

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of MCImetro)	
Access Transmission Services, LLC)	
for Arbitration Pursuant to Section 252(b))	Case No. 01-1319-TP-ARB
of the Telecommunications Act of 1996 to)	
Establish an Interconnection Agreement with)	
Ameritech Ohio.)	

ARBITRATION AWARD

The Commission, considering the petition, the evidence of record, the arbitration Panel Report and the exceptions and replies thereto, and being otherwise fully advised, hereby issues its arbitration award.

APPEARANCES:

Porter Wright Morris & Arthur LLP, by Daniel R. Conway and Mark S. Stemm, 41 S. High Street, Columbus, Ohio 43215.

Mayer, Brown & Platt, by Theodore A. Livingston, Dennis G. Friedman, and Christian F. Binnig, 190 S. La Salle Street, Chicago, Illinois 60603.

Bell, Royer & Sanders Co. LPA, by Judith B. Sanders, 33 S. Grant Avenue, Columbus, Ohio 43215-3900.

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ARBITRATION AWARD

I. BACKGROUND

On December 27, 2000,¹ MCImetro Access Transmission Services, LLC, (MCI_m) served upon Ameritech Ohio (Ameritech) a written request for the rates, terms, and conditions for interconnection, resale services, network elements, and related services and arrangements pursuant to Sections 251 and 252 of the Act.

Pursuant 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. Prior to this, on July 18, 1996, this Commission established guidelines to carry out its duties under Section 252 of the Act. See, *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal*

¹ MCI_m served its initial request for negotiations on August 15, 2000. To provide additional time to negotiate, the parties, by stipulation, ultimately revised the date of the initial request to December 27, 2000.

47 CFR §51.309(b), which provides that UNEs may be used in the provision of interexchange services to subscribers. MCI_m further argues that this Commission has previously rejected attempts to restrict the DA database to the provision of local exchange service (MCI/Cincinnati Bell Arbitration, Order on Rehearing, 5). Ameritech's proposed language would limit MCI_m's use of the database to its use in Ohio for local exchange services and therefore should be rejected.

(d) Arbitration Award

The FCC rules (§51.309(a)) are clear that an ILEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. The Commission finds that the Panel Report recommendation should be adopted with one clarification. MCI_m's access to LIDB database on an unbundled basis, pursuant to §319(e)(2) of the FCC rules, should be only for purposes of providing any telecommunications services it intends to offer in Ameritech Ohio's territory.

16. Issue 86:

Which party's definition of Line Splitting should the Commission adopt?

17. Issue 90:

Is Ameritech required to continue to provide data services when MCI_m provides voice services over the same loop?

18. Issue 91:

What terms and conditions should apply to Ameritech's provision of Line Splitting to MCI_m?

19. Issue 92:

Is Ameritech required to provide the splitter when MCI_m is providing voice services over UNE-P?

20. Issue 93:

When MCI_m is providing the broadband portion and Ameritech is providing the POTS and the customer disconnects the Ameritech service, must MCI_m convert to a stand alone UNE?

21. Issue 94:

Is Ameritech obligated to provide multi-carrier or multi-service Line Sharing arrangements as referenced in FCC 99-355, ¶75?

22. Issue 95:

Is HFPL available in conjunction with UNE-P or any other arrangement where Ameritech is not the retail POTS provider?

23. Issue 96:

Should the Commission adopt MCI's proposed OSS language related to HFPL and Line Splitting?

(a) Panel Recommendation

Based on various FCC rules and statements, the Panel found that there is a clear distinction drawn by the FCC between line sharing and line splitting arrangements. Accordingly, the Panel recommended that the Commission reject MCI's claim that there is no technical or physical difference between line sharing and line splitting. The Panel found that the record reflects the fact that both the splitter and the low frequency portion of the loop do not satisfy either the "necessary" or "impair" tests pursuant to Section 251(d)(2) of the 1996 Act and §51.317 of the FCC rules. Accordingly, the Panel recommended that Ameritech should not be required to provide either splitters or the low frequency portion of the loop as UNEs.

As to the splitter provision/ownership, the Panel agreed with Ameritech that the FCC has never required ILECs to own and provide splitters to CLECs. Rather, the FCC gave ILECs the option to maintain control over the splitter in the line sharing arrangement, but did not require ILECs to do so. Accordingly, the Panel recommended, consistent with the Commission's conclusion in Ameritech/AT&T Arbitration Award (Case No. 00-1188-TP-ARB), that Ameritech should not be required to own or provide splitters to MCI in either line sharing or line splitting arrangements (as defined by the FCC and recommended by the Panel). According to the Panel, this recommendation would apply to situations where line splitting arrangement is provisioned by MCI over a stand-alone xDSL-capable unbundled loop and where a line splitting arrangement is provisioned by MCI over a Unbundled Network Element Platform (UNE-P) arrangement. Accordingly, the Panel recommended that MCI's proposed language in Appendix Line Sharing §4.3 be revised to reflect its recommendation.

The Panel further found that MCI's claim that a splitter is part of the unbundled loop definition to be inconsistent with the FCC's definition of unbundled loop in §51.319(a)(1). Accordingly, the Panel recommended that the Commission reject MCI's argument that Ameritech should provide its splitter in a line splitting arrangement over UNE-P based on the claim that a splitter is part of the unbundled loop definition.

The Panel also rejected another argument of MCI. MCI claimed that when Ameritech is engaged in a line sharing arrangement with a CLEC that provides data service while Ameritech provides voice service, and MCI wins the voice service of that customer, MCI would be able to serve the same customer using a combination of the same network elements as Ameritech and that this is a UNE-P migration. According to the Panel, this argument is inconsistent with this Commission's definition of the existing UNE-P combination set in Case No. 96-922-TP-UNC and its decision in Ameritech/AT&T arbitration. Second, because the Panel determined that the splitter is neither a UNE nor a part of the unbundled loop element, it cannot be a part of an existing unbundled network combination such as the UNE-P.

Next, the Panel addressed two additional claims made by MCI. First, MCI claims that Ameritech should be required to handle line splitting arrangements utilizing UNE-P in the same manner (from the end user's standpoint) that a line sharing arrangement is provided. Second, MCI claims that its ability to provide telecommunications migration service via UNE-P is impaired by lack of access to Ameritech's splitter, because Ameritech will disconnect the customer's service and take other unnecessary and disruptive steps which adversely affect MCI. According to the Panel, the same central office procedures (i.e. disassembling the UNE-P and installing the splitter between the unbundled loop and unbundled switch port that made up the UNE-P) necessary to convert MCI's UNE-P arrangement into a line splitting arrangement would have to be performed to convert Ameritech's POTS customer to line sharing arrangement. Therefore, the Panel found that from the end user's standpoint, the end user would not interact with Ameritech in either situation (line sharing or line splitting) but will interact with the data provider CLEC, and the Panel rejected MCI's claim. The Panel also noted that it did not see the distinct competitive disadvantage that MCI envisions, since the data provider CLECs will experience the same "disruptive steps" in either situation (line sharing with Ameritech or line splitting with another CLEC). Accordingly, the Panel recommended that Ameritech and MCI address the ordering and provisioning issues associated with line splitting in the Ohio Operation Support Systems (OSS) collaborative.

Based on all of the above findings, the Panel recommended that the Commission adopt Ameritech's proposed line splitting definition included in Ameritech Exhibit 11, page 17 in its entirety thereby replacing MCI's proposed language in Appendix Line Sharing §2.7. The Panel also recommended that the Commission adopt Ameritech's proposed Appendix Line Sharing §§1.3 and 5.5, and delete Ameritech's proposed Appendix Line Sharing §5.6. As to Appendix Line Sharing §§4.1 and 4.1.1, the Panel recommended that it be revised to reflect its recommendations in this section of the report as well as on Issues 85 and 90 of the report.

