

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to )  
commence a collaborative proceeding to monitor and )  
facilitate implementation of Accessible Letters issued )  
by **SBC MICHIGAN** and **VERIZON**. )  
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Case No. U-14447

At the September 20, 2005 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman  
Hon. Laura Chappelle, Commissioner  
Hon. Monica Martinez, Commissioner

**ORDER**

On July 7, 2005, Covad Communications Company (Covad), a competitive local exchange carrier (CLEC) filed a self certification with SBC Michigan (SBC), asserting that Covad was entitled to unbundled DS1<sup>1</sup> loops pursuant to 47 USC 251(c)(3) at the Dearborn Fairborn wire center, a wire center that SBC had declared unimpaired under the provisions adopted by the Federal Communications Commission (FCC) in the *Triennial Review Remand Order (TRRO)*<sup>2</sup> and implementing rules. Pursuant to the dispute resolution procedures adopted in the Commission's

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<sup>1</sup> Digital Signal Level 1.

<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. (TRO Remand Order), rel'd February 4, 2005.*

March 29, 2005 order in Case No. U-14447, SBC filed its challenge to Covad's certification on July 18, 2005.

On August 8, 2005, Covad and TDS Metrocom, LLC, XO Communications Services, Inc., and Talk America Inc. (the Joint CLECs), filed affidavits in support of Covad's self certification. On August 22, 2005, the Commission received briefs from the following: SBC, Covad, the Joint CLECs, and the Commission Staff (Staff). On August 29, 2005, reply briefs were filed by SBC and Covad.

### Legal Framework

47 CFR 51.319(a)(4)(i) provides in part:

Subject to the cap described in paragraph (a)(4)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T-1 services.

In the *TRRO*, the FCC found that in most instances, CLECs would be impaired in their ability to compete without access to DS1 loops, except in certain circumstances. In reaching this conclusion, the FCC recognized that "stand-alone DS1 loops offer low revenue opportunities and are unlikely to be deployed competitively." *TRRO* ¶ 171. Therefore, the FCC adopted a scheme for determining the availability of high capacity unbundled network element (UNE) loops and dedicated interoffice transport "based upon objective and readily available facts, such as the number of business lines or the number of facilities based competitors in a particular market." *TRRO*, ¶ 234. SBC must provide Covad and other CLECs unbundled access to DS1 loops and transport if the CLEC self certifies that it is eligible to obtain the loops ordered. Thereafter, the

incumbent local exchange carrier (ILEC) may challenge the self certification, but will prevail only where both of two conditions exist: (1) the wire center in question serves more than 60,000 business lines, and (2) there are at least 4 unaffiliated fiber-based collocators at that wire center. *See*, 47 CFR 51.319(a)(4)(i).

The burden of proof is on the ILEC to demonstrate that CLECs are not impaired without access to unbundled DS1 loops at a particular wire center. Unless SBC can demonstrate that the Dearborn Fairborn wire center serves more than 60,000 business lines and houses at least 4 fiber-based collocators, its challenge will fail.

### Line Count Issues

#### 1. Current Data Use

The *TRRO* adopts a calculation for business lines based on ARMIS 43-08 business lines, plus UNE-P<sup>3</sup> and UNE-L<sup>4</sup> loops. *Id.*, ¶ 105. SBC argues that its 2003 ARMIS 43-08 line counts, 2003 UNE-P business lines, and all 2003 UNE-L (whether used for business or residential service) should be used.

Covad takes the position that 2003 data is stale and should not be used. It argues that its self certification relates to the state of impairment that exists in the wire center today. Thus, it argues, the timeliness and vintage of the data that is used to resolve the challenge must be the latest data available in order to be relevant to the determination. Covad argues that SBC's data was nearly one and one half years old at the time of Covad's self certification. Covad states that it has obtained more recent wire center data, which it presented in its supporting affidavits.

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<sup>3</sup> UNE-P refers to the unbundled network element platform, which includes the loop, unbundled local switching, and transport.

