

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application and complaint of )  
**WORLDCOM TECHNOLOGIES INC.** )  
against **AMERITECH MICHIGAN, AMERITECH** )  
**SERVICES, INC., AMERITECH INFORMATION** )  
**INDUSTRY SERVICES, and AMERITECH LONG** )  
**DISTANCE INDUSTRY SERVICES** relating )  
to unbundled interoffice transport. )  
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Case No. U-12072

At the March 3, 2000 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

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

**OPINION AND ORDER**

**I.**

**HISTORY OF PROCEEDINGS**

On August 11, 1999, WorldCom Technologies Inc., an MCI WorldCom company (and will be referred to as such in this order), filed an application and complaint against Ameritech Michigan, Ameritech Services, Inc. (ASI), Ameritech Long Distance Industry Services (ALDIS), and Ameritech Information Industry Services (AIIS). The application and complaint alleged that Ameritech Michigan had violated its tariff and applicable law by refusing to provision unbundled local transport (ULT) to MCI WorldCom and by imposing unreasonable ordering and coding requirements on orders for ULT.

A prehearing conference was conducted on September 21, 1999 before Administrative Law Judge George Schankler (ALJ). MCI WorldCom, Ameritech Michigan, and the Commission Staff participated in the case. An evidentiary hearing was held on November 30, 1999. The record consists of 542 pages of transcript and 42 exhibits that were fully or partially received in evidence.

Briefs were filed on December 16, 1999 and reply briefs on January 5, 2000. The ALJ issued a Proposal for Decision (PFD) on January 28, 2000. MCI WorldCom and Ameritech Michigan filed exceptions on February 7, 2000 and replies to exceptions on February 14, 2000.

## II.

### **BACKGROUND**

MCI WorldCom is seeking access to its customers through the purchase from Ameritech Michigan of ULT, an unbundled network element (UNE). The customers are Internet service providers (ISPs) that require a dedicated high speed data transfer service. MCI WorldCom seeks this access to ULT at Ameritech Michigan's central offices in close proximity to its customers to avoid the higher mileage charges associated with serving customers from more distant central offices. ULT is provisioned through the use of facilities that consist of fiber optic cables with electronics at both ends. The electronics (called SONET equipment) are located in Ameritech Michigan's central offices and consist of bays with slots into which cards are inserted when additional capacity is needed. The problem arises when all of the slots in a bay are full. At that point, Ameritech Michigan refuses to provision ULT on the basis that facilities do not "exist" and the Federal Communications Commission's (FCC) orders permit it to reject an order for that reason.

When all of the bays are full, Ameritech Michigan does not inform MCI WorldCom of any plans it may have to add bays. Ameritech Michigan simply informs MCI WorldCom that facilities

do not exist, and rejects the order. MCI WorldCom can request ULT at another, more distant office, which involves additional mileage charges. Ameritech Michigan will reject that order if all of the bays at that location are full. MCI WorldCom can continue to order ULT at other locations until it chooses a routing for which there is capacity, decides not to serve the customer, or decides to order more costly special access, which provides the same functionalities. There is no allegation that Ameritech Michigan refused to provision special access upon request at any time.

Furthermore, Ameritech Michigan requires two access service requests (ASR) for a ULT order while requiring only one for a special access order. Ameritech Michigan also requires certain coding on the forms that creates a conflict with MCI WorldCom's computer system.

### **III.**

#### **DISCUSSION**

##### **Jurisdiction**

Ameritech Michigan asserts that the Commission does not have jurisdiction because the traffic that would be carried by the facilities is ISP traffic, which the FCC has determined to be interstate and, as such, not subject to the jurisdiction of the Commission. Ameritech Michigan further asserts that the service does not involve local exchange service because there is no dial-up or switching involved and it is not required to provide ULT to MCI WorldCom except in connection with the provision of local exchange service.

MCI WorldCom argues that Ameritech Michigan waived the primary jurisdiction argument by failing to raise it as an affirmative defense. It also maintains that numerous provisions of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq.; MSA 22.1469(101) et seq.,

confer jurisdiction, that not all of the traffic at issue is interstate, and that the ultimate use of ULT does not determine Ameritech Michigan's obligations.

The ALJ concluded that the FCC has been clear that ISP traffic is interstate in nature if it reaches a website in another state or a foreign country and that a "substantial portion" of ISP traffic is interstate in nature. FCC 99-38, para. 18. Nevertheless, he agreed with MCI WorldCom that the Commission has jurisdiction because, in the same order, the FCC noted that the issue in that proceeding (reciprocal compensation for ISP traffic) could be dealt with voluntarily in an interconnection agreement or in a state commission proceeding even if a substantial portion of the traffic was interstate in nature.

The ALJ agreed with MCI WorldCom that the FCC orders addressing the obligation to provide UNEs in the context of local exchange service were distinguishable because those orders dealt with access to switching, not ULT, access to shared transport, not dedicated transport, and combinations of UNEs, not ULT alone. He concluded that those orders did not require that ULT be used solely to provide local exchange service. Further, he noted that Ameritech Michigan had provided ISP-related ULT to MCI WorldCom on eight occasions and had provided it to others as well. Hence, he concluded that the Commission has jurisdiction.

