

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition of <b>McLEODUSA</b>	)	
<b>TELECOMMUNICATIONS SERVICES, INC.,</b>	)	
for arbitration of interconnection rates, terms,	)	
and conditions and related arrangements with	)	Case No. U-13124
Michigan Bell Telephone Company, d/b/a	)	
Ameritech Michigan, pursuant to Section 252(b)	)	
of the Telecommunications Act of 1996.	)	
_____	)	

At the January 22, 2002 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**

**I.**

**HISTORY OF PROCEEDINGS**

On September 28, 2001, McLeodUSA Telecommunications Services, Inc., (MTSI) filed a petition for arbitration of an interconnection agreement with Ameritech Michigan, pursuant to Section 252(b) of the federal Telecommunications Act of 1996 (federal Act), 47 USC 252(b). The petition identified 85 open issues. On October 23, 2001, Ameritech Michigan filed a response, which identified three additional issues.

An arbitration panel was designated consisting of Barbara A. Stump, Robin Ancona, and Thomas Saghy. On October 25, 2001, the arbitration panel met with the parties to discuss the

arbitration schedule. On November 20, 2001, the parties made oral presentations to the arbitration panel. On November 29, 2001, each party filed a Proposed Decision of the Arbitration Panel (PDAP).

On December 12, 2001, the arbitration panel issued its Decision of the Arbitration Panel (DAP). On December 26, 2001, MTSI and Ameritech Michigan filed their objections to the DAP.

On January 15, 2002, MTSI filed a motion to strike portions of Ameritech Michigan's objections to the DAP or, in the alternative, leave to file a response to those objections, which it attached to its motion.

The Commission denies the motion. MTSI does not specify the portions of Ameritech Michigan's 40-page filing (not including attachments) to which it objects except in the most general terms: "Any new arguments and additional information Ameritech [Michigan] provided in its Objections should be stricken by this Commission as improper and untimely." Motion, p. 3. Furthermore, 47 USC 252(b)(4)(B), cited by MTSI, does not support its argument that the parties may not provide any additional information after the filing of the response to the petition for arbitration, and, in any event, Ameritech Michigan's objections do not raise any new issues for arbitration. As to its alternative request to file a response, MTSI seeks an opportunity to respond to Ameritech Michigan's objections to the DAP without providing Ameritech Michigan any comparable opportunity to respond.

## **II.**

### **DISCUSSION**

Pursuant to the Commission's July 16, 1996 order in Case No. U-11134, the arbitration panel is to issue a decision on the merits of the parties' positions on each issue raised by the request for arbitration. In deciding each issue, the arbitration panel is limited to selecting the position of one

of the parties on that issue unless the result would be clearly unreasonable or contrary to the public interest.

### Issue 1

Should terms and conditions, including pricing, be subject to an end date before a subsequent interconnection agreement between the parties is executed?

MTSI says that the terms and conditions of the agreement, including pricing, should extend through the term of the agreement and month-to-month thereafter until the parties reach a subsequent agreement. MTSI argues that prohibiting parties from operating under an expired agreement on a month-to-month basis during the gap between agreements will force them to enter into costly, time-consuming negotiations and arbitrations. MTSI also says that, as the incumbent local exchange carrier (ILEC), Ameritech Michigan does not need an interconnection agreement to continue operating, while a competitive local exchange carrier (CLEC), such as itself, cannot operate without an interconnection agreement. MTSI therefore asserts that creating an artificial termination for the terms and conditions after expiration of the agreement harms CLECs more than Ameritech Michigan. MTSI says that it seeks the certainty of knowing that the rates contained in this agreement will continue in effect until superseded by a new agreement.

Ameritech Michigan proposes that when this agreement expires, its rates would continue to apply temporarily and that when the parties enter into a successor agreement, the new rates would be applied retroactively to the date this agreement expired, with a true-up to be completed within 90 days. Otherwise, Ameritech Michigan says that it may be harmed if a CLEC is able to continue operating under an expired agreement, such as when CLECs continued to receive reciprocal compensation payments under expired agreements for traffic to internet service providers. Ameritech Michigan further contends that it is more sensible to apply rates during the gap period that will

more accurately and fairly reflect current costs, i.e., rates from the subsequent agreement.

Ameritech Michigan also argues that there is no legal basis to continue applying rates from an expired agreement.

MTSI offered a compromise position during its oral presentation to the arbitration panel:

(1) If there is an approved tariff rate for an item, that rate would apply. (2) If there is no approved tariff rate but there is a rate in the expired interconnection agreement, the rate in the expired agreement would apply. (3) If there is no approved tariff rate and no rate in the expired agreement, but there is a rate for that item in an existing interconnection agreement, the rate in the existing agreement would apply.

a. DAP

The arbitration panel adopted MTSI's compromise position because it found that it levels the bargaining field for the parties and provides an incentive for both parties to resolve issues productively. The arbitration panel agreed with MTSI that ILECs hold greater bargaining power than CLECs because ILECs do not need interconnection agreements to do business. It found that allowing rates from the subsequent agreement to be applied retroactively would provide a disincentive for the ILEC to resolve issues and to enter into a fair interconnection agreement. The arbitration panel also found that the CLEC had an incentive to resolve the issues because, in order to stay in business, the CLEC needed to enter into a successor agreement, regardless of the rates. The arbitration panel concluded that continuing the rates in the prior agreement was a step closer to leveling the bargaining field and would provide some financial certainty during the negotiation process and reduce the parties' expenses for negotiation and arbitration.

b. Ameritech Michigan's Objection

First, Ameritech Michigan argues that the Commission's arbitration rules in Case No. U-11134 do not permit the panel to adopt a position that was offered for the first time at the hearing.

Second, Ameritech Michigan argues that the three alternatives in the compromise position are unlawful. It argues that alternative 1 is unlawful because it would allow MTSI to buy an item at the rates in Ameritech Michigan's tariff without being subject to the terms and conditions of the tariff. It argues that alternative 2 is unlawful because there is no basis in law or reason to permit the prices in the contract to outlive the contract. It argues that alternative 3 is unlawful because it would allow MTSI to buy an item at the rates in another CLEC's interconnection agreement without being subject to any related terms and conditions.

