

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of )  
**BRE COMMUNICATIONS, L.L.C.**, d/b/a **PHONE** )  
**MICHIGAN**, against **AMERITECH INFORMATION** )  
**INDUSTRY SERVICES**, a division of **AMERITECH** )  
**MICHIGAN**, on behalf of **AMERITECH MICHIGAN**, )  
and request for declaratory ruling. )  
\_\_\_\_\_ )

Case No. U-11654

At the October 2, 1998 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. David A. Svanda, Commissioner

**OPINION AND ORDER**

On March 12, 1998, BRE Communications, L.L.C., (BRE) filed a complaint pursuant to the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq. (Michigan Act), and the federal Telecommunication Act of 1996, 47 USC 151 et seq. (federal Act) against Ameritech Information Industry Services, a division of Ameritech Services, Inc., acting on behalf of Ameritech Michigan. The complaint seeks relief pursuant to the February 3, 1997 interconnection agreement, which was approved in the Commission's June 5, 1997 order in Case No. U-11326. BRE requests the Commission to find Ameritech Michigan liable for liquidated damages based on its poor performance in installing unbundled loops and providing interim number portability (INP) within the time frames established in the interconnection agreement. In addition, BRE seeks to

recover economic losses it alleges resulted from Ameritech Michigan's discriminatory treatment in violation of Section 305 of the Michigan Act, MCL 484.2305; MSA 22.1469(305), and Section 251 of the federal Act, 47 USC 251.

On March 24, 1998, Ameritech Michigan answered the complaint. On March 26, 1998, a prehearing conference was held before Administrative Law Judge George Schankler, at which time the Commission Staff (Staff) appeared in addition to BRE and Ameritech Michigan.

Evidentiary hearings were held June 5 through 12, 1998 before Administrative Law Judge Theodora M. Mace (ALJ). The record consists of 1,168 pages of transcript and 55 exhibits that were entered into evidence, some of which were sealed in a separate, confidential file.

Following the hearing, the parties filed briefs and reply briefs on July 2 and 17, 1998, respectively.

Thereafter, on August 17, 1998, the ALJ issued her Proposal for Decision (PFD), in which she recommended that the Commission find that BRE failed to meet its burden of proof that Ameritech Michigan should pay liquidated damages for its failure to comply with the performance standards contained in the interconnection agreement. She therefore recommended that Count I of the complaint be dismissed with prejudice. The ALJ further found that Ameritech Michigan had discriminated against BRE. However, she concluded that BRE had failed to meet its burden to establish with any certainty the losses it incurred as a result. Therefore, the ALJ recommended that the Commission also dismiss the second count of the complaint with prejudice and deny BRE's request for costs and attorney fees.

On August 26, 1998, BRE, Ameritech Michigan, and the Staff filed exceptions to the PFD. On September 4, 1998, the parties filed replies to exceptions.

Compliance with Contract Performance Standards for  
Installing Unbundled Loops and Porting Numbers

In its complaint, BRE alleges that Ameritech Michigan failed to meet the performance standards for installation of unbundled loops and provisioning INP, which are established in Section 27.1.3 of the parties' interconnection agreement. That section of the agreement requires that Ameritech Michigan must complete installation within 5 days of receiving a valid service order for unbundled loops or INP involving 1 to 10 lines. The performance interval increases to 10 days for orders involving 11 to 20 lines. For orders involving more than 20 lines, the performance interval is subject to negotiation. The agreement further provides for liquidated damages of \$75,000 for every three month period in which Ameritech Michigan fails to meet these standards at least 80% of the time for either unbundled loops or INP. BRE asserts that Ameritech Michigan should be required to pay \$600,000 for failing to meet the performance standards for eight three-month periods (four periods each for unbundled loops and INP).

In support of its allegation that Ameritech Michigan's performance entitles BRE to liquidated damages under the contract, BRE relies upon Exhibit C-7, which consists of a list of nearly 3,000 orders for unbundled loops and 567 orders for INP. According to BRE's exhibit, Ameritech Michigan met the contract performance standards for unbundled loops no more than 14% of the time in any given month during the period of June through November 1997. BRE claims that timely INP provision occurred only as much as 20% of the time during that same period.

Using the orders listed on the same exhibit, Ameritech Michigan calculates that its performance for installing unbundled loops never sank below 85.4% in any given month. For INP, Ameritech Michigan claims that it met the performance requirements on 91.7% to 95.9% of the orders.

The vast difference in the parties' results is attributable largely to differences in their underlying assumptions about what must occur for performance to be considered to meet the contract performance standards. The disputed issues include: (1) when an order is received; (2) what is required for an order to be considered valid; (3) whether the number of days allowed for order completion are business days or calendar days; (4) when an order is considered complete; and (5) to what orders the performance standards are applicable. In addition, issues arose concerning the efficacy of Exhibit C-7 to demonstrate Ameritech Michigan's noncompliance, considering the effect of BRE's occasional requests for a completion date that is after what would otherwise be required by the contract and the inclusion of orders for more than 10 loops.

