

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
AMERITECH MICHIGAN for approval of)
a shared transport cost study and resolution)
of disputed issues related to shared transport.)
_____)

Case No. U-12622

At the January 4, 2001 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

**ORDER GRANTING RELIEF REQUESTED
IN AN APPLICATION FOR LEAVE TO APPEAL**

On September 18, 2000, Ameritech Michigan filed an application to resolve disputed issues related to the rates, terms, and conditions that it will offer in providing shared transport as an unbundled network element.

On December 6, 2000, two days after the deadline for filing rebuttal testimony, but one day prior to the scheduled date for conducting cross-examination, CoreComm Michigan, Inc. (CoreComm), an intervenor in this proceeding, filed a motion to submit supplemental testimony of James D. Webber, a CoreComm employee, along with a copy of the proposed testimony and exhibit. According to the supplemental testimony, CoreComm received an e-mail attachment from Ameritech Michigan on December 4, 2000 in the course of ongoing negotiations concerning an

interconnection arrangement. The communication stated that Ameritech Michigan “will process intraLATA calls [originated by CoreComm customers] over the shared transport at the shared rate.” Webber Supp. Testimony, dated Dec. 6, 2000, at 3. The employee of Ameritech Corporation (or one of its subsidiaries) to whom the statement was attributed was not a witness. CoreComm claimed that the statement was inconsistent with a position expressed by an Ameritech Michigan witness, which is that using shared transport to connect customers placing intraLATA toll calls to interexchange carriers over Ameritech Michigan’s network is not practical or feasible.

Prior to cross-examination on December 7, 2000, Administrative Law Judge George Schankler (ALJ) denied CoreComm’s motion to file supplemental testimony. He noted that the testimony was untimely, that it is hearsay, that Ameritech Michigan would not have an opportunity for rebuttal, and that it is cumulative to other evidence relating to technical feasibility. Tr. 126-27.

On December 13, 2000, CoreComm filed an application for leave to appeal the ALJ’s ruling. On December 18, 2000, the Commission Staff (Staff) filed a response supporting admission of the supplemental testimony, and Ameritech Michigan filed a response in opposition.

CoreComm says that it filed its motion relating to the supplemental testimony as soon as possible after the information became available to it. CoreComm argues that it would not be fair for Ameritech Michigan to allow its witness to claim that a sought-after arrangement is not feasible, even as it withheld contrary evidence that only came to light during CoreComm’s discussions with another employee. CoreComm says that Ameritech Michigan could have brought in additional witnesses if necessary to rebut the supplemental testimony. It says that if there is some reasonable explanation for the apparent inconsistency, Ameritech Michigan should be required to address it. CoreComm argues that the exhibit is admissible under the admission by party-opponent exclusion to the hearsay rule, MRE 801(d)(2), or could be admitted pursuant to R 460.17325(1) as

“evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.” In addition to the probative value of the evidence on a major issue in this case, CoreComm contends that it also affects Ameritech Michigan’s credibility. CoreComm argues that the importance of the evidence should overcome any technical deficiencies. The Staff’s response is in accord with CoreComm’s arguments.

In response, Ameritech Michigan says that CoreComm has failed to justify setting aside the procedural deficiencies of its motion to introduce untimely evidence. Ameritech Michigan argues that there is no evidentiary basis to admit the evidence. It notes that, despite the characterization of the statement in question as contained within an e-mail attachment, the exhibit itself is a matrix of open interconnection issues. It does not identify who entered the various statements contained in it. Ameritech Michigan notes that there is no copy of an e-mail message that indicates who sent it to whom. Ameritech Michigan suggests that it is possible that the exhibit may be nothing more than CoreComm’s recital of its own understanding of what someone told one of its employees. As such, Ameritech Michigan argues, CoreComm has failed to show either that the hearsay contained within the supplemental testimony would be commonly relied upon by reasonably prudent persons in the conduct of their affairs or that the statement can be attributed to Ameritech Michigan for purposes of MRE 801(d)(2).