Moreover, Ameritech Michigan argues that the rationale adopted by the arbitration panel is arbitrary and capricious. It argues that the panel ignored its arguments rather than addressing them. It also argues that the panel should not have accepted the argument that ILECs have greater bargaining power than CLECs; that if prices during a gap period are set equal to the prices in the subsequent agreement, ILECs would be disinclined to resolve issues and enter into fair agreements; and that prices during the gap period should therefore be the prices from the agreement that precedes the gap period. It says that the rationale is unlawful because the Commission cannot impose an illegal rate to level the bargaining field. Further, it argues that the analysis rests on two inaccurate assumptions. First, it says that there is no evidence that the ILEC has superior bargaining power and good reason to believe that it does not. It says that CLECs in Michigan presumably understand by now the negotiating leverage that the threat of arbitration gives them, and says that it recognizes that it is likely to lose any unresolved issue in arbitration. Second, it

says that there is no basis in the record for the assumption that prices in the successor agreement will be higher than prices in the prior agreement and therefore no basis for the conclusion that the prices from this agreement should carry over to provide an incentive for Ameritech Michigan to resolve the issues quickly.

Finally, Ameritech Michigan argues that its position is better than MTSI's. First, it says that the parties have agreed that the contract they are arbitrating will have a two-year term (or, more precisely, that either party can cause the contract to expire in two years by giving notice that the term will not be extended). It says that if MTSI wanted an agreement with prices to be in effect for more than two years, it could have bargained for, or should have arbitrated for, a longer term. Second, Ameritech Michigan argues that it is more reasonable to apply rates that are set at or near the time they are to be applied, and that will more accurately reflect then-current costs, than to apply rates that will be at least two years old when the gap occurs. Third, it says that its approach removes the incentive for either party to drag its feet in negotiating a successor agreement because the new rates, whatever they may be, will go into effect (by means of a retroactive true-up) when the old agreement terminates and will apply regardless of whether the gap is long or short.

c. Commission Decision

The Commission adopts MTSI's initial position. The question is as simple as Ameritech Michigan states: whether, during any gap, the prices in this agreement should apply or whether the prices in the subsequent agreement should apply. The Commission rejects Ameritech Michigan's argument that because the rates in this agreement have "expired," they cannot apply. The clear meaning of the contract language on which the parties agree is to continue the rates, terms, and conditions of this agreement "in full force and effect" beyond the time when the agreement would otherwise expire. General Terms and Conditions, Section 5.7. The dispute is

about whether this agreement should provide that the rates during the gap period will be subject to a retroactive true-up to reflect the rates in the successor agreement. The Commission does not place much weight on speculation about the timing of negotiations to extend the agreement or to enter into a subsequent agreement, the relative bargaining power and motivations of the parties, the length of the gap, or the potential amount of any true-up payment. To a large extent, those depend on factors that cannot be known at this time, such as whether rates are likely to be higher or lower in the future. Instead, the Commission concludes that the rates in this agreement should apply as MTSI initially proposed because that result gives the parties advance notice of the rates that will be in effect, is more consistent with the arbitration rules, yields certainty about the rates during the gap period, and is simple to administer, unlike MTSI's compromise position.

### Issue 3

Should pricing in the interconnection agreement be subject to a true-up and refund or credit if the United States Supreme Court rules that the Federal Communications Commission's (FCC) total element long run incremental cost (TELRIC) rules are not valid under the Telecommunications Act of 1996?

The TELRIC-based prices in the agreement are based on rules that the FCC established to implement the pricing standards in Section 252(d) of the federal Act, 47 USC 252(d). Those rules are currently on review before the United States Supreme Court in Verizon Communications Inc v FCC, Nos. 00-511 et al., which was argued on October 10, 2001.

Ameritech Michigan objects to any language in the contract that would prevent full implementation of the Supreme Court's decision. It maintains that if the Court changes the pricing rules, the parties must abide by that decision.

Initially, MTSI's position was that if the issue of retroactivity were left open by the Supreme Court, the issue should be dealt with now because the financial effect on CLECs and customer choice could be devastating if unbundled network element (UNE) prices significantly increase as a result of the Supreme Court's decision. Therefore, it first proposed that if the Court were to rule that TELRIC pricing is not lawful, the prices in the agreement would nevertheless continue in effect for the term of the agreement. But MTSI also recognizes that if the Court invalidates the pricing rules, the question of retroactively applying new rates may be decided by the Supreme Court, the FCC on remand from the Court, or by state commissions in implementing any new FCC rules that result from the Supreme Court's decision. It therefore modified its position to provide that the prices would be altered only if the Supreme Court, the FCC, or the Commission explicitly required a change as a result of the Court's decision.

a. DAP

The arbitration panel adopted Ameritech Michigan's position. It agreed with Ameritech Michigan that if the Supreme Court sets aside the FCC's pricing rules, it is possible that the Court will indicate what should happen to prices in existing agreements. The arbitration panel found that if this were to happen, other provisions in the interconnection agreement address how to deal with any changes required by the courts, the FCC, and state commissions. Additionally, the arbitration panel said that because it did not know what the Supreme Court would do, it would be premature to address the issue.

b. MTSI's objection

MTSI fears that Ameritech Michigan may assert the right (possibly unilaterally) to apply new rates retroactively if the Supreme Court does not affirmatively foreclose that possibility. It argues

that Ameritech Michigan should be allowed to apply new rates retroactively only if the Supreme Court, the FCC, or the Commission explicitly orders that it may do so. It therefore says that postponing a decision on the issue until the Supreme Court rules will most certainly lead to further disagreement between the parties and uncertainty for the parties in conducting their business.

c. Commission Decision

The Commission adopts MTSI's modified position. It agrees with the arbitration panel that there is substantial uncertainty about what the Supreme Court will rule and that the Court may address this specific issue. It does not agree that other provisions of the agreement adequately address this issue. To promote certainty and to avoid future disputes, the Commission concludes that the agreement should directly address this issue. The Commission therefore agrees with MTSI that unless the Court, the FCC, or this Commission requires retroactive rate changes, the rates in the agreement should remain in effect.

