

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **LUCRE, INC.**,)
against **MICHIGAN BELL TELEPHONE**)
COMPANY, d/b/a SBC MICHIGAN, to resolve)
a dispute over a refusal to allow adoption of an)
interconnection agreement, a refusal to pay certain)
charges, and improper charges imposed.)
_____)

Case No. U-13785

At the December 18, 2003 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER DISMISSING COMPLAINT

History of Proceedings

On May 6, 2003, Lucre, Inc., filed a six-count complaint against SBC Michigan (SBC) alleging, among other things, that SBC breached their July 17, 1997 interconnection agreement by refusing to compensate Lucre for certain services required to deliver SBC-originating traffic to the Lucre network. Through alternative dispute resolution and negotiation, five of the six counts in the complaint have been resolved.

Pursuant to due notice, Administrative Law Judge James N. Rigas (ALJ) presided over the July 14, 2003 prehearing conference, which was attended by Lucre, SBC, and the Commission Staff (Staff).

On September 17, 2003, the ALJ conducted an evidentiary hearing. Four witnesses testified and eight exhibits were received into evidence. Thereafter, Lucre and SBC submitted timely briefs and reply briefs. On November 5, 2003, the ALJ issued a Proposal for Decision (PFD) in which he recommended that Lucre's complaint be dismissed by the Commission. Lucre filed exceptions to the PFD on November 14, 2003. SBC filed replies to exceptions on November 21, 2003.

Factual basis

The underlying facts are not significantly disputed by either party. Lucre and SBC are parties to an interconnection agreement that was approved by the Commission's May 27, 1999 order in Case No. U-11974. Lucre and SBC interconnect their networks through use of a joint SONET¹ ring. Each party provides its own section of the SONET ring.

Section III.2.4 of the interconnection agreement provides as follows:

Based on the physical architecture and Reciprocal Compensation arrangements that the Parties agree to in this Agreement, each Party shall be responsible for establishing and maintaining certain physical facilities and logical trunking necessary for Interconnection. Each Party shall provide, at its own expense, the physical facilities and logical trunking necessary on its side of the common physical meet point with respect to each Interconnection which provides for the transmission, routing and termination of Telephone Exchange Service traffic and Exchange Access traffic to their respective Customers. Such facilities and logical trunking shall be provided on a basis consistent with the standards set forth in this Agreement. Lucre may purchase such facilities from Ameritech at the rates set forth at Item V of the Pricing Schedule. Any Interoffice Transmission Facilities purchased by Lucre from Ameritech to be utilized for such transmission shall be at the rates for Dedicated Interoffice Transmission Facilities.

Exhibit R-8.

For several years, Lucre provided various services to SBC for termination of SBC-originating inbound traffic without charging SBC for services associated with changing a DS-3 signal to

¹SONET is an acronym for Synchronous Optical Network, a standard protocol for transmitting calls over fiber optic cable on one network or transmitting calls over fiber optic cable between two different networks. A SONET passes light back and forth over fiber cable in lockstep with a master clock allowing for transmissions that arrive and depart to be neither lost nor jumbled.

DS-1 and DS-0 signals. On February 6, 2003, Lucre invoiced SBC for \$4,671,163.23 for such services. Exhibit C-1. This invoice covered charges dating back to 1999 for the services Lucre rendered to SBC. SBC refused to pay the invoice.

Positions of the Parties

Lucre contends that the ALJ erred in interpreting the meaning of the interconnection agreement. Specifically, Lucre challenges the ALJ's finding that the word "facilities," which appears in Section 3.2.4 of the interconnection agreement, was intended to encompass the word "services." According to Lucre, the interconnection agreement evidences that the parties never intended to equate the words "facilities" and "services." Citing Article 27.1.1 of the interconnection agreement, Lucre insists that the parties distinguished between those terms. Likewise, Lucre cites the amended pricing schedule appended to the interconnection agreement and three other instances² as further evidence that facilities and services have different meanings. For these reasons, Lucre argues that the PFD tramples the plain meaning of the interconnection agreement.

Next, Lucre attacks the ALJ's reliance on the appended pricing schedule and his effort to harmonize two provisions by characterizing them as a general rule (Section 3.2.4) and as an exception (Section 3.9.2(a)). Lucre insists that the ALJ's rationale violates the most basic tenet of contract interpretation—that the plain meaning of the contract language should control.

Finally, Lucre attempts to explain that its failure to bill SBC for the disputed services for several years should not have influenced the ALJ's recommendation or the Commission's determination. According to Lucre, the failure to bill SBC was simply a billing oversight that is understandable in light of the complexity of the circumstances. However, in its argument on this point, Lucre does concede that application of Section 27.5 of the interconnection agreement, which

²Sections E of the Recitals, Section 3.9.2 of Article III, and Section 8.3 of Article VIII.

limits the ability of both parties to bill for underbilled charges incurred more than one year prior to the date of the billing, requires the Commission to reduce the maximum amount of recovery by Lucre from \$4,671,163.23 to \$2,389,420.88.³

In response, SBC maintains that the only question presented by this proceeding involves the identity of the entity responsible for the cost of multiplexing, entrance facilities, and facility termination provided by Lucre, in Lucre's central office, without which Lucre could not terminate traffic to its customers. According to SBC, the underlying philosophy of the interconnection agreement embraces the concept that each party will be financially responsible for building out facilities to the joint SONET ring to support both the origination and termination of both carriers' traffic. In other words, it is SBC's position that each party bears the cost of interconnection on its side of the joint SONET.

