Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Michigan Bell Telephone Company, and	)	WC Docket No. 03-16
Southwestern Bell Communications Services, Inc.	)	
For Provision of In-Region, InterLATA	)	
Services in Michigan	)	

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

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COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. opposes the above-captioned application of SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for authorization to provide in-region, interLATA services in Michigan.[1] The public interest requires that the Application be denied unless the Commission is convinced that the local markets have been opened fully and irreversibly to competitive entry. In Sprint's view, this is not yet the case.

[1] Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan, WC Docket No. 03-16 (filed January 16, 2003) (Application).

I. INTRODUCTION AND SUMMARY

A. Introduction

A key purpose of the 1996 amendments to the Communications Act of 1934 (the Act) was to open the local market to competition. To that end, Congress envisioned three avenues of local entry: resale, use of incumbent LEC unbundled network elements and facilities-based competition; and it placed incumbent LECs in the rather unnatural role of assisting their would-be competitors by imposing the interconnection, resale, unbundling and collocation obligations of § 251(c).

To encourage the principal ILECs – the BOCs – to cooperate in this process, Congress enacted the "carrot" of § 271, giving the BOCs the right to enter the interLATA long distance market in-region once their local markets were truly open. The Commission recognized the importance of local market competition in one of the first applications it decided under this section.

> Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition. *** In order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.[2]

[2] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶18 (1997) (Michigan Order).

If the BOCs are allowed to enjoy the § 271 "carrot" before local competition is fully and irreversibly established, they will have little incentive to cooperate with competitive LECs thereafter, unless they are subject to continuing regulation. Successfully maintaining such a regulatory structure and adapting it to changes in technology will require significant on-going resources of both the Commission and interested parties, with, at best, uncertain results. It would be far preferable to withhold the § 271 "carrot" until local competition is sufficiently entrenched that competitive forces can supplant the intensive regulation and enforcement that otherwise would be required. Sprint does not believe that point has yet been reached in the state of Michigan for which SBC is seeking § 271 authorization.

The public interest inquiry should focus on competition in the local market. In the decision of the Court of Appeals for the District of Columbia concerning the FCC's grant of SBC's 271 application for long distance service in Kansas and Oklahoma remanding the "price squeeze" issue,[3] the court commented on the Commission's inadequate consideration of the appellants' claim that the low volume of residential customers in these states and SBC's pricing which does not provide enough margin to make competition profitable are evidence of a "price squeeze" that is inconsistent with the public interest. The court stated: "Here, as the Act aims directly at stimulating competition, the public interest criterion may weigh more heavily towards addressing potential 'price squeeze.'" Id. at 555. Clearly, the court considers the Act's goal of

[3] Joint Application by SBC for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 (2001), remanded, Sprint Communications Co. L.P. v. FCC, 274 F. 3d 549 (DC Cir. 2001).

"stimulating competition" to refer to competition in the local market, the market adversely affected by a "price squeeze." Thus, it is appropriate to consider whether the dismal state of competition and the low volume of residential customers served by facilities-based competitors is in the public interest when evaluating a § 271 application.

B. Summary

As shown below, the CLEC industry remains under financial pressure. The past year has been marked by the collapse of several major CLECs and a severe tightening of capital to would-be entrants. Further, the regulatory environment is now in a state of uncertainty as a result of the recent decision of the D.C. Circuit Court of Appeals on UNE standards.[4] Uncertainty now reigns concerning whether or not the Commission will reduce the RBOCs' UNE and line sharing obligations, creating even more business uncertainty for the competitive industry and greater risk for those carriers relying on the current UNE-P regime. Because so much of the CLEC market share for residential service is based on UNE-P offerings, a conclusion that local competition has been fully and irreversibly enabled is precluded.

Further evidence of the dismal state of competition is the fact that the RBOCs have failed to establish themselves outside their territory. Finally, SBC improperly inflates its CLEC line estimates by including data products and one-way lines which are not used to provide competitive local service.

[4] United States Telecom Association v. Federal Communications Commission, 290 F.3d 415 (D.C.Cir. 2002)(petitions for certiorari pending)("*USTA*").

