

January 18, 2005

**Via Hand Delivery &
E-file**

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48911

**Re: In the matter of the application of competitive local exchange carriers to initiate a Commission investigation of issues related to the obligation of incumbent local exchange carriers in Michigan to maintain terms and conditions for access to unbundled network elements or other facilities used to provision basic local exchange and other telecommunications services in tariffs and interconnection agreements approved by the Michigan Public Service Commission, pursuant to the Michigan Telecommunications Act, the Telecommunications Act of 1996, and other relevant authority.
Case No. U-14303**

**In the matter of the application of SBC Michigan for a consolidated change of law proceeding to conform 251/252 interconnection agreements to governing law pursuant to Section 252 of the Communications Act of 1934, as amended.
Case No. U-14305**

**In the matter of the application of Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems, for a consolidated change-of-law proceeding to conform interconnection agreements to governing law.
Case No. U-14327**

Dear Ms. Kunkle:

Enclosed for filing in the above-referenced case is an original and 4 copies of the *Reply Comments of SBC Michigan* and *Proof of Service*.

If you have any questions or concerns, please contact me.

Very truly yours,

William J. Champion III

WJC/jkt
Enclosure
cc: Hon. James N. Rigas
All Parties of Record

LANSING 34060-219 347014

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of competitive)
local exchange carriers to initiate a Commission)
investigation of issues related to the obligation)
of incumbent local exchange carriers in)
Michigan to maintain terms and conditions)
for access to unbundled network elements)
or other facilities used to provision basic local)
exchange and other telecommunications services)
in tariffs and interconnection agreements)
approved by the Michigan Public Service)
Commission, pursuant to the Michigan)
Telecommunications Act, the Telecommunications)
Act of 1996, and other relevant authority.)

Case No. U-14303

In the matter of the application of SBC Michigan)
for a consolidated change of law proceeding to)
conform 251/252 interconnection agreements to)
governing law pursuant to Section 252 of the)
Communications Act of 1934, as amended.)

Case No. U-14305

In the matter of the application of VERIZON)
NORTH INC. and CONTEL OF THE SOUTH,)
INC., d/b/a VERIZON NORTH SYSTEMS, for a)
consolidated change-of-law proceeding to conform)
interconnection agreements to governing law.)

Case No. U-14327

REPLY COMMENTS OF SBC MICHIGAN

Pursuant to the Commission’s November 9, 2004 Order and Notice of Opportunity to Comment (“Order and Notice”), Michigan Bell Telephone Company d/b/a SBC Michigan (“SBC Michigan”) respectfully submits the following Reply Comments.

I. The CLECs' Request That The Commission Reinstate the Unbundling Obligations that the FCC Has Eliminated Is a Dead Letter.

In its Initial Comments, the CLEC Coalition repeats, and incorporates by reference, its demand that the Commission order the “continued provision” of “specific UNEs that may no longer be required under the [FCC’s] Final Rules” pursuant to “the Commission’s general authority under state law to require unbundling.” CLEC Coalition at 6 (incorporating by reference its September 30, 2004 Application to Initiate Investigation in Case No. U-14303). That proposition is a non-starter for two principal reasons.

First, the federal courts and the FCC have made abundantly clear that the era of maximum unbundling is over. The Supreme Court held as much in 1999 in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), when it vacated the FCC’s first set of unbundling rules. The Court found that the FCC’s decision to give CLECs “blanket access to incumbents’ networks” wanting, because the FCC had failed “to apply some *limiting* standard, rationally related to the goals of the Act.” *Id.* at 387-90. The D.C. Circuit then confirmed that result in 2002 in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”), when it vacated the FCC’s attempt to reinstate essentially the same discredited rules. In *USTA I*, the court rejected the FCC’s pervasive “belief that in this area more unbundling is better,” finding that “Congress did not authorize so open-ended a judgment. It made ‘impairment’ the touchstone.” *Id.* at 425. The court explained that a proper unbundling analysis necessitates a balance of competing interests because “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.” *Id.*

On remand from *USTA I*, the FCC drew closer to the mark in its *Triennial Review Order* (“*TRO*”).¹ Among other things, in the *TRO*, the FCC eliminated or reduced the scope of unbundling obligations in many respects, concluding that:

