DICKINSON WRIGHT PLLC
COUNSELLORS AT LAW

215 S. WASHINGTON SQUARE, SUITE 200
LANSING, MICHIGAN 48933-1816
TELEPHONE: (517) 371-1730
FACSIMILE: (517) 487-4700
http://www.dickinson-wright.com

WILLIAM J. CHAMPION III
WChampion@dickinsonwright.com

February 23, 2005

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 in Opposition to MCI's Objections to SBC Accessible Letters*** 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
DN: cn=William J. Champion, c=US
Date: 2005.02.23 11:11:23 -05'00'

William J. Champion III

WJC/jkt
Enclosures
cc: Parties of Record

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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 IN OPPOSITION TO MCI'S "OBJECTIONS TO SBC ACCESSIBLE LETTERS"

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INTRODUCTION

MCI tries hard to bury the lead – and the dispositive rejoinder to its "Objections" – on page 10 of its brief. MCI's principal goal is to have this Commission perpetuate unbundled access to local switching and the UNE Platform ("UNE-P"). But Congress gave the FCC responsibility for deciding which network elements must (or must not) be unbundled; the Supreme Court has confirmed that state commissions must hew to the FCC's unbundling decisions; and the D.C. Circuit has held that state commissions are not free to usurp the FCC's role or make unbundling determinations of their own. Here, the FCC has indisputably held that local switching, and thus the UNE-P, are *not* to be unbundled – a decision MCI does not mention until page 10 of its brief. The Commission is not free to either disregard or nullify that decision as MCI requests.

After the Supreme Court and the D.C. Circuit repeatedly repudiated previous attempts to require unbundled switching, the FCC has finally listened and established a "nationwide bar" on unbundled switching and the UNE-P. Its rule unambiguously mandates that "[r]equesting carriers may not obtain new local switching as an unbundled network element." The FCC then reiterated that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching."

The FCC found a nationwide bar necessary because further "unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition," contrary to federal policy. It specifically repudiated the UNE-P, finding it "clear" that "UNE-P has been a disincentive to competitive LECs' infrastructure investment." Further, the FCC found immediate implementation of its bar to be vital, accelerating the effective date in advance of the normal deadline (30 days after publication in the Federal Register). The rule will thus go into effect on March 11, 2005.

SBC's announced withdrawal of its switching and UNE-P products, effective on the FCC's March 11, 2005 deadline, is thus hardly "unilateral," the way MCI (at 1) portrays it. It is the straightforward consequence compelled by the FCC's nationwide bar on switching and the UNE-P. Similarly, the other modifications to which MCI objects – relating to dark fiber, high-capacity loops, dedicated transport, and transitional pricing for pre-March 11 switching arrangements – are dictated by the FCC's rules.

In "objecting" to those results, therefore, MCI is really asking this Commission to flout the FCC's order. MCI wants to obtain exactly what the FCC and the federal courts have said it "may not obtain," and it wants the Commission to order SBC Michigan to provide exactly what the FCC has said that SBC Michigan "ha[s] no obligation to provide." But this Commission does not have the power to preempt federal law; to the contrary, the Constitution's Supremacy Clause resolves conflicts in favor of federal law. Likewise, this Commission does not have the power to stay, modify, or overturn FCC decisions; that authority resides exclusively with the federal Hobbs Act court – the same court that virtually prodded the FCC to bar unbundled switching in the first, second, and third place.

What basis, then, does MCI offer for its collision course with federal law? The fact that MCI does not even mention the FCC's order until page 10 of its "objections," and never even discusses the contents of that order, tells us that their strategy will be evasion. So it is. MCI first tries to sidestep section 251 of the federal Telecommunications Act of 1996, the provision that governs unbundled access, by asserting that unbundling would be consistent with section 271 of the federal Act. But that does not *justify* MCI's proposal; it simply creates *more* conflicts. First, section 271 is a federal statute administered by a federal agency, the FCC, not a license for states to skirt the limits of section 251. Second, MCI fails to comply with section 271's pricing regime,

because it wants unbundled access at TELRIC rates – a result the FCC has flatly rejected under section 271. Third, section 271 deals only with individual network elements, and the FCC has held that it has no place for combinations of network elements like the UNE-P that MCI craves.

MCI's next dodge is an amorphous invocation of unspecified "state law." But the Commission has already tried that path and found it a dead end. Under the Supremacy Clause, federal law trumps inconsistent state law, not vice versa. The Sixth Circuit – which MCI wrongly describes as its ally – has held that the Act reflects Congress' "clearly stated" intent "to supersede state laws that are inconsistent with" the provisions of the Act and its implementing regulations. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). Just last month, the Eastern District of Michigan enjoined a Commission-imposed unbundling requirement that deviated from federal law, holding that the Commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law." *Michigan Bell Tel. Co. v. Lark*, No. 04-60128, at 14 (E.D. Mich. Jan. 6, 2005) (Attach. A hereto). Moreover, the Court rebuffed MCI's theory that unbundling authority is shared between the FCC and the states, finding that such a view "cannot be countenanced" because it would ignore the D.C. Circuit's holding that state commissions *cannot* make unbundling decisions. *Id*. at 13. As the Court explained, "[w]hen the D.C. Circuit acts as a Hobbs Act reviewing court, its decision is binding"; thus, the Court "is not free to ignore the [D.C. Circuit's] mandate, and it cannot condone [the Commission's] decision to do so." *Id*. at 14. There the Commission would swiftly return if it tried the same approach, and there it would surely meet the same fate.

MCI also fails in its contention that it can use tariffs to circumvent the FCC's rules. Far from endorsing MCI's approach in this context, the Sixth Circuit has held such tariffs to be contrary to and preempted by federal law.

MCI's last resort is its old favorite: delay. MCI wants to suspend implementation of the FCC's rule pending an "investigation" or change-of law "negotiations." But on the matters to which MCI objects, there is no further investigation or negotiation to be done. MCI already had its chances – lots of them – before the FCC and the federal courts, and it lost. The FCC's rule is unambiguous, unconditional, and unequivocal. So is its deadline: March 11, 2005. Any attempt to delay implementation of the rule beyond that date would, in effect, be a stay or modification of the FCC's order – something this Commission has no power or jurisdiction to do. Moreover, MCI has already received an enormous windfall at SBC Michigan's expense: eight years' worth of unbundled switching and the UNE-P where it deserved none. Further delay in implementing federal law is simply untenable.

BACKGROUND

The regime that MCI seeks here – unbundled access on a virtually "blanket" basis, without heed to the limitations imposed by the 1996 Act – has been tried before, and it has failed miserably in each reincarnation. Prior to the FCC's August 2003 *Triennial Review Order* (*"TRO"*),[1] the FCC's rules sought to require unbundled access on a nearly universal basis – to nearly all elements in nearly all markets. But the FCC's attempts to impose such a regime were vacated by the federal courts – first by the Supreme Court, and then by the D.C. Circuit – which repudiated the approach of "blanket access" (*AT&T Corp. v. Iowa Utilities Bd*., 525 U.S. 366, 390 (1999)) and the underlying "belief that in this area more unbundling is better" (*United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-30 (D.C. Cir. 2002) ("*USTA I*")) as contrary to the

[1] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (F.C.C. rel. Aug. 21, 2003).

federal Telecommunications Act of 1996, which limits unbundling to those contexts in which competitors would be "impaired" without such access.

The *TRO* then held that there was no impairment, and thus no unbundling obligation, in several situations, such as switching used to serve "enterprise" customers. For the most part, these portions of the *TRO* were left intact on appeal. In three other situations (mass market switching and dark fiber, DS1 and DS3 loops and transport) the *TRO* attempted to maintain a "blanket access" regime by making a provisional finding of impairment and delegating the ultimate unbundling decision to the states. On appeal, the D.C. Circuit held that the FCC's attempted delegation of unbundling authority was unlawful. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) ("*USTA II*"). As the Court explained, the Act assigns to the FCC the task of determining which network elements are to be made available. States are not free to exercise that authority because they might "pursue goals inconsistent with those of the agency and the underlying statutory scheme." *Id*. at 565-66. Further, the Court vacated as unlawful the FCC's provisional findings of "impairment." *Id.* at 570-71, 574-75. The Court announced that its mandate would issue in 60 days, finding the accelerated deadline to be "appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *Id*. at 595.

On February 4, 2005, the FCC at last completed a lawful analysis of "impairment" with respect to mass market switching, and it squarely held that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." *TRO Remand Order* ¶ 5.[2] The accompanying FCC rule unconditionally states that "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

C.F.R. § 51.319(d)(2)(iii) (App. B to *TRO Remand Order*). In adopting that rule, the FCC considered and squarely rejected arguments from MCI and other competing LECs, who sought yet another revival of unbundled switching. *See, e.g., TRO Remand Order* ¶ 217.

