

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint and request for )	
emergency relief filed by <b>TDS METROCOM, LLC,</b> )	Case No. U-13789
against <b>SBC MICHIGAN.</b> )	
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At the October 23, 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**

On May 13, 2003, TDS Metrocom, LLC, (TDS) filed a complaint and request for emergency relief against SBC Michigan (SBC), pursuant to MCL 484.2203(2). On May 20, 2003, SBC filed an answer.

On June 9, 2003, a hearing was held before Administrative Law Judge Barbara A. Stump (ALJ).

On June 16, 2003, the Commission issued an order in which it concluded that TDS did not meet its burden to demonstrate that emergency relief is warranted. Specifically, the Commission was not persuaded that exigent circumstances warranted that relief or that TDS could suffer irreparable harm in its ability to serve customers if emergency relief were not granted. The matter was remanded to the ALJ for further proceedings.

On June 23, 2003, the ALJ conducted a prehearing conference to establish a schedule for the remainder of the case.

On August 4, 2003, SBC filed a motion to dismiss and TDS filed a motion for partial summary disposition. On August 11, 2003, both parties filed answers to each other's motions.

On August 14, 2003, a hearing was held on both motions and the ALJ issued an oral Proposal for Decision (PFD) granting SBC's motion to dismiss and denying TDS's motion for summary disposition. On August 27, 2003, TDS filed exceptions to the PFD. On September 4, 2003, SBC filed a response to TDS's exceptions.

TDS is a facilities-based competitive local exchange carrier (CLEC). Its complaint alleged that SBC, an incumbent local exchange carrier (ILEC), acted in a discriminatory manner by refusing to honor an agreement to mutually waive early termination fees, which TDS claimed resulted in confusion and misunderstanding in the minds of customers that desire to switch from SBC to TDS. According to TDS, SBC has many long-term contracts with customers that require the customers to pay early termination fees. TDS claimed that many of SBC's customers would be willing to switch to TDS except for the provision in their contracts that requires them to pay the early termination fees.

TDS alleged that SBC entered into a secret contract with Climax Telephone Company (Climax) to waive early termination fees. According to TDS, the secret contract placed TDS at a competitive disadvantage because SBC customers faced with payment of an early termination fee by switching to TDS would not encounter a similar barrier to switch to Climax.

When TDS became aware of the secret SBC/Climax agreement, TDS demanded a similar agreement from SBC. On January 15, 2003, SBC communicated its intention to enter into such an arrangement with TDS, which it did on January 29, 2003.

The complaint alleged that TDS identified 228 SBC customers that have or are willing to switch to TDS based on the understanding that the SBC early termination fees will be waived.<sup>1</sup> However, TDS alleged that SBC refused to advise in advance of the switch to TDS as to whether SBC would honor the January 29 agreement and that SBC had billed 20 switching customers for early termination fees. Additionally, TDS asserted that SBC unreasonably refused to provide any written explanation of SBC's position as to which types of contracts qualify for a waiver.

TDS alleged that SBC's conduct violates Section 502(1)(h) of the Michigan Telecommunications Act (MTA) by causing a probability of confusion or a misunderstanding as to the legal rights, obligations, and remedies of a party to the transaction. TDS also contended that SBC's (1) billing of the early termination fees, (2) failure to waive the early termination fees, and (3) unwillingness to advise TDS and customers prior to switching regarding SBC's policy towards the waiver of the early termination fees, violated Section 502(1)(a) of the MTA by making false, misleading, and deceptive statements. In other counts, TDS alleged violations of Sections 502(1)(c), 352, 355, 304, and 502(1)(f) of the MTA and Sections 251 and 252 of the federal Telecommunications Act (FTA).

In its August 4, 2003 motion for partial summary judgment, TDS insisted that it is entitled to partial summary judgment with respect to Counts I, II, and III of its complaint. According to TDS, the waiver agreement applies to all term contracts for telecommunications. Likewise, TDS asserted that SBC's refusal to properly implement the waiver agreement harms customers.

