of non-participants. Second, the entire CLEC industry was aware of the issues presented in this case and that the outcome might result in higher TELRIC-based rates. No CLEC was required to seek formal intervention in the proceeding. Rather, any entity was permitted to participate to whatever extent and in whatever manner it chose. Thus, any lack of participation was voluntary and cannot support a claim that the newly approved rates should not apply to all CLECs.

The Commission is not persuaded that it should alter the result it reached in the January 25 order. Pursuant to state and federal law, TELRIC provides the floor for pricing of UNEs. Thus, in order for the interconnection agreements to provide lawful terms, they must incorporate prices that meet or exceed those established in Case No. U-13531.

Section 251(c)(3), 47 USC 251(c)(3), requires ILECs to provide UNEs on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of Section 252, 47 USC 252. Section 252(d)(1) of the FTA provides that just and reasonable for purposes of Section 251(c)(3) means that the price must be based on the cost of providing the interconnection or network element, be nondiscriminatory, and may include a reasonable profit. The FCC has determined that cost-based rates should be set at TELRIC. It has promulgated rules that set out the permitted methods for a state commission to arrive at TELRIC and set just and reasonable rates for UNEs. *See, 47 CFR 51.503 et seq.* This case was a proceeding consistent with those rules.

The Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, also requires that a provider's rates be just and reasonable. Section 102(y) provides that to be just and reasonable, a rate may not be less than the total service long run incremental cost of providing the service. Section 352(1) applies the just and reasonable requirement to interconnection rates. Thus, once the TELRIC is determined, as it has been in this case, there is no reason for negotiation concerning price. That does not mean, however, that the prices determined in a cost case automatically are included within an interconnection agreement. Rather, the Commission's January 25 order recognized that amendments to those agreements would be necessary to bring the agreements into compliance with applicable law. The Commission approved SBC's request for an expeditious process because there was no reasonable purpose to be served by requiring individual negotiations for a matter for which no real latitude is permitted. Pursuant to state law, interconnection rates are set by the Commission. Pursuant to federal law, the Commission must use the FCC-approved method to determine rates. This the Commission has done.

Finally, the Commission finds that its determination to require all CLECs with approved or pending interconnection agreements with SBC to amend their contracts is necessary in order to preserve the rates as nondiscriminatory. Virtually simultaneous implementation of the new rates treats all CLECs equally. In an area subject to pervasive regulation, this is not an unacceptable method to achieve the required result.

Therefore, the Commission concludes that the CLEC petitioners' rehearing request should be denied. Because the request for partial stay of the January 25 order is based on the same arguments that have been rejected above, the Commission also denies that request.

#### Batch Hot Cuts

MCI requests rehearing of the Commission's January 25 order because it claims that the Commission failed to set any rates for batch hot cuts. MCI argues that in the *TRRO*, the FCC ruled that there is no impairment for CLECs without unbundled switching and explicitly indicated that the state commissions could further refine batch hot cut processes. MCI acknowledges that the January 6, 2005 order of United States District Court Judge Marianne O. Battani in *Michigan Bell v Lark et al*, Case No. 04-60128 (ED Mich, 2005) , enjoins the Commission from enforcing its June 28, 2004 order in Case No. U-13891 (Batch Hot Cut Order). However, MCI argues that the District Court order, read in conjunction with the *TRRO*, does not prevent the Commission from addressing and resolving disputes about batch hot cuts as a part of the amendment process to interconnection agreements nor from addressing rates for batch hot cuts.

MCI argues that it presented abundant evidence in this proceeding with regard to batch hot cut costs. It asserts that the FCC's rulings within the *TRRO* concerning batch hot cuts constitute a basis for rehearing on this issue. Further, it argues that the Commission's setting a rate for batch hot cuts in this docket would not in fact require SBC to provide batch hot cuts. Rather, the legal

obligation for SBC to provide batch hot cuts would be determined by the language in the interconnection agreements, including these amendments. MCI argues that, in accordance with the Commission's findings concerning nonrecurring costs, the Commission should order SBC to amend the approved rate schedules to include a rate for batch hot cuts set at 120% of the rate proposed by AT&T Communications of Michigan, Inc.