The Panel found that requirements and limitations in ¶74 and 75 of the FCC's *Line Sharing Order* were not replaced or altered by, but coexist with, the requirements in ¶18 of the *Line Sharing Reconsideration Order*. Accordingly, the Panel recommended the adoption of Ameritech's proposed language in Appendix Line Sharing §5.4 by the Commission and rejected MCI's argument that Ameritech is obligated to provide multi-carrier or multi-service line sharing arrangement.

The Panel found that based on ¶16 of the *Line Sharing Reconsideration Order*, MCI's request that "Ameritech-Ohio continue to provide data services" is not an obligation for Ameritech in a situation where Ameritech (or its affiliate) would have been the provider of data service prior to MCI winning the voice service of the customer. The Panel found that it would be even more appropriate not to obligate Ameritech to "continue to provide data services" when Ameritech was not the provider of data service prior to MCI winning the voice service of the customer. Therefore, the Panel recommended that the Commission reject MCI's proposed language in Appendix Line Sharing §§4.1.1 and 4.1.2.

The Panel recommended that the Commission adopt Ameritech's proposed language in §5.2, since it is consistent with ¶72 of the *Line Sharing Order* and ¶22 of the *Line Sharing Reconsideration Order* requirement. Under this requirement, when MCI is providing the broadband portion and Ameritech is providing the Plain Old Telephone Service (POTS), and the customer disconnects the Ameritech service, MCI would be required to purchase the full stand-alone loop network element if it wishes to continue providing xDSL service.

Finally, the Panel found that MCI's request for what it calls "line splitting" and "line sharing" are significantly different from and inconsistent with the FCC's definition of those activities, and that Ameritech should not be required to provide MCI's proposed OSS language related to MCI's versions of "line sharing" and "line splitting." Accordingly, the Panel recommended that the Commission reject MCI's proposed language in Appendix Line Sharing §6.

(b) Exception

After filing exceptions to the Panel Report, the parties were granted an opportunity to supplement the record concerning the issue of line sharing, in light of *United States Telecom Association, et al., v. FCC et al.*, (US DC Cir., May 24, 2002), (*USTA* or D.C. Circuit Opinion). We will summarize MCI's analysis of *USTA* and then will list MCI's exceptions to the Panel Report.

It is MCI's opinion that in *USTA* the D.C. Circuit remanded the *Line Sharing Order* only for the limited purpose of having the FCC take into account "competition in broadband services coming from cable (and to a lesser extent satellite)." As to the *UNE Remand Order*, it is MCI's opinion that the D.C. Circuit unquestionably did not vacate the *UNE Remand Order* and it is still very much in effect and will be so until the FCC addresses the remand in its Triennial Review proceeding.

MCI further argues that, in *USTA*, the D.C. Circuit did not vacate §51.317 of the FCC's rules, under which the FCC explicitly gives states the authority to further unbundle incumbent carriers' networks. Therefore, MCI contends, the D.C. Circuit did not and could not affect: 1) Ohio's authority under Section 251(d)(3) of the 1996 Act, 2) currently binding §51.317(d) of the FCC rules, or 3) independent state law to order Ameritech to continue to provide line sharing (or any other challenged element) during

any remand of the line sharing issues. MCI_m believes that even if the D.C. Circuit issues its mandate, this Commission retains full authority to proceed with this case and to order Ameritech to unbundle its Project Pronto architecture, making it available for carriers seeking to line share. MCI_m notes that this Commission exercised such authority in its prior arbitration with Ameritech, *In the Matter of MCI Telecommunication Corporation Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ohio Bell telephone Company dba Ameritech Ohio*, Case No. 96-888-TP-ARB (96-988) (January 9, 1997). In 96-988, the Commission ordered Ameritech to unbundle its dark fiber prior to the time that the FCC had added dark fiber to its list of UNEs.

MCI_m addresses the D.C. Circuit's conclusion in its "line sharing" decision that the FCC improperly failed to consider the "competitive context" in which DSL-based services exist, i.e. failed to consider the relevance of competition from cable modem and satellite services. MCI_m claims that the limitation on cable and satellite services has been demonstrated in the record in this case. MCI_m argues that cable modem service provides no competitive alternative for business services, since cable systems run only to homes. MCI_m adds that, even concerning residences that have a choice between cable modem and DSL, that is still only a choice of two alternatives, and in a duopoly each provider still retains significant market power.

Next, MCI_m addresses the D.C. Circuit's ruling that on remand, the FCC should consider issues involving the retail rate structure, economies of scale, and granularity. MCI_m argues that this is not likely to have much relevance to line sharing. MCI_m claims that DSL retail rates generally do not vary by zone, and whatever the FCC ultimately concludes about the relevance of retail rates to impairment analysis, it is not likely to have impact on line sharing. As to economies of scale, MCI_m contends that the concerns raised by the D.C. Circuit have very little relevance to unbundling analysis of loop-based facilities. Leaving aside the issue of intermodal competition from cable, according to MCI_m, no one seriously challenges the point that the loop plant is an essential facility, and that competitors would not be able economically to duplicate the nation's loop infrastructure unless they captured an exceedingly large share of the market. MCI_m further contends that for similar reasons, the D.C. Circuit's concern that the current "impairment" analysis is insufficiently granular would not have much, if any, relevance to a state's decision to unbundle the High Frequency Portion of the Loop (HFPL) since it is by its very nature more granular than the FCC's national rule.

Also, MCI_m claims that the nondiscrimination provisions of the 1996 Act obligate Ameritech to provide line sharing in Ohio. Therefore, MCI_m argues that as long as the ILECs are able to use the HFPL to provide DSL-based services, CLECs are entitled to access the HFPL on a nondiscriminatory manner. MCI_m further argues that when the ILEC has a separate data affiliate (e.g., Ameritech Advanced Data Services (AADS)) that leases the HFPL like other CLECs does then the Commission must ensure that nonaffiliated CLECs have access to the HFPL in a manner that does not provide the ILEC's affiliate a competitive advantage.

Next, MCIIm addresses how the D.C. Circuit decision relates to line splitting. MCIIm argues that the FCC in ¶18 of its *Line Sharing Reconsideration Order* made clear that the obligation to allow carriers to engage in line splitting is independent from its *Line Sharing Order*, and is derived from the FCC rules that "require incumbent LECs to provide competing carriers with access to unbundled loops in a manner that allows the competing carriers to provide any telecommunications service that can be offered by means of that network element." Thus, MCIIm concludes that to the extent that loops are available under the *UNE Remand Order*, which they are, line splitting is also available.

In its exception to the Panel Report, MCIIm grouped Issues 86 and 90-96 together under the same topic. MCIIm claims that the parties agree that "line sharing" involves the provision of voice service by Ameritech and data service by Ameritech, an Ameritech affiliate or a data CLEC, while "line splitting" occurs when the customer receives voice service from a CLEC and data service from another CLEC. MCIIm states that there is also no question that line splitting may be requested by MCIIm either when a customer in a line sharing arrangement desires to switch voice service to MCIIm, or when, after the customer becomes a voice customer of MCIIm, he/she wants to add data service over the same loop.

MCIIm argues that the line splitting issues contained in this arbitration revolve around Ameritech's refusal to permit line splitting in conjunction with UNE-P, and Ameritech's extremely cumbersome processes associated with ordering and provisioning facilities over which line splitting can occur. MCIIm's first exception concerns Ameritech's line sharing to line splitting migration process. It is MCIIm's position that in the line sharing to line splitting migration requested here, Ameritech should be required to keep the previously assembled combinations connected and allow the voice provider to change without disassembling the previously established circuit or discontinuing the data. MCIIm believes that the Panel became pre-occupied with various FCC statements and lost focus on the practical problems caused by Ameritech's proposals. MCIIm argues that Ameritech will contend that it is facilitating DSL competition by doing what it is "required" to do by the FCC with respect to line sharing and line splitting. However, in MCIIm's opinion, if the Commission is serious about providing customers with viable choices with respect to high-speed DSL services, accepting Ameritech's version of its "requirements" is not good enough.

