

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of the **COMPETITIVE** )  
**LOCAL EXCHANGE CARRIERS ASSOCIATION** )  
**OF MICHIGAN, CMC TELECOM, INC., LONG** )  
**DISTANCE OF MICHIGAN, INC., MCLEODUSA** )  
**TELECOMMUNICATIONS, INC., MICHTEL, INC.,** )  
and the **ASSOCIATION OF COMMUNICATIONS** )  
**ENTERPRISES** against **SBC AMERITECH** )  
**MICHIGAN** for anti-competitive acts and acts )  
violating the Michigan Telecommunications Act. )  
\_\_\_\_\_)

Case No. U-13193

At the March 29, 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**

On January 29, 2002, the Competitive Local Exchange Carriers Association of Michigan, CMC Telecom, Inc., Long Distance of Michigan, Inc, McLeodUSA Telecommunications, Inc., MichTel, Inc., and the Association of Communications Enterprises (collectively, the CLEC Association) filed an application for leave to appeal the January 22, 2002 rulings of Administrative Law Judge George Schankler (ALJ) that dismissed most of the counts of their complaint against Ameritech Michigan and struck a portion of the testimony of one of the witnesses. On February 5, 2002, Ameritech Michigan, Attorney General Jennifer M. Granholm, and the Small Business

Association of Michigan (SBAM) filed responses. On February 7, 2002, Ameritech Michigan filed an objection to SBAM's response.

Rule 337 of the Commission's Rules of Practice and Procedure, 1992 AACRS, 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 Commission concludes that addressing the application for leave to appeal will materially advance a timely resolution of the case and is necessary in light of the time that the Michigan Telecommunications Act (MTA) permits to complete the case. See MCL 484.2203(11).

## Count II

Count II of the complaint alleges that the termination penalties that are part of Ameritech Michigan's Centrex contracts are anticompetitive and unjust and unreasonable. The ALJ dismissed the count because he found that the services were "so predominantly unregulated" and "not tied to traditional basic local exchange service." Tr. 29.

The CLEC Association argues that Centrex customers obtain elements of basic local exchange service from Ameritech Michigan and will be tied into local as well as unregulated services through the threat of unjust and unreasonable termination penalties. It therefore argues that the

termination penalties should be subject to scrutiny in the same manner as the CompleteLink contracts that are the subject of Count I, which the ALJ did not dismiss.

Ameritech Michigan responds that the Commission cannot adjudicate the rates, terms, and conditions of an unregulated service and points out that Centrex features are unregulated. It asserts that contracts have long been used in connection with Centrex service and that the Commission has previously rejected attempts to abrogate those Centrex contracts. It also says that the Commission has upheld the use of termination penalties as part of those contracts. It further argues that the complainants lack standing to challenge the termination penalties because they have not suffered an injury in fact and are not within the zone of interests to be protected by the MTA.

The Commission agrees with the CLEC Association that the termination penalties in Centrex contracts, as well as CompleteLink contracts, should be examined in this case. Both contracts address aspects of basic local exchange service as well as other regulated and unregulated services. Although the prominence of the basic local exchange service aspect may differ between the two, the Commission does not conclude that the difference is sufficient to justify preventing the CLEC Association from trying to make its case that the termination penalties in the Centrex contracts, to the extent they involve basic local exchange service and other regulated services, are anticompetitive and unjust and unreasonable. The complainants have standing to raise the issue because they are challenging the effect of the termination penalties on themselves as competitors of Ameritech Michigan and the effect on the development of competition in Michigan.

#### Count IV

Count IV alleges that, beginning in September 2001, Ameritech Michigan tried to block competition by requiring that when a customer with voice service from Ameritech Michigan and

digital subscriber line (DSL) service from Ameritech Michigan's affiliate wants to change its voice service to a competitive local exchange carrier (CLEC), the customer's DSL service must be disconnected and reinstalled, which requires the customer to give up DSL service for two weeks. The ALJ dismissed the count because the DSL service is not provided by Ameritech Michigan and thus Ameritech Michigan is not refusing to provide the service. Tr. 42

The CLEC Association argues that the Commission cannot ignore the fact that the DSL service is provided by Ameritech Michigan's affiliate, which uses the Ameritech name. It says that the purpose for requiring advanced service to be offered by an affiliate is to require the affiliate to compete with other providers, not to shield anticompetitive conduct from examination.

Ameritech Michigan responds that it does not provide DSL service. It says that it provides access to the high frequency portion of the loop to a number of DSL providers, including its affiliate. It argues that the Commission lacks authority to require an unregulated DSL service provider, whether affiliated with Ameritech Michigan or not, to engage in line sharing or line splitting to provide DSL service to customers.

