BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. dba PAETEC Business Services and LDMI TeleCommunications, Inc., Complainants	)	
v.	)	Case No. 11-3407-TP-CSS
AT&T Ohio, Respondent	)	

APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code Section 4903.10 and Rule 4901-1-35 of the Ohio Administrative Code, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") and LDMI TeleCommunications, Inc. ("LDMI") (collectively "PAETEC") file this application for rehearing from the October 12, 2011 Entry of the Public Utilities Commission of Ohio ("Commission") dismissing PAETEC's Complaint. The Commission's decision was unreasonable and unlawful for the following reasons:

A. The Commission acted unreasonably and unlawfully by determining that it lacked authority to review PAETEC's complaint to enforce relevant non-discriminatory provisions of federal law and the parties' interconnection agreements. The Commission unreasonably and unlawfully made findings of fact regarding the parties' interconnection agreements that contributed to the Commission's unreasonable and unlawful decision to dismiss this complaint. Instead, the Commission is bound by the legal standards of review set forth for a motion to

dismiss, and the complainants must be given the opportunity to develop sufficient facts to establish their meritorious claims of unlawful discrimination by AT&T Ohio.

B. The Commission acted unreasonably and unlawfully by failing to consider Section 252(i) when making its determination that Section 252(a)(1) allows AT&T Ohio to charge for physical collocation in a manner that is discriminatory and in violation of Section 251(c)(6). PAETEC and AT&T Ohio never negotiated terms regarding physical collocation, with those terms being adopted through a 252(i) offering and then amended through an accessible letter offering. The lack of negotiated terms means that the physical collocation nondiscrimination standards apply to AT&T Ohio, and the Commission should have denied the motion to dismiss on that basis.

C. The Commission acted unreasonably and unlawfully by dismissing PAETEC's Complaint because under Section 252(e)(2), the Commission cannot approve an interconnection agreement if any portion of that agreement is discriminatory against other carriers or is in violation of the public interest, convenience or necessity.

A Memorandum in Support setting forth the specific grounds for rehearing is attached. WHEREFORE, PAETEC respectfully requests that the Commission grant its application for rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. INTRODUCTION

McLeodUSA Telecommunication Services, Inc. ("McLeodUSA") and LDMI TeleCommunications, Inc. ("LDMI") (collectively "PAETEC") submit this application for rehearing because the decision of the Public Utilities Commission of Ohio ("Commission") to grant AT&T Ohio's motion to dismiss was unreasonable and unlawful for several reasons. First, the Commission acted unreasonably and unlawfully when it refused to exercise its authority to enforce the non-discrimination obligations imposed by federal law and the provisions written into McLeodUSA's and LDMI's interconnection agreements with AT&T Ohio. As this Commission has stated, "[t]he Commission has continuing regulatory oversight over [interconnection agreements] at all times pursuant to Title 49 of the Revised Code as well as the Act itself." The Commission should have exercised its authority to enforce the

nondiscrimination requirements imposed on AT&T Ohio under federal lawand the parties' interconnection agreements. The Commission's failure to do so was unreasonable and unlawful.

Second, the Commission unreasonably and unlawfully ignored the applicable standard of review for a motion to dismiss. That standard required the Commission to accept all facts alleged in the Complaint as true and assume all material allegations in the Complaint as admitted. The Commission did not follow this standard of review when determining that McLeodUSA and LDMI negotiated away the nondiscrimination requirements for collocation . Not only was this finding improper when ruling on a motion to dismiss, it was wrong because the physical collocation provisions include specific requirements to comply with the Section 251(c)(6) nondiscrimination obligations.

Third, the Commission acted unreasonably and unlawfully when it failed to consider Section 252(i) when applying Section 252(a)(1). Both McLeodUSA and LDMI adopted physical collocation provisions from other interconnection agreements by operation of Section 252(i) of the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), a process that does not allow negotiations. Furthermore, the subsequent power collocation amendments entered into by McLeodUSA and LDMI with AT&T Ohio were not negotiated – a fact apparent from AT&T Ohio's accessible letter, on file at the Federal Communications Commission ("FCC"), offering the collocation power amendment on an all or nothing basis.[1] Therefore, the Commission acted unlawfully and unreasonably when it found that under Section 252(a)(1), McLeodUSA and LDMI had negotiated away the protections of Section 251(c)(6).

[1] AT&T Ohio's (then SBC Communications, Inc.) accessible letter offering along with the draft form amendment is publicly available on FCC Docket No. 03-167, September 30, 2003, at the FCC's website at http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6516283633. A copy of the accessible letter is attached hereto as Exhibit A.

Finally, and as an alternative argument for rehearing, even though it improperly held that McLeodUSA and LDMI negotiated collocation provisions with AT&T Ohio, the Commission still had a duty under Section 252(e)(1) and (2) to ensure that the PAETEC interconnection agreements do not discriminate against other carriers and that the agreements are in the public interest, convenience and necessity. McLeodUSA and LDMI alleged in the Complaint that AT&T Ohio was charging for DC power above and beyond what it charged itself. In essence, by charging McLeodUSA and LDMI on a capacity basis for DC power, AT&T Ohio is able to subsidize its own DC power costs, giving it a competitive advantage over other local exchange carriers competing in the market. This is exactly the type of anticompetitive provision that the Commission cannot approve in an interconnection agreement whether the provision is negotiated, arbitrated or adopted under Section 252(i). The Commission's failure to exercise its authority under Section 252(e)(1) and (2) once it obtained knowledge of this anticompetitive discrimination was unreasonable and unlawful.

Accordingly, given these errors, the Commission must grant PAETEC's application for rehearing. As the FCC has stated, the 1996 Act's prime goals are the "... nondiscriminatory treatment of carriers and promotion of competition."[2] These goals should have guided the Commission to exercise its authority to: (1) enforce the nondiscrimination obligations that exist under federal law and that exist in the provisions of the PAETEC interconnection agreements; (2) consider the relevance of McLeodUSA's and LDMI's use of Section 252(i) to adopt the collocation provisions of their interconnection agreements; and (3) utilize its authority under Section 252(e)(1) and (2) to prevent AT&T Ohio from imposing charges under the PAETEC interconnection agreements that favor AT&T Ohio and, thus, result in discriminating against

[2] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C.R. 15499 (Aug. 8, 1996), P. 1315 (hereinafter referred to as "FCC First Report and Order at ___").

competitive local exchange carriers that are not parties to these agreements, but compete with AT&T Ohio.

II. ARGUMENT

A. The Commission Acted Unreasonably and Unlawfully In Determining That It Lacked Authority To Review PAETEC's Complaint To Enforce Non-Discriminatory Provisions of Federal Law and the Parties' Interconnection Agreements

The Commission's decision to ignore AT&T Ohio's discriminatory treatment of McLeodUSA and LDMI is particularly troubling given that in paragraph 34 of its October 12, 2001 Entry, the Commission stopped just short of finding that AT&T Ohio's manner of charging for physical collocation power is discriminatory. Nevertheless, the Commission determined that it did not have the authority to stop AT&T Ohio's discriminatory conduct even though the Commission has publicly stated that it has this authority over interconnection agreements.[3] As discussed in more detail below, the Commission's failure to exercise that regulatory authority was unreasonable and unlawful, just as its failure to accept the allegations in PAETEC's Complaint as true was unreasonable and unlawful.

1. The Commission has regulatory authority to enforce the non-discriminatory provisions of federal law and the parties' interconnection agreements.

The Commission fundamentally erred in its understanding of the case that McLeodUSA and LDMI bring before this body. This is not a challenge to an existing agreement "done solely on the basis of alleged unfairness," as described by this Commission's October 12, 2011 Entry.[4]

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[3] *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Entry dated July 19, 1996, page 18, ¶ 17.

[4] *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. dba PAETEC Busiess Services and LDMI TeleCommunications, Inc.*, Case No. 11-3407-TP-CSS, October 12, 2011 Entry at ¶ 36 (hereinafter referred to as the "October 12, 2011 Entry").

Instead, the Complaint in this case sets forth precisely the type of claims that the Commission must fully hear and adjudicate.[5]

To be clear, the Complaint seeks to have the Commission enforce the relevant non-discriminatory provisions of 1996 Act, the parties' interconnection agreements and state law. It is indisputable that state regulatory commissions have the authority to interpret and enforce such interconnection agreements pursuant to federal law.[6] The Sixth Circuit has not only recognized a state regulatory commission's enforcement authority,[7] but has determined that it is specifically one of the commission's functions, as contemplated by the 1996 Act, to review and enforce these agreements.[8]

McLeodUSA's and LDMI's claims are rather straightforward – most basically, McLeodUSA and LDMI seek relief from AT&T Ohio's ongoing unlawful, discriminatory behavior. AT&T Ohio's conduct directly violates the non-discrimination provisions of 47 U.S.C. § 251(c) and the interconnection agreements. As was spelled out in McLeodUSA's and LDMI's Memorandum Contra to AT&T Ohio's Motion to Dismiss, the interconnection agreements plainly incorporate the Section 251(c)(6) non-discrimination obligations.[9] The LDMI interconnection agreement with AT&T Ohio provides:

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[5] *Michigan Bell Telephone Co. v. Climax Technology Co.*, 202 F.3d 862 (6th Cir. 2000).

