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	)))))	MPSC Case No. U-12320

XO COMMUNICATIONS, INC.'S OBJECTIONS TO SBC MICHIGAN'S WITHDRAWAL OF ITS UNE TARIFF

NOW COMES XO Communications, Inc. ("XO"), by and through its legal counsel, and for its Objections to SBC Michigan's Withdrawal of its UNE Tariff states:

1. Pursuant to the procedure established in this Commission's November 7, 2002 Opinion and Order in Case No. U-12320, XO files these objections to SBC Michigan's threatened withdrawal of its Michigan UNE tariff.

2. Pursuant to its February 10, 2005 Accessible Letter (CLECAM105-037), SBC states that "an incumbent local exchange carrier (ILEC) cannot be required by a state to tariff the terms and conditions of its wholesale offerings . . ." The letter further states that as a result, "the SBC ILEC in Illinois, Indiana, Michigan and Wisconsin ("SBC") have or soon will be notifying the respective state regulatory commissions that each will be withdrawing its state UNE tariffs in the near future." The letter concludes that "the exact date of the withdrawal of SBC's UNE tariffs is not known for each state," but that the withdrawal may be "as early as March 10, 2005." (SBC's Accessible Letter is attached as Exhibit A.)

3. In its November 7, 2002 Opinion and Order in Case No. U-12320, this Commission rejected SBC's argument that it could unilaterally alter its Michigan UNE tariffs.

Instead, the Commission created a process where SBC would be required to provide 30 days notice and an opportunity for competitive local exchange carriers ("CLECs") to object. The Commission's Opinion and Order stated:

> The Commission cannot agree with Ameritech Michigan's apparent position that it alone should decide when the law has changed and when and how that change should be reflected in its tariffs and interconnection agreements. . . . It is one thing to argue that a CLEC cannot refuse to negotiate provisions governing how changes in laws and regulations will be reflected in the agreement. It is quite another to argue that a CLEC must accept tariffs and a Michigan-specific amendment, which are not subject to negotiation, that permit Ameritech Michigan alone to decide when and how changes should be implemented.
>
> If Ameritech Michigan is correct about the Commission's lack of authority to restrict the right to change tariffs upon one day's notice, and the Commission does not agree that it is, Ameritech Michigan will be unable to comply with Section 271 by offering UNE combinations through tariffs or an amendment that incorporates the tariffs. Federal law requires a binding obligation. The Commission therefore agrees with the Staff and the CLECs that, as a condition of finding that Ameritech Michigan is in compliance with Section 271, a process is needed to address changes to the tariffs.
>
> The Commission orders, as it did in the March 7, 2001 order in Case No. U-12540, that Ameritech Michigan may not change the UNE combination tariffs until it has complied with the following process. Further, before Ameritech Michigan may limit or withdraw the availability of any combination, including the UNE-P, to any provider, it must comply with this process. As Z-Tel proposed, this includes any proposal to limit or withdraw the availability of the UNE-P to providers seeking to serve any customers or class of customers based on the geographic location served or number of customer lines used. **It must provide 30 days' notice of any proposed change** to all CLECs that are purchasing UNE combinations. **The CLECs will have two weeks to file objections with the Commission**. **If the Commission concludes, on its own motion or on the basis of the objections, that the change should not take effect without further proceedings, it will issue an order commencing a proceeding, and Ameritech Michigan may not implement the change until the Commission orders otherwise**. In the absence of an order

> commencing a proceeding (either a collaborative discussion or contested case) within that period, Ameritech Michigan may implement the change at the conclusion of the notice period. (*Id.*, at pages 6- 7; emphasis added.)

Based on the procedure established by this Commission, XO files these objections to SBC's threatened withdrawal of its Michigan UNE tariffs. XO requests that this Commission commence a proceeding to consider these objections and order that SBC Michigan shall not implement any change to its UNE tariffs until the Commission orders otherwise.

4. SBC's Accessible Letter apparently relies upon *Verizon North Inc v Strand*, 309 F3d 935 (6th Cir 2002) for the proposition that SBC cannot be required to maintain wholesale offerings through state tariffs. Yet, the case relied upon by SBC has been distinguished by the Sixth Circuit in *Michigan Bell Co v MCI Metro Access Transmission Services Inc*, 323 F3d 348 (6th Cir 2003). In that case, the Sixth Circuit expressly rejected the position that SBC did not have any obligation to process orders as required by its Michigan tariffs. The Sixth Circuit rejected SBC's argument and held:

> The Act, then, recognizes that interconnection agreements are not the sole way to promote competition among local service providers, for it allows room for state regulation. **The Act does not impliedly preempt Michigan's tariff regime.** The Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services. Assuming that the interconnection agreement did not preclude MCI's placing resale orders under Ameritech's tariff obligations, the agreement and the Michigan tariff obligations can co-exist and work in concert to promote local service competition. (*Id.* at page 359; emphasis added.)

