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September 24, 2007

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
PO Box 30221
Lansing, MI 48909

Re: In the matter of the formal complaint, application and request for emergency relief of Clear Rate Communications, Inc. against Local Exchange Carriers of Michigan, Inc., and Internet 123, Inc.
MPSC Case No. U-15424

Dear Ms. Kunkle:

Enclosed for filing, please find Local Exchange Carriers of Michigan, Inc. Motion for Summary Disposition and Response to Clear Rate Communications, Inc.'s Request for Emergency Relief and Notice of Hearing thereof in the above-captioned proceeding. Proof of Service upon the Party of Record is also enclosed.

Very truly yours,

CLARK HILL PLC

Haran C. Rashes

HCR:pat
Enclosures

cc: Party of Record

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the formal complaint,)
application and request for emergency relief of)
Clear Rate Communications, Inc. against)
Local Exchange Carriers of Michigan, Inc. and)
Internet 123, Inc.)

Case No. U-15424

LOCAL EXCHANGE CARRIERS OF MICHIGAN, INC.’S
MOTION FOR SUMMARY DISPOSITION AND
RESPONSE TO
CLEAR RATE COMMUNICATIONS, INC.’S REQUEST FOR EMERGENCY RELIEF

Local Exchange Carriers of Michigan, Inc. (“LECFMI”), by and through its attorneys, Clark Hill PLC, pursuant to Section 203(2) of the Michigan Telecommunications Act (“MTA”), MCL 484.2203(2), pursuant to Rule 323 of the Rules of Practice and Procedure before the Michigan Public Service Commission (“Commission” or “MPSC”), MAC R 460.17323, and pursuant to Michigan Court Rules 2.116(C)(8) and (10), hereby submits its Motion for Summary Disposition of the above-captioned proceeding and Response to Clear Rate Communications, Inc.’s (“Clear Rate” or “Complainant”) Request for Emergency Relief (“Request for Emergency Relief”) in the above-captioned proceeding and states as follows:¹

LECFMI is a Michigan corporation headquartered in New Baltimore, Michigan. LECFMI is a facilities-based competitive local exchange carrier licensed to provide basic local exchange service in Michigan. LECFMI was initially licensed to provide basic local exchange service in all zones of the Grand Rapids District Exchange under its previous name of Mutual Information

¹ LECFMI makes this response and motion without waiving any claims or defenses it may have to jurisdiction of the Commission to adjudicate the issues raised in this matter and reserves its right to contest the subject matter jurisdiction of the Commission to adjudicate these issues.

Exchange, Inc., in MPSC Case No. U-11877 on April 23, 1999. LECMI's license was expanded, to include authority to serve all exchanges served in which Ameritech Michigan (now known as AT&T Michigan), Verizon North Inc., Contel of the South, Inc., d/b/a Verizon North Systems, CenturyTel of Michigan, Inc., CenturyTel of Northern Michigan, Inc., CenturyTel of Midwest-Michigan, Inc., and CenturyTel of the Upper Peninsula, Inc. are the incumbent local exchange carriers, in MPSC Case No. U-12916 on July 11, 2001.

On September 17, 2007, Clear Rate filed its Complaint against LECMI and Internet 123, Inc. ("Internet 123") alleging that Clear Rate "entered into an agreement with [LECMI and Internet 123] to purchase wholesale basic local exchange and other telecommunications services for the provision of retail telecommunications services by Clear Rate" (Complaint at ¶16) and that LECMI and Internet 123 had threatened to shut off service being provided to Clear Rate (Complaint ¶¶ 10, 22, 28, 30, 39, 41, 47, 49, and 57). Clear Rate seeks an Emergency Relief Order from this Commission requiring LECMI "to not discontinue service to Clear Rate until Clear Rate has migrated off of [LECMI and Internet 123's] network." (Complaint, Relief Requested, ¶ B).

