

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application and complaint of)
AT&T COMMUNICATIONS OF MICHIGAN, INC.,)
against MICHIGAN BELL TELEPHONE COMPANY,))
d/b/a AMERITECH MICHIGAN, for modification)
and clarification of the Mi2A amendment approved)
by the Michigan Public Service Commission.)
_____)

Case No. U-13082

At the October 29, 2001 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On September 7, 2001, AT&T Communications of Michigan, Inc., (AT&T) filed an application and complaint and request for emergency relief, pursuant to Section 203(2) of the Michigan Telecommunications Act (MTA), MCL 484.2203(2), on a narrow issue that arose as a result of the January 4, 2001 and March 19, 2001 orders in Case No. U-12320. In those orders, the Commission had addressed Ameritech Michigan's proposed offering, for purposes of complying with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996 (FTA), 47 USC 271, of unbundled network element (UNE) combinations pursuant to an amendment to its interconnection agreements (the Mi2A). AT&T requests that the Commission clarify "that it did not intend by its March 19, 2001 Order on Rehearing [in Case U-12320] to require AT&T (or [competitive local exchange carriers] CLECs generally) to waive the right to

challenge the sufficiency of the Mi2A under relevant legal standards, and that the Order on Rehearing is not to be so construed” Complaint, Prayer For Relief, ¶ A. AT&T says that the complaint was necessitated by Ameritech Michigan’s inclusion of Section 6.2 in the Mi2A, which requires AT&T (and any other CLEC that signs the Mi2A) to waive its right to challenge the Mi2A’s terms and conditions as being inconsistent with Section 271.

On September 14, 2001, Ameritech Michigan filed a response to the request for an emergency order and a motion to dismiss the application and complaint. In the response, Ameritech Michigan argues that the request for emergency relief must be denied because AT&T has failed to satisfy any of the four criteria required for an emergency relief order. In its motion to dismiss, Ameritech Michigan argues that AT&T’s complaint is an impermissible and untimely collateral attack on the order on rehearing and seeks relief that is inconsistent with federal law.

On September 21, 2001, AT&T filed a response to Ameritech Michigan’s motion to dismiss.

On October 2, 2001, the Commission issued an order finding that the request for emergency relief should be set for hearing. On October 4, 2001, Long Distance of Michigan, Inc., (LDMI) filed a statement in support of AT&T’s request for emergency relief and a petition for leave to intervene in the remainder of the case.

The hearing was held on October 8, 2001 before Administrative Law Judge Barbara A. Stump. She granted LDMI’s petition for leave to intervene in any proceedings beyond the request for emergency relief. Two witnesses testified on behalf of AT&T, one witness testified on behalf of Ameritech Michigan, and five exhibits were received into evidence. The parties waived the right to file briefs. Tr. 169.

Discussion

The Commission may issue an emergency relief order if the party requesting the order can show (1) exigent circumstances that warrant emergency relief, (2) it will likely succeed on the merits, (3) it will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and (4) the order is not adverse to the public interest. MCL 484.2203(3).

Ameritech Michigan asserts that AT&T cannot show exigent circumstances because it has long been aware of the waiver language of Section 6.2, and cannot claim that an emergency now exists from the inclusion of that language in the Mi2A. AT&T says that its attempts at negotiating this issue have only recently reached impasse and its plans for the testing of operational systems have now become imminent. Moreover, AT&T's pleadings and testimony establish that circumstances have changed since issuance of the order on rehearing. AT&T announced in June 2001 that it will enter the Michigan residential local market using Ameritech Michigan's UNE combinations by the end of this year (if Ameritech Michigan's operation support systems will support such entry). AT&T says that it has attempted to negotiate, arbitrate, and compromise on this dispute with Ameritech Michigan, although every initiative has been rejected by Ameritech Michigan. Therefore, far from being a situation of its own making, AT&T says that its action has been brought about because it has exhausted all other means of obtaining access to new UNE combinations. If the Commission denies the request for emergency relief, AT&T will not be in a position to offer service to customers despite its announced intention to do so because Ameritech Michigan will not provide new UNE combinations to AT&T.