[6] AT&T Ohio itself has admitted that the Commission has such authority, "[c]iting a federal case, AT&T concludes that a state regulatory commission is limited to arbitrating, approving, and enforcing interconnection agreements." October 12, 2011 Entry at ¶ 22 (emphasis added).

[7] "The [Telecommunications] Act [of 1996] contemplates that state public utility commissions will assume regulatory authority over interconnection agreements." *Michigan Bell Tel. Co.*, 202 F.3d at 865.

[8] "Furthermore, it is the [state regulatory commission's] function . . . to enforce the agreement." *Id.* at 868. *See also In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Entry dated July 19, 1996, page 18 ("[t]he Commission has continuing regulatory oversight over these agreements at all times pursuant to Title 49 of the Revised Code as well as the Act itself").

[9] McLeodUSA and LDMI Memorandum Contra to AT&T Ohio's Motion to Dismiss at p. 7.

> Physical collocation shall be provided on a nondiscriminatory basis, on a "first come, first served" basis, and otherwise in accordance with the requirements of the Act (**including 47 U.S.C. 251(c)(6)**), and applicable FCC rules thereunder.[10]

Similarly, the McLeodUSA interconnection agreement with AT&T Ohio provides:

> Except where Physical Collocation is not practical for technical reasons or because of space limitation, Ameritech-Ohio will provide Physical Collocation to MCIm for the purpose of interconnecting with Ameritech-Ohio's network or for obtaining access to Ameritech-Ohio's unbundled Network Elements pursuant to 47 U.S.C. 251(c).
> ....
> The incumbent must provide power and Physical Collocation services and facilities, subject to the same **nondiscrimination requirements** as applicable to **any other** Physical Collocation arrangement.[11]

The 2003/2004 collocation power form amendment executed by PAETEC left these provisions untouched. AT&T Ohio drafted the amendment to make this very clear, emphasizing in the amendment that "EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT."[12] (Emphasis in original). The amendment did not modify the nondiscrimination requirements.

With the agreements' nondiscrimination provisions in full force and effect, AT&T Ohio must provide collocation services to McLeodUSA and LDMI under the nondiscriminatory

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[10] *See In re Application of SBC-Ohio and LDMI Telecommunications, Inc. for an Interconnection Agreement*, Case No. 03-0667-TP-NAG, March 10, 2003 filing, part 1 of 3 containing LDMI ICA, Attachment A, at p. 10 (emphasis added).

[11] *In the Matter of the Application for Approval of an Agreement Between SBC Ohio and McLeodUSA Telecommunications Services, Inc. pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 03-1961-TP-NAG, September 17, 2003 filing, Section 1 of 2, Appendix IV "Collocation," Sections 4.1 and 16.5.2, p. 19.

[12] Because the 2003/2004 power collocation amendment was a form amendment, the McLeodUSA and LDMI amendments both contain the emphasized language. *See In the Matter of the Application for Approval of an Agreement Amendment Between SBC Ohio and McLeodUSA Telecommunications Serivces, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 04-0133-TP-AEC, filed January 30, 2004, Collocation Power Amendment at ¶ 9 and see *In the Matter of the Application for Approval of an Agreement Amendment Between SBC Ohio and LDMI Telecommunications, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 03-2357-TP-AEC, filed December 4, 2003, Collocation Power Amendment at ¶ 9

provisions of Section 251(c)(6).[13] As noted in the Complaint, AT&T Ohio has made DC power a fundamental part of collocation, as it requires collocators to purchase DC power from AT&T, rather than purchasing power directly from an electric utility company. Thus, McLeodUSA's and LDMI's action here is not an effort to "reform" the parties' interconnection agreements or circumvent the negotiation process for a new agreement, but instead this is an effort to interpret and enforce the clear provisions of the agreements, which incorporate federal law.

It is clear that the Commission unreasonably and unlawfully characterized the claims at issue in this case when it dismissed the Complaint. The Commission not only has the authority to hear McLeodUSA's and LDMI's claims, but also has a duty to enforce the nondiscrimination provisions under federal law and the parties' interconnection agreements.[14] As this Commission has stated, it "has continuing regulatory oversight over these agreements at all times pursuant to Title 49 of the Revised Code as well as the Act itself."[15] For this reason, the Commission must grant McLeodUSA's and LDMI's application for rehearing.

2. The Commission acted unreasonably and unlawfully by improperly ignoring the standard of review applicable to a motion to dismiss.

The Commission also unreasonably and unlawfully relied on findings of fact regarding the parties' interconnection agreements which contributed to its unlawful and unreasonable decision to dismiss this Complaint. In reviewing AT&T Ohio's motion to dismiss for failure to state a claim, the Commission must accept all facts alleged in the Complaint as true and assume all material allegations in the Complaint as admitted.[16] For example, the Commission was

[13] Not only do the express terms of the interconnection agreements require nondiscriminatory collocation, but the terms also state that the parties to the agreements do not waive their rights under the agreement unless expressly so done. And, neither agreement waives the parties' nondiscriminatory collocation rights under federal law.
[14] *Michigan Bell Tel. Co.*, 202 F.3d at 868.
[15] *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Entry dated July 19, 1996, page 18 at ¶17.
[16] *Lucas County Commissioners v. Public Utilities Commission of Ohio* (1997), 80 Ohio St.3d 344, 347.

required to accept PAETEC's allegations that it was not aware until recently that AT&T Ohio incurred collocation costs on a usage basis and not a capacity basis.[17] The Commission also was required to accept as true PAETEC's allegations that AT&T Ohio's method of charging for DC power resulted in a great disparity between the charges incurred by PAETEC for DC power and the costs incurred by AT&T Ohio for the same DC power.[18]

The Commission, however, apparently chose to ignore PAETEC's allegations of its recent discovery of AT&T Ohio's discriminatory conduct when making its findings. The Commission brushed off these allegations by stating that it agrees with PAETEC that it has not previously addressed the "issue of whether a capacity-based rate or a usage-based rate is more appropriate to recover power costs." The facts in the Complaint do not refer to whether usage-based rates are "more appropriate", but rather that AT&T Ohio incurs DC power costs on a usage basis while charging PAETEC on a capacity basis, resulting in the anticompetitive subsidizing of AT&T Ohio's own power usage.. These facts, which must be taken as true when ruling on a motion to dismiss, establish unlawful discriminatory conduct by AT&T Ohio.

The Commission then stated that what was important was its finding in its March 13, 2003 opinion and order in Case No. 96-922-TP-UNC ("96-922 proceeding") that capacity-based pricing was reasonable. There are several concerns with this statement. Reliance on an evaluation that occurred years before the discrimination was discovered disregards the facts alleged in the Complaint, which unlawfully ignores the standard of review. It must also be noted that a review of the March 13, 2003 opinion and order finds no language to indicate that such evaluation occurred in that phase of the proceeding. And, further, reviewing the order from the earlier phase of the 96-922 proceeding referred to in the 2003 opinion and order, the

[17] Complaint, ¶ 27.
[18] Complaint, ¶ 26.

Commission merely found when addressing physical collocation the "methodology employed by Ameritech in order to construct a TELRIC study to identify forward-looking costs associated with physical collocation reasonable."[19] But "reasonable" does not address whether AT&T Ohio's practice is nondiscriminatory, *i.e.*, providing access to DC power on the same terms and conditions to PAETEC as AT&T Ohio provides for itself --- the more stringent standard for nondiscrimination established by the FCC.[20] The statutory language of Section 251(c)(6) requires that the terms and conditions for collocation be *both* reasonable *and* nondiscriminatory. The plain and usual meaning of the word "and" is conjunctive, and therefore the finding of "reasonableness" does not end the inquiry.[21] The Commission was required to take PAETEC's allegations regarding AT&T Ohio's discriminatory conduct as true, but it did not. These failures by the Commission to follow the standard of review for a motion to dismiss and the FCC's stringent discrimination standards unlawfully and unreasonably denied PAETEC's right to a hearing.

The Commission was also required to accept as true that the physical collocation provisions were the result of opting in to existing interconnection agreements and not the result of negotiation. The facts that establish this opting in include, for example, the McLeodUSA interconnection agreement pages identifying MCImetro Access Transmission Services LLC ("MCImetro") as the contracting local exchange carrier (and specifically, Appendix IV, at p. 3 of

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[19] *In the Matter of the Review of Ameritch Ohio's Economic Costs for Interconnection Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Case No. 96-922-TP-UNC, Opinion and Order entered June 19, 1997 at page 73.

[20] FCC First Report and Order at P 218.