Talk America notes that SBC excluded from its compliance filing price list the batch hot cut rates approved by the Commission. Talk America states that it assumes the Commission's approval of the price list without the rate for batch hot cuts relates to the injunction issued by Judge Battani. It requests that the Commission clarify that the Commission has approved batch hot cut rates that should be implemented upon the expiration or reversal of the injunction.

SBC responds that the prices advocated for implementation are founded on the batch hot cut process imposed by the Commission's Batch Hot Cut Order. It argues that the foundation of that proceeding and the associated prices rests on an implicit finding that CLECs are impaired without unbundled mass market switching, and the FCC's unlawful attempt to delegate authority to state commissions to develop a batch hot cut process to alleviate that impairment. Those bases, SBC argues, were destroyed in *USTA II*, in which the Court vacated those portions of the *TRO* that delegated to state commissions the authority to determine whether CLECs are impaired without access to certain network elements, including mass market switching.

SBC argues that Judge Battani's order permanently enjoins the Commissioners from enforcing the Batch Hot Cut Order, which the Court vacated as contrary to federal law. It argues that if the Commission prevails on its appeal, the United States Court of Appeals will instruct the District Court and the District Court will instruct the Commission on how to proceed. Therefore, SBC argues, the Commission should not accept Talk America's invitation to set prices now to be

effective in the event the Commission prevails on appeal. Until the federal Court of Appeals acts on the appeal, SBC argues, the Commission is bound to comply with Judge Battani's injunction.

Further, SBC argues that MCI's reading of the *TRRO* to include an FCC mandate for the Commission to address batch hot cuts is a curious one. It states that the FCC held in that case that there is no impairment to CLECs arising from the hot cut process for the majority of mass market lines, that the new hot cut processes developed by each of the Bell Operating Companies (BOCs) significantly address the issues noted in the *TRO*. *See, TRRO*, ¶ 210.

Moreover, SBC argues, the citations to the FCC's order that MCI does mention are hardly a "mandate" for MCI's proposed prices. According to SBC, the FCC intended to request the states to resolve carrier-specific complaints concerning whether incumbents faithfully performed in accordance with the processes represented to the FCC. SBC argues that MCI's position essentially requests the Commission to re-institute the same prices that arose from the Commission's unlawful Batch Hot Cut Order by changing the docket number. Therefore, SBC argues, the Commission should reject the petitions for rehearing filed by MCI and Talk America.

At this juncture, the Commission finds that to grant the petitions for rehearing filed by MCI and Talk America would be premature. The Commission established a docket specifically to address hot cut issues. However, the Commission takes seriously Judge Battani's injunction and will do nothing inconsistent with that order unless and until it is altered by a court of competent jurisdiction. The Commission has appealed Judge Battani's ruling and will seek to reinstitute its prior order in Case No. U-13891 if the injunction is lifted. Nonetheless, the petitions for rehearing filed by MCI and Talk America should be denied, in as much as the current law of the case requires it.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*
- b. The petitions for rehearing should be denied.

THEREFORE, IT IS ORDERED that the petitions for rehearing of the January 25, 2005 order filed by TelNet Worldwide, Inc., CMC Telecom, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, and Grid 4 Communications, Inc., Talk America, Inc., and MCImetro Access Transmission Services LLC are denied.

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 E A L )

/s/ J. Peter Lark

Chairman

By its action of May 17, 2005.

/s/ Robert B. Nelson

Commissioner

/s/ Mary Jo Kunkle  
Its Executive Secretary

/s/ Laura Chappelle  
Commissioner

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Its Executive Secretary

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Commissioner