- “[I]ncumbent LECs do not have to provide unbundled access to the high frequency portion of their loops.” *Id.* at 16988, ¶ 7.
- “Incumbent LECs do not have to offer unbundled access to newly deployed or ‘greenfield’ fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops.” *Id.*
- ILECs “are no longer required to unbundle OCn loops.” *Id.*
- ILECs were required to “offer unbundled access to dark fiber loops, DS3 loops (limited to 2 loops per requesting carrier per customer location) and DS1 loops except at specified customer locations where states have found no impairment pursuant to Commission-delegated authority to conduct a more granular review.” *Id.*
- ILECs do not have to offer “unbundled OCn level transport,” and dark fiber, DS3, and DS1 transport were “each independently subject to a granular route-specific review by the states to identify available wholesale facilities.” *Id.* at 16989, ¶ 7.
- ILECs do not have to offer “unbundled local circuit switching when serving the enterprise market.” *Id.*
- States could “identify particular markets where there is no impairment” as to mass-market switching. *Id.*
- “[C]arriers are impaired without shared transport only to the extent that carriers are impaired without access to unbundled switching.” *Id.*
- ILECs “are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs).” *Id.*

¹ Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003) (“*TRO*”) (subsequent history omitted).

- ILECs “are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching.” *Id.*
- CLECs “may order new combinations of unbundled network elements (UNEs), including the loop- transport combination (enhanced extended link, or EEL), to the extent that the requested network elements are unbundled.” *Id.* at 16990, ¶ 7.
- CLECs must additionally meet strict eligibility criteria before they can order the enhanced extended link.” *Id.* at 16990-91, ¶ 7.

In explaining the rationale for its new unbundling rules, the FCC specifically acknowledged that it was “very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.” 18 FCC Rcd. at 16984, ¶ 3. The FCC added that by reducing incumbent carriers’ unbundling obligations, the *TRO* would “help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of all American consumers.” *Id.* at 16985, ¶ 6. And the FCC made clear that states may not countermand FCC unbundling determinations. See *id.* at 17099-17100, ¶¶ 192-95.

While the D.C. Circuit upheld the limitations on ILEC unbundling obligations set forth in the *TRO*, it again vacated the FCC’s rules in the instances where those rules perpetuated overly broad unbundling. *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA II*”), cert. denied, 125 S. Ct. 313 (2004). And while the indications from the FCC’s Press Release suggest that its Final Rules still will not comply fully with the mandates of the Supreme Court and the D.C. Circuit, those shortcomings do not change the fact that, in the overall picture, it is emphatically clear that the courts have ushered the FCC’s original vision of maximum unbundling to the scrap heap of history.

Second, the D.C. Circuit has held that under section 251(d)(2) of the 1996 Act, the FCC – and only the FCC – has authority to make the impairment determinations that are statutory prerequisites to any unbundling requirements. That decision is binding nationwide, as it was rendered by the court in its capacity as a Hobbs Act reviewing court (28 U.S.C. § 2342), and the Supreme Court already has denied petitions for certiorari seeking to overturn it. See, *e.g.*, *Michigan Bell Tel. Co. v. Lark*, No. 04-60128, slip op. at 14 (E.D. Mich. Jan. 6, 2005) (Attach. A hereto) (“When the D.C. Circuit acts as a Hobbs Act reviewing court, its decision is binding on this court”).

Although the 1996 Act invites state commissions to play a role in implementing the Act as “deputized federal regulators” (*MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343 (7th Cir. 2000)), only the FCC can make an impairment determination that requires an element to be unbundled. The Supreme Court observed in *Iowa Utils. Bd.*, 525 U.S. at 391-92, that section 251(d)(2) of the 1996 Act, on its face, “requires *the Commission* to determine on a rational basis *which* network elements must be made available.” (Emphasis added.) And the D.C. Circuit confirmed this view in *USTA II*, holding that the FCC could not allow state commissions to make impairment findings, but instead had to make the impairment determinations that trigger the requirements for unbundling on its own. 359 F.3d at 568.

