

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of a request for declaratory)
ruling, or in the alternative, complaint of)
COMPTEL/ASCENT ALLIANCE, AT&T)
COMMUNICATIONS OF MICHIGAN, INC.,)
TCG DETROIT, MCIMETRO ACCESS)
TRANSMISSION SERVICES, INC., TALK)
AMERICA INC., CLEC ASSOCIATION OF)
MICHIGAN, LDMI TELECOMMUNICATIONS,)
INC., TC3 TELECOM, INC., TELNET)
WORLDWIDE, INC., QUICK COMMUNICATIONS,)
INC., d/b/a QUICK CONNECT USA, SUPERIOR)
TECHNOLOGIES, INC., d/b/a SUPERIOR)
SPECTRUM, INC., THE ZENK GROUP, LTD.,)
d/b/a/ PLANET ACCESS, grid 4)
COMMUNICATIONS, INC., and C.L.Y.K., INC.,)
d/b/a AFFINITY TELECOM against MICHIGAN)
BELL TELEPHONE COMPANY, d/b/a SBC)
MICHIGAN, and VERIZON NORTH INC. and)
CONTEL OF THE SOUTH INC., d/b/a VERIZON)
NORTH SYSTEMS, for an order requiring)
compliance with the terms and conditions of)
interconnection agreements.)

Case No. U-14139

At the June 3, 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

OPINION AND ORDER

On February 20, 2003, the Federal Communications Commission (FCC) adopted rules in its Triennial Review proceeding that affect how incumbent local exchange carriers (ILECs) must

meet their statutory obligations to make unbundled network elements (UNEs) available to competitive local exchange carriers (CLECs) as required by the Federal Telecommunications Act of 1996, 47 USC 251 et seq. On August 21, 2003, the FCC issued the text of its Triennial Review Order (TRO) and rules, which became effective October 2, 2003.

The TRO was appealed to the U.S. Court of Appeals for the D.C. Circuit, which held that several aspects of the TRO are unlawful, including the FCC's sub-delegation of certain impairment decisions to state commissions. See, United States Telecom Ass'n v FCC, Nos. 00-1012 (consol), 2004 WL 374262 (CADDC, March 2, 2004) (USTA II). However, as noted in the Commission's March 15, 2004 order in Case No. U-13796, there is considerable debate concerning the legal effect of the USTA II decision in light of the fact that the appellate court stayed the vacatur for 60 days (which has now been extended to June 15, 2004). Id., p. 4, fn. 3. Due to that stay for a period permitting appeal and commercial negotiations between affected parties, USTA II may never take effect.

On May 18, 2004, CompTel/ASCENT Alliance, AT&T Communications of Michigan, Inc., TCG Detroit, MCImetro Access Transmission Services, Inc., Talk America Inc., CLEC Association of Michigan, LDMI Telecommunications, Inc., TC3 Telecom, Inc., TelNet WorldWide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., The ZENK Group, Ltd., d/b/a/ Planet Access, grid 4 Communications, Inc., and C.L.Y.K., Inc., d/b/a Affinity Telecom (collectively AT&T et al) filed a complaint and request for declaratory ruling against SBC and Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon). In that complaint and request for declaratory relief, AT&T et al. seek a Commission determination that USTA II does not permit SBC and Verizon to unilaterally alter the terms and conditions regarding UNEs and the unbundled network element

platform (UNE-P) contained in existing interconnection agreements approved by this Commission. According to the complaint, AT&T et al. are concerned that the ILECs will refuse to provide UNEs and the UNE-P under the terms of these approved contracts and will require the CLECs to either change their system configurations or to pay rates substantially higher than those provided for under the current interconnection agreements. AT&T et al. request the Commission to grant emergency relief, arguing that substantial harm will occur if the ILECs should do as the complainants fear they might.

On May 25, 2004, SBC and Verizon each filed a response to the request for emergency relief. Those parties argue that the complainants have failed to state an actual controversy, much less meet the statutory requirements for granting emergency relief.

SBC argues that the complainants' entire case rests upon the fear that SBC will disregard applicable provisions of its interconnection agreements and tariffs and unilaterally decide that it will not comply with the terms and conditions of those agreements and tariffs. SBC asserts that it has no intention to do as the CLECs fear. Rather, SBC argues, it has adhered to the applicable provisions, including the change of law provisions, of its existing, effective interconnection agreements. SBC commits that it has and will continue to comply with its effective tariffs and valid Commission orders governing changes to those tariffs. In light of this commitment, SBC argues, the complainants have not demonstrated any actual controversy and no need for emergency relief.