In response, SBC insisted that its waiver agreement with TDS does not apply to all telecommunications service. Rather, SBC contended that the agreement carefully delimits the term contracts that are subject to the agreement. According to SBC, the agreement applies to end users

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<sup>1</sup> There is some confusion regarding the number of customers involved. Various claims put the number of customers at 136, 169, or 228.

and arrangements including toll or local services and associated features, but not to under-utilization charges pro-rated to the date of termination. Citing the June 6, 2002 order in Case No. U-13193, wherein the Commission rejected a claim that SBC's use of term contracts containing early termination fees was unlawful, SBC asserted that the Commission does not have jurisdiction over its agreement with TDS. SBC stressed that the agreement at issue was privately negotiated by SBC and TDS with no Commission participation or approval. SBC denied violating any provision of either the MTA or the FTA.

In its August 4, 2003 motion to dismiss, SBC argued that only 4 of the over 200 instances where TDS requested a waiver were rejected by SBC. Accordingly, SBC insisted that the propriety of its treatment of those four instances should determine the outcome of this proceeding. Citing confidential Exhibit R-15 that was introduced at the May 16, 2003 hearing – a log originally prepared by a TDS employee of customers that SBC had charged an early termination fee – SBC asserted that it did not waive the fees for three of the four customers because the services provided under those arrangements were not covered by the early termination agreement and the fourth situation did not result in a waiver because TDS had failed to provide the required seven day notice specified in the agreement. SBC stated that two of the customers received DS-1 and Integrated Services Digital Network (ISDN) Prime service. One customer received only ISDN Prime service. The final customer, which had SBC's "CompleteLink" service, switched its service more than 10 weeks before the waiver request.

SBC maintained that the waiver agreement applies only to its toll or local exchange agreements, but not to its dedicated telecommunications services, such as T-1, DS-1, DS-3, ISDN Prime, access services, payphone service, directory services, which are unregulated services.

The ALJ recommended dismissal of TDS's complaint. In so doing, the ALJ stated:

. . . I find that the contract in dispute, that is, the mutual waiver of early termination fees agreement, relates to the parties' rights and obligations relative to the payment of early termination fees. It does not relate to the provision of a telecommunications service. Moreover, the disputed contract was negotiated privately between the parties, with no Commission participation or approval needed. That some aspects of the underlying services are regulated is not dispositive of this question, because the issue raised in the complaint, which is the proper interpretation of the waiver agreement, is not subject to regulation. Thus, the dispute does not relate to a regulated telecommunications issue.

3 Tr. 283

The ALJ further determined that:

Aside from the fact that the Commission does not have jurisdiction over this dispute, the motion itself lacks merit . . . [S]ending bills to customers that include contractual termination charges does not constitute making a statement regarding the rates, terms, or conditions of providing a telecommunications service, and there is nothing false, misleading, or deceptive about it . . . [I]t was not SBC that made any statements to its customers regarding the waiver of the termination fees, but rather it was TDS that told those customers that the fees would be waived . . . [C]harging customers for voluntarily assumed early termination charges is not charging for a telecommunications service.

3 Tr. 287-288

Finally, with regard to the TDS's claim that SBC offered more favorable terms to Climax, the ALJ found that:

First of all, an agreement for the waiver of termination fees is not a term of interconnection and therefore does not constitute an interconnection agreement . . . As such, SBC was under no obligation to offer the same agreement to TDS. Nevertheless, the evidence established that SBC has administered the Climax agreement in the same manner as the mutual waiver agreement at issue here.

3 Tr. 289

On August 27, 2003, TDS filed exceptions to the PFD. TDS alleges that ISDN service is a local exchange service over which the Commission has jurisdiction, not a private network. Even if the Commission decides that ISDN service is not a local exchange service, TDS argues that the Commission still has jurisdiction because Section 502 of the MTA applies to both regulated and

unregulated services. According to TDS, MCL 484.2502(1) covers all providers of telecommunications service, which is defined in Section 102(dd) to include both regulated and unregulated services.