<sup>4</sup> UNE-L refers to an unbundled loop.

Although Covad acknowledges that this issue is not dispositive of the validity of SBC's challenge, it argues that the Commission should provide guidance for the parties that may face challenges in the future. Covad states that its more recent data reflects a significant decrease in business lines, which reflects a decreasing use of switched service through the wire center and shows that SBC cannot meet the 60,000 business line count in the near future (if it actually meets it now). Further, Covad argues, the new data evidences the low likelihood of economic revenue opportunities for CLECs to provide competitive services.

The Staff agrees with Covad that the most recent information available at the time of the CLEC's self certification (in this case June 5, 2005 data) should be used.

The Joint CLECs argue that SBC has created a fundamental mismatch of data by using figures as of December 31, 2003 for the number of lines and more recent data for the number of fiber-based collocators. They argue that to satisfy the FCC test, SBC must demonstrate that the wire center met the requirements of both prongs of the rule at the same time.

The joint CLECs argue that December 31, 2004 data was within SBC's possession, even if not yet tabulated, when SBC filed its challenge to Covad's self certification. These parties argue that SBC should have current data for both parts of the FCC test for the current time period.

SBC argues that the data for determining wire center impairment must be consistent with that available at the time at which SBC listed the wire center as unimpaired. SBC states that it relied upon the most recent ARMIS 43-08 data available, coupled with UNE data and collocation information of the same vintage. SBC argues that the approach suggested by Covad is not consistent with the *TRRO* and would violate federal law.

SBC states that the *TRRO* identified the data to be used for determinations concerning impaired wire centers to be the ARMIS 43-08 report, which is compiled annually and filed with

the FCC. SBC states that it used the most recent data available when it made its determination. It argues that the December 2004 ARMIS 43-08 report and the June 30, 2005 data had not yet been created for other regulatory purposes at that time. In fact, SBC argues that the latter data group will never be used for other regulatory purposes.

SBC argues that there is no doubt that the Dearborn Fairborn wire center exceeded both of the non-impairment thresholds and satisfied the standard for no required DS1 loop unbundling at the time that SBC filed its list of unimpaired wire centers with the FCC. As a result, SBC asserts, it may not be required in the future to provide DS1 loops in that wire center.

The Commission finds that for SBC to meet its burden to challenge a self certification, it must demonstrate that the wire center in question met the two prongs of the 47 CFR 51.319(a)(4) standard when SBC declared the wire center unimpaired. The language of the federal rule explicitly provides that once the criteria have been found to be met, SBC may not be required to provide DS1 loops from that wire center at any future point. The age of the data must be close enough in time to reflect conditions at the time that SBC claims that the wire center is no longer impaired. In this case, the Commission finds that SBC should have used the 2004 ARMIS data, which was available, even if not fully edited and incorporated in a report to the FCC. The analysis requires using data gathered for ARMIS calculations, not the calculations themselves. Once SBC can demonstrate that the wire center served more than 60,000 lines and had more than 4 collocators at the same time, it has met the criteria of 47 CFR 51.319(a)(4)(i).

Because SBC need not demonstrate a continuing state of meeting the criteria of the FCC rule, the fact that either factor is no longer met or may not be met in the near future is irrelevant as to whether SBC must now provide DS1 loops to competitors. The Commission is not free to

establish its own rules with respect to this issue. In the Commission's view, the language in the FCC's order and its rule are not ambiguous or subject to alternate interpretation.

## 2. Residential Lines

Covad and the Joint CLECs argue that SBC has impermissibly included residential lines in its count of lines for purposes of meeting the standards expressed in 47 CFR 51.319(a)(4). Although SBC removed residential UNE-P lines from this count, it included residential UNE-L lines. The Joint CLECs argue that SBC tacitly admits it can distinguish between UNE-L lines used to serve business customers and those used to serve residential customers. These parties argue that to include residential lines merely inflates the business line count in this wire center.