In a careful and thoughtful analysis, the ALJ set out in detail the parties' arguments concerning the above issues and resolved each one in turn. She determined that Ameritech Michigan receives BRE's valid service orders when those orders are faxed. She further found that the columns on Exhibit C-7 listing "sent fax date" and "sent fax time" sufficiently establish the time that valid orders were received by Ameritech Michigan. The ALJ noted the parties' agreement that the last supplement to an order controls the receipt of a valid order and that a fax sent after 3:00 p.m. is considered by the parties to have been received by Ameritech Michigan the following day.

The ALJ further found that, consistent with the plain language of the contract, the number of days allowed to complete orders for unbundled loops and INP were intended to be calendar days, but that if the last day of the allowed period falls on a Saturday, Sunday, or a holiday, the final day for completion is the next following business day. In the ALJ's view, orders should be considered completed only after Ameritech Michigan has notified BRE of completion.

The ALJ next examined Ameritech Michigan's claim to exemptions or exclusions of orders listed on Exhibit C-7 from the contract performance requirements. She determined that the mere

need to dispatch a technician does not justify excluding an order from the performance requirements, but rather that such an exclusion would require the unavailability of facilities sufficient to trigger the need for a bona fide request, e.g., installations in a new subdivision. Moreover, the ALJ found that delaying events do not require exclusion of an order from the performance requirements. Rather, she found that such events require an hour-for-hour and day-for-day extension based on the length of the delay. She noted that Ameritech Michigan's witness Ronald J. Cate was unable to indicate which, if any, installations contained on Exhibit C-7 were subject to any delaying events outside of Ameritech Michigan's control.

Despite the above conclusions and findings, the ALJ determined that BRE had failed to meet its burden of proof. In her view, Exhibit C-7 did not include enough information to determine whether the time period between BRE's submission of an order and Ameritech Michigan's completion of that order falls within the contract requirements. She found that the exhibit does not include the completion dates that Ameritech Michigan faxed to BRE, fails to take into account instances in which BRE's requested due date fell after the contract completion dates, and does not reflect the correct manner in which to count the allowed days<sup>1</sup>. The ALJ rejected the Staff's proposal to provide additional time to recalculate Exhibit C-7 to comply with the findings in the PFD.

The parties have excepted to many of the individual findings made by the ALJ. The Commission is persuaded that the ALJ's decision is accurate and supported by the record. Further, the Commission agrees with the ALJ's conclusions regarding the assumptions to be used in computing Ameritech Michigan's performance. Arguments neither set out nor discussed in this order are rejected.

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<sup>1</sup>BRE had used calendar days without any allowance for end dates on weekends or holidays.

Specifically, the Commission rejects Ameritech Michigan's argument that Exhibit C-7 should not have been admitted into evidence. If the Commission were to exclude that exhibit for the reasons proffered by Ameritech Michigan, a similar result would be necessary with regard to certain of Ameritech Michigan's exhibits. In any event, the exhibit was properly received. Possible errors in the exhibit go to the weight, not the admissibility, of the exhibit.

The Commission further rejects Ameritech Michigan's argument that its acceptance of faxed orders from BRE was merely an accommodation, not an agreement to alter the acceptable method of receiving orders. Ameritech Michigan acted in conformity with its agreement to receive faxed orders. There is no evidence to suggest that the mutual agreement to fax orders included an explicit or implicit agreement to extend the time for completing the orders. For INP orders, Ameritech Michigan admits that electronic delivery was not available. Thus, the Commission finds that faxed orders for either unbundled loops or INP are valid service orders.

Further, the Commission is not persuaded by Ameritech Michigan's argument that the Commission approved cost studies in Case No. U-11280 require a different result. The Commission finds that the cost of providing service does not affect whether an order is valid when faxed.

The Commission notes the parties' agreement that an order must be complete and accurate to be valid. When information is missing or incorrect, a supplement may be required. The time allowed for performance does not begin until the last required supplement has been received by Ameritech Michigan.

The Commission further rejects Ameritech Michigan's exception to the ALJ's conclusion that order completion notification should be "sent in a timely and easily tracked form." It asserts that she granted relief on an issue not properly raised in this case. PFD, p. 25. As pointed out by the Staff, BRE did raise this issue. See, Complaint, ¶ 19(d), 6 Tr 365, and Exhibit S-10. The

Commission further finds that Ameritech Michigan's assertion that it needs two days to notify BRE of a completed order is unacceptable in light of the need to confirm installation dates for purposes of billing and 9-1-1 database maintenance.