Rule 337 of the Commission’s Rules of Practice and Procedures, 1992 AACS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review; an appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.

2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

The supplemental testimony and exhibit indicate that an Ameritech employee made a representation to CoreComm that tends to contradict positions taken by Ameritech Michigan on the record. This evidence may have value in corroborating the representations of various witnesses employed or retained by competitive local exchange carriers to the same or similar effect as well as contradicting Ameritech Michigan's witness. It may affect the credibility of Ameritech Michigan's stated position on this issue. In view of the potential probative value of this evidence in resolving major issues in this case, the Commission finds that addressing CoreComm's appeal prior to submission of the case for a final decision will materially advance a timely resolution based on a complete record. The Commission further finds that the potential effect of the evidence,¹ coupled with the fact that CoreComm could not have introduced it sooner than it did, overcomes objections based on an untimely filing.²

The hearsay rule does not preclude admission of the exhibit. Mr. Webber's supplemental testimony attributes the statement to a named Ameritech employee. It thus falls within

¹In deciding whether to admit the supplemental testimony, the Commission has not made any evaluation of its weight. That determination must await submission of the case for final decision with a complete record, after Ameritech Michigan has had an opportunity to participate in the reopened proceedings required by this order.

²However, the Commission notes that the case schedule is subject to a short deadline required by statute. See MCL 484.2203(11); MSA 22.1469(203)(11). Granting relief in the context of an interlocutory appeal is not routine, but the decision to admit the evidence underscores the importance of the issue in this particular case.

MRE 801(d)(2), which provides that a statement offered against a party is not hearsay if it is made by a person that the party authorized to make it or is made by the party's agent or servant within the scope of his or her employment. Moreover, a written commitment made while negotiating an interconnection agreement would be commonly relied upon by reasonably prudent persons in the conduct of their affairs. Mr. Webber's supplemental testimony contains factual representations that meet the foundational objections related to hearsay requirements.

Therefore, the Commission finds that CoreComm's motion to file supplemental testimony should be granted.³ The Commission directs the ALJ to reopen the record for the limited purpose of admitting the supplemental testimony and exhibit and conducting appropriate cross-examination. Ameritech Michigan may submit rebuttal testimony, if it chooses, but it may not seek to extend the case beyond the hearing date for the reopened proceedings or otherwise prolong the schedule any longer than necessary. In addition, any rebuttal must be limited in scope to new facts or information contained in the supplemental evidence that Ameritech Michigan could not have previously addressed on the present record.

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.;

³This disposition moots one issue raised in an application for leave to appeal filed by AT&T Communications of Michigan, Inc., and TCG Detroit on December 13, 2000. In their appeal, they had argued that the ALJ erred by not allowing them to conduct a voir-dire examination of Mr. Webber in an effort to establish an independent foundational basis for admitting the exhibit of the open issues matrix into evidence.

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. CoreComm's application for leave to appeal and motion to file supplemental testimony should be granted.

THEREFORE, IT IS ORDERED that:

- A. The application of CoreComm Michigan, Inc., for leave to appeal is granted.
- B. The motion of CoreComm Michigan, Inc., to file supplemental testimony is granted.
- C. The case should be remanded to the Administrative Law Judge to conduct a reopened hearing and for further proceedings consistent with this order.

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

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ John G. Strand
Chairman

By its action of January 4, 2001.

/s/ David A. Svanda
Commissioner

/s/ Dorothy Wideman
Its Executive Secretary

/s/ Robert B. Nelson
Commissioner

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b. CoreComm's application for leave to appeal and motion to file supplemental testimony should be granted.

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Suggested Minute:

“Adopt and issue order dated January 4, 2001 granting an application for leave to appeal by CoreComm Michigan, Inc., and granting a motion by CoreComm Michigan, Inc., to file supplemental testimony in a case commenced on an application filed by Ameritech Michigan related to shared transport issues, as set forth in the order.”