

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of SBC MICHIGAN 's classification)	
of business local exchange service as competitive)	
pursuant to section 208 of the Michigan)	Case No. U-14323
Telecommunications Act.)	
_____)	

In the matter of SBC MICHIGAN 's classification)	
of residential local exchange service as competitive)	
pursuant to section 208 of the Michigan)	Case No. U-14324
Telecommunications Act.)	
_____)	

At the March 29, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

ORDER DENYING PETITION FOR REHEARING

On February 7, 2005, Talk America, Inc. (Talk), filed a petition for rehearing of the January 6, 2005 order in these cases that declared business basic local exchange service in SBC Michigan's (SBC) Access Area A to be competitive for the purposes of a one-year trial period.

On February 28, 2005, responses to Talk's petition for rehearing were filed by SBC and MCImetro Access Transmission Services LLC (MCImetro).

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.

Talk raises myriad arguments to support its position that the Commission should grant rehearing of the January 6, 2005 order in these proceedings. First, Talk maintains that the Federal Communications Commission's (FCC) new rules for network unbundling obligations of incumbent local exchange carriers¹ (ILECs) may affect the ability of competitive local exchange carriers (CLECs) to compete with SBC for business customers in Access Area A. Referencing the anticipated effects of the *TRO Remand Order*, Talk insists that the inability to access either dedicated interoffice transport or high-capacity loops in any of the wire centers located in Access Area A will likely have a dramatic adverse effect on competition. According to Talk, these considerations alone mean that it was premature to declare business basic local exchange service in Access Area A to be competitive without first conducting a contested case proceeding.

Talk also insists that the effect of the FCC's recent orders regarding switching and access to unbundled network element-platform (UNE-P) may have stifling consequences on competition and the ability of CLECs to provide service to their customers, because many of the CLECs provide business local exchange service through use of UNE-P.

¹*In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338. (*TRO Remand Order*).

Other concerns expressed by Talk include: (1) SBC's success in having a federal district court enjoin the Commission from requiring SBC to provide batch hot cuts², (2) SBC's announcement of its plans to purchase AT&T Communications, Inc., (3) the inability of the Commission to measure customer vulnerability to exorbitant rates and other unfair terms and conditions, (4) the inability of the Commission to detect predatory pricing tactics, and (5) the absence of any meaningful evaluation process for assessing the actual state of competition.

In response, SBC argues that Talk's petition for rehearing fails to set forth any newly discovered evidence, unintended consequences, or legal error that would justify rehearing under Rule 403. Rather, SBC contends that Talk's positions constitute nothing more than a rehash of comments the Commission considered and rejected in its January 6 order. For this reason, SBC argues that the petition for rehearing should be denied.

MCImetro also opposed Talk's efforts to set aside the one-year trial period adopted by the January 6 order. According to MCImetro, Talk's concerns about the Commission's authority over batch hot cuts is unfounded. Citing Judge Battani's ruling and paragraphs 211 and 217 of the *TRO Remand Order*, MCImetro insists that the Commission has ample authority to address batch hot cut issues. MCImetro also contends that Talk's concern regarding the inability to access UNE-P is baseless. MCImetro argues that SBC has a continuing obligation to provision UNE-P under Section 271 of the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*, and the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484.2101 *et seq.*

MCImetro next maintains that SBC remains obligated to adhere to all of its Section 271 obligations until it obtains a ruling from the FCC. According to MCImetro, in Paragraph 39 and in footnote 120 of the *TRO Remand Order*, the FCC established a process for SBC to obtain

²Talk's argument in this regard references the January 6, 2005 order in *Michigan Bell v Lark, et al.*, (USDC, ED MI, Southern Division, Case No. 04-60128, Hon. Marianne O. Battani).

forbearance from enforcement of SBC's Section 271 obligations. MCImetro states that this process includes filing a petition for forbearance with the FCC and obtaining a favorable ruling on such a petition, which SBC has not attempted.

MCImetro states that the Commission may use provisions in the MTA, such as Section 355,³ to require unbundling even after termination of the unbundling obligations available pursuant to Section 251 of the FTA. Additionally, MCImetro insists that "savings" clauses in the FTA⁴ expressly preserve the Commission's ability to order unbundling because the FCC has not preempted the Commission's state authority in accordance with the process established by Paragraph 195 of the Triennial Review Order (TRO)⁵ that was left intact by the United States Circuit Court of Appeals' decision in *United States Telecom Assn v Federal Communications Comm*, 359 F3d 554 (DC Cir 2004). Indeed, MCImetro points out that various court decisions, including *Michigan Bell Telephone Co v MCImetro Access Transmission*, 323 F3d 348, 359 (6th Cir 2003), *Michigan Bell Tel Co v Chappelle*, 222 F Supp 2d 905, 918 (ED Mich 2002), and *Michigan Bell Tel Co v Strand*, 26 F Supp 2d 993, 1000-01 (WD Mich 1998), have affirmed Commission orders regarding unbundling under the MTA.

Finally, MCImetro asserts that Talk's rates for basic local exchange service will remain tariffed under state law.

³MCL 484.2355.

⁴*See*, 47 USC 251(d)(3), 252(e)(3), 261(c); and Pub L No 104-104, Section 601(c)(1), 110 Stat. 56, 143 (uncodified note to 47 USC 152).

⁵*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003).

The Commission finds that Talk's petition for rehearing should be rejected. Reduced to its essence, Talk's primary justification for rehearing is its belief that the current regulatory climate is too unstable for the Commission to undertake an attempt to declare business basic local exchange service in SBC's Access Area A to be competitive. However, nothing in the MTA indicates that the Commission must wait until the condition of state and federal regulatory authority over the telecommunications market stabilizes before declaring business basic local exchange service in SBC's Access Area A competitive for the purposes of a one-year trial period. The concerns described by Talk could have an effect on the telecommunications market. Other influences, such as technological advances, may also play a role in the competitiveness of the market for telecommunications services. Nevertheless, the Commission finds that Talk's concerns about the current state of the marketplace do not constitute a sufficient basis to prematurely abandon the trial program commenced by the January 6, 2005 order. The Commission has established a mechanism for monitoring the state of competition in the telecommunications market every three months and the test period is of limited duration. For these reasons, the Commission finds that Talk's petition should be rejected.

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.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*
- b. The petition for rehearing filed by Talk should be rejected.

THEREFORE, IT IS ORDERED that the February 7, 2005 petition for rehearing filed by Talk America, Inc., is rejected.

The Commission reserves jurisdiction and may issue further orders as necessary.

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark

Chairman

(S E A L)

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of March 29, 2005.

/s/ Mary Jo Kunkle

Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 29, 2005.

Its Executive Secretary