The Staff also raised the issue of Ameritech Michigan's record keeping commitments under the interconnection agreement. One of the problems that BRE faces in this case is attempting to provide data that Ameritech Michigan had the responsibility to provide to BRE on an accurate and timely basis. The Commission agrees with the ALJ's assessment that Ameritech Michigan has not provided sufficient detail in its monthly reports to be useful to BRE in accurately tracking Ameritech Michigan's performance. Ameritech Michigan's failure to provide accurate and timely performance reports in a useful format has contributed to BRE's difficulties in proving its case.

Section 27.6 of the interconnection agreement requires that Ameritech Michigan maintain complete and accurate records, on a monthly basis, of its performance under the contract of each specified activity and demonstrate compliance with the contract performance standards. The Commission finds that it is not enough to send a summary, broad stroke report, without identifying the underlying information that supports Ameritech Michigan's claimed percentage of compliance with the contract performance standards and stating the reasons, if any, that the installation date may have been extended.

The Commission further affirms the ALJ's conclusion that the performance standards for unbundled loops and INP reference calendar days unless the last day of the period falls on a Saturday, Sunday, or holiday. In so finding, the Commission rejects Ameritech Michigan's argument that the actions of the parties support a finding that the parties intended the interval to be measured in business days. Rather, the record reflects that BRE set dates for its customers that it felt would be more likely to be met when it was having difficulty in obtaining the prompt installation

that it had anticipated under the interconnection agreement. The ALJ's determination appears the most reasonable, particularly in light of the specific use of "business days" elsewhere in the interconnection agreement. See, interconnection agreement, Section 4.4.4.

In adopting the ALJ's finding on this issue, the Commission ascribes the ordinary meaning to the use of "days" in a legal context, when the word is used without a modifier such as "calendar" or "business." The Commission rejects BRE's argument that the parties intended that if the last day fell on a weekend or holiday, installation must occur on or before the last day prior to the weekend or holiday. Nor does it make sense that the parties intended that installation routinely occur on days that the parties' offices are closed. The record reflects that BRE would not have personnel available to coordinate cut overs on weekends or holidays on an ongoing basis. Moreover, the Commission's finding is consistent with the normal meaning attributed to "days" in legal documents. See, e.g., the Commission's Billing Rules and MCR 1.108(1).

The Commission further adopts the ALJ's reasoning as well as her conclusion that it is inappropriate to exclude an order from the performance standards merely because it may require a technician to be dispatched. The Commission agrees with the ALJ and the Staff that a loop is unavailable, within the meaning of that term in the interconnection agreement, if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but for some reason the order requires a field dispatch. Unless the order requires a bona fide request for new or different facilities, the time for completion should be governed by the performance standards in Section 27. The Commission notes that the performance standards provide Ameritech Michigan with a 20% margin for missing installation dates over an extended period of time without triggering the liquidated damage provision. The leeway provided by the contract should be sufficient to allow Ameritech Michigan to avoid any liability for liquidated damages.

Moreover, the Commission rejects Ameritech Michigan's argument that all integrated digital loop carrier (IDLC) or remote switching technology orders are exempt from the performance standards of Section 27.1.3. The Commission notes that Ameritech Michigan did not identify any installations at issue in this case that involved IDLC.

Similarly, the Commission rejects Ameritech Michigan's attempts to excuse its performance because of delaying events that are not its fault. Ameritech Michigan did not identify any delaying events for the orders listed on Exhibit C-7. In the Commission's view, Ameritech Michigan had the burden to establish any affirmative defense such as delaying events that were caused by BRE or the end user. It was not for BRE to prove that no delaying events occurred without Ameritech Michigan's demonstrating reason to believe that delaying events did, in fact, occur on specific orders. This is particularly true where, as here, Ameritech Michigan had a contract obligation to prepare and keep records related to its performance. Further, the Commission agrees with the ALJ that any delaying events should merely extend the time allowed for completion rather than exclude the order from the calculation of Ameritech Michigan's performance under the contract.

The Commission rejects Ameritech Michigan's argument that the contract does not require reporting its performance as to unbundled loops and INP as distinct obligations. As pointed out by the Staff, Section 27.6 of the interconnection agreement requires Ameritech Michigan to keep records of each specified activity. The list of specified activities is included in Section 27.1.2 and includes unbundled loops, INP, and repair of out of service problems. Although, as a practical matter, INP should be accomplished at the same time as installation of the unbundled loop with which it is associated, that does not negate the need to report performance on INP separately. Further, all unbundled loop orders do not include INP. Thus, Ameritech Michigan might be able to meet 80% timely completion of unbundled loop orders as a group without doing so for INP.

