Attachment E

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Via E-Filing and Hand Delivery

June 1,2004

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
PO Box 30221
Lansing, MI 48909-7721

Re: Case No. U-14139
Proof of Service

Dear Ms. Kunkle:

Enclosed please find the original and four copies of CompTel/ASCENT Alliance, et al.'s Motion to Withdraw, Without Prejudice, The Request for Emergency Relief and Proof of Service in the above-referenced matter. The document also is being electronically filed.

If you have any questions or comments, do not hesitate to contact me.

Sincerely,

DYKEMA GOSSETT PLLC

Daniel J. Oginsky

DJOG:smw

Enclosure

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * * *

COMPTEL/ASCENT ALLIANCE, AT&T COMMUNICATIONS, OF MICHIGAN, INC., TCG DETROIT, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., TALK AMERICA INC., CLEC ASSOCIATION OF MICHIGAN, LDMI TELECOMMUNICATIONS, INC., TC3 TELECOM, INC., TELNET WORLDWIDE, INC., QUICK COMMUNICATIONS, INC., d/b/a QUICK CONNECT USA, SUPERIOR TECHNOLOGIES, INC., d/b/a SUPERIOR SPECTRUM, INC., THE ZENK GROUP, LTD, d/b/a PLANET ACCESS, grid 4 COMMUNICATIONS, INC., and C.L.Y.K. INC. d/b/a Affinity Telecom Complainants, v.	)	Case No. U-14139
MICHIGAN BELL TELEPHONE COMPANY, d/b/a SBC Michigan, VERIZON NORTH, INC., and CONTEL OF THE SOUTH, INC. d/b/a VERIZON NORTH SYSTEMS Respondents.	)	
In the matter of a Request for Declaratory Ruling, or in the Alternative, Complaint against Michigan Bell Telephone Company d/b/a SBC Michigan Verizon North, Inc., and Contel of the South Inc. d/b/a/ Verizon North Systems for an Order Requiring Compliance With **The Terms** and Conditions Of Interconnection Agreements	)	

MOTION TO WITHDRAW, WITHOUT PREJUDICE, THE REQUEST FOR EMERGENCY RELIEF

Complainants CompTel/ASCENT Alliance ("CompTel/ASCENT"), Communications of Michigan, Inc., TCG Detroit, MCImetro Access Transmission Services, Inc., Talk America Inc., CLEC Association of Michigan, Telecommunications, Inc., TC3 Telecom, Inc., Telnet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., The Zenk Group, LTD, d/b/a Planet Access, grid 4 Communications, Inc., and C.L.Y.K. Inc., d/b/a Affinity Telecom (together referred to herein as the "Complainants") move to withdraw, without prejudice to reassert, the request for an Emergency Relief Order ("ERO"), filed May 18, 2004, against Michigan Bell Telephone Company d/b/a SBC Michigan ("SBC"), Verizon North, Inc., and Contel of the South, Inc. d/b/a Verizon North Systems (together referred to as "Verizon"). The Complainants also respectfully move for an order to be issued by the Commission requiring SBC and Verizon to formally answer the Complaint and scheduling Prehearing Conference in this case. Finally, Complainants request that the order issued by the Commission in response to this motion reference Section 203(13) and the requirement that SBC and Verizon "not discontinue service," including their provision of UNEs (including, but not limited to high capacity loops, transport and UNE-P) "during the period of [this] contested case." MCL § 484.2203(13).

In support of their motion, Complaints state as follows:

In their Complaint, the Complainants petitioned the Michigan Public Service Commission to issue findings and an order pursuant to its authority under the

Michigan Telecommunications Act ("MTA")[1] and the Administrative Procedures Act of 1969[2] declaring that SBC and Verizon must continue to abide by the terms and conditions of their existing interconnection agreements with competitive local exchange carriers ("CLECs"), their tariffs, as well as state and federal law if the United States Court of Appeals for the District of Columbia Circuit issues a mandate in the case of *United States Telecom Ass'n v. FCC*, 359 F. 3rd 554 (D.C. Cir. 2004) ("*USTA II*") (the mandate will be referred to herein as the "*USTA II Mandate*").