Clear Rate's Request for Emergency Relief has two main flaws that require that the Commission dismiss the Request for Emergency Relief and dismiss this proceeding against LECMI:

- 1. Clear Rate has no agreement with LECMI to receive or purchase any services from LECMI; and,**
- 2. Clear Rate does not receive, and has not purchased, any services from LECMI.**

II. THE REQUEST FOR EMERGENCY RELIEF IS MOOT

Though Clear Rate claims that it has an agreement with LECMI to provide various telecommunications services (Complaint at ¶16), no such “agreement” was attached to the Complaint or to the prefiled testimony that accompanied the Complaint. This is because LECMI provides no services to Clear Rate (Affidavit of Dan Irvin, ¶20) and has no agreement to provide services to Clear Rate (Affidavit of Dan Irvin, ¶19).

Because LECMI does not provide any services to Clear Rate, any order of the Commission ordering it “to not discontinue service to Clear Rate until Clear Rate has migrated off of [LECFMI and Internet 123’s] network” (Complaint, Relief Requested, ¶ B) is moot and cannot be complied with by LECMI nor enforced by the Commission.

A. Clear Rate Cannot Meet the Requirements for an Emergency Relief Order against LECMI.

Section 203(3) of the MTA provides:

- (3) An order for emergency relief may be granted under subsection (2) if the commission finds all of the following:
 - (a) That the party has demonstrated exigent circumstances that warrant emergency relief.
 - (b) That the party seeking relief will likely succeed on the merits.
 - (c) That the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted.
 - (d) That the order is not adverse to the public interest.

LECFMI respectfully contends that Clear Rate cannot meet these four requirements. Because LECMI provides no services to Clear Rate, no exigent circumstances exist that warrant emergency relief. Because LECMI provides no services to Clear Rate, Clear Rate is *not* likely to succeed on the merits if this case is not dismissed against LECMI. Because Clear Rate is not

dependent on LECMI for any services, Clear Rate will not suffer any harm in its ability to serve customers if emergency relief against LECMI is not granted. If the Commission issues an Emergency Relief Order against LECMI, it will demonstrate that such an order can be obtained against someone with no legal privity to the issued alleged, clearly such a ruling would be adverse to the public interest and a waste of LECMI's and this Commission's scarce legal resources.

For the above-stated reasons, LECMI respectfully requests that the Commission deny Clear Rate's Request for an Emergency Relief Order against LECMI.

III. CLEAR RATE IS IMPERMISSIBLY AND ILLEGALLY ATTEMPTING TO "PIERCE THE CORPORATE VEIL"

Clear Rate claims that:

[Internet 123] is an affiliate of LECM[I]. [Internet 123] and LECM[I] share the same corporate president, share the same key employees, share telecommunication facilities and equipment, and share the same business locations at 50572 Jefferson, New Baltimore, Michigan 48047 and 24700 Northwestern Highway, Suite 50, Southfield, MI 48075. Indeed, LECM[I] and [Internet 123] are alter egos of one another. This is further evidenced by the fact that Clear Rate is actually collocated with LECM[I], but is billed for its collocation services through [Internet 123]. As a result, LECM[I] and [Internet 123] both provide regulated and unregulated services to Clear Rate, including but not limited to local exchange service. For this reason, LECM[I] and [Internet 123] are hereafter [in Clear Rate's Brief in Support of Emergency Relief Order] referred to as LECM/I 123.

Clear Rate Brief in Support of Emergency Relief Order, pp 2-3.

Clear Rate's attempt to link LECMI to the alleged actions of Internet 123, to hold LECMI accountable in this proceeding, to assert that LECMI and Internet 123 are alter egos of each other, are an impermissible attempt to "pierce the corporate veil."