The Sixth Circuit has expressly concluded that the Michigan tariff regime may co-exist with the federal Telecommunications Act of 1996 ("federal Act").

5. XO objects to SBC's efforts to withdraw its Michigan UNE tariff because it conflicts with SBC's obligations under Section 355 of the Michigan Telecommunications Act ("MTA"). Section 355 requires "at a minimum" an unbundling of local exchange service to the "loop" and "port" components. Section 355 of the MTA states:

> (1) On or before January 1, 1996, a provider of basic local exchange service **shall unbundle and separately price each basic local exchange service offered by the provider into the loop and port components** and allow other providers to purchase such services on a nondiscriminatory basis.
>
> (2) Unbundled services and points of interconnection **shall include at a minimum** the loop and the switch port. (MCL 484.2355(1) and (2); emphasis added.)

Thus, "at a minimum" SBC is required to unbundled the "loop" and the "port" as those terms are defined by the MTA.

6. The terms "loop" and "port" are broadly defined under the MTA.

7. The "loop" is defined as "the transmission facility between the network interface on a subscriber's premises and the main distribution frame in the servicing central office." MCL 484.2102(r). This definition includes all loop types, including, without limitation, basic analog and digital high capacity loops, and includes all features, functions, and capabilities of the loop transmission facility, including the network interface device. It also includes all electronics, optronics, and intermediate devices used to establish the transmission path to the end-user customer premises as well as any inside wire owned or controlled by the ILEC that is part of the transmission path.

8. The "port" or "switch port" is defined as "except for the loop…, the entirety of local exchange, including dial tone, a telephone number, switching software, local calling, and access to directory assistance, a white pages listing, operator services, and interexchange and

intra-LATA toll carriers." MCL § 484.2102(x). In other words, the MTA effectively defines the "port" network element to include local switching, and transport, and signaling as well as other elements and functionalities utilized to provide competitive services. As is the case with loops, the MTA definition of port places no limitation on the type or function of the network facility included, and thus, the definition includes, for example high capacity transport (*i.e.*, DS-1 and DS-3), network signaling functionality, and call related databases. Moreover, the definition would similarly include all features, functions, and capabilities of the network facility being unbundled.

9. This Commission has long recognized that Section 355 of the MTA requires broad unbundling by the ILECs. In the January 28, 1998 Order in Case U-11280, this Commission held:

> The Commission further finds that even if Ameritech Michigan's interpretation of federal law were valid, the Michigan Telecommunications Act requires the Commission to administer and enforce the obligations of incumbent providers to offer common transport. **Section 355(2) states that unbundling of basic local exchange service requires the separation into the loop and port elements "at a minimum."** However, the same principles that mandate unbundling make it appropriate to consider further disaggregation of basic local exchange service into more constituent elements than simply the loop and the port. **Moreover, unbundling into more and smaller components or functions of the network furthers the competitive purposes and policies of the Michigan Telecommunications Act.** The Commission also agrees with MCI that the statutory definition of "port" as "the entirety of local exchange" (except for the loop) used to provide local calling is consistent with the unbundling concepts of the Michigan Telecommunications Act and embraces the common transport function. If it did not, local calling would not be a viable means of terminating any call that did not originate in the same end office. (January 28, 1998, order, Case No. U-11280, pp. 21-22; emphasis added.)

In applying Section 355, this Commission has recognized that the Michigan Legislature has mandated broad unbundling of the ILECs' network.

10. Thus, SBC's efforts to withdraw its Michigan UNE tariff conflicts with its obligations under Section 355 of the MTA.

11. As a Bell Operating Company ("BOC"), SBC also has an obligation to provide unbundled network elements under Section 271 of the federal Act. SBC's obligations under Section 271 of the federal Act are independent and separate from its obligations under Section 251 of the federal Act. This was made clear by both the FCC's *Triennial Review Remand Order* and *Triennial Review Order*. The August 23, 2003 *Triennial Review Order* provided:

> 653. For reasons set forth below, we continue to believe that the requirements of **section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251**.