MCIIm acknowledges that some customer disruption may occur, from a technical/physical standpoint, when the customer first orders DSL over a voice loop, regardless of the carrier from whom the DSL is ordered or which carrier is providing voice service. This physical/technical disruption may occur when the loop and switch are separated and the splitter installed. However, MCIIm argues, in an existing line sharing arrangement, where Ameritech has already taken steps to have the splitter installed, the customer should not be subjected to more inconvenience upon deciding that his/her voice service should be transferred to MCIIm. It is MCIIm's position that that customer should not be subjected to service delays because: 1) Ameritech does not need to physically disconnect the loop and switch and remove the splitter and 2) there is no need for MCIIm and/or another CLEC to make arrangements to install a splitter and restore data service (again) to this UNE-P customer. MCIIm contends that §51.315(b) of the FCC rules prohibits the breaking apart of previously assembled combinations and that the Supreme Court

found that the purpose of §51.315(b) is to prevent ILECs from "disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on the new entrants." MCIIm claims that Ameritech uses "back end systems" and "inventory issues" as excuses for line splitting order rejections.

Next, MCIIm argues that when a customer that is provided voice service by MCIIm via UNE-P decides to add data service over the same loop, the customer may experience the same service disruption during the splitter installation process that would have occurred in a line sharing situation. However, service disruptions should not be permitted under these circumstances simply because Ameritech's ordering and billing processes do not permit the smooth addition of data service to the loop after the voice service has been won by another carrier.

The second topic addressed by MCIIm's exception is the Panel's determination that Ameritech should not be required to provide the splitter in either a line sharing or line splitting situation. First, MCIIm argues that the Panel relied on a narrow reading of the FCC's pronouncements as to splitter ownership, and swept all line-sharing-to-line-splitting scenarios into the same pile of "Ameritech-provided splitters," which completely overlooks the line sharing situation where the CLEC owns the splitter. Specifically, MCIIm points to this finding in the Panel Report:

The Panel finds that MCIIm's claim that a splitter is part of the unbundled loop definition is inconsistent with the FCC's definition of the unbundled loop element, and unreasonable in light of finding that Ameritech is not obligated to provide splitter[s] under either 'line sharing' or 'line splitting' arrangements as we discussed earlier (Report, 81).

Second, MCIIm disagrees with the Panel's finding that the UNE-P with a splitter in place (apparently whether or not provided by Ameritech or by the data CLEC) could not possibly be considered to be an existing combination of network elements platform pursuant to Case Nos. 96-922 and 00-1188. In support of its position, MCIIm argues that the United States Supreme Court issued its decision in *Verizon Communications, Inc. et. al. v. Federal Communications Commission, et. al.*, 535 U.S. (2002) (*Verizon*) (May 13, 2002) which reinstated the FCC's rules on new combinations [FCC Rule 51.315(c)-(f)], has now overturned the findings of this Commission in Case Nos. 96-922 and 00-1188 with regard to "existing combinations." MCIIm also argues that *Verizon* decision has altered the Commission's prior holdings as to line splitting over UNE-P. Thus, in MCIIm opinion, because CLECs may now request that Ameritech provide combinations of network elements, there can be no argument that UNE-P with a splitter can be migrated to a voice CLEC in the same manner that a customer without data on the line can be migrated to the winning CLEC via UNE-P. Accordingly, it is MCIIm's position that its proposed language in Line Sharing Appendix §§2.4, 2.7, 4.1, 4.1.1, 4.1.2, and 4.3 should be adopted, and Ameritech's proposed language in §§1.3, 2.4, 5.2, and 5.6 should be rejected. As to its proposed Section 6 of the Line Sharing Appendix, MCIIm argues that the Panel should not have rejected it out of hand because these are the very issues that will be addressed in the

industry collaborative that the Panel recommended. MCIIm suggests that the parties should be directed to develop placeholder language for the purposes of this agreement until such time as the ordering and provisioning processes are determined.

(c) Reply

It is Ameritech's position that the D.C. Circuit's decision in *USTA* held that the "impair" test previously developed by the FCC is unlawful and also vacated the *Line Sharing Order* – in which the FCC classified the HFPL as a UNE – in its entirety. Ameritech further opines that the FCC's now-invalid impair test formed the basis for the FCC's development of its entire national list of UNEs, as set forth in the *UNE Remand Order* and *Line Sharing Order*, including the HFPL. Therefore, Ameritech objects to MCIIm's proposals that the Commission should require Ameritech to (1) provide the "line splitting service" that MCIIm has advocated throughout this proceeding and (2) provide the HFPL to MCIIm as an UNE. Ameritech argues that such proposals have no legal basis and that the Commission should reject those proposals.

According to Ameritech, with respect to Issues 86, 90-93, and 95-96, the limited question for the Commission to consider is whether the Commission should adopt the Panel's rejection of MCIIm's "line splitting service" proposal. Ameritech argues that MCIIm's Exceptions and Supplemental Exceptions add nothing new to its previously flawed assertions regarding its "line splitting service" proposal, which the Panel correctly rejected. Ameritech adds that the correctness of the Panel's decision was confirmed by *USTA*. Therefore, says Ameritech, the Commission should reject MCIIm's proposed contract language on Issues 86, 90-93, and 95-96. In *USTA*, Ameritech argues, the D.C. Circuit found unlawful the FCC's formulation of the "impair test" established in the *UNE Remand Order*, which forms the entire basis of MCIIm's proposed requirements relating to line-splitting. Ameritech further states that while the Panel correctly concluded that MCIIm had grossly mischaracterized and misapplied the FCC's rules relating to line splitting as they existed before *USTA*, it is even more clear that, in the wake of *USTA*, MCIIm's "line splitting service" proposal has no legal basis whatsoever.

Ameritech summarizes MCIIm's "line splitting service" proposal as requesting that the Commission order: (1) the unbundling of the splitter, (2) the unbundling of the low frequency portion of the loop, and (3) in a situation where Ameritech is line sharing with a data CLEC, and the end-user elects to switch voice service from Ameritech to MCIIm, Ameritech must migrate MCIIm's voice service to the loop over which Ameritech previously provided the voice service, regardless of whether the splitter used in the line sharing arrangement was provided by Ameritech or the data CLEC, and regardless of whether the data CLEC agreed to line split with MCIIm.

Ameritech considers MCIIm's argument that the Commission should order Ameritech to unbundle the HFPL to be flawed, because MCIIm suggests that the Commission can order the unbundling of the HFPL by applying to that element the FCC's now invalid "impair" test established in the *UNE Remand Order* and FCC Rule 317 – the very test that the D.C. Circuit held in *USTA* was unreasonable and unlawfully broad. Ameritech also objects to MCIIm's argument that the Commission is free to create its own

state-specific "impairment" test interpreting *USTA*, apply that state-specific test to the HFPL, order the unbundling of the HFPL, and require Ameritech to provide MCI's proposed "line splitting service" – all without knowing what the FCC will decide in the Triennial Review UNE rulemaking. According to Ameritech, the Commission cannot lawfully order Ameritech to unbundle the HFPL at this time, since there currently is no basis for ordering Ameritech to provide the HFPL as a UNE. Ameritech further argues that the D.C. Circuit pointed out that the FCC ignored the robust intermodal competition in the broadband market in applying the impairment requirement of the 1996 Act to broadband facilities. Ameritech argues that as a matter of law, the HFPL is no longer classified as a UNE, and that the FCC's "impair" test, set out in FCC Rule 317, does not provide a sufficient basis for requiring incumbent LECs to unbundle network elements. Accordingly, Ameritech concludes: 1) the FCC has no current regulations for a state commission to apply when determining (under its limited power to do so) whether a specific network element is subject to the 1996 Act's unbundling obligations, and 2) there is no lawful basis for the Commission to adopt MCI's proposal. Ameritech states that it intends to offer to MCI, for inclusion in the parties' anticipated interconnection agreement, revised HFPL-related contract provisions consistent with SBC's commitment to voluntarily provide the HFPL until at least February 15, 2003, as more fully set forth in a June 18, 2002 letter from SBC President William Daley to FCC Chairman Powell.