The general legal principle in Michigan is that separate corporate identities will be respected and the corporate veil will be pierced only to prevent fraud or injustice. *CMS Energy Corp v Attorney General*, 190 Mich App 220, 232 (1991); *Bodenhamer Building Corp. v. Architectural Research Corp*, 873 F2d 109, 111 (6th Cir 1989). Accordingly, “the formalities of separate corporate existence may be disregarded where they are designed for an improper use such as to avoid legal obligations.” *CMS Energy Corp v Attorney General*, 190 Mich App 220, 232 (1991); *Yankoviak v Public Service Comm*, 349 Mich 641, 648-649; 85 NW2d 75 (1957); *People ex rel Attorney General v Michigan Bell Telephone Co*, 246 Mich 198, 204; 224 NW 438 (1929); *Michigan Bell Communications, Inc v Michigan Public Service Comm*, 155 Mich App 40, 46-47; 399 NW2d 49 (1986). However, Clear Rate does not claim that LECMI is avoiding any legal obligations nor do they allege fraud on the part of Internet 123 or LECMI.

Generally, a corporation is treated as a separate legal entity and one corporation will not be held liable for the acts of another corporation. The Michigan Supreme Court, in *Daymon v Fuhrman*, 474 Mich 920, 921; 705 NW2d 347 (2005) restated the Court of Appeals standard established in *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996), to “pierce the corporate veil,” and hold one corporation liable for another’s actions, a Complainant must establish the following three elements: “First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.” These standards have also been held by the United States Sixth Circuit Court of Appeals in *Spartan Tube & Steel v Himmelspach*, 102 F3d 223 (6th Cir 1996), in which it cited similar standards from a Michigan Court of Appeals case, *Nogueras v Maisel & Assoc of Michigan*, 142 Mich App 71, 86; 369 NW2d 492, 498 (1985), and held that “[a] court may find that one entity is

the alter ego of another and pierce the corporate veil upon proof of [these same] three elements.” Clear Rate does not, cannot, and reasonably should have known that it could not establish these three elements.

LECMI is not a mere instrumentality of Internet 123 – contrary to the assertions of Clear Rate. LECMI and Internet 123 have different corporate presidents. Dan Irvin is the president of Internet 123. (Affidavit of Dan Irvin ¶11). James Kandler is the president of LECMI. (Affidavit of Dan Irvin ¶12). While Dan Irvin is a common shareholder in both corporations, the other shareholders in Internet 123 are not the same persons who are the other shareholders in LECMI. (Affidavit of Dan Irvin ¶10). LECMI and Internet 123 do not share any employees. (Affidavit of Dan Irvin ¶13). Internet 123 purchases services from, and leases facilities from, LECMI and pays for such. (Affidavit of Dan Irvin ¶¶ 15, 16 & 17). While Internet 123 and LECMI share a common address, they each pay separately for rent. (Affidavit of Dan Irvin ¶14).

LECMI was not, and is not alleged to have been, used to commit a fraud or wrong. And, Clear Rate is not alleging in its Complaint any unjust loss or injury, but rather a prospective injury is alleged.

Clear Rate and its attorneys had no reasonable basis to believe that the facts underlying their position that LECMI and Internet 123 are “alter egos” or affiliates of each other are true. Clear Rate’s attempt to pierce the corporate veil is impermissible, inappropriate, and is devoid of factual support and is devoid of arguable legal merit. The only logical explanation for Clear Rate’s inclusion of LECMI in this action is that Clear Rate’s primary purpose in attempting to pierce the corporate veil was to harass, embarrass, or injure LECMI and Dan Irvin.

IV. MOTION FOR PARTIAL SUMMARY DISPOSITION

Because Clear Rate has no agreement with LECMI to receive or purchase any services from LECMI and because Clear Rate does not receive, and has not purchased, any services from LECMI, there is no cause of action against LECMI and this proceeding should be dismissed pursuant to Rule 323 of the Commission's Rules, MAC R 460.17323, and pursuant to MCR 2.116(C). As this Commission has previously noted,

Rule 323 (the administrative equivalent of MCR 2.116(C)(8), (10)) provides that, where the presiding officer finds that there is no genuine issue of material fact or there has been a failure to state a claim for which relief can be granted, summary disposition of all or part of the proceeding may be recommended to the Commission. *Auto-Owners Insur Co v Detroit Edison Co*, MPSC Case No. U-14611, Apr 25, 2006, pp 2-3.