Similarly, in the *TRO*, the FCC made clear that states are *not* free to reconsider federal policies and impose an unbundling requirement — whether under federal or state law — that the FCC has already considered and expressly rejected. The FCC ruled that in circumstances where “the Commission has either found no impairment * * * or otherwise declined to require unbundling on a national basis,” states are effectively barred from adopting any unbundling requirement because it would be “unlikely that such decision would fail to conflict with * * *

implementation of the federal regime.” *TRO*, 18 FCC Rcd. at 17100, ¶ 195. And, as noted in SBC Michigan’s Initial Comments, the FCC has stated that “[i]n the UNE context,” any state rule that “struck a different balance” than the FCC’s rules “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). The Seventh Circuit similarly has said that it “cannot now imagine” circumstances in which a state could require unbundling of an element as to which the FCC has found no impairment. *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004).

A Michigan federal court recently reached precisely the same conclusion in enjoining the Commission from enforcing an order, purportedly imposed under state law, establishing a batch hot cut migration process. *Michigan Bell Tel. Co. v. Lark*, No. 04-60128, slip op. at 14 (E.D. Mich. Jan. 6, 2005). In that case, the court rejected the argument that the Commission had authority to impose batch cut unbundling requirements under state law, because any such requirements are the sole prerogative of the FCC. In reaching that conclusion, the district court observed that the D.C. Circuit “rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations.” *Id.* at 13 (citing *USTA II*, 359 F.3d at 568). And the court explained that “state statutory law” could not “salvage” the Commission’s order, for “[i]t 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.” *Id.* at 14.²

² The federal court further noted that state law itself constrains the Commission “to act in ways consistent with ‘all federal telecommunications laws, rules, orders, and regulations that are delegated to the state.’” *Id.* (citing Mich. Comp. Laws 484.2201).

The upshot of these decisions is that where no valid federal impairment finding exists, any state imposition of any unbundling is *per se* inconsistent with federal law and is therefore preempted. This is precisely what the Virginia commission recently held, explaining that “*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)” and that any state-commission imposed UNE obligations would therefore “violate federal law.” Order, Cases No. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004). Similarly, the New York PSC has recognized that when a regulation requiring an ILEC to provide a UNE is eliminated — whether by action of the FCC or a court — the ILEC is “permit[ted] * * * to cease performance of [that] prior obligation if it so desires.” Order Resolving Complaint, Complaint of MetTel and Broadview against Verizon New York Inc. Concerning Alleged Discriminatory and Anti-Competitive Abuse of OSS Changes, Case 04-C-0538, at 9 (N.Y. P.S.C. June 3, 2004). See also Verizon Initial Comments at 12 & nn. 17-18 (citing similar state commission decisions).

The same reasoning applies where a court of appeals has found that there is no valid FCC finding of impairment. As the D.C. Circuit has consistently found, unbundling in the absence of genuine impairment undermines the 1996 Act’s central goal of promoting facilities-based competition. See *USTA I*, 290 F.3d at 424-25. Because the 1996 Act preserves only those state regulatory requirements that are “*consistent with*” and “do[] *not* substantially prevent implementation of the requirements of this section [251]” (47 U.S.C. § 251(d)(3)), state commissions have no authority to require provision of UNEs that a federal court has declared unlawful. And for all of these reasons, the CLECs are foreclosed as a matter of federal law from obtaining from the Commission an order finding “[a]s a matter of state law pursuant to the [MTA], it is consistent with federal and state law that SBC Michigan and Verizon Michigan

offer nondiscriminatory access to unbundled network elements without limitation or restriction, as currently required and at the rates listed in applicable interconnection agreements or in applicable tariffs.” CLEC Coalition App. at 2. Thus, the Commission must reject the CLECs’ request for such an order.

II. The CLECs’ Request to Delay Implementation of the FCC’s New Rules Through Protracted Proceedings Is Contrary to Federal Policy.

In the face of the sea change in the substantive law of unbundling and the FCC’s admonition to act quickly in implementing its new rules, the CLECs’ attitude, as reflected in their Initial Comments, may be summarized in a single word: delay. In unison, all of the CLECs advise the Commission to do absolutely nothing – not only until the FCC *issues* its Final Rules, but until those Rules actually *become effective*. CLEC Coalition Initial Comments at 5; Sprint Initial Comments at 6; ACD Initial Comments at 1 (joining CLEC Coalition comments). And when that occurs, the CLECs propose that the Commission commence a lengthy schedule that, if adopted, would be sure to delay any resolution of this proceeding for at least six months, maybe longer. CLEC Coalition Initial Comments at 5-6; Sprint Initial Comments at 6. That proposed schedule includes a 45-day “study and preparation period,” followed by a 90-day period for individual carrier negotiations. *Id.* Only after that already extended period, would the CLECs’ schedule call for the submission of amendments or petitions identifying disputed issues. *Id.* Then, the CLECs suggest that the Commission “schedule a pre-hearing or collaborative to identify the common or unique issues” in dispute. *Id.*