Ameritech believes that MCI misses the point when MCI claims that the FCC's requirement in the *Line Sharing Reconsideration Order* (i.e. line splitting) does not derive from the *Line Sharing Order*, and therefore that requirement is unaffected by the D.C. Circuit's decision vacating the *Line Sharing Order*. It is Ameritech's position that the *Line Sharing Reconsideration Order* was a "reconsideration" and "clarification" of the *Line Sharing Order*, it cannot survive without the now-vacated *Line Sharing Order* and, as a result, the *Line Sharing Reconsideration Order* was implicitly vacated when the D.C. Circuit vacated the *Line Sharing Order*. Ameritech adds that even if this were not so, the *Line Sharing Reconsideration Order*, like the *Line Sharing Order*, necessarily rested on the FCC's now-invalid "impair" test. Ameritech then argues that even if the *Line Sharing Reconsideration Order* was not implicitly vacated by *USTA*, there is still no support for MCI's so-called "line splitting service" proposal because, as the Panel correctly found, MCI's proposal is inconsistent with the *Line Sharing Order*, the *Line Sharing Reconsideration Order*, and federal law as it existed prior to *USTA*.

Ameritech further argues that even if *USTA* did not exist, MCI's proposal would require Ameritech to provide at least two types of "combinations" that would not have accorded with federal law as it existed prior to *USTA*. Ameritech explains that MCI's proposal would require Ameritech to: (1) provide a "combination" consisting of pre-*USTA* UNEs (the unbundled loop and switch) and ILEC-owned equipment (the splitter) that is not a UNE; and (2) provide a "combination" consisting of pre-*USTA* UNEs (the unbundled loop and switch) and equipment (the splitter) owned by a CLEC other than MCI (which is the "requesting carrier"). Ameritech first points out that both the FCC (*Line Sharing Reconsideration Order*, ¶19; *Texas 271 Order*, ¶¶327-328; *Line Sharing Order*, ¶¶76, 146) and this Commission (Ameritech/AT&T Arbitration Award in 00-1188 at page 23) have held pre-*USTA* that the splitter is not a UNE and ILECs have no obligation to provide splitters to CLECs. Ameritech contends that while it has processes in place whereby it will migrate

(without any service disruption) a line sharing arrangement (where the data CLEC provides the splitter) into a line splitting arrangement so long as the data CLEC agrees to "line split" with MCI, this is not what MCI proposes. Rather, Ameritech goes on, MCI proposes that Ameritech be required to provide this combination of pre-USTA UNEs and equipment owned by a CLEC other than MCI (the "requesting carrier"), even though the data CLEC has not agreed to permit MCI to use its equipment. Ameritech also criticizes MCI for its claim that the Panel "overlooks the line sharing situation where the CLEC owns the splitter" and fails to consider whether a data CLEC's splitter can be considered part of an existing combination of network elements. Ameritech argues that since the splitter is not a UNE when Ameritech owns it, the splitter is certainly not a UNE when a CLEC owns it, because CLECs are not required to unbundle their networks.

Ameritech also argues that MCI incorrectly claims that the Supreme Court's decision in *Verizon*, which upheld the FCC's rules on UNE combinations, invalidates the Panel's recommendation and Ameritech's position on this Issue. Ameritech argues that MCI incorrectly assumes that the 8th Circuit's ruling on combinations was the only basis for the Panel's conclusion that MCI's "line splitting service" proposal violates federal law. Ameritech points out that the Panel's conclusion that the splitter "cannot be a part of an existing unbundled network combination such as the UNE-P" is not affected by the U. S. Supreme Court's *Verizon* decision. According to Ameritech, the *Verizon* decision and FCC Rule 315 require ILECs, where technically feasible, to combine unbundled network elements with other unbundled network elements, and to combine unbundled network elements with elements possessed by the requesting carrier, when the requesting carrier is unable to combine the elements itself. Since, according to Ameritech, concludes that because the FCC's entire national list of UNEs has no lawful basis as a result of USTA, and until the FCC establishes new unbundling rules that comport with USTA, there is no lawful basis for determining what UNEs - and hence what UNE combinations - incumbent LECs such as Ameritech can be required to provide.

Next, Ameritech objects to MCI's claim that Ameritech's procedures for permitting line splitting are cumbersome. Ameritech argues that even assuming that the FCC's *Line Sharing Reconsideration Order* is not affected by USTA, Ameritech's procedures for permitting line splitting are consistent with the FCC's *Line Sharing Reconsideration Order*. Ameritech contends that the Panel correctly found that the *Line Sharing Reconsideration Order* required ILECs to "permit competing carriers to engage" in line splitting only where the CLEC (or the CLEC and its partner CLEC) purchases an entire unbundled loop and provides and installs its own splitter. Ameritech believes that it complies with this requirement. Ameritech states that MCI asserts that there are two "line splitting" scenarios, one under which MCI provides voice service via the UNE-P and the end-user wants to add data service. Ameritech argues that MCI does not identify in its Exceptions any particular problem with Ameritech's practices related to this type of conversion. The second scenario identified by MCI, according to Ameritech, is where a line sharing arrangement needs to be converted to a line splitting arrangement (with MCI providing voice service and a data CLEC providing data service), because MCI has won the voice customer from Ameritech. Ameritech argues that MCI ignores the law and misstates the facts when it claims that Ameritech does not need to physically disconnect the loop and switch and remove the splitter. Ameritech explains that when a

line sharing arrangement (using a data CLEC's splitter) is converted to a line splitting arrangement, Ameritech does not disconnect the loop and switch and remove the splitter, so long as the same data CLEC's splitter is being utilized and the data CLEC has agreed to permit MCI to use its splitter and Digital Subscriber Line Access Multiplexer (DSLAM) equipment. Ameritech argues that where the data CLEC has not agreed to engage in line splitting with MCI, the data CLEC cannot be forced to line split with a voice CLEC, nor can it be required to permit a voice CLEC to use its equipment. Ameritech argues that even under the law as it existed pre-*USTA*, line splitting arrangements are voluntary arrangements between two CLECs. As to situations where Ameritech provides the splitter in the line sharing arrangement and MCI seeks to have that arrangement converted into a line splitting arrangement, Ameritech argues that it cannot be required to leave its own splitter in the arrangement, as the Panel correctly concluded. Ameritech points that the Commission has previously concluded, in Ameritech/AT&T Arbitration, that Ameritech had no obligation, pre-*USTA*, to provide its splitters to CLECs under any circumstance, which should be the case post-*USTA*.

Ameritech disagrees with MCI's argument that when Ameritech removes a splitter (whether it is an Ameritech-owned splitter or a data CLEC's splitter), Ameritech essentially breaks apart a previously assembled combination in violation of FCC Rule 315(b). Ameritech argues that: 1) as a result of *USTA*, there currently are no lawful UNE combinations to which FCC Rule 315 would apply, and 2) FCC Rule 315 does not require ILECs to provide combinations that include UNEs and ILEC-owned equipment that is not a UNE (such as the splitter), nor does it require ILECs to provide combinations that include UNEs and equipment owned by a CLEC other than the requesting CLEC.