TDS also argues that Case No. U-13195 was wrongly interpreted in the PFD. According to TDS, although Case No. U-13195 decided that services listed in Section 401 were not included in the prohibitions of Section 502 of the MTA, ISDN service is not included because ISDN service is not a private network. TDS asserts that the ISDN service (1) connects with the public local exchange, (2) is a type of access line to provide local exchange service, and (3) is billed as “Ameritech Local Service” by SBC. TDS maintains that because SBC bills ISDN as a regulated service under Section 314 of the MTA, SBC has essentially admitted that ISDN constitutes a local exchange service. TDS points out that SBC bills ISDN customers for end user common line (EUCL) charges, which are only imposed on local exchange telephone service users. Further, according to TDS, because the SBC tariff states that “an end user is provided ISDN PRI local exchange service,” TDS asserts that ISDN is a local exchange service (SBC’s FCC Tariff No. 2 Second Revised Page 80.3). Also, TDS introduced evidence that Climax, another CLEC, also interpreted the waiver to include ISDN service. Finally, TDS contends that SBC has organized its state tariffs without including ISDN as a local exchange service, but that is not controlling.

TDS also alleges that the ALJ’s reliance on Cases Nos. U-13501 and U-13193 was an error. TDS contends that Cases Nos. U-13501 and U-13193 have no bearing because they decide jurisdiction over claims brought under a different section of the MTA, which has a different jurisdictional standard.

Next, TDS reasons that SBC’s alleged breach of contract does not automatically bring the case outside the MTA, because a company can breach a contract and violate the MTA at the same time.

TDS further contends that this case involves a generic form contract offered by SBC to all CLECs and, therefore, is not even a privately negotiated contract.

In addition to allowing its motion to go forward, TDS asks that its motion for partial summary disposition be granted. TDS stresses that SBC admits to billing customers early termination fees after promising to waive them. TDS alleges that this violates Section 502 of the MTA because it is false, misleading, or deceptive and creates a probability of confusion or misunderstanding. TDS further indicates that the mutual waiver agreement covered ISDN because the waiver covers local exchange service and ISDN is a local exchange service. TDS asserts that Case No. U-11038 holds that a bill insert is covered by the MTA; therefore, TDS reasons that imposing early termination fees is sufficiently related to telecommunications service to fall under Section 502 of the MTA. TDS also argues that SBC violated the MTA even without telling a customer that it would waive fees because the MTA only requires the capacity to deceive – not actual deception.

TDS also states that the mutual waiver agreement applies even if ISDN is not found to be a local exchange service because it applies to all term contracts. TDS contends that SBC continually uses the term “telecommunications service” in the mutual waiver agreement, rather than limiting the waiver to local exchange service. TDS states that any ambiguity must be construed against the drafter. Stark v Kent Products, Inc., 62 Mich App 546; 233 NW2d 643 (1975). To refute SBC’s argument that the contract language limits the waiver to local exchange, toll service, and associated features, TDS emphasizes that the list in the waiver is preceded by the phrase “which includes.” According to TDS, the Michigan Supreme Court has interpreted that phrase to enlarge rather than limit a list of examples. Skillman v Abruzzo, 352 Mich 29; 88 NW2d 420 (1958).

With regard to the issue of the timeliness of the notice to SBC, TDS maintains that SBC should waive the fee even without the seven days’ notice provided for in the mutual waiver

agreement. TDS argues that the deadline is only to facilitate implementation and SBC would gain a windfall if it did not have to waive fees because of late notice. TDS also alleges that SBC alleged no harm by receiving late notice.

Finally, TDS insists it has a valid claim against SBC for discriminatory treatment under the FTA and MTA. TDS claims that the term “interconnection agreement” should be interpreted broadly to include the mutual waiver agreement. TDS contends that SBC gave favorable treatment to Climax by offering them a mutual waiver agreement, secretly, a year before TDS was offered one. TDS believes that this is a violation of the FTA and MTA because the interconnection agreement was not made available for public inspection and approval, was not made to all CLECs equally and fairly, and was not just and reasonable.

In response, SBC contends that out of over 200 requested waivers only 4 have been denied, and those 4 were rightly denied under the mutual waiver agreement. SBC further asserts that the Commission lacks jurisdiction, but even if it did have jurisdiction, TDS still has no valid claim.