BRE excepts to the ALJ's conclusion that BRE failed to meet its burden to demonstrate that Ameritech Michigan's performance fell below the requirements of Section 27 of the interconnection agreement. BRE refers to its brief and reply brief, which point out that taking the fax received dates from Exhibit C-7 and the completion dates from Exhibit R-48, while excluding the instances in which BRE requested a completion date after the allowable performance period, Ameritech Michigan's performance still fell below 80% for July, August, September, October, and November, 1997. BRE acknowledges that Exhibit C-7 does not reflect the ALJ's determination that the days allowed for order completion are calendar days unless the period ends on a weekend or holiday. On the other hand, BRE argues that if the Commission adopts the ALJ's determination, it should allow BRE additional time in which to recalculate Ameritech Michigan's compliance with the performance standards. BRE asserts that it would not be necessary to hold a new hearing or initiate a new complaint, but merely to allow BRE to recompute Ameritech Michigan's performance in accordance with the Commission's determination of the issues in this case. The Staff supports BRE's request to recalculate Ameritech Michigan's performance.

Ameritech Michigan responds that allowing BRE to recalculate Ameritech Michigan's performance with the assumptions determined by the ALJ would be tantamount to ordering the parties back to the drawing board to determine whether Ameritech Michigan achieved compliance with the provisions of the interconnection agreement. Ameritech Michigan contends that neither BRE nor the Staff has cited any legal precedent that would allow for such a recalculation after the record is closed.

Ameritech Michigan further argues that, although Ameritech Michigan provides BRE with installation completion information, BRE made no effort to reflect the completion date information on Exhibit C-7 or any other exhibit entered into evidence. In Ameritech Michigan's view, BRE has

only itself to blame for any evidentiary deficiencies in this case. Ameritech Michigan argues that the Commission should not rescue BRE from the consequences of how the company chose to construct Exhibit C-7. Ameritech Michigan argues that despite many opportunities to correct its exhibit, BRE did nothing to obtain and use actual completion dates or to calculate performance based on the alternative method proposed by the Staff.

Section 203 of the Michigan Act establishes that BRE has the initial burden of proof in this matter. MCL 484.2203; MSA 22.1469(203). The Commission finds that BRE has failed to meet that burden. However, that failure is a result of Ameritech Michigan's breach of its responsibilities under the interconnection agreement, which was approved by the Commission in its June 5, 1997 order in Case No. U-11326. Specifically, as discussed earlier, Ameritech Michigan failed to meet its obligations with regard to maintaining complete and accurate records to support its claimed performance. The summary, broad stroke monthly report Ameritech Michigan provided to BRE concerning the installation of unbundled loops lacked necessary details for tracking Ameritech Michigan's performance. No monthly reports on INP provisioning were provided.

Because Ameritech Michigan and BRE have been unable to agree on the proper interpretation of their own negotiated interconnection agreement, the Commission provides the necessary interpretations for future activity related to Ameritech Michigan's performance under its agreement with BRE. These interpretations cannot be used by BRE to recalculate its initial request for relief. Further, the Commission's order does not absolve Ameritech Michigan from the material breach of the interconnection agreement with BRE.

The Commission concludes that Count I of this complaint must be dismissed with prejudice. The Commission also determines that, by the company's failure to comply with the reporting

requirements to which it agreed, Ameritech Michigan has violated the Commission's June 5, 1997 order in Case No. U-11326 approving the interconnection agreement.

### Discrimination

BRE charged in its complaint that Ameritech Michigan had violated provisions of both the federal Act and the Michigan Act that prohibit discriminatory treatment of other providers. BRE alleged that Ameritech Michigan had failed to (1) fill service orders on an expedited basis when required for medical emergencies, (2) advise BRE when service orders were installed earlier than the firm order confirmation date, (3) advise BRE of the correct data base for 9-1-1, (4) install additional trunking to avoid network blockage, (5) provide competent installation and maintenance service, and (6) keep appointments for scheduled live conversions when a BRE technician could not be reached.

The ALJ concluded that BRE had not met its burden to prove most of its claims of discrimination. For the most part, the ALJ found that BRE's evidence lacked sufficient specific instances of prohibited behavior that Ameritech Michigan could address, and the evidence failed to establish Ameritech Michigan's standards for service to itself with regard to these issues.

However, the ALJ concluded that the record supported a finding that Ameritech Michigan had discriminated against BRE in its failure to advise BRE that the Master Street Addressing Guide (MSAG ) is used to check 9-1-1 database inputs from all carriers. The ALJ noted that Ameritech Michigan "designed the learning curve" in relation to 9-1-1 service, but instead of helping BRE to improve its accuracy, Ameritech Michigan spent its resources measuring how poorly BRE was doing.

The ALJ found also that Ameritech Michigan had discriminated against BRE in the availability of weekend installations. She noted testimony from Ameritech Michigan's witness that although Ameritech Michigan would occasionally provide a weekend installation for its own customers, any request by BRE for a weekend installation would be ignored or denied.