2. Complainants initiated this proceeding due to the uncertainty generated by the incumbent local exchange carriers ("ILECs") concerning the status of the Federal Communications Commission's ("FCC") unbundling rules and their apparent confusion, if not denial, with respect to their continuing obligations to abide by the terms of their interconnection agreements and tariffs, and the impending expiration of the stay in the *USTA II* case. Thus, in their request for emergency relief, Complainants urged the Commission to act affirmatively and immediately to restrain SBC and Verizon from engaging in self-help to unilaterally raise rates or withdraw service in contravention of the terms of their interconnection agreements and tariffs. Complainants pointed to statements made by SBC and Verizon prior to the filing of the Complaint that indicated an intent to unilaterally raise rates for the unbundled network element platform ("UNE-P") and other unbundled network elements ("UNEs") including, but not limited to, high

[1] PA 179 of 1991 as amended and reenacted by Act 295 of 2000, including but not limited to MTA §§ 203 and 204.

Act 306 of 1969.

capacity loops and dedicated transport after June 15, 2004, the date by which (unless the matter is stayed by court order) the *USTA II Mandate* will be issued.[3]

3. Under the MTA's procedures for EROs, Complainants were required to hand serve Respondents SBC and Verizon, which was duly accomplished, and SBC and Verizon were required to file a response to the request for an ERO within five (5) business days. Complainants have received and now reviewed these responses. Because both SBC and Verizon have stated expressly that they (individually) do not intend to take unilateral action in abrogation of Complainants' rights under their respective interconnection agreements and tariffs to obtain unbundled network elements, complainants – taking SBC and Verizon at their word – believe that the Commission may proceed with the underlying complaint, without the need to address the Complainants' request for emergency relief at this time.

4. SBC filed a Response acknowledging Complainants' "fear that SBC will disregard applicable provisions of its interconnection agreements and tariffs and unilaterally decide that it will not comply the terms and conditions of those agreements and tariffs." SBC Response, p. **2.** To this, SBC states: "SBC has no such intent."

5. In other similar statements contained in its Response, SBC acknowledges that there can be no disagreement that even if the mandate issues an ILEC may not act unilaterally – e.g., by withdrawing services or changing pricing. The ILEC must, SBC states,

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[3] See, *e.g.* April 20,2004 Letter from David A. Cole, SBC President – Industry Markets to H. Russell Frisby, Jr., CEO Comptel/ASCENT, attached as Exhibit A; April 21,2004 letter from Virginia Ruesterholz, President-Wholesale Markets, Verizon, to H. Russell Frisby, Jr., CEO CompTel/ASCENT, attached as Exhibit B.

follow the procedures required for its tariffs and contained in its interconnection agreements. There is no argument here as SBC agrees with this premise. This should be the end of the case. (SBC Response, p. 18 & n. 29.)

6. Moreover, SBC has conceded that the *status quo* (*i.e.*, the current terms and pricing of its effective interconnection agreements and tariffs) will continue and will only change when those agreements and tariffs are amended and modified pursuant to the Commission's orders (as in the case of the approval of an amendment to an Interconnection Agreement):

> Moreover, [SBC] has indicated that it will follow governing procedures for amendment in its effective interconnection agreements and tariffs. (SBC Response, p. 3, ¶ 2.)

7 Verizon's Response reflects a position similar to that espoused by SBC. Verizon states: "Verizon MI will not unilaterally disconnect the services CLECs use to serve their end users when the USTA II mandate is issued, and any suggestion to the contrary in a pleading or an order is unfounded." Verizon Response, p. 2 (footnote omitted).[4]

8. These statements, taken at face value, indicate that SBC and Verizon do intend to abide by the terms and conditions of their existing interconnection agreements, including the change in law provisions, and that they do not intend to terminate CLECs' access to unbundled network elements (*i.e.* "the services CLECs use to serve their end users"), including loops, transport and UNE-P, or unilaterally attempt to change rates[5]

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[4] Complainants assume that Verizon's response ("will not unilaterally disconnect") includes the commitment to not unilaterally decide that it will not make available newly ordered network elements, and that it will not unilaterally modify the prices of the services that are currently 'connected' as UNEs.