The *Triennial Review Remand Order* made clear that this requirement in the *Triennial Review Order* survived both the *USTA II* decision and the FCC's *Triennial Review Remand Order*. (*See, Triennial Review Remand Order* at paragraph 12.)

12. For all the above reasons, XO objects to SBC's threatened withdrawal of its Michigan UNE tariff.

WHEREFORE, XO Communications, Inc. requests this Commission to do the following:

A) Initiate a proceeding to determine to what extent SBC may amend, modify or withdraw its Michigan UNE tariff;

B) Require SBC Michigan to comply with this existing tariffs until an order is issued by this Commission allowing those tariffs to be amended, modified or withdrawn; and

C) Grant any other relief which is just and reasonable.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.
XO Communications, Inc.

Mike Ashton
Digitally signed by Mike Ashton
DN: CN = Mike Ashton, C = US, O = Fraser Law Firm
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Dated: February 23, 2005

By:_____

Michael S. Ashton (P40474)
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EXHIBIT A



Accessible

Date: **February 10, 2005**

Number: **CLECAM05-037**

Effective Date: **2-11-05**

Category: **UNE**

Subject: **IL, IN, MI and WI UNE State Tariff Withdrawal**

Related Letters: **N/A**

Attachment: **N/A**

States Impacted: **Illinois, Michigan, Indiana, Wisconsin**

Response Deadline: **ASAP**

Contact: **SBC Account Manager**

Conference Call/Meeting: **N/A**

Several Federal Court of Appeals decisions have concluded that an incumbent local exchange carrier (ILEC) cannot be required by a state to tariff the terms and conditions of its wholesale offerings that are required pursuant to § 251 of the Telecommunications Act of 1996 (the "1996 Act").[1] Rather, these courts have found that the terms and conditions for such elements and services are properly subject to the negotiation and arbitration requirements of 47 U.S.C. §§ 251-252. In accordance with these decisions, and in an effort to simplify its wholesale offerings consistent with its obligations under federal law, the SBC ILECs in Illinois, Indiana, Michigan and Wisconsin ("SBC") have or soon will be notifying the respective state regulatory commissions that each will be withdrawing its state UNE tariffs in the near future.[2]

If you have an Interconnection Agreement ("ICA") with SBC but are purchasing products from the UNE tariffs—and would like to continue purchasing said products after the tariffs are withdrawn—SBC will agree to negotiate an amendment to your ICA to incorporate such products that SBC is required to provide as and to the extent required by federal law. SBC may contact you regarding any such amendments but has no obligation to do so. Rather, you should identify the specific tariff products that you want to incorporate into your ICA. To the extent that you do not amend your ICA to incorporate products from the UNE tariff, the tariff rates, terms and conditions for those products will no longer be available to you after the tariffs are withdrawn.

Other than for Indiana, the exact date of the withdrawal of SBC's UNE tariffs is not known for each state.[3] As stated above SBC plans to withdraw all such UNE tariffs in the near future, beginning as early as March 10, 2005. Therefore, this letter requests that you contact your Account Manager at your earliest convenience to begin the process of amending your ICA.

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[1] See *Verizon North, Inc. vs. Strand, et al.*, 367 F.3d 577 (6th Cir. 2004); *Wisconsin Bell, Inc. vs. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003), and *Verizon North, Inc. vs. Strand, et al.*, 309 F.3d 935 (6th Cir. 2002).

[2] In addition, the Illinois Commerce Commission has ruled that, consistent with the negotiation process required by the 1996 Act, such tariffs, while they are in effect, are available only to carriers that have, or enter into, an Interconnection Agreement with SBC. [Order, Docket 02-0864, p. 293-94 (June 9, 2004)]

[3] Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana filed its Notice of Tariff Withdrawal with the Indiana Utility Regulatory Commission on January 27, 2005, with an effective tariff withdrawal date of March 13, 2005.

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

The undersigned, being first duly sworn, deposes and states that she served papers as follows:

1. Document(s) served: XO Communications, Inc.'s Objections To SBC Michigan's Withdrawal Of Its UNE Tariff, and Proof of Service

2. Served upon: All counsel of record

3. Method of service: First Class, U.S. Mail

4. Date served: February 23, 2005

Connie Pyle
Digitally signed by Connie Pyle
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Date: 2005.02.23 14:43:34 -05'00'

Connie S. Pyle

Subscribed and sworn to before me
this 23rd day of February, 2005.

Jennifer Joy Yocum
Digitally signed by Jennifer Joy Yocum
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Acting in Ingham County
My Commission Expires: 12-17-2011

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