SBC responds that whether these lines are included in this case is immaterial, because even with the residential UNE-L lines removed from the count, there are still over 60,000 lines served by this wire center. Further, SBC argues, the *TRRO* requires inclusion of all UNE-L lines in the count of business lines. SBC argues that when the FCC created the definition of business line in 47 CFR 51.5, it required the inclusion of "the sum of all UNE loops" connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." *Id.* SBC notes that the staff of the Illinois Commerce Commission (ICC) adopted SBC's position on this issue, concluding that requiring SBC to use a counting method inconsistent with that relied upon by the FCC is tantamount to modifying the FCC's impairment criteria. SBC insists that its method of counting lines is consistent with the *TRRO*, and the arguments supporting modifications to those criteria should be rejected.

The Staff points out that there is no disagreement with regard to UNE-P lines, because SBC removed residential lines from that count. The Staff agrees with Covad that only business UNE-L lines should be counted. Although not all ILECs have the ability to separate out business UNE-L

from residential UNE-L, SBC does have the ability to do so. In the Staff's view, SBC has provided no persuasive argument against using the most accurate information to determine the number of business lines served by the wire center.

The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P, UNE-L, or leased line will be counted when it serves a business customer. SBC admits that it has the information necessary to remove the residential lines from this count and should do so. However, in this case, the residential line count is so small as to not affect the end result of this portion of the analysis.

### 3. Centrex Lines

SBC takes the position that each Centrex line should be counted as one business line. It argues that the instructions used to determine ARMIS 43-08 line counts provide that each Centrex line be counted as a business line. It points out that the ICC staff recently rejected a similar CLEC proposal to graft a line equivalency factor onto the FCC's rules. SBC states that it appropriately counted Centrex lines in accordance with the FCC's ARMIS reporting instructions.

On the other hand, Covad argues that the number of Centrex lines should be divided by nine (what it terms a Centrex line equivalency factor) to determine the number of business lines. It argues that Centrex service is functionally equivalent to a private branch exchange service, although Centrex requires more connections between the customer premises and the central office. Covad states that for purposes of access charges and universal service counts, the FCC has adopted a one to nine equivalency factor that counts nine Centrex lines as one business line.

Covad admits that the FCC rule defining business lines does not state that the Centrex equivalency factor should be applied. However, Covad argues that the rationale is equally applicable and justified in this proceeding. It argues that a business line is count that does not adjust for the Centrex equivalency factor provides a distorted picture of the actual revenue opportunities in a given wire center.

The Joint CLECs agree with Covad that Centrex lines should be subject to the equivalency factor. They argue that the theoretical merits of applying such a factor here are the same as in other contexts urged before the FCC. Because the rationale and reasoning employed in adopting an equivalency factor should apply equally here, the Joint CLECs urge the Commission to adopt the use of the factor to reduce the line count.

The Staff agrees with SBC that the definition of business lines found in the *TRRO* makes it appropriate to use the well established instructions for determining ARMIS 43-08 line counts to define Centrex lines. Those instructions provide that each Centrex line is counted as one business line.

The Commission finds that the *TRRO* requires that the line count include each Centrex line as one line, without a factor to reduce the number to one ninth. There is no provision in those rules or the *TRRO* that would permit the reduction by the Centrex equivalency factor as proposed by the CLECs. If the parties believe that such an equivalency factor is appropriate for use in the impairment analysis, they must prevail on that argument before the FCC.

## Number of Collocators

The resolution of issues related to the number of fiber-based collocators present in the Dearborn Fairborn wire center rests on the definition in 47 CFR 51.5, which provides in relevant part:

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that

- (1) Terminates at a collocation arrangement within the wire center;
- (2) Leaves the incumbent LEC wire center premises; and
- (3) Is owned by a party other than the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 USC 153(1) and any relevant interpretation in this Title.