[21] Federal law requires that a statutory provision be construed according to this ordinary sense of the word unless Congress dictates otherwise. *See Crooks v. Harrelson*, 282 U.S. 55, 58 (1930) ("We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense"); *City of Rome v. United States*, 446 U.S. 156, 172 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent").

this interconnection agreement provides that "[t]his Appendix sets forth terms and conditions for Collocation provided by Ameritech-Ohio and MCIm."). Likewise, the collocation appendix of the LDMI interconnection agreement specifies Allegiance Telecom of Ohio, Inc. ("Allegiance") as the contracting local exchange carrier at the top of every page. There are no revisions to the opted in physical collocation provisions in either agreement. This lack of revisions reflects the conditions imposed through the FCC's pick and choose rules ((252(i) rules) at the time of the PAETEC interconnection agreements --- a local exchange carrier opting in to an interconnection, service or element that exists in another carrier's interconnection agreement must accept the terms for such interconnection, service or element without negotiation or revision. Whether the ICA was negotiated is not relevant to address PAETEC's Complaint. What is relevant, and shown, is there is no dispute that the physical collocation provisions were adopted through Section 252(i) opt-in without revision. And, those opt-in provisions specify that physical collocation will be provided in a manner consistent with Section 251(c)(6). It is the discriminatory practices of AT&T Ohio with respect to the physical collocation that are before the Commission in the Complaint.

Similarly, the Commission ignored facts with respect to the PAETEC 2003/2004 collocation power amendments with AT&T Ohio establishing the amendments were not negotiated. The McLeodUSA and LDMI amendments were identical. Both amendments included a reference in the recitals to an AT&T Ohio accessible letter filed in relation to AT&T Ohio's 271 proceeding at the FCC.[22] The accessible letter attached the form amendment, which

[22] *See In the Matter of the Application for Approval of an Agreement Amendment Between SBC Ohio and McLeodUSA Telecommunications Serivces, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 04-0133-TP-AEC, filed January 30, 2004, Collocation Power Amendment and see *In the Matter of the Application for Approval of an Agreement Amendment Between SBC Ohio and LDMI Telecommunications, Inc.*

is identical to the PAETEC 2003/2004 collocation power amendments. Thus, the accessible letter and amendments make two facts clear: i) it was a form amendment; and ii) AT&T Ohio offered it on an all-or-nothing basis. These facts demonstrate that the PAETEC 2003/2004 collocation power amendments were not negotiated.

Although the Commission was required to accept PAETEC's factual allegations as true, it ignored PAETEC's factual allegations, committing several errors when deciding to dismiss the Complaint. The most basic of these errors is that the Commission wrongly determined that McLeodUSA and LDMI negotiated the relevant collocation portions of the parties' interconnection agreements. Specifically, the Commission concluded that "AT&T and PAETEC established by agreement the [discriminatory] standards for their collocation, as they were free to do under the provisions of the Act."[23] As discussed below in Section B(1), this is not true. The Commission also erred in making a factual finding that PAETEC negotiated provisions to eliminate the non-discrimination requirements of Section 251(c)(6) with respect to physical collocation by ignoring PAETEC's allegations that only recently did PAETEC become aware of AT&T Ohio's discriminatory conduct. It is not possible to voluntarily "agree" on something for which one has no knowledge. As a result of these errors, the Commission committed another error when ignoring the many allegations by PAETEC that AT&T Ohio was engaging in discriminatory conduct. Yet as noted in Section A(1) above, this Commission has the authority to remedy such discriminatory conduct.

The Commission did not accept as true or as admitted the allegations in the Complaint. Instead it disregarded its obligations to accept all facts alleged in the Complaint as true and

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Pursuant to Section 252 of the Telecommunications Act of 1996, Case No. 03-2357-TP-AEC, filed December 4, 2003, Collocation Power Amendment.

[23] October 12, 2011 Entry at ¶ 36.

assume all material allegations in the Complaint as admitted to find that the PAETEC entities and AT&T Ohio set standards as to physical collocation that eliminated the Section 251(c)(6) obligations.[24] Since the Commission could not dismiss the Complaint without ignoring the allegations in the Complaint and its erroneously decided factual determination, the Commission unlawfully and unreasonably dismissed the Complaint. Having unlawfully and unreasonably dismissed the Complaint, the Commission must allow McLeodUSA and LDMI the opportunity to develop sufficient facts to establish their meritorious claims of unlawful discrimination by AT&T Ohio. For this reason too, the application for rehearing must be granted.

B. The Commission Acted Unreasonably and Unlawfully by Failing to Consider Section 252(i) When Making its Determination that Section 252(a)(1) Allows AT&T Ohio to Charge for Physical Collocation in a Discriminatory Manner.

In dismissing the Complaint, the Commission relied on Section 252(a)(1) of the 1996 Act to conclude that AT&T Ohio, McLeodUSA and LDMI set standards regarding physical collocation in their respective interconnection agreements that eliminated the Section 251(c)(6) obligations.[25] Section 252(a)(1) provides that "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."[26] (emphasis added). The Commission could only rely on this language in Section 252(a)(1) to dismiss the Complaint by finding that the parties negotiated terms related to physical collocation.

Not only was this inappropriate for purposes of a motion to dismiss as discussed above, the factual finding is simply wrong. Neither McLeodUSA nor LDMI negotiated the physical

[24] *Lucas County Commissioners v. Public Utilities Commission of Ohio* (1997), 80 Ohio St.3d 344, 347.
[25] October 12, 2011 Entry at ¶ 34.
[26] 47 U.S.C. § 252(a)(1).

collocation provisions in their interconnection agreements with AT&T Ohio. Instead, McLeodUSA and LDMI used Section 252(i) to opt-in and obtain physical collocation services from AT&T Ohio. The only change to the initial terms on physical collocation was subsequently made through a form amendment that AT&T Ohio offered on a take-it-or-leave-it basis to all CLECs via an accessible letter offering in its Section 271 proceeding before the FCC. With no factual record before it supporting its determination that the parties negotiated collocation services, the Commission should not have held that McLeodUSA and LDMI waived the protections of Section 251(c)(6). Accordingly, as further discussed below, the Commission acted unreasonably and unlawfully by granting AT&T Ohio's motion to dismiss.

1. PAETEC and AT&T Ohio never negotiated terms regarding physical collocation.

Absent from the Commission's decision is any discussion on Section 252(i) which provides CLECs with an alternative to arbitrating or negotiating an interconnection agreement. Section 252(i) provides: "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[27] At the time the PAETEC interconnection agreements were entered into, the FCC had stated that Section 252(i) acts as a most favored nations clause and allows the connecting party to "... utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement."[28]

[27] 47 U.S.C. § 252(i).
[28] FCC First Report and Order at P 1316.

The FCC's "pick-and-choose" rules that were in place at the time LDMI and McLeodUSA adopted their interconnection agreements allowed a local exchange carrier to adopt only that section of an agreement related to the requested interconnection, service or element.[29] However, the one limitation on local exchange carriers using Section 252(i) and the "pick and choose" rules to elect an interconnection, service or element was that the carrier could not negotiate the terms of the requested interconnection, service or element.[30] In other words, the local exchange carrier could not negotiate the terms of the individual interconnection, service, or elements that were being adopted through Section 252(i).[31] Thus, Section 252(i) has always imposed an all or nothing approach for any local exchange carrier seeking to adopt a specific interconnection, service or element from an existing interconnection agreement.

McLeodUSA and LDMI were subject to this rule when they used Section 252(i) to request physical collocation services from AT&T Ohio. McLeodUSA exercised its rights under Section 252(i) to adopt the physical collocation provisions from the interconnection agreement between AT&T Ohio (then known as SBC Ohio) and MCImetro .[32] LDMI exercised its rights under Section 252(i) to adopt the physical collocation provisions from the AT&T Ohio (then SBC Ohio) and Allegiance interconnection agreement.[33] This means that McLeodUSA and

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[29] *Id.* at P 1316 (noting that incumbent LEC may only require connecting carrier to adopt the same terms and conditions that relate solely to the individual interconnection, service, or element being requested under section 252(i).").

[30] Subsequent to the PAETEC interconnection agreements, the FCC adopted rules requiring the local exchange carrier to adopt the interconnection agreement in its entirety.

[31] *Id.* at P 1315 *and see AT&T Corporation, et al., v. Iowa Utilities Board et al.*, 525 U.S. 366, 396 (1999) ("The Commission has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove are "legitimately related" to the desired term.)

[32] *In the Matter of the Application for Approval of an Agreement Between SBC Ohio and McLeodUSA Telecommunications Services, Inc. pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 03-1961-TP-NAG, September 17, 2003 filing, Section 1 of 2, document page 48. When adopting the MCImetro agreement, McLeod also executed three amendments, none of which related to physical collocation. *Id.* at Section 1 of 2, document pages 9, 27 and 38.

[33] *In the Matter of the Application for Approval of an Agreement Between SBC Ohio and LDMI Telecommunications Inc.dba LDMI Telecommunications also dba FoneTel for an Interconnection Agreement*, Case No. 03-0667-TP-

LDMI could not (and did not) negotiate the terms and conditions for physical collocation with AT&T Ohio when adopting the MCImetro and Allegiance agreements.