[5] In their Responses, SBC and Verizon do not go so far as to state affirmatively that they will continue to provide access to unbundled network elements (UNE-P etc.) to CLECs at TELRIC rates in the event the mandate is issued. By their statements that they will abide by the terms of their interconnection agreements and tariffs, however, we take SBC and Verizon to have conceded that until (and unless) those agreements and tariffs are duly modified, i.e., pursuant to a negotiated agreement or Commission dispute resolution, the

without first complying with the terms and conditions (including change of law) and any applicable interconnection agreement or tariff requirement. In other words, SBC and Verizon have agreed to maintain the status quo vis-a-vis their provision of UNEs while (and if) they pursue renegotiation of any terms of an interconnection agreement and/or modification of any tariff provisions. Complainants commend SBC and Verizon for their responses.

9. In light of SBC's and Verizon's statements, Complainants acknowledge that the grounds asserted by Complainants in support of their request for emergency relief appear to have been dissipated. SBC and Verizon in their responses have now disavowed this intention, and assuming that disavowal is candid and not later withdrawn or conditioned, Complainants' immediate concerns are (at least for the present) ameliorated.

10. In good faith, therefore, and in reliance upon SBC's and Verizon's good faith, Complainants withdraw their request for an immediate emergency relief order. Complainants withdraw their request without prejudice to the right to renew such a request should circumstances change and, particularly, should SBC and/or Verizon withdraw andor modify the positions(s) taken in their responses.

11 Assuredly, Complainants' ultimate relief has not become moot. Complainants do not withdraw and have not modified their view that regardless of when or whether the *USTA II* mandate issues, SBC and Verizon may not discontinue the provision of unbundled network elements to CLECs at the rates set forth in interconnection agreements or applicable tariffs. Indeed, Complainants disagree

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obligations contained therein to provide access to UNEs and UNE-P at the existing rates remain in full force and effect.

vehemently with many of the other positions found in the SBC and Verizon responses. For example, SBC has asserted that high-capacity loops and transport are no longer network elements required to be provided under Section 251. (See May 19, 2004 Letter from SBC *Gary* L Phillips to Steven A. Augusto, Kelley Drye & Warren LLP, attached hereto as Exh. A.). Complainants disagree with this conclusion, and the Commission may need to address this or other issues generically (albeit perhaps not on an emergency basis), depending upon developments in the period leading up to and after June 15th. Therefore, Complainants respectfully request that the Commission issue an order requiring the Respondents to formally answer the Complaint. The Commission should then set this case for a Prehearing Conference, at which time the parties may discuss before the appointed administrative law judge matters necessary for the prosecution of this case.

12. To prevent any party from contending that there is no requirement that the status quo be maintained while this case remains before the Commission, the aforesaid order of the Commission should reference Section 203(13) of the MTA, which provides:

> (13) If a complaint is filed under this section by a provider against another provider, the provider of service shall not discontinue service during the period of the contested case, including the alternative dispute process, if the provider receiving service had posted a surety bond, provided an irrevocable letter of credit, or provided other adequate security in an amount and on a form as determined by the commission.[6]

Respectfully, the Commission should expressly state that SBC and Verizon may not discontinue any service, including the provision of UNEs and UNE combinations (including UNE-P) now provided under interconnection agreements and tariffs at the prices now in effect, during the period of this contested case. The Commission should

[6] MCL § 484.2203(13).

further find that the Complainants are not required to post security, in that the express terms of the applicable interconnection agreements[7] and tariffs provide adequate security to SBC and Verizon.[8]

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, Complainants respectfully withdraw, without prejudice to reassert, the request for an immediate entry of an emergency relief order. Complainants respectfully request that the Commission issue an order requiring the Respondents to formally answer the Complaint. The Commission should then set this case for a Prehearing Conference, at which time the parties may discuss before the appointed administrative law judge matters necessary for the prosecution of this case.