The FCC reached this conclusion for two reasons. First, it reviewed extensive evidence showing that "competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets." *Id.* ¶ 199. Based on that evidence, the FCC "determine[d] not only that competitive LECs are not impaired in the deployment of switches, but that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation." *Id.* ¶ 204.

Second, above and beyond its finding of non-impairment, the FCC found – just as the D.C. Circuit had foreshadowed in *USTA I* – "that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives." *Id.* ¶ 210. The FCC specifically singled out the "UNE Platform" or "UNE-P" – a combination of network elements that includes local switching, shared transport, and a local loop – finding it "clear" that "UNE-P has been a disincentive to competitive LECs' infrastructure investment." *Id.* ¶ 218. The FCC then "conclude[d] that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." *Id.* ¶ 204. As the FCC explained, such a bar is warranted "where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *Id.* ¶ 218.

The FCC similarly ruled out unbundling for certain high-capacity loops (such as "dark fiber" loops) and transport facilities (such as "entrance facilities" that run from SBC Michigan's network to that of a competitor). *Id.* ¶ 5. It then established transitional pricing rules for switching, loops, and transport arrangements obtained prior to the effective date of the FCC's new rules. *Id.*; 47 C.F.R. § 51.319(a)(4)(iii), (a)(5)(iii), (a)(6)(ii), (d)(2)(iii), (e)(2)(ii)(C), (e)(2)(iii)(C), (e)(2)(iv)(B).

The FCC recognized "the need for prompt action" to implement these directives. *Id.* ¶ 235. Accordingly, the FCC stated that "the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register" as is generally the case with federal rules. *Id.*[3]

DISCUSSION

The Commission's inquiry must begin and end with a single undisputed fact: SBC Michigan's "accessible letters" faithfully track the provisions of the FCC's *TRO Remand Order*. Notwithstanding its harangue, MCI's "objections" do not even allege that *any* paragraph, sentence, clause, word, or punctuation mark on those letters is in any way inconsistent with the FCC's new rules. Instead, MCI's brief is devoted solely to their attempts to *ignore* – and thus nullify – the FCC's rules. As shown below, each evasion fails.

[3] The FCC's rules include a transition plan for existing customers served by unbundled switching, but the FCC expressly limited that transition period "to the embedded customer base," and made clear that its transition rule "does not permit competitive LECs to add new switching UNEs." *Id.* ¶ 5; *see also id.* ¶ 199 ("This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching.").

I. The Modifications Described In SBC Michigan's Accessible Letters Are Fully Consistent With The FCC's Order.

A. MCI's Objections Are Directly Contrary To The FCC's *TRO Remand Order*.

There is a simple reason why SBC Michigan announced that it would no longer provide unbundled local switching, alone and in combinations (including the UNE-P), after the FCC's March 11, 2005 deadline. Such unbundling would be directly contrary to the FCC's *TRO Remand Order*. The FCC has established a "nationwide bar on such unbundling." *TRO Remand Order* ¶ 204. That bar is unambiguous and unconditional – and it is repeated numerous times in the FCC's order:

- "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops." 47 C.F.R. § 51.319(d)(2)(i).

- "Requesting carriers may not obtain new local switching as an unbundled network element." *Id*. § 51.319(d)(2)(iii).

- "Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." *TRO Remand Order* ¶ 5.

- The FCC's transition plan "does not permit competitive LECs to add new switching UNEs." *Id*.

- "[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide." *Id*. ¶ 199.

- "[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." *Id*. ¶ 204.

- "[T]he continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine not to unbundle that network element." *Id*. ¶ 210.

- "[W]e bar unbundling . . . where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *Id*. ¶ 218.

The FCC's bar applies with equal force to network elements, such as shared transport, that can only be provided in conjunction with switching. Under federal law, "switching and shared transport are inextricably linked," and thus "requesting carriers are impaired without access to unbundled shared transport only to the extent that we find they are impaired without access to unbundled switching." *TRO* ¶ 534. The *TRO* reaches a similar result for signaling (¶ 544) and for certain databases used in routing calls (¶ 551). Given the FCC's bar on unbundled switching, SBC Michigan cannot be required to provide unbundled access to these "switch-related" elements.

The same analysis applies to the other network elements for which the FCC's order has terminated unbundling. For dark fiber loops, the FCC's rule states that "[r]equesting carriers may not obtain new dark fiber loops as unbundled network elements." 47 C.F.R. § 51.319(a)(6). For DS1 and DS3 loops, the rule limits unbundling to wire centers that fall below certain numeric thresholds (based on the number of lines and carriers with fiber-based collocations in the applicable central office). Once those thresholds are crossed, "*no* future . . . loop unbundling will be required in that wire center." *Id.* § 51.319(a)(4)(i) (DS1 loops) & (a)(5)(i) (DS3 loops) (emphasis added). Similar thresholds apply to dedicated transport facilities between SBC Michigan central offices. *Id.* § 51.319(e)(2)(ii) (DS1 transport), (e)(2)(iii) (DS3 transport), & (e)(2)(iv) (dark fiber transport). Moreover, the FCC's rules preclude *all* unbundling of entrance facilities, that is, transport facilities that run from an SBC Michigan central office to another carrier's network. *Id.* § 51.319(e)(i); *TRO Remand Order* ¶ 141 ("The evidence . . . convinces us that competitive LECs are not impaired without access to entrance facilities."). For the "embedded base" of customers served by mass market switching, "[t]he price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport

obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar." 47 C.F.R. § 51.319(d)(2)(iii). Similarly, the price for the embedded base of high-capacity loop and transport facilities that are no longer to be unbundled will be increased by 15 percent. *Id*. § 51.319(a)(4)(iii), (a)(5)(iii), (a)(6)(ii), (e)(2)(ii)(C), (e)(2)(iii)(C), (e)(2)(iv)(B).

The Accessible Letters challenged by MCI simply implement these FCC directives. MCI's "objections" are thus contrary to the FCC's rules.

B. MCI's Attempt To Impose Unbundling Requirements Is Contrary To Federal Law, Which Vests Such Decisions Exclusively With The FCC.

As shown above, the Commission cannot grant MCI's objections or require SBC Michigan to provide unbundled local switching (or other elements for which the FCC's rules preclude unbundling), because the FCC has imposed a nationwide bar on such unbundling. More fundamentally, the Commission cannot assert authority to decide unbundling issues in the first place, because Congress assigned those determinations to the FCC.

The lesson of *USTA II* is that state commissions are not free to decide whether particular network elements should be unbundled. Section 251(d)(2) of the 1996 Act expressly directs *the FCC* to make impairment determinations, and the D.C. Circuit – sitting as a Hobbs Act court with exclusive jurisdiction over the FCC's attempted delegation – held that state commissions could not exercise that authority. As the court explained, "[i]t is clear here that Congress has not delegated to the FCC the authority to subdelegate to outside parties," including state commissions. *Id.* The court recognized that the exercise of federal authority by outside entities like the states "may blur" the "lines of accountability" that bind the FCC and would thus

"undermin[e] an important democratic check on government decision-making." *USTA II*, 359 F.3d at 565. "Also, delegation to outside entities increases the risk that these parties will not share the agency's national vision and perspective, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme." *Id*. at 565-66 (citation omitted).

The risks associated with state deviation from federal policy are particularly acute in the unbundling context. Federal law requires a "limiting standard" (*AT&T Corp.*, 525 U.S. at 388) that strikes a careful "balance[]" of the benefits *and* costs of unbundling, including the reduced incentives to invest and innovate that forced sharing engenders (*USTA I*, 290 F.3d at 422, 427). Congress entrusted the FCC to calibrate the scales, and states are not free to tip the federal balance.

The Commission is, of course, well aware of these principles. Just last month, the federal district court for the Eastern District of Michigan enjoined a Commission-imposed requirement for "batch cut" unbundling, finding that the Commission's assertion of authority under state law "cannot be countenanced." *Michigan Bell v. Lark*, No. 04-60128, slip. op at 13-14 (Attach. A). As the Court reasoned, it would be "incongruous" in light of *USTA II*'s holding "that Congress prohibited the FCC from passing unbundling decisions to the states" if the states were allowed to simply "seize the authority themselves." *Id*. at 13-14.

MCI's proposal here vividly illustrates the reason for the Eastern District's injunction and the D.C. Circuit's holding. MCI wants the Commission to usurp the FCC's authority to decide which network elements are to be unbundled – and just as the D.C. Circuit warned, MCI's ultimate goals are flatly "inconsistent with those of the [FCC] and the underlying statutory scheme." MCI proposes that SBC Michigan be required to unbundle local switching – in the face of a "nationwide bar on such unbundling" (*TRO Remand Order* ¶ 204) and the FCC's

finding that unbundling "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition," thereby frustrating national policy (*id.* ¶ 218). As the Commission has already been reminded, however, it "is not free to ignore the [D.C. Circuit's] mandate," and the federal court "cannot condone" any attempt by the Commission to do so. *Lark*, slip op. at 14.