AT&T Ohio may argue that McLeodUSA and LDMI subsequently negotiated terms for physical collocation when the PAETEC entities executed the 2003/2004 power collocation amendments. It is true that both McLeodUSA and LDMI entered into collocation power amendments with AT&T Ohio on January 27, 2004 and December 2, 2003 respectively.[34] However, contrary to any allegation by AT&T Ohio, these amendments were not negotiated. Instead, the amendments were the product of an accessible letter offering by AT&T Ohio in its Section 271 proceeding before the FCC. The collocation power amendment was a form amendment offered by AT&T Ohio on a take-it-or-leave-it-basis, as evidenced by the fact that both the LDMI and McLeodUSA amendments are identical to the draft amendment attached to AT&T Ohio's accessible letter filing, with the exception of the name of the contracting parties and the effective dates.[35]

The fact that AT&T Ohio used a take-it-or-leave-it-approach in that offering is clear from the text of the accessible letter. In that letter, AT&T Ohio stated:

> To the extent a CLEC chooses not to execute the amendment, SBC Indiana and/or SBC Ohio shall continue to bill such CLEC for one hundred percent (100%) of the combined ordered capacity of the leads installed to the CLEC's collocation space (including any 'non-fused' leads, where applicable), utilizing the monthly

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NAG, March 10, 2003 filing, Part 1 of 3, document page 47. LDMI also executed amendments that were submitted with the agreement, none of which related to collocation with the exception of an amendment implementing the Commission ordered rates from the 96-922 TELRIC proceeding. Id. at document page 30.

[34] *See* Application filed December 4, 2003, *In the Matter of the Application for Approval of an Agreement Amendment Between SBC Ohio and LDMI Telecommunications, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 03-2357-TP-AEC; Application filed January 30, 2004, *In the Matter of the Application for Approval of an Agreement Amendment Between SBC Ohio and McLeodUSA Telecommunications Services, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 04-0133-TP-AEC.

[35] AT&T Ohio's (then SBC Communications, Inc.) accessible letter offering along with the draft form amendment is available on the FCC's website at http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6516283633. A copy of the accessible letter is attached hereto as Exhibit A.

recurring rates for collocation DC power elements as set forth in the parties' interconnection agreement or the governing tariff, whichever is applicable.[36]

AT&T Ohio simply gave McLeodUSA and LDMI the choice of signing the amendment as presented or continue paying for collocation power based on the capacity of two leads. This type of offer does not constitute negotiations as contemplated by the Act, and AT&T Ohio cannot claim otherwise.

2. Because AT&T Ohio did not negotiate the terms for physical collocation with McLeodUSA and LDMI, the Commission should have denied AT&T Ohio's motion to dismiss.

The Commission recognized the importance of its application of Section 252(a)(1) when granting AT&T Ohio's motion to dismiss. Specifically, after discussing the nondiscriminatory protections of Section 251(c)(6), the Commission stated that "[e]nding the analysis here would dictate an outcome favorable to PAETEC."[37] The Commission, however, then made the erroneous factual finding that the parties had engaged in negotiations on physical collocation and that as a result, McLeodUSA and LDMI had negotiated away the nondiscrimination protections of Section 251(c)(6). This was a mistake and unreasonable and unlawful for several reasons.

First, as discussed above, the physical collocation provisions of McLeodUSA and LDMI's interconnection agreements were not the products of negotiation; therefore, Section 252(a)(1) has no bearing in this proceeding. The language of Section 252(a)(1) is clear in this regard; "[u]pon receiving a request for interconnection services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the

[36] *Id.* at Accessible Letter, CLECAM03-325 dated September 29, 2003.
[37] October 12, 2000 Entry at ¶ 34.

standards set forth in subsections (b)(and (c) of section 251."[38] (emphasis added). The physical collocation provisions of McLeodUSA and LDMI interconnection agreements were adopted pursuant to Section 252(i) with the only amendment on physical collocation offered in a Section 271 proceeding on a take-it-or-leave-it-basis. These facts are evidenced by i) both the McLeodUSA and LDMI interconnection agreements have whole sections, including physical collocation, taken from other local exchange carrier interconnection agreements, ii) the McLeodUSA and LDMI collocation power amendments are identical to the form amendment attached to the accessible letter referenced in the power collocation amendments, and iii) the referenced accessible letter provides that the amendment was offered on an all or nothing basis. It was unlawful and unreasonable for the Commission to dismiss the Complaint given these facts, which must be construed in McLeodUSA's and LDMI's favor.

Even though McLeodUSA and LDMI did not negotiate terms for physical collocation, AT&T Ohio will still argue the PAETEC entities have waived the protections of Section 251(c)(6).[39] First, AT&T Ohio will claim that the agreements were negotiated. But this argument simply highlights that a factual issue is in dispute and that the Commission made a mistake in granting the motion to dismiss prior to developing the necessary factual record. Second, AT&T Ohio will likely argue that Section 252(a)(1) applies if any part of an interconnection agreement is negotiated. Such an argument, however, is contrary to the plain language of the statute and " ... the Act's prime goals of nondiscriminatory treatment of carriers and promotion of competition."[40]

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[38] 47 U.S.C. 252(a)(1).

[39] The prohibitions on nondiscrimination were written into the McLeodUSA and LDMI interconnection agreements. At a minimum, the Commission should have viewed this Complaint as an issue of enforcement and contract interpretation, entitling the PAETEC entities to a hearing.

[40] FCC First Report and Order at 1315.

For example, it is entirely feasible that a local exchange carrier could negotiate and resolve certain issues on interconnection, services and elements with an incumbent local exchange carrier, but not resolve other issues. The 1996 Act allows the parties in that situation to submit the unresolved issues to arbitration with the result being an interconnection agreement created through negotiation and arbitration. As noted by this Commission, "[p]ursuant to Section 252(b)(1) of the Act, if the parties are unable to reach agreement on the terms and conditions for interconnection, a requesting carrier may petition a state commission to arbitrate any open issues which remain unresolved despite voluntary negotiation under Section 252(a) of the Act."[41] In this scenario, Section 252(c) of the 1996 Act requires that in resolving by arbitration any open issues, the state commission shall ensure the resolutions meet the requirements of Section 251.[42] A local exchange carrier certainly does not waive the nondiscrimination protections afforded by Section 251(b) and (c) if it negotiates some provisions but arbitrates others.

Further, Section 252(e)(1) still applies to a state commission's approval of arbitrated terms even if other parts of an interconnection agreement are resolved through negotiation. As stated in the Commission's rules:

> The commission shall resolve each issue set forth in the petition and the response by imposing conditions that ensure that the resolution and conditions meet the requirements of 47 U.S.C. 251, as effective in paragraph (A) of rule 4901:1-7-02 of the Administrative Code, establish rates for interconnection, services, or network elements in accordance with 47 U.S.C. 252(d), as effective in paragraph (A) of rule 4901:1-7-02 of the Administrative Code, and provide a schedule for

[41] *See e.g. In the Matter of the Petition of MCImetro Access Transmission Services, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, Case No. 01-1319-TP-ARB, Arbitration Award issued November 7, 2002.

[42] See, 47 U.S.C. § 252(c)

implementation of the terms and conditions by the parties to the agreement.[43] (emphasis added).

This rule follows the Commission's procedures on arbitration that were in place when the McLeodUSA and LDMI adopted their interconnection agreements.[44]

The Commission, thus, cannot ignore the statutory protections imposed by Section 251(b) and (c) even though other parts of the interconnection agreement are resolved through negotiation. Likewise, the Commission must reject any argument by AT&T Ohio that the protections of Sections 251(b) and (c) do not apply if any part of an interconnection agreement is negotiated. To do otherwise will create a result that is anticompetitive and contrary to the goals of the 1996 Act. This Commission is entitled to implement restrictions above and beyond the 1996 Act, but not inconsistent with the 1996 Act.[45]

The Commission's decision was inconsistent with the 1996 Act. The Commission failed to consider that McLeodUSA and LDMI used Section 252(i) to opt in to physical collocation services. The Commission also ignored the allegations by PAETEC of AT&T Ohio's discriminatory conduct and that PAETEC was only recently made aware of such conduct. Having acted unlawfully and unreasonably, the proper course is for the Commission to grant rehearing to allow PAETEC's claims to be heard.

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[43] OAC Rule 4901:1-7-09G(4)(k).

[44] *See In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Entry dated July 19, 1996, page 8. *See also In the Matter of the Petition of MCImetro Access Transmission Services, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, Case No. 01-1319-TP-ARB, Arbitration Award issued November 7, 2002 at ¶40 part d (finding Panel recommendation to be reasonable and consistent with Sections 251(c)(2), 251(c)(3) and 251(c)(6) of the Act).

[45] *See* FCC First Report and Order at P 66 ("... states may impose additional pro-competitive requirements that are consistent with the Act and our rules."). Considering this guidance, it was unreasonable and unlawful for the Commission to not hear PAETEC's state law claims.

