

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**. )  
\_\_\_\_\_ )

Case No. U-14447

At the December 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 DENYING MOTION**

On September 20, 2005, the Commission issued an order (the Covad Order) resolving a dispute between AT&T Michigan, f/k/a SBC Michigan, (AT&T Michigan) and Covad Communications Company (Covad), regarding whether 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 AT&T Michigan 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. In that order, the Commission determined that AT&T Michigan had improperly declared the wire center to be unimpaired. Among other things, the Commission found that AT&T Michigan had

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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*, rel'd February 4, 2005.

not correctly counted the number of fiber-based collocators and the number of business lines in the wire center.

On October 20, 2005, Talk America Inc., XO Communications Services, Inc., and TDS Metrocom, LLC (collectively, the CLECs<sup>3</sup>) filed a motion “to fully implement the Commission’s findings in its September 20, 2005 order, or in the alternative motion to reopen or petition for rehearing.” In its motion, the CLECs assert that the Commission should require that AT&T Michigan file supporting data for each wire center that it alleges is unimpaired. In the CLECs’ view, only requiring AT&T Michigan to file its list and supporting data will permit ensuring proper implementation of the *TRRO*. The CLECs acknowledge that, in the March 29, 2005 order in Case No. U-14447, the Commission adopted an approach to resolving disputes between AT&T Michigan and the CLECs concerning whether a particular wire center is impaired. They assert that they do not want to dispose of that dispute resolution process, but rather, request an additional mechanism to review AT&T Michigan’s claims that particular wire centers are not impaired.

The CLECs further state that the Commission should make the underlying data for all wire centers available for inspection in this proceeding. They complain that AT&T Michigan has placed significant limitations on the access to data that the incumbent relies upon in determining that a wire center is not impaired. Without access to the underlying data, the CLECs complain, they cannot make the reasonably diligent inquiry required by the *TRRO*, ¶240, before ordering unbundled network elements (UNEs). The lack of access to data, they argue, increases litigation necessary to test AT&T Michigan’s determinations.

The CLECs further argue that AT&T Michigan’s listing a wire center as not being impaired for high-capacity loops or transport has a chilling effect on competition. They state that on

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<sup>3</sup>Competitive local exchange carriers.

September 9, 2005, the incumbent submitted a letter to the FCC announcing that AT&T Michigan had “re-surveyed” a number of wire centers and conducted a “more recent review” as to which wire centers meet the *TRRO*’s impairment tests as of February 2005. The CLECs assert that AT&T Michigan added to the list of wire centers it claims are not impaired. They allege that in doing so, AT&T Michigan relied upon its own interpretation of the *TRRO* and ignored the Commission’s previous determinations with regard to counting fiber-based collocators and business lines.

On October 31, 2005, AT&T Michigan filed a response to the CLECs’ motion, arguing that it should be treated as a petition for rehearing or reopening, and found to be untimely. AT&T Michigan argues that the CLECs actually seek to substantially revise the procedures the Commission established for self-certification challenges in the March 29, 2005 order. AT&T Michigan states that the September 20 order did not alter the dispute resolution process previously established, although it did reject certain data AT&T Michigan used in determining whether one wire center was impaired. Because the October 20 motion was filed more than 30 days after the March 29, 2005 order, it should be denied as untimely under R 460.17401 and R 460.17403.

AT&T Michigan states that the data supporting its list of wire centers that are not impaired is on file with the FCC, and is available pursuant to a federal protective order for review either in Washington D.C. or in Michigan. It argues that the CLECs’ complaints about the restrictions on the federal protective order are rehashed arguments rejected by the Commission in the March 29, 2005 order. In any event, AT&T Michigan states, once a CLEC self-certifies and AT&T Michigan challenges that self-certification, the data that AT&T Michigan relies upon is available for review pursuant to the terms of the protective order in this docket.

AT&T Michigan acknowledges that “Absent vacatur of the Covad Order, it would likely be required to submit data consistent with the Commission’s determinations in the Covad Order in order to prevail when or if it challenges any CLEC self-certifications in the future.” AT&T Michigan’s response, p. 5. However, AT&T Michigan argues, there is no basis to require the incumbent to gather the revised data in the absence of any indication that a CLEC intends to self-certify for a particular wire center. It argues that this is the sort of pre-dispute inquiry rejected by the Commission in the March 29, 2005 order.

However, AT&T Michigan states, if the Commission is inclined to modify its self-certification challenge procedures, it should do so in a manner that would benefit all parties. AT&T Michigan suggests that the Commission might replace the current process with the following:

1. At the time AT&T Michigan notifies CLECs through an Accessible Letter that a wire center meets relevant non-impairment criteria, AT&T Michigan would agree to file with the Commission, under seal, the information upon which it relied in making this determination. . . . AT&T Michigan would file information consistent with that filed with the FCC, as well as data consistent with the requirements of the Covad Order, to the extent the different requirements imposed under that order remain in effect.
2. The data filed by AT&T Michigan would be made available to CLECs under the terms of the protective order in this proceeding.
3. Consistent with the current process, CLECs would have sixty days to review the data and determine whether or not they believe it would be appropriate to dispute the listing of any wire center by self-certifying. As with the current process, AT&T Michigan would honor CLEC orders for affected network elements following self-certification.
4. During the sixty-day period, [the Commission] Staff would also have the ability to review the relevant data and, if deemed appropriate, to physically inspect the central office of any listed wire center where fiber-based collocation arrangements were relied upon in meeting the impairment criteria. To the extent that the Staff disagrees with an AT&T Michigan non-impairment determination, the Staff could object to the listing of that wire center as well.
5. In the absence of any CLEC self-certification, *or Staff objection* within sixty (60) days, the listed wire centers would be deemed non-impaired by Commission determination.