BRE excepts to all of the ALJ's findings that are contrary to the position that it took in this case. It argues that its evidence clearly supports BRE's position that Ameritech Michigan has discriminated against BRE in all of the ways charged in the complaint. Ameritech Michigan on the other hand complains that it did not discriminate against BRE on either the 9-1-1 issue or in the provision of weekend installations.

The Commission again finds that the ALJ provided a thorough summary of the evidence and arguments and generally reached correct conclusions. The PFD appears to be accurate and supported by the record. Thus, except where specifically modified, the ALJ's reasoning and conclusions are adopted.

Specifically, the Commission rejects BRE's assertion that the record demonstrates that Ameritech Michigan requires written proof of medical emergencies for expediting installation, when it would not require such proof from its own retail customers. Although BRE's witness Cindy Lanning testified that Ameritech Michigan required such proof, she had not compiled a list of instances in which expedited installation was denied for lack of written verification of medical emergency. In fact, she brought nothing with her to substantiate her claim that expedited installation would not occur without such written verification. See, 5 Tr. 200-201.

On the other hand, Ameritech Michigan's witness Kim Hadley testified that Ameritech Michigan does not require written verification of medical emergency in order to expedite installation. However, she indicated that if BRE asks for an expedited installation without stating a reason,

that request is not acknowledged. If an oral expedite request is made, the service center personnel will ask the reason for the request. Moreover, she testified that service center personnel treat BRE no differently on this issue than any other competitive local exchange carrier (LEC). See, 8 Tr. 1040-1041. With two witnesses testifying to opposing positions, the ALJ was the best position to judge the credibility of the witnesses. The Commission therefore adopts the ALJ's conclusion.

The Commission further finds that BRE has failed to meet its burden to demonstrate that Ameritech Michigan has discriminated in its provisioning of INP. Although BRE accepts that it has the responsibility to check for dial tone, it asserts that Ameritech Michigan has failed to "check to make sure that the porting is to the correct telephone number." BRE's exceptions, p. 9. BRE also complains that Ameritech Michigan considers problems with number porting to be a repair problem rather than an installation problem. Thus, BRE argues, Ameritech Michigan takes the position that a problem with INP completion does not affect its performance under Section 27 of the interconnection agreement.

The Commission is persuaded that Ameritech Michigan's responsibility is to verify that the line and switch translations have been done accurately per the request received from BRE. The Commission is not persuaded that Ameritech Michigan has the contractual obligation to make test calls to the recipient to ensure a working INP installation. However, the Commission is also persuaded that Ameritech Michigan must accurately translate the switch and line translations as provided by BRE within the period allowed by contract for installation. If BRE has made an error in its request, the performance time should start anew when the correction is provided to Ameritech Michigan.

BRE also complains that Ameritech Michigan sometimes completes an order early without notifying BRE that it has done so. Such early provisioning without notice, argues BRE, causes income loss, because the line is in service without BRE's knowledge, and therefore, before measuring begins. Further, BRE argues, until it has notice of installation, 9-1-1 calls may be misdirected.

Ameritech Michigan counters that BRE could prevent early, unbilled use by not providing dial tone over the loop until it is ready to measure use. Further, Ameritech Michigan argues that a 9-1-1 call during the time that BRE is unaware that the phone is in service will likely result in a "no record found" message for the public safety answering point. It argues that this is no greater problem than if BRE furnishes incorrect address information to the database.

The Commission agrees with the ALJ that the problem is not really the early installation, but the failure of Ameritech Michigan to notify BRE of the early installation in a timely manner. The Commission finds that in instances in which Ameritech Michigan completes an order before the due date, it should immediately notify BRE that it has done so. It is obvious that when Ameritech Michigan installs service for itself, it immediately has notice of that fact. Thus, to provide less to BRE violates the proscription against discrimination, and leaves BRE vulnerable to unmeasured use and its customers with potential problems with 9-1-1 calls. The Commission rejects Ameritech Michigan's proposed solution because it would mean that BRE's customer would lose days of phone service.

As to BRE's allegations that Ameritech Michigan did not provide the same quality of installation and maintenance service to BRE customers as it does itself, the Commission agrees with the ALJ that BRE failed to meet its evidentiary burden. The testimony that BRE relies upon is plagued with problems noted by the ALJ, who found the witness to be evasive when answering

cross-examination questions. The Commission finds that the ALJ was in the best position to judge the credibility of witnesses. BRE's arguments do not persuade the Commission that the ALJ's determination should be reversed.