II. THE COMMISSION SHOULD REJECT MCI'S RESORT TO SECTION 271.

Section 271 of the 1996 Act sets forth the requirements for a former Bell Operating Company like SBC Michigan to receive FCC approval to compete in the long-distance market (*id.* § 271(d)). Three items of the statutory "checklist" (47 U.S.C. § 271(c)(2)(B)) call for the BOC to show that it has an interconnection agreement that includes access to three network elements on a pure unbundled basis; that is, separate from other network elements: "local loop transmission . . . unbundled from local switching or other services" (checklist item 4); "local transport . . . unbundled from switching or other services" (item 5), and "local switching unbundled from transport, [loops] or other services" (item 6). The FCC has held that access under section 271 differs markedly from that under section 251. For example, section 271 does not address combinations of network elements, only standalone items (*TRO* ¶ 655 n.1989); further, the price for section 271 access is not based on the TELRIC model that applies under section 251 (*id.* ¶ 659).

Instead of addressing the *TRO Remand Order* and the unbundling rules of section 251, MCI suggests that the Commission could support unbundling under section 271. As shown below, MCI's reference to section 271 is no cure at all – simply the source of additional federal/state conflicts.

A. Section 271 Is A Federal Statute Administered By A Federal Agency, Not A Source Of State Authority.

Section 271 is a federal statute, authored by the same Congress that established the impairment standard and administered by the same federal agency that has authority to decide which network elements are to be unbundled. The standards the FCC applies under section 271 are dictated by federal law, not state law. The Commission, meanwhile, has no decision making authority under that *federal* statute.

Thus, over and above the fact that MCI's proposed unbundling requirements conflict with the substantive provisions of section 251 (and section 271, as shown below) its underlying theory that section 271 gives this Commission authority to order unbundled access conflicts with the structure of federal law, which vests unbundling decisions in the FCC under *both* sections 251 and 271. Under section 251, the lesson of *USTA II* is that state unbundling determinations are *contrary* to the Act, because the Act assigns those determinations to the FCC, and because state commissions might "pursue goals inconsistent with those of the agency and the underlying statutory scheme." *USTA II*, 359 F.3d at 565-66.

Similarly, section 271 leaves no decision making role for this Commission. Rather, section 271 makes clear that the FCC, and *only* the FCC, has authority under section 271 to enforce that provision. A section 271 application is submitted *to the FCC* (47 U.S.C. § 271(d)(1)) and approval is granted *by the FCC* (*id.* § 271(d)(3)). During the application process, section 271 does not set forth *any* state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). A state commission may not "parley its limited role in issuing a recommendation under section 271" to impose substantive requirements under the guise of section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004). Once an application is approved – as SBC Michigan's application has

been approved – section 271 provides authority *only to the FCC* to enforce continued BOC compliance with the conditions for approval. 47 U.S.C. § 271(d)(6). There is no provision in section 271 providing any role to state commissions – not even a consultative role – with respect to the ongoing obligations of the BOCs once they have received approval.

B. MCI's Proposal Violates Section 271's Pricing Rules.

Given the fundamental conflict between MCI's proposal and section 271 – namely, the attempt to justify state action by reference to a statute that does not give the states any decision making authority – it should come as no surprise that their approach conflicts with the specific dictates of section 271. The first barrier is price. The price for unbundled access under section 251 is based on "cost," which the FCC has interpreted to require the "TELRIC" methodology. Under section 271, though, "the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the federal Communications Act. *TRO* ¶ 663. The FCC has rejected TELRIC pricing for section 271 items, on the ground that such pricing would "gratuitously reimpose the very same requirements that another provision (section 251) has eliminated." *Id.* ¶ 659. The D.C. Circuit upheld this FCC decision in *USTA II* (359 F.3d at 589), finding that "the CLECs have no serious argument" in opposition to the FCC's reading of the statute.

MCI proposes that the Commission perpetuate unbundled local switching and the UNE-P (along with other elements for which unbundling has been eliminated under section 251), at the current TELRIC prices. Plainly, that approach is *not* supported by section 271 – it would *violate* section 271 and "gratuitously reimpose the very same requirements that another provision (section 251) has eliminated." *Id.* ¶ 659. Moreover, no matter what principles or prices the Commission might employ, a state-regulated rate cannot comply with the federal pricing

standards of sections 271. To the contrary, the FCC has held that sections 201 and 202 (which govern prices under section 271) require nothing more than that "the market price should prevail" – "*as opposed* to a regulated rate" of the type that MCI seeks. *UNE Remand Order*, 15 F.C.C. Rcd. 3696, ¶473 (1999) (emphasis added). The FCC has also stated that a BOC may satisfy section 271's pricing requirements simply by showing that the rate is consistent with those in "arms-length agreements with other, similarly situated purchasing carriers" or is "at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff." *TRO* ¶ 664. MCI does not mention these principles, nor could its TELRIC-based proposal possibly comport with them.

C. Section 271's Access Requirements Relate Only To Standalone Network Elements, Not To Combinations Of Network Elements.

MCI's attempted resort to section 271 overlooks, and thus conflicts with, a second limitation of that federal statute. While section 251 and its implementing regulations call for incumbents to provide UNEs in combinations with other UNEs, section 271 contains no independent combinations requirement. Instead, section 271 specifically calls for checklist items to be provided *apart* from other items or services. For example, checklist item (vi) states that "[l]ocal switching" is to be "unbundled from transport, local loop transmission, or other services." 47 U.S.C. §271(c)(2)(B)(vi). Enforcing the plain language of the statute, the FCC has squarely rejected CLEC attempts "to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." *TRO* ¶ 655 n.1989. As the FCC explained, "[u]nlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of 'combining' and . . . do not refer back to the combination requirement set forth in section 251(c)(3)." *Id*. Here too, the D.C. Circuit upheld the FCC's ruling. *USTA II*, 359 F.3d at 589.

MCI, however, wants SBC Michigan to provide UNE combinations and even to create them. To take the leading and most egregious example, they want SBC Michigan to provide the UNE-P, which consists of switching in conjunction with shared transport (a network element that *cannot* be provided *except* in a combination with switching) and loops. That is directly contrary to section 271's checklist, which clearly states that switching is to be "unbundled from transport [and] local loop transmission" 47 U.S.C. § 271(c)(2)(B)(vi). By requiring network elements to be provided in combinations, MCI's proposal does not comport with section 271; it conflicts with that statute. Here too, the reference to section 271 simply does not rescue MCI's objections from their conflicts with federal unbundling law, but instead reveals additional conflicts.

III. THE COMMISSION CANNOT ACT IN A MANNER INCONSISTENT WITH FEDERAL LAW AND THEN CLAIM ITS CONDUCT IS AUTHORIZED UNDER STATE LAW.

MCI's next pitch is to leave the federal books entirely, contending that the Commission can ignore the federal law and require unbundling under state law. The first reason to reject that argument is that MCI cannot even find, much less cite, a "state law" that supports its position. The second is that the Commission has heard – and made – the "state law" argument before, only to run head-on into the Supremacy Clause and the federal courts. As the federal district court reminded the Commission last month, "[t]he MPSC cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law." *Lark*, slip op. at 14. That holding applies with equal force here.

A. As To Unbundling Requirements, States Are Not Free To Tip The Federal Balance.

As Justice Scalia's opinion for the Court in *AT&T Corp.* explained, Congress "unquestionably" took "regulation of local telecommunications competition away from the States" as to all "matters addressed by the 1996 Act." 525 U.S. at 379 n.6. The unbundling of

network elements plainly is one of the most significant "matters addressed by the 1996 Act." *AT&T Corp.*, 525 U.S. at 379 n.6. In section 251(d)(2) of the Act, Congress specifically "charged the [FCC] with identifying" which network elements are to be unbundled. *USTA I*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*"). The Supreme Court flatly rejected the FCC's initial attempt to set unbundling rules, holding that a rule giving "blanket access" to incumbents' networks was not faithful to the plain terms of the 1996 Act. *AT&T Corp.*, 525 U.S. at 387-90. The Supreme Court sent the FCC back to the drawing table, explaining that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act." *Id*. at 388; *see also id*. at 391-92 (noting that the Act "requires the [FCC] to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements").

Since *AT&T Corp.*, the D.C. Circuit has explained that a lawful "impairment" standard could not reflect an "open-ended" judgment that "more unbundling is better." *USTA I*, 290 F.3d at 422. Instead, it must result from a "nuanced" approach to unbundling that "balance[s]" the "competing concerns" of promoting network investment and innovation on the one hand and avoiding wasteful and inefficient duplication of facilities on the other hand. *Id*. at 427. The FCC subsequently explained in the *TRO* that states may not simply "impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id*. ¶ 192. To the contrary, both the Act itself and "long-standing federal preemption principles" place significant restrictions on state authority. *Id*. In particular, a state's authority "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime." *Id*. ¶ 193. And because the Act expressly confers on the FCC power to prescribe "regulations to implement the

requirements" of section 251 and requires state commissions to resolve interconnection disputes in accordance with "the requirements of section 251, *including the regulations prescribed by the [FCC] pursuant to section 251*" (47 U.S.C. § 252(c)(1) (emphasis added)), there can be no doubt that FCC regulations are "requirements of section 251." *TRO* ¶¶ 192-93 & n.614. The FCC added that if a state commission were to "require the unbundling of a network element for which the [FCC] has . . . found no impairment," such a requirement "would conflict with the limits set in section 251(d)(2)." *Id.* ¶ 195.