C. The Commission Acted Unreasonably and Unlawfully by Dismissing PAETEC's Complaint Because Under Section 252(e)(1) and (2), the Commission Cannot Approve an Interconnection Agreement if any Portion of the Agreement Discriminates Against Other Carriers or is in Violation of the Public Interest, Convenience and Necessity.

If this Commission upholds its determination that "AT&T and PAETEC established by agreement the [discriminatory] standards for their collocation, as they were free to do under the provisions of the Act,"[46] PAETEC presents this alternative basis for rehearing. Specifically, even assuming arguendo that negotiations on physical collocation took place (which they did not), the Commission ignored its obligations under Section 252(e)(1) and (2) when dismissing the Complaint.

Under Section 252(e)(1) and (e)(2), a state commission can only approve a negotiated interconnection agreement (or any portion that was negotiated) if the negotiated agreement (or negotiated provision) does not discriminate against other local exchange carriers and is consistent with the public interest, convenience, and necessity.[47] Faced with the allegations in the Complaint that AT&T Ohio was engaged in discriminatory conduct by charging McLeodUSA and LDMI more for DC power than it was charging itself, the Commission should have exercised its continuing authority over the parties' interconnection agreements to determine whether this new information affected its prior approval of the agreements, including the collocation power amendment, under Section 252(e). The Commission, however, failed to consider its obligations under Section 252(e) of the 1996 Act and this failure was unlawful and unreasonable.

The Commission's duties in regard to Section 252(e) are clearly set forth in the statute. Section 252(e) provides, in part:

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[46] October 12, 2011 Entry at ¶ 36.
[47] 47 U.S.C. § 252(e)(1) and (2)(A).

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.[48] (emphasis added).

Considering the above emphasized language, the Commission would never have approved the McLeodUSA and LDMI collocation power amendments with AT&T Ohio under Section 252(e) had it been made aware that AT&T Ohio charged itself for DC power on a usage basis in contrast to charging CLECs on a capacity basis. This conclusion applies regardless of whether any negotiations took place on the amendments because even if a portion of an agreement is negotiated, the Commission cannot approve it if the agreement is discriminatory against other carriers and is inconsistent with the public interest, convenience and necessity.

Given the discovery of new information that has revealed anticompetitive discriminatory behavior by AT&T Ohio and the Commission's ongoing jurisdiction over the PAETEC

[48] 47 U.S.C. § 252(e)(1) and (2).

agreements, the Commission has the authority to remedy AT&T Ohio's discriminatory conduct. PAETEC alleged in its Complaint that it recently discovered that AT&T Ohio is discriminating against local exchange carriers by charging carriers for DC power on a capacity basis while it incurs its charges on a usage basis. AT&T Ohio gives itself a competitive advantage by subsidizing its own DC power charges by using the overcharges it receives from other local exchange carriers for the same service. For example, AT&T Ohio overcharges to McLeodUSA means that AT&T Ohio can apply the overcharges to reduce its own DC power costs, in turn assisting its ability to compete against LDMI and other local exchange carriers (not parties to McLeodUSA's interconnection agreement with AT&T Ohio). When taken in the aggregate, as specified in the Complaint and as will be further established at hearing, this anticompetitive discriminatory subsidy is very large and is exactly the type of discrimination that the Commission has an obligation under Section 252(e)(1) and (2) to prevent.

Accordingly, PAETEC has satisfied its burden of pleading that AT&T Ohio is engaged in discriminatory conduct. Even if the Commission upholds its determination that "AT&T and PAETEC established by agreement the [discriminatory] standards for their collocation...[,]"[49] this Commission still acted unlawfully and unreasonably. Having received new information via PAETEC's Complaint that the PAETEC interconnection agreements provide AT&T Ohio with an anticompetitive subsidy at the expense of competitive local exchange carriers, it must exercise its continuing authority over the PAETEC agreements to review AT&T Ohio's manner of charging for collocation power. The application for rehearing by McLeodUSA and LDMI should be granted on this basis.

[49] October 12, 2011 Entry at ¶ 36.

III. CONCLUSION

For the foregoing reasons, McLeodUSA and LDMI's application for rehearing must be granted. The PAETEC entities have brought a meritorious case for enforcement of the non-discrimination provisions of federal and state law and the interconnection agreements. At a minimum, this Commission must exercise its jurisdiction to provide McLeodUSA and LDMI with an opportunity to develop and present those claims at a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served upon the following persons via electronic mail and U.S. Mail this 10th day of November, 2011:

Jon F. Kelly
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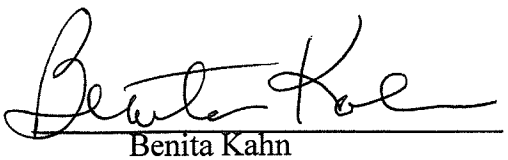

Benita Kahn

FCC

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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EXHIBIT A

DA 03-3003
Released: September 30, 2003

COMMENTS REQUESTED IN CONNECTION WITH SBC'S PENDING SECTION 271 APPLICATIONS

WC Docket No. 03-167

Comments Due: October 7, 2003

On September 29, 2003, the Commission received the attached *ex parte* filing from SBC Communications, Inc. (SBC) in the above-referenced docket.[1] This *ex parte* filing contains two Accessible Letters made available to competitive LECs in Indiana and Ohio regarding recurring charges for collocation direct current (DC) power. Specifically, the Accessible Letters allow competitive LECs in Indiana and Ohio to amend their existing interconnection agreements with SBC to include new recurring charges for DC power,[2] and inform them of SBC's policy of fusing DC power leads at 125 percent of the capacity requested by a competitive LEC.[3]

We now seek comment on this *ex parte* filing. We have established a short comment period due to the imminent deadline for ruling on SBC's section 271 application in WC Docket No. 03-167. Without deciding what reliance, if any, the Commission will place on this information, the Commission encourages interested parties to respond to this evidence. We emphasize that this public notice does not represent a decision about whether we will accord any weight to the supplemental evidence. The Commission expects that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its determination.[4] If parties in a section 271 proceeding choose to

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1 Letter from Geoffrey M. Klineberg, Legal Counsel for SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-167 (filed September 29, 2003) (SBC September 29 *Ex Parte* Letter).

2 SBC September 29 *Ex Parte* Letter at Attach. A.

3 SBC September 29 *Ex Parte* Letter at Attach. B.

4 *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20570, para. 49 (1997) (*Ameritech Michigan Order*). *See also Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19711 (1996); *Revised Comment Schedule for Ameritech Michigan Application, as amended, for*

submit new evidence, however, the Commission retains the discretion to waive the procedural rules and consider the evidence,[5] "to start the 90-day review process anew, or to accord such evidence no weight."[6]

Comments By Interested Third Parties. Pursuant to our procedures governing section 271 applications[7] and sections 1.415 and 1.419 of the Commission's rules,[8] interested parties may file comments on such information. Comments must be filed by **October 7, 2003**. We waive section 1.45 of the Commission's rules insofar as it permits reply comments. All such filings shall refer to the Commission docket number, **WC Docket No. 03-167**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[9] Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form ." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan, Public Notice, 12 FCC Rcd 1197 (Com. Car. Bur. 1997); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (1997); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 99-1994 (Com Car. Bur. Sept. 28, 1999); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 18 FCC Rcd 12203 (Com. Car. Bur. 2001) (collectively "271 Procedural Public Notices").

[5] *See* section 1.3 of the Commission's rules, 47 C.F.R. § 1.3.

[6] *Ameritech Michigan Order*, 12 FCC Rcd at 20575, para. 57; *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3968, para. 34 (1999).

[7] *See* 271 Procedural Public Notices.

[8] 47 C.F.R. §§ 1.415, 1.419.

[9] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

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September 29, 2003

Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), I am attaching an Accessible Letter released today to CLECs in Indiana and Ohio that offers them an amendment to their interconnection agreements relating to rates for collocation power. See Attachment A. Specifically, the amendments would provide (among other things) that, if a CLEC in Indiana or Ohio warrants that it will at no time draw more than fifty percent of the combined ordered capacity of the leads that are fused for a collocation arrangement, Indiana Bell or Ohio Bell (as appropriate) will bill that CLEC for DC collocation power at a monthly recurring rate of $9.68 per ampere ("AMP") applied to fifty percent of the combined ordered capacity of the leads that are fused. This $9.68 rate is derived by subtracting from the approved, per AMP rate in Michigan the recurring rate attributable to the Battery Distribution Fuse Bay ("BDFB"); in both Indiana and Ohio, the costs for the BDFB are already recovered through non-recurring charges. See Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Marlene H. Dortch, FCC, Attach. E, Exhs. 1 & 2 (Sept. 22, 2003).