The Commission agrees with the CLEC Association that it should be permitted to develop a factual record about the termination of DSL service and to make an argument that the Commission has authority to grant a remedy.

#### Count VI

Count VI alleges that it is anticompetitive for Ameritech Michigan to refuse to offer voice mail in conjunction with the unbundled network element platform (UNE-P) when voice mail is ordinarily combined with basic local exchange service or, alternatively, for Ameritech Michigan to refuse to make the stutter dial tone available to CLECs so that they can offer a competing voice mail service. (The stutter dial tone or lamp indicator is a way to notify the customer that a

message is waiting.) The ALJ dismissed the count because he found that the stutter dial tone is offered “on paper, at least.” Tr. 65.

The CLEC Association argues that it is anticompetitive for Ameritech Michigan to provide voice mail to itself as part of the elements that it ordinarily combines while not doing likewise for competitors in conjunction with the UNE-P at a reasonable price. As to the stutter dial tone, it argues that although Ameritech Michigan alleges that it provides that function, there is testimony that, in fact, the feature is not offered.

Ameritech Michigan responds that the Commission has previously ruled that voice mail is not a UNE and that the complainants have admitted that voice mail is unregulated.

The Commission concludes that the availability of the stutter dial tone is a factual matter that should be addressed on the record and not disposed of by a motion to dismiss. The Commission does agree with the ALJ’s dismissal of the portion of this count that is related to the CLEC Association’s argument that Ameritech Michigan must make voice mail available as a part of the UNE-P at total service long run incremental cost. That issue has previously been decided to the contrary.

#### Count IX

Count IX alleges that Ameritech Michigan is using its monopoly power to impede the deployment of DSL broadband technology and refusing to resell DSL service. The ALJ dismissed all but a portion of the count related to additional qualification charges because the issues had been addressed in Case No. U-12540. Tr. 63-64.

The CLEC Association argues that Ameritech Michigan, and its affiliates, are required to offer DSL services for resale and are not doing so.

Ameritech Michigan responds that the issues have been fully addressed in Case No. U-12540 or are beyond the Commission's jurisdiction. Further, it argues that DSL service is an unregulated service that Ameritech Michigan does not offer.

The Commission concludes that the availability of DSL for resale is a factual matter that should be addressed on the record and not disposed of by a motion to dismiss. The Commission does agree with the ALJ's dismissal of the other portions of this count, such as the CLEC Association's argument that Ameritech Michigan must unbundle Project Pronto. Those issues have been fully addressed elsewhere.

#### Other Counts

The Commission affirms the ALJ's rulings on the other counts, for the reasons given by the ALJ.

#### Stricken Testimony

The Commission has reviewed the stricken testimony referenced in the application for leave to appeal, and finds no reason to reverse the ALJ's ruling. The stricken testimony would not significantly contribute to the Commission's deliberations in this case.

#### SBAM

SBAM is not a party to this case, although it filed a response to the application for leave to appeal. Its response does not fall within the scope of R 460.17207, because the response was not made at a time provided by the ALJ for that purpose, and is not authorized by MCR 7.212(H), because that appellate court rule does not apply to proceedings before the Commission. The Commission has therefore disregarded the filing, which, in any event, does little more than voice support for the CLEC Association's position.

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 AACRS, R 460.17101 et seq.
- b. The CLEC Association's application for leave to appeal should be granted.
- c. The ALJ's rulings as to counts II, IV, VI, and IX, as limited by this order, should be reversed.

THEREFORE, IT IS ORDERED that:

- A. The CLEC Association's January 29, 2002 application for leave to appeal is granted.
- B. The Administrative Law Judge's rulings as to counts II, IV, VI, and IX, as limited by this order, are reversed.
- C. The case is remanded to the Administrative Law Judge for further proceedings.

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

MICHIGAN PUBLIC SERVICE COMMISSION

( S E A L )

/s/ Laura Chappelle  
Chairman

By its action of March 29, 2002.

/s/ David A. Svanda  
Commissioner

/s/ Dorothy Wideman  
Its Executive Secretary

/s/ Robert B. Nelson  
Commissioner

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Suggested Minute:

“Adopt and issue order dated March 29, 2002 granting the application for leave to appeal, reversing some of the Administrative Law Judge’s rulings, and remanding the complaint of the Competitive Local Exchange Carriers Association of Michigan et al. against Ameritech Michigan for further proceedings, as set forth in the order.”