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January 18, 2005

VIA HAND DELIVERY

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

RE: MPSC Case No. U-14303, U-14305 & U-14327

Dear Ms. Kunkle:

Enclosed for filing, please find the original and four copies of Reply Comments of TDS Metrocom, LLC, Talk America Inc. and XO Michigan, Inc., regarding the above matter, as well as a Proof of Service. Thank you for your assistance in this regard. Should you have any questions, please feel free to contact my office.

Very truly yours,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

Michael S. Ashton

MSA/vlj
Encl.
cc: Parties of Record

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 TDS METROCOM, LLC, TALK AMERICA INC. AND XO MICHIGAN, INC.

I. INTRODUCTION

TDS Metrocom, LLC, Talk America Inc. and XO Michigan, Inc. file these reply comments and response to SBC Michigan's motion for summary disposition pursuant to the

scheduling order established by this Commission on November 9, 2004. In their briefs and comments, both SBC and Verizon erroneously argue that the competitive local exchange carriers' application in Case No. U-14303 should be dismissed due to federal preemption. First, such argument is, at best, premature because the Federal Communication Commission's ("FCC") December 15, 2004 Order On Remand (FCC 04-290) regarding unbundling requirements under the federal Telecommunications Act ("federal Act") has not even been released. Thus, such an argument is based on Verizon's and SBC's guess at to what may be contained in the FCC's order and rules. Second, such arguments are inconsistent federal Act's savings clauses that allow the MPSC "to impose additional pro-competitive requirements under state law." Michigan Bell Telephone Co v Chappelle, 222 F Supp 2nd 905, 918 (E.D. Mich, 2002). As discussed below, there is simply no basis to dismiss the CLECs' application.

II. REPLY

A. Claims Of Preemption Are, At Best, Premature Guesswork

On December 15, 2004, the FCC issued a press release announcing the issuance of its Order On Remand (FCC 04-290) which establishes the unbundled network elements ("UNEs") which will be required to be provided by incumbent local exchange carriers ("ILECs") to competitive local exchange carriers ("CLECs") pursuant to Section 251 of the federal Act. While expected soon, the release of the FCC order and rules has not yet occurred. The press release, however, nowhere mentions preemption of any additional pro-competitive unbundling requirements imposed by state law. Thus, SBC's and Verizon's arguments that federal law preempts Michigan's unbundling and interconnection requirements are, at best, based on premature guesswork. Furthermore, as discussed below, such are arguments are inconsistent with the framework of the federal Act.

B. The MPSC Retains Authority To Require Unbundling Under Sate Law

Federal law preserves to the states the authority to require ILECs to offer non-discriminatory access to their network elements. The federal Act contains no less than four separate "savings clauses," all which make clear that nothing in the federal statue preempts Michigan's efforts to open local telecommunication markets to competition. Paramount to the consideration of whether state law is preempted is Congress' intent in enacting the federal Act. In Section 601(c)(1) of the federal Act, 110 Stat. 143 (1996), Congress expressly stated that preemption of state law is not to be implied. Section 601(c)(1) states:

> No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Similarly, Section 261(c) of the federal Act explicitly allows for states to impose additional state law requirements to further competition in local telecommunications market. Section 261(c) states:

> Additional state requirements.—Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part. (47 USC 261(c).)

Thus, the federal Act makes clear that states are entitled to enact additional requirements to promote competition and there has been no showing that state unbundling requirements are inconsistent with the yet to be released federal rules.

The federal Act also allows for states to impose pro-competitive requirements under state law when approving interconnection agreements. When the MPSC reviews interconnection agreements "nothing in this section [252] shall prohibit a state commission from establishing or enforcing other requirements of state law . . ." (47 USC 252(e)(3); emphasis added.) Thus, in reviewing and approving interconnection agreements pursuant to Section 252 of the federal Act, states are explicitly allowed to establish and enforce requirements under state law including but not limited to state unbundling requirements.

Also, Section 251 of the federal Act requires that the FCC implement unbundling, interconnection and other requirements. In doing so, Section 251(d)(3) makes clear that the FCC is not to "preclude the enforcement of any regulation, order, or policy of the State commission that establishes access and interconnection obligations of local exchange carriers" so long as it "is consistent with the requirements of [Section 251]" and "does not substantially prevent implementation of the requirements of [Section 251]." 47 USC 251(d)(3). One of the mandates of Section 251(c)(3) is the duty of ILECs is to provide "nondiscriminatory access to network elements on an unbundled basis. . . " As set forth in the CLECs' application in Case No. U-14303, the requirements of Section 355 of the Michigan Telecommunications Act to provide unbundled network elements is entirely consistent with this section of the federal Act and the FCC shall not preclude the enforcement of the state's requirements imposed by Section 355 of the MTA.