Issue 28

If MTSI performs trouble isolation and determines that a problem is caused by Ameritech Michigan's network, should MTSI be allowed to charge Ameritech Michigan a trouble isolation charge in the same manner that Ameritech Michigan would charge MTSI a trouble isolation charge in the opposite case?

MTSI argues that if Ameritech Michigan can impose a charge when one of its technicians determines that the trouble is in MTSI's network, MTSI should be able to charge Ameritech Michigan in a comparable situation.

Ameritech Michigan did not address this issue in its PDAP.

a. DAP

The arbitration panel adopted MTSI's position. It said that MTSI was simply seeking to charge Ameritech Michigan for the very same service for which Ameritech Michigan charges MTSI. It said that if Ameritech Michigan performs its trouble isolation work correctly, then MTSI would have no basis to charge Ameritech Michigan. Furthermore, it said that this provision would create an incentive for Ameritech Michigan to find and correct trouble the first time, just as MTSI would have an incentive to research trouble issues thoroughly before issuing a trouble ticket.

b. Ameritech Michigan's Objection

Ameritech Michigan says that the parties settled this issue. It also objects to the arbitration panel's decision as not fully consistent with the parties' settlement. It says that the parties agreed that MTSI would be entitled to charge Ameritech Michigan for trouble isolation provided that (i) the rate is no greater than Ameritech Michigan's tariffed rate for the same charge, (ii) MTSI's rate is reasonable in relation to the work actually performed, and (iii) Ameritech Michigan may pay the charge by means of a credit on MTSI's account. Ameritech Michigan requests that the Commission not address the issue, or alternatively, render an order consistent with the parties' settlement.

c. Commission Decision

The Commission adopts the arbitration panel's recommendation, with one condition. It seems only reasonable that if Ameritech Michigan can impose a charge when its technicians determine that the trouble is in MTSI's network, MTSI should be permitted to impose a charge in a comparable situation. The one condition is that if MTSI agrees that the parties settled the matter, as Ameritech Michigan represents, the agreed language should be incorporated into the intercon-

nection agreement. The Commission is not in a position to evaluate Ameritech Michigan's representation on the basis of confusing and vague e-mail messages. It would be preferable in the future for the parties to promptly notify the arbitration panel when they have reached agreement on an issue.

#### Issue 54

Does Ameritech Michigan have to provide power cabling as part of its obligation to provide physical collocation?

Ameritech Michigan's position is that the CLEC is responsible for getting power from the power source to the collocation site and, consequently, Ameritech Michigan does not have a duty to provide cabling.

MTSI says that the parties have narrowed the scope of their disagreement. Despite its concerns about increased costs, delays, and loss of efficiency, MTSI is willing to accept responsibility for scheduling the installation of power cabling as long as Ameritech Michigan may not bill recurring charges for collocation space until the space is functional, and it agrees that it will not unreasonably delay scheduling the installation of power cabling.

#### a. DAP

The arbitration panel adopted MTSI's position as consistent with the FCC's rules on delivery of collocation space.

#### b. Ameritech Michigan's Objection

Ameritech Michigan says that the arbitration panel's decision on Issue 54 really addresses Issue 60. Ameritech Michigan therefore requests that the Commission clarify that the parties have agreed that MTSI will provision its own power cable and that Issue 54 is effectively settled.

c. Commission Decision

The Commission does not agree with Ameritech Michigan that the issue of power cabling is effectively settled as a stand-alone issue because MTSI has agreed to schedule the installation of power cabling only if Ameritech Michigan is not permitted to bill recurring charges until collocation space is functional. As discussed below in connection with Issue 60, the Commission adopts MTSI's position on recurring charges. Therefore, MTSI will be responsible to schedule the installation of power cabling, as its conditional position requires on this issue.

Issue 59

What should the delivery interval be for physical collocation space?

MTSI objects to Ameritech Michigan's proposed delivery intervals on the basis that they significantly exceed the intervals established by the FCC. Its position is that the time frames should reflect the order in In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, DA 00-2528 (rel. November 7, 2000). Ameritech Michigan says that its proposed intervals are consistent with that order, and contends that MTSI seeks the ability to file an excessive number of collocation applications at one time—a process known as “dumping.” MTSI counters that it does not advocate dumping and that the parties have agreed on language to address that problem.

a. DAP

The arbitration panel adopted MTSI's position because it concluded that Ameritech Michigan had proposed delivery intervals that exceed those approved by the FCC in the November 7, 2000 order. It acknowledged Ameritech Michigan's claim that its proposed longer intervals were permissible because they are contained in an approved state tariff, but rejected that argument because

the FCC order says that it “does not permit an incumbent LEC to set unilaterally different standards by incorporating time periods of its own choosing into its . . . tariffs and having those standards take effect through inaction by the state commission.” DA 00-2528, paragraph 7. It said that to supersede the national standard set by the FCC, Ameritech Michigan must produce “affirmative determinations by a state commission that different intervals are appropriate,” DA 00-2528, paragraph 8, which it said Ameritech Michigan had failed to do. Finally, the arbitration panel noted that a similar issue was decided by the Commission in the arbitration between TDS Metrocom, Inc., (TDS) and Ameritech Michigan in Case No. U-12952, where, on September 7, 2001, the Commission found that the longer intervals requested by Ameritech Michigan were not necessary.

b. Ameritech Michigan’s Objection

Ameritech Michigan says that the parties settled this issue. It therefore requests that the Commission not address the issue or, alternatively, render an order consistent with the parties’ settlement or require the parties to use the collocation intervals from Ameritech Michigan’s collocation tariff. It says that the issue of collocation intervals was previously addressed in Case No. U-12952, where Ameritech Michigan says that it had proposed longer intervals than the FCC set in order to protect itself from dumping. Ameritech Michigan also argued there, as it does here, that federal law permits state commissions to set longer intervals. Ameritech Michigan says that, contrary to the arbitration panel’s statement, the Commission did not decide the issue in that case entirely in TDS’s favor. Instead, the Commission acknowledged Ameritech Michigan’s concerns regarding dumping, and required the parties to include a provision that permits Ameritech Michigan to seek an extension of the intervals in extraordinary circumstances. September 7, 2001

order, Case No. U-12952, p. 15. It says that the parties ultimately agreed to use the collocation intervals from the Michigan collocation tariff.