As to MCI's assertions regarding Ameritech's process for migrating line sharing arrangements into line splitting arrangements, Ameritech argues that this was not an issue in this arbitration and consequently, the Commission does not have authority to rule on that non-issue here. Ameritech also argues that its Three-LSR Process for migrating line sharing arrangements into line splitting arrangements is consistent with federal law and temporary.

Ameritech also argues that MCI did not provide any legal basis for the Commission to reject the Panel's recommendation. Ameritech observes that MCI points to a decision by the Michigan Public Service Commission (MPSC) as support for MCI's "line splitting service" proposal, which in Ameritech's opinion, is not binding authority in Ohio. Ameritech adds that the MPSC did not adopt a "line splitting service" proposal such as the one advocated by MCI here. According to Ameritech, MCI continues to ignore the fact that this Commission already has rejected a "line splitting service" proposal in the Ameritech/AT&T Arbitration this is indistinguishable from MCI's proposal. In Ameritech's opinion, MCI provides no basis for the Commission to deviate from that prior determination.

Ameritech argues that MCI incorrectly claims that the D.C. Circuit's Opinion in *USTA* cannot become effective until the D.C. Circuit issues its mandate, which will not occur until at least July 8, 2002. In Ameritech's opinion, such claim contradicts the well-established principle that a decision constitutes binding precedent as of the moment it is

issued. Ameritech further argues that while the FCC's *Line Sharing Order* and its rule establishing the HFPL UNE technically remain in effect until the D.C. Circuit's mandate actually issues, this does not mean that the D.C. Circuit's decision is not yet "effective" or that the Commission can ignore that decision. Therefore, it is Ameritech's opinion that the overwhelming weight of authority establishes that the D.C. Circuit's opinion in *USTA* constitutes binding precedent from the day it was issued, and it will remain governing law unless or until the Supreme Court directs otherwise.

Contrary to MCI's argument that the Telecommunications Act of 1996 and Ohio law give the Commission independent authority to require the unbundling of the HFPL, Ameritech argues that the federal law preempts any state action to unbundle the HFPL at this time. In support of its argument, Ameritech asserts that the D.C. Circuit's decision in *USTA* means that the FCC currently has no lawful "impair" test for the Commission to apply in order to determine whether a particular network element should be unbundled. According to Ameritech, Section 251(d)(1) of the 1996 Act and federal preemption rules do not permit state commissions to create their own state-specific "impair" tests, and order the unbundling of network elements (such as the HFPL) based on those tests. Ameritech adds that, contrary to MCI's contention, the savings clauses in Sections 251(d)(3) and 261(b) of the 1996 Act do not grant state commissions "power to act without regard to whatever the federal 'impair' standard is or may become after the Triennial Review process."

Ameritech disagrees with MCI's claim that *USTA* did not vacate the *UNE Remand Order*, and that Rule 317 (the "impair" test enunciated by the FCC in the *UNE Remand Order*) remains good law that the Commission can apply to unbundle the HFPL. In Ameritech's opinion that "impair" test has been held to violate the 1996 Act. Ameritech further argues that if the FCC is prohibited from unbundling the HFPL based on its invalid "impair" test enunciated in Rule 317, a state Commission is similarly prohibited.

Ameritech believes that as a matter of sound public policy and administrative efficiency, the Commission should not order Ameritech to provide the HFPL to MCI as a UNE. In support of its position, Ameritech first argues that even if the Commission were to conclude that it has independent authority to implement and apply to the HFPL the impairment requirement of Section 251(d)(2), there is no evidentiary basis for determining whether the HFPL satisfies the impairment requirement of Section 251(d)(2). Ameritech argues that up until the present time, the Panel's investigation and the parties' positions (and, hence, the record) in this proceeding were based entirely on the FCC's now-invalid "impair" test as promulgated in the *UNE Remand Order*. Ameritech further argues that the only "impairment" discussion that MCI arguably included in its Briefs and testimony relates to the Project Pronto DSL architecture – not the HFPL which rested on the FCC's flawed "impair" test promulgated in the *UNE Remand Order*, and even these "impairment" assertions relating to Pronto DSL unbundling never considered intermodal competition. Second, according to Ameritech, the public policy considerations favor not unbundling the HFPL. In support of its position, Ameritech argues that there would be no sound basis for the Commission to order the unbundling of the HFPL at this time and it would be a waste of resources because the Commission would no doubt have to revisit and revise any decision on that issue after the FCC establishes a new impair test to implement the

impairment requirement of Section 251(d)(2). Third, according to Ameritech, the nondiscrimination provisions of Section 251(c)(3) of the 1996 Act do not obligate Ameritech to provide the HFPL as a UNE to CLECs. Ameritech also addresses MCI's claims that Ameritech must be forced to keep providing the HFPL as a UNE, even after the vacatur of the *Line Sharing Order*, because otherwise Ameritech will discriminate in favor of its affiliated data CLEC (AADS). In response, Ameritech argues that it treats and will treat AADS the same as any other CLEC. Ameritech argues that it has committed to continue providing the HFPL to CLECs on a voluntary basis until at least February 15, 2003, pursuant to the terms set forth in a June 18, 2002 letter from William Daley to FCC Chairman Powell. Consistent with that voluntary commitment, Ameritech plans to offer MCI revised HFPL-related contract language for inclusion in the parties' anticipated interconnection agreement. Accordingly, says Ameritech, MCI's "what if" speculation provides no support for its HFPL unbundling proposal.

(d) Arbitration Award

The Commission will discuss the issues subject to MCI's exceptions in light of the record, the *USTA* decision, and the *Verizon* decision issued subsequent to the Panel Report. We would also note that after the filing of Exceptions and Reply Exceptions, on July 8, 2002, the FCC and other entities filed with the D.C. Circuit Court for rehearing or rehearing en banc of the May 24, 2002, decision (*USTA* decision). On September 4, 2002, the D.C. Circuit Court denied the petitions for rehearing or rehearing en banc and granted WorldCom's request for a partial stay of the mandate regarding the *Line Sharing Order* to January 2, 2003.

At the outset we observe that Ameritech has already agreed to offer to MCI, for inclusion in the parties' anticipated interconnection agreement, revised HFPL-related contract provisions consistent with SBC's commitment to voluntarily provide the HFPL until at least February 15, 2003, pursuant to June 18, 2002 letter from SBC President William Daley to FCC Chairman Powell. We find that in light of Ameritech's commitment to make line sharing available to MCI and the D.C. Circuit Court stay of the *Line Sharing Order* till January 2, 2003, the parties should adopt the agreed upon line sharing language subject to the Commission decisions discussed in this Award. The agreed upon line sharing language and the provisions we adopt in this award are interim provisions in the contract until at least February 15, 2003, or as modified by any further decision on line sharing by the Commission on or before February 15, 2003. If the FCC issues a decision in the line sharing remand proceeding prior to February 15, 2003 and retains an ILEC's obligation under federal law to provide line sharing in some form (either an enhanced or diminished obligation), Ameritech shall, within 15 days of the effective date of such FCC decision, file a proposed plan in this docket for complying with the new line sharing obligation under federal law and address how it will avoid any interruption in service for existing line sharing arrangements beyond February 15, 2003. If the FCC issues a decision in the line sharing remand proceeding prior to February 15, 2003 and eliminates an ILEC's obligation to provide line sharing under federal law, Ameritech will simply fulfill its commitment through February 15, 2003. If it appears that the FCC will not issue a decision in the line sharing remand proceeding prior to February 15, 2003, then the parties should attempt to informally resolve the issue and may request a further Commission

ruling in the event no agreement is reached. By adopting Ameritech's commitment as an interim solution, the Commission is not at this point of time reaching any decision regarding Ameritech's legal obligation to offer line sharing, including addressing arguments made by MCIIm regarding Ameritech's obligation under state law to offer line sharing. By the same token, our adoption of Ameritech's commitment as an interim solution has no bearing on the issue in Case No. 00-942-TP-COI of whether Ameritech's voluntary offering satisfies Ameritech's 271 checklist obligation. The Commission reserves its right to revisit these issues in the future either on its own motion or upon change in federal law.

