

Via Hand Delivery

October 8, 2003

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

Re: *Sage Telecom, Inc. v SBC Michigan*
MPSC Case No. U-13747

Dear Executive Secretary:

Enclosed for filing please find an original and four (4) copies of SBC Michigan's Reply to Sage Telecom, Inc.'s Exceptions to the Proposal for Decision in the above-referenced proceeding. Also enclosed is a Proof of Service. These documents have been filed electronically with the Commission.

Sincerely yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By _____
Daniel J. Demlow

Enclosures

cc: Hon. Barbara A. Stump (w/encls.)
Steven D. Hughey (w/encls.)
Haran C. Rashes/Roderick S. Coy (w/encls.)
Katherine K. Mudge (w/encls.)
Elizabeth Durbin (w/encls.)

DJD:cml

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the Complaint of SAGE)
TELECOM, INC. against SBC)
MICHIGAN for Implementation of)
Procedures for Incollect Traffic.)
_____)

Case No. U-13747

**SBC MICHIGAN’S REPLY TO SAGE TELECOM, INC.’S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

Respondent, SBC Michigan (“SBC”), by and through its attorneys, Honigman Miller Schwartz and Cohn LLP, hereby replies to Sage Telecom, Inc.’s (“Sage”) Exceptions to the Proposal for Decision (“PFD”).

I. INTRODUCTION

The Administrative Law Judge (“ALJ”) thoroughly reviewed all of the testimony and exhibits in this proceeding, but in her PFD recommended the Complaint of Sage against SBC be dismissed with prejudice for the reason that the Michigan Public Service Commission (“Commission”) lacked jurisdiction over the subject matter of Sage’s Complaint. SBC expresses no opinion on the subject of the Commission’s jurisdiction and leaves it to the Commission to determine whether it has jurisdiction. Because SBC expresses no opinion regarding the issue of jurisdiction, it is not replying herein to Section II. A. of Sage’s Exceptions.¹

Should the Commission determine that it has jurisdiction and issue a decision on the merits, SBC believes that the Commission would either have to remand this proceeding to the

_____ ¹ SBC’s failure to reply to Section II. A. of Sage’s Exceptions, however, should not be read as an acceptance of the arguments and representations contained therein.

ALJ for a new PFD² or review the record itself in order to comply with the procedures for contested cases contained in the Michigan Administrative Procedures Act. See MCL 24.281.

Initially, SBC notes that Sage's Exceptions are procedurally improper. In its Exceptions, Sage copied, word-for-word in most cases, large sections of its Initial Brief and Reply Brief that were previously filed in this case. In reiterating its argument, Sage was not taking exception with any portion of the PFD, but was merely improperly re-hashing its arguments. However, since the Commission could determine it has jurisdiction or otherwise determine to rule on the merits of this case, SBC has no choice but to briefly reply herein to the sections of Sage's Exceptions that discuss the merits of the case.

SBC will not engage in the same procedural missteps as Sage. Instead of wasting the Commission's time by parroting the Briefs it previously filed in this matter, SBC incorporates those Briefs by reference and will only briefly argue the merits of this matter responding to Sage's arguments.

II. REPLY TO SAGE'S EXCEPTIONS

A. Sage Is Liable For Its Customers' Incollect Charges Under Standard Industry Practice.

This matter involves the question of whether Sage should be financially responsible for the Incollect services its customers agree to accept and pay for, pursuant to a service Sage chose to provide. It is clear that the standard industry practice is that a local exchange carrier ("LEC"),

² The time constraints imposed upon the Commission by Section 203(11) of the Michigan Telecommunications Act ("MTA") complicate this issue. According to SBC's calculations, the Commission must issue its Order in this matter no later than November 6, 2003 (based on 180 days plus 45 days for mediation).

whether an incumbent local exchange carrier (“ILEC”) or a competitive local exchange carrier (“CLEC”), is responsible for charges incurred by its customers. See SBC’s Initial Brief at 11-16; SBC’s Reply Brief at 8-10; 12-13. Indeed, the Federal Communications Commission (“FCC”) recognized this practice in *In The Matter Of Application By Verizon New Jersey Inc., et al.*, 17 F.C.C.R. 12275, 12355-12356 (June 24, 2002), in which the FCC held that an ILEC acted properly by holding CLECs liable for the Incollect charges accepted by the CLEC’s customers. See SBC’s Initial Brief at 11-12.

Sage argues that the FCC’s decision is limited to resellers. This is clearly untrue. The FCC Order makes it clear it applies to all telecommunications carriers. See 17 F.C.C.R. at 12355-12356 (“A reseller, like any other telecommunications carrier – including Verizon, with respect to its retail customers – is responsible for the charges incurred by its own end users.”) (emphasis added). Furthermore, the fact that Sage is a UNE-P CLEC and not a reseller is a factor that supports a finding that Sage be held liable. Unlike resellers, who merely resell an ILEC’s service, UNE-P CLECs claim to actually be providing their own service. Thus, a reseller can argue that it is just a reseller and not a telecommunications service provider, but a UNE-P CLEC cannot. Because Sage is a telecommunications service provider, Sage must, like every other provider, take responsibility for charges incurred by its customers.