Citing Section 3.2.4 of the interconnection agreement, SBC contends that the parties gave special meaning to the phrase "physical facilities" by referencing Item V of the pricing schedule, thereby undermining Lucre's contentions in this proceeding. SBC also argues that the lack of mutuality of Section 3.2.4 is evidence that the parties intended Lucre to assume full responsibility for terminating SBC-originating traffic.

SBC insists that the ALJ correctly determined that Lucre's interpretation of Section 3.2.4 is flawed because it would render Section 3.9.1, which requires (1) SBC to terminate Lucre-originated 9-1-1 traffic and (2) Lucre to compensate SBC for such services, meaningless. According to SBC, because the parties inserted Section 3.9.1 into the interconnection agreement, they had to intend a meaning for Section 3.9.1 that is different than the meaning Lucre ascribes to

³Lucre also sought an award of costs and attorney fees and the imposition of fines on SBC.

Section 3.2.4. Moreover, SBC asserts that it has only billed Lucre for multiplexing 9-1-1 traffic pursuant to Section 3.9.1.

Finally, SBC contends that the testimony supports its position that the \$4,671,163.23 invoice covers not only multiplexing services, but also entrance facilities. Charging Lucre with duplicity through use of “selective semantic distinctions,” SBC argues that Lucre’s complaint should be dismissed.

Discussion

Neither party has identified specific language in the interconnection agreement that explicitly controls the outcome of this proceeding. Rather, their positions are constructed on various provisions that arguably disclose the intent to the parties with respect to whether SBC should be found to be liable to Lucre for services performed in delivering SBC-originating traffic to Lucre’s network. Because Lucre is the complainant, it bears the burden of persuasion on this issue. The ALJ found that Lucre failed to meet this burden. For the reasons set forth in this order, the Commission agrees with the ALJ.

The Commission finds that the language of Section 3.2.4 is more consistent with SBC’s position that the interconnection agreement assigns financial responsibility for the services performed on each side of the joint SONET ring to the party responsible for the physical facilities and logical trunking necessary on its side of the joint SONET ring. The ALJ correctly noted that multiplexing services at issue are essential for the proper transportation and delivery of a usable signal to customers. Moreover, the record shows that the parties agreed to hand off traffic at the DS-3 level, which means that multiplexing services were necessary in order to complete calls on their respective sides of the joint SONET ring.

Lucre's attempt to explain away its nearly four year failure to bill SBC for these services as a simple oversight strains credibility. The amount involved is significant. The Commission doubts that it was simply overlooked for most of the life of the interconnection agreement. Indeed, the Commission agrees with the ALJ that the administration of the interconnection agreement by the parties for such an extended period of time suggests that SBC is correct in its interpretation of Section 3.2.4.

In addition, the Commission finds that the reference in Section 3.2.4 to Item V of the Pricing Schedule, a list of facilities and services, supports SBC's position. Item V of the Pricing Schedule describes both facilities and services, including services that Lucre claims are the responsibility of SBC in this case, which lends support to the ALJ's finding that the parties intended to include services within the term physical facilities.

Furthermore, the Commission finds that acceptance of Lucre's position regarding Section 3.2.4 would render Section 3.9.1 surplus verbiage. Rather, the Commission agrees with the ALJ's assessment that Section 3.2.4 should be viewed as expressing the general rule that each party is responsible for the costs incurred on its side of the joint SONET ring, and that Section 3.9.1 states the exception, which obligates Lucre to pay for multiplexing services for 9-1-1 traffic.

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, 1999 AC, R 460.17101 et seq.
- b. The May 6, 2003 complaint filed by Lucre against SBC should be dismissed with prejudice.

THEREFORE, IT IS ORDERED that the May 6, 2003 complaint filed by Lucre, Inc., against SBC Michigan is dismissed with prejudice.

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/ J. Peter Lark

Chair

(S E A L)

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of December 18, 2003.

/s/ Mary Jo Kunkle

Its Executive Secretary

THEREFORE, IT IS ORDERED that the May 6, 2003 complaint filed by Lucre, Inc., against SBC Michigan is dismissed with prejudice.

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

Chair

Commissioner

Commissioner

By its action of December 18, 2003.

Its Executive Secretary

In the matter of the complaint of **LUCRE, INC.**,)
against **MICHIGAN BELL TELEPHONE**)
COMPANY, d/b/a SBC MICHIGAN, to resolve)
a dispute over a refusal to allow adoption of an)
interconnection agreement, a refusal to pay certain)
charges, and improper charges imposed.)
_____)

Case No. U-13785

Suggested Minute:

“Adopt and issue order dated December 18, 2003 dismissing with prejudice the May 6, 2003 complaint filed by Lucre, Inc., against SBC Michigan, as set forth in the order.”