### 1. Shared Facilities

SBC asserts that it has demonstrated that it has four unaffiliated fiber-based collocators at the Dearborn Fairborn wire center. SBC asserts that Covad and the Staff attempt to read into this definition a requirement that a fiber-based collocator own its own fiber-optic or equivalent transmission facility. Rather, SBC argues, the controlling fact is whether the party operates a fiber-optic or comparable transmission facility, something SBC claims that all of its counted fiber-based collocators do. In the *TRRO*, the FCC stated: “We define fiber-based collocation simply. For purposes of our analysis, we define fiber based collocation as a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center.” *Id.*, ¶ 61.

Covad argues that one of the collocators included on SBC's list of fiber-based collocators does not operate its own fiber-optic cable that terminates in and leaves the ILEC wire center. It argues that despite SBC's claim that certain facts are undisputed, SBC cannot show that this carrier operates a fiber-optic cable that both terminates at the collocation arrangement within and leaves the wire center. Rather, it argues, SBC is only able to show that this collocator has cross connected to a fiber of another fiber-based collocator on SBC's list. Covad asserts that a cross connect is not the same as operating a cable that terminates within and leaves the wire center.

Moreover, Covad argues, SBC has failed to demonstrate that the collocator uses the fiber pursuant to an infeasible right of use arrangement, which might be counted as a fiber-based collocator. Covad insists that SBC has failed to meet its burden of proof that this cross-connected collocator meets the FCC definition of a fiber-based collocator. Moreover, Covad argues, the FCC required at least four fiber-based collocators to ensure that there would be multiple competitive fiber rings. Covad states that such fiber rings reduce dependency on the incumbent's facilities and establish the economic opportunity to provide service within the wire center.

The Joint CLECs agree with Covad on this issue. The Joint CLECs assert that counting the one fiber facility as two fiber-based collocators results in double counting, and is directly contrary to the plain language and intent of the *TRRO*. They argue that the *TRRO* provides that each collocator must maintain a collocation arrangement and operate a fiber-optic cable that terminates within the wire center and leaves the wire center. However, the Joint CLECs state, this collocator does not have an entrance fiber at its space or entrance fiber leaving the wire center. Rather, this collocator is connected to another collocation arrangement of a fiber-based collocator on SBC's list. Thus, the Joint CLECs argue, SBC is misapplying the rule when it attempts to treat such a provider as a fiber-based collocator when it does not operate a fiber optic cable. They argue that

the FCC contemplated that, to be counted, collocators should actually deploy and operate their own network facilities. It is the duplicity of deployment, the Joint CLECs argue, that the FCC held would demonstrate the competitive nature of the wire center and availability of multiple fiber rings.

The Staff agrees that counting two fiber-based collocators, where a CLEC shares the collocation facilities of a fiber-based collocator, impermissibly double counts collocators. In the Staff's view, each counted fiber-based collocator must have entrance and exit facilities. During an on-site visit, the Staff states, it was unable to identify four fiber-based collocators as defined by 47 CFR 51.5. Thus, it states, only one of these two collocators should count for purposes of the impairment analysis.

The Commission agrees with Covad, the Joint CLECs, and the Staff that SBC has failed to meet its burden to demonstrate that there are at least four fiber-based collocators at the Dearborn Fairborn wire center. The arrangement in which one CLEC cross connects to the facilities of another CLEC that is a fiber-based collocator does not increase the number of fiber-based collocators for purposes of this analysis. *See* 47 CFR 51.5. Contrary to SBC's arguments, the issue is not ownership, but rather control and operation of fiber facilities. There is no support for finding that this arrangement includes fiber to the collocation cage of the CLEC that cross-connects to the CLEC that does control and operate fiber facilities. Because there are only three fiber-based collocators at the Dearborn Fairborn wire center, the wire center is impaired and Covad is entitled to have its orders for DS1 loops filled.

## 2. Affiliates

For purposes of this analysis, SBC treated AT&T Communications of Michigan, Inc. (AT&T), as an unaffiliated fiber-based collocator.