In its D.C. Circuit brief in the *TRO* appeal, the FCC was even more explicit as to the preemptive effects of its unbundling rules. As the FCC wrote, "[i]n the UNE context . . . a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element," and "*[a]ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption*." Brief for Respondents FCC and United States in No. 00-1012 and Consolidated Cases at 92-93 (D.C. Cir. Dec. 31, 2003) (Attach. B hereto) (emphasis added). Thus, at least as to UNEs, the FCC's rules establish a line – *i.e.*, both federal floor and a federal ceiling – from which states may not deviate. *AT&T Corp.*, 525 U.S. at 379 n.6 (holding that states must "hew" to the lines drawn by Congress and the FCC with respect to the "matters addressed" in the 1996 Act).

Because unbundling plainly is one of the "matters addressed" by Congress, any retained or residual state authority must be exercised in a manner consistent with Congress' express objective that the FCC – and it alone – set national unbundling rules. See *USTA II*, 359 F.3d at 565-66. In view of this reality, it is perhaps not surprising that, in its petition to the Supreme Court, NARUC candidly admitted that absent reversal of *USTA II*'s construction of the Act, the

unbundling game is largely over for the states. See NARUC Pet. at 22 (filed June 30, 2004) (Attach. C hereto) – a concession that this Commission joined, as the Eastern District reminded it in *Lark*. As the Court correctly reasoned, further state unbundling actions after *USTA II* are "at odds with the position advanced in the MPSC's attempt to have the decision reversed." *Lark*, slip op. at 12.

B. MCI Mischaracterizes The D.C. Circuit's Decision In *USTA II*.

Given *USTA II*'s holding that state commissions cannot decide which network elements are to be unbundled – and the Commission's firsthand collision with that holding in *Lark* – it is both surprising and disingenuous for MCI to claim that *USTA II* supports its position. MCI contends (at 12-13) that "[t]he D.C. Circuit has unequivocally held that the FCC has not preempted any state law relating to interconnection and unbundling." But the D.C. Circuit has not supported MCI's view at all. MCI's argument rests on a deeply flawed reading of the D.C. Circuit's decision in *USTA II* and another fundamental misunderstanding of federal preemption law. Although the FCC did not address any specific state unbundling rule when it promulgated new national unbundling standards in the *TRO*, its rules are entitled to preemptive effect *vis-à-vis* any conflicting state-imposed unbundling requirement by operation of law under the Supremacy Clause. Because the *TRO* was before the D.C. Circuit on petitions for direct review under the Hobbs Act (28 U.S.C. § 2342(1)), the court could not opine on any issues that the FCC did not reach. Thus, the court held that the question whether any particular state unbundling rule is preempted by the *TRO* was not ripe for decision.

However, nothing in the *USTA II* decision or the *TRO* even suggests – much less holds – that the FCC's new unbundling rules are entitled to less preemptive effect than any other FCC rules. Indeed, any such suggestion would overrule, *sub silentio*, decades of Supreme Court precedent on the preemptive force of federal agency rules and regulations and would be contrary

to the Supreme Court's own admonitions in *AT&T Corp.*, 525 U.S. at 379 n.6, about the respective roles of the state commissions, the FCC, and the courts under the 1996 Act – something that the D.C. Circuit neither intended nor had the power to accomplish in ruling that the states' anti-preemption arguments were not properly before it in *USTA II*. It is beyond dispute that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988); see also *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes").

Instead of directly addressing the myriad state unbundling requirements, the FCC stated that "[i]t will be necessary" for the state commissions "to amend their rules and to alter their decisions to conform to" the new national unbundling rules. *TRO* ¶ 195. Further, the FCC warned that states are *not* free to "impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id.* ¶ 192. Notably, the FCC did not direct the states to commence declaratory ruling proceedings at the FCC prior to "conform[ing]" their rules to the FCC's new standards. Nor did the FCC even remotely suggest that the declaratory ruling mechanism that it referenced in ¶ 195 constituted a required procedure for pursuing preemption of a state unbundling rule – the way MCI contends. Rather, the FCC merely indicated that it would entertain such declaratory ruling proceedings, *if* any party chose to commence such proceedings. *TRO* ¶ 195. The FCC went on to say that it would be "unlikely" that any "decision pursuant to state law" that "require[d] the unbundling of a network element for which the Commission has . . . found no impairment" could be consistent with federal law. *Id.* Clearly, the *TRO* and *USTA II* refute, rather than support, MCI's objections.

C. MCI Cannot Use Tariffs To Evade Federal Law.

MCI's discussion of other precedents is as disingenuous, and erroneous, as its take on *USTA II*. Indeed, even MCI's attempt to file objections in this docket is founded on a misreading of precedent. MCI's objections purportedly carry out the tariff "process" described in the Commission's November 7, 2002 Order in this docket. But that decision simply references the Commission's March 7, 2001 order in Case No. U-12540. The tariffing requirements of that order were struck down by the federal court in *Michigan Bell Tel. Co. v. Chappelle*, No. 01-73257 (E.D. Mich. Aug. 16, 2004). In so doing, the Court expressly "reject[ed] any contention that the Court can impose mandatory tariff obligations . . . in the context of a proceeding commenced by the MPSC to determine Ameritech's compliance with § 271" – a not-so-subtle reference to this docket. This Commission is not free to disregard the Court's order.[4]

MCI's citation to *Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348 (6th Cir. 2003) is equally miscast. The way MCI tells it (at 7), "the Sixth Circuit specifically upheld the ability of MCI to order from the wholesale tariff." That is a gross distortion of the court's holding. *Michigan Bell* merely upheld MCI's ability to place orders by facsimile, as opposed to electronically (323 F.3d at 353, 357) – a highly arcane subject that is not addressed by any FCC rules. That decision clearly did not address tariffs (like those at issue here) that dealt with the core issue of what network elements are to be unbundled, and it most certainly did not address tariffs (like those at issue here) that directly contradicted FCC rules.[5]

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[4] MCI and the Commission have appealed from the federal court's decision, but they have not sought a stay. Accordingly, the court's order is final and binding.

[5] For the same reason, MCI's citation to *Michigan Bell Tel. Co. v. Chappelle*, 222 F. Supp. 2d 905 (E.D. Mich. 2002), is of no avail. That case dealt with transiting, and the court expressly relied on the premise that "federal law does not preclude mandatory transiting" (*id.* at 918) (a point that SBC Michigan maintains was incorrectly decided). Here, by contrast, federal law *does* preclude unbundled switching, as the *TRO Remand Order* repeatedly makes clear.

In those contexts, the Sixth Circuit has rejected MCI's position and invalidated state tariffs. In *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), the court invalidated a Commission-ordered tariff that "required incumbents to offer *network elements* and services to competitors through published tariffs." *Id*. at 937. In so doing, the court explained that "Congress has clearly stated its intent to supersede state laws that are inconsistent with the [1996 Act]" – as MCI's objections most assuredly are. *Id*. at 940. Similarly, in *Verizon North, Inc. v. Strand*, 367 F.3d 577 (6th Cir. 2004), the court invalidated a Commission-ordered tariff that required payment of reciprocal compensation on Internet traffic where, under the applicable FCC order, the incumbent "would be under no duty" to provide such compensation (*id*. at 586) – just as SBC Michigan has "no obligation to provide" unbundled switching here. *Accord Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (by imposing on incumbent "unnegotiated obligations in its provision of local service," state commission's order conflicted with "the process for interconnection agreements for local service under sections 251 and 252" of the 1996 Act); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) ("The district court was right to hold that the state's tariffing requirement is preempted.").

IV. THE COMMISSION CANNOT DELAY THE EFFECTIVE DATE OF THE FCC'S ORDER AND RULES.

MCI's final ploy is to obtain by delay what it cannot obtain by decision. In this vein, MCI wants to force SBC Michigan to jump through several MCI-constructed hoops before implementing the FCC's rules. First, MCI wants the Commission to conduct an "investigation" and put off the date on which the FCC's order will go into effect. Similarly, MCI contends that SBC Michigan must commence change-of-law "negotiations" under its interconnection agreement with MCI. Neither of these delaying tactics has any merit.