Ameritech Michigan says that, in the present arbitration, it proposed to use the intervals from the Michigan collocation tariff, which the arbitration panel rejected. It says that the panel failed to recognize that Ameritech Michigan's current collocation tariff resulted from extensive Commission involvement in Case No. U-11831 (the biennial cost docket) and Case No. U-11830 (the performance measurements docket). Indeed, it says that the tariff was largely drafted by AT&T Communications of Michigan, Inc., (AT&T) and that AT&T and numerous other CLECs requested the Commission to order Ameritech Michigan to adopt the tariff, which the Commission did in Case No. U-11831. Because it says that the collocation tariff intervals are reasonable and consistent with Commission-approved language in the TDS/Ameritech Michigan interconnection agreement, they should be used in this interconnection agreement.

c. Commission Decision

The Commission adopts the arbitration panel's recommendation, with one condition. MTSI's position fully addresses the issue, including the issue of dumping. As to Ameritech Michigan's claim that the intervals from the Michigan collocation tariff should apply, the Commission would agree that the tariff resulted from cases decided by the Commission, but would not agree that the intervals were a contested issue upon which the Commission made an affirmative decision. The one condition is that if MTSI agrees that the parties settled the matter, as Ameritech Michigan represents, the agreed language should be incorporated into the interconnection agreement. The Commission is not in a position to evaluate Ameritech Michigan's representation on the basis of confusing and vague e-mail messages. It would be preferable in the future for the parties to promptly notify the arbitration panel when they have reached agreement on an issue.

Issue 60

Should the agreement require that “functional” collocation space be turned over to MTSI at the end of the delivery interval?

MTSI takes the position that the FCC requires that Ameritech Michigan deliver functional collocation space.

Ameritech Michigan takes the position that it has completed its obligation when it has roughed in the space and marked it distinctly.

MTSI counters that it should not incur monthly recurring charges for collocation space that has merely been roughed in and is not yet usable. It proposes that recurring charges commence when the space is functional, consistent with paragraph 30 of the FCC’s order in In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability et al., CC Docket Nos. 98-147 and 96-98, FCC 00-297, paragraph 30 (rel. Aug. 10, 2000).

a. DAP

The arbitration panel adopted MTSI’s position as consistent with the FCC’s order. “To complete provisioning of a collocation arrangement, an incumbent LEC must finish construction in accordance with the requesting carrier’s application and turn functional space over to the requesting carrier.” FCC 00-297, paragraph 30. In adopting this requirement, the arbitration panel noted that the FCC had referenced a letter from Allegiance Telecom. Id. at n. 77. In that letter, Allegiance had requested clarification from the FCC that ILECs could not begin charging for collocation space until power is available. The arbitration panel was persuaded that the FCC’s reference to the letter clearly indicated that collocation space cannot be considered functional until power is available and, therefore, that recurring charges should not apply before then. It concluded that Ameritech Michigan’s position was not in compliance with the FCC’s order. The arbi-

tration panel also rejected Ameritech Michigan's argument that MTSI's position was analogous to a lessee renting an apartment, failing to establish services for which he or she is responsible (such as telephone or electricity), and then refusing to pay rent because the lessee did not have those services. It said that the analogy was not appropriate because the lessee can still live in the apartment without such services, whereas the collocation space is not functional until the space is usable by the CLEC.

b. Ameritech Michigan's Objection

Ameritech Michigan says that the FCC's order does not define the term "functional" and that the arbitration panel erred by tying power cabling to the requirement that space be functional. It says that, taken to its logical extension, one could say that collocation space is not functional until the CLEC installs and makes operational its collocation equipment. It also says that the arbitration panel erred in rejecting the analogy to a landlord preparing an apartment for a new lessee. It says that it should not have to hold space on a rent-free basis for an indefinite time while MTSI arranges for power installation or installs equipment. It says that it cannot possibly do more than it has already undertaken to do, namely, to complete all work that it is required to perform in accordance with MTSI's collocation application and to deliver the space to MTSI.

c. Commission Decision

The Commission agrees with the panel that Ameritech Michigan is required to do more than mark the space distinctly, and therefore adopts MTSI's position. Ameritech Michigan's position is not in compliance with the FCC's order because distinctly marking a space does not make it functional. The arbitration panel also properly rejected Ameritech Michigan's analogy to a lessee renting an apartment. Whatever the merits of that reasoning in the context of a landlord/tenant

relationship, it does not prevail over an FCC decision to the contrary. The Commission therefore adopts MTSI's position that Ameritech Michigan must deliver functional collocation space, with power available as required by the FCC.

#### Issue 64

Should Ameritech Michigan obligate MTSI to enter into agreements with third-party telecommunications carriers prior to delivering traffic for transiting to the third party?

MTSI states that Ameritech Michigan has proposed that MTSI enter into agreements with numerous third-party carriers before it will allow MTSI to transit any traffic in a given market. MTSI asserts that although it will enter into such agreements when desired by either the originating or terminating carrier, there is no reason to require that if neither carrier thinks that an agreement is necessary. MTSI states that, despite Ameritech Michigan's concern that traffic may become congested at its tandem switches, it should not be required to trunk directly to third-party carriers when initial transit traffic with the third party does not significantly affect capacity at Ameritech Michigan's tandem switch.

Ameritech Michigan did not address the issue in its PDAP.

#### a. DAP

Because Ameritech Michigan did not address the issue, the arbitration panel adopted MTSI's position.