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[7] For example, Article XXVIII, Section 28.2.2.2 of the AT&T/SBC interconnection agreement allows a party who disputes an invoice to place "all Disputed Amounts into an interest bearing escrow account with a third party escrow agent mutually agreed upon by the Parties." However, this escrow process is not if the party disputing the billing presents no risk of nonpayment. Section 28.2.2.4 allows: "The Billed Party shall not be required to place Disputed Amounts in escrow, as required by Section 28.2.2.2, above, if (i) does not have a proven history of late payments and has established a minimum of twelve (12) consecutive months good credit history with the Billing Party (prior to the date it notifies the Billing Party of its billing dispute), and (ii) the Billed Party has not filed more than three (3) previous billing disputes that were resolved in Billing Party's favor within the twelve (12) months immediately preceding the date it notifies the Billing Party of its current billing dispute." Thus, the interconnection agreement procedures obviate any need for the pasting of a security interest to maintain the status quo in this case.

[8] Neither Verizon nor SBC assert in their response that Complainants should be required to post any security to maintain the status quo.

Respectfully submitted this 1st day of June, 2004.

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By: _____
Gary L. Field (P37270)
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TC3 TELECOM, INC.

By: Norman C. Witte /gfr

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Exhibit A

Gary L. Phillips
General Attorney &
Assistant General Counsel

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Washington, D.C. 20005

202-326-8910. Phone
202-408-8731. Facsimile

May 19, 2004

Via Electronic Mail

Steven A. Augustino, Esq.
Kelley Drye & Warren
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Dear Mr. Augustino:

I am writing in response to your open letter of May 18, 2004, in which you publicly accuse SBC of engaging in "stalling tactics" designed to derail commercial negotiations over access to high-capacity loops and transport.[1] That accusation is unfounded. As SBC has stated time and again, SBC is firmly committed to the process of commercial negotiations. Indeed, as you may recall, we specifically asked you this past Monday to identify the representatives of your clients whom we should contact in order to commence negotiations (a request to which you have yet to respond).[2] Moreover, as your letter acknowledges, we have also expressed our willingness to negotiate with your clients without a non-disclosure agreement – notwithstanding our view that such an agreement would lead to more productive negotiations – if that is your clients' preference. SBC values the wholesale business your clients represent, and we have no interest in losing that business to other providers. I am confident that, if we focus our efforts on reaching mutually acceptable arrangements, we can successfully reach agreement.

Your letter incorrectly suggests that SBC's insistence that section 252 of the 1996 Act does not apply to these negotiations presents a bamer to commercial negotiations. But SBC is simply stating a fact. Section 252 is triggered only by "a request for interconnection, services, or network elements pursuant to section 251."[3] In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the D.C. Circuit vacated the Commission's rules requiring incumbent LECs to provide unbundled access to high-capacity loops and transport pursuant to section 251(c). Once the mandate for that decision issues on June 15, 2004, SBC's affiliated incumbent LECs will not be required to make those facilities available "pursuant to section 251." Accordingly, any negotiations over access to those facilities do not trigger the requirements of section 252, nor does your letter make any effort to explain your claim that section 252 does in fact apply.

Instead, your letter suggests that, regardless of the merits of SBC's view that section 252 does not apply to commercial negotiations over high-capacity loops and transport, it is an issue that can be put off for another day, because the question arises "only if the parties have reached a substantive agreement."

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[1] See Letter from Steven A. Augustino, Kelley Drye & Warren, to David A. Cole, SBC Telecommunications Inc. (May 18, 2004).

[2] See Email from Jennifer Jones, SBC, to Steven A. Augustino, Kelley Drye & Warren (May 17, 2004, 4:04 pm).

[3] 47 U.S.C. § 252(a)(1); *see id.* § 252(b)(1).