C. Courts Have Upheld Pro-Competitive Requirements Imposed By State Commissions

The courts have upheld the right of the MPSC to impose pro-competitive state law requirements upon ILECs. For example in Michigan Bell Telephone Co v Chappelle, 222 F

Supp 2d 905, 918 (E.D. Mich, 2002), SBC argued that the FCC precluded the MPSC from requiring SBC to provide transiting to CLECs. The federal court disagreed and held:

> Thus, the third question for the Court is whether state law allows imposition of mandatory transiting. The answer is simple . . .. **Since federal law does not preclude mandatory transiting, under the FTA's savings clause, the MPSC is allowed to impose additional pro-competitive requirements under state law**. (Emphasis added; ellipsis added.)

Similarly in Michigan Bell Telephone Co v MCIMetro Access Transmission Services Inc. 323 F3d 348 (CA 6, 2002), SBC argued that an MPSC order was impermissible because it imposed state tariff requirements which SBC complained interfered with the interconnection requirements of the federal Act. The Court of Appeals disagreed and, in rejecting SBC's argument, the court stated:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261. Additionally, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).
>
> The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." *Verizon N.*, 309 F.3d at 944. The Federal ***359**Communications Commission's ruling in *In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460, ¶ 52 (Oct. 1, 1997), draws several conclusions from these provisions of the Act:
> ... Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets .... however, Congress did not intend to permit state regulations that conflicted with the 1996 Act....Thus, a state may not impose any requirement that is

> contrary to terms of sections 251 through 261 or that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." ... Congress plainly authorized agency preemption based on a conflict between enacted federal rules and state requirements.
>
> According to the Federal Communications Commission, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted. *Id.* ¶ ¶ 50-52.

Thus, the courts have recognized that the federal Act does not oust the state from playing an important role in development of competitive telecommunications market and clearly permits pro-competitive state requirements.

Similarly, in Bell South Telecommunications Inc. v Cinergy Communications Co 297 F Supp 2d 946 (ED Ken, 2003) relying upon Michigan Bell Telephone Co v MCIMetro Access, supra, concluded that:

> Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not 'substantially prevent' implementation of federal statutory requirements.

The courts have clearly recognized that the states have an important role to play in the development of pro-competitive policies. Here, the MPSC has not been preempted because nothing in the state unbundling requirements substantially prevents the implementation of federal statutory requirements.

D. Section 201 Of The MTA Does Not Preclude Enforcement Of Additional State Requirements For Unbundling

As set forth in the CLECs' application, this Commission has previously interpreted Section 355 of the MTA to require broad unbundling under state law. In its comments, SBC wrongly asserts that Section 201(2) of the MTA prevents this Commission from imposing state

law unbundling requirements which in anyway "deviate from the lines drawn by the FCC." (SBC Brief at p 25.) Such an argument is completely erroneous.

Section 201(2) of the MTA relied upon by SBC states that:

> The commission shall exercise its jurisdiction and authority consistent with this act and all federal telecommunications laws, rules, orders, and regulations. 484.2201(2).

This section does not require the Commission to deviate from the standard interpretation of Michigan statutes. Instead, this section merely states that the Commission shall exercise its jurisdiction and authority consistent with both (1) this act [the MTA] and (2) federal telecommunications laws. As set forth in the earlier determinations made by this Commission, in enacting Section 355 of the MTA the Michigan Legislature required broad unbundling. Pursuant to Section 201(2), this Commission must exercise its jurisdiction and authority consistent with the requirements of Section 355 of the MTA as enacted by the Michigan Legislature. Furthermore, in exercising its jurisdiction consistent with the unbundling requirements of Section 355 of the MTA, this Commission is not in anyway acting inconsistent with federal telecommunications law. As discussed above, the federal Act specifically provides the states with the authority to impose additional pro-competitive requirements to open the local telecommunications markets. Thus, despite SBC's efforts to misinterpret Section 201(2) of the MTA, it clearly requires this Commission to enforce the unbundling requirements intended by the Michigan Legislature as enacted in Section 355 of the MTA.

III. RELIEF REQUESTED

As set forth in their initial and reply comments, TDS Metrocom, LLC, XO Michigan, Inc. and Talk America Inc. requests that this Commission dismiss the applications of SBC and Verizon and to hold a second hearing conference to determine what, if any, further

action on the CLECs' application is necessary pending the parties' opportunity to review the FCC's decision and new rules.

TDS METROCOM, LLC, XO MICHIGAN, INC. AND TALK AMERICA INC.

Mike Ashton

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DATED: January 18, 2005

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
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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

Valerie L. Johnston, being first duly sworn, deposes and says that on this 18th day of January , 2004, she served a copy of Reply Comments of TDS Metrocom, LLC, Talk America Inc. and XO Michigan, Inc. upon the following individual(s):

See attached service list

via e-mail and/or by placing the same in an envelope(s) addressed to said individual(s) at the aforesaid business address(es) and depositing same in the U.S. mail.

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