Although Ameritech did not include in its commitment to offer line sharing any commitment to providing line splitting, we find that Ameritech should also provide line splitting according to arbitration decisions in this proceeding on interim basis, subject to all time frames and conditions outlined above in the line sharing discussion.

As to MCIIm's exception to the Panel's recommendation that Ameritech should not be required to provide splitters in either line sharing or line splitting arrangements, we find that MCIIm did not offer any new argument or cite a violation of any of the FCC's or this Commission's orders and rules. In support of its exception, MCIIm argued that the Panel relied on a narrow reading of the FCC's pronouncements as to splitter ownership, and swept all line-sharing-to-line-splitting scenarios into the same pile of "Ameritech-provided splitters," which completely overlooks the line sharing situation where the CLEC owns the splitter. We find that the Panel correctly noted that even pre *USTA* decision, the FCC has never required ILECs to own and provide splitters to CLECs. Rather, the FCC gave ILECs the option to maintain control over the splitter, but did not require ILECs to do so. As to the line sharing situation where the CLEC owns the splitter, we find it to be irrelevant to the Panel's recommendation since such a splitter is not an "Ameritech-provided splitter" and no legal requirements exists for a CLEC to provide its splitter for other CLECs' use. We also agree with Ameritech that the data CLEC cannot be forced to line split with a voice CLEC, nor can it be required to permit a voice CLEC to use its equipment.

Next, we address MCIIm's exception to the Panel's recommendation that the UNE-P with a splitter in place could not possibly be considered to be an existing combination of network elements platform pursuant to 96-922-TP and 00-1188. First, we disagree with MCIIm's argument that the *Verizon* decision has now overturned the findings of this Commission in the above cases with regard to "existing combinations" and has altered the Commission's prior holdings as to line splitting over UNE-P, because CLECs may now request that Ameritech provide combinations of network elements, like UNE-P with a splitter. We find that nothing in the *Verizon* decision (which reinstated Sections 51.315(c)-(f) of the FCC rules) affects our decision regarding the definition of the existing UNE-P combination that we established in 96-922 and 00-1188 pursuant to §51.315(a) and (b) of the FCC rules. We also find that in developing its recommendation, the Panel correctly rejected MCIIm's claim that a splitter is part of the unbundled loop definition as being inconsistent with the FCC's definition of unbundled loop in §51.319(a)(1) and, accordingly, cannot be a part of an existing combination. Therefore, we adopt the Panel's

recommendation that Ameritech should not be required to provide splitters in either line sharing or line splitting arrangements.

Next, we address MCI's exceptions to the Panel's recommendation to reject MCI's proposed OSS language for ordering and provisioning the migration of line sharing arrangement to line splitting arrangement. We note that Ameritech states that it has processes in place whereby it will migrate (without any service disruption) a line sharing arrangement (where the data CLEC provides the splitter) into a line splitting arrangement so long as the data CLEC agrees to "line split" with MCI. We find that Ameritech's established process to migrate (without any service disruption) a line sharing arrangement (where the data CLEC provides the splitter) into a line splitting arrangement when the data CLEC agrees to "line split" with MCI to be reasonable and consistent with our decisions and conclusions discussed above. Therefore, we adopt the Panel's recommendation that any ordering and provisioning issues associated with line splitting, to the extent not addressed by Ameritech's process described above, should be addressed in Ohio OSS collaborative and the resolution be adopted in this agreement. Accordingly, we reject MCI's proposed OSS language for HFPL and line splitting.

Based on the above decisions, we adopt the Panel's recommendations for Issues 86 and 90-96 in its entirety, subject to modifications reflecting the line sharing commitment. The parties are directed to adopt such recommendations in their interconnection agreement.

24. Issue 89:

Can MCI integrate a splitter on a DLC line card in Ameritech's remote terminal?

25. Issue 101:

Should the Commission adopt MCI's proposed language requiring Ameritech to provide line splitting over fiber-fed DLC configuration?

26. Issue 207:

What subloop segments should Ameritech be required to provide access to?

27. Issue 225:

Should the definition of DSL loop include fiber-fed configurations?

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to)	
consider Ameritech Michigan's compliance with)	
the competitive checklist in Section 271 of the)	Case No. U-12320
federal Telecommunications Act of 1996.)	
_____)	

At the March 29, 2002 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
 Hon. David A Svanda, Commissioner
 Hon. Robert B. Nelson, Commissioner

ORDER DENYING REHEARING

On December 20, 2001, the Commission issued an order in Case No. U-12320 (the December 20 order), addressing certain issues related to Ameritech Michigan's compliance with four items on the competitive checklist in Section 271 of the federal Telecommunications Act of 1996 (the federal Act), 47 USC 271. The Commission found that it would likely find Ameritech Michigan not in compliance on those issues, without some changes in its procedures or positions.

On January 22, 2002, Ameritech Michigan filed a request for clarification and petition for rehearing challenging two portions of the December 20 order.

On February 12, 2002, AT&T Communications of Michigan, Inc., (AT&T) and MCImetro Access Transmission Services, Inc., Brooks Fiber Communications of Michigan, Inc., and MCI WorldCom Communications, Inc. (collectively, MCI) filed responses.

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACRS, R460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

Line Sharing to Line Splitting

Ameritech Michigan argues that the Commission's reference in the December 20 order to a UNE-P combination remaining a UNE-P, even when data service is added to the high frequency portion of the loop (HFPL), is not technically feasible. It states that the UNE-P is a discrete wholesale product that consists of an unbundled loop and unbundled local switch port that are cross-connected together in Ameritech Michigan's network. It argues that because the new line splitting configuration involves a splitter owned by a competitive local exchange carrier (CLEC) and digital subscriber line access multiplexer (DSLAM) equipment that is located in the CLEC's collocation space, it is no longer cross-connected in Ameritech Michigan's network. Ameritech Michigan insists that it "must disconnect the existing UNE-P to install the connections for each separate UNE (loop and port) to the collocation to reach the CLEC's collocated splitter." Ameritech Michigan's petition p. 5.

Ameritech Michigan further requests clarification of the Commission's holdings concerning the relative rights of the voice CLEC and the data CLEC. Ameritech Michigan states that it agrees that the data CLEC does not have veto power over the customer's choice of

voice providers. However, it states, the voice CLEC should not be permitted veto power over the customer's choice of data providers. It states that its current practice does not prohibit a CLEC from winning the voice service from Ameritech Michigan, despite any line sharing with a data CLEC. However, Ameritech Michigan argues that the data CLEC has an interest in the line it currently uses and should be given the opportunity to choose whether to agree to enter into a line splitting agreement with the voice CLEC. In any event, Ameritech Michigan states, the data CLEC is entitled to notice of the change in voice providers. Ameritech Michigan argues that because its current practice permits the CLEC to win the voice service and migrate from line sharing to either a line splitting or UNE-P configuration, it is in compliance with the requirements of the federal Act.