II. THE CLEC INDUSTRY REMAINS UNDER FINANCIAL PRESSURE (PUBLIC INTEREST)

The past two years have been marked by the bankruptcy of many of the CLECs that were in the vanguard of the industry: Adelphia Business Solutions, ART, Birch, Convergent, Covad, e-Spire, ICG Communications, Metropolitan Fiber Networks, McLeodUSA, Mpower, Net2000, Network Plus, NorthPoint, Rhythms, TeleGlobe, Teligent, Viatel Holding, Williams Communications Group, WinStar and XO Communications, to name a few.[5] WorldCOM, which claims to be the largest CLEC in the U.S. in addition to providing long distance services,[6] reported financial misrepresentations and was forced into bankruptcy in July 2002. The number of CLECs has decreased from approximately 330 at the end of 2000 to fewer than 80 today.[7]

The bleak state of the industry is making it difficult for the surviving CLECs to obtain capital to expand their facilities. Given the current high risk associated with the CLEC industry, any financing that can be obtained comes at a high price. In the telecom industry, capital spending decreased by 25 percent in 2001 and was expected to be another 20 percent lower in 2002. *Id.*

In addition to these financial hurdles, CLECs now face regulatory uncertainty concerning the availability and pricing of UNEs. In its *USTA* opinion, the D.C. Circuit

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[5] A number of CLECs have emerged from bankruptcy, including Birch, Covad, McLeodUSA and XO.

[6] See Statement of Victoria D. Harker before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, June 19, 2002.

[7] Yochi J. Dreazen, FCC's Powell Says Telecom 'Crisis' May Allow a Bell to Buy WorldCom, The Wall Street Journal, A4 (July 15, 2002).

addressed the RBOCs' appeals of the FCC's UNE Remand decision[8] in which the FCC reviewed its definition of "impair" and other unbundling criteria and its list of UNEs in light of the Supreme Court's decision in *Iowa Utilities Board.* The court remanded the Commission's UNE Remand Order in an opinion that displayed some hostility towards UNE-based competition, despite the Supreme Court's recognition, just a few days earlier, that the Commission could set UNE rates so as to promote local competition broadly.[9] The D.C. Circuit's decision, coming in the midst of the Commission's own UNE Review proceeding,[10] creates additional uncertainty for the already troubled competitive industry. At one extreme, the FCC could decide that the RBOCs are no longer required to provision many UNEs in metropolitan areas. Since a significant portion of the competitive industry relies on UNE components, CLEC investments likely will be scaled back until the regulatory environment becomes clearer. In the interim, funding for an industry already under severe financial pressure will be extremely scarce, and what is available will be high-priced.

At a minimum, until decisions are made concerning the availability of UNEs, the Commission must pay more attention to the market shares of the competition. It is highly unlikely that the percentage will increase at the same pace as it has in recent years,

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[8] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("UNE Remand Order).

[9] Verizon Communications Inc. v. Federal Communications Commission, Nos. 00-511 *et al.* (S. Ct. May 13, 2002).

[10] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, released December 21, 2001.

given the tumult recounted above. Indeed, it is more reasonable to expect that the market shares of competitors will shrink as the uncertainty about the availability and pricing of UNEs restricts further investments and sends additional competitors into bankruptcy.

III. OUT OF REGION RBOCs HAVE FAILED TO COMPETE AGAINST FELLOW RBOCs (PUBLIC INTEREST)

ILECs have chosen not to compete with each other for customers outside their territories. Why would this be the case? ILECs not only know the local market, but they come equipped with the complex back-office systems needed to provide service efficiently and economically. It is telling, then, that despite earlier assertions to the contrary, the RBOCs have remained largely outside the local competition fray. If local competition were truly enabled, these RBOCs, who are high on the learning curve for the provision of local service, would have the incentive to enter the local markets outside their serving territories with bundles of local and long distance service.

In its order approving Verizon's Section 271 application for Rhode Island, the Commission found that the lack of entry by other carriers – either out-of-region RBOC or CLEC – can be explained by factors beyond the control of the applicant, "such as a weak economy, individual competing LEC and out-of-region BOC business plans, or poor business planning by potential competitors."[11] This suggests that the Commission believes that the public interest considerations should only include factors within the control of the applicant. Sprint disagrees. In Sprint's view, consideration of the public

[11] In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, released February 22, 2002, ¶ 106 (Rhode Island Order).

interest should include all factors, whether or not they are within the applicant's control, that bear on whether the local market has indeed been irreversibly opened. The fact that the carriers which are best prepared to enter the local markets are not even attempting to do so in any market outside their local territories is indicative of some deterrent to entry and should give the Commission pause as it considers whether or not local competition is fully and irreversibly enabled.