Covad asserts that AT&T should be considered an affiliate of SBC. It argues that SBC's position, that the two cannot be considered affiliate, until and unless the SBC/AT&T merger is completed, must be rejected. Covad asserts that the definition of affiliate adopted by the FCC for purposes of 47 CFR 51.5 is that provided in 47 USC 153(1), which provides:

The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Covad argues that this definition permits affiliation to be shown either by ownership or control, whether directly or indirectly. It asserts that the January 2005 merger agreement, approved by both companies' shareholders, and both parties having sought approval of the merger should be sufficient to meet the FCC's broad definition.

The Joint CLECs agree with Covad and argue that an entity does not need to be directly owned to be an affiliate. Rather, they argue, the definition of affiliation includes any entity directly or indirectly controlled by another, regardless of any ownership share. They argue that the affidavit of Jason Wakefield and Michael Sharkey on behalf of Covad shows a substantial relationship between SBC and AT&T, sufficient to establish, at a minimum, indirect control and, thus, an affiliation between SBC and AT&T. They insist that the facts stated in Covad's affidavit indicate that AT&T's regulatory activity has dramatically dropped since the June 30, 2005 shareholder approval of the merger agreement and both companies have been acting in concert. Moreover, the Joint CLECs argue, the fact that AT&T could not operate successfully as an independent company speaks of the lack of robust competition. The Joint CLECs state that any reliance upon AT&T as an unaffiliated collocator should be rejected.

SBC responds that counting AT&T as an affiliate of SBC is inconsistent with the facts and applicable law. It argues that affiliation under 47 USC 153(1) does not turn on Covad's

interpretation of AT&T's regulatory strategies, or whether 31 of 36 state commissions have approved the merger. An agreement, which, if consummated, would result in AT&T becoming an affiliate of SBC is not the same thing as affiliation. SBC quotes the ICC staff statement that "Unless the agreement is consummated, SBC does not own or control, is not owned or controlled by, and is not under common ownership or control with, another person." SBC argues that compliance with federal law necessary to complete the merger is not a mere formality.

The Staff agrees with SBC's position that AT&T should not be considered an affiliate for purposes of this analysis. In the Staff's view, the claim that SBC and AT&T are not currently affiliated is irrefutable. The Staff states that until the companies are legally affiliated, they should not be treated as such. The Staff states that the FCC intended to have impairment determinations based on objective and readily obtainable facts. Thus, it argues, to open this issue to a different interpretation would be contrary to the FCC's chosen framework.

The Commission finds that this issue is not dispositive of whether the Dearborn Fairborn wire center is impaired under the analysis dictated by the FCC in the *TRRO* and implementing rules. The Commission declines to find on this record that AT&T should be considered an affiliate of SBC. This issue would benefit from more instruction from the FCC as to what it meant by the "indirectly controlled" portion of the analysis. It is apparent that AT&T and SBC have acted in concert to effectuate their agreement to merge. The FCC's definition of an affiliate seems to be broader than the normal legal definition of that term. If the FCC intended that an as yet incomplete merger should be found to establish an affiliate relationship, it may have the opportunity to speak on that issue before, if ever, it arises again at this Commission. However, without such instruction, the Commission will not find that AT&T is an affiliate of SBC until the merger is complete.

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. SBC's challenge to Covad's self certification concerning the Dearborn Fairborn wire center should be denied, as the wire center is impaired under the analysis established in the *TRRO*.

THEREFORE, IT IS ORDERED that SBC Michigan's challenge to Covad Communications Company's self certification concerning the Dearborn Fairborn wire center is 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/ J. Peter Lark  
Chairman

( S E A L )

/s/ Laura Chappelle  
Commissioner

/s/ Monica Martinez  
Commissioner

By its action of September 20, 2005.

/s/ Mary Jo Kunkle  
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of September 20, 2005.

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Its Executive Secretary