Ameritech Michigan excepts and argues that the ULT at issue in the complaint would be used exclusively to provide high-speed Internet data access, that the FCC has concluded that such traffic is interstate in character, and that the FCC has exclusive jurisdiction over interstate communications. It says that the FCC's decision that it will not disturb state commission decisions addressing intercarrier compensation for such traffic does not confer jurisdiction in this case because an interconnection agreement, reciprocal compensation, and a preexisting Commission determination are not at issue.

MCI WorldCom excepts to the ALJ's failure to find that Ameritech Michigan waived the jurisdictional argument. It also argues that it cannot be disputed that the Commission has jurisdiction over claimed violations of state tariffs and state law, and it asserts that Ameritech Michigan violated numerous sections of the MTA. Further, it argues that the FCC has ruled that state commissions can grant remedies when an incumbent local exchange carrier (ILEC) fails to provide a UNE used to provision DSL-based services. MCI WorldCom also objects to the ALJ's failure to address the Commission's jurisdiction under additional sections of the MTA.

The Commission finds that it has jurisdiction. The MTA grants the Commission jurisdiction to resolve complaints and applications filed under the act. MCL 484.2203; MSA 22.1469(203) and MCL 484.2204; MSA 22.1469(204). To prevail on its argument that the Commission cannot exercise that jurisdiction, Ameritech Michigan must show that federal law bars Commission action. At best, it can argue that the FCC might also be a proper forum to resolve the complaint, but that is an argument of primary jurisdiction and the Commission is not persuaded that there is any federal policy that complaints about the provisioning of ULT should be resolved by the FCC rather than the state commission. Furthermore, the traffic is not destined solely for the Internet. Tr. 446. In addition, Ameritech Michigan previously provided ULT without asserting that it was not obligated to do so because of the nature of the traffic, Tr. 285; Exhibit C-10, and did not reject any order because of the nature of the traffic to be carried. In fact, it filled orders for ULT except when it claimed that facilities did not exist. Finally, to the extent that the issue is one of primary jurisdiction, Ameritech Michigan waived the defense.

## Duty to Provide ULT

MCI WorldCom maintains that Ameritech Michigan had no justification for rejecting ULT orders while at the same time processing special access orders because both are provisioned with the same SONET equipment. It argues that if either can be provided by adding an additional card to an existing bay or by expanding the number of bays, Ameritech Michigan is obligated to do so.<sup>1</sup>

Ameritech Michigan says that when a central office bay is used to capacity, it may reject an order for ULT. Ameritech Michigan asserts that if it must add electronics to meet a request for ULT, then the needed facilities do not exist as required by the FCC's orders. Ameritech Michigan does concede that it routinely adds cards to existing bays to provision ULT, which it characterizes as using existing capacity, not constructing additional facilities. The issue, it says, is whether it must purchase, install, and deploy additional SONET multiplexers and circuit equipment. It says that it was able to fill all requests for special access because it recognizes the legal obligation to provide network engineering, design, and facility construction if needed to provide special access.

Ameritech Michigan's position is based on the FCC's First Report and Order, issued on August 8, 1996, where the FCC mandated access to ULT by competing carriers "where such interoffice facilities exist." FCC 96-325, para. 443. The FCC also stated that the provisioning of a UNE is limited to "*existing* incumbent LEC facilities." FCC 96-325, para. 451 (emphasis in original). Ameritech Michigan contends that these holdings were reaffirmed in the FCC's UNE Remand Order, FCC 99-238.

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<sup>1</sup>None of the ULT orders that Ameritech Michigan rejected required the installation of additional fiber optic cables along existing or new routes. Consequently, the Commission does not reach the question of whether Ameritech Michigan would be obligated to install new fiber optic cables.

MCI WorldCom says that the need to add electronics in a central office does not mean that facilities do not exist or that the incumbent LEC has not deployed transport facilities for its own use. MCI WorldCom asserts that what it is seeking is the expansion of existing facilities used by the ILEC for its own needs. MCI WorldCom cites the FCC's UNE Remand Order:

We reject incumbent LECs' arguments that because dark fiber is transport that is not currently "used" in the provision of a telecommunications service, . . . it does not meet the statutory definition of a network element or the definition of interoffice transport. Rather, we agree with the Illinois Commission that the term "used in the provision of telecommunications service" in section 153(29) refers to network facilities or equipment that is "customarily employed for the purpose" of providing a telecommunications service. Although particular dark fiber facilities may not be "lit" they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the [federal] Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always "currently used" as the term is interpreted by incumbent LECs.

FCC 99-238, para. 327 (footnotes omitted).

MCI WorldCom says that this passage demonstrates the FCC's recognition of the distinction between constructing new facilities and expanding the capacity of existing facilities. MCI WorldCom asserts that when the expansion of existing facilities is involved, Ameritech Michigan cannot reject ULT orders.

The ALJ concluded that Ameritech Michigan's position was untenable, although he concluded that none of the FCC's orders resolved the issue explicitly. He noted that Ameritech Michigan placed particular reliance on a portion of the FCC's UNE Remand Order:

In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. . . . [W]e do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.