Further, Ameritech Michigan argues that the Commission should not grant AT&T's requested relief because it seeks "to change the status quo on an emergency basis . . ." Ameritech Michigan's response, p. 4 (emphasis omitted). It suggests that the Commission follow the general

law that injunctive relief is an extraordinary remedy that should be granted sparingly. The fallacy in this argument is the assumption that Section 203 of the MTA is an injunctive statute. In Section 203, the Legislature provided a means to obtain emergency relief that expressly authorizes the Commission to enter an order requiring “a party to act or refrain from action to protect competition.” MCL 484.2203(2). Thus, the MTA specifically authorizes the Commission to issue an order changing the status quo if necessary to protect competition. The focus is on protecting competition, not on maintaining the status quo that is inconsistent with competition. Indeed, where Ameritech Michigan is the incumbent and dominant LEC and new entrants are seeking to begin to compete in the local market, preserving the status quo would typically have the practical effect of delaying competition and preserving Ameritech Michigan’s market dominance. The Commission therefore concludes that the circumstances warrant consideration of emergency relief.

Ameritech Michigan argues that AT&T cannot show a likelihood of prevailing on the merits because it says that AT&T has raised and already lost in Case No. U-12320 the issue about the waiver language in Section 6.2 of the amendment. Although it is true that parties attacked the waiver in their filings prior to the January 4, 2001 order in Case No. U-12320, the Commission’s decision rendered that issue partially moot because the Commission rejected Ameritech Michigan’s product offer for UNE combinations. January 4, 2001 order, pp. 9-10. The issue arose again on rehearing, where the Commission addressed the waiver as follows:

Specifically, the Commission has found that Ameritech Michigan’s combinations proposal complies with the scope of the product offering that today is required by Section 271 of the FTA. This issue may be revisited should future court or FCC orders require. Neither the Commission nor the CLECs waive any right to address other issues regarding combinations in further Section 271 proceedings, including such things as the actual provisioning of combinations, OSS testing, and performance measurement results. Furthermore, CLECs may seek clarification of the terms of the [Mi2A] at any time as well as pursue these issues in pending arbitrations.

March 19, 2001 order, Case No. U-12320, pp. 7-8. Further, the Commission clearly indicated that it viewed its decision as a first step in a process to more clearly define Ameritech Michigan's obligations regarding UNE combinations: "The Commission finds it unnecessary at this time to resolve the arguments regarding the precise demarcation point between new and existing combinations." March 19, 2001 order, p. 4. In addition, the Commission stated "further Commission orders may be issued . . . clarifying the obligations of ILECs to provide UNE combinations including the precise demarcation point between new and existing combinations" and also that the "term of the offerings may also be revisited" in a future order. March 19, 2001 order, p. 6.

Upon further consideration, the Commission concludes that it should modify the waiver as AT&T proposes. It is now apparent that the waiver is having the unintended effect of hampering the development of competition, as demonstrated by AT&T's and other CLECs' unwillingness to sign the Mi2A as is and Ameritech Michigan's consequent refusal to provide new UNE combinations. Furthermore, Illinois, by statute, requires Ameritech Michigan's affiliate to offer new UNE combinations without a comparable waiver, and Wisconsin, by commission order, does the same. In addition, the March 19, 2001 order contains the Commission's finding that "Ameritech Michigan's combinations proposal complies with the scope of the product offering that today is required by Section 271 of the FTA." March 19, 2001 order, p. 7. Although the Commission continues to believe that the combinations offering made by Ameritech Michigan at this time suffices for Section 271 compliance purposes given the current state of the law, the necessity for a competitor to agree with these determinations in order to purchase UNE combinations now appears to severely limit the ability of providers to move forward with plans to compete with Ameritech Michigan on a reasonably nondiscriminatory basis. This is particularly the case because the legal issue of Ameritech Michigan's duty to provide UNE combinations may well be

decided by the United States Supreme Court before a decision must be made on Ameritech Michigan's Section 271 application, which would render irrelevant the parties' opinions, and that of the Commission as well, on Ameritech Michigan's compliance with the duty to offer new UNE combinations.

Ameritech Michigan claims there is no irreparable harm to AT&T. The Commission disagrees. In the absence of an executed Mi2A, Ameritech Michigan will not provide access to UNE combinations. The testimony filed in this case shows that access to new and additional lines through UNE combinations is a vital component of AT&T's local entry plans. Thus, Ameritech Michigan's continued insistence that AT&T waive its rights as a condition of obtaining access to UNE combinations is impeding AT&T's entry into the local exchange market at the most critical time—the time of initial entry. The presence of other, more expensive methods of serving customers does not change the analysis.