In determining whether a movant has met the standard for a Motion for Summary Disposition under MCR 2.116(C)(8) and (10), for failure to state a claim on which relief can be granted or where there are no genuine issues of material fact, the Commission must accept as true all well-pleaded facts. *Henry v Dow Chem Co*, 473 Mich 63 (2005); *see also, Radtke v Everett*, 442 Mich 368, 373 (1993). A Motion for Summary Disposition under MCR 2.116(C)(8) "should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery." *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 692 (1998).

As discussed above, there is no privity between Clear Rate and LECMI. Because Clear Rate has no agreement with LECMI to receive or purchase any services from LECMI and because Clear Rate does not receive, and has not purchased, any services from LECMI, there is no cause of action against LECMI. Clear Rate's Complaint against LECMI fails to state claim upon which relief can be granted and there is no genuine issue as to any material fact.

Clear Rate’s attempt to link LECMI to the alleged actions of Internet 123, to hold LECMI accountable in this proceeding, to assert that LECMI and Internet 123 are alter egos of each other, are an impermissible attempt to “pierce the corporate veil.”

The general legal principle in Michigan is that separate corporate identities will be respected and the corporate veil will be pierced only to prevent fraud or injustice. *CMS Energy Corp v Attorney General*, 190 Mich App 220, 232 (1991); *Bodenhamer Building Corp. v. Architectural Research Corp*, 873 F2d 109, 111 (6th Cir 1989). Accordingly, “the formalities of separate corporate existence may be disregarded where they are designed for an improper use such as to avoid legal obligations.” *CMS Energy Corp v Attorney General*, 190 Mich App 220, 232 (1991); *Yankoviak v Public Service Comm*, 349 Mich 641, 648-649; 85 NW2d 75 (1957); *People ex rel Attorney General v Michigan Bell Telephone Co*, 246 Mich 198, 204; 224 NW 438 (1929); *Michigan Bell Communications, Inc v Michigan Public Service Comm*, 155 Mich App 40, 46-47; 399 NW2d 49 (1986). However, Clear Rate does not claim that LECMI is avoiding any legal obligations nor do they allege fraud on the part of Internet 123 or LECMI. Thus, Clear Rate’s claim against LECMI is so clearly unenforceable that no factual development could render LECMI responsible for any claims made in Clear Rate’s Complaint. LECMI respectfully requests partial summary disposition be granted dismissing LECMI from this proceeding.

V. CLEAR RATE’S CLAIMS AGAINST LECMI ARE FRIVOLOUS

Clear Rate and its attorneys had no reasonable basis to believe that the facts underlying their positions that LECMI and Internet 123 are “alter egos” or affiliates of each other are true. Clear Rate’s attempt to pierce the corporate veil is inappropriate, is devoid of any factually support, and is devoid of arguable legal merit. The only logical explanation for Clear Rate’s

inclusion of LECMI in this proceeding is that Clear Rate's primary purpose in attempting to pierce the corporate veil was to harass, embarrass, or injure LECMI and Dan Irvin.

Section 209 of the MTA provides

(1) If the commission finds that a party's position in a proceeding under this act was frivolous, the commission shall award to the prevailing party the costs, including reasonable attorney fees, against the nonprevailing party and their attorney.

(2) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the proceeding or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Frivolous" does not mean a complaint filed to challenge a rate alteration increase for basic local service if the complaint has been reviewed by the commission and has not been dismissed by the commission pursuant to section 203(2).

(c) "Prevailing party" means a party who wins in the proceeding.

MCL 484.2209.

Clear Rate and its attorney's attempt to drag LECMI into this proceeding is frivolous, as defined in Section 209 of the MTA, and should result in an award of costs to LECMI, including reasonable attorney fees, against the Clear Rate and its attorney. LECMI has shown that not only one of the elements have been met (only one element is needed to meet the definition of "frivolous"), but that all of the elements have been met.

