

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of **AMERITECH MICHIGAN's**)
submission on performance measures, reporting,)
and benchmarks, pursuant to the October 2, 1998)
order in Case No. U-11654.)
_____)

Case No. U-11830

At the January 22, 2004 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 DENYING REHEARING

On October 23, 2003, the Commission issued an order establishing a collaborative process to consider and develop proposed performance measurements, standards, procedures, and remedies that would apply to competitive local exchange carriers (CLECs) that provide basic local exchange services within the service territory of SBC Michigan (SBC). On November 24, 2003, Z-Tel Communications, Inc., Talk America Inc., XO Michigan, Inc., TDS Metrocom, LLC, KMC Telecom III, LLC, and Focal Communications Corporation of Michigan (collectively, petitioners) filed a petition for rehearing. On December 15, 2003, MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Michigan, Inc., (collectively, MCI), AT&T Communications of Michigan, Inc., and TCG Detroit (collectively, AT&T), and SBC filed answers.

The petitioners argue that requiring a collaborative is erroneous as a matter of law because the Commission is seeking to impose binding determinations on CLECs outside of either the contested case or rulemaking procedures mandated by the Administrative Procedures Act of 1969 (APA), MCL 24.201 et seq. The petitioners cite In re Public Service Comm Guidelines for Transactions between Affiliates, 252 Mich App 254; 652 NW2d 1 (2002), for the proposition that the APA does not permit a contested case to be brought against unnamed parties. Because SBC is the only named party in this docket, the petitioners claim that the Commission may not impose performance standards on the CLECs, or anyone other than SBC, without first naming them as parties and providing them with adequate notice that their obligations are at issue.

The petitioners characterize the proceedings conducted thus far, with respect to SBC's performance plan, as part of SBC's effort to comply with 47 USC 271 (Section 271), which sets forth a checklist of requirements that a Bell operating company must meet before it may provide interLATA services. The petitioners say that there is no corresponding imperative for CLECs to show compliance with the checklist, as CLECs are not Bell companies subject to Section 271, have no monopoly over essential facilities, and cannot impede competition. Although 47 USC 251(c) imposes related duties on incumbent local exchange carriers, the petitioners say that none of those duties apply to CLECs under federal law. They also claim that state law provides no basis of authority for this proceeding. If a local exchange carrier's dealings with another were to violate the nondiscrimination provisions of Section 305 of the Michigan Telecommunications Act, MCL 484.2305, they say, the proper remedy would be to file a complaint in accordance with the procedural requirements of the APA. If the Commission were to find a generic proceeding to be appropriate, they add, the proceeding must conform to the rulemaking provisions of the APA.

The petitioners argue that it is burdensome to require CLECs to participate in yet another round of collaborative discussions at this time. They claim that their resources are already being stretched by multiple state proceedings ancillary to the recent issuance of the Triennial Review Order¹ as well as SBC's cost study proceeding in Michigan (Case No. U-13531).

In reply, SBC argues that nothing in the APA forecloses the Commission from undertaking informal discussions aimed at finding consensual solutions. SBC contends that the petitioners' desire to avoid a collaborative reveals an indifference to the customer-oriented issues that are at stake. SBC describes various CLEC-caused technical situations that adversely affect customers when migrating to or from CLECs. SBC claims that the burden of participating in a collaborative pales in comparison to the need to resolve these matters. It claims that a collaborative could forestall the even greater regulatory burdens that would result if the Commission were compelled to impose solutions through litigation. SBC views the petitioners' opposition to a collaborative as an unwillingness to participate that could defeat the purpose of finding solutions by agreement. If that is the case, SBC suggests, it may be better for the Commission to bypass a collaborative and proceed directly to a rulemaking.

MCI also opposes rehearing. It says that the October 23, 2003 order does not impose any rule or legal determination in violation of the APA, but that it is merely an invitation for interested parties to have discussions. Unlike the affiliate transaction guidelines imposed on public utilities in In re Public Service Comm Guidelines, MCI says, performance standards are merely a means of gathering data that would be useful in evaluating whether carriers are complying with their

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-388, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003).

preexisting duties under federal and state law. MCI claims that performance standards are not rules. It further claims that the remedy plan previously developed in this case (applicable to SBC) has been lawfully implemented through tariffs and interconnection agreements. It says that any procedural issues that may later arise in this proceeding may be dealt with in accordance with the standards prescribed in the APA.

AT&T supports rehearing, although on slightly different grounds than the petitioners. AT&T says that technical standards governing interactions with the facilities, systems, and operations of any given carrier are specific to that carrier, so that a course of dealing between any two carriers is itself unique. Therefore, AT&T contends, carrier-to-carrier performance measures are not susceptible to generic solutions, but they are best worked out through carrier-specific negotiations, such as the procedures used to produce interconnection agreements.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant rehearing.

The Commission will not grant rehearing of its decision to initiate a collaborative regarding CLEC performance standards. As the Commission has often noted, negotiations are usually more efficient than litigation as a means of achieving solutions, and compromise is usually preferable to an outcome imposed through adjudication. The order creates a forum for collaborative discussions and does not seek to impose obligations on CLECs at this time. It is neither a contested case nor a

rule, as those terms are used in the APA. See MCL 24.203(3) (defining a contested case as “a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing”), MCL 24.207 (defining a rule as “an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies the law enforced or administered by the agency”). If, as AT&T alleges, it is true that some performance standards cannot be addressed on an industry-wide basis, the collaborating participants should identify areas in which uniformity is efficient and workable, as well as its limitations. The participants may also address the procedural means and legal mechanisms necessary to implement their solutions.

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, 1999 AC, R 460.17101 et seq.
- b. The petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing is denied.

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 January 22, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated January 22, 2004 denying a petition for rehearing filed by Z-Tel Communications, Inc., and others concerning the October 23, 2003 order commencing a collaborative process to consider adoption of performance measurements for competitive local exchange carriers, as set forth in the order.”