SBC has offered this amendment in the hope of resolving (at least prospectively) the issues raised by NuVox Communications, Inc., in its pending complaint proceedings in both Indiana and Ohio. See NuVox Communications of Indiana, Inc., Against SBC Indiana Regarding Its Unlawful Billing Practices For Collocation Power Charges, Cause No. 42398 (IURC filed Mar. 25, 2003); In the Matter of NuVox Communications of Ohio, Inc. v. SBC Ohio, Case No. 03-802-TP-CSS (PUCO filed Mar. 24, 2003). SBC continues to believe that these complaints are simply disputes over the proper application of the parties' interconnection agreements and should, therefore, be left to the state commissions to resolve, if necessary. But

The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002.

-The filing hours at this location are 8:00 a.m. to 7:00 p.m.

-All hand deliveries must be held together with rubber bands or fasteners.

-Any envelopes must be disposed of before entering the building.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

-All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Filings and comments are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. They may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail qualexint@aol.com.

Parties are strongly encouraged to file comments electronically using the Commission's Electronic Comment Filing System (ECFS). Parties are also requested to send a courtesy copy of their comments via email to: janice.myles@fcc.gov; pamela.arluk@fcc.gov; jennifer.mckee@fcc.gov; jfeipel@icc.state.il.us; khenry@urc.state.in.us; nicholas.linden@psc.state.wi.us; hisham.choueiki@puc.state.oh.us; and layla.seirafi-najar@usdoj.gov.

Wireline Competition Bureau Contacts:	Jennifer McKee	(202) 418-1590
	Irshad Abdal-Haqq	(202) 418-1444

because the issue of collocation power charging practices has been raised in this proceeding, SBC is informing the Commission of these latest developments.

In addition, I am attaching a second Accessible Letter clarifying that, as of April 1, 2003, SBC Midwest has applied an engineering policy of fusing CLEC DC power leads at 125 percent of the capacity actually requested by the CLEC. See Attachment B. This letter also makes clear that any CLEC should contact its account manager with any questions about this policy.

Finally, I would like to inform you that James C. Smith and Rebecca L. Sparks, representing SBC, spoke on the telephone Friday with Richard Lerner, Deena Shetler, and Jennifer McKee regarding these same collocation power issues.

In accordance with this Commission's Public Notice, DA 03-2344 (July 17, 2003), SBC is filing this letter electronically through the Commission's Electronic Comment Filing System. Thank you for your kind assistance in this matter.

Sincerely,

Geoffrey M. Klineberg

Attachments

cc: Pam Arluk
Deena Shetler
Janice Myles
Jon Feipel
Karl Henry
Hisham Choueiki
Nicholas Linden
Layla Seirafi-Najar
Qualex International

ATTACHMENT A

Accessible

Date: **September 29, 2003**

Number: **CLECAM03-325**

Effective Date: **September 29, 2003**

Category: **Interconnection**

Subject: **(COLLOCATION) Collocation Power Amendment Offering – IN, OH**

Related Letters: **CLECAM03-324**

Attachment: **NA**

States Impacted: **Indiana, Ohio**

Response Deadline: **NA**

Contact: **Collocation Account Manager**

Issuing SBC ILECS: **SBC Indiana and SBC Ohio**

Conference Call/Meeting: **NA**

This Accessible Letter notifies Indiana and Ohio CLECs of an offer by SBC Indiana and SBC Ohio to enter into an interconnection agreement amendment regarding monthly recurring collocation DC power rates and billing procedures. The form of the amendment is attached. A summary of the offer is set forth below.

Nothing in this Accessible Letter shall be deemed or considered an admission on the part of SBC Indiana and/or SBC Ohio as to, or evidence of, the unreasonableness of the rates and/or elements for collocation DC power in Indiana and Ohio, or of the manner in which SBC Indiana and/or SBC Ohio have applied or billed such rates, or any other aspect of their collocation power billing, nor shall anything in this Accessible Letter restrict SBC Indiana's and/or SBC Ohio's rights with respect to arguments or positions either may take in any pending or future proceedings. Nothing in this Accessible Letter shall affect SBC Indiana's and/or SBC Ohio's rights, claims, arguments, or positions with respect to collocation power billing.

Indiana and Ohio Collocation Power Amendment

SBC Indiana and SBC Ohio are offering an amendment in the attached form, which provides that if a CLEC represents and warrants that it will at no time draw more than 50% of the combined ordered capacity of the leads (in amperes or AMPs) that are fused for a collocation arrangement (the aggregate ordered capacity of all fused leads for that arrangement, e.g., all "A" AMPs and all "B" AMPs), SBC Indiana and/or SBC Ohio shall prospectively bill the CLEC for DC collocation power at a monthly recurring rate of $9.68 per AMP applied to fifty percent (50%) of the combined ordered capacity that is fused.[1] By way of example, where a CLEC has ordered and SBC Indiana and/or SBC Ohio has provisioned two (2) twenty (20) AMP DC power leads that have been fused (for a combined total of forty (40) AMPs), based upon the CLEC's representation and warranty, SBC Indiana and/or SBC Ohio shall bill the CLEC the monthly recurring charge of $9.68 per AMP multiplied by a total of twenty (20) AMPs (i.e., $193.60 per month).[2]

---

1 For those CLECs that operate under an effective interconnection agreement, but are purchasing a collocation arrangement(s) pursuant to a tariff offering Section 251(c)(6) collocation, the provisions of the offered amendment shall apply only to DC collocation monthly recurring power charges. In all other respects, the tariff would otherwise continue to apply to that arrangement(s).

2 As set forth in Accessible Letter CLECAM03-324 dated September 29, 2003, effective April 1, 2003, SBC Midwest prospectively implemented an engineering policy of fusing CLEC DC power leads at 125% of the capacity actually requested by the CLEC. Thus, to the extent power leads were installed, or at the CLEC's request, refused after April 1, 2003, each 20 AMP lead in the example would actually be fused at 25 AMPs, for a total fused amperage of 50 AMPs, but the CLEC would be billed the monthly recurring charge for only 20 AMPs under the amendment.

The amendment also provides that, to the extent SBC Indiana and/or SBC Ohio are billing a CLEC monthly recurring rates for collocation DC power elements with respect to DC power lead(s) for which a fuse has not been installed (a "non-fused lead"), SBC Indiana and/or SBC Ohio shall prospectively cease billing for such non-fused leads if a CLEC, in writing, provides its SBC Indiana or SBC Ohio collocation account manager with notice and specific information to identify those leads claimed to be "non-fused" so to allow SBC Indiana and/or SBC Ohio to confirm that status and cease billing.

With respect to the rate and billing procedures offered by the amendment, in any instance in which a CLEC requests and signs the amendment within sixty (60) days of issuance of this Accessible Letter, such rate and billing procedure shall be effective as of the date of this Accessible Letter. Any amendment (including an MFN into an agreement/amendment) executed after sixty (60) days of issuance of this Accessible Letter shall become effective only upon execution and approval of the state commission in the ordinary course, and the rate and billing procedure set forth above shall apply prospectively only from the amendment approval date.

With respect to the non-fused lead billing procedure offered by the amendment, in any instance in which a CLEC requests and signs the amendment within sixty (60) days of issuance of this Accessible Letter and also provides SBC Indiana and/or SBC Ohio the specific written notice required under the amendment within such sixty (60) day period, such provision shall be effective for all qualifying leads contained in that notice as of the date of this Accessible Letter. Otherwise, if the CLEC fails to provide the required written notice for some or all qualifying leads within such sixty (60) days, SBC Indiana and/or SBC Ohio shall cease billing prospectively for any "non-fused" leads contained in such notice beginning the day after receipt of the required notice or on the effective date of the amendment, whichever occurs later.

The amendment provides that the rate and billing procedure set forth in the amendment shall remain effective until such time as the IURC and/or PUCO, respectively, establish, after the date of this Accessible Letter, in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (i.e., rate application) for SBC Indiana's and/or SBC Ohio's collocation DC power, or until expiration or termination of the term of the amendment (which shall be tied to the term of the CLEC's underlying interconnection agreement), whichever is first. By executing such amendment, both parties relinquish any right, during the term of the amendment, to a different rate and billing procedure from the date that the rate and billing procedure set forth above begins to apply between them, until such time as the IURC and/or PUCO, respectively, establish, after the date of this Accessible Letter, in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure for SBC Indiana's and/or SBC Ohio's collocation DC power. The amendment, however, shall not affect either party's rights, positions, or arguments with respect to collocation power billings prior to the effective date of the rate and billing procedure provided under the amendment.

SBC Indiana and SBC Ohio reserve the right, under the terms of the amendment, to periodically inspect and/or test the amount of DC power a CLEC actually draws and, in the event the CLEC is found to have breached the representations and warranties under the amendment, to pursue remedies for breach of the amendment and the parties' interconnection agreement.

This summary is for information purposes only, and the amendment executed by the parties shall control in all respects.

To the extent a CLEC chooses not to execute the amendment, SBC Indiana and/or SBC Ohio shall continue to bill such CLEC for one hundred percent (100%) of the combined ordered capacity of the leads installed to the CLEC's collocation space (including any "non-fused" leads, where applicable), utilizing the monthly recurring rates for collocation DC power elements as set forth in the parties' interconnection agreement or the governing tariff, whichever is applicable.