IV. COMPETITION IN MICHIGAN HAS NOT BEEN FIRMLY ESTABLISHED (PUBLIC INTEREST)

As noted above, the Act allows competitors to enter the local market via three entry strategies: resale of the incumbent's network, the use of unbundled network elements, or interconnection to the incumbent's network by pure facilities-based providers, or some combination thereof. The Commission has found that all three means of entry should be available:

> Congress did not explicitly or implicitly express a preference for one particular strategy, but rather sought to ensure that all procompetitive entry strategies are available. Our public interest analysis of a section 271 application, consequently, must include an assessment of whether all procompetitive entry strategies are available to new entrants.

Michigan 271 Order ¶387. In discussing how it would evaluate whether all strategies are available, the Commission made clear that there should be competition in each means of providing competitive local service and to both business and residential customers:

> The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with

> the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).

Id. ¶391.

In its Rhode Island Order, the Commission stated that the public interest standard does not require it to "consider the market share of each entry strategy for each type of service." ¶ 104. However, the public interest standard does require that local competition be healthy and sufficient to endure after RBOC entry. Low levels of facilities-based competition, particularly in the residential market, should signal that competitors are unwilling or unable to make a sizeable investment in the market. If competition is not fully and irreversibly enabled in that market, the RBOC will retain its monopoly control over residential customers, and its entry into the long distance market will not serve the public interest.

Although SBC claims that meaningful competition exists in Michigan, SBC's methodology improperly inflates the CLECs' line estimates by including CLECs' high speed data lines and local lines which are not used for competitive local telephone service and by attributing too many lines to competitors based on interconnection trunks. As of the date of the Application, Sprint did not compete with SBC for local voice service in Michigan. Nevertheless, SBC attributes to Sprint thousands of "UNE-P CLEC Lines in Michigan Bell Local Service Area as of November 2002."[12] In addition, according to SBC, Sprint is reselling lines and has well over five percent of the "CLEC Operational Interconnection Trunks in Michigan Bell Local Service Area as of November 2002." *Id.*

[12] Application, Affidavit of Deborah O. Heritage Regarding the Status of Local Exchange Competition, Attachment E.

Sprint's facilities are actually one-way Dial IP lines used to access IP providers and some DSL lines. Sprint's service orders reflect the fact that the facilities are being used for Dial IP service. Clearly, these facilities are not substitutes for local exchange service, the market over which SBC retains control and which is the market at issue here. To the extent that the market share information provided by SBC reflects facilities such as those used by Sprint for data services, it improperly overstates the relevant CLEC market share.

According to the information provided by SBC in this Application, approximately 60 percent of the CLEC lines in Michigan are provisioned using the UNE-P platform, while only 37 percent are facilities-based.[13] If the FCC decides in its Unbundled Network Element Triennial Review[14] that the RBOCs may reduce or phase-out the UNE-P platform, the prices will undoubtedly rise for unbundled elements, and CLECs may have no meaningful ability to compete for residential customers. Ultimately, as a result of changes to the unbundling requirements, the CLECs may be forced to exit the residential UNE-P-based market. The CLEC residential market is clearly at risk in these times of regulatory uncertainty. Thus, despite the facially impressive residential market share attributed to CLECs by SBC, the fact that so much of this market share is composed of UNE-P-based offerings precludes, given the uncertain future of UNE-P, a conclusion that local competition has been fully and irreversibly enabled.

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[13] *Id.* Percentages are based on Table 1, p. 7, E911+UNE-P Lines + Resale.

[14] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338.

V. CONCLUSION

Because SBC has failed to demonstrate that there is meaningful competition in the states here at issue, its application for § 271 relief should be denied.

Respectfully submitted,

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February 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of Sprint's Comments In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Michigan, WC Docket No. 03-16, was sent electronically and/or by U.S. First Class Mail on this 6th day of February 2003 to the parties listed below.

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