As for an investigation, the FCC has already conducted it. MCI participated, and lost. The FCC has already decided that MCI "may not obtain" unbundled switching or the UNE-P, and it has already decided that its "nationwide bar" must go into effect on March 11, 2005. MCI is of course free to seek a stay of that ruling – from the D.C. Circuit – but it is not free to seek one here. Under the Hobbs Act, the federal appellate court "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission." 28 U.S.C. §2342. This Commission, however, has none.

Equally unavailing is MCI's reference to change-of-law negotiations. Simply put, there is nothing to negotiate. The FCC has unequivocally stated that MCI "may *not* obtain" unbundled switching or the UNE-P, and it has clearly stated the effective date of March 11, 2005. What part of the FCC's "no, no a thousand times no" is there to negotiate? Delaying that effective date for needless negotiations would contradict the FCC's March 11 deadline. Thus, the FCC discusses "change of law" negotiations solely in the context of the procedures for transitioning the embedded base of *old* switching arrangements, not the straightforward bar on new arrangements.

CONCLUSION

MCI may not like the FCC's rules, but it must abide by those rules. So must the Commission. The Commission must refrain from taking MCI's bait and thereby endorsing an outcome that is clearly contrary to federal law. Accordingly, SBC Michigan respectfully requests that MCI's ill-placed "objections" to SBC Michigan's implementing letters be denied.

Respectfully submitted,

Craig Anderson (P28968)
SBC MICHIGAN
444 Michigan Avenue, Room 1700
Detroit, Michigan 48226
(313) 223-8033

DICKINSON WRIGHT PLLC

Signature Not Verified
William J. Champion
Digitally signed by William J. Champion
DN: cn=William J. Champion, c=US
Date: 2005.02.23 11:12:41 -05'00'

By:_____

John M. Dempsey (P30987)
William J. Champion III (P31934)
Attorneys for SBC Michigan
215 S. Washington Square, Suite 200
Lansing, Michigan 48933-1816
(517)371-1730

Theodore A. Livingston
John E. Muench
Demetrios G. Metropoulos
MAYER, BROWN, ROWE & MAW LLP
190 S. LaSalle Street
Chicago, IL 60603
Telephone: (312) 782-0600
Facsimile: (312) 701-7711

Dated: February 23, 2005

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ATTACHMENT A

MPSC CASE NO. U-12320

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EASTERN MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN BELL TELEPHONE COMPANY, INCORPORATED, d/b/a SBC MICHIGAN,

Plaintiff,

v.

CASE NO. 04-60128
HON. MARIANNE O. BATTANI

J. PETER LARK, LAURA CHAPPELLE, and ROBERT B. NELSON, in their Official Capacities as Commissioners of the Michigan Public Service Commission and not as Individuals,

Defendants, and

AT&T COMMUNICATIONS OF MICHIGAN, INC., and MCIMETRO ACCESS TRANSMISSION SERVICES, LLC,

Intervenor-Defendants.

_____/

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiff Michigan Bell Telephone Company's d/b/a SBC Michigan ("SBC Michigan") Motion for Summary Judgment brought pursuant to Fed.R.Civ.P. 56(c). At issue is the validity of a June 29, 2004 Order in case number U-13891, issued by the Michigan Public Service Commission ("MPSC"), acting through Defendant Commissioners, J. Peter Lark, Laura Chappelle and Robert B. Nelson. The parties stipulated to allow AT&T Communications

of Michigan, Inc. ("AT&T") to intervene pursuant to Fed.R.Civ.P. 24(b)(2), and MCImetro Access Transmission Services, LLC ("MCImetro") to intervene pursuant to Fed.R.Civ.P. 24(a).

The Court heard oral argument on September 10, 2004. In addition, the Court has reviewed SBC Michigan's Submission of Supplemental Authorities as well as the response filed October 22, 2004, by the Intervenor/Defendants MCImetro and AT&T. For the reasons that follow, the Court GRANTS Plaintiff's motion.

I. STATEMENT OF FACTS

On September 30, 2003, the MPSC at the behest of the Federal Communications Commission ("FCC") issued an order commencing a proceeding, Case No. U-13891, to investigate and to implement, if necessary, a batch hot cut migration process.[1] On June 18, 2004, SBC Michigan filed a motion to dismiss the case, alleging that the decision in United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir.) (USTA II), cert. denied, 125 S.Ct. 345 (2004), vacated the MPSC's authority to implement a batch hot cut process.

On June 29, 2004, the MPSC denied the motion and adopted SBC Michigan's proposed batch hot cut process on an interim basis. It further ordered the parties in that proceeding to "engage in collaborative discussions to reach agreements regarding the content and testing

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[1]When a mass market customer changes from SBC Michigan's local exchange service switch to local exchange service provided by a competing carrier's switch, the connection between the customer's loop and SBC Michigan's switch must be severed and a new connection must be established between the customer's loop and the competing carrier's switch. The procedure is performed while the customer's line is in service--it is cut while it is hot. Accordingly, the FCC used the term "hot cut" to refer to the process. See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, ("Triennial Review Order" or "TRO"), 18 FCC Rcd. 16,978, ¶ 465 (2003). A batch cut occurs when the incumbent carrier simultaneously migrates two or more loops.

procedures for a final batch cut migration process." Pl.'s Ex. 1 at 23. Talk American Inc. timely filed a petition for rehearing and clarification, asking the MPSC to clarify the jurisdictional basis for the June 29, 2004 Order. That motion was pending at the time this Court heard oral argument.

Plaintiff subsequently filed this action for declaratory and injunctive relief, pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (2001). Plaintiff challenges the MPSC's June 29, 2004 Order, arguing it is contrary to the decision in USTA II (vacating in part the efforts of the FCC to fashion rules relating to the competitive relationship between telecommunications carriers). Plaintiff asserts that the MPSC mandated procedures in its June 29, 2004 Order that are preempted by federal law. More specifically, Plaintiff contends that MPSC was acting under a delegation of authority from the FCC, which the circuit court subsequently held unlawful. Consequently, it asks this Court to set aside the challenged MPSC Order.

Defendants assert that the June 29, 2004 Order is a proper exercise of authority under state law, which is consistent with federal law, and that the motion must be stayed because it is not an appeal of a final order issued by the MPSC. Intervenor-Defendants AT&T and MCImetro join in supporting Defendants' position that the MPSC has independent state authority that validates the June 29, 2004 Order. They also assert that the proceedings mandated in the June 29, 2004 Order comport with federal law.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) authorizes the Court to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." There is no genuine issue of material fact if there is no factual dispute that could affect the legal outcome on the issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). In other words, the movant must show it would prevail on the issue even if all factual disputes are conceded to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. ANALYSIS

Before turning to the merits of Plaintiff's motion, the Court addresses a preliminary matter raised by Defendants: whether the doctrine of primary jurisdiction precludes judicial resolution of this motion at this time. For the reasons that follow, the Court finds that it does not.

A. Primary Jurisdiction Doctrine

The doctrine of primary jurisdiction "arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." United States v. Haun, 124 F.3d 745, 749 (6th Cir. 1997). When the doctrine applies, court proceedings are stayed so that the agency may bring its special competence to bear on the issue. Id., (citing Reiter v. Cooper, 507 U.S. 258, 268 (1993)). Unfortunately, "[n]o fixed formula exists for applying the doctrine [.]" United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956)). Rather, "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Id. Those reasons include the "desire for uniformity in adjudication and the belief that the decisionmaker with the most expertise and broadest perspective regarding a statutory or

regulatory scheme will be most likely to resolve the issue correctly." Id.

Here, Defendants bear the burden of persuading the Court that the case "requires resolution of issues that have been placed within the special competence of an administrative body," MCI Telecomm. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1103 (3d Cir. 1995), cert. denied, 519 U.S. 815 (1996), and they have failed to do so. Defendants' argument is built upon their position that MPSC based its decision to proceed with the development of a batch cut process on state law. In its June 29, 2004 Order, the MPSC invoked jurisdiction under the Michigan Telecommunications Act ("MTA") Mich.Comp.Laws § 484.2101, et seq. (1998), and the Michigan legislature has committed primary responsibility for implementing the MTA to the MPSC. Therefore, Defendants conclude that this Court should have the benefit of the MPSC's final analysis of its duties under Michigan law before it conducts a review of the June 29, 2004 Order.

Defendants' argument fails to convince the Court. The rehearing petition asks MPSC to clarify the state law basis for its decision to proceed with the development of a batch cut process. A legal question is implicated, not a question involving technical or policy considerations, thereby falling within the MPSC's field of expertise. Moreover, this Court already has the MPSC's analysis of the arguments advanced by Plaintiff in this litigation--Plaintiff's motion to dismiss the state proceedings raised the same arguments advanced in its summary judgment motion in this Court. In sum, there is no reason to forestall a ruling on the issues raised by Plaintiff, and the Court turns to the issue of whether the action is authorized under state and/or federal law.