Sage’s assertions against the standard practice are baseless. In attempting to rebut the practice endorsed by the FCC, Sage relies on a witness who has virtually no experience in the telecommunications industry. See SBC’s Initial Brief at 4-5; Reply Brief at 13. Sage also attempts to rely upon SBC’s opposition to the intervention of the CLEC Association. But SBC was not acting inconsistently when it opposed the intervention of the CLEC Association. The attempted intervention by the CLEC Association, of which Sage is a member and which is

represented by the same attorneys who represent Sage, was merely a transparent attempt by Sage to attempt to introduce additional testimony and legal briefs through a proxy.

B. Sage’s Assertions Of Violations Of The MTA And FTA Are Baseless.

On pages 50-53, Sage alleges that SBC violated the Federal Telecommunications Act (“FTA”) and the MTA. SBC thoroughly addressed and refuted Sage’s allegations in its Initial Brief and Reply Brief and SBC relies on those filings. In summary, there was no violation of the FTA or MTA Section 502(1)(a) because Sage knew SBC’s position regarding liability for Incollets; Sage never even alleged a violation of MTA Section 502(1)(b) in its Complaint and Sage is not an “end user” and cannot allege a violation of this provision; and the MTA does not turn every alleged breach of a Commission-approved interconnection agreement into a violation of the MTA.³

C. A Minor Mistake By SBC’s Counsel Is Not A “Misrepresentation.”

Sage spends four pages of its Exceptions discussing an error that appeared in SBC’s Initial Brief. SBC admits that its counsel inadvertently and erroneously quoted language from another interconnection agreement in its Initial Brief. This mistake by counsel, however, was quickly corrected when Sage notified SBC of the mistake.⁴ SBC deplors Sage’s attempt to turn a minor mistake in a brief into an MTA violation, and the lack of civility of Sage’s counsel.

Furthermore, the language of Sage’s Interconnection Agreement supports SBC’s position. The language quoted on page 55 of Sage’s Exceptions clearly states that, in the event of fraud associated with alternatively billed services (“ABS”), “liability should be determined

³ Sage never makes this allegation in the substantive portion of its Exceptions, but does make it in passing on pp 9-10 of its Exceptions while discussing jurisdiction.

⁴ Sage’s counsel never contacted SBC’s counsel regarding the error so that it could be corrected quickly, but instead kept silent and used the error as an argument in Sage’s Reply Brief.

based on the facts related to the incident of fraud.” Sage’s position, however, is that Sage is never liable for ABS charges. The provision regarding fraud only makes sense if Sage is generally liable for ABS charges but, if there is fraud, Sage may avoid that liability based on the facts related to the fraud.

D. If The Commission Determines It Lacks Jurisdiction, It May Dismiss This Action “With Prejudice.”

On pages 57 and 58 of its Exceptions, Sage argues that, should the Commission conclude it lacks jurisdiction, it should not dismiss this case “with prejudice.” Sage argues that inclusion of the words “with prejudice” might mean that Sage would be precluded from bringing another action because the Commission’s decision will operate as a final decision on the merits.

Sage’s argument is clearly incorrect. Even at common law it was recognized that dismissal due to lack of jurisdiction does not operate to preclude future litigation in an appropriate forum. *See Laude v Cossins*, 334 Mich 622, 625-626; 55 NW2d 123 (1952) (prior judgment dismissing claim “with prejudice” on grounds of lack of jurisdiction does not bar another action); *In re Quinney’s Estate*, 287 Mich 329, 338-339; 283 NW 599 (1939) (“While a dismissal on the ground the court has no jurisdiction of the subject-matter is a conclusive determination of want of jurisdiction, it is no adjudication of the merits and will not bar another action for the same cause.”). This rule has been incorporated into the Michigan Court Rules. See MCR 2.504(B)(3) (dismissal for lack of jurisdiction does not operate as an adjudication on the merits).

III. CONCLUSION

As clearly demonstrated in SBC’s prior Briefs, there is no merit to Sage’s Complaint. If Sage continues to choose to offer its customers the option of authorizing and accepting ABS charges, Sage must also accept the financial responsibility for its choice, just as SBC and other

providers have done. If Sage is concerned about the financial risk its choices present, SBC's Briefs demonstrate Sage has a variety of options for limiting that risk, including not offering the service, blocking, or various alternative arrangements between the parties.

Respectfully submitted,

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STATE OF MICHIGAN
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MICHIGAN for Implementation of)	
Procedures for Incollect Traffic.)	
_____)	

PROOF OF SERVICE

Lori Smith being first duly sworn, deposes and says that on October 8, 2003, a copy of SBC Michigan's Reply to Sage Telecom, Inc.'s Exceptions to the Proposal for Decision was served upon the following parties as indicated:

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Lori S. Smith

Subscribed and sworn to before me
this 8th day of October, 2003.

Cynthia M. Lenneman, Notary Public
Clinton County, Acting in Ingham County, Michigan
My commission expires: 2-20-07
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