Further, the Commission is persuaded that the ALJ correctly reasoned that the trunking issue did not support a finding of discrimination. The record reflects that the actions and inactions of both parties contributed to the severe blockage that occurred, although each would like the other to take the entire blame. Moreover, BRE was not disproportionately affected by the blockage. Ameritech Michigan's customers were affected in greater numbers and for a longer period of time than BRE's customers. There is no indication that Ameritech Michigan remedied the problem in a manner that unreasonably favored its end users.

Ameritech Michigan excepts to the ALJ's finding that the company discriminated against BRE with regard to weekend installations. Ameritech Michigan argues that the issue is not properly before the Commission because BRE did not allege or prove that it ever requested a weekend installation that was denied during the period covered by the complaint. Ameritech Michigan argues that, because there is no evidence that Ameritech Michigan ever denied a BRE request for a weekend installation, there is no evidence upon which to base the finding that Ameritech Michigan discriminated against BRE.

BRE argues that the issue of weekend installations is related to Ameritech Michigan's compliance with performance requirements for installation of unbundled loops. BRE asserts that the record demonstrates that Ameritech Michigan provides weekend installation to its retail customers, but that it would not even consider a weekend installation for BRE.

The Commission finds that the ALJ properly concluded that Ameritech Michigan has discriminated against BRE in relation to the availability of weekend installations. If Ameritech

Michigan provides weekend installation to its own retail customers under certain circumstances, it must make that service available to BRE under like conditions. That BRE has not shown specific requests for weekend installation were denied does not negate the discrimination in what is made available. BRE need not demonstrate that it has made futile requests.

Ameritech Michigan also excepts to the ALJ's finding that it discriminated against BRE in relation to 9-1-1 service. Ameritech Michigan claims that it provided the resources to BRE that would allow it to submit data in an appropriate fashion and in a format necessary for acceptance into the 9-1-1 database. It asserts that there is no basis on which to find that it failed to perform any necessary task and charges that BRE was slow and ineffectual at maintaining the accuracy of its 9-1-1 data in the database.

BRE responds that Ameritech Michigan never informed BRE that the vendor in charge of the 9-1-1 database uses the MSAG for purposes of validating street addresses. Ameritech Michigan uses the street addressing guide (SAG) for purposes of ordering unbundled loops. There are significant differences between the SAG and the MSAG. Because information provided by BRE to the 9-1-1 database vendor had to pass checks using the MSAG, BRE experienced difficulty with its customers showing up on the screens at the public safety answering point as "no record found." Only after extensive inquiry to Ameritech Michigan, states BRE, did it become apparent that the MSAG was necessary. And even then, BRE asserts, Ameritech Michigan instructed BRE to obtain the MSAG from the relevant county. However, BRE states, Ameritech Michigan now provides updates for the MSAG on a monthly basis.

The Commission is persuaded that the ALJ aptly analyzed and resolved this issue. It is apparent to the Commission that by failing to provide BRE with the correct information concerning what it must do to enter data, Ameritech Michigan failed to treat BRE as it treats itself. Thus,

Ameritech Michigan has improperly discriminated against BRE, which violates Section 305 of the Michigan Act. MCL 484.2305; MSA 22.1469(305).

### Economic Loss

The ALJ found that, although BRE had suffered some discriminatory treatment by Ameritech Michigan, BRE had failed to provide enough evidence to support its request to be made whole by payment of the requested \$2.7 million. The ALJ noted that there was no documentation of customer losses or the reasons that customers might have left BRE's system, which might have supported BRE's claim that it lost 91 customers. She further found unpersuasive BRE's attempt to set an average value to those claimed lost customers.

BRE excepts and argues that it sufficiently proved that it suffered economic loss as a result of Ameritech Michigan's actions and is thus entitled to the requested \$2.7 million. Moreover, BRE states, the ALJ did not find that BRE had failed to show that it incurred any economic loss. It argues that if the Commission does not award BRE compensation for losses caused by Ameritech Michigan's unlawful conduct, the incumbent will conclude that it may continue to disregard the interconnection agreements and state and federal law.

BRE argues that even if it did not sufficiently establish its right to \$2.7 million, it "proved the majority of its case" and has a right to be made whole pursuant to Section 601 of the Michigan Act. Further, BRE argues that, at a minimum, it should be entitled to recover economic losses, costs, and attorney fees.

Ameritech Michigan responds that the lack of documentation to establish the loss of customers should lead the Commission to conclude that BRE's claim to that loss is without substance. Ameritech Michigan argues that even if the Commission upholds the ALJ's findings of

discrimination with regard to 9-1-1 and weekend installations, BRE has not shown that those issues had any economic effect. Rather, Ameritech Michigan argues, BRE claimed the loss of 91 customers resulted from the network blockage problem. Moreover, Ameritech Michigan asserts, although asking for an alternate award, BRE has not even suggested where the Commission might find record support for an alternate award amount.