B. Statutory Background

A summary of the steps and missteps and interplay between the Telecommunications Act of 1996 (the "Act"), the FCC, and the D.C. Circuit Court places the June 30, 2004 Order in the proper context. The Telecommunications Act of 1996 seeks primarily to promote competition in the previously monopoly-driven local telephone service market. See Verizon Communications, Inc. v. FCC, 535 U.S. 467, 475-76 (2002). It requires the incumbent local telephone service provider (SBC Michigan in this case) to allow new market entrants to interconnect with and access the incumbent's network for a fair price. 47 U.S.C. § 251(c) (2001). Specifically, incumbent local exchange carriers ("ILECs") must allow competing carriers, known as competitive local exchange carriers ("CLECs"), to use their networks–loops, switching and transport–at cost-based rates, a practice known as "unbundling." See 47 U.S.C. § 251(c)(3).

The Act delegates the task of determining those network elements that must be unbundled to the FCC. See 47 U.S.C. § 251(c)(3). In determining whether a network element should be unbundled, the Act requires the FCC to consider "at a minimum" two criteria: first, whether "access to such network elements as are proprietary in nature is necessary;" and second, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

Pursuant to that authority, the FCC has issued a series of orders addressing the scope of ILECs' obligation to unbundle their network elements. Its previous attempts to fashion competition rules were invalidated once by the U.S. Supreme Court in AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 390 (1999) (rejecting a blanket approach to an incumbent's duty to share), and

again by the U.S. Court of Appeals for D.C. Circuit in United States Telecom Ass'n v. FCC, 290 F.3d 415, 425-30 (D.C. Cir. 2002) ("USTA I") (rejecting an "open-ended" judgment that more unbundling is better did not comport with the impairment standard), cert. denied sub nom Wordcom, Inc. v. U.S. Telecom Ass'n, 538 U.S. 940 (2003).

The FCC subsequently addressed the holding in USTA I and the Act's impairment requirement in its Triennial Review Order ("TRO"). In fashioning the TRO, the FCC considered, among other things, mass market switching, which is used to service mass market customers, including residential and certain small business customers with a limited number of traditional DS0 telephone lines. The FCC recognized that competing carriers had installed a significant number of their own switches and acknowledged that CLECs "may not be impaired without access to unbundled switching in. . .specific markets." TRO, ¶ 473. The FCC did not make a final determination of impairment or non-impairment for any particular geographic area. Rather, it made a provisional nationwide finding of "impairment" and delegated the remaining tasks--the initial "market definition" and the ultimate assessment of impairment for each market--to the states. Further, it issued detailed rules for the states to apply in reaching those determinations. TRO, ¶¶ 458-463; 47 C.F.R. 51.319(d)(2).

One component of the FCC-delegated analysis for mass market switching was the batch hot cut process. Specifically, the FCC directed states to define geographic markets and to determine for each market whether CLECs would be impaired without either (i) unbundled access to mass market switching from the incumbent or (ii) a new batch hot cut process. For markets where such impairment existed, the FCC instructed state commissions to develop and

establish that batch cut process. See 47 C.F.R. § 51.319(d)(2)(ii).[2] State commissions were required to complete the task within nine months of the TRO's effective date. TRO, ¶ 527.

Within a week of the release of the TRO, MPSC "sought comments on the TRO implementation, including the batch cut migration process." Pl.'s Ex. 2; Order Commencing Proceedings, Case No. U-13891. Even as it participated in the state proceedings, SBC Michigan (and other incumbent carriers) challenged the rules through petitions for judicial review. The appeals were consolidated, and on March 2, 2004, the D.C. Circuit issued a decision on the appeals.[3] In USTA II, the court held that the "federal agency officials. . .may not subdelegate [their decision making authority] to outside entities--private or sovereign--absent affirmative evidence of authority to do so." 359 F.3d at 566. Because the circuit court found no affirmative evidence, it deemed the subdelegation improper. Consequently, it directed the FCC to adopt new unbundling rules in which the FCC, not the states, would make the impairment analysis. Id. at 568-75. Finally, the USTA II Court summarized it decision, "We vacate the [FCC's] subdelgation to state commissions of decision-making authority over impairment determinations,

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[2]Pursuant to the regulation, "If a state commission concludes that the absence of a batch cut migration process is not impairing requesting telecommunications carriers' ability to serve end users using DS0 loops in the mass market without access to local circuit switching on an unbundled basis, that conclusion will render the creation of such a process unnecessary. In such cases, the state commission shall issue detailed findings regarding the volume of unbundled loop migrations that could be expected if requesting telecommunications carriers were no longer entitled to local circuit switching on an unbundled basis, the ability of the incumbent LEC to meet that demand in a timely and efficient manner using its existing hot cut process, and the non-recurring costs associated with that hot cut process. The state commission further shall explain why these findings indicate that the absence of a batch cut process does not give rise to impairment in the market at issue." 47 C.F.R. § 51.319(d)(2)(ii).

[3]Under the Hobbs Act, 28 U.S.C. § 2342, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction to review the FCC's Order.

which in the context of this Order applies to the subdelgation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements." Id. 359 F.3d at 594. The D.C. Circuit Court stayed the issuance of its mandate. On June 16, 2004, it formally vacated the FCC rules.

ICECs, the National Association of Regulatory Utility Commissioners ("NARUC") and individual states filed petitions for *certiorari*, which the Supreme Court denied October 12, 2004. Therefore, USTA II stands as controlling authority.

C. Compliance with Federal Law

In deciding whether Plaintiff is correct that the June 29, 2004 Order is contrary to federal law, the Court examines not only the plain language of the Order itself, but also the FCC regulation it purports to implement, the circuit court decision in USTA II, and the FCC's subsequent Order and Notice of Proposed Rulemaking. In addition, the Court must ascertain whether state law provides an independent basis of sustaining the Order. Accordingly, the Court first directs its attention to the June 29, 2004 Order.

In the Order, the MPSC concluded that the batch cut requirements were not vacated and that it was required to establish a batch hot cut migration process even if the FCC must make its own impairment determinations. See Pl.'s Ex. 1, June 29, 2004 Order, p. 18. The MPSC further found that it has jurisdiction under the MTA[4] to ensure a competitive market for local exchange

[4]The MTA was enacted to encourage competition in the industry. It requires incumbent carriers to "unbundle and separately price each basic local exchange service offered. . .and allow other providers to purchase such services on a nondiscriminatory basis." Mich.Comp.Laws § 484.2355 (1998).

service in Michigan, and that abandonment of the proceedings would be detrimental to competition and contrary to the "intent of federal and state law." Id., p. 19. The Commission therefore approved the batch cut migration process detailed in the Order on an interim basis. Pl.'s Ex. 1, p. 23.

The Court disagrees with the conclusion that the batch cut requirements were not vacated. Pursuant to the FCC regulation, 47 C.F.R. § 51.319(d)(2)(ii), the MPSC could not establish a batch cut process without first "conclud[ing] that the absence of a batch cut migration process is. . .impairing requesting telecommunications carriers' ability to serve end users" in Michigan, and that the process it adopted would "alleviate [that] impairment." USTA II held the regulation at issue constituted an unlawful delegation of authority to the states. The plain language of the regulation locks the batch cut directive to the impairment finding, and the circuit court in USTA II, 359 F.3d at 565, vacated the FCC's decision to order unbundling of mass market switches. Because the rule has been vacated as contrary to federal law, the June 29, 2004 Order, which arises out of the rule, likewise is contrary to federal law.

The FCC's conduct post USTA II, shows a similar understanding of the import of the decision. On August 20, 2004, the FCC adopted and released an Order and Notice of Proposed Rulemaking ("Order and Notice"), in which it solicits comments on alternative unbundling rules to implement the obligations of § 251(c)(3) "in a manner consistent" with the USTA II decision. Order and Notice, ¶ 1. To avoid disruption in the industry while the new rules are being written, the Order and Notice preserves for six months certain obligations "as they existed. . .except to the extent they have been superseded by voluntarily negotiated agreements, an intervening order from the FCC, or a state public utility commission order (with respect to rates only) ." Id. at ¶

21. The plan contemplates a second six-month period during which "competitive carriers would retain access to network elements that the Commission has not subjected to unbundling. . . ." Id. Contracts that predated the vacated rules remain in place, but under the interim approach competing carriers cannot expand contractual rights. Id. at ¶ 23. The FCC specifies that the interim approach "forecloses the implementation and propagation of the vacated rules." Id. (emphasis added).