For instructions about how to obtain this amendment, a CLEC should contact its collocation account manager.


IN Collo Power Amendment - 9-29-0


OH Collo Power Amendment - 9-29-0

INDIANA
DRAFT COLLOCATION POWER AMENDMENT

COLLOCATION POWER AMENDMENT TO THE INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Collocation Power Amendment to the Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 (the "**Amendment**") by and between Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana ("**SBC Indiana**") and _____("**CLEC**") is dated _____, 2003.

WHEREAS, SBC Indiana and CLEC are parties to a certain Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("**Act**") submitted for approval in the Indiana Utility Regulatory Commission's ("IURC") Cause No. _____, as may have been amended prior to the date hereof (the "**Agreement**");

WHEREAS, SBC Indiana has provided notice to all telecommunications carriers in Indiana that have an interconnection agreement with SBC Indiana or are purchasing Act offerings from SBC Indiana intrastate tariffs, of the availability of the collocation power offering reflected in this Amendment, via Accessible Letter _____ dated September 29, 2003, which notice expressly set forth the timing of the offering and the dependency of the change date of the collocation rate and billing terms (including rate application) on the timing of a telecommunications carrier's actions to accept that offering;

WHEREAS, CLEC wants to amend the Agreement to include the collocation power offering, as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Parties agree as follows:

1. Unless otherwise defined herein, capitalized terms shall have the meanings assigned to such terms in the Agreement.

2. Beginning on and after the Power Change Date (as defined in paragraph 5 of this Amendment), CLEC represents and warrants that it will at no time draw more than 50% of the combined ordered capacity of the DC power leads (in amperes or "AMPs") that are fused for a collocation arrangement (the aggregate ordered capacity of all fused leads for that arrangement, e.g., all "A" AMPs and all "B" AMPs). Based upon that representation and warranty, SBC Indiana shall prospectively bill the CLEC for DC collocation power at a monthly recurring rate of $9.68 per AMP applied to fifty percent (50%) of the ordered capacity that is fused. By way of example, where a CLEC has ordered and SBC Indiana has provisioned two (2) twenty (20) AMP DC power leads that have been fused (for a combined total of forty (40) AMPs), based upon that representation and warranty, SBC Indiana shall bill the CLEC the monthly recurring charge of $9.68 for a total of twenty (20) AMPs (i.e., $193.60 per month).

3. Beginning on and after the Power Change Date, to the extent SBC Indiana is billing CLEC monthly recurring rates for collocation DC power elements with respect to DC power lead(s) for which a fuse has not been installed (a "non-fused lead"), SBC Indiana shall cease billing prospectively, from the Power Change Date, for such non-fused leads if a CLEC, in writing, provides its SBC Indiana collocation account manager with specific information to identify those leads claimed to be "non-fused" so to allow SBC Indiana to confirm that status and cease billing for qualifying "non-fused" leads. Such notice must be received by SBC Indiana no later than November 29, 2003, if, pursuant to paragraph 5 hereof, the

Power Change Date is September 29, 2003. Otherwise, the notice must be received by SBC Indiana by the Amendment Effective Date (as defined herein). If CLEC fails to provide the required written information for any qualifying "non-fused" lead by the date set by the foregoing, SBC Indiana shall cease billing prospectively for such a qualifying "non-fused" leads beginning the day after receipt of the required notice.

4. If CLEC is also purchasing any collocation arrangement pursuant to Tariff I.U.R.C. No. 20, Part 23, Section 4, this Amendment shall apply to any such arrangement only as to its monthly recurring DC power charges in accordance with the Amendment's provisions; that Tariff would otherwise continue to apply to that arrangement(s).

5. The "Power Change Date" is

a. September 29, 2003, only if SBC Indiana received an original of this Amendment executed by CLEC no later than November 28, 2003 (including if CLEC is seeking to adopt this Amendment pursuant to 47 U.S.C. § 252(i)); or otherwise

b. the Amendment Effective Date.

6. SBC Indiana has the right to periodically inspect and/or test the amount of DC power CLEC actually draws and, in the event CLEC is found to have breached the representation and warranty set forth in paragraph 2, to pursue remedies for breach of this Amendment and the Agreement.

7. The provisions of this Amendment shall remain effective until such time as the Indiana Utility Regulatory Commission ("IURC") establishes, after September 29, 2003, in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (including rate application) for SBC Indiana's collocation DC power, or until expiration or termination of this Amendment, whichever is first. If the foregoing is triggered by a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, then either Party may invoke the change of law/rate (or similar) provisions of the Agreement, as may be applicable, in accordance with such provisions. In the case of either triggering event, the provisions of this Amendment shall continue to apply until thereafter replaced by a successor interconnection agreement/amendment, as the case may be. By executing this Amendment, both Parties relinquish any right, during the term of the Amendment, to a different rate and billing procedure (including rate application) from the Power Change Date until such time as the IURC establishes, after September 29, 2003, in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (including rate application) for SBC Indiana's collocation DC power.

8. Nothing in this Amendment shall be deemed or considered an admission on the part of SBC Indiana as to, or evidence of, the unreasonableness of the rates and elements for collocation DC power in SBC Indiana, or of the manner in which SBC Indiana has applied or billed such rates, or any other aspect of its collocation power billing, all as existed prior to the changes being made by this Amendment. Nothing in this Amendment shall restrict either Party's rights with respect to arguments or positions either may take in any pending or future proceedings. Nothing in this Amendment shall affect either Party's rights, claims, arguments, or positions with respect to collocation power billing (including rate application) for the period prior to the Power Change Date and, further, as to "non-fused" leads, prior to the date that SBC Indiana ceases to bill for any such "non-fused" leads pursuant to this Amendment.

9. The effective date of this Amendment shall be the day the IURC approves this Amendment under Section 252(e) of the Act or, absent such IURC approval, the date this Amendment is deemed approved by operation of law ("**Amendment Effective Date**"). In the event that all or any portion of this Amendment as agreed-to and submitted is rejected and/or modified by the IURC, this Amendment shall be automatically suspended and, unless otherwise mutually agreed, the Parties shall expend diligent efforts to arrive at mutually acceptable new provisions to replace those rejected and/or modified by the IURC; provided, however, that failure to reach such mutually acceptable new provisions within thirty (30) days after such suspension shall permit either Party to terminate this Amendment upon ten (10) days written notice to the other.

10. EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT. This Amendment will become effective as of the Amendment Effective Date, and will terminate on the termination or expiration of the Agreement. This Amendment does not extend the term of the Agreement.

11. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, its rights under the United States Supreme Court's opinion in *Verizon v. FCC, et al,* 535 U.S. 467 (2002); the D.C. Circuit's decision in *United States Telecom Association, et. al v. FCC,* 290 F.3d 415 (D.C. Cir. 2002); the FCC's Triennial Review Order, adopted on February 20, 2003; the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002); and/or the Public Utilities Act of Illinois, which was amended on May 9, 2003 to add Sections 13-408 and 13-409, 220 ILCS 5/13-408 and 13-409, and enacted into law ("Illinois Law").

12. This Amendment constitutes the entire amendment of the Agreement and supersedes all previous proposals, both verbal and written. To the extent there is a conflict or inconsistency between the provisions of this Amendment and the provisions of the Agreement (including all incorporated or accompanying Appendices, Addenda and Exhibits to the Agreement), the provisions of this Amendment shall control and apply but only to the extent of such conflict or inconsistency. The Parties further acknowledge that the entirety of this Amendment and its provisions are non-severable, and are "legitimately related" as that phrase is understood under Section 252(i) of Title 47, United States Code, notwithstanding the fact that Section 252(i) does not apply to this Amendment.

13. This Amendment may be executed in counterparts, each of which shall be deemed an original but all of which when taken together shall constitute a single agreement.

IN WITNESS WHEREOF, each Party has caused this Amendment to be executed by its duly authorized representative.

CLEC

Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana
By its Authorized Agent,
SBC Telecommunications, Inc.

By: _____ By: _____

Printed: _____ Printed: _____

Title: _____ Title For/ President – Industry Markets

Date: _____ Date: _____

AECN/OCN # _____

OHIO
DRAFT COLLOCATION POWER AMENDMENT

COLLOCATION POWER AMENDMENT TO THE INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Collocation Power Amendment to the Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 (the "**Amendment**") by and between The Ohio Bell Telephone Company d/b/a SBC Ohio ("**SBC Ohio**") and _____("**CLEC**") is dated _____, 2003.

