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October 14, 2004

**Via Hand Delivery & E-file**

Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909

**Re: In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996.**
**Case No. U-12320**

Dear Ms. Kunkle:

Enclosed for filing regarding the above-captioned matter please find the original and 4 copies of ***SBC Michigan's Response to Petition for Clarification or Rehearing of Covad, MCI, AT&T, and Talk America*** and ***Proof of Service***.

If you should have any questions, please contact me. Thank you.

Very truly yours,

Signature Not Verified
William J. Champion

Digitally signed by William J. Champion
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William J. Champion III

WJC/jkt
Enclosures
cc: Parties of Record

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996. | ) ) ) ) ) | Case No. U-12320 |

**SBC MICHIGAN'S RESPONSE TO PETITION FOR CLARIFICATION OR REHEARING OF COVAD, MCI, AT&T, AND TALK AMERICA**

On August 31, 2004, the Commission issued an Order Vacating Rules (August 31 Order) that, in light of the United States Court of Appeals decisions in *USTA I*[1] and *USTA II*[2], as well as the FCC's TRO[3] decision, vacated certain line sharing or line splitting requirements imposed on SBC Michigan in its December 20, 2001, March 29, 2002, and October 3, 2002 orders in this proceeding.

On September 23, 2004, AT&T, Talk America, MCI, and Covad filed a Petition for Clarification or Rehearing ("Petition for Rehearing") of the August 31 Order. The Petition is without merit. It should be denied.

## I. INTRODUCTION

In its August 31 Order, the Commission held that:

> The provisions in the December 20, 2001 and March 29 and October 3, 2002 orders in this proceeding that address the migration from line sharing to line

1 *United States Telecom Assn v FCC*, 290 F3d 415 (D.C. Cir., 2002).

2 *United States Telecom Assn v FCC*, 359 F d 554 (D.C. Cir., 2004), *cert. denied*, October 12, 2004.

3 *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 19020 (2003).

> splitting and SBC's responsibility to provision line splitting through use of UNE-P should be vacated.[4]

In vacating its prior orders in this proceeding, the Commission determined that its prior orders in this proceeding requiring SBC to permit line-splitting through use of UNE-P:

> … relied on the Federal Communication's (FCC) Line Sharing Reconsideration order.[5] However in United States Telecom Assn v FCC, 351 US App DC 329, 290 F3d 415 (2002) [USTA I], the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's determinations regarding line sharing.
>
> On remand, which was consolidated with its Triennial Review proceeding, the FCC decided to reverse its earlier position and eliminate this unbundling mandate. In United States Telecom Assn v FCC, 360 US App DC 202; 359 F3d 554 (2004) [USTA II], the Court of Appeals upheld the FCC.[6]

The petitioners claim, notwithstanding the definitive rulings of the FCC and the Court of Appeals, that the high frequency portion of the loop ("HFPL") is no longer a UNE and,

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4 August 31 Order, at 3.

5 *In the matter of Deployment of Wireline Services offering Advance Telecommunication Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, rel'd January 19, 2001.

6 August 31 Order, at 1–2. In its *USTA I* decision, the D.C. Circuit vacated the FCC's Line Sharing Order (the FCC's Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order), CC Docket No. 96-98, FCC 99-355 (*rel*. December 9, 1999). In its *USTA II* decision, the D.C. Circuit upheld the TRO and implemented rules which found that the HFPL is not a UNE that is required to be unbundled. The D.C. Circuit also vacated, among other things, the TRO and associated rules which required the unbundling of mass market switching (unbundled local switching), effectively eliminating the requirement to offer the UNE-P. Therefore, under *USTA II*, SBC has no obligation to make available unbundled local switching as a UNE (and under the FCC's lawful and effective rules relating to line splitting, CLECs are only entitled to UNE Line Splitting i.e., line splitting when the CLEC purchases unbundled local switching as a UNE from SBC, when that CLEC acquires unbundled local switching as a UNE). Under the FCC's Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004), which became effective on September 13, 2004 ("Interim Order"), SBC Michigan will continue to provide unbundled local switching to CLECs with such provisions in their ICAs on June 15, 2004 as provided for in the FCC's Interim Order.