In its attempt to have the decision reversed, the NARUC, of which MPSC is a member, advanced arguments that mirror the FCC's reading of USTA II. For example, it observed in its petition that the D.C. Circuit vacated portions of the FCC's TRO "requiring incumbent local exchange carriers to share components of their local networks with competitors and establishing extensive federal standards to guide State Commissions in determinations of which unbundled network components do not have to be shared." Nat'l Ass'n of Regulatory Utility Commissioners v. United States Telecom Ass'n, Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Court, 2004 WL 1475967 (U.S. June 30, 2004) (No. 04-12). The NARUC further characterized the decision as finding "that States can play no role in these determinations. . .uphold[ing] broad FCC determinations limiting other sharing (`unbundling') rights" and "jeopardiz[ing] competition in the local exchange market that has developed over the last decade, which is dependent on those rights." Id. at *18. The petition added, "[T]he court's decisions effectively limits States' ability to play further substantive role. The FCC is not well positioned to succeed without the States' assistance, given the heavy burden the Court imposed as a prerequisite to authorizing unbundling. The result is an order that effectively disables many of the Act's critical leasing provisions. It also flies in the face of the

cooperative scheme established by the Act and the express authority given to States to make unbundling determinations." Id. at * 19. The response of the MPSC supporting NARUC's petition echoed these arguments. See 2004 WL 1665337.

Defendants' state proceeding, which continued even after the decision and mandate issued in USTA II, is seemingly at odds with the position advanced in the MPSC's attempt to have the decision reversed as well as the Order and Notice. The FCC batch cut requirements have been vacated, and MPSC's position that the batch cut portion of the FCC's rule was not vacated, see Pl.'s Ex. 1 at 18, is unavailing. According to Defendants, the MPSC's batch cut proceeding was not part and parcel of the FCC's delegation of impairment determinations; rather, Case. No. U-13891 was initiated to investigate existing batch cut processes and, if necessary, adopt new procedures.[5] Defendants' assertion that the FCC's delegation of impairment determinations to state commissions was separate from its requirement that state commission undertake an investigation of the batch cut process ignores the plain language of the regulations. The state commissions were to explore specific mechanisms to ameliorate or eliminate the costs

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[5]Intervenor-Defendants advance the position that batch cuts are just a detail of providing loops and not part of the "scheme for subdelegating mass market switching determinations," found unlawful in USTA II. Because there is no prohibition in federal law preventing carriers from providing loops as effectively as possible, there is no basis for this Court to find the June 29, 2004 Order contrary to federal law.

The Court rejects Intervenor-Defendants' characterization of the Order as addressing the condition of providing loops and therefore independent of the need to find impairment with switches. The batch cut rules were part of the scheme for subdelegating mass market switching determinations on impairment, not part of the access to loops. The section of the TRO devoted to loops is found at ¶¶ 197-343. Not one of the paragraphs mentions batch cuts. The TRO covers batch cuts in the section addressing mass market switching, found at ¶¶ 464-75; 459-527. The regulations likewise separate loops (47 C.F.R. § 51.319(a)) and mass market switching (47 C.F.R.§ 51.319(d)), which contains a subsection on batch cuts (47 C.F.R. § 319(d)(2)(ii)).

of the hot cut process, but only if they found competing CLECs were impaired. See 47 C.F.R. § 51.319(d)(2). The Order and Notice explicitly forecloses the implementation and propagation of the rules. Further, the FCC requested state commissions to "file summaries of state proceedings" and "efforts to develop batch hot cut processes." The FCC also specified in the Order and Notice that obligations that predated the vacated rules were frozen, and CLECs were prevented from expanding their contractual rights. Order and Notice, ¶ 23. This directive further undermines Defendants' argument.

Defendants' reliance on provisions of the Telecommunications Act of 1996 that reflect that regulatory authority is shared with the state cannot be countenanced by this Court, which, in essence, it being asked to ignore USTA II. The USTA II decision warned that state commissioners might "not share the agency's national vision and perspective, and thus may pursue goals inconsistent with those of the [FCC] and the underlying statutory scheme." 359 F.3d at 565-66. In short, the circuit court rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations. Id. at 568.

There is no dispute that the state is free to adopt procompetitive requirements. See 47 U.S.C. § 261(b). The bottom line, however, is Section 261 of the Act authorizes states to enforce procompetitive state regulations, "provided the state's requirements are not inconsistent" with the statute and FCC regulations. 47 U.S.C. § 261(c). So the MPSC may impose batch cut requirements under state law, but only if its action is not contrary to federal law. Defendants' position is that SBC Michigan has not identified any provision in the 1996 Act or in the FCC rules that bars, or is even inconsistent with, the batch cut proceedings. Their position is undermined by the simple fact that the state-imposed requirements are at odds with USTA II and

the subsequent Order and Notice. It is incongruous for the USTA II Court to find that Congress prohibited the FCC from passing unbundling decisions to the state, but found the states could seize the authority themselves.

Finally, Defendants' reference to the many provisions of state statutory law that recognize the role the state commission plays in fostering competition do not aid the Court's analysis as the MTA likewise requires the MPSC to act in ways consistent with "all federal telecommunications laws, rule, orders, and regulations that are delegated to the state." See Mich.Comp.Laws 484.2201. Therefore, state statutory law does not salvage Defendants' June 29, 2004 Order.

In reaching the conclusion that Defendants are constrained by USTA II and the FCC's subsequent Notice and Order, the Court finds it unnecessary to discuss the alternative argument raised by Plaintiff, i.e., that the June 29, 3004 Order circumvents the Act's established process of negotiation and arbitration in violation of § 252 of the Act.

V. CONCLUSION

The MPSC cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law. It must challenge the decision in USTA II through the appropriate channels. When the D.C. Circuit acts as a Hobbs Act reviewing court, its decision is binding on this court. 28 U.S.C. § 2349(a). This Court is not free to ignore the mandate issued by the circuit court, and it cannot condone Defendants' decision to do so. For the reasons discussed above, the Court GRANTS Plaintiff's Motion for Summary Judgment.

IT IS FURTHER ORDERED that Defendant Commissioners are permanently enjoined from enforcing the MPSC Order.

IT IS SO ORDERED.

Marianne O. Battani

MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Dated: JAN 6 - 2005

CERTIFICATE OF SERVICE

Copies of this Order were mailed to Craig Anderson, Demetrios G. Metropoules, John Dempsey, Joseph P. Tocco, Michael G. Vartanian, Theodore A. Livingston, Steven D. Hughey, Albert Ernst, Allison M. Ellis, John Harrington, Robert J. Franzinger, Robin M. Meriweather, David W. Carpenter, Arthur J. LeVasseur, David L. Lawsen, Jacqueline G. Cooper, and John J. Reidy, III on this date by ordinary mail.

Deputy Clerk

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY
DEPUTY CLERK

ATTACHMENT B

MPSC CASE NO. U-12320

ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2004

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 00-1012 (AND CONSOLIDATED CASES)

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

JOHN E. INGLE
JOHN P. STANLEY
LAURENCE N. BOURNE
JAMES M. CARR
JOEL MARCUS
CHRISTOPHER L. KILLION
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

Even if this claim were ripe, it is unfounded. It rests largely on section 251(d)(3), which preserves state authority to adopt unbundling rules so long as they are "consistent with the requirements" of section 251 and do "not substantially prevent implementation of the requirements" of section 251 "and the purposes of this part." 47 U.S.C. §251(d)(3). But section 251(d)(3) authorizes preemption of state requirements that "substantially prevent implementation of the requirements" of section 251; and it recognizes the FCC's power to prescribe and enforce "regulations to implement the requirements" of section 251. *Ibid.* Thus, by the statute's own terms, any state law that undermines the FCC's implementing rules would "substantially prevent implementation of the requirements" of section 251. In that circumstance, the Act permits preemption.

Contrary to the states' contention, Congress has explicitly defined "the requirements of section 251" to incorporate the FCC's implementing rules. Section 252(c)(1) requires state commissions to resolve interconnection disputes in accordance with "the requirements of section 251, *including* the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. §252(c)(1) (emphasis added). This language leaves no doubt that FCC regulations are "requirements of section 251."

To be sure, an implementing regulation in some circumstances might be permissive rather than mandatory; and a state rule requiring something that the federal agency permits but does not require would not necessarily undermine a federal statutory requirement. In the UNE context, however, a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a "balance" struck by the agency between the costs and benefits of

unbundling that element. *USTA*, 290 F.3d at 427; *Order* ¶¶ 4-5, 235 (JA ,). Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.[41]

The states' contrary position ignores a long line of Supreme Court precedent. The federal government has the power to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Unless Congress expressly states otherwise, a statutory "saving clause" that preserves some state authority does not diminish the preemptive force of federal regulations. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000).[42]

VIII. NASUCA LACKS STANDING.

The Court should dismiss NASUCA's petition for lack of standing. A party invoking federal jurisdiction bears the burden of establishing Article III standing. *Lujan v. Defenders of*

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[41] For example, this Commission declined to unbundle the packetized functionality of ILEC loops. A state requirement to reverse that decision would substantially prevent implementation of the Act.

[42] The Supreme Court's recognition of the preemptive force of federal regulations casts serious doubt on the Eighth Circuit's ruling that section 251(d)(3) does not permit the FCC to preempt state rules that are "merely" inconsistent with FCC regulations. *See Iowa Utilities Board*, 120 F.3d at 806-07 (cited in States Br. 7-8). That legally dubious conclusion does not bind this Court in any event. The Eighth Circuit's ruling rested in part on that court's flawed assumption that Congress intended to confine FCC regulation of local telecommunications competition to a few expressly designated areas. The Supreme Court firmly rejected that premise. *See AT&T*, 525 U.S. at 378 n.6.

