

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 June 10, 2008 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Steven A. Transeth, Commissioner

ORDER

On May 27, 1999, the Commission issued an order (May 27 order) adopting an initial set of performance measures and benchmarks to be used in reviewing the compliance of Ameritech Michigan, now known as AT&T Michigan, with its obligation to provide nondiscriminatory access to its facilities and services, including unbundled network elements (UNEs), to competitive local exchange carriers (CLECs). The Commission has modified those measures and benchmarks in a number of orders issued after the May 27 order. A collaborative group of interested parties works together in regularly scheduled reviews to refine the performance measures and remedy plan. Participants in those collaborative efforts include AT&T Michigan, interested CLECs, and staff from state regulatory commissions from Michigan, Illinois, Indiana, Ohio, and Wisconsin. Changes agreed to are presented to the Commission for approval and adoption.

There are a number of issues currently pending before the Commission in this case. This order will address the following:

1. AT&T Michigan's Tier 2 payment waiver request¹ (filed September 28, 2007)
2. AT&T Michigan's motion for expedited modification of the existing remedy plan related to performance measure 65.1 (PM 65.1). (filed January 17, 2008)
3. Second Amended Joint Filing (filed February 18, 2008)
4. K Table related issues.

AT&T's Tier 2 Payment Waiver Request

On September 28, 2007, AT&T Michigan filed an application for waiver of the Tier 2 assessment for January 2007, for performance related to missing a PM 5 submeasure performance benchmark. AT&T Michigan asserts that it missed that measure due to an unreasonable number of orders submitted to it over a holiday weekend by McLeodUSA Telecommunications Services, Inc. (McLeod). AT&T Michigan asserts that the interconnection agreement and the remedy plan prohibit such gaming of the system as unreasonably withholding orders and "dumping" those orders on the incumbent local exchange carrier (ILEC) without forewarning that the orders were coming. AT&T Michigan asserts that it made a good faith effort to meet the performance standard, but was not able to do so. AT&T Michigan requests that the Commission determine that the company is not obligated to pay the \$30,000 Tier 2 assessment under the provisions of Section 7.1 of the performance measurement plan. It also asks that the Commission find that AT&T Michigan should be permitted a \$30,000 credit for the amount that it paid to the State of Michigan against any future Tier 2 assessment liability.

¹The current performance remedy plan, which has been incorporated into interconnection agreements between AT&T Michigan and a number of CLECs, provides for two tiers of assessment payments when the performance measures are not met. Tier 1 payments go to the affected CLEC, and Tier 2 payments are made to the State of Michigan.

In an order dated October 25, 2007, the Commission determined that AT&T Michigan's application should be noticed for opportunity to comment or request a hearing, and AT&T Michigan should be permitted to respond to any comments filed.

On November 30, 2007, McLeod filed comments, which challenge certain of AT&T Michigan's asserted facts. It argues that AT&T Michigan should be relieved of its Tier 2 payment obligations when a CLEC's violation of law or contract causes the deficiency. In this case, McLeod argues, such a violation never occurred. It argues that there was no limit on the number of orders that McLeod could send in at one time. It asserts that it did nothing against the provisions of the contract or applicable law. It denies that it unreasonably held orders back and dumped them on AT&T Michigan on a holiday weekend. Rather, it states, data for the period previous to the time that AT&T Michigan complains about reveals no sudden increase in orders for the holiday weekend.

On December 21, 2007, AT&T Michigan replied to McLeod's comments, stating that McLeod's submission of data to support its position is misleading. Rather than data indicating orders placed that require manual intervention, AT&T Michigan states, McLeod's data includes all orders submitted during the time period – even those not requiring manual intervention. The performance measure at issue does not cover the latter type.

The Commission finds that it should grant the motion for waiver of the \$30,000 Tier 2 payment required due to the unpredicted influx of orders requiring manual intervention by AT&T Michigan. The Commission does not agree that the CLEC must be shown to have violated a provision of law or contract for relief to be warranted in this case. Tier 2 payments are intended to preserve the integrity of the competitive market and protect the public interest. It is apparent to the Commission that the failure on AT&T Michigan's part was not intentional, nor was it a significant

deterrence to the competitive market. Moreover, with the amendments approved in this order to the remedy plan, this issue will not appear again due to the elimination of Tier 2 payments.

The Commission urges the parties to address the concerns related to the permissible number of orders requiring manual intervention submitted without prior notice in their six-month review or in their respective interconnection agreements.

AT&T Michigan's Motion for Expedited Modification

As noted earlier, the affected parties review and negotiate refinements to the performance measures and remedy plan on an almost continuous basis. On December 18, 2007, AT&T Michigan and the Joint CLECs² filed a joint motion to amend the Commission's prior orders to reflect agreements made during the most recent review.

On January 17, 2008, AT&T Michigan filed a motion to expedite modification to the current remedy plan related to PM 65.1, thereby giving immediate effect (effective for the January 2008 performance results) to certain agreed upon provisions in the December 18 joint motion. On January 23, 2008, AT&T Michigan filed an erratum to that motion requesting that the Commission make adoption of the floors and ceilings function effective for December 2007 performance.

In an order dated February 12, 2008, the Commission solicited comments from the parties, with a provision for reply comments from AT&T Michigan. The order further provided for AT&T Michigan to escrow the amounts due for Tier 1 and Tier 2 payments related to the 8.0 dB loop submeasure of PM 65.1.

On March 4, 2008, the Joint CLECs filed comments opposing AT&T Michigan's motion for expedited modification. They state that the request for immediate implementation is limited to a

²The Joint CLECs include: LDMI Telecommunications, Inc., Talk America Inc., DIECA Communications, Inc., McLeod, US Xchange of Michigan, L.L.C., and TDS Metrocom LLC.

very small portion of the revised remedy plan, contrary to language agreed upon by the parties that:

The commitments made herein are conditioned upon overall approval of the PM User Guide and the AT&T Midwest Performance Remedy Plan. All of the Parties support the PM User Guide and the AT&T Midwest Performance Remedy Plan before the Commission and request that the Commission accept and approve the PM User Guide and AT&T Midwest Performance Remedy Plan without any change or conditions.

Second Amended Joint Motion for Expedited Amendment of Prior Orders Resulting from the 2006-2007 Six Month Review, p. 2.

The CLECs argue that AT&T Michigan's motion is contrary to the terms of the joint filing, which were reached after the give and take of negotiations. They argue that AT&T Michigan should not be permitted to change the terms of a bargain to which it expressly agreed – that the proposed modifications to the remedy plan were a package deal.

The CLECs point out that if the Commission were to grant AT&T Michigan's motion, it would effectively modify many existing interconnection agreements that the performance measures and remedy plan contemplated would only be modified as part of the six month review process. The CLECs urge the Commission to decline to implement a retroactive modification of PM 65.1.

Finally, the CLECs point out that altering PM 65.1 will not merely relieve AT&T Michigan of Tier 2 penalties, payable to the State of Michigan, but also will relieve it of obligations for Tier 1 payments to the affected CLECs.

The Commission is persuaded that it should not alter one performance measure provision outside of the package to which all parties have agreed. As the CLECs point out, the process of modifying the performance measures and related remedies is a matter of negotiation – of give and take. To grant AT&T Michigan's motion would be at odds with the system that has been set up to

permit modifications in a straightforward, orderly manner. The problem will be fixed with the adoption of the Second Amended Joint filing discussed below.

AT&T Michigan should disburse the amounts that it has in escrow to cover the payments to which it is obligated. It may set off against its obligation to the State of Michigan the \$30,000 payment made for which the Commission granted a waiver of the penalty earlier in this order.

Second Amended Joint Filing

On December 18, 2007, the parties filed a joint motion to amend the performance measures and remedy plan to implement agreements made in the collaborative review for 2006-2007. Among other things, the proposed amendment would eliminate any Tier 2 payment obligation from occurring under the remedy plan. On February 5, 2008, the parties filed a First Amended Joint Motion. On February 18, 2008, the parties filed the Second Amended Joint Filing, which supersedes the other two filings.

Among other things, the Second Amended Joint Filing retains the Tier 2 structure within the remedy plan, without current obligation to make the payments. Should AT&T Michigan's performance warrant additional incentives, the Commission would have the option of reinstating the Tier 2 payments after December 31, 2010 after a contested case. Further, the Commission may audit AT&T Michigan to assure that the incumbent LEC is compliant with the performance measures. The CLECs receive higher Tier 1 payments and continued Commission oversight. The PM 65.1 issue discussed earlier is cured by the amended plan. Finally, the amended plan eliminates the K table, a statistical method used to excuse a number of misses under certain conditions.

The Commission finds that the Second Amended Joint Filing should be approved and the proposed modifications to the performance measures and the remedy plan should be adopted.

K Table

With the elimination of the K Table in the Second Amended Joint Filing, the Commission assumes that all issues with the K Table are now moot. Should any party disagree with this finding, it may petition the Commission, setting forth the issue perceived to be still pending and the proposed resolution to that issue. Should the Commission receive such a filing, it will determine at that time the process to be used to reach a conclusion.

THEREFORE, IT IS ORDERED that:

A. AT&T Michigan's request for waiver of \$30,000 Tier 2 payment for missing PM 5 is granted.

B. AT&T Michigan's motion for modification of the existing remedy plan related to PM 65.1 is denied. Amounts held in escrow under the Commission's February 12, 2008 order shall be released for payment to the appropriate entities.

C. The performance measurements and remedy plan, as described and agreed to by the parties in the Second Amended Joint Motion filed on February 18, 2008 in this docket, are approved.

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

Any party desiring to appeal this order must do so in the Michigan Court of Appeals, pursuant to MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Steven A. Transeth, Commissioner

By its action of June 10, 2008.

Mary Jo Kunkle, Executive Secretary