The Commission finds that, generally, the ALJ's analysis of BRE's proofs regarding economic losses is cogent, accurate, and succinct. The only discrimination claims that have been adequately proven on this record relate to the 9-1-1 problems, weekend installation availability, and lack of notification of early installations. There is no evidence on this record suggesting that those issues caused a particular amount of economic harm to BRE. Thus, the Commission concludes that BRE has failed to quantify its economic loss.

However, the Commission finds that BRE's request for costs and attorney fees should be granted. Although BRE has not sufficiently quantified its economic loss, it is clear that Ameritech Michigan has breached the interconnection agreement and violated the Michigan Act, which has resulted in economic loss to BRE. Thus, the Commission finds that BRE has suffered economic loss and may receive costs and attorney fees incurred in its effort to obtain redress.

Therefore, the Commission directs Ameritech Michigan to reimburse BRE for its reasonable expenses, including attorney fees incurred in connection with this case.

### Motion to Dismiss

On April 6, 1998, Ameritech Michigan filed a motion for summary disposition and a motion to dismiss. By April 17, 1998, BRE and the Staff filed responses opposing Ameritech Michigan's motions. After hearing arguments, the ALJ denied Ameritech Michigan's motion for summary

disposition at an April 23, 1998 hearing. Arguments on the motion to dismiss were delayed until the briefing stage of the case and a ruling deferred until the PFD, in which the ALJ denied that motion as well.

In its exceptions, Ameritech Michigan again raises these motions, which it requests that the Commission grant. Ameritech Michigan has presented no new argument that persuades the Commission that a different result is required. Therefore, the Commission finds that the ALJ correctly denied the motions for the reasons stated on the record and set forth in the PFD.

#### Miscellaneous Corrections

BRE proposed two “factual corrections” to the PFD. The first involves a typographical error on page 10 of the PFD; the second involves enlarging a statement of BRE’s position on page 11. Ameritech Michigan acknowledges the typographical error, but argues that the ALJ’s understanding of BRE’s argument needs no amendment. The Commission agrees with Ameritech Michigan that although the first correction is an obvious typographical error, the second requested correction is better considered as an explanation of BRE’s position. The additional language does not alter the Commission’s decision on the issues in this case.

#### Further Proceedings

Through the testimony of Ann Schneidewind, the Staff points out that Ameritech Michigan, as an incumbent LEC, has responsibility under state and federal law and the various interconnection agreements to provide quality service to competitive LECs. For example, pursuant to Section 305 of the Michigan Act, MCL 484.2305; MSA 22.1469(305), Ameritech Michigan may not do any of the following:

- (a) Discriminate against another provider by refusing or delaying access service to the local exchange.
- (b) Refuse or delay interconnection or provide inferior connections to another provider.
- (c) Degrade the quality of access service provided to another provider.
- (d) Impair the speed, quality, or efficiency of lines used by another provider.
- (j) Refuse or delay access service by any person to another provider.

Also, pursuant to Section 355(1) of the Michigan Act, MCL 484.2355(1); MSA 22.1469(355)(1), Ameritech Michigan must provide unbundled network elements on a nondiscriminatory basis.

The Staff further pointed out that Section 251(c)(2)(C) of the federal Act requires incumbent LECs to provide interconnection to competitive LECs at least equal in quality to that which the incumbent LEC provides itself or any affiliate. Section 251(c)(2)(D) requires the incumbent LEC to provide unbundled network elements on terms that are just and reasonable and not discriminatory. The Federal Communications Commission (FCC) has held that this section requires incumbent LECs to provide network elements “under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.” FCC order in CC Docket No. 96-98 issued August 1996, ¶315.

However, despite these provisions and provisions within the interconnection agreement itself that require nondiscriminatory provision of services and network elements, the Staff took the position that there are no specific performance standards to which the Commission might compare Ameritech Michigan’s performance for purposes of determining whether it has discriminated. Ms. Schneidewind testified that the FCC has begun a docket to identify performance measurements

that might be used to judge the obligations of the incumbent LECs. However, she stated that the FCC has expressed its intention to allow states that have begun the process of developing performance measurements and reporting requirements to continue work and to incorporate the model rules to the extent those states deem appropriate. Notice of Proposed Rule Making issued April 17, 1998, CC Docket No. 98-56, ¶23. The FCC determined to look only at what should be measured and how those items should be reported. For the present time, the FCC left any performance benchmark design to the states.

The Staff therefore proposed that the Commission immediately initiate a separate proceeding allowing for input from incumbent LECs, competitive LECs, and other interested parties to establish the performance measurements, reporting requirements, and performance benchmarks by which competitive LECs and the Commission can more readily assess the provision of interconnection services by the incumbent LECs. The Staff proposed that the Commission first order Ameritech Michigan to present its proposal on the measurements, reporting, standards, and enforcement mechanisms that it believes to be appropriate, with others permitted to file comments on that proposal. The Staff asserted that completion of such a proceeding would allow more efficient resolution of disputes like those asserted in Count II of BRE's complaint.