SBC contends that the Commission already decided in its June 6, 2002 order in Case No. U-13193, that it lacked jurisdiction to adjudicate disputes regarding unregulated services, except for limited exceptions. SBC further points out that the Commission decided in the July 23, 2002 order in Case No. U-13195, that Section 505 of the MTA was not meant to cover “unregulated two-way high-speed data transmission services,” like the services involved in this case. Also, SBC indicates that this is a privately negotiated contract with no Commission participation or approval and that the contract dispute does not relate to a telecommunications issue.

SBC also contends that even assuming that the Commission has jurisdiction, TDS still has no valid claim. SBC claims that the mutual waiver agreement only applies to “end users,” which are defined in the Section 505 as the retail subscriber of a telecommunications service. SBC argues

that this does not include providers who are not buying the service for their own use. SBC further argues that the contract language stating, “which include intraLATA and/or interLATA toll service, local exchange service, and/or associated features,” limits the contract to one of those users. Citing Sandy Pines Wilderness Trails v City of Pontiac, 232 Mich App 11; 591 NW2d 658 (1998), SBC maintains that although the Michigan Court of Appeals has decided that the word “includes” can be used as a term of enlargement or limitation, in the context of this agreement if the parties had wanted to use it as a term of enlargement they would have stated, “including, but not limited to,” as they did later in the contract. Also, SBC argues that its accessibility letter offers the mutual waiver agreement for local exchange service or toll service only. In short, SBC alleges that TDS’s interpretation of the agreement is “tortured.”

SBC also renews its claim that waivers were not appropriate for three of the four customers because local exchange or toll services are the only services covered by the mutual waiver agreement. The three customers at issue had contracts for ISDN and DS-1 services, which SBC asserts are unregulated, private line, sophisticated business services. SBC further points out that DS-1 circuits are frequently used to connect two computer systems, and if used for basic local exchange service, the customer would have to obtain the local service through a totally separate contract.

SBC next contends that it did not violate Section 502 of the MTA by sending bills to customers that include properly assessed contractual termination charges. According to SBC, there is nothing false, misleading, or deceptive about applying an appropriate charge to a customer’s bill. Besides, argues SBC, it was TDS, not SBC, who led customers to believe that the charges were not appropriate.

SBC also claims that the ALJ correctly dismissed the discrimination claims. SBC indicates that the Climax mutual waiver agreement was entered into as a settlement in a contested case, which is why the same agreement was not offered to TDS. SBC points out that when TDS contacted them about the Climax agreement, SBC offered TDS the same agreement. SBC further mentions that even without a legal obligation to do so, it has administered the Climax agreement identically to the TDS agreement. SBC states that the Climax agreement is not an interconnection agreement and, therefore, is not covered under MTA and FTA. SBC continues that if all agreements are interconnection agreements, the mutual waiver agreement with TDS is an unenforceable interconnection agreement because it has not been filed with, and approved by, the Commission. SBC concludes that even if the agreement is found to be a discriminatory interconnection agreement, TDS offered no evidence of harm.

Based on the preceding arguments, the Commission rejects TDS's exceptions to the PFD. The Commission finds that there is ample support for the ALJ's August 14, 2003 ruling dismissing TDS's claims without consideration of the issue of whether the services supplied pursuant to SBC's contracts with its customers involved regulated or unregulated services. Indeed, TDS's complaint only tangentially concerns such issues. Rather, the complaint concerns the mutual waiver agreement between SBC and TDS. The Commission agrees with the ALJ that it lacks jurisdiction over this agreement because it is a privately negotiated agreement with no Commission participation or approval. It does not fall within the terms of Section 251 of the FTA, relating to interconnection. Specifically, the Commission agrees with the ALJ that the SBC/Climax mutual waiver agreement does not qualify as an interconnection agreement; therefore, SBC was under no obligation to offer it to TDS.

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. SBC's motion to dismiss TDS's complaint should be granted.

THEREFORE, IT IS ORDERED that the May 13, 2003 complaint filed by TDS Metrocom, LLC, against SBC Michigan is dismissed.

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 October 23, 2003.

/s/ Robert W. Kehres

Its Acting Executive Secretary

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Its Acting Executive Secretary

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against **SBC MICHIGAN.** )  
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Case No. U-13789

Suggested Minute:

“Adopt and issue order dated October 23, 2003 dismissing the complaint filed by TDS Metrocom, LLC, against SBC Michigan, as set forth in the order.”