To the extent that the Commission does not agree with Ameritech Michigan's interpretation of the December 20 order, or would determine that the data CLEC is not entitled to notice and an opportunity to provide data service on a stand-alone unbundled loop when the voice provider changes, Ameritech Michigan argues, the order is in error. Ameritech Michigan argues that the order interpreted in any other way violates Federal Communications Commission (FCC) precedent and would result in unintended consequences.

AT&T responds that Ameritech Michigan's first request for clarification is merely an attempt to relitigate the issue of whether the incumbent local exchange carrier (ILEC) is required to permit line splitting over the UNE-P. AT&T points out that the issue has been decided more than once and need not be revisited. It urges the Commission to see through Ameritech Michigan's attempt to gain a Commission finding that once line splitting has occurred, the product technically is no longer Ameritech Michigan's wholesale offering. AT&T argues that granting Ameritech Michigan's request would invalidate the Commission's

prior decisions on this issue rather than provide the clarification that Ameritech Michigan says it seeks.

AT&T argues that Ameritech Michigan has provided no factual basis for its claim that the requirements of the December 20 order are technically infeasible. The cause for that lack, AT&T argues, is that Ameritech Michigan takes an "absurd and insupportable position." AT&T's response, p. 6. It also argues that it is contrary to the findings of the FCC and the Commission that an ILEC must provide CLECs nondiscriminatory access to the UNE-P and that line splitting over the UNE-P is technically feasible.

AT&T continues that Ameritech Michigan's position is "inherently discriminatory" in that there appears to be no difficulty accepting that it is feasible to combine Ameritech Michigan's own voice services with the data services provided by an affiliate or another data CLEC and calling it line sharing. AT&T's response, p. 7. AT&T argues that there is no difference between that arrangement of network facilities, i.e. for line sharing, and the arrangement of network facilities used by a voice service CLEC and a data CLEC, i.e. UNE-P with line splitting. There is no dispute, AT&T argues, that the same facilities will be used to provide both such arrangements.

AT&T argues that Ameritech Michigan's position, which requires the CLEC to purchase a new loop whenever there is line sharing prior to the voice service migration, results in a service disconnection and potentially an extended period of no dial tone for the customer, increases the probability of facilities loss (such as a working telephone number), increases the complexity of the ordering process, and unnecessarily increases the number of nonrecurring charges. In AT&T's view, granting Ameritech Michigan's request would mean a "full scale retreat from the Commission's prior orders and the FCC's position." AT&T's response, p. 11.

AT&T further warns that Ameritech Michigan's argument that the data CLEC is entitled to notice of a change in voice providers creates a conflict where none exists in an attempt to entice the Commission to grant approval of Ameritech Michigan's current procedures for migrating voice service in the presence of line sharing. In AT&T's view, the Commission need not go further than reaffirming its December 20 refusal to approve Ameritech Michigan's process for line sharing and line splitting.

MCI argues that there is no present need to clarify the December 20 order as requested by Ameritech Michigan. MCI states that the Commission clearly delineated Ameritech Michigan's duties with regard to the migration of voice service in the presence of line sharing/line splitting. It argues that Ameritech Michigan merely disagrees with the Commission's findings and conclusions rather than truly seeking a clarification of the December 20 order.

MCI further argues that the Commission should not approve Ameritech Michigan's method of migrating voice service when line sharing is involved. MCI asserts that it has proposed a method of line splitting that would create no downtime or disruption of voice or data service. The issues involved in different methods of providing this service, MCI states, are now being discussed in collaboratives and should not be prejudged by the Commission in an order on rehearing.

MCI charges that Ameritech Michigan's claim to a policy that allows voice migration to UNE-P is either "entirely disingenuous" or any such policy has not been implemented with any efficacy. MCI states that Ameritech Michigan routinely rejects UNE-P orders on line-sharing accounts for the stated reason that the HFPL is being used by another CLEC.

MCI further argues that Ameritech Michigan has taken out of context language cited from ¶ 72 the FCC's Line Sharing Order¹ to the effect that if a customer terminates its ILEC provided service, the data CLEC must purchase the full stand-alone loop network element if it wishes to continue providing data service. Taken in context, MCI argues, the cited portion does not relate to migration of voice service from the ILEC to a CLEC. Rather, MCI argues, it refers to instances in which the customer completely cancels its voice service on the line where data is also provided. It states that the FCC's Line Sharing Reconsideration Order² provides that voice migration should be accomplished without need for central office wiring changes, which should avoid disruption of voice or data service.

The Commission is not persuaded that it should grant Ameritech Michigan's request for clarification or rehearing. In the Commission's view, Ameritech Michigan's petition merely reargues the points already decided in the December 20 order. The Commission notes that nowhere in the December 20 order does it state that the data CLEC may not receive notice concerning the migration of voice service to a CLEC. Nor has the Commission dictated that the data CLEC must partner with a voice CLEC or continue to provide service if the voice provider changes. Rather, the order simply holds that migration of voice service from the incumbent to a CLEC should be feasible over a UNE-P, even where that migration would mean line sharing migrating to line splitting. Moreover, the Commission agrees with AT&T

¹ FCC Order 99-355, Third Report and Order, CC Docket No. 98-147 and Fourth Report and Order, Docket No. 96-98, In re Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of Local Competition Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 20912 (1999).

² FCC Order 01-26, Order on Reconsideration, In the matter of Deployment of Wireline Services Offering Advanced Telecommunication Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98, rel'd January 19, 2001.

that Ameritech Michigan's request circumvents the Commission's direction that Ameritech Michigan collaborate with CLECs on proposed ordering and pricing processes. The Commission takes this opportunity to reiterate its finding in the December 20 order that ordering and provisioning scenarios be discussed by interested parties and the specifics of unresolved issues be brought to the Commission for resolution. In light of that finding and an immediate need to resolve the specifics of the disputes, the parties are hereby required to file within 45 days of the date of this order a report on discussions occurring to date to resolve the issues in this proceeding. The parties shall work with the Commission Staff to frame specific scenarios. Commission orders will follow to further narrow and specify the requirements in this area.

At this juncture, the Commission affirms its determination that "Ameritech Michigan's position with regard to line splitting may not meet the requirements of the checklist."

December 20 order, p. 9.

Pricing of Access to Directory Assistance Listings (DAL) Database

Ameritech Michigan requests rehearing on the Commission's determinations with regard to the pricing of access to DAL. It argues that requiring Ameritech Michigan to provide nondiscriminatory access to DAL at cost-based rates is directly contrary to federal law. It argues that its position is based on a number of FCC decisions that "clearly distinguish DAL from the network elements known as OS/DA (operator services and directory assistance)." Ameritech Michigan's petition, p. 14. Ameritech Michigan asserts that DAL is not a UNE and is not subject to the requirement that the incumbent provide it at a cost-based rate, as provided in 47 USC 251(c)(3), but rather, must be provided by all LECs pursuant to 47 USC 251(b)(3), and may be priced at market-based rates

AT&T responds that Ameritech Michigan's request that the Commission "reconsider" its determination that DAL should be provided at cost-based prices fails to meet the standard for granting rehearing. AT&T asserts that Ameritech Michigan provides no new evidence, raises no new argument, and discusses no claim of unintended consequences as required under Rule 403. In AT&T's view, the Commission should reject Ameritech Michigan's petition on this issue as merely another attempt by Ameritech Michigan to argue its position or express disagreement with the Commission's decision.

MCI urges the Commission to reject Ameritech Michigan's argument that because DAL is not an unbundled element as defined in 47 USC 251(c)(3), it may be priced at market, rather than cost-based, rates. MCI argues that, pursuant to 47 USC 251(b)(3), DAL must be provided to CLECs on a nondiscriminatory basis. MCI states that the nondiscriminatory requirement means that the ILEC must provide DAL to CLECs on the same basis that it provides DAL to itself. That, MCI argues, requires cost-based pricing. Thus, MCI argues, a determination that DAL is not a UNE does not require permitting market pricing of the service.