#### b. Ameritech Michigan's Objection

Ameritech Michigan says that the parties settled this issue. It therefore requests that the Commission not address the issue or, alternatively, render an order consistent with the parties' settlement. Further, it says that even if the issue were not settled, the Commission should adopt its

position as consistent with the Commission's order in Case No. U-12465, the arbitration between AT&T and Ameritech Michigan. November 20, 2000 order, Case No. U-12465, p. 19.

c. Commission Decision

The Commission adopts the arbitration panel's recommendation, with one condition. Although it is appropriate for the agreement to address billing arrangements, as the Commission decided in Case No. U-12465, it is not necessary to require direct trunking in all cases, as Ameritech Michigan seeks in this case. The one condition is that if MTSI agrees that the parties settled the matter, as Ameritech Michigan represents, the agreed language should be incorporated into the interconnection agreement. The Commission is not in a position to evaluate the accuracy of Ameritech Michigan's representation on the basis of confusing and vague e-mail messages. It would be preferable in the future for the parties to promptly notify the arbitration panel when they have reached agreement on an issue.

Issue 66

Should Ameritech Michigan be required to explicitly identify by state all service order and/or non-recurring charge (NRC) rate elements that are applicable to "as is" conversion orders, existing service orders with changes, and new service orders?

MTSI says that the interconnection agreement should be a stand-alone document that lists all applicable rate elements rather than making reference to tariffs. MTSI also argues that the interconnection agreement should state that Ameritech Michigan cannot assess any service order or NRC rate element that has not been explicitly approved by the Commission.

Ameritech Michigan counters that referencing the tariffs rather than including them in the interconnection agreement serves two purposes. First, it diminishes the possibility that an incom-

plete rate will be applied. Second, it prevents the agreement from becoming even larger. Additionally, Ameritech Michigan points out that the rates may change if its costs change and it files a rate change, as it is entitled to do. Ameritech Michigan says that MTSI's attempt to lock-in certain rates as part of the interconnection agreement is potentially discriminatory because it could result in MTSI paying rates different from Ameritech Michigan's retail customers and other CLECs.

a. DAP

The arbitration panel adopted MTSI's position. It said that including the rate elements in the interconnection agreement would give parties to the agreement and other CLECs, which might be interested in exercising their right to adopt the agreement under Section 252(i), one document from which to determine all rate elements that are applicable to each type of order.

b. Ameritech Michigan's Objection

Ameritech Michigan says that the parties settled this issue. It therefore requests that the Commission not address the issue or, alternatively, render an order consistent with the parties' settlement. If the Commission addresses this issue, Ameritech Michigan argues that it should simply find that the NRCs should be included in the pricing schedule consistent with the arbitration panel's resolution of Issue 85.

c. Commission Decision

The Commission adopts the arbitration panel's recommendation, with one condition. There is a benefit in having one document with all of the rates, terms, and conditions under which the parties will operate. The one condition is that if MTSI agrees that the parties settled the matter, as Ameritech Michigan represents, the agreed language should be incorporated into the interconnection agreement. The Commission is not in a position to evaluate the accuracy of

Ameritech Michigan's representation on the basis of confusing and vague e-mail messages. It would be preferable in the future for the parties to promptly notify the arbitration panel when they have reached agreement on an issue.

#### Issue 67

Should Ameritech Michigan waive term penalties if its customer service record (CSR) does not accurately reflect that the customer being converted to MTSI has an existing contract that is subject to term liability?

MTSI says that it sometimes faces situations in which it asks a prospective customer whether it has a term contract with Ameritech Michigan, and the customer either does not know or believes that there is no contract. MTSI also says that frequently the customer will ask Ameritech Michigan for a copy of whatever contract exists but get no response. In addition, MTSI says that it views the customer's CSR in an attempt to determine the existence of a contract. MTSI says that, in some cases, after the customer switches to MTSI, it is assessed a penalty by Ameritech Michigan for early termination of a contract even though both the customer and MTSI believed that there was no contract. In fact, it says, sometimes Ameritech Michigan is unwilling to waive the term penalty even if MTSI releases the customer to return to Ameritech Michigan. MTSI contends that the CSR is the only document accessible in a timely fashion that indicates whether the customer is under a contract with Ameritech Michigan. As a consequence, MTSI says that if the CSR does not disclose the existence of a contract, Ameritech Michigan should not be allowed to levy a termination charge when that customer switches to MTSI.

Ameritech Michigan counters that MTSI is attempting to avoid responsibility to determine if term liability exists. It also contends that its CSR records are sufficiently accurate for MTSI to identify whether a customer has a contract.

a. DAP

The arbitration panel adopted MTSI's position. It noted that, in the arbitration with Coast to Coast Telecommunications, Inc., (Coast) in Case No. U-12382, Ameritech Michigan had argued that it should not be required to produce, upon request, a copy of its contract with the customer within 10 business days. Instead, Ameritech Michigan had maintained that if the customer did not have a copy of the contract, the customer could contact Ameritech Michigan to obtain a copy or Coast could obtain the information from the CSR. The August 17, 2000 order in that case rejected Ameritech Michigan's arguments and affirmed the arbitration panel's decision that Coast should be entitled to receive a copy of any contract within 10 business days of its request and that failure to do so would entitle Coast to treat the customer as a new customer, not subject to any contractual obligation. The arbitration panel therefore concluded that Ameritech Michigan should be required to maintain CSRs that accurately reflect its contracts with customers and that if it was unable or unwilling to do so, it should not be able to assess termination penalties under those contracts.

b. Ameritech Michigan's Objection

Ameritech Michigan argues that the arbitration panel's recommendation is contrary to both Michigan common law and the Commission's order in the Coast arbitration and would relieve a customer of its term liability if the existence of the term contract is not disclosed by the CSR even when the customer has full knowledge of the contract and Ameritech Michigan or the customer provides MTSI with a copy of the contract. It acknowledges that MTSI has a legitimate interest in knowing whether a particular customer has a contract with a term liability provision. It says that MTSI can ask the customer or access the CSR, which it says will, in most instances, accurately indicate whether the customer has a contract with a term liability provision.