In sum, based upon the *USTA I and II* decisions and the TRO, the HFPL is no longer a UNE and, under the TRO, CLECs are not entitled to sign up new end-users to be served over the HFPL after October 2, 2004 (a date which has passed). SBC Michigan will continue to comply with the transitional line sharing mechanisms established by the FCC in its TRO and implementing rules for the phase-out of the HFPL. As to line splitting in connection with the aforementioned decisions, SBC Michigan has no obligation to support UNE Line Splitting arrangements (i.e., those involving SBC Michigan-provided unbundled local switching) except to the extent provided for in the FCC's Interim Order. CLECs remain free, however, to engage in line splitting using CLEC-provided switching under the TRO and lawful and effective rules.

notwithstanding the Commission's recognition that the underpinnings of its earlier orders have been swept away, the Commission should maintain the requirements in its prior orders regarding the migration from line sharing to line splitting. According to Petitioners, the August 14 Order:

> … appears to rely on an assumption that SBC is no longer subject to line sharing or line splitting requirements or that the Commission lacks authority over those issues.[7]

They "urge" the Commission to "clarify" that the Order does not constitute a finding that this Commission lacks authority to address line sharing and line splitting issues.[8] Alternatively, Petitioners claim that "any conclusion that SBC is free from line sharing and line splitting requirements, or that this Commission has no authority over line sharing or line splitting issues, was made in error."[9]

Petitioners fail to demonstrate the Commission's decision to vacate its prior line splitting orders was wrong; instead, they quarrel with what they *assume* to be the rationale for the Commission's decision, a rationale that is not stated in the order. A petition for reconsideration is not an opportunity for a party to set up a straw man in order to knock him down.

The Petition for Reconsideration should be denied.

## II. ANY OBLIGATIONS WITH RESPECT TO LINE SHARING AND LINE SPLITTING ARE SUBJECT TO FEDERAL LAW

The petitioners contend that in the wake of *USTA I, USTA II,* and the TRO, SBC Michigan remains subject to certain transitional line splitting and line sharing obligations under

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7 Petition for Rehearing, at 10.

8 Petition for Rehearing, at 2.

9 *Id.*, at 3.

FCC rules. Even assuming this was an entirely accurate representation, this alone is insufficient reason to reconsider the Commission's decision to vacate its prior orders in this proceeding.[10]

First, there is no allegation that SBC Michigan has violated or intends to violate any obligations it may have under the FCC's rules. Second, to the extent that the Commission's prior orders merely reflect these federal obligations, they are redundant and superfluous. On the other hand, to the extent the prior orders are inconsistent with federally imposed requirements, they are preempted by federal law and unlawful.[11] In either case, the Commission was correct in vacating these requirements.

Petitioners' half-hearted claim that the Commission "has authority under state law to require SBC to provide ongoing access to line sharing" is both legally incorrect and irrelevant. Regardless of whether the MTA purports to give the Commission authority to impose line sharing in a manner inconsistent with federal law – and it doesn't – the Commission's decision to vacate its earlier orders was clearly correct. The Commission forthrightly acknowledged that its prior orders were based on findings in the Line Sharing Reconsideration Order that were vacated by the Court of Appeals, not on some purported state law authority.

Even if the Commission could lawfully turn back the hands of time in an attempt to create a *post hoc* state law rationalization for its prior orders, the effort would be unavailing. Nothing in the MTA requires SBC to unbundle the High Frequency Portion of the Loop. Section

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[10] With respect to line sharing, the FCC did indeed adopt rules in its TRO which provide for the phase-out of the HFPL. *See* 47 C.F.R. §51.319(a)(1)(i). However, the FCC has not adopted any "rules" relating to the transition of line splitting. *See* Footnote 6 above for a summary of the current status of SBC Michigan's line splitting (and line sharing) obligations in light of *USTA I, USTA II,* and the *TRO.*

[11] As the Commission is aware, in *Michigan Bell Telephone Company v. Chappelle, et al,* C.A. No. 5:03-CV-15 (W.D.Mich), SBC Michigan appealed from the Commission's orders in this proceeding that purport to eliminate a data CLEC's option to purchase the entire stand-alone unbundled loop when SBC Michigan no longer provides voice service to the end user as being inconsistent with FCC rules. Counsel for SBC Michigan and the Commission have agreed that when the August 31 Order vacating this requirement is final and not subject to further review, this appeal will be dismissed.