WHEREAS, SBC Ohio and CLEC are parties to a certain Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("**Act**") submitted for approval in The Public Utilities Commission of Ohio's ("PUCO") Case No. _____, as may have been amended prior to the date hereof (the "**Agreement**");

WHEREAS, SBC Ohio has provided notice to all telecommunications carriers in Ohio that have an interconnection agreement with SBC Ohio or are purchasing Act offerings from SBC Ohio intrastate tariffs, of the availability of the collocation power offering reflected in this Amendment, via Accessible Letter _____ dated September 29, 2003, which notice expressly set forth the timing of the offering and the dependency of the change date of the collocation rate and billing terms (including rate application) on the timing of a telecommunications carrier's actions to accept that offering;

WHEREAS, CLEC wants to amend the Agreement to include the collocation power offering, as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Parties agree as follows:

1. Unless otherwise defined herein, capitalized terms shall have the meanings assigned to such terms in the Agreement.

2. Beginning on and after the Power Change Date (as defined in paragraph 4 of this Amendment), CLEC represents and warrants that it will at no time draw more than 50% of the combined ordered capacity of the DC power leads (in amperes or "AMPs") that are fused for a collocation arrangement (the aggregate ordered capacity of all fused leads for that arrangement, e.g., all "A" AMPs and all "B" AMPs). Based upon that representation and warranty, SBC Ohio shall prospectively bill the CLEC for DC collocation power at a monthly recurring rate of $9.68 per AMP applied to fifty percent (50%) of the ordered capacity that is fused. By way of example, where a CLEC has ordered and SBC Ohio has provisioned two (2) twenty (20) AMP DC power leads that have been fused (for a combined total of forty (40) AMPs), based upon that representation and warranty, SBC Ohio shall bill the CLEC the monthly recurring charge of $9.68 for a total of twenty (20) AMPs (i.e., $193.60 per month).

3. Beginning on and after the Power Change Date, to the extent SBC Ohio is billing CLEC monthly recurring rates for collocation DC power elements with respect to DC power lead(s) for which a fuse has not been installed (a "non-fused lead"), SBC Ohio shall cease billing prospectively, from the Power Change Date, for such non-fused leads if a CLEC, in writing, provides its SBC Ohio collocation account manager with specific information to identify those leads claimed to be "non-fused" so to allow SBC Ohio to confirm that status and cease billing for qualifying "non-fused" leads. Such notice must be received by SBC Ohio no later than November 29, 2003, if, pursuant to paragraph 4 hereof, the Power Change Date is September 29, 2003. Otherwise, the notice must be received by SBC Ohio by the

Amendment Effective Date (as defined herein). If CLEC fails to provide the required written information for any qualifying "non-fused" lead by the date set by the foregoing, SBC Ohio shall cease billing prospectively for such a qualifying "non-fused" leads beginning the day after receipt of the required notice.

4. The "Power Change Date" is

a. September 29, 2003, only if SBC Ohio received an original of this Amendment executed by CLEC no later than November 28, 2003 (including if CLEC is seeking to adopt this Amendment pursuant to 47 U.S.C. § 252(i)); or otherwise

b. the Amendment Effective Date.

5. SBC Ohio has the right to periodically inspect and/or test the amount of DC power CLEC actually draws and, in the event CLEC is found to have breached the representation and warranty set forth in paragraph 2, to pursue remedies for breach of this Amendment and the Agreement.

6. The provisions of this Amendment shall remain effective until such time as the PUCO establishes, after September 29, 2003, in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (including rate application) for SBC Ohio's collocation DC power, or until expiration or termination of this Amendment, whichever is first. If the foregoing is triggered by a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, then either Party may invoke the change of law/rate (or similar) provisions of the Agreement, as may be applicable, in accordance with such provisions. In the case of either triggering event, the provisions of this Amendment shall continue to apply until thereafter replaced by a successor interconnection agreement/amendment, as the case may be. By executing this Amendment, both Parties relinquish any right, during the term of the Amendment, to a different rate and billing procedure (including rate application) from the Power Change Date until such time as the PUCO establishes, after September 29, 2003, in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (including rate application) for SBC Ohio's collocation DC power.

7. Nothing in this Amendment shall be deemed or considered an admission on the part of SBC Ohio as to, or evidence of, the unreasonableness of the rates and elements for collocation DC power in SBC Ohio, or of the manner in which SBC Ohio has applied or billed such rates, or any other aspect of its collocation power billing, all as existed prior to the changes being made by this Amendment. Nothing in this Amendment shall restrict either Party's rights with respect to arguments or positions either may take in any pending or future proceedings. Nothing in this Amendment shall affect either Party's rights, claims, arguments, or positions with respect to collocation power billing (including rate application) for the period prior to the Power Change Date and, further, as to "non-fused" leads, prior to the date that SBC Ohio ceases to bill for any such "non-fused" leads pursuant to this Amendment.

8. The effective date of this Amendment shall be the day this Amendment is filed with the PUCO ("**Amendment Effective Date**"), and is deemed approved by operation of law on the 31st day after filing. In the event that all or any portion of this Amendment as agreed-to and submitted is rejected and/or modified by the PUCO, this Amendment shall be automatically suspended and, unless otherwise mutually agreed, the Parties shall expend diligent efforts to arrive at mutually acceptable new provisions to replace those rejected and/or modified by the PUCO; provided, however, that failure to reach such mutually acceptable new provisions within thirty (30) days after such suspension shall permit either Party to terminate this Amendment upon ten (10) days written notice to the other.

9. EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT. This Amendment will become effective as of the Amendment Effective Date, and will terminate on the termination or expiration of the Agreement. This Amendment does not extend the term of the Agreement.

10. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, its rights under the United States Supreme Court's opinion in *Verizon v. FCC, et al,* 535 U.S. 467 (2002); the D.C. Circuit's decision in *United States Telecom Association, et. al v. FCC,* 290 F.3d 415 (D.C. Cir. 2002); the FCC's Triennial Review Order, adopted on February 20, 2003; the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002); and/or the Public Utilities Act of Illinois, which was amended on May 9, 2003 to add Sections 13-408 and 13-409, 220 ILCS 5/13-408 and 13-409, and enacted into law ("Illinois Law").

11. This Amendment constitutes the entire amendment of the Agreement and supersedes all previous proposals, both verbal and written. To the extent there is a conflict or inconsistency between the provisions of this Amendment and the provisions of the Agreement (including all incorporated or accompanying Appendices, Addenda and Exhibits to the Agreement), the provisions of this Amendment shall control and apply but only to the extent of such conflict or inconsistency. The Parties further acknowledge that the entirety of this Amendment and its provisions are non-severable, and are "legitimately related" as that phrase is understood under Section 252(i) of Title 47, United States Code, notwithstanding the fact that Section 252(i) does not apply to this Amendment.

12. This Amendment may be executed in counterparts, each of which shall be deemed an original but all of which when taken together shall constitute a single agreement.

IN WITNESS WHEREOF, each Party has caused this Amendment to be executed by its duly authorized representative.

CLEC _____	**The Ohio Bell Telephone Company d/b/a SBC Ohio** **By its Authorized Agent,** **SBC Telecommunications, Inc.**
By: _____	By: _____
Printed: _____	Printed: _____
Title: _____	Title *For/* President – Industry Markets
Date: _____	Date: _____

AECN/OCN # _____

ATTACHMENT B

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...

SBC Communications Inc.

...and Thank You for Your Comments

Your Confirmation Number is: '2003929479535 '	
Date Received:	**Sep 29 2003**
Docket:	**03-167**
Number of Files Transmitted: 1	

DISCLOSURE

This confirmation verifies that ECFS has received and accepted your filing. However, your filing will be rejected by ECFS if it contains macros, passwords, redlining, read-only formatting, a virus or automated links to source documents that is not included with your filing.
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updated 02/11/02

Accessible

Date: **September 29, 2003** Number: **CLECAM03-324**

Effective Date: **September 29, 2003** Category: **Interconnection**

Subject: **(COLLOCATION) Notification of 125% Fusing Practice for Collocation Power**

Related Letters: **NA** Attachment: **NA**

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

Response Deadline: **NA** Contact: **Collocation Account Manager**

Issuing SBC ILECS: **SBC Illinois, SBC Indiana, SBC Michigan, SBC Ohio and SBC Wisconsin (collectively referred to for purposes of this Accessible Letter as "SBC Midwest Region 5-State")**

Conference Call/Meeting: **NA**

This Accessible Letter notifies CLECs in the SBC Midwest Region 5-State that, effective April 1, 2003, SBC Midwest Region 5-State prospectively implemented an engineering policy of fusing CLEC DC power leads at 125% of the capacity actually requested/ordered by the CLEC. By way of example, if on or after April 1, 2003, a CLEC ordered two (2) 20 AMP DC power leads for a combined total amperage of forty (40) AMPs, each lead is fused at twenty-five (25) AMPs, for a combined total fused amperage of fifty (50) AMPs. This procedure was implemented in order to provide additional protection for SBC Midwest Region 5-State's network. CLECs have not been and will not be billed for any of the additional amperage fused based upon the revised policy. This policy has been implemented on a prospective basis only. CLEC DC power leads ordered and installed prior to April 1, 2003, were fused at the amperage actually ordered by the CLEC, and remain fused at such levels.

To the extent a CLEC has questions with respect to this prospective policy it should contact its collocation account manager.

Summary: App for Rehearing Application for Rehearing of PAETEC electronically filed by Benita Kahn on behalf of PAETEC