Ameritech Michigan claims that granting emergency relief would be adverse to the public interest. To the contrary, a grant of emergency relief is in the public interest by encouraging competition in the provision of basic local exchange service. Despite Ameritech Michigan's arguments, a grant of emergency relief does not violate the Commission's March 19, 2001 order, does not violate federal law, does not violate state contract law, does not violate the Commission rules governing the time for seeking rehearing, and does not encourage collateral attacks on Commission orders.

The MTA places on the respondent the burden to show that the emergency relief requested would not be technically feasible and would not be economically reasonable. MCL 484.2203(2). Ameritech Michigan did not offer evidence on either standard. Tr. 147.

Because AT&T has established the elements necessary to support its request, and Ameritech Michigan has not demonstrated that the relief would be technically infeasible or economically unreasonable, the Commission concludes that it should grant the emergency relief requested by AT&T.

In its motion to dismiss, Ameritech Michigan argues that AT&T's application for emergency relief is an impermissible and untimely collateral attack on a Commission order. In light of new circumstances, it was reasonable for AT&T to request that the Commission revisit the waiver provision. There is no validity to Ameritech Michigan's implicit argument that a Commission order, once issued, cannot be altered after the time for rehearing has run. Commission orders are effective until changed by the Commission through another order, in the same or another docket.

In addition, Ameritech Michigan contends that AT&T's complaint must be dismissed because "[a]s the law stands today, Ameritech Michigan clearly is not required to combine unbundled network elements (i.e., to provide 'new' combinations) for CLECs, where those elements are not already physically combined in Ameritech Michigan's network." Ameritech Michigan's motion, pp. 10-11 (footnote omitted). In support of this argument, Ameritech Michigan cites Verizon North Inc v Strand, 140 F Supp 2d 803 (WD Mich, 2000), pending appeal at the Sixth Circuit Court of Appeals, and Iowa Util Bd v FCC, 219 F3d 744 (CA 8, 2000), which is being reviewed by the United States Supreme Court. But those decisions did not approve the waiver language at issue in this case. What AT&T has raised is the issue of whether AT&T must waive its right to challenge Ameritech Michigan's compliance with Section 271 in order to obtain access to Ameritech Michigan's UNE combinations, particularly those used to supply new and additional lines to customers. On the other hand, final decisions in those cases may determine the success of

any challenge that AT&T may later choose to make to the legal sufficiency of Ameritech Michigan's product offerings.

The MTA envisions that an emergency relief order might be followed by a partial final order as well as a final order. At the hearing, there was uncertainty about the need for further proceedings if the Commission granted the request for emergency relief. Tr. 169-171. It is not clear to the Commission what further proceedings are required because the request for emergency relief appears to encompass all of the relief that AT&T seeks. If any party believes that further proceedings are required, it should file a notice within 10 days of the issuance of this order. Otherwise, this order will serve as the final order, subject to any requests for rehearing.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.
- b. The waiver language in Section 6.2 of the Mi2A should be modified as AT&T requested.

THEREFORE, IT IS ORDERED that:

- A. Within 5 business days, Ameritech Michigan shall execute and submit a modified Mi2A to AT&T Communications of Michigan, Inc., with Section 6.2 worded as proposed in the application and complaint in this docket.
- B. The motion to dismiss filed by Ameritech Michigan is denied.
- C. The Administrative Law Judge shall schedule further proceedings if any party so requests within 10 days of the issuance of this order.

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.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman, concurring in a separate opinion.

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of October 29, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated October 29, 2001 granting AT&T Communications of Michigan, Inc., emergency relief with respect to the waiver of rights under the Mi2A amendment, as set forth in the order.”

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CONCURRING OPINION OF CHAIRMAN LAURA CHAPPELLE
(Submitted on October 29, 2001)

Although I do not fully agree with my colleagues about the meaning and intent of the Commission's orders on the Mi2A in Case No. U-12320, I do agree that AT&T Communications of Michigan, Inc., should not be required to waive the right to challenge the legal sufficiency of Ameritech Michigan's UNE combination offerings. I therefore concur in the result.

MICHIGAN PUBLIC SERVICE COMMISSION

Laura Chappelle, Chairman