Ameritech Michigan acknowledges that the August 17, 2000 order in the Coast arbitration affirmed the arbitration panel's decision that Coast should be entitled to receive a copy of any contract within 10 business days of its request, and that failure to do so would entitle Coast to treat the customer as a new customer, not subject to any contractual obligations. On the other hand, it says that the Commission took pains to explain that it was not doing anything that affected the contractual relationship between Ameritech Michigan and its customers. In support of its position, it quotes the Commission's order in the prior case:

[T]he Commission finds that if, as Ameritech Michigan has argued (and the arbitration panel agreed), Coast must be willing to sign an agreement to be bound by the terms of an assumed contract between Ameritech Michigan and an end-user customer, Coast should be able to review a copy of the contract that created those obligations. Without the ability to review such a contract, Coast would be unable to determine precisely what obligations it is taking on, thus placing the CLEC in a position that might require litigating what contract rights actually exist. Further, the Commission finds that should Ameritech Michigan be unable or unwilling to produce a copy of the contract within a reasonable time (10 business days), Ameritech Michigan should not be permitted to insist on Coast's performance under that contract. Rather, under those circumstances, the Commission finds that Coast should be allowed to treat the customer as a new customer. Contrary to Ameritech Michigan's argument, this decision does nothing to alter the rights and responsibilities of the parties to the original contract for services. It merely relieves Coast of any obligation to perform under a contract that it cannot review.

August 17, 2000 order, Case No. U-12382, p. 17, emphasis added.

In any event, Ameritech Michigan argues that the Commission must reject MTSI's position for four reasons. First, it says that Section 251(c)(3) of the federal Act, 47 USC 251(c)(3), requires it to give unbundled access to its network elements, including its operations support systems (OSS), of which the CSRs are one part. It says that the law is clear that the right to Ameritech Michigan's UNEs extends only to what is there. Iowa Utils Bd v FCC, 120 F3d 753, 813 (CA 8, 1997) (the federal Act "implicitly requires unbundled access only to an incumbent LEC's existing network—not to a yet unbuilt superior one"). It says that this does not mean that its

records should not be accurate, only that MTSI is entitled to access CSRs in whatever condition they may be and that the Commission cannot require Ameritech Michigan to improve its CSRs for MTSI's benefit.

Second, Ameritech Michigan argues that MTSI asks the Commission to invalidate the term liability provision in the contract between Ameritech Michigan and its customer when the customer is as much to blame as Ameritech Michigan because MTSI can ask the customer as well about the contract.

Third, Ameritech Michigan argues that the Commission cannot lawfully impair contracts between Ameritech Michigan and its retail customers by invalidating a provision to punish Ameritech Michigan for conduct that is not even a breach of that contract. It notes that under Article I, § 10 of the United States Constitution "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." It says that the prohibition precludes the Commission from impairing or abrogating a party's rights under a contract in the absence of an overriding public interest that the state addresses in the exercise of its police powers. Keystone Bituminous Coal Ass'n v DeBenedictis, 480 US 470, 502-03 (1987). It says that there is no suggestion here of an overriding public interest in abrogating a provision in a contract between Ameritech Michigan and its customer.

Fourth and finally, Ameritech Michigan argues that even if the concept MTSI is proposing were acceptable, the proposal is defective because it releases the customer from liability when the CSR does not disclose the term liability even if the customer knows that it is subject to a term liability and communicates that fact to MTSI.

c. Commission Decision

The Commission rejects the recommendation of the arbitration panel because MTSI's position goes too far. MTSI seeks to absolve a potential customer of its term liability if the CSR does not

disclose the contract even if both MTSI and the customer know that the contract exists. Further, MTSI has not explained how its proposal is consistent with the constitutional prohibition against the impairment of contracts. Therefore, choosing between the positions of the two parties, the Commission finds Ameritech Michigan's the less objectionable. On the other hand, Ameritech Michigan should be on notice that the accuracy of its CSRs is an issue that it must resolve in the process of seeking authority under Section 271 of the federal Act, 47 USC 271, to provide in-region interLATA service.

#### Issue 76

Should the agreement contain a process for setting prices for any UNEs for which prices have not been otherwise agreed?

MTSI maintains that it has faced situations in the past where a UNE is available in the state, but cannot order it because either its interconnection agreement does not contain a price for the particular UNE or the ILEC has not determined the price. It says that Ameritech Michigan has agreed to a process for setting the price, although with a time frame of 90 days. MTSI says that its existing agreements specify either 10 or 20 days, and argues that if this process can be performed in 10 days elsewhere, Ameritech Michigan should be able to do the same.

Ameritech Michigan says that MTSI appears to be seeking to require it to provide a network element without complying with the federal Act or Paragraph 43 of the merger conditions imposed by the FCC in connection with the merger of SBC Communications Inc. (SBC) and Ameritech Corporation, Ameritech Michigan's parent corporation. In the Matter of Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations, CC Docket No. 98-141, FCC 99-279 (rel. October 8, 1999) (Merger

Order), Appendix C, Paragraph 43. Moreover, Ameritech Michigan argues there is no need for language to address MTSI's concern because Paragraph 43 provides for interim pricing.

MTSI counters that the language it has proposed is contained in SBC's Texas interconnection agreement and its Kansas interconnection agreement. MTSI therefore concludes that Ameritech Michigan obviously is capable of meeting the 10-day time frame.

a. DAP

The arbitration panel adopted MTSI's position because Ameritech Michigan had failed to present any compelling reasons for not adopting the same contractual language to which it had agreed in other agreements to identify and price UNEs for which the parties have not previously agreed on a price.

b. Ameritech Michigan's Objection

Ameritech Michigan says that the arbitration panel's decision is premised on facts that are not in the record and creates a most favored nation requirement that was not contemplated by Congress or the FCC. It says that MTSI has two lawful means by which it can use contract provisions that appear in other agreements. One is Section 252(i) of the federal Act, which requires Ameritech Michigan to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 USC 252(i). The other is Paragraph 43 of the conditions in the Merger Order, which requires Ameritech Michigan to make available "any interconnection arrangement or UNE . . . that (1) was negotiated with a telecommunications carrier . . . by an SBC/Ameritech incumbent LEC . . . and (2) has been made available under an agreement to which SBC/Ameritech is a party." Ameritech

Michigan says that these provisions have limits in that that neither allows the CLEC to pick an isolated provision in an existing agreement and both require that the CLEC accept all reasonably related terms and conditions. It therefore objects to the panel's creation of a third means to incorporate a contract provision that would not be subject to those limitations.

c. Commission Decision

The Commission adopts MTSI's position because there is value in specifying a process to set prices for UNEs for which the parties have not previously agreed on a price. Adoption of the process proposed by MTSI and recommended by the arbitration panel does not depend upon whether it has been approved elsewhere. Ameritech Michigan's argument is based on the false premise that a provision in an interconnection agreement cannot be patterned after another agreement except in compliance with Section 251(i) or Paragraph 43. There are at least two other ways to arrive at the same result: by negotiation or arbitration. There is nothing objectionable in MTSI's seeking approval in this arbitration for provisions that may be similar or even identical to provisions found in other agreements. Section 251(i) and Paragraph 43 require Ameritech Michigan to make available an interconnection arrangement or UNE without negotiation or arbitration.