The ALJ found that Staff's proposal had merit in that she believed that establishing performance measures, reporting requirements, and benchmarks could guide parties in resolving their disputes without the need to come to the Commission. She recommended that the proceeding should not be conducted as a contested case, but rather as a shortened procedure.

No party excepted to the ALJ's recommendation. The Commission finds that the Staff's proposal for a further proceeding should be adopted. Therefore, the Commission directs Ameritech Michigan to file within 30 days of the date of this order its proposal for the appropriate measure-

ments to be reported, the appropriate form and method for reporting its performance, the standards or benchmarks for performance that should be adopted by the Commission for use in determining whether Ameritech Michigan is providing interconnection in conformity with the provisions of federal and state law, and appropriate enforcement mechanisms. The Commission further directs Ameritech Michigan to provide notice of the new proceeding to all parties with whom it has an executed interconnection agreement and to all licensed basic local exchange providers in Michigan, along with a copy of its proposal. Interested persons may file comments on Ameritech Michigan's proposal within 21 days of the date that Ameritech Michigan files and serves its proposal. Thereafter, within 10 days of the last date for filing comments, reply comments may be filed. Reply comments must respond to previously filed comments and may not raise new issues.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACR, R 460.17101 et seq.
- b. Ameritech Michigan violated provisions of the state and federal acts that prohibit discrimination against competitive LECs in provision of access service and interconnection, as detailed in this order.
- c. Ameritech Michigan breached its interconnection agreement, which was approved by the Commission's June 5, 1997 order in Case No. U-11326 in relation to reporting requirements.
- d. BRE failed to meet its burden of proof with regard to its allegations in Count I.

e. BRE suffered economic loss as a result of Ameritech Michigan's violation of the Michigan Act, as detailed in this order.

f. Ameritech Michigan should pay the reasonable expenses and attorney fees incurred by BRE in connection with this case.

g. A further proceeding should be held to determine the appropriate performance measurements to be reported, the form and method for reporting performance on those measurements, and the standards or benchmarks for performance that should be adopted by the Commission for use in determining whether Ameritech Michigan is providing interconnection in conformity with the provisions of applicable federal and state law, and appropriate enforcement mechanisms.

THEREFORE, IT IS ORDERED that:

A. Count I of the complaint is dismissed with prejudice.

B. Ameritech Michigan's motions for summary disposition and its motion to dismiss are denied.

C. Ameritech Michigan shall file monthly performance reports consistent with the reporting requirements of its interconnection agreement, as interpreted in this order.

D. Ameritech Michigan shall cease and desist the discriminatory practices discussed in this order.

E. Ameritech Michigan shall pay the reasonable expenses, including attorney fees, incurred by BRE Communications, L.L.C., d/b/a Phone Michigan, in connection with this case.

F. Within 30 days of the date of this order, Ameritech Michigan shall file its proposal for the appropriate performance measurements to be reported, the form and method for reporting its performance, and the standards or benchmarks for performance that should be adopted by the

Commission for use in determining whether Ameritech Michigan is providing interconnection in conformity with the provisions of applicable federal and state law, and appropriate enforcement mechanisms. At the same time as its filing with the Commission, Ameritech Michigan shall provide notice to all licensed basic local exchange companies in Michigan, all parties with whom it has executed interconnection agreements, and Attorney General Frank J. Kelley with a copy of Ameritech Michigan's proposal.

G. Any interested party may file comments on Ameritech Michigan's proposal within 21 days of the notice provided for in Paragraph F of this order. Thereafter, within 10 days of the last day for filing comments, reply comments may be filed. Reply comments, if any, must respond to previously filed comments and may not raise new issues.

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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand

Chairman

( S E A L )

/s/ David A. Svanda

Commissioner

By its action of October 2, 1998.

/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; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

By its action of October 2, 1998.

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Its Executive Secretary

In the matter of the complaint of )  
**BRE COMMUNICATIONS, L.L.C.**, d/b/a **PHONE** )  
**MICHIGAN**, against **AMERITECH INFORMATION** )  
**INDUSTRY SERVICES**, a division of **AMERITECH** )  
**MICHIGAN**, on behalf of **AMERITECH MICHIGAN**, )  
and request for declaratory ruling. )  
\_\_\_\_\_ )

Case No. U-11654

Suggested Minute:

“Adopt and issue order dated October 2, 1998 finding that Ameritech Michigan violated provisions of the Michigan Telecommunications Act and ordering Ameritech Michigan to pay BRE Communications, L.L.C., d/b/a Phone Michigan, reasonable expenses, including attorney fees, incurred in connection with this case, as set forth in the order.”