Moreover, MCI argues, Ameritech Michigan's citations to FCC decisions do not support its position. For example, Ameritech Michigan cites ¶ 473 of the UNE Remand Order³, which states:

In circumstances where a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. Such a finding in the case of switching for large volume customers is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be counterproductive to mandate that the incumbent offers the

³ FCC Order 99-238, In re the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, rel'd November 5, 1999.

element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.

¶473 UNE Remand Order.

Because DAL has not been seen as a UNE, MCI argues, it cannot be said to be “a network element [that] is no longer unbundled.” *Id.* Unlike the switching example used by the FCC, MCI states, DAL may only be provided by the LEC serving the end user. Therefore, it asserts that DAL cannot be said to be competitive, and there is nothing counterproductive in requiring cost-based rates for DAL service.

Further, MCI argues, Ameritech Michigan erroneously takes the position that to comply with FCC requirements, it must merely provide access to its DAL on a basis that does not discriminate between CLECs, a position that it says ignores the responsibility to provide access that is nondiscriminatory as between itself and any CLEC. MCI states that Ameritech Michigan mistakenly relies on the following sentence from ¶ 35 of the FCC’s DAL Provisioning Order⁴, which says: “Thus, LECs must offer access to their DA database at rates that do not discriminate among the entities to which it provides access.” *See*, 47 C.F.R. § 51.217(a)(2)(i). MCI argues that the reference Ameritech Michigan cites does not support the ILEC’s position and ignores the footnote attached to the next sentence, which states in part.

On September 9, 1999, the Commission released the Third Report and Order in this docket, adopting reasonable and nondiscriminatory pricing rules for subscriber list information pursuant to Section 222(e). The Commission concluded that LECs should be able to recover their incremental costs plus a reasonable allocation of common costs and overheads.

DAL Provisioning Order, fn. 96.

⁴ FCC Order 01-27, Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, CC Docket No. 99-273, rel’d January 23, 2001.

That footnote, MCI argues, does not reflect the FCC's intent to require or permit market-based rates for DAL. Rather, it argues, the footnote is consistent with the Commission's finding that cost-based rates that comply with the orders in Case No. U-11831 should apply to DAL

The Commission agrees with AT&T that Ameritech Michigan's petition for rehearing does not meet the standard for granting rehearing, because it essentially restates the arguments raised prior to the December 20 order. Therefore, for the reasons expressed in the December 20 order, the Commission reaffirms its findings on this issue, and denies Ameritech Michigan's petition.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b Ameritech Michigan's request for clarification and petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that the request for clarification and petition for rehearing filed by Ameritech Michigan are denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of March 29, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462 26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 29, 2002.

Its Executive Secretary

In the matter, on the Commission's own motion, to)
consider Ameritech Michigan's compliance with)
the competitive checklist in Section 271 of the)
federal Telecommunications Act of 1996.)
_____)

Case No. U-12320

Suggested Minute:

“Adopt and issue order dated March 29, 2002 denying Ameritech Michigan's request for clarification and petition for rehearing, as set forth in the order.”

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission,	:	
On Its Own Motion	:	
	:	
Investigation concerning Illinois Bell	:	01-0662
Telephone Company's compliance with	:	
Section 271 of the Telecommunications	:	
Act of 1996.	:	

PHASE I INTERIM ORDER ON INVESTIGATION

February 6, 2003

offer DSL when they request line sharing. The Court rejected this position as “quite unreasonable” because the “unbundling is not an unqualified good.” The Court found that the Commission must “apply some limiting standard, rationally related to the goals of the Act” and “cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network”. The Court also observed that such “naked disregard of the competitive context” would allow the FCC to inflict costs on the economy under conditions “where it had no reason to think doing so would bring on a significant enhancement of competition”. USTA at 429.

⁹³⁵ The Court thus vacated and remanded the Line Sharing Order stating that a future “order unbundling the high frequency portion of the loop should not be tainted by the sort of errors” that had been identified in the UNE Remand Order. USTA at 429. It rejected the ILECs’ claim that “a portion of the spectrum of the loop cannot qualify as a ‘network element.’” USTA at 429.

⁹³⁶ On September 4, 2002, the Court denied Petitions for Rehearing and rehearing *en banc*, but stated that “[t]he vacatur of the Commission’s orders is hereby stayed until January 2, 2003”. See USTA v. FCC, Order, Nos. 00-1012 and 00-1015 (D.C. Cir. 2002).

The Record and the Law

⁹³⁷ It is against this legal background that we review, in our own way, the showings and positions with respect to line sharing/line splitting. The Commission finds it useful to examine Ameritech Illinois’ obligations and compliance therewith through a series of factual scenarios.

Scenario A

⁹³⁸ AI provides voice service but no data service is provided to the customer; the CLEC wins the customer and then orders the line to be converted to UNE-P and connections to a splitter established in order to provide data service. As the Commission found in Docket 00-0393, the loop will need to be disconnected from the switch in order to insert a splitter. It is assumed that the splitter would be owned by a CLEC, because AI has no obligation to provide splitters to CLECs in this situation.

Discussion

⁹³⁹ The standard of review requires AI to demonstrate that it has a legal obligation to provide line splitting through rates, terms and conditions in interconnection agreements. This issue of rates will be discussed below. In order to show compliance with the terms and conditions portions of its obligation, AI refers to the fact that it provides the same terms and conditions approved by the FCC in SBC’s 271 applications in Texas, Kansas, Oklahoma, Arkansas, and Missouri. In our review of the FCC’s orders in those dockets, however, it does not appear that any actual line splitting was occurring in those jurisdictions when the 271 applications were made.

940 In Illinois, both AT&T and WorldCom have expressed an interest in providing line-splitting service. WorldCom has even gone so far as to submit orders for such service. In the presence of actual demand for this service, it is the Commission's preference to examine the actual function of provisioning of the service in order to determine if the terms and conditions obligating AI to provide the service are sufficient.

941 AI makes reference to a process being implemented in order to provision the services described in Scenario A. AT&T expresses doubt that such process will work. Rather than speculate on this process the Commission will require Ameritech to submit evidence of how the process works, and evidence that it is being provided in a nondiscriminatory manner, in Phase II of this proceeding.

Migration from Line Sharing to Line Splitting

(i) Agreement of Data CLEC to line split

942 The Commission found in Docket 00-0393 that "[CLECs wanting to line split] must be responsible for all coordination with third party vendors or data services partners." Order Docket 00-0393 at 55. Implicit in this statement is an endorsement of the policy that the data CLEC must be a willing participant in this relationship. WorldCom's apparent desire to line split without the consent of the data CLEC is not the type of situation that would lead to the Commission to find AI deficient on this checklist item.

943 Turning to the matter of the rejected WorldCom orders, it appears that they were rejected because of the missing authorization information. This, however, has not been conclusively established. As such, AI should present a root cause analysis with findings for the rejection of the 778 Worldcom orders in Phase II of this docket.

944 As Ameritech well notes, this same issue has been put before the FCC on several occasions and it has found that the refusal of the incumbent's data affiliate (or any data CLEC for that matter) to participate in a line splitting arrangement to be within the data CLEC's rights.

(ii) Single Order Process

945 Staff initially raised an issue on a single-order process for line-splitting and AT&T joined in on reply argument. While Ameritech would claim that the FCC has never required a single order process, the Commission observes that the FCC has encouraged such a process. Further, the FCC has noted the development of a single order process in many of its 271 decisions where both Verizon and BellSouth developed single order processes in 2001, and early 2002, respectively.