Issue 80

Does SBC have to provide power cabling as part of its obligation to provide virtual collocation?

MTSI and Ameritech both state that the issue is the same as Issue 54, except that it relates to virtual collocation.

a. DAP

The arbitration panel adopted Ameritech Michigan's position, based on the provisions of the collocation tariff, that MTSI should schedule the installation of power cabling to the collocation equipment.

b. MTSI's objection

MTSI says that the arbitration panel has erroneously equated the concept of delivery of equipment with the installation of equipment. It says that merely because it has delivered equipment to the collocation site, it does not follow that it should be its responsibility to install that equipment, particularly in a virtual collocation situation where Ameritech Michigan has even greater, if not complete, control of the virtual collocation location. It notes that CLECs do not even have access to a virtual collocation space. It also notes that, with respect to Issue 54, the arbitration panel, based on rulings from the FCC, found that collocation space cannot be functional until power is available and, therefore, no recurring charges should apply until after that time. MTSI says that the same should hold true with respect to virtual collocation. As a result, it requests that the Commission decide Issue 80 consistent with the arbitration panel's recommendation on Issue 54.

c. Commission Decision

As discussed in connection with issues 54 and 60, the Commission accepts MTSI's concession that it will schedule the installation of power cabling as long as recurring charges do not commence until the collocation space is functional.

Issue 85

How should inconsistencies between Ameritech Michigan's proposed price sheets and the language of the agreement be handled?

MTSI asserts that there are many discrepancies between the pricing schedule and the interconnection agreement. It maintains that because of the nature of the discrepancies, it is difficult to propose specific prices or language. MTSI suggests that Ameritech Michigan be required to produce a revised pricing schedule consistent with certain principles.

Ameritech Michigan acknowledges that there are inconsistencies, but states that the parties are continuing to work out the discrepancies.

a. DAP

The arbitration panel adopted Ameritech Michigan's position that the parties should correct the errors without the guidance of abstract principles. The arbitration panel said that MTSI's proposal consisted of abstract principles that were not applied to any specific contract language. It also noted that one of the principles provides that if an item is not listed on the pricing schedule, there would be no price for that item, although MTSI acknowledges that the absence of the item in the pricing schedule could be a typographical error. The arbitration panel was not willing to adopt as a rule the principle that a typographical error would eliminate any price for a service. Moreover, it concluded that an arbitration proceeding was not the proper venue for deciding pricing principles. Thus, the panel concluded that it was not helpful to adopt a set of abstract principles but, rather, found that the parties should work to resolve the inconsistencies.

b. MTSI's objection

MTSI acknowledges that if Ameritech Michigan fully corrects the pricing appendix, its concerns would be resolved, and says that it is willing to work with Ameritech Michigan to correct the pricing appendix and to craft any additional language that is necessary. On the other hand, it believes that guidance is crucial to the parties in understanding their rights and obligations in the

event discrepancies are later discovered in the pricing appendix. It strongly disagrees with the arbitration panel's characterization of its proposed principles as abstract and unnecessary. Rather, it says that the principles give the parties clear guidance in the event that Ameritech Michigan is unwilling or unable to correct the deficiencies in the pricing appendix. It therefore asks that the Commission approve the following principles:

Every item for which there is a Commission-approved charge should be included in Appendix Pricing.

If an item is not included in Appendix Pricing, there is no separate charge for the item.

If there is a charge for an item in Appendix Pricing, but the item is not identified in the agreement, the charge may not be applied.

Appendix Pricing may refer to an approved tariff for tariffed items, but for any such items, MTSI must be given notice, pursuant to the notice provisions of the interconnection agreement, of proposed changes to the tariffed rate at least 30 days before the proposed change is to take effect.

No charges or components of charges should require reference to an external document or source under the control of Ameritech Michigan in order to determine the components or amount of the charge.

If Ameritech Michigan takes the position that there is no charge for an item, then the item should be so listed in Appendix Pricing.

c. Commission Decision

The Commission agrees with the arbitration panel that the parties should identify and correct any errors in the pricing appendix. The Commission also agrees with MTSI that errors may have a cost to it and that future disputes may arise. The Commission therefore agrees with MTSI that its proposed principles should be approved as a guide by which the parties are to resolve disputes about the pricing schedule, although the Commission does not agree that typographical errors excuse any payment for items associated with those errors.

Liability Issues

Four of the unresolved issues relate to limitation of liability provisions.

## Issue 15

Should the interconnection agreement limit the parties' liability for any loss relating to or arising out of providing services under the agreement?

Ameritech Michigan says that although the parties have agreed on certain limitations, there remain four areas of dispute: Section 13.1 limits liability for damages resulting from services provided under the agreement to the amounts charged for those services. Section 13.6 limits Ameritech Michigan's liability for errors and omissions in connection with end-user information, essentially White Pages listings. Section 13.7 limits Ameritech Michigan's liability for errors in connection with the provision of 9-1-1 services. Finally, Section 13.8 provides that the limitations are necessary to reflect that current pricing for network elements and resold services is based on the limitations of liability.

MTSI takes the position that each party should be responsible for its own conduct and should be liable to the other party for direct damages that are the result of that conduct. It therefore proposes to eliminate sections 13.1, 13.6, 13.7, and 13.8, and offers its own language for Sections 13.1, 13.3, 13.4, and 13.5. MTSI maintains that the limitations of liability proposed by Ameritech Michigan are overly broad and constitute a contract of adhesion because there is no other ubiquitous provider of network elements. It asserts that if the policy of the federal Act and state law is to promote competition, Ameritech Michigan must be held accountable for providing negligent service that causes MTSI to suffer lost income and to incur additional operating costs and other damages.