As demonstrated above, Clear Rate had no reasonable basis to believe that the facts underlying its positions were true. Other than Clear Rate's bald allegations, there are no facts to

establish that there is or was any agreement between LECMI and Clear Rate for the provision of services to Clear Rate by LECMI. In fact, not only was there no agreement, no services were ever provided by LECMI, nor purchased from LECMI by Clear Rate.

Clear Rate's factual allegations concerning its "alter ego" claim are similarly devoid of factual support. As the Affidavit of Dan Irvin demonstrates, the claims regarding the sharing of corporate presidents, employees, offices, and equipment are nothing but bald allegations.

Clear Rate's legal positions are also devoid of arguable legal merit. As shown above, Clear Rate has not even begun to satisfy the legal elements necessary to pierce the corporate veil or prove an "alter ego" claim. Clear Rate has not even alleged all of the necessary elements.

Clear Rate's use of the term "LECM/I 123" throughout its Complaint, Brief, and the testimony of Mr. Namy lead to confusion and ambiguity regarding what Clear Rate alleges were the actions of Internet 123 and the actions of LECMI, but it is clear upon examination of the facts that they do not support any claim against LECMI. This attempted blurring of the distinction between LECMI and Internet 123 was done only because the facts and the law do not support such a claim. The only explanation for Clear Rate's actions regarding LECMI is that Clear Rate is attempting to harass, embarrass, or injure LECMI and Dan Irvin. LECMI respectfully requests that the Commission award costs to LECMI, including reasonable attorney fees, against the Clear Rate and its attorney.

VI. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons LECMI respectfully requests that the Commission issue an Order:

- A. Denying Clear Rate's Request for an Emergency Relief Order against LECMI;
- B. Granting Partial Summary Disposition, dismissing LECMI from this proceeding;

C. Awarding costs to LECMI, including reasonable attorney fees, against Clear Rate and its attorney, pursuant to Section 209 of the MTA; and,

D. Granting LECMI such other relief as is just and reasonable.

Respectfully Submitted,

By: _____

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Date: September 24, 2007

Attorneys For
Local Exchange Carriers of Michigan

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the formal complaint,)
application and request for emergency relief of)
Clear Rate Communications, Inc. against) Case No. U-15424
Local Exchange Carriers of Michigan, Inc. and)
Internet 123, Inc.)

NOTICE OF HEARING

TO PARTIES OF RECORD:

PLEASE TAKE NOTICE that Local Exchange Carriers of Michigan's Motion for Summary Disposition, in the above-captioned proceeding, will be heard before the Michigan Public Service Commission ("Commission"), 6545 Mercantile Way, Suite 7, Lansing, Michigan 48911, at a time and date to be set by the Commission or at the first hearing or pre-hearing held in this matter.

Respectfully Submitted,

By: _____
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Date: September 24, 2007

Attorneys For
Local Exchange Carriers of Michigan

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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Internet 123, Inc.)

Case No. U-15424

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Patricia A. Tooker, being duly sworn, deposes and says that she is an employee of Clark Hill PLC, and that on September 24, 2007, a copy of Local Exchange Carriers of Michigan, Inc. Motion for Summary Disposition and Response to Clear Rate Communications, Inc.'s Request for Emergency Relief and Notice of Hearing thereof in the above captioned proceeding was served via Electronic and United States Postal Service First-Class Mail upon the below stated party of record.

Michael Ashton
Nicole L. Proulx
Fraser Trebilcock Davis & Dunlap
Attorneys for Clear Rate Communications, Inc.
124 W. Allegan St., Ste 1000
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Mashton@fraserlawfirm.com
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Patricia A. Tooker

Subscribed and sworn to before me
this 24th day of September, 2007.

Haran C. Rashes, Notary Public
Washtenaw County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: September 18, 2013