Moreover, SBC argues, the Commission should reject the request for emergency relief and dismiss the case because: (1) there is no actual controversy ripe for review, because there is no allegation that SBC has acted contrary to the applicable provisions in its tariffs, interconnection agreements, or federal or state law; (2) there is no demonstrated exigent circumstances warranting

an emergency relief request; (3) complainants are unlikely to succeed on the merits of their complaint; (4) complainants have failed to demonstrate that irreparable harm will result without immediate action; and (5) complainants have failed to establish that the requested relief is not adverse to the public interest.

Verizon agrees with SBC that the complainants have failed to state an actual controversy for the Commission to resolve, much less meet the statutory standard for granting emergency relief. Verizon adds that the complaint fails to allege that any of the named CLECs currently purchase from Verizon UNEs affected by USTA II. Thus, it argues, any changes in the way that Verizon provides service pursuant to USTA II should not prejudice these parties. Moreover, Verizon argues, its new product, referred to as "Wholesale Advantage" is offered at rates that are not materially different from those currently available through approved interconnection agreements, and includes optional services such as digital subscriber line (DSL) service. Verizon also states that there is no change proposed in the ordering process for Wholesale Advantage. Finally, Verizon commits that it too will comply with the terms and conditions of current, approved interconnection agreements while negotiations are ongoing pursuant to the change of law provisions in those contracts.

On June 1, 2004, the complainants filed a motion to withdraw their request for emergency relief, without prejudice to their right to renew it at a later date if necessary. Additionally, the complainants request that the Commission order the respondents to file an answer to the complaint and to set the matter for hearing. Further, the complainants request that the Commission order reference Section 203(13) of the Michigan Telecommunications Act, MCL 484.2203(13), which provides for continuance of service during the pendency of a contested case, with the posting of

sufficient security. The complainants assert that the interconnection agreements and tariffs provide adequate security.

On June 2, 2004, SBC filed a response to the complainants' motion to withdraw the request for emergency relief. It argues that the Commission should reject the complaint as failing to state a prima facie case and return it to complainants' attorney. Further, SBC asks that the Commission order complainants to pay SBC's costs to respond to what it believes is a frivolous complaint.

The Commission finds that, based on the commitments expressed by SBC and Verizon to refrain from precipitous unilateral discontinuance of providing UNEs to the CLECs and to continue to maintain the status quo while negotiations for implementing the change of law provisions in their current interconnection agreements are ongoing, that no state of facts exists that warrants the emergency relief that the complainants request. The Commission concludes that unless the parties appropriately amend their contracts as provided in their change of law provisions, the promised status quo should be maintained until the Commission orders otherwise. At the conclusion of this case, the Commission's decision may be appropriately implemented. The parties' arguments regarding standing and sufficiency of the complaint may be addressed in the usual course of this contested case proceeding.

There is no need to issue a Commission order for a respondent to file an answer to a complaint. Normal Commission procedures regarding complaints provide for an answer to be filed. In this case, the respondents have already responded to the request for immediate relief within the prescribed time. There is no reason to believe that they will neglect to defend themselves during the remaining portion of this case. Moreover, the Commission finds no justification for the rest of the relief requested by the complainants in their motion. This case should proceed through the statutory complaint process.

Finally, the Commission finds that the complainants' request to withdraw their motion for emergency relief, without prejudice should not be granted. The Commission has already considered the arguments raised in support of the request for emergency relief and determined that no emergency relief is needed. The statute is specific about when and in what manner a request for emergency relief may be made and on what grounds it may be granted. There is no provision for later renewing such a request.

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 and Verizon must honor their commitment to maintain the status quo with respect to providing UNEs and the UNE-P to the CLECs until the parties appropriately amend their interconnection agreement or the Commission orders otherwise.
- c. The motion to withdraw the request for emergency relief should be denied.

THEREFORE, IT IS ORDERED that:

A. SBC Michigan and Verizon North Incorporated., and Contel of the South, Inc., d/b/a Verizon North Systems shall honor their commitment to continue the status quo with respect to providing unbundled network elements and the unbundled network element platform to competitive local exchange companies with which either has approved interconnection agreements, until the parties have appropriately amended their interconnection agreements or the Commission orders otherwise.

B. The motion to withdraw the request for emergency relief 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

Chair

(S E A L)

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of June 3, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary