

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition of )  
ACE TELEPHONE COMPANY, BARRY COUNTY )  
TELEPHONE COMPANY, DEERFIELD )  
FARMERS' TELEPHONE COMPANY, KALEVA )  
TELEPHONE COMPANY, LENNON TELEPHONE )  
COMPANY, OGDEN TELEPHONE COMPANY, )  
PIGEON TELEPHONE COMPANY, the UPPER )  
PENNINSULA TELEPHONE COMPANY, and )  
WALDRON TELEPHONE COMPANY, for the )  
arbitration of interconnection rates, terms, and )  
conditions and related arrangements with VERIZON )  
WIRELESS, pursuant to Section 252(b) of the )  
federal Telecommunications Act of 1996. )

Case No. U-14678

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)  
In the matter, on the Commission's own motion, )  
to examine the total service long run incremental )  
costs of the MICHIGAN EXCHANGE CARRIERS )  
ASSOCIATION COMPANIES, including ACE )  
TELEPHONE COMPANY, BARRY COUNTY )  
TELEPHONE COMPANY, DEERFIELD )  
FARMERS' TELEPHONE COMPANY, KALEVA )  
TELEPHONE COMPANY, LENNON TELEPHONE )  
COMPANY, OGDEN TELEPHONE COMPANY, )  
PIGEON TELEPHONE COMPANY, the UPPER )  
PENNINSULA TELEPHONE COMPANY, )  
and WALDRON TELEPHONE COMPANY. )  
\_\_\_\_\_)

Case No. U-14781

At the February 21, 2006 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman  
Hon. Laura Chappelle, Commissioner  
Hon. Monica Martinez, Commissioner

**ORDER**

On October 31, 2005, Ace Telephone Company, Barry County Telephone Company,  
Deerfield Farmers' Telephone Company, Kaleva Telephone Company, Lennon Telephone

Company, Ogden Telephone Company, Pigeon Telephone Company, the Upper Peninsula Telephone Company (UPTC), and Waldron Telephone Company (collectively, the petitioners or the ILECs<sup>1</sup>) filed a petition for arbitration of rates, terms, and conditions and other related arrangements with Verizon Wireless,<sup>2</sup> pursuant to Section 252(b) of the federal Telecommunications Act of 1996 (federal Act), 47 USC 151 *et seq.*, Section 204 of the Michigan Telecommunication Act (MTA), MCL 484.2101 *et seq.*, and the Commission's July 16, 1996 order in Case No. U-11134 and the May 18, 2004 order in Case No. U-13774. The petitioners identified two issues for arbitration as follows: (1) Whether the interconnection agreement should include rates proposed by petitioners for local switching, local transport termination, and local transport facility relative to terminating commercial mobile radio service (CMRS) traffic, and (2) whether the interconnection agreement should exclude a provision prohibiting one party from blocking traffic of another party without prior Commission approval.

On November 9, 2005, Verizon Wireless filed a motion to compel discovery, in which it sought to obtain the cost models used to determine the Commission approved costs, from which the petitioners mapped the proposed rates for this interconnection agreement.

A letter dated November 14, 2005 informed the parties that the arbitration panel would consist of Orjiakor N. Isiogu and Wendy Thelen, Staff members of the Commission's Telecommunications Division, and Administrative Law Judge James N. Rigas. The letter further provided a schedule for addressing Verizon Wireless' motion to compel and for Verizon Wireless to file its response to the petition for arbitration.

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<sup>1</sup>Incumbent local exchange carriers.

<sup>2</sup>Records at the Michigan Department of Labor and Economic Growth indicate that in Michigan, Verizon Wireless is an assumed name for Verizon Wireless Personal Communications LP and Verizon Wireless Power Partners Inc.

On November 28, 2005, Verizon Wireless filed its response opposing the petitioners' position on the two issues raised in the petition and adding two issues: (1) whether petitioners negotiated in good faith, and (2) the proper form of compensation under Sections 251(b)(5) and 252(d)(2) of the federal Act, when the ILECs fail to meet their burden of proof under the Federal Communications Commission's forward-looking cost requirements.

On December 22, 2005, the petitioners and Verizon Wireless filed their respective proposed decision of the arbitration panel (PDAP).

On January 23, 2006, the arbitration panel issued its decision of the arbitration panel (DAP) in which it resolved the issues presented by the parties and addressed two motions to compel and a motion to strike a portion of the petitioners' final arguments filed by Verizon Wireless. The panel concluded that it should decline to address the merits of contested case motions in the context of this arbitration. It determined that motion practice does not assist in the presentation, development, analysis, and resolution of arbitration issues.

On February 2, 2006, the parties filed their respective objections to the DAP.

## Discussion

### 1. Appropriate Rates

The petitioners proposed reciprocal compensation rates of \$0.039028 per minute of use (MOU) for UPTC. For all other ILECs: (1) \$0.019705 per MOU for local switching, (2) \$0.001472 per MOU for local transport-termination, and (3) \$0.000161 per MOU per mile for local transport-facilities. The ILECs insisted that their proposed rates are based on mapping the costs from their total service long run incremental cost (TSLRIC) studies that were approved by the Commission in the respective cases.<sup>3</sup>

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<sup>3</sup>See, January 28, 1998 order in Case No. U-11448, March 14, 2000 order in Case No. U-12261, and September 18, 2000 order in Case No. U-12471.

Verizon Wireless, on the other hand, complained that the TSLRIC studies were too old to be compliant with the rulings of the Federal Communications Commission (FCC) pursuant to the federal Act, because they relied upon data from as early as 1999. Therefore, Verizon Wireless contended that the cost studies were inappropriate for establishing rates for this interconnection agreement. Instead of the rates proposed by the petitioners, Verizon Wireless proposed that the Commission order that the parties enter into a bill and keep arrangement, until current, forward-looking cost studies could be approved. In the alternative, Verizon Wireless proposed that the Commission order a cost based rate of \$0.006 per MOU for local call termination as a reasonable interim rate until new cost studies are produced.

The arbitration panel determined that the parties should implement the rates proposed by the petitioners. It noted that those rates are mapped from TSLRIC cost studies approved by the Commission in separate proceedings, and that Verizon Wireless had not objected to the mapping method, only the age of the studies.

However, the arbitration panel noted that the Commission's findings concerning usage sensitive and end office switching costs subsequent to the approval of the petitioners' TSLRIC studies might be considered a sufficient change in circumstance to warrant a new cost study application by the petitioners. Therefore, the arbitration panel recommended that the Commission direct the petitioners to file, within 30 days of the date of the final order in this case, a new cost study either jointly or separately and require the agreement to provide for the inclusion of new rates when the cost study is approved.

Further, the arbitration panel rejected Verizon Wireless' alternate proposals. First, it found that bill and keep is an inappropriate alternative, because the direction of traffic between the parties is not well-balanced, a prerequisite for the reasonableness of bill and keep. Second, the arbitration panel found that to employ Verizon Wireless' proposed \$0.006 per MOU would require

the petitioners to provide service at a price below the TSLRIC for that service, which would violate MCL 484.2321.

Finally, the arbitration panel rejected Verizon Wireless' position that the underlying cost studies must be made a part of the record in this arbitration proceeding. The panel determined that the Commission may properly take official notice of cost studies that it has previously approved in a separate docket.

The petitioners argue that the Commission should adopt the petitioners' proposed rates for purposes of the interconnection agreement, not merely as interim rates until the completion of a new cost study proceeding. These parties object to the arbitration panel's determination that the Commission should require them to file new cost studies within 30 days. They argue that the arbitration panel went beyond its authority because the issue of whether a new cost study should be required had not been submitted to the panel by the parties. Because the panel is restricted to making determinations on issues submitted, the petitioners argue, it should not have made a determination outside of those issues.

Moreover, the petitioners argue, the arbitration panel incorrectly concluded that the Commission's September 21, 2004 order in Case No. U-13531 constituted a fundamental change in circumstance that would justify requiring the petitioners to file new cost studies. They state that the panel was presumably referring to the portion of the cited decision dealing with usage sensitive end office switching costs related to terminating local traffic for a UNE-P line.<sup>4</sup> They state that the costing method for the UNE-P should not affect the costing method for reciprocal compensation, because those are two different services involving different aggregation of costs. Thus, the Commission's prior decision should have no bearing on whether a new cost study is required for reciprocal compensation rates for local traffic to a non-UNE-P line.

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<sup>4</sup>UNE-P refers to unbundled network element platform.

Moreover, the petitioners argue, the Commission has not changed the rules as to how a TSLRIC study is to be conducted, or the methodology to use since it approved the petitioners' studies. Thus, they argue, there is no fundamental change requiring new studies to be filed.

Further, the petitioners argue, to the extent that the arbitration panel believed that the passage of time and changes in the industry and methodology constituted a sufficient change in circumstances justifying a new cost study, it was not correct. They state that the record reflects no such fundamental changes have occurred, and the arbitration panel did not identify what particular industry changes the petitioners' studies fail to include. Petitioners note that the most recent cost study for Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon) was filed and approved before the studies upon which the petitioners' rates rely. Therefore, they argue, the Commission may not require the petitioners to file new cost studies unless it requires companies with approved costs of a similar age to also file new cost studies.

In the petitioners' view, the Commission should adopt the petitioners' proposed rates for purposes of the interconnection agreement, not merely as interim rates until the completion of a new cost study proceeding. Again, the petitioners argue that the interim nature of the rates set in this agreement was not an issue submitted to the arbitration panel. Moreover, they argue, the proposed rates are valid rates, that are based on approved TSLRIC studies. However, the petitioners argue that if the Commission affirms the arbitration panel's determination on this issue, it should affirmatively state that any new rates arising from a newly approved cost study would be on a prospective basis as of the date of the order approving the new cost study.

Finally, the petitioners state that if the Commission determines that a new cost study must be done, it should permit the ILECs until January 31, 2007 to file their applications. They state that the Commission has extended time periods set for Verizon to file its cost study to 10 months. Because a cost study for the petitioners will involve collecting data from several companies and

compiling and analyzing it, the petitioners state that they need at least as much time as Verizon required.

Verizon Wireless also charges that the arbitration panel erred in adopting an interim rate, albeit for different reasons. In Verizon Wireless' view, the arbitration panel should have set any interim rate under the FCC's proxy pricing methodology and the interim compensation rules in 47 CFR 51.715(b)(3), which Verizon Wireless argues would lead to a rate for termination charges between \$0.002 and \$0.004 per MOU, and a proxy transport rate of less than \$0.005. It argues that the FCC's rules for establishing total element long run incremental costs have changed since the Commission approved the cost study relied upon by the petitioners. In fact, the change in method is so dramatic, Verizon argues, that approving rates based on the old cost studies would not comply with FCC rules.

Moreover, Verizon Wireless argues, the petitioners must present company-specific evidence of their costs. Because the petitioners did not submit their costs or their cost models in this case, Verizon Wireless argues, they failed to meet the burden of proof with regard to costs underlying the proposed rates. Therefore, Verizon Wireless asserts, the Commission must approve the alternate rates proposed by Verizon Wireless.

The Commission finds that the reasoning, findings, and conclusions of the arbitration panel on this issue should be adopted, with limited modification. The petitioners have requested more time to compile the necessary information for a new cost study case. Although the Commission is not persuaded that such a case should wait until January 31, 2007, it is persuaded that 30 days is not sufficient time for the parties to compile and analyze the data needed to inform the Commission. Therefore, with this order, the Commission commences an investigation and review of TSLRIC for petitioners in Case No. U-14781. No later than June 30, 2006, the petitioners shall file in that case, the documents and testimony necessary to support their cost studies. They may proceed

individually, or as a group. Also as provided by MCL 484.2304, these companies may determine that their TSLRIC is the same as either AT&T Michigan or Verizon, rather than file their own cost studies. If the petitioners choose this option, they must inform the Commission no later than March 30, 2006.

Except for the limited modifications made in this order, the Commission adopts the reasoning and conclusions of the arbitration panel on this issue, having found them well reasoned and complete. Therefore, the Commission finds that the rates proposed by the petitioners should be included as initial rates for the interconnection agreement, effective until the Commission approves new cost studies for these ILECs. Language indicating that new rates will be incorporated as of the date of a Commission order approving the new cost studies should be included in the interconnection agreement.

The Commission rejects the petitioners' claim that the Commission is without authority to require a review of the petitioners' cost studies. That authority is conferred by MCL 484.2352 and MCL 484.2202, among other statutes. For purposes of this case, the Commission also enjoys authority provided under 47 USC 252. The Commission likewise rejects Verizon Wireless' argument that the Commission may only approve cost studies for each individual ILEC. For small ILECs, the Commission has concluded that a joint cost study is permissible. Nothing in the cited section of the federal Act persuades the Commission to the contrary.

47 USC 252(d)(2) provides:

Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

- (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

- (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

The Commission is not persuaded that Congress intended to preclude small companies from joining together to produce cost studies applicable to the whole group. When such studies are approved as appropriate, they provide the basis for recovery of costs associated with the transport and termination on each participating carrier's network. Small companies will tend to have similar costs. To require that each of several companies with similar costs must each conduct its own cost study would be to impose an undue burden on those companies, without a commensurate benefit of improved accuracy. Because the Commission finds that its order is consistent with the federal Act, there is no valid argument that the Commission is preempted from making this determination.

The Commission further rejects Verizon Wireless' argument that there should be a true-up of rate prior to the inception of the interconnection agreement after the Commission issues an order adopting new cost studies. The Commission finds that the petitioners' cost studies, as currently approved, comply with legal requirements until the Commission issues an order stating otherwise. Therefore, the current rates, as mapped by petitioners will be effective until the Commission approves a different cost study. New rates will be mapped accordingly and will be effective on the date of the Commission order approving the new cost studies.

## 2. Discontinuance of Service

The parties disputed whether a provision should be included in the agreement that would prohibit one party from discontinuing interconnection service to another without prior Commission approval. Verizon Wireless asserted that it would be in the public interest to include a provision, which read as follows:

In no event shall either party block traffic from the other Party unless it has received prior approval from the Michigan Public Service Commission.

In determining that the petitioners' position was the more reasonable, the arbitration panel noted that the parties had already agreed to terms in Section 17 that memorialized (1) their intent to resolve disputes without litigation, (2) that they will use an agreed upon dispute resolution procedure to resolve disputes arising from the agreement, (3) that either party may request to employ an informal dispute resolution procedure to resolve any disputes arising from the agreement, (4) if, after 120 days, the informal dispute resolution process fails to resolve any issues, either party may proceed with any remedy available to it under the agreement or pursuant to law, and (5) that the parties will continue to provide services to each other while any informal dispute resolution procedure or any matter submitted to binding arbitration is pending. In the arbitration panel's view, including the provision proposed by Verizon Wireless would increase the likelihood of litigation before the Commission, and could prejudice one party's rights to the benefit of the other.

Verizon Wireless objects to the arbitration panel's determination on this issue. It argues that the arbitration panel's conclusion is contrary to the provisions of 47 USC 251(a), which provides that each telecommunications carrier has the duty to interconnect and not to install network features, functions, or capabilities that do not comply with the cited guidelines and standards. In Verizon Wireless' view, permitting one party to block the traffic of another party would be inconsistent with Congressional intent to establish seamless transparent transmission and receipt of information between and across networks.

The Commission finds that the arbitration panel reached a reasonable result with respect to this issue. The exclusion of this provision does not permit the unprovoked cessation of service under the agreement. The dispute resolution procedures already agreed to by the parties should protect both from any unexpected discontinuance of service. Each party has the right to petition the Commission to prevent a discontinuance of service, should that be necessary.

### 3. Good Faith Negotiations

Verizon Wireless asserted that the petitioners failed to negotiate in good faith because they did not provide adequate support for the costs underlying the proposed rates. The petitioners responded that Verizon Wireless' assertion was inaccurate, misleading, and an exaggeration of the facts.

The arbitration panel found that Verizon Wireless had failed to demonstrate any lack of good faith in the negotiations between the parties. This failure related to the lack of documentation of repeated requests for cost study information. In fact, a review of the supporting documentation led the arbitration panel to find that Verizon Wireless itself was not altogether certain that it had made clear to the petitioners that it sought a "functioning copy of the cost model used in the cost studies." Further, the arbitration panel concluded that the fact that only two disputed issues remained at the time of filing the petition supported the view that the parties acted in good faith to negotiate an interconnection agreement.

Verizon Wireless objects to this finding and argues that its witness' unrebutted sworn pre-filed testimony demonstrates that he had repeatedly requested copies of the petitioners' cost studies.

The Commission rejects Verizon Wireless' assertion that the petitioners acted in bad faith. Because the Commission does not review previously approved cost studies in arbitration cases, results of the cost studies and how those results were mapped to the rates are the only salient information for this arbitration. It appears to the Commission that the petitioners provided that salient information to Verizon Wireless. Thus, there is no prejudice to Verizon Wireless' position, and no actionable lack of good faith.

### 4. Procedural Motions

In its December 16, 2005 application for leave to appeal and in its February 2, 2006 exceptions to the DAP, Verizon Wireless insists that the arbitration panel erred in failing to afford

Verizon Wireless the relief requested in its November 9 and 17, 2005 motions to compel discovery and its January 4, 2006 motion to strike and for sanctions. Specifically, Verizon Wireless had sought access to certain cost studies and supporting documentation. Although Verizon Wireless acknowledges that on November 16, 2005 it received paper copies of the detailed summaries of the 1998 and 2000 Michigan Exchange Carriers Association (MECA) cost studies and on November 18, 2005 it was provided with similar documents for UPTC's 2000 cost study, Verizon Wireless asserts that "these documents failed to include the actual cost studies, working models, or electronic copies and models" that had been requested. December 16, 2005 application, p. 2. According to Verizon Wireless, this information is absolutely necessary for the Commission to reach a lawful decision in this matter. Verizon Wireless also contends that without access to this information, Verizon Wireless was unable to develop testimony, present an argument, and otherwise receive a fair hearing.

The arbitration panel responded to Verizon Wireless' November 9 and 17, 2005 requests in a December 2, 2005 letter as follows:

Verizon Wireless has filed a motion to compel discovery and a renewed motion to compel discovery. The Commission's Orders in Cases Nos. U-11134, dated July 16, 1996, and U-13774, dated May 18, 2004, established the procedures for arbitration and mediation. There the Commission provided that the arbitration process will not be patterned after contested case proceedings but will be designed to inform the Panel. The Commission found there is "no right to conduct discovery." The Commission did provide that a party may request that the Arbitration Panel direct the production of information. Given these Commission established procedures the Arbitration Panel has determined that motions to compel discovery are clearly not in accord with these directives. Such motions are associated with the contested case process and are not designed or intended to inform the Arbitration Panel. Verizon Wireless' motions to compel discovery are therefore not accepted and will not be considered by the Arbitration Panel in its deliberations.

December 2, 2005 letter.

Additionally, in the DAP, the arbitration panel stated:

The Panel is compelled to again address the issue of motion practice in arbitration proceedings. The Commission made clear in its Arbitration Procedures Orders that

the arbitration process is not to be patterned after contested case proceedings. It is instead baseball-style arbitration. The Commission specifically provided that the purpose of the arbitration process is to inform the panel. For these reasons the Commission provided the arbitration panel with discretion to determine how each arbitration will proceed.

The Panel believes that the use of the contested case motion practice in an arbitration proceeding introduces an adversarial element that is contrary to the function and purpose of baseball-style arbitration. Contested case motions do at best little, and more often than not nothing, to assist in the presentation, development, analysis and resolution of the issues in arbitration. At the same time, contested case motions divert resources away from the development of consensus and provide a disincentive to settlement. Consequently the Panel declines to address the merits of contested case motions in the context of this arbitration for the reason that to do so would send a false signal regarding their acceptability.

DAP, p. 5.

Verizon Wireless argues that the arbitration panel's refusal to permit discovery was improper because this arbitration is unlike other arbitration proceedings previously considered by the Commission. According to Verizon Wireless, the main dispute in this proceeding is the rate that the ILECs propose to charge for wireless termination, not the terms and conditions of providing service. Verizon Wireless asserts that the ILECs have requested that the Commission adopt rates regarding local switching, local transport-termination, and local transport facility relative to terminating CMRS traffic that are alleged to be equal to and directly based on mapping applicable Commission-approved TSLRIC studies. Verizon Wireless insists that the Commission cannot make such a determination without access to and review of the complete cost studies.

Moreover, Verizon Wireless contends that the arbitration panel's refusal to grant its motion to compel discovery directly contradicts established Michigan law. Verizon Wireless argues that the Commission is a creature of statute and has no common law powers. According to Verizon Wireless, Section 203(1) of the MTA, MCL 484.2203(1), mandates that this dispute be adjudicated as a contested case proceeding under MCL 24.271 to 24.287 of the Michigan Administrative Procedures Act (APA). Verizon Wireless maintains that "[b]ecause this proceeding comes within

the APA definition of a contested case, the Commission is required to follow the Commission's own rules for discovery and motions." Verizon Wireless' exceptions, p. 43.

In addition, Verizon Wireless maintains that the Commission's July 16, 1996 order in Case No. U-11134 and May 18, 2004 order in Case No. U-13774, which established the existing procedures for handling interconnection arbitrations under Section 252 of the federal Act, are flawed. Verizon Wireless states that the Commission is out of step with the FCC and the majority of the states with regard to whether arbitrating parties should be entitled to conduct discovery. Verizon Wireless also asserts that the arbitration procedures adopted by the July 16, 1996 order in Case No. U-11134 and May 18, 2004 order in Case No. U-13774 may not pass appellate court scrutiny because they were adopted as the result of a "comments" proceeding, not a contested case proceeding or a rulemaking proceeding.

The Commission finds that Verizon Wireless' exception to the failure of the arbitration panel to grant its motions to compel discovery should be rejected. Through passage of Section 252(b) of the federal Act, Congress empowered the Commission to approve arbitrated interconnection agreements as follows:

Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

- (i) the unresolved issues;
- (ii) the position of each of the parties with respect to those issues; and
- (iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

Federal Act, Section 252b. The Michigan Legislature explicitly confirmed the Commission's authority to administer this federal law by passage of Section 201 of the MTA, MCL 484.2201(2).

It was necessary for the Commission to act quickly to adopt a procedure by which to arbitrate interconnection agreements pursuant to Section 252 of the federal Act. In doing so, the Commission recognized that time was of the essence given that the filing of arbitration proceedings was imminent. Accordingly, the Commission acted on July 16, 1996 to adopt an arbitration process in Case No. U-11134.<sup>5</sup> This process limited the arbitration proceedings to the parties; intervention by non-parties was not permitted. The Commission opted for baseball-style arbitration; the panel was

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<sup>5</sup>The Commission has the option of setting standards either pursuant to the rulemaking provisions of the APA or on a case-by-case basis. *Northern Michigan Exploration Co v Public Service Comm*, 153 Mich App 635, 649; 396 NW2d 487 (1986). In *Northern Michigan*, a gas proration proceeding was commenced by a notice of hearing to affected parties, and the proration was applied to all parties involved after their rights were determined in an evidentiary hearing. This process was upheld by the Court of Appeals. *Id.* See, also, *Midland Cogeneration Venture Ltd v Public Service Comm*, 199 Mich App 286; 501 NW2d 573 (1993) (upholding the Commission's authority to prescribe the manner and form of the system of accounts for utilities through general ratemaking authority).

limited to selection of the position of one of the parties on each issue unless the result would be clearly unreasonable or contrary to the public interest. In addition, the Commission stated that “[t]he process will not be patterned after a contested case proceeding, but will be designed to inform the panel.” July 16, 1996 order in Case No. U-11134, p. 2. The Commission also provided that the parties to the negotiations “will not have a right to conduct discovery, although either may request that the panel order the production of additional information from the other party.”

July 16, 1996 order in Case No. U-11134, p. 2.

The process established in Case No. U-11134 was subjected to two rehearing requests, both of which attempted to persuade the Commission to adopt a process more similar to a contested case. The Commission refused to do so, reasoning that the arbitration process envisioned by Congress was not consistent with the contested case process. In so doing, the Commission stated:

As Ameritech Michigan argues, arbitration is not a contested case within the meaning of the Administrative Procedures Act, which defines 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 24.203(3); MSA 3.560(103)(3). The Commission is not aware of any legal requirement to provide an opportunity for an evidentiary hearing in arbitration. Neither MCI nor TCG cites one. The Commission concludes that the procedures applicable to a contested case may not be invoked as a matter of right in the context of arbitration. See Bukhtia v Bureau of State Lottery, 190 Mich App 323, 326; 475 NW2d 475 (1991).

Moreover, contested case procedures would not be compatible with the legislative purpose underlying the use of arbitration to resolve disputes between telecommunications providers. Arbitration is usually regarded as substituting the judgment of an arbitrator for the formal decision-making procedures of civil litigation. The objective of arbitration under Section 252 is to resolve disputes governing future transactions between two providers with as much efficiency as possible. Section 252 contemplates that the parties will use negotiations to reach an agreement and to identify those issues that cannot be resolved voluntarily. It limits arbitration to those issues that are left unresolved and requires the state commission to complete arbitration within 110 to 135 days of the filing of a petition for arbitration. 47 USC 252(b). The primary procedural safeguard against erroneous or inappropriate decisions by the arbitrator is in the form of review by the state commission, which must be completed within 30 days of submission of an agreement adopted by arbitration. *Id.* Section 252 does not require evidentiary hearings or cross-examination of witnesses, but rather it

provides the state commission with flexibility to implement procedures that will promote the objectives of arbitration. It does not guarantee discovery, but provides instead that the state commission may require parties to provide information that is necessary for a decision.

September 23, 1996 order, Case No. U-11134, pp. 3-4. These key points were reaffirmed by the Commission's May 18, 2004 order in Case No. U-13774.

The Commission is not persuaded that the arbitration panel's refusal to order the discovery requested by Verizon Wireless was in error. Rather, the Commission finds that the arbitration panel fully recognized that the arbitration process approved by the Commission was never intended to afford a party the full panoply of rights available in a contested case proceeding.

The Commission's limitation of the arbitration process is required to carry out the intent of Congress, which could have required a contested case proceeding, but opted for a much more truncated proceeding. Section 252 of the federal Act clearly does not contemplate an exhaustive litigation process. Rather, it requires a quick and simple process. Section 252b(4)(C) requires that a state commission complete the arbitration process not later than 9 months after the parties initiated the negotiation process. However, pursuant to Section 252b(1) of the federal Act, at least 135 days (but not more than 160 days) must elapse before a party may even petition a state commission to arbitrate any open issues, which means that no more than 135 days (and possibly as few as 110 days) remain for the Commission to act on an arbitration petition. The amount of time for the Commission to complete the arbitration is further compressed by the 25 day period set forth in Section 252b(3) that the non-petitioning party has to respond to the petition for arbitration. So, in reality, the Commission can count on only 110 days (and possibly as few as 85 days) to complete the arbitration process. Given the tight time frame mandated by Congress, a party to a Section 252 arbitration proceeding cannot reasonably demand access to all of the rights, including discovery, that are ordinarily available to litigants in fully contested cases.

Finally, the Commission finds that the arbitration panel did not err when it refused to require the production of the petitioners' cost study for this proceeding. The Commission has repeatedly held that an arbitration proceeding is not the proper forum for resolution of cost study issues. Because the petitioners had approved cost studies, and Verizon did not object to the method for mapping those study results to the proposed rates, the Commission concludes that there was no purpose in requiring the admission of the details of a cost study or an executable program for those studies in this proceeding. Rather, the Commission takes administrative notice of the previously approved cost studies, thereby including their results in this case. The Commission will not review cost studies in an arbitration proceeding. As previously noted, the time permitted for completion of an arbitration proceeding simply does not permit such a detailed and complicated process. Moreover, the cost studies affect more than the parties to this arbitration. A cost study for an ILEC affects all parties that may desire to interconnect to provide service. It also affects facilities based competitors and end-user customers. Thus, to review a cost study in an arbitration case with one competitive local exchange carrier would be imprudent at best and at worst affect due process rights of many other entities.

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 January 23, 2006 DAP should be adopted, with one modification.
- c. The Commission should commence an investigation and review of the TSLRIC of the petitioners.

d. The petitioners should be directed to file documents and testimony by June 30, 2006 in Case No. U-14782 to support cost studies of their TSLRIC.

e. Within 30 days, the parties should submit an executed interconnection agreement that complies with this order.

THEREFORE, IT IS ORDERED that:

A. The January 23, 2006 Decision of the Arbitration Panel is adopted, with one modification.

B. A proceeding is commenced in Case No. U-14781 to investigate and review the total service long run incremental costs of the petitioners.

C. The petitioners are directed to file documents and testimony by June 30, 2006 in Case No. U-14781 to support cost studies of their total service long run incremental costs.

D. Within 30 days, the parties shall submit an executed copy of an interconnection agreement conforming to this order.

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

Any party aggrieved by this order may bring an action in an appropriate federal district court as provided in 47 USC 252(e).

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark  
Chairman

( S E A L )

/s/ Laura Chappelle  
Commissioner

/s/ Monica Martinez  
Commissioner

By its action of February 21, 2006.

/s/ Mary Jo Kunkle  
Its Executive Secretary

Any party aggrieved by this order may bring an action in an appropriate federal district court as provided in 47 USC 252(e).

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of February 21, 2006.

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Its Executive Secretary