The CLEC proposal should be rejected out of hand, because it is a recipe for delay for the sake of delay, as the CLECs endeavor once again to stave off the inevitable as far into 2005 as the eye can see. And the reason for this is simple: the current, outdated unbundling arrangements are far more generous to the CLECs than the lawful provisions to which the

CLECs are entitled under the FCC's new unbundling regime. Incumbent carriers have been waiting eight years for relief from the FCC's initial, unlawful maximum unbundling rules, and the CLECs apparently feel that waiting the better part of another year should be no problem.

In addition to the unfairness of the CLECs' transparent effort to milk the old regime for as long as humanly possible, the CLECs' proposal is diametrically contrary to the FCC's express and repeatedly stated policy of avoiding any "delay in the implementation of the new rules we adopt," because such delay "will have an adverse impact on investment and sustainable competition in the telecommunications industry." *TRO*, 18 F.C.C.R. at 17405, ¶ 703. The FCC also emphatically stated that its new rules should take effect immediately, even where parties' agreements contained language stating that new rules would not take effect until there has been a "final and unappealable" change in the law. Such a change, the FCC observed, had *already* happened, when its prior unbundling rules had been vacated. Thus, "[g]iven that the prior UNE rules have been vacated and replaced *today* by new rules, we believe that it would be *unreasonable and contrary to public policy* to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* at 17406, ¶ 705 (emphasis added).

The FCC's *Interim Rules Order* reiterated the federal policy favoring a "speedy transition" to new rules, including those affecting mass-market switching and high-capacity loops and transport. *Interim Rules Order* ¶ 22. Along the same lines, the FCC said that "whatever alterations are approved or deemed approved by the relevant state commission" should "*take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue." *Id.* ¶ 23 (emphasis added). Toward that end, the FCC advised that parties and state commissions should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* ¶ 22.

The CLECs' constant refrain of delay, delay, and more delay clearly works at cross purposes with the FCC's admonition that its Rules be implemented speedily in furtherance of important national policy goals. In light of the FCC's statements, the Commission should pay no heed to the CLECs' suggestion that the parties and the Commission sit on their hands until the Final Rules become effective. Once the FCC issues new rules, numerous parties undoubtedly will appeal, presenting the CLECs with yet another excuse to request delay in revising their agreements. The suggestion that the parties should nonetheless wait for the FCC to conclude its proceeding – which would in turn lead to still more requests for delay while any appeals are pursued – is untenable.

There is no reason why the Commission should not immediately move to implement the settled rulings from the *TRO* that either were affirmed in *USTA II* or not appealed at all. The *TRO*'s declassification rulings are perfectly clear and certain, they have been upheld, they are now final and nonappealable, and they have been awaiting implementation for over 15 months now. The *TRO* was vacated *only* to the extent that it imposed overly broad unbundling obligations on ILECs or improperly delegated authority to the states. To the extent that the *TRO* *limited* those obligations, it was sustained. As a result, there can be no plausible argument that it would be “prematu[r]e” (see, e.g., Sprint Initial Comments at 2) to implement the declassification rulings of the *TRO*.

III. The Commission Should Move Expeditiously to Approve Conforming Interconnection Agreement Amendments That Give Effect to the FCC's Rules.

The Commission is legally bound to implement the FCC's determinations, consistent with the pertinent court rulings including the D.C. Circuit's decision in *USTA II*, as to all incumbent and competing carriers as of the date on which those determinations take effect. The controlling legal authorities establish that (i) the prior maximum unbundling regime is over and

(ii) the FCC alone has authority to draw the unbundling lines to which the states must hew and from which they lawfully may not deviate. Nothing in state law provides a vehicle for an end run around federal law. The Supremacy Clause means that the Commission “cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law.” *Lark*, slip op. at 14. And, in any event, the Michigan Telecommunications Act requires the Commission to act consistently with “all federal telecommunications laws, rule, orders, and regulations that are delegated to the state.” MCL 484.2201.