6. In the event of a Staff objection or a CLEC self-certification within sixty days, the procedure set forth in the March 29, 2005 order would govern the resolution of the dispute.

*See*, AT&T Michigan response, pp. 6-7. (emphasis in original)

On November 8, 2005, the CLECs filed a reply opposing AT&T Michigan's proposal to modify the challenge procedures adopted in the March 29, 2005 order.<sup>4</sup> In essence, the CLECs argue that AT&T Michigan's proposal takes away important gains the CLECs made in the March 29, 2005 order, the most important perhaps being the Commission's refusal to limit the time period in which a CLEC may challenge the incumbent's designation of a wire center as unimpaired.

The Commission finds that it should use a one-time modified process, described below, to clearly identify those wire centers that are currently not impaired pursuant to 47 CFR 53.319. The CLECs raise reasonable objections to the lack of information from which they can reasonably determine whether they should be permitted to obtain certain UNEs from AT&T Michigan. As demonstrated by the challenge involving Covad and reasonable inferences made from AT&T Michigan's response, it appears that AT&T Michigan may not be analyzing wire center impairment consistent with the findings the Commission made in resolving the Covad dispute.<sup>5</sup>

AT&T Michigan's proposal provides a reasonable basis upon which to fashion a remedy for the deficiencies complained about by the CLECs, but needs certain modifications. Therefore, the Commission finds that the one-time process should include the following: First, AT&T Michigan

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<sup>4</sup>The Commission notes that its rules do not contemplate replies to responses to a motion. However, in this instance, AT&T Michigan included a new proposal in its response. Therefore, the Commission will consider the reply to AT&T's response.

<sup>5</sup>The Commission affirmatively states that AT&T Michigan is to abide by the Commission's determinations unless and until there is a contrary finding by an appropriate court. The incumbent is not free to act as if the Commission's orders are not valid until after the company appeal is completed. Violation of Commission orders may subject a party to sanctions provided by law.

shall file no later than January 5, 2006, a list of Michigan wire centers that it contends are not impaired pursuant to 47 CFR 52.319. That list must be made consistent with the requirements in the Commission's September 20, 2005 order resolving the Covad dispute and any FCC orders. For example, as a condition of approving a merger between AT&T Michigan and AT&T Communications, Inc., (AT&T), the FCC required that SBC/AT&T exclude AT&T as a fiber-based collocator when AT&T Michigan identifies wire centers in which it believes there is no impairment pursuant to 47 CFR 53.319(a) and (e). *See, FCC 05-183, In the matter of SBC Communications Inc. and AT&T Corp. applications for approval of transfer of control, WC Docket No. 05-65, issued October 31, 2005.* Therefore, the Commission concludes that AT&T must no longer be considered a fiber-based collocator for determining impaired wire centers placed on the filed list. Along with the list, AT&T Michigan is to file, under seal, the underlying data upon which it made its determinations that those wire centers are not impaired, including the identification of all claimed fiber-based collocators in the wire centers. This information will be made available to the Commission Staff (Staff) and to the CLECs that are subject to the protective order already established in this proceeding.

Second, within 60 days of AT&T Michigan's complete filing, the Staff and interested CLECs may physically inspect the listed wire centers for accuracy of the claimed data, and compliance with the *TRRO* and the Commission's previous determinations. Third, within 30 days following the 60-day period, the Staff or any CLEC may file an objection to AT&T Michigan's designation of a wire center or centers as not impaired. Fourth, AT&T Michigan will have 15 days to file its response to any objections. Fifth, the Commission will issue an order determining the status of the challenged wire centers.

After this process has been followed, wire centers listed as unimpaired, but for which no objection has been filed, will be considered as determined by the Commission to be unimpaired, and will not be subject to further or future challenge. For wire centers not determined to be unimpaired, the process outlined in the March 29, 2005 order for challenging those determinations will apply. Hopefully, this process will provide some finality to wire center determinations.

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. By January 5, 2006, AT&T Michigan should file a list of Michigan wire centers that it believes are not impaired, and, under seal, the underlying data to support that determination, including the identity of each claimed fiber-based collocator.

c. The Staff and interested CLECs should have 60 days from the date of AT&T Michigan's filing to physically inspect the listed wire centers as provided in this order.

d. Any objections to AT&T Michigan's determinations must be filed within 30 days after the 60-day inspection period.

e. AT&T Michigan should have 15 days to respond to any objections.

THEREFORE, IT IS ORDERED that:

A. By January 5, 2006, AT&T Michigan shall file a list of Michigan wire centers that it believes are not impaired, and, under seal, the underlying data to support that determination, including the identity of each claimed fiber-based collocator.

B. The Commission Staff and interested competitive local exchange carriers shall have 60 days from the date of AT&T Michigan's filing to physically inspect the listed wire centers as provided in this order.

C. Any objections to the determinations must be filed within 30 days following the 60-day period.

D. AT&T Michigan may respond within 15 days of the date any objection is filed.

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 December 20, 2005.

/s/ Mary Jo Kunkle

Its Executive Secretary

B. The Commission Staff and interested competitive local exchange carriers shall have 60 days from the date of AT&T Michigan's filing to physically inspect the listed wire centers as provided in this order.

C. Any objections to the determinations must be filed within 30 days following the 60-day period.

D. AT&T Michigan may respond within 15 days of the date any objection is filed.

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

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Chairman

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Commissioner

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Commissioner

By its action of December 20, 2005.

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Its Executive Secretary