MTSI alleges that there have been instances in which Ameritech Michigan has committed gross negligence in violation of the interconnection agreement, but has refused to compensate MTSI because of the limitation of liability provisions. For example, MTSI states that in January

2001, Ameritech Michigan unilaterally changed trunk translation without warning, causing all of MTSI's customers to get a fast busy signal for several hours on three separate occasions within a four-day period. According to MTSI, this grossly negligent act caused MTSI to incur additional operating costs to resolve the emergency and caused it to lose a substantial number of customers. MTSI states that when it sought compensation from Ameritech Michigan, it denied any responsibility to compensate MTSI because of the limitation of liability provisions in their interconnection agreement.

#### Issue 29

Should MTSI's liability be limited to those items for which it is directly responsible when performing intrusive tests of plain old telephone service (POTS) using Ameritech Michigan's mechanized loop testing (MLT) intrusive test scripts?

When a CLEC uses MLT, Ameritech Michigan requires use of its test scripts, which are a set of instructions for how the MLT should be accomplished. MTSI states that it is willing to bear responsibility for its own actions, but it is not willing to assume potential liability for damages caused by an inadequate test script furnished by Ameritech Michigan.

Ameritech Michigan argues that this issue has two components: (1) what is the extent of MTSI's liability for its intrusive testing, and (2) whether MTSI should hold Ameritech Michigan harmless for claims resulting from MTSI's intrusive testing. As to the first component, Ameritech Michigan states that the parties' disagreement appears to be over whether the word "directly" should be included in the contract language. Ameritech Michigan contends that the word "directly" would add nothing but ambiguity to the contract and could open the door for MTSI to escape liability for damage or loss caused by intrusive testing. Furthermore, according to Ameritech Michigan, because it has no obligation to allow MTSI to use MLT in the first place, it

may impose any conditions it chooses. As to the second component, Ameritech Michigan proposes to require MTSI to release, to defend and indemnify, and to hold it harmless from any claims for loss or damages by an end-use customer, any telecommunications service provider, or telecommunications user relating to such testing by MTSI. Ameritech Michigan states that the primary purpose of this indemnification provision is to protect it in the event that a customer cannot use its telephone for emergency assistance because of a service outage caused by MTSI.

#### Issue 61

Should Ameritech Michigan be exempt from most potential liability for its own actions?

Section 13.2 of Appendix Collocation relates to Ameritech Michigan's liability for the acts of others. Ameritech Michigan proposes language under which it would have no liability for any actions or omissions of third parties, regardless of the degree of culpability of any other party. Ameritech Michigan states that it is required by law to allow MTSI and other competitors to collocate in Ameritech Michigan's central offices, and argues that it would be unreasonable to hold it responsible for the acts or omissions of those parties.

MTSI believes that Ameritech Michigan should be liable for its own negligence and willful misconduct. MTSI proposes language that would relieve Ameritech Michigan from liability with respect to any action or omission by any other party, except to the degree of Ameritech Michigan's culpability.

#### Issue 82

What should be the limits of the parties' liability with respect to virtual collocation space?

Issue 82 is the same as Issue 61, except that it relates to virtual collocation.

a. DAP

The arbitration panel adopted two fundamental principles identified by MTSI. First, neither party should have to waive any of its rights under state and federal law. Second, each party should be responsible for its own conduct and should be liable to the other party for direct damages that are the result of that conduct, but neither should be responsible for acts of third parties. The arbitration panel recommended that the parties, guided by these principles, draft contract language.

b. MTSI's objection

MTSI believes that the language it proposed with respect to each of these issues clearly and forcefully promotes these principles, and says that it is mindful that the arbitration panel declined to adopt specific contract language on behalf of either party. However, it requests that the Commission adopt its proposed liability language, but if it will not do so, it requests guidance in the event that Ameritech Michigan is unwilling to agree to language that is in accordance with the recommended principles.

c. Commission Decision

The Commission adopts MTSI's position. Although the Commission agrees with the principles that the arbitration panel adopted, it does not agree that the parties should be left to work out language consistent with those principles, which would likely unduly delay the filing of an executed interconnection agreement. The Commission concludes that MTSI's position is more consistent with those principles, the development of competition, and the public interest. Ameritech Michigan's proposed limitations of liability are overly broad and characteristic of a contract of adhesion. It is reasonable to propose, as MTSI does, that Ameritech Michigan should be accountable for negligent conduct that causes harm to CLECs and that Ameritech Michigan

should not be accountable for any act or omission by any other party, except to the extent of Ameritech Michigan's culpability. It is not reasonable to propose, as Ameritech Michigan does, that CLECs must be responsible for harm that is caused by an inadequate MLT test script furnished by Ameritech Michigan.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 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.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The parties should file an interconnection agreement in conformity with the decision of the arbitration panel, as modified by this order.

THEREFORE, IT IS ORDERED that McLeodUSA Telecommunications Services, Inc., and Ameritech Michigan shall file, within 30 days, an executed interconnection agreement in conformity with the decision of the arbitration panel, as modified by this order.

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of January 22, 2002.

/s/ Dorothy Wideman  
Its Executive Secretary

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

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of January 22, 2002.

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Its Executive Secretary

In the matter of the petition of **McLEODUSA** )  
**TELECOMMUNICATIONS SERVICES, INC.,** )  
for arbitration of interconnection rates, terms, )  
and conditions and related arrangements with )  
Michigan Bell Telephone Company, d/b/a )  
Ameritech Michigan, pursuant to Section 252(b) )  
of the Telecommunications Act of 1996. )  
\_\_\_\_\_ )

Case No. U-13124

Suggested Minute:

“Adopt and issue order dated January 22, 2002 requiring McLeodUSA Telecommunications Services, Inc., and Ameritech Michigan to file an interconnection agreement in conformity with the decision of the arbitration panel, as modified by this order, as set forth in the order.”