Exhibit A

In fact, if section 252 applies (which it does not), it applies with considerable force if the parties do *not* reach a substantive agreement. In particular, as you may be aware, section 252, where it applies, authorizes state commissions to arbitrate open issues that the parties are unable to resolve in negotiations.[4] What is more, at least one court of appeals has held that state commissions may arbitrate *any* issue raised in connection with a section 251/252 negotiation, provided that the parties attempted to reach agreement on that issue.[5] And that, of course, is precisely the problem. In conducting such arbitrations, state commissions are required to adhere to the standards of federal law.[6] With respect to high-capacity loops and transport in the wake of *USTA II*, there are no such standards. Rather, with respect to these facilities, it is the parties' mutual commercial interests – not any binding legal standards – that will determine the appropriate terms of access. In light of that fact, your apparent insistence that SBC agree to arbitrate those terms in front of state commissions makes no sense. Instead, it is entirely appropriate – and, in our view, critical to successful negotiations – for the parties to agree in advance that the negotiations are *not* governed by sections 251 and 252, and thus that, in the event we are unable to reach agreement, it would *not* give rise to arbitration before state commissions.

Let me stress that SBC in no way seeks to prevent your clients from taking advantage of the substantive and procedural rights granted in sections 251 and 252 of the 1996 Act. If your clients wish to make a request for interconnection, services, or elements pursuant to section 251, they are welcome to do so, and SBC will respond to that request in a manner fully consistent with, and subject to the requirements of, the 1996 Act. If, however, your clients wish to make a request for services or facilities that are *not* subject to section 251 – in particular, high-capacity loops and transport – then SBC will look forward to negotiating a mutually agreeable commercial resolution of such a request outside the confines of the 1996 Act.

Yours truly,

Jay C. Phillips

cc: The Honorable Michael K. Powell
The Honorable Kathleen Abernathy
The Honorable Michael Copps
The Honorable Kevin Martin
The Honorable Jonathan Edelstein
Christopher Libertelli
Matthew Brill
Scott Bergmann
Jessica Rosenworcel
Daniel Gonzalez
John Rogovin
William Maher
Jeffrey Carlisle
Michelle Carey

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[4] *See* id. § 252(b).

[5] *See Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

[6] *See* id. § 252(c), (d).

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * * *

COMPTEL/ASCENT ALLIANCE, AT&T COMMUNICATIONS, OF MICHIGAN, INC., TCG DETROIT, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., TALK AMERICA INC., CLEC ASSOCIATION OF MICHIGAN, LDMI TELECOMMUNICATIONS, INC., TC3 TELECOM, INC., TELNET WORLDWIDE, INC., QUICK COMMUNICATIONS, INC., d/b/a QUICK CONNECT USA, SUPERIOR TECHNOLOGIES, INC., d/b/a SUPERIOR SPECTRUM, INC., THE ZENK GROUP, LTD, d/b/a PLANET ACCESS, grid 4 COMMUNICATIONS, INC., and C.L.Y.K. INC. d/b/a Affinity Telecom Complainants, v.	)	Case No. U-14139
MICHIGAN BELL TELEPHONE COMPANY, d/b/a SBC Michigan, VERIZON NORTH, INC., and CONTEL OF THE SOUTH, INC. d/b/a VERIZON NORTH SYSTEMS Respondents.	)	

In the matter of a Request for Declaratory Ruling, or in the Alternative, Complaint against Michigan Bell Telephone Company d/b/a SBC Michigan Verizon North, Inc., and Contel of the South Inc. d/b/a/ Verizon North Systems for an Order Requiring Compliance With The Terms and Conditions Of Interconnection Agreements	)

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

Susan M. Womble, an employee of Dykema Gossett PLLC, being first duly sworn, deposes and says that on the 1st day of June, 2004, she served a copy of CompTel/ASCENT Alliance, et al.'s Motion to Withdraw, Without Prejudice, The Request for Emergency Relief upon persons listed in the attached Service List at their respective addresses, by enclosing copies of the same in an envelope properly addressed, and by depositing said envelope in the United States Mail with postage thereon having been fully prepaid and electronic mail.

Susan M. Womble

Susan M. Womble

Subscribed and sworn before
me this 1st day of June, 2004.

Trace Graham

Trace Graham, Notary Public, Ingham Co., MI
My Commission Expires: 08/20/06
Acting in Ingham County, Michigan

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