355, relied upon by Petitioners, requires SBC Michigan to "unbundle and separately price each *basic local exchange service* into the loop and port components." (Emphasis added.) High speed data services provided over the HFPL are not "basic local exchange services," and nothing in the MTA purports to require local exchange providers to unbundle the HFPL from the voice channel of a loop. Even if the MTA purported to authorize the Commission to mandate unbundling in a manner inconsistent with FCC rules, imposing such a requirement would be inconsistent with the Commission's obligation to "exercise its jurisdiction and authority consistent with this act and all federal telecommunications laws, rules, orders, and regulations." MCL 484.2201(2). It would also be preempted under federal law. As the FCC stated in the *TRO:*

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that at least in some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules. *TRO*, ¶194

Petitioners' claim that line sharing and line splitting migration requirements are "a proper issue for negotiation or arbitration of interconnection agreements,"[12] far from supporting their position, undermines their claims. To the extent that these issues are an appropriate subject for negotiation, the Commission should not undermine that process. *See, e.g., Wisconsin Bell v Bie,* 340 F. 3d 441, 443 (7th Cir. 2003).

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[12] Petition for Rehearing, at 10.

Likewise, Petitioners' contention that SBC Michigan has line sharing or line splitting obligations under Section 271 of the federal act does not undermine the Commission's August 31 Order and, in any event, has no merit. First, the Commission's orders were not based on Section 271. Second, while the Commission clearly played an important consultative role in the FCC's approval of SBC Michigan's 271 application, enforcement of Section 271 is exclusively the province of the FCC under Section 271(d)(6)(a). Finally, SBC Michigan does not have, and has never had, an independent obligation under 271 of the Act to provide line sharing or line splitting, as reflected by the plain language of 271.[13]

The Illinois Commerce Commission (ICC) recently had occasion to reconsider its prior orders imposing various line sharing and line splitting requirements on SBC Illinois. The ICC concluded that it should construe its authority under state law in a manner that avoids a conflict with federal law:

> SBCI is correct in observing that the Commission's decision to construe Section 13-505.6 to avoid "conflict between federal law and state action" and thus steer clear of the "path of preemption" is patterned on the way that federal and state courts across the country adhere to the doctrine of constitutional avoidance, pursuant to which and where possible, statutes will be construed in a manner that avoids the need to decide a constitutional question. See, *e.g.*, McConnell v. Federal Election Comm'n, 124 S. Ct. 619, 632 (2003) (noting the Court's "obligation to construe a statute, if possible, in such a way as to avoid constitutional questions"); Harris v. Manor Healthcare Corp., 111 Ill. 2d 350, 363 (1986) ("a statute will be interpreted so as to avoid a construction which would raise doubts as to its validity"); Northwest Airlines, Inc. v. Department of Revenue, 295 Ill. App. 3d 889, 893 (1st Dist. 1998) ("an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded").
>
> The CLEC's appear to take issue with this approach, suggesting that our action of avoiding conflict with the FCC's unbundling rules is based on nothing more than mere "convenience." ( CLEC exceptions brief at 2). They are wrong. It is a far more serious matter that drives the Commission, that being our attentiveness to

[13] Nothing in Section 271(c)(2)(B) of the Act provides that SBC Michigan make available line splitting (which is not and has never been a UNE) or line sharing. In addition, SBC Michigan is in full compliance with all of its 271 obligations.