The purpose of this proceeding is to implement the unbundling framework established by the FCC’s rules and pertinent judicial decisions and to do so expeditiously to achieve the “speedy transition” called for by the FCC and to avoid wasteful litigation. In this case, this may be accomplished through the speedy approval by the Commission of amendments to all section 252 agreements that reflect current declassifications of network elements. To the extent that this process involves elimination of unbundling obligations that no longer exist, it should be essentially a ministerial task. Finally, as the Commission Staff has recognized, implementation should take place in a single consolidated proceeding “for administrative efficiency,” as authorized by section 252(g) of the federal Act. Staff Initial Comments at 10-11 & n.2.

In sum, the Commission is obligated to give immediate effect to the FCC’s substantive impairment and unbundling determinations and to do so in a fashion that honors the FCC’s policy decision that those determinations will promote important policy objectives. The Commission should disregard the CLECs’ concerted efforts to distract the Commission from its duty and decline the CLECs’ invitation to commence months of skirmishing to implement largely self-evident results that follow from the pertinent FCC and judicial decisions.

Respectfully submitted,

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Dated: January 18, 2005

LANSING 34060-219 352276

MPSC CASE NOS. U-14303, U-14305 & U-14327

REPLY COMMENTS OF SBC MICHIGAN

ATTACHMENT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
JAN 6 - 2005
CLERK'S OFFICE
U. S. DISTRICT COURT
EASTERN MICHIGAN

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

¹When 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 Red. 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 its decision, "We vacate the [FCC's] subdelegation to state commissions of decision-making authority over impairment determinations,

²Pursuant 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).

³Under 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 subdelegation 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 MTA⁴ to ensure a competitive market for local exchange

⁴The 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

⁵Intervenor-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.

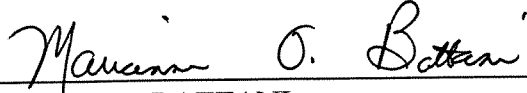
In reaching the conclusion that Defendants are constrained by USTA II and the FCC's subsequent Notice and Order, the Court finds it unnecessary to discuss the alternative argument raised by Plaintiff, i.e., that the June 29, 2004 Order circumvents the Act's established process of negotiation and arbitration 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.

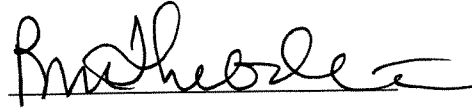
IT IS SO ORDERED.


MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

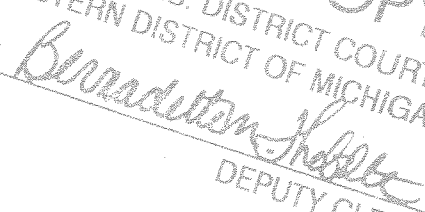
Dated: JAN 6 - 2005

CERTIFICATE OF SERVICE

Copies of this Order were mailed to Craig Anderson, Demetrios G. Metropoulos, 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

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EASTERN DISTRICT OF MICHIGAN
BY 
DEPUTY CLERK

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of competitive local exchange carriers to initiate a Commission investigation of issues related to the obligation of incumbent local exchange carriers in Michigan to maintain terms and conditions for access to unbundled network elements or other facilities used to provision basic local exchange and other telecommunications services in tariffs and interconnection agreements approved by the Michigan Public Service Commission, pursuant to the Michigan Telecommunications Act, the Telecommunications Act of 1996, and other relevant authority.

Case No. U-14303

In the matter of the application of SBC Michigan for a consolidated change of law proceeding to conform 251/252 interconnection agreements to governing law pursuant to Section 252 of the Communications Act of 1934, as amended.

Case No. U-14305

In the matter of the application of VERIZON NORTH INC. and CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS, for a consolidated change-of-law proceeding to conform interconnection agreements to governing law.

Case No. U-14327

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WASHTENAW)

Jacqueline K. Tinney, being first duly sworn, deposes and says that she is employed at Dickinson Wright PLLC, and that on January 18, 2005, she caused a copy of the Reply Comments of SBC Michigan to be served upon the parties listed below via email and first class mail.

Jacqueline K. Tinney

Subscribed and sworn to before me,
a Notary Public in and for said County,
this 18th day of January, 2005.

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

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