ATTACHMENT C

MPSC CASE NO. U-12320

No. 03-

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND THE ARIZONA CORPORATION COMMISSION,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER C. KEMPLEY
Chief Counsel
MAUREEN A. SCOTT
Attorney
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402

JAMES BRADFORD RAMSAY*
General Counsel
GRACE DELOS REYES
Assistant General Counsel
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1101 Vermont Ave. NW
Suite 200
Washington, DC 20005
(202) 898-2207

June 30, 2004

* Counsel of Record

1535(a) (instructing cooperation with States "to the maximum extent practicable"), *with* 16 U.S.C. § 1535(c)(1)(B) (requiring determinations of endangered or threatened species status to be made "by the Secretary"), *and with* 16 U.S.C. § 1533(d) (permitting regulations regarding taking of certain species "only to the extent that regulations have also been adopted by such State"); *compare* 21 C.F.R. § 1250.26(e) (delegating certain licensing determinations to State authorities), *with* 42 U.S.C. § 241(a) (permitting Secretary to "encourage, cooperate with, and render assistance to" other public bodies).

Such schemes will be upheld in the Ninth Circuit, but are in doubt—or will be struck down—in the D.C. Circuit. *Certiorari* is warranted to resolve the ambiguity the decision below has created, which until corrected will lead to substantial unnecessary litigation concerning the propriety of many cooperative federalism enactments.

B. The Court Should Grant Certiorari Because the Court Below Has Incorrectly Decided an Important Question of Federal Law.

This petition raises important questions of federal law that this Court should resolve concerning the meaning and effectiveness of the 1996 Act. *See* Supreme Court Rule 10(c). The 1996 Act's local competition provisions "profoundly affect[] a crucial segment of the economy worth tens of billions of dollars," and "fundamentally restructure[] local telephone markets." *IUB*, 525 U.S. 366, 397 (1999) ("*IUB*"). The Supreme Court has twice granted certiorari to review court of appeals decisions striking down FCC regulations implementing the Act's local competition provisions. *See, e.g.*, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *IUB*, *supra*. Here the lower court has struck down the FCC's unbundling rules, rules that are "[c]entral to the scheme of the Act." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 875 (2004); *see also IUB*, 525 U.S. at 371 (describing unbundling obligations as "foremost" among duties imposed by the 1996 Act).

The practical effect of the lower court's ruling is to eliminate the States from their designated role in bringing competition to local telecommunications markets. Moreover, by imposing extraordinary evidentiary burdens on the FCC before it can unbundle any network element, burdens more akin to constitutional adjudication then to administrative review, and then refusing to allow the FCC to share any of those burdens with willing State commissions, the court has reversed the basic premise of the Act – that it is to build on the unbundling regimes begun by State commissions in an "attempt[] 'to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises,'" and is, in that respect, "much more ambitious than the antitrust laws." *Trinko*, 124 S. Ct. at 883 (quoting *Verizon*, 535 U.S. at 476). The practical effect of the ruling is to disable the Act's central leasing provisions. And one consequence could well be the severe curtailment of competition in local telecommunications markets. Indeed, two of the primary

competitors that have succeeded in bringing competition to local markets have already announced their intention to pull back in wake of the D.C. Circuit decision. AT&T has announced its intention to stop offering local service to new residential customers in seven States, and, because consumers increasingly desire bundled local and long distance service offerings, to stop offering new long distance service as well. *TR Daily*, June 23, 2004. Z-Tel has similarly announced its intention to stop offering new residential service in eight States. *TR Daily*, June 22, 2004. These competitors likely acted in advance of issuance of new rules because they do not foresee any possibility of favorable rules on remand given the constraints imposed by the D.C. Circuit. These constraints are severe. As the *New York Times* contends, "[b]oth sides in the matter agree that if the Supreme Court does not alter the appeals decision, a central element of the landmark Telecommunications Act of 1996 will effectively be repealed." *See* Bush Backs Off Rule that Eased Phone Line Fees, *New York Times*, June 10, 2004 at A1.

To begin with, the court excluded States from the process. This was so even though Congress constructed the Act based on States' successful unbundling regimes prior to 1996, and understood that enlisting the States' expertise in this area would be critical to the success of the federal regime. [11]

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[11] *See, e.g.*, *Trinko*, 124 S. Ct. at 881-82; *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (2000) (justifying FCC deference to States in § 271 decisions based in part on the "considerable expertise" of States in TELRIC proceedings and the "significant amount of background work" they perform); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 F.C.C.R. 22781, ¶ 78 (2001) (reasoning that "State commissions may be more familiar than the [FCC] with the characteristics of markets and incumbent carriers within their jurisdiction, and that entry strategies may be more sophisticated in recognizing regional differences"); *Local Competition Order* ¶ 53 (noting that inasmuch as "[v]irtually every decision in this Report and Order

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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 February 23, 2005 she served a copy of ***SBC Michigan's Response in Opposition to MCI's Objections to SBC Accessible Letters*** 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: 2005.02.23 11:13:12 -05'00'

Jacqueline K. Tinney

Subscribed and sworn to before me,
a Notary Public in and for said County,
this 23rd day of February, 2005.

Signature Not Verified
Elaine M. Masters
Digitally signed by Elaine M. Masters
DN: cn=Elaine M. Masters, c=US
Date: 2005.02.23 11:13:38 -05'00'

Elaine M. Masters, Notary Public
Washtenaw County, Michigan
Acting in Washtenaw County, Michigan
My Commission Expires: 9/23/07

SERVICE LIST – MPSC CASE NO. U-12320

MPSC STAFF Steven D. Hughey Assistant Attorney General Public Service Division 6545 Mercantile Way, Suite 15 Lansing, MI 48911 Email: hugheys@ag.state.mi.us	**ATTORNEY GENERAL** Michael E. Moody Assistant Attorney General Special Litigation Division 6th Floor, G. Mennen Williams Bldg. 525 W. Ottawa Street Lansing, MI 48913 Email: MoodyME@michigan.gov
TRA Andrew O. Isar Director – State Affairs Telecommunications Resellers Association 7901 Skansie Avenue, Suite 240 Gig Harbor, WA 98335 Email: aisar@harbor-group.com	**TELNET WORLDWIDE, INC.** **TELECOMMUNICATIONS ASSOCIATION OF MICHIGAN** Harvey J. Messing Gary L. Field Loomis, Ewert, Parsley, Davis & Gotting, PC 232 South Capitol, Suite 1000 Lansing, Michigan 48933
AT&T COMMUNICATIONS OF MICHIGAN, INC. And TCG DETROIT Arthur J. LeVasseur Fischer, Franklin & Ford Guardian Building, Suite 3500 500 Griswold Street Detroit, MI 48226 Email: artlev@voyager.net John J. Reidy, III AT&T Communications 222 W. Adams, Suite 1500 Chicago, IL 60606 Email: jjreidy@att.com	**WORLDCOM** **COVAD COMMUNICATIONS COMPANY** Albert Ernst Dykema Gossett PLLC 800 Michigan National Tower Lansing, MI 48933 Email: aernst@dykema.com James R. Denniston WorldCom 205 North Michigan Ave., Suite 3700 Chicago, IL 60601 Email: james.denniston@mci.com

IP COMMUNICATIONS **Z-TEL COMMUNICATIONS, INC.** **FOCAL COMMUNICATIONS CORPORATION OF MICHIGAN** **TALK AMERICA** **XO MICHIGAN INC.** **QWEST COMMUNICATION CORP and LCI INTERNATIONAL TELECOM CORP** **MICHIGAN CABLE TELECOMMUNICATIONS ASSOC.** **NEXTLINK MICHIGAN, INC**. David E.S. Marvin Michael S. Ashton Fraser Trebilcock Davis & Foster, P.C. 1000 Michigan National Tower Lansing, Michigan 48933 Email: mashton@ftdf.com	**MCLEODUSA** **SPRINT COMMUNICATIONS CO., L.P.** **CLEC ASSOCIATION OF MICHIGAN** **MEDIAONE TELECOMMUNICATIONS OF MICHIGAN, INC.** **COAST TO COAST TELECOMMUNICATIONS, INC.** **AIRTOUCH CELLULAR, INC.** **LONG DISTANCE OF MICHIGAN, INC.** **TELIGENT, INC.** **MICHIGAN PAY TELEPHONE ASSOC.** **WINSTAR WIRELESS OF MICHIGAN, INC.** **CORECOMM MICHIGAN, INC.** William R. Ralls Roderick S. Coy Leland R. Rosier Clark Hill PLC 212 East Grand River Avenue Lansing, MI 48906 Email: Williamrralls@aol.com Rcoy@clarkhill.com Lrosier@clarkhill.com