> the supremacy clause of the U. S. Constitution and the fundamental precept that where state law and federal clash, the conflict is resolved in favor of federal law. Wisconsin Bell v. Bie, 340 F. 3d 441, 443 (7th Cir. 2003). Whereas the CLEC's would have us maintain a requirement that conflicts with the federal law, we decline to purposefully invite preemption.[14]

In light of subsequent federal developments, the ICC concluded that its line sharing requirements could no longer stand:

> While in effect, we recall that the FCC's Line Sharing Order required the HFPL to be unbundled when used in an arrangement commonly referred to as "line sharing." This is the situation where an ILEC provides retail voice service to an end-user over the low-frequency spectrum of a local loop while a competitor provides xDSL-based data service to the same end-user over the high-frequency portion of the same loop. In the existing orders for this docket, we required SBCI to file a tariff for its HFPL "UNE" offering and, among other things, a monthly recurring price of $0 was established for this HFPL UNE.
>
> The FCC's Line Sharing Order, however, was subsequently reversed and vacated, on grounds that the HFPL unbundling requirement rested on a flawed "impair" test that utterly failed to consider the relevance of competition from newer technologies. USTA , 290 F.3d at 428-29. Having addressed anew the issue of HFPL unbundling in its TRO, the FCC now sets out a national finding that ILECs cannot be required to make the HFPL available as a UNE. TRO 255-63. More specifically, the FCC declares that CLECs are not impaired without access to the high-frequency portion of a copper loop ("HFPL") and thus ILECs no longer can be required to unbundle the HFPL. TRO. 258-63.
>
> The FCC further finds that the HFPL "must not" be unbundled in any market, and now is required to be provided only under certain transitional terms. These very terms are set out in the TRO ¶187, 255-63; See 47 C.F.R. § 51.319(a)(1)(i). And, we see SBCI to contend that it is bound to abide by the specifics of the transition plan.[15]

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[14] *Final Order on Rehearing, Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Illinois Commerce Commission, Docket No. 00-0393 (September 28, 2004) (footnotes omitted).

[15] *Id*., at 45 – 46.

"[H]aving fully considered the pronouncements of the FCC and the federal law changes that spring out of the *TRO*," the ICC found it "appropriate to vacate the requirements in our existing orders."[16]

Under Section 201(2) of the MTA, the Commission acted in a similar fashion. The Commission looked to the current state of federal law and vacated requirements inconsistent with federal rules.

## III. CONCLUSION

In light of the dramatic changes in federal law since the Commission's December 20, 2001, March 29, 2002, and October 3, 2002 orders in this proceeding, the Commission appropriately vacated the provisions of those orders relating to line sharing and line splitting. SBC Michigan will, of course, comply with all lawful requirements of the FCC relating to line sharing and line splitting. To the extent the Commission's orders merely duplicate those requirements, they are unnecessary. To the extent they differ from the FCC's requirements, they are, at best, "inviting preemption."

The Petition for Rehearing should be denied.

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[16] *Id*., at 59.

Respectfully submitted,

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and

DICKINSON WRIGHT PLLC

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William J. Champion

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Dated: October 14, 2004

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**STATE OF MICHIGAN**

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| In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996. | ) ) ) ) ) | Case No. U-12320 |

## PROOF OF SERVICE

STATE OF MICHIGAN )
) ss.
COUNTY OF WASHTENAW )

Jacqueline K. Tinney, being first duly sworn, deposes and says she is employed at Dickinson Wright PLLC; and that on October 14, 2004 she caused a copy of ***SBC Michigan's Response to Petition for Clarification or Rehearing of Covad, MCI, AT&T, and Talk America*** to be served upon the attached service list via email and first class mail by depositing the same in a United States postal depository, enclosed in an envelope, bearing postage fully prepaid in Ann Arbor, Michigan.

Signature Not Verified
Jacqueline K. Tinney
Digitally signed by Jacqueline K. Tinney
DN: cn=Jacqueline K. Tinney, c=US
Date: 2004.10.14 14:21:59 -04'00'

Jacqueline K. Tinney

Subscribed and sworn to before me,
a Notary Public in and for said County,
this 14th day of October, 2004.

Signature Not Verified
Anita B. Zischerk
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Anita B. Zischerk, Notary Public
Oakland County, Michigan
Acting in Washtenaw County, Michigan
My Commission Expires: 07/13/07

# SERVICE LIST – MPSC CASE NO. U-12320

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