FCC 99-238, para. 324 (footnote omitted). He concluded that because Ameritech Michigan had deployed SONET technology for its own use and could fill MCI WorldCom's orders by expanding the capacity of the existing facilities, it was obligated to do so. He concluded that the addition of SONET equipment was an ongoing process that did not require the construction of new facilities. The ALJ found it relevant that the rates for ULT fully compensate Ameritech Michigan, even when SONET electronics must be added.

The ALJ also relied on the January 4, 2000 Opinion and Order of Judge Lawrence P. Zatkoff of the United States District Court, Eastern District of Michigan, in Ameritech Michigan v MPSC and BRE Communications, LLC, Case No. 99-CV-71180-DT, an appeal of the Commission's order in Case No. U-11735. The Court found that it "must determine whether Ameritech has an existing network to serve BRE's unbundled loop orders and whether those unbundled loops are available for BRE's use." Order, p. 11. Ameritech Michigan had claimed that facilities did not exist or were not available on its network because certain equipment would have to be removed and other equipment added to condition loops for high speed data transfer. The Commission had found that, to the contrary, the loops did exist and were available and that Ameritech Michigan had discriminated in failing to provide the loops. The Court held that the Commission's order was consistent with both the interconnection agreement and the federal Telecommunications Act of 1996 (FTA). The Court noted that, under Ameritech Michigan's tariff, loops can be obtained "where facilities are available." Order, p. 12. The Court cited Section 251(c) of the FTA, 47 USC 251(c), as requiring an incumbent carrier to provide access to unbundled loops in its "existing network." Order, p. 13. In affirming the Commission's order that Ameritech Michigan must provide unbundled loops without additional charge, the Court affirmed the Commission's decision "that since Ameritech has an existing network of unbundled loops that can be used for unbundled

loop access, it must provide BRE with access and make the unbundled loops ‘available’ even if additional engineering and construction are necessary.” Order, p. 14. The Court noted the Commission’s finding that the additional construction and engineering needed to provision loops to BRE are normal, routine work covered by rates that are based on total service long run incremental cost (TSLRIC).

The ALJ therefore concluded that by refusing to expand its SONET capacity to fill MCI WorldCom's ULT orders, Ameritech Michigan had violated its tariff, had violated Sections 251(c)(2)(B) and 251(c)(3) of the FTA, and had discriminated under Section 305(1)(a) of the MTA.

Ameritech Michigan excepts to what it alleges to be significant factual errors in the PFD. The Commission concludes that Ameritech Michigan’s quarrel with how the ALJ stated some of the facts does nothing to affect the validity of the ALJ’s conclusions.

Ameritech Michigan also excepts to the ALJ’s conclusion that it violated its tariff and federal law. It argues that the costs associated with providing network facilities, and whether and how those costs are recovered, in no way affect its legal obligation to provision ULT. It argues that the Commission’s decision in Case No. U-11735 and the subsequent appeal do not support the conclusion in the PFD. It asserts that the BRE decision is distinguishable because it did not consider the issue of the legal obligation to provision unbundled interoffice transport, but rather addressed the issues of what the parties to an interconnection agreement intended by the word “available” and whether special construction charges could be imposed. Ameritech Michigan returns to its argument that the FCC has clearly stated that an ILEC has an obligation to provide access to facilities only where those facilities “exist.”

The Commission concludes that Ameritech Michigan is obligated to provide ULT under the circumstances addressed by the complaint and its failure to do so violates its tariff, the FTA, and the MTA. Ameritech Michigan will install additional SONET electronics if needed to serve its retail customers, it will install additional SONET electronics if needed to fill an order for special access, but it will not install additional SONET electronics if needed to fill an order for ULT. Ameritech Michigan cannot claim that the FCC's orders and rules prohibit it from installing additional SONET electronics. It can only claim that it is not required to do so, and the support for that position is language in the FCC's orders that is, at best, ambiguous. Considering the language and policies of the MTA and FTA, and the effects of Ameritech Michigan's interpretation, the Commission concludes that Ameritech Michigan's position is both unreasonable and frivolous.

Ameritech Michigan takes a narrow view of its obligation under state and federal law to provide ULT. It took a similarly narrow view of its obligation to provide unbundled loops in BRE. It argued that the loops did not "exist" because they could not be provided without a "complex dispatch," "conditioning," or "remote switching." BRE, p. 11. Here, it argues that ULT facilities do not exist if it must add bays. The Commission rejects that argument, as it rejected the argument about the availability of unbundled loops. Ameritech Michigan relies again upon the FCC's orders, but the Commission is not persuaded that those orders support Ameritech Michigan's position that there is a legal difference between adding cards to existing bays and adding additional bays to existing fiber optic cable.

The Eighth Circuit's decision in Iowa Utilities Board v FCC, 120 F3d 753 (8<sup>th</sup> Cir, 1997), said that "subsection 251(c)(3) [of the FTA] implicitly requires unbundled access only to an incumbent LEC's existing network—not to a yet unbuilt superior one." 120 F3d 813 (emphasis in the original). MCI WorldCom is not seeking access to a superior, unbuilt network, but access to the

existing network with a technology that Ameritech Michigan itself uses. MCI WorldCom is not asking Ameritech Michigan to deploy facilities that it does not use in providing service or to install facilities along new routes. It is not asking Ameritech Michigan to “build” facilities as that term is used in the industry. Tr. 308. The Commission concludes that the FTA requires Ameritech Michigan to provide transport facilities of the type that are currently in use, even if that requires the installation of additional electronics at either end of the fiber. That conclusion is entirely consistent with BRE. Furthermore, it appears that Ameritech once shared that view and changed its policy somewhere between January and April 1999. Tr. 391-392. The Commission also concludes that Section 355 of the MTA, MCL 484.2355; MSA 22.1469(355), requires Ameritech Michigan to provide ULT.

Furthermore, the rate for ULT is based on the TSLRIC of the service, and the TSLRICs for ULT and special access are essentially the same. Tr. 137-138. The similarity of the costs undercuts its claim that it has additional obligations with respect to provisioning special access. To the contrary, Ameritech Michigan claims that its TSLRIC studies reflect the terms and conditions of each service. Exhibit C-30; Tr. 320. If the costs are the same, the terms and conditions for ULT and special access cannot be significantly different. Consequently, even when Ameritech Michigan must install new capacity to provide ULT, it recovers its costs just as it does when it installs new capacity to provide special access. Tr. 141.

Ameritech Michigan’s position serves to hinder rather than promote the competition intended by the FTA and the MTA. It seems not to understand the effect of its conduct because it asserts that there is no basis for a fine because “the only ‘harm’ MCI WorldCom has suffered is the payment of a higher monthly amount for purchasing the facility through a special access order as opposed to an ULT order. Clearly, there has been no harm to any competition in this case.”

Ameritech Michigan's exceptions, p. 6. The payment of higher rates (up to double or more) for the same functionalities can hardly be described as imposing no harm on a competitor. Furthermore, the time and effort, with the corresponding delay and cost, in submitting repeated orders in an attempt to find "existing" facilities also imposes harm on a competitor.

Ameritech Michigan also excepts to the conclusion that it discriminated against MCI WorldCom in violation of state and federal law. As to state law, it says that Section 305(1)(a) does not apply to ULT because it is not a form of access to the local exchange network. More generally, it asserts that it cannot be found to discriminate when it applies the same ordering process to all providers. It says that it has no obligation to treat orders for ULT and special access the same because the services are different. Similarly, it says that there is no discrimination when it builds facilities for its own use because MCI WorldCom can also build facilities.

The Commission concludes that there is discrimination. Ameritech Michigan provides ULT and special access on a different basis, and the Commission does not agree that there is any meaningful difference between the two for purposes of this case. Both serve the same function in MCI WorldCom's provision of service to its customers, a proposition that Ameritech Michigan has previously put forth. FCC 97-298, para. 309. The primary difference is the much higher rates for special access. Furthermore, the Commission rejects Ameritech Michigan's claim that ULT is not subject to the MTA's discrimination provisions because it is not part of the obligation to unbundle. The Commission rejected that view in the January 28, 1998 order in Case No. U-11280, pp. 21-22. Section 355 of the MTA requires Ameritech Michigan to unbundle local exchange service, and ULT is part of that obligation. Section 305 of the MTA and Section 251 of the FTA require that ULT be offered on a non-discriminatory basis. Ameritech Michigan has discriminated because it unreasonably distinguishes between providers requesting special access and those requesting ULT

and unreasonably distinguishes between its own need for facilities to serve its end-use customers and the needs of a provider/customer, such as MCI WorldCom, for facilities to serve its end-use customers.

### FOCs and Disclosure

MCI WorldCom objects to the fact that Ameritech Michigan will not issue a firm order confirmation (FOC) for ULT when Ameritech Michigan needs to add electronics before it can provision the service. MCI WorldCom says that issuing an FOC is required by tariff and FOCs are issued for another provider pursuant to an interconnection agreement. It asserts that to refuse to issue FOCs to MCI WorldCom is therefore discriminatory.

The ALJ found that the issue was resolved, in essence, by the finding that Ameritech Michigan cannot reject ULT requests for lack of existing facilities. He concluded that because Ameritech Michigan must expand its SONET capacity as needed to provision ULT, it must provide FOCs accordingly. The ALJ went on to find that Ameritech Michigan's refusal to even advise MCI WorldCom of Ameritech Michigan's plans to add SONET capacity when it rejected ULT orders amounted to a "cat and mouse" game that impaired MCI WorldCom's ability to operate efficiently, discriminated against MCI WorldCom as compared to Ameritech Michigan and its affiliates, and delayed MCI WorldCom's access to Ameritech Michigan's network in violation of Sections 305(1)(a) and (f).

The ALJ also noted that when Ameritech Michigan rejected a ULT order, it would refuse to reveal where capacity was available so that MCI WorldCom could select the next most favorable site. Instead, MCI WorldCom had to submit an ASR for a site before Ameritech Michigan would either reject the order for lack of capacity or fill the order. The ALJ found Ameritech Michigan's

conduct to evidence bad faith on its part and to be inconsistent with the goals of both the MTA and FTA to promote the development of a competitive market.

Ameritech Michigan excepts and argues that there is nothing in the law that requires it to divulge such information to MCI WorldCom. It says that Section 305(1)(f) does not cover this situation and that it cannot have a duty to disclose its internal business plans related to facilities that it does not have an obligation to build. It also argues that it has valid business reasons for not disclosing this proprietary information and that it is required to treat all carriers equally. It asserts that a new problem would be created if it were required to disclose its plans and those plans later changed for valid reasons after a carrier had relied upon them.

The Commission's decision that Ameritech Michigan must add SONET equipment as needed to fill an order for ULT requires Ameritech Michigan also to issue an FOC for those orders, as it does for special access. The Commission agrees with the ALJ that Ameritech Michigan's conduct is evidence of bad faith, in addition to being anticompetitive and discriminatory. Ameritech Michigan has offered no reason for refusing to disclose where capacity is available even if it need not expand its existing capacity, and the effect is clearly to delay MCI WorldCom in serving its customers. Ameritech Michigan asserts that if it must expand its facilities, it still should not be obligated to disclose its expansion plans because those plans could change. Disclosure of those plans would not prevent changes for good reasons. Ameritech Michigan discloses to a customer the expected date that special access will be available as ordered, even though its plans could change, and can do the same for ULT. Discrimination can be eliminated by full disclosure to any requesting provider, and competition will be served by putting Ameritech Michigan and its competitors on a more even basis. It is also consistent with the requirement of the UNE Remand Order that "the access and unbundled network elements provided by an incumbent LEC must be

provided in ‘substantially the same time and manner’ to that which the incumbent provides to itself.” FCC 99-238, para. 490. Ameritech Michigan has committed to do so. Exhibit C-22; Tr. 305-306.

### Performance Measures

MCI WorldCom excepts to the ALJ’s failure to address its request that Ameritech Michigan should be required to reflect the delay in provisioning ULT in any applicable performance measures, as it does for special access. It says that the performance report for ULT does not reflect the true interval because it excludes the orders that Ameritech Michigan rejects for a claimed lack of facilities.

The Commission agrees. Because the Commission finds that Ameritech Michigan is required to offer ULT even if it must add electronics at either end of existing fiber, it is appropriate to measure its performance in the same manner for both ULT and special access. Furthermore, improperly rejected orders should be included in any measure of Ameritech Michigan’s performance.

### Order Processing

MCI WorldCom says that it is unreasonable and burdensome for Ameritech Michigan to require it to submit two ASRs for each ULT order when it requires only one ASR for each special access order. MCI WorldCom also complains that the illogical coding that Ameritech Michigan requires on ULT orders makes it impossible to process orders without changing its computer software. It also complains that Ameritech Michigan will no longer allow a manual work around of the problem.

Ameritech Michigan contends that two ASRs are needed for a ULT order because two distinct services, transport and cross-connect, are being provided and because there is nothing in the ULT tariff that prohibits this practice. Ameritech Michigan says that special access is an end-to-end service and separate ASRs for each element are therefore not required. Similarly, with respect to the coding requirements, Ameritech Michigan contends that it reflects the nature of the services being ordered. It denies refusing to work around the system compatibility problem.

The ALJ concluded that Ameritech Michigan's preference for two ASRs for ULT orders, representing the two elements of ULT, was not unreasonable and, while a minor inconvenience, was not a matter that required the Commission's involvement. As to the coding requirements, the ALJ noted that MCI WorldCom had made changes to its computer programming to accommodate Ameritech Michigan's coding requirements in late August 1999. The ALJ therefore concluded that the issue was moot. However, he found that the refusal to do manual work arounds after August 1, 1999 violated Section 305(1)(a) of the MTA by unreasonably refusing access based solely on short-term system compatibility issues. He found no compelling reason for Ameritech Michigan to reject ULT orders while the system compatibility problem was being resolved.

MCI WorldCom excepts and argues that the ALJ applied the wrong standard when he concluded that Ameritech Michigan had a rational basis for its insistence on two ASRs for ULT orders. MCI WorldCom asserts that the FCC orders and Ameritech Michigan's tariff require the cross-connect for ULT to be provisioned in the same manner as the cross-connect for special access, i.e., with a single ASR. It asserts that Ameritech Michigan's process results in the discriminatory provision of access service.

The Commission agrees. The requirement of two ASRs for each ULT order serves to complicate the process and is discriminatory. Furthermore, it defies common sense to argue that

submitting two ASRs is not more burdensome than submitting one. Ameritech Michigan failed to show any reason, except its own preference, for imposing this unnecessary requirement.

Ameritech Michigan excepts to the conclusion that its refusal to do manual work arounds was unreasonable and violates Section 305(1)(a) of the MTA. It says that it is undisputed that it did do manual work arounds for orders that were filled and that there is no evidence that ULT orders were rejected on the basis of system compatibility problems. Further, it says that no ULT orders were submitted after May 1999. As a result, it says that it could not have failed to do manual work arounds after August 1, 1999 as the PFD found.

The Commission finds that Ameritech Michigan did manual work arounds until May 1999. Tr. 363. For any future orders, Ameritech Michigan is obligated to make reasonable accommodation in the ordering process if the new programming of MCI WorldCom's computers has not eliminated the system compatibility problem.

### Damages

MCI WorldCom says that when the denial of a ULT order caused it to place an order for ULT at a more distant central office, it incurred unnecessary additional mileage charges and that when it resorted to special access as an alternative to ULT, it incurred special access charges that exceed the ULT charges.

Ameritech Michigan argues that MCI WorldCom did not mitigate damages because it ordered special access at more distant central offices, which caused it to incur additional charges. Ameritech Michigan also argues that the filed rate doctrine prevents MCI WorldCom from ordering special access and later asking to pay ULT rates and that the common law precludes any refund because MCI WorldCom voluntarily paid the special access charges.

MCI WorldCom says its decision to request special access at a particular location was based on the last office at which Ameritech Michigan had rejected a ULT order. It says that it ordered special access from the same office for which Ameritech Michigan had most recently denied a request for ULT to show that Ameritech Michigan was provisioning the electronics for special access at the same time as it was rejecting ULT orders.

The ALJ agreed with Ameritech Michigan that damages should be limited to the excess cost of special access at the office at which ULT was originally requested. He said there was no precedent for allowing a complaining party to recover damages for excess costs that were incurred to aid in proving an aspect of that party's case. However, he also found that this amount should be calculated for the 22 orders listed on Exhibit C-8, rather than the 16 shown on Exhibit C-37, because the refusal to do manual work arounds was not reasonable.

Ameritech Michigan excepts to the ALJ's reliance on Exhibit C-8, which he had stricken from the record. For that reason, it says that the damages must be limited to the 16 ULT orders shown on Exhibit C-37.

The Commission agrees that the damages should not be limited to the 16 orders, and therefore reverses the ALJ's ruling that struck the revised exhibit.

MCI WorldCom excepts to the ALJ's acceptance of the mitigation argument. It asserts that Ameritech Michigan waived the argument by failing to raise the defense in its answer and also failed to establish the facts necessary to show that transport was available with a shorter distance. It says that it spent considerable effort on mitigation and should not be criticized for failing to do still more when Ameritech Michigan's conduct created the problem in the first place. It also asserts that the defense is not available against a claim of violating a statutory prohibition against

discrimination and that it would be contrary to public policy to allow Ameritech Michigan to profit from its wrongful conduct.

The Commission finds that Ameritech Michigan's mitigation argument should be rejected. Ameritech Michigan treated the process of ordering ULT as a game.<sup>2</sup> Under the circumstances, it was entirely reasonable for MCI WorldCom to order alternative service in the manner that it did. The effect was to permit it to provide service to its customers and to reduce the probability that Ameritech Michigan would later claim that new facilities had been added after it rejected the first request for ULT. There is no reason in law, equity, or policy for permitting Ameritech Michigan to raise the mitigation defense. Its unlawful conduct provided the basis for the complaint, and there is no reason to require MCI WorldCom to play the game of guessing where and when ULT would be provided or to permit Ameritech Michigan to profit from its own wrongdoing.

The ALJ rejected as frivolous the arguments that the filed rate and voluntary payment doctrines prevent an award of damages. He concluded that those were not applicable where a complainant paid a higher rate for service because it had illegally been denied access to service at lower tariffed rates.

The Commission agrees that the arguments are frivolous. MCI WorldCom is not challenging the legality of Ameritech Michigan's special access rates but rather the legality of applying those rates to its requests for service. Similarly, MCI WorldCom cannot be said to have acquiesced in Ameritech Michigan's unlawful conduct and the charges it imposed in furtherance of that conduct. Furthermore, Section 601 of the MTA, MCL 484.2601; MSA 22.1469(601), requires the Commis-

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<sup>2</sup>From all that appears on the record, Ameritech Michigan would reject an order for ULT even if it knew that facilities would become available the next day.

sion to make the complainant whole, a requirement with which Ameritech Michigan's arguments cannot be squared.

There is some question which of the disputed charges MCI WorldCom has paid. Therefore, the Commission orders that, for the ULT orders that Ameritech Michigan honored, MCI WorldCom owes the charges associated with the location for which it first placed the order. MCI WorldCom shall pay that amount, and Ameritech Michigan shall refund any excess paid. For ULT orders that Ameritech Michigan rejected and MCI WorldCom ordered special access in substitution, MCI WorldCom owes the ULT charges associated with the location for which it first placed the ULT order. MCI WorldCom shall pay that amount, and Ameritech Michigan shall refund any excess paid. Prospectively, Ameritech Michigan shall charge only those amounts that are consistent with this order.

### Fines

MCI WorldCom asks that the Commission fine Ameritech Michigan \$40,000 per day for the violations established on this record. That amount is the maximum fine permitted under Section 601 after the first violation. Because Ameritech Michigan first rejected a ULT order on February 22, 1999, MCI WorldCom proposed that Ameritech Michigan be fined for each day from February 22, 1999 to March 8, 2000, the anticipated date of the Commission's order, or \$15,200,000 (\$40,000 for 380 days). Likewise, MCI WorldCom proposed an additional \$40,000 per day for each day after August 1, 1999 when it says Ameritech Michigan first rejected an ASR because it refused to manually work around the incompatibility of MCI WorldCom's and Ameritech Michigan's ordering systems.

Ameritech Michigan argues that the Commission cannot impose a fine because it did not violate any provision of the MTA. Further, it argues that if the Commission finds any violations of the act, they would be new violations, distinct from the violations found in previous orders, and therefore the fine should be the minimum of \$1,000 per day permitted under Section 601 for a first offense.

The ALJ recommended a fine of \$10,000 per day from February 22, 1999 to March 8, 2000, or \$3,800,000, an amount that is within the range of fines for both first and subsequent offenses. He concluded that this amount was sufficient to recognize not only Ameritech Michigan's refusal to provision ULT but also Ameritech Michigan's bad faith in refusing to share its plans to expand the SONET capacity of its network. He said that the amount also recognized Ameritech Michigan's refusal to work around the problem of ULT order incompatibility while the issue was being resolved in this proceeding and while MCI WorldCom worked to modify its system to comply with Ameritech Michigan's system logic.

Ameritech Michigan excepts to the recommendation that the Commission impose a fine because it says there were no violations of the MTA. Further, it says that it approached the legal issue in a reasonable, good-faith effort to comply with federal and state law. It says that, as the Commission has previously found in other cases, it should not impose a fine in a case of first impression. It also says that it would be unconstitutional to impose a fine because the Commission must give due regard to the circumstances of the case. It says that if the Commission disagrees with its legal position, the Commission should focus on clarifying the law, not on punishing Ameritech Michigan for a reasonable and supported interpretation of the law or chilling its exercise of the right to assert reasonable interpretations of the law. In any event, it says that the

Commission should limit any fine to the period from when a rejected order for ULT was submitted to when an FOC was received on the corresponding special access order.

The Commission finds that a fine is appropriate. Ameritech Michigan's conduct was a serious violation of the law and, if unchecked, would have a significant adverse effect on the development of competition. Its argument that a fine is not appropriate in a case of first impression is misplaced because of the similarity to the litigation in BRE. Furthermore, the argument loses much of its force when Ameritech Michigan is repeatedly subject to complaints about its narrow and unreasonable interpretation of its legal obligations.

The Commission agrees that a fine of \$10,000 per day, as recommended by the ALJ, is appropriate because it results in a substantial fine that is consistent with the seriousness of Ameritech Michigan's conduct. It also agrees that the fine should be imposed from February 22, 1999 through the date of this order to reflect that Ameritech Michigan has rejected ULT orders on a basis that the Commission finds unlawful and that the company is still defending its refusal to comply with its obligation to provide ULT.

#### Attorney Fees and Costs

MCI WorldCom seeks an award of attorney fees and costs under Section 209 of the MTA, MCL 484.2209; MSA 22.1469(209). It contends that Ameritech Michigan's primary purpose in asserting its position was to harass MCI WorldCom into ordering special access at a greater cost to MCI WorldCom and greater profit to Ameritech Michigan.

The ALJ noted that because attorney fees and costs can be awarded only to the prevailing party, the Commission would have to consider this issue after it determined who prevailed. He also noted that the Commission always has the prerogative to award fees and costs under

Section 209. Accordingly, he directed the parties to address this issue in their exceptions and replies to exceptions.

In its exceptions, MCI WorldCom argues that the Commission should find that Ameritech Michigan's primary purpose in changing its policy on provisioning ULT was to harass MCI WorldCom into ordering special access instead of ULT. It says that the motivation was to charge MCI WorldCom more, to force MCI WorldCom to charge its customers more, and to slow its provision of DSL services. It says that the harassment continued in May 1999 when Ameritech Michigan would no longer allow manual work arounds of its cumbersome and illogical two ASR ordering process. Finally, it asserts that an award of attorney fees would be warranted for the various frivolous defenses that Ameritech Michigan raised.

Ameritech Michigan excepts and argues that any award of attorney fees must be based on the party's position in the proceeding, not events that precede the case. It says that it has not harassed MCI WorldCom in this case because it asserted appropriate arguments based on good faith positions and did not rely on procedural gimmicks or other unprofessional conduct.

The Commission finds that an award of attorney fees and costs is warranted in this case because Ameritech Michigan's overall position and many of its individual arguments are frivolous. As discussed above, despite the countervailing legal and policy reasons for providing ULT as MCI WorldCom requested, Ameritech Michigan chose to focus on language that at best provides ambiguous support for its position. Section 209 requires the Commission to award costs and attorney fees against the party and its counsel if "a party's position in a proceeding under this act was frivolous." MCL 484.2209(1); MSA 22.1469(209)(1). That section defines a party's position to be "frivolous" if the "primary purpose in . . . asserting the defense was to harass, embarrass, or injure the prevailing party" or the "party's legal position was devoid of arguable legal merit."

MCL 484.2209(2); MSA 22.1469(209)(2). The Commission finds that this is not a case of first impression, that Ameritech Michigan had no arguable basis for asserting its position in this case, and that its purpose in litigating this complaint was to continue to defend its view that ULT is not available as requested by MCI WorldCom. In this case, Ameritech Michigan sought both to harass MCI WorldCom and to injure it by imposing unlawful delays and costs.

### Proper Parties

Ameritech Michigan said in a footnote to its brief that ASI, ALDIS, and AIIS are not proper parties because AIIS and ALDIS are not legal entities and because ASI is not regulated by the Commission. The ALJ rejected the argument because he thought that Ameritech Michigan should have sought the dismissal of parties by filing a motion.

Ameritech Michigan excepts to the ALJ's refusal to decide the issue, although it admits that this is at most a procedural technicality because the ALJ did not make a finding that any of the three entities violated any law. MCI WorldCom excepts to the ALJ's failure to give additional reasons in support of not dismissing these parties.

The Commission concludes that it need not resolve the issue. Ameritech Michigan admits that the issue is a procedural technicality, and MCI WorldCom did not except to the lack of any finding that any of the three violated a tariff or the law.

### Section 271 Application

Yesterday, the Commission began a collaborative process with Ameritech Michigan, the Staff, staff from other state commissions, and various competitive local exchange carriers regarding Ameritech Michigan's proposed Section 271 filing with the FCC. The Commission is committed to proceeding with this collaborative effort. The Commission believes that the actions of

Ameritech Michigan described in this case are not conducive to the successful completion of the Section 271 process.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. Ameritech Michigan should cease and desist from refusing to provide ULT when it has existing facilities, as discussed in this order.
- c. Ameritech Michigan should provision ULT under the same procedures and within the same time frames as special access.
- d. Ameritech Michigan should disclose on a continuing basis the location of existing transport capacity and its plans to expand its transport capacity.
- e. Ameritech Michigan should cease and desist from charging special access rates for orders that MCI WorldCom first placed for ULT, and should refund the excess of the special access rate over the ULT rate for those orders.
- f. Ameritech Michigan should cease and desist from charging the greater mileage charges for ULT orders that MCI WorldCom first placed for a shorter distance, and should refund the excess collected for those orders.
- g. For all new ULT orders, Ameritech Michigan should bill only the ULT rate.
- h. MCI WorldCom should pay the ULT rates and any amounts due under this order.

- i. Ameritech Michigan should allow a manual work around for system incompatibilities.
- j. The interval in the performance reports for ULT should be measured from the time the order is submitted until the ULT is provisioned, and Ameritech Michigan should adjust past reports accordingly.
- k. A copy of this order should be placed in the docket in Case No. U-12320, where Ameritech Michigan's compliance with the Section 271 checklist will be examined.
- l. Ameritech Michigan should be required to pay MCI WorldCom's reasonable attorney fees and costs.
- m. Ameritech Michigan should be required to pay a fine of \$3,750,000.

THEREFORE, IT IS ORDERED that:

- A. Ameritech Michigan shall cease and desist from refusing to provide unbundled local transport when it has existing facilities, as discussed in this order.
- B. Ameritech Michigan shall provision unbundled local transport under the same procedures and within the same time frames as special access.
- C. Ameritech Michigan shall disclose on a continuing basis the location of existing transport capacity and its plans to expand its transport capacity.
- D. Ameritech Michigan shall cease and desist from charging special access rates for orders that WorldCom Technologies Inc. first placed for unbundled local transport, and should refund the excess of the special access rate over the unbundled local transport rate for those orders.
- E. Ameritech Michigan shall cease and desist from charging the greater mileage charges for unbundled local transport orders that WorldCom Technologies Inc. first placed for a shorter distance, and shall refund the excess collected for those orders.

F. For all new unbundled local transport orders, Ameritech Michigan shall bill only the unbundled local transport rate.

G. WorldCom Technologies Inc. shall pay the unbundled local transport rates and, within 30 days, any amounts due under this order.

H. Ameritech Michigan shall allow a manual work around for system incompatibilities.

I. The interval in the performance reports for unbundled local transport shall be measured from the time the order is submitted until the unbundled local transport is provisioned, and Ameritech Michigan shall adjust past reports accordingly.

J. A copy of this order shall be placed in the docket in Case No. U-12320, where Ameritech Michigan's compliance with the Section 271 checklist will be examined.

K. Within 30 days, Ameritech Michigan shall pay WorldCom Technologies Inc.'s reasonable attorney fees and costs.

L. Within 30 days, Ameritech Michigan shall pay a fine of \$3,750,000 to the State of Michigan.

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

/s/ Robert B. Nelson  
Commissioner

By its action of March 3, 2000.

/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

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Commissioner

By its action of March 3, 2000.

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Its Executive Secretary

In the matter of the application and complaint of )  
**WORLDCOM TECHNOLOGIES INC.** )  
against **AMERITECH MICHIGAN, AMERITECH** )  
**SERVICES, INC., AMERITECH INFORMATION** )  
**INDUSTRY SERVICES, and AMERITECH LONG** )  
**DISTANCE INDUSTRY SERVICES** relating )  
to unbundled interoffice transport. )  
\_\_\_\_\_ )

Case No. U-12072

Suggested Minute:

“Adopt and issue order dated March 3, 2000 finding that Ameritech Michigan unlawfully failed to provide unbundled local transport to WorldCom Technologies Inc